HARRY ELIAS PARTNERSHIP

**E-briefing** **21 June 2024**

# Keep Calm and Carry On Restructuring (While Paying Rent)

Harry Elias Partnership LLP successfully represented landlords in obtaining conditions to be attached to moratorium orders sought by tenants

## Introduction

1. Our Partners Justin Chia and Kok Yee Keong, Of Counsel Charles Ho, and Senior Associate Toh Ming Wai, represented 2 institutional landlords in challenging and seeking carve-outs from the moratorium applications by the Picotin group of companies in *Re Picotin Pte Ltd* [2024] SGHC 156.[1]

2. This is a milestone decision as the General Division of the High Court of Singapore clarified the law under Sections 64 and 65 of the Insolvency, Restructuring and Dissolution Act 2018 ("**IRDA**")[2] in respect of corporate group restructuring and sets out details on how the Court approaches the balancing of the proprietary interests of landlords. We will examine the decision and draw out learning points.

## Preliminary: Background on Sections 64 and 65 of IRDA

3. To better appreciate the decision in *Re Picotin Pte Ltd* [2024] SGHC 156, we first provide a brief introduction on the relevant provisions – Sections 64 and 65 of the IRDA. These Sections serve different purposes under the restructuring regime.

4. Section 64 provides the Court the power to restrain proceedings and "protect" a company (i.e. by way of instituting a moratorium to restrict the rights of creditors[3]) that *has* or *intends to* propose and undertake a compromise or arrangement between the company and its creditors. In other words, the applicant is the very subject company that is seeking restructuring. Thus, the primary rationale for a moratorium under Section 64 is to provide the subject company a short breathing space to formulate a restructuring plan before it formally seeks the approval of creditors (whether by way of a private compromise or by applying to Court under Section 210 of the Companies Act 1967 to summon a creditors' meeting to vote on the proposed scheme of arrangement).

5. In contrast, Section 65 provides the Court the same power to grant a moratorium but for a *related company* to the subject company who had applied for the 'main' moratorium under Section 64. Examples of a related company might include a subsidiary, holding company, and ultimate holding company, etc. Based on a plain reading of Section 64, the related company itself is not seeking to propose a compromise or arrangement (otherwise it could have applied concurrently under Section 65).

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[1] The judgment may be viewed at: **https://www.elitigation.sg/gd/s/2024_SGHC_156**.
[2] Insolvency, Restructuring and Dissolution Act 2018 ("**IRDA**"), accessible at: **https://sso.agc.gov.sg/Act/IRDA2018?WholeDoc=1#pr64-**.
[3] The scope of the moratorium or restriction is set out in the IRDA at Section 64(1).

6. Consequently, the conditions under Section 65 differs from that under Section 64, as the related company must satisfy the various requirements under Sections 65(2)(a) to (e), including the following:[4]

> *"(c) the related company plays a necessary and integral role in the compromise or arrangement relied on by the subject company to make the application for the order under section 64(1);*
>
> *(d) the compromise or arrangement mentioned in paragraph (c) will be frustrated if one or more of the actions that may be restrained by an order under subsection (1) are taken against the related company;*
>
> *(e) the Court is satisfied that the creditors of the related company will not be unfairly prejudiced by the making of an order under subsection (1)."*

7. With these conditions, Section 65 is intended to address the situation where the operation of the related company is intertwined and co-dependent with the subject company, for example, where various contracts and obligations of these separate companies may be significantly connected (e.g. where contracts may have cross-default provisions). Thus, despite only the subject company intending to undergo restructuring, the prospects and success of the restructuring is invariably tied to the related company which must continue to play its supportive role.

8. Another important difference between the 2 provisions is that an application under Section 64 immediately entitles the applicant to an automatic 30-day moratorium[5], whereas an application under Section 65 does not.

## The decision in *Re Picotin Pte Ltd* [2024] SGHC 156

9. With the background to the statutory provisions in mind, we now turn to the case in question. The Applicants comprises 1 holding company, Picotin Pte Ltd ("**PPL**"), and 4 wholly-owned subsidiaries which were in turn operating different restaurant and pub outlets.[6] The group of companies encountered financial difficulties due to the COVID-19 pandemic and delayed expansion, renovation and launches, and underperformance.

10. We acted for the respective Landlords of 2 of the subsidiaries, namely, Picotin ASQ Pte Ltd at Asia Square ("**ASQ**") and Picotin Brewhaus Pte Ltd at Rochester Park ("**Rochester**") respectively. Both subsidiaries were in arrears to the Landlords.

11. In April 2024, the group of companies concurrently applied for moratoria - PPL applied under Section 64 of the IRDA and its 4 subsidiary companies applied under Section 65 of the IRDA. In broad terms, the Applicants' plan essentially focused on promoting a franchise model and redirecting the business model to focus on its unique "live craft beer" concept.

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[4] IRDA, *supra* n 2, at Section 65(2).
[5] IRDA , *supra* n 2, at Section 64(8) read with Section 64(14).
[6] The Picotin Group consists of Picotin Pte Ltd ("**PPL**"), Picotin ASQ Pte Ltd, Picotin Bay Pte Ltd, Picotin Brewhaus Pte Ltd, and The Hogs Bars Pte. Ltd. See also *Re Picotin Pte Ltd* [2024] SGHC 156 at [2].

12. The moratorium applications taken out by the Picotin group of companies were a cause for concern to the Landlords, as Picotin Group had sought a prayer to restrain any enforcement of any right of re-entry or forfeiture under any lease in respect of any premises which the group occupied.[7] If the relief was granted without any qualification or conditions, this would effectively "lock in" the Landlords into having to allow the Applicants to remain in possession of the relevant ASQ and Rochester premises without being paid – in other words to be a continuing supplier to the Applicants but without any certainty of payment. The Landlords would thus be 'forced' to suffer continuing losses, unlike other trade creditors of the Applicants who have the option to discontinue further supply of goods or services if there are outstanding arrears.[8]

13. Ordinarily, when Landlords face situations of defaulting tenants, they can usually exercise their right of re-entry and forfeiture of the lease which is typically provided for in the lease agreements, and further undertake measures to mitigate losses such as searching for alternative tenants as soon as possible. However, with such a moratorium in place, this cannot be done.

14. Our clients thus resisted the re-entry prohibition sought in the moratorium applications on the following main grounds:

    14.1. That the Applicants have not shown how their related companies played a necessary and integral role and/or that the Landlords exercising their rights of re-entry will frustrate the intended restructuring; and

    14.2. That the Landlords will be unfairly prejudiced if they were denied their right to re-entry to mitigate their losses, and instead forced to suffer continuing losses.

    14.3. Alternatively, even if a moratorium is granted, conditions should be imposed such that the Landlords may exercise their right of re-entry if the arrears exceed more than 1 month's rent and utilities.

15. In support of the above, we submitted that the Court should adopt the principles set out in the English Court of Appeal case of *In Re Atlantic Computer Systems plc* [1992] Ch 505 ("***Re Atlantic***"). The principles in *Re Atlantic* were cited positively in the Singapore Court of Appeal case of *Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd (under judicial management)* [2001] SGCA 59[9], and was also discussed in another landmark case of *Hyflux Ltd v SM Investments Pte Ltd* [2020] 4 SLR 1265 (HC).[10] The principles in *Re Atlantic* include that ordinarily, weight is to be given to the proprietary

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[7] The exact prayer sought by Picotin Group is reflected under Section 65(1)(f) of the IRDA, which states as follows: "*an order restraining the enforcement of any right of re-entry or forfeiture under any lease in respect of any premises occupied by the related company (including any enforcement pursuant to section 18 or 18A of the Conveyancing and Law of Property Act 1886), except with the permission of the Court and subject to such terms as the Court imposes.*"

[8] Alternatively, other trade creditors may also demand immediate payment terms such as cash on delivery, so that they can ensure that they receive payment for any further supply of goods and services moving forward.

[9] See *Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd (under judicial management)* [2001] SGCA 59 at [8]-[11]. In this case, the Court of Appeal ultimately did not need to address the relevant principles as an order for the winding up of the company had since been made, and there was no longer a need to decide upon whether leave should be granted to commence proceedings against Sogo Department Stores (S) Pte Ltd (under judicial management).

[10] See *Hyflux Ltd v SM Investments Pte Ltd* [2020] 4 SLR 1265 (HC) at [26].

rights and interests of a lessor in the balancing exercise between the legitimate interests of the parties, and that the Court should also consider whether it is appropriate to impose conditions of any leave that may be granted.[11]

16. Ultimately, the Honourable Justice Aedit Abdullah ("**Judge**") found in favour of the Applicants that moratoria should be granted for 3 months for all 5 companies. This was because Abdullah J found that the Applicants had sufficiently shown that the related companies were necessary and integral to the restructuring plan and that the plan would be frustrated if they were excluded from moratoria protection. However, Abdullah J also imposed a further condition that the Landlords may exercise re-entry of forfeiture if the rent remains unpaid beyond one calendar month (effectively accepting our submissions). This was because His Honour found that in balancing the rights and interests of the parties, the Landlords' interests would be sufficiently protected so long as rent was paid going forward.

17. Importantly, Abdullah J gave the following general guidance for applications under Section 65 of the IRDA as follows:[12]

    17.1. While the plain literal wording of Section 65 suggests a requirement for an Order under Section 64 in relation to the subject company to be in place and precede an application under Section 65 (i.e. applications must be taken out sequentially with some unspecified time elapsing between the making of a Section 64 Order and an application under Section 65), such a literal reading is impractical as there will often be the possible threat of action or proceedings being undertaken against the related company along with the main company.

    17.2. It will be sufficient if the Section 65 application is preceded by an application under Section 64 in a single hearing. In other words, an applicant seeking a moratorium under Section 65 may take out the application concurrently with the subject company's application under Section 64. The Court can hear both applications together in a single hearing.

    17.3. The test for "*necessary and integral*" under Section 65(2)(c) must be measured against the restructuring objectives of the arrangement (which is to be proposed by the subject company) and cannot be a strict test. It is thus not necessary to fully flesh out the connection of the related companies to the subject company.

    17.4. The Courts will not need a detailed plan to be given at the moratorium stage, but there must be more than a hope and prayer. 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 subject company being given some breathing room. The role of related companies will thus be assessed in relation to that plan.

    17.5. The Court does not consider the question on the viability of the plan put forth, so long as the plan is not so unreasonable or implausible as to render the moratoria

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[11] *In Re Atlantic Computer Systems plc* [1992] Ch 505; [1992] 2 WLR 367 at 395. This case set out 12 principles on whether leave for a creditor to commence proceedings against a company in an administration order (which is the equivalent of a judicial management order in Singapore law) should be granted. These principles should in principle be equally relevant to the context of restructuring.

[12] See *Re Picotin Pte Ltd* [2024] SGHC 156, *supra* n 1, at [8] to [17].

protecting the related companies futile. This is because the viability of the plan is a business judgement which is to be left to the creditors and applicant company to assess.

18. Furthermore, in respect of the Landlords' unique position and applications for carve-out of the moratoriums, the Judge held as follows:[13]

    18.1. The case of *Re Atlantic* is useful guidance where the principles are relevant in weighing the competing interests in the context of restructuring, whether in the context of judicial management or other restructuring cases (effectively accepting our submissions). 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.

    18.2. 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. It is also important to consider Singapore's unique circumstances with scarcity of land and property being at a premium – Landlords, and property, should not be locked in losing propositions 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.

    18.3. The Court place no weight on security deposits held by the Landlords as the security deposits are, as was argued by us, meant to cover various possible expenses, and not just function as security for any arrears that may be incurred.

## Learning points for future cases

19. This High Court decision clarifies the law on moratorium applications on 2 fronts.

20. Firstly, there is greater clarity for the approach to making an application under Section 65 of the IRDA. Companies which are part of group structures can better navigate the relevant requirements that will need to be shown to the Court should they desire to apply for moratoriums under Section 65 of the IRDA in support of the related subject company that intends to undergo, or is undergoing, restructuring.

21. Secondly, there is now reassurance for Landlords (as well as other creditors with similar proprietary interests) that their unique position and interests will be specifically considered and weighed by the Court. They will not invariably be forced to remain locked into leases without vindication. While the Judge's decision was given in the context of a Section 65 application, the same approach will undoubtedly feature in in an application under Section 64. Even before applying to Court, future applicant companies may therefore need to offer more with regards to their landlords to convince their landlords to support any restructuring plans. Additionally, tenants may no longer assert that their landlords are in a better position as compared to other unsecured creditors simply because their landlords hold a security deposit. This is especially so for commercial

[13] See *Re Picotin Pte Ltd* [2024] SGHC 156, *supra* n 1, at [19] to [24].

properties where large reinstatement costs may inevitably need to be incurred, and security deposits are often insufficient to cover such reinstatement costs.

22. The above guidance by the Court is much welcomed to help distressed companies and creditors navigate their rights and obligations in respect of a moratorium application.

23. There remains, however, some uncertainties regarding the interplay of Section 64 and Section 65. For example, as mentioned above, an applicant under Section 64 is entitled to an automatic 30-day moratorium[14] but this is not extended to an applicant under Section 65. This raises at least 2 interesting questions.

    23.1. Whether an applicant under Section 65 may apply for an urgent interim moratorium pending the determination of its Section 65 application, which is practically trying to seek the benefit of the automatic 30-day moratorium which Parliament found fit not to extend to Section 65 applicants – and if so, what would be the key factors to guide the Court in assessing this interlocutory application?

    23.2. Whether it is permissible to circumvent the above disparity in entitlement to the automatic 30-day moratorium, by the related company and the subject company concurrently applying under Section 64, such that both will be entitled to the automatic 30-day moratorium.

24. These are interesting questions to be left for another day.

## Conclusion

25. Overall, when things go south, tough decisions will have to be made with various competing considerations and the uncertainty of the looming future. It is not always the case that our Courts will prefer an ailing company's interests in seeking restructuring over the rights of its creditors or other relevant parties. We are of the view that the Court's approach in *Re Picotin Pte Ltd* [2024] SGHC 156 sets a good direction towards ensuring fairness and a good balance of all stakeholders' interests holistically.

## Harry Elias Partnership LLP

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[14] See IRDA, *supra* n 2, at Section 64(8) read with Section 64(14).

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