

Federal Court will not condone irregularities in court orders

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Litigation, Malaysia

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Introduction

Typically, once an order has been drawn up and sealed, the court becomes *functus officio* and has no power to vary or set aside the same. However, an exception to this rule is where an order has been irregularly obtained. This exception was recently expounded on in the leading Federal Court decision of *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd.*(1)

In its decision, the Federal Court reaffirmed that where a final court order is proved to be null and void on grounds of illegality or due to a lack of jurisdiction, the court has inherent jurisdiction to set the decision aside, even in the absence of an express enabling provision.

However, is the rule different for winding-up orders?

In *Vijayalakshimi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram*(2) the Court of Appeal held that a winding-up order cannot be discharged or rescinded after it has been made. The only remedy is to apply for a stay of proceedings under the winding-up order pursuant to Section 342(1) of the Companies Act 1965.

This article examines how the Federal Court in *Malayan Banking Berhad v Gan Bee San* decided on the following question of law:

[Does] the principle established in Badiaddin confer jurisdiction upon a court to set aside a perfected winding-up order for breach of rule 5 of the Companies (Winding-Up) Rules 1972 having regard to the decision in Vijayalakshimi?

Facts

The respondents applied to a high court to set aside a winding-up order on the grounds that it had been made by the deputy registrar of the high court and not by a judge, in contravention of Rule 5(1)(a) of the Companies (Winding-Up) Rules 1972 (the Winding-Up Rules).

The high court dismissed the application, but this was subsequently reversed by the Court of Appeal, which set aside the winding-up order.

Dissatisfied, the appellants applied to the Federal Court and obtained leave to appeal on the abovementioned question of law.

Breach of Winding-Up Rules

Rule 5(1)(a) of the Winding-Up Rules states as follows:

Matters to be heard in Court and Chambers

5.(1) The following matters and applications in Court shall be heard before the Judge in open Court:

(a) petitions.

From the above, the Federal Court was of the view that the words "Judge in open Court" are amply clear, precise and unambiguous.

Based on the facts, the court determined that a deputy registrar – and not a high court judge in open court – had made the winding-up order. The deputy registrar's name in the winding-up order was not a typographical error. Hence, there was a clear breach of Rule 5(1) (a) of the Winding-Up Rules.

The Federal Court held that this breach related to the fundamental question of jurisdiction. Applying the principles in *Badiaddin*, the court found that a clear contravention of the Winding-Up Rules had occurred and thus rendered the winding-up order null and void for lack of jurisdiction.

Can courts set aside winding-up orders?

The Court of Appeal ultimately held as follows:

A winding-up order could not be discharged or rescinded after it had been made. The only remedy is to apply for a stay of proceedings under the winding-up order. See s342(1) of the Companies Act 1965.

Based on the above, the appellants submitted that the winding-up order could not be set aside. However, the Federal Court disagreed and reiterated that a court's jurisdiction to set aside fundamentally irregular or seriously defective orders is inherent and not dependent on any express statutory provision. As such, the Federal Court held that the deputy registrar's lack of jurisdiction to grant winding-up orders was so fundamental that the winding-up order had to be set aside in the interest of justice.

Comment

Based on the Federal Court's decision, a court order must be pronounced to avoid the court's jurisdiction being challenged.

Nonetheless, at the end of the judgment, the Federal Court stated that its decision was based solely on the peculiar facts of the case. It appears that the determining factor was that the deputy registrar's name had been reflected in the winding-up order instead of the judge's name. Had the judge's name been on the winding-up order (even if the deputy registrar had made the said order) it could have been argued that the judge had been acting through the deputy registrar.

In short, the court ultimately found that no "two sets of facts are alike. Each case is to be decided purely on its own fact".

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Endnotes

(1) [1998] 1 MLJ 393.

(2) [1995] 1 MLJ 830.

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