

**DALAM MAHKAMAH TINGGI MALAYA DI PULAU PINANG**  
**PENGGULUNGAN SYARIKAT NO.: PA-28NCC-111-09/2018**

Dalam Perkara mengenai Seksyen  
465(1)(e) dan Seksyen 466(1)(a) Akta  
Syarikat 2016

Dan

Dalam Perkara mengenai Kaedah-kaedah  
(Penggulungan) Syarikat 1972

Dan

Dalam Perkara Jinko Solar Technology Sdn  
Bhd (No. Syarikat 1128218-T)

ANTARA

OCEANTRAX ENGINEERING SDN BHD  
(No. Syarikat: 541733-X)

... PEMPETISYEN

DAN

JINKO SOLAR TECHNOLOGY SDN BHD  
(No. Syarikat: 1128218-T)

... RESPONDEN

## GROUNDS

### **Introduction**

[1] The Notice of Motion (enclosure 8) heard and decided by this Court is filed by the Respondent utilising Orders 18 rule 19(1)(a) (b) (c) and (d) and Order 92 rule 4 of the Rules of Court 2012 together with Section 25 of the Court Judicature Act 1964 for these Orders:

- a) that the Winding-Up Petition dated 25.9.2018 (enclosure 1) and the proceedings therein be temporarily stayed pending the disposal of this application.
- b) the hearing date for the Winding-Up Petition (enclosure 1) fixed on 11.12.2018 be vacated and the Petitioner be stopped from taking any further action pending the final disposal of this application
- c) the Winding-Up Petition dated 25.9.2018 be struck out
- d) costs of this application be paid by the Petitioner
- e) any such and further relief that the Court finds just and equitable.

[2] The Notice of Motion was dismissed after written submissions were filed and oral clarifications made and the grounds for such a decision is hereby furnished.

### **Brief facts**

[3] The Petitioner is in the business of providing mechanical and electrical engineering services after being incorporated under the Companies Act 1965 and the Respondent is a private limited company dealing in the business of manufacturing, research and development and sale of solar energy cells and modules and related auxiliary products.

[4] The petitioner was appointed as the respondent's main M & E contractor to carry out works for their factory projects. Until April 2018 it is averred that there were outstanding invoices for services and works done for the Respondent to the sum of RM 11 million.

[5] Arising from this the first Statutory Notice pursuant to section 465(1)(e) and section 466 (1)(a) of the Companies Act dated 19.4.2018 was issued to the sum of RM 4,913,460.00 which resulted in some payments being made. As there were still outstanding sums owed further Notices dated 27.8.2018 and 30.8.2018 were issued to the sums of RM 5,600,926.55 and RM 688,845.96 adding up to the sum of RM 6,289,772.51.

[6] This Petition was filed on 25.9.2018 with the Respondent arguing that it had filed an Originating Summons No. PA-24NCC-30-09/2018 on 24.9.2018 seeking to injunct the presentation of this Winding-up Petition. An ex parte Injunction was granted on 28.9.2018 to stop the presentation of the Winding-up Petition and to stop the gazette and publication of the Petition but the pursuance of this Injunction by way of ex parte is a rather <sup>strange</sup> peculiar step to be undertaken as the Respondent already knew that the Petitioner have always been legally represented from the initial stage.

[7] It is the argument of the Petitioner that the obtainment of the ex parte order only after the presentation of the Winding-up Petition renders the Order as of no consequence. Any steps to challenge the Winding-up Petition should be presented before this same Winding-up Court rather than instituting an action before another court to curtail the pursuance of the Winding-up Petition. This brings the question of whether another

concurrent court of the same jurisdiction can bind this Court whereby this Winding-up Petition is being pursued.

[8] Following the 21 days statutory period that expired on 20.9.2018 the Petitioner avers that the Respondent was presumed to have been unable to pay its debt. On 25.9.2018 being 4 days after the expiry of the statutory 21 days period, the Petitioner filed the Winding-Up Petition.

### **Deliberations of the Court**

[9] The application using the provisions in the Rules of Court 2012 is ignoring of there being a specific legislation i.e the Companies Act 2016 and Companies (Winding-Up) Rules 1972 to operate to the exclusion of any provisions of the Rules of Court 2012 which is a general provision. In **Homewest Sdn Bhd v Vision Returns Sdn Bhd [2016] 5 CLJ 922** Wong Kian Kheong JC (as he then was) made these observations:

*"When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg, service, advertisement, compliance with r.32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing.*

*That is what the rule envisage. In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.*

[10] This court is in full agreement with the views expressed. As the Winding-up process has very specific rules and provisions, the observation of the rules and provisions should be adhered to without the need and necessity to bring the Rules of Court 2012 into play.

[11] Furthermore, as the Winding-up Petition has already been fixed for hearing with affidavits filed to contest the said Petition, the step in filing this application taken by the Respondent reeks of an attempt to delay the proceedings as the issues raised are very much issues that will be raised in contesting the Winding-up Petition. This court sees no necessity to pre-empt the arguments and for the court to consider the same arguments and issues twice.

[12] This court is of the considered view that the application under Order 18 rule 19 of the Rules of Court 2012 together with Order 92 rule 4 of the same is clearly misconceived.

[13] Pertaining to the prayer for a stay it must be observed that there is no such provision in a winding up petition for such a prayer. This court would like to reflect on section 222 of the Companies Act 1965 and section 470 Companies Act 2016 which is *pari materia* with the repealed section 222.

***s.222. Power to stay or restrain proceedings against company***

*At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the court to stay or*

*restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.*

***s. 470. Power to stay or restrain proceedings against company prior to the order of winding-up.***

*(1) At any time after the presentation of a winding-up petition and before a winding-up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court for an order to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the action or proceeding accordingly on such terms as it thinks fit.*

[14] From the 2 provisions it's clear that section 222 of the old act has morphed into section 470 of the Companies Act 2016 whilst retaining the essence of the 2 provisions. The reading is plain and clear that a stay mentioned therein is for a stay of all other actions or proceedings but certainly not the winding-up action itself.

[15] The Court of Appeal in **Sri Jeluda Sdn Bhd v Pentalink Sdn Bhd [2008] 3 MLJ 692** in deciding on section 222 of Companies Act 1965 has succinctly explained the rationale behind this provision and held:

*(2) What may be applied for and ordered under s.222 of the Act is a stay of further proceedings in the action or proceeding that is also pending, not further proceedings in the winding-up petition in question. The use of the words, 'where any action or proceeding against the company is pending', before the words 'apply to the*

*court' and the use of the words 'further proceedings in the action or proceeding' after the word 'restrain' in s.222 of the Act clearly evinced the intention of the Legislature to give the court power to stay further proceedings in the action or proceeding (other than) the hearing of the winding-up petition in question which was pending before the court (see paras 11 & 12); Shing Hup Hin Construction Sdn Bhd v General Soil Engineering Sdn Bhd [1999] 1 MLJ 167 followed.*

*(3) It was clear that the purpose of the power to stay under s.222 of the Act was to enable the court to ensure that no creditor should gain priority over others of his class. This approach, which was intended to prevent a scramble by the creditors while the court was considering whether to wind up the company or not, again supported the fact that s.222 of the Act only gave the court the power to stay further proceedings in the action or proceedings other than the hearing of the winding-up petition pending before the court (see para 14).*

*In this connection, the Court of Appeal referred to Palmer's Company Law (24<sup>th</sup> Ed) at p 1448, on stay proceeding that the object of the winding-up provisions of the Companies Act 1862, said Lindley LJ In Re Oak Pitts Colliery Co, 'is to put all unsecured creditors upon an equality and to pay them pari passu. To accomplish this it was indispensable that proceedings against the company by way of action, execution, distress or other process should be suspended, otherwise the winding-up would resolve itself into a scramble for the assets.*

[16] The authorities of **Yayasan Nelayan Pahang v Fong Chang Kok [2016] 1 LNS 655** and **Cheah Chin Kean v True Fitness World Sdn Bhd [2017] 1 LNS 2222** have followed the stare decisis of *Sri Jeluda*. Thus the prayer for a stay in enclosure 8 before this Court falls in limine.

[17] It is undisputed that there are multiple proceedings filed by the Respondent in different High Courts in Penang and such an act of having multiplicity of proceedings has been viewed negatively as decided in **Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248** wherein it was pronounced:

*As pointed out by my learned brother Gopal Sri Ram JCA, the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications. That would invariably stall the hearing of the petition proper.*

*If the application is dismissed, the respondent would appeal to the Court of Appeal or may even try to go further, further delaying the hearing of the petition. I have come across cases where even an order made by the senior assistant registrar under s.32 of the Companies (Winding-up) Rules 1972 was appealed against and when the appeal was dismissed, the respondent further appealed to the Supreme Court – see *Asia Commercial Finance (M) Berhad v Lum Choon Realty Sdn Bhd (Penang High Court Companies Winding-up No: 28-60-92)*. Of course, having filed the notice of appeal, the respondent then filed a notice of motion to stay all proceedings pending the disposal of the appeal by the then Supreme Court. When the notice of motion was dismissed, another appeal was filed.*

*The effect is that the hearing and disposal of the petition is delayed. One of the most abused procedures adopted in winding up proceedings is the application to strike out the petition under O.18 r. 19 of the RHC 1980 and/or inherent jurisdiction of the court.*

[18] It is apparent that this quoted precedent falls squarely within what is developing in this case with the respondent now appealing against the dismissal of enclosure 8 that has been decided by this Court.


### **Conclusion**

[19] It is settled law that a winding up petition should be disposed of expeditiously hence a stay or a striking out application would serve to defeat this settled principle. The law disapproves of an application such as enclosure 8 as the respondent should be canvassing their argument at the hearing of the winding up Petition itself.

[20] If the general principle for a striking out application is revisited then it is only allowed in plain and obvious cases or whereby the claim is not obviously sustainable and this Court is satisfied that this criteria is not fulfilled herein. From the affidavits there are certainly issues that require careful deliberations and this Court refrains itself from making findings at this striking out application stage as they shall form the same arguments for the contest against the winding up petition.

[21] Based on those deliberations this Court decides to dismiss enclosure 8.

Dated 16<sup>th</sup> December 2019.

  
AZMI BIN ABDULLAH  
High Court Judge  
High Court of Malaya, Penang

COUNSELS

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