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SPECIAL ALERT

Dispute Resolution



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Apex Equity Sdn Bhd v Concrete Parade Sdn Bhd & Others (FC) – A Landmark Decision on Corporate Transactions and Shareholders’ Dispute

Recently, lawyers from LHAG, Lambert Rasa-Ratnam and Chan Mun Yew, successfully represented their clients in an important Federal Court case concerning company law and common corporate transactions such as mergers & acquisitions and private placements. On 26.3.2024, the Federal Court ruled in favour of LHAG’s clients, overturning the Court of Appeal’s decision in *Concrete Parade Sdn Bhd v Apex Equity Holdings Berhad & Others [2022] 2 MLJ 857*.

Background

High Court

In 2019, Concrete Parade Sdn Bhd (“**Concrete Parade**”) brought an action against, amongst others, Apex Equity Holdings Berhad (“**Apex Equity**”) and its directors for oppression under Section 346 of the Companies Act 2016 (“**CA 2016**”). The complaint relates to two sets of transactions:

- (i) A proposed merger between Apex Equity's subsidiary with Mercury Securities Sdn Bhd, and a proposed private placement to fund the proposed merger; and
- (ii) Share buy-back transactions conducted by Apex Equity from 2005 to 2017.

Concrete Parade alleged that:

- a) The agreements executed by parties for the Proposed Merger (i.e., Heads of Agreement and Business Merger Agreement) had contravened Section 223(1) CA 2016, as the relevant shareholders' approvals had not been obtained;
- b) The proposed private placement was in breach of Concrete Parade's pre-emptive rights under Section 85(1) CA 2016; and
- c) Apex Equity was not authorised by its constitution to purchase its own shares. The share buy-back transactions were ultra vires and in breach of Sections 67 and 67A of Companies Act 1965 ("**CA 1965**") and Sections 123 and 127 of CA 2016. For the same reason, the subsequent validation proceedings filed by Apex Equity under Section 582(3) CA 2016 to regularise the share buy-back transactions ("**Validation Proceedings**"), and the Validation Order obtained from that proceeding, were invalid.

The High Court had dismissed Concrete Parade's claim based on the reasons noted in its written grounds ¹.

¹ See Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors (HC) [2020] 11 MLJ 120

Court of Appeal

The Court of Appeal, however, reversed the High Court's decision. It held, amongst others:

a) On the Proposed Merger (Section 223 of CA 2016):

Despite the word 'or' separating Section 223(1)(i) from 223(1)(ii) of CA 2016, Section 223(1) should be read conjunctively, in that both limbs (i) and (ii) must be complied with. On the facts, these limbs were not complied with as: (a) the Heads of Agreement was not made subject to shareholders' approval as a condition precedent; and (b) shareholders' approval was not obtained prior to the execution of the Business Merger Agreement.

b) On the Proposed Private Placement (Section 85 of CA 2016):

Section 85(1) of CA 2016 does not allow shareholders' pre-emptive rights to be waived, citing the Indian High Court decision in *Shanti Prasad*². In any event, for there to be an effective waiver of pre-emptive rights, the proposed shareholders' resolutions must spell out that: (i) shareholders have pre-emptive rights; and (ii) by voting in favour of the proposed private placement, shareholders will be waiving their statutory pre-emptive rights. In addition, these resolutions must be passed before the signing of the relevant agreements for the proposed private placement (i.e., subscription agreements). This is despite the fact that the subscription agreements expressly stipulate that the allotment and issuance of

² *Shanti Prasad Jain v Kalinga Tubes Ltd & Others (India) AIR 1962 Ori 202*

shares under the agreement are subject to shareholders' approval being obtained.

c) On the Share Buy-Back Transactions & Validation Proceedings (Sections 123, 127, and 582 of CA 2016):

Apex Equity ought to have amended its constitution to authorise it to purchase its own shares before filing the Validation Proceedings. Since the constitution had remained unamended, all share buy-back transactions from 2005 to 2017 continue to be illegal, notwithstanding the Validation Order. The Validation Proceedings were also oppressive as they were filed by Apex Equity without obtaining prior approval from its shareholders.

The Court of Appeal's decision has sparked significant discussions and commentaries within the industry, as it has fundamentally changed the manner in which parties should approach corporate transactions.³

Federal Court

In reversing the Court of Appeal's decision, the Federal Court has now provided clarification on this critical area of law. From its oral grounds, the Federal Court essentially held:

On the Proposed Merger (Section 223 of CA 2016)

The two limbs of Section 223(1) should be read disjunctively, requiring compliance with just either one of the limbs, as opposed to both. The Heads of

³ 'Capital markets, corporates await ruling on agreements, shareholders' rights' – Article published by TheEdge Malaysia on 2.8.2023, available at <https://theedgemalaysia.com/node/677176>. See also 'Shareholders' Pre-emption Rights to New Shares: The Legislative and Regulatory Scheme' [2022] 4 MLJ lxiv, article by Dato' Loh Siew Cheang

Agreement constitute a mere record of understanding between parties that may be detailed out in a subsequent formal agreement, should the transaction materialise. Even if Section 223(1)(i) applies to the Heads of Agreement, the said provision has clearly been complied with, as the Heads of Agreement was expressly made subject to shareholders' approval as a condition precedent. The proposed merger could not be carried out without the approval of Apex Equity's shareholders.

The Court of Appeal's interpretation of Section 223(1) will result in directors having to obtain shareholders' approval twice for the same corporate transaction; the first being before the execution of the merger agreement, and the second being before the actual acquisition or disposal of assets envisaged by the agreement. This, according to the Federal Court, would be an unreasonable construction of Section 223(1) and contrary to commercial sense. Requiring shareholders' approvals to be obtained at different stages of the same transaction may stifle corporate transactions and cause them to be aborted.

On the Proposed Private Placement (Section 85 of CA 2016)

Pre-emptive rights prescribed by Section 85(1) CA 2016 are subject to provisions in the company's constitution. Such statutory pre-emptive rights can be waived or disapplied if the company's constitution expressly provides for it. On that note, Apex Equity's constitution expressly allows pre-emptive rights to be waived by way of "*directions to the contrary at a general meeting*". Such directions to the contrary must necessarily include shareholders' resolution passed at a general meeting.

Additionally, it was not necessary for Apex Equity to explicitly remind shareholders of their pre-emptive rights, or state in circulars / resolutions that voting in favour of the resolution would result in their pre-

emptive rights being waived. Section 85(1) of CA 2016 and Apex Equity's constitution do not impose such requirements. The Court of Appeal failed to consider that by voting in favour of the proposed private placement, the shareholders of Apex Equity knew, or ought to have known, that their shareholding will be diluted.

The Court of Appeal also erred in relying on the Indian High Court decision of *Shanti Prasad*, as the said decision was reversed by the Division Bench and Supreme Court on appeal.

On the Share Buy-Back Transactions & Validation Proceedings (Sections 123, 127, and 582 of CA 2016)

The share buy-back transactions by themselves were not illegal, as Section 67 and 67A of CA 1965, and Sections 123 and 127 of CA 2016 do not prohibit such transactions. The legality of these transactions, however, is not the subject matter of the appeal. Although Apex Equity's constitution does not authorise it to purchase its own shares, this does not necessarily mean that the transactions themselves were illegal. *Ultra vires* is not to be equated with illegality. For these reasons, the transactions cannot form the basis of Concrete Parade's complaint of oppression. In any event, the share buy-back transactions affected all shareholders equally. In such a case, Concrete Parade being the minority shareholder, could not be said to have been oppressed by the transactions.

On Oppression (Section 346 of CA 2016)

The Federal Court concluded by holding that oppression was not made out, as:

- i) Concrete Parade has failed to prove that it has been singled out or unfairly prejudiced by way of the aforementioned transactions.

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- ii) The majority shareholders of Apex Equity were not even joined as parties to the oppression claim.

Conclusion

The Federal Court's decision is significant as it provides guidance to companies and legal practitioners engaging in corporate transactions governed by the aforementioned CA 2016 provisions. The detailed written grounds of the Federal Court will be published in due course.

If you have any queries, kindly contact Partner, [Chun Mun Yew](mailto:myc@lh-ag.com) (myc@lh-ag.com), who has extensive experience dealing with corporate and shareholders' disputes, or Senior Partner, [Lambert Rasa-Ratnam](mailto:lr@lh-ag.com) (lr@lh-ag.com).