

Insolvency: Recent Federal Court Decisions

A REVIEW OF RECENT FEDERAL COURT DECISIONS RELATING TO INSOLVENCY PRACTICE

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The objective of this article is to discuss recent decisions of the Federal Court on several issues relating to insolvency practice i.e. the application of:

- Rule 173 of the Companies (Winding Up) Rules 1972 (“the WU Rules”);
- Section 8(2A) of the Bankruptcy Act 1967 (“the Bankruptcy Act”); and
- Section 6(1) (a) of the Power of Attorney Act 1949 (“the PAAct”).

A. Rule 173 of the Companies (Winding Up) Rules

1972 reads:

173. Costs

No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers or other persons other than payments for costs and expenses incurred and sanctioned under rule 45, and payments of bills which have been taxed and allowed under orders made for the taxation thereof, shall be allowed out of assets of the company without proof that the same have been taxed and allowed by the Taxation Officer. The Taxing Officer shall satisfy himself before passing the bills or charges that the employment of a solicitor or other person to assist the liquidator in the performance of his duties in respect of the matters mentioned in the bills or charges has been duly sanctioned. Provided that the Official Receiver when acting as liquidator may without taxation pay and allow the costs and charges of any person employed by him where the costs and charges are within the scale usually allowed by the Court and do not exceed the sum of RM100.

Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor[2013] 2 MLJ 629

The respondents were liquidators of **Folin and Brothers Sdn Bhd (Folin)**. The appellants who were shareholders of Folin applied to have the respondents removed as liquidators under Section 232 of the Companies Act 1965. One of the grounds relied on by the appellants to support their application was that the respondents had paid bills of lawyers engaged by them without requiring the bills to be taxed pursuant to Rule 173 of the WU Rules.



The facts also reveal that the first appellant was responsible for negotiating the fees with the lawyers and the cheques for the payments were approved by the appellants. The lawyers were appointed for the purposes of bringing and defending an action on behalf of Folin pursuant to Section 236(2) of the Companies Act.

In interpreting Rule 173 of the WU Rules, the Federal Court referred to its earlier decision in **Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785** where a distinction was drawn on the appointment of an advocate by a liquidator under Section 236(1) and Section 236(2) of the Companies Act respectively. In the present case, the Federal Court affirmed the decision of the High Court and Court of Appeal and held that Rule 173 of the WU Rules only applies to services envisaged under Section 236(1) of the Companies Act i.e. services rendered to the liquidator in the ordinary administrative and management duties of the liquidator. Rule 173 of the WU Rules did not apply to services rendered by lawyers pursuant to Section 236(2) of the Companies Act 1965.

The Federal Court also considered Rule 165 of the WU Rules where it is only upon request by the liquidator that a solicitor shall deliver a bill of costs to the taxing officer to be taxed. The Federal Court held that Rule 165 of the WU Rules is only a discretionary provision and was not mandatory.

B. Section 8(2A) of the Bankruptcy Act 1967 reads:

Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realise his security within six months from the date of the receiving order.

Pilecon Realty Sdn Bhd v Public Bank Berhad & Ors and another appeal [2013] 3 MLJ 1

Three questions of law were posed to the Federal Court for determination –

1. Whether the statutory right of a charge under the National Land Code 1965 to rely on his security to obtain full satisfaction of the indebtedness owed by him is restricted by Section 8(2A) of the Bankruptcy Act where such security was provided by a company which was later wound up and the security was not realised within six months of the winding up order;
2. Does Section 8(2A) of the Bankruptcy Act apply in a company liquidation situation where the secured creditor relies on his security for full satisfaction?
3. Whether a secured creditor is entitled to any interest in respect of its debts after the making of a winding up order if it does not realise its security within six months from the date of the winding up order.

The Federal Court held that Section 8, and in particular, subsection (2A) of the Bankruptcy Act, is clear and unambiguous. In the absence of an express provision limiting its application, there was no reason to limit its application only against a bankrupt and not to a wound up company.

The Federal Court held that on the reading of Section 8(2A) of the Bankruptcy Act, a secured creditor is given a timeline of six months from the date the debtor was wound up to sell the charged property failing which it is not entitled to interest subsequent to the date of winding up.

The Federal Court answered Questions 1 and 2 in the affirmative and Question 3 in the negative.

C. Section 6(1)(a) of the Power of Attorney Act 1949 reads:

6(1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser –

(a) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental

disorder, unsoundness of mind, or bankruptcy of the donor of the power; and

Lim Eng Chuan Sdn Bhd v United Malayan Banking Corporation & Anor [2013] 3 MLJ 161

The Federal Court was invited to answer the following questions:-

1. When a chargee sells charged property to realise its loan, without recourse to and compliance with the National Land Code, and without the consent of the chargor, is that sale void, as stated in *Kimlin Housing Development Sdn. Bhd. (Appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (SC)* irrespective of whether the sale was by use of a power of attorney (“PA”) as opposed to a debenture?
2. Can a PA for valuable consideration and expressed to be irrevocable, be granted by a company as donor (as opposed to a natural person) pursuant to Section 6(1)(a) of the PA Act?
3. In respect of a PA, expressed to be for valuable consideration and irrevocable pursuant to Section 6(1)(a) of the PA Act, does such a PA survive and remain valid upon the winding up of a donor company?
4. Is a disposition of property belonging to a company in liquidation which is held as a security or otherwise, without leave of the winding up court required by Section 223 of the Companies Act void?

In respect of Question 1, the Federal Court held that *Kimlin* was concerned with the narrow issue of whether a receiver and manager appointed under a debenture could sell lands charged under the National Land Code (“NLC”) and was different from the facts of the present case. In the present case, the issue was whether an attorney of the chargor could sell lands charged under the NLC. The Federal Court held that a sale by a chargor of land charged under the NLC, through its attorney, pursuant to an irrevocable power of attorney given for valuable consideration, is valid.

The Federal Court answered Question 2 in the affirmative. The reading of both Section 3(1)(a) of the PA Act and Form II in the First Schedule to the PA Act made it clear that a company was competent to grant a PA provided there was scrupulous compliance with the form of authentication of the PA.

In relation to Question 3, the Federal Court held that a winding up order made against the appellant does not vitiate, nullify or revoke the PA which the appellant had expressly granted to the first respondent.

In answer to Question 4, the Federal Court held that as the sale of the land concerned in the present case was subject to charge, it was not a disposition within the meaning of Section 223 of the Companies Act, 1965. This section does not apply to the realisation of creditors of assets of a company charged as security. ■