

A **MOHD AFRIZAN HUSSAIN v. THEIN HONG TECK & ORS AND
ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ABDUL AZIZ ABDUL RAHIM JCA

B VARGHESE GEORGE JCA
[CIVIL APPEALS NO: W-02(IM)(NCC)-322-02-2013 &
W-02(IM)(NCC)-323-02-2013]
26 APRIL 2017

C **PARTNERSHIP:** *Winding-up – Setting aside – Requirement of having more than
five members at time of presentation of petition – Whether complied with –
Insolvency of partners – Whether sanction of Director General of Insolvency obtained
prior to presentation of petition – Whether trustee of bankrupt member could be
considered a member in partnership – Whether winding-up order null and void –*
D *Bankruptcy Act 1967, s. 38(1)(b) – Companies Act 1965, ss. 314 & 315*

PARTNERSHIP: *Liabilities of partner – Bankrupt partner – Whether
automatically disqualified as partners – Power of attorney to ‘do and perform all acts
or things and/or exercise all powers and rights of donor as partner of partnership’
– Whether strictly construed – Whether general words which do not confer general
powers – Whether other partners consented for donee to be a partner in place of
bankrupt partner – Bankruptcy Act 1967, s. 38(1)(b)*
E

There were two appeals herein: (i) appeal no 322 wherein the appellant was
the second defendant in the High Court; and (ii) appeal no 323 wherein the
appellant was the first defendant in the High Court. Both defendants appealed
F against the decision of the Judicial Commissioner (‘JC’) allowing the
respondents’ (‘plaintiffs’) claim. The plaintiffs together with one Syed Kharul
Azhar and one Yee Chang Man were partners in a partnership named ARCI
Enterprise which was formed for a fixed term of eight years, expiring on
28 October 2000 (‘the first ARCI Enterprise’). The purpose of the
G partnership was to carry out gold mining business. By a deed of assignment
and execution of a power of attorney both dated 30 January 1997, Syed
Kharul Azhar sold his rights, titles, and interests in the partnership to the first
defendant. *Vide* the power of attorney, Syed Kharul Azhar named Cedric
David Joseph Williamson (‘Cedric Williamson’), a director of the first
H defendant, as his attorney to ‘do and perform all acts or things and/or
exercise all powers and rights of the donor as a partner of the partnership’.
Subsequently, a joint venture agreement was executed between all partners
in the first ARCI Enterprise and the first defendant to carry out gold mining
operations on the land. However, Yee Chang Man and Syed Kharul Azhar
I were respectively adjudicated bankrupts on 9 July 2003 and 19 April 2005.
After the expiry of the eight years fixed term of the first ARCI Enterprise,
a second partnership comprising the same seven partners was registered with
the same name for a period of one year. In the meantime, the Companies

Commission of Malaysia revoked the business registration of the first ARCI Enterprise on 24 October 2005. On 12 January 2006, a third partnership with the same name was registered but only with five surviving partners for a period of one year.

Pursuant to a creditor's meeting held on 11 May 2007, it was determined that the first ARCI Enterprise was insolvent and the second defendant be appointed as the provisional liquidator for the first ARCI Enterprise. Thereafter, the first defendant filed a winding-up petition at the Malacca High Court for an order to wind up the first ARCI Enterprise, relying on ss. 314 and 315 of the Companies Act 1965 ('CA'). The first defendant also had expressly stated in the petition that the first ARCI Enterprise consisted of five partners, *ie*, the plaintiffs, excluding the two bankrupt partners. The first ARCI Enterprise was wound up by the Malacca High Court on 8 May 2008 with the second defendant appointed as the liquidator. The first ARCI Enterprise's application to set aside the winding-up order and for leave to file an affidavit of objection against the petition was dismissed. Dissatisfied, the plaintiffs filed a writ action in the Kuala Lumpur High Court against the defendants. The High Court Judge held that the winding-up order was a nullity *ab initio* as a partnership is excluded from the regime of the Companies Act 1965 and therefore, had set aside the winding-up order and the appointment of the second defendant as liquidator of the first ARCI Enterprise. Dissatisfied, both parties appealed to the Court of Appeal. The Court of Appeal dismissed the defendants' appeal in relation to their striking out applications but allowed the plaintiffs' cross-appeal to have their writ and statement of claim reinstated. In the Federal Court, the plaintiffs contended that it would be absurd for a partnership registered under the Partnership Act 1961 to also be categorised as an 'unregistered company' pursuant to s. 314 of the CA. In the alternative, the plaintiffs argued that even if the partnership was an unregistered company under s. 314 of the CA, it did not fulfil the requirements of s. 314, in that, it did not comprise of more than five partners when the winding-up petition was presented. The plaintiff's appeal was dismissed and the entire action was remitted to the High Court for full trial. In allowing the plaintiffs' claim, the JC confined his deliberation only to the issues pertaining to the *locus standi* of the plaintiffs, holding *inter alia*, that the bankruptcy of the two partners would automatically disqualify them as partners of the first ARCI Enterprise by virtue of s. 38(1)(d) of the Bankruptcy Act 1967 and that at the point of presentation of winding-up there were only five partners left. The submissions in the appeal herein was confined to the issue of the number of partners in the first ARCI Enterprise when the petition for winding-up was presented before the winding-up court.

Held (dismissing appeal with costs)

Per Alizatul Khair Osman JCA delivering the judgment of the court:

- (1) Powers of attorney are strictly construed and are interpreted as giving only such authority as they confer expressly or by necessary implication. General words do not confer general powers, but are

- A limited to the purpose for which the authority is given. The appointment of Cedric Williamson as attorney of Syed Kharul Azhar was tied up with the deed of assignment dated 30 January 1997. Clauses 1 to 6 of the power of attorney, however, were drafted in general words which appeared to confer general powers to the attorney to exercise all the powers and rights of the assignor-donor as a partner in the partnership. (paras 37 & 38)
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- C (2) According to the fundamental principles of partnership law, subject to any agreement express or implied between the partners, no person may be introduced as a partner without the consent of all existing partners. An attempt by one partner to introduce a new partner without consent amounts only to an assignment of part of his share in the partnership. The fact that Cedric Williamson signed the joint venture agreement as attorney of Syed Kharul Azhar did not mean that the other partners had consented to or even acknowledged Cedric Williamson as a partner in place of Syed Kharul Azhar. Hence, based on cl. 1 of the power of attorney, Syed Kharul Azhar remained a partner of the first ARCI Enterprise. (paras 40-42)
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- E (3) An assignment by a partner of his partnership share entitles the assignee only to limited rights. If a partner does assign his share, he thereby confers upon the assignee a right to payment of what, upon the taking the accounts of the partnership, may be due to the assignor. But the assignee acquires no other right than this and he takes subject to the rights of the other partners and will be affected by equities arising between the assignor and his co-partners subsequent to the assignment, irrespective of whether the assignment is absolute or otherwise.
- F Although the assignee does not become a partner in place of the assignor, he effectively stands in his shoes and is accordingly bound to indemnify the assignor against any liability for the partnership debts. In this way, the assignee will be indirectly liable for the assignor's share of any losses. It was only in this sense that Cedric Williamson stepped into the shoes of the partner Syed Kharul Azhar. (para 43)
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- H (4) A partnership agreement may, exceptionally, give a partner the right to transfer his share to a third party and, thereby, to constitute that third party a partner in his place. If partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not; nor why, having so agreed, they should not be bound by the agreement. Persons who enter into such an agreement consent prospectively and once and for all to admit into partnership any person who is willing to take advantage of their agreement, and to observe those stipulations, if any, which may be made conditions of his admission. In the present case, there was no such agreement, or evidence of such agreement. It was neither the defendants' case in the winding up court nor in the court below that there was such agreement between the partners in the first ARCI Enterprise. (para 44)
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- (5) The requirement of having more than five members must be complied with at the time of the presentation of the winding-up petition and not later. It was obvious that the alleged sanction from the official receiver was only obtained by the first defendant after the presentation of the winding-up petition. Although the business registration record showed that the first ARCI Enterprise comprised seven partners, on presentation of the winding up petition, it was undeniable that only five partners remained solvent, consistent with the first defendant's pleaded facts in the winding-up petition. (para 52) A
B
- (6) Upon being adjudicated a bankrupt, the official assignee took on the role as trustee in the bankruptcy of Syed Kharul Azhar. A trustee of a bankrupt member could not be considered as a 'member', regardless of whether the first defendant had obtained any sanction from the official assignee, hence, by necessary implication, the first defendant could not be regarded as a 'member' for the purpose of determining the number of members required under s. 314 of the CA. (para 53) C
D
- (7) Under s. 38(1)(d) of the Bankruptcy Act 1967, a bankrupt is prohibited from, *inter alia*, entering into or carrying on any business either alone or on partnership unless he has obtained sanction from the Director General of Insolvency ('DGI') or the permission of the court. However, there was no sanction granted by the official assignee to the first defendant. The letter issued by the DGI 'acknowledged' the first defendant as the rightful owner of the bankrupt partner's rights and interests in the first ARCI Enterprise pursuant to the deed of assignment. However, being the rightful owner of a bankrupt partner's rights and interests pursuant to an absolute assignment does not automatically turn an assignee into a partner. (paras 36, 54 & 55) E
F
- (8) In the circumstances, at the time of the presentation of the winding-up petition at the Malacca High Court, there were only five partners left and therefore by virtue of s. 314 of the CA, it was not a partnership that could be wound up under s. 315 of the CA, being a partnership comprising of less than seven members. The order of winding-up by the Malacca High Court was made without jurisdiction and was therefore null and void. (para 56) G

Bahasa Malaysia Headnotes

Terdapat dua rayuan di sini: (i) rayuan no 322 di mana perayu adalah defendan kedua di Mahkamah Tinggi; dan (ii) rayuan no 323 di mana perayu adalah defendan pertama di Mahkamah Tinggi. Kedua-dua defendan merayu terhadap keputusan Pesuruhjaya Kehakiman ('PK') membenarkan tuntutan responden-responden ('plaintif-plaintif'). Plaintif-plaintif bersama-sama dengan Syed Kharul Azhar dan Yee Chang Man adalah rakan kongsi dalam perkongsian bernama ARCI Enterprise yang dibentuk bagi tempoh tetap lapan tahun, yang tamat pada 28 Oktober 2000 ('ARCI Enterprise pertama'). Tujuan perkongsian ialah untuk menjalankan perniagaan melombong emas. H
I

- A Melalui surat ikatan penyerahhakan dan pemeteraian surat kuasa wakil, kedua-duanya bertarikh 30 Januari 1997, Syed Kharul Azhar menjual hak, hak milik, dan kepentingannya dalam perkongsian kepada defendan pertama. Melalui surat kuasa wakil, Syed Kharul Azhar menamakan Cedric David Joseph Williamson ('Cedric Williamson'), seorang pengarah defendan pertama, sebagai wakilnya untuk 'do and perform all acts or things and/or exercise all powers and rights of the donor as a partner of the partnership'.
B Kemudian, satu perjanjian usaha sama dimeterai antara kesemua rakan kongsi dalam ARCI Enterprise pertama dan defendan pertama untuk menjalankan operasi perlombongan emas atas tanah tersebut. Walau bagaimanapun, Yee Chang Man dan Syed Kharul Azhar diiktiraf bankrap
C masing-masing pada 9 Julai 2003 dan 19 April 2005. Selepas tamat tempoh tetap lapan tahun ARCI Enterprise pertama, perkongsian kedua melibatkan tujuh rakan kongsi yang sama didaftarkan dengan nama yang sama bagi tempoh satu tahun. Sementara itu, Suruhanjaya Syarikat Malaysia
D membatalkan pendaftaran perniagaan ARCI Enterprise pertama pada 24 Oktober 2005. Pada 12 Januari 2006, satu perkongsian ketiga dengan nama yang sama didaftarkan hanya dengan lima rakan kongsi yang ada bagi tempoh satu tahun.
- E Menurut mesyuarat pemiutang yang diadakan pada 11 Mei 2007, diputuskan bahawa ARCI Enterprise pertama tidak solven dan defendan kedua dilantik sebagai pelikuidasi sementara bagi ARCI Enterprise pertama. Kemudian, defendan pertama memfailkan petisyen penggulungan di Mahkamah Tinggi Melaka bagi perintah penggulungan ARCI Enterprise pertama, bersandar pada ss. 314 dan 315 Akta Syarikat 1965 ('AS'). Defendan pertama juga telah menyatakan secara jelas dalam petisyen bahawa ARCI Enterprise pertama
F terdiri daripada lima rakan kongsi, iaitu, plaintif-plaintif, mengecualikan dua rakan kongsi yang bankrap. ARCI Enterprise pertama digulung oleh Mahkamah Tinggi Melaka pada 8 Mei 2008 dengan defendan kedua dilantik sebagai pelikuidasi. Permohonan ARCI Enterprise pertama untuk mengetepikan perintah penggulungan dan kebenaran untuk memfailkan
G affidavit bantahan terhadap petisyen ditolak. Tidak berpuas hati, plaintif-plaintif memfailkan tindakan writ di Mahkamah Tinggi Kuala Lumpur terhadap defendan-defendan. Hakim Mahkamah Tinggi memutuskan bahawa perintah penggulungan adalah batal *ab initio* kerana perkongsian tersebut dikecualikan daripada rejim Akta Syarikat 1965 dan oleh itu, mengetepikan
H perintah penggulungan dan pelantikan defendan kedua sebagai pelikuidasi ARCI Enterprise pertama. Tidak berpuas hati, kedua-dua pihak merayu kepada Mahkamah Rayuan. Mahkamah Rayuan menolak rayuan defendan-defendan berkaitan dengan permohonan-permohonan pembatalan tetapi membenarkan rayuan balas plaintif-plaintif untuk mengembalikan writ dan
I pernyataan tuntutan. Di Mahkamah Persekutuan, plaintif menghujahkan bahawa amat mustahil bagi perkongsian yang didaftarkan bawah Akta Perkongsian 1961 untuk juga dikategorikan sebagai 'syarikat tidak berdaftar' menurut s. 314 AS. Secara alternatif, plaintif menghujahkan bahawa

walaupun perkongsian tersebut adalah syarikat bawah s. 314 AS, ia tidak memenuhi keperluan s. 314, di mana, ia tidak mempunyai lebih daripada lima rakan kongsi semasa petisyen penggulungan dikemukakan. Rayuan plaintif ditolak dan keseluruhan tindakan dikembalikan ke Mahkamah Tinggi untuk bicara penuh. Membenarkan tuntutan plaintif, PK meneghaskan keputusannya hanya bagi isu-isu berkaitan *locus standi* plaintif-plaintif, memutuskan antara lain, kebangkrapan dua rakan kongsi secara automatik mengecualikan mereka sebagai rakan kongsi ARCI Enterprise pertama menurut s. 38(1)(d) Akta Kebankrapan 1967 dan pada masa penggulungan dikemukakan hanya tinggal lima orang rakan kongsi. Hujahan dalam rayuan ini dihadkan pada isu tentang jumlah rakan kongsi dalam ARCI Enterprise pertama semasa petisyen penggulungan dikemukakan di mahkamah penggulungan.

Diputuskan (menolak rayuan dengan kos)

Oleh Alizatul Khair Osman HMR menyampaikan penghakiman mahkamah:

- (1) Surat kuasa wakil ditafsir secara ketat dan ditafsirkan memberi kuasa setakat yang diberikan secara jelas dan melalui implikasi yang perlu. Perkataan-perkataan umum tidak memberi kuasa umum, tetapi terhad untuk tujuan kuasa itu diberikan. Pelantikan Cedric Williamson sebagai wakil Syed Kharul Azhar terikat dengan surat kuasa penyerahhakan bertarikh 30 Januari 1997. Klausula 1 hingga 6 surat kuasa wakil, walau bagaimanapun, dirangka dalam perkataan-perkataan umum yang jelas memberikan kuasa-kuasa umum, kepada wakil untuk melaksanakan kesemua kuasa dan hak penyerahhak-penderma sebagai rakan kongsi dalam perkongsian tersebut.
- (2) Menurut prinsip asas undang-undang perkongsian, tertakluk pada mana-mana perjanjian langsung atau tersirat antara pihak-pihak, tiada seorang pun yang boleh diperkenalkan sebagai rakan kongsi tanpa persetujuan kesemua rakan kongsi sedia ada. Cubaan oleh seorang rakan kongsi untuk memperkenalkan rakan kongsi baru tanpa persetujuan bermaksud hanya sebagai penyerahhakan sebahagian syernya dalam perkongsian tersebut. Fakta bahawa Cedric Williamson menandatangani perjanjian usaha sama sebagai wakil Syed Kharul Azhar tidak bermaksud bahawa rakan kongsi lain menyetujui atau mengiktiraf Cedric Williamson sebagai rakan kongsi di tempat Syed Kharul Azhar. Oleh itu, berdasarkan kl. 1, surat kuasa wakil, Syed Kharul Azhar kekal sebagai rakan kongsi dalam ARCI Enterprise pertama.
- (3) Penyerahhakan oleh rakan kongsi, sebahagian syernya dalam perkongsian, memberikan penerima hak hanya hak yang terhad. Jika seorang rakan kongsi menyerahhak syernya, dia memberikan kepada penerima hak, selepas akaun perkongsian dikemukakan, bayaran-bayaran yang mungkin tertunggak kepada penyerah hak. Tetapi penerima hak memperoleh hak yang tidak lebih daripada itu dan

- A penerimaannya tertakluk pada hak kesemua rakan kongsi lain dan akan
terjejas oleh ekuiti yang timbul antara penyerahhak dan rakan kongsi
selepas penyerahhak, tidak kira sama ada penyerahhak itu adalah
mutlak atau sebaliknya. Walaupun penerima hak tidak menjadi rakan
kongsi di tempat penyerah hak, dia jelas mengambil kedudukannya dan
B dengan itu terikat untuk membayar penyerah hak terhadap kesemua
liabiliti bagi hutang-hutang perkongsian. Dengan cara ini, penerima hak
bertanggungjawab secara langsung pada syer penyerah hak bagi apa-apa
kerugian. Hanya dalam cara ini Cedric Williamson mengambil
kedudukan rakan kongsi Syed Kharul Azhar.
- C (4) Satu perjanjian perkongsian mungkin, secara khusus, memberikan hak
kepada rakan kongsi untuk memindah milik syernya kepada pihak
ketiga, dan dengan itu, meletakkan pihak ketiga sebagai rakan kongsi
ditempatnya. Jika rakan kongsi memilih untuk menyetujui sesiapa
D daripada mereka bebas memperkenalkan orang lain ke dalam
perkongsian, tiada alasan mengapa mereka tidak boleh; atau mengapa,
setelah menyetujuinya, tidak terikat dengan perjanjian itu. Seseorang
yang memasuki perjanjian itu memberi persetujuan secara prospektif dan
sekali gus untuk menerima ke dalam perkongsian sesiapa yang hendak
mengambil faedah perjanjian mereka, dan untuk mematuhi pernyataan-
E pernyataan, jika ada, yang mungkin menjadi syarat penerimaannya.
Dalam kes ini, tiada perjanjian sedemikian, atau keterangan perjanjian
sedemikian. Juga bukan kes defendan-defendan di mahkamah
penggulangan atau di mahkamah di bawah terdapat perjanjian
sedemikian antara rakan-rakan kongsi ARCI Enterprise pertama.
- F (5) Keperluan untuk lebih daripada lima ahli perlu dipatuhi pada masa
pengemukakan petisyen penggulangan dan bukan kemudian. Jelas
bahawa sanksi yang didakwa daripada pegawai pemegang harta hanya
diperoleh defendan pertama selepas petisyen penggulangan
dikemukakan. Walaupun rekod pendaftaran perniagaan menunjukkan
G bahawa ARCI Enterprise pertama terdiri daripada tujuh rakan kongsi,
semasa petisyen penggulangan dikemukakan, tidak dinafikan bahawa
hanya lima orang rakan kongsi masih solven, konsisten dengan fakta
yang diplid defendan pertama dalam petisyen penggulangan.
- H (6) Selepas diiktiraf bankrap, pegawai pemegang harta mengambil peranan
sebagai pemegang amanah dalam kebangkrapan Syed Kharul Azhar.
Seseorang pemegang amanah bagi seorang ahli yang bankrap tidak boleh
dianggap sebagai 'ahli', sama ada defendan pertama telah memperoleh
sanksi daripada pegawai pemegang harta, dengan itu, melalui implikasi,
defendan pertama tidak boleh dianggap sebagai 'ahli' bagi tujuan
menentukan jumlah ahli yang diperlukan bawah s. 314 AS.
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- (7) Bawah s. 38(1)(d) Akta Kebankrapan 1967, seorang bankrap dihalang daripada, antara lain, memasuki atau menjalankan apa-apa perniagaan sama ada secara sendiri atau perkongsian kecuali persetujuan Ketua Pengarah Insolvensi ('KPI') atau kebenaran mahkamah diperoleh. Walau bagaimanapun, tiada persetujuan diberikan oleh pegawai pemegang harta kepada defendan pertama. Surat yang diberikan oleh KPI 'mengiktiraf' defendan pertama sebagai pemilik sah hak dan kepentingan rakan kongsi yang bankrap dalam ARCI Enterprise pertama menurut surat ikatan penyerahhakan. Walau bagaimanapun, sebagai pemilik sah hak dan kepentingan rakan kongsi yang bankrap menurut penyerahhakan mutlak tidak menjadikan penerima hak sebagai rakan kongsi secara automatik. A
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C
- (8) Dalam keadaan tersebut, pada masa pengemukakan petisyen penggulungan di Mahkamah Tinggi Melaka hanya tinggal lima orang rakan kongsi dan dengan itu, menurut s. 314 AS, ia bukan perkongsian yang boleh digulung bawah s. 315 AS, kerana perkongsian yang kurang daripada tujuh ahli. Perintah penggulungan oleh Mahkamah Tinggi Melaka dibuat tanpa bidang kuasa dan oleh itu terbatal dan tidak sah. D

Case(s) referred to:

- Bray v. Fromont* (1821) 6 Madd 5 (*refd*)
Crawshay v. Maule (1818) 1 Swan 495 (*refd*) E
Mohamed Tawfik Tun Dr Ismail v. HLG Credit Sdn Bhd & Anor [2012] 2 CLJ 65 CA (*dist*)
Ong Kian Loo v. Hock Wah Trading Co [1990] 1 MLJ 315 (*refd*)
Re Slyth, ex p Barrow (1815) 2 Rose 252 (*refd*)
Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal [2012] 1 CLJ 49 FC (*refd*) F

Legislation referred to:

- Bankruptcy Act 1967, s. 38(1)(d)
 Civil Law Act 1956, s. 4(3)
 Companies Act 1965, ss. 314(1), 315
 Partnership Act 1961, ss. 37, 40, 41 G
 Rules of the High Court 1980, O. 14A
 Companies Act 1948 [UK], ss. 398(c), 399

Other source(s) referred to:

- Bowstead & Reynolds on Agency*, 20th edn, Sweet & Maxwell, para [3-011]
Halsbury's Law of England, 5th edn, vol 79, paras 124, 125 H
Lindley & Banks on Partnership, paras 10-60, 19-53, 19-57, 19-60
 (Civil Appeal No: W-02(IM)(NCC)-322-02-2013)
 For the appellant - Amir Asree Meor Nordin; M/s Zainul Rijal Talha & Amir
 For the respondents - Manpal Singh Sacdev, Vikram Singh, Rabinder Singh & Juliana Johari; M/s Rabinder Budiman & Assocs I

A *(Civil Appeal No: W-02(IM)(NCC)-323-02-2013)*
For the appellant - V Sithambaram & A Ruebankumar; M/s Ahmad Rizal, Sara Idylla & Co
For the respondents - Manpal Singh Sacdev, Vikram Singh, Rabinder Singh & Juliana Johari; M/s Rabinder, Budiman & Assocs

B *[Editor's note: For the High Court judgment, please see Thein Hong Teck & Ors v. TRA Mining (Malaysia) Sdn Bhd & Ors [2013] 1 LNS 1486 (affirmed).]*

Reported by S Barathi

C **JUDGMENT**

Alizatul Khair Osman JCA:

Introduction

D **[1]** These two appeals, appeal no. 322 and 323 were heard together before us as they both arose out of the same case.

[2] The appellant in appeal no. 322 was the second defendant in the court below while the appellant in appeal no. 323 was the first defendant in the court below.

E **[3]** Both defendants appealed against the decision of the learned Judicial Commissioner (JC) of the High Court who had, after a full trial allowed the respondents' (the plaintiffs in the court below) claim as contained in the writ of summons and statement of claim for, *inter alia*, the following reliefs:

F (a) The appointment of the appellant/second defendant as a provisional liquidator for ARCI Enterprise is invalid and be set aside;

(b) A declaration that the winding up order of the Malacca High Court dated 8 May 2008 to wind up ARCI Enterprise is invalid and be set aside;

G (c) A declaration that the Malacca High Court order dated 8 May 2008 which appointed the appellant/second defendant as the liquidator of ARCI Enterprise is invalid and be set aside;

(d) The appellant/second defendant is ordered to give full details of the accounts of ARCI Enterprise at the point in time that he carried out his duties as the provisional liquidator and the liquidator;

H (e) The defendants be ordered to pay damages which is to be assessed by the court.

I **[4]** Having given due consideration to both appeals, we have unanimously dismissed the appeals with costs. We now set out our reasons in so deciding. For ease of reference, parties will be referred to as they were in the court below.

Background Facts

[5] As rightly observed by the learned JC in his grounds of judgment, the dispute between the parties herein ‘had spawned at least nine cases and four reported ones’ and that ‘to recount its full history would be both tedious and tiresome’. As such, we will only make a brief reference to the relevant history of the proceedings necessary for the disposal of the issue at hand. The pertinent facts are set out below.

[6] The plaintiffs together with one Syed Kharul Azhar bin Syed Talib and one Yee Chang Man were partners in a partnership named ARCI Enterprise (915175-X). ARCI Enterprise was formed on 8 October 1992 for a fixed term of eight years, expiring on 28 October 2000 (the first ARCI Enterprise). The purpose of the partnership was to carry out gold mining business on a piece of land situated in Kuala Lipis, Pahang. The partnership was granted a mining certificate by the State Government to undertake gold mining business on the identified land.

[7] By a deed of assignment and execution of a power of attorney both dated 30 January 1997 Syed Kharul Azhar sold his rights, titles, and interests in the partnership to the first defendant for a consideration of RM4 million. *Vide* the power of attorney, Syed Kharul Azhar named Cedric David Joseph Williamson (Cedric Williamson), a director of the first defendant at the material time, as his attorney to ‘do and perform all acts or things and/or exercise all powers and rights of the donor as a partner of the partnership’. Subsequently, a joint venture agreement dated 25 February 1997 was executed between all partners in the first ARCI Enterprise and the first defendant to carry out gold mining operations on the land.

[8] Yee Chang Man and Syed Kharul Azhar were respectively adjudicated bankrupts on 9 July 2003 and 19 April 2005. Another partner Yong Kat Keong passed away on 17 March 2009 and Yong Choong Yim (the fourth plaintiff) was appointed as administrator of the estate of the said Yong Kat Keong *vide* a court order dated 10 September 2009.

[9] After the expiry of the eight years fixed term of the first ARCI Enterprise on 28 October 2000, a second partnership comprising the same seven partners was registered (registration number 1502428-X) with the same name on 29 July 2004 for a period of one year until 28 July 2005 (the second ARCI Enterprise). In the meantime, the Companies Commission of Malaysia revoked the business registration of the first ARCI Enterprise on 24 October 2005. On 12 January 2006 a third partnership with the same name was registered (registration number 1593482-D) but only with five surviving partners for a period of one year until 11 January 2007 (the third ARCI Enterprise).

[10] Meanwhile, Cedric Williamson, the attorney of Syed Kharul Azhar gave a general notice to convene a creditor’s meeting *vide* an advertisement in *The New Straits Times* on 27 April 2007. The creditor’s meeting held on

A 11 May 2007 determined that the first ARCI Enterprise was insolvent. It was also decided in the meeting that the second defendant be appointed as the provisional liquidator for the said first ARCI Enterprise.

B [11] After the creditor's meeting, the first defendant filed a winding up petition (the petition) on 16 April 2007 at the Malacca High Court. In the petition, the first defendant sought an order to wind up the first ARCI Enterprise on the ground that the latter owed the first defendant, as creditor, a sum of RM6,157,121.57 as at 1 December 2008. The first defendant specifically relied on the provisions of s. 314 and s. 315 of the Companies Act 1965 to wind up the first ARCI Enterprise. At the same time, the first defendant had expressly stated in the petition that the first ARCI Enterprise consisted of **five partners** namely the first, second, third, fifth plaintiffs and Yong Kat Keong, excluding the two bankrupt partners.

(emphasis added)

D [12] The petition was allegedly not served on the plaintiffs. Instead, *vide* letter dated 19 February 2008 it was served by the first defendant petitioner's solicitor only on the second defendant as provisional liquidator purportedly appointed in the earlier creditor's meeting held on 11 May 2007. The first ARCI Enterprise was wound up by the Malacca High Court on 8 May 2008 with the second defendant appointed as the liquidator.

E [13] Subsequent to the winding up order being made, the first ARCI Enterprise applied *vide* summons-in-chambers dated 13 June 2008 in the Malacca High Court to set aside the winding up order and for leave to be granted to the first ARCI Enterprise to file an affidavit of objection against the petition. On 8 July 2008, the winding up court dismissed the first ARCI Enterprise's application on the ground that the partnership should have appealed against the winding up order because the winding up court was *functus officio* and had no jurisdiction to set aside a perfected order.

F [14] Dissatisfied with the winding up court's decision, on 29 December 2009 the plaintiffs, as contributors of the first ARCI Enterprise, filed a writ action in the Kuala Lumpur High Court, from which the appeals now before us emanate, against the defendants seeking the following orders:

G (a) the appointment of the second defendant as the provisional liquidator for the first ARCI Enterprise by the purported creditor's meeting held on 11 May 2007 is not valid in law and be set aside;

H (b) a declaration that the order by the Malacca High Court dated 8 May 2008 which ordered the first ARCI Enterprise to be wound up is not valid in law and be set aside;

I (c) a declaration that the order by the Malacca High Court dated 8 May 2008 which ordered the appointment of the second defendant as a liquidator is not valid in law and be set aside;

- (d) an order that the second defendant shall give full details of the first ARCI Enterprise account at the time he executed his duty as provisional liquidator for the first ARCI Enterprise; **A**
- (e) an order for the defendants to pay damages to the plaintiff to be assessed by the court; **B**
- (f) interest at 8% per annum from date of judgment to realisation; and
- (g) costs.
- [15]** In the High Court, prior to the commencement of trial, the plaintiffs applied by summons-in-chambers to summarily set aside the winding up order and sought a further order that the first ARCI Enterprise be allowed to continue to conduct its business. The defendants on the other hand applied to strike out the plaintiffs' writ and statement of claim. The defendants' striking out application was premised on the (lack of) jurisdiction of the High Court to set aside an order of another High Court. **C**
- [16]** Instead of dealing with the parties' interlocutory applications, the learned High Court Judge decided that the entire matter could be disposed of by way of O. 14A of the Rules of the High Court 1980 by determining the following two questions of law: **D**
- (i) Whether the order of the Malacca High Court dated 8 May 2008 can be set aside by this court on the ground that it is a nullity *ab initio*? **E**
- (ii) And, if so, whether this court has jurisdiction to set aside an order of concurrent jurisdiction?
- [17]** The learned High Court Judge concluded that the winding up order is a nullity *ab initio* as a partnership is excluded from the regime of the Companies Act 1965. The court therefore set aside both the winding up order and the appointment of the second defendant as liquidator of the first ARCI Enterprise. The learned High Court Judge also ordered that his decision pursuant to O. 14A shall be the final order for the entire suit and in the result all pending interlocutory applications before the court were dismissed. Yet, in dismissing the defendants' striking out applications, the learned High Court Judge stated his view that if not for his decision to set aside the winding up order, he would have allowed the defendants' striking out applications. **F**
- [18]** Dissatisfied with the decision, both parties appealed to the Court of Appeal. The Court of Appeal dismissed the defendants' appeal in relation to their striking out applications but allowed the plaintiffs' cross-appeal to have their writ and statement of claim reinstated. The defendants did not pursue the matter further. **G**
- [19]** The plaintiffs, on the other hand, obtained leave and appealed to the Federal Court. In the Federal Court, the plaintiff contended that it would be absurd for a partnership registered under the Partnership Act 1961 to also be categorised as an 'unregistered company' pursuant to s. 314 of the Companies **H**
- I**

A Act. In the alternative, the plaintiff argued that even if the partnership was an unregistered company under s. 314 of the Companies Act, it did not fulfil the requirements of s. 314 in that it did not comprise more than five partners when the winding up petition was presented.

B [20] The Federal Court dismissed the plaintiffs' appeal and remitted the entire action to the High Court for a full trial. The Federal Court judgment is reported in *Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal* [2012] 1 CLJ 49; [2012] 2 MLJ 299. In dismissing the plaintiffs' appeal, the Federal Court opined, *inter alia*, as follows:

C [36] Part V of the Partnership Act 1961 deals with the dissolution of partnership. It is true as contended by learned counsel for the appellants that the court may decree a dissolution of a partnership under s. 37 of the Partnership Act 1961. However, it must be noted that the application can be made only by a partner of a partnership. A creditor such as the respondents in the instant case cannot make an application under that s. 37 to dissolve a partnership.

D [37] Dissolution is distinct from the 'winding up' of a partnership business. Although the term dissolution implies termination, dissolution is actually the beginning of the process that ultimately terminates a partnership. For example, if a partner resigns or if a partnership expels a partner, the partnership is considered legally dissolved. Section 40 of the Partnership Act 1961 provides that after the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership. Under s. 41 of the Partnership Act 1961 any partner or his representative may, on the termination of a partnership, apply to the court to wind up the business and affairs of the firm.

E [38] It is therefore clear that under the Partnership Act 1961 only the partners can make application to court to dissolve and wind up a partnership. A creditor cannot make application under the Partnership Act 1961 to wind up a partnership. We are therefore of the view that s. 314 of the Act is applicable in a situation where a creditor seeks a remedy against an insolvent partnership which has more than five members. Not all partnership can be wound up under s. 314 of the Act. The circumstances under which a partnership may be wound up are stated under s. 315(1) of the Act. There is therefore no doubt that s. 314 and s. 315 of the Act can co-exist with s. 40 and s. 41 of the Partnership Act 1961. The Partnership Act 1961 deals only with the voluntary winding up of a partnership by the partners themselves and no other. On the other hand s. 315 expressly states that s. 314 does not apply in the event a partnership is wound up voluntarily.

F [39] The partnership was registered on 8 October 1992 for a period of 8 October 1992 to 28 October 2000. It must be noted that at the date of the winding up order the registration of the partnership was not renewed. However, the partners had continued to register two other partnerships in the same name of the firm with a different composition of partners and

in the absence of few partners on the grounds of sale, death and/or bankruptcy. The subsequent partnership was registered on 29 July 2004 with registration No 001502428-X and the third and final partnership was registered from 12 January 2006 to 11 January 2007 under the registration No 001593482-D. Section 34(1)(a) of the Partnership Act 1961 provides that subject to any agreement between the partners, a partnership is dissolved if entered into for a fixed term, by the expiration of that term.

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[40] From the facts it is unclear what was the status of the partnership at the time of the presentation of the winding up petition at the Malacca High Court by the first defendant.

[41] Learned counsel for the appellants submitted that as the partnership had only five partners at the time of the presentation of the winding up petition, which was on 16 April 2007, the partnership did not therefore fulfil the requirement of s. 314 of the Act to be categorised as an unregistered company because s. 314 provides that a partnership must comprise of more than five members. In response, learned counsel for the respondents submitted that s. 314 of the Act does not say whether the requirement to have more than five members has been complied with at the time of the presentation of the winding up petition.

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[42] It is to be noted that s. 314 and s. 315 of the Act are under division 5 of Part X of the Act which deals with the winding up of unregistered companies. It is therefore our unanimous view that the requirement of having more than five members must be complied with at the time of the presentation of the winding up petition. *The issue whether the partnership had more than five members at the time of the presentation of the winding up petition against the partnership was not considered by the learned High Court Judge.*

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[43] *The facts, in our view, are not clear whether the partnership had only five members at the time of the presentation of the winding up petition against the partnership at the Malacca High Court. On the facts of the instant case we are of the view that the issue of how many members of the partnership were there at the time of the presentation of the winding up petition against the partnership could only be determined in a full trial where witnesses ought to be called and to be cross-examined so that full evidence on the matter are made available to the court for the court to make a proper finding on the issue.*

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[44] For the reasons given we would answer the question posed to us as follows. A partnership with more than five members is an unregistered company and can be wound up under part X of the Act by virtue of the definition of unregistered company in s. 314(1) of the Act.

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[45] *It is to be noted that the appellants appealed against only part of the judgment of the Court of Appeal, that is to say against the decision of the Court of Appeal which set aside the decision of the learned High Court Judge that set aside the order of Malacca High Court dated 8 May 2008 given in Suit No 28-15 of 2007 and the appointment of the second defendant as a liquidator. In this appeal we are therefore only concerned with that part of the judgment of the Court of Appeal.*

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(emphasis added)

A Proceedings In The High Court

[21] When the entire action was remitted back to the High Court, it was heard before a different Judicial Commissioner. After a full trial (the defendants submitted no case to answer and called no witness to testify on their behalf), parties submitted at length in their respective written submissions on a host of other issues not otherwise identified as triable issues by the Federal Court, apart from the issue identified by the Federal Court to be determined by the said court, ie,:

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How many partners were there in the 1st ARCI Enterprise that was wound up by the winding up court on 8.5.2008 when the petition was filed on 18.4.2007 within the meaning of section 314(1) of the Companies Act 1965?

Decision Of The High Court

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[22] On 27 December 2012 the learned JC allowed the plaintiffs' claim. In allowing the plaintiffs' claim, the learned JC did not address all issues submitted before him. Instead, the learned JC confined his deliberation only to the issues pertaining to the *locus standi* of the plaintiffs ie, the requirement for leave from the winding up court to institute a suit to set aside the winding up order and leave from the winding up court to bring an action against the provisional liquidator, the number of partners of the first ARCI Enterprise when it was wound up, the effect of setting aside the winding up order on the liquidator, and whether the first defendant as assignee was entitled to call for a creditors' meeting to appoint the second defendant provisional liquidator.

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[23] In relation to the pivotal issue of the number of partners in the first ARCI Enterprise when it was wound up by the winding up court, the learned JC made the following findings:

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... the bankruptcy of Yee Chang Man and Syed Kharul Azhar would automatically by virtue of section 38(1)(d) of the Bankruptcy Act 1967 disqualify them as partners of the 1st ARCI Enterprise. Though the partnership was registered with 7 partners, there were only 5 partners left at the point of presentation of the petition. In other words the 1st defendant had consciously disregarded the 2 bankrupts from the computation of the number of partners as 5 when it presented a winding up petition against the 1st ARCI Enterprise. Being a partnership of 5 partners, the law does not allow such a partnership to be wound up under section 314 of the Companies Act 1965 for it clearly refers to a partnership of more than 5 members. In *Re Bolton Benefit Loan Society Coop v. Booth* [1879] Ch D 679 it was held under the English equivalent of sections 199 and 200 of the Companies Act 1862 as follows:

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Held, that, having regard to sects. 199 and 200 of the Companies Act, 1862, a winding up order could not be made when the number of members had at the date of the petition fallen below seven.

... As such the order made was made without jurisdiction and is null and void and as such I am constrained to have it set aside based on the principle set out in *Badiaddin's* case.

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At any rate the 1st defendant had stated in its winding up petition against the 1st ARCI Enterprise that the partnership consisted of 5 partners ... It cannot now turn round and say that 5 partners mean also 7 partners and as such it qualified to be wound up. Indeed it is estopped from asserting otherwise ...

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Proceedings In The Court Of Appeal

[24] Before us, learned counsel for both parties confined their submissions only to the issue of the number of partners in the first ARCI Enterprise when the petition for winding up was presented before the winding-up court.

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Our Preliminary Observations

[25] Based on the direction of the Federal Court when it remitted the matter back to the High Court for trial, it appears to us unmistakable that the Federal Court had only one issue in mind to be determined by the High Court. This is patently clear in para. [43] of the Federal Court judgment. According to the Federal Court:

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[43] The facts, in our view, are not clear whether the partnership had only five members at the time of the presentation of the winding up petition against the partnership at the Malacca High Court. *On the facts of the instant case we are of the view that the issue of how many members of the partnership were there at the time of the presentation of the winding up petition against the partnership could only be determined in a full trial where witnesses ought to be called and to be cross-examined so that full evidence on the matter are made available to the court for the court to make a proper finding on the issue.*

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(emphasis added)

[26] We have perused the notes of evidence of the proceedings in the High Court and we observed that learned counsel for the defendants did in fact agree with the learned JC that the issue as singled out by the Federal Court on how many members of the partnership were there at the time of the presentation of the winding-up petition was the 'prime issue' for trial. (see pp. 50-53 of the notes of proceedings in RRT Bah. B Jld. 2(9) of the record of appeal).

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[27] We saw no reason to disagree with the view expressed by the learned JC at p. 53 of the notes of proceedings (*supra*) that if the court were to come to a finding that the winding up order is invalid, in that the winding up court was not seised of the jurisdiction under s. 314 and/or s. 315 of the Companies Act 1965 to grant the impugned winding up order, 'it cuts right through' the entire case. A perusal of the notes of proceedings (*supra*) showed that learned counsel for the defendants clearly agreed to proceed on the single

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A issue proposed by the learned JC. Learned counsel for the plaintiffs too agreed that if the question was answered in their favour ‘it will solve everything’ (see p. 51 of the notes of proceedings (*supra*)).

[28] Nevertheless, it would appear for some reasons not disclosed in the notes of evidence, that course was not eventually taken up by the parties.
B Instead, parties engaged the court below on a host of other issues not identified by the Federal Court for determination as adverted to earlier.

[29] Be that as it may, parties quite rightly agreed before us to confine their submission to the prime issue as identified by the Federal Court (*ante*).

C **Our Findings**

[30] It is an agreed fact that there were seven partners when the first ARCI Enterprise was formed on 8 October 1992. The first ARCI Enterprise was formed for a fixed term of eight years, expiring on 28 October 2000. The purpose of the partnership was to carry out gold mining business. It is
D common ground between the parties that Yee Chang Man and Syed Kharul Azhar were respectively adjudicated bankrupts on 9 July 2003 and 19 April 2005. Another partner Yong Kat Keong passed away on 17 March 2009 and Yong Choong Yim (the fourth plaintiff) was appointed as administrator of the estate of the said Yong Kat Keong *vide* a court order dated 10 September 2009.

[31] It is also an agreed fact that after expiry of the eight years fixed term of the first ARCI Enterprise on 28 October 2000, a second partnership comprising the same seven partners was registered (registration number 1502428-X) with the same name on 29 July 2004 for a period of one year until 28 July 2005. On 12 January 2006 a third partnership with the same
F name was registered (registration number 1593482-D) but only with five remaining partners (excluding the two former partners who were adjudicated bankrupts) for a period of one year until 11 January 2007.

[32] It is also agreed that by a deed of assignment and a power of attorney both dated 30 January 1997, one of the partners Syed Kharul Azhar ‘had sold all of his rights, titles and interests in the said ARCI partnership to the first defendant for the consideration (of RM4 million). The first defendant had named Cedric Williamson (a director of the first defendant at the material time) as its attorney, to be the attorney of Syed Kharul Azhar in the said ARCI partnership’. It has also been agreed upon that a joint venture
G agreement dated 25 February 1997 was executed between all of the partners in the first ARCI Enterprise and the first defendant to collaborate in the mining operations.

[33] It was the defendants’ contention that by virtue of the said assignment and the appointment of the said Cedric Williamson as attorney of Syed Kharul Azhar *vide* the power of attorney executed on 30 January 1997 pursuant to the said assignment the said Cedric Williamson had stepped into the shoes of Syed Kharul Azhar and substituted as a partner of the first ARCI Enterprise.
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[34] That being the case, the bankruptcy of Syed Kharul Azhar in 2005 had no effect on his status as a partner since he had been substituted as a partner by Cedric Williamson pursuant to the said assignment and his appointment as the former's attorney in 1997.

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[35] Learned counsel for the defendants relied on s. 4(3) of the Civil Law Act 1956 and the Court of Appeal case of *Mohamed Tawfik Tun Dr Ismail v. HLG Credit Sdn Bhd & Anor* [2012] 2 CLJ 65; [2011] MLJU 1010 in support of their contention.

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[36] In our view, the above case does not apply to the facts of our case as it does not concern a partnership.

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Firstly, before determining whether the said assignment and the consequent appointment of Cedric Williamson as the said attorney has the effect as contended, it is of course trite that by virtue of s. 38(1)(d) of the Bankruptcy Act 1967, a bankrupt is prohibited from, *inter alia*, entering into or carrying on any business either alone or in partnership unless he has obtained sanction from the Director General of Insolvency (DGI) or the permission of the court. The issue of the sanction from the DGI will be dealt with later in the judgment.

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[37] Secondly, it is patently clear that the appointment of Cedric Williamson as attorney of Syed Kharul Azhar was tied up with the deed of assignment dated 30 January 1997. Clause 6 of the deed of assignment expressly states that the appointment of Cedric Williamson is to enable the attorney 'to do and sign all things or documents required by (the first defendant as assignee) to give effect to the (absolute assignment in cl. 5(I))'. Clauses 1 to 6 of the power of attorney dated 30 January 1997 however are drafted in general words which appear to confer general powers to the attorney to exercise all the powers and rights of the assignor-donor as a partner in the partnership.

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[38] The law on the construction of powers of attorney is settled. Powers of attorney are strictly construed and are interpreted as giving only such authority as they confer expressly or by necessary implication. It is an entrenched rule of construction that general words do not confer general powers, but are limited to the purpose for which the authority is given (para. [3-011] *Bowstead & Reynolds on Agency*, 20th edn, Sweet & Maxwell). The purpose here being the purpose set out in cl. 6 of the said assignment.

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[39] Thirdly, and more importantly a partnership is personal in character as explained by Lindley & Banks in their book *Lindley & Banks on Partnership* at paras. 19-49, which we reproduce below:

When persons enter into a contract of partnership, their intention ordinarily is that a partnership shall exist between themselves and themselves alone. The mutual confidence reposed by each in the other is one of the main elements in the contract, and it is obvious that persons may be willing enough to trust each other, and yet be unwilling to place

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- A the same trust in any one else. Hence it is one of the fundamental principles of partnership law that no person can be introduced as a partner without the consent of all those who for the time being are members of the firm. If, therefore, a partner dies, his executors or devisees have no right to insist on being admitted into partnership with the surviving partners, unless some agreement to that effect has been entered into by
- B them. **Still less can a partner by assigning his share entitle his assignee to take his place in the partnership against the will of the other members**
 ...
- (emphasis added)
- C **[40]** The same passage which appeared in the case of *Ong Kian Loo v. Hock Wah Trading Co* [1990] 1 MLJ 315 was relied on by the learned JC to illustrate the same point (see pp. 48-49 of RRT Bah. A Jld. 1(2)). Thus, according to the fundamental principles of partnership law, subject to any agreement express or implied between the partners, no person may be introduced as a partner without the consent of all existing partners (*Crawshay v. Maule* (1818) 1 Swan 495 at 509n). An attempt by one partner to introduce
- D a new partner without consent amounts only to an assignment of part of his share in the partnership (*Re Slyth, ex p Barrow* (1815) 2 Rose 252 at 255; *Bray v. Fromont* (1821) 6 Madd 5).
- E **[41]** The fact that Cedric Williamson signed the joint venture agreement as attorney of Syed Kharul Azhar did not mean that the other partners had consented to or even acknowledged Cedric Williamson as a partner in place of Syed Kharul Azhar.
- F **[42]** As pointed out by learned counsel for the plaintiff, it is clear from cl. 1 of the power of attorney that the donor ie, Syed Kharul Azhar remains a partner of the first ARCI Enterprise. Clause 1 reads, *inter alia*, as follows:-
 To do and perform all acts or things and/or all the powers and rights of
 the Donor as a Partner of the Partnership ...
 (emphasis added)
- G **[43]** Due to this personal character that underpins a partnership, an assignment by a partner of his partnership share entitles the assignee to limited rights only (para [124] *Halsbury's Law of England*, 5th edn, vol. 79). If a partner does assign his share, he thereby confers upon the assignee a right to payment of what, upon the taking the accounts of the partnership, may be
- H due to the assignor. But the assignee acquires no other right than this; and he takes subject to the rights of the other partners; and will be affected by equities arising between the assignor and his co-partners subsequent to the assignment (para [19-53] *Lindley & Banks on Partnership*). This is so irrespective of whether the assignment is absolute or otherwise (para [125] *Halsbury's Law of England*, 5th edn, vol. 79). Although the assignee does not
- I become a partner in place of the assignor, he effectively stands in his shoes

and is accordingly bound to indemnify the assignor against any liability for the partnership debts. In this way, the assignee will be indirectly liable for the assignor's share of any losses (para [19-57] *Lindley & Banks on Partnership*). It is only in this sense that the assignee (ie, Cedric Williamson in this case) steps into the shoes of the partner (Syed Kharul Azhar) and not as suggested by learned counsel for the defendants, that is, the assignee becomes a partner in place of the assignor.

[44] We however noted that a partnership agreement may, exceptionally, give a partner the right to transfer his share to a third party and, thereby, to constitute that third party a partner in his place: If partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not; nor why, having so agreed, they should not be bound by the agreement. Persons who enter into such an agreement consent prospectively and once and for all to admit into partnership any person who is willing to take advantage of their agreement, and to observe those stipulations, if any, which may be made conditions of his admission (para [19-60] *Lindley & Banks on Partnership*). In the case at hand, there was no such agreement, or rather no evidence of such agreement. It was neither the defendants' case in the winding-up court nor in the court below that there was such agreement between the partners in the first ARCI Enterprise.

[45] Fourthly, after the creditor's meeting, the first defendant filed a winding-up petition on 16 April 2007 at the Malacca High Court. In the petition, the first defendant sought an order to wind up the first ARCI Enterprise on the ground that the first partnership owed the first defendant a sum of RM6,157,121.57 as at 1 December 2008. To be specific, it was set out in the petition that:

1. ARCI Enterprise was a valid and existing partnership comprising of Yee Fook Shin, Thein Hong Teck, Yee Fook Choy, Yee Chong Khoon, Yong Kat Keong.

...

6. The partnership is indebted to the petitioner in the sum of RM6,157,121.57 as at 1.12.2008 *via* suit in Kuantan High Court, Writ Summons ...

...

10. The Partnership is therefore unable to pay its debts.

11. In the circumstances, it is just and equitable that the Partnership be wound up.

Your Petitioner therefore humbly pray as follows:

(a) that the Partnership be wound up by the court under the provisions of section 314 and section 315 of the Companies Act 1965;

- A (b) that [the 2nd defendant] be appointed as the Liquidator of the Partnership;
- (c) that the costs of and incidental to this Petition be paid out of the assets of the Partnership.
- B (emphasis added)
- C [46] The interplay between the winding up provisions in the Partnership Act 1961 and ss. 314 and 315 of the Companies Act 1965 has been conclusively answered by the Federal Court in the previous appeal brought by the same parties herein. We have at the outset of this judgment reproduced *in extenso* the relevant paragraphs from the said Federal Court written judgment (paras [36] - [38] in *Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal* [2012] 1 CLJ 49; [2012] 2 MLJ 299).
- D [47] In short, the Federal Court held that ‘a creditor such as the (first defendant) cannot make an application under s. 37 (of the Partnership Act) to dissolve a partnership’, that ‘under the Partnership Act 1961 only the partners can make application to court to dissolve and wind up a partnership’; that ‘a creditor cannot make application under the Partnership Act 1961 to wind up a partnership’; that ‘s. 314 of the (Companies Act) is applicable in a situation where a creditor seeks a remedy against an insolvent partnership which has more than five members’; that ‘s. 314 and s. 315 of the (Companies Act) can co-exist with s. 40 and s. 41 of the Partnership Act 1961’; that ‘the Partnership Act 1961 deals only with the voluntary winding-up of a partnership by the partners themselves and no other (while) s. 315 expressly states that s. 314 does not apply in the event a partnership is wound up voluntarily’.
- E [48] Most importantly, for the purpose of this appeal, the Federal Court has determined that:
- F [42] It is to be noted that s 314 and s 315 of the Act are under division 5 of Part X of the Act which deals with the winding up of unregistered companies. It is therefore our unanimous view that **the requirement of having more than five members must be complied with at the time of the presentation of the winding up petition.**
- G (emphasis added)
- H [49] As stated earlier, it is only in respect of whether the first ARCI Enterprise had more than five members at the time of the presentation of the winding-up petition that the case was remitted for trial in the High Court.
- I [50] In their submissions before us, learned counsel for the defendants did not deny that only five partners were named in the first defendant’s winding-up petition. However, learned counsel contended that despite the bankruptcies of Yee Chang Man and Syed Kharul Azhar prior to the first defendant filing of the winding up petition, by virtue of the fact that the first defendant has obtained a sanction dated 18 May 2007 from the official assignee to maintain the rights and interests of the assignor Syed Kharul

Azhar, the assignor though a bankrupt, would be considered a member of the partnership within the meaning of s. 314(1) of the Companies Act 1965. Secondly, learned counsel for the defendants argued that the issue of estoppel does not arise and this court is not prevented from relying on the business registration of the first ARCI Enterprise which shows the actual number of partners as consisting seven partners.

[51] We find no merits in both contentions. Section 398(c) and s. 399 of the English Companies Act of 1948 are equipollent of our corresponding ss. 314 and 315 of the Companies Act 1965, except that there the minimum members required are eight whereas in our case are five. In *Halsbury's Laws of England* 3rd edn, vol. 6 the learned author explains that:

1613. Number of members required. A company which consists of less than eight members is not an unregistered company for the purpose of winding up. **It is insufficient if there have been, although there are not at the date of the presentation of the winding up petition, at least eight members** [*Re Bolton Benefit Loan Society, Coop v. Booth* (1879), 12 Ch. D. 679]. It is sufficient if eight persons admit that they are members and that the association is insolvent [*Re South of France Pottery Works Syndicate* (1877), 36 L.T. 651]. *The word "members", as used above, means existing members; and does not include the representatives of deceased members or the trustees of bankrupt members as such, or past members* (*Re Bolton Benefit Loan Society, Coop v Booth* (1879), 12 Ch. D. 679; *Re Bowling and Welby's Contract*, [1895] 1 Ch. 663, C.A.) (emphasis added)

[52] From the excerpts, it is irrefutably clear that the requirement of having more than five members must be complied with at the time of the presentation of the winding up petition and not later. In this case, it is obvious that the alleged sanction from the official receiver was only obtained by the first defendant on 18 May 2007, which was after the presentation of the winding up petition by the first defendant on 16 April 2007. Although, as alternatively argued by the defendants here, the business registration record showed that the first ARCI Enterprise comprised seven partners, nevertheless on presentation of the winding up petition it is undeniable that only five partners remained solvent, consistent with the first defendant's own pleaded facts in the winding up petition.

[53] The authorities referred to in *Halsbury* have also established beyond doubt that by 'members' it does not include trustees of bankrupt members. In the instant case, upon being adjudicated a bankrupt, the official assignee took on the role as trustee in bankruptcy of Syed Kharul Azhar. Since the position is that even a trustee of a bankrupt member could not be considered as a 'member', in the instant case, regardless of whether the first defendant has obtained any sanction from the official assignee, by necessary implication, the first defendant (or for the matter the bankrupt partner himself), could not be regarded as a 'member' for the purpose of determining the number of members required under s. 314 of the Companies Act 1965.

A [54] Next, about the alleged ‘sanction’ dated 18 May 2007 obtained from the official assignee, having perused the document, we find that there was actually no sanction being granted by the official assignee. In fact, this is very clear from the letter which says:

B 2. Ketua Pengarah Insolvency bersetuju dengan permintaan tuan bahawa hak dan kepentingan sibankrap Syed Kharul Azhar bin Syed Talib dalam perkongsian ARCI Enterprise diserahkan kepada TRA Mining sepertimana perjanjian yang dimasuki oleh pihak berkenaan bertarikh 30.1.1997. Ini adalah kerana tarikh Penerimaan dan Perintah Penghukuman dibuat terhadap bankrap ialah pada 19.4.2005, hampir 8 tahun selepas perjanjian tersebut.

C 3. ... [pihak] Tuan telah diiktiraf (acknowledge) sebagai pemilik hak sibankrap dan terpulang kepada tuan untuk mengambil tindakan selanjutnya.

D [55] It is apparent that the letter issued by the Director General of Insolvency ‘acknowledged’ (to borrow the word used in the letter) the first defendant as the rightful owner of the bankrupt partner’s rights and interests in the first ARCI Enterprise pursuant to the deed of assignment entered into between the parties previously. But as we have shown earlier, being the rightful owner of a bankrupt partner’s rights and interests pursuant to an absolute assignment does not automatically turn an assignee into a partner. E (see paras. 38-43 of this judgment, *ante*).

Our Decision

F [56] Thus, for the reasons outlined above, we concurred with the learned JC’s finding that at the time of the presentation of the winding up petition at the Malacca High Court there were only five partners left and therefore by virtue of s. 314 of the Companies Act 1965, it was not a partnership that could be wound up under s. 315 of the said Act, being a partnership comprising of less than seven members. As correctly found by the learned JC, the order of winding up by the Malacca High Court was made without G jurisdiction and was therefore null and void.

[57] In the premises, we were unanimously of the view that the appeal should be dismissed with costs.

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