

Commercial Litigation

Judge, Jury and Investigator: Court of Appeal Outlines Scope of Liquidator's Investigative Duties and Powers

Introduction

When a company is being wound up, its liquidators have powers to investigate into the company's affairs and dealings. Such powers are for the purpose of discharging their duties as officers of the court to steward the estate in liquidation.

However, to what extent are liquidators supposed to investigate the company's affairs, particularly in the event of disputes between shareholders? Is it within the liquidators' purview to determine, for instance, the true ownership of the shares of members in order to distribute the assets of a company to the members?

These and other issues arose in *Rashmi Bothra v SuntecCity Thirty Pte Ltd* [2023] SGCA 38, in which the Court of Appeal ("**CA**") considered whether the High Court Judge ("**Judge**") had correctly rejected a shareholder's nominees as liquidators due to a perception of conflict and bias that would arise if the liquidators were required to determine the true beneficial ownership of her shares. The CA considered the purpose of the liquidators' investigative duties, finding that (i) the issue of beneficial ownership should be determined in separate proceedings between the relevant parties and not by the liquidators, and (ii) concerns of perceived conflict and bias surrounding the shareholder's nominee liquidators were unfounded.

The appellant was successfully represented by Vikram Nair, Foo Xian Fong, and Glenna Liew of Rajah & Tann Singapore.

Background

The first respondent ("**Company**") was a special purpose vehicle incorporated for the sole purpose of purchasing and holding several office units ("**Property**"). The appellant and a friend were its registered shareholders with 50% shareholding each. Importantly, 50% of the purchase price was funded by Fareast Distribution and Logistics Pte Ltd ("**Fareast**"), of which the appellant's husband was sole director and shareholder at the material time.



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The Property was later sold. A dispute arose between the shareholders over the distribution of the sale proceeds, and the appellant commenced proceedings to wind up the Company on just and equitable grounds ("**CWU 234**").

High Court proceedings

Both shareholders agreed that the Company was solvent but no longer had a business purpose, and thus should be wound up on the just and equitable ground stated in section 125(1)(i) of the Insolvency, Restructuring and Dissolution Act 2018 ("**IRDA**").

By this stage, the appellant's husband had been adjudged a bankrupt. The private trustees of the husband's estate in bankruptcy (the second and third respondents in the appeal) ("**PTs**") opposed CWU 234 and the appointment of the appellant's nominees as liquidators of the Company. The PTs alleged that:

1. The appellant's shares were beneficially owned by her husband in light of Fareast's contribution of 50% of the purchase price.
2. The liquidators would have to determine the beneficial owner of the appellant's shares in order to distribute the sale proceeds of the Property.
3. Due to the dispute over the beneficial ownership of the appellant's shares, her nominee liquidators were unsuitable for appointment.
4. Although the appellant contended that her husband and her shared a common intention that the appellant's shares would be hers, and relied on four declarations of trusts in her favour ("**Declarations of Trust**") to support this, the Declarations of Trusts had allegedly been backdated.

The Judge agreed that the appellant's nominees were unsuitable, given that the liquidators would have to determine the beneficial ownership of her shares as well as investigate her financial affairs. In the circumstances, the Judge appointed the PTs' nominees as liquidators.

Court of Appeal proceedings

In the appeal before the CA, the issue that arose for determination was whether the Judge was correct in appointing the PTs' nominees and rejecting the appellant's nominees. This gave rise to two questions:

1. Did the PTs have standing to nominate liquidators?
2. Was the Judge correct in rejecting the appellant's nominees due to the perception of conflict or bias? Relatedly, did the liquidators' investigative powers extend to determining the beneficial ownership of the appellant's shares, thus giving rise to such perception?

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Court of Appeal Decision

The PTs did not have standing to nominate liquidators of the Company

The PTs argued that the appellant's husband, as the beneficial owner of the appellant's shares in the Company, was a contributory and therefore had standing under section 124(1) of the IRDA to nominate liquidators.

However, the CA found that even if the appellant's husband was the beneficial owner, he was not a "contributory" under the IRDA. Sections 121 and 152 of the IRDA, read with rules 113 and 114 of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 ("IRDR"), provided that only past and present members of a company are contributories for the purpose of a winding up ordered by the court. Therefore, the appellant's husband did not have standing to nominate the liquidators of the Company, and the PTs as representatives of his estate in bankruptcy could not do more than he could.

The Judge erred in rejecting the appellant's nominee liquidators

The Judge had rejected the appellant's nominees on the grounds that the liquidators would have to investigate (i) the beneficial ownership of her shares, and (ii) the alleged backdating of the Declarations of Trusts. However, the CA noted that these grounds applied equally to the PTs' nominees. As one of the parties asserting beneficial ownership over the appellant's shares, the PTs had an interest in the outcome of the determination of the issues, and their nominees were likewise impacted by any perception of conflict or bias.

However, the more fundamental question was whether the liquidators had a duty to investigate those issues in the first place. The CA answered this in the negative, holding that a liquidator's powers of investigation into the affairs of the company and its dealings are to discharge his duties to steward the estate in liquidation. The information gathered is to be used only for the purpose of discharging the liquidator's duties, and not for any purpose that does not afford a benefit to the company in liquidation.

Applying this principle to the present facts, the beneficial ownership of the appellant's shares and the related issues had nothing to do with the administration of the estate of the Company in liquidation. It would therefore not be a legitimate exercise of the liquidators' investigative powers to examine these issues. Instead, those issues should have been resolved by way of separate proceedings between the PTs and the appellant.

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Concluding Words

The CA's decision provides helpful guidance on the scope of liquidators' investigative duties and powers in the context of winding up proceedings. These principles are potentially of broader application to insolvency practitioners appointed in other capacities for other insolvency and similar proceedings. Liquidators that investigate matters beyond their purview risk their decisions being challenged, potential exposure to adverse cost orders, and may face objections from stakeholders in relation to liquidation costs.

In liquidations of group companies, issues concerning the liquidators' use of information gathered from one company for the benefit of another company within the group may also be thrust into the spotlight when companies within the group each have stakeholders with competing interests.

For further queries, please contact our team below.

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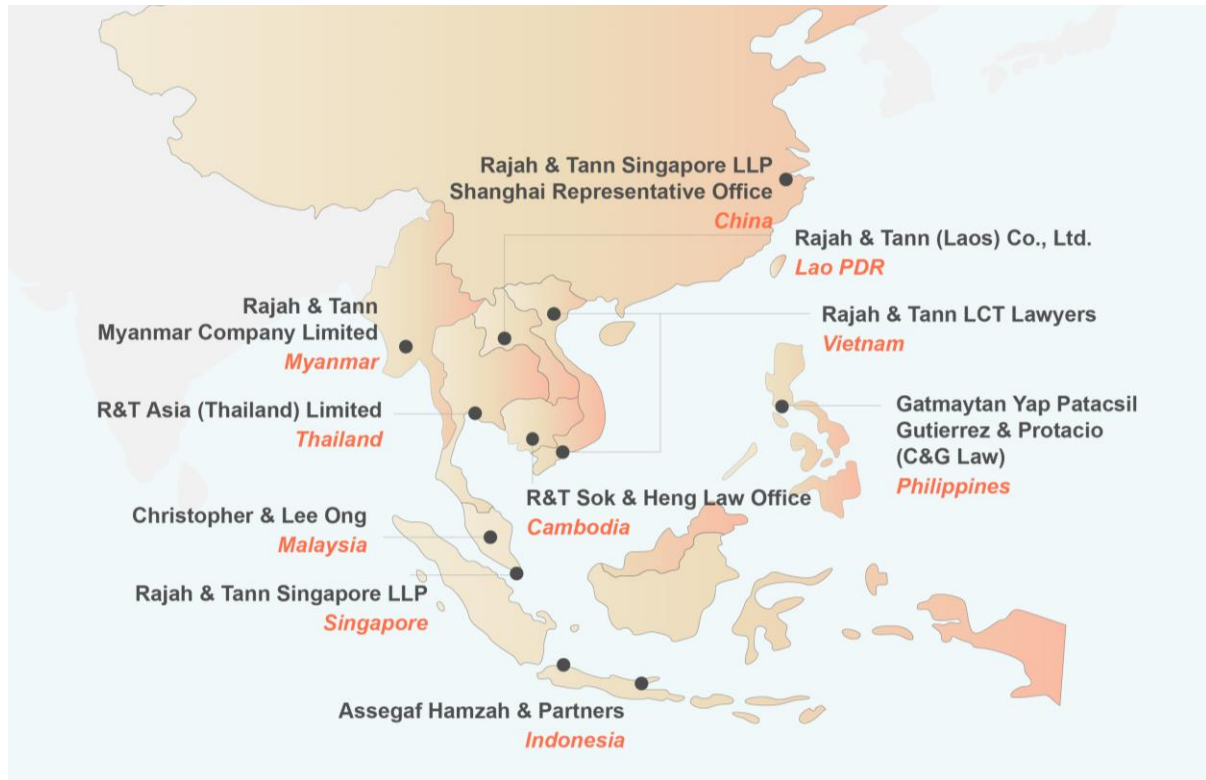
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