DALAM MAHKAMAH PERSEKTUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. 02 – 47 – 2008(W)

ANTARA

ZAITUN MARKETING SDN BHD
(No. Syarikat: 158603-X) … PEMOHON

DAN

BOUSTEAD ELDRED SDN BHD
(No. Syarikat: 001631-D)
(dahulunya dikenali sebagai
"Boustead Trading (1985) Sdn Bhd") … RESPONDEN

[Dalam perkara mengenai Mahkamah Rayuan Malaysia
(Bidangkuasa Rayuan)
Rujukan Sivil No. W-02(IM)-742-2008

Antara

Zaitun Marketing Sdn Bhd
(No. Syarikat: 158603-X) … Perayu

Dan

Boustead Eldred Sdn Bhd
(No. Syarikat: 001631-D)
(dahulunya dikenali sebagai
"Boustead Trading (1985) Sdn Bhd") … Responden]

[Dalam perkara mengenai Mahkamah Tinggi di Kuala Lumpur
(Bahagian Dagang)
Rujukan Sivil No. D1-22-1919-1999

Antara

Zaitun Marketing Sdn Bhd
(No. Syarikat: 158603-X) … Plaintif

Dan

Boustead Eldred Sdn Bhd
(No. Syarikat: 001631-D)
(dahulunya dikenali sebagai
"Boustead Trading (1985) Sdn Bhd") … Defendan]

Coram: Zaki Tun Azmi, C.J.
Alauddin bin Dato' Mohd Sheriff, P.C.A.
Gopal Sri Ram, F.C.J.

JUDGMENT OF GOPAL SRI RAM, F.C.J.

1. On 24 November 2008, this Court granted the appellant leave to appeal on the following question: whether the official liquidator of the Department of Insolvency is authorised to appoint an advocate and solicitor to institute or defend legal proceedings pursuant to section 236(2)(a) of the Companies Act 1965 ("the Act"), independent of section 236(1)(e) of the Act. However, as arguments developed before us at the hearing proper on 16 June 2009, it became apparent that section 236 had really nothing to do with the fact pattern of this appeal, although that provision had been erroneously referred to and relied upon by the parties in the courts below. The real issue at the heart of this appeal is whether sanction may be granted by the Director General of Insolvency ("the DGI" for short) to a former director of a company in liquidation who is also not a contributory or creditor to use the name of the company to bring, continue or defend an action.

2. The relevant facts and the arguments advanced on section 236 have been admirably dealt with by Hishamuddin J (now JCA) who heard the matter at first instance and whose judgment has been reported in [2008] 9 CLJ 194. I therefore find it sufficient merely to allude to those facts purely relevant to the issue at stake.

3. As long ago as 1999, the appellant, then a going concern, brought an action against the respondent for goods sold and delivered. On 28 September 2004, while the action was afoot, the

appellant was compulsorily wound up by an order of that date. By a letter dated 16 March 2005, the DGI gave his consent to one Khaidzir bin Hj. Ishak, a former director, though not a contributory or a creditor, of the appellant to engage the services of a firm of solicitors to prosecute the action pending against the respondent. Although the letter does not expressly say as much, its proper construction admits only of the conclusion, namely, that the DGI was granting his permission, on terms, to Khaidzir to use the name of the appellant in liquidation for the limited purpose of continuing with the action in question. It may be advisable for the DGI in future cases to grant such consent in clear terms. After having obtained permission, the appellant moved the High Court *inter partes* for a *Mareva* injunction. The application was opposed principally on the ground that the DGI had to seek the leave of the court or the committee of inspection under section 236(1)(e) before he permitted the appointment of solicitors. And so, the case went tangentially off course.

4. What appears to have been overlooked all round is the fundamental principle that once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. However, there is jurisdiction in the court to authorise other persons to conduct litigation in the name of the company.

5. In **Russell v Westpac Banking 13 ACSR 5**, King CJ when delivering the judgment of the Full Court of South Australia said:

> "When the company is in liquidation, the person in whom is vested the authority to institute

> proceedings, is the liquidator: *Scarel Pty Ltd v City Loan & Credit Corporation Pty Ltd* (1988) 12 ACLR 730. There is power, however, in the court to authorise other persons to conduct litigation in the name of the company: *Cape Breton Company v Fenn* (1881) 17 Ch D 198; *Aliprandi v Griffith Ventures Pty Ltd* (1991) 6 ACSR 250."

6. Of course, resort to the court's power to authorise someone other than the liquidator to institute, continue or defend proceedings only arises where the liquidator refuses to do so and declines authority. But where, as here, the liquidator grants authorisation, there is no necessity to move the court. Once authority is given either by the liquidator or by the court, the person authorised may appoint counsel of his or her choice to prosecute the proceedings in question. The only issue is whether it is competent for the liquidator to authorise a former director of the company in liquidation to use the company's name to commence, continue or defend proceedings. The answer to that question was provided by Cotton LJ in **Cape Breton Company v Fenn (1881) 17 Ch D 198** as follows:

> "… '*prima facie* proceedings in the name of the company ought to be conducted by the liquidator- an officer appointed by the Court and subject to the supervision of the Court. There may be, no doubt, special cases where, although the Court does not think fit to remove the liquidator on the ground that his conduct in not bringing an action is

> improper, it may give power to other persons to conduct the litigation upon their giving proper indemnity against any consequences of that litigation. But who are the persons who can be authorized to take these steps? In my opinion the creditors and the contributories only, not under any special clause of the Act, but because they are the persons who, under the terms of the Act, can intervene if they are advised that the liquidator does not properly do his duty. They have a right in special cases to ask the Court for leave to do that which the liquidator is advised not to do, or which, because he has no funds, he does not do, viz., take proceedings in the name of the company, but in my opinion the power of the Court to give leave to use the name of the company stops there, and is confined to those who are parties to the liquidation. The Court has, in my opinion, no power whatever to give persons in the position of the solicitors authority to use the name of the company in any litigation against any other person.'"

7. Since a director – or more appropriately a former director – of a company in liquidation is not a party to the liquidation a court will not authorise him or her to launch or to continue proceedings or indeed to defend them. *A fortiori*, the liquidator has no power to confer such

authority, since he cannot do what the court will not do on his default. It follows that Khaidzir bin Hj. Ishak ought not to have been authorised to continue with the proceedings. I would on that ground support the ultimate order made by the learned judge in the High Court. It may well have been different if Khaidzir had also been a creditor or a contributory.

8. For completeness there remains the question whether the learned judge was correct in holding that the liquidator in this case had to obtain leave of the court to appoint an advocate and solicitor to conduct the litigation. With respect I must express my disagreement. In my judgment, the correct view is that expressed by Abdul Aziz J in **Selvam Holdings (Malaysia) Sdn Bhd v Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor [1994] 4 CLJ 899** as follows:

> "The second point is that s. 236(1)(e) does not apply to the appointment of an advocate and solicitor to defend a liquidator against a suit arising out of the performance of his duties as liquidator. Paragraph (e) of s. 236(1) speaks of the appointment of an advocate by a liquidator 'to assist him in his duties'. In my opinion the duties envisaged are the ordinary administrative and management duties of a liquidator such as those that are within his ordinary professional competence. It is only that kind of duties that the words 'to assist' can comfortably go along with.

When a liquidator is sued, as in this case, the liquidator has a problem which falls outside his professional competence as liquidator and for which he must engage an advocate and solicitor to represent him to resist the suit. The first respondent's duty to resist this application is not, in my opinion, one of a kind intended by the word 'duties' in paragraph (e), and counsel acting for him in this case cannot be said to have been appointed by him 'to assist him in his duties'.

As to whether a liquidator's power to appoint an advocate to defend him in an action brought against him falls under s. 236(2) (a) or (i) is a secondary question. Paragraph (i) of s. 236(2) - which gives power to 'appoint an agent to do any business which the liquidator is unable to do himself' - appears to be wide enough to enable a liquidator to appoint an advocate and solicitor to defend him. If in defending this application the first respondent can be said to be doing so 'in the name and on behalf' of the applicant, I would decidedly say he had power, under paragraph (a) of s. 236(2), to appoint an advocate and solicitor because to defend any action he must necessarily engage an advocate and solicitor.

Whatever the position may be under s. 236(2), as

> long as the first respondent is not caught by paragraph (e) of s. 236(1) - and I do not think he is - he does not need to get the authority either of the Court or of the committee of inspection to appoint an advocate and solicitor."

In short, a liquidator who wishes to appoint an advocate and solicitor to prosecute, continue or defend an action by or against the company in liquidation may do so under section 236(2)(a) without the leave of the court or the committee of inspection.

9. It follows that the learned judge was wrong in his reasoning although the order he made was entirely correct. It also follows that **Bensa Sdn Bhd (in liquidation) by its liquidator v Malayan Banking Berhad Damansara Utama Branch & Anor [1993] 2 CLJ 68** which the judge preferred when arriving at his conclusion was wrongly decided and is not good law.

10. For the reasons already given, I would dismiss this appeal and affirm the orders of the courts below, albeit for different reasons. The appellant must pay the costs of this appeal. The deposit shall be paid out to the respondent.

11. The President of the Court of Appeal has seen this judgment in draft and has expressed his agreement with it.

Dated this 16th day of July 2009.

Gopal Sri Ram
Judge, Federal Court, Malaysia

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