

## COMPANY LAW

**JUDICIARY VS LIQUIDATOR: A**

**STANDARD REINFORCED...** The Federal Court in *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629 had reaffirmed the decisions of the Court of Appeal<sup>1</sup> and held that **the court should be slow to interfere with any act or decision of the Liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way.** It further held that the court will not interfere with the decision simply because its opinion might differ from that of the Liquidator.

**INTRODUCTION** On 18.03.2021, the Court of Appeal in *Sunrise Megaway Sdn Bhd (dalam pengkulungan) v Kathryn Ma Wai Fong* [2021] MLJU 368 upheld with clarity on the extent of judicial scrutiny under section 517<sup>2</sup> of the Companies Act 2016 (previously section 279 of the Companies Act 1965) over the statutory role and function of a liquidator. In this article, we examine the facts, issues and ruling of the case.

**BACKGROUND FACTS** The case concerns the issue of admission of Proof of Debt (“POD”) by the Appellant’s Liquidator. The Appellant (“Sunrise”) is a company within the WTK group of companies and was wound up. One of the creditors of Sunrise, Lismore Trading Co. Ltd (“Lismore”) lodged a POD for a sum of **RM4,018,389.88**. Sunrise’s liquidator admitted the POD lodged. The Respondent (“Kathryn”) filed an application to the High Court to oppose the admission of Lismore’s POD by the Liquidator. The High Court held that Sunrise’s liquidator wrongly exercised his discretion by failing to ascertain the genuineness of Lismore’s claim and allowed Kathryn’s application. Sunrise appealed to the Court of Appeal (“the Court”).

<sup>1</sup> *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor* [2007] 2 MLJ 12; *Lim Chiew v Lee Choa Yong & Anor Appeal* [2018] MLJU 956

<sup>2</sup> Any person aggrieved by an act or decision of the liquidator may apply to the Court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

**ISSUE** The main issue was whether the High Court was justified in interfering with the conduct or decision of the Liquidator in admitting the POD.

**DECISION** Being satisfied that there are merits in the Appellant’s appeal and in reversing the decision of the High Court, the Court of Appeal had amongst others, held as follows:-

- (a) The duty of a Liquidator was to act impartially and to draw the attention of the Court to the facts and matter which were material for the Court’s consideration<sup>3</sup>;
- (b) It is not for the Court to determine or to dictate the manner in which the investigation is to be done or carried out by the Liquidator and the relevancy and adequacy of the documents to be considered in reaching the Liquidator’s findings. The Court shall not interfere unless the Liquidator had failed to carry out investigations or his conduct **was so unreasonable and absurd that no reasonable person would so act or has acted in bad faith**;
- (c) Kathryn had tendered no evidence to show that the admission of Lismore’s POD was made in bad faith or out of some erroneous approach in law. The Court was of the view that the sufficiency of the liquidator’s investigation before making any decision to admit or reject the POD is entirely the Liquidator’s own function and not that of the Court;
- (d) The Liquidator was justified in admitting a POD as there was detailed and thorough investigation which had formed the basis of the liquidator’s determination. The Court is of the view that similar to the case above, the Appellant’s Liquidator had carried out detailed and thorough investigation before admitting Lismore’s POD<sup>4</sup>;
- (e) Generally the liquidator is only bound to take extraordinary steps to scrutinize a proof of debt on the basis that it could be a false claim in cases where he has reason to be suspicious about its

<sup>3</sup> *Vijayalaksmi Devi D/O Nadchatiram v Dr Mahadevan S/O Nadchariram & Ors* [1995] 2 MLJ 709

<sup>4</sup> Reference made to Australian case of *Barnden (in his capacity as liquidator of Masonry Works Pty Ltd) (in liq)* [2020] FCA 545

genuineness or legal validity. Therefore, although a liquidator has a duty to scrutinize all proof of debts, the level of scrutiny required by the liquidator to discharge this duty must, in the final analysis, depend on the circumstances of a case<sup>5</sup>;

- (f) The Court affirmed and restated that the threshold test which shall be applied is that “***the court should be slow to interfere with any act or decision of the Liquidator in discharging his role in company’s liquidator particularly involving the admission or rejection of POD which involve commercial consideration. The Court can only interfere in very exceptional circumstances when the liquidator has acted in utter unreasonableness.***”

The Court also referred to a recent case of ***Tan Kim Tian v Tan Kim Chuan & Anor*** [2020] MLJU 86 which took a similar approach as the threshold test herein, which held as follows:-

*“[31] The Court will have to see if liquidator’s action has such importance and can be seen to have such defects as to justify the court exercising its supervisory power where a defect arising either out of some want of good faith or out of some erroneous approach in law or in principle then that it clearly a ground on which the court would entertain an application by one of the interested parties for appropriate direction or some other form of remedial order.”*

**CONCLUSION** Practitioners in advising clients on reviewing or challenging the decision of a liquidator must bear in mind that the threshold for a challenge to be successful is high as the Courts would be slow to interfere with the act or decision of liquidators.

Liquidators can be assured that decisions which were made in the discharge of their statutory duties whilst not immune from judicial scrutiny, will only be set aside in very limited circumstances.

That being the case, in instances where members or creditors of a corporate entity are in a position to agree to an appointment of a liquidator in a liquidation scenario, it is of utmost importance that a suitable liquidator who is sufficiently able to discharge his/her statutory duties be appointed.

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2 June 2021

<sup>5</sup> Reference made to Singapore Court of Appeal case of ***Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd*** [2009] 4 SLR 458