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MERAIS SDN BHD v. LAI KING LUNG & ANOR

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
BADARIAH SAHAMID JCA
MARY LIM JCA
B [CIVIL APPEAL NO: B-02(NCVC)(W)-3-01-2018]
13 MARCH 2019

COMPANY LAW: *Liquidation – Company wound-up – Appointment of official receiver ('OR') as liquidator – Notice of appeal by wound-up company – Whether wound-up company must obtain consent or sanction of OR before filing of notice of appeal – Whether actions or proceedings filed without sanction of liquidator void ab initio and must be struck out – Whether OR authorised to grant sanction retrospectively – Companies Act 2016, ss. 483(2) & 486(1)*

D The appellant sued the respondents in December 2013 for recovery of trust monies, a sum in excess of RM14 million. On 1 September 2015, whilst the High Court proceedings were in progress, the appellant was wound up, pursuant to an unrelated matter, and the official receiver ('OR') was appointed as the liquidator of the appellant. After obtaining the requisite consent/sanction of the OR in January 2016, the appellant carried on with E the High Court suit. The respondents also obtained leave from the winding-up court under s. 226(3) of the Companies Act 1965 ('CA 1965') in order to proceed with their counterclaim against the appellant in the High Court proceedings. On 28 November 2017, after full trial, both the appellant's claim and the respondents' counterclaim were dismissed and both parties F appealed. The appellant filed its notice of appeal and the respondents requested for a copy of the OR's sanction to appeal. In reply, the appellant stated that in view of the constraint of time, the sanction of the OR could not be obtained before the notice of appeal was filed and indicated that the required sanction would be obtained in retrospect. Hence, the respondents G filed a notice of motion (encl. 3) to strike out the notice of appeal pursuant to ss. 483(2) and/or 486(1) of the Companies Act 2016 ('CA 2016') and/or pursuant to the inherent jurisdiction of the court. The essence of the respondents' application was that the notice of appeal was invalid and void *ab initio* and must be struck out on the single ground that it was filed without H the prior approval or sanction of the OR.

Held (dismissing application with costs)
Per Mary Lim JCA delivering the judgment of the court:

(1) There are no provisions in the new CA 2016, whether in ss. 483 or 486 or any other provision that actions or proceedings, or more particularly I appeals, which had been filed without the sanction or approval of the liquidator, are necessarily void *ab initio* and must be struck out. Much depended on the particular facts and circumstances. With the presence of s. 236(2) of the CA 1965, it is the liquidator who has the authority

to bring or defend any action or proceedings in court. Section 236(2) of the CA 1965 is to be found in Part 1 of the Twelfth Schedule of the CA 2016. The term 'bringing' must necessarily include continuing with any action or proceedings already brought or commenced, and any such action or proceedings must also extend to the conduct and continuation of appeals. (paras 27 & 34)

(2) The appellant had diligently set about attending to the matters of mandate and sanction according to the legal provisions, and had done so timeously. It had also promptly informed of the registration details of the appeal and sought the sanction to be granted retrospectively. The OR sanctioned the appeal with retrospective effect, from the date the notice of appeal was filed. (paras 18, 58 & 59)

(3) The OR, as the liquidator of the appellant, had all the necessary authority to consider and grant a sanction which was effective on a date other than the date it was made. This was particularly so given the circumstances that there must first arise a decision to appeal before the matter of sanction was relevant. Since the decision to appeal must be made within a month, it was only after this decision to appeal was made that the OR was approached for its sanction. The insolvency office or the OR's response had not unduly delayed the application; it had responded just under two months from the time of request. Although that was commendable, it was still way past the time for filing of any appeal. However, the steps taken and the sanction secured by the appellant were proper and valid and hence, the matter was not irretrievably a nullity. (paras 61-63)

(4) The grant of retrospective leave or leave *nunc pro tunc* is well within the jurisdiction of the court to make, but only where the circumstances are appropriate. What is appropriate is fact sensitive and a matter of discretion. If an application for retrospective leave or leave *nunc pro tunc* may be sought from the court, there is no reason why the liquidator may not likewise do the same. In situations where sanction or leave of the court is sought, the role of the court is to supervise and control the liquidator and to consider appeals against its decisions. In this case, since the OR had already granted the necessary sanction, the respondent's notice of motion was without merit and was therefore, dismissed. (paras 54, 65 & 68)

Bahasa Malaysia *Headnotes*

Perayu menyaman responden-responden pada Disember 2013 untuk pemulangan semula wang amanah, dalam jumlah melebihi RM14 juta. Pada 1 September 2015, semasa prosiding Mahkamah Tinggi masih berjalan, perayu digulungkan, berikutan satu perkara yang tidak berkaitan, dan pegawai penerima ('OR') dilantik sebagai pelikuidasi perayu. Setelah memperoleh persetujuan/sanksi OR yang diperlukan pada Januari 2016, perayu meneruskan dengan guaman Mahkamah Tinggi. Responden-

responden juga memperoleh kebenaran mahkamah penggulungan bawah s. 226(3) Akta Syarikat 2016 ('AS 1965') untuk meneruskan dengan tuntutan balas mereka terhadap perayu dalam prosiding Mahkamah Tinggi itu. Pada 28 November 2017, selepas perbicaraan penuh, kedua-dua tuntutan perayu dan tuntutan balas responden-responden ditolak dan kedua-dua pihak merayu. Perayu memfailkan notis rayuannya dan responden meminta salinan sanksi OR untuk rayuan. Dalam balasannya, perayu menyatakan bahawa disebabkan kesuntukan masa, sanksi OR tidak diperoleh sebelum notis rayuan difailkan dan menyatakan bahawa sanksi yang diperlukan akan diperoleh secara kebelakangan. Oleh itu, responden-responden memfailkan notis usul (lampiran 3) untuk membatalkan notis rayuan menurut s. 483(2) dan/atau s. 486(1) Akta Syarikat 2016 ('AS 2016') dan/atau menurut bidang kuasa inheren mahkamah. Inti pati permohonan responden-responden adalah notis rayuan tidak sah dan batal *ab initio* dan mesti dibatalkan atas satu-satunya alasan bahawa permohonan itu difailkan tanpa kelulusan atau sanksi OR.

Diputuskan (menolak permohonan dengan kos)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Tiada peruntukan dalam AS 2016 baharu, sama ada dalam ss. 483 atau 486 atau apa-apa peruntukan bahawa tindakan-tindakan atau prosiding-prosiding atau lebih khusus, rayuan-rayuan, yang difailkan tanpa sanksi atau kebenaran pelikuidasi sepatutnya batal *ab initio* dan mesti dibatalkan. Kebanyakannya bergantung pada fakta-fakta dan hal keadaan khusus. Dengan adanya s. 236(2) AS 1965, pelikuidasi yang mempunyai kuasa memulakan atau membela apa-apa tindakan atau prosiding di mahkamah. Seksyen 236(2) AS 1965 boleh didapati dalam Bahagian 1 Jadual Keduabelas AS 2016. Terma 'membawa' semestinya termasuk meneruskan dengan apa-apa tindakan atau prosiding yang telah dibawa atau dipertahankan, dan apa-apa tindakan atau prosiding sedemikian juga semestinya dilanjutkan pada tindakan dan penerusan rayuan-rayuan.

(2) Perayu telah menguruskan perkara-perkara berkaitan mandat dan sanksi dengan teliti menurut peruntukan undang-undang, dan melakukannya dengan segera. Perayu juga dengan segera memaklumkan butir-butir pendaftaran rayuan dan memohon sanksi diberi secara kebelakangan. Pegawai penerima membenarkan rayuan secara kebelakangan, dari tarikh notis rayuan difailkan.

(3) Pegawai penerima, sebagai pelikuidasi perayu, mempunyai kesemua kuasa yang diperlukan untuk mempertimbangkan dan memberi sanksi yang berkuat kuasa dari tarikh selain dari tarikh sanksi dibuat. Ini khususnya apabila mula-mula sekali perlu ada keputusan untuk dirayu sebelum perkara sanksi menjadi relevan. Oleh sebab keputusan untuk merayu mesti dibuat dalam tempoh satu bulan, sanksi OR dipohon hanya selepas keputusan untuk merayu dibuat. Jawapan pejabat insolvensi atau OR tidak melengahkan permohonan itu; mereka

memberi jawapan dalam kurang daripada dua bulan dari tarikh permohonan. Walaupun patut dipuji, ini jauh melampaui masa untuk rayuan difailkan. Walau bagaimanapun, langkah-langkah yang diambil dan sanksi yang diperoleh perayu adalah wajar dan sah dan dengan itu, perkara tersebut bukan ketaksahan yang tidak boleh dibetulkan.

(4) Pemberian kebenaran kebelakangan atau kebenaran *nunc pro tunc* adalah dalam bidang kuasa mahkamah, tetapi hanya dalam hal keadaan yang wajar. Maksud wajar bergantung pada fakta dan perkara budi bicara. Jika permohonan untuk kebenaran kebelakangan atau kebenaran *nunc pro tunc* boleh dipohon daripada mahkamah, tiada alasan mengapa pelikuidasi tidak boleh melakukan perkara sama. Dalam situasi sanksi atau kebenaran mahkamah dipohon, peranan mahkamah adalah untuk menyelia dan mengawal pelikuidasi dan mempertimbangkan rayuan-rayuan terhadap keputusannya. Dalam kes ini, oleh sebab OR telah pun memberi sanksi yang perlu, notis usul responden-responden tidak bermerit dan dengan itu, ditolak.

Case(s) referred to:

Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal [2018] 2 CLJ 513 FC ***(dist)***
Battiston v. Maiella Construction Pty Ltd [1967] VR 349 ***(refd)***
HLE Engineering Sdn Bhd v. HTE Letrik Bumi JV Sdn Bhd [2015] 1 LNS 4 CA ***(refd)***
Howe v. RM MacDougall Pty Ltd [1939] 13 WCR (NSW) 180 ***(refd)***
Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd [2012] 10 CLJ 88 CA ***(refd)***
Re Clarke, ex p Clarke [1896] 17 LR (NSW) (B&P) 85 ***(refd)***
Re Excelsior Textile Pty Ltd [1964] VR 574 ***(refd)***
Re Hutton (a bankrupt) ex parte Mediterranean Machine Operations Ltd v. Haigh [1969] 2 Ch 201 ***(refd)***
Re Saunders (A bankrupt); Re Bearman (A bankrupt) [1997] Ch 60 ***(refd)***
Reebok (M) Sdn Bhd v. CIMB Bank Bhd [2018] 1 LNS 1186 CA ***(refd)***
Russel v. Westpac Banking Corporation [1994] 13 ACSR 5 ***(refd)***
Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corporation Sdn Bhd & Ors [2017] 9 CLJ 45 CA ***(refd)***
Thomson v. Mulgoa Irrigation Co Ltd [1894] 4 BC (NSW) 33 ***(refd)***
Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd [2014] 2 CLJ 1 FC ***(dist)***
Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC ***(dist)***

Legislation referred to:

Companies Act 1965 (since repealed), ss. 226(2), (3), 233(1), (2), 236(1)(e), (2)(a), 279
Companies Act 2016, ss. 483(2), 486(1)
Courts of Judicature Act 1964, ss. 68, 96
Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)

Insolvency Act 1986 [UK], s. 285(3)

For the appellant - Gabriel Daniel & Sukhdev Kaur; M/s Paul Ong & Assocs
For the respondents - Justin Voon, Ho Kok Yew & Khor Heng How; M/s Owee & Ho

Reported by S Barathi

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JUDGMENT

Mary Lim JCA:

[1] Enclosure 3 is a notice of motion filed by the respondents to strike out the notice of appeal dated 21 December 2017 pursuant to ss. 483(2) and/or
B 486(1) of the Companies Act 2016 and/or pursuant to the inherent jurisdiction of the court.

[2] We were not inclined nor were we persuaded to do so. We found the application without merit and proceeded to consequentially dismiss the motion with costs on 20 April 2018.

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[3] On 10 January 2019, the Federal Court exercised its discretion under s. 96 of the Courts of Judicature Act 1964 and granted leave to appeal against that decision.

Material facts

D **[4]** There were two affidavits before us, the respondents' affidavit filed in support of the motion (encl. 4), and the appellant's affidavit filed in reply (encl. 5). From those affidavits, we gathered the following material facts.

[5] In December 2013, the appellant sued the respondents *vide* Shah Alam
E High Court Civil Suit No. 22NCvC-723-12/2013 (Shah Alam suit). The appellant's claim is for recovery of trust monies a sum in excess of RM14 million - see para. 13 of the appellant's affidavit-in-reply filed by a contributory.

[6] On 1 September 2015, whilst the High Court proceedings were in
F progress, the appellant was wound-up and the official receiver was appointed as the liquidator of the appellant. The winding-up petition was initiated by the Government of Malaysia in an unrelated matter/dispute.

[7] After obtaining the requisite consent/sanction of the official receiver in January 2016, the appellant carried on with the Shah Alam suit. The
G respondents too, on 9 June 2016, obtained leave from the winding-up court under s. 226(3) of the Companies Act 1965 in order to proceed with their counterclaim against the appellant in the High Court proceedings.

[8] On 28 November 2017, after a full trial, both the appellant's claim and the respondents' counterclaim were dismissed. According to para. 13 of
H the appellant's affidavit-in-reply, the "High Court found in favour of the appellant save that the claim was said to be time barred."

[9] Both parties appealed. According to the appellant's affidavit-in-reply, the appellant "deliberated over the said decision". On 21 December 2017, the appellant instructed its solicitors to file a notice of appeal which was
I accordingly done the following day.

[10] Upon sight of the appellant's notice of appeal, the respondents' solicitors requested from the appellant's solicitors *vide* letter dated 26 December 2017, a copy of the official receiver's sanction to appeal, stating:

> In view of your client's liquidation, we trust that you would have obtained the required sanction from the Official Receiver in advance of the intended appeal.

[11] In its reply, the appellant's solicitors informed the respondents that "in view of the constraint of time, the sanction of the official receiver could not be obtained before the notice of appeal was filed." The appellant, however, indicated that "the required sanction would be obtained in retrospect".

[12] Citing a line of authorities including *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785; [2010] 2 MLJ 749; *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88; [2013] 1 MLJ 406; *Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd* [2014] 2 CLJ 1; [2014] 3 MLJ 1; *Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corporation Sdn Bhd & Ors* [2017] 9 CLJ 45; [2017] 6 MLJ 116; *HLE Engineering Sdn Bhd v. HTE Letrik Bumi JV Sdn Bhd* [2015] 1 LNS 4; [2015] 2 MLJ 661; and *Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal* [2018] 2 CLJ 513; [2018] 2 AMR 97; the respondents took the view that the appeal was invalid and void *ab initio* and must be struck out.

[13] In summary, the respondents' submission was that since all assets and liabilities of the appellant had been vested with the official receiver upon the appellant being wound up, it was up to the official receiver to decide whether or not to appeal against the decision of the High Court. The respondents alleged that the appellant "lacks the requisite *locus standi* to initiate the appeal herein" because:

(i) there was no prior consent and/or sanction obtained from the official receiver by the appellant when the notice of appeal was filed; and

(ii) any consent and/or sanction obtained by the appellant subsequently from the official receiver cannot in any event retrospectively clothe the appellant with the necessary *locus standi* to sustain the appeal herein.

[14] The respondents however, acknowledged that "in appropriate circumstances", "special" or "very rare circumstances", the court may grant retrospective leave *nunc pro tunc*. But, this too, would require a formal application. It was further urged upon us to disregard the affidavit-in-reply that was filed by a contributor of the appellant. The respondents contended that such affidavit was inadmissible as only the liquidator should affirm any affidavit for the appellant at this point in time. Given that there was no formal application supported by a properly deposed affidavit, there was therefore no material for the court to consider or justify any *nunc pro tunc*

leave, the respondents urged the court to allow their motion in encl. 3 and strike out the appeal. It was the final contention of the respondents that allegations of prejudice or injustice caused by such a motion "is not relevant where the appellant had failed to follow the law".

[15] In opposing the motion on the ground that it was *inter alia* baseless, the appellant submitted that in view of the circumstances of the case, the sanction could actually be granted in retrospect. The circumstances were these.

[16] The appellant explained in the affidavit filed in reply that on 22 December 2017, the appellant's solicitors had informed the insolvency department/official receiver of the appellant's intention to appeal whilst simultaneously seeking the necessary sanction to appeal with retrospective effect from 21 December 2017 and for the solicitors to act for the appellant in the appeal filed.

[17] The appellant further explained at para. 8 of the affidavit-in-reply:

> Taking into account the time limited for filing the said Notice of Appeal was one (1) month from the date of the said Decision which would have ended on 28.12.2017, the required sanction could certainly not be obtained by 28.12.2017 as it could take some time for the application to be processed.

[18] As it turned out, the official receiver sanctioned the appeal with retrospective effect from 21 December 2017.

[19] According to the appellant, applying for a sanction prior to receiving firm instructions to appeal from the appellant "will be a futile exercise" because the application will be made in anticipation of such instructions; the application requires undertakings to be given by the appellant and the appellant's solicitors; and unnecessary time and costs will be incurred. Since the application for sanction was made promptly and since ultimately, it was granted with retrospective effect in view of the circumstances of the case, the appellant submitted that the respondents' complaints were baseless, that the application was "made frivolously and to derail the administration of justice"; and to "circumvent the merits of the case being ventilated" which the appellant invited the court not to countenance.

Our Analysis And Decision

[20] As mentioned at the outset, we disagreed with the submissions of the respondents. We found the application without merit and proceeded to dismiss it with costs.

[21] The respondents' application is made pursuant to ss. 483(2) and/or 486(1) of the Companies Act 2016 (Act 777). The respondents have also invoked the inherent jurisdiction of the court, a recourse which we do not readily subscribe to nor encourage when there are specific written provisions on the matter.

[22] Sections 483(2) and 486(1) read respectively as follows:

Custody and vesting of company's property

483. (1) Where an interim liquidator has been appointed or a winding up order has been made, the interim liquidator or liquidator shall forthwith take into his custody or under his control all the property to which the company is or appears to be entitled.

(2) On the application of the liquidator, the Court may order that all or any part of the property belonging to the company or held by trustees on behalf of the company shall vest in the liquidator and the property shall, subject to subsection (3), vest accordingly and the liquidator may, after giving such indemnity, if any, as the Court directs, bring or defend any action which relates to that property or of which is necessary to bring or defend for the purpose of effectually winding up of the company and recovering its property.

(3) Where an order is made under subsection (2), every liquidator in relation to whom the order is made shall within seven days of the making of the order:

(a) lodge an office copy of the order with the Registrar; and

(b) where the order relates to land, lodge an office copy of the order with the appropriate authority concerned with the registration or recording of dealings in that land.

Powers of liquidator in winding up by Court

486. (1) Where a company is being wound up by the Court, the liquidator may:

(a) without the authority under paragraph (b), exercise any of the general powers specified in Part I of the Twelfth Schedule; and

(b) with the authority of the Court or the committee of inspection, exercise any of the powers specified in Part II of the Twelfth Schedule.

(2) 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 proposed exercise of any of those powers.

[23] The general powers of the liquidator which may be exercised without seeking the authority of the court or the committee of inspection are as spelt out in Part I of the Twelfth Schedule:

The liquidator may:

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

(b) compromise any debt due to the company other than calls and liabilities for calls and other than a debt where the amount claimed by the company to be due to it exceeds one thousand five hundred ringgit;

A (c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

(d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use B when necessary the company's seal;

(e) prove rank and claim in the bankruptcy of any contributory or debtor for any balance against his estate, and receive dividends in the bankruptcy in respect of that balance as a separate debt due from the bankrupt and rateably with the other separate creditors; C

(f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business; D

(g) raise on the security of the assets of the company any money requisite;

(h) take out letters of administration of the estate of any deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor or his E estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purposes of enabling the liquidator to take out the letters of administration or recover the money, be deemed due to the liquidator;

F (i) make any payment as necessary in carrying on the affairs of the company in its ordinary course of business including payment of utility bills, statutory fees and all other such payments;

(j) appoint an agent to do any business which the liquidator is unable to do himself;

G (k) appoint an advocate to assist him in his duties; and

(l) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

[24] Having examined the above provisions, we noted that these provisions H are substantially similar to the relevant and comparable provisions of ss. 226 (2) & (3), 233, and 236 under the previous Companies Act of 1965, which provisions were under consideration by the court in the cases relied on by the respondents. The general powers of the liquidator as found in Part I of the Twelfth Schedule are also similar to those previously found in s. 236(2) of the old Companies Act 1965. I

[25] Be that as it may, we do not propose to discuss the similarities or differences as that is neither material nor relevant for our instant appeal.

[26] The essence of the respondents' application before us is that the notice of appeal dated 22 December 2017 is invalid and void *ab initio* and must be struck out on the single ground that it was filed without the prior approval or sanction of the official receiver. The sanction that was procured subsequently was said to be of no effect as the sanction does not operate retrospectively. The court was also urged not to consider granting leave *nunc pro tunc* due to an absence of any formal application, and that there are no appropriate circumstances warranting the grant of such retrospective leave *nunc pro tunc*.

[27] We find the respondents' line of argument unpersuasive and unsustainable in the face of the provisions relied on. To start with, there are no provisions in the new Companies Act 2016, whether in ss. 483 or 486, or any other provision that has been drawn to our attention that actions or proceedings, or more particularly appeals, which have been filed without the sanction or approval of the liquidator are necessarily void *ab initio* and must be struck out. The cases cited further bear this out. Much would depend on the particular facts and circumstances.

[28] We find the respondents' line of argument stems from reasoning supposedly found in the cases relied on, starting with the Federal Court's decision in *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* (*supra*).

[29] With respect, we do not find that decision, or any of those cited, as supportive of the proposition now articulated by the respondents before us.

[30] The Federal Court's decision of *Zaitun Marketing Sdn Bhd* (*supra*) is in fact not applicable to the instant appeal. That was a case where the Federal Court was invited to determine the question of whether the appointment of an advocate and solicitor to represent the liquidator required leave of court, whether s. 236(1)(e) or 236(2)(a) of the old Companies Act 1965 applied. The issue of sanction in the terms understood in the present appeal did not arise.

[31] The issue posed was answered in the negative by the Federal Court and the decisions of both the High Court and the Court of Appeal were affirmed, but for different reasons. The Federal Court was *inter alia* of the view that the Rules of the High Court 1980 required all companies, without exception to be represented in court by an advocate. As such, "a consent or sanction of the court becomes superfluous", per Zaki Azmi CJ.

[32] Gopal Sri Ram FCJ on the other hand felt that the fact pattern of the appeal did not call for the examination or application of s. 236 at all. Instead, His Lordship was of the view that "the real issue at the heart of this appeal is whether sanction may be granted by the Director General of Insolvency ("DGI") to a former director of a company in liquidation who is also not a contributory or creditor to use the name of the company to bring, continue or defend an action." And, it was in that context that His Lordship made the following observation:

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> [17] What appears to have been overlooked all round is the fundamental principle that once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. However, there is jurisdiction in the Court to authorise other persons to conduct litigation in the name of the company.

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[33] The Federal Court recognised too, that there was recourse under s. 279 that in the event the liquidator refused to grant leave or has declined authority, any interested party may approach the court for such necessary authorisation.

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[34] We have no hesitation in subscribing to that principle; that the same considerations apply under the new statutory arrangements; and that is, following the order to wind up a particular company, all assets and liabilities of that company vests in the liquidator or the official receiver. More specifically, with the presence of s. 236(2) of the Companies Act 1965, it is

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the liquidator who has the authority to bring or defend any action or proceedings in court. And, if we may add, the term "bringing" in our view, must necessarily include continuing with any action or proceedings already brought or commenced, and any such action or proceedings must also extend to the conduct and continuation of appeals. Section 236(2) of the Companies Act 1965 is now to be found in Part I of the Twelfth Schedule of the

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Companies Act 2016.

[35] That principle was in fact reiterated in *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* (*supra*), para. [11] of the judgment where the Court of Appeal cited *Zaitun Marketing Sdn Bhd* and the Australian

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decision of *Russel v. Westpac Banking Corporation* [1994] 13 ACSR 5 in support; and *HLE Engineering Sdn Bhd v. HTE Letrik Bumi JV Sdn Bhd* (*supra*).

[36] However, in none of those decisions, or in the decisions in *Winstech Engineering Sdn Bhd v. Espl (M) Sdn Bhd* (*supra*); *Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corp Sdn Bhd & Ors* (*supra*); or even

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Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal (*supra*) is there a suggestion that there can never be retrospective leave or sanction. On the contrary, a closer examination of these cases reveal that there may be retrospective leave or sanction, or leave *nunc pro tunc* granted in appropriate cases; or even the application of the principle of ratification.

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In our view, that call does not arise in the instant appeal as the sanction has already been granted by the official receiver but in the event there is such a need, the circumstances are in fact ripe for a grant of retrospective leave or for a *nunc pro tunc* leave. We will explain.

[37] It is a misconception and an erroneous reading of the decision in

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Hup Lee Coachbuilders to suggest that that Court of Appeal's decision supports the proposition that retrospective sanction is not possible. A careful reading of the decision will readily show that it was the peculiar circumstances of that case and the conduct of the appellant that certain observations were made by the Court of Appeal.

[38] In that appeal, the appellant together with another had filed a civil suit against the respondent, seeking to recover monies paid on false invoices. At the time of filing of the suit in June 2009, the appellant had already been wound up; it was wound up in May 2006 and the official receiver had been appointed its liquidator. Without obtaining leave either from the court or from the liquidator, the appellant sued the respondent. More importantly, the appellant did not disclose its own wound-up status in the writ or the statement of claim filed against the respondent. The respondent objected to the appellant's *locus standi* to initiate action.

[39] Despite being directed to amend its writ and statement of claim to disclose that status of insolvency, or to obtain sanction, the appellant did neither. The action was thus struck out.

[40] Subsequently, the action was reinstated but, on terms; that sanction was to be obtained by a particular dateline (30 November 2010). Where the sanction was so obtained, the appellant was to write to the "managing judge unit" to have the case fixed for case management.

[41] The official receiver gave a conditional sanction on 29 November 2010 and upon meeting its terms, sanction was granted on 3 March 2011.

[42] Meanwhile, on 28 February 2011, the respondent filed an application to strike out the proceedings pursuant to O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980 on the grounds, *inter alia*, that the appellant's action was vexatious, frivolous and scandalous, and an abuse of process because the appellant had no *locus standi* to proceed with the claim as leave of the court was not obtained before the action was commenced.

[43] The respondents' application was allowed and the decision was affirmed on appeal.

[44] What is interesting is what was argued by the appellant at the Court of Appeal. It had submitted that leave was not required at all because under s. 226(3) of the Companies Act 1965, leave is only required if action is to be brought against the wound-up company. Since it is the wound-up company that was suing, s. 226(3) did not arise.

[45] The Court of Appeal disagreed clarifying that the relevant provisions were ss. 233(1) and (2), and not, s. 226(3). Since the appellant was already wound-up at the material time of commencement of the civil suit against the respondent resulting in all its assets and liabilities being vested in the liquidator, and since leave had never been sought from either the liquidator or from the court to commence action, neither the company, its shareholders or its directors have any *locus standi* to commence action without the liquidator or the court's leave. The action filed therefore "is clearly illegal and invalid. The action ought to be struck out."

[46] The Court of Appeal further found that there was:

> ... no evidence to show that the commencement of the present action by the appellant itself on 26 February 2009 was done with the knowledge and authority of the official assignee as the liquidator. Clearly, the appellant or its shareholders or creditors cannot usurp the powers of the liquidator in initiating the present action against the respondent. The appellant cannot commence the action and then later, after objections raised by the respondent, apply for leave or sanction from the official assignee. There are no provisions of law to authorise that leave or sanction of the official assignee is to have retrospective effect. Therefore the action was invalid and void *ab initio*. Subsequent leave or approval by the official assignee office which came more than two years later cannot legalise or validate an action which was invalid and *void ab initio*.

[47] It is under those circumstances and conditions that the Court of Appeal made its observations, that the sanction granted and effective from 3 March 2011, applied for and obtained two years after the respondent had raised its objections, was not and could not be made retrospective by the court.

[48] Similar considerations can be seen in the Federal Court decision of *Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd* (*supra*). In *Winstech Engineering*, the respondent had filed a motion to strike out the applicant's application for leave to appeal to the Federal Court on the ground that there was no leave or sanction from the official receiver as liquidator for the applicant to file such an application. The motion was allowed.

[49] The Federal Court first found the two warring parties approaching the issue of whether leave was required to appeal under two different legislations: the appellant relying on the Bankruptcy Act 1967 whilst the respondent relied on the Companies Act 1965. Since the appellant was a company, the Federal Court opined that where there is specific law enacted, that law must prevail over any other similar laws. As for the matter of whether leave was required, the Federal Court found no reason to depart from *Hup Lee*, adding that the doctrine of ratification was not applicable as the application for sanction did not specify that it was to be retrospective.

[50] The Federal Court further said:

> [21] The issue of prejudice or miscarriage of justice does not arise in the circumstances, as the applicant, on its own accord, had failed to utilise the enabling provisions of the law to commence the impugned legal proceedings. The Court, in law, is not in a positon to render assistance to such a litigant.

[51] What is, however, overlooked is that the Federal Court acknowledged in *Winstech Engineering* that following the English decision in *Re Saunders (A bankrupt); Re Bearman (A bankrupt)* [1997] Ch 60, leave *nunc pro tunc* or retrospective leave may be granted:

> [22] ... in appropriate circumstances, which has to be proven, leave *nunc pro tunc* may be given under s. 236(2)(a) of the Companies Act subject to the discretion of the Courts under s. 236(3) of the Act. Such discretion and control by the Court under s. 236(3) is to be read together with s. 226(3) of the Act. **This is notwithstanding the fact that the proceedings had already commenced**.
>
> (emphasis added)

[52] In *Re Saunders*, after proceedings had already been commenced against a couple of bankrupt solicitors, the various plaintiffs applied for leave of court under s. 285(3) of the Insolvency Act 1986. Lindsay J carefully examined the approaches of the courts and the relevant legislations of Australia, New Zealand, Canada and India before concluding that the court in appropriate circumstances may give retrospective leave. His Lordship rejected the submission that proceedings continued without leave are to be considered irretrievably null, and found that the particular facts before him justified the granting of such leave.

[53] Lindsay J found that the Australian experience preferred a more pragmatic approach. In *Thomson v. Mulgoa Irrigation Co Ltd* [1894] 4 BC (NSW) 33, Manning J recognised the absurdity of requiring the same pleadings to be filed all over again gave the plaintiff leave *nunc pro tunc* to institute the suit. This decision was followed in *Re Clarke, ex p Clarke* [1896] 17 LR (NSW) (B&P) 85, with the court observing that leave was in fact not absolutely necessary; and in *Howe v. RM MacDougall Pty Ltd* [1939] 13 WCR (NSW) 180, where Long Innes CJ opined that in an ordinary case, the court would have no hesitation in granting leave *nunc pro tunc* and moulding the order in such a way as to see that no injustice was suffered and to avoid the costs of instituting proceedings *de novo*. Yet another decision which favoured the grant of a *nunc pro tunc* order was the decision in *Battiston v. Maiella Construction Pty Ltd* [1967] VR 349 where if retrospective leave was not given, the plaintiff would have been left without remedy. This was because the limitation period had expired.

[54] The position was the same in Canada, New Zealand and India. Closer to home was the decision in *Re Hutton (a bankrupt) ex parte Mediterranean Machine Operations Ltd v. Haigh* [1969] 2 Ch 201, where proceedings were stayed and leave was also granted to continue. Lindsay J found the only case that went the other way was *Re Excelsior Textile Pty Ltd* [1964] VR 574 where the court was of the view that retrospective leave was not within the power of the court to grant. Hence, the grant of retrospective leave or leave *nunc pro tunc* was well within the jurisdiction of the court to make, but only where the circumstances are appropriate. What is appropriate is fact sensitive and a matter of discretion.

[55] On the facts in *Winstech Engineering*, the Federal Court found after examining the sanction by the official receiver dated 19 August 2013 that there was actually no application for the sanction to be made retrospectively. There was also no material placed before the court to consider and justify a grant of a *nunc pro tunc* leave. Hence, the respondent's preliminary objection was allowed.

[56] Being mindful of the earlier observations of the Federal Court in *Winstech* about citing and relying on other legislation when there is specific legislation on the subject matter, we find the recent Federal Court decision of *Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal* (*supra*) cited by the respondent, in fact of no real relevance in this appeal as that is a decision on the matter of sanction to file and maintain appeals under the Bankruptcy Act 1967, and not under the Companies Act 1965 or 2016.

[57] The fact patterns in both decisions of the Court of Appeal of *HLE Engineering Sdn Bhd v. HTE Letrik Bumi JV Sdn Bhd* (*supra*) and *Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corp Sdn Bhd & Ors* (*supra*) also reveal similar failure to procure the necessary sanctions at the material time. In *HLE Engineering*, no sanction was at all sought while in *Small Medium Enterprise Development Bank Malaysia Bhd*, the sanction was sought almost four years after the writ was filed; and it would seem that there was no effort to secure it retrospectively.

[58] All this is entirely different from the circumstances and conditions in our present appeal. Not only do we find an appellant who has diligently set about attending to the matters of mandate and sanction according to the legal provisions, it has done so timeously. It promptly informed and sought the official receiver's sanction to appeal against a part of the decision of the High Court (see letter dated 22 December 2017). It also promptly informed of the registration details of the appeal and sought the sanction to be granted retrospectively - see letter dated 5 January 2018.

[59] In response, the official receiver has quite clearly in its letter dated 2 February 2018, stated that it has granted sanction for Messrs Paul Ong & Associates to be the solicitors for the appellant in the appeal filed; that subject to the conditions in (a) to (e), the sanction is to be of retrospective effect from 21 December 2017, that is, the date the notice of appeal was filed.

[60] Under such circumstances, the respondent's complaint is completely devoid of merit. Quite unlike the cases cited, there is sanction here; and the sanction is clearly effective from the date of the notice of appeal.

[61] We are of the view that the official receiver as the liquidator of the appellant has the necessary authority to consider and grant a sanction which is effective on a date other than the date it was made. This is particularly so given the circumstances, that there must first arise a decision to appeal before the matter of sanction is relevant. Since the decision to appeal must be made

within a month, it is only after this decision to appeal is made that the official receiver is approached for its sanction. And, as is evident from the contents of the letters exchanged, the matter of the application for such sanction is neither a routine nor a simple business. Letters of undertaking from the necessary parties including solicitors, guarantors and contributories have to be secured and provided.

[62] Until and unless the liquidators, both private and public, find some way to resolve its concerns and reply all requests promptly, we can expect some delay between the application for sanction and the actual grant of sanction, if it is ultimately granted. In the facts of the present appeal, we note that the insolvency office or the official receiver's response had not unduly delayed the application; it had responded just under two months from the time of request. Although that may be commendable, it is still way past the time for the filing of any appeal. And, we can appreciate the dilemma of the appellant, to appeal and simultaneously apply for sanction; or apply for sanction and then appeal. If the latter was the option, the appellant would have been faced with a different complexion of arguments.

[63] Given the legal provisions, we take the view that the steps taken and the sanction secured by the appellant were proper and valid. We do not see the matter to be irretrievably a nullity. We draw two analogies to further explain our views.

[64] First, unlike the express terms of say s. 68 of the Courts of Judicature Act 1964 where no appeal may be brought in certain matters unless there is leave from the Court of Appeal, ss. 483 and/or 486 whether read together with Part I of the Twelfth Schedule or otherwise, do not contain the same prohibitory terms. This suggests that these provisions are more directory in nature as opposed to the mandatory terms of the Courts of Judicature Act and the Court of Appeal Rules.

[65] This then brings us to our second point which fortifies our earlier point. If an application for retrospective leave or leave *nunc pro tunc* may be sought from the court and the court may, in appropriate circumstances, grant such leave or sanction, we cannot see why the liquidator, may not likewise do the same. In situations such as these where sanction or leave of the court is sought, the role of the court is to supervise and control the liquidator and to consider appeals against its decisions.

[66] Since the official receiver has seen it fit, after it had been appropriately satisfied and had imposed conditions, to grant the sanction sought retrospectively to the date of the notice of appeal, and it is an authority which it has, we see no reason why we should question that decision. Unlike the factual matrix of the cases cited where the issue of prejudice and miscarriage of justice did not arise because of the applicant's own conduct, failure and dereliction in compliance with the law, we do not see any presented in the instant appeal.

[67] For the record, we add that had there been an application for retrospective leave or leave *nunc pro tunc* sought by the appellant before us, we would have granted it unhesitatingly. The reasons and explanations offered are matters of record and are strong cogent reasons for the grant of such leave.

[68] However, since the official receiver has already granted the necessary sanction, the respondents' notice of motion is without merit and must be dismissed.

[69] Since the making of this decision, our learned brother Justice Hamid Sultan JCA has taken a similar approach in *Reebok (M) Sdn Bhd v. CIMB Bank Berhad* [2018] 1 LNS 1186, distinguishing and clarifying the facts in *Winstech Engineering*, *Hup Lee* and *Small Medium Enterprise Development Bank Malaysia Bhd*, as we have undertaken in this judgment.

[70] Like the facts in the present appeal, the appellant who had sanction at the High Court had subsequently applied for sanction to appeal; but had filed a notice of appeal in order to preserve the right of appeal while awaiting sanction. Sanction was given by the time of the hearing of the motion to strike out the appeal on similar grounds as encl. 3. The respondent also argued that the sanction obtained could not be backdated.

[71] That submission was rejected. At para. [19], His Lordship opined that:

> Retrospective sanction is a well-accepted jurisprudence in many jurisdiction especially in winding up proceedings as opposed to bankruptcy proceedings.

Conclusion

[72] As we can see from the factual matrix, the appellant had duly complied with the legal requirements. However, it was simply not possible for the appellant to obtain the sanction prior to the filing of the notice of appeal. The application was made promptly on the same day as the filing of the notice of appeal on 22 December 2017.

[73] The official receiver has seen it fit to grant leave retrospectively, as sought. We have no reason to interfere in that exercise of authority. The respondents' application in encl. 3 is without merit and is therefore dismissed with costs.