

Apex court decides on validity and effects of retrospective sanction by liquidators

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Introduction

When a company is wound up by a court order, a liquidator steps in and manages the company. It is enunciated in the Malaysian company law regime that the legal standing of such company to bring or proceed with an action or proceedings is vested in the liquidator. If an action or proceeding is taken by a wound-up company, the liquidator's prior sanction⁽¹⁾ must be obtained. In *Lai King Lung v Merais Sdn Bhd*,⁽²⁾ the apex court handed down a landmark judgment on the validity of retrospective sanction granted by liquidators.

Facts

In 2013 the respondent, a private limited company, commenced an action against the appellants at the high court. The appellants filed a counterclaim against the respondent in the same suit. In September 2015, as the suit was ongoing, the respondent was wound up via an order by a winding-up court. In January 2016 the liquidator granted sanction to the respondent's contributory and its solicitors to proceed with the suit before the high court. Consequently, the suit continued and the high court dismissed the parties' claims.

The issue arose when the respondent's solicitors, acting on the instructions of the contributory, filed a notice of appeal with the Court of Appeal. Thereafter, the solicitors also applied to the liquidator for sanction to file the notice of appeal and to proceed with the appeal before the Court of Appeal. The sanction was subsequently given by the liquidator, but it was stated that the sanction was to apply retrospectively one day before the filing of the notice of appeal in the Court of Appeal.

At the Court of Appeal, no formal application was made by the respondent for leave *nunc pro tunc* and such leave was not granted. The appellants took issue with the validity of the retrospective sanction granted by the liquidator and filed a motion to strike out the respondent's appeal. The Court of Appeal dismissed the appellants' motion for striking out – hence the present appeal before the apex court.

Companies Act

Section 236(2)(a) of the Companies Act 1965 (now Section 486(1) read with Part (1)(a) of the 12th Schedule of the Companies Act 2016) states as follows:

Powers of liquidator

(1) ...

(2) *The liquidator may –*

(a) *Bring or defend any action or other legal proceeding in the name and on behalf of the company*

...

(3) ***The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers. (Emphasis added.)***

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Questions of law

The key question of law addressed by the apex court was whether the retrospective sanction granted under Section 236(2)(a) of the Companies Act 1965 was valid in view of the circumstances of the case, as the liquidator had given such sanction without the respondent obtaining the leave of court *nunc pro tunc*.

Decision

In allowing the appeal, the apex court held that the respondent had not had the necessary legal standing when it had filed the notice of appeal before the Court of Appeal, as the sanction given by the liquidator, which was subsequent to the filing of the notice of appeal, had no retrospective effect. Further, the liquidator had not had the power to grant retrospective sanction in the absence of express statutory provisions conferring such powers.

Comment

Vernon Ong FCJ declined to answer the question on whether an application to the court for leave *nunc pro tunc* must be made by way of a formal application pursuant to Section 486(2) of the Companies Act 2016, as no such application was made in that case. This is significant, as it would allow some room for litigants that are unable to obtain the liquidator's sanction in time to make the formal application to the court to regularise matters, especially in light of the unprecedented COVID-19 pandemic.

For further information on this topic please contact [Lee Xin Div](#) or [Foo Joon Liang](#) at Gan Partnership by telephone (+603 7931 7060) or email (xindiv@ganlaw.my or joonliang@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Endnotes

(1) 'Sanction' means 'approval' in this article.

(2) *Lai King Lung (acting in the name of Chris Lai, Yap & Partners) v Merais Sdn Bhd* [2020] 6 AMR 217.

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