Restructuring & Insolvency

Court Determines When It Will Allow the Transfer of Shares in Insolvent Company

Introduction

When a company commences winding-up, the disposition of its property and the transfer of shares in the company is void, unless the Court otherwise orders. Under what conditions will the Court allow such disposition or transfer? This was the question in *Ong Boon Chuan v Tong Guan Food Products Pte Ltd* [2022] SGHC 181, when the Singapore High Court was faced with an application for the sale and transfer of shares in an insolvent company ("**Company**").

The Applicant and Respondent were both shareholders of the Company. The Applicant sought the sale and transfer of the Respondent's shares in the Company under section 130 of the Insolvency, Restructuring and Dissolution Act 2018 ("**section 130**") to fulfil unpaid cost orders against the Respondent.

The Court chose to exercise its discretion under section 130 in favour of the Applicant, granting the order for sale and transfer. In reaching its decision, the Court set out the applicable principles in determining the exercise of its discretion.

This Update provides a summary of the Court's decision and the key points of law regarding the operation of section 130.

Brief Facts

The Applicant and the Respondent were brothers and, along with a third brother, were the shareholders of the Company. The Respondent had commenced and failed in a minority oppression claim against his brothers, and was ordered to pay the Applicant costs of S$262,562.79.

The Company was subsequently ordered to be wound up on the basis of insolvency. As the costs outstanding to the Applicant remained unpaid, the Applicant filed a writ of seizure and sale to seize and sell the Respondent's shares in the Company. In turn, the Respondent applied for a stay of proceedings until all litigation regarding the Company had been completed.

In the present application, the Applicant sought an order for the transfer of the Respondent's shares in the Company under section 130, which provides that:

> Any disposition of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up by the Court is, unless the Court otherwise orders, void.

Holding of the High Court

The Court allowed the application, granting an order for the transfer of the Respondent's shares. The Court found that the Applicant was able to demonstrate why the application should be granted, and that the Respondent had not given sufficient reasons to deflect the exercise of the Court's discretion under section 130.

Operation of section 130

The parties agreed that the object of section 130 is to ensure that there is no evasion of liability by contributories. Therefore, transfers should be allowed if there is no risk of evasion of such liability. In this case, the shares were fully paid up and no risk of evasion arose.

However, the Court noted that the rationale underlying section 130 may need to be refined in future. As the use of partly paid shares is very rare in modern times, the objective of section 130 would rarely be engaged.

The Court was of the opinion that a more appropriate rationale for section 130 may be the maintenance of the status quo of a company's position pending resolution of the winding-up petition. The Court's view was that it should lean in favour of not granting an application under section 130 in order to maintain the status quo, unless an applicant can demonstrate reasons for the Court to exercise its discretion otherwise.

The Court also held that the relevant factors to be considered in the exercise of its discretion under section 130 ought to be limited to those related to the disposition of property in the context of winding up of the company. The Court rejected the Respondent's submission that the Court has a broader discretion to prevent wrongdoing against the company.

Application

The Court accepted that the Applicant was able to demonstrate why the application should be granted, and that the status quo would not be adversely affected.

On the Applicant's side, the Court found that the shares potentially offered an avenue for recovery of the unpaid cost orders. However, on the Respondent's side, the Court found that none of the matters raised by the Respondent pointed to any prejudice or any other reason against the grant of the order. Further, there was nothing to show any impact on the Company's liquidation or the distribution of its assets.

Assessing matters as a whole, the Court did not find any adverse impact on the status quo, and thus exercised its discretion under section 130 and allowed the application.

Concluding Words

When a company enters winding-up, its ability to dispose of its property is greatly curtailed. A court order has to be obtained in order to enter into such transactions. This prevents the company and its officers from moving the company's assets out of the reach of creditors.

The Court's decision provides helpful guidance on when it will allow the transfer of shares in a company which is in liquidation. It also puts forward a proposed new rationale for this provision – the maintenance of status quo of a company's position pending winding-up. It remains to be seen how this will be received by courts in future cases on section 130.

For further queries, please feel free to contact our team below.

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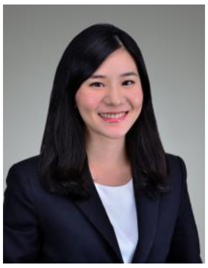

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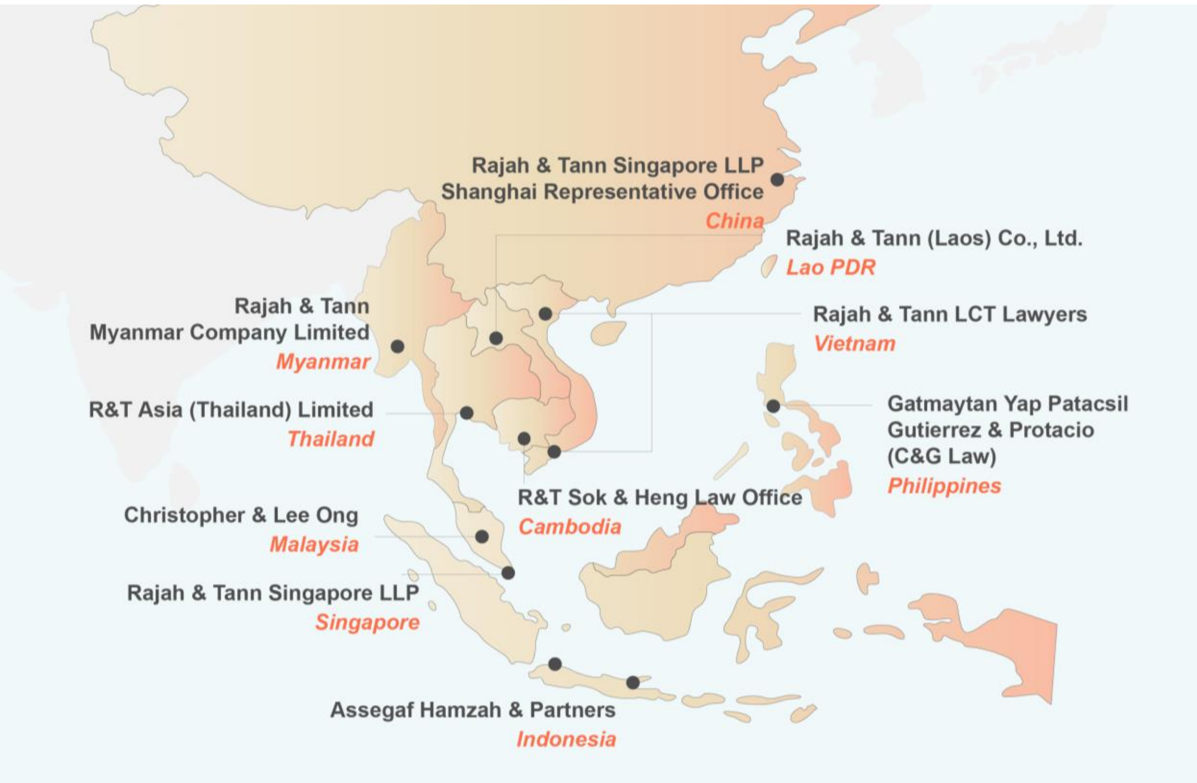

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