

“No-action clause” Inapplicable Where Bond Trustee in Position of Conflict

The General Division of the Singapore High Court (**High Court**) has affirmed that a “no-action clause” ought not to apply where a bond trustee would be placed in a position of conflict or has shown unjustifiable unwillingness to act: *Lim How Teck v Laguna National Golf and Country Club Ltd and another matter* [2023] SGHC 32.

Our Comments

“No-action clauses” are often found in corporate debt instruments, such as a bond or debenture agreement, where a trustee structure is used. Such clauses typically bar an individual holder of a note (such as of a bond or debenture) from taking legal action against the borrower / issuer on his or her own, with the right to do so vested in the trustee only. This can have far-reaching consequences. In many instances of corporate borrowing, the underlying debt is one that can span many years – in this case, decades – and a note holder who subsequently wishes to pursue action in respect of the borrower’s breach may find that he or she is barred from doing so.

“No-action clauses” are intended to protect the borrower from frivolous claims by note holders, as well as to protect the entire class of note holders generally since the trustee is supposed to take action that would be in the interest of the class of note holders as a whole. As these clauses would be incorporated in the legal documentation that is contractually agreed upfront, it can often be an uphill battle to convince the courts to allow a note holder to proceed in the face of such a clause. The legal avenues are usually limited, and prior to this decision, there has been a dearth of case law in Singapore dealing with this issue.

Our Tan Chee Meng, SC, Paul Loy and Samuel Navindran acted for the successful applicant in HC/CWU 78 of 2022 and the successful defendant in HC/OA 96 of 2022 before the High Court.

This update examines the High Court’s decision.

Background

The applicant, Mr Lim How Teck (**Mr Lim**), is one of the holders of the “Laguna National Unsecured Notes 2021 Series A” debentures (**Notes**) issued by the Laguna National Golf and Country Club Ltd (**Company**) in the early 1990s. The Company had defaulted on over S\$70,000,000 in unpaid Notes which became due on 11 June 2021. A group of Note holders appointed Mr Lim as the Chairman of a Dispute Resolution Committee to pursue recourse in relation to the Company’s breach and non-redemption of the Notes.

Mr Lim issued a statutory demand to the Company, which went unanswered. He duly brought a winding-up application against the Company, in his capacity as a Note holder, on the basis that the Company was unable to fulfil its debts.

In response, the Company argued that Mr Lim had no standing to bring the winding-up action as he was prevented from doing so by a “no-action clause” in the trust deed governing the Notes. The trust deed put in place a trusteeship structure and mandated that, save for certain limited exceptions, only the trustee (**Trustee**) could pursue, on behalf of the Note holders, rights and remedies relating to the Notes that would otherwise have been available to the Note holders.

In response, Mr Lim argued that the “no-action clause” should be circumvented on the basis, among others, that the Trustee was in a potential position of conflict *vis-à-vis* the Note holders. It was submitted that a “no-action clause” should not apply in a situation where the trustee, by reason of a conflict of interest or unjustifiable unwillingness to act, cannot properly pursue a remedy on behalf of the Note holders. Mr Lim highlighted that it was a question as to whether, over the years, the Trustee had properly carried out its duties and sufficiently safeguarded the interests of the Note holders.

The High Court’s Decision

This was the first time that the Singapore courts considered the operation of “no-action clauses” and the circumstances pursuant to which the court would allow them to be circumvented. Our lawyers referred to and made legal arguments on foreign jurisprudence, where overseas courts had considered similar issues in relevant cases.

Deciding the matter in favour of Mr Lim, the High Court granted his application for the winding-up, principally on the basis that a conflict of interest would arise between the Trustee and the Note holders upon the commencement of the winding-up process.

In doing so, the High Court affirmed that a “no-action clause” cannot apply where a bond trustee would be placed in a position of conflict or has shown unjustifiable unwillingness to act.

The High Court found that there did not appear to be unjustifiable unwillingness by the Trustee to act, as the Trustee had confirmed that it would act if, in accordance with the “no-action clause”, it was directed by the qualifying Note holders to do so.

However, the High Court agreed with Mr Lim that the Trustee would be in a position of conflict once the winding-up commenced:

After the Company is ordered to be wound up, the liquidators will step in and take control of the Company and its property and things in action. One of the liquidators’ responsibilities would be to investigate the Company’s affairs and to seek recovery where warranted. The Trustee (as the applicant in the winding up proceedings) would need to continue to liaise with the liquidators and to provide the liquidators with all relevant information.... As the Trustee is facing potential claims by some noteholders, its interest in protecting itself against such claims would conflict with its duty to protect the interests of the noteholders.... The Trustee may have information that is relevant to the liquidators but which may be adverse to its own interests in any action brought by the noteholders against it.

The High Court noted that, on the evidence presented before it, there were numerous examples of areas where the Trustee’s interest in protecting itself against potential claims from Note holders would conflict with its duty under the trust structure to protect the interests of the Note holders. The High Court also made it clear that it did not have to decide that the Trustee had definitively breached its duties under the trust deed, and that it sufficed that the conflict of interest might potentially arise; the Trustee should not place itself in such a position.

Conclusion

This decision by the High Court is a welcome addition to Singapore jurisprudence, and provides greater clarity on the scope of operation of “no-action clauses” generally. It behoves holders of corporate debt to obtain advice and properly understand the ramifications of the relevant contractual structure to which they

are signing up, and monitor where appropriate not only the performance of the borrower but also the actions of the trustee in protecting their interests.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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