

THE *PARI PASSU* PRINCIPLE IN JUDICIAL MANAGEMENT

Re Wan Soon Construction Pte. Ltd.

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I. INTRODUCTION

Judicial Management ('JM') is in its nineteenth year in Singapore.¹ It represents a basic legal framework that provides a temporary breathing space for companies in financial difficulty from creditor enforcement action. Many aspects of JM rest on the exercise of judicial and judicial manager discretion.² This open-ended legal framework has, in recent years, seen a gradual articulation by case law of its contours and doctrinal underpinnings.³ The High Court's decision in *Re Wan Soon Construction Pte Ltd*⁴ addresses two important issues in this ongoing process. First, to what extent does the *pari passu* principle, an important principle that under girds the winding up process, apply in JM? If it does, how does it influence the decisions of the judicial manager and the processes in that regime? Second, on what basis can provisions in Part X of the *Companies Act*⁵ be imported to fill out or augment the legislative framework of JM via s. 227X? In answer, *Re Wan Soon* holds that the *pari passu* principle is *per se* inapplicable in JM, but s. 334 may nevertheless be imported via

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¹ Introduced via the *Companies (Amendment) Act* (No. 13 of 1987, Sing.), which came into force on 15 May 1987.

² For example, the court ultimately exercises its discretion in determining whether to place the company in JM: s. 227D(6). The efficacy of the critical statutory moratorium under ss. 227C and 227D rests in large part on whether the court will grant leave to affected creditors to proceed with enforcement action or be provided with adequate protection: *Electro Magnetic (S) Ltd v. DBS Ltd*, [1994] 1 S.L.R. 734 (C.A.) [*EMS v. DBS*]. The judicial manager is given substantial commercial discretion in managing the business of the company with a view to formulating proposals intended to achieve the statutory objectives set out for the company under s. 227B(1)(b); s. 227G(3) and see also *Re Charnley Davies Ltd* (No. 2) [1990] B.C.L.C. 760 (Ch.); *Re T&D Industries plc* [2000] 1 All E.R. 333 (Ch.). The court also has an apparently broad discretion in hearing an application for discharge of a JM order: s. 227Q(2).

³ See for e.g. *Hinckley Singapore Trading Pte Ltd v. Sogo Department Stores (S) Pte Ltd*, [2001] 4 S.L.R. 154 (C.A.) (principles governing moratorium leave applications); *Re Boonann Construction Pte. Ltd.*, [2002] 3 S.L.R. 338 (H.C.) (creditors' substantive rights may only be abrogated by express provision); *Re Bintan Lagoon Resort Ltd* [2005] 4 S.L.R. 336 (H.C.) (scope of the 'public interest' ground of JM under s. 227B(10)(a)).

⁴ [2005] 3 S.L.R. 375 (H.C.), [2005] SGHC 102 [*Re Wan Soon*].

⁵ Cap. 50, 1994 Rev. Ed. Sing. [CA]. All textual references to legislative provisions hereafter are to the CA unless otherwise stated.

s. 227X(b) to prevent an execution creditor from claiming priority in respect of the sale proceeds of the company's property, thus relegating it to its *pari passu* claim in winding up. This note examines the reasoning behind these conclusions and their implications for JM as a 'corporate rescue' procedure as a whole.

II. THE DISPUTE IN QUESTION

Wan Soon Construction Pte. Ltd. ('the company') was placed in JM on 1 October 2004 pursuant to a petition filed on 22 July 2004, presumably for one or more of the statutory objectives listed in s. 227B(1)(b). On the latter date, the company also granted an option to Ad Graphic Pte Ltd ('the purchaser') to purchase its 30-year Jurong Town Corporation leasehold property at 12 Loyang Lane ('the property'). The purchaser exercised the option on 17 September 2004 and completion was fixed for 23 January 2005.

The judicial managers adopted the sale as they thought that the purchase price was reasonable and the sale would ultimately benefit the creditors as a whole. However, prior to the grant of the option, Deschen Holdings Ltd ('Deschen'), a judgment creditor of the company, obtained a writ of seizure and sale ('WSS') against the property on 19 June 2004. Deschen registered this WSS against the property on 28 June 2004. The judicial managers therefore asked Deschen to remove the WSS in order to allow completion of the sale, but it refused. The managers then applied to the High Court for an order to remove the WSS and a declaration that Deschen was not entitled to any priority in respect of the sale proceeds. On 17 January 2005, the High Court acceded to the former request, which paved the way for completion of the sale. The proceeds of sale, amounting to S\$310,000, were then held by stakeholders pending the resolution of the second application which was deferred to a later hearing.

On 14 June 2005, Andrew Phang J.C. (as he then was) decided that Deschen was not entitled to any priority in respect of the sale proceeds. Although the WSS was registered, execution was not complete by reason of the statutory moratorium imposed by s. 227D(4). It was conceded that Deschen was accordingly an unsecured creditor.⁶ Second, he held that the *pari passu* principle did not generally apply in JM, ostensibly on the basis that to hold otherwise would be incompatible with its function as a corporate rescue, rather than a liquidation, mechanism.⁷ This meant that the company could not resist Deschen's claim to priority over the proceeds, presumably, on the basis of the dictates of that principle. Nevertheless, Phang J.C. exercised his discretionary power under s. 227X(b) to import s. 334 into the JM legal framework. The former section was "intended to ensure that where the provisions relating to liquidation ... were appropriate in facilitating the general mission and purpose of judicial management, those provisions should... apply where in the *court's discretion*, this was appropriate."⁸ The latter section prevented Deschen as an unsecured creditor from "stealing a march on the remaining unsecured creditors" and "retaining

⁶ *Supra* note 4 at para. 14.

⁷ Relying on *Hitachi Plant Engineering & Construction Co Ltd. v. Eltraco International Pte Ltd*, [2003] 4 S.L.R. 384 (C.A.) [*Hitachi Plant Engineering*].

⁸ *Supra* note 4 at para. 36 [emphasis in original].

the benefit of the registration of the WSS since it had not completed execution before the commencement of the judicial management.”⁹

III. THE REACH AND LIMITS OF THE ‘*PARI PASSU* PRINCIPLE’

The litigation in *Re Wan Soon* offered the courts an opportunity to clarify the interrelationship of two important insolvency regimes, winding up and judicial management, and in particular, the basis on which principles and statutory provisions of the former could be transplanted into the latter. While some *Companies Act* winding-up provisions have explicitly been replicated or transplanted into JM,¹⁰ s. 227X(b) gives the court supervising a JM a general discretion to “order that any other section in Part X shall apply to a company under judicial management as if it applied in a winding up by the Court...”.

The real candidate for transplantation was the well-known and commonly asserted as¹¹ fundamental *pari passu* principle in winding-up. While the uncontroversial core stipulation of this principle is distributive in nature—that all unsecured creditors are to be paid their equal rateable share in the proceeds of the realisation of the company’s property—it actually expresses itself in many other provisions in winding up that operate to ensure that this distributive rule is observed. Thus *pari passu* distribution is said to be the underlying rationale for the avoidance of dispositions of the company’s property,¹² the staying of all actions and proceedings against a company in winding up, the avoidance of pre-liquidation transactions that confer an ‘undue preference’ on some creditors to the prejudice of others,¹³ and (of particular relevance here) the avoidance of all executions and attachments that are incomplete at the commencement of the winding up process.¹⁴ The nexus between the distributive principle and its foregoing progeny is simple—if *pari passu* distribution is to be achieved, logic requires that unsecured creditors must be prevented from acting prematurely and unilaterally in seeking to satisfy their unpaid debts ahead of other unsecured creditors.¹⁵

Hence winding up insists that unsecured creditors act collectively by respecting the centrally managed realisation of the company’s assets for eventual distribution by a court or creditor appointed liquidator. The goal of formal equality in distribution amongst unsecured creditors is, however, not the sole justification for mandatory collectivity in insolvency proceedings like winding up. Quite apart from distributive

⁹ *Ibid.* at paras. 51 and 55 respectively.

¹⁰ *Viz.* ss. 337, 340, 341 and 342 via s. 227X(b) CA.

¹¹ U.K., Department of Trade Review Committee, *Insolvency Law and Practice*, Cmnd. 8558/1992 (London: Her Majesty’s Stationery Office, 1981) at para. 1220 [*Cork Report*]; R. Goode, *Principles of Corporate Insolvency Law*, 3rd ed. (London: Sweet & Maxwell, 2005) at 175, para. 7-02. [Goode, *Corporate Insolvency Law*].

¹² *Re Civil Service & General Store Ltd.* (1889), 58 L.T. 220 at 221; *Re J. Leslie Engineers Co. Ltd.* [1976] 1 W.L.R. 292 (Ch.) at 304.

¹³ *Cork Report*, *ibid.* at para. 1209; Austl., Commonwealth, Law Reform Commission, *General Insolvency Inquiry* (Report No. 45) (Canberra: Australian Government Publishing Service, 1988) at paras. 33 and 629; *Hudson v. Benallack*, [1976] 2 S.C.R. 168 (S.C.C.).

¹⁴ *Transbilt Engineering Pte Ltd (in liq.) v. Finebuild Systems Pte Ltd*, [2005] 3 S.L.R. 550, [2005] SGCA 33 at para. 2 [*Transbilt Engineering*].

¹⁵ M. Bridge, “Collectivity, Management of Estates and the *Pari Passu* Rule in Winding-up” in J. Armour & N. Bennett, *Vulnerable Transactions in Corporate Insolvency* (Oxford: Hart, 2003), c.1 at 4.

expediency, collective action has strategic and economic benefits quite independent of how the company's pie is ultimately to be distributed.¹⁶ So, while closely connected in winding up, these two principles of mandatory collective management and equal rateable distribution have independent standing in insolvency processes like winding up.¹⁷ Confusion often results if the phrase '*pari passu* principle' is indiscriminately used to refer to the influence or operation of either of these principles in insolvency regimes. References to the principle hereafter relate to the distributive principle.

IV. COLLECTIVITY AND *PARI PASSU* DISTRIBUTION IN JUDICIAL MANAGEMENT

To what extent do these concepts apply in JM? *Enhanced* mandatory collectivity is the centre-piece of JM. This is reflected in the broader (albeit not absolute) statutory moratorium on competing secured and unsecured creditor actions as compared to winding up.¹⁸ The determination of how best to manage and realise the assets of a distressed company is to be centrally determined by the judicial manager¹⁹ and approved by the creditors given voting rights in JM,²⁰ under the supervision of the court.²¹ Secured and unsecured creditors (often determined doctrinally, not functionally²²) are generally²³ bound by the JM process that is clearly meant to be only temporary and interim.²⁴ Determinative resolution of the tensions and disputes between management, shareholders and creditors (especially in respect of distributional entitlements) must usually come about by way of a statutory scheme of arrangement or a follow-on winding up,²⁵ apart from the conceivable but exceptional situation where all the distressed company in question needs is a brief period to trade out of its difficulties without any concessions from creditors.

The more interesting question is whether the *pari passu* rule of distribution has any role to play in JM. The answer given by the High Court in *Re Wan Soon* is

¹⁶ *Ibid.* at 5.

¹⁷ See *Worsley v. Demattos* (1758) 1 Burrow 467, 97 E.R. 407 (Ch.) at 412, per Lord Mansfield; *Re International Tin Council* [1987] Ch. 419 at 456, per Millett J.: "The great object of insolvency law, whether individual or corporate, is to protect the debtor from harassment by the creditors, and the assets from piecemeal realisation and unequal distribution as the creditors scramble for them." For a more detailed discussion of the confusion between mandatory collectivity and equal treatment often associated with the *pari passu* principle, see R. Mokal, "Priority as Pathology: The *Pari Passu* Myth" (2001) 60(3) C.L.J. 581 at 590-595 [Mokal, "Priority as Pathology"].

¹⁸ See ss. 227D(3) and (4), *Cf.* s. 262(3) CA.

¹⁹ Sections 227G(1)-(3); s. 227M CA.

²⁰ Section 227N CA.

²¹ Section 227G(5), ss. 227N(3), (4) CA.

²² See for e.g. *EMS v. DBS*, *supra* note 2, *Re Lomax Leisure Ltd.* [1999] 3 All E.R. 22 (Ch.).

²³ The significant and crucial exception is the person who has appointed or is or may be entitled to appoint a receiver and manager of the whole (or substantially the whole) of a company's property under the terms of any debentures of a company secured by a floating charge or by a floating charge and one or more fixed charges: s. 227B(4)(b) read with sub-section (5).

²⁴ See comments of the Finance Minister in the second reading of the *Companies (Amendment) Bill* introducing JM: Sing. *Parliamentary Debates*, vol. 49, col. 1194 (26 March 1987) (Dr. Richard Hu); *Re Atlantic Computer Systems plc* [1992] Ch. 505 (C.A.) at 528 (in respect of the earlier U.K. Administration regime), quoted with approval in *Hinckley Singapore Trading Pte Ltd v. Sogo Department Stores (S) Pte Ltd*, [2004] 4 S.L.R. 154 (C.A.) at para. 8.

²⁵ The regime only provides for an interim holding period: see Finance Minister's comments, *ibid.* See also V. Finch, *Corporate Insolvency: Perspectives and Principles* (Cambridge: Cambridge University Press, 2002) c. 9 at 277-278.

somewhat uncertain. Phang J.C. argues that there is *per se* no reason in principle why this ought to apply in JM (on the basis that JM is a corporate rescue mechanism, not a distributive one), but also acknowledges that s. 227X(b) can be used to introduce “the winding up regime” into JM.²⁶ As mentioned, many of the latter regime’s provisions rest on the *pari passu* principle. Perhaps a fair interpretation of this reasoning would be that the *pari passu* principle has no mandatory or automatic application in JM, without foreclosing the possibility of a contextual or discretionary application where the circumstances warrant. Generally speaking, this must be correct—judicial management is not intended to provide unsecured creditors with any general distributive function.²⁷ Distributions to pre-judicial management unsecured creditors are prohibited unless sanctioned by the court or made pursuant to a compromise or arrangement so sanctioned.²⁸ The weight of authority considering the earlier U.K. Administration regime (there is as yet no direct Singapore precedent) suggests that such exceptional payments may only be made if it is necessary or incidental to the functions of the judicial manager under the regime.²⁹ The usual situation where this would be satisfied is where the payment or distribution to a pre-JM unsecured creditor furthers the interests of the creditors as a whole in achieving JM’s statutory objectives.³⁰ Thus in the usual scheme of things, the *pari passu* requirement of *pro rata* distribution simply has no occasion to bite.

Notwithstanding this, statutory protections are in place to ensure that in the absence of clear justification, JM should not prejudice the application of distributive rules or compromises applicable under any ensuing insolvency regime or enforceable under general non-insolvency law.³¹ Consequently, it would be premature to completely dismiss or preclude consideration of the *pari passu* principle in JM. As mentioned, the principle’s influence extends far in advance of the point of ultimate distribution of an insolvent company’s assets. As an interim regime, a majority of judicial managements do in fact end up in winding up, where formal equality in distribution kicks in as the default.³² Before such outcomes can be predicted, courts supervising JM (or similar regimes) have developed two guiding principles. The first is that JM, and its statutory moratorium in particular, do not deprive creditors of *substantive*, as opposed to *procedural*, rights unless this is expressly provided for in

²⁶ *Supra* note 4 at para. 28.

²⁷ See *Re Maxwell Fleet and Facilities Management Ltd* [2001] 1 W.L.R. 323 (Ch.) at 329; *Re T&N Limited & Others* [2004] E.W.H.C. 2361 at para. 77.

²⁸ Section 227G(6)(a). Special provision is made for distributions to secured creditors under certain circumstances: see ss. 227H(2), (5) and (6).

²⁹ *Re The Designer Room Ltd* [2004] 3 All E.R. 679 (Ch.) at para. 25, per Rimer J.; *Cf. Re Mark One (Oxford Street) plc* [1999] 1 All E.R. 608 (Ch.) at 609, per Jacob J. In the U.K., this issue has been overtaken by amendments introduced by the *Enterprise Act 2002* (U.K.), 2002, c. 40 which confers distributive powers on the administrator: see *Insolvency Act 1986* (U.K.), 1986, c. 45, Schedule B1, para. 65.

³⁰ See for e.g. *Re WBS Realisations 1992 Ltd* [1995] 2 B.C.L.C. 576 (Ch.).

³¹ *Supra* note 28. See also T.C. Choong & V.K. Rajah, *Judicial Management in Singapore* (Singapore: Butterworths, 1990) at 43, 172 (Appendix 1).

³² See Sing. C.L.R.F.C. Working Group 4, *Interim Report on the Corporate Insolvency Regime in Singapore* (August 2001), Annex B – Review of Judicial Management Cases (1996–2000) (on file with author). Out of 58 reviewed cases where JM orders were made, 33 (56.8%) were classified as qualified successes or failures that ended up in liquidation, while an unspecified portion of a total of 25 successful cases also ended up in winding up as the objective achieved was a more advantageous realisation of assets under s. 277B(3)(b)(iii).

the legislative framework.³³ Secondly, as a corollary to this, courts have also emphasised that pre-JM unsecured creditors should not take advantage of JM to secure an unwarranted advantage or priority over other unsecured creditors in excess of their pre-existing rights. Thus, in *Bristol Airport plc. v. Powdrill*,³⁴ the English Court of Appeal refused to grant leave to the airport authority to enforce a statutory lien acquired solely as a result of Bristol Airport's operations in administration in respect of pre-administration debts on the following basis:

In my judgment, whilst the administration procedure should not be used so far as possible to prejudice those who were secured creditors at the time when the administration order was made in lieu of a winding up order, *nor should it be used so as to give the unsecured creditors at that time security which they would not have enjoyed had it not been for the administration.*³⁵

The concerns expressed by Browne-Wilkinson V.C. in holding that the airport authority was not entitled to acquire such priority were essentially distributive in nature. It is submitted that this concern can be explained by acknowledging that the *pari passu* principle does at least influence the exercise of the court's discretion in managing the JM moratorium. On the facts of that case, it was legitimate for the airport authority to be paid in full in respect of airport charges that accrued *during* administration (presumably as expenses of the administration), but not acquire greater priority in respect of unsecured pre-administration airport charges than if Bristol Airport had gone into liquidation instead. This is entirely consistent with administration (and JM) being interim and temporary, and is an anticipatory recognition of the concerns of the *pari passu* principle in ensuring the fair distribution of Bristol Airport's realised assets in accordance with the statutory scheme under a follow-on liquidation process.³⁶ If Bristol Airport had successfully emerged from administration, then the creditors would be at liberty to proceed to enforce their outstanding claims in accordance with general law, or would be bound by compromises achieved under a statutory scheme or voluntary contractual compromise. If, on the other hand, winding up ensued, this particular exercise of the moratorium discretion would have ensured that other unsecured creditors would not have been unfairly prejudiced by the interjection of an administration (or here, JM). Thus, the influence or implicit application of the *pari passu* principle in these circumstances would not contradict or impede the main goals of an ostensibly corporate 'rescue' regime like administration or JM.

Secondly, even if JM is not intended to be distributional in function, distributional questions that require definitive resolution may still arise during its currency. For example, in *Oakley-Smith v. Greenberg and Ors.*,³⁷ an administration for the purpose, *inter alia*, of a more advantageous realisation of an insolvent bank's assets, was run in parallel with a company voluntary arrangement ('CVA') proposed and approved

³³ See *Re Boonann Construction Pte Ltd* [2002] 3 S.L.R. 338 (H.C.).

³⁴ [1990] Ch. 744 (C.A.). See also *London Flight Centre (Stanstead) Pte Ltd v. Osprey Aviation Ltd*, [2002] B.P.I.R. 1115 (Ch.).

³⁵ *Ibid.* at 767, per Browne-Wilkinson V.C. [emphasis supplied].

³⁶ If it be thought that this is merely an instance of mandatory collectivity in administration, then this could specifically have been achieved by denying leave to enforce the lien, but imposing terms allowing Bristol Airport to retain the lien, or offering suitable alternative security in respect of the loss of the lien when the aircraft was released: *ibid.* at 763.

³⁷ [2004] B.C.C. 81 (C.A.).

during that same administration. The latter's objective was to achieve a simultaneous distribution of the assets to unsecured creditors (after full provision for secured and preferential creditors) on a *pari passu* basis. The Greenbergs were unliquidated tort claimants who were not allowed to vote at the CVA meeting as the chairman refused to value their claim for the purposes of vote allocation. Thus, the Greenbergs were not bound by the terms of the CVA and their claim was subsequently settled for a fixed sum. The administrators cum CVA supervisors then sought directions as to the amount they should set aside for the Greenbergs in respect of their non-CVA claim, or alternatively, if the Greenbergs should be allowed to execute against the company's assets for the full amount of their settled claim, since they were not bound by the distributional rules of the CVA. In essence, the issue centred on the relative distributional entitlements of the unsecured CVA bound creditors and the Greenbergs as unsecured non-CVA creditors.

The English Court of Appeal resolved the question by considering what the likely outcomes of that administration would be. These were determined to be either (a) a premature termination of the administration and transfer of assets to liquidation, or (b) a continuation of the administration cum CVA, and thereafter an eventual resort to liquidation to distribute the company's remaining assets, if any. Under either of these alternatives, the court reasoned that the Greenbergs could not have been entitled to more than a *pari passu* share of the relevant assets of the insolvent bank at any particular time since the distributional rules of liquidation were considered to be the relevant base line. Whatever one may think of the particular reasoning employed in *Oakley-Smith v. Greenberg*,³⁸ the general approach adopted is to be supported. The court has to consider the distributional rules that are likely to be applied depending on the ultimate destination of the company in administration or JM. These are limited—either a scheme of arrangement and the likely distributional rules therein adopted, liquidation with the *pari passu* principle as a default, or a return to general (non-insolvency) law rules of first-past-the-post distribution. No doubt, some speculation or estimation would be involved if at the time of the determination, it is not clear what the outcome of the judicial management will be. But this is inevitable in an interim regime like JM. If the *pari passu* principle is determined to be the relevant base line under this approach, then the court *de facto* imports this into judicial management when it uses the principle to guide the resolution of distributional issues that arise during the currency of the JM process.

It is submitted that *Re Wan Soon Construction* was another instance of a distributional dispute arising in the context of JM, in respect of which the *pari passu* principle could well control. By the time of the second application, Deschen as execution creditor was no longer interfering with the conduct of the JM, and the judicial managers had since completed the sale of the property. In resolving the dispute over the proceeds in favour of the company, and therefore its unsecured creditors in

³⁸ C. H. Look & R. Mokal, "Interplay of CVA, Administration and Liquidation" (2004) 25(1) Company Lawyer 3 & (2004) 25(2) Company Lawyer 35, argue that option (a) was never a possibility as it was against the economic interests of the CVA unsecured creditors to allow the company to move into a compulsory liquidation. Thus, the Greenbergs would have been left with their full uncompromised claim at general law since they were not bound by the terms of the CVA. According to these commentators, the court should therefore have allocated the Greenbergs the full sum of their unsecured tortious claim.

general, Phang J.C. reasoned that:

...allowing s.334 to apply pursuant to the power conferred under s 227X(b) would indeed conduce towards the benefit of the company in general and the unsecured creditors in particular. The assets and economic resources generally of the company would be preserved for the benefit of all concerned. As the respondent has admitted that it is an unsecured creditor, there is no reason in principle why it ought to be allowed to *steal a march on the remaining unsecured creditors* and, in this respect, *the application of s 334 would ensure that this does not occur* ... If the respondent had in fact completed execution of the said WSS, it would have reaped the full benefits concerned and, indeed, the present proceedings would have been unnecessary. The fact of the matter, however, is that it had not.³⁹

This reasoning raises a number of issues that require further reflection. The first relates to the apparent contradiction between holding on the one hand that the *pari passu* principle ought not to apply in JM *per se*, and on the other, that s. 334 could be imported into JM to *prevent* Deschen as unsecured creditor from gaining priority over the company's remaining unsecured creditors. The contradiction is apparent once it is remembered that the underlying rationale for s. 334 is in fact *pari passu* distribution.⁴⁰ It is difficult to find some other independent rationale for s. 334 grounded for example in mandatory collectivity alone—that other important principle in insolvency law highlighted above. The “benefit of execution or attachment” in the section specifically refers to the priority interest conferred by the charge created by the execution or attachment process,⁴¹ and the section is accordingly only concerned with the relative priorities to the company's assets that are seized pursuant to execution that is not complete by the relevant date. It is because of this *prior* loss of procedural security that the assets subject to the particular execution or attachment must be returned to the liquidator, whether by the creditor⁴² or the bailiff.⁴³ The creditor is thereafter left with his *pari passu* claim. However, any receipt of moneys in discharge of the execution debt prior to the relevant date are not affected.⁴⁴ The apparent contradiction can be resolved if we read Phang J.C.'s pronouncements on the *pari passu* principle in JM restrictively as only precluding mandatory or automatic application. The principle or its legislative expressions in winding up may thus still be of potential application or influence in, for example, a s. 227X(b) application.

Secondly, the justification for importing s.334 does not appear to square with the broad guideline enunciated by the court in determining whether to import a Part X provision under s. 227X(b), *viz.* whether it would “inure to the benefit of the unsecured creditors *generally* and/or aid the company in its attempt at *economic recovery*”.⁴⁵ These are essentially the *collective* concerns of the company and its

³⁹ *Supra* note 4 at para. 51 [emphasis supplied].

⁴⁰ See *Ng Wei Teck Michael & Ors v. Oversea-Chinese Banking Corporation Ltd*, [1998] 2 S.L.R. 1 (C.A.) at para. 31; *Transbilt Engineering*, *supra* note 14 at para. 2.

⁴¹ *In re Andrew, ex parte Official Receiver (Trustee)* [1937] Ch. 122 (C.A.) at 123.

⁴² *Re Caribbean Products (Yam Importers) Ltd* [1966] Ch. 331 (C.A.) at 345-346 (per Harman L.J.), 350 (per Russell L.J.).

⁴³ Section 335 specifically provides for the bailiff to deliver the goods and any money seized or received in part satisfaction of execution to the liquidator.

⁴⁴ *Supra* note 41 at 136.

⁴⁵ *Supra* note 4 at para. 50 [emphasis added].

unsecured creditors in ensuring that the assets of the company are realised in the most efficient manner. Would the property in question be preserved for this objective by reason of importing s. 334? Clearly not, because registration of the WSS had already been removed earlier and the sale of the property completed on schedule by reason of adoption by the judicial managers (who presumably considered that its terms were in the collective interests of the company and its creditors). The sole issue remaining was the relative priorities of creditors to the realised proceeds *inter se*. Here, the consideration that Deschen should not be allowed to “steal a march” vis-à-vis the other unsecured creditors cannot really be rooted in mandatory collectivity, but rather in the formal equality of distribution mandated by the *pari passu* principle (in the absence of a legitimate reason for conferring such priority), carried through by provisions such as s. 334.

The third issue stems from the strange concession by counsel for Deschen, who conceded on the one hand that Deschen was an unsecured creditor, and yet argued that it was entitled to the entire proceeds of sale by reason of the registered WSS (i.e. it was entitled to priority, or secured, in respect of the proceeds).⁴⁶ The court was thus constrained to hold that s. 334 prevented Deschen from *acquiring* priority over the other unsecured creditors, when its intended operation in winding up is to prevent an execution creditor from *retaining* any charge acquired by reason of the seizure of property in execution or attachment.⁴⁷ If Deschen was indeed unsecured, then there would be no pressing reason during the currency of the JM order (and accompanying statutory moratorium under s. 227D(4)(c) which precludes any enforcement action) to preempt any determination of the distributional entitlement to the sale proceeds, since JM is not distributional in function and therefore not *per se* tied to any *pari passu* ideal.

This commentator argues that the importation of s. 334 in *Re Wan Soon* makes better sense if it is acknowledged that Deschen was in fact a secured creditor in the following sense. It is well settled that upon issuance of a WSS, the sheriff has a right of seizure against the property of the judgment debtor.⁴⁸ Upon actual seizure of that property, but before its sale, the execution creditor is ‘as regards those goods in the position of a secured creditor’,⁴⁹ and the sheriff acquires a qualified property in the goods in equity with a power of sale to satisfy the execution creditor in priority to other writs of seizure and sale.⁵⁰ In respect of chattels, seizure is effected upon actual seizure by the sheriff. However, in respect of immovable property, Order 47 rule 4(1)(a) of the *Rules of Court*⁵¹ expressly provides that seizure in respect of land shall be effected by “registering under any written law relating to immovable property a writ of seizure and sale ... attaching the interest of the judgment creditor in the immovable property described therein and upon registration, such interest shall be deemed to be seized by the Sheriff.”⁵² Accordingly, Deschen could legitimately

⁴⁶ *Supra* note 4 at para. 14.

⁴⁷ See *supra* note 41 and 42.

⁴⁸ *Peck v. Craighead*, [1995] 1 B.C.L.C. 337 (H.C.) at 341. See also *Wooding v. James & Ors.* (1996) 21 A.C.S.R. 397 (W.A.S.C.) at 400-401.

⁴⁹ *Ibid.*, per Mann Q.C., who refers to the security right as ‘not unlike a lien’ in the context of the U.K. *Insolvency Act 1986*, 1986, s. 383.

⁵⁰ *In re Davis, ex parte Williams* (1872), L.R. 7 Ch. App. 314 (C.A.) at 317-318.

⁵¹ 2004 Rev. Ed. Sing., r.5 [RC].

⁵² *Ibid.* This provision reverted the execution process in respect of immovable property to the position under the *Civil Procedure Rules of Supreme Court 1934* (No. 8785/34), Or. 41, r.1 and its predecessors, the

claim that prior to the commencement of the interim moratorium under s. 227C when the JM petition was filed on 22 July 2004, it had a valid procedural security in respect of the property which, apart from the institution of a winding up, entitled it to priority over the other unsecured creditors of the company.

It follows that at the first hearing concerning the WSS registered by Deschen, the judicial managers could have relied on the statutory moratorium to remove the WSS from the land register on the ground that by insisting on maintaining registration, it was, if not continuing execution without leave under s. 227D(3)(c), enforcing its procedural security without leave of court, which was prohibited by s. 227D(3)(d). Thus, the WSS registration could be removed on the ground that it was impeding the completion of sale and hence the collective realisation of the company's assets as determined by its judicial managers. The question then is whether the court ought to have qualified the removal of the WSS on condition that Deschen's pre-existing security rights over the property should be preserved, or a suitable alternative security provided.⁵³

At this juncture, the distributional issue was unavoidable as the validity of the security held by Deschen was qualified by the ultimate destination of the company. Since it was clear that the judicial managers had already petitioned to place the company in compulsory winding up,⁵⁴ and there would therefore be no opportunity for Deschen to complete its execution by sale of the property⁵⁵ before the commencement of winding up,⁵⁶ its procedural security was defeasible on an anticipatory basis since the liquidator had the wherewithal to require the entire proceeds to be paid over to him on the basis of s. 334. Accordingly, in conformity with the result in *Re Wan Soon*, Deschen would not be entitled to any priority over the proceeds of sale, and *pari passu* distribution prevails. It is suggested that in a situation where it is not clear what the outcome of a JM might be, or if a winding up order would be made, the court could alternatively order a preservation of the creditors' existing pre-JM security rights notwithstanding the removal of the WSS, but without prejudice to any subsequent challenge by a liquidator or an unsecured creditor.

Finally, it is of interest to note that if the provisions of the *Bankruptcy Act*⁵⁷ were imported instead, a very different result would occur. Section 105(2)(c) *BA* provides that execution of land is completed by *registration* of a WSS under any

Civil Procedure Code 1926 (Ord. XI of 1925, Sing.), s. 619 and *Civil Procedure Code 1907* (Ord. XXXI of 1907, Sing.), s. 619, by extending the writ of seizure and sale mechanism to land and removing the use of charging orders, for which statutory legitimacy was considered lacking: see J. Pinsler, *Civil Justice in Singapore* (Singapore: Butterworths Asia, 2000) at 436-437. A pre-independence decision on the predecessors to Or. 47 r. 4(1)(a) *RC* confirms that registration of a WSS against the land in question has 'the effect of making the judgment a charge on the land': *Re Yap Geok Song Deceased* [1938] 7 M.L.J. 122 (Sing. H.C.). See also *Re Rotormaster Equipment Ltd.* [1956] S.R. (N.S.W.) 149 (S.C.) at 153 for a very similar situation in the context of winding up.

⁵³ See *supra* note 36.

⁵⁴ *Supra* note 4 at para. 11: The judicial managers had filed a winding-up petition on 1 February 2005, the hearing of which was adjourned pending the instant application.

⁵⁵ Section 334(2)(c); In *Official Assignee of the Property of Lim Chiau Kim v. United Overseas Bank Ltd.*, [1988] 3 M.L.J. 189 (Sing. C.A.), it was held that completion by sale would be constituted by the making of a validly binding contract of sale between the sheriff and the purchaser.

⁵⁶ Section 255(2) provides that winding up shall be deemed to have commenced at the time of the making presentation of the petition for the winding up (now upon the *application* for the winding up: see *Statutes (Miscellaneous Amendments) (No. 2) Act* (No. 42 of 2005, Sing.), First Schedule).

⁵⁷ Cap. 20, 2000 Rev. Ed. Sing. [BA].

written law relating to the registration of land. On the facts of *Re Wan Soon*, this would mean that Deschen would have been able to retain the benefit of its execution against the company and its judicial managers as its execution would have been deemed completed. Could Deschen have argued that s. 105 *BA* should instead apply by ‘double importation’ via s. 227X(b) and s. 327(b) or s. 329 to entitle it to retain the proceeds of its execution against the property?⁵⁸ The former imports the rules in bankruptcy with regard to (*inter alia*) “the rights of secured and unsecured creditors and debts provable” into the winding up of insolvent companies. However, there is English authority on the equivalent antecedent provisions of s. 327(b) that the section does not import the equivalent of s. 105 *BA* into winding up, but only bankruptcy rules in relation to the administration of an insolvent estate.⁵⁹ Indeed, it would be strange if such an importation were permissible under the scheme of our current *Companies Act*, as it would confine the application of s. 334 to the winding up of *solvent* companies, where the question of priority amongst creditors *inter se* in respect of property seized by execution would be irrelevant.

There are also a couple of early 20th century Australian cases that have utilised the equivalent of s. 329 to achieve the importation considered.⁶⁰ This latter section requires that “any transfer, ... execution or other act relating to property made or done by or against a company” be similarly rendered void or voidable in a winding up as it would in a bankruptcy. However, these decisions were made at the time when the relevant Australian state companies legislation⁶¹ did not have its own provisions relating to execution as they do now.⁶² To allow such an importation under our s. 329 when Part X of the Act expressly provides for the very same situations would render s. 334 otiose. Even so, this digression seeks to highlight the inconsistent provisions on the restriction of execution creditors’ rights in bankruptcy and winding up in Singapore.⁶³ There is no obvious reason why the effects of execution should differ between these insolvency regimes. In the light of the proposed omnibus insolvency legislation,⁶⁴ it would be opportune to reconsider how, and to what extent, the procedural security rights of execution creditors—inherently in conflict with the important insolvency policies of collective action and fair distribution amongst unsecured creditors—ought to be accommodated.⁶⁵ That task, given the ambit of this note, must be left for another occasion.

⁵⁸ My thanks to the referee for raising this question.

⁵⁹ *Re Richards & Co.* (1879), L.R. 11 Ch. D. 676; *Re Withernsea Brickworks* (1880-81), L.R. 16 Ch. D. 337 (C.A.), construing s.10 of the *Judicature Act 1875* (U.K.), 38 & 39 Vict., c. 77.

⁶⁰ *Re St. George Industrial Co-operative Society Ltd.* (1900), 16 W.N. (N.S.W.) 259 (S.C.); *Re Scott Sibbald & Co.* (1906), 6 S.R. (N.S.W.) 643 (S.C.), construing s. 263 of the *Companies Act 1899* (N.S.W.).

⁶¹ *Companies Act 1899* (N.S.W.)

⁶² B.H. McPherson, *The Law of Company Liquidation*, 2nd ed. (Sydney: LBC Co. Ltd., 1980) at 165.

⁶³ Although s. 105 *BA* reflects its predecessor, s. 49 of the *Bankruptcy Act* (Cap. 20, 1985 Rev. Ed. Sing.), sub-section (2)(c) of the current *BA* in respect of completion of execution against land, significantly departs from s. 49 and appears to take into account the 1991 amendments to the *RC* extending the WSS to immovable property: *RSC (Amendment No. 3) Rules 1991* (S. 532/91 Sing.). In contrast, s.334 is based on s. 298 of the *Companies Act 1961* (Vic.), which stipulates sale as the definitive event.

⁶⁴ Company Legislation and Regulatory Framework Committee, *Final Report* (October 2002), c.4, para. 2, online: Ministry of Finance, Singapore <http://www.mof.gov.sg/cor/clrfc_reports.html>.

⁶⁵ Compare s. 569(1) of the Australian *Corporations Act 2001* (Cth.), which goes further in requiring an execution creditor to pay over to the liquidator the received proceeds of any execution issued within 6 months before the commencement of the winding up.

V. THE ANTI-DEPRIVATION PRINCIPLE AND JUDICIAL MANAGEMENT

Although it was not specifically relied upon in *Re Wan Soon*, it is fitting, given the general discussion of the *pari passu* principle above, to briefly consider the extent to which the common law rule in *Re Jeavons, ex parte McKay*⁶⁶ and *British Eagle International Airlines v. Compagnie Nationale Air France*⁶⁷ applies in JM. This “anti-deprivation principle”, as one case has described it,⁶⁸ generally provides that a company may not stipulate by contract that its property is to be distributed for the benefit of one or more of its unsecured creditors in a way which is different from that prescribed by the statutory scheme of distribution under s. 300 in a winding up.⁶⁹ Coincidentally, the very same company in JM tried to invoke this principle in an earlier District Court case, *Attorney General v. Wan Soon Construction*.⁷⁰ The judicial managers of the company argued that the assignment of an interim payment (due to the company under a certificate of completion) to one of its judgment creditors was void on the ground that it infringed this principle. Thean D.J. dismissed the argument on the basis that (a) no ‘contracting out’ was involved in making the assignment and (b) that the principle only kicks into operation upon the making of the judicial management order.⁷¹

What is most significant about this reasoning is the implicit assumption that the anti-deprivation principle⁷² can apply in JM as well. Given that it has been traditionally asserted that the anti-deprivation principle is rooted in the *pari passu* principle of distribution,⁷³ the question arises whether this assumption is valid in the light of the reasoning in *Re Wan Soon* rejecting (at least) any mandatory or automatic application of the *pari passu* principle in JM. When, if at all, would it be legitimate to invoke the anti-deprivation principle in JM? As a starting point, it is submitted that Phang J.C. points us in the right direction. Applying his approach with respect to the exercise of discretion under s. 227X(b), a court should similarly consider whether the application of the anti-deprivation principle would “facilitate the general purpose and mission of judicial management” and “inure to the benefit of the unsecured creditors generally and/or aid the company in its attempt at economic recovery”.⁷⁴ In order to answer this question, one not only needs an appreciation of the facts in order to determine how the principle would actually operate, but more importantly, a clear understanding of the function or purpose of the anti-deprivation principle. Unfortunately, the cases at present do not offer a coherent account of its contours

⁶⁶ (1873), 8 Ch. App. 643 (C.A.).

⁶⁷ [1975] 1 W.L.R. 758 (H.L.) [*British Eagle*].

⁶⁸ *Peregrine Investments Holdings Ltd (In liq.) v. AIFMC Ltd LDC*, [2004] H.K.E.C. 54 (H.K.C.A.) at para. 11 [*Peregrine Investments*].

⁶⁹ *Supra* note 66 at 647-648; *Joo Yee Construction Pte Ltd (in liq.) v. Diethelm Industries Pte Ltd and Ors*, [1990] S.L.R. 278 (H.C.) at para. 18 [*Joo Yee Construction*], per Thean J.; *Low Gim Har v. Low Gim Siah*, [1992] S.L.R. 593 (H.C.) at paras. 46-47, per Chan J.

⁷⁰ [2005] SGDC 6 at para. 27. [*AG v. Wan Soon*].

⁷¹ *Ibid.*

⁷² As applied in *Joo Yee Construction v. Diethelm Industries Pte Ltd*, *supra* note 69.

⁷³ See for example, Goode, *Corporate Insolvency Law*, *supra* note 11, c. 7 at para. 7-06.

⁷⁴ *Supra* note 4 at paras. 47 and 50.

or underlying rationale.⁷⁵ Several features of the principle do however emerge to provide us some handle on the issue.

First, it has been argued that some cases applying the anti-deprivation principle can be understood as enforcing the mandatory collectivity entailed by the winding up process.⁷⁶ For example, a contractual stipulation that, upon an individual's bankruptcy, the individual's property which was his up to the date of the bankruptcy should be forfeited to the contractual counter-party or a third party, is void as being a violation of the policy behind bankruptcy law, as it deprived the bankruptcy estate of the asset.⁷⁷ In another instance, a 'user' clause that allowed the appropriation of an insolvent ship-builder's property was void as it purported to remove the power of control over these assets otherwise vested in the bankruptcy estate.⁷⁸ Following through the argument above that the principle of mandatory collectivity is equally applicable in JM, in so far as the anti-deprivation principle prevents such unilateral opting-out of the collective management of the insolvent estate, it should also be applicable in JM to further its statutory objectives in s. 227B(1)(b). However, as has been pointed out, the principle may have to be adapted to cohere with the scope of the statutory moratorium which does not *per se* prohibit the exercise of contractual self-help remedies.⁷⁹ Perhaps the resolution to this is to be found in *Re Olympia & York*⁸⁰—the statutory moratorium is not intended to interfere with the rights of creditors further than is required to enable the judicial managers to carry out their functions, and, in particular, to gain control of the company's assets for this purpose. Pursuant to this particular rationale, the moratorium and anti-deprivation principle should not otherwise interfere with the creditors' contractual power to crystallise or discharge contractual rights and liabilities.

Second, this commentator has argued in another context that some anti-deprivation precedents also reveal another objective—the regulation of corporate debtor misbehaviour that affects the interests of a company's creditors.⁸¹ The anti-deprivation principle may thus also render pre-insolvency contractual provisions, and in particular *ipso facto* deprivation clauses, wholly unenforceable in instances of an abuse of corporate debtor powers. This occurs where the costs of such transactions are borne solely or disproportionately by the creditors of an insolvent company or group. If this interpretation of some of the relevant cases is accepted,⁸² the application of this aspect of the anti-deprivation principle should not depend on which particular insolvency regime has been invoked, since it seeks to correct the improper dissipation of value from the insolvent company that resulted from the perverse

⁷⁵ *Money Markets International Stockbrokers Ltd (In Liq.) v. London Stock Exchange Ltd*, [2002] 1 W.L.R. 1150 (Ch.) at para. 87, per Neuberger J.

⁷⁶ Mokai, "Priority as Pathology", *supra* note 17 at 603.

⁷⁷ *In re Harrison, ex parte Jay* (1880), L.R. 14 Ch. D. 19 (C.A.); See also *supra* note 66.

⁷⁸ *In re Walker ex parte. Barter ex parte. Black* (1884), L.R. 26 Ch. D. 510 (C.A.).

⁷⁹ J. Armour & R. Mokai, "Reforming the Governance of Corporate Rescue: The Enterprise Act 2002" *ESRC Centre for Business Research Working Paper No. 288* (2004), at para. 5.3, online: SSRN <<http://ssrn.com/abstract=567306>>, citing *Re Olympia & York Canary Wharf Ltd* [1993] B.C.L.C. 453 (Ch.).

⁸⁰ *Ibid.* at 457, per Millett J.

⁸¹ Chan, "A Falcon Takes Flight: The Anti-Deprivation Principle And Corporate Groups" [2005] Sing. J.L.S. 270 at 274–278.

⁸² For example, *Re Frechette* (1982) 138 D.L.R. (3d) 61 (Q.S.C.); *Peregrine Investments*, *supra* note 68.

incentives created by limited liability. Furthermore, its application should not be confined to transactions that only take effect *after* the commencement of JM.⁸³

Finally, to the extent that the anti-deprivation principle further seeks to ‘equalise’ unsecured creditors by ensuring that they are paid no more than their *pro rata* dividend in a winding up,⁸⁴ it is uncertain whether this has any obvious role in a JM. On the one hand, as the Court of Appeal in *Hitachi Plant Engineering*⁸⁵ observed, a rigid insistence on formal equality has no place in a regime intended to achieve a corporate ‘rescue’ or a better *realisation* of assets. Flexibility is the order of the day. Furthermore, the authorities on this aspect of the anti-deprivation principle also stipulate that it only applies to contractual provisions that are put in force or take effect on or after the commencement of winding up.⁸⁶ On the other hand, we have seen that even in a JM-type regime, the courts have been concerned to prevent unjustified attempts by pre-existing unsecured creditors using the interim regime to jump the priority queue prescribed by any impending scheme of distribution. This is not without good cause. JM is very often a prelude to a winding up, yet unsecured creditors cannot easily protect themselves against the operation of such contractual clauses by filing a winding up application during the period for which a JM order is in force.⁸⁷

It is suggested that these competing considerations should be balanced in determining whether the anti-deprivation principle should apply in the particular context, albeit with priority given to the attainment of the collective objectives set out for JM, over ensuring *pari passu* distribution. Where the former are not impeded, the court may in appropriate circumstances legitimately invoke the anti-deprivation principle to prevent strategic anticipatory attempts to circumvent prescribed statutory distribution rules by prior contracting. After all, even in a winding up, the default *pari passu* rule is subject to many significant exceptions. For example, in exercising its discretion to validate void dispositions under s. 259, the court can do so even if it results in preferential treatment when such treatment makes such a course desirable “in the interests of the unsecured creditors as a body”.⁸⁸ The judicial exercise of discretion in the supervision of a JM should be similarly guided.

VI. CONCLUSION

In summary, *Re Wan Soon* represents an important step forward in the development and clarification of the principles underpinning JM in Singapore. Winding up provisions from Part X will be imported under s. 227X(b) if they further the mission and purposes of JM in the context of the particular case. The *pari passu* principle,

⁸³ See for e.g., in the context of winding up, *Fraser v. Oystertec Plc.*, [2004] B.P.I.R. 486 (Ch.), where the court held that a deprivation clause re-transferring a patent was null and void in the event of the acquiring company’s factual insolvency even though no insolvency proceedings had been commenced. Cf. *AG v. Wan Soon*, *supra* note 70.

⁸⁴ *British Eagle*, *supra* note 67; Mokai, “Priority as Pathology”, *supra* note 17 at 598-599.

⁸⁵ *Supra* note 7 at para. 81.

⁸⁶ See e.g. *British Eagle*, *supra* note 67 at 781, per Lord Cross; *Joo Yee Construction*, *supra* note 69.

⁸⁷ Section 227D(1)(b) provides that any winding up application shall be dismissed upon the making of the JM order, while s. 227D(4)(c) forbids the commencement or continuation of any proceedings except with leave of court or consent of the judicial manager during the currency of a JM order.

⁸⁸ *Re Gray’s Inn Construction Co. Ltd.* [1980] 1 W.L.R. 711 (C.A.) at 718, per Buckley L.J.

at least in so far as it is understood solely as a rule of equal rateable distribution for unsecured creditors, does not automatically apply in a ‘rescue’ oriented regime like JM. However, as this note has argued, there is cause for caution before one rules out the influence or application of this principle and its derivative provisions, given its many facets. The concerns of the principle continue to influence courts in their exercise of the moratorium discretion, and distributional issues do arise in JM even though that is not its overt function. In the latter situation, it is argued that courts have to anticipate the forthcoming distributional regime in order to meaningfully resolve such distributional disputes that may arise during the course of JM. In doing so, *pari passu* dictates will prove influential, if not determinative, if a winding up is likely to follow. Finally, the anti-deprivation principle—inaccurately equated solely with preserving *pari passu* distribution—should also have potential for application in JM in appropriate circumstances. Such determinations would have to involve some articulation of the purpose or justification for this other principle, in evaluating if its extrapolation into JM is justified by the regime’s overall mission or objectives.