MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK

AT KOTA KINABALU

COMPANIES (WINDING UP) NO.: BKI-28NCC-29/6-2017

IN THE MATTER *of Section 465 of the Companies Act 2016*

AND

IN THE MATTER *of Companies (Winding-Up) Rule 1972*

BETWEEN

MOHAMED ALI BIN AB JABAR … 1ST PETITIONER
(Trading as Partner under the name and style of "PEMBORONG AM LAKA SHAP")

RARIAH BINTI JULAIN … 2ND PETITIONER
(NRIC NO. 700113-12-5668 / H0757844)
(Trading as Partner under the name and style of "PEMBORONG AM LAKA SHAP")

AND

SABAH FOREST INDUSTRIES SDN BHD … RESPONDENT
(COMPANY NO. 84330-K)

BEFORE THE HONOURABLE
YA TUAN LEONARD DAVID SHIM
JUDICIAL COMMISSIONER
HIGH COURT IN SABAH AND SARAWAK
AT KOTA KINABALU

GROUNDS OF DECISION

(Enclosure 1)

[1] This is a Companies Winding Up Petition (the WUP) to wind up the Respondent company under s. 465 of the Companies Act 2016.

Brief Factual Background

[2] The Respondent is a company incorporated on 30.04.1982 under the Companies Act 1965, whose registered address is No. 10, Jalan Jeti, Kompleks SFI in Sipitang, Sabah. Its authorised capital is RM2,200,000,000.00. And its nature of business is manufacturing paper and wood products – see Petitioners' Exhibit PALS-2, i.e. the Enhanced Company Intelligence.

[3] On 14.12.2016, the Petitioners obtained a judgment against the Respondent via High Court Suit No. BKI-22NCvC-119/11-2016 (HC1) for the payment of the following ("JID") –

i. The sum of RM3,946,923.70 as at 31.10.2016;

ii. Statutory interest at the rate of 5.00% per annum from 01.11.2016 until the date of full settlement; and

iii. Costs of RM40,742.00.

[4] The JID has neither been stayed nor set aside. Therefore it is final, conclusive and binding on the Respondent.

[5] Based on the JID, the Petitioners, through their solicitors, served on the Respondent a notice of demand dated 17.01.2017 ("the NOD") under Section 218(2)(a) of the Companies Act 1965 demanding

payment of the sum of RM3,989,006.20 as at 17.01.2017 with judgment interest of 5.00% per annum commencing from 18.01.2017 until date of full settlement and cost of RM40,742.00 within 21 days of receipt of the NOD – see Petitioners' Exhibit PALS-2.

[6] For ease of reference, the particulars of the demanded sum are produced as follows –

Date	**Particulars**	**Amount (RM)**	**Balance (RM)**
31.10.2016	Amount outstanding		3,946,923.70
31.12.2016	Add: Statutory interest of 5.00% p.a. on RM3,946,923.70 from 01.11.2016 to 31.12.2016 (61 days)	32,891.03	3,979,814.73
17.01.2017	Add: Statutory interest of 5.00% p.a. on RM3,946,923.70 from 01.01.2017 to 17.01.2017 (17 days)	9,191.47	3,989,006.20
	Add: Cost	40,742.00	4,029,748.20
Balance Outstanding as at 17.01.2017:			**4,029,748.20**

[7] The NOD was served on the Respondent's registered address on 23.01.2017 please see the AOS.

[8] After receiving the NOD, the Respondent made the following payments to the Petitioners – please see paragraph 7 of the WUP:

No.	**Date**	**Payment (RM)**
1.	24.01.2017	50,000.00
2.	03.04.2017	504,134.34
3.	26.04.2017	491,369.68
4.	19.05.2017	202,175.44
		1,247,679.46

[9] More than 21 days had elapsed since the last payment made. But no further payment was forthcoming and hence the WUP herein.

[10] As at the date of the WUP (i.e. 13.06.2017), the balance outstanding is computed as follows –

Date	**Particulars**	**Amount (RM)**	**Balance (RM)**
31.10.2016	Principal amount outstanding		3,946,923.70
31.12.2016	Add: Statutory interest of 5.00% p.a. on RM3,946,923.70 from 01.11.2016 to 31.12.2016 (61 days)	32,891.03	3,979,814.73
23.01.2017	Add: Statutory interest of 5.00% p.a. on RM3,946,923.70 from	12,435.51	3,992,250.24

	01.01.2017 to 23.01.2017 (23 days)		
24.01.2017	Less: Payment	(50,000.00)	3,942,250.24
02.04.2017	Add: Statutory interest of 5.00% p.a. on RM3,896,923.70 from 24.01.2017 to 02.04.2017 (69 days)	36,833.94	3,979,084.18
03.04.2017	Less: Payment	(504,134.34)	3,474,949.84
25.04.2017	Add: Statutory interest of 5.00% p.a. on RM3,392,789.36 from 03.04.2017 to 25.04.2017 (23 days)	10,689.61	3,485,639.45
26.04.2017	Less: Payment	(491,369.68)	2,994,269.77
18.05.2017	Add: Statutory interest of 5.00% p.a. on RM2,901,419.68 from 26.04.2017 to 18.05.2017 (23 days)	9,141.46	3,003,411.23
19.05.2017	Less: Payment	(202,175.44)	2,801,235.79
13.06.2017	Add: Statutory interest of 5.00% p.a. on RM2,699,244.24 from 19.05.2017 to 13.06.2017 (26 days)	9,613.75	2,810,849.54
	Add: Cost	40,742.00	2,851,591.54
Balance Outstanding as at 13.06.2017:			**2,851,591.54**

[11] The grounds upon which the WUP is presented are that –

i. The Respondent is unable to pay its debts – Section 465(1)(e) of the Companies Act 2016; and/or

ii. It is just and equitable that the Respondent be wound up – Section 465(1)(i) of the Companies Act 2016.

[12] The WUP was originally fixed for hearing on 14.07.2017. But could not be proceeded with due to a Restraining Order (the RO) obtained by the Receiver and Manager of the Respondent on 13.07.2017.

[13] The Restraining Order had recently expired on 14.07.2021 and hence the continuation of the proceedings herein.

Contention of the Parties

[14] The Respondent's contention based on the Affidavits and written submissions can be summarized as follows:

i. That the Petitioners' AIR is defective;

ii. That the WUP herein is defective;

iii. That it is not just and equitable to wind up the Respondent; and

iv. That the Petitioners failed to take into account the payments made by the Respondent after the statutory NOD is issued.

[15] The Petitioners contends that, the Respondent contended that the AIR is defective by reason of the fact that it was filed in breach of the 3-day period prescribed by Rule 30(2) of the Companies (Winding-Up) Rules 1972 ("Winding-Up Rules").

[16] At the outset, the Petitioners submit that submissions from the bar ought not be allowed. It will be noted that at present there are no materials before this Court to support the Respondent's contention in Paragraph 15. Be that as it may, the Petitioners submit that the Respondent is misconceived – please see:

a. Federal Court case of **Kilo Asset Sdn Bhd v Hew Tai Hong [2016] 1 MLJ 785;**

b. Rule 193 of the Winding-Up Rules at page 2 of the PSBOA;

c. Rule 194(1) of the Winding-Up Rules;

d. Section 469 (3)(b) of the Companies Act 2016; and

e. Section 582 of the Companies Act 2016.

[17] In particular, the Federal Court in Kilo Asset Sdn Bhd (Supra) held as follows –

> *"[37] In the circumstances, we agree with the finding of the Court of Appeal in the instant case in that the judicial commissioner was in error when he failed to direct his mind to the facts of this case where equitable considerations invariably would come into play and it was not advisable for*

the court to adopt such a rigid approach on non-compliance. On the facts, we are of the view that there were circumstances shown by the petitioner that it had plausible reason to file the petition. Under the circumstances, we find that it would not be right to adopt a purely mechanistic approach to this issue of time limits, and completely ignore the discretion of the court in extending the same under r 193 of the Winding-Up Rules.

[38] We are of the unanimous opinion that courts when exercising its powers under rr 193 and 194 of the Winding-Up Rules must be wary of all the surrounding circumstances of each case. In exercising such discretion, courts must weigh the interest of both parties in accordance with the facts and circumstances of each case. In the instant case, having considered the facts and circumstances, we find no injustice, let alone substantial injustice, had been caused by the defect or irregularity. Further, it had not been shown to us that the injustice, if any, cannot be remedied by an order of the court. That being the case, in our considered view the High Court erred as it ought to have exercised its powers under rr 193 and 194 of the Winding-Up Rules in favour of the petitioner and allowed the affidavits to be used in the hearing of the petition on merits. In this case, we find that the irregularity did not cause any injustice to the company, and the delay by the petitioner in filing the affidavits was inconsequential and could be safely condoned under rr 193 and 194 of the Winding-Up Rules and ss 221(2)(b) and 355 of the Companies Act 1965."

[18] Reverting to the present case, the Petitioners submit that the WUP herein is filed on the premise that the Respondent has failed to satisfy its judgment debt, which constitutes valid reason for the presentation of the winding up petition against the Respondent.

[19] In exercising the Court's discretion to extend the time for the Petitioners to file their AIR, the Petitioners humbly urge this Court to take into consideration the following factors –

a. The deponent 1st Petitioner's address is in Beaufort but he affirmed the AIR before a Commissioner for Oaths in Kota Kinabalu. So the 3 days' limit was pretty tight in the circumstances.

b. If it be true that the Respondent's Solicitor's served the Affidavit in Opposition (the AIO) [Encl. 5] on the Petitioners' previous solicitors (i.e. Messrs. RYCO Law Firm) on 05.07.2017, it is worth pointing out that 05.07.2017 was a Wednesday. Applying the words "exclusive of the day on which the event happens" in Section 54(1)(a) of the Interpretation Acts 1948 and 1967 ("Interpretation Acts") (see page 6 of the PSBOA) to Rule 30(2) of the Winding-Up Rules which requires "within 3 days of the date of service" would exclude the date of service of the AIO in the computation of the 3 days' limit. It follows that the due date for filing would be on 08.07.2017, which was a Saturday, i.e. a weekly holiday. In accordance with Section 54(1)(b) of the Interpretation Acts, the deadline for filing of the AIR would be the next following working day, i.e. Monday, 10.07.2017.

c. On the facts, the AIR was filed on 10.07.2017. And the Respondent admitted vide its Submission that it was served on the Respondent by facsimile on 11.07.2017 and subsequently by hand on 12.07.2017.

d. It is pertinent to note that unlike Rule 30(1) of the Winding-Up Rules (see page 1 of the PSBOA), which specifically requires the AIO to be "filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition", Rule 30(2) is worded differently –

> *"Any affidavit in reply to an affidavit filed in opposition to a petition (including a further affidavit in support of any of the facts alleged in the petition) shall be filed within three days of the date of service on the petitioner of the affidavit in opposition and a copy of the affidavit in reply shall be forthwith served on the opposing petitioner or his solicitor."*

It is submitted by the Petitioners that "forthwith" in Rule 30(2) of the Winding-Up Rules means immediately or without delay. If the legislation intended the AIR to be served on the same day of filing of the AIR, it would have been worded in the same manner as Rule 30(1) of the same rules.

e. Therefore, it is submitted by the Petitioners that there had not been undue delay in the filing and service of the AIR on the Respondent through its solicitors.

[20] In reliance of Kilo Asset Sdn Bhd (Supra) and noting that the Respondent in this case has not established any injustice caused to it by the alleged irregularity, the Petitioners submits that this is a proper case for the Court to exercise its discretion under Rules 193 and 194 of the Winding-Up Rules as well as Sections 469(3)(b) and 582 of the Companies Act 2016 to extend time for filing of the AIR and thereby cure the purported non-compliance.

[21] The Respondent contended that the WUP is defective and is incurable on the ground that it is issued under Section 465 of the Companies Act 2016 whilst the statutory NOD was issued under the Companies Act 1965.

[22] It is submitted by the Petitioners that the Respondent is again misconceived – see Section 619 of the Companies Act 2016.

[23] In **MTV Digital Sales Sdn Bhd v First Omni Sdn Bhd [2018] 1 LNS 1520**, on the respondent-company's contention that the petition that was premised on debts which were incurred before the coming into force of the Companies Act 2016 should have been commenced under the Companies Act 1965 instead, the High Court held as follows (see page 16-19 of the PSBOA) –

> *"[27] In order* ***for Section 619(4) of the CA 2016 to apply*** *so that the present proceedings are to be under CA 1965, the* ***proceedings must have been commenced before the commencement of the CA 2016.*** *Although the* ***CA 2016 was gazetted on 15.09.2016, it only came into force on 31.01.2017.***

[28] By virtue of Section 219(2) of the CA 1965, the winding up proceeding is deemed to have been commenced at the time of presentation of the Petition … However, in the present case, the ***Petition was presented on 23.01.2018, well after the commencement of the CA 2016.*** *Thus,* ***Section 619(4)*** *of the* ***CA 2016 does not apply to the Petition herein.***

…

[34] It is provided under Section 465 of the CA 2016 that the court may order the winding up if the company is unable to pay its debts. Section 466(1) of the CA 2016 in turn defines "inability to pay debts" as inter alia, where the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for 21 days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor. The same wordings are found in Section 218(1)(e) and (2) of the CA 1965.

[35] In the present case, although some of the debts were incurred before the coming into force of the CA 2016, until and unless the Petitioner caused the statutory demand to be issued, they were mere debts which yet to entitle the Petitioner a right (to present the Petition) under CA 2016 (or the CA 1965 for that matter). ***It was only when the Petitioner had issued that notice*** *and the* ***Respondent failed to pay,*** *that the* ***Petitioner's right to present the Petition accrued.*** *That was*

on 23.10.2017 i.e. after the lapse of the 21-day notice dated 02.10.2017. This was well after the coming into force of the CA 2016."

[24] Applying MTV Digital Sales (Supra) to the present case, the Petitioners submit that by reason of the following factors, Section 619(4) of the Companies Act 2016 does not apply to the WUP herein:-

a. Even though the statutory NOD dated 17.01.2017 was issued before the coming into force of the Companies Act 2016, the Petitioners' right to present the WUP herein only accrued after the lapse of the 21 days' notice therein, which was after the effective date of the Companies Act 2016; and

b. The WUP was issued on 13.06.2017, which is also after the coming into operation of the Companies Act 2016.

[25] Therefore, the Petitioners submitted that the proceedings herein is rightly issued under the Companies Act 2016.

[26] The Respondent contended that there is no basis to assert that they are unable to pay its debts because the Petitioners had continued to do business with the Respondent after the issuance of the statutory NOD.

[27] At Paragraphs 4(a) to (c) and (g) of the Further AIR, the Petitioners had explained that –

a. They were induced by the Respondent to keep supplying logs or risk not getting paid on the outstanding sums.

b. They only proceeded with the supply after the Respondent paid them RM554,134.34 –see the payments dated 24.01.2017 and 03.04.2017 at page 16 of the Respondent's Exhibit CTY-2 in the Further AIO.

c. They had continued to supply logs to the Respondent because they were informed that the Respondent required steady supply of raw materials in order to resume its production of pulp and paper, without which it would not be able to generate income to pay its debts.

[28] It will be seen at the Petitioners' Exhibit PALS-2 in the Petitioners' Affidavit Verifying Petition that the statutory NOD does not include the Invoices dated 03.05.2017, 05.05.2017, 05.05.2017, 17.05.2017, 20.06.2017 and 04.07.2017 shown in Respondent's Exhibit CTY-2 (i.e. pages 7 to 15 of the Further AIO) as the NOD is only for the judgment debt calculated up until 17.01.2017.

[29] It can also be seen at paragraph 4(d) and (e) read together with the Petitioners' Exhibits PALS-4(a) to (d) in the Further AIR that the payment of RM1,247,679.46 was made in relation to the invoices issued prior to the issuance of summons against the Respondent on which judgment was obtained against the Respondent.

[30] As regards the Respondent's contention that the WUP failed to take into account the said payment of RM1,247,679,46, the Petitioners submit that the Respondent is rather misconceived in that Paragraph 7 of the WUP expressly acknowledged the said payment.

[31] As submitted by the Petitioners, the Respondent had kept incurring new debts whilst the existing debt with the Petitioners remains due and outstanding. The Petitioners submitted that the Respondent's inability to pay its debts is thus evident from the materials laid before this Court.

[32] The Petitioners reiterate that the Respondent, having failed to settle its debts, is deemed insolvent and in such circumstances, it is just and equitable to wind it up.

Evaluation and Findings

[33] The Respondent contends that Affidavit in Reply (Encl. 7) was defective by reason of the fact that it was filed in breach of the 3 day period prescribed by Rule 30(2) of the Companies Winding-Up Rules. Having regard to the circumstances of this case where the 1st Petitioner's address is in Beaufort but he affirmed the Affidavit in Reply before a Commissioner For Oaths in Kota Kinabalu and the intervening weekend, the filing of the Affidavit in Reply is not inordinate. In addition to the AIO (Encl. 5), the Respondent affirmed a Further Affidavit in Opposition on 7.7.2017 (Encl.6) which have the effect of extending the time to file the Affidavit in Reply beyond 10.7.2017. The said delay did not cause any injustice to the Respondent. Even if Encl. 7 is filed and served out of time, this is a

proper case for the Court to exercise its discretion under Rules 193 and 194 of the Winding-Up Rules to extend the time for filing and service and cure the non-compliance. See Kilo Asset Sdn Bhd's case above.

[34] The Respondent further contends that the Companies Winding Up Petition is defective as it is issued under s.465 CA 2016 whilst the statutory notice of demand was issued under s.218 CA 1965. Even though the statutory notice of demand dated 17.1.2017 was issued before the coming the coming into force CA 2016, the Petitioners' right to present the Petition accrued after the lapse of the 21 days' notice which was after the effective date of the CA 2016. The Petition was filed on 13.6.2017. Applying the principles in MTV Digital Sales's case to the instant case, the Winding-Up Petition is valid and rightly issued under the CA 2016.

[35] The Respondent contends that they continued to do business with the Petitioners after the issuance of the statutory notice of demand and there is no basis to assert that they are unable to pay its debts.

[36] Section 466 of the Companies Act 2016 stipulates that–

> *"(1) A company shall be deemed to be unable to pay its debts if-*
>
> *(a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the*

company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

(b) …; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company."

[37] It is settled law that in a winding up petition, the burden is on the Respondent to establish by evidence that it is able to pay its debts see **Sri Hartamas DVPT. Sdn. Bhd. V MBF Finance Bhd [1992] 1 CLJ (Rep) 303.**

[38] A company is "unable to pay its debts" when it is "commercially insolvent". That means inability to meet current demands irrespective of whether the company possesses assets which, if realised, would enable it to discharge its liabilities in full. The test of the solvency of a company does not depend on the presence of its realisable assets – see **Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd [1989] 1 LNS 170** and **Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 8 CLJ 775.**

[39] In **Affin Bank Berhad v Abu Bakar Ismail [2020] 3 CLJ 739** at 753- 754 the Federal Court stated that:

> *"[39] In a corporate insolvency case of Lian Keow Sdn Bhd (in Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44; …, the Supreme Court held as follows:*
>
> > *In short, the question is not whether the debtor's assets exceed his liabilities as appeared in the books of the debtor, but whether there are moneys presently available to the debtor, or which he is able to realize in time, to meet the debts as they become due.* ***It is not sufficient that the assets might be realizable at some future date after the debts have become due and payable.***
>
> *[40] In Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637; …, the respondent obtained judgment against the appellant. A demand under s. 218(2)(a) of the Companies Act 1965 was then served on the appellant. As the appellant failed to pay the debt demanded, the respondent presented a winding-up petition against the appellant, on the ground that having failed to comply with the statutory demand, the appellant was presumed insolvent and unable to pay its debts. The High Court granted the winding-up order against the appellant. It was concluded that the appellant had not rebutted the statutory presumption.*

[41] The appellant appealed to the Supreme Court where it was contended that the learned judge below had applied the wrong legal test and that the correct test should be whether the appellant would be capable, if necessary, of paying all its debts by a realization of its assets, including any immovable property.

[42] The Supreme Court dismissed the appellant's appeal. Gunn Chit Tuan SCJ said:

> *In this case, the* ***presumption of insolvency arises when the requirements of s. 218(2)(a) of the Act, have been satisfied and it is for the company to prove that it Is able to pay its debts. In dealing with 'commercial insolvency',*** *that is, of* ***a company being unable to meet current demands upon it,*** *we should respectfully follow the Privy Council in the Malayan Plant Case and cite the following observations from Buckley on the Companies Act (13th Ed) at p. 460:*
>
> > *In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test.* ***A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.***

Applying the test in the above-quoted observations, we therefore held that the learned judge had exercised his discretion correctly in ordering the appellant to be wound up.

[43] Similar principles on the test of commercial insolvency were enunciated in the Court of Appeal decisions in Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd [2010] 8 CLJ 775; … and Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd [2011] 1 LNS 1763; ….”

[40] On the assertion that the Respondent will present a Scheme of Arrangement for the approval of its creditors, there is no such proposal put forth in the present proceedings as to how the Respondent is going to satisfy the judgment debt or how and when the Respondent proposes to extricate themselves from their financial difficulties.

[41] There is no evidence before this Court to establish that the Respondent has monies presently available or which it is able to realise in time, to meet the judgment debt presently due to the Petitioners herein.

[42] The Respondent further contends that they made partial payments to the Petitioner amounting to RM1, 247,679.46 from 24.1.2017 to 19.5.2017 and the Petitioner did not take into account these part payments when presenting this Petition for winding up. Thus, the

Respondent contends that it is not just and equitable for the Respondent to be would up.

[43] It is not disputed that the partial payments amounting to RM1,247,679.46 as at 7.6.2017 has been taken into account in paragraph 7 of the Petition (Encl. 1). No further payments were made by the Respondent after 19.5.2017 until todate. The balance outstanding as at 13.6.2017 is RM2,851,591.54.

[44] Further, the Respondent contends that it is a heavy asset-based company and together with its fixed assets, it had a market value of RM2.087 billion. The Respondent contends that the company have 1,200 employees who may lose their job and incomes if the Petition is granted. See Paragraph 3.1 and 3.1 of the Respondent's Submission (Encl. 72). The Respondent requested for another 9 months until end of July, 2022 to retender and/or to revive the company. However, the Respondent did not exhibit its latest audited financial statements to substantiate their contention that they have substantial assets with a market value of RM2.087 billion and have 1,200 employees and/or to show that they are not insolvent. It is also doubtful whether the salaries of the Respondent's employees have been paid due to the lack of contemporaneous supporting documents evidencing such payment.

[45] The Opposing Creditors contend that the total indebtedness of the Respondent to the Opposing Creditors as at 31.8.2021 stands at RM1.502 billion. See Page 3 of Opposing Creditor's Affidavit (Encl. 71). Further, the Opposing Creditors asserted that the market value of the Respondent's assets "as is" with Timber Licences is

RM2,087,000.00. See Paragraph 9(a) of Encl. 71. However, in paragraph 7 of the Supporting Creditors' Affidavit (Encl. 70), the Supporting Creditor (Sabah Development Bank Bhd) asserted that the total amount outstanding to the Supporting Creditor is RM2,846,738.38 as at 20.9.2021. The Respondent did not affirm an Affidavit to dispute the Supporting Creditor's assertion on the amount outstanding to Sabah Development Bank. It appears that the contingent or prospective liabilities would exceed the alleged market value of the Respondent's assets.

[46] In determining the issue of whether the Respondent is unable to pay its debts and should be wound up, the Court is entitled to take into account the contingent and prospective liabilities of the Respondent. In **Teck Yow Brothers Hand-Bag Trading Co v Maharani Supermarket Sdn Bhd [1989] 1 CLJ 258**, the High Court, per Abu Mansor J (as his Lordship then was) said as follows:

> *"After hearing arguments I came to the conclusion on the facts before me that the sole issue is whether Maharani is unable to pay its debt and therefore should be wound-up. On such examination of the facts the evidence is overwhelming that the respondent Maharani is unable to pay its debt. I find as a fact that the petitioner has proved to my satisfaction that Maharani was* ***unable to pay its debt and in so determining I am allowed to do so by taking into account the contingent and prospective liabilities of the company Maharani.*** *As has rightly been pointed to by the petitioner's Counsel as per encl. (63)* ***Maharani's debt according to the list of supporting creditors amount to RM100,000. To this must***

be added the amount he owed the opposing creditor his landlord to RM40,000. *The distress realised only RM61,000. Because of this amount it has never been really disputed by the opposing creditor that Maharani is insolvent but what the objection consists of is that there was sufficient to pay Ban Heng Hong and by that yardstick Maharani is able to pay its debt and we shut our eyes to the other creditors in the list. To take that view is in my view unreasonable and unjust.*

As for the contention that no proper notice under s. 218(2)(a) of the Act has been given I find in this case that the notice is in the circumstances unnecessary and I order that it be dispensed with as the petition is not wholly founded under s. 218(2)(a) of the Companies act. I am of the view that s. 218(2)(a)(b) and (c) are mutually exclusive and on the facts and in the exercise of its discretion a company can be wound up by the Court on any of the grounds (a), (b) or (c).”

[47] In **Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd [1990] 1 CLJ 292,** the Court held that:

“As has been established and well settled, the sole issue before the Court is whether the respondent is unable to pay its debt and therefore should be wound up. I am of the view on the facts before me, the evidence is overwhelming that the respondent is unable to pay its debts. In so determining, I am ***entitled to take into consideration contingent and prospective liabilities. The respondent has to pay RM 2.3 million consisting of supporting creditors.*** *The objection*

taken before me is not that the respondent has the capacity to pay its debts. They were on other issues not central to the issue before me."

[48] It is undisputed that the Respondent had been given ample time of over 4 years to revive or restructure the company under a scheme of arrangement as a going concern. At the date hereof, the scheme of arrangement was unsuccessful and the Respondent is still under receivership. It is not in dispute that the Respondent could not meet its debts when it fell due in 2017 after the expiry of the s.218 notice of demand and/or after the presentation of this Petition. Thus, the Respondent who could not meet the current demand of the Petitioners is insolvent – See Affin Bank Bhd and Lafarge Concrete (Malaysia) Sdn Bhd (above).

[49] The Petitioners are unsecured Judgment creditors who had waited for over 4 years to recover the outstanding Judgment debt due to the restraining order obtained by the Receiver and Manager of the Respondent on 13.7.2017 which recently expired on 14.7.2021 but to no avail. There is no evidence to show that further restructuring will yield a better outcome and bring about a revival of the Respondent's business operations and/or financial position by July, 2022. Therefore, it is unfair and unjust to make the Petitioners wait for another 9 months after the Respondent was given ample opportunity and a long period of over 4 years to restructure or revive the company and settle the outstanding debt. Delay defeats equity. Hence, this Court finds that it is just and equitable for the Respondent to be wound up.

[50] The Respondent raised the same grounds to oppose both WUP. Based on the aforesaid reasons and pursuant to s.469(1)(c) of the Companies Act 2016 and in the interest of justice, Encl. 1 is allowed with costs in the sum of RM5,000.00 to be paid out of the Respondent's assets.

[51] This WUP was heard together with WUP BKI-28NCC-31/6-2017 (HC1). The statutory letters of demand for both WUP are dated 17.1.2017. Both WUP are filed on the same date i.e. 13.6.2017 and the parties are represented by the same counsels. Under s.469(1)(c) Companies Act 2016, the Court is empowered on hearing the Petition for winding up to make any interim or any other order that the Court thinks fit. Hence, the order made herein is stayed until the winding up order made in WUP No. BKI-28NCC-31/6-2017 (HC1) is set aside or the amount outstanding thereunder have been duly settled.

Dated 15th November, 2021.

Signed
Leonard David Shim
Judicial Commissioner
High Court Kota Kinabalu

For the Petitioners: Cindy Han of Messrs K Ting & Co.

For the Respondent: Sukumaran Vanugopal of Messrs S. Vanugopal & Partners

For the Opposing Creditors: Sukumaran Vanugopal of Messrs S. Vanugopal & Partners

For the Supporting Creditor: Tengku Ahmad Fuad B.T.A Burhanuddin of Messrs F.T Ahmad & Co. [Sabah Development Bank]

For the Supporting Creditor: Chung Yaw Vui of Messrs Lim Chung & Zahbia

Watching brief Counsel: Chantelle Yee of Messrs Alex Pang & Co. [On behalf of Pelangi Prestasi Sdn Bhd]

[Notice: This Grounds of Decision is subject to official editorial revision]