CHRISTOPHER & LEE ONG
Client Update: Malaysia
2023 FEBRUARY

RAJAH & TANN ASIA
LAWYERS WHO KNOW ASIA

Winding Up Court Directions Given to the Liquidator Affecting Substantive Rights of Parties are Now Appealable

Summary

The role of the liquidator is to realise the assets of the company and from the sale proceeds, pay off creditors of the company. If a difficulty arises in the course of his administration of the winding up, the liquidator may apply to the winding up court for directions.

A decade ago, the Malaysian Federal Court (being the apex Court) held in *Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 that such directions given by the winding up court to the liquidator were non-appealable on the ground that those directions were in the nature of advice only and were accordingly not a judgment or order.

Recently, the same issue (on the appealability of such directions) came up before the Federal Court in *Tan Kim Chuan v. Tan Kim Tian & Ors and another appeal* [2022] 6 MLJ 888, where the Federal Court clarified and qualified its abovesaid earlier decision made a decade ago, and held that such directions given by the winding up court to the liquidator are appealable only if those directions affect the substantive rights of the parties involved in the liquidation.

In this Update, we summarise the legal issues in this decision of the Federal Court and discuss its impact.

Full Article

Introduction

When making an order to wind up a company, the court appoints a liquidator. The liquidator can be either the Official Receiver (a civil servant) or a licensed private liquidator. The role of the liquidator is to realise the assets of the company and from the sale proceeds, pay off creditors of the company.

If a difficulty arises in the course of his administration of the winding up, the liquidator may apply to the winding up court for directions under section 487(3) of the Companies Act 2016 ("**Companies Act**"). The rationale or the purpose of section 487(3) of the Companies Act is to enable the liquidator both to obtain advice and to protect his position as to personal liability in the administration of the winding up.

It is important to note that section 487(3) of the Companies Act is a re-enaction of its predecessor provision, i.e. section 237(3) of the repealed Companies Act 1965. A decade ago, the Malaysian Federal Court held in *Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 that such directions given by the winding-up court to the liquidator (under section 237(3) of the repealed

Companies Act 1965) were non-appealable on the ground that those directions were in the nature of advice only and were accordingly not a judgment or order.

Recently, the same issue (on the appealability of such directions) came up before the Federal Court in *Tan Kim Chuan v. Tan Kim Tian & Ors and another appeal* [2022] 6 MLJ 888, where the Federal Court clarified and qualified its abovesaid earlier decision made a decade ago, and held that such directions given by the winding up court to the liquidator are appealable only if those directions affect the substantive rights of the parties involved in the liquidation. It is a question of fact whether in a given case such directions affect the substantive rights of the parties involved in the liquidation.

Background Facts

Properland Realty Sdn Bhd ("**Properland**") was a real estate investment company, whose shareholding was equally held by the brothers, Tan Kim Tian ("**TKT**") and Tan Kim Chuan ("**TKC**"). TKT and TKC were the only directors and contributories of Properland. Properland owned three immovable properties known as Lot 14, Lot 949 and Lot 21. Tan Beng Seng (M) Sdn Bhd ("**TBS**") was another family company incorporated by the father of both TKT and TKC. Following the demise of their father, TKT took over the management of TBS while TKC set up another company, Cemerlang Raya Sdn Bhd. In 1999, TBS obtained a judgment in default of appearance against Properland and thereupon petitioned for a winding up order against Properland. Properland was wound up in 2000 where the official receiver was appointed as its liquidator. Subsequently, Yew Fooi and Onn Kien Hoe were appointed as joint liquidators of Properland. Both Yew Fooi and Onn Kien Hoe (as the joint liquidators) had initially agreed that it would be in the best interest of Properland to dispose of the properties by way of first right of refusal. However, Onn Kien Hoe later changed his mind and agreed with TKC that the best method of disposal would be by open tender.

The High Court Decision

Due to the conflicting opinions of the joint liquidators as to the methods of realisation of the properties, the joint liquidators as well as the contributories filed separate applications seeking the High Court's directions, where Yew Fooi (one of the joint liquidators) sought an order to offer to sell all three immovable properties on a first right of refusal and Onn Kien Hoe (the other joint liquidator) sought an order to sell all the properties by way of public tender to the highest bidder (with Lot 21 being offered to TBS on a first right of refusal at the highest tender price); and TKT sought an order that Lot 21 be sold to him or TBS based on a first right of refusal.TKC sought an order that all the properties (including Lot 21) be sold by way of open tender to the highest bidder.

After hearing all the applications together, the High Court concluded that since TKC as well as Onn Kien Hoe objected to the method that was initially agreed upon, the proposal by the joint liquidators would not be the best option. It stated that a sale by open tender would instead be in the best interest of Properland and the contributories as that would not cause any prejudice to the parties. Accordingly, the High Court dismissed the applications filed by Yew Fooi and TKT, and allowed the applications filed by TKC and Onn Kien Hoe – where the High Court directed that all the three properties be sold by open tender to the highest bidder.

The Court of Appeal Decision

Aggrieved by the decision of the High Court, TKT and TBS appealed to the Court of Appeal. The joint liquidators did not file any appeal.

The Court of Appeal took the view that there was an error in the High Court's approach and held that the High Court had interfered with the scope of powers of the joint liquidators under the Companies Act. In this regard, the Court of Appeal found that TKT had unequivocally accepted the offer of the first right of refusal in respect of Lot 21 to purchase at the agreed price. The Court of Appeal was of the view that the High Court ought not to invoke its supervisory power to substitute the joint liquidators' decision without just cause, and that the joint liquidators were not prevented from reaching a decision merely by the objection of one contributory. They should have proceeded with the realisation of Lot 21 as initially agreed. According to the Court of Appeal, the High Court also failed to consider the current economic climate where it may not be possible to obtain the desired market value through a public tender process and that a public or open tender may protract the liquidation process. Accordingly, the Court of Appeal allowed the appeals (of TKT and TBS) on stipulated terms to the effect that Lot 21 be sold by way of first right of refusal to TKT and TBS (jointly and/or severally) by way of private treaty; whereas Lot 14 and Lot 949 be sold by way of first right of refusal to TKC by way of private treaty.

The Federal Court Decision

Dissatisfied with the decision of the Court of Appeal, TKC applied to the Federal Court for leave (permission) to appeal. The Federal Court granted TKC's leave to appeal where the principal issue to be addressed was whether the decision of the winding up court under section 487(3) of the Companies Act (section 237(3) of the repealed Companies Act 1965) is appealable or not.

The Federal Court observed that the primary concern of a liquidator is to liquidate the company's assets in the most cost-saving and expeditious manner – and that the interest of the company must be paramount. The Federal Court emphasised that where there are conflicting duties of the liquidators, which places the liquidators in a difficult situation, the best thing for the liquidator to do is to seek directions of the winding up court. In this regard, the Federal Court recognised that the rationale or the purpose of section 487(3) of the Companies Act (section 237(3) of the repealed Companies Act 1965) is to enable the liquidator both to obtain advice and to protect his position as to his personal liability in the administration of the winding up.

The Federal Court examined its decision made a decade ago in *Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713, where the Federal Court in that case held that such directions given by the winding-up court to the liquidator (under section 237(3) of the repealed Companies Act 1965) were non-appealable on the ground that those directions were in the nature of advice only and were accordingly not a judgment or order. In this regard, the Federal Court observed that in that case, the winding up court was not approached for directions on substantive issues of rights or liabilities of any of the parties, but an order seeking the court's direction for the liquidators to proceed with the sale of the shares as decided by the liquidators in the best interest of the wound up company. There was therefore no issue of conclusiveness or finality involved in the directions sought in that case. As such,

the direction or advice given by the High Court in that case was not a judgment or order but purely advisory and administrative in nature, and was therefore non-appealable.

The Federal Court was of the view that in considering whether the application for direction is properly and correctly initiated by the liquidator, it is incumbent for the court to ask what are the circumstances or reasons for the application. In the present case, after considering the factual matrix of the case, the Federal Court concluded that the applications and the orders sought by the joint liquidators as well as the contributories affect the substantive rights of the parties in the liquidation.

The Federal Court held that the decision of the High Court in the present case is certainly not purely advisory and neither is it purely supervisory in nature. It held that the order made by the High Court is a judgment that falls within the ambit of section 67(1) of the Courts of Judicature Act 1964 and is therefore appealable. In the upshot, directions given by the winding up court to the liquidator (under section 487(3) of the Companies Act) are appealable only if those directions affect the substantive rights of the parties involved in the liquidation. It is a question of fact whether such directions affect the substantive rights of the parties involved in the liquidation.

The Federal Court then went on to consider the merits of the appeal. The Federal Court found that it is undisputed that the joint liquidators had informed the parties including TKC that (i) a decision had been made by the joint liquidators to realise the properties in such a way that Lot 21 would be offered by way of first right of refusal to TKT / TBS, and Lot 14 and Lot 949 be offered by way of first right of refusal to TKC; and (ii) TKT had given his unequivocal acceptance of the offer of first right of refusal to purchase Lot 21. It is also undisputed that neither TKC nor Onn Kien Hoe (as the joint liquidator) adduced any evidence that a public tender would in fact attract a higher price than the market value.

The Federal Court reiterated that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation. The court may do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way. It also stated that the court will not interfere with the liquidator's decision simply because its opinion might differ from that of the liquidator.

The Federal Court concluded that the High Court was plainly wrong to form its own view that due to the objection, it would not be appropriate to dispose of the properties in the way the joint liquidators originally agreed – and that the High Court should have instead directed that the properties be disposed off according to the agreed arrangement made by the joint liquidators, as the arrangement would be in the best interest of the company and contributories as well as expedite the liquidation process.

Accordingly, the Federal Court dismissed the appeals and affirmed the decision of the Court of Appeal.

Conclusion

With this recent decision of the Federal Court, a decade-long doubt as to whether directions given by the winding up court to the liquidator pursuant to the liquidator's application under section 487(3) of the Companies Act (section 237(3) of the repealed Companies Act 1965) are non-appealable – and which was once thought to be a blanket ban on challenges to such directions – has now been finally and conclusively removed. In the upshot, such directions given by the winding up court to the liquidator are appealable but only if those directions affect the substantive rights of the parties involved in the liquidation. Whether the directions issued by the winding up court affect the substantive rights of the parties involved in the liquidation is a question of fact which must be determined in each case.

Should you require further information on the above matter or any other matter pertaining to Restructuring & Insolvency, please feel free to reach out to our team below.

****

Contacts

John Mathew
Partner
Dispute Resolution & Litigation

T +60 3 2267 2626
F +60 3 2273 8310
john.mathew
@christopherleeong.com

Chua See Hua
Partner
Corporate & Debt Restructuring
Insolvency

T +60 3 2273 1919
F +60 3 2273 8310
seehua.chua
@christopherleeong.com

Heng Yee Keat
Partner
Dispute Resolution

T +60 3 2267 2723
F +60 3 2273 8310
yee.keat.heng
@christopherleeong.com

CHRISTOPHER & LEE ONG

Client Update: Malaysia

2023 FEBRUARY

RAJAH & TANN ASIA
LAWYERS WHO KNOW ASIA

Regional Contacts

R&T SOK & HENG | *Cambodia*
R&T Sok & Heng Law Office
T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN 立杰上海
SHANGHAI REPRESENTATIVE OFFICE | *China*
Rajah & Tann Singapore LLP
Shanghai Representative Office
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*
Assegaf Hamzah & Partners

Jakarta Office
T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Lao PDR*
Rajah & Tann (Laos) Co., Ltd.
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*
Christopher & Lee Ong
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN | *Myanmar*
Rajah & Tann Myanmar Company Limited
T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL
GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*
Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)
T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

RAJAH & TANN | *Singapore*
Rajah & Tann Singapore LLP
T +65 6535 3600
sg.rajahtannasia.com

RAJAH & TANN | *Thailand*
R&T Asia (Thailand) Limited
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*
Rajah & Tann LCT Lawyers

Ho Chi Minh City Office
T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

Hanoi Office
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

Rajah & Tann Asia is a network of legal practices based in Asia.

Member firms are independently constituted and regulated in accordance with relevant local legal requirements. Services provided by a member firm are governed by the terms of engagement between the member firm and the client.

This update is solely intended to provide general information and does not provide any advice or create any relationship, whether legally binding or otherwise. Rajah & Tann Asia and its member firms do not accept, and fully disclaim, responsibility for any loss or damage which may result from accessing or relying on this update.

CHRISTOPHER & LEE ONG

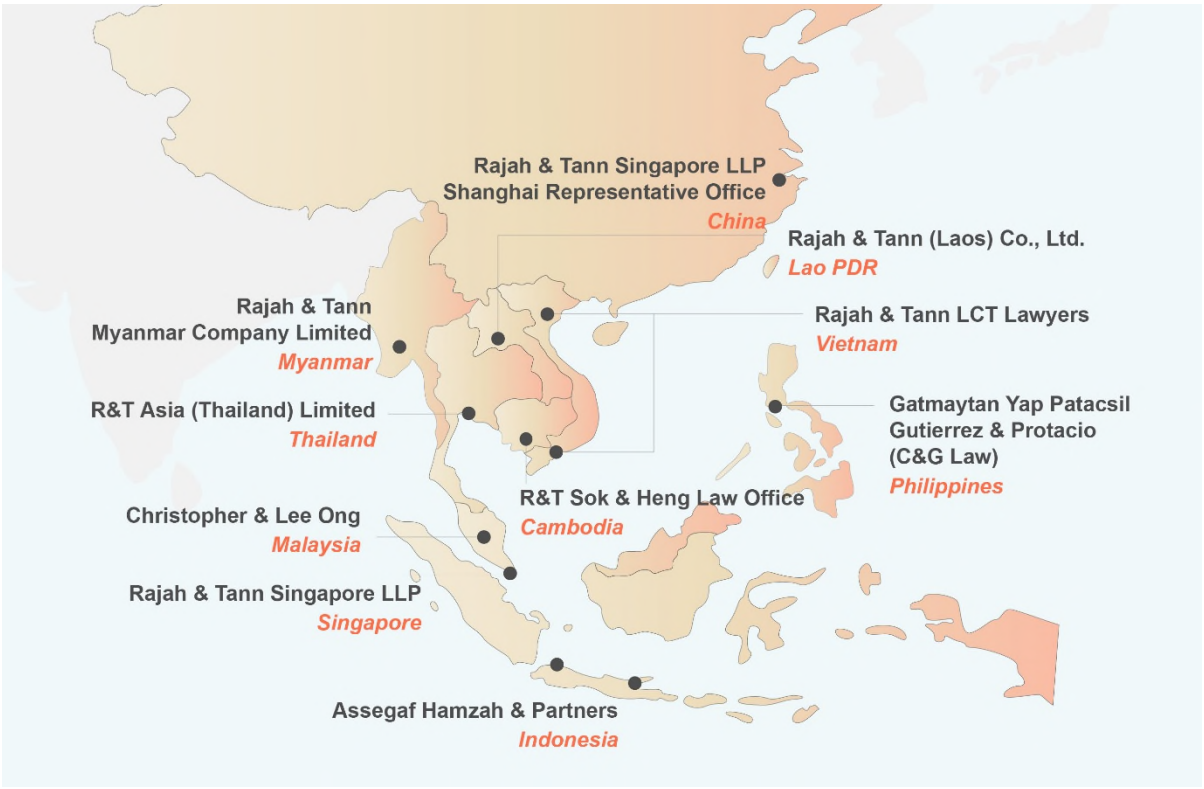
Client Update: Malaysia

2023 FEBRUARY

RAJAH & TANN ASIA

LAWYERS WHO KNOW ASIA

Regional Presence



Christopher & Lee Ong is a full service Malaysian law firm with offices in Kuala Lumpur. It is strategically positioned to service clients in a range of contentious and non-contentious practice areas. The partners of Christopher & Lee Ong, who are Malaysian-qualified, have accumulated considerable experience over the years in the Malaysian market. They have a profound understanding of the local business culture and the legal system and are able to provide clients with an insightful and dynamic brand of legal advice.

Christopher & Lee Ong is part of Rajah & Tann Asia, a network of local law firms in Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Our Asian network also includes regional desks focused on Brunei, Japan and South Asia.

The contents of this Update are owned by Christopher & Lee Ong and subject to copyright protection under the laws of Malaysia and, through international treaties, other countries. No part of this Update may be reproduced, licensed, sold, published, transmitted, modified, adapted, publicly displayed, broadcast (including storage in any medium by electronic means whether or not transiently for any purpose save as permitted herein) without the prior written permission of Christopher & Lee Ong.

Please note also that whilst the information in this Update is correct to the best of our knowledge and belief at the time of writing, it is only intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific business or operational requirements. It is to your advantage to seek legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Christopher & Lee Ong.