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Raintree F&B Sdn Bhd v Red Sena Berhad (In Liquidation) [Court of Appeal Civil Appeal No. W-02(A)-1595-08/2022]

In this recent decision, the Court of Appeal considered, for the first time, the issue of distribution of the surplus assets of a Special Purpose Acquisition Company (“**SPAC**”) upon its voluntary winding-up, following its failure to complete a Qualifying Acquisition within the Permitted Timeframe.

The decision provides invaluable guidance for future similar cases. It also serves as a timely reminder that a SPAC is governed by and must comply, with the Equity Guidelines issued by the Securities Commission Malaysia (“**SC Equity Guidelines**”) under Section 377 of the Capital Markets and Services Act 2007 (“**CMSA**”).

Background

Red Sena Berhad (In Liquidation) (“**Red Sena**”) was a SPAC. It was incorporated by 6 individuals, who are members of the Management Team of Raintree F&B Sdn Bhd (“**Raintree**”).

As a SPAC, Red Sena had no operations or income generating business. Its sole objective was to undertake an initial public offering (“**IPO**”) for the purpose of raising funds to acquire an operating company, business, or asset, in the food and beverage industry (“**Qualifying Acquisition**”).

Prior to the IPO, Red Sena raised a total sum of RM10 million from subscription of its shares by Raintree (“**Raintree Proceeds**”). In total, Raintree subscribed to 200,000,000 ordinary shares in Red Sena at RM0.05 per share. The Management Team make up the shareholders of Raintree. Raintree and the Management Team are the promoters of Red Sena.

Red Sena subsequently raised a total sum of RM400 million from the IPO (“**IPO Proceeds**”). In total, Red Sena issued 800,000,000 new

ordinary shares at RM0.50 per share. The shareholders who subscribed to Red Sena's shares through the IPO, are the "**IPO Investors**".

In accordance with paragraphs 6.21, 6.21A, and 6.22 of the SC Equity Guidelines, Red Sena placed 92% of the IPO Proceeds amounting to RM368 million in a trust account ("**IPO Trust Proceeds**"). Under these provisions, the IPO Trust Proceeds can only be utilised to acquire the Qualifying Acquisition. Pursuant to paragraphs 6.21B, 6.24, and 6.24A of the SC Equity Guidelines, the balance 8% of the IPO Proceeds amounting to RM32 million ("**Remaining IPO Proceeds**") were set aside to defray expenses related to the IPO and completion of the Qualifying Acquisition ("**Permitted Purposes**"). These provisions expressly provide that prior to the completion of the Qualifying Acquisition, the Remaining IPO Proceeds cannot be utilised for payment of remuneration to members of the Management Team.

Red Sena was listed on the Main Market of Bursa Malaysia Securities Berhad on 10.12.2015 ("**Listing Date**"). Under the SC Equity Guidelines, Red Sena must complete the Qualifying Acquisition within 36 months from the Listing Date, i.e., by 10.12.2018 ("**Permitted Timeframe**"). In the event Red Sena fails to complete the Qualifying Acquisition within the Permitted Timeframe. Therefore, in accordance with the SC Equity Guidelines, the shareholders of Red Sena passed a special resolution to wind it up voluntarily and appointed Pauline Teh @ Pauline Teh Abdullah and Onn Kien Hoe of Messrs. Crowe Advisory Sdn Bhd as joint and several liquidators ("**Liquidators**").

Upon a review of Red Sena's accounts, the Liquidators identified a surplus sum of RM15,453,164.00 representing the aggregate of the balance Raintree Proceeds (RM54,222.00) and balance Remaining IPO Proceeds (RM15,398,942.00).

Due to what they perceived to be the differences in the views expressed by some of the shareholders of Red Sena and the Management Team on the manner of distribution of the balance Raintree Proceeds and balance Remaining IPO Proceeds, the Liquidators filed an application¹ under Section 461 of the Companies Act 2016 for the Court's determination of whether Raintree, the members of the Management Team and the persons connected to them, are entitled to participate in the distribution of the balance Raintree Proceeds and the balance Remaining IPO Proceeds.

High Court

On 14.10.2019, the High Court held that Raintree, members of the Management Team and persons connected to them, are entitled to the entire balance Raintree Proceeds, but are not entitled to participate in the distribution of the balance Remaining IPO Proceeds ("**2019 Order**").

It is common ground that Raintree and the Management Team are entitled to the entire balance Raintree Proceeds. On 11.11.2019, Raintree filed an application to set aside or vary the 2019 Order insofar as it concerns the distribution of the balance Remaining IPO Proceeds.²

¹ Kuala Lumpur High Court Companies Post Winding-Up No. WA-28PW-382-05/2019

² Kuala Lumpur High Court Companies Post Winding-Up No. WA-28PW-626-11/2019

On 15.8.2022, the High Court dismissed Raintree's application to set aside or vary the 2019 Order. The written grounds of the High Court can be seen here: [Red Sena Bhd \(dalam likuidasi\) v Raintree F&B Sdn Bhd \[2022\] MLJU 2079](#).

Court of Appeal

On 19.9.2023, the Court of Appeal dismissed Raintree's appeal against the decision delivered by the High Court on 15.8.2022.

From its broad oral grounds, the Court of Appeal held:

(1) The learned High Court Judge correctly held that since the Qualifying Acquisition within the Permitted Timeframe was not achieved, the monies in the trust account will revert to the IPO Investors who are not members of the Management Team and persons connected to them. As such, the Liquidators will have no claim to them as it would, following the words of the Federal Court in **PECD Bhd & Anor v Am Trustee Bhd and other appeals** [2013] 9 CLJ 841, FC, "*be a fair and just result*".

(2) The learned High Court Judge also correctly held that the entire Remaining IPO proceeds of RM15,398,942.00 were funds invested by the said IPO Investors, and neither Raintree nor the Management Team contributed any part of the balance Remaining IPO Proceeds.

(3) As a SPAC, Red Sena is governed by inter alia the SC Equity Guidelines. The SC Equity Guidelines were issued under Section 377 of CMSA, and therefore have the force of law.

(4) The balance Remaining IPO Proceeds form part of the 'liquidation distribution' of Red Sena under paragraphs 6.41, 6.42, and 6.43 of the SC Equity Guidelines. Both the IPO Trust Proceeds and the Remaining IPO Proceeds originated from funds invested by the public. As such, pursuant to paragraphs 6.42 and 6.43 of the SC Equity Guidelines, Raintree and the Management Team are not entitled to participate in the distribution of the balance Remaining IPO Proceeds.

(5) The learned High Court Judge also correctly held that the Remaining IPO Proceeds were set aside from the IPO Proceeds solely for the Permitted Purposes, that is, to defray expenses related to the IPO and the completion of the Qualifying Acquisition. This was done pursuant to paragraphs 6.21B and 6.24 of the SC Equity Guidelines. Consequently, like the IPO Trust Proceeds, the balance Remaining IPO Proceeds are to be returned to the IPO Investors in the event Red Sena fails to complete the Qualifying Acquisition within the Permitted Timeframe. It is equally important to note that pursuant to paragraph 6.24A of the SC Equity Guidelines, the Remaining IPO Proceeds cannot be utilised for payment of remuneration to members of the Management Team, prior to the completion of the Qualifying Acquisition.

(6) In these circumstances, the learned High Court Judge was correct in holding that a Quistclose Trust has indeed been formed in favour of the IPO Investors. This trust arose because the IPO Investors who are distinct from the Management Team and not affiliated with them, were provided and relied on the assurance by the Management Team that in the event the primary objective, namely the Qualifying Acquisition within the Permitted Timeframe was not accomplished, any funds held in the trust account would be distributed to them as a

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respective holder of voting securities on a proportionate basis after deducting taxes and direct expenses associated with the liquidation distribution.

(7) The learned High Court Judge was correct in finding that the general pari passu rule of insolvency law is not applicable in this case, and the balance Remaining IPO Proceeds should be distributed to shareholders of Red Sena equitably in accordance with their rights and interests.

Conclusion

It is the authors' respectful view that the decisions of the High Court and Court of Appeal are in accord with the law. More importantly, they also accord with equity and good conscience. The decisions uphold the policy intent of the aforesaid provisions in the SC Equity Guidelines – which is to ensure the IPO Investors are not put at risk and will be able to recoup their invested funds, if the SPAC fails to complete the Qualifying Acquisition within the Permitted Timeframe.

Lambert Rasa-Ratnam (together with Chia Oh Sheng and Lim Jun Xian) of Lee Hishammuddin Allen & Gledhill appeared on behalf of the Securities Commission Malaysia as amicus curiae in the High Court and Court of Appeal.

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