

Restructuring & Insolvency

Disposition of Property in Bankruptcy – Can the Court Grant Consent to a Proposed Sale Prior to a Bankruptcy Order

Introduction

In the course of bankruptcy proceedings, the disposition of property by the bankrupt is subject to a degree of control and restriction, requiring the consent or ratification of the Court. This protects the creditors from the unfair removal of property from the bankrupt's pool of assets.

In *Re Eng Lee Ling and another matter* [2024] SGHC 52, the Singapore High Court considered the scope of the Court's jurisdiction to grant such approval – specifically, in circumstances where prior approval is sought for a proposed disposition of property, and where a bankruptcy order has yet to be made. The Court also provided general guidance on what it expects of the applicant when applying for prospective approval of proposed dispositions.

The Court held that section 328(1) of the Insolvency, Restructuring and Dissolution Act 2018 ("**IRDA**") empowers it to grant a prospective validation order to allow the proposed disposition of property during the intervening period between the making of a bankruptcy application and the making of a bankruptcy order. In deciding whether to exercise its power, the Court's primary consideration is whether the disposition is fair and to the benefit of the general body of unsecured creditors. The Court will also consider whether the applicant has acted in good faith.

On the facts, the Court declined to grant consent to the proposed sale of property. The Court found that the applicants had fallen short in demonstrating how the proposed sale would benefit the general body of creditors, and of the requisite good faith.

Chua Beng Chye, Cherie Tan and Fong Han Peow of Rajah & Tann Singapore LLP represented the non-party creditor bank in this matter, successfully resisting the debtors' applications for the Court's prospective approval.

Brief Facts

The Applicants, Mdm Eng and Mr Dong, were the joint owners of a Property. A bankruptcy application had been filed against Mdm Eng by Maybank Singapore Limited ("**Maybank**").

Mdm Eng and Mr Dong entered into an agreement with a third-party purchaser for the sale of the Property. However, before the completion of the sale, the purchaser declined to complete the sale due to concerns over whether he could obtain good title to the Property in light of Maybank's pending



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bankruptcy application. To assuage the purchaser's concerns, Mdm Eng and Mr Dong applied to Court, seeking its consent to proceed with the proposed sale ("**Applications**").

Another creditor – DBS Bank Ltd ("**DBS**") – then filed further bankruptcy applications against Mdm Eng and Mr Dong. DBS also sought to oppose the Applications.

At the time of the hearing of the Applications, no bankruptcy orders had been made against Mdm Eng or Mr Dong. The Court was faced with the following issues:

- Whether the Applications were premature, which in turn depended on whether the Court has the jurisdiction to grant its consent to a proposed disposition of property by a debtor prior to the making of a bankruptcy order; and
- If the Applications were not premature, whether the Court should allow the Applications on the facts.

Decision of the High Court

The Court confirmed that it did have the jurisdiction to grant consent to the proposed sale of the Property. However, the Court declined to exercise its jurisdiction and dismissed the Applications.

Whether the Court has jurisdiction

Section 328(1) of the IRDA provides that:

Where a person is adjudged bankrupt, any disposition of property made by the bankrupt during the period beginning on the day of the making of the bankruptcy application and ending on the day of the making of the bankruptcy order is void except to the extent that such disposition has been made with the consent of, or been subsequently ratified by, the Court.

The Court held that section 328(1) empowers the Court to grant a prospective validation order to a proposed disposition of property during the intervening period between the making of a bankruptcy application and the making of a bankruptcy order.

The Court reached its decision on a plain reading of the wording of section 328(1), as well as its assessment that there is nothing in the objective, purpose or context of section 328 that would militate against the Court having such jurisdiction. Rather, if the Court did not have this jurisdiction, parties transacting with debtors would be forced to run the risk of the transaction being nullified if a bankruptcy order were to be made later down the line, which would be wholly uncommercial.

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Whether consent should be granted

The Court highlighted that the primary consideration when it exercises its discretion to validate a disposition is that the disposition should promote an orderly and rateable distribution to the general body of creditors. The "guiding light" should thus be whether the disposition is: (a) fair; and (b) to the benefit of the general body of unsecured creditors.

The Court further elaborated that the burden of proof lies on the applicant seeking the Court's approval to show that, on the balance of probabilities, the proposed disposition is likely to benefit the general run of creditors.

However, in these Applications, Mdm Eng and Mr Dong had fallen short of this burden of proof. Tellingly, Mdm Eng and Mr Dong had not even produced a list of their creditors. The Court was of the view that their professed intention to pay off Maybank in full from the proceeds of the sale of the Property clearly amounted to a preference that would be injurious of other unsecured creditors, including DBS, as such assets would no longer be available to the other creditors.

While it might be the case that the sale price in the proposed sale of the Property may be a better price than in a "fire sale" conducted by the mortgagee, in the absence of any valuation report or evidence of proper marketing by the applicants, the Court cannot conclude that this is a likely benefit and will therefore not validate a proposed sale even if it means that the sale will be lost.

The Court was satisfied that Mdm Eng and Mr Dong had not exhibited the degree of candour or proactivity associated with good faith and a genuine intention to act in the interests of their creditors. They failed to lead important pieces of evidence to allow the Court to properly assess the merits of their Applications, or to engage with creditors other than Maybank. Importantly, they had not even notified DBS of the proposed sale of the Property and the Applications until one day before the hearing date.

The Court thus dismissed the Applications.

Concluding Words

The Court's decision provides clarity on the Court's power to allow a proposed sale of property by a debtor facing a bankruptcy application. The Court took a reasoned and commercial approach in determining its jurisdiction to grant such consent.

The decision also provides guidance on what an applicant should produce when seeking the Court's approval for such disposition, which should be directed at demonstrating how the sale would benefit the general body of creditors. This may entail producing evidence such as (a) a list of creditors; (b) an indication of the planned distribution and how it would benefit the creditors; and (c) a valuation report showing the financial advantage of the proposed sale price.

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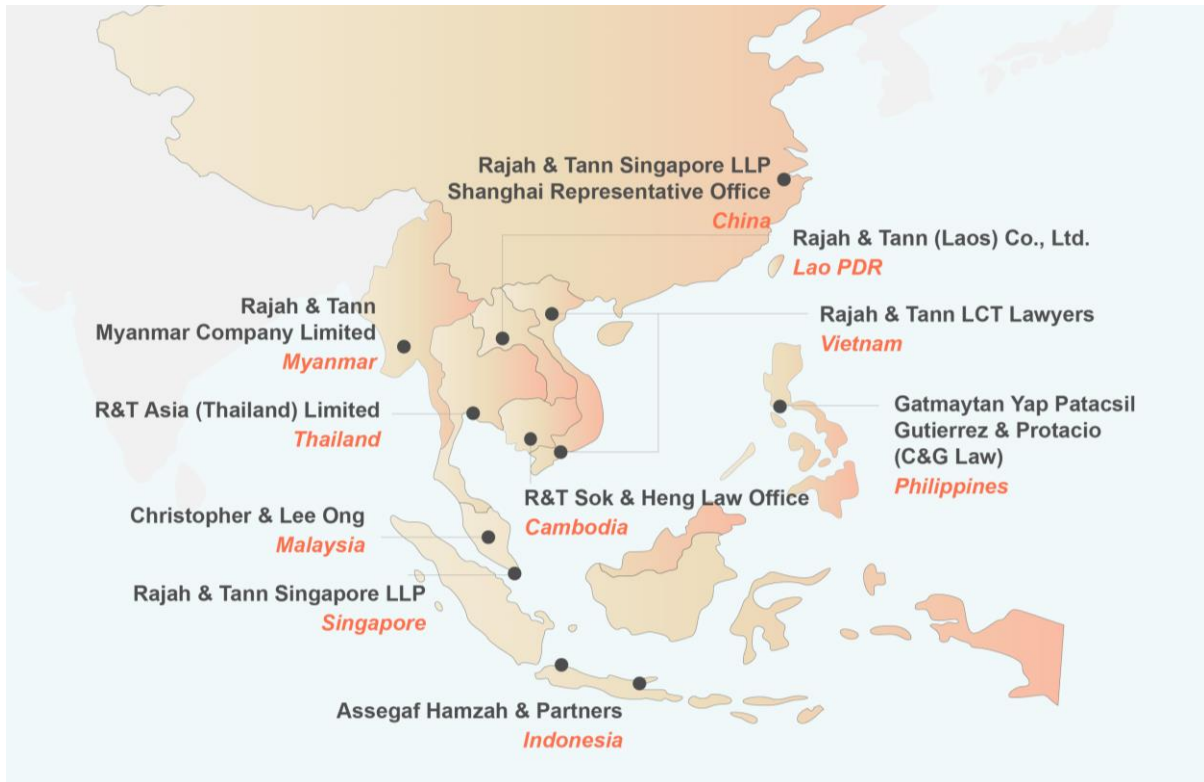
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