



24 July 2023

GOLDEN AFFINITY - A LIQUIDATOR'S DILEMMAⁱ

A. INTRODUCTION

1. In an unprecedented situation, the High Court in **Golden Affinity Development Sdn Bhd (In Liquidation) v. Lim Yoke Wah & 8 Ors [2023] 6 CLJ 76** ordered costs to be borne personally by the liquidator.
2. This appears to be the first Malaysian reported legal case whereby personal costs out of legal proceedings has been made personally against a liquidator.
3. As a general rule, when a liquidator does not sue or defend in his own name but that of a wound-up company, any costs awarded out of legal proceedings should be that of the wound-up company.

Please see the decision of the High Court in **Markcon Sdn Bhd (In Liquidation) v. Resilient Construction Sdn Bhd (Labtec Sdn Bhd & Anor; opposing creditors) [1993] 3 MLJ 429.**

4. Nevertheless, the High Court in **Markcon's case** observed that the court has the discretionⁱⁱ to award costs against a liquidator personally in certain situations namely-
 - (a) Where the liquidator has instituted unnecessary legal proceedings or incurred unnecessary litigious expenses;
 - (b) Where there is some misconduct or fault or error on the part of the liquidator in bringing such proceedings.
5. As a result, it is important to consider the decision in the **Golden Affinity case** to determine the impact of this decision to the liquidation landscape in Malaysia and what liquidators ought to consider doing to avoid a similar predicament.

B. BACKGROUND FACTS IN THE GOLDEN AFFINITY CASE

Relevant Parties

6. The Plaintiff, Golden Affinity, was a holding and development Company that owned and developed a piece of land into a development known as "i-32 Corporate Industrial Park" ("**Project**").
7. There were 6 unsold units identified in the Grounds of Judgment ("**GOJ**") in the **Golden Affinity Case** as "Property 1"; "Property 2"; "Property 3"; "Property 4"; "Property 5"; and "Property 6".
8. Particulars of the Defendants are as follows.



24 July 2023

Defendants	Particulars	Appointment Date	Resignation Date
D1	Plaintiff's former director, a shareholder of D5	7.7.2011	16.1.2017
D2	Plaintiff's former director, a shareholder of D5	7.7.2011	14.7.2017
D3	Plaintiff's shareholder and former director. Also director and shareholder of D7	7.7.2011	14.7.2017
D4	Plaintiff's shareholder and former director	7.7.2011	16.1.2017
D5	Plaintiff's shareholder		
D6	D5's wholly owned subsidiary		
D7	Company connected to D3		
D8	Plaintiff's current director	13.7.2017	N/A
D9	Plaintiff's current director	13.7.2017	N/A

- The Project was completed and vacant possession of the sold units was delivered in March 2016.
- On 7.12.2016, the Plaintiff declared dividends of RM27 million to its shareholders (D3; D4; and D5). The declared dividends were distributed partially in cash and in kind with the remaining unsold 6 properties as follows.

Shareholders	Dividend Payable (RM)	Cash Paid	Payment in kind
D3	5,400,000	200,000	2 units (Property 5 and Property 6) at consideration of RM5,200,000
D4	3,240,000	3,200,000	
D5	18,360,000	700,4000	4 units (Property 1 to Property 4) at consideration of RM17,659,600
Total	27,000,000		

- D5 nominated its subsidiary, D6 to receive Property 1 to Property 4 by entering into a sale and purchase agreements ("SPA") with the Plaintiff at the total purchase consideration of RM17,659,000 which was contra with the dividend payable to D5.
- D3 nominated his company, D7, to receive Property 5 and Property 6 by entering into SPAs with the Plaintiff at the total purchase consideration of RM5,628,600 which was contra with the dividend payable to D3.



24 July 2023

Golden Affinity was wound-up

13. On 30.10.2017, the Plaintiff was wound up.
14. On 19.7.2018, Tan Wai Leng of Cheng & Co. Corporate Recovery Sdn Bhd was appointed by the Court as the Plaintiff's private liquidator in place of the Official Receiver.

Digest of the Golden Affinity Case

15. In Suit 472, the Plaintiff's various causes of action arises out of the complaint that the former Directors deliberately distributed RM27,000,000.00 as dividends notwithstanding that the Plaintiff not financially sound to do so and unable to pay Liquidated Ascertained Damages ("**LAD**")ⁱⁱⁱ.
16. The Plaintiffs contend that the:
 - (a) Forensic Account Review Report^{iv} revealed that the former directors of the Plaintiff were fully aware of the letters of demand from the purchasers;
 - (b) Unlawful declaration and payment of dividends made less than 1 year from the winding-up date was to enrich the former directors and shareholders. The 6 properties were also sold to D6 and D7 at an undervalue.
17. *Vis-à-vis* Suit 472, the High Court *inter alia* found that:
 - (a) the Company had a total retained profit of RM27,281,286.00. The dividend of RM27,000,000.00 was declared out of profits and in compliance with section 365 (1) of the Companies Act 1965 ("**CA 1965**");
 - (b) there was no fraudulent trading on the part of D1 – D7 because at the time of the declaration of the dividends, there were no crystallized LAD claims as they were being disputed at the time. The Company obtained 2 legal opinions and it was advised that the Company had a good case of resisting the LAD claims;
 - (c) the evidence as a whole does not support a finding of fraud. There was no police report lodged. Neither was a report^v lodged by the Liquidator to the Companies Commission of Malaysia ("**CCM**") even though fraudulent trading carries grave consequences. The allegations of fraud remained just that;
 - (d) as the type of conspiracy was not pleaded, the pleading is bad and deficient. This resulted in the dismissal *vis-à-vis* the complaint of conspiracy;



JUSTIN WEE
ADVOCATES & SOLICITORS

PEGUAMBELA & PEGUAMCARA 律师事务所

24 July 2023

- (e) in relation to the alleged non-submission of the Statement of Affairs, this issue was not put to the Defendants' witnesses and the Plaintiff is deemed to have abandoned these claims;
 - (f) the claim for unpaid income tax of RM6,480,000.00 for the dividend distributed is plainly misconceived;
 - (g) be that as it may, the High Court accepted that some of the properties were sold at undervalue. As a result, D7 was ordered to pay the sum of RM46,000.00 to the Plaintiff and D1, D2, D5 & D6 were ordered to jointly and or severally pay a sum of RM36,000.00 to the Plaintiff.
18. Suit 210 was filed subsequent to Suit 472 as a consequence of the Supplemental Forensic Account Report which was only completed on 6.5.2020 and the Supplemental Liquidator Report which was only completed on 21.5.2020.
19. In Suit 210, the Liquidator alleged that a sum of RM6,240,000.00 was unlawfully dissipated by D1 to D4 and was fraudulent trading pursuant to section 540 CA 2016 against the same body of LAD creditors as in Suit 472.
20. D1 and D2 successfully struck out Suit 210 against them. The Liquidator's claim remained against D3 and D4 and is reduced to RM2,675,000.00 only and not RM6.4 million.
21. It was agreed by the parties that the findings of fact in Suit 472 will bind the parties in Suit 210.
22. *Vis-à-vis* Suit 210, the High Court *inter alia* found that:
- (a) Lee Haw Hann as one of the shareholders of the Plaintiff, issued a written instruction to the Plaintiff's Board of Directors to instruct that his entitlement to the interim dividend be paid directly to D3 and Lim Boon Kang as repayment of loan. Payment of RM1,680,000.00 received by D3 was due to the distribution of the interim dividend as Lee Haw Han's entitlement as one of the shareholders of the Plaintiff. The declaration and distribution of dividend was not unlawful;
 - (b) The Plaintiff has not led any contemporaneous evidence and/or provided sufficient particulars to show that D3 was in control of the Plaintiff and/or the directing mind behind the trading of the Plaintiff and/or has any involvement with the business of the Plaintiff;
 - (c) As for the balance claim against D4, it is based on 3 cheques made to him:



JUSTIN WEE

ADVOCATES & SOLICITORS

PEGUAMBELA & PEGUAMCARA 律师事务所

24 July 2023

- RM200,000.00 via OCBC cheque 00084 dated 6.12.2016;
- RM495,000.00 via OCBC cheque 000862 dated 6.12.2016;
- RM500,000.00 via OCBC cheque 666373 dated 11.5.2017.

It was admitted by the Liquidator that the 1st payment of RM200,000 claimed was part of Suit 472. The Liquidator alleged that the payment of a total sum of RM2.12 Million cashed out by D2 (against whom the suit was struck off) and of which a sum of RM995,000.00 was attributable to D4 was to enrich themselves fraudulently and to deprive the purchasers of their LAD claims.

- (d) The finding in Suit 472 that there is no fraudulent trading also applies to this suit. The totality of evidence demonstrates that the actual complaint against D4 in respect of this sum of RM 995,000 is to all intent and purposes one of undue preference. Fraudulent trading and undue preference are as different as cheese is from chalk. Undue preference was not pleaded and was considered academic.

23. As a conclusion, the High Court decided mainly in favor of the Defendants in the **Golden Affinity Case**.

24. This sets up the context to the thrust of this article i.e., the issue of costs.

C. ISSUE OF COSTS

25. The **1st issue** the High Court had to decide was who ought to bear the legal costs.

26. As a general rule, costs would follow the event i.e., the winning party would be awarded costs.

27. As such, since the Plaintiff (Golden Affinity) was awarded the sum of RM46,000.00 to be paid by D7 for Property 6 and RM36,000.00 to be paid by D1, D2, D5 and D6 jointly and severally for Property 6 in Suit 472, the Plaintiff would “normally” be awarded costs.

28. However, the High Court considered that the Defendants were entitled to costs because:

- (a) it was a pyrrhic victory for the Plaintiff; and
- (b) the Defendants succeeded in defending most heads of the Plaintiff’s claim.



24 July 2023

29. After making the determination that the Defendants were entitled to costs, the High Court had to decide on the **2nd issue** i.e., whether the Liquidator ought to be made to pay costs on a personal basis^{vi}.
30. The High Court took cognizance of its earlier decision in **Markcon's case** and ordered personal costs against the Liquidator because there is evidence that the Liquidator instituted these actions "*out of bad faith or a misguided sense of propriety of the course of action he has taken*".
31. Examples given by the High Court in coming to that determination *vis-à-vis* the Liquidator's conduct are:
 - (a) It is clear that the dividend declaration did not breach section 132 of the CA 2016. It was the old CA 1965 that was in force in 2016;
 - (b) The Liquidator proceeded to adjudicate the PODs in 2020, long after Suit 472 was filed and ignored late payments made by the Purchasers. The Liquidator did so knowing of the decision of the High Court in Acoustic's^{vii} case (which was upheld by the Court of Appeal);
 - (c) Attempting to make a claim based on fraud when the Liquidator's own 2 reports and 2 Forensic Accountant's reports were "*deafeningly silent on 'fraud'*";
 - (d) The claim for conspiracy to defraud the Plaintiff was not properly pursued at trial;
 - (e) The claim for over RM6 million as tax for the RM27 million dividends distributed is "*hopelessly misconceived*" when there is no tax payable under section 108 of the Income Tax Act 1967;
 - (f) The Liquidator and the Forensic Accountant's firm were "*inextricably linked, intertwined and involved in the entire claims*".
32. It is unclear whether the Liquidator was given an opportunity to be represented and heard as to why an order for costs should not be made against him.

D. A LIQUIDATOR'S "DILEMMA" AFTER THE DECISION IN THE GOLDEN AFFINITY CASE

33. There should not be a knee-jerk reaction from Liquidators pursuant to this decision in the **Golden Affinity case** to refrain from instituting legal proceedings (where necessary) to assert the rights of the wound-up company.



24 July 2023

34. Afterall, the Federal Court in **Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd (formerly known as Busted Trading (1985) Sdn Bhd) [2010] 2 MLJ 749** at paragraph 10 has already determined that recovery of monies and assets belonging to the wound-up company is an important duty of the liquidator.
35. If the Liquidator does nothing to recover monies and assets rightfully belonging to the wound-up company out of fear due to the decision in the **Golden Affinity case**, he may be failing his duties as a Liquidator.
36. It is unfortunate that the Liquidator has been made to bear personal costs when it appears that the High Court's criticism of his (mis)conduct largely stems from the handling of legal proceedings in court.
37. It did not appear from the High Court's GOJ that the Liquidator had legal representation in his own personal capacity to address the potential risk of personal costs to be awarded against him. If the Liquidator had no legal representation to address the issue of personal costs, perhaps, there is an arguable case to set aside the order for cost against him.
38. If there were any misgivings about the "*sense of proprietary of the course of action*", it would probably be fairer if costs were ordered against the Liquidator's solicitor pursuant to Order 59 rule 6 of the Rules of Court 2012.
39. So, what should a Liquidator do now post-**Golden Affinity**?
40. Firstly, it would be prudent for any Liquidator to obtain competent legal advice as to the prospects of any litigious case, especially where it involves serious allegations of civil fraud.
41. Serious allegations of civil fraud should not be lightly made. A Liquidator should avail himself to all the "tools" provided under the CA 2016 to gather sufficient information and evidence before mounting such a claim.
42. For example, a Liquidator may apply to Court to:
 - (a) summon any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade dealings, affairs or property of the company; and
 - (b) compel the officer or person to produce any books and papers in his custody or power relating to the company.



24 July 2023

43. Secondly, where there is a need to appoint a Forensic Accountant, it is best to appoint somebody totally independent and distinct so as to avoid any accusation of bias.
44. Thirdly, where there is any serious doubt as to the correct course of action to take *vis-à-vis* any potential litigation, the Liquidator may consider seeking directions from the winding-up court.
45. The 3 suggestions above are not exhaustive. But, it will hopefully assist any liquidator from the same predicament encountered in **Golden Affinity**.

Author: Justin Wee Kim Fang
Partner of Messrs Justin Wee

ⁱ Disclaimer: This article is presented for information purpose only and covers legal issues in a general way. The contents are current only as of the date of the article and are not intended to constitute advice on any specific matter and should not be relied upon as a substitute for detailed legal advice;

ⁱⁱ Be that as it may, the High Court in **Markcon's case** did not order personal costs against the liquidator;

ⁱⁱⁱ This LAD issue arose out of late delivery of vacant possession by the Plaintiff. Subsequent to the Plaintiff's winding-up, the Liquidator received and adjudicated proof of debts ("**POD**") from a group of creditors who are purchasers and had bought the factories;

^{iv} This report was prepared by Cheng & Co. Global Advisory Sdn Bhd. The identity of the maker of the report becomes more important later in the GOJ as the High Court considered that the Liquidator and the Forensic Accountant are closely linked;

^v A Liquidator should always strongly consider lodging a report with the CCM, if there are any suspected offences committed by the former officers of the wound-up company under the Companies Act 2016 ("**CA 2016**");

^{vi} It appears that this 2nd issue arose because the Defendants had urged that costs be personally borne by the Liquidator;

^{vii} In the Acoustic's case (KLHC Suit No. WA-22NCvC-688-11/2016), the High Court dismissed the purchaser's LAD claim as there were still outstanding sums payable by the purchaser to the Plaintiff. This decision was then affirmed by the Court of Appeal;