

# Challenging a liquidator's decision to admit a proof of debt

30 March 2021 | Contributed by [Gan Partnership](#)

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In *Sunrise Megaway Sdn Bhd (In Liquidation) v Kathryn Ma Wai Fong*,<sup>(1)</sup> the Court of Appeal was tasked with deciding whether a liquidator's decision to admit a proof of debt (POD) could be challenged. A 'POD' is a document which quantifies the sum owed to a creditor by a company, which is indispensable for the creditor to be able to claim the outstanding debt from the company in liquidation.

## Facts

The appellant was a company within the WTK group, while the respondent was the petitioner. The appellant was wound up by a court order and a liquidator was appointed upon the winding-up order. Subsequent to the appellant's winding up, one of the creditors and part of the WTK group, Lismore Trading Co Ltd, lodged a POD for approximately RM4 million for advances paid in several tranches to the appellant. The appellant disbursed the sum to another company in the same group, which was later wound up. The summary of statement and bank statements of the accounts were enclosed with the POD.

The liquidator investigated the POD, including by verifying the transaction among the three companies with the relevant bank statements and interviewing the financial controller who oversaw the accounts of several companies within the group, including those of the appellant. The POD was in turn admitted by the liquidator. After that, the respondent filed a motion at the high court pursuant to Section 517 of the Companies Act 2016 and Rules 91, 93 and 98 of the Companies (Winding-Up) Rules 1972 to oppose the liquidator's admission of the POD.

## High court decision

The high court allowed the respondent's motion and reversed the liquidator's decision to admit the POD. The court found that the POD was unsubstantiated due to insufficient evidence, and that the evidence of the financial controller was questionable and unreliable. The court also found that the liquidator had failed to perform more investigations into the POD by obtaining evidence of a company written resolution in support of the claim. Dissatisfied, the appellant appealed.

## Court of Appeal decision

The central issue on appeal was whether the liquidator's decision to admit the POD was unreasonable and absurd, such that it had required the high court's interference in view of the threshold set by the apex court in *Wong Sin Fan v Ng Peak Yam @ Ng Pyak Yeow*.<sup>(2)</sup> The Court of Appeal disagreed with the high court and reinstated the liquidator's decision.

## Key takeaways

In allowing the appeal and reinstating the liquidator's decision, the Court of Appeal unanimously held that the liquidator's discretion in admitting the POD had been correctly exercised following a detailed investigation. In this regard, the Court of Appeal ruled that it is not for the court to determine the investigating manner of a liquidator, or the relevancy and adequacy of documents to be considered in the course of such investigation, before deciding. Otherwise, the court would usurp the liquidator's functions and interfere with the discharge of their role and function.

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Applying the Australian case of Barnden (in his capacity as liquidator of *Masonry Works Pty Ltd*)(in liquidation) ([2020] FCA 545)), the Court of Appeal decided that the liquidator had applied the correct accounting principles to the documents involved in the transactions and contemporaneous evidence before deciding to admit the POD.

Further, the liquidator was found to have possessed the necessary qualification, skill and ethics to discharge his function in the company liquidation. Guided by the principles set out by the Singapore Court of Appeal in *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* ([2009] 4 SLR 458), the factors<sup>(3)</sup> to be assessed when scrutinising a POD and the level of scrutiny are subject to the circumstances of each case. The relationship between the subsidiaries in the WTK Group was a relevant consideration in reaching a decision on the POD. The Court of Appeal ruled that the sum provided in the POD was an advancement between the appellant and another company in the same group, despite the absence of a director's resolution, as the transactions were shown in contemporaneous documents exhibited in this case.

The Court of Appeal decided that the respondent could not meet the threshold set by the apex court in *Wong Sin Fan*. The courts should be slow to interfere with any act or decision of a liquidator in discharging their role simply because its opinion may differ from that of the liquidator; they should do so only if such act or decision is so unreasonable and absurd that no reasonable person would have acted in the same way. Hence, the high court had erred in law and fact by interfering with the liquidator's decision to admit the POD of Lismore Trading Co Ltd. In the absence of fraud or bad faith, there was no reason why the liquidator's decision to admit the POD had warranted the court's interference.

### Comment

This decision clarifies the extent of judicial scrutiny regarding the exercise of liquidators' powers in admitting proofs of debt and at the same time provides welcome guidance for liquidators in this undertaking.

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### Endnotes

(1) Civil Appeal B-02(A)-1078-06/2019.

(2) [2012] 2 MLJ 629.

(3) *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* ([2009] 4 SLR 458), pp468-469. Factors to be considered include:

- the origins of the debt;
- the length of time that the debt has been due;
- how the company has treated the debt in its financial statements;
- the business of the debtor company; and
- where relevant, the relationship between the claimants and the controlling shareholders of the company.

In addressing these factors, the liquidator must rely on:

- knowledge of the general principles of company accounting;
- the auditing practice of companies by independent auditors;
- the effect and implication of directors' and shareholders' annual approval of company accounts made in compliance with the law;
- the customary insolvency practice in verifying debts; and
- some degree of common sense in understanding human relationships.

Considering these matters, the liquidator should also apprise themselves of the nature of the company's business and other facts peculiar to said company. In *Fustar*, the relationship between the directors and the shareholders *inter se* is a relevant factor to be considered. Therefore, although a liquidator has a duty to scrutinise all proof of debt, the level of scrutiny required by the liquidator to discharge this duty must, in the final analysis, depend on the circumstances of the case.