

**IN THE HIGH COURT OF MALAYA
AT GEORGETOWN PENANG
COMPANIES WINDING-UP PETITION NO. 28-6-01/2013**

BETWEEN

ABDUL RAHMAN BIN ISMAIL

PETITIONER

AND

PEMBANGUNAN QUALICARE SDN BHD

RESPONDENT

GROUND OF DECISION

Introduction

1. These are competing applications to appoint a private liquidator in replacement of the Official Receiver for a wound up company.
2. The Respondent company was wound up by the Petitioner who is its contributor and director on 4 April 2013. The Official Receiver

was appointed as the provisional liquidator and the Petitioner filed his proof of debt.

3. Furthermore, the Respondent was indebted to China Idea Development Limited (“Creditor”) by virtue of an order made by this Court dated 3 April 2013 pursuant to Originating Summons no. 24NCVC-461-03/2013 registering the foreign judgment in terms of the consent order dated 20 April 2009 made in the High Court of the Hong Kong Special Administrative Region Court. Accordingly, the Creditor filed its proof of debt amounting to RM15,429,969.81 on 17 February 2015.

4. Additionally, the Respondent was also indebted to Yanfull Investment Ltd (“Further Creditor”) by virtue of an order made by the Kuala Lumpur High Court dated 18 October 2012 pursuant to Originating Summons no. 24NCVC-2429-09/2012 registering the foreign judgment in terms of the consent order dated 20 April 2009 made also in the High Court of the Hong Kong Special Administrative Region Court. Accordingly the Further Creditor also filed its proof of debt amounting to RM19,167,702.88 on 18 February 2004.

5. The dissolution of the Respondent has been still ongoing todate.
6. Consequently, the Creditor filed its notice of motion dated 5 October 2017 (enclosure 18) to apply to appoint Dato' Heng Ji Keng and Andrew Heng of Ferrier Hodgson MH Sdn Bhd as joint and several liquidators of the Respondent company in replacement of the Official Receiver.
7. As the result, the Petitioner similarly filed its notice of motion dated 7 December 2017 (enclosure 23) to apply to appoint Afrizan bin Hussein of Parker Randall Insol Plt as the liquidator of the Respondent company in replacement of the Official Receiver.
8. The affidavits filed for the purposes of the Creditor's application are as follows:
 - (i.) Creditor's affidavit in support affirmed by Ho Woon Choon dated 29 September 2017;
 - (ii.) Petitioner's affidavit in reply affirmed by Abdul Rahman bin Ismail dated 7 December 2017; and

- (iii.) Creditor's affidavit in reply affirmed by Ho Woon Choon dated 22 January 2018.
9. The affidavits that were filed for purposes of the Petitioner's application are as follows:
- (i.) Petitioner's affidavit in support affirmed by Abdul Rahman bin Ismail dated 7 December 2017;
 - (ii.) Creditor's affidavit in reply affirmed by Ho Woon Choon dated 23 January 2018; and
 - (iii.) Petitioner's affidavit in reply affirmed by Abdul Rahman bin Ismail dated 9 February 2018.
10. The Further Creditor also filed an affidavit affirmed by Kwan Will Sen dated 30 May 2018 to support the Creditor's application and oppose the Petitioner's application.
11. Both applications came before me for hearing on 4 and 18 June 2018. After hearing counsel, I ordered that Chua Man Kit of PKF Malaysia is appointed as the private liquidator and his

remuneration is based on the 2nd Schedule of the Companies (Winding-up) Rules 1972 with joint indemnity by the parties. There shall no order as to costs in respect of both applications.

12. I now provide below the supporting grounds of my decision.

Contentions and Findings

13. The relevant law is contained in s. 477 of the Companies Act 2016 which is *pari materia* with s. 227 of the Companies Act 1965 that stipulates as follows:

“227. Appointment, style, etc., of liquidators

The following provisions with respect to liquidators shall have effect on a winding up order being made:

(1) if an approved liquidator other than the Official Receiver is not appointed to be the liquidator of the company the Official Receiver shall by virtue of his office become the provisional liquidator and shall continue to act as such until

he or another person becomes liquidator and is capable of acting as such;

(2) if there is no liquidator appointed the Official Receiver shall summon separate meetings of the creditors and contributories of the company for the purpose of determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the Official Receiver;

(3) the Court may make any appointment and order required to give effect to any such determination, and, if there is a difference between the determinations of the meetings of the creditors and contributories in respect of the matter aforesaid, the Court shall decide the difference and make such order thereon as the Court may think fit;

(4) in a case where a liquidator is not appointed by the Court, the Official Receiver shall be the liquidator of the company;

(5) the Official Receiver shall by virtue of his office be the liquidator during any vacancy;

(6) any vacancy in the office of a liquidator appointed by the Court may be filled by the Court;

(7) a liquidator shall be described, where a person other than the Official Receiver is liquidator, by the style of "the liquidator", and, where the Official Receiver is liquidator, by the style of "the Official Receiver and liquidator", of the particular company in respect of which he is appointed, and not by his individual name."

14. In ***C.H. Construction & Trading v Langkah Cergas Sdn Bhd*** [1994] 5 MLRH 225, Zakaria Yatim J (later FCJ) held as follows:

"This is an application (Encl.57) by summons in chambers in which Messrs. C.H. Construction and Trading, the petitioner, is seeking the order of the Court in terms of the following prayers:

(a) that an approved liquidator pursuant to Section 8 of the Companies Act, 1965 namely, Mr. Ng Pyak Yeow be

substituted in place of the Official Receiver as liquidator of the Respondent until further order;

(b) that the liquidator upon giving security to the satisfaction of the Official Receiver and upon such appointment be at liberty to exercise all the functions and powers under the provisions of the Companies Act, 1965;

(c) that the cost of the application be taxed and paid out of the assets of the Respondent; and

(d) such further or other relief as this Honourable Court may deem fit and just to grant.

...

The Court is fully aware that the Official Receiver is inundated with work and therefore understands why he could not take immediate steps in the present case. The Official Receiver in fact by a letter dated 5th July 1994 had consented to the appointment of another person to act as liquidator in his place. It is to be noted that Mr. Ng Pyak

Yeow is an accountant practicing in Messrs. Ng, Lee & Partners.

In my opinion this is a proper case for the Court to make an order sought by the petitioner. In the circumstances I allow the application in terms of prayers (a), (b) and (c).”

15. At the outset, the Official Receiver here has no objection to the applications that it ceases to act as the provisional liquidator and be replaced by a private liquidator. The Official Receiver is however neutral on the choice of the private liquidator.
16. In view of the slow progress after 5 years in settling the dissolution of the Respondent company understandably because of the mammoth caseload handled by the Official Receiver, I am satisfied that this is a fit and proper case for the Court’s appointment of a private liquidator in replacement of the Official Receiver.
17. That notwithstanding, the Creditor and the Petitioner were however at odds over the choice of the private liquidator.

18. According to the Creditor, the nominee proposed by the Petitioner is unsuitable because Mr. Afrizan bin Hussein of Parker Randall Insol Plt would be put in a position of conflict of interest because Parker Randall Loh was appointed by the Respondent as its auditors from 14 March 2008 to 27 June 2009 and the Petitioner has not been forthcoming to deny or explain any relationship between Parker Randall Insol Plt and Parker Randall Loh. Moreover the proposed liquidation fee charges were uncapped and subject to further discussion with the Petitioner. The discussion is seemingly not transparent. That aside, the Creditor point out that Mr. Afrizan bin Hussein's performance as liquidator was questioned in ***Malayan Banking Berhad v SKS Foam (M) Sdn Bhd*** [2017] 1 MLJU 1514.

19. On the other hand, the Petitioner submitted that the nominees proposed by the Creditor and supported by the Further Creditor are equally unsuitable because Dato' Heng Ji Keng's performance as liquidator had similarly been questioned in ***Code Brilliant Sdn Bhd & Ors v Heng Ji Keng & Ors*** [2014] 6 CLJ 502. In addition, the Petitioner is suspicious and fearful that the Creditor's nominated liquidator may further venture to fish for evidence in the Respondent company for the Creditor in its law suit against the

Petitioner and the rest of the Respondent company's directors for fraudulent trading in KL High Court Suit no. 22NCVC-197-04/2015.

20. The duty of the liquidator particularly in respect of conflict of interest has been explained by Zulkefli Makinudin CJ (Malaya) (now PCA) in ***Ooi Woon Chee v. Dato' See Teow Chuan & Ors And Other Appeals*** [2012] 2 CLJ 501 as follows:

“[25] It is trite that the correct principle with respect to conflict of interest in the case of liquidators are as set out in McPherson's Law of Company Liquidation (at paragraph 8.120). The guiding principle is that the liquidator must be independent and be seen to be independent. In other words, there cannot be an actual or apparent conflict.

...

[27] On apparent conflict the correct approach is as set out in Advance Housing Ptv Ltd (in Liq.) v. Newcastle Classic Development Ptv Ltd [1994] 14 ACSR 230 at page 233:

"In performing his functions the liquidator must both be and appear to be independent and impartial of the creditors; Re Intercontinental Properties Pty Ltd (in liq) H 97712 ACLR 488 at 491-2

[After citing from Re Chevron Furnishers Pty Ltd. the Court held:]

...If the foregoing statement were taken as precluding any association, it being in the circumstances obiter, then even the most limited prior involvement with the company in liquidation could disqualify the relevant firm of accountants from providing one of its partners as liquidator. In my judgment, the correct balance is struck by permitting a liquidator to act as such even if there be a prior involvement with the company in liquidation, provided that involvement is not likely to impede or inhibit the liquidator from acting impartially in the interests of all creditors or be such as would give rise to a reasonable apprehension on the part of a creditor that the liquidator might be so impeded or inhibited. In short the question should be whether there would be a reasonable apprehension by any creditor of lack of

impartiality on the liquidator's part in the circumstances by reason of prior association with the company or those associated with it, including creditors, or indeed any other circumstance.”

21. In the English High Court case of ***Fielding v Seery & Anor* [2004] B.C.C. 315**, Maddocks J held as follows:

“(2) An application in relation to the appointment of the liquidator accordingly has to be considered by reference to the test adopted by Sir Andrew Morritt V-C, and he proceeds at para. 47 to set out the test being whether in his words. ‘it will be conducive to both the proper operation of the process of liquidation, and to justice as between all those interested in the liquidation.’

(3) It follows I think from this and from the statutory provisions and the rules to which I have referred, that although the majority vote of the normal course prevail, creditors holding the majority vote do not have the absolute right as to the choice of the liquidator. Thus the court may in

a proper case restrain the holding of a meeting to remove a liquidator; see Re Mansel, ex parte Sayer (1888) LR 19 QBD 679, and as applied to a company in creditor's liquidation the case of Re Barrings (No. 6) to which I have referred.

(4) A liquidator should not be a person nor be the choice of a person who has a duty or purpose which conflicts with the duties of the liquidator. There are many illustrations of this principle. I was referred in particular to Re City & County Investment Co (1877) 25 WR 342, Re Charterland Goldfields (1909) TLR 132, and Re Corbenstone (No. 2) (1989) 5 BCC 767.

(5) More specifically the liquidator should not be the nominee of a person: (a) against whom the company has hostile or conflicting claims as in Re City & County Investment Co, (and see also Deloitte & Touche AG v Johnson [1999] BCC 992; [1999] 1 WLR 1605); or (b) whose conduct in relation to the affairs of the company is under investigation as in Re Charterland Goldfield (and Re Mansel, ex parte Sayer)."

22. Consequently but subject to disqualification because of conflict of interest, the appointment of liquidator is often based on majority wishes: see ***Malaysian Assurance Alliance Bhd v Comsa Properties Sdn Bhd & Another Appeal*** [2011] 7 CLJ 942. I hold that the classic maxim 'justice must not only be done but also seen to be done' must apply also to the appointment of a liquidator who performs his duties as an officer of the Court.
23. On the nominees proposed, it would not be fair for me in the interest of justice to appoint any one of them without ascertaining the validity of the assertions and claims of the respective parties. It however necessitates a mini trial if that is to be done. Hence and in order to have the liquidator appointed expeditiously and save costs too, I instead proposed to the parties that the Court makes the nomination of an independent nominee as the liquidator for their joint consent.
24. As the result, the parties agreed to my proposal and consented to one of the two nominees put to them.

Conclusion

25. It is for the foregoing reasons that I made the appointment of the liquidator as so ordered.

Dated this 20 June 2018

t.t

**LIM CHONG FONG
JUDGE
HIGH COURT GEORGETOWN PENANG**

**COUNSEL FOR THE PETITIONER: RAZLAN HADRI BIN ZULKIFLI
(MOHAMAD YAZID BIN MOHAMAD SALIM WITH HIM)**

SOLICITORS FOR THE PETITIONER: GAN HO RAZLAN HADRI

COUNSEL FOR THE CREDITOR: TEH ENG LAY

SOLICITORS FOR THE CREDITOR: CHEAH TEH & SU

COUNSEL FOR THE FURTHER CREDITOR: KWAN WILL SEN

SOLICITORS FOR THE FURTHER CREDITOR: SKRINE

COUNSEL FOR THE OFFICIAL RECEIVER: ROHAFIZA MD. RADZI