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# DIRECTOR'S DUTIES OF CARE, SKILL AND DILIGENCE ON UNFAIR PREFERENCES PAYMENTS



**The litigation between BIT Baltic Investment & Trading Pte Ltd, represented by its Liquidator, against its former director Mr Wee See Boon ([2022] SGHC 110 and [2023] SGCA 17) provides an important clarification of a director's responsibilities in the context of insolvency and related party transactions. While the High Court had initially dismissed the Liquidator's claim against Mr Wee, the Court of Appeal substantially reversed that decision, defining fiduciary duties and duties of care, skill and diligence, especially where a director becomes aware of unfair preference payments after they have occurred.**

**This case study also draws out and describes clearly payments that were unfair preference transactions. Such transactions are subject to a claw back under Section 329 of the Companies Act.**

## The High Court Judgment

BIT Baltic Investment & Trading Pte Ltd ("BIT Baltic") was incorporated in 2011 and was in the business of chartering and managing vessels. The directors of BIT Baltic were Mr Wee (the Singapore resident director) and two German nationals, Mr Peter Christian Harren and Dr Martin Harren, who had day to day management control over the operations of BIT Baltic.

In December 2018, BIT Baltic made payments amounting to US$1,472,500 to two related German companies, HARPA Service & Support GmbH & Co. ("HARPA") and HPS Shipping & Management GmbH & Co. KG ("HPS"). The funds used came almost entirely from loan repayments by BIT Baltic's holding company. At this time, BIT Baltic had ceased generating revenue and was insolvent.

Following the commencement of compulsory liquidation proceedings in June 2020, the Liquidator of BIT Baltic, brought legal proceedings against Mr Wee, alleging that he had breached his fiduciary and statutory duties by facilitating, permitting, or failing to prevent the payments made to HARPA and HPS, which were said to constitute unfair preferences under Singapore insolvency law. Although HARPA and HPS repaid the principal sum before the hearing, the Liquidator pursued Mr Wee personally for additional damages, including interest loss and costs.

The High Court made several key findings:

- **The payments were unfair preference transactions**

  All statutory elements were met: BIT Baltic was insolvent or became insolvent because of the payments, HARPA and HPS were creditors and the payments placed them in a better position than other creditors, and the payments occurred within the 2-year claw-back period.





- **Mr Wee did not know of the payments at the time they were made**

  The court noted that the German directors controlled BIT Baltic's operational and financial decisions, and that Mr Wee was informed of the payments only after they had already occurred.

- **No breach of fiduciary duties**

  Since Mr Wee neither authorised nor procured the payments, and lacked contemporaneous knowledge, the court held that Mr Wee's failures cannot be described as dishonest.

- **No breach of the duty of care, skill and diligence**

  Given Mr Wee's limited role as a local resident director whose primary responsibilities were limited to that of doing the necessary paperwork with auditors, relevant agencies and dealing with regulatory authorities in Singapore, the court held that it was reasonable for him not to have detected the payments earlier.

Accordingly, the High Court dismissed the Liquidator's claim in its entirety.

## The Court of Appeal Judgment

On appeal, the Liquidator challenged the High Court's characterisation of Mr Wee's role and argued that, even if Mr Wee may not know of the payments when they were made, he breached his duties after becoming aware of them. The appeal raised the following pertinent issues:

- Whether Mr Wee's role was wrongly described as merely administrative; and

- Whether Mr Wee breached any duties after acquiring knowledge of the payments and BIT Baltic's insolvency state.



The Court of Appeal took a more searching view of both evidence and directors' duties and made the following findings:

- **Mr Wee's role was not limited**

  The court of appeal found that Mr Wee's involvement in BIT Baltic went beyond regulatory compliance. He had signed the service agreements with HARPA and HPS, acted as an authorised bank signatory, signed audited financial statements and approved substantial inter-company loans.

- **Knowledge acquired after the payments was decisive**

  Mr Wee was aware of the payments and of BIT Baltic's insolvent state by 15 August 2019 at the latest, when he signed the audited financial statements for the year ended 31 December 2018. The audited financial statements disclosed BIT Baltic's net liabilities position, contained a qualified audit opinion casting doubt on BIT Baltic's ability to continue as a going concern and disclosed the payments as significant related party transactions. Even if Mr Wee had been unaware at the time of payment, this subsequent knowledge triggered duties going forward.

- **Breach of the duty of care, skill and diligence**

  Once Mr Wee knew of the payments and BIT Baltic's insolvency state, he had an obligation to inquire into their propriety, take follow-up steps and seek recovery. His failure to do so fell below the minimum standard expected of directors.

Accordingly, the Court of Appeal substantially allowed the appeal and ordered Mr Wee to compensate BIT Baltic for the loss.

## Conclusion

Together, the two judgments underscore a critical lesson: a director's obligations do not end simply because a wrongful transaction has already occurred. Awareness after the fact will still trigger legal responsibilities, particularly the duty to act with care, skill and diligence to protect the interests of the company and its creditors, especially once insolvency is evident.

The judgments also provide valuable guidance on what may constitute an unfair preference and the circumstances in which such transactions may be set aside, with the recipients required to repay or return the assets for distribution to the general body of creditors.

For debtors facing financial distress, it is equally important to understand that they are not without recourse if certain creditors have been preferred at the expense of others. The availability of remedies will depend on the specific facts, the timing of the transactions, and the applicable insolvency laws. Where unfair preference transactions are suspected, debtors should seek advice from an experienced insolvency practitioner to assess the available remedies and determine whether recovery actions may be commenced. Professional guidance can help identify the recourse available and navigate the legal process. Early intervention can help preserve assets, maximise recoveries and ensure that creditors are treated fairly in accordance with the insolvency regime.

Complete Corporate Services advises companies and debtors on insolvency-related matters, including assessing potential unfair preference claims, recovery options and other available recourse.

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