DOES JUDICIAL MANAGEMENT IN MALAYSIA SUFFICIENTLY EMBODY A RESCUE CULTURE?

On 31 August 2016, the Companies Act 2016 (Act 777) formally introduced and embedded the judicial management framework into Malaysia's statutory corporate insolvency framework. It has been more than a year since the judicial management provisions came into effect, and therefore, this article will explore the extent to which judicial management in Malaysia, in its present iteration, sufficiently embodies a rescue culture. To achieve this, this article will examine the law reform efforts leading to the introduction of judicial management and the decisions of the Malaysian courts thereafter, and juxtapose the same against reforms and decisions in other jurisdictions, namely the UK and Singapore. Ultimately, there will be an evaluation on the adequacy of the law reforms undertaken that led to the introduction of judicial management in Malaysia.

Rabindra S **NATHAN**
LLB (Hons) (University of Canterbury) (New Zealand),
LLM (Hons) (University of Cambridge);
Barrister and Solicitor (New Zealand); Advocate and Solicitor (Malaysia).

I. Introduction

1 Is a rescue mechanism a rescue mechanism if it is not set up to have rescuing the company as a going concern as its first objective?[1] This article asks this question of the new judicial management framework in Malaysia. Judicial management was formally introduced and embedded into Malaysia's statutory corporate insolvency framework on 31 August 2016 when the Companies Act 2016[2] ("CA 2016") was enacted in place of its predecessor, the Companies Act 1965. Nevertheless, the actual judicial management provisions themselves only came into force on 1 March 2018, more than a year after the other parts of the Act itself came into force.

1 This is the position in the UK by a reading of para 3(1)(a) of Schedule B1 to the UK Insolvency Act 1986 (c 45) which provides that the administrator of a company in administration must perform his functions with the objective of rescuing the company as a going concern. The opening words of para 3(3) state that the administrator must perform his functions with the objective specified in para 3(1)(a) unless he thinks (a) he cannot achieve that purpose; or (b) a better result would be achieved for the creditors as a whole.

2 Act 777.

There have been several judicial management applications and it is not as yet evident that this new mechanism has achieved a good take up rate. The new judicial management provisions are located in Division 8 of the CA 2016 together with another innovation called "Corporate Voluntary Arrangement". The title to Division 8 is "Corporate Rescue Mechanism". Judicial management and corporate voluntary arrangements are thus intended to operate as corporate rescue mechanisms. A corporate rescue mechanism should facilitate a corporate rescue, whether of the business or the company itself. Such a mechanism should therefore also be infused with and embody a corporate rescue culture. This article explores the extent to which the description "Corporate Rescue Mechanism" is apt to describe judicial management in Malaysia and whether the legislation can be said to embody a rescue culture in its present iteration.

2 The framers of the judicial management framework in the CA 2016 used the regime for judicial management in the Singapore Companies Act[3] as a blueprint. At the time the CA 2016 was enacted, the Singapore judicial management framework was already the subject of review and re-evaluation by the Singapore Insolvency Law Reform Committee ("ILRC").[4] In its comprehensive Final Report, the ILRC had recommended several reforms to address deficiencies in the then existing regime in Singapore. Eventually in 2017, the Singapore judicial management model was reformed and modernised.[5] None of the recommendations originating out of the Singapore insolvency law reform process found their way into the draft Companies Bill that underwent the pre-enactment consultation process in Malaysia, prior to the enactment of the CA 2016.

3 Prior to the Singapore ILRC recommendations, a major shift had taken place in the UK in terms of the balance between a debenture holder's rights and those of unsecured creditors in the receivership and administration regime under the Insolvency Act 1986[6] in the UK. This recalibration of rights and approach took place with the enactment of the Enterprise Act 2002,[7] which came into force on 15 September 2003.[8] The ostensible purpose of the framers of the Enterprise Act was to strengthen

3 Cap 50, 2006 Rev Ed.

4 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6.

5 Amendments were made to various parts of the judicial management framework under the Singapore Companies Act (Cap 50, 2006 Rev Ed) by the Companies (Amendment) Act 2017 (Act 15 of 2017) (passed on 10 March 2017).

6 c 45 (UK).

7 c 40 (UK).

8 Len Sealy, David Milman & Peter Bailey, *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2019* (Sweet & Maxwell, 2019) at p 616.

the core corporate rescue foundation underpinning the UK provisions. This rebalancing of rights and approaches, which has been described as having revolutionised the law of receivership and administration in the UK,[9] has been far reaching in effect. Despite this having happened in the UK in 2003, there was no room in the pre-enactment consultation and dialogue over the shape, substance and form of the proposed new Malaysian judicial management framework for any of these considerations that have so fundamentally altered the UK insolvency landscape.

4 Without these and other improvements that corporate insolvency rescue regimes elsewhere in the Commonwealth have implemented or are in the course of implementing, including recommended improvements to the Singapore regime itself which have since become a reality, judicial management as it exists in Malaysia does not either sufficiently embody the concept of corporate rescue or provide a meaningful platform for restructuring. Therefore, for all intents and purposes, it has rendered the much-heralded new corporate rescue mechanism less effective than it ought to be, or worse still, dead in the water in the long term.

5 This article examines the law reform efforts that led to the introduction of judicial management as a new corporate rescue mechanism between 2004 and 2015. Legislative developments and reform initiatives in other common law jurisdictions with which Malaysia shares its company law legislative ancestry are traced and examined. The question is then asked whether these reform initiatives and legislative developments ought to have been considered in a more fundamental way at a more conceptual level to address questions relating to the objectives and range of outcomes of judicial management. The article also asks whether a corporate rescue mechanism such as judicial management ought to cater for a more diverse set of stakeholders and interests than just the limited constituency catered for in the current Malaysian provision. Most importantly, the article seeks to evaluate whether sufficient regard was paid to reforming the veto rights that secured creditors enjoy under the current judicial management framework and to address not only the position of unsecured creditors but also the intangible interests of other stakeholders, the broader community in which every company carries on business and possibly the interests of the nation itself.

6 The article will also review the decisions of the Malaysian courts since 1 March 2018 on applications under the new judicial management provisions. The outcomes, and the driving forces behind those outcomes, will also be considered. The article also considers decisions of the Singapore

9 *Goode on Principles of Corporate Insolvency Law* (Kristin Van Zwieten ed) (Sweet & Maxwell, 5th Ed, 2018) at para 11-05.

courts on the equivalent provisions of the Singapore regime, and will examine what resulted from the Singapore ILRC's recommendations as to changes to the judicial management framework in Singapore. This article asks whether, as a minimum, the Malaysian regime should embrace the changes to date in Singapore that are intended to enhance the efficacy of the Singapore judicial management framework.

7 The author will also trace the emergence of what is known as the rescue culture in insolvency law and the recognition of such a culture in several decisions of the courts in some of the leading jurisdictions in the Commonwealth. This then leads to the discussion on the reforms to the administration and administrative receivership procedures in the UK in 2002 and their impact on corporate rescue in the time since then. These UK reforms included the removal of the debenture holder's veto right to block the appointment of an administrator under the UK administration regime and the abolition of administrative receivership for all floating charges created on or after 15 September 2003. The article will examine the reasons that led to the abolition of administrative receivership and the removal of the debenture holder's veto right to block administration under the UK insolvency regime. The question then arises as to whether reform along these lines is necessary or desirable in Malaysia in order to make the Malaysian judicial management framework a more rescue-orientated regime? Inevitably, in the course of considering this, the issue of whether this debate ought to have in fact occurred in Malaysia in the lengthy law reform process leading up to the enactment of the CA 2016 and the introduction of the Malaysian judicial management regime in its present form, will arise. The hard question will then be whether in order for judicial management in Malaysia as it exists to stand any chance of being a true rescue mechanism, changes to modify or extinguish the veto rights of secured creditors are needed in order to reset the balance between secured and unsecured creditors in judicial management.

II. Legislative reform of Malaysia's corporate insolvency framework

8 Historically, legislation governing Malaysian company law and insolvency law has generally followed English and Australian statutory models. By the early 1960s, the earlier colonial era legislation had become outdated, and newly independent Malaysia needed a modern company law statute. Eventually, the Companies Act 1965 was enacted. It was based on the 1961 Australian legislation (but with some elements from the 1948 English Companies Act). The draftsman of the Australian Uniform Companies legislation assisted in the preparation of the Bill of what was to become the Companies Act 1965. This remained law for 51 years.

9 Reform was nevertheless on the cards. In December 2003, the Companies Commission of Malaysia established the Corporate Law Reform Committee ("CLRC") and charged the CLRC with the twin goals of creating a legal and regulatory structure that would facilitate business and promote accountability and protection of corporate directors and members in line with international standards, while taking the interests of other stakeholders into account. The CLRC embarked on what it called a law reform programme, and in the course of that programme, issued 12 "consultative documents" for public consultation. The CLRC published its Final Report in 2008,[10] and the Cabinet approved most of its recommendations in 2010. An exposure draft of the proposed Companies Bill was published in 2013 for public consultation,[11] and eventually the CA 2016 was passed. It received the Royal Assent on 31 August 2016.[12]

10 In terms of reforms in the corporate insolvency space, the CA 2016 introduced corporate rescue mechanisms into Malaysian corporate insolvency law for the very first time. The newly introduced corporate rescue processes were corporate voluntary arrangement and judicial management. All parts of the CA 2016, other than the new corporate rescue provisions, came into force on 31 January 2017. The new corporate rescue provisions came into force on 1 March 2018. The Companies (Corporate Rescue Mechanism) Rules 2018,[13] which contains the rules that underpin these corporate rescue mechanisms, also came into force on 1 March 2018. As at 30 September 2019, the new provisions would have been in force for 18 months. Even in the challenging conditions of the Malaysian economy, it cannot be said that there has been a burst of judicial management filings in the Malaysian courts.

11 In 1965, when the previous Companies Act was enacted, the emergence of corporate rescue as a concept, a culture and an outcome to aim for would still be years away. In the 51-year period before the enactment of the CA 2016, the only generally available collective process capable of facilitating a rescue, as opposed to the demise, of a company in Malaysia was the scheme of arrangement process. Under the Companies Act 1965, companies wanting to undertake a corporate debt restructuring could only utilise the scheme of arrangement procedure. There were no specific tailor-made processes or mechanisms for corporate rehabilitation.

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10 Corporate Law Reform Committee, *Review of the Companies Act 1965 – Final Report* (2008).

11 Companies Commission of Malaysia, *Public Consultation on the New Companies Bill* (July 2013).

12 PU (B) 408/2016, *Prescription under Section 6* (*Federal Government Gazette*, 15 September 2016); PU (B) 50/2017, *Appointment of Date of Coming into Operation 777 – Companies Act 2016* (*Federal Government Gazette*, 26 January 2017).

13 PU (A) 64/2018 (*Federal Government Gazette*, 28 February 2018).

12 As stated earlier, after its formation in December 2003, the CLRC proceeded to issue 12 consultation documents. Of specific relevance to this article is the consultative document entitled *Reviewing the Corporate Insolvency Regime: The Proposal for the Corporate Rehabilitation Framework* ("CD 10"), released in August 2007. CD 10 came under the auspices of Working Group D, comprised mainly of insolvency practitioners and academics. Working Group D's remit was to consider the then existing law and practice relating to insolvency practices in Malaysia. In the insolvency field, it embarked on a review of the corporate insolvency framework and, separately, a review of corporate receivership. It is interesting to revisit what Working Group D proposed in CD 10 all those years ago.

13 The working group declared that one of the aims of the review was to create a "comprehensive corporate insolvency framework" that would have various objectives. However, none of the stated objectives prioritised or emphasised corporate rescue. While the consultation document mentioned "rescue" a number of times, it looked at rescue through a rather different prism from in the US or the UK. Indeed, it is difficult to interpret what this meant or understand what amounted to a "rescue" because there was no separate elucidation of this in CD 10. The proposed corporate insolvency framework put forward in CD 10 had a number of features, none of which emphasised corporate rescue, or emphasised any stakeholder interest other than interests of creditors. Therefore, the range of interests and constituencies that the CLRC catered for in its review of Malaysia's corporate insolvency framework was a considerably restricted and narrow one. As will be discussed below,[14] in contrast to the narrow compass of interests that the CLRC looked at, the seminal report of the Cork Committee on Insolvency Law and Practice[15] emphasised corporate rescue and the need to recognise a broader range of interests and communities that insolvency law ought to cater for. This wider range of interests has already received judicial recognition at the highest level in the UK.

14 In the end result, the CLRC did not study or evaluate these particular aspects of insolvency law reform. In 2007 when CD 10 was released, the UK had already long embarked on a radical reform pathway that had eliminated the debenture holder's veto right to block the appointment of an administrator under the UK administration regime and abolished administrative receivership for all floating charges

14 See paras 43–63 below.

15 United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Chairman: Sir Kenneth Cork) at paras 192, 198(i), 203–204 and 1734.

created on or after 15 September 2003. These UK reforms were not alluded to in the CLRC's CD 10 in any detail. In CD 10, the Working Group did, however, note that the ability of a secured creditor to veto the administration process in the UK had been identified as one of the deficiencies of the administration regime there[16] but did not go on to discuss the specific method that the UK adopted to address that perceived deficiency. In CD 10[17] the working group noted that other jurisdictions had approached the matter differently – in Hong Kong, the holder of a floating charge had at that time been accorded a right to opt to stay out of provisional supervision, thereby leaving it free to enforce its security; and in Singapore, the debenture holder had a right to oppose the making of a judicial management order. It was decided that the Singapore approach that accorded a veto right to the debenture holder was best suited for the Malaysian environment; thus, it was proposed that s 227B(5) of the Singapore Companies Act be adopted. There was no analysis of what constituted the Malaysian environment. There was also neither any analysis nor evaluation of the reasons why Singapore had elected to accord such a right to debenture holders or of why the Singapore approach was best suited to Malaysia.

15 Following the consultation process under CD 10, the CLRC issued its Final Report[18] in which it recommended the establishment of a proposed corporate rehabilitation framework for Malaysia, with similar objectives and features as had been proposed in CD 10. The end result of this is that the CLRC recommended that two new corporate rehabilitation schemes in the form of corporate voluntary arrangement and judicial management be introduced in Malaysia. The exposure draft of the proposed Companies Bill that was issued in 2013 contained virtually the same framework that ended up in the CA 2016.

16 Despite the passage of time between the exposure draft in 2013 and the eventual introduction of the Bill in Parliament in late 2015, the framers of the Bill did not consider it necessary to take account of developments in the Singapore insolvency setting, and in particular, the ILRC's Final Report in 2013 which, *inter alia*, recommended important changes to judicial management in Singapore that were thought to be necessary in order to address "deficiencies of the existing [Singapore] judicial management regime". As will be charted below,[19] at least two of

16 Corporate Law Reform Committee, Companies Commission of Malaysia, *10. A Consultative Document (1)* (August 2007) at p 39, para 2.25.

17 Corporate Law Reform Committee, Companies Commission of Malaysia, *10. A Consultative Document (1)* (August 2007) at p 40, paras 2.27 and 2.28.

18 Corporate Law Reform Committee, *Review of the Companies Act 1965 – Final Report* (2008).

19 See paras 70–74 below.

the recommendations in effect watered down the floating charge holder's ability to block the making of a judicial management order. It is unclear whether the framers of the Malaysian provisions had considered the implications of these recommendations by the Singapore ILRC prior to the Bill containing the proposed judicial management regime being presented to Parliament.

17 There is also the other parallel dimension to the CLRC's deliberations on the proposed corporate insolvency framework between 2003 and 2008, namely the review of the receivership process in Malaysia. The Enterprise Act 2002 brought about a dramatic legislative shift in the UK wherein it abolished administrative receivership for floating charges created on or after September 2003. In view of the aforesaid, one would have expected this development to feature in and significantly inform the debate over receivership during the CLRC's deliberations on both receivership and judicial management and prompt whether a recalibration of the balance between the two processes, one collective and one not, was required in favour of prioritising the collective. In the introductory remarks to ch 2 of CD 10, Working Group D stated[20] that the declared objective of that part of its review was to highlight issues and problems with the state of the then existing law of receivership in Malaysia, with a view to improving the efficiency of the process in Malaysia. It was also stated that statutory reforms in the UK, Australia and New Zealand would be highlighted.[21] Nevertheless, despite the CLRC's declared aim of studying reforms in receivership law in those jurisdictions, there was no mention of, let alone discussion of, the abolition of receivership[22] in the UK under the Enterprise Act 2002 or the reasons that compelled the UK Insolvency Service to drive through such a radical reform. In contrast, as will be elaborated below,[23] the Singapore ILRC asked itself whether receivership as a mode of enforcement of security should continue to be part of the law of Singapore, and in responding to this question, the ILRC took account of the UK reforms. Ultimately, following the exposure draft of the Companies Bill and the eventual passing of the Companies Act in 2016, receivership as a process remained very much part of Malaysian law and the prospect of the holder of a floating charge being able to veto the making of a judicial management order remains the reality that exists to this day in Malaysia. The recommendation of the ILRC, in its Final Report, was to confer on the court the overriding discretion to make a judicial management order even where secured creditors who

20 Corporate Law Reform Committee, Companies Commission of Malaysia, *10. A Consultative Document (1)* (August 2007) at p 73, para 1.1.

21 Corporate Law Reform Committee, Companies Commission of Malaysia, *10. A Consultative Document (1)* (August 2007) at p 73, para 1.1.

22 More accurately, administrative receivership (as it was by then known in the UK).

23 See paras 70–74 below.

may appoint a receiver over the whole or substantially the whole of the company's assets object to the same. The basis on which the court determines whether to exercise its overriding discretion is dealt with below.[24] The prospect of meaningful change in Malaysia to the efficacy of judicial management was missed.[25]

III. Judicial management – Post-enactment experience in Malaysia[26]

18 It is necessary to review the decisions of the Malaysian courts in order to develop an understanding as to whether the judicial management regime is working as intended or not, and whether reform is necessary. This article will first provide a brief summary of the decisions to date, followed by a thematic discussion on key principles and approaches laid down by the Malaysian courts, and a brief consideration of areas where Malaysian courts may diverge from the well-trodden path that Singapore courts have taken under the Singapore judicial management regime.

19 The case of *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd*[27] ("*Leadmont*") has the distinction of being the first reported decision of the Malaysian High Court under the new judicial management provisions. The respondent in that case was the main contractor of a development and a creditor of the applicant. The applicant was the developer of a development project that was in the process of being constructed on land owned by a subsidiary of the developer. The developer had applied for and obtained a judicial management order from the High Court. Notice of the application had been advertised in accordance with s 408(1)(a) of the CA 2016. The Respondent creditor applied to set aside the judicial management order on several grounds. Wong Chee Lin JC (as she then was) had to first consider whether the conditions for a judicial management order under s 405(1) had been met. The first condition is whether the court is satisfied that the company is or will be unable to pay its debts. As to the first condition, the court considered that the definition of "inability to pay debts" from the winding up provisions[28] of the CA 2016 would apply whenever the

24 See paras 34–42 below.

25 In fairness, the Corporate Law Reform Committee had effectively completed its remit once its final report had been issued in 2008 and could not have continued to be the forum in which such reforms could be discussed and analysed.

26 A more in-depth treatment of the whole Malaysian judicial management framework, which is beyond the scope of the narrower focus of this article, can be found in Jack Yow Pit Pin, "Judicial Management" in *Law and Practice of Corporate Insolvency Law* (Rabindra S Nathan ed) (Sweet & Maxwell, 2019) ch 4.

27 [2019] 8 MLJ 473; [2018] 10 CLJ 412.

28 Companies Act 2016 (Act 777) s 466.

court had to make this determination.[29] Applying the *dicta* of Hoffmann J (as he then was) in *Re Harris Simons Construction Ltd*[30] in relation to the term "satisfied" in s 8 of the UK Insolvency Act 1986, the court held that "satisfied" in s 405(1)(a) when contrasted with the word "considers" that appears in s 405(1)(b) indicated that there had to be "a higher threshold of persuasion" in order for the court to be satisfied.

20 Under s 405(1)(b) of the CA 2016, the second condition that has to be met before a judicial management order is made is that the court considers that the making of a judicial management order will likely achieve one or more of three statutory purposes, namely:[31]

> (a) the survival of the company, or the whole or part of its undertaking, as a going concern;[32] or
>
> (b) the approval under s 366 of the CA 2016 of a compromise or arrangement between the company and any such persons as mentioned in that section;[33] or
>
> (c) a more advantageous realisation of the company's assets would be effected than on a winding up.[34]

21 In *Leadmont*, the court held[35] that the court merely has to consider whether there is a real prospect that one or more of the above outcomes are achievable.[36] In *Leadmont*, the court also construed the phrase "going concern" which appears in s 405(1)(b)(i), and after considering several

29 *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd* [2019] 8 MLJ 473; [2018] 10 CLJ 412 at [30]. Under s 227(B)(12) of the Singapore Companies Act (Cap 50, 2006 Rev Ed), the definition of "inability to pay debts" under s 254(2) of the same statute, which applies in winding up, is expressly imported for the purposes of the Singapore judicial management regime. This is to be contrasted with Malaysia where there is no such provision for referential incorporation.

30 [1989] 1 WLR 368 at 370. This *dicta* was applied in *Re Colt Telecom Group Ltd* [2002] All ER (D) 347 at [22], *per* Jacob J. See also *Re Primlaks (UK) Ltd* [1989] BCLC 177 and *Re Rowbotham Baxter Ltd* [1990] BCLC 397 where this approach was applied, and in the process affirmatively consigning the more demanding test of "more probably than not" emanating from *Re Consumer & Industrial Press Ltd* [1988] BCLC 177 to history.

31 *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd* [2019] 8 MLJ 473; [2018] 10 CLJ 412 at [35].

32 Companies Act 2016 (Act 777) s 405(1)(b)(i).

33 Companies Act 2016 (Act 777) s 405(1)(b)(ii).

34 Companies Act 2016 (Act 777) s 405(1)(b)(iii).

35 *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd* [2019] 8 MLJ 473; [2018] 10 CLJ 412 at [36].

36 The position is the same in Singapore – see, *eg*, the decision of the Singapore Court of Appeal in *Deutsche Bank AG v Asia Pulp & Paper Co Ltd* [2003] 2 SLR(R) 320, where the Court of Appeal in turn applied the test laid down in *Re Harris Simons Construction Ltd* [1989] 1 WLR 368.

sources, held that it meant that making a judicial management order will allow the applicant company to continue its operations for the foreseeable future.[37]

22 The most interesting aspect of the decision in *Leadmont* was the court's use[38] of the approach laid down by the Singapore Court of Appeal in *The Royal Bank of Scotland NV v TT International Ltd*[39] ("*Re TT International*"). That case concerned a scheme of arrangement under s 210 of the Singapore Companies Act, and in relation to the approach that ought to be taken by the court in an application for leave to convene meetings of the various classes of creditors to consider the scheme, the Singapore Court of Appeal held that where there was no realistic prospect of a scheme receiving the requisite statutory approval, the court should not act in vain to grant the application for meetings to be convened.[40] Confronted with clear opposition by the respondent, as the main contractor for the development and a creditor with a debt that constituted 38.7%[41] and 26% of the total debt for the proposed scheme by the judicial manager in respect of the subsidiary and the developer respectively, and given that the statutory voting majority required was 75% in value of the creditors, the court held that it would not act in vain and would accordingly set aside the judicial management order. The court held there was no way that the requisite statutory majority of creditors would approve the scheme proposed by the judicial manager.[42] This aspect of the court's decision will be returned to below,[43] as it is important to consider the impact of such an approach in the context of a rescue mechanism. Given the very early stage at which this refrain of "not acting in vain" is applied, the prospect of a recue is effectively pre-empted and the purpose of judicial management as a rescue mechanism is set at nought.

37 *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd* [2019] 8 MLJ 473; [2018] 10 CLJ 412 at [42]–[43].

38 *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd* [2019] 8 MLJ 473; [2018] 10 CLJ 412 at [104].

39 [2012] 2 SLR 213. The "no realistic prospect" and "the court should not act in vain" approach laid down in *Re TT International* was reiterated by the Singapore Court of Appeal in *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] 2 SLR 77 at [29].

40 *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [64], approving on this point *Re Ng Huat Foundations Pte Ltd* [2005] SGHC 112 at [9].

41 Which when added to the debt of the opposing nominated subcontractors grew to 46.9% of the total scheme debt.

42 *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd* [2019] 8 MLJ 473; [2018] 10 CLJ 412 at [104]–[105].

43 See paras 27–33 below.

23 Subsequent to *Leadmont*, the High Court decision in *Dalam Perkara Wellcom Communications (NS) Sdn Bhd*[44] ("*Wellcom Communications*") also illustrates a textbook example where the judicial management regime works exactly as enacted but yet lacks utility as a rescue mechanism. The first applicant was a special purpose vehicle that had been established in order to obtain funding for all contracts and projects secured and undertaken by the second applicant. The second applicant was a joint venture between the first applicant and Menteri Besar Incorporated (a state government entity); it held a telecommunications infrastructure concession under which the second applicant would own telecommunications towers in the State of Negeri Sembilan and would lease them to various telecommunications service providers. The respondent bank had financed the works undertaken in respect of the telecommunications infrastructure concession. The bank held debentures containing fixed and floating charges as security for the banking facilities extended. However, the second applicant defaulted on repayment of the banking facilities and the bank recalled the facilities and appointed a receiver and manager over both applicants. Both applicants applied for a judicial management order over the second applicant on the ground that there was a prospect of the company being rehabilitated and also to preserve the businesses of the applicant.

24 As the learned judge noted,[45] the judicial management application by the applicants immediately and predictably came up against the clear words of s 409 of the CA 2016, which provides that the court has to dismiss an application for a judicial management order if it is satisfied that a receiver or a receiver and manager has been or will be appointed, and a secured creditor opposes the making of the order. The bank *qua* secured creditor opposed the judicial management order application. Given the clear words of s 409, the court held it had no option but to dismiss the application for a judicial management order. The court did take note that there was only one set of circumstances that could permit the court to make an exception to the secured creditor's objection to the making of a judicial management order; s 405(5) of the CA 2016 states that nothing will preclude a court from making a judicial management order if the court considers the public interest so requires. Counsel for the applicants submitted that there was an element of public interest because the Negeri Sembilan State Government was one of the joint venture parties and had an interest in the second applicant. Counsel added that if the judicial management order was not made, there was a possibility that the second applicant would be wound up. One of the consequences would thus be

44 [2019] 9 MLJ 510; [2019] 1 CLJ 393.

45 *Dalam Perkara Wellcom Communications (NS) Sdn Bhd* [2019] 9 MLJ 510; [2019] 1 CLJ 393 at [23].

that agencies that used telecommunications services within the State Government would be affected, and ultimately the end-users of such services in the State, namely the public at large, would be disadvantaged. Unfortunately for the applicants, the court held[46] that the submissions on the public interest aspect were not substantiated or backed up by any tangible evidence to that effect. The court did not therefore delve into an analysis of the scope and ambit of the phrase "public interest"[47] or deal with issues of law arising from the interplay between s 405(5) and s 409 of the CA 2016. Instead, it was left to the court to simply dismiss the judicial management application because of the appointment of a receiver and manager and because the secured creditor opposed the application. The receivership could therefore continue unimpeded. This was an entirely orthodox and predictable outcome to an attempted rehabilitation of two companies in distress. It is tempting to speculate how matters might have turned out if the same scenario had played out under the administration regime in the UK or to a lesser extent under the current Singapore judicial management regime.

25 The application for judicial management orders over three wholly-owned subsidiaries within the Scomi Group Berhad ("SGB") is the latest example of the complexities of attempting to obtain such orders. SGB is a public company listed on Bursa Malaysia. The three subsidiaries are:

(a) Scomi Rail Berhad ("SRB");

(b) Scomi Engineering Berhad ("SEB"); and

(c) Scomi Transit Projects Brazil (Sao Paulo) Sdn Bhd ("STPB").

The applications were lodged in respect of each subsidiary on 7 December 2018.[48] On 24 January 2019, judicial management orders were made in respect of SEB and STPB respectively on two out of the three applications filed.[49] A judicial management order was not possible in respect of the

46 *Dalam Perkara Wellcom Communications (NS) Sdn Bhd* [2019] 9 MLJ 510; [2019] 1 CLJ 393 at [27].

47 The relevant Singapore case law on the equipollent provision under the Singapore judicial management regime is reviewed at paras 35–40 below.

48 Scomi Group Berhad, "Others Application for Judicial Management Order for Three (3) Subsidiaries of Scomi Group Bhd (SGB or the Company)" *Bursa Malaysia* (7 December 2018) <https://www.bursamalaysia.com/market_information/announcements/company_announcement/announcement_details?ann_id=2911850 > (accessed 24 November 2019).

49 Scomi Group Berhad, "Others Application for Judicial Management Order for Three (3) Subsidiaries of Scomi Group Bhd (SGB or the Company)" *Bursa Malaysia* (24 January 2019) <https://www.bursamalaysia.com/market_information/

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third application, involving SRB, because the holder of a debenture and an unsecured creditor respectively opposed the application, therefore requiring an adjournment for affidavits to be exhausted. A moratorium under s 410 of the CA 2016 had come into force in respect of SRB because of its pending judicial management application with effect from the date of filing, thereby protecting SRB in the interim from other legal proceedings and possible winding up. Eventually, the judicial management application in respect of SRB was withdrawn[50] and, following the withdrawal of that application and the concomitant loss of the protection of the moratorium in respect of legal proceedings, SRB was wound up by the High Court on 6 May 2019.[51] Three days later, on 9 May 2019, the holder of the debenture over SRB appointed a receiver and manager over the assets and undertaking of SRB.[52] Despite the judicial management orders made in respect of SEB and STPB on 18 January 2019, the attempted judicial management was eventually unsuccessful as the judicial managers' applications in respect of each company for an extension of each judicial management order from 24 July 2019 until 24 January 2020 were dismissed on 15 November 2019.[53]

26 Two important areas where there were missed opportunities for the Malaysian courts to develop the law are now discussed. These concern, firstly, the application in *Leadmont* of the principle that a court ought not to act in vain when considering whether to make a judicial management order, and secondly, the scope and ambit of the phrase

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announcements/company_announcement/announcement_details?ann_id=2923480> (accessed 24 November 2019).

50 Scomi Group Berhad, "Others Application for Judicial Management Order for Three (3) Subsidiaries of Scomi Group Bhd (SGB or the Company)" *Bursa Malaysia* (6 May 2019) <https://www.bursamalaysia.com/market_information/announcements/company_announcement/announcement_details?ann_id=2952357> (accessed 24 November 2019).

51 Scomi Group Berhad, "Winding Up/Receiver & Manager/Restraining Order/Special Administrator Scomi Group Bhd ('SGB' of the 'Company') – Appointment of Receiver and Manager over the propoerty of Scomi Rail Bhd, an indirect wholly-owned subsidiary of SGB" *Bursa Malaysia* (6 May 2019) <https://www.bursamalaysia.com/market_information/announcements/company_announcement/announcement_details?ann_id=2952356> (accessed 24 November 2019).

52 Scomi Group Berhad, "Winding Up/Receiver & Manager/Restraining Order/Special Administrator Scomi Group Bhd ('SGB' of the 'Company') – Appointment of Receiver and Manager over the propoerty of Scomi Rail Bhd, an indirect wholly-owned subsidiary of SGB" *Bursa Malaysia* (9 May 2019) <https://www.bursamalaysia.com/market_information/announcements/company_announcement/announcement_details?ann_id=2953329> (accessed 24 November 2019).

53 Scomi Group Berhad, "Others Application for Judicial Management Order for Three (3) Subsidiaries of Scomi Group Bhd (SGB or the Company)" *Bursa Malaysia* (15 November 2019) <https://www.bursamalaysia.com/market_information/announcements/company_announcement/announcement_details?ann_id=3002316> (accessed 24 November 2019).

"public interest" in the exception contained in s 405(5)(a) of the CA 2016 that was not discussed in *Wellcom Communications*.

IV. Appropriateness of "a court should not act in vain" approach being applied to applications for judicial management orders

27 Before considering whether it is appropriate for there to be a principle that under the Malaysian judicial management framework, a judicial management order ought not to be made where creditors representing a combined level of debt in excess of the negative threshold of 25% oppose the making of such an order, the position in Singapore should be compared. In *Re TT International*, the Singapore Court of Appeal held that where there is no realistic prospect of a scheme receiving the requisite approval, the court should not act in vain in granting an application for class meetings to be convened. In this regard, the Court of Appeal approved of the decision in *Re Ng Huat Foundations Pte Ltd*[54] ("*Re Ng Huat*"). This has been recently reiterated by the Singapore High Court in *Re Empire Capital Resources Pte Ltd*[55] and confirmed on appeal by the Singapore Court of Appeal in *Pathfinder*.[56] However, in *Re Pacific Andes Resources Development Ltd*,[57] the Singapore High Court held that it was not appropriate or correct to apply the *Re Ng Huat* approach to an application for a moratorium under s 210(10) of the Singapore Companies Act.[58] This same approach was also taken in *Re IM Skaugen SE*[59] where the court held as follows:[60]

> *I now explain why it was premature to consider whether MAN's objection to the moratorium was fatal.* My observations in *Pacific Andes* ([35] *supra*) were relevant and apposite to this issue. In that case, the application for moratorium relief under s 210(10) was opposed by creditors who collectively held more than 25% of the debt owed by the applicant. The creditors argued that due to their opposition, the scheme would never receive the approval of the requisite majority of creditors at a scheme meeting, and as such it would be futile to grant a moratorium under s 210(10). In support of their argument, the creditors relied on the case of *Re Ng Huat* ([34] *supra*), which held that a court in determining whether to convene a scheme meeting, should consider whether there is a realistic prospect of approval of the requisite majority of creditors both in terms of value and numbers. In *Pacific Andes*, I declined to extend that requirement to an application under s 210(10) for the following reasons (at [70]):

54 [2005] SGHC 112 at [9].
55 [2018] SGHC 36 at [33]–[34].
56 [2019] 2 SLR 77 at [29].
57 [2018] 5 SLR 125.
58 *Re Pacific Andes Resources Development Ltd* [2018] 5 SLR 125 at [70].
59 [2019] 3 SLR 979.
60 *Re IM Skaugen SE* [2019] 3 SLR 979 at [65].

> … I do not believe that it would be appropriate or indeed correct to apply *Re Ng Huat* to a s 210(10) application. It seems self-evident that if the plan that is before the Court for the purpose of a s 210(10) application is liable to or capable of evolution and change because it is nascent and subject to discussion and negotiation, taking a straw poll of creditors at that stage would not be justified. *Conchubar* (at [12]) has warned against this, suggesting that a close scrutiny of the likely acceptance of the plan by creditors ought to be avoided when the Court makes the broad assessment. It is a matter of common logic that as the plan evolves, creditors are prone to change their position based on their commercial motivations. Indeed, I note that one creditor, UOB, has changed its position from unequivocal opposition to neutrality. Accordingly, to make an assessment of creditor support at the stage of a s 210(10) application is premature.
>
> If close scrutiny of the likelihood of a proposed scheme obtaining the requisite creditor support for a s 210(10) application was premature, it was difficult to see why a different analysis would apply for the purpose of s 211B(4)(*a*) in the First and Second Scenarios. As I have noted in *Pacific Andes*, *a clear line should be drawn between the assessment made for the purpose of granting the moratorium under s 210(10) and the assessment made when deciding whether a scheme meeting should be called under s 210(1). The issue of futility as described in Re Ng Huat assumes far greater relevance in the latter case.* The same line has been drawn in the statutory construct of s 211B(1). Like the application for a moratorium under s 210(10), as read by the cases, there is no requirement for a s 211B(1) application to be coupled with an application under s 210(1) for a scheme meeting to be called. It suffices that an undertaking to file an application under s 210(1) is given as part of the application under s 211B(1). The statutory focus at the point of application is whether the prerequisites for the Automatic Stay and the continuation of the moratorium have been met. That being the case, it seemed evident the relevant question that the court should ask, for the purpose of s 211B(4)(*a*), was not whether it would be futile to extend the moratorium, but whether there was sufficient support for the restructuring efforts to warrant the continuation of the moratorium. As I noted in *Pacific Andes* (at [65]), while creditor opposition is relevant, that must be weighed in the face of the significance of the creditor support.
>
> [emphasis added]

28 Based on the cases considered above, the position in Singapore is that where the level of creditor objection is such that at the stage where the court has to consider whether to convene class meetings in respect of a proposed scheme of arrangement, there is no realistic prospect of the scheme receiving the requisite approval, a court ought not to act in vain and grant the order sought. However, at the earlier stage where there is an application for the granting of a moratorium, the Singapore courts have held that it is inappropriate and premature to apply the same approach. Essentially, at the moratorium application stage, the "plan" such as it is would be regarded as nascent and would most certainly be subject to

further discussion and negotiation[61] and therefore is likely to undergo further refinement and revision before the plan can advance to the stage where class meetings can be convened. Therefore, the "futility" or "no realistic prospect" approach should not be used at the moratorium stage.

29 Thus, the question arises as to whether the Malaysian courts ought to apply the "futility" or "no realistic prospect" approach that is grounded in jurisprudence relating to schemes of arrangement to applications for a judicial management order. Before embarking on the appropriateness of the transposing of this approach, which originates from schemes of arrangement to judicial management order applications, it is necessary to note that there is ample Malaysian case law that has applied the same approach to applications for restraining orders under s 176(10) of the Companies Act 1965 and now s 368(1) of the CA 2016 in scheme of arrangement proceedings. This body of case law includes *Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd (No 2)*,[62] *Metroplex Bhd v Morgan Stanley Emerging Markets Inc*,[63] *Exogenus Factor Sdn Bhd v HG Metal Manufacturing Ltd*[64] and *Dynawell Corp Sdn Bhd v Universal Trustee (M) Bhd*.[65] However, there are also Malaysian cases going the other way, in effect for the same reasons as articulated by the Singapore courts that have declined to apply the "futility" and "no realistic prospect" approach. In *Re Kai Peng Bhd*,[66] the court quite trenchantly held[67] that the argument that there is no useful purpose of sanctioning a creditors meeting as the scheme is likely to fail for failure to obtain approval of statutory majority was without merit and baseless at the restraining order stage because the court cannot anticipate what would be the decision taken by the creditors at the creditors meeting which would not have been held. It is up to all the creditors or classes of creditors to deliberate on the issue at their respective meetings. This approach was also taken in *Baneng Holdings Bhd v CIMB Bank Bhd*[68] where *Re Kai Peng Bhd* was approved.[69]

30 While Singaporean courts have only applied the "futility" or "no realistic prospect" test to applications under s 210(1) of the Singapore Companies Act for the convening of creditor class meetings to consider a scheme, the courts have declined to apply this approach in the context

61 *Re Pacific Andes Resources Development Ltd* [2018] 5 SLR 125 at [70].
62 [1993] 2 MLJ 353.
63 [2005] 6 MLJ 487.
64 [2012] 1 LNS 182.
65 [2013] 1 LNS 1391.
66 [2007] 8 MLJ 122.
67 *Re Kai Peng Bhd* [2007] 8 MLJ 122 at [31]–[32].
68 [2013] MLJU 269.
69 *Baneng Holdings Bhd v CIMB Bank Bhd* [2013] MLJU 269 at [17].

of applications for a moratorium under s 201(10). The differentiation between the two scenarios can be pragmatically put down to the extent to which the evolution of the underlying scheme can be said to be sufficiently advanced in terms of its sophistication so as to justify the no realistic prospect approach. In Malaysia, the preponderance of case law has not seen fit to draw such a distinction and more often than not Malaysian courts have been content to deny scheme applicants the protection of restraining orders simply because creditors holding more than 25% of the outstanding scheme debt oppose the scheme even at such an early stage.

31 In *Leadmont*, given that the opposing creditors held more than 25% of the outstanding debt and that the statutory voting majority required was 75% in value of the creditors, the court held that it would not act in vain and would accordingly set aside the judicial management order. The court held there was no way that the requisite statutory majority of creditors would approve any scheme proposed by the judicial manager.[70] In *Leadmont*, matters were at an early stage. The opposing creditors had been served and had filed an application to set aside the judicial management order.[71] The judicial manager would not have been in office for long enough to be able to have formulated a statutory proposal for the creditors' consideration.[72] Nevertheless, the "the court shall not act in vain" argument prevailed in *Leadmont*. This approach is not taken in Singapore when applications are made for judicial management orders. It is necessary to appreciate that when a judicial management order is applied for, *ex hypothesi* no plan or proposal by the judicial manager exists because a judicial manager would not have yet been appointed. The focus of the court's consideration will be, and should be, whether the prerequisites set out in s 404, read with s 405 of the CA 2016, have been satisfied and it is appropriate that a judicial manager be appointed. Therefore, it would be premature for any creditor to contend that it would not vote in favour of any such proposal put forward by the judicial manager under s 420 of the Companies Act. It would be helpful if courts in future could reconsider the appropriateness of the "the court shall not act in vain" approach in the context of applications for judicial management orders.

32 It will also be argued that this approach has no place in a true rescue mechanism where corporate rescue is the primary objective

70 *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd* [2019] 8 MLJ 473; [2018] 10 CLJ 412 at [104]–[105].

71 *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd* [2019] 8 MLJ 473; [2018] 10 CLJ 412 at [13].

72 *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd* [2019] 8 MLJ 473; [2018] 10 CLJ 412 at [104].

of the regime[73] because it would stymie the essence of the mechanism and deprive it of any meaningful *raison d'être*. It is simply incompatible with a rescue, especially if, as will be argued below, the existing statutory prerequisites contained in ss 404 and 405 of the CA 2016 ought to be fashioned along the lines of the revisions to Schedule B1 of the UK Insolvency Act 1986, which emphasise corporate rescue as the first objective of an administrator.

33 The dissimilarities between the court process in schemes of arrangement and in judicial management should also be borne in mind before any attempt is made to apply the "futility" or "no realistic prospect" arguments to judicial management order applications. Schemes of arrangement are debtor-in-possession type proceedings where the debtor has, through its management and with the help of advisers, the task of formulating a scheme that will satisfy and persuade at least the statutory majority of creditors to accept it by the time class meetings are held. However, at the very inception of the court phase, only a basic outline of a scheme, that could be said to constitute "more than a general layout of the scheme" and sufficiently particularised, is required and such a basic plan would be sufficient to justify a restraining order in Malaysia[74] or a moratorium in Singapore.[75] In other words, creditors opposing even a restraining order or moratorium in a scheme of arrangement proceeding would have something along the lines of an adequately particularised general layout of a scheme based on which creditors can take initial positions; whether to support or oppose the scheme or to demand changes and negotiate further. In contrast, at the very inception of judicial management proceedings, the statutory proposal that a judicial manager puts forward[76] could be at least 60 days away[77] from the date of the making of a judicial management order. Unless creditors are exceptionally prescient, they will not know what possible proposal a judicial manager may have in mind. Creditors cannot therefore claim to be able to take positions on an informed basis as to the viability of any proposal and it would thereby be premature and pre-emptive to allow creditors to do so by claiming that a court ought not to act in vain. The contrast between the position in schemes of arrangement and judicial

73 Paragraph 3(1)(a) of Schedule B1 to the UK Insolvency Act 1986 (c 45) provides that the administrator of a company in administration must perform his functions with the objective of rescuing the company as a going concern.

74 *Re Kuala Lumpur Industries Bhd* [1990] 2 MLJ 180, *per* V C George J (as he then was), which was referred to and applied by the Singapore Court of Appeal in *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] 2 SLR 77 at [29].

75 *Re Conchubar Aromatics Ltd* [2015] SGHC 322 at [4] and [11], *per* Aedit Abdullah JC.

76 Companies Act 2016 (Act 777) s 420(1).

77 Indeed a court may extend this period pursuant to s 420(1) of the Companies Act 2016 (Act 777).

management in this respect is sufficiently stark to warrant jettisoning the "the court shall not act in vain" approach in the context of applications for a judicial management order.

V. Public interest exception

34 If a secured creditor opposes the making of a judicial management order and[78] a receiver or a receiver and manager[79] has been or will be appointed, the court has no alternative but to dismiss the application for a judicial management order. The only exception to this is where the public interest under s 405(5)(a) of the CA 2016 is invoked. This provision confers on the court an overriding discretion to appoint a judicial manager if the court considers that the public interest so requires. The only reported Malaysian decision where this provision was considered is *Wellcom Communications*.[80] In *Wellcom Communications*, the court did not construe this provision or discuss its scope or shed light on the parameters of the discretion afforded to the court or the circumstances under which it would be applied so as to override the secured creditor's veto under s 409.

35 The provision has, however, been subject to judicial consideration in two decisions of the Singapore courts.[81] The earlier of the two decisions is *Re Cosmotron Electronics (Singapore) Pte Ltd*[82] ("*Re Cosmotron*"). In that case, the company, Cosmotron Electronics (Singapore) Pte Ltd, carried on a printed circuit board manufacturing business. The manufacturing

78 There is a significant difference between the Malaysian and Singapore provisions in this respect. In Singapore, there is an "or" between limbs (a) and (b) of s 227B(5) of the Companies Act (Cap 50, 2006 Rev Ed); on the other hand in Malaysia, the draftsman has inserted "and" between the equivalent provisions in limbs (a) and (b) of s 409 of the Companies Act 2016 (Act 777) with the result that the Malaysian provision inevitably has to be read conjunctively. See Jack Yow Pit Pin, "Judicial Management" in *Law and Practice of Corporate Insolvency Law* (Rabindra S Nathan ed) (Sweet & Maxwell, 2019) ch 4 at para 4.053, p 84.

79 In this regard, there are differences between the Malaysian and Singaporean provisions. In Singapore, under s 227B(5)(*b*) of the Companies Act (Cap 50, 2006 Rev Ed), the veto is conferred on a person who has the right to appoint a receiver *and* manager, whereas the Malaysian provision, which is s 409(b) of the Companies Act 2016 (Act 777), extends the veto to a person who has the right to appoint a receiver.

80 *Dalam Perkara Wellcom Communications (NS) Sdn Bhd* [2019] 9 MLJ 510; [2019] 1 CLJ 393.

81 It has also been extensively considered in an illuminating article by Tracey Evans Chan, "The Public Interest in Judicial Management" [2013] Sing JLS 278; see also more generally Andrew Keay, "Insolvency Law: A Matter of Public Interest?" (2000) 51(4) NILQ 509. The latter is a wide-ranging survey of the many contexts in which the public interest has a role to play in insolvency law.

82 [1989] 1 SLR(R) 121.

plant at which the business was carried on was charged to a debenture holder as security for banking facilities provided to the company. Having encountered cash flow problems, the company entered into an agreement whereby the company would sell the plant and machinery to a buyer. The agreement for the disposal of the plant and machinery did not have the consent of the debenture holder. Subsequently the debenture holder indicated it was prepared to consent to the disposal of the plant and machinery subject to the condition that it be paid 10% of the sale price. The company was warned that otherwise the debenture holder would appoint a receiver and manager. The company then applied for a judicial management order. Its case was that the company would only be able to discharge its debts if the sale of its plant and machinery to the buyer went through. The company contended that for this reason, placing the company under judicial management would "achieve the survival of the company of the whole part of its undertaking as a going concern and a more advantageous realization of the company's assets would be effected than through a winding up".[83] It further contended that the interest of the creditors would be better served.[84] The debenture holder, along with three other unsecured creditors, opposed the application. In addition, the debenture holder also exercised its power to appoint receivers and managers; the latter were unable to assume office by reason of the judicial management application.

36 The High Court refused to grant the judicial management order. The High Court was satisfied that the company was unable to pay its debts but it did not consider that the making of the judicial management order would achieve any of the purposes set out in s 227B(1)(*b*) of the then Singapore Companies Act[85] ("Companies Act 1988") for several reasons. Among the more prominent of the reasons for this result was firstly the fact that contrary to the requirement under s 227B(1)(*b*)(i), the survival of the company as a going concern did not require placing the company under judicial management; the receivers and managers were competent to perform the agreement between the company and the buyer. Therefore, if the purposes the company wished to achieve through judicial management could be achieved by the receivers and managers without any detriment to the company or its shareholders, the company had not made out a valid case for depriving a secured creditor of its contractual right to assume possession and control of its security.[86] Furthermore, as the company had agreed to dispose of its plant which constituted its entire undertaking, the question of rehabilitating the

83 *Re Cosmotron Electronics (Singapore) Pte Ltd* [1989] 1 SLR(R) 121 at [8].
84 *Re Cosmotron Electronics (Singapore) Pte Ltd* [1989] 1 SLR(R) 121 at [8].
85 Cap 50, 1988 Rev Ed.
86 *Re Cosmotron Electronics (Singapore) Pte Ltd* [1989] 1 SLR(R) 121 at [17].

company or of preserving all or part of its business as a going concern did not arise.[87]

37 Chan Sek Keong J (as he then was) also considered the possibility that s 227B(10)(*a*) of the Singapore Companies Act 1988 might apply. He noted that it had the effect of conferring on the court an overriding power to make a judicial management order if it considered the public interest so required it.[88] This power could be exercised even if the court was not satisfied that the making of the judicial management order would achieve one or more of the purposes set out in s 227B(1).[89] However, the legislation had not provided a definition for the expression "public interest". Given that the phrase was used in conjunction with an overriding power, the court felt that it would connote an interest or object which, if achieved, would transcend any or all of the purposes specified in s 227B. However, on the evidence before the court, the public interest element could not be supported.[90] The *dicta* suggested a very narrow construct of what constituted public interest for this purpose, and based on such a reading, it would be difficult to see how and under what circumstances a court would be able to identify any such interest or object that could transcend any or all of the purposes and objectives of judicial management.[91] As such, on this approach, the practical utility of the public interest as a means of permitting the making of a judicial management order notwithstanding the objections of a secured creditor under the court's overriding power would be minimal.

38 A more expansive and considered approach to the scope and ambit of the public interest exception under the judicial management framework was taken in the case of *Re Bintan Lagoon Resort Ltd*[92] ("*Re Bintan Lagoon*"). In this case, the company, which operated a holiday resort located in Bintan, Indonesia, had accumulated substantial debt. The petitioners seeking the appointment of a judicial manager were a group of creditors who between them were collectively owed approximately 41.4% of the total debt of the company and 66% of its unsecured debt. The company also defaulted under a facility provided by a group of banks which was secured by a deed of debenture conferring a fixed and floating charge over the company's assets. After the company had defaulted on repayment of the facility, its shareholders formed a company to buy out the banks. The banks' rights and interests under the debenture passed to

87 *Re Cosmotron Electronics (Singapore) Pte Ltd* [1989] 1 SLR(R) 121 at [18].
88 *Re Cosmotron Electronics (Singapore) Pte Ltd* [1989] 1 SLR(R) 121 at [22].
89 This is the equivalent to s 405(1) of Companies Act 2016 (Act 777).
90 *Re Cosmotron Electronics (Singapore) Pte Ltd* [1989] 1 SLR(R) 121 at [23].
91 Tracey Evans Chan, "The Public Interest in Judicial Management" [2013] Sing JLS 278 at 288 and 289.
92 [2005] 4 SLR(R) 336.

the purchaser. There were then discussions on a restructuring proposal that went on for four years but this yielded no result. Subsequently, the purchaser that had acquired the banks' rights under the debenture, appointed a receiver and manager, who was to sell the assets of the company. There were allegations by the petitioners that the restructuring discussions had caused the petitioning creditors to stay their hands during the four-year period and that the buy-out of the banks had been done in bad faith. The petitioners then applied for a judicial management order despite the fact that the purchaser had appointed a receiver and manager under the debenture. Given s 227B(5) of the then Singapore Companies Act,[93] the court had no alternative but to dismiss the petition given that a receiver and manager had been appointed, unless it could be satisfied that the power under s 227B(10) to make a judicial management order on the basis that the public interest so required, could be invoked.

39 Hence the public interest element came squarely to the forefront. The court noted that it has an overriding power to make a judicial management order if it considers the public interest so requires. Andrew Ang J in the Singapore High Court referred to the earlier decision in *Re Cosmotron* and referred to the *dicta* in that case to the effect that the court has an overriding power to make a judicial management order if it considers the public interest so requires it and further that this power could be exercised even if the court was not satisfied that the making of the judicial management order would achieve one or more of the purposes set out in s 227B(1). The court went on to hold that such a power should not be lightly exercised even if it may be in the public interest to do so. It was not enough to contend, as the petitioning creditors had done, that there was a public interest in rescuing companies with a decent chance of survival.[94] In the circumstances, something more was required. The court held that the question of whether the public interest so requires the use of the court's overriding discretion might perhaps best be answered by considering the likely consequences of not making a judicial management order and, in particular, whether a refusal to make such order will lead to or allow the dismemberment or collapse of a company whose failure will have a serious economic or social impact.

40 The petitioners responded to that with various arguments.[95] These included possible frustration of the international economic co-operation agreement that Singapore had signed with Indonesia that had the aim of promoting the development of that region. The employees of the resort could lose their livelihood if the company were to be wound up, with

93 Cap 50, 1994 Rev Ed.
94 *Re Bintan Lagoon Resort Ltd* [2005] 4 SLR(R) 336 at [13].
95 *Re Bintan Lagoon Resort Ltd* [2005] 4 SLR(R) 336 at [15].

the consequence that there would be concomitant social, economic and political repercussions. These arguments were not accepted, and the court was not moved by such arguments. The court rightly observed that companies do fail sometimes and often with adverse consequences to employees, customers and suppliers, and that as such, it could not seriously be suggested that the court should exercise its power under s 227B(10) each time this happens.[96] The court also observed that any buyer of the resort could continue to employ some or all of the existing employees if it wished to continue to operate the resort and that the social and economic impact had been exaggerated.[97] Chan[98] has observed that the approach taken in *Re Bintan Lagoon* conflates public interest in all its various possibilities into a single dimension involving systemic or severe economic or social impact.

41 It may be recalled that the Malaysian case of *Wellcom Communications* involved a company that had been awarded a telecommunications infrastructure concession under which the company would own the telecommunications towers in the State of Negeri Sembilan, one of the States comprising the Federation of Malaysia, and the company would in turn lease the towers to the various network telecommunications service providers. Counsel for the applicants highlighted the fact that the State was itself a shareholder of the parent of the applicant company and the utility of the services provided by the applicant company in the context of telecommunications services within the State, not to mention the inconvenience to end users of such services, which included state agencies. Ultimately, the contention foundered on the ground of lack of evidence of such repercussions and did not afford an opportunity for the court to clarify whether such considerations could constitute sufficient grounds to invoke the public interest exception to the secured creditor's veto. It would be interesting to ponder, but probably speculative to answer, the question whether the court in *Wellcom Communications* would have accepted that such matters constituted the serious economic or social impact, as contemplated by the judgment in *Re Bintan Lagoon Resort Ltd*, that would follow in the wake of the refusal of the judicial management order application there.

42 There will undoubtedly be a space where the public interest exception must surely apply. In the wake of the global financial crisis of 2007 to 2009, insolvency law has a role to play in relation to dealing with "too big to fail" institutions that are at the heart of systemic risk within

96 *Re Bintan Lagoon Resort Ltd* [2005] 4 SLR(R) 336 at [16].
97 *Re Bintan Lagoon Resort Ltd* [2005] 4 SLR(R) 336 at [16].
98 Tracey Evans Chan, "The Public Interest in Judicial Management" [2013] Sing JLS 278 at 290.

national economies.[99] As part of the solutions formulated as a result of lessons learnt from the global financial crisis, such financial institutions are intended to be dealt with under special resolution regimes created to deal in an orderly fashion with the scale and impact of failures of such institutions; nevertheless, by way of an example, it might be envisaged that there is still a need to work out what scope there is for the public interest exception in a corporate rescue framework such as judicial management in situations where companies (such as key financial industry service providers) outside such special resolution regimes are collaterally but seriously affected by the insolvencies of such institutions with resultant social and economic upheaval.

VI. Corporate rescue and rescue culture

43 There is as yet no instance of a judicial management order being made over the opposition of a secured creditor. There is also no decision of the Malaysian courts on the scope and ambit of the limited and tightly circumscribed "public interest" exception under s 405(5) of the CA 2016. But a more fundamental question arises – is judicial management in Malaysia likely to be successful, and corporate rescue achievable as an objective, if secured creditors are given such an almost absolute right to block the making of a judicial management order, with only a very narrowly circumscribed "public interest" exception available to override the veto? The paths that other jurisdictions have taken to eliminate or mitigate, as the case may be, this extensive veto right, will be discussed in the next two parts. Inevitably, the discussion will also have to consider the objective of corporate rescue as something for insolvency law to aim for. The next section traces the emergence in traditional common law jurisdictions of the concept of a "rescue culture" in insolvency law and the extent of judicial acceptance and articulation of this notion.

44 It is unlikely that the Cork Committee[100] will claim to have been the originators of the approach known as rescue culture in insolvency law, but it can claim with justification to have laid the foundation in its report for the emergence of such a culture within the UK insolvency law framework.[101] In raising awareness of this, the Cork Committee

99 For a discussion on the role of insolvency law with a specific focus on systemic risk in financial contracts and the financial institutions and market participants in that field, see Rizwaan J Mokal, "Liquidity, Systemic Risk, and the Bankruptcy Treatment of Financial Contracts" (2015) 10 Brook J Corp Fin & Com L 15.

100 United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Chairman: Sir Kenneth Cork).

101 United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Chairman: Sir Kenneth Cork) at paras 203–204.

also injected into the reform debate the need to appreciate the broader context within which insolvency law operates. The Committee stated that among the aims of a good modern insolvency law are the need to recognise that the effects of insolvency are not limited to the private interests of the insolvent and its creditors, but also the interests of society and other groups in society that are vitally affected. The Committee added there was a need to ensure these public interests were recognised and safeguarded. Insolvency law also had to provide the means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country. In amplification of these points, the Committee said:[102]

> 203. The business or commercial insolvent presents an entirely different picture. The failure of such an insolvent has wider repercussions, not only upon those intimately considered with the conduct of the business, such as directors, shareholders and employees, but on other interests, such as suppliers, etc. The effect of the failure upon the realisable value of the stock, plant and goodwill can be disastrous, and not infrequently there is a general feeling of desperation which needs to be resolved. A modern manifestation of this is the sit-in by workers seeking by their physical presence to ensure that their jobs will not be lost, by having some new organisations carry on the business.
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> 204. We believe that a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region, is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.

45 Commentators since then have accepted that the concept of corporate rescue, infused with an underlying rescue culture, has become embedded within the insolvency law framework in the UK.[103] The acceptance that there is such a culture and that it has a role to play in insolvency law has also come from the Judiciary. In the case of *Powdrill v Watson*,[104] Lord Browne-Wilkinson said:[105]

> The Insolvency Acts 1985 and 1986 introduced for the first time the machinery of the court-appointed administrator. This was done on the recommendations

102 United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Chairman: Sir Kenneth Cork) at paras 203–204.

103 See Muir Hunter, "The Nature and Functions of a Rescue Culture" (1999) 104 *Commercial Law Journal* 426; *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten ed) (Sweet & Maxwell, 5th Ed, 2018) at para 11-03; Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge University Press, 3rd Ed, 2017) ch 6; and Andrew Keay, "Insolvency Law: A Matter of Public Interest?" (2000) 51(4) NILQ 509 at 510.

104 [1995] 2 AC 394; [1995] 2 WLR 312; [1995] 2 All ER 65.

105 *Powdrill v Watson* [1995] 2 AC 394 at 441–442.

> contained in the Report of the Cork Committee on Insolvency Law and Practice (1982) (Cmnd 8558). Chapter 9 of the report draws attention to an advantage which attaches to cases where an out-of-court receiver is appointed, viz, the ability of the receiver to carry on the profitable parts of the business of the company with a view either to procuring its recovery or to its disposal as a going concern. It said, at p 117, para 495, that such 'preservation of the profitable parts of the enterprise has been of advantage to the employees, the commercial community, and the general public.' The report states that where a receiver had not been appointed by a debenture holder, in a significant number of cases companies had been forced into liquidation and potentially viable businesses capable of being rescued had been closed down. To meet this need, the committee recommended the creation of a court-appointed administrator who should have similar powers to those customarily conferred on a receiver appointed out of court. Part II of the Act of 1986 implements that recommendation.
>
> This 'rescue culture' which seeks to preserve viable businesses was and is fundamental to much of the Act of 1986. Its significance in the present case is that, given the importance attached to receivers and administrators being able to continue to run a business, it is unlikely that Parliament would have intended to produce a regime as to employees' rights which renders any attempt at such rescue either extremely hazardous or impossible.

46 The courts have also referred to the Cork Committee's identification of the broader range of interests that comprise the spectrum of stakeholders in insolvency. In the case of *Re Pantmaenog Timber Co Ltd*,[106] Lord Millet said:[107]

> From the earliest days of the joint stock company the liquidator has exercised functions which serve the public interest and not merely the financial interests of the creditors and contributories. The Cork Committee (Cmnd 8558) observed (in para 192 of its report) that: 'The law of insolvency takes the form of a compact to which there are three parties: the debtor, his creditors and society.' In consequence insolvency proceedings: 'have never been treated in English law as an exclusively private matter between the debtor and his creditors; the community itself has always been recognized as having an important interest in them.'[108]

47 The extent to which the wider community can be impacted was lucidly explained by Millet J (as he then was) in *Re Barlow Clowes Gilt Managers Ltd*,[109] which, although a case on liquidation, sums up the position in any insolvency situation where the company has no rescue

106 [2004] 1 AC 158. Referred to in *Re Kennedy (No 2)* [2004] 3 HKC 411 at [49], *per* Kwan J.

107 *Re Pantmaenog Timber Co Ltd* [2004] 1 AC 158 at [52].

108 United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Chairman: Sir Kenneth Cork) at para 1734.

109 [1992] Ch 208; [1992] 2 WLR 36; [1991] 4 All ER 36.

option and faces eventual closure with all the economic consequences of that result:[110]

> The liquidation of an insolvent company can affect many thousands, even tens of thousands of innocent people … it can affect people's savings. In the case of a major trading company it can affect its customers and suppliers and the livelihood of many thousands of persons employed by other companies whose viability is threatened by the collapse of the company in liquidation.

48 The Hong Kong courts have also articulated the broader policy concerns that arise from the wider range of interests affected by legislation that is intended to give effect to a corporate rescue of a corporation. In *Re Legend International Resorts Ltd*:[111]:

> The rationale of corporate rescues is that, if successful, there is almost certainly likely to be a better return to creditors and also shareholders than if the particular company went into liquidation. Overseas, there have been a number of successful corporate rescues but there have been an equal or perhaps greater number when rescue has failed. In Hong Kong, there have also been some very high profile successful corporate rescues. Nevertheless, whether a law should be introduced remains a matter of policy for the administration and the legislature. Amongst other things, any such law has to cater for the rights of secured creditors, in respect of both fixed and floating charges; it normally has to cater for the need for there to be further borrowing, in practice thus necessitating giving the lenders in respect of any new loans what has been called super priority. The position of directors also needs to be catered for. Major difficulties can arise in respect of insolvent trading and the liability of the relevant person(s), namely, for example the provisional supervisor has to be limited. Some of the relevant matters dealt with in the Report and in overseas corporate rescue legislation are matters of policy. Not least amongst these are the rights of the employees and the effect introduction of a corporate rescue regime would have on their rights both under contract and under other legislation.

49 Therefore, corporate rescue frameworks that only cater for creditors' interests, and that of secured creditors in particular, without a nod to the interests of the employees and the communities in which businesses are set,[112] are exposed to the charge that the interests served by the framework are too narrow. In addition to the narrow band of interests served, a rescue framework would also be open to criticism if it was not set up to permit a collective process that might achieve a better overall distribution to creditors that is fair to all creditors even taking into account the secured versus unsecured creditor divide. And possibly

110 *Re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208 at 221.

111 [2006] 3 HKC 565 at [34], *per* Rogers VP.

112 Andrew Keay, "Insolvency Law: A Matter of Public Interest?" (2000) 51(4) NILQ 509 at 518.

of even greater concern would be enacting a rescue mechanism that is set up to allow a secured creditor to veto the possibility of the mechanism being resorted to. The public interest factor in insolvency law has been said to include, as an element, the public interest in ensuring people are protected from the adverse effects which insolvency can produce.[113]

50 The Commonwealth jurisdiction that has gone the furthest in terms of setting up corporate rescue as the first objective and in abolishing[114] the debenture holder's primary weapon, *viz*, the ability to appoint a receiver and manager over a company in financial distress, is the UK. In the next part, the considerations that constituted the drivers behind such a revolutionary reform will be considered.

VII. Reforms to administrative receivership and administration procedures in the UK

51 As a result of the recommendations of the Cork Committee in 1982, two new insolvency procedures were introduced through the then newly enacted Insolvency Act 1986. These procedures were the administration process that enabled the appointment of an administrator over a company[115] and corporate voluntary arrangement.[116] The old process of appointing a receiver of the property of a company under a floating charge, a security device invented by the Courts of Equity,[117] was retained, and was absorbed into the statutory insolvency framework,[118]

113 Andrew Keay, "Insolvency Law: A Matter of Public Interest?" (2000) 51(4) NILQ 509 at 510.

114 Exceptions comprising receivership (known as administrative receivership) in two principal categories remain notwithstanding the abolition. The first is the preservation of the right to appoint such a receiver under pre-commencement floating charges (*ie*, floating charges created prior to the commencement date of 15 September 2003) and the second is the continuing availability of this remedy in the case of specialised corporate financing situations: see Len Sealy, David Milman & Peter Bailey, *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2019* (Sweet & Maxwell, 2019) at p 55.

115 United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Chairman: Sir Kenneth Cork) ch 9.

116 United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Chairman: Sir Kenneth Cork) ch 7, section 2.

117 United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Chairman: Sir Kenneth Cork) at para 104.

118 Part III of the Insolvency Act 1986: see Len Sealy, David Milman & Peter Bailey, *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2019* (Sweet & Maxwell, 2019) at p 52.

and renamed as administrative receivership.[119] Indeed the Cork Committee spoke of receivership in glowing terms:[120]

> There is, however, one aspect of the floating charge which we believe to have been of outstanding benefit to the general public and to society as a whole: we refer to the power to appoint a receiver and manager of the whole property and undertaking of a company. This power is enjoyed by the holder of any well-drawn floating charge, but by no other creditor. Such receivers and managers are normally given extensive powers to manage and carry on the business of the company. In some cases they have been able to restore an ailing enterprise to profitability, and return it to its former owners. In others, they have been able to dispose of the whole or part of the business as a going concern. In either case, the preservation of profitable parts of the enterprise has been of advantage to the employees, the commercial community and the general public.

52 The Cork Committee, however, noted[121] that where there was no floating charge, the company was bereft of meaningful choices, in the sense that the options open to the company, such as a formal scheme of arrangement under the Companies Act 1948, were not wholly satisfactory, as that procedure was "expensive and time consuming". Without a meaningful practical course of action to resort to, directors of a company would have to cease trading. The Cork Committee felt that there were many instances of cases where companies had been compelled to undergo liquidation, and all because of the absence of a floating charge under which a receiver and manager could have been appointed, potentially viable businesses that were capable of being rescued were closed down, unnecessarily. Consequently, the Cork Committee considered it appropriate to recommend that a person armed with the powers normally conferred on a receiver and manager appointed under a floating charge, would be appointed as the administrator of a company, thereby displacing management, with a view to achieving a corporate rescue.[122] Hence, as the late Ian Fletcher wrote:[123]

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119 Ian F Fletcher, "UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration and Company Voluntary Arrangements – The Insolvency Act 2000, the White Paper 2001, and the Enterprise Act 2002" (2004) 5 EBOLR 119 at 124.

120 United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Chairman: Sir Kenneth Cork) at para 495.

121 United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Chairman: Sir Kenneth Cork) at para 496.

122 United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Chairman: Sir Kenneth Cork) at para 497.

123 See Ian F Fletcher, "UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration and Company Voluntary Arrangements – The Insolvency Act 2000, the White Paper 2001, and the Enterprise Act 2002" (2004) 5 EBOLR 119 at 124. Administration was thus originally intended to fill a void: see Andrew Keay, "What Future for Liquidation in Light of the Enterprise Act Reforms?" [2005] JBL 143 at 145. In *Re Welfab Engineers Ltd* [1990]

(cont'd on the next page)

> It was this possibility of extending the use of the plenipotentiary powers of the receiver and manager that inspired the Cork Committee to advocate an alternative procedure, modelled upon receivership, as a vehicle for seeking to achieve a corporate rescue.

53 Such was the position in 1986 that both processes, receivership and administration, existed side by side. Some 14 or so years later, by the end of the millennium, views about the ability of administration to achieve a corporate rescue, and about the shortcomings and disadvantages of receivership, particularly in terms of the position of returns to unsecured creditors, had hardened to such an extent within the UK government that reform of both procedures became a necessity. The stage was set for the dramatic and far-reaching reforms of 2003, which will be described next.

54 It has been said that the move to foster a rescue culture was driven by a perception that powerful secured creditors had been too ready to put distressed companies into receivership.[124] The drive came from the newly-elected Labour government in the UK, which through the Department of Trade and Industry ("DTI") published a White Paper in July 2001.[125] The proposals in this White Paper were remarkable – administrative receivership would to all intents and purposes be abolished. In her foreword to the White Paper, the then Secretary of State for Trade and Industry[126] made very clear what the underlying drivers for this reform were:

> Companies in financial difficulties must not be allowed to go to the wall unnecessarily. Administrative receivership which placed effective control of the direction and outcome of the procedure in the hands of the secured creditor is now seen by many as outdated. There are many other important interests involved in the fate of such a company, including unsecured creditors, shareholders and employees. We propose to create a streamlined administration procedure which will ensure that all interest groups get a fair say and have an opportunity to influence the outcome.

55 In the introduction to the White Paper, the DTI asserted that "there was also widespread concern that the large number of administrative receivership appointments in the early 1990s may have represented precipitate behaviour on the part of lenders, causing

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BCLC 833 at 838, Hoffmann J (as he then was) said that recent developments in insolvency law, such as the institution of administration, are intended to encourage trying to save the business rather than destroy it.

124 Vanessa Finch, "Reinvigorating Corporate Rescue" [2003] JBL 527 at 527.

125 Department of Trade and Industry, *Insolvency – A Second Chance* (CM 5234, 2001).

126 The Rt Honourable Patricia Hewitt MP.

companies to fail unnecessarily".[127] This statement was not backed by any empirical evidence whatsoever and in fact precipitated a robust riposte from banks.[128] The proposals in the White Paper emphasised the fact that unsecured creditors were the disadvantaged constituency whenever a company in distress underwent administrative receivership. There was an absence of adequate incentives for the secured creditor and its appointee to maximise economic value.[129] There was also an unacceptable level of transparency and accountability to the range of stakeholders with an interest in the company's affairs.[130] The White Paper observed that while administrative receivers, who had to be authorised insolvency practitioners, must discharge their duties professionally, their principal obligation is to the appointor. Therefore, administrative receivership, a statutory based process directed at administrative receivers appointed by holders of floating charges that is very similar to corporate receivership by holders of such charges in Malaysia, was fingered as the principal stumbling block, if not the villain of the piece, to corporate rescue. The White Paper emphasised that the time had come to tip the balance in favour of collective insolvency proceedings, in which all creditors participate and under which an insolvency office holder would be collectively accountable to all creditors.[131] Most importantly for the future success of administration and its ascendency over receivership, the White Paper made this critical reform statement that in effect signalled the end of the centuries-old receivership procedure:[132]

> At present, the holder of a floating charge has the effective right to veto the making of an administration order. We would propose to remove that right except in certain specified circumstances where the change was granted in connection with certain transactions in the capital markets.

56 To make the new streamlined administration procedure more palatable to the secured lenders who were effectively emasculated, and with a nod to concerns of secured lenders as to whether their interests

127 Department of Trade and Industry, *Insolvency–A Second Chance*, (CM 5234, 2001) at para 2.1.

128 Rizwaan Mokal referred to the British Bankers' Association's claim in its response to these reform proposals that there was no evidence that debenture holders destroy viable companies through over-hasty appointment of receivers: Rizwaan Jameel Mokal, "The Harm Done by Administrative Receivership" (2004) 1(5) *International Corporate Rescue* at 2, fn 7.

129 Department of Trade and Industry, *Insolvency – A Second Chance* (CM 5234, 2001) at para 2.2.

130 Department of Trade and Industry, *Insolvency – A Second Chance* (CM 5234, 2001) at para 2.2.

131 Department of Trade and Industry, *Insolvency – A Second Chance* (CM 5234, 2001) at para 2.5.

132 Department of Trade and Industry, *Insolvency – A Second Chance* (CM 5234, 2001) at para 2.15.

would be sufficiently protected, the White Paper proposed that the holder of a floating charge (which post-reform is known as a qualifying floating charge) be conferred a statutory power whereby it would be entitled to petition for an administration order.[133] According to the DTI, the aim was to provide secured creditors who held floating charges and other security with a procedure that would be as flexible and cost effective as administrative receivership whilst remedying the major defects of that procedure.[134]

57 This reform proposal kick-started a wide-ranging debate among UK commentators[135] about the supposed disadvantages of administrative receivership and the benefits of a more inclusive, collective procedure like the streamlined administration procedure under the subsequent Enterprise Act 2002 that was enacted following the reform initiative initiated by the UK government. There was also a debate over whether the notion of corporate rescue had been misunderstood by the UK government – did it mean the rescue of the company as opposed to the business?[136] Indeed in this respect, it is helpful to remember that the Cork Committee had itself said:[137]

> In the case of an insolvent company, society has no interest in the preservation or rehabilitation of the company as such, though it may have a legitimate concern in the preservation of the commercial enterprise.

133 Department of Trade and Industry, *Insolvency – A Second Chance* (CM 5234, 2001) at para 2.10. This is unlike the position under the UK Insolvency Act 1986 (c 45) prior to the UK Enterprise Act 2002 (c 40) where only the company, its directors or any creditors could initiate administration.

134 Department of Trade and Industry, *Insolvency – A Second Chance* (CM 5234, 2001) at para 2.12.

135 The literature is vast and contains a colourful range of views and perspectives. See, on a not exhaustive basis, Ian F Fletcher, "UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration and Company Voluntary Arrangements – The Insolvency Act 2000, the White Paper 2001, and the Enterprise Act 2002" (2004) 5 EBOLR 119; Vanessa Finch, "Reinvigorating Corporate Rescue" [2003] JBL 527; Sandra Frisby, "In Search of a Rescue Regime: The Enterprise Act 2002" (2004) 67 MLR 247; Vanessa Finch, "The Recasting of Insolvency Law" (2005) 68 MLR 713; John Armour & Rizwaan Jameel Mokal, "Reforming the Governance of Corporate Rescue: The Enterprise Act 2002" [2005] LMCLQ 28; John Armour & Sandra Frisby, "Rethinking Receivership" (2001) 21 OxJLS 73; Vanessa Finch, "Control and Coordination in Corporate Rescue Legal Studies" (2005) 25(3) *Legal Studies* 374; and Rizwaan Jameel Mokal, "The Harm Done by Administrative Receivership" (2004) 1(5) *International Corporate Rescue*.

136 The British Bankers' Association even went so far as to suggest that it should be assumed that there was a typographical error in the Government's proposals when it suggested that the primary object of rescue would be the companies rather than the businesses themselves: see Rizwaan Jameel Mokal, "The Harm Done by Administrative Receivership" (2004) 1(5) *International Corporate Rescue* at 3, fn 10.

137 United Kingdom, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Chairman: Sir Kenneth Cork) at para 193.

58 There were many aspects to the dissatisfaction with administrative receivership as a process. Insolvency practitioners would be very familiar with the status of a receiver and there is congruence between the UK and Malaysian case law in most of the applicable legal principles. The receiver and manager is an agent of the company.[138] The agency terminates when the company goes into liquidation.[139] Although agents are typically fiduciaries, owing duties of loyalty and care, a receiver is uniquely not a fiduciary *vis-à-vis* the company. While the company is on paper the principal, the true principal, and the beneficiary of all the receiver's duties, is the debenture holder who is his appointor.[140] Save to the extent that directors may be entitled to specific information that is necessary in order for them as office holders to comply with reporting duties imposed under companies legislation, a receiver is under no obligation to furnish any information to the corporate principal or its directors.[141] The receiver is required to merely act and exercise his powers in good faith, but save to that extent, he is under no general duty to the company to use reasonable care when exercising his powers, including the powers of sale.[142] There is a limited requirement to take reasonable steps to obtain a proper price when he exercises his power of sale.[143] Another complaint about administrative receivership as a procedure is the disenfranchisement of other stakeholders, as Armour and Frisby put it.[144] Other parties such as unsecured creditors and shareholders have little or no input and there is little transparency and accountability to anyone other than the debenture holder. However, as Armour and Mokal observed, there was a serious concern that the administrative procedure was inefficient in the sense that it failed to maximise value for creditors.[145] Mokal argues that the perverse structure of receivership led to unnecessary job losses, resource misallocation and inflated costs.[146] Lastly, it is also argued convincingly that the appointment of an administrative receiver pursuant to a floating charge in order to enforce the rights of the holder of that charge is not an insolvency proceeding as such because it does not have the element of collectivity about it. It is a remedy designed, from start to finish, to

138 *Sowman v David Samuel Trust* [1978] 1 WLR 22 at 28.
139 *K Balasubramaniam v Mbf Finance Bhd* [2005] 2 MLJ 201 at [54].
140 *R B Johnson & Co (Builders) Ltd* [1955] Ch 634 at 661–662.
141 *Gomba Holdings UK Ltd v Minories Finance Ltd* [1989] 1 All ER 261; applied in *Saripah bte Manap v Emar Sdn Bhd* [1998] 1 MLJ 323 at 324 and 331.
142 *Public Bank v Ng Chee Ping* [1998] 4 MLJ 449 at 457, citing *Downsview Nominees v First City Corp* [1993] AC 295.
143 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949; explained in *Talam Corp Bhd v Bangkok Bank Bhd* [2016] 6 MLJ 61 at 70.
144 John Armour & Sandra Frisby, "Rethinking Receivership" (2001) 21 OxJLS 73 at 78.
145 John Armour & Rizwaan Jameel Mokal, "Reforming the Governance of Corporate Rescue: The Enterprise Act 2002" (2005) LMCLQ 28 at 31.
146 See Rizwaan Jameel Mokal, "The Harm Done by Administrative Receivership" (2004) 1(5) *International Corporate Rescue* at 9.

protect the security holder's interests.[147] It will be apparent from the review of the case law above that the law clothes the receiver with the protection necessary to ensure that he has the one overriding function owed to only one party, the debenture holder.

59 The Enterprise Act 2002 reforms abolished administrative receivership[148] but created an exception for a limited category of cases.[149] The detailed procedure for appointment of an administrator and the prerequisites for an administration order are beyond the scope of this article. However, an overview of the process of initiating administration and an understanding of the requirements that need to be shown is necessary.

60 In addition to the previous pathway where the company or its directors or creditors could apply to court for the appointment of an administrator under Pt II of the Insolvency Act 1986,[150] there is now a streamlined procedure for administration in the UK whereby an administrator may be appointed out of court by direct appointment by the company or its directors[151] or by the holder of a floating charge.[152] The holder of a floating charge is protected in the event of recourse to either the court-based application for an administration order or by the company's (or its directors') intention to appoint an administrator by the fact that under either process, the holder of a floating charge has to be given notice of the intended appointment whereby the holder of such a charge has a specified period within which to decide whether to pre-emptively appoint the administrator by direct appointment of

147 Dan Prentice, Fidelis Oditah & Nick Segal, "Administration: The Insolvency Act 1986, Part II" (1994) LMCLQ 487 at 492–493.

148 Section 72A of the UK Insolvency Act 1986 (c 45) as added by s 250 of the UK Enterprise Act 2002 (c 40): see Len Sealy, David Milman & Peter Bailey, *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2019* (Sweet & Maxwell, 2019) at pp 92–93.

149 The exceptions are set out in ss 72B–72GA of the UK Insolvency Act 1986 (c 45) as inserted by the UK Enterprise Act 2002 (c 40): see Len Sealy, David Milman & Peter Bailey, *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2019* (Sweet & Maxwell, 2019) at p 94.

150 Insolvency Act 1986 (c 45) (UK) Schedule B1, para 10.

151 Insolvency Act 1986 (c 45) (UK) Schedule B1, para 22.

152 Insolvency Act 1986 (c 45) (UK) Schedule B1, para 14. The floating charge has to be a "Qualifying Floating Charge" ("QFC"). A QFC is defined in para 14(2) of Schedule B1. The main attribute that a QFC must have is that it covers the whole or substantially the whole of the company's property. Anything less than that level of asset coverage (*ie*, a floating charge over part only of the company's property) will mean that the holder of such non-qualifying floating charge has to apply to court for an administration order: see Len Sealy, David Milman & Peter Bailey, *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2019* (Sweet & Maxwell, 2019) at p 636.

the floating charge holder. Under this last-mentioned path, the floating charge holder determines the identity of the administrator, a privilege it has been conferred given that the administrative receivership has been mainly abolished. An event of default must have occurred prior to the appointment under the floating charge, thereby entitling the holder to enforce the charge by the direct appointment of an administrator.[153] It is, however, not necessary that the company should be, or be likely to become, insolvent in order for the holder of a floating charge to make the appointment.[154]

61 The reforms brought about by the Enterprise Act 2002 in the UK also effected a major change to the description of the purposes for which administration is available. It will be useful to contrast the old and the new approaches under the Insolvency Act 1986 given that the judicial management framework in Malaysia under the CA 2016 is still closer in substance and in spirit to the older administration framework, despite the fact that the Malaysian provisions were only introduced in 2016 and the older English provisions had been radically changed since 2002.

Pre-amendment Insolvency Act 1986	Post-Enterprise Act 2002
Four alternative authorised purposes: (a) the survival of the company and the whole or any part of its undertaking as a going concern; (b) the approval of a voluntary arrangement under Pt I of the Insolvency Act 1986; (c) the sanctioning of a scheme of arrangement or compromise; or (d) a more advantageous realisation of the company's assets than would be effected under a winding up.	A single hierarchy of objects or purposes: (a) rescuing the company as a going concern; or (b) achieving a better result for the company's creditors as a whole than would be likely if the company were to be wound up (without first being in administration); or (c) realising property in order to make a distribution to one or more secured or preferential creditors.

153 Len Sealy, David Milman & Peter Bailey, *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2019* (Sweet & Maxwell, 2019) at p 636.

154 Len Sealy, David Milman & Peter Bailey, *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2019* (Sweet & Maxwell, 2019) at p 636.

	Objective (a) must apply unless the administrator thinks that: (i) it is not reasonably practicable to achieve that object; or (ii) objective (b) would achieve a better result for the company's creditors as a whole.
	Objective (c) only applies where: (i) the administrator thinks it is not reasonably practicable to achieve either objectives (a) or (b); *and* (ii) it does not necessarily harm the interests of the creditors of the company as a whole.

62 The primary purpose or objective is spelt out in sub-para (a), which is rescuing the company as a going concern. Reinforcing this is the provision that the administrator must pursue objective (a), which is the rescue of the company as a going concern, unless he thinks that it is not reasonably practicable to achieve that object, or objective (b) would achieve a better result for the company's creditors as a whole. Although other stakeholders, such as shareholders and employees, are not mentioned expressly under objective (a), the object of rescuing the company as a going concern would inevitably serve the interests of both constituencies in addition to the interests of creditors as a whole. In relation to objective (b) and the requirement that the administrator perform his functions in the interests of the company's creditors as a whole, Fletcher expressed the view that this seems to have been a reflection of the traditional disposition of English insolvency law to elevate the interests of creditors over those of the other potential beneficiaries of a corporate rescue, namely shareholders and employees.[155]

63 Another change brought about by the Enterprise Act 2002 reforms is the fact that the threshold of proof has now been slightly tweaked. Under the older pre-Enterprise Act framework, not only did it have to be shown that the company was, or was likely to become, unable to pay its debts; it also had to be shown that an administration order was likely

155 Ian F Fletcher, "UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration and Company Voluntary Arrangements – The Insolvency Act 2000, the White Paper 2001, and the Enterprise Act 2002" (2004) 5 EBOLR 119 at 137.

to achieve one or more of the statutory purposes of administration.[156] Under the Enterprise Act 2002 reforms, it is sufficient for court-based appointments if it is "reasonably likely" to be achieved,[157] and for out-of-court appointments, it is sufficient if the administrator is willing to declare that he thinks there is a reasonable likelihood of achieving the new statutory purposes.[158] Much is left to the professional judgment of the administrator.[159] The critical change in emphasis is the introduction of the notion of corporate rescue as being the primary objective unless it is not achievable and the interests of creditors as a whole are better served by other purposes.

VIII. Different perspectives of secured creditors' rights in a corporate rescue

64 English law, and other legal systems that draw their heritage from it, have historically elevated the secured creditor to a status above preferential creditors and unsecured creditors. The floating charge, typically contained in a debenture, is usually among the types of security taken and the source of the secured creditor's rights and remedies. In *Buchler v Talbot*[160] ("*Buchler*"), Lord Nicholls of Birkenhead explained the matching of needs of businessmen and financiers as follows, and in doing so showed that the risks assumed meant that such financiers wished to rank ahead of other, ordinary, creditors:[161]

> 1 My Lords, in England and Wales floating charges are a judge-made, or judge-approved, type of security. They originated in the early days of the development of company law in the 1870s. They are a means whereby a financier, typically a bank, provides a company with money on the security of the company's assets which continue to be used and turned over in the ordinary course of business until, when certain events happen, the charge 'crystallises' into a fixed charge on the assets then within its scope. Notable among

156 Insolvency Act 1986 (c 45) (UK) s 8(1).

157 Insolvency Act 1986 (c 45) (UK) Schedule B1, para 11(b).

158 Insolvency Act 1986 (c 45) (UK) Schedule B1, para 18 for direct appointments by the holder of a qualifying floating charge pursuant to para 14, and para 29 for an appointment by the company or the directors under para 22. See Len Sealy, David Milman & Peter Bailey, *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2019* (Sweet & Maxwell, 2019) at pp 630–647. See also John Armour & Rizwaan Jameel, "Reforming the Governance of Corporate Rescue: The Enterprise Act 2002" [2005] LMCLQ 28 at 32.

159 Ian F Fletcher, "UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration and Company Voluntary Arrangements – The Insolvency Act 2000, the White Paper 2001, and the Enterprise Act 2002" (2004) 5 EBOLR 119 at 136.

160 [2004] 2 AC 298; [2004] 2 WLR 582; [2004] 1 All ER 1289.

161 *Buchler v Talbot* [2004] 2 AC 298 at [1]–[2].

> crystallising events are the appointment of a receiver by the charge holder or the company being wound up.
>
> 2 Over the years floating charges have played an invaluable role in the development of business. They bridge a gap between businessmen and financiers. Businessmen need money but may have insufficient fixed assets to offer as security. Financiers have money but want security for any loans they make. They wish to rank ahead of the company's unsecured creditors if the business does not prosper. They wish to minimise their risks by having a charge over whatever assets a company may acquire in the course of carrying on its trade. Floating charges have provided a legal mechanism by which in these circumstances capital and business enterprise can be harnessed.

65 Also in *Buchler*, Lord Millet traced the historical treatment of secured creditors in insolvency and their position relative to that of the company and all other claimants:[162]

> Bankruptcy and companies liquidation are concerned with the realisation and distribution of the insolvent's free assets among the unsecured creditors. They are not concerned with assets which have been charged to creditors as security, whether by way of fixed or floating charge. Secured creditors can resort to their security for the discharge of their debts outside the bankruptcy or winding up. Assets subject to a charge belong to the charge holder to the extent of the amounts secured by them; only the equity of redemption remains the property of the chargor and falls within the scope of the chargor's bankruptcy or winding up. As James LJ observed in *In re Regent's Canal Ironworks Co* (1877) 3 Ch D 411, 427 charge holders are creditors 'to whom the [charged] property [belongs] … with a specific right to the property for the purpose of paying their debts'. Such a creditor is a person who 'is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property'.[163]

66 In the same case of *Buchler*, Lord Nicholls did allude to the fact that sometimes, there were imbalances, perceived or actual, in the rights and interests of charge holders relative to those of other creditors that needed to be corrected and as such the imbalance warranted legislative intervention:[164]

> Typically a floating charge extends to substantially all the assets of a company. On its face this gives a charge holder a high degree of control over the assets and fortunes of a company. At times this has been seen to work unsatisfactorily. The security afforded by a floating charge on the assets of a business, and the charge holder's ability to enforce his security, should not always be allowed to prevail. More than once Parliament has intervened to correct perceived imbalance

162 *Buchler v Talbot* [2004] 2 AC 298 at [51].
163 *Re David Lloyd & Co* (1877) 6 Ch D 339 at 344.
164 *Buchler v Talbot* [2004] 2 AC 298 at [3].

> between the rights and interests of charge holders and the rights and interests of other persons. The most recent intervention was in the Enterprise Act 2002.

67 Secured creditors have also had their share of bad press. In the context of the extensive policy debates among US commentators over the extent to which the US Uniform Commercial Code should confer priority on secured creditors, Elizabeth Warren wrote:[165]

> In bankruptcy, the warring nature of the creditors – secured versus unsecured – comes to the foreground. Secured creditors want their assets now, even if it means killing a going concern. They battle with unsecured creditors, who view the remaining assets as a last-ditch chance to recover something for the value they contributed to the business.

68 Prof Warren also expressed the matter in terms that reflect the policy debate over whether it should be right that a secured creditor can block a reorganisation under US bankruptcy law, especially when all creditors collectively stand to do better in a going concern rescue. She said:[166]

> Notwithstanding the features of bankruptcy that curtail the power of the secured creditor, the ability of the secured creditor to demand adequate protection and to insist on a priority repayment of assets effectively gives the secured creditor the power to block a reorganization. If the creditors collectively might be better off with the business as a going concern, secured creditors can nonetheless insist on liquidation, unless they receive their statutorily protected treatment. Every strengthening of the secured creditors' rights outside of bankruptcy redounds to a more lopsided distribution inside bankruptcy.

69 The treatment of secured creditors' security rights, and their ability, individually or collectively, to block a rescue, can be very contentious subjects. The extent to which any jurisdiction modifies those rights and remedies, long enjoyed by secured creditors, must be the subject of careful study and scrutiny and informed debate. In terms of the relevance of the 2002 reforms to the Insolvency Act 1986 in the UK to potential Malaysian reform of the current judicial management framework in Malaysia, the abolition of administrative receivership with the rebalancing of rights of qualifying floating charges *vis-à-vis* the rights of unsecured creditors and the express statutory affirmation of corporate rescue as the primary objective of administration that the administrator has to pursue unless it is not achievable are the main reforms that ought to be considered. However, it is not necessarily the case that another

165 Elizabeth Warren, "Making Policy with Imperfect Information: The Article 9 Full Priority Debates" (1997) 82 Cornell L Rev 1373 at 1390.

166 Elizabeth Warren, "Making Policy with Imperfect Information: The Article 9 Full Priority Debates" (1997) 82 Cornell L Rev 1373 at 1390.

jurisdiction with a similar legal heritage and legislation will go down the same path. Singapore, which embarked on a long programme of insolvency law reform leading up to the Companies Act reforms of 2017, is a good example of this. The Singapore ILRC Final Report contains some clues as to how different jurisdictions view these reforms under local conditions and circumstances. The eventual changes to the judicial management regime in Singapore reflect the attitudes and priorities of the country.

IX. Singapore judicial management reforms of 2017

70 Between 2010 and 2013, the Singapore judicial management framework was already the subject of review and re-evaluation by the Singapore ILRC.[167] In its comprehensive Final Report, the ILRC had recommended several reforms to address deficiencies in the then existing regime in Singapore. Eventually in 2017,[168] the Singapore judicial management model was reformed and modernised. The ILRC observed[169] that since its introduction in 1987, the judicial management regime had not managed to secure a successful track record in relation to rehabilitating financially troubled companies, with few reported examples of companies emerging from judicial management as financially viable businesses. The ILRC noted that nevertheless judicial management had proved effective in some scenarios as opposed to others. A good example of this was in the context of public companies undergoing judicial management. The sale of the listing status of such companies to investors, who injected new businesses, coupled with a backdoor listing, enabled even shareholders to benefit in some cases.[170]

71 The ILRC examined some of the underlying reasons why judicial management may not have fared well over the years. Some of these reasons will be examined on a non-exhaustive basis. One possible reason for the low success rate of judicial management was the late stage at which the judicial management regime was tapped and resorted to.[171] Another reason was that the statutory moratorium that comes into force

167 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6.

168 Amendments were made to various parts of the judicial management framework under the Singapore Companies Act (Cap 50, 2006 Rev Ed) by the Companies (Amendment) Act 2017 (Act 15 of 2017) (passed on 10 March 2017).

169 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6 at para 3.

170 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6 at para 6.

171 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6 at para 8.

upon the making of a judicial management order was not sufficiently wide to prevent the exercise of certain self-help remedies like contractual termination clauses predicated on the commencement of an insolvency restructuring proceeding and contractual rights of set-off that could see bank balances wiped out through set-off against liabilities owed to banks.[172] The floating charge holder's right to veto the making of a judicial management order in order to commence receivership was also a factor.[173] The narrow interpretation placed on the public interest exception under s 227B(10)(*a*)[174] and uncertainty over the parameters of the exception limited its potential use as a means of overriding the secured creditor's veto.[175]

72 The floating charge holder's right to veto the making of a judicial management order in order to commence receivership has been noted, as has the narrow interpretation placed on the public interest exception under s 227B(10)(*a*) as a means of overriding the secured creditor's veto. The ILRC did consider the possibility of emulating the UK experience under the Enterprise Act 2002 and removing the veto right. It rightly observed that ultimately it is a question of considering how a proper balance is to be struck between the interests of the holder of a floating charge and those of unsecured creditors.[176] The ILRC did not eventually recommend the removal of the veto right and declined to follow the UK reforms in that regard. However, the ILRC did recommend an adjustment of where the balance is to be struck. It took the form of a recommendation that the court's ability to override the veto ought to be expanded to cover a situation where the prejudice that will be caused to unsecured creditors, if a judicial management order is not made, is wholly disproportionate to the prejudice caused to the secured creditors if the company is placed in judicial management.[177] In this regard, a further proposed reform was the addition of a provision conferring on the holder of a floating charge who consents to the making of a judicial management order the right

172 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6 at para 10.

173 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6 at para 12.

174 The Malaysian equivalent is found in s 405(5)(a) of the Companies Act 2016 (Act 777).

175 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6 at para 13.

176 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6 at para 21.

177 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6 at para 23.

to appoint the judicial manager,[178] thereby incentivising the holder of a floating charge to consent to judicial management being invoked.

73 The ILRC recommended that procedurally, the regime be amended so as to allow the company to place itself into judicial management out of court.[179] The ILRC felt that only the company should have this option, but also that this out-of-court alternative should be subject to the floating charge holder's veto.[180] A recommendation was also made that the court should be empowered to make a judicial management order if the company is likely to become unable to pay its debts instead of merely when it is or will be unable to pay its debts.[181] The ILRC also took considerable effort to review possible enhancements to the judicial management regime imported from the US Bankruptcy Code, such as rescue financing and super-priority, limiting set-off rights and restrictions on the enforcement of *ipso facto* clauses.[182]

74 Many of these recommendations by the ILRC were adopted by the Singapore government and found their way into the Singapore Companies Act in 2017 through the Singapore Companies (Amendment) Act 2017,[183] which came into force on 23 May 2017. The provision for relaxation of the eligibility criteria for entry into judicial management took the form of a new s 227B(1)(*a*) that incorporates the words "the company is likely to become unable to pay its debts". Of prime importance to the issues considered in this article is the reform to change the ambit of the court's ability to override the floating charge holder's veto. The amendment took the form of a new s 227B(5), which incorporated the recommendation that the court can override the veto where the prejudice that will be caused to unsecured creditors if a judicial management order is not made is wholly disproportionate to the prejudice caused to the secured

178 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6 at para 26.

179 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6 at para 29.

180 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6 at para 29.

181 Singapore, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairman: Lee Eng Beng) ch 6 at para 37.

182 As to what an *ipso facto* clause is, see, for example, *Re Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch) at [12], where Morgan J held:

> In some jurisdictions, a clause which allows a party to a contract to terminate the contract by reason of the insolvency of the counterparty is called an *ipso facto* clause. In certain jurisdictions in the United States, such clauses are automatically invalid. In Canada, the court has power to stay the exercise of rights under such clauses. Later in this judgment, I will consider how such clauses are treated under Korean insolvency law.

183 Act 15 of 2017.

creditors if the company is placed in judicial management. This exercise is likely to involve a court considering whether the secured creditor is over or under secured and that consideration could play a significant role in determining whether there will be the prejudice contemplated by the amended provision. Thus, Singapore ultimately decided not to adopt the same approach as the UK to recalibrating the balance between rights of secured creditors and those of unsecured creditors but did give its domestic courts an expanded ability to consider when the opposition by a holder of a floating charge should be overridden.

X. Conclusion

75 The long law reform process that led to the judicial management regime in Malaysia did not consider, debate and decide on whether the 2002 reforms to the Insolvency Act 1986 in the UK were worth incorporating into the then proposed judicial management framework in Malaysia. The abolition of administrative receivership with the rebalancing of rights of qualifying floating charges *vis-à-vis* those of the unsecured creditors and the express statutory affirmation of corporate rescue as the primary objective of administration that the administrator has to pursue unless it is not achievable are the main reforms that ought to be considered in Malaysia. The matter should be given serious consideration, even in the face of expected opposition and resistance from the major lending banks in Malaysia. Any eventual changes to the judicial management regime in Malaysia must reflect the attitudes and priorities of the country. Where possible it should be based on empirical studies. What possibilities are potentially achievable will not be known unless this area of law reform is seriously looked into. It may ultimately even be worth exploring the Singapore reforms referred to above, particularly conferring on the Malaysian courts an expanded ability to consider when the exercise of a veto by a holder of a floating charge should be overridden in the wider interests of other stakeholders. Any Malaysian reform initiative should also give serious consideration to inserting into the purposes for which judicial management may be resorted to, an overarching statutory objective of achieving a rescue of the company, and not just the business, as a going concern, with concomitant benefit to unsecured creditors, shareholders, employees and even the broader community and ultimately the states that comprise the Federation of Malaysia and the Federation as a nation itself. The existing statutory prerequisites contained in ss 404 and 405 of the CA 2016 ought to be refashioned along the lines of the revisions to Schedule B1 of the UK Insolvency Act 1986, which emphasise corporate rescue as the first objective of an administrator. Until these steps are taken, judicial management in Malaysia, which is not even available to public listed companies, will be of limited utility as a rescue mechanism. Unless and until that happens, judicial management

in Malaysia cannot be thought of as a true rescue mechanism. It does not sufficiently embody a rescue culture.
