

# Landmark decision: Singapore's first successful application for super priority rescue financing

03 May 2019 | Contributed by [Oon & Bazul LLP](#)

## Introduction

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## Introduction

On 8 April 2019 Asiatravel.com Holdings Ltd (ATH) and its subsidiary, AT Reservation Network Pte Ltd (ATRN), (the applicants) obtained Singapore's first super priority order for rescue financing pursuant to Section 211E(1)(b) of the Companies Act (Cap 50, 2006 Rev Ed). The Honourable Justice Kannan Ramesh granted the order giving priority to the debt arising from the rescue financing over all of the applicants' unsecured and preferential debts (as specified in Sections 328(1)(a) to (g) of the Companies Act) – a crucial step in the restructuring of the applicants by way of a scheme of arrangement with the creditors.

### Facts

ATH is a public company listed on the Catalist of the Singapore Exchange Trading Limited (the SGX). The applicants ran an online travel platform through which they sold travel products, including hotel rooms, flights and tours. The applicants ran into financial difficulty and on 7 August 2018 filed applications with the Singapore High Court seeking moratoria against enforcement actions and legal proceedings by creditors under Section 211B of the Companies Act. The moratoria were extended on 7 September 2018. The Singapore Tourism Board decided to suspend the applicants' travel agent licence on 5 October 2018 and, as a result, they ceased business operations.

Under Section 211B of the Companies Act, companies can avail themselves of an automatic stay upon the filing of a stay application and pending the application's formal hearing. Section 211B of the Companies Act was introduced as part of the amendments to the Companies Act in May 2017.

#### **Application for super priority rescue financing under Section 211E(1)(b) of the Companies Act**

In November 2018 the applicants found an investor that was willing to invest up to S\$6.5 million in them in exchange for shares if their existing debts were compromised by way of a scheme of arrangement. As the investor also operates in the tourism industry, the parties agreed to revive the applicants' business instead of assuming a new business or acquiring new assets.

However, in order to obtain the SGX's approval in principle for the issuance of new shares to the creditors and the investor, and for the resumption of trading of ATH's shares, ATH had to be an ongoing concern with an existing business. In view of this, the applicants negotiated with the investor for S\$1.5 million of the S\$6.5 million investment to be channelled towards reviving their business (the so-called 'business quick-start financing'). The business quick-start financing was to be invested before the schemes of arrangement's approval. As a result, the investor required the protection afforded by the grant of super priority over the business quick-start financing.

On 21 January 2019 the applicants applied under Section 211E(1)(b) of the Companies Act for the business quick-start financing to be granted priority over all of the preferential debts specified in Sections 328(1)(a) to (g) of the Companies Act and all other unsecured debts. Section 211E(1)(b) of

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the Companies Act was also part of the 2017 amendments to the Companies Act.

In order to apply for super priority for rescue financing under Section 211E of the Companies Act, a company must have made an application under Sections 210(1) or 211B(1) for:

- a court-supervised compromise with creditors, members and holders of units of shares; or
- the court to restrain proceedings against the company respectively.

Under Section 211E(1)(a) of the Companies Act, rescue financing is treated as part of the costs and expenses of the winding up mentioned in Section 328(1)(a) of the act. The High Court in *Re Attilan Group Ltd* ([2018] 3 SLR 898) held that the applicant should adduce some evidence of reasonable attempts to secure financing without any super priority to move the court to exercise its discretion, even though it is not a condition that financing would not be obtained but for the grant of super priority.

Under Section 211E(1)(b) of the Companies Act, rescue financing is granted priority over all of the preferential debts specified in Sections 328(1)(a) to (g) of the act and all other unsecured debts. Applicants must satisfy the courts that they would be unable to obtain rescue financing from any party unless the debt arising from the rescue financing is given this priority.

Under Section 211E(1)(c) of the Companies Act, rescue financing is secured by:

- a security interest on company property that is not otherwise subject to a security interest; or
- a subordinate security interest on company property that is subject to an existing security interest.

Applicants must satisfy the courts that they would be unable to obtain the rescue financing from any party unless the debt arising from the rescue financing is given this priority.

Under Section 211E(1)(d) of the Companies Act, rescue financing is secured by a security interest on property of the company that is subject to an existing security interest of the same priority as or a higher priority than that existing security interest if:

- the company would have been unable to obtain the rescue financing from any party unless the debt arising from the rescue financing was secured in this manner; and
- there is adequate protection for the interests of the holder of the existing security interest.

*Re Attilan* is the only reported decision on an application for super priority under Section 211E of the Companies Act. In *Re Attilan*, the applicant (AGL) applied unsuccessfully for super priority under Sections 211E(1)(a) and (b) of the Companies Act in respect of a subscription of convertible equity-linked notes (the subscription).

### **Applicants must undertake reasonable efforts to explore other financing**

The High Court in *Re Attilan* stated that applicants must demonstrate that reasonable efforts have been undertaken to explore other financing that does not entail super priority. While this was only one of the factors to be considered by the court in exercising its discretion on whether to grant a super priority application under Section 211E(1)(a) of the Companies Act, it is a material condition stated in Section 211E(1)(b) of the act.

### **Other factors to consider under Section 211E(1)(b) of the Companies Act**

The High Court stated that the following factors from US cases are relevant considerations in the exercise of its discretion in adjudicating a super priority application:

- no alternative financing is available on any other basis;
- the proposed financing must be in the exercise of sound and reasonable business judgement;
- such financing is in the creditors' best interest;
- no better offers, bids or timely proposals are before the court;
- the proposed credit transaction is necessary to preserve the assets of the estate and is necessary, essential and appropriate for the continued operation of the debtors' businesses;
- the financing agreement's terms are fair, reasonable and adequate in light of the circumstances of the debtor and proposed lender; and
- the financing agreement was negotiated in good faith and at arm's length between the debtor on the one hand and the agents and the proposed lender on the other.

Nonetheless, the High Court stated that most of the factors from US cases were not directly relevant, as AGL's application had failed because it could not show the unavailability of financing without super priority under Section 211E(1)(b) of the Companies Act. Therefore, the court stated that it would consider the above factors more closely when the issue specifically arose.

## **Why was AGL unsuccessful in its super priority application?**

In *Re Attilan*, the High Court provided two main reasons for declining to grant super priority status to the proposed financing under the subscription.

### ***AGL did not undertake reasonable efforts to secure financing without super priority***

First, the court was of the view that AGL had failed to provide evidence of the unavailability of financing without super priority under Sections 211E(1)(a) and (b) of the Companies Act. AGL had failed to demonstrate that it had undertaken reasonable efforts to source for financing without the type of super priority sought.

### ***AGL did not demonstrate that the terms of the subscription were the best available***

With respect to AGL's application under Section 211E(1)(b) of the Companies Act, the court stated that AGL's belief that the terms of the subscription were the "best possible that could be obtained" was not backed up by any credible evidence. The court explained that evidence should have been deposited to put on record that alternative sources of financing had been sought but had been rejected. For example, AGL could have produced correspondences relating to rejections or negotiations with other financial institutions or possible rescuers. The court stated that AGL had provided mere unsubstantiated assertions.

## **Business quick-start financing**

The following factors may have differentiated the applicants' business quick-start financing from AGL's proposed financing under the subscription, which may have resulted in their success in obtaining the super priority order:

- The applicants approached their existing lenders, which were unwilling to provide any further financing. Apart from their own efforts, the applicants also engaged a third-party investment banking and financial advisory firm, DHC Capital Pte Ltd, to approach the market and identify other potential lenders that would be willing to offer financing to them. None of the nine other potential lenders which DHC approached were willing to provide any financing for a variety of reasons, including the following:
  - The applicants' weak financial position – the applicants had no hard assets or assets of significant identifiable value equivalent to the S\$1.5 million loan that potential lenders would require as security for financing. This seems likely to have discouraged potential lenders from providing funding as there was limited downside protection to potential lenders in the event that the business could not successfully recommence.
  - The cessation of the applicants' business operations – this seems likely to have discouraged potential lenders from providing funding as there was uncertainty surrounding the applicants' ability and timeline to recommence operations. The applicants must also have operated successfully for several months before they could apply to the SGX for the resumption of trading of its shares.
  - The short timeline to finalise terms of funding given the court deadlines and need to quickly recommence business operations – this factor, together with the complexities and interconnectedness of multiple work streams, such as the court process under Section 211B of the Companies Act, proposed new equity investment and compromising debts owed to the applicants' creditors by way of schemes of arrangement may also have discouraged potential lenders from providing funding.
  - The niche nature of the online travel agency market, with only a limited number of players that might be interested in investing in the companies – additional factors that potential lenders might have considered were business strategy (eg, the nature of industry and stage of investment) and the level of business synergies that could be captured once the applicants' business operations have recommenced or turned around. These business synergies could include reducing costs through shared cost centres and strategic synergies via combining similar businesses to capture scale or geographic expansion. To that end, there may have been no interest from the lenders because the limited number of players may have had other alternative options at their disposal (eg, setting up their own platform or forming commercial partnerships or joint ventures).
- The applicants set out in their affidavit evidence the efforts made to secure rescue financing to restart the applicants' business activities and why such rescue financing was critical to the restructuring efforts.
- The applicants also filed affidavit evidence containing an analysis of how each component of the rescue financing was arrived at and the assumptions that were made in this regard.
- The liquidation scenario would have resulted in no returns to the applicants' unsecured creditors because they had no discrete assets to be realised for value apart from their online platform.

## Comment

This case deals only with an application under Section 211E(1)(b) of the Companies Act for an order that if a company is wound up, the debt arising from any rescue financing obtained, or to be obtained, by the company is to have priority over all of the preferential debts specified in Sections 328(1)(a) to (g) of the act and all other unsecured debts. Singapore has yet to see a successful application under Sections 211E(1)(a), (c) and (d) of the Companies Act. The decision in *Re Attilan* left unanswered questions regarding the factors that the courts will consider in an application for super priority under Section 211E(1)(a) of the Companies Act for an order that if the company is wound up, the debt arising from any rescue financing obtained, or to be obtained, by the company will be treated as if it were part of the costs and expenses of the winding up mentioned in Section 328(1)(a) of the Companies Act. It also remains to be seen what would constitute "adequate protection for the interests of the holder of that existing security interest" under Section 211E(1)(d) of the act.

Nonetheless, this groundbreaking decision provides valuable guidance to insolvency practitioners regarding future applications for super priority rescue financing. This will hopefully increase the attractiveness of distressed financing as an investment opportunity in Singapore, fostering its development as an insolvency and restructuring hub.

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