

Case Update: Liquidator Cannot Grant Sanction for Continuation of Litigation

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The High Court in ***Small Medium Enterprise Development Bank Malaysia Berhad v Oren Venture Sdn Bhd and 3 others*** [2022] MLJU 410 decided on the liquidator granting sanction for legal proceedings.

The crucial issue before the Court was whether a liquidator of a wound-up company can issue a sanction, or delegate to another person, the liquidator's power to bring or defend any action or other legal proceedings in the name and on behalf of the company.

Summary of Decision and Significance

The Court clarified the seemingly long-accepted practice that a liquidator, especially the Director-General of Insolvency, could grant sanction to a creditor or contributory for them to continue legal proceedings on behalf of the wound-up company. The Court held that such a liquidator-granted sanction is invalid.

The Court held that there is no such power under the Companies Act 2016 ("**CA 2016**") to allow a liquidator to delegate the liquidator's statutory power to "*bring or defend any action or other legal proceedings in the name and on behalf of the company*".

Instead, the Court has now set out the following approach based on a reading of the CA 2016 and case law:

1. The liquidator must first decide whether to bring, continue with or defend the legal action on behalf of the company.

2. If the liquidator refuses to do so, the creditor or contributory may then apply to the winding-up Court under section 486(2) of the CA 2016. This is the provision where the winding-up Court has oversight over the liquidator's powers.
3. The Court may then grant an Order to compel the liquidator to act or for a Court sanction of the creditor or contributory for them to act in the legal proceedings on behalf of the company.

Background Facts

In July 2020, SME Bank filed the first legal suit against the company, Oren Venture, and the company's directors. In May 2021, Oren Venture filed the second legal suit against SME Bank.

On 25 May 2021, Oren Venture was wound up by an Order of Court. The Director-General of Insolvency ("DGI") was appointed as liquidator of Oren Venture.

Counsel for the now wound-up Oren Venture was now instructed by a contributory of Oren Venture. The contributory had obtained a 'sanction' letter dated 13 December 2021 from the liquidator i.e. DGI in order for Oren Venture to continue with the suit against SME Bank.

SME Bank applied to withdraw its first suit against Oren Venture while also applying for security for costs against Oren Venture in the second suit.

The Court invited the counsel for Oren Venture and for SME Bank to address the Court on a preliminary issue:

"Whether a liquidator of a wound-up company can issue a sanction or delegate his power under Item (a) of the Twelfth Schedule of the Companies Act 2016 to any other person to

bring or defend any action or other legal proceedings in the name and on behalf of that company.”

Counsel for Oren Venture produced the ‘sanction’ letters issued by the liquidator to the contributory for the purposes of defending the first legal suit and for continuing with the second legal suit. The letters contained the following:

1. Both were signed by the same officer from DGI.
2. Both shared the same title: “*Syarat-syarat bagi permohonan kebenaran penyelesaian di bawah Akta Syarikat 1965 / Akta Syarikat 2016*” (‘Conditions for the application for the liquidator’s sanction under the Companies Act 1965 / Companies Act 2016’).
3. Both referred to a “*Surat Aku Janji*” that had been submitted to the DGI.
4. Both letters stated that “*Pegawai Penerima dan Penyelesai (“PPP”) bagi Oren Venture Sdn Bhd ... telah meluluskan kebenaran penyelesaian (“sanksi”) untuk tuan/puan memulakan dan/atau meneruskan tindakan di Mahkamah Tinggi ... untuk mewakili syarikat Oren Venture Sdn Bhd ... dalam guaman tersebut tertakluk kepada syarat-syarat yang berikut*” (‘The Official Receiver and Liquidator for Oren Venture Sdn Bhd ... has approved the sanction to you initiating and/or continuing with the High Court proceedings ... in representing Oren Venture Sdn Bhd ... in the suit but subject to the following conditions’).
5. The conditions included a competent “*Penjamin*” providing the PPP with an “*Aku Jamin Penjamin*” and a “*Bon Jaminan*”, and further depositing a specified sum of money with the PPP; that neither the PPP nor the estate of the Company would be responsible or held responsible for any failure, loss or costs involved in or imposed by that action, and that the “*Penjamin*” would bear all costs; and that the lawyers having the conduct of the matter would inform PPP in writing of the progress of the case from time to time.

Counsel for Oren Venture took the position that the ‘sanction’ letters clothed the contributory with the power to defend the first suit and to continue with the second suit.

Counsel for SME Bank submitted that the liquidator cannot delegate his power or issue a sanction to anyone to defend the first suit and to continue with the second suit.

Decision

(i) Preliminary

The Judicial Commissioner started by observing that a liquidator is a creature of statute. The liquidator derives his powers from the statute that creates him and enables him. In Malaysia, section 486(1) and the Twelfth Schedule of the Companies Act 2016 (CA 2016) are the source of a liquidator’s powers in a winding up by the Court. These powers were also contained in the predecessor section 236 of the Companies Act 1965 (CA 1965).

(ii) Liquidator’s Powers under the CA 2016: No Power to Issue a Sanction to the Contributory

Through section 486(1)(a) of the CA 2016, the liquidator may, without the authority of the Court or of the committee of inspection, exercise any of the general powers in Part 1 of the Twelfth Schedule of the CA 2016. The relevant ones are:

- Item (a): a liquidator may “*bring or defend any action or other legal proceedings in the name and on behalf of the company*”.
- Item (j): the liquidator may “*appoint an agent to do any business which the liquidator is unable to do*”.
- Item (k): the liquidator may “*appoint an advocate to assist him in his duties*”.

The language used in these general powers connotes that the liquidator must exercise those powers personally.

The Court then noted that the CA 2016 does not contain any express provision giving a liquidator the power to delegate or abrogate the exercise of any of his powers. Or the power to issue a sanction to someone else to exercise any of these powers. This must mean that Parliament intended for only the liquidator to have those general powers, including the power to “*bring or defend any action or other legal proceedings in the name and on behalf of the company*”.

When the Court looked at the sanction letters by the liquidator, the Court held that the liquidator had by the sanction letter, in effect and substance, abrogated and delegated the liquidator’s power to the contributory to continue and to defend the legal proceedings. It was not an appointment of an agent to do any business which he as liquidator was unable to do. It was a wholesale delegation of that power.

On the DGI taking security from the “*Penjamin*” (guarantor), the Court noted that the CA 2016 does not provide for the liquidator taking any security.

For appointing solicitors, while a liquidator may “*appoint an advocate to assist him in his duties*”, it would not extend to the liquidator appointing an advocate to assist a contributory to carry out a liquidator’s duties.

The power to bring and defend legal proceedings is a power bestowed on the liquidator. There are no provisions in the CA 2016 for the liquidator to delegate that power.

Therefore, the Court held that the DGI, as the liquidator, did not have the power to issue a sanction to the contributory to defend the first legal suit and to continue with the second legal suit. The supposed “*sanction*” by the DGI issued to the contributory was invalid and inoperable.

(iii) The Court's Power of Sanction under the CA 2016

Nevertheless, the Court had the power to grant a sanction to a creditor and a contributory. The basis for this is section 486(2) of the CA 2016 and the Federal Court decision in *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785 and other case law.

Section 486(2) of the CA 2016 provides that:

The exercise by the liquidator in a winding-up by the Court of the powers conferred by this section is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposes exercise of any of those powers.

The Court summarised the position when a wound-up company brings, continues with or defends an action.

First, only the liquidator has the power to do such acts.

It is only when the liquidator refuses to, or is unable to do so, or has no funds (and the grounds are not exhaustive), can a creditor or contributory apply to the winding up Court. The applicant can first apply for an Order to either compel the liquidator to bring, continue with or defend that action.

Alternatively, apply for an Order that Court grants sanction for them to bring, continue with or defend that action. The applicant would have to satisfy the Court that doing so would be in the interests of the company. The Court can impose terms and conditions in granting sanction, including requiring security and indemnity. But the liquidator does not have that power.

Second, only the Court is best placed to make that judicial evaluation of whether bringing, continuing with or defending that action would be in the interests of the company,

particularly where the liquidator has first declined to. The Court would want to request the presence of the liquidator to hear his views and why he decided not to pursue it himself.

Third, if a liquidator from the DGI is allowed to give sanction to someone else to bring an action, why could not the same power be given to and exercised by a private liquidator? Allowing a private liquidator *carte blanche* power to delegate his duties may lead to misuse and abuse.

Fourth, as the Court's power to sanction a creditor or contributory to bring, continue with or defend an action is derived from section 486(2) of the Act, then a liquidator is in a subservient position to the Court. The liquidator cannot be placed on par with the Court in having that power of sanction.

Finally, the Court noted that there have been other cases that have referred or alluded to a liquidator's sanction.

The Court distinguished those cases on the basis that none of the cases ever raised whether a liquidator had that power of sanction in the first place. None of the parties in any of those cases canvassed that issue.

The Court was also cognisant that in legal proceedings, the timelines for say bringing an appeal and doing the acts would make going through that process very urgent and onerous. However, the Rules do have provisions for extending time and the Courts have on many occasions exercised their decision for such extension.

Comments

I agree with this decision. I had long viewed it as an anomaly to have a liquidator grant "*sanction*" to a creditor or contributory to allow that creditor or contributory to be able to essentially borrow the name of the company in legal proceedings.

Nonetheless, the liquidator granting sanction had appeared to be entrenched in case law or had long been assumed to be correct. For instance, the Federal Court in ***Lai King Lung and another v Merais Sdn Bhd*** [2020] 5 MLJ 614 proceeded on the questions of law on the *assumption* that the liquidator could grant sanction. The appeal proceeded on the issue whether the liquidator could grant *retrospective* sanction.

I believe this practice of a liquidator granting sanction emanated from the personal bankruptcy procedure where the DGI would give sanction for the bankruptcy to bring or continue with legal proceedings. Section 38(1)(a) of the Insolvency Act 1967 (previously known as the Bankruptcy Act 1967) requires the “**sanction of the Director General of Insolvency**”. The DGI’s website sets out the bankruptcy sanction documents and where these documents appear to then be very similar to the DGI liquidation sanction documents. The Federal Court in ***Lai King Lung*** also started by drawing the comparison with sanction in bankruptcy proceedings.

I agree that section 486(2) of the CA 2016 would be where the creditor or contributory could first apply to have the winding-up Court have the control over the liquidator’s powers to initiate or bring legal proceedings on behalf of the company. However, my view is section 486(2) of the CA 2016 only goes so far as to allow the Court to direct the liquidator to then take a particular course of action e.g. to continue with the legal proceedings. The legal proceedings are still ultimately under the control of the liquidator.

I go further to suggest the following. Where the Court makes an order to sanction or to essentially vest the carriage of the wound-up company’s legal proceedings in the hands of the creditor or contributory, the Court is exercising its inherent jurisdiction to do so.

See the examples of the following cases that have approved the Court’s power to do so:

- ***Cape Breton Co v Fenn*** (1881) 17 Ch D 198 at 207: “*Then on what principle is it that a creditor or contributory has been allowed to sue in the name of the company? On the same principle on which a man could always have filed a bill in the old Court*”

of Chancery against his trustee to be allowed to use his name to recover the trust property. That is the principle.”

- ***Ferguson v Wallbridge*** [1935] 3 DLR 66 at 83.
- ***Aliprandi v Griffith Ventures Pty Ltd*** [1991] 6 ACSR 250 at 252.
- ***Challis v Hoffman and others*** [2017] NSWSC 870.

Finally, if this finding in ***SME Bank v Oren Venture*** were to be applied to all ongoing cases where the liquidator had granted sanction, there could be widespread uncertainty. Where the liquidator’s sanction is found to be invalid or void, that would throw the legal proceedings, judgments and appeals all into a standstill. Litigants or liquidators should either seek for clarification before the Court hearing the ongoing legal proceedings or return for directions from the winding up Court itself.

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