



4 June 2024

PROTECTION OF LIQUIDATOR'S REMUNERATION WHEN DETERMINING WHETHER WINDING-UP PROCEEDINGS OUGHT TO BE TERMINATEDⁱ

1. In **Ascentury International Co Ltd v. Viva Capital (SG) Pte Ltdⁱⁱ**, the Singapore High Court considered the point of how a court should consider the interests of the liquidator in deciding to terminate a winding up.

Genesis

2. The claimant applied to set asideⁱⁱⁱ the winding up order dated 31.10.2023 against the defendant, Viva Capital (SG) Pte Ltd. The Defendant consented to this application.
3. While the defendant's liquidators ("**Liquidators**") did not object to the application, they sought certain directions pertaining to their remuneration and disbursements ("**Liquidation Remuneration and Disbursements**"). Specifically, the Liquidators sought confirmation that the Liquidation Remuneration and Disbursements, for the period from 31 October 2023 to the determination of the application, should be paid out of the defendant's assets, the quantum of which to be agreed if not taxed.
4. In response to the Liquidators' position, the claimant submits that the Liquidation Remuneration and Disbursements ought to be a matter between the Liquidators and the party which had engaged them, i.e., 61 Robinson Pte Ltd ("**61R**"), who was the petitioning creditor in CWU 138.
5. Specifically, the claimant contended that the directions which the Liquidators sought ought to be dealt with separately from the termination of the defendant's winding up. This is because those directions concern a contractual issue that the Liquidators should raise against 61R and do not give rise to a legitimate basis to object to this application.



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Decision

6. The Singapore High Court held that it has the statutory power to terminate a winding up pursuant to s 186(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (“**IRDA**”), which reads as follows:

Power to stay or terminate winding up

186.—(1) At any time during the winding up of a company, the Court may, on the application of the liquidator or of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed or terminated, make an order —

- (a) staying the proceedings either altogether or for a limited time, on such terms and conditions as the Court thinks fit; or
- (b) terminating the winding up on a day specified in the order.

7. The Singapore High Court considered 3 principles which applies to s 186(1) of the IRDA:
- (a) the state of affairs that required the company to be wound up no longer exists;
 - (b) the granting of a stay^{iv} would not be detrimental to commercial morality and the interests of the public at large;
 - (c) the interests of the creditors, the members, **and the liquidator** must be protected.
8. With the 3 principles in mind, the Singapore High Court held that there are good reasons to terminate the defendant’s winding up subject to the adequate protection of the Liquidators’ interests, especially in relation to the Liquidation Remuneration and Disbursements.



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9. The Singapore High Court then proceeded to terminate the winding up effective upon the amount of the Liquidation Remuneration and Disbursements being agreed or taxed, which is to be paid out of the defendant's assets. The termination of the winding up takes effect once there is agreement or fixing of the Liquidation Remuneration and Disbursements and is not dependent on the actual repayment of such amount, which can take place later.

Comments

10. The Malaysian position in relation to the termination of a winding up of a company is found in s. 493 of the Companies Act 2016 (“**CA 2016**”).

11. S. 493 (1) of the CA 2016 reads as follows:

“(1) At any time after an order for winding up has been made, the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up of the company ought to be terminated, make an order terminating the winding up of the company as the Court thinks fit.”

12. The Singapore High Court acknowledged that there are “*some differences*” between s. 493 (1) of the CA 2016 and s. 186 (1) of the IRDA but ultimately concluded that they don't appear to provide any substantive difference. The relevant portion of the judgment is set out below for ease of reference:

15 To be clear, there are some differences between s 493(1) of the Malaysian Companies Act 2016 and s 186(1) of the IRDA. One, whereas s 493(1) provides that it applies “any time after an order for winding up has been made” [emphasis added], s 186(1) provides that it applies “at any time during the winding up of a company” [emphasis added]. While this may suggest that s 186(1) applies in a different time period from s 493(1), I think that this is a drafting distinction with no substantive difference. After all, the winding up process continues even after an order for winding up has been made. This is because the liquidator would then carry out the actual winding up of the



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company. Two, whereas s 493(1) allows the order terminating the winding up to be made “as the Court thinks fit”, s 186(1)(b) only provides for “terminating the winding up on a day specified in the order”. While this may suggest that a court is powerless to attach terms to the termination of the winding up pursuant to s 186(1)(b), I do not think that this was the legislative intent. After all, specifying a day on which the termination takes effect is to stipulate terms. Further, there is no good reason why a court can attach terms to the staying of a winding up but not to the termination of a winding up. Moreover, s 186(3) provides that the court can, in fact, give certain directions relating to the “resumption of the management and control of the company” by its officers.

13. It is arguable that the decision in **Ascentury International** will be persuasive in Malaysia because s. 493 (2) of the CA 2016 confers a wide discretion on the Malaysian winding-up courts to consider various factors in making an order to terminate a winding up.
14. As a result, there is no legal impediment for the Malaysian High Court to consider the issue of a liquidator’s remuneration before allowing the termination of a winding-up. After all, the liquidators are a vital organ in the entire corporate insolvency ecosystem and they ought to be remunerated fairly and reasonably for all work carried out.

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ⁱⁱ [2024] SGHC 118;

ⁱⁱⁱ The learned High Court Judge considered it a “*termination of winding up*” application;

^{iv} Or termination;