Yap Jeffery Henry and Another v Ho Mun-Tuke Don
[2006] SGHC 106

Case Number : OS 1723/2005

Decision Date : 15 June 2006

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Sankaran Karthikeyan and Ong Bock Kee (Toh Tan & Partners) for the plaintiffs; P Jeya Putra and Magdalene Chew (AsiaLegal LLC) for the defendant

Parties : Yap Jeffery Henry; Azlan Bin Abdul Rahim — Ho Mun-Tuke Don

Insolvency Law – Winding up – Liquidator – Plaintiff-creditors of company applying to court to have defendant removed as liquidator of company – Liquidator of company subsequently applying to court for permission to resign as liquidator of company – Whether liquidator having power to resign from office – Circumstances under which creditors may apply to court for removal of liquidator – Whether due cause for removal of defendant as liquidator of company existing – Section 302 Companies Act (Cap 50, 1994 Rev Ed)

15 June 2006 *Judgment reserved.*

Judith Prakash J:

Introduction

1 The plaintiffs in this originating summons, Jeffery Henry Yap ("Mr Yap") and Azlan Bin Abdul Rahim ("Mr Azlan"), are two of the creditors of a company in liquidation, Timothy Seow Group Architects Pte Ltd ("the company"). The defendant, Don Ho Mun-Tuke ("Mr Ho"), was appointed as liquidator of the company in April 1999.

2 This application was filed on 10 November 2005. The main orders that the plaintiffs sought were for:

(a) Mr Ho to be removed as liquidator of the company;

(b) Mr Chen Yeow Sin and Mr Arumugam Ravinthran to be appointed liquidators of the company; and

(c) Mr Ho to forthwith hand over to the new liquidators an itemised list of all books, documents and records of the company which were in his possession, custody or control as the liquidator.

3 The first hearing of the application on 22 November 2005 was adjourned so that Mr Ho could file an affidavit responding to the allegations made by the plaintiffs. That affidavit was filed in early December 2005. The plaintiffs' affidavit in reply having been filed on 16 December 2005, 20 January 2006 was assigned as the hearing date for the originating summons.

4 On 13 January 2006, Mr Ho took out his own application by way of Originating Summons No 77 of 2006 ("OS 77"). In OS 77, Mr Ho was named as the plaintiff and the company was named as the defendant. The main prayers in OS 77 were as follows:

(a) for an order that the specific requirements imposed by Rules 149 and 150 of the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed) be dispensed with;

(b) for an order that Mr Ho be permitted to forthwith resign from the office of liquidator of the company;

(c) that Mr Ho be released and that the company be dissolved; and

(d) that all fees, costs and expenses incurred by Mr Ho from the date of his appointment as liquidator on 13 April 1999 to the date of OS 77 be preserved as against the company and/or that the liquidator's lien on the documents of the company be preserved.

At the request of Mr Ho's solicitors, OS 77 was fixed for hearing on the same day as this originating summons.

5 When the two applications came on for hearing before me on 20 January 2006, counsel for the plaintiffs indicated that despite Mr Ho's application for leave to resign, the plaintiffs wanted to proceed with their application. Even if Mr Ho was allowed to resign, the plaintiffs should be given the costs of their application as it had been made at the request of Mr Ho himself and the application to resign had been made at the last minute after the plaintiffs' affidavit in reply had been filed and the plaintiffs had incurred substantial costs. Mr Ho was not willing to pay costs because he considered he had not done anything wrong.

6 I took the view that since the plaintiffs wanted Mr Ho to vacate the post of liquidator and to replace him with two other persons and since Mr Ho himself had now decided that he should leave, it would be best for me to allow him to do so immediately so that his responsibilities could be taken over quickly. I therefore proceeded to hear OS 77 first before dealing with this application. I then made the following orders in OS 77:

(a) that the specific requirements of rr 149 and 150 of the Companies (Winding Up) Rules be dispensed with;

(b) that Mr Ho be permitted to forthwith resign from the office of liquidator of the company known as Timothy Seow Group Architects Pte Ltd (in liquidation);

(c) that Mr Ho be forthwith released;

(d) that all reasonable fees, costs, and expenses incurred by the liquidator, Mr Ho, from the date of his appointment as liquidator, on 13 July 1999 [this date should actually have been 13 April 1999 but the order was made in terms of prayer 4 of OS 77 which contained the wrong date] to the date of this order be preserved as against the company, Timothy Seow Group Architects Pte Ltd (in liquidation) and that the plaintiff's lien on all documents of the company, Timothy Seow Group Architects Pte Ltd (in liquidation) be preserved; and

(e) costs of OS 77 be reserved and parties to see me after judgment had been delivered in Originating Summons No 1723 of 2005.

I did not, however, make any order for the dissolution of the company since the creditors wanted to appoint new liquidators to continue with the liquidation.

Background facts

7 Most of the facts leading to the application by the plaintiffs are not in dispute.

8 The company carried on the business of providing architectural services to the building industry. It was incorporated on 20 January 1996 with an authorised capital of $1m divided into one million ordinary shares of $1 each. Mr Yap was employed by the company but his services were not paid for. He sued the company for the amounts due and, on 25 February 1999, the company consented to judgment being entered against it for the sum of $600,321, interest thereon of $19,605 and costs. On 26 February 1999, the directors of the company resolved to put the company into voluntary liquidation and appointed a provisional liquidator. On 13 April 1999, the creditors of the company confirmed the winding up and appointed Mr Ho the liquidator of the company.

9 Mr Ho was asked by the creditors to carry out investigations into the affairs of the company. He did so. On 15 May 2000, he issued a report containing the findings he had made after an examination of the company's records. One of his findings was that the company had acquired the business and net assets of a partnership but that certain parts of that business had still continued under the name of the partnership (instead of under the name of the company) and the partnership had benefited from such business. Proceeds from projects acquired by the company had been deposited into the bank account of the partnership. He also stated that the company became insolvent sometime in 1997 but that the directors, although fully aware of the poor state of the company's finances, had continued to operate and caused the company's financial position to deteriorate even further. He made an observation that certain directors had repeatedly drawn money from the company as repayments to themselves. He expressed concern as to whether the directors had acted with due diligence in the discharge of their duties and also observed that the company might have a claim against the directors and shareholders for a sum of more than $1.3m. Mr Ho stated that in his view, based on the records of the company and the explanations given by the directors, it appeared that funds put into the partnership account had been utilised for the purposes of the company's project and expenses and therefore that the directors had properly accounted for a sum of $3.6m that had gone into the partnership account.

10 After the report was issued, Mr Ho informed the Committee of Inspection ("COI") of the company (of which Mr Yap was a member) that he had referred the matters set out in the report to his solicitors for an opinion on the company's rights against the directors. At the same time, he was also assisting the Commercial Affairs Department of the Singapore Police Force ("CAD") with investigations into this matter. In December 2001, Mr Ho told the COI that the CAD would not be taking any action and enquired whether the members of the COI wished to pursue a civil action for recovery. The plaintiffs then asked Mr Ho for the opinions of himself and his solicitors on the merits of such an action. Mr Ho responded that he was waiting for his solicitors' opinion. Mr Ho sent his solicitors numerous reminders but did not receive their opinion until May 2002. In the meantime, Mr Ho continued with his other work in relation to the liquidation of the company.

11 On 10 May 2002, Mr Ho convened the 6th meeting of the COI with a view to finalising the liquidation. Mr Yap was a member of the COI. He did not attend the meeting but was represented by his solicitor who had a proxy from him. Two of the former directors of the company who were also members of the COI were present at the meeting as well.

12 Mr Ho informed the meeting that on 9 May 2002, he had received his solicitors' opinion on the merits of an action against the directors of the company. He then stated that if he was to proceed with such an action, substantial costs would be involved. At that time, the assets of the company were insufficient to fund any recovery action. Accordingly, he could not proceed further unless the action was funded by the creditors. If no funds were forthcoming, then the liquidation would end and final meetings of the members/shareholders and creditors would be called to close the liquidation. He

stated that the creditors would need to decide whether they would consent to the finalisation of the liquidation. Alternatively, if they wished to continue with the liquidation, they could either finance the liquidation process or appoint a new liquidator to take Mr Ho's place. Mr Yap's counsel stated that he needed time to take instructions from his client and for him to decide whether to fund the recovery action. Mr Ho then suggested that notices for the convening of the final meeting be sent out so that it could be convened at least six weeks later thus giving counsel time to take his client's instructions.

13 The final meeting of the creditors was fixed on 2 July 2002. At that meeting, Mr Ho proposed that the company be dissolved and its books and records be destroyed within three months. A vote was taken and this proposal was approved despite the plaintiffs' objections. The plaintiffs objected to the proposal because it would result in evidence being destroyed. Mr Yap then took out an originating summons to prevent the implementation of the resolutions. By orders of court made on 2 October 2002 and 13 November 2002, the dissolution of the company was deferred and Mr Yap was allowed access to the company's books and records. Thereafter, the plaintiffs inspected the documents on at least ten occasions between November 2002 and January 2005.

14 In February 2004, the plaintiffs' solicitors wrote to Mr Ho to ascertain whether he was prepared to proceed against the directors under ss 340 and 341 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act") if the necessary funds were made available. Mr Ho's reply was that if the plaintiffs wanted the liquidator to proceed further with the investigations into the transactions of the company, he would require a formal indemnity indemnifying him against all claims arising in the course of the investigations and an undertaking that the liquidator's remuneration would be paid. Mr Ho also wanted confirmation that all the legal costs incurred in undertaking the investigations would be borne by the plaintiffs. Mr Ho then set out a schedule of fees and asked for an upfront deposit of $50,000 as payment to account. On 18 February 2004, the plaintiffs' solicitors informed Mr Ho that the plaintiffs were prepared to pay him $50,000 upon terms. The terms were that the sum would be deposited with the official receiver and upon Mr Ho's solicitors' undertaking to commence legal proceedings against directors of the company within one month (or such other reasonable period as the plaintiffs might agree to) from the date of payment of the sum of $50,000 to the Official Receiver. Mr Ho was not willing to accept these conditions. He replied to say that considering the ramifications and merits of the case, it would be better for the plaintiffs to institute proceedings as creditors against the parties concerned since they now had all the facts.

15 On 18 March 2004, Mr Yap commenced Suit No 217 of 2004 ("Suit 217") against the directors of the company. He asked Mr Ho to be a witness in the action so that Mr Ho's report could be adduced in evidence. A draft affidavit of evidence-in-chief was sent to Mr Ho. On 1 July 2005, Mr Ho stated that he would not affirm an affidavit. Thereafter, there was some correspondence between the parties on the fees to be paid to Mr Ho for his attendance in court but this issue was not resolved by the hearing date. Eventually, Mr Yap's solicitors compelled Mr Ho's attendance in court by issuing and serving him with a subpoena. On 11 October 2005, Mr Ho was called as a witness. On the stand, he objected to the use of his report in the action as he said it was a private and confidential document meant for the COI. The report, however, was received in evidence after a ruling on its admissibility was made by Choo Han Teck J, the presiding judge.

16 In the meantime, on 19 May 2004, Mr Ho had informed the plaintiffs' solicitors that he would be making an application to this court for leave to resign from his duties as liquidator. Nothing transpired thereafter, however. On 23 February 2005, the plaintiffs' solicitors informed Mr Ho that they agreed that he should resign and that Mr Yap would be making an application for another liquidator to be appointed in Mr Ho's place. Mr Ho responded that he was considering other issues relating to his resignation as liquidator and requested that Mr Yap stay his hand while Mr Ho took further legal advice on the matter. Some two weeks later on 4 March 2005, Mr Ho informed Mr Yap's

solicitors that he would agree to resign as liquidator "subject to an indemnity to be absolved from any costs, expenses, claims past, present and in the future". On 8 March 2005, Mr Ho's solicitors informed Mr Yap's solicitors that they had been instructed to accept service in respect of Mr Yap's application to court. Attached to this letter was a *pro forma* invoice for $170,557.50 being the "outstanding liquidator's remuneration" which, according to the letter remained unbilled as of that date. Mr Ho said that the bill was for Mr Yap's attention.

17 On 7 June 2005, three members of the COI requested Mr Ho to convene a meeting to consider his response to the COI's request that he resign. The meeting was held on 16 June 2005 and was attended by the three creditors who had called for it. The directors of the company who were also members of the COI did not attend. At the meeting, Mr Ho was informed that the other creditors wished to appoint another liquidator to proceed with actions against the directors. Mr Ho stated that he was willing to stand down as liquidator subject to his costs being taken care of. He said that he had not sent his bill for taxation because the company had no funds to pay the fees that would be incurred in this exercise. Mr Ho did not want to pay such fees out of his own pocket. He also said that the decision for him to step down should be made by all the creditors of the company.

18 The next development was that on 23 September 2005, three members of the COI requested Mr Ho to convene a creditors' meeting so that all the creditors could decide whether Mr Ho should stand down as liquidator. Mr Ho replied to state that he could not accede to the request as the matter to be decided at the meeting could only be effected by an application to the court. He said that under s 302 of the Act, a liquidator in a voluntary winding up could be removed by an application to court and as such a meeting of creditors to decide on removal was not appropriate. As a consequence of this letter, the present application was filed.

The law

19 Whilst the Act has a provision (to which I shall come shortly) providing for the removal of a liquidator who has been appointed to conduct a voluntary winding up, there is no provision that expressly deals with the right of such liquidator to resign from his position. However, s 275(a) of the Act provides that when the liquidator has resigned or has been removed from his office he may, apply to the court for, *inter alia*, an order that he be released. Section 275 applies to all liquidators including those appointed in a voluntary winding up and, therefore, it is clear to me that a liquidator like Mr Ho has the power to resign from his office even if there is no section stating so in unequivocal terms. What is not clear is whether such a liquidator requires the consent of creditors and contributories in order to do so. The situation under the Australian legislation is similar. Commenting on it, *McPherson, The Law of Company Liquidation* (LBC Information Services, 4th Ed, 1999), at p 308 states that if such consent is not obtained, the liquidator may be liable for breach of contract, and possibly for this reason, it is the practice to tender the resignation at meetings of creditors and contributories. It seems to me therefore that Mr Ho could have resigned and could then have asked the court for a confirmation that his resignation was in order. Alternatively, he could have called a meeting as suggested by some of the members of the COI and tendered his resignation to them and only if they did not accept it, would he then have needed to obtain court approval for it.

20 Assuming that the liquidator does not resign, a creditor who wants him removed may have recourse to s 302 of the Act. This provision applies to liquidators appointed in voluntary liquidations and states that:

> The Court may, on cause shown, remove a liquidator and appoint another liquidator.

There are equivalent sections to this with practically identical wording in both the English and

Australian legislation and the meaning of "on cause shown" has been considered by local and foreign cases. These are summarised in Woon & Hicks *The Companies Act of Singapore – An Annotation,* (LexisNexis, Looseleaf Ed, 2004, Issue 2) at para 3105–3125 as follows:

> *Removal of liquidators for cause* See also s 268(1). A liquidator may be removed if there is some unfitness of the person by reason of his personal character, or from his connection with other parties or from the circumstances in which he is involved: *Sir John Moore Gold Mining Co* (1879) 12 Ch D 325, 331 per Jessel MR. Thus, for instance, if a liquidator refuses to take action against miscreant directors because he is one of them or because they are his friends, he may be removed by the court: *Chua Boon Chin v McCormack* [1979] 2 MLJ 156. If the liquidator is not independent or impartial because of his connection with persons against whom there might be pending claims, there would be cause to have him removed: *Re: Charterland Goldfields* (1909) 26 TLR 132. Similarly, if it appears that the liquidator is in a position where his duty and interest conflict: *Re International Properties Pty Ltd* (1977) 2 ACLR 488, 492.
>
> The court has power to remove a liquidator not only because of his personal unfitness, but also on the ground that it is in the interest of the liquidation that he should be replaced: *Chua Boon Chin v McCormack* [1979] 2 MLJ 156, 158; *Re Adam Eyton Ltd* (1887) 36 Ch D 299, 303–304. In *Procam (Pte) Ltd v Nangle* [1990] 3 MLJ 269 Thean J declined to order the removal of a liquidator on the ground that it was not in the interest of the liquidation to do so, given the advanced state of the liquidation. Moreover, the errors made by the liquidator were made in good faith and did not prejudice the liquidation.

21 In *Re Adam Eyton Ltd* which was cited in the above extract, Bowen LJ observed that when the court was considering whether it should remove the liquidator on the basis of due cause having been shown (the words in the then applicable section being "on due cause shewn"), the due cause had to be measured by reference to the "real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed. Of course, fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation". Also relevant is the observation of Millett J in *Re Keypak Homecare Ltd* [1987] BCLC 409 at 416 that:

> … the words of the statute are very wide and it would be dangerous and wrong for a court to seek to limit or define the kind of cause which is required. Circumstances vary widely, and it may be appropriate to remove a liquidator even though nothing can be said against him, either personally or in his conduct of the particular liquidation.

22 It is plain from the above that the "cause" for removing a liquidator from his position can be made out in varying circumstances and not simply because the liquidator has either acted wrongfully or acted ineptly (as was the case in *Re Keypak Homecare Ltd* itself). Removal of the liquidator therefore does not necessarily mean that fault of any sort has been found with the liquidator. It simply means that in the circumstances that have arisen in the case the court considers that there was cause to remove him.

The arguments and the court's decision

23 The plaintiffs' various arguments in support of the application dealt with the conduct of Mr Ho from the year 2000 onwards. When the arguments are analysed, however, it can be seen that these contentions actually relate to two separate periods and two different sets of grounds. The first period and first ground related mainly to Mr Ho's conduct prior to 2004 whilst the second related to his conduct thereafter.

24 In relation to the first period, the plaintiffs pointed out that Mr Ho had released the liquidator's report on 15 May 2000. Thereafter, despite having made findings of fraud and indicating that there was some potential to recover amounts due from the directors of the company, Mr Ho took no legal action on behalf of the company. Instead, he kept the creditors waiting for two years on the basis that he was waiting for a legal opinion on the merits of recovery. From December 2001 onwards, the creditors kept asking him for the details of this legal opinion. Those details were not forthcoming. Despite receiving the legal opinion in May 2002, at the COI meeting that month, Mr Ho discouraged further action by stating that substantial costs would be involved, that an action would require an indemnity and that the court would want an unlimited indemnity. He told the creditors that if they were keen to pursue the matter, they should do it themselves. At the meeting, some creditors had asked for a copy of the legal opinion but it was not disclosed. From 2001 to 2004 the creditors were made to wait for the legal opinion on the merits of discovery. Mr Yap commenced his action on 18 March 2004 without the benefit of that opinion which had been paid for from the company's assets. Mr Ho only released the opinion two months later.

25 The plaintiffs submitted that Mr Ho had done nothing to advance the liquidation process since 2000. The creditors could not expect that anything would ever be done and the plaintiffs had therefore put forward an alternative to move the liquidation forward. Moving it forward would be in the interests of the company and the creditors.

26 Counsel for Mr Ho contended that all the allegations made by the plaintiffs had been fully rebutted and/or explained and/or rendered moot. In respect of the allegation that Mr Ho had not done anything from the year 2000 to 2002, Mr Ho had explained that during this period, he had investigated the affairs of the company and had also realised its assets. In addition, he had assisted the CAD in their investigations into the company. These investigations ended in November 2001 when the CAD stated that there was insufficient evidence to show that an offence had been committed and therefore they would not be pursuing the matter. Mr Ho had given copies of his Liquidator's Report to all members of the COI on 21 June 2000. Thereafter, he had repeatedly asked his solicitors for their opinion on the merits of the recovery action.

27 There had been regular meetings of the COI called by Mr Ho. Prior to the sixth meeting of the COI held on 10 May 2002, Mr Ho had written to its members informing them of his intention to call for the final meeting of the creditors to finalise the liquidation. During this sixth meeting, he had also told members that he was not obliged to incur further costs in the liquidation as the company had no funds and there had been no funding by the creditors in the liquidation. The majority of the COI members then gave approval for him to call the final meeting. Although the solicitors acting for Mr Yap asked for time to take instructions on funding, no further news was received up to and including the date of the final meeting on 2 July 2002. It was not till some two years later, on 9 January 2004 to be precise, that the plaintiffs expressed a willingness to fund the litigation.

28 At the final meeting of the creditors held on 2 July 2002, Mr Ho proposed the motion for the destruction of the books and records of the company upon its dissolution. This resolution was passed by a majority of the creditors present (five approvals versus one objection and one abstention). Since the majority of the creditors had approved this action, it was correct for him to go ahead with it.

29 Mr Ho contended that he had done all that he could in relation to the conduct of the liquidation and that there was no obligation on him to do anything further in the absence of assets to support such action and in the further absence of any financial support coming from the creditors. When funding suggestions were made, they came with conditions which were unacceptable because the money would not have been easily available to him for the purposes of the court action. The creditors had only offered to place a sum of $50,000 with the official receiver and on terms. At that

time, there were fees due to him of $170,557.50. Without an indemnity and/or adequate funds, Mr Ho as the liquidator was not obliged to incur any expense.

30 I am satisfied that in respect of the period prior to May 2004 the liquidator's actions did not provide cause for his removal. He conducted the liquidation in the normal way and carried out all necessary investigations. Whilst his investigations did reveal certain irregularities in the way that the company had been managed by the previous directors, he did not have any obligation to commence action against the previous directors unless all costs that would be incurred in such litigation would be provided for. Up to May 2004, nothing had been done to provide for the costs of any legal action. Even in early 2004 when some financing for the action was offered, this offer was inadequate. Mr Ho had asked for a deposit of $50,000 and an indemnity against all further costs. What he was offered was $50,000 to be placed with the official receiver and therefore not immediately available for his use. There were also other conditions and there was no undertaking or agreement that he would be indemnified if the costs of the litigation exceeded that sum. In view of the likelihood that the company's action against the former directors would be hotly contested and therefore an expensive one, the offer made was impracticable and unacceptable. Mr Ho was entitled to reject it.

31 As far as the action taken to dissolve the company and destroy its books was concerned, this was approved by the majority of creditors who had been given sufficient notice of Mr Ho's intentions. In any case, I think it is far too late to complain about it three years after the event and after the plaintiffs themselves had been able to preserve the books and prevent the dissolution. Additionally, at that time, since there was no money in the company, there really was nothing that could be done to move the liquidation forward.

32 In the plaintiffs' affidavits, much time was spent on the plaintiffs' complaints about the liquidator's perceived inaction in relation to the directors' misfeasance. In their submissions, however, the plaintiffs spent more time establishing cause in relation to events that had occurred in and after May 2004. Counsel noted that although Mr Ho had stated in May 2004 that he would be applying shortly to the High Court in order to resign from his duties as liquidator, he did nothing to effect such resignation between then and February 2005. On 23 February 2005, the plaintiffs' solicitors informed him that they were of the view that it would be best to let Mr Ho resign from his duties as requested. Mr Ho then apparently reneged on his prior position by saying that he had to take further legal advice on the matter of his resignation. Then, on 4 March 2005, Mr Ho stated that he would agree to resign as liquidator subject to being given an indemnity absolving him from all costs, claims and expenses.

33 On 7 June 2005, members of the COI asked for a meeting to consider Mr Ho's response to the creditors' request that he resign. The meeting of the COI was held on 16 June and there Mr Ho agreed to step aside subject to terms but stated that the decision should be made at a meeting of all creditors. On 23 September 2005, the COI members asked Mr Ho to call a creditors' meeting to consider his removal as the liquidator and the appointment of another liquidator. Mr Ho did not do so. Instead, he informed the plaintiffs that they should take out an application to court under s 302 of the Act. The plaintiffs thus had no choice but to make the application. They submitted that Mr Ho ought to have known that such application would cost them money and they had only done it after exhausting all efforts to remove him without an application to court. It was Mr Ho's conduct and refusal to resign that made the application a necessity.

34 Counsel for Mr Ho responded that creditors could not remove the liquidator in a voluntary liquidation and that a court application had to be made. Parties were under a misapprehension as to the law and the liquidator could not resign either without court approval. Mr Ho had been willing to step down on terms (these were that he was indemnified against his costs and the costs to be incurred in taxing his bill). These terms were never met and the creditors had not offered a substitute

liquidator to take over the liquidation until 28 October 2005. Mr Ho had taken the view that he could not abandon the liquidation of the company and not fulfil his statutory duties.

35 I have considered the arguments and the circumstances carefully. It was clear by May 2004 that there was nothing more that Mr Ho could do as liquidator. Whilst the dissolution of the company had been prevented by the plaintiffs' actions, Mr Ho had taken the view since July 2002 that the company ought to be dissolved and nothing further could be done in view of the lack of finances. There was no change in the financial position up to January 2004. At that stage, the plaintiffs made an offer to finance the litigation but their offer was limited and Mr Ho cannot be criticised in any way for refusing to accept it. Accordingly, by May 2004, his inability to do anything further was reconfirmed. Further, the plaintiffs and Mr Ho were, to put it mildly, not on good terms. In these circumstances, Mr Ho stated that he was going to resign and again this was a perfectly rational decision since he could not see any further progress being made in the liquidation. Yet, Mr Ho did nothing to effect his resignation. He did not call a meeting of the creditors to offer it nor did he make a court application. The matter dragged on till February 2005, but when he was given an opportunity to say to the creditors "Go ahead, you make an application at your expense, and I will consent", Mr Ho appeared to have got cold feet and instead asked for time to get legal advice. Subsequently, he made it clear that he was not prepared to step down without an indemnity as to his costs. I see no justification for him putting forward such a condition. He was given an indemnity in respect of costs when he first started the liquidation and could not ask for any further indemnity as a basis for resigning. He also said that he wanted a decision to be made by the full body of creditors but refused to call such a meeting. If he had called the meeting and it had accepted his resignation, the application to court would have been rendered unnecessary.

36 I agree with the plaintiffs that it is the actions of Mr Ho since May 2004 in relation to the resignation of his office (rather than the manner in which he conducted the liquidation up to that date) that have established cause for his removal. He did not attempt to resign. He did not call a directors' meeting. He equivocated when it was clear that he had no further function to perform both in his own eyes and in the eyes of many of the creditors who were at odds with him. If another liquidator is appointed, since he does not have the unfortunate history that exists between Mr Ho and the plaintiffs, he may be able to come to terms with them in relation to the conduct of the litigation and the recovery of some money for the creditors of the company. It appears to me therefore that it would be in the interest of the company and the liquidation if Mr Ho was removed and the way made clear for a new appointment. Of course, since I have allowed Mr Ho to resign, this point is now moot. However, I conclude, therefore, that if Mr Ho had continued to resist leaving his position and had not filed the application for leave to resign, I would have acceded to the plaintiffs' application and removed him.

37 Since the plaintiffs would have succeeded on this application, they are entitled to their costs in respect of it. However, the plaintiffs did include many irrelevant matters in their affidavit and made allegations which I can see Mr Ho thought he had no choice but to respond to. If they had limited themselves to the matters that had occurred after May 2004, then the application might have been consented to by Mr Ho. In these circumstances, I do not think that the plaintiffs should be given their full costs. I will hear submissions on this point.