WONG PARTNERSHIP

LAW WATCH

DECEMBER 2021

In Brief

DEALS

WongPartnership acts in… 1

Proposed merger of ESR-REIT and ARA LOGOS Logistics Trust

COMPANY LAW

Singapore Court of Appeal Clarifies Law on "No Reflective Loss" Principle 5

CONTRACT

Singapore Court of Appeal Clarifies Rule Against the Use of Non-Contractual Documents for Purposes of Incorporating Terms into a Contract 10

INSOLVENCY

Singapore Court of Appeal Endorses Test for "Unfair Prejudice" and Intervening in Judicial Managers' Decisions 13

DEALS

WONGPARTNERSHIP LLP ACTS IN…
Proposed merger of ESR-REIT and ARA LOGOS Logistics Trust

WongPartnership is acting for ESR Funds Management (S) Limited, as manager of ESR-REIT, in relation to the S$1.4 billion proposed merger ("**Merger**") with ARA LOGOS Logistics Trust ("**ALOG**") by way of a trust scheme of arrangement, and the financing in relation to the Merger.

Both ESR-REIT and ALOG are real estate investment trusts listed on the Main Board of the Singapore Exchange Securities Trading Limited. The principal activity of ESR-REIT is to invest in quality income-producing industrial properties. ALOG invests in quality income-producing industrial real estate used for logistics purposes, as well as real estate-related assets in the Asia Pacific region.

In August 2021, ESR Cayman Limited ("**ESR**"), the sponsor of ESR-REIT, announced the proposed acquisition by ESR of 100% of the issued share capital and voting power of ARA Asset Management Limited, the sponsor of ALOG ("**Proposed ARA Acquisition**"). The Merger is conditional upon, among others, the completion of the indirect acquisition of ARA LOGOS Logistics Trust Management Limited, the manager of ALOG, pursuant to the Proposed ARA Acquisition.

Partners involved in the transaction are Andrew Ang, Audrey Chng and Soong Wen E from the Mergers & Acquisitions Practice; Monica Yip and Jerry Tan from the Corporate Real Estate Practice; Christy Lim and Bernadette Tan from the Banking & Finance Practice; Hui Choon Yuen from the Debt Capital Markets Practice; and Chan Jia Hui from the Antitrust & Competition Practice.

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Other recent matters that WongPartnership was involved in were:

DESCRIPTION	PRACTICE AREAS
Acting as Singapore counsel in the merger of Polestar with blank-cheque company, Gores Guggenheim Inc., at a valuation of approximately US$20 billion.	Corporate/Mergers & Acquisitions Tax
Acted in the S$422 million acquisition of 61 Robinson Road by Rivulets Investments, and the financing of such acquisition.	Corporate/Mergers & Acquisitions Corporate Real Estate Banking & Finance
Acted in the sale of Nova Systems (Singapore) Pte. Ltd. by Nova Systems & Engineering Pte. Ltd. to RSA Network in a management buyout. Nova Systems (Singapore) Pte. Ltd. was renamed as Heron Technology.	Corporate/Mergers & Acquisitions Commercial & Corporate Disputes
Advising in the approximately US$200 million investment by Singapore Exchange Limited as a limited partner in a private equity fund managed by 7RIDGE, a specialised growth equity firm invested in transformative technologies. The fund will be acquiring Trading Technologies International, Inc., a global provider of high-performance professional trading software, infrastructure and data solutions for listed futures and options.	Corporate/Mergers & Acquisitions
Acted in the investment by an institutional investor in CapitaLand India Logistics Fund II with a fund size of S$400 million.	Asset Management & Funds
Acted in the establishment by Keppel Corporation of US$1 billion Euro-Commercial Paper Programme first digitalised for issuances under the FIX Marketplace. DBS is the sole arranger and dealer of the programme.	Debt Capital Markets
Acted in the first dual tranche sustainability bond offering by United Overseas Bank Limited that raised US$1.5 billion.	Debt Capital Markets

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DESCRIPTION	PRACTICE AREAS
Acted in the issuance by Sembcorp Financial Services Pte. Ltd. ("**SFS**"), a wholly owned subsidiary of Sembcorp Industries Ltd ("**SCI**"), of S$400 million 2.45 per cent green notes due in 2031 under the S$3 billion Multicurrency Debt Issuance Programme established by SCI and SFS, with DBS Bank Ltd. and United Overseas Bank Limited as joint lead managers. This was the first certified green bond issued under the Climate Bonds Standard by a Singapore-based energy company.	Debt Capital Markets

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COMPANY LAW

Singapore Court of Appeal Clarifies Law on "No Reflective Loss" Principle

The Singapore Court of Appeal, overturning its earlier decision in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597, has held that the "no reflective loss" principle (or, for convenience, the "**reflective loss principle**") applies to shareholders bringing claims in their capacity as shareholders, and that claims by shareholders for the diminution in the value of their shareholding or in distributions they receive as shareholders as the result of actionable loss suffered by the company cannot be maintained: *Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management) and another* [2021] SGCA 116.

Our Comments

This is a significant decision for shareholders considering the legal remedies available to them for losses suffered when investing in companies. The Court of Appeal provides a welcome clarification that shareholders who suffer losses that result in a diminution in the value of their shareholding or in distributions they receive as shareholders are not entitled to bring claims against the wrongdoer in their capacity as shareholders. This is even in cases where there is no risk of double recovery against the wrongdoer. Instead, it is the company's management that will determine how to pursue legal redress, subject to statutorily conferred shareholder rights (for instance, the right to commence a derivative action or minority oppression claim).

On the other hand, shareholders claiming against the wrongdoer in a capacity other than as a shareholder (for e.g., as creditor) need not be concerned that the reflective loss principle will apply to bar such a claim.

This update takes a look at the Court of Appeal's decision.

Background

The first respondent ("**Tendcare**") was an investment holding company which owned and operated a group of hospitals and other medical-related businesses ("**Tian Jian Group**") in the People's Republic of China. Tendcare was also the parent company of Tian Jian Hua Xia Medical Group (HK) Limited ("**TJHK**"), which was later wound up.

When Tendcare was placed under judicial management, the second respondent ("**Mr Yit**") was appointed as judicial manager. At the material time, the first defendant ("**Mr Gong**") was the majority shareholder of Tendcare.

The appellant ("**Mr Miao**") was the sole director and shareholder of various companies, including Qian Hui Capital Limited ("**QHC**"), which had been wound up in Hong Kong on the application of TJHK's liquidators, and Hui Xiang Group Pte Ltd ("**HXG**").

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In 2013, HXG became involved in Tendcare's planned initial public offering ("**Tendcare IPO**") which never took place. Pre-IPO funds from various investors and creditors were paid into the Tian Jian Group, and a total of US$45.29 million and S$500,000 was transferred from the Tian Jin Group to, among others, QHC through TJHK ("**Disputed Transfers**").

The respondents brought proceedings against Mr Gong, Mr Miao and others, alleging they had engaged in a scheme of fraudulent trading and had made the Disputed Transfers for their personal benefit. In particular, the respondents claimed that Mr Miao was liable for dishonest assistance in relation to fund transfers made pursuant to two loan agreements:

(a) A transfer of US$2 million from Tendcare to TJHK and then to QHC ("**US$2 million Transfer**"); and

(b) A transfer of US$4 million from Tendcare to TJHK and then to QHC ("**US$4 million Transfer**").

The respondents contended that the US$2 million Transfer and US$4 million Transfer from Tendcare to QHC *via* TJHK were procured by Mr Gong in breach of his fiduciary duties owed to Tendcare, and that Mr Miao had dishonestly assisted in those breaches.

Mr Miao denied any fraudulent trading. He asserted that, regarding the US$2 million Transfer, the US$2 million had been lent by TJHK to QHC under a loan agreement. He also contended that Tendcare and Mr Yit were precluded from recovering any money as, even though the detriment suffered by Tendcare was in its capacity as a creditor of TJHK, Tendcare was a shareholder of TJHK and Tendcare's loss was therefore reflective of the loss suffered by TJHK.

The High Court's Decision

The High Court found Mr Gong liable for fraudulent trading, but found that Mr Miao was not involved in or aware of the scheme, and did not know about the Disputed Transfers except for the US$2 million Transfer and US$4 million Transfer. The High Court held that Mr Gong was in breach of his fiduciary duties, and that Mr Miao was liable for dishonest assistance for facilitating this, since he knew that the funds were not being remitted for the Tian Jian Group's business or the Tendcare IPO, or, at the very least, that he was reckless. The High Court therefore found Mr Miao, together with other parties, jointly and severally liable for US$2 million and US$4 million.

Mr Miao appealed to the Court of Appeal, arguing, among other things, that: (a) the High Court erred in finding that Mr Miao had dishonestly assisted Mr Gong in respect of the US$2 million Transfer and the US$4 million Transfer; (b) the High Court failed to consider whether the reflective loss principle prevented the respondents from recovering moneys that were channelled through or incurred by Tendcare's subsidiary, TJHK; and (c) Tendcare's loss was reflective of TJHK's loss, as Tendcare was a shareholder of TJHK.

The respondents contended that the reflective loss principle did not apply, since Tendcare's claim was for its own cause of action and for its own loss.

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The Court of Appeal's Decision

Dishonest assistance

The Court of Appeal reviewed the evidence at first instance, and upheld the High Court's finding that Mr Miao was liable for dishonest assistance in respect of the US$4 million Transfer but allowed Mr Miao's appeal in respect of the US$2 million Transfer.

Given that Tendcare was able to establish actionable loss against Mr Miao, it was therefore relevant to consider whether the reflective loss principle applied to preclude the respondents' claims against Mr Miao.

The reflective loss principle

Following a careful review of the case law, the Court of Appeal endorsed the majority decision of the UK Supreme Court in *Marex Financial Ltd v Sevilleja (All Party Parliamentary Group on Fair Business Banking intervening)* [2021] AC 39 ("***Marex***"), which is that the reflective loss principle is a rule of company law (as opposed to a mere mechanism to prevent double recovery or prejudice to other shareholders and creditors of the company) and limited to shareholders' claims based on a diminution of the value of shares or distributions they receive as the result of actionable loss suffered by the company.

In so doing, the Court of Appeal ruled that the approach it had earlier taken in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 the(R) 597 ("***Townsing***") (which conflicted with the approach of the majority in *Marex* and, in any case, was rendered by way of *obiter dicta*) is no longer the law in Singapore.

In *Townsing*, the court had identified the rationale for the reflective loss principle on two bases: first, as a variant of the proper plaintiff rule, which provided that where actionable loss was suffered by the company, it was the company that was the proper plaintiff to bring the claim; and second, to prevent double recovery or prejudice to creditors and other shareholders. This led to the adoption of a rule preventing shareholders from claiming for any loss, whether suffered as shareholder *or in any other capacity*, if the company had an actionable claim for the same loss, but subject to a policy exception which allowed recovery if the need to prevent double recovery or prejudice to other shareholders or creditors did not apply.

The Court of Appeal held that the court in *Townsing* conflated a specific principle of company law with the general principle proscribing double recovery. This resulted in the law being left in an unstable state where the policy exception had the tendency to dictate the actual scope of the rule, rather than simply being an exception to the rule. In addition, the scope of the reflective loss principle would logically extend to creditors of a company, leading to a significant distortion throughout the law of obligations while making it confusing and difficult to apply in practice.

The Court of Appeal reasoned as follows:

(a) The reflective loss principle should be justified by reference to the specific relationship between the shareholder and the company, in which a loss is caused to the company and a shareholder wishes to claim against the wrongdoer as a consequence of that loss. In this context, the fundamental nature of a share must be examined.

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(b) The fundamental *nature* of a share lies in the right it represents to participate in a company under company law, and not in its market value. This is in turn displayed by two fundamental principles of company law: (i) the rule that the proper plaintiff in a wrong done to the company is, *prima facie*, the company ("**proper plaintiff rule**"); and (ii) the principle that the management of a company's affairs is entrusted to the decision-making organs of the company ("**corporate management principle**").

(c) The reflective loss principle is the corollary of the proper plaintiff rule as it properly places the shareholder's loss in the context of the company's loss. What a shareholder ultimately receives is subject entirely to the company's fortunes. Wrongs done to the company are part and parcel of the company's fortunes, and when the risk of such wrongs eventuate, the shareholder cannot complain about a loss caused to the value of his investment.

(d) The reflective loss principle also ensures that the corporate management principle is maintained and the company can deal with the wrongs done to it in the manner that it deems fit. If shareholders are dissatisfied, they have to take the matter up with the management of the company through the proper channels.

(e) On the other hand, the need to prevent double recovery does not provide sufficient justification for the reflective loss principle. Double recovery is a general concern which the law has always found ways of dealing with (largely in the realm of procedure and assessment of damages), and lacked normative weight to justify the exclusion of a particular head of claim entirely. Further, there are clear situations where the reflective loss principle has been applied even though there is no risk of double recovery. Justifying the reflective loss principle on the prevention of double recovery also requires one to assume that there is always an overlap between the loss caused to the company and the loss suffered by the shareholder, but this is not a realistic assumption to make.

(f) While there may be some meritorious claims that shareholders may wish to bring against wrongdoers, this must be considered in light of the fact that appropriate mechanisms for such claims by shareholders have been legislatively prescribed for, in the form of the derivative action and oppression claim under section 216A and section 216 of the Companies Act, respectively.

Therefore, where an actionable wrong is done to a company that causes loss to the company, a shareholder cannot be said to have suffered any loss that is separate and distinct from the company's loss, and cannot recover for such loss even if the shareholder has a personal cause of action against the same wrongdoer.

In addition, given that the reflective loss principle is ultimately a rule of company law specifically arising from the unique status of shareholders, the scope of the rule extends only to shareholders claiming *qua* shareholders.

Application to the appeal

The Court of Appeal held that the reflective loss principle had no application in this case. Tendcare did not bring its claim as a shareholder of TJHK for the diminution in the value of its shareholding or in distributions from TJHK, but against Mr Miao for dishonestly assisting in a wrong done directly to it.

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Further, while Mr Miao had argued that there was a risk of double recovery because the liquidators of TJHK had commenced proceedings in Hong Kong against QHC on the basis of the loan agreements, the Court of Appeal held that this was not sufficiently made out by Mr Miao:

(a) First, the parties in the Singapore and Hong Kong proceedings are different. Whatever is recovered in Hong Kong is not in fact due from Mr Miao, and there is no risk that Mr Miao will be made to pay damages twice over.

(b) Second, no evidence was provided to show how much TJHK has been or will be able to recover from QHC, and how much Tendcare will in turn be able to recover from TJHK. If Tendcare chose to proceed against TJHK even after receiving payment from Mr Miao, any prevention of double recovery was a matter better left to either the Hong Kong court to determine or to a future application in Singapore.

In the circumstances, the Court of Appeal allowed the appeal in part, reversing the High Court's finding that Mr Miao was liable for the US$2 million Transfer, but affirming the High Court's finding that Mr Miao was jointly and severally liable for his dishonest assistance in relation to the US$4 million Transfer, and holding that the principle of reflective loss did not bar Tendcare's recovery of the US$4 million from Mr Miao.

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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CONTRACT

Singapore Court of Appeal Clarifies Rule Against the Use of Non-Contractual Documents for Purposes of Incorporating Terms into a Contract

The Singapore Court of Appeal has affirmed that non-contractual documents cannot give rise to a course of dealing sufficient to justify incorporation of their terms in a subsequent contract; terms sought to be incorporated must have the requisite contractual force to begin with: *Nambu PVD Pte Ltd v UBTS Pte Ltd and another appeal* [2021] SGCA 98 ("***Nambu v UBTS***").

Our Comments

It is not uncommon for contracting parties to seek to rely on terms which are not found in the contract itself but found in documents relating to previous dealings and transactions between the parties. The Court of Appeal's decision in *Nambu v UBTS* is a timely reminder that, in order for a party to rely on such terms as being incorporated into the contract, these terms must have *contractual force* in the first place. In other words, non-contractual documents cannot give rise to a course of dealing for the purposes of incorporating a term into a contract.

As explained by the Court of Appeal, this categorical rule would promote certainty and avoid unnecessary litigation as contracting parties would be dissuaded from arguing that there are exceptional circumstances warranting reliance on non-contractual documents.

This case update examines the Court of Appeal's decision.

Background

The facts relevant to the issues canvassed in this case update are summarised below.

Nambu PVD Pte Ltd ("**Nambu**") and UBTS Pte Ltd ("**UBTS**") entered into a contract ("**Contract**") for UBTS to transport a prefabricated vertical drain machine. The vehicle from UBTS carrying the machine caught fire in the course of the carriage and the fire damaged the machine. Nambu commenced legal proceedings against UBTS in the High Court in respect of the damage to the machine.

Before the High Court, UBTS argued that certain exclusion and limitation clauses in UBTS' own standard terms and conditions ("**UBTS T&Cs**") and the standard terms and conditions of the Singapore Logistics Association ("**SLA T&Cs**") were incorporated into the Contract, and that those clauses operated to limit UBTS' liability.

UBTS contended that the SLA T&Cs had been incorporated in the Contract by virtue of, among other things, a previous course of dealing, based on the invoices and delivery orders issued in respect of past contracts which contained express references to the SLA T&Cs ("**Past Invoices and DOs**"). The Past Invoices and DOs were always issued *after* a contract between Nambu and UBTS had been orally concluded (i.e., post-contract formation). This was the case for other contracts concluded prior to the Contract, as well as for the Contract itself.

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The High Court's Decision

The High Court found that the fire was due to UBTS' negligence and that neither the UBTS T&Cs nor the SLA T&Cs had been incorporated into the Contract. It therefore gave judgment in favour of Nambu.

However, while Nambu's claims totalled S$1,226,807.20 on the basis of replacement costs, and alternatively, S$1,279,537.20 on the basis of repair costs, the High Court awarded Nambu only S$248,240. The High Court determined that the machine could have been repaired for less than its replacement cost, and that this ought to have been done within six months of the accident. It therefore allowed Nambu's claims for loss of use, and for storage and relocation charges, for only that six-month period. It also reduced the amount of repair costs claimed and declined to award Nambu loss of profits from a contract which Nambu had given up because the machine was not operational.

UBTS appealed to the Court of Appeal against the High Court's finding that the SLA T&Cs were not incorporated into the Contract (but did not appeal against the finding that the UBTS T&Cs were not so incorporated).

Nambu appealed to the Court of Appeal in respect of the quantum of damages and costs awarded to it.

The Court of Appeal's Decision

The Court of Appeal dismissed both appeals.

UBTS' appeal

Before the Court of Appeal, UBTS argued that it was unnecessary for the Past Invoices and DOs to have contractual effect to give rise to a course of dealing sufficient to justify the incorporation of the SLA T&Cs in the Contract. This argument was rejected by the Court of Appeal.

The Court of Appeal explained that non-contractual documents cannot, as a matter of both principle and authority, give rise to a course of dealing sufficient to justify incorporation of their terms in a subsequent contract. Any terms sought to be incorporated must possess the requisite contractual force to begin with.

The Court of Appeal noted that the High Court had found that the Past Invoices and DOs were not meant to have contractual effect, and that it was therefore difficult for the Past Invoices and DOs to ever amount to a course of dealing sufficient to justify the incorporation of the SLA T&Cs. Even assuming that Nambu's representative had notice of the Past Invoices and Dos, there was no reason for the representative to expect the Past Invoices and DOs to be binding, either for the very contracts for which they were issued, or for the Contract itself.

The Court of Appeal explained that it would be both senseless and unprincipled to permit a term that had no contractual force during those previous occasions to be incorporated as a term with contractual force in the present contract. The court would only be prepared to incorporate that term in the present contract (despite the fact that it was not otherwise incorporated) precisely because the contracting parties had consistently contracted with reference to that term on a previous occasion. The categorical rule that non-contractual documents cannot give rise to a course of dealing also has the benefit of avoiding unnecessary litigation,

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whilst promoting greater certainty and dissuading contracting parties from arguing that there are exceptional circumstances warranting reliance on non-contractual documents.

The Court of Appeal declined to follow the *obiter* views of McLure P and Buss JA in the Court of Appeal of Western Australia's decision in *La Rosa v Nudrill Pty Ltd* [2013] WASCA 18 ("***La Rosa***") that the term sought to be incorporated by way of a previous course of dealing need not have been incorporated in a previous contract for the following reasons:

(a) As a matter of principle, it is difficult to see how non-contractual documents can give rise to a course of dealing. Permitting non-contractual documents to give rise to a course of dealing would amount to allowing terms which have been consistently treated by parties as non-binding to take on contractual effect. Indeed, the fact that certain terms have been consistently non-binding would engender the expectation that such terms would remain non-binding for the contract in question.

(b) The position taken by McLure P and Buss JA was at odds with other decisions which had been discussed in *La Rosa* itself.

(c) McLure P and Buss JA's observations were directly at odds with their actual decisions in *La Rosa* itself and are, therefore *obiter dicta* at best.

Nambu's appeal

On appeal, Nambu raised a number of arguments against the High Court's findings of fact in relation to UBTS' liability in conversion and detinue, as well as in relation to the quantum of damages and costs awarded to it.

The Court of Appeal noted that all the arguments raised on appeal had already been ventilated before the High Court, and that Nambu had not satisfied the high threshold to warrant appellate intervention in the High Court's findings of fact (i.e., shown that the High Court had made an assessment which was plainly wrong or manifestly against the weight of the evidence).

The Court of Appeal therefore dismissed both UBTS' and Nambu's appeals.

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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INSOLVENCY

Singapore Court of Appeal Endorses Test for "Unfair Prejudice" and Intervening in Judicial Managers' Decisions

Authored by Partners Joel Chng and Daniel Liu, with contribution from Senior Associates Clayton Chong and Muhammed Ismail Noordin

The Singapore Court of Appeal has, for the purposes of determining "unfair prejudicial" conduct under section 227R(1) of the Companies Act (now section 115(1)(a) and (b) of the Insolvency, Restructuring and Dissolution Act 2018 ("**IRDA**")), endorsed a two-stage test to determine whether a judicial manager has acted or proposed to act in a manner which would unfairly harm the interests of the applicant: *Yihua Lifestyle Technology Co, Ltd and another v HTL International Holdings Pte Ltd and others* [2021] SGCA 87.

Our Comments

This case update examines the Court of Appeal's decision. For our commentary on the Singapore High Court's decision at first instance in *Re HTL International Holdings Pte Ltd* [2021] SGHC 86, please see Law Watch, June 2021, Navigating Between Scylla and Charybdis: Singapore High Court Clarifies Test for "Unfair Prejudice" and Intervening in Judicial Managers' Decisions.

The Court of Appeal broadly agreed with the High Court's exposition of the relevant principles in determining when the court would interfere with a judicial manager's decision. Generally, there appears to be a high threshold in applying the test for intervention. Among other things, the conduct complained of must either be conspicuously unfair to the complainant or lack legal or commercial justification such as to be perverse. In the case, the focus of the court's analysis was whether the conduct complained of was perverse, i.e., whether the judicial managers' decision was able to withstand logical analysis.

It is noteworthy that the court held that the burden of proof in showing that the conduct complained of was perverse lies on the complainant. The complainants in this case were unable to adduce any compelling evidence to rebut the judicial managers' financial assessment and merely asserted that the judicial managers had not produced any accounts to support their projections. The court disagreed with these assertions as it held that doing so would constitute an "impermissible reversal of the burden of proof" to the judicial managers.

Background

The appellants ("**Shareholders**") were the direct and ultimate shareholders of HTL International Holdings Pte Ltd ("**Company**"), a company placed under interim judicial management in May 2020, and then judicial management in July 2020.

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The first respondent was Golden Hill Capital Pte Ltd ("**Golden Hill Capital**"), whose beneficial owners were the original founders of the Company and also the second and third respondents.

While the Company was under interim judicial management, the interim judicial managers, on behalf of the Company, entered into a share purchase agreement with Golden Hill Capital to sell the Company's interests in its subsidiaries ("**Assets**") to Golden Hill Capital.

On 19 August 2020, after the Company was placed under judicial management and nine days before the completion of the sale and purchase of the Assets, another prospective buyer, Man Wah Holdings Ltd ("**Man Wah**") offered to buy the Assets at a higher price than Golden Hill Capital's.

Five days after Man Wah's initial offer was received, the judicial managers ("**JMs**") of the Company invited both Golden Hill Capital and Man Wah to provide – by 26 August 2020 – "anything further" they wished to communicate in relation to their respective offers.

Man Wah then sought a court order for the JMs to provide a full set of the Company's financial accounts and requested an extension of the 26 August 2020 deadline. The JMs did not agree to Man Wah's request for the provision of the financial accounts, but agreed to extend the deadline to 31 August 2020.

On 31 August 2020, both Golden Hill Capital and Man Wah submitted revised and final offers. After considering both parties' offers, the JMs accepted Golden Hill Capital's 31 August 2020 offer and sold Golden Hill Capital the Assets.

The Shareholders, however, considered Man Wah's offer superior to Golden Hill Capital's, and applied to the High Court for the discretion exercised by the JMs in choosing to sell the Assets to Golden Hill Capital to be set aside and for the JMs to be directed to accept Man Wah's offer.

The Shareholders' application was brought under section 227R of the Companies Act (now section 115 of the IRDA) ("**Section 227R**"), which sought relief on the basis that the JMs had acted in a manner that was unfairly prejudicial to the Shareholders' interests. The salient portions of Section 227R read as follows:

> 227R.—(1) At any time when a judicial management order is in force, a creditor or member of the company may apply to the Court for an order under this section on the ground —
>
> (a) that the company's affairs, business and property are being or have been managed by the judicial manager in a manner which is or was **unfairly prejudicial to the interests of its** creditors or **members** generally or of some part of its creditors or members (including at least himself) or of a single creditor that represents one quarter in value of the claims against the company; or
>
> (b) that **any actual** or proposed **act or omission of the judicial manager is or would be so prejudicial**.
>
> (Emphasis added)

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 a company's assets at an undervalue, which they claimed was what had transpired here. The Shareholders also contended that the JMs' general conduct lacked transparency and was unfair to the Shareholders, and thus perverse.

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The High Court's Decision

The High Court dismissed the Shareholders' application, holding that the court would interfere with the JMs' decision only if it could be shown that their conduct had been plainly wrongful, conspicuously unfair or perverse, and that this high threshold had not been met on the facts of the case.

The High Court also found, on the facts of the case, that the JMs were justified in weighing the interests of creditors over those of the members or shareholders of the Company.

Our earlier update on the High Court's decision is available here.

The Shareholders appealed to the Court of Appeal against the High Court's decision.

The Court of Appeal's Decision

The Court of Appeal upheld the High Court's decision, and broadly agreed with the High Court's discussion of the principles governing the displacement of a judicial manager's decision made in its discretion pursuant to Section 227R (which were, in any event, unchallenged by the parties on appeal).

However, the Court of Appeal, drawing guidance from English authorities, set out a two-stage test for the court to determine whether a judicial manager has acted or proposed to act in a manner which would unfairly harm the interests of an applicant seeking recourse under Section 227R:

(a) First, it must be shown that the action complained of has caused, or would cause, the applicant to suffer harm in his capacity as a member or creditor; and

(b) Secondly, the harm caused by the action complained of must be unfair. Unfairness may stem from the following:

  (i) conspicuously unfair or differential treatment to the disadvantage of the applicant (or applicant class) which cannot be justified by reference to the objective of the judicial management or the interests of the members or creditors as a whole; or

  (ii) a lack of legal or commercial justification for a decision which causes harm to the members or creditors as a whole. This might include, for example, a decision to sell the company's assets at an undervalue, or a course of action that is based on a wrong appreciation of the law. However, in such cases, the court will not interfere with the judicial manager's decision unless it is perverse (i.e., unable to withstand logical analysis).

Before the Court of Appeal, the Shareholders contended that:

(a) The JMs erred in concluding that Golden Hill Capital's offer would yield higher shareholder returns than Man Wah's offer, and in support of this contention, alleged that the JMs' calculations were flawed in a number of respects; and

(b) The JMs' refusal to provide Man Wah a full set of the Company's financial accounts prevented Man Wah from improving its offer.

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Based on the evidence before it, the Court of Appeal rejected both contentions as being meritless and speculative or baseless, and agreed with the High Court that the JMs did not act in an unfairly prejudicial manner by selecting Golden Hill Capital's 31 August 2020 offer over Man Wah's 31 August 2020 offer.

The Court of Appeal therefore dismissed the appeal with costs.

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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