

A **BEHN MEYER INTERNATIONAL TRADING
SDN BHD**

v.

B **PREMIER DESIGN SDN BHD**
HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI J
[COMPANIES (WINDING-UP) NO: D-28NCC-10-2011]
14 NOVEMBER 2011

C **COMPANY LAW:** *Winding-up - Petition - Withdrawal and striking
out of petition - Costs - Search results with Department of Insolvency
Malaysia showing respondent not wound up when in fact respondent was
D wound up - Whether official receiver responsible for state of affairs leading
to withdrawal of petition - Whether official receiver to bear costs of
petitioner - Companies Act 1965, s. 2 - Companies (Winding-Up) Rules
1972, r. 25(3) - Bankruptcy Act 1967, ss. 70, 71, 87(1) - Government
Proceedings Act 1956, s. 31(1)*

E **CIVIL PROCEDURE:** *Costs - Petition for winding-up dismissed -
Search results with Department of Insolvency Malaysia showing
respondent not wound up when in fact respondent was wound up -
Whether official receiver responsible for state of affairs leading to
withdrawal of petition - Whether official receiver to bear costs of petitioner
F - Companies Act 1965, s. 2 - Companies (Winding-Up) Rules 1972,
r. 25(3) - Bankruptcy Act 1967, ss. 70, 71, 87(1) - Government
Proceedings Act 1956, s. 31(1)*

G The petitioner had filed a winding-up petition against the
respondent company on 5 January 2011. Before the filing thereof,
the petitioner had made two company searches in respect of the
respondent's status with the Companies Commission of Malaysia
(‘CCM’) and with the Department of Insolvency Malaysia
(‘DIM’). In the search with CCM, the respondent's name and
company's number were cited and the abbreviated words of “Sdn
H Bhd” were spelt with a dot after the words “Sdn.” and “Bhd.”.
The results of the search showed that the respondent was wound
up. Whereas in the search with DIM, the petitioner had cited the
respondent's name and company's number but spelt the words
“Sdn” and “Bhd” without the dots. The search results showed
I that the respondent was not wound up. The petitioner then
proceeded to commence winding-up proceedings against the

respondent and served the petition upon the official receiver of DIM on 5 January 2011 as per r. 25(3) of the Companies (Winding-up) Rules 1972. On 14 January 2011, the petitioner informed the official receiver that the hearing of the petition was fixed on 3 March 2011. On 2 March 2011, a day before the hearing, the official receiver informed the petitioner by telephone that the respondent was in fact wound up much earlier on 20 September 2007. At the hearing on 3 March 2011, the petitioner had no alternative but to withdraw the petition. The petitioner then prayed for costs to be paid by the official receiver and for the return of the deposit paid.

Held (costs to be paid by official receiver and deposit to be returned):

- (1) The official receiver under the Companies Act 1965 was defined to mean the Director General of Insolvency and other officers appointed under the Bankruptcy Act 1967. The Bankruptcy Act 1967 defined the Director General of Insolvency to include any officer appointed under s. 70 and authorised to exercise the powers of the Director General of Insolvency. Section 71 of the Bankruptcy Act 1967 provided that the duties of the Director General of Insolvency should have relation both to the conduct of the debtor and to the administration of his estate. As regards the estate of a debtor, the Director General of Insolvency should act as the receiver of the debtor's estate and act as a manager thereof where a special manager was not appointed. Therefore, it was incumbent upon the official receiver to exercise his duties as a receiver of the debtor's estate. In the present case, as it was incumbent upon the official receiver to exercise his duties as a receiver of the respondent, he was obliged to check the records upon the filing of a winding-up petition and to inform the petitioner expeditiously and accurately of the status of the respondent if the respondent was wound up. (para 6)
- (2) The petition was served on the official receiver on 5 January 2011 and the official receiver was informed on 14 January 2011 that the hearing was fixed on 3 March 2011. However, the official receiver did not verify the status of the respondent for two months until a day before the hearing, during which time the petitioner incurred costs and expenses in advertising the petition in the newspaper and gazette. Had the official

- A receiver checked the status of the respondent soon after service of the petition, those costs and expenses could have been saved. (para 6)
- (3) The petitioner was not negligent in failing to place the dots after the abbreviated words of “Sdn” and “Bhd” when it made the company search with DIM. The petitioner had cited the company number in its search. If the dots should have been inserted on the basis that the system of reference was sensitive as submitted by the official receiver, then it was incumbent upon the provider to desensitise the system and make it more user friendly and reliable. Until that revelation was made by the official receiver in court, neither the petitioner nor the court was aware that there was a difference in the search results when placing the dots after the words “Sdn” and “Bhd”. (para 6)
- (4) Due to the omission of the official receiver to inform the petitioner that the respondent was already wound up on 20 September 2007 within a reasonable time upon being served with the petition, the official receiver was estopped from raising the issue of negligence on the part of the petitioner. In the circumstances, the official receiver as an officer of the court and a party to the proceedings, ought to be held responsible for his actions. (para 6)
- (5) Pursuant to s. 87(1) of the Bankruptcy Act 1967 the court was entitled to inquire into the matter upon the complaint of the petitioner and found that the official receiver failed to faithfully perform his duties by firstly, furnishing erroneous information on the status of the respondent to the petitioner and secondly, by failing to inform the petitioner of the correct status of the respondent after the petition was served on him. In the circumstances, it was expedient to make an order of costs against the official receiver. Also, as the official receiver, a public officer, was a party to the winding-up proceedings, the court was empowered under s. 31(1) of the Government Proceedings Act 1956 to order costs for or against such public officer in the same manner and upon the same principles as in proceedings between subject and subject. (para 6)

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(6) The order of costs was within the discretion of the court and the order could only be challenged if it could be shown that the discretion was exercised upon wrong principles (*Dr Bernadine Malini Martin v. MPH Magazine Sdn Bhd & Ors and Another Appeal*, refd.) (para 6) A

(7) An order of costs made against the official receiver was necessary to encourage and promote efficiency on the part of the DIM so that the end users of the statutory services provided by the DIM would not be prejudiced and made to suffer cost and expense without just cause. (para 6) B

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC (*refd*)

Dr Bernadine Malini Martin v. MPH Magazine Sdn Bhd & Ors and Another Appeal [2010] 7 CLJ 525 CA (*refd*) C

Legislation referred to:

Bankruptcy Act 1967, ss. 70, 71, 87(1)

Companies (Winding-up) Rules 1972, r. 25(3)

Government Proceedings Act 1956, s. 31(1) D

For the petitioner - LK Chow; M/s Josephine, LK Chow & Co

For the official receiver - Rosli Ahmad SFC E

Reported by Usha Thiagarajah F

JUDGMENT

Mah Weng Kwai J:

[1] This is an appeal by the Pegawai Penerima Malaysia (official receiver) against the decision of the court given on 14 April 2011 which ordered the official receiver to pay the costs of the winding-up proceedings to the petitioner. G

[2] Leave to appeal against the decision of costs was granted by the Court of Appeal on 30 September 2011. H

[3] Background Facts

3.1. The petitioner filed a winding-up petition against the respondent on 5 January 2011. I

- A 3.2. On 21 September 2010, before filing the petition, counsel for the petitioner made a company search with Suruhanjaya Syarikat Malaysia (SSM) and was informed that the status of the company was “winding-up”. The name of the respondent and the company number were cited. The abbreviated words of “Sdn Bhd” were spelt with a dot after the words “Sdn.” and “Bhd.”.
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- C 3.3. Counsel for the petitioner made a second company search on 8 December 2010. This time the search was made with Jabatan Insolvensi Malaysia (JIM) from the counsel’s office portal (<http://callback.rilek.com.my>). Counsel had cited the name and the company number of the respondent. However, on this occasion the abbreviated words “Sdn Bhd” were spelt without the dots after the words “Sdn” and “Bhd”.
- D The result obtained from this search showed that the respondent was not wound up.
- E 3.4. Upon filing and extraction, the petition was served on *inter alia*, JIM on 5 January 2011.
- F 3.5. On 14 January 2011, counsel for the petitioner informed JIM by letter that the hearing of the petition was fixed on 3 March 2011.
- G 3.6. However on 2 March 2011, that is, a day before the hearing, the official receiver informed counsel for the petitioner by telephone that the respondent had in fact been wound up much earlier on 20 September 2007.
- H 3.7. At the hearing on 3 March 2011, the petitioner had no alternative but to withdraw the petition. Counsel prayed for costs to be paid by the official receiver in light of the circumstances leading to the withdrawal and striking off the petition by the court and for the deposit to be returned.

Decision Of The Court

- H [4] Upon reading the written submissions of counsel for the petitioner and the official receiver and upon hearing the oral submissions of the parties, the court exercised its discretion and ordered that costs of the proceedings be borne by the official receiver and that the deposit be returned to the petitioner.
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Grounds Of Decision

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[5] The only issue in this appeal is whether the court had exercised its discretion properly and judiciously when granting the order for costs.

[6] Status Of Official Receiver

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6.1. “Official receiver” under the Companies Act 1965 has been defined to mean the “official assignee” and other officers appointed under the Bankruptcy Act 1967. While the Bankruptcy Act 1967 does not define “official assignee”, the Act does define “Director General of Insolvency” to include any officer appointed under s. 70 and authorised to exercise the powers of the Director General of Insolvency. And s. 71 of the Bankruptcy Act provides that the duties of the Director General of Insolvency shall have relation both to the conduct of the debtor and to the administration of his estate. As regards the estate of a debtor, the Director General of Insolvency shall act as the receiver of the debtor’s estate and act as manager thereof where a special manager has not been appointed. Thus, by definition it is incumbent upon the official receiver to exercise his duties as a receiver of the debtor’s estate. In this case, it will be incumbent upon the official receiver to exercise his duties as a receiver of the respondent company. And in the exercise of his duties, the court is of the view that the official receiver is obliged to check the records whenever a winding up petition has been filed and to inform the petitioner expeditiously and accurately of the status of the respondent company, if it has already been wound up.

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6.2. Rule 25(3) of the Companies (Winding-up) Rules 1972 stipulates that a copy of the petition shall also be served upon the official receiver and the Registrar of Companies. Compliance with the rule is mandatory and the official receiver is always present during the hearing of a winding-up petition and in fact has the right of appearance to be heard in court. The official receiver is an officer of the court and a party of the proceedings.

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6.3. The court does not share the view that the official receiver is an *amicus curiae* at winding-up proceedings as suggested by the writers of the paper titled “The Singapore experience in the Administration of Insolvency Regime” presented at

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- A the Forum of Insolvency Reform in Asia: An assessment of
the recent developments and the role of the Judiciary [[http://
www.oecd.org/data-oecd/7/38/1874000\(pdf\)](http://www.oecd.org/data-oecd/7/38/1874000(pdf))]. The official
receiver is present not merely as a friend of the court but
B has statutory duties to perform and to assist the court on
the compliance of statutory requirements by the petitioner.
Hence the official receiver is paid a deposit of RM3,000 by
the petitioner upon filing of the petition.
- C 6.4. As an officer of the court and a party to the winding-up
proceedings, the official receiver ought to be responsible for
his actions. And the question in this case is whether the
official receiver ought to be held responsible for the state of
affairs that existed on 3 March 2011 and if so, whether the
official receiver ought to bear the costs of the petitioner.
- D 6.5. The court is of the view that the official receiver ought to
be held responsible for the following reasons:
- E (a) the petition was served on the official receiver on
5 January 2011 and the official receiver was informed
on 14 January 2011 that the hearing was fixed on
3 March 2011;
- F (b) yet for two months the official receiver did not verify
the status of the respondent and did not inform the
counsel for the petitioner that the respondent had been
wound up on 20 September 2007 until a day before
the hearing, during which time the petitioner had
incurred costs and expenses in advertising the petition
in the newspaper and gazette. Had the official receiver
G checked the status of the respondent soon after service
of the petition, these costs and expenses could have
been saved;
- H (c) the official receiver submitted that the petitioner was
negligent when it made the company search with JIM
on 8 December 2010 by failing to place the dots after
the abbreviated words of “Sdn” and “Bhd” being part
of the name of the respondent. The official receiver
also suggested the petitioner ought to be more careful
I as the search system was very “sensitive”. The court
was hard-pressed to accept this explanation as being

reasonable. To begin with, all companies on incorporation are identified by a company number. The counsel for the petitioner had cited the company number for the respondent in its search. Why no reliance was placed on the company number was not explained. Instead reliance was placed on whether the words “Sdn” and “Bhd” were spelt with dots inserted after the words. The court found this system of reference most intriguing and unreliable to say the least. If as claimed by the official receiver, that the system was “sensitive” then it would be incumbent upon the provider to desensitise the system and make it more user friendly and reliable. Until this revelation was made by the official receiver in court neither the counsel for the petitioner nor the court was aware that there would be a difference in the search results depending on whether the dots were placed after the words “Sdn” and “Bhd”;

(d) due to the omission of the official receiver to inform the petitioner that the respondent had been wound up on 20 September 2007, within a reasonable time upon being served with the petition, the official receiver is estopped from raising the issue of negligence on the part of the petitioner (see *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 FC).

6.6. Also, pursuant to s. 87(1) of the Bankruptcy Act “the court shall take cognizance of the conduct of the Director General of Insolvency, and in the event of the Director General of Insolvency not faithfully performing his duties and duly observing all the requirements imposed on him by any statute, rules or otherwise with respect to the performance of his duties, or in the event of any complaint being made to the court by any creditor in regard thereto, the court shall inquire into the matter and take such action thereon as is deemed expedient”. In the present case, on the complaint of the petitioner, a creditor, the court proceeded to inquire into the matter and found that the Director General of Insolvency had indeed failed to faithfully perform his duties by firstly, furnishing erroneous information on the status of

- A the respondent company to the petitioner and secondly, failing to inform the petitioner of the correct status of the respondent company after the petition had been served on him. In the circumstances, the court deemed it expedient to make an order of costs against the official receiver.
- B 6.7. Having held that the official receiver, a public officer, is a party to the winding-up proceedings the court is empowered under s. 31(1) of the Government Proceedings Act 1956 to order costs for or against such public officer in the same manner and upon the same principles as in proceedings between subject and subject.
- C 6.8. The order of costs is within the discretion of the court and the order can only be challenged if it can be shown that the discretion is exercised upon wrong principles. In the case of
- D *Dr. Bernadine Malini Martin v. MPH Magazine Sdn Bhd & Ors and Another Appeal* [2010] 7 CLJ 525, Zaleha Zahari JCA reiterated this settled principle as follows:
- E [27] An appellate court seldom interferes in the question of costs, and if they do so, it is done reluctantly. This is because the court below has an absolute discretion except that discretion must be exercised judicially. Wee Chong Jin CJ in *KE Hilborne v. Tan Tiang Quee* [1972] 1 LNS 49 said:
- F It has long been well settled that costs are in the discretion of the court. It has also long been well settled that an appellate tribunal is not entitled to interfere with a discretion exercised by a lower court unless it is clearly shown that the discretion
- G has been exercised on wrong principles ...
- H 6.9. An order of costs made against the official receiver was necessary in the circumstances to encourage and promote efficiency on the part of JIM so that the end users of the statutory services provided by JIM would not be prejudiced and made to suffer cost and expense without just cause.
- I [7] In the result an order for costs to be taxed was granted.
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