Guidance on removal of alleged misbehaving liquidators: A case comment on *Liquidators of Ace Class Precision Engineering Pte Ltd (in members' voluntary liquidation) v Tan Boon Hwa* [2021] SGHC 134

DENTONS RODYK

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Introduction

In Singapore, applications to remove liquidators are relatively uncommon and cases which have succeeded are even rarer. Applicants typically have to show that the removal of the liquidators is "in the real, substantial and honest interest of the liquidation" and will "advance the purposes for which the liquidator was appointed": see *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2018] 3 SLR 687 (Petroships); section 174 of the Insolvency, Restructuring and Dissolution Act 2018 (IRDA). In this case update, we take the opportunity to discuss a recent application of this principle in *Ace Class Precision Engineering Pte Ltd (in members' voluntary liquidation) v Tan Boon Hwa and ors and other matters* [2021] SGHC 134 (ACP).

Facts

The companies in question (the Companies) were incorporated to undertake subcontract work exclusively for one Yangbum Engineering Pte Ltd (Yangbum). One Mr Loong Soo Min (Mr Loong) was a shareholder-director of Yangbum. He also claimed to be a beneficial owner of the Companies, which was the subject of separate proceedings in HC/S 345/2020 (S 345).

The Companies were subsequently placed under a members' voluntary liquidation (MVL), and liquidators were appointed (the Liquidators). Yangbum was the most significant creditor of each of the Companies, and submitted proofs of debt totalling at around SGD 10.8 million. At the time of the hearing, the Liquidators had not adjudicated these proofs of debt.

Yangbum and Mr Loong (the Applicants) applied to remove the Liquidators pursuant to section 302 of the Companies Act (now section 174 of IRDA). They made several allegations, all of which impugn the Liquidators' impartiality. The Liquidators argued that Yangbum and Mr Loong had no standing to make such an application, and that there was no actual or perceived bias.

Holding

Before proceeding with showing cause for the removal of the Liquidators, the Applicants had to show that they had standing to even bring the application. In this regard:

1. The Singapore High Court (SGHC) affirmed the principle that the only a person with sufficient or legitimate interest in the removal of a liquidator has standing to bring the application, as per the decision in in *Deloitte & Touche AG v Johnson and anor* [1999] 1 WLR 1605 (Deloitte). Such persons may include person "entitled to participate in the ultimate distribution of the company's assets", i.e. the creditors or contributories. In the context of a solvent

liquidation, there is also no rule that only shareholders of a company can have such legitimate interest.

2. The SGHC accordingly found that Yangbum had standing to bring the application. It was a significant creditor of the Companies. Crucially, there was an exclusive subcontract relationship between Yangbum and the Companies. As such that it had a legitimate interest in the distribution of the Companies' assets in ensuring that its debts were paid in full.
3. On the other hand, the SGHC found that Mr Loong did not have standing:
   a. Whether or not Mr Loong was the beneficial owner of the Companies had not yet been decided by the court in S 345.
   b. Further, Mr Loong was not a person "alleged to be a contributory" within the meaning of section 2(1) of IRDA. The SGHC held that neither the Companies' records nor registers reflected Mr Loong as a shareholder, director, or beneficial owner. In other words, the phrase "person alleged to be a contributory" could not include a self-proclaimed contributory where there was no evidence to support as such. Instead, this phrase would refer to persons who are placed on the provisional list of contributories by the liquidator or by the court, but whose status is disputed.
   c. In any event, it would be the trustee and not the beneficial owner which fell within the definition of "contributory". As such, even if Mr Loong had evidence to show that he was the beneficial owner, he would not be a "contributory" within the definition of section 2(1) of IRDA.

The SGHC proceeded to find that Yangbum failed to show that the removal of the Liquidators was "in the real, substantial and honest interest of the liquidation" and would "advance the purposes for which the liquidator was appointed":

1. First, a court ordinarily considers the views of the members in determining the interest of a solvent liquidation. Creditors of a solvent company have no real interest in the liquidation; this is because a solvent liquidation is commenced on the basis that creditors will be paid in full and within one year: section 163(1) of the IRDA. This is in contrast with the interest of an insolvent liquidation, whereby the views of the creditors will be considered instead.
2. Second, a court has to assess the allegations against the liquidator in the light of the purpose of the liquidation. In the context of a solvent liquidation, liquidators only have a limited duty to investigate the company's affairs with two objectives: (i) to maximise the return to those interested in the liquidation; and (ii) to uphold standards of commercial morality by identifying improper or dishonest conduct by the company's officers in which prosecution or civil action should be pursued.
3. Third, in both solvent and insolvent liquidations, a liquidator has a duty to act impartially in carrying out the liquidation. The Applicants relied on this ground to show cause, and made several wide-ranging allegations of bias against the Liquidators. These included (among others) how there was a prior relationship between the Liquidators and Ms Liang (the sole registered shareholder and a director of the Companies); that the Liquidators had took an irrationally targeted approach by "hounding" Mr Loong for documents; and that the Liquidators failed to make any perceptible effort to adjudicate Yangbum's proofs of debt.
4. Based on the evidence, the SGHC found that the Applicants failed to show that the Liquidators' actions demonstrated actual bias or created a reasonable perception of bias. Each of the allegation either lacked evidence in support, or was a result of the Applicants' own actions. Just because Ms Liang had a prior relationship with the Liquidators was not sufficient. The SGHC cited with ostensible approval Australian authority that[1] :

   > It was not the law that a liquidator could not have had any prior contact with the company or its directors or officers. It was commonplace for a company to seek professional advice with respect to actual or apprehended insolvency, often from someone who later accepted appointment as the company's liquidator. Hence, there would be "an air of commercial unreality about any suggestion that this course of events is necessarily improper" (Irving at 177). Indeed, creditors were frequently well served by the appointment of a liquidator with some familiarity with the affairs of the company, provided that the reasons leading to this familiarity did not give rise to an apprehension of lack of

impartiality or reflect an actual or perceived conflict."

Ultimately, this is a fact sensitive inquiry, and ""mere professional acquaintanceship" and "professional connections of a passing nature" would not create actual bias or a reasonable perception of bias" but "[i]ntimate relationships of long standing" likely would (Irving at 176)." [2]

The SGHC also found that the Liquidators' removal would create further costs, delay and disruption in the liquidation process of the Companies. Such removal would also cast an unwarranted shadow over the Liquidators' professional standing and reputation, especially since the allegations impugned the Liquidators' impartiality.

Case Comment

Even though this case involved an MVL, it is a good illustration on some of the evidential difficulties on showing cause to remove liquidators, and highlights some of the relevant factors. Allegations of bias (in any context) are generally difficult to prove, and strong evidence should be obtained before making such allegations. For example, as per the decision in *Petroships*, the applicant may try to obtain evidence to show that the liquidator's decision not to investigate the affairs of the company is arbitrary or without basis, or that it had been made to further his personal interest or to protect the interests of one faction of the members or creditors in preference to those of another.

If creditors or any persons with sufficient standing are unhappy with the liquidators in any way, it is always more prudent to try and work with the liquidators first before considering any removal application which will invariably have a bearing on the reputation of the liquidator.

If you have any questions on the operation of IRDA or any issue related to restructuring, insolvency and bankruptcy, please feel free to contact us.

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1. [125(a)] of the judgment

2. [125(b)] of the judgment

Your Key Contacts

Kia Jeng Koh
Senior Partner, Singapore
D +65 6885 3698
kiajeng.koh@dentons.com

Elias Benyamin Arun
Senior Associate, Singapore
D +65 6885 2885
elias.arun@dentons.com