

THE PUBLIC INTEREST IN JUDICIAL MANAGEMENT

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The public interest is a common, but rarely discussed, feature in insolvency processes. It features in both winding up and judicial management in Singapore, with statutory provisions that stipulate the public interest as a ground for invoking these processes. However, it is unclear from the legislative deliberations what specific purpose was envisaged by the public interest exception to the typical requirements for making a judicial management order. This article reviews the concept of the public interest in the context of insolvency law in general, and corporate rescue in particular. In the light of the objectives and principles of insolvency law, and the role of the public interest, it argues for a revised, more robust understanding of the public interest in judicial management and its interaction with receivership.

I. INTRODUCTION

The public interest is a common, but rarely discussed, feature in insolvency processes. The relatively influential Cork Committee report recognised the triadic importance of the interests of the debtor, creditor and the public in the design and implementation of insolvency systems.¹ The public interest also features in winding up and judicial management (“JM”) in Singapore, with unique statutory provisions that stipulate the ‘public interest’ as a ground for invoking insolvency processes² and a consideration for the court in appointing a judicial manager nominated by the Minister.³

It is unclear from the legislative deliberations on the *Companies (Amendment) Bill*⁴ what specific purpose was envisaged by the public interest exception to the typical requirements for the making of a JM order. Two important High Court cases have since given a rather restrictive interpretation to the ‘public interest’. This article reviews the concept of the public interest in the context of insolvency law in general, but focuses on its understanding and application in the context of corporate rescue in particular. In the light of the general objectives and principles of insolvency law

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¹ U.K., Cork Committee, *Insolvency Law and Practice* (Cmd. No. 8558) by Kenneth Cork *et al.* (London: Her Majesty’s Stationary Office, 1982) at paras. 192, 193, 1734 [*Cork Report*]. See also *infra* note 7.

² *Companies Act* (Cap. 50, 2006 Rev. Ed. Sing.), ss. 254(1)(g) and 227B(10)(a) in winding up and judicial management respectively [CA]. All subsequent references in this article to legislative provisions are to the CA unless otherwise stated.

³ Section 227B(3)(d).

⁴ Bill 9, *An Act to amend the Companies Act*, 2nd Sess., 6th Parl., 1986.

and the role of the public interest, it argues for a revised, more robust understanding of the public interest in JM. This would allow the court to invoke the public interest as a ground to override the veto of a qualifying floating charge holder (“QFCH”) under s. 227B(5) in favour of the more collective and accountable JM of a relevant company in financial difficulty.

II. THE PUBLIC INTEREST IN INSOLVENCY LAW

Insolvency processes have never simply been considered as purely vindicating private interests and rights, although its role as a collective debt collection process is undoubted.⁵ Larger community and normative concerns over the purposes and outcomes for insolvency processes have nevertheless wielded legitimate influence, over and above the private individual interests of creditors.⁶ This larger public interest has been recognised by both judicial decisions on and legislative reviews of insolvency law. In *In re Pantmaenog Timber Co Ltd*, Lord Millet observed that:⁷

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.*” (Para 1734.)

Apart from these generic observations, insolvency processes here also have the public interest as their explicit statutory purpose. In the context of liquidation, under s. 254(1)(g)(ii), a company may be wound up if an inspector appointed under Part IX of the CA is of the opinion that “it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up”. In this respect, s. 241 of the CA provides that the Minister may apply for the winding up of a declared company after an inspector has made the requisite report and is of the opinion that this should be done.⁸

Unfortunately, there is lacking a systematic exposition of what the ‘public interest’ encompasses under this ground of winding up. The English and Commonwealth cases emphasise that the public interest ground of winding up may persuade the court to make the order notwithstanding that there is majority creditor or contributory opposition to it; the remedy is ordered because it is in the interests of the public *at*

⁵ *Wight v. Eckhardt Marine GmbH* [2004] 1 A.C. 147 at para. 27 (P.C.).

⁶ *Cork Report*, *supra* note 1 at para. 198(i).

⁷ [2004] 1 A.C. 158 at para. 52 (H.L.) [emphasis added]. These insights of the Cork Committee were also approved in *Liquidator of W&P Piling Pte Ltd v. Chew Yin What* [2004] 3 S.L.R.(R.) 164 at para. 26 (H.C.).

⁸ Section 229 provides that a “declared company” is a company or foreign company which the Minister has by order declared to be a company to which investigations ordered under Part IX of the Act apply.

large that the company be wound up.⁹ In *Re Walter L. Jacob & Co. Ltd.*, Nicholls L.J. held, in respect of the equivalent of the current s. 124A of the U.K. *Insolvency Act 1986*,¹⁰ that:¹¹

The court's task, in the case of so-called public interest petitions, as in the case of all other petitioners invoking the court's winding-up jurisdiction under sec. 122(1)(g), is to carry out the balancing exercise described above, having regard to *all the circumstances as disclosed by the totality of the evidence before the court*... Thus, where the reasons put forward by the petitioner are founded on considerations of public interest, the court, if it is to discharge its obligation to carry out the balancing exercise, must itself evaluate those reasons to the extent necessary for it to form a view on whether they do afford sufficient reason for making a winding-up order in the particular case.

Some instances of reasons founded on the public interest are where the company in question has committed serious breaches of the relevant Companies Act,¹² other regulatory requirements,¹³ or the affairs of the company have been conducted fraudulently or deceptively.¹⁴ Where there has been some important deviation from the accepted standards of commercial morality within the particular industry in question, there is a need to protect the interests of investors or future creditors in the public at large by invoking the winding up process.¹⁵

However, apart from these specific instances and the need to balance the competing interests of the public, creditors and contributories in the particular circumstances of each case,¹⁶ the cases have not articulated clearly what represents the public interest—the concept is indeed difficult to pin down with specificity since it varies with the legal context.¹⁷ For the purpose of this paper, it is submitted that the public interest in insolvency can be articulated as representing two different but related concepts. The first is that in the exercise of jurisdictional or discretionary power, the courts may legitimately take into consideration the wider interests of what Professor Sarra calls 'equitable' or non-financial claimants—persons or entities who have nonetheless made firm-specific investments in the particular enterprise, or would suffer harm without having any direct legal recourse against the insolvent company.¹⁸

⁹ *In re Lubin, Rosen and Associates Ltd.* [1975] 1 W.L.R. 122 at 129 (Ch.); *Re Attorney-General of Canada and Continental Trust Co. (No. 2)* (1986) 52 O.R. (2d) 525 at 535, 536 (High Court of Justice); *Australian Securities Commission v. AS Nominees Ltd* (1995) 18 A.C.S.R. 459 at 516, 517 [AS Nominees].

¹⁰ 1986, c. 45.

¹¹ (1989) 5 B.C.C. 244 at 251 (C.A.) [emphasis added].

¹² See e.g., *In re Allied Produce Co. Ltd.* [1967] 1 W.L.R. 1469 (Ch.).

¹³ See e.g., *AS Nominees*, supra note 9.

¹⁴ See e.g., *In re Golden Chemical Products Ltd.* [1976] 1 Ch. 300 (Ch.).

¹⁵ Andrew Keay, "Public Interest Petitions" (1999) 20 *Company Lawyer* 296 at 299.

¹⁶ For an example of this balancing exercise in the context of personal bankruptcy, see *Hong Leong Bank Bhd v. Soh Seow Poh* [2009] 4 S.L.R.(R.) 525 (C.A.); *Lim Hun Swee v. Malaysia British Assurance Bhd* (currently known as *Allianz General Insurance Malaysia Bhd*) [2011] 2 M.L.J. 218 (C.A.).

¹⁷ See Andrew Keay, "Insolvency Law: A Matter of Public Interest?" (2000) 51 *N. Ir. Legal Q.* 509 at 523-525 [Keay, "Insolvency Law"].

¹⁸ Janis Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003) at 69-80. See also Elizabeth Warren, "Bankruptcy Policymaking in an Imperfect World" (1993) 92 *Mich. L. Rev.* 336 at 355, 356: In the U.S. context, recognition of these external interests is reflected in a bankruptcy policy choice to promote rehabilitation under Chapter 7 or 11 of the *Bankruptcy Code*. However, the protection given is derivative in nature and limited in scope.

For example, the company's employees may have made more firm-specific investments through skills specialisation than represented by the financial claims for unpaid wages would indicate. In addition, other non-financial claimants will have an interest in the outcome of the process, such as the state and other local and community interests.¹⁹

Judicial statements made in the context of winding up here also reveal the relevance of these non-capital interests in the wider public or community context, particularly when the court exercises its discretion. Recognising the real potential for a winding up application to push a company over the insolvency threshold by triggering a chain of contractual cross-defaults, in *BNP Paribas v. Jurong Shipyard Pte Ltd*, Chan C.J. observed that:²⁰

Where a petition to wind up a temporarily insolvent but commercially viable company is filed, many other economic and social interests may be affected, such as those of its employees, the non-petitioning creditors, *as well as the company's suppliers, customers and shareholders*. These are interests that the court *may legitimately take into account* in deciding whether or not to wind up the company.

Nevertheless, protection of these rights is derivative from the consideration they are accorded in the exercise of judicial discretion, and no direct participatory rights are accorded.²¹

The second important aspect of the public interest idea relates to the normative principles that are to guide the court when it takes into account the triad of general interest groups in the insolvency context—the debtor, creditors and the public. In this respect, Professor Keay argues that the notion of public interest translates into societal norms that are applicable in the insolvency context, which are distinct from individual interests or the accumulation of private interests:²²

[T]he public interest does not include or consist of interests of creditors and the debtor in a given case as it is very much “other than” such interests; it is objective and cannot be seen as an accumulation of private interests. An example is the need for commercial morality.²³ This is a societal norm as opposed to being in anyone's individual interest.

The protection of public expectation that debts will be incurred and honoured in good faith undergirds commercial life, and this translates into a public interest that these norms are observed and enforced.²⁴ In appropriate cases, these deviations from

¹⁹ Sarra, *ibid.* at 89-98.

²⁰ [2009] 2 S.L.R.(R.) 949 at para. 19 (C.A.) [emphasis added], citing the Malaysian case of *Pilecon Engineering Bhd v. Remaja Jaya Sdn Bhd* [1997] 1 M.L.J. 808 at 813 (H.C.), to the same effect, with approval.

²¹ Warren, *supra* note 18 at 355.

²² Keay, “Insolvency Law”, *supra* note 17 at 525 [footnote added].

²³ This is a ground on which a company may be wound up in the public interest: Andrew Keay, *McPherson's Law of Company Liquidation*, 2nd ed. (London: Sweet & Maxwell, 2009) at 275; *Re Marann Brooks CSV Ltd.* [2003] B.C.C. 239 (Ch.).

²⁴ Ian F. Fletcher, “Juggling with Norms: the Conflict Between Collective and Individual Rights Under Insolvency Law” in Ross Cranston, ed., *Making Commercial Law: Essays in Honour of Roy Goode* (Oxford: Clarendon Press, 1997) c. 17 at 393.

commercial morality should be investigated and sanctioned either within the winding up process itself,²⁵ or via the criminal law or professional disciplinary proceedings.²⁶

Another relevant example of an objective societal norm in insolvency is the priority of collective processes over individual enforcement against an insolvent company, in order that insolvencies be resolved in an orderly and efficient manner.²⁷ The theory underlying the need for collective action as a basic feature of any ‘true’ insolvency process is described in terms of a higher normative interest in ensuring the most optimal outcome in the preservation of economic value of an economically or financially distressed enterprise.²⁸ Such systems represent a collective set of procedures that seek to first, prevent the fragmentation of the company’s assets as a result of unilateral, uncoordinated enforcement action²⁹ and, second, maximise the *ex post* value of a firm once financial distress occurs, and distribute this surplus to the firm’s creditors.³⁰

This (once-invoked) mandatory collective mechanism³¹ offers creditors several advantages. At general law, creditors may pursue individual rights of enforcement to satisfy their claims. These individual remedies will however often reduce the value available for distribution when the aggregate value of the assets—the ‘going concern’ value—is greater than the break up value. Here, in accordance with game theory, rational individual behaviour in the absence of co-operation with other interested individuals results in a sub-optimal decision—what is often described in the insolvency context as a ‘common pool’ problem. A statutorily imposed collective system thus affords the creditors the opportunity to capture this going concern surplus and avoid the risk of variable recoveries that competition amongst creditors using unilateral enforcement methods offers.³² Butler and Gilpatric summarise the economic advantages of a collective debt collection system as follows:³³

As a result [of allowing unilateral enforcement], any given creditor’s recovery will only by chance approximate the level consistent with economic efficiency or the broader purposes of public policy. Moreover, if the creditors individually press their claims, the total value of the firm may decline because the firm’s assets may be worth more if liquidated as a whole than if split up, or because the firm may have a greater value to its creditors as a going concern than in liquidation. Each individual creditor who collects on her claim thus imposes costs on all other creditors by increasing the likelihood that they will not be paid and by reducing the pool of assets available to all creditors. The benefits of forbearance by any single

²⁵ See *Companies Act*, ss. 341, 342.

²⁶ *Cork Report*, *supra* note 1 at paras. 235-240.

²⁷ Keay, “Insolvency Law”, *supra* note 17 at 510, 511; *Cork Report*, *supra* note 1 at paras. 224-227.

²⁸ See Warren, *supra* note 18 at 350-352.

²⁹ See *Re Rasmachayana Sulistyjo (alias Chang Whe Ming), ex parte The Hongkong and Shanghai Banking Corp Ltd* [2005] 1 S.L.R.(R.) 483 at para. 20 (H.C.) [*Re Rasmachayana Sulistyjo*]: “The objectives of insolvency legislation... are to prevent fragmentation of assets and to sterilise certain legal rights of an insolvent debtor...”.

³⁰ Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, Massachusetts: Harvard University Press, 1986) at 17, 18.

³¹ See *In re Lines Bros. Ltd. (In Liquidation)* [1983] Ch. 1 at 20 (C.A.).

³² Jackson, *supra* note 30.

³³ Richard V. Butler & Scott M. Gilpatric, “A Re-Examination of the Purposes and Goals of Bankruptcy” (1994) 2 Am. Bankr. Inst. L. Rev. 269 at 272, 273.

creditor accrue mostly to the other creditors. By collectivizing and consolidating the debt collection process, bankruptcy attempts to preserve as much of the firm's value as possible.

In a normative sense, the objective of maximisation of enterprise value can be viewed as an aspect of the public policy or interest in the establishment and design of collective insolvency processes generally. This principle was also recognised in Singapore in the context of the public interest in regulating the remuneration of insolvency practitioners. In *Re Econ Corp Ltd (in provisional liquidation)*, V.K. Rajah J.C. (as he then was) noted:³⁴

How does an insolvency practitioner justify the remuneration he should receive for his services? *This is definitely a matter of public interest*, given that our insolvency practitioners play a significant role in lubricating the wheels of commerce. They are, in a number of insolvency situations, officers of the court, *instrumental in ensuring that returns from failed commercial enterprises are maximised*.

Thus, it is argued that a principle that undergirds not just overlapping individual creditor interests, but also the wider public interest, is that of the maximisation of overall enterprise value gained by the outcomes of the corporate rescue process—even if it is a principle that operates to the benefit of both directly and indirectly affected stakeholders—creditors and the wider public respectively. In this respect, Keay notes that there may be an overlap between what is in the interests of creditors and the public interest:³⁵

“Public interest” has been contrasted with the interests of creditors in a number of cases and the interests of the debtor, and is something which transcends individual interests, but of course the public interest may well overlap with the interests of the creditors and/or the debtor in any given case... *it is submitted that it is in the public interest that creditors be able to recover as much as possible from an insolvent as the provision of credit is critical for the development of commerce*—if creditors are not assisted then they are unlikely to extend credit, or extend it so readily.

III. THE PUBLIC INTEREST IN CORPORATE RESCUE

Some of these broader, diverse considerations regarding the public interest apply with equal force in respect of corporate rescue processes like JM. In promulgating the Bill introducing JM into the CA, then-Minister of Finance Richard Hu echoed similar conceptions of the nature of the public interest in JM:³⁶

The limited liability company does not simply represent one interest but *a confluence involving the interests of investors, creditors, employees, consumers and the public*. It has, therefore, long been recognized and accepted that since the company is an artificial creation of law, it is the duty of Government to ensure *that its operations do not prejudice these diverse interests*...

³⁴ [2004] 2 S.L.R.(R.) 264 at para. 1 (H.C.) [emphasis added].

³⁵ Keay, “Insolvency Law”, *supra* note 17 at 525.

³⁶ Sing., *Parliamentary Debates*, vol. 48, cols. 37-40 (5 May 1986) [emphasis added and footnote added].

It would be noted that the benefits of a successful company rescue accrue not only to its shareholders *but to employees, the business community and the general public*.³⁷ A key element in a company rescue is the provision of a breathing space during which plans can be put together to achieve the purposes just mentioned... The new judicial management procedure, therefore, provides a legal framework that would, in a suitable case, *enable the rescue of a potentially viable business and thus prevent a premature liquidation*.

This articulation of legislative policy concerning corporate rescue not only recognises the need to protect the broader constituency of interests affected by the outcome of a corporate rescue process, but also the public interest in facilitating the preservation of viable businesses (as opposed to the mere corporate shell) in a *suitable case*.³⁸ It also reflects the fact that rehabilitation is not the only relevant public interest: there is also a potentially competing public interest that corporate rescue processes do not operate to render the value of formal and quasi-security interests so uncertain as to affect the provision of credit in the economy.³⁹

In the context of JM, with the exception of s. 227B(10)(a) (discussed below), there is no explicit statutory recognition of non-capital claims against a company, such as firm-specific investments of human capital or state infrastructure investment to support the business operations of a company. For example, the s. 227N meeting is essentially a decision-making forum for unsecured creditors with financial claims against the company, while the employees of the company may be represented by their trade unions at s. 227M meetings or in s. 227R petitions, but only in respect of their interests as creditors for unpaid wages or salary.⁴⁰

However, the public interest does obliquely reveal its influence in the exercise of judicial discretion in JM, *e.g.*, in granting creditors leave to enforce notwithstanding the operation of the statutory moratorium under ss. 227C and D. In *In re Atlantic Computer Systems Plc.*, Nicholls L.J. alluded to this earlier-mentioned legislative intent that when exercising its discretion in overseeing the statutory moratorium, courts should consider the wider circumstances and consequences of their decisions:⁴¹

Indeed, Parliament must have intended that when exercising its discretion the court should have due regard to the property rights of those concerned. *But Parliament must also have intended that the court should have regard to all the other circumstances, such as the consequences which the grant or refusal of*

³⁷ This echoes and acts on what was recommended earlier by the Singapore, Fiscal and Financial Policy Sub-Committee, *Report of the Fiscal and Financial Policy Sub-Committee* by Keith Tay *et al.* (Singapore: Singapore National Printers Ltd, 1986) at 63: "Accordingly, it can be said that measures should be introduced so that a viable business capable of making a useful contribution to the economy of the country could be preserved wherever possible for the benefit of the employees, the commercial community and the general public." The Cork Committee was of the same view: see *Cork Report*, *supra* note 1 at para. 204.

³⁸ See *Cork Report*, *ibid.* at para. 193; Keay, "Insolvency Law", *supra* note 17 at 518.

³⁹ See *e.g.*, *Report of the Fiscal and Financial Policy Sub-Committee*, *supra* note 37 at 63, 64; Keay, "Insolvency Law", *supra* note 17 at 515.

⁴⁰ Section 227S—more specifically, where a trade union is recognised by the company under the *Industrial Relations Act* (Cap. 136, 2004 Rev. Ed. Sing.).

⁴¹ [1992] Ch. 505 at 528 (C.A.) [*Atlantic Computer*] [emphasis added]. The *Atlantic Computer* principles were endorsed in *Hinckley Singapore Trading Pte Ltd v. Sogo Department Stores (S) Pte Ltd (under judicial management)* [2001] 3 S.L.R.(R.) 119 at para. 10 (C.A.).

leave would have, the financial position of the company, the period for which the administration order is expected to remain in force, *the end result sought to be achieved*, and the prospects of that result being achieved.

The notion of the public interest in the exercise of judicial discretion over the maintenance of the statutory moratorium in administration was more clearly acknowledged in *In re Rhondda Waste Disposal Ltd.*⁴² In deciding whether to grant leave to allow criminal proceedings to be brought against a company in administration, a judge is not limited to considering the creditors' interests above all else. The judge must also consider the wider public interest represented by a governmental agency's decision to pursue criminal proceedings against the company.⁴³ The legitimate influence of diverse public interests that are affected by the conduct of rescue processes therefore need to be balanced against each other and the private interests of the creditors and shareholders.

Professor Sarra thus observes that judicial oversight in corporate rescue is necessary to reconcile divergent interests and the promotion of policy objectives—satisfying creditor claims and facilitating workouts where the company's business is viable.⁴⁴ This involves balancing the social and economic consequences of the company's failure against the protection of traditional creditor rights and continued availability of capital financing.⁴⁵ In examining the similar public interest in Canadian corporate rescue under the *Companies Creditors' Arrangement Act*,⁴⁶ she usefully outlines some of the specific principles that the Canadian courts have used in balancing these conflicting interests in managing the corporate reorganisation process.⁴⁷ It is in the public interest to (*inter alia*):⁴⁸

- (1) Avoid premature liquidations, and restructuring schemes are a valuable mechanism to prevent them. These entail a temporary suspension of control or enforcement rights in order to provide an opportunity to assess the causes of financial and economic distress, and evaluate the prospects of a rehabilitation.
- (2) Protect the claims of various stakeholders such that there is not a race to enforce individual claims to the detriment of other claimants.
- (3) Respect the statutory allocation of priority claims while still allowing parties the opportunity to determine whether they should compromise or defer those claims in anticipation of generating greater value for the long term.
- (4) Enhance access to information about an insolvent firm in order to allow for informed negotiations for an optimal solution.
- (5) Generate economic activity and to create a going forward business strategy that preserves creditors', workers' and other firm-specific economic investments, in order to maximise the wealth of the enterprise.

⁴² [2001] Ch. 57 at para. 35 (C.A.) (Scott Baker J.).

⁴³ *Ibid.* at para 42 (Scott Baker J.), para. 55 (Robert Walker L.J.).

⁴⁴ Sarra, *supra* note 18 at 106.

⁴⁵ On the necessity for balancing various competing public and private interests, see Keay, "Insolvency Law", *supra* note 17 at 530, 531.

⁴⁶ R.S.C., 1985, c. C-36.

⁴⁷ Sarra, *supra* note 18 at 106.

⁴⁸ *Ibid.*

These principles also resonate with the statutory policies and provisions of corporate rescue processes in Singapore, such as JM and schemes of arrangement. Principle 1 is manifestly one of the two *substantive* objectives of JM, encapsulated in ss. 227B(1)(b)(i) and (iii)—to achieve the survival of the company or the whole or part of its undertaking as a going concern, or a more advantageous realisation of the company's assets. To the extent that schemes of arrangement have been judicially recognised as a corporate rescue mechanism, these also work towards the similar goal of rehabilitating the company or achieving a better realisation of assets than possible in a winding up.⁴⁹

Principle 2 is manifested in the common provision of a stay of proceedings once corporate rescue proceedings have commenced, although the extent to which creditors and other claimants are impeded varies between regimes.⁵⁰ In addition, there was explicit acceptance in *Re Wan Soon Construction Pte Ltd* that JM's collective nature meant that unsecured creditors should not be allowed to steal a march on others in the enforcement and discharge of their debts.⁵¹

Principle 3 is reflected in JM through a number of mechanisms, the most prominent of which is s. 227H's protection of secured and quasi-secured creditor priority of claims. In addition, s. 227G(6) precludes the payment of pre-existing unsecured liabilities without the sanction of the court or a scheme of arrangement. Correspondingly, in schemes of arrangement, the courts are alive to the importance of respecting distributional priorities while supporting the rehabilitative objectives of corporate rescue:⁵²

[A] scheme of arrangement is a corporate rescue mechanism. As with other corporate rescue mechanisms, such as judicial management, it seeks to rehabilitate the company and achieve a better realisation of assets than possible on liquidation. . . Such a rescue mechanism may need, in order to be effective, to discriminate amongst creditors for example by repaying bigger creditors proportionately less than small creditors are repaid. Dictating that the assets should be distributed in a *pari passu* manner would not only decrease the flexibility now available to planners of schemes but it may also put a dampener on what the scheme of arrangement could achieve and sound the death knell of the company prematurely.

Nevertheless, the court must exercise its supervisory jurisdiction to ensure that there is proper classification of creditors and that the scheme on the whole is just and fair:⁵³

The statutory regime already sufficiently safeguards the interests of such creditors. Under s 210(3) of the Companies Act for a scheme of arrangement *simpliciter* and s 210(3) read with s 227X(a) of the Companies Act for a scheme of arrangement in a judicial management, the scheme will not become binding unless the court

⁴⁹ *Hitachi Plant Engineering & Construction Co Ltd v. Eltraco International Pte Ltd* [2003] 4 S.L.R.(R.) 384 at para. 81 (C.A.) [*Hitachi*].

⁵⁰ See Tracey Evans Chan, "Schemes of Arrangement as a Corporate Rescue Mechanism: The Singapore Experience" (2009) 18 *International Insolvency Review* 37 at 42, 43. See also *Re Rasmachayana Sulisty*, *supra* note 29.

⁵¹ [2005] 3 S.L.R. 375 at para. 51 (H.C.). See also Tracey Evans Chan, "The *Pari Passu* Principle in Judicial Management" [2006] *Sing. J.L.S.* 213 at 216-218.

⁵² *Hitachi*, *supra* note 49 at para. 81.

⁵³ *Ibid.* at para. 86.

approves it. This means that every creditor is entitled to challenge the scheme before the courts and to point out why it should not be sanctioned. Such objections can be based on the failure of the scheme to embody the *pari passu* principle or be made for other reasons.

Principle 4 was recently emphasised in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) v. TT International Ltd*, where the Court of Appeal highlighted the importance of informational transparency in insolvency proceedings, and the scheme process in particular via the explanatory statement under s. 211.⁵⁴ Information disclosure is achieved in different ways in JM, namely through the appointment of an independent officer, the judicial manager, who is accountable to the creditors in general at a s. 227N meeting, and their representative creditors' committee appointed under s. 227O. In addition, the former management of the company is required to submit a statement of affairs and co-operate with the judicial manager.⁵⁵

Principle 5 is a follow through from Principle 1, in that where suitable, the reorganisation of the company's financial and business affairs, or a sale of the whole or part of its going concern is the central concern of the safe harbour afforded by the statutory moratorium in both JM and schemes of arrangement (when used as a corporate rescue mechanism). On the principle of maximising enterprise wealth, Girgis argues:⁵⁶

Public interest is defined by the goals that are internal to the logic and rationality of the legal regime in question... Under the [*Companies' Creditors' Arrangement Act*], public interest has typically been interpreted to mean that corporations should continue to exist for the welfare of its constituency groups because reorganization is chosen over liquidation when 'the reorganized firm is better for its owners as a group than the alternative use of the assets'.

While reflecting the goals and principles articulated in liquidation, the public interest in corporate rescue processes such as JM is decidedly more oriented towards the maximisation of enterprise wealth and the extent to which this would work to the benefit of the primary stakeholders and the wider community's interest in seeing this value preserved. In contrast, while similar investigative and enforcement powers have been conferred on the judicial manager,⁵⁷ the public interest in enforcing commercial morality takes a back seat in corporate rescue in order to temporally focus resources on the former as represented by the specific statutory goals under s. 227B(1)(b).

IV. THE PUBLIC INTEREST EXCEPTION

Nonetheless, the main barometer for the public interest is the provision for making a JM order under s. 227B(10) where 'the public interest' so requires, notwithstanding

⁵⁴ [2012] 4 S.L.R. 1182 at para. 37 (C.A.). See also *Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufacturers Pte Ltd* [2003] 3 S.L.R.(R.) 629 at paras. 24, 37 (C.A.).

⁵⁵ Sections 227L and 227V respectively.

⁵⁶ Jassmine Girgis, "Corporate Restructuring, the Evolution of Corporate Assets and the Public Interest" (2013) 22 *International Insolvency Review* 29 at 46.

⁵⁷ See ss. 227W and 227X(b) importing ss. 341 and 342.

that any of the conditions under that section may not be satisfied. Part VIIA of the CA does not define what the ‘public interest’ represents, nor did the phrase receive any specific attention in the Parliamentary Debates or Select Committee deliberations.⁵⁸ The ‘public interest’ exception was first judicially analysed in *Re Cosmotron Electronics (Singapore) Pte Ltd* and described by Chan Sek Keong J. (as he then was) as an “overriding power”:⁵⁹

Section 227B(10)(a), in my view, has the effect of vesting in the court an overriding power to make a judicial management order if it considers the public interest so requires notwithstanding that it may not be satisfied that the making of the order would be likely to achieve one or more of the purposes set out in s 227B(1). This is undoubtedly the effect of s 227B(10)(a) in relation to s 227B(1)...

The expression “public interest” in s 227B(10) is not statutorily defined. But since its existence is a requirement for the exercise of an overriding power, it would connote an *interest or object* which, if achieved, *would transcend any or all of the purposes prescribed in s 227B*.

Several observations may be made here. First, it is important to note that the principal ground for dismissing the petition in that case was the failure to satisfy the requirements of s. 227B(1)(b). The petitioner had failed to persuade the court that either of the relevant purposes relied on in sub-clauses (i) or (iii) would likely be achieved. Thus the comments on public interest must be read in that particular light—that the public interest must represent an interest or object that would “transcend” the purposes in s. 227B(1)(b) when there was insufficient evidence to persuade the court that those purposes could be achieved according to the requisite standard of proof (a real prospect).⁶⁰ The court declined to speculate on how the public interest exception might apply to other requirements of s. 227B.

Secondly, it is difficult to understand why the public interest must necessarily transcend any objective found in s. 227B(1)(b). It would make sense why the wider public *interests* in the outcome of the JM would do so, since the JM procedure was designed primarily to benefit the company and its creditors, and their interests would be the focus of the exercise of discretion under s. 227B(3). However, it is difficult to see what *other* objective should be pursued under JM on the basis of a potential s. 229B(10) public interest order, given the wide purport of s. 227B(1)(b) to achieve the purposes of the survival of the company’s undertaking as a going concern, or a more advantageous realisation of its assets. As discussed above, it is well accepted as a matter of legislative and judicial policy that there is a public interest in facilitating the restructuring and hence, rescue of viable businesses, and avoiding premature liquidations. It could also be argued to be in the wider public interest that the assets of the company, even where some form of rescue is not possible, are realised for their maximum value, since this reinforces in some way the *ex ante* incentives for provision of credit.⁶¹ However, as the judgment stands, it suggests a far narrower

⁵⁸ See T.C. Choong & V.K. Rajah, *Judicial Management in Singapore* (Singapore: Butterworths, 1990) at 38, 39.

⁵⁹ [1989] 1 S.L.R.(R.) 121 at para. 22, 23 (H.C.) [*Re Cosmotron Electronics*] [emphasis added].

⁶⁰ See *Deutsche Bank AG v. Asia Pulp & Paper Co Ltd* [2003] 2 S.L.R.(R.) 320 at para. 17 (C.A.) [*Deutsche Bank AG*].

⁶¹ See Keay, “Insolvency Law”, *supra* note 17 at 525.

reading of what constitutes the public interest—only if it would promote transcendent interests or objectives beyond those explicitly articulated by s. 227B(1)(b).

Thirdly, it is puzzling why s. 227B(5) was not relied upon as a more compelling ground for dismissal, since the opposing creditor Indian Bank appeared to be a person who had appointed a receiver and manager within the meaning of s. 227B(4). This would have entitled it to veto the JM petition since the phrase “shall dismiss” under s. 227B(5) is clearly intended to be imperative, rather than discretionary.⁶² This leaves open the question of the circumstances in which the public interest exception could override the exercise of such a veto power—this exception was clearly envisaged by the Select Committee of functioning in precisely such a manner.⁶³ It would seem from *Re Cosmotron Electronics* that the same narrow requirement of ‘transcendence’ of object or interest would still apply.

This particular aspect of the public interest exception was directly engaged in the subsequent decision of *Re Bintan Lagoon Resort Ltd*,⁶⁴ where a receiver and manager of the company’s undertaking in a holiday resort located in Bintan, Indonesia, had already been appointed. The JM application was brought by a group of unsecured creditors who sought to wrest control of the process of selling the company’s assets from the receiver and manager in favour of JM. In dismissing the petition, the court construed the public interest requirements as follows:⁶⁵

In other words, the court has the power (if it considers the public interest so requires) to make a judicial management order even though the making of such order is unlikely to achieve any of the purposes which, by virtue of s 227B(1), are prerequisites to the making of such order. Such a power therefore should not be lightly exercised even if it may be in the public interest to do so. The court must be of the view that the public interest so requires; *it should not only be opportune but also importunate that the power be exercised*. Thus, even assuming, as the petitioners’ counsel contended, that it is in the public interest to rescue companies with a decent chance of survival, that alone is not enough.

The question whether the public interest so requires may perhaps best be answered by considering the *likely consequences of not making* a judicial management order. Will a refusal to make such order lead to or allow the dismemberment or collapse of a company *whose failure will have a serious economic or social impact*? The Pan-Electric type of case comes immediately to mind as a paradigm but I do not suggest that the circumstances need be as dire nor that the consequences of not granting the order should be as grievous.

The touchstone of the public interest after *Re Bintan Lagoon* is now severity of economic or social impact by reason of corporate failure, with a rehabilitative object *per se* insufficient. On the facts, any buyer of the undertaking wishing to continue its operations would have to preserve some employment and chains of supply; the adverse consequences of failure and non-recourse to JM were thus overstated.⁶⁶

⁶² See Sing., Select Committee, *Report of the Select Committee on the Companies (Amendment) Bill (No. 9 of 1986)* (Singapore: Singapore National Printers Ltd, 1987) at D 40, 41.

⁶³ *Ibid.*

⁶⁴ [2005] 4 S.L.R.(R.) 336 (H.C.) [*Re Bintan Lagoon*].

⁶⁵ *Ibid.* at paras. 13, 14 [emphasis added].

⁶⁶ *Ibid.* at para. 16.

This reasoning essentially extends the *Re Cosmotron Electronics* 'transcendent' conception of public interest to the exercise of a s. 227B(5) veto. The more stringent construction proffered is nonetheless imprecise since it must surely be a question of degree how serious the economic and social consequences must be before the threshold is breached. What is clear is there must be some systemic level of repercussions, as instanced by the example of the Pan Electric Group collapse given by the court, and not merely the typical, insulated implications of failure of the company's business in question as part of the normal entry and exit process of businesses in a competitive market.⁶⁷

The main difficulty, however, with the reasoning in *Re Bintan Lagoon* is that it conflates the varied conceptions of public interest (discussed above) into a single, narrow dimension of systemic or severe economic and social impact. What the cases seem to overlook is that a veto under s. 227B(5) operates *notwithstanding* that the applicant may have demonstrated a good case for achieving one of the purposes of JM under s. 227B(1)(b) relating to the preservation of going concern surplus or enhanced liquidation value. In this situation, it is not clear why such a high consequential threshold is necessary, working as it does only in the self-interest of the QFCH under s. 227B(5) read with s. 227B(4), and potentially thwarting the basic public interest *objective* for the corporate rescue process in preserving going concern value.

The interpretation of public interest requiring systemic economic or social impact makes more sense if the hurdle to be breached is the lack of a real, evidential prospect of achieving these objectives.⁶⁸ This was the case in *Re Cosmotron Electronics*, where the proposal for JM conceived of a plan no different from what the receiver and manager was proposing.⁶⁹ In such a factual situation, the presence of grave economic and social consequences may suggest giving JM a shot anyway in the wider public interests of the community and economy. In this respect, Butler and Gilpatric draw a distinction between the 'private' and 'external' going concern surplus of a candidate firm for corporate rescue. The former relates to the surplus value over a firm's liquidation value that reflects the transaction costs saved from maintaining production through the firm's established contractual relationships.⁷⁰ The latter represents the investments and transaction costs that both contractual and non-contractual counterparties have made or incurred in cultivating commercial relationships with the firm. For example, as mentioned above, employees develop firm-specific human capital that depends on their ongoing relationship with the firm, and may exceed any outstanding financial claims they may have against the firm. If the firm is liquidated, a large external cost is imposed on these parties, which is distinct from the value of its private going concern surplus. Thus, a corporate rescue of the firm offers the additional potential benefit of preserving this external value.⁷¹

⁶⁷ See comments of the Minister of Finance in the second reading of the *Companies (Amendment) Bill (No. 9 of 1986)*, *supra* note 36 at col. 41.

⁶⁸ See the test adopted in *Deutsche Bank AG*, *supra* note 60, following *Re Harris Simons Construction Ltd* [1989] B.C.L.C. 202 at 204 (Hoffmann J.) (as he then was).

⁶⁹ *Supra* note 59 at paras. 17-19.

⁷⁰ Butler & Gilpatric, *supra* note 33 at 281.

⁷¹ *Ibid.* at 282-284. See also Warren, *supra* note 18 at 356, who argues this reflects the economic reality that the parties with formal legal rights in an insolvency process never completely internalise the full costs of business failure.

However, apart from this public interest exception at the threshold of entry into JM, nothing in the statutory provisions indicates that these external costs should override the direct interests that creditors have in preserving the 'private' going concern surplus. Put another way, nothing in the provisions suggests that JM should seek to preserve external going concern value even if there is no private going concern value at stake. Otherwise, this would sanction the redistribution of firm value away from its creditors to the firm's external interests.⁷² In addition, the absence of private going concern value indicates that the firm is not viable, and will likely eventually be liquidated by its owners or re-enter an insolvency process.⁷³

Thus, none of the provisions in Part VIIIA instruct the manager on how she is to proceed differently if an order is made under the public interest exception. Section 227M(1) requires her to submit proposals for achieving one or more of the statutory purposes mentioned in s. 227B(1), which relate to preserving going concern value or enhancing liquidation value, not the public interest. Secondly, none of the provisions provide for any cram down or loss allocation mechanisms in respect of creditor claims and interests in order to promote a rescue outcome.⁷⁴ The equivalent reorganisation provisions in s. 210 are modified solely to the extent of requiring a one-class majority of 75% in value of creditor votes.⁷⁵ Shareholders are not offered any voting rights. Thus, creditors are entitled to vote in their private interests, and have no obligation or incentive to consider the external costs of failure since the wider benefits of rehabilitation would not accrue to them. Delay by keeping the company in JM could confer some leverage on the manager, but s. 227N(4) provides that the court may discharge the JM order if the creditors decline to approve the manager's proposals, while s. 227Q obliges the manager to apply for a discharge from JM where it appears to her that the statutory purposes are incapable of achievement.

These constraints in the JM process strongly suggest that public interest considerations only permit a relaxation of the threshold entry requirements. If significant externalities of firm failure exist, this would warrant the breathing space offered by the regime to further investigate the possibility of a solution that would preserve the going concern value, even in the absence of current evidence of a *private* going concern surplus. However, evidence of *external* going concern surplus is likely costly to obtain with any degree of useful precision.⁷⁶ Typically, the onus is on the applicant company or creditor(s) to produce supporting evidence of this, but they may not have adequate incentives, access or resources to gather such information. In this respect, the standing of the Minister of Finance under s. 227B(3)(d) to nominate a person to act as judicial manager could prove important as a source of relevant evidence. The standing of eligible trade unions to represent the interests of employees

⁷² Rizwaan Jameel Mokal, *Corporate Insolvency Law: Theory and Application* (Oxford: Oxford University Press, 2005) at 63, who argues that to extend insolvency law's application to address such wide-ranging interests would ensure that "the law as a whole treated similarly-placed individuals differently for wholly arbitrary reasons". See also Douglas G. Baird, "A World Without Bankruptcy" (1987) 50 *Law & Contemp. Probs.* 173 at 184, 185, who argues that such alterations or redistributions in insolvency law would impose additional costs by encouraging forum shopping.

⁷³ Butler & Gilpatric, *supra* note 33 at 287.

⁷⁴ Cf. the US Bankruptcy Court's cram-down powers under Chapter 11: see 11 U.S.C. § 1129(b)(1).

⁷⁵ Section 227X(a). Note also the observations in *Hitachi*, *supra* note 49 at paras. 43-46.

⁷⁶ Butler & Gilpatric, *supra* note 33 at 287.

collectively may also improve access to information concerning employees' firm-specific investments of human capital, in evaluating the public interest behind the particular JM application.⁷⁷ If such evidence of negative externalities on third party or non-creditor interests is available, it should approach such a level as to warrant a recalibration of the cost-benefit analysis of investigating a rehabilitative option under JM as compared to competing insolvency or creditor enforcement processes such as a winding up or receivership—and thereby warranting a JM order on the ground of public interest.

However, given the typical difficulties of direct proof of external going concern value, the court in *Re Bintan Lagoon* could understandably only vaguely outline the parameters of a "serious economic or social impact".⁷⁸ It is suggested that this must be inferred from the nature of the company's functions and business operations, and the potential for systemic impact on the relevant industry or economy as a whole. This potential must then be weighed against the deficiencies of evidence concerning the prospect of preserving private going concern value (which may not be within the applicant's control, and also involve difficulties of proof), in order to assist the court to make a judgment, particularly at the margin, if JM is merited.⁷⁹ On the whole, one could be forgiven for thinking that this particular conception and operation of the public interest in JM will rarely be invoked.

V. THE DRAWBACKS OF RECEIVERSHIP IN PROMOTING THE PUBLIC INTEREST

It therefore becomes necessary to understand the reasons why a QFCH was given a veto power under s. 227B(5) in the first place, and the bearing that this has on whether we should restrict ourselves to such a narrow conception of the public interest in JM. The effect of s. 227B(5) is to give the QFCH or a receiver and manager a statutory priority in pursuing a private remedy over the collective process under JM. At the Select Committee deliberations, the permissive "may" in the original draft of s. 227B(5) was substituted with "shall". Dr Richard Hu, then-Minister of Finance, explained the need for the amendment to the Select Committee as follows:⁸⁰

This is an important amendment. The effect of it would be that the court would be bound, *subject to the new subsection (10)*, to dismiss a petition if it is satisfied that a floating charge holder has appointed a receiver and manager or will appoint a receiver and manager or if such holder opposes the making of the judicial management order... The use of this form of security has become widespread amongst the financial community, particularly the banking community, which provides a substantial part of loan finance to the corporate sector not only for the working capital but also for stock in trade etc., subject to a floating charge. We are, therefore, mindful of the fact that we should not discourage loan financing by financial institutions by means of a floating charge or restrict commercial enterprises from raising finance in this way...

⁷⁷ See *supra* note 40.

⁷⁸ *Supra* note 64 at para. 14.

⁷⁹ Butler & Gilpatric, *supra* note 33 at 288, 289. As they point out, the presence of private going concern value is itself difficult to determine.

⁸⁰ *Report of the Select Committee on the Companies (Amendment) Bill*, *supra* note 62 [emphasis added].

For these reasons I now consider that the introduction of this new Part VIIIA should not disturb existing law in this area nor interfere with the rights of a debenture holder under a floating charge instrument... This means that the law of receivership would continue to apply in such a case and *the receiver and manager would, under the normal terms of a debenture, be able to accomplish much the same kind of objectives as a judicial manager appointed under the new Part VIIIA*, i.e., he could sell the business as a going concern or, generally, seek to rescue an ailing business.

This thinking was entirely consistent with that of the Cork Committee in its recommendations for the (then) new administration procedure under the U.K. *Insolvency Act 1986*.⁸¹ Administration, on which JM is substantially modelled, was conceived of as playing a supplementary role to receivership—especially in the situation where there was no creditor contractually entitled to invoke such an enforcement mechanism that conferred managerial control over the company’s undertaking.⁸² Alternatively, the statutory moratorium could confer benefits on JM over receivership that could persuade such QFCHs to accede to a JM application. However, under the U.K. *Insolvency Act 1986*, this was achieved by the statutory powers conferred on an administrative receiver.⁸³

From a theoretical perspective, the principal benefit of a receivership appears to be its informal procedure and *potentially* lower administrative cost. It obviates the need for judicial involvement, grants total control to the secured creditor in the realisation of its security, while avoiding protracted creditor negotiation over auction or sale procedures that may arise under a JM process. Further, in respect of small and medium sized enterprises (“SMEs”) where there is usually a concentrated creditor with extensive security collateral, there are enhanced incentives for monitoring the company’s financial condition and economic prospects by the concentrated creditor and consequently increased discipline on management.⁸⁴ Thus such a concentrated creditor can contribute this information to the receiver and manager it appoints, thereby increasing the efficiency and optimality of enforcement and returns for the secured creditor, preferential creditors and unsecured creditors as well.

However, there have since emerged equally powerful concerns about the structural sub-optimality of receivership (or administrative receivership) in so far as it hoped to serve as a privately ordered corporate rescue mechanism. First and foremost, the hope and assumption that receivership can concurrently serve the public interest in collective creditor wealth maximisation rests on the premise that the pursuit of the QFCH’s self interests coincides with that of the company’s other unsecured creditors at large. This is only true where the QFCH is under-secured, such that there would be an overlapping self interest in maximising the value of the company’s undertaking, whether through sale or a restructuring to preserve going concern surplus. However, if the secured creditor is over-secured (*i.e.* where the value of the company’s assets in a quick sale exceeds the value of the secured debt and enforcement costs), such that a sub-optimal realisation of the company’s assets would completely

⁸¹ *Cork Report*, *supra* note 1 at paras. 495-497.

⁸² *Ibid.* See also *Atlantic Computers*, *supra* note 41 at 525 (Nicholls L.J.).

⁸³ See Part VI, Section A below.

⁸⁴ John Armour & Sandra Frisby, “Rethinking Receivership” (2001) 21 *Oxford J. Legal Stud.* 73 at 87-89.

satisfy that creditor's interest, then we have a material divergence between the private and collective, public interests.⁸⁵ Pro-market commentators argue that the general creditors can simply buy out the secured claim (if they perceive greater value in the company's undertaking than the QFCH) and conduct by themselves the sale or a reorganisation that would achieve an outcome consistent with their valuation of the debtor company.⁸⁶ However, the underlying assumption that other categories of interested creditors can simply buy out the secured claims is unsubstantiated. There are also obstacles to collective action on the part of such creditors and the free rider problem. Furthermore, unless the appropriate tail-end creditors conduct the sale, intermediate creditors who undertake the sale may also not have appropriate incentives to maximise value.⁸⁷

Second, the conceptual role of the receiver cannot square with the collectivist concerns of JM in maximising *ex post* value and minimising cost. As a matter of legal duty, the receiver is not bound to allow the debtor company's business to continue. Her decisions cannot be impeached so long as they are taken in good faith while protecting the interests of the appointing secured creditor, even though these may be disadvantageous to the company on the whole.⁸⁸ Furthermore, this pro-secured stance is reinforced by the principle that the timing of the exercise of the right of enforcement over the security, once it has arisen, is not constrained by any duty to consider the interests of debtor or its creditors.⁸⁹ Once appointed, there is no obligation for the receiver and manager to continue to trade.⁹⁰ Receivership is thus a remedy designed to protect the interests of the security holder; preservation of the business is not the primary concern. Consequently, it is to be expected that she would follow the path of maximum recovery with minimum risk.⁹¹ It is also reasonable to expect that, save in clear cases, a receiver will more commonly cease operating the business. Where recovery for the secured creditor is assured, there is also little incentive for the receiver to minimise the costs of realisation of the security.⁹²

Third, it is questionable whether the concerns over the implications on asset-based lending practices in Singapore warrant a blanket exemption for the specified category of the QFCH. This creates an incentive in favour of over-securitisation solely in order

⁸⁵ See Rizwaan Jameel Mokal, "Administrative Receivership and Administration—An Analysis" (2004) 57 *Curr. Legal Probs.* 355 at 363-365 [Mokal, "Administrative Receivership"].

⁸⁶ Dan Prentice, Fidelis Oditah & Nick Segal, "Administration: The Insolvency Act 1986, Part II" (1994) 31 *L.M.C.L.Q.* 487 at 503, 504; David C. Webb, "An Economic Evaluation of Insolvency Procedures in the United Kingdom: Does the 1986 Insolvency Act Satisfy the Creditors' Bargain?" (1991) 43 *Oxford Economic Papers* 139 at 147, 148, 151.

⁸⁷ Webb, *ibid.*

⁸⁸ *Downsview Nominees Ltd. v. First City Corporation Ltd.* [1993] A.C. 295 at 312, 313 (P.C.); *Roberto Building Material Pte Ltd v. Oversea-Chinese Banking Corp* [2003] 3 S.L.R.(R.) 217 at paras. 52-56 (C.A.).

⁸⁹ *China and South Sea Bank Ltd. v. Tan Soon Gin (Alias George Tan)* [1990] 1 A.C. 536 (P.C.).

⁹⁰ *Medforth v. Blake* [2000] Ch. 86 at 102 (C.A.).

⁹¹ Armour & Frisby, *supra* note 84 at 90, 91, n. 116.

⁹² There is evidence that receivership costs can be as high as 25% (on average) of the value of the insolvent estate: see Julian Franks & Oren Sussman, "The Cycle of Corporate Distress, Rescue and Dissolution: A Study of Small and Medium Size UK Companies" (19 April 2000) at 14, online: CRS Turnaround Management <<http://www.turnaround-sa.com/pdf/The%20cycle%20of%20corporate%20distress.pdf>>; Mokal, "Administrative Receivership", *supra* note 85 at 365-368.

to preserve for the lender a remedial advantage,⁹³ incurring additional transaction costs whenever companies have to renegotiate with existing floating charge holders for subsequent secured financing as a result of pervasive overreaching security interests.

Fourth, the problem of structurally sub-optimal incentives is a real one: there is data from the U.K. that reveals that this was as common in as much as half of all receiverships there before the changes introduced via the *Enterprise Act 2002*.⁹⁴ In an earlier 2000 study of SMEs in the U.K. by Franks and Sussman, recovery rates for concentrated creditors like banks were high, while unsecured trade creditors received almost nothing.⁹⁵ Significantly, the costs of the receivership were high, amounting to almost one quarter of the proceeds, lending further credence to the analysis above of a lack of incentives to reduce costs once the secured creditor is adequately collateralised.⁹⁶ The rate of success in terms of going concern sales was uncertain, with overall figures estimated to be 44%, which is comparable to a later study of administrative receiverships and administrations between 2001 and 2004.⁹⁷ Most interestingly, however, the banks undertook their own private monitoring and rescue process of debtor operations outside receivership, utilising management changes, asset sales, and new finance or directors' guarantees. The success rates for these early interventions were very substantial—about 75%.⁹⁸ These benefits arguably flowed chiefly from the concentrated creditor status of the banks and their heightened incentives to monitor debtors.

There is further empirical support for these arguments from a more recent study conducted on the newly expanded administration procedure emplaced by the *EA*. Armour, Hsu and Walters conducted a multivariate analysis on a random sample of 348 administrative receivership and administration cases commenced between 1 Jan 2001 and 31 Dec 2004, and completed by 1 Feb 2006 (when the study was done).⁹⁹ Comparing administrative receiverships pre-*EA* and new administrations post-*EA*, they found that in cases where the secured creditor was over-secured, the realisations in administration were 60% higher than in an administrative receivership, while in cases where the secured creditor was under-secured, there were no significant differences in realisations.¹⁰⁰

However, direct costs in the post-*EA* administrations were significantly higher than pre-*EA* administrative receiverships, although this occurred mainly, again, in

⁹³ See *Re Croftbell Ltd.* [1990] B.C.C. 781 (Ch.) for an instance of the use of “lightweight” floating charges.

⁹⁴ (U.K.), 2002, c. 40 [EA]. Mokal, “Administrative Receivership”, *supra* note 85 at 364, 365, n. 37; John Armour & Rizwaan Jameel Mokal, “Reforming the Governance of Corporate Rescue: The Enterprise Act 2002” (2005) L.M.C.L.Q. 28 at 59.

⁹⁵ Franks & Sussman, *supra* note 92 at 3.

⁹⁶ *Ibid.*

⁹⁷ Sandra Frisby, *Report on Insolvency Outcomes* (26 June 2006) at 59, online: The Insolvency Service <<http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/InsolvencyOutcomes.pdf>>. The rate of going concern sales for administrative receivership was 41% in a dataset of companies entering administration and administrative receivership between Sep 2001 and Sep 2004.

⁹⁸ Franks & Sussman, *supra* note 92 at 2.

⁹⁹ John Armour, Audrey Hsu & Adrian Walters, *The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings: A Report Prepared for the Insolvency Service* (December 2006) at 30, 31, online: The Insolvency Service <<http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/ImpactofEARreport.pdf>>.

¹⁰⁰ *Ibid.* at 53.

cases where the secured creditor was over-secured. There was relatively little impact where secured creditors were under-secured.¹⁰¹ The increased direct costs resulted specifically from the impact of the legal changes introduced by the EA,¹⁰² rather than general changes in the regulatory environment for insolvency practitioners.¹⁰³

The underlying issue raised by the foregoing empirical studies in the U.K. relates to the optimal balance between receivership and JM within the corporate rescue framework. At the moment this balance is decidedly in favour of the QFCH and receivership, unless the QFCH is of the view that JM offers procedural or substantive advantages that are unavailable in receivership. Receivership has the potential to serve the wider public interest in maximising enterprise value, provided the optimal factors are in place. This however overlooks the moral hazard that occurs when the QFCH is over-secured. How serious is this problem of moral hazard here? There is no available empirical evidence of the state of affairs in Singapore, but if the U.K. studies are an indication of the level of over-security on the part of QFCHs here, then in half of all receiverships, there are real problems as to the incentives on the part of receivers and managers to maximise recoveries for all creditors and to keep costs down. In contrast, when the QFCH is under-secured, then its interests are *aligned* with all other downstream claimants in maximising recoveries under the floating charge.

Recourse to JM in the situation of over-security is presently dependent wholly on the whim and fancy of the QFCH, who would not have any incentive to accede to a JM when over-secured. Under s. 227B(5), the QFCH is not obliged to give any justification for his refusal, and the court is obliged to dismiss the application in the face of such opposition unless it considers that “the public interest so requires”.¹⁰⁴ Furthermore, the current receivership regime (and its governing principles on receivers’ duties) remains largely skewed in favour of promoting the interests of the QFCH, although there have been academic calls for a review of the duties of a receiver and manager.¹⁰⁵ What can therefore be done to achieve a better balance between the competing private and public interests arising from the interplay of receivership and JM?

VI. MEANS TO REDRESS THE IMBALANCE IN CORPORATE RESCUE POLICY

A. *Scope of the QFCH’s Veto under s. 227B(5)*

First, it is important for the courts to construe the ambit of the veto power under s. 227B(5) carefully. This is conferred on a receiver and manager or a person entitled

¹⁰¹ *Ibid.*

¹⁰² Specifically, it was suggested by Armour, Hsu & Walters, *ibid.* at 11, 12, that increased direct costs might be due to negotiations with diffuse unsecured creditors in administration and ‘litigation-proofing’ office-holder actions from subsequent scrutiny as a result of greater emphasis on justifying decisions and strategy.

¹⁰³ *Ibid.* at 59. For a description of what these may be, see *ibid.* at 26, 27.

¹⁰⁴ This was the intention of the Select Committee considering the *Companies (Amendment) Bill (No. 9 of 1986)* in substituting “may” for “shall” in the original draft: see *supra* note 62.

¹⁰⁵ Gerard McCormack, “Receivership and the Rescue Culture” (2000) *Company, Financial and Insolvency Review* 229; Wee Meng Seng, “Duties of a Mortgagee and a Receiver: Where Singapore Should and Should Not Follow English Law” (2008) 20 *Sing. Ac. L.J.* 559.

to appoint such a receiver and manager, which is defined in s. 227B(4)(b)(ii) as:

[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.

There is some ambiguity over whether the contractual entitlement to appoint a receiver and manager over substantially the whole undertaking of the company would suffice. It may be that notwithstanding such a contractual entitlement, control of the assets of the company may be more fragmented by reason of prior security or quasi-security interests, such as prior fixed charges, moveable assets on hire-purchase or assets subject to a title retention clause. It is submitted that s. 227B(5) should be read to require that the receiver and management be entitled at law to actually obtain control of the whole or substantially the whole undertaking of the company. Any significant gaps in the control rights of the QFCH or receiver and manager should preclude such a receivership from being able to trump a JM, on the logic that this would increase the chances of maximising the going concern value, or a more advantageous realisation of the company's assets.¹⁰⁶

The s. 227B(5) definition should also be contrasted with the definition of an administrative receiver under the former *Insolvency Act 1986*, which also provided for a QFCH's veto over administration. Section 29(2) of this Act provided that:¹⁰⁷

In this Chapter "administrative receiver" means—

- (a) a receiver or manager of the whole (or substantially the whole) of a company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge and one or more other securities; or
- (b) *a person who would be such a receiver or manager but for the appointment of some other person as the receiver of part of the company's property.*

It is clear from the italicised portion of s. 29(2) that the presence of a prior receiver of a portion of the company's assets did not preclude the existence of an administrative receivership in respect of the company, thus requiring the court to dismiss the petition for administration under s. 9(3) unless the person appointing the receiver consents to administration. This provision is explicable on the basis that U.K. administrative receivership in *addition* confers the power on the administrative receiver under s. 43 the same power as administrators to dispose of charged property. Thus the absence of contractual priority to control the disposal of assets would not matter under the former *Insolvency Act 1986* regime. This power does not exist in relation to receivership under Part VIII of the *CA*. The definition of a qualifying receiver and manager under s. 227B(5) should therefore purposively be interpreted to focus on the ability to control at least substantially the whole undertaking of the company, whatever the contractual entitlements of the chargee. Such a reading of the section would also be consistent with the rationale for a collective process like JM, and the legislative intent behind the provisions.

¹⁰⁶ Cf. Choong & Rajah, *supra* note 58.

¹⁰⁷ [emphasis added].

B. Reinterpreting the Public Interest

Secondly, limiting the scope of the statutory veto of JM still does not address head on the problem of an over-secured QFCH's (and the receivership's) sub-optimal incentive to maximise enterprise value. There is currently no effective means for a JM applicant, particularly the company and its management, to argue that a JM should nonetheless be allowed to proceed as it could implement a proposal that could preserve the company's business as a going concern, or more likely increase realisations for *all* creditors of the company without unduly prejudicing the interests of the over-secured QFCH.

Such an overriding power might have been initially possible under the public interest exception provided by s. 227B(10), but that possibility is extremely unlikely because of the restrictive judicial interpretation of what the public interest requires, as discussed in Part IV above. By reading public interest to mean an object or interest that transcends the purposes under s. 227B(1), the courts have arguably set an unrealistically high threshold of serious economic or social impact,¹⁰⁸ and overlooked the reality that the public interest can overlap with the collective private interests of the company's creditors.

Given the structural problems raised by private receivership, some mechanism is sorely needed to at least review or moderate the present exclusive control exercised by a QFCH. It is submitted that a more flexible approach to identifying the public interest is a preferable way forward. The burden remains on the applicant to demonstrate this, not the QFCH. However, it would require the applicant to build a more specific case as to why JM would offer a *better* prospect of greater return for creditors, as compared to what is envisaged a receivership would achieve, since the maximisation of enterprise value is contextual to the company's circumstances and market conditions. Apart from a concentrated creditor who has the appropriate monitoring incentives, such a case is only realistically likely to be put together by the company's management, who would have access to the requisite information necessary to support the application.

This enlarged judicial discretion under s. 227B(10) would not necessarily be met with scepticism based on the neutral results from the Armour, Hsu and Walters study mentioned above, for the reason that it does not involve a wholesale shift from receivership to JM (as is the position put in place by the *EA vis-à-vis* administration), but only in meritorious cases where the better returns to creditors (taking into account likely costs) is demonstrable. Furthermore, the practical need for some party with the information and means to put together a coherent JM application would also suggest the presence of a party with both the interest and means to monitor direct costs incurred in a JM, as opposed to a diffuse group of unsecured creditors hampered by coordination difficulties.¹⁰⁹ In any event, based on the data from the Armour, Hsu and Walters' study, secured creditors have not been prejudiced by a shift from receivership to administration, and even preferential creditors appear to benefit from a slight increase in returns.¹¹⁰ Firm protections for secured creditors, and a floating charge holder in particular, remain in place under ss. 227H(1) and (2), as is the

¹⁰⁸ *Re Bintan Lagoon*, *supra* note 64 at para. 14.

¹⁰⁹ *Cf.* the proffered reasons for the higher direct costs of administration in Armour, Hsu & Walters, *supra* note 99 at 26, 27.

¹¹⁰ *Ibid.* at 44. Note the mean and median recoveries for secured and preferential creditors.

remedy of challenging the judicial manager's decisions under s. 227R. What is really at stake is interim control over the company in order to determine, as objectively as possible, what the company's rescue or asset realisation prospects are.

A more flexible, nuanced interpretation of the public interest exception would allow the court to make a JM order notwithstanding the objection of the QFCH where a JM would promote the overall interests of the company and its creditors, without causing significant risk or loss to the interests of the QFCH. As discussed above, this would cohere with the public interest in maximising value in corporate rescue as a matter of legislative policy. This entails a balancing exercise weighing the tangible but competing interests of the company and the QFCH, and not an evaluation based on vague notions of serious social and economic consequences that may or may not constitute the 'public interest'. The courts are not unused to making such evaluations; witness the analogous approach adopted by the English C.A. in *Atlantic Computers* in dealing with applications by secured creditors to lift the automatic moratorium and allow individual enforcement:¹¹¹

In other cases when a lessor seeks possession the court has to carry out a balancing exercise, balancing the legitimate interests of the lessor and the legitimate interests of the other creditors of the company... The metaphor employed here, for want of a better, is that of scales and weights... It must be kept in mind that the exercise under section 11 is not a mechanical one; *each case calls for an exercise in judicial judgment, in which the court seeks to give effect to the purpose of the statutory provisions, having regard to the parties' interests and all the circumstances of the case.*

Finally, such a re-invigorated public interest exception could also deal with the potential problem of otherwise vulnerable floating charges being used to veto JM. A floating charge may be avoidable on the application of the judicial manager under s. 227T, but only if a JM order is made as the power is a personal one that vests in the office holder.¹¹² Prior to entry into JM, there would be no legal basis to avoid the floating charge on the grounds of it being an undervalue transaction or an unfair preference. It cannot be in the interests of a vulnerable QFCH to allow such a JM to proceed, who can therefore be expected to veto a relevant JM application. Under the former U.K. *Insolvency Act 1986*, s. 9(3)(b) specifically excluded such vulnerable floating charges from the veto power, but this provision was for reasons unknown not incorporated in the current JM provisions when they were first enacted in 1987. An argument could be made for admitting such instances under the purview of the public interest exception. Where the grounds for avoidance exist, the floating charge was not obtained pursuant to an arm's length lending transaction, but rather to improve the position of the QFCH in anticipation of an insolvency proceeding. Thus the underlying justifications for allowing such a QFCH to dictate the path of the financially troubled company (through the optimal incentives created by bona fide concentrated lending) are far weaker, or non-existent.¹¹³

¹¹¹ *Supra* note 41 at 542 [emphasis added].

¹¹² *Neo Corp Pte Ltd (in liquidation) v. Neocorp Innovations Pte Ltd* [2006] 2 S.L.R. 717 (C.A.).

¹¹³ *Cf. Choong & Rajah, supra* note 58.

VII. CONCLUSION

In summary, the concept of the public interest in corporate rescue context can be fleshed out in two related dimensions. First, this involves the recognition and attribution of appropriate weight to non-capital interests in the firm, who may nonetheless be affected by the outcomes of the insolvency or corporate rescue process. This operates as a legitimate consideration in unlocking the gates of JM, even in the face of evidential uncertainty of the presence of going concern surplus. However, even if a company is allowed into JM on this basis, it does not obviate the need to mount a corporate rescue on the basis of the preservation of *private* going concern value. Secondly, the balancing of these interests against those of creditors (with some form of capital claim, and who may also have conflicting interests *inter se vis-à-vis* the outcomes) leads to the distillation of general principles or policy objectives that serve to guide the balance between these interests where they conflict. An important principle serving both creditors' interests and the public interest in the context of corporate rescue is the maximisation of enterprise value, whether through a restructuring or sale of the business as a going concern.

It is argued that the Singapore case law approach to interpreting the public interest in the context of JM is too narrow, in that it focuses solely on the first aspect and prescribes a strict threshold before non-capital interests can outweigh creditor interests. Instead, greater credence can and should be given to the balancing of inter-creditor interests in pursuit of enterprise wealth maximisation in the public interest, in the light of the underlying rationale for granting a statutory veto in favour of a QFCH. This would allow the courts greater supervisory jurisdiction over the interplay between receivership and JM within the corporate rescue framework, and allow JM to proceed where the court is persuaded that the overall balance of interest points in such a direction, notwithstanding the exercise of a QFCH's veto power under s. 227B(5).