

December 23, 2020

Allied Properties Privatization

The Court of Appeal Sanctioned the Scheme and Reversed the Lower Court's Decision

SUMMARY

For details of the background and the Hong Kong Court of First Instance (“HKCFI”) judgment of the case, please refer to our earlier article – [The Curious Case of the Allied Properties Privatization: A Practitioner’s View](#).

On November 23, 2020, the Hong Kong Court of Appeal (the “**Court of Appeal**”) reversed the ruling of the HKCFI and exercised its discretion to sanction the proposed privatization of Allied Properties (H.K.) Limited (“**APL**”) by way of a scheme of arrangement (the “**Scheme**”). In so doing, the Court of Appeal clarified two questions that were raised by the HKCFI judgment. These are explained below.

Headcount Test

In its judgment, the Court of Appeal affirmed that, in lieu of the headcount test, the dual requirements under section 674(2) of the Companies Ordinance (Cap. 622) should be applied in schemes of arrangements to implement takeover cases. The dual requirements are that the votes cast against a scheme cannot exceed 10% of the total voting rights attached to all disinterested shares in the company (the negative 10% test), and that the scheme must be approved by a 75% majority in value of the voting rights of the members present and voting (the 75% test). Based on the evidence, the Court of Appeal was satisfied that the dual requirements were met. This dispels the doubts created by the HKCFI and the headcount test is now confirmed to be irrelevant in Hong Kong schemes for takeover cases.

Disclosure

The Court of Appeal held that the HKCFI judge was wrong to ignore the contents of the Composite Document and substitute the judge’s own views on dividend policy for APL’s dividend policy. The judge hypothesized that the Scheme Shareholders (i.e. the shareholders of APL other than the offeror and its

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concert parties) can expect APL to use the relevant reserve (i.e. the portion of APL's accumulated profits which APL proposed to use to pay the special interim dividend of HK\$1.50 per Scheme Share (the "**Special Dividend**") upon the Scheme becoming effective) to pay a dividend to all shareholders if the Scheme were not implemented. This hypothesis was at odds with the Explanatory Statement, which stated that the Scheme and the Special Dividend are inter-conditional, and that APL would not be in the position to pay the Special Dividend to the Scheme Shareholders if not for the offeror and the offeror concert parties' consent to waive and surrender their entitlements to the Special Dividend. More importantly, the Explanatory Statement set out the historical dividend policy of APL, under which a total dividend of HK6 to 8 cents was declared for each of the years from 2015 to 2019. As clearly disclosed in the Explanatory Statement, in the event the Scheme was not approved, the board of directors would revert to the existing dividend policy and no Special Dividend would be paid. The board, in the exercise of its commercial judgment, was entitled to form the view that reverting to the existing dividend policy would be in the best interests of APL.

Contrary to the HKCFI, the Court of Appeal was of the view that the Scheme Document already provided all the information that a Scheme Shareholder would need in order to make a comparison of the closing share prices with the Scheme consideration. Crucially, the Scheme Shareholders were given the information of the total price they would get under the Scheme for the cancellation of their shares, and the market value of their shares. As such, the Court of Appeal concluded that adequate explanation had been given to the Scheme Shareholders, and that the HKCFI judge was wrong to refuse to sanction the Scheme.

Concluding Remarks

According to the Court of Appeal, the Scheme had met the statutory requirements and satisfied the fairness test as it was one that an intelligent and honest person, a member of the class concerned and acting in respect of his interest, might reasonably approve. The Court of Appeal stressed that, as the privatization had the overwhelming support of the Scheme Shareholders, the court should be slow to differ from the majority views. This is because the court normally adheres to the principle that businessmen are better judges of what is to their commercial advantage than the court could be. For these reasons, the Court of Appeal exercised its discretion to sanction the Scheme and in so doing reverted the court's role in sanctioning a scheme to that which was customarily understood to be the case.

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