

LAW ON REMUNERATION OF A LIQUIDATOR

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Like any other profession, a liquidator is entitled to receive remuneration. However, in Malaysia, there is no fixed method for determining how a liquidator should be compensated for their work in a winding up proceeding. By virtue of Section 479(2) of the Companies Act 2016 (“CA 2016”), a liquidator is entitled to receive remuneration by way of percentage, or otherwise as is determined by: (a) an agreement between the liquidator and the committee of inspection (“COI”); (b) if there is no agreement or COI, a resolution passed at a creditors’ meeting by a majority of not less than three-fourths in value and one-half in number of creditors present at the meeting; or (c) if the agreement or determination under paragraph (a) or (b) fails, at the behest of the court.

At this juncture, it is imperative to highlight that a reading of the said Section 479(2) of the CA 2016 mandates that there must either be (a) an agreement with the COI as to the liquidators’ remuneration, or alternatively (b) a resolution passed at a meeting of creditors in accordance with Section 479(2)(b) of the CA 2016. Failure to comply with either of the subsections will render the court being unable to hear the application due to the express words in Section 479(2)(c) of the CA 2016, specifically “*if the agreement or determination under paragraph (a) or (b) fails, the Court*”. Clearly, only if either subsection (a) or (b) fails, then and only then will the court be able to determine the liquidators’ remuneration (See: *Poly Ritz*

Development Sdn Bhd v Datuk Tee Guan Pian [2020] 1 LNS 2279).

In this legal alert, we will examine how the court evaluates the rationale behind liquidators’ remuneration when the same is challenged by a contributory under Section 479(3) of the CA 2016.

Brief Facts

The Court of Appeal’s decision in *Emiprima Sdn Bhd v Wonderful Castle Sdn Bhd (in Liquidation)* [2023] 5 MLJ 695 involves an application for the review of the liquidator’s remuneration. In this case, following the winding-up of Wonderful Castle Sdn Bhd (“Respondent”), the liquidator released the sum of approximately **RM148 million** from the sale of its assets and then called for a meeting to approve a resolution to pay him approximately **RM9 million** as his fees, computed based on Table C of the Companies (Winding-Up) Rules 1972 (“CWUR”). All members of the COI approved the resolution, except for Emiprima Sdn Bhd (“Appellant”), a contributory of the Respondent. The Appellant, dissatisfied with the COI’s decision, applied to the High Court vide Section 479(3) of the CA 2016 to assess and vary the liquidator’s remuneration.

High Court

The High Court dismissed the application,

holding that based on Table C of the CWUR, the liquidator was entitled to charge RM9 million as his fees, and that it did not offend the principle of fairness and reasonableness.

Court of Appeal

On appeal, the main question to be determined was whether the High Court was correct in accepting the determination of the remuneration solely based on the percentage listed in Table C of the CWUR without making any assessment. The Court of Appeal held that (a) Table C of the CWUR cannot be used as of right by a liquidator to calculate remuneration; and (b) the liquidator therein had failed to provide any justification for the amount claimed.

The Court of Appeal reaffirmed their decision in *Ong Kwong Yew & Ors v Ong Ching Chee & Ors and other appeals* [2018] MLJU 2189, which followed the High Court's decision in *Perumahan NCK Sdn Bhd v Mega Sakti Sdn Bhd* [2005] 7 MLJ 389, specifically in relation to the two key principles relating to the determination of the liquidators' remuneration, namely, (a) the burden of proof lies with the liquidators to show that the remuneration claimed is justifiable; and (b) the benchmark in the assessment process is fairness and reasonableness.

What Is Fair and Reasonable?

Following the recent ruling in *Emiprima (supra)*, it is evident that in Malaysia, the pivotal benchmark for determining the quantum of a liquidator's remuneration rests upon the principles of "fairness and reasonableness". However, due to the subjective nature of these terms, clarity is crucial. We will take a closer look at the various approaches adopted by the courts across jurisdictions like Singapore, England, Australia, and Hong Kong in assessing liquidators' remuneration, with the aim of shedding light on the nuanced interpretations of "fairness and reasonableness".

Singapore

Like Malaysia, Singapore also prioritises fairness and reasonableness as the benchmark in its assessment process. This principle was articulated in the Singapore High Court decision in *Re Econ Corp Ltd (In Provisional Liquidation) (No 2)* [2004] 2 SLR 264. In this case, the Singapore High Court thoroughly examined different aspects of the liquidator's claimed remuneration and outlined several principles to guide the determination of the liquidator's remuneration. It is noteworthy that the Singapore High Court acknowledged that the list



is not exhaustive and that the guidelines are not immutable rules.

A summary of the principles are as follows:

(i) **Valued contributions**

The impact the liquidator has made on the matter.

(ii) **Amount of time spent**

The importance of this factor will vary from case to case, being crucial in one case and just another consideration in another.

(iii) **Rates**

In the absence of acceptable guidelines, rates cannot be accepted at face value. The determination of fair and reasonable rates depends on the complexity of the matter.

(iv) **Assistance rendered by the employees from the liquidator's firm**

This factor will be subject to strict proof.

(v) **Scope of work.**

(vi) **Disbursements**

There must be some measure of restraint and discipline on how the items are recouped and accounted for.

Australia

Following the decision in *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr* [2017] NSWCA 38, the Australian Court set out the general principles and test to be adopted when assessing the remuneration to be accorded to a liquidator. Although the legislative provisions differ, the following established principles are equally applicable to the assessment of remuneration in our jurisdiction:

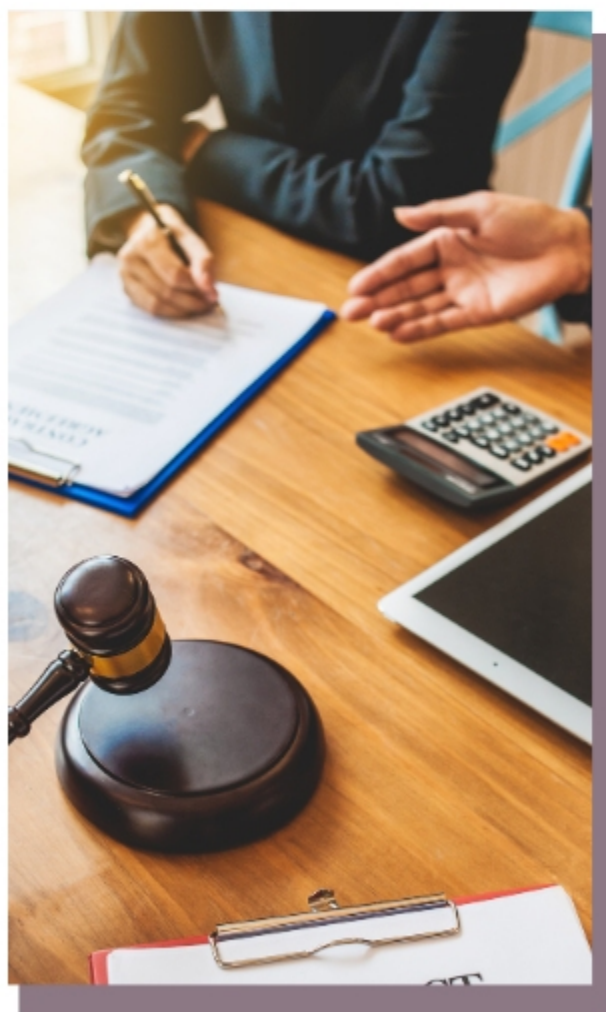
- (i) The onus is on the liquidator to establish that the sum claimed is reasonable;
- (ii) The liquidator is required to provide material on which the court can undertake a reasonable analysis; and
- (iii) The court is to determine the liquidator's remuneration by evaluating the

remuneration due based on the materials before it with an independent mind.

Hong Kong

The Hong Kong statutory framework is, by and large, identical to that in Singapore. The Court of Appeal in *Re Peregrine Investments Holdings Ltd* [1999] 3 HKC 291 held that:

- (i) The liquidators had to provide full particulars to justify the amount of any claim for remuneration;
- (ii) Where charges are sought to be recovered on a time-costs basis, the liquidators are not allowed to simply list the total number of hours spent by themselves including their staff and apply their normal charging rate. Instead, they must explain exactly what they did and why they did it; and
- (iii) The liquidators must keep proper records of what they have done and why they have done it. Without contemporaneous records, they will be in a difficult position in discharging their duty to account.





Conclusion

Quite clearly, the common factor in determining liquidators' remuneration is the principle of reasonableness in the abovementioned jurisdictions. The Malaysian courts' stance on this matter mirrors that of the other jurisdictions. In Malaysia, like the abovementioned jurisdictions, liquidators are expected to justify the remuneration claimed.

It therefore appears that the percentage in Table C of the CWUR should not be taken for granted by a liquidator, as they are required to show that their remuneration is fair and reasonable. Evidently, the Court is becoming more hesitant in approving liquidators' remuneration by solely relying on Table C of the CWUR, especially when there is a lack of justification or evidence from the liquidators to support their remuneration requests.

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