



**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)**

PETISYEN PENGGULUNGAN SYARIKAT

[NO: WA-28NCC-250-03/2018]

**Dalam Perkara Seksyen 464(1)(e),
466(1)(a) Akta Syarikat, 2016**

Dan

**Dalam Perkara Kaedah-Kaedah
(Penggulungan) Syarikat 1972**

Dan

**Dalam Perkara CY HITECH
DEVELOPMENT (M) SDN BHD
(No. Syarikat: 224191-M)**

ANTARA

1. **WONG CHIN KAU**
(No. K/P: 530225-06-5031)
2. **NGEOW YEE LEE**
(No. K/P: 580929-08-5562)
3. **WONG CHEE FAI**
(No. K/P: 800612-08-5101)

**...PEMPETISYEN-
PEMPETISYEN**

DAN

**C Y HITECH DEVELOPMENT (M) SDN BHD
(No. Syarikat: 224191-M)**

...RESPONDEN



FOUNDATIONS OF DECISION

Introduction

[1] There were 3 applications before the Court. The Petitioners vide encl.1 has sought, among others, to wind up the Respondent Company ('the Company'/'the Respondent' as the case may be) and that Dato' Heng Ji Keng (NRIC No: 471010-01-5435) [Approval No: 578/05/18 (J/PH)] and Andrew Heng (NRIC No: 750225-71-5051) [Approval No: 02935/08/2018P] of Ferrier Hodgson MH Sdn Bhd be appointed as joint and several liquidators of the Company upon a winding-up Order being granted against the Company pursuant to ss.465(1)(e) and 466(1)(a) of the **Companies Act 2016 ('CA 2016')**.

[2] The Company had applied vide **encl.13** to strike out the Petition under O.18 r.19(1)(b) or (c) or(d) or the inherent jurisdiction of the Court. Encl.34 is, among others, an intervention application by a Supporting Creditor, SAP Holdings Berhad (In Liquidation) (**encl.34**).

[3] Encls.1, 13 and 34 were heard together. Having heard the parties and having considered the submissions of the parties, I had allowed the Petition with costs of RM5,000.00, dismissed the striking out with costs of RM3,000.00 and dismissed encl.34. The Company has appealed against the decision in encl.1.

Brief Facts

[4] The factual matrix of the case relevant to the appeal is as follows. The Petitioners have entered into a Sale and Purchase Agreement (**'the said SPA'**) with the Company on 25/1/2006 to purchase one unit of semi-detached bungalow, Unit No.13, Lot No. 67461, PT No. 2166 held under Master Title No.PN 11842, Lot 61198, Bandar Selayang, Mukim Batu, Daerah Gombak, Negeri Selangor (**'the said Property'**) for the sum of RM747,744.00.



[5] The Company was on 2/9/1991 incorporated under the Companies Act, 1965 as a private company limited by shares.

[6] The Petitioners had effected payment towards the purchase of the said Property in accordance to Schedule 3 of the said SPA. The Petitioners had then claimed that the Company has failed to deliver vacant possession of the said Property to the Petitioners. Consequently, the Petitioners claimed that the Company is indebted to the Petitioners for the sum of RM746,157.53 and costs of RM23,075.00 by way of Judgment dated 10/4/2017 vide Shah Alam Sessions Court Suit No:B52NCVC-453-11/2015 (**‘the Judgment’**).

[7] Hence, Encl.1 was presented against the Respondent and was served on the Company at its registered address on 29/3/2018.

Respondents/Petitioners’ Submission

[8] The Petitioners submitted that the Company’s Statement of Affairs dated 10/8/2017 is not up to date and in no way suggests that it is able to pay its debts due and owing at this stage.

[9] They argued that the Statement of Affairs does not give a true reflection of the Company’s current financial state and does not provide proof that the Company is solvent and able to satisfy its debts owing to the Petitioners.

[10] Further, no audited accounts, bank statements or any other supporting evidence showing the Company’s current financial state is presented before the Court. According to the Petitioners, even if the Company does have available assets, its inability to meet the current demand of the Petitioners by way of end.1 deems it to be commercially insolvent and therefore ought to be wound up.

[11] It was submitted that the Company offered to settle the debt owing to the Petitioners by way of two cheques; however the Petitioners



rejected the offer, for fear that such payment will be caught as undue preference under s.528 of the CA 2016.

[12] Furthermore, the Petitioners argued that the Company will not be able to show how payment to the Petitioners will benefit the other creditors and contributories to this winding-up. In fact, the reverse may occur in that the Petitioners would be in priority over other creditors if such validation was to be allowed by the Court.

[13] Hence, the Petitioner submitted that there would be no basis for such application for validation but it would merely be an attempt to avoid the certainty that the Company is now insolvent and ought to be wound up.

Appellant/Company's Submission

[14] At the outset I wish to state that learned Counsel for the Company did not file any Written Submission but submitted orally primarily on the following:

[14.1] The thrust of the Company's submission is that the "*Respondent has filed end. 13, amongst others, to strike out the Winding Up Petition for the reason that the Respondent Company is a solvent company and the Petition encl. 1 is oppressive in nature.*"

[14.2] The Petitioners knew that the Company has several assets wherein the Judgment which is disputed and upon which the Petition is based on can be settled. This is because the Company's Statement of Affairs as at 10/8/2017 (**'Statement of Affairs'**) (exh.L-1, Respondent's Affidavit in Support affirmed by Lin Lih Sen on 18 May 2018) (**'Respondent's Affidavit in Support'**) showed that the Company has the ability and assets to pay the Petitioners.

[14.3] The Company had on 17/5/2018 (not 18/5/2018 as averred and submitted by Counsel for the Company) on a without prejudice basis made an offer of RM769,232.53 which constituted the full sum owing to the Petitioners as a full and final settlement but the Petitioners refused to



accept the offer on the ground that the instruction is to proceed with the hearing of the Petition. The Company exhibited 2 cheques, CIMB cheques no.000142 dated 16/5/2018 and no.000143 dated 31/5/2018 (exh.LL-1, Respondent's Affidavit in Reply affirmed by Lin Lih Sen on 22/6/2018) (**'Respondent's Affidavit in Reply'**). On 8/6/2018, the Petitioners' Counsel informed the Court that with regard to the offer of settlement, nothing was forthcoming from the Company since 17/5/2018.

[15] Furthermore, the Company submitted that there is a dispute on the debt based on the Judgment as the Judgment was obtained by way of fraud. According to the Respondent, they will be filing the necessary cause/action to impeach the Judgement.

[16] The Company further argued they have lodged the necessary complaints with the MACC on the Judgment by way of a Letter from the Company to the MACC dated 21/3/2018.

Findings

- (i) **Whether the Company has available assets to pay its outstanding debts.**
- (ii) **Whether the Respondent was solvent and is able to pay its debts**

[17] Under these heads of argument, in my judgment, contrary to the Company's contentions, I find the Company's Statement of Affairs is not up to date and neither does it give a true reflection of the Company's financial status as there are no audited accounts, bank statements or any other supporting evidence to show the Company's current financial state and proof that the Company is solvent and able to satisfy its debts due and owing to the Petitioners.

[18] In any event even if the Company does have available assets (which so I have held there are none), I find the Company's inability to meet the current demand of the Petitioners deemed it to be commercially insolvent and therefore ought to be wound up. The following are my reasons:



[18.1] The Company failed to pay the Judgment sum claimed in the Statutory Notice pursuant to s.465 of the CA 2016 dated 19/12/2017 within 21 days from the service of the said Notice notwithstanding that the Company acknowledged receipt of the said Notice on 20/12/2017 (exh. Annexure C in the Petition). The 21 days have since lapsed.

[18.2] In this regard I relied on the Court of Appeal case of *Gulf Business Construction (M) Sdn Bhd v Israaq Holding Sdn Bhd* [2010] 5 IVILJ 34 at 40[7] where Abdul Malik Ishak JCA (as he then was) (delivering the judgment of the Court) stated -

“[7] The test to ascertain commercial insolvency is rather simple. It is this. That the company is unable to meet the current debts as they fall due. And such a company may still be categorized as ‘unable to pay its debts’ even though the company has substantial wealth which cannot be realized immediately and even though on liquidation the company will be able to meet all its liabilities...”.

(see also *Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd* [1990] 1 MJ 21 (HC) at p.22 A-C).

Whether the Petitioners were justified in rejecting the Company’s offer to settle for fear of undue preference

[19] S.528 of CA 2016 reads:

“528. Undue preference

(1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which is unable to pay its debts, as the debts become due, from its own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors in the event of the company being wound up on a winding up petition presented within six months from the date of making or doing the same and every such act shall



be deemed fraudulent and void.

(2) The date of presentation of the winding up petition shall be -

(a) in the case of winding up by Court -

(i) the date of the presentation of petition...”.

(Emphasis added)

[20] In *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 3 MLJ 309, the petitioner sought a winding up order as the respondent was unable to pay its debt. The respondent paid a certain sum to one supporting creditor in settlement of the debt and also transferred a piece of land to the said creditor. The petitioner contended that this was undue preference of one creditor over another after the petition had been presented and was contrary to s.223 CA 1965.

[20.1] In ordering that the money paid to the supporting creditor be returned to the respondent company. At 311 D-G, Zakaria Yatim J (as he then was) opined -

"From the authorities cited above (with the exception of *Re Miles* [1948] 1 Ch 188), it can be concluded that under s 223 of the Companies Act, the disposition of the property of the company after a winding-up petition has been presented is void unless the court makes a validating order. The purpose of the section is to protect the interests of creditors when a petition for winding up is presented. The court, however has the discretion whether or not to make a validating order. The court cannot exercise its discretion to make a validating order if the result of the order is to make one or more creditors being paid in full. In *Re Gray's Inn* [1980] 1 All ER 814, Buckley LJ in his judgment at p 718 said:

Since the policy of the law is to procure so far as practicable ratable payments of the unsecured creditors' claim, it is, in my opinion, clear that the court should not validate any transaction or series of



transactions which might result in one or more pre-liquidation creditors being paid in full at the expense of the other creditors ...”.

(Emphasis added)

[21] The foregoing principle was accepted and referred by the Court of Appeal in *Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation)* [2011] 4 MLJ 161 where, among others, the Court of Appeal at 171 [21] held:

“[21] On the facts of the present case, a validation order under s 223 was the only doable option. But there was no application from the appellant for such an order. Winding up had commenced against Inai on 29 June 2009, that is, at the time of the presentation of the petition of winding up (see s 219(2) of the Companies Act 1965). **Without an order of validation, that remittance of RM 1,400,000 to the appellant on 19 August 2009, which was clearly a disposition of the property of Inai after commencement of winding up, was void”.**

(Emphasis added)

[22] On the facts in the present case, the payment was offered on 17/5/2018 after the Petition was presented on 29/3/2018. Premised on the aforesaid principle of law in **Kimoyama** (supra) and **Zulpadli** (supra), in my judgment the Petitioners are obligated not to receive such payment from the Company as there is the problem of undue preference that it will be a priority of the Petitioners over the 7 other Supporting Creditors who were part of the winding up proceedings and such payment if accepted by the Petitioners may be clawed back by the appointed liquidator in the event the Company is wound up.

Conclusion

[23] For all the foregoing reasons, in respect of the Petition (encl.1), I granted O.I.T of prayer 16 as follows:



- “(a) That the Respondent, C Y HITECH DEVELOPMENT (M) SDN BHD (Company No.: 224191-M) be wound up by the Court under the provisions of the Companies Act 2016;
- (b) That Dato’ Heng Ji Keng (NRIC No.: 471010-01-5435) [Approval No.: 578/05/18(J/PH)] and Andrew Heng (NRIC No.: 750225-71-5051) [Approval No.: 02935/08/2018P] of Ferrier Hodgson MH Sdn Bhd be appointed as joint and several liquidators of the Respondent Company;
- (c) That the remuneration of Dato’ Heng Ji Keng and Andrew Heng as the Liquidators of the Respondent Company shall be on a time-cost basis or as provided under the Companies Act, 2016 and the Companies (Winding-Up) Rules, 1972 and be paid out of the assets of the Respondent Company;
- (d) That the costs of this Petition be paid out of the assets of the Respondent Company to Your Petitioners”.

Dated: 30 JANUARY 2019

(LAU BEE LAN)

JUDGE

HAKIM MAHKAMAH RAYUAN MALAYSIA

PUTRAJAYA

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