REASSESSING LIQUIDATORS' POWERS, RIGHTS, AND LIABILITIES AFTER THE *VICTOR SAW SENG KEE* CASE

by Tan Jun Yu

Towards the end of 2025, the Federal Court, in *Victor Saw Seng Kee ((As joint liquidator of London Biscuits Bhd) (In liquidation)) v Wong Weng Foo & Co & Anor and other appeals* [2025] MLJU 3886, reversed the Court of Appeal's decision in four related appeals, which are reported as, among others, *Wong Weng Foo & Co v London Biscuits Bhd* [2024] MLJU 1981, and *Wong Weng Foo & Co v Lim San Peen (in capacity as liquidator for London Biscuits Bhd (in liquidation)) & Anor and another appea*l [2024] 1 MLJ 132.

The apex court's decision in *Victor Saw Seng Kee* is particularly significant, as the Court addressed eight questions of law, thereby shedding light on an area that one might perceive as not having been as widely reported as others. Notably, the Court affirms the legal test for the removal of a liquidator and clarifies the scope of the powers of joint liquidators, both of which form the focus of the present article.

Proceedings At The High Court

London Biscuits Berhad (LBB) was wound up on 13.1.2020 with Mr Lim San Peen (LSP) appointed as the sole liquidator. On 6.5.2021, LSP applied to the High Court for his release and discharge upon retirement, and for Mr Victor Saw (Victor) to be appointed as his successor. On 9.12.2021, the High Court directed that meetings be held to select a new liquidator, which then saw Victor being supported by an overwhelming majority of creditors. Another candidate, Gabriel Teo (Gabriel), secured only a negligible share.

One of LBB's unsecured creditors, Wong Weng Foo & Co (WWF), opposed the application for LSP's release and discharge. At the same time, it initiated its own application to remove LSP for an alleged breach of duty. It nominated its own candidate, Gabriel, to act as the liquidator.

On 3.10.2022, the High Court found that LSP had acted reasonably and lawfully, and accordingly allowed his discharge, appointed Victor as the sole liquidator, and dismissed WWF's application for removal.

Proceedings At The Court Of Appeal

Dissatisfied, WWF appealed to the Court of Appeal. On 30.10.2023, the Court of Appeal allowed the appeals in part, accepting that certain payments made by LSP are in breach of the law. The Court of Appeal set aside LSP's release and discharge, and subsequently removed LSP as the liquidator. The Court further affirmed Victor's appointment but ordered Gabriel to be appointed as the Joint Liquidator to safeguard creditors' interests. An application to stay the Court of Appeal's decision made by Victor was dismissed by the Court on 24.7.2024.

Federal Court's Decision Concerning Removal Of LSP

As explained above, the Court of Appeal set aside LSP's release and discharge granted by the High Court, and removed him as the liquidator.

The difference here is not just the terminology between "release", "discharge" and "remove". The legal consequences are profound.

A release order stems from section 491(4) of the Companies Act 2016 (CA 2016). It has the effect of discharging a liquidator "from all liability in respect of any act done or default made by him in the administration of the affairs of the company or otherwise in relation to his conduct as liquidator". In other words, the release and discharge order is a pass given by the Court evidencing a released and discharged liquidator's due performance of his duties as a liquidator.

On the other hand, an order to remove a liquidator has the effect of inevitably impugning a liquidator's professional standing and reputation, a fact acknowledged by the Federal Court in *Victor Saw Seng Kee 2025.* In practice, such an order often invites subsequent proceedings against the removed liquidator in attempts to impose personal liability on him. A removal order is, quite literally, a drop of blood in an ocean of sharks.

The basis for WWF's complaints against LSP, which also formed the premise of the Court of Appeal's removal order, was the payment of termination benefits and indemnity in lieu of notice made by LSP to LBB's employees, who continued to be employed post-winding-up.

LSP had previously carried out LBB's business for 180 days without leave of the Court in accordance with his power derived from paragraph 1(a) of Part II of the Twelfth Schedule, read together with section 486 CA. He subsequently, on 10.7.2020, obtained leave of the Court to continue LBB's business for another 180 days. The High Court was in agreement with LSP's business judgment that the continued operation of LBB is commercially justified to preserve value and maximise recovery for creditors.

Against this power to continue LBB's business, LSP retained LBB's employees for several months, and upon their termination, paid them termination benefits and indemnity in lieu of notice. In the course of doing so, LSP treated those payments

as "costs and expenses of the winding up" prescribed under section 527(1)(a) of the CA 2016, and accorded those payments priority over debts owed to LBB's unsecured creditors.

Unfortunately, the Court of Appeal treated the payments made and the priority accorded by LSP as contravening the statutory priority in payment laid down by section 527 of the CA 2016. Essentially, the Court of Appeal found that the termination benefits and indemnity in lieu of notice paid to LBB's employees did not amount to wages or salary envisaged by section 527(1)(b) of the CA 2016. The Court of Appeal did not discuss whether the same could fall within the purview of "costs and expenses of the winding up" prescribed under section 527(1)(a) of the CA 2016.

On appeal, the Federal Court, in contrast, took into account LSP's lawful authority to continue carrying on LBB's business, and was of the view that LSP's decision to retain LBB's employees, as well as his subsequent payments of termination benefits and indemnity in lieu of notice upon their termination, fall within the "costs and expenses of winding up" envisaged under section 527(1)(a) of the CA 2016. These payments form part of the duly authorised winding-up process.

It accordingly follows that there are no inappropriate payments or breaches of duty made or committed by LSP that can warrant his removal.

The Revival of the "All Creditors Must Support" Test?

In arriving at its conclusion that the Court of Appeal's removal of LSP was erroneous, the Federal Court took the opportunity to reaffirm the trite principle that the court should be slow to interfere with any act or decision of a liquidator in the discharge of his role in a company liquidation, and will only do so where the act or decision is so unreasonable and absurd that no reasonable person would have acted in that manner. The Court will not intervene merely because its opinion may differ from that of the liquidator.

The Federal Court also recounted and approved the often-cited test for the removal of a liquidator laid down by Ramly Ali J (as His Lordship then was) in the *locus classicus of Ng Yok Gee & Anor v. CTI Leather Sdn Bhd; Metro Brilliant Sdn Bhd & Ors (Interveners)* [2006] 3 CLJ 360. Interestingly, in the course of doing so, the Federal Court might have inadvertently reopened a debate on one of the principles laid down in Ng Yok Gee 2006.

There are a considerable number of legal principles crystallised and formulated by Ramly Ali J in Ng Yok Gee 2006. One of them that later proved contentious is the principle that in a case where the application for removal is made by a creditor, all the creditors must be given notice of the application. As made clear in the judgment, Ramly Ali J derived this principle from the New Zealand Supreme Court's decision in *In re White Cliffs Dredging Co* (1893) 11 NZLR 711.

On its face, the above principle is grounded in natural justice and commercial morality, and makes good logical sense. It is only fair that no creditor can steal a

march by surreptitiously applying to remove a liquidator without the knowledge of other creditors. The requirement has been repeatedly approved, for example, by the Court of Appeal in *Jagdis Singh a/l Banta Singh & Anor v Return 2 Green Sdn Bhd* [2020] MLJU 2193 and *Majidee Park Auto Spares & Services Sdn Bhd (in liquidation) & Anor v N Thanavathy a/p Rajah & Anor* [2025] 3 MLJ 941.

The same principle was also approved by the Federal Court in *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629. In *Wong Sin Fan 2013*, the Federal Court referred to Ramly Ali J's formulation in Ng Yok Gee 2006 with approval, and proceeded to summarise the legal principles crystallised by Ramly Ali J. Notably, the Federal Court has summarised and construed the principle that "all creditors ought to be notified" as "all the contributories and creditors must support the removal application".

This summarisation by the Federal Court was once relied upon by the courts as a concrete requirement that a removal application would be dismissed so long as there is a single creditor that opposes the application. See, for example, *Jagdis Singh a/l Banta Singh & Anor v Return 2 Green Sdn Bhd* [2020] MLJU 2193 where the Court of Appeal disagreed with such a requirement of "all creditors must support" distilled from *Wong Sin Fan 2013*. The Court of Appeal was of the view that the requirement is merely a non-binding obiter dictum and is neither practical nor workable. The Court of Appeal was of the view that out of hundreds or thousands of creditors, it is logical that one or two might oppose the removal application, especially those who are given undue preference by the liquidator. To insist on the principle that "all creditors must support" would mean that an aggrieved creditor could almost never successfully remove a misbehaving liquidator. The Court of Appeal in *Jagdis Singh 2020*, therefore, held that the "all creditors must support" requirement distilled from the Federal Court's judgment in Wong Sin Fan 2013 should not be acted upon.

Interestingly, the Federal Court in the present *Victor Saw Seng Kee 2025* quoted Wong Sin Fan 2013 with complete approval, including the principle that all creditors must support the removal application. The Federal Court concluded at paragraph 42 of the judgment that *"Wong Sin Fan & Ors remains the leading Federal Court authority on the removal of liquidators"*, and propounded that *"(r)emoval must be in the best interests of all parties involved, with support from both contributories and creditors"*. The Federal Court did not discuss the Court of Appeal's judgment in *Jagdis Singh 2020.*

On its face, the Federal Court's decision in the present *Victor Saw Seng Kee 2025* appears to revive the "all creditors must support" principle laid down in Wong Sin Fan 2013 (assuming that "revive" is the appropriate term, given that the Court of Appeal in *Jagdis Singh 2020* is in no position to extinguish or overrule that principle under the doctrine of stare decisis). Nonetheless, in the Author's view, the reasoning advanced by the Court of Appeal in Jagdis Singh 2020 remains intact, and it remains to be seen whether the "all creditors must support" principle will be followed and applied in subsequent cases. To date, it appears that the test has not yet been affirmed as a binding ratio decidendi by the apex court.

Dynamics Between Joint Liquidators

The Federal Court in the present *Victor Saw Seng Kee 2025* further vindicates LSP's conduct in appealing to the Federal Court without the approval of Gabriel, the Joint Liquidator appointed by the Court of Appeal. The Federal Court agreed with LSP's contention that, as the appeal concerns the Court of Appeal's appointment of Gabriel, he is conflicted from acting or being involved in the appeal-related affairs and decision-making. The apex court held that requiring Gabriel's approval to proceed with the appeal would constitute a breach of the rule of natural justice, *nemo judex in re sua*, namely that no one should be a judge in his own cause.

More importantly, the Federal Court accepted LSP's alternative contention that, under section 478(2) of the CA 2016, even where joint liquidators are appointed, one of the two may perform the functions and exercise the powers of the liquidator on his own, so long as the Court does not make an express order requiring otherwise.

The Author is of the respectful view that such a proposition may be too broad and is inconsistent with current practice, in which the Court distinguishes between "joint liquidators" and "joint and several liquidators." Evidently, the use of the title "joint liquidators" is sufficient to imply that their powers must be exercised jointly, with each liquidator's knowledge and approval. To suggest that joint liquidators can act unilaterally in all circumstances risks conflating "joint liquidators" with "joint and several liquidators."

It remains to be seen whether the Federal Court's decision on this issue will be further tested and refined in subsequent cases. In the meantime, to safeguard their interests, the Author is of the view that, in every case where the Court appoints joint liquidators, the liquidators should insist on an express order specifying that their powers are to be exercised jointly and with each other's consent. Such an express order is essential to ensure that a liquidator is neither taken by surprise nor held liable for actions undertaken by a counterpart without prior knowledge.

Conclusion

The Federal Court's decision in *Victor Saw Seng Kee 2025* reflects a pro-liquidator approach in the absence of damning or implicating evidence. Notably, the Court also made an alternative ruling that a payment made by a liquidator in good faith, even if potentially in breach of the statutory priority under section 527 of the CA 2016, does not constitute a ground for the liquidator's removal, nor for leave to commence proceedings against the liquidator. While a few legal issues may still require further refinement and clarification by subsequent courts, the commercial pragmatism demonstrated in the judgment is likely to be warmly welcomed by insolvency practitioners.

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