IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 156

Originating Application No 372 of 2024

In the matter of Part 5 and section 64(1) of the Insolvency, Restructuring and Dissolution Act 2018

Picotin Pte Ltd

… *Applicant*

Originating Application No 373 of 2024

In the matter of Part 5 and section 65(1) of the Insolvency, Restructuring and Dissolution Act 2018

Picotin ASQ Pte Ltd

… *Applicant*

Originating Application No 374 of 2024

In the matter of Part 5 and section 65(1) of the Insolvency, Restructuring and Dissolution Act 2018

Picotin Bay Pte Ltd

… *Applicant*

Originating Application No 375 of 2024

In the matter of Part 5 and section 65(1) of the Insolvency, Restructuring and Dissolution Act 2018

Picotin Brewhaus Pte Ltd

… *Applicant*

Originating Application No 376 of 2024

In the matter of Part 5 and section 65(1) of the Insolvency, Restructuring and Dissolution Act 2018

The Hogs Bars Pte Ltd

… *Applicant*

BRIEF REMARKS

[Insolvency Law — Schemes of arrangement — Moratoria over related companies — Section 65 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)]

Re Picotin Pte Ltd and other matters

[2024] SGHC 156

General Division of the High Court — Originating Application No 372 of 2024, Originating Application No 373 of 2024, Originating Application No 374 of 2024, Originating Application No 375 of 2024, Originating Application No 376 of 2024
Aedit Abdullah J
15 May, 7 June 2024

18 June 2024 Judgment reserved.

Aedit Abdullah J:

1 The applicant holding company sought and obtained a moratorium under s 64 of the IRDA; moratoria protecting its subsidiaries were also sought under s 65 of the IRDA. These related company moratoria were resisted by the respective landlords of these subsidiaries, who sought carve-outs for re-entry into their properties rented by the related companies. Interim moratoria were imposed by the Court pending the determination of the related companies' moratoria applications and the landlords' carve-out applications. These brief remarks are issued to provide guidance on this court's approach to such carve-out applications as well as applications under s 65 of the IRDA generally.

2 In summary, the applicant company is the holding company of a group of companies involved in the restaurant and pub business at various locations. The related companies are primarily one-outlet companies under the holding

company. In HC/OA 373/2024 ("OA 373"), the related company has premises at Asia Square, while HC/OA 375/2024 ("OA 375") concerns an outlet at Rochester Park. The group of companies has encountered difficulties, it is said, because of the pandemic and delayed expansion, renovation and launches and underperformance. Difficulties were also encountered with another outlet. Possible investment has been sought from various investors, and a compromise proposed, with restructuring through a deed poll scheme. The details remain to be worked out.

3 The two landlords sought to exclude their premises from any moratoria under s 65. The landlord at Asia Square took the primary role in arguments, with the landlord at Rochester Park adding its own points.

4 These remarks will only address the points arising in respect of the two premises that are subject to the carve-out applications by the landlords.

The Requirements

5 The applicable legal regime firstly centres on ss 65(1) and 65(2) of the IRDA. The question is whether the related companies here are necessary and integral to the arrangement under sub-section (2)(*c*), and under (2)(*d*), whether the arrangements will be frustrated if actions against the related companies are not restrained.

6 The second question goes to whether carve-outs should be allowed for the landlords to re-enter their properties.

7 I am satisfied that the related companies are indeed necessary and integral, and that the arrangements will be frustrated if actions against them are not restrained. Secondly, I am also satisfied that carve-outs need not be granted

at this time for the landlords' claims, and that it suffices for conditions to be imposed to adequately protect their interests.

Whether an order under s 64(1) must precede an application under s 65(1)

8 As a preliminary point, I would note that s 65(1) does specify that the power to make orders in respect of the related company arises where the Court has made an order under s 64(1) in relation to the main company. This would seem to be further reinforced by sub-section 2(*b*), which requires that an order under s 64(1) be in force. The difficulty with taking this too literally is that it would seem to require matters to be done sequentially, with some unspecified time elapsing between the making of a s 64(1) order and an application under s 65(1). That would in fact be often impractical: there will often be the possible threat of action or proceedings being undertaken against the related companies along with the main company.

9 To my mind, it would be sufficient that the s 65(1) application be preceded by the making of that under s 64(1) in a single hearing. I see nothing in the language of the statute that would require the passing of any minimum period between applications.

10 In any event here, an interim order was obtained previously, in these proceedings, in HC/SUM 1107/2024, at least as regards ASQ.

Whether the moratoria over the related companies are necessary and integral

11 Section 65(1) allows an order to be made in respect of a related company if, in the language of s 65(2), the related company plays a necessary and integral

role in the arrangement under s 64(1), and that the arrangement will be frustrated if actions are not restrained against the related company.

12 What is necessary and integral must be measured against the restructuring objectives of the arrangement. The test cannot be that strict given that, at this stage of the proceedings, the plans for the restructuring do not have to be fully detailed, and do not yet require the statutory level of support: *Re IM Skaugen SE and other matters* [2019] 3 SLR 979. Given that the plans of the company are taken at a broad level, the connection to these subsidiaries need not be fleshed out fully either. Any stricter approach would be incongruous.

13 Here, what is contemplated by the applicant is a restructuring using a deed poll by the applicant to become the primary co-obligor for all claims against all the companies. While the details are being worked out, what is contemplated is that funding, cost rationalisation and further marketing will be undertaken to increase the profitability of the companies. The proposed investment will be in all the companies.

14 What seems clear is that the proposed restructuring arrangement is to involve the various companies getting funding, while improving their operations. However, I should emphasise for guidance for the future that applications under ss 64 and 65 of the IRDA are not an invitation to regurgitate business or marketing plans to the Court. The hearing is not a funding round presentation. While the courts do not require a detailed plan to be given at the moratorium stage, there must be more than a hope and a prayer. Here, there is some evidence of support. The applicant need not show that the plan involving the related company is the only plausible or possible arrangement. It is a separate question whether there might be some other plausible or even more realistic or rewarding plan that does not involve the related companies. The

Court does not at this stage displace the commercial judgment of the applicant, nor that of the creditors. As long as the plan is sincerely and earnestly put forward, that is with *bona fides*, and it is not a doomed or totally flimsy plan, it is sufficient to warrant the applicant being given some breathing room. And thus, the role of the two related companies will be assessed in relation to that plan.

15 The plan essentially is for the applicant and its officers to promote their franchise model, pushing out what is described as 'live crafted beer', with money spent on installing various features, and having the various related companies' retail premises as outlets for sale of the products of the company, thus showing presence and creating brand awareness. It is said that scale is required for it to work, and thus the two related companies are needed.

16 The landlords argue that it is not shown how the related companies would be integral, and that what is shown just points to the related companies being franchise operations.

17 Given what I have noted about the broad nature of the proposed compromise or arrangement at this time, I accept that what the applicant has put forward is sufficient to show that the related companies are necessary and integral, and that leaving them out would frustrate the proposed compromise. The landlords' complaint is perhaps more about the viability of this plan, but that is another question. There might be some greater degree of optimism on the applicant's part, but I do not see that the plan here is so unreasonable or implausible as to render the moratoria protecting the related companies futile. What the creditors make of the plan is for them to determine in their business judgment.

18 I am thus satisfied that the two related companies are indeed necessary and integral to the plan, and that the plan will be frustrated if they are excluded from moratoria protection.

Carve-out

19 Turning then to the carve-out, I accept that the approach espoused in *In re Atlantic Computer Systems plc* [1992] Ch 505 ("*Re Atlantic*"), which I also considered in *Hyflux Ltd v SM Investments Pte Ltd* [2020] 4 SLR 1265, is applicable here. Although *Re Atlantic* was not concerned with a moratorium under any equivalent English statutory provision to s 65 of the IRDA, it provides useful guidance in the weighing of competing interests in the context of restructuring. The applicants argue that there is a distinction to be drawn between judicial management or English administration cases and restructuring. The latter, at least here, involves a going concern. I am doubtful that there is a substantial distinction between judicial management and restructuring cases in the application of the principles in *Re Atlantic*. The considerations at play are similar: whether the proprietary interest of the landlord is to be postponed or deferred because of the statutory prohibition or moratorium. In either situation, the court has a broad discretion to either maintain the effect of the moratorium or prohibition, or to carve out some exception. Such discretion needs to be exercised judiciously, bearing in mind the competing interests at stake. The considerations would seem to be similar as between judicial management and a scheme moratorium.

20 Following *Re Atlantic*, the question is answered, unless there is no impediment posed to the restructuring, by examining whether it would be inequitable considering the legitimate interests of the company and the landlord, with weight given to the proprietary interests of the landlord, and any significant

loss would normally be sufficient ground for a carve-out. Various matters would be weighed, including the history of the matter, financial position, the length of time, the objectives of the restructuring, and the probabilities of the various outcomes. Conduct of the parties would also be a material consideration. Conditions may also be imposed if necessary: *Re Atlantic* at 542–543.

21 Here, several factors point to the court's discretion being exercised in favour of the applicants. The landlords would be paid rent going forward. The arrears, while not negligible, are not disproportionately large, leaving aside the question of the security deposit. The loss to be borne by the landlords do not appear to be significantly large. There was nothing in the history between the parties that would point to the incurring of large losses as being likely at this time; and conditions may also be imposed to give the landlords an exit if the arrears do mount considerably.

22 In light of the above, I do not see any strong factors acting against the prohibition covering the landlords, provided that they are not exposed as continuing creditors. In the present circumstances, weighing the position of the parties, I am of the view that a sufficient condition to protect the interests of the two landlords would be to specify that their rights of re-entry may be exercised in relation to each property if rent is unpaid for more than one month going forward.

23 In coming to this conclusion, I do not put weight on the security deposit given to the landlords. As the landlords argued, the security deposits were meant to cover various possible expenses, and not just function as security for any arrears that may be incurred.

24 I should emphasise that landlords are a specific category of creditors in respect of which the courts would be mindful of the effects of any restraint or moratoria. They are property owners, whose rights should be vindicated unless there are strong reasons made out favouring some postponement. They are also continuing creditors, with their property continuing to be occupied or used by the applicant company. They should not be locked in with losses going beyond interest increasing all the while; there should be some assurance, that some payment is on the way. Any arrears should not be too large. Ideally some reduction or elimination of arrears needs to be worked in. The larger the arrears at the point of application, the less likely it will be that the restraint will continue against the landlord. There are also the circumstances in Singapore, with scarcity of land and property being at a premium. Property should not be tied up in a losing proposition.

25 The following orders are thus made:

(a) Moratoria in respect of the companies extended for three months from today, or other order of court;

(b) In OA 373 and OA 375, the respective landlord may exercise re-entry or forfeiture if the rent remains unpaid beyond one calendar month; and

(c) Liberty to apply.

26 These orders are subject to the Court's further orders and directions. Parties are to write in within one week if any of the orders as phrased present difficulties. Any moratoria extension applications should be made in good time.

Aedit Abdullah
Judge of the High Court

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Toh Ming Wai and Ho Jiaxin (Harry Elias Partnership LLP) for the non-party UE One North Development Pte Ltd.