IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
[COMPANIES (WINDING UP) NO: WA-28NCC-173-03/2016]

BETWEEN

TAN POH LEE
(NRIC No.: 641112-10-5780) ... PETITIONER

AND

1. TAN KIM CHOO HOLDINGS SDN BHD
(Company No.: 183398-H)

2. TAN BOON THIEN
(NRIC No.: 710417-10-5681) ... RESPONDENTS

Abstract: Winding-up petitions should be speedily disposed of. Keeping a winding-up petition in the court's docket will be antithetical to the very process of the expeditious disposal approach and render it illusory. Where a winding-up proceeding is being stayed for a very long period pending disposal of the parties' rights and determination of the petitioner's *locus standi* in a civil suit, then the logical course for the winding-up court to take would be to give leave to withdraw the winding-up petition and liberty to file afresh. Withdrawal with liberty to file afresh will still give effect to the original intention of the stay to sort out the *locus standi* in changed circumstances.

COMPANY LAW: *Winding-up - Petition - Withdrawal - Petitioner applied for withdrawal after 6 years during case management - Application for withdrawal resisted by respondent - Winding-up proceeding was stayed for 6 years pending disposal of civil suit between parties to determine locus standi of petitioner - Whether expeditious disposal approach required in winding-up proceedings - Whether petition was at an advance stage - Whether leave to withdraw should be given with liberty to file afresh - Whether substantial* *prejudice would be caused to respondent if withdrawal allowed - Whether withdrawal was made with ulterior motive to gain collateral advantage - Whether court has discretion to strike out petition with liberty to file afresh*

[**Petitioner's petition was struck out with liberty to file afresh and with no order as to costs.**]

Case(s) referred to:

*Ambank (M) Bhd v. Malaysian Coal & Minerals Corp Sdn Bhd [2016] 1 LNS 472 (**refd**)*

*Fox v. Star Newspaper Company [1898] 1 QB 636 (**refd**)*

*Hanhyo Sdn. Bhd. v. Marplan Sdn. Bhd & Ors [1991] 2 CLJ Rep 684 HC (**refd**)*

*Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd and other appeals [2001] 3 CLJ 248 CA (**refd**)*

*New Lake Development Sdn Bhd v. Zenith Delight Sdn Bhd & 10 Ors [2017] 1 LNS 527 CA (**refd**)*

*Overseas Union Finance Ltd v. Lim Joo Chong Chong [1971] 1 LNS 101 HC (**refd**)*

*Punj Lloyd Oil & Gas (M) Sdn Bhd v. Etiqa Insurance Bhd & Ors [2016] 5 CLJ 549 CA (**refd**)*

*See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA (**refd**)*

Legislation referred to:

Rules of Court 2012, O. 21 r. 3

Companies Act 2016, s. 469(3)(e)

Companies Act 1965, s. 221(2)(e)

GROUNDS OF JUDGMENT

Introduction

[1] This Winding-Up Petition was filed on 1.3.2016 by the Petitioner pursuant to Section 218 of the Companies Act 1965 premised *inter alia* on a failure of the substratum, deadlock in management and breakdown of mutual trust and confidence between the shareholders. The Petition against the 1st Respondent (interchangeably "the Company") seeks the following relief:

a. That the 1st Respondent to be wound up by Court pursuant to Section 218 of Companies Act, 1965;

b. That Ng Eng Kiat and Khoo Pek Ling be appointed as the Liquidators of the 1st Respondent.

[2] The Winding-Up Petition was amended by the Petitioner by order of the Court dated 23.3.2017 in Enclosure 121.

[3] On 2.9.22, the Petitioner sought to withdraw the Petition with liberty to file afresh and with no order as to costs. The other contributories (including the Administrator Pendente Lite of TKC's estate) except for the 2nd Respondent. After considering the written submissions of the Petitioner and 2nd Respondent and upon hearing learned counsel for the various parties, I had on 14.11.2022 struck out the Winding-Up Petition with liberty to file afresh and no order as to costs. This judgment contains the full reasons for my decision.

Background Facts

[4] The background facts are culled from the Petition, the affidavits and submissions of the parties.

[5] The 1st Respondent ("the Company") is a family company established by Tan Kim Choo @Tan Kim Choon("TKC") and the late Madam Chang Ying ('late Madam Chang') who are the parents of the

Petitioner. The shareholding of the Company is held by family members. The Company owns real estate and receives rental income from its rented assets.

[6] After the demise of Madam Chang Ying in 2006, the shareholding of the Company was held as follows:

Shareholding as of November 2015	
Tan Kim Choo (Contributory)	40%
Tan Boon Thien (2^{nd} Respondent)	15%
Tan Poh Lee (The Petitioner)	15%
Tan Poh Hui (Contributory)	15%
Tan Poh Yee (Contributory)	15%

[7] The Petitioner, 2^{nd} Respondent, Tan Poh Hui and Tan Poh Yee are siblings.

[8] Both the Petitioner and the 2^{nd} Respondent are directors of the 1^{st} Respondent. TKC was a director until his demise in August 2018. He was incapacitated due to a stroke on 3 August 2015 and was unable to perform his duties as a director.

[9] TPH and TPY as the Contributories of the 1^{st} Respondent are in support of the Winding-Up Petition. TKC objected to the Petition and on his application, the Winding-Up Petition was stayed by order of the Court since 28.11.2017 pending the disposal of Kuala Lumpur High Court Civil Suit No WA-22NCVC-58-01/2017 (“Suit 58”) on the basis that if Suit 58 is successful, it would mean that the Petitioner has no locus to present this Winding Up Petition as she is not a shareholder of the 1^{st} Respondent.

[10] Suit 58 in summary was filed by the late TKC against the Petitioner, the 2nd Respondent, TPH, TPY and 4 family companies including the 1st Respondent. TKC's cause of action in Suit 58 was based on the trust arrangements prior to and/or in 2004 that in consideration of certain Brickfields properties being transferred to his daughters (the Petitioner, TPH and TPY), his daughters were to transfer their shares in the 1st Respondent to him and his late wife. Despite the transfer of the Brickfield properties to the daughters, the shares in the 1st Respondent had remained in the daughters' names. TKC seeks an order that the shares held by the Petitioner, TPH and TPY in the 1st Respondent are held in trust by them and to be transferred to TKC as the principal beneficiary holding the ultimate beneficial interest to the shares under the trust arrangements.

[11] On 5.11.2018, the Petitioner filed an application to remove the Stay of Proceedings Order which was dismissed on 3.12.2018.

[12] Since the passing of the late TKC on 29.8.2018, the 1st Respondent was left with only 2 remaining directors who are the Petitioner and the 2nd Respondent. The acrimonious disputes between the Petitioner and the 2nd Respondent spawned other suits including them being entangled in a Probate dispute over the estate of the late TKC in Kuala Lumpur High Court Suit No. WA-22NCVC-703-10/2018("Probate Action"), Kuala Lumpur High Court Originating Summons No. WA-24NCVC-1650- 08/2018 ("OS 1650"), Kuala Lumpur High Court Originating Summons No. WA-32NCVC-1651-09/2018 ("OS 1651") which are being heard together with Suit 58.

[13] On 22.02.2017, this Court on the application of the 2nd Respondent in enc 83 had granted an Interim Preservation Order (Enclosure 116) on the following terms pursuant to the application filed by the 2nd Respondent: -

> "IT IS HEREBY ORDERED up to the next hearing date on 23.3.2017 that: -

(a) The composition of the Board of Directors of the Company comprising the Petitioner Tan Poh Lee, the 2nd Respondent Tan Boon Thien and Tan Kim Choo @ Tan Kim Choon as well as the position of Company Secretary, being one Mr Heng Chiang Pooh shall be maintained; and

(b) Any or all notices received from 3rd parties, addressed to the Company, either at the registered office or received by any Director should be circulated immediately to all other directors."

[14] On 28.11.2017 this Court on the application of TKC in enc 129 ordered a stay of the Winding- Up Petition on the following terms (enc. 178): -

"

(a) All proceedings in and/or pursuant to the Petition dated 1 March 2016 herein, including without l imitation the advertisement and/or gazetting of the Petition, be stayed pending disposal of the action vide Kuala Lumpur High Court Suit No. WA-22NCVC-58-01/2017 ("Suit 58"); and

(b) The Order herein be subject to the terms of the interim preservation Order dated 22 February 2017 (Enclosure 116); and

(c) Parties be at liberty to apply for validation orders."

[15] The 1st Respondent's Board comprising the Petitioner and 2nd Respondent has been tragically deadlocked which renders it impossible for the Company to take any steps to remedy and deal with the Company's affairs, its debts or negotiate with the Company's creditors.

[16] After numerous case management for parties to update the court on the progress and fate of suit 58, the Petitioner took the view that the Winding-Up Petition is no longer relevant given the change in circumstances since the passing of TKC and the default in the Company's loan facilities. For these reasons, the Petitioner moved the court for the withdrawal of the Winding-Up Petition with liberty to file afresh and no order as to costs.

Petitioner's Case for Withdrawal of the Winding-Up Petition

[17] The Petitioner argued that:

17.1 The Petitioner has carriage of the Winding-Up Petition and is entirely at liberty to withdraw it – *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299;

17.2 The Court's power to permit such a withdrawal is clearly codified in Section 221(2) of the Companies Act 1965 (CA 1965) which does not extend to imposing any other terms – *New Lake Development Sdn Bhd v. Zenith Delight Sdn Bhd & 10 Ors* [2017] 1 LNS 527.

17.3 The question of costs is very much at the Court's discretion. As there are no specific provisions in the Companies Act or in the Companies (Winding Up) Rules 1972, the Court ought to be guided by Order 59 of the Rules of Court 2012 and in that regard, the Court has a wide discretion as to costs.

17.4 The 2nd Respondent is blowing hot and cold; he had opposed the Winding-Up Petition but now resists the withdrawal of the Winding-Up Petition.

17.5 The Petitioner argued that the 2nd Respondent's only collateral purpose in seeking to make the withdrawal contingent upon the terms of the injunction that his seat on the Board is preserved, amounts to an abuse of the Court's process.

2nd Respondent's Objection against the Withdrawal of the Petition

[18] The 2nd Respondent contended that:

18.1 Although the Petitioner has originally filed the Winding-Up Petition, she is not *dominus litis* as both the Respondents and the Contributories have also filed and/or benefitted from various interlocutory applications; the Petitioner who has brought his adversary into Court, shall not be allowed to escape through the side door and avoid the contest, and it is for the Judge to say whether the action shall be discontinued or not and upon what terms. (See *Fox v. Star Newspaper Co* [1898] 1 QB 636 at 639, *CA (Eng), per Chitty LJ;* [1900] AC 19, *HL & Rohde & Liesenfeld PTE LTD v. Jorg Geselle & Ors* [1998] 3 SLR 772;

18.2 The numerous applications made by both the Respondents and Contributories led to various orders made during the conduct of the Petition including but not limited to the Interim Preservation Order (enc 116) and the Order to Stay the Petition pending disposal of Suit 58 (enc 178) (collectively, "the 2 orders").

18.3 The Petitioner had also filed an application in Enclosure 207 to remove the Stay of Proceedings Order dated 27.11.2017 but the application was dismissed vide Order dated 3.12.2018 in Enclosure 251; the stay order dated 27.11.2017 remains valid;

18.4 The proceedings have progressed to an advanced stage; the Court should be hesitant to grant leave to discontinue or withdraw the Petition;

18.5 The withdrawal of the Winding-up Petition is an attempt to defeat the 2 orders and a tactical manoeuvre to get rid of the 2^{nd} Respondent from the Board of the 1^{st} Respondent before the merits of Suit 58 is disposed of; this would cause a miscarriage of justice to the 2^{nd} Respondent.

The issue - Whether withdrawal of the Winding- Up Petition ought to be allowed?

[19] The nub of the dispute is whether the withdrawal of the Winding-Up Petition should be allowed at this stage.

Court's Findings

[20] At case management in July 2022, this matter having been adjourned several times since 2017 to await the fate of Suit 58, I had proposed that parties mull over a withdrawal of the Petition. At the next case management on 1.8.2022, the Petitioner applied to withdraw the Winding-Up Petition.

[21] As stated earlier, the other Contributories, namely the Administrator Pendente Lite representing the estate of Tan Kim Choo, TPH and TPY have no objection to the Petitioner withdrawing the Winding-Up Petition without costs and with liberty to file afresh. However, the 2^{nd} Respondent objected to the proposed withdrawal of the Winding- Up Petition.

[22] Section 469(3)(e) of the Companies Act 2016 ("CA 2016") (Section 221(2)(e) CA 1965) confers power on the court for withdrawal of a Winding-Up Petition. It reads:

"(3) <u>The Court may, at the hearing of the petition</u> **<u>or</u> at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition** –

(a) direct that any notice be given or any steps is taken before or after the hearing of the petition;

(b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the Court;

(c) direct that oral evidence be taken on the petition or any matter relating to the petition;

(d) direct a speedy hearing or trial of the petition or any issue or matter;

(e) **allow the petition to be amended or withdrawn**; and

(f) give such directions as to the proceedings as the Court thinks fit."

[23] O.21 r.3 Rules of Court 2012 ("ROC") also contains similar powers. It provides -

"**3 Discontinuance of action with leave** (O. 21 r. 3)

(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

(2) An application for leave under this rule shall be made by a notice of application".

[24] It is well established that the exercise of the Court's power to discontinue an action is an exercise of discretion as held by the Court of Appeal in *Punj Lloyd Oil & Gas (M) Sdn Bhd v. Etiqa Insurance Bhd & Ors.* [2016] 2 MLJ 676 at [14] and *New Lake Development Sdn Bhd v. Zenith Delight Sdn Bhd & Ors.* [2017] MLJU 671; [2017] 1 LNS 527 at [24] where it held:

> "In summary, **the discretion to allow the application to discontinue an action** and the discretion to impose the terms accompanying it, **depends very much on the facts and circumstances of each case**". (Emphasis added)

[25] Both cases of *Punj Lloyd* and *New Lake* cited with approval *Fox v. Star Newspaper Company* [1898] 1 QB 636, where Chitty LJ held at p.639:

> "The principle of the rule is plain. It is that after the proceedings have reached a certain stage the Plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms... The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter".

[26] The Court of Appeal further in *New Lake* held at para 23 that before granting the order for discontinuance of the action, the Court must be satisfied -

"i) if a defendant is *dominus litis*, the general rule is to refuse leave to discontinue (see *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124);

ii) the case is not at an advanced stage; if so, care must be taken not to permit discontinuance. What constitutes an advanced stage depends on the facts and circumstances of the case (see *Fox v. Star Newspaper Company* [1898] 1 QB 636;

iii) the plaintiff may have gained an *interim* interlocutory advantage between the date of issue of the writ and the point of time he seeks to discontinue (*O'Neal v. Mann* [2000] FCA 1680);

iv) there is no miscarriage of justice occasioned by its refusal to permit the discontinuance;

v) it will not prejudice the opponent to the application or take away from him any advantage to which he is fairly and reasonably entitled".

[27] Lim Beng Choon J explained the ambit of the injustice in *Hanhyo Sdn. Bhd. v. Marplan Sdn. Bhd & Ors.* [1992] 1 MLJ 51 at p 63,64; [1991] 2 CLJ (Rep) 684, as follows:

"The Court would not compel a plaintiff to continue his action against a defendant if he does not want to do so **provided no injustice is caused to the defendant**. Injustice would be caused to the defendant if:

(1) the discontinuance was made **with ulterior motive to obtain a collateral advantage** as in the case of *Castanho v. Brown & Root Ltd*;

(2) the discontinuance was not made *bona fide* by the plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be *dominis litis* as the

defendant has a perfectly good defence - see *Overseas Union Finance Ltd. v. Lim Joo Chong* case;

(3) by the discontinuance of the action the **defendant would be deprived of an advantage which he has already gained in the litigation** - see *Covell Matthews & Partners v. French Wools Ltd*. case". (Emphasis added)

[28] At the outset, I should mention that the Petitioner's argument that the principles applicable to the withdrawal of a Writ do not apply to s. 221(2) CA 1965 (Section 469(3)(e) CA 2016) is not unpersuasive as a Winding Up Petition is governed by the Companies (Winding Up) Rules 1972 which are designed for a speedy disposal of the Petition.

[29] However, in the exercise of discretion whether or not to allow a withdrawal of Winding Up Petition in this case, since the winding Up rules and the Companies Act itself are silent and do not provide in what circumstances withdrawal should be permitted, I do not see any reason not to seek guidance from cases decided pursuant to O.21 r.3 ROC.

[30] Applying the principles culled from the above cases, in my judgment in the exercise of the Court's discretion, the Petitioner ought to be granted liberty to file afresh based on the considerations that follow.

[31] Firstly, I am not satisfied that the 2nd Respondent is *dominus litis* or has "*by the proceedings obtained an advantage of which it does not seem just to deprive him*" based on the 2 orders - see *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124); [1971] 1 LNS 101:

31.1 Enc. 116, being the order dated 22.2.2017 which granted the 2nd Respondent an Interim Preservation is clearly stated to be "**up to the next hearing date on 23.3.2017"**; it was not an absolute or unqualified order; unless renewed, the order in enc. 116 would and in fact expired on 23.3.2017;

31.2 Added to that, in fact on 23.3.2017, the 2nd Respondent withdrew enc. 83 whereupon the court struck off enc 83 with no order as to costs as made evident by the court minutes of the same day; the said interim preservation order in enc. 116 collapsed and was rendered nugatory and being interim in nature, the question of whether it was rightly or wrongly granted in the 1st place became purely academic. There is thus no basis at all for the 2nd Respondent to cling onto the order and claim that the withdrawal of this proceeding shall prejudice his right;

31.3 As for the Order in enc. 178, the first part of the order is to stay proceedings pending the outcome of suit 58, it was granted in favour of TKC who had opposed the Petition strenuously but who now through the Administrator Pendente Lite representing the estate of TKC is supporting the withdrawal of the Petition due to change of circumstances enumerated by the Petitioner as follows:

31.3.1 The Winding-Up Petition was filed due to deadlock in the management;

31.3.2 At the time the Petition was filed and the Orders of 22.2.2017 and 28.11.2017 were made, there were 3 directors including TKC;

31.3.3 TKC was incapacitated as a result of a stroke, but the 2nd Respondent refused to attend Board meetings called by the Petitioner as a result of which the financial statements, directors' reports, annual accounts were not filed since 2015 till to date;

31.3.4 The Petitioner and the late TKC are guarantors of the loan facilities of RM10 million granted to the Company which is in default for a considerable period due to non-payment arising from dispute over rental with Cairnhill Hotel Sdn Bhd ("CHSB"), a company controlled by the 2nd Respondent and his family members; the rental being the Company's main source of revenue for servicing the loans to the Company. It also cannot be disputed that Kuala Lumpur Sessions Court Suit No. WA-B52NCvC-429-11/2021 was filed against CHSB after leave was granted to file a suit in the name of the Company for the outstanding arrears of rental. The Company's land is being foreclosed and the default make the Petitioner and the late TKC's estate contingently liable as guarantors.

[32] It is my respectful view that the non-preparation of financial statements, directors' reports, and non-filing or lodgment of these financial statements and financial reports annually has serious ramifications on the Company:

32.1 Section 248 CA 2016 makes it imperative for the Directors to prepare financial statements within 6 months of the financial year end and s. 248(3) stipulates every director who contravenes this section commits an offence and shall on conviction be liable to a fine not RM500K or imprisonment for a term not exceeding one year or both;

32.2 Financial statements shall be approved by the board – s. 251 CA 2016;

32.3 Directors are mandated to prepare for each financial year a report and such report to be attached to the financial statements – s. 252 (1) CA 2016 and these directors' report shall be (a) approved by the board; (b) signed on directors' behalf by at least 2 directors -s. 252 (2) CA 2016; any director who fails to secure compliance with s. 252(1) commits an offence and shall on conviction be liable to a fine not exceeding RM500,000.00 or imprisonment for a term not exceeding one year or both – s. 252 (4) CA 2016; the company and every officer who contravenes subsection (2) commit an offence and shall on conviction, be liable to a fine not exceeding RM 20,000.00 - s.252(5) CA 2016;

32.4 The company shall send a copy of the financial statements and reports for each financial year to every member of the company, every person entitled to receive notice of general meeting, every auditor of the company and every debenture holder of the company - s .257 (1) CA 2016; and the company and every officer who contravenes the section commit an offence and shall on conviction, be liable to a fine not exceeding RM 50,000.00 – s.257(4) CA 2016;

32.5 It cannot be disputed that non-filing or lodgment of financial statements and reports for each financial year with the Companies Commission will expose each officer of the company to an offence and liable on conviction to a fine not exceeding RM50,000.00 and in the case of continuing offences, **a further fine of RM1,000 for each day** the offence continues after conviction – s. 259 (3) CA 2016.

[33] I do not read the Order in enc. 178 as an order that precludes or prevent the making of an application for withdrawal of the Petition in the light of any changed circumstances.

[34] The fact that the Order in enc. 178 which reads *"The Order herein be subject to the terms of the interim preservation Order dated*

22 February 2017 (Enclosure 116)" does not in my view add to the 2nd Respondent's case as the interim preservation order dated 22 February 2017 (Enclosure 116) had as alluded earlier, expired.

[35] It must not be forgotten why the Winding-Up Petition was stayed pending the outcome of Suit 58 which will effectively decide an issue which is vital to this Winding-Up Petition on the legal capacity of the Petitioner to commence the same and the legal capacity of TPH and TPY to support this Winding Up Petition. In the event Suit 58 is decided in favour of the estate of TKC, the Petitioner, TPH and TPY will be required to transfer the shares they hold to TKC's estate and this will ultimately remove their *locus standi* as Contributory of the Company and accordingly the Petitioner's right to present this Winding Up Petition. In this instant case, I have taken not that:

35.1 The management of cases by the courts prior to the trial is intended to ensure 'just, expeditious and economical disposal' of an action (see – O. 34 r. 1(1) ROC and the Practice Direction No 2 of 2014 issued by the Chief Judge of High Court in Malaya). Timely disposal of cases and the limitation of cost are now the primary considerations under the present regime;

35.2 In the instant case, there had been 30 case management since November 2017 and there was no indication at all that the trial in suit 58 will be finishing in the near future; keeping the Winding - up Petition in the court's docket will not be in consonance with what was laid down in Abdul Hamid Mohamad JCA's judgment in the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd and other* appeals [2001] 4 MLJ 187; [2001] 3 CLJ 248, that winding up petitions should be speedily disposed of. Wong Kian Kheong JC (now JCA) term it the "expeditious disposal approach"

Ambank (M) Berhad v. Malaysian Coal & Minerals Corporation Sdn Bhd [2016] 11 MLJ 590; [2016] I LNS 472 where after a survey of the approach in various jurisdictions, His Lordship said:

"[30] The expeditious disposal approach is consistent with cases from the following jurisdictions:

(a) Singapore cases are highly persuasive as Singapore's Companies Act on winding up is *in pari materia* with our CA. The following decisions of the Singapore HC are pertinent:

(i) Sinnathuray J decided as follows in Re Pentasia (Pte) Ltd [1979] 2 MLJ 59*:*

A petition for the winding-up of a company is a grave matter for the Company and for those who have dealings with the Company. Section 219(2) of the Companies Act (of Singapore) provides that commencement of winding-up by the court 'shall be deemed to have commenced at the time of the presentation of the petition for the winding-up'. The sections that follow spell out important consequences that affect a variety of matters. Some of them are that creditors are deprived of their remedies against the company; all actions by and against the Company come to a standstill; and, any disposition of property including any transfer of shares or alterations of the status of members of the Company is terminated. The cumulative effect is that a company, upon a petition for winding-up presented against it, cannot carry on business as outsiders will be reluctant to have dealings with it. It is because of these effects that section 221(1) of the Companies Act and Rule 32(2) of the Rules provide that on the hearing of a winding-up petition the court may either dismiss it or adjourn it conditionally or unconditionally.

Now, as regards an adjournment it is at the discretion of the court. Having regard to the foregoing, I am of the view that except for a short adjournment to remedy technical matters relating to a petition, any other adjournment must be an exception rather than the rule as it will be prejudicial to the company (see: Re Chapel House Colliery Co (1883) 24 Ch D 259 per Cotton LJ at p 268). It is therefore imperative that the winding-up of a company which cannot pay its debts must be seriously weighed, and once proceedings are commenced they must be prosecuted expeditiously.

For the reasons I have given I refused the application for an adjournment of the petition….

(ii) in Re Pek Chuan Development Pte Ltd [1988] 3 MLJ 140 at p 143, Chan Sek Keong JC (as he then was) held as follows:

I agree with counsel for the company that, as a general rule, winding-up proceedings should be heard expeditiously even where, as here, a company is solvent on the business of company. In the case of a trading or manufacturing company, such proceedings may paralyse its business as suppliers and bankers may stop giving credit. Its whole existence is in doubt pending the disposal of the petition.

(b) English courts (in chronological order) have decided as follows:

(i) in Re Metropolitan Railway Warehousing Co Ltd (1867) 31 LJ Ch 827 at p 830, Cairns LJ (as he then was) held as follows:

I am averse to adjourning or suspending the petition, for this reason, that I think it is always a very inconvenient thing for a company to have a pending petition for a winding-up order hanging over their heads. I think the court should, as far as possible, either make an order upon the petition for the winding up of the company, if it is a fit case, or, if not, dismiss the petition. There are many cases in which it cannot be done; but where that can be done, I think that is the better course, and the more so, because it is well known, if the petition is adjourned, it is adjourned with this consequence imminent over the company, if the winding-up order is made, the winding up will date back to the presentation of the petition, and avoid, therefore, or imperil anything that has been done by the company in the meantime.

(ii) in Re Boston Timber Fabrications Ltd [1984] BCLC 328 at pp 332–333, Oliver LJ (as he then was) gave the following judgment in the English Court of Appeal:

> … Counsel for the appellant (Mr. Stubbs QC) has referred us to a Practice Direction which was issued in 1977 by Brightman J (as he then was), a statement which represented all the views of the Companies Court and which was made with the concurrence of the Vice-Chancellor, in which attention is drawn to the undesirability of lengthy adjournments of winding-up petitions.
>
> …
>
> It is quite easy to see why, in the case of a winding-up petition it is undesirable that there should be lengthy adjournments. If an order is made on a petition, it dates back to the date of the petition. The company in the meantime is put in the position of having to trade with a winding-up petition hanging over its head. Nobody knows where they stand; if there is, as there was here, an order made under s 227 in the interim, there may be all sorts of difficult questions about whether a particular disposition of the company's assets is, or is not a proper disposition. And a further matter of some considerable importance is this: If anyone else wishes to present a petition against

> the company, they find themselves, as a practical matter, blocked by a petition being already on the file, and that is of course particularly difficult where you have an adjournment of the sort which we have here, which is a general adjournment for an indefinite period, where the proposed petitioner cannot get the satisfaction of simply giving a notice that he intends to support the petition because he does not know when the petition is going to come on, if indeed at all. So, he is thereby kept effectively out of a remedy which the statute gives him as creditor, and that is a most undesirable situation. It is not, therefore, surprising to find that the courts have set themselves against adjournments in the case of winding-up petitions.

(iii) Robert Walker LJ (as he then was) decided in the English Court of Appeal case of Re a debtor (No 544/SD/98) [2000] 1 BCLC 103 at pp 116–117, as follows:

> … However, it is precisely because of the far-reaching effect of those sections (in the United Kingdom's Insolvency Act 1986) (and comparable sections in the winding-up legislation) that the bankruptcy court and the companies court have a strong and well-established policy of discouraging long or repeated adjournments of bankruptcy and winding

> up petitions. The judge was right to reject the suggestion that he should allow a petition to be presented and then go into suspended animation. "

[36] In my considered opinion, keeping this Petition in the court's docket will be antithetical to the very process of the "expeditious disposal approach" and render it illusory. In fact, the Court of Appeal in *Sibu Slipway Sdn Bhd v. Yii Chee Ming & Ors & Other Appeals* [2017] 1 MLJ 368 took the position that it is most prudent for claims in relation to dispute as to ownership of shares in a company be determined before the presentation of winding up petition of the company. In my considered view, the logical course for this court to take would be to give leave to withdraw and liberty to file afresh. Withdrawal with liberty to file afresh will still give effect to the original intention of the stay to sort out the *locus standi* in changed circumstances. Suit 58 has a determinative effect on the Petition. If suit 58 is decided in the Petitioner and the sisters' TPH and TPY favour – there should be nothing to stop the Petitioner from filing the Petition afresh again if warranted; but if found in suit 58 that the shares indeed belong to TKC's estate, it is the end of the matter. I further fail to see why the application for withdrawal ought not to be granted as it is not a case of the Petitioner not wanting to prosecute the Petition to a final hearing with due diligence save for the question of *locus standi* – which is fought out in suit 58.

[37] Even if I am wrong in my construction of the 2 orders, these orders cannot be taken advantage of by the 2nd Respondent to prejudice the interest of the Company and the other contributories. It remains curious to me that the 2nd Respondent chose not to support the withdrawal of the Petition which can only be for the benefit of the Company. In fact, the only inference that can be made from such unreasonable objection to withdraw the Petition is that of his self-vested agenda to remain on the Board. I am not persuaded that there is any material substance to the 2nd Respondent's fear of being removed as a director and that substantial prejudice would be caused to him.

[38] Removal of directors and change in company secretaries are matters that belong to the internal management or affairs of the company and the court would not interfere with the internal management of a company as stated in in *Burland v. Earle* [1902] AC 83 at p 93.

[39] In *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716, the Federal Court stated:

> "Traditionally, courts have been reluctant to interfere with matters relating to the internal management of incorporated companies. Through a series of decisions of the Court of Chancery in the mid-nineteenth century, they administered unto themselves a jurisdictional prohibition from entering upon domestic disputes between corporators. Two landmark decisions settled the law upon the subject for all time. The first of these was *Foss v. Harbottle* [1843] 67 ER 190 the second was Mozley *v.* Alston [1847] 41 ER 833."

[40] This principle in Owen Sim was echoed by the same court in the *Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Cororation (M) Bhd & Anor* [2010] 6 CLJ 721 case at para [23].

[41] It is the memorandum and articles of association ("M & A" now called the Constitution) that govern the affairs of the company, including the appointment and removal of directors. Besides the M&A, s. 206 CA 2016 allow shareholders to remove directors without assigning a reason. This is not the type of case where the 2nd Respondent has entered into association with the Petitioner or the other contributories upon the understanding that he participates in the management of the company in which event, equitable considerations can make it unfair for those conducting the affairs of a company to rely on their strict legal powers or rights under the articles of association. Neither is it the 2nd Respondent's complaint that he has a legitimate right to participate in the management of the Company based on an understanding as in cases such as *Tan Kian Hua v. Colour Image Scan Sdn Bhd & Others* [2004] MLJU 178; [2004] 6 CLJ 174; *Wong Kim Yoon v. Cheong Kim Hong & Ors* [2019] MLJU 1589 *and Tob Chee Hoong v. Tob Chee Choong & Ors* [2017] 1 LNS 1256; [2017] MLJU 1303.

[42] In *Re Kong Thai Sawmill (Miri) Sdn Bhd v. Ling Beng Sung* [1978] 2 MLJ 227, it was said by the Privy Council that 'Those who take interests in companies limited by shares have to accept majority rule'. The majority in any company is entitled to vote any director off the board.

[43] Besides, there is no permanent right to a directorship unless it is entrenched specifically in the M&A. An illustration of this is the case of *Re Chi Liung & Son Ltd; Tong Chong Fah v. Tong Lee Hwa & Ors* [1968] 1 MLJ 97 where the founding director Chi Liung's position was ensconced as a permanent director until she resigns the office or dies.

[44] Legitimacy to the 2nd Respondent's fear of being removed from the board ought to be viewed against the backdrop of a hopelessly deadlocked board, and whether the interests of the Company can be safeguarded if the composition of the Board were to be maintained as it is. As succinctly stated by Ms. Renu acting for the Administrator Pendente Lite, and I am inclined to agree with her, "**If the 2nd Respondent wants to be a director, he must do his duties as a director**."

[45] In any winding- up petition, the power of the court is simply to determine the broad question of whether or not it is just and equitable for the subject company to be wound up. Any interlocutory order made by the winding up court must have a linkage to the ultimate relief for winding-up.

[46] I agree with the Petitioner's submission that due to TKC's passing and the default in the loan, the change in circumstances make the Winding-Up Petition no longer relevant. And added to that, the statutory offences due to non-preparation of financial statements, directors' report and non-filing of financial statements, directors' report annually will have a deleterious effect on the Company and its officers. That the Company was solvent was maintained in 2017 by the late TKC in his affidavit affirmed in support of a stay of the Petition that led to the order in enc. 178. His Administrator Pendente Lite now supports a withdrawal as his estate together with the Petitioner stand to be liable as guarantors for the default in the Company's loan. No one can deny that the Company is now hemorrhaging. The change in circumstances must weigh heavily in the Court's consideration whether to allow a withdrawal of the Petition by the Petitioner.

[47] Finally, I do not find that the Petition is at an advanced state. What constitutes an advanced stage depends on the facts and circumstances of the case (see *Fox v. Star Newspaper Company* [1898] 1 QB 636). In this case, Chitty LJ stated as follows:

> "The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms. I think it would be a great error to construe the rule by reference to the old meaning of the term "discontinuance" or any mere technical sense of words. The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the

judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter."

[48] Significantly, even at this stage, which is more than 6 years after the filing of the Winding-Up Petition, it has not yet been advertised or gazetted to be ready for hearing due to the stay order in enc 178 - these are mandatory steps to be taken before the Petition can be fixed for hearing. With no hearing date fixed as there is no end of suit 58 in sight, there can be no miscarriage of justice occasioned by the Court in permitting the withdrawal of the Petition whilst the issue of *locus standi* to file the Petition and to support the Petition is being sorted out in another court. Clearly, it is rather pointless to allow the Petition to clog the Court's docket.

[49] Whilst I agree that justice of the case is of paramount consideration, in the circumstances of this case, justice should not only be for the 2nd Respondent but for other Contributories of the Company as well.

[50] Considering all the circumstances and submissions of learned counsel for the respective parties, in the upshot, I do not find that the Petitioner's withdrawal of the Petition was done with an ulterior motive to gain a collateral advantage. In my view it is clear that in the interests of the parties and of the justice system itself, it is time that this protracted litigation be terminated and no longer 'drag its weary length before the Court' - Charles Dicken's Bleakhouse.

[51] As such, I exercise my discretion to strike out the Winding-up Petition, with liberty to the Petitioner to file afresh and with no order as to costs.

Dated: 28 JANUARY 2023

(Liza Chan Sow Keng)
Judge, High Court of
Malaya at Kuala Lumpur

Counsel:

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For the 2nd respondent - Brian Ernest Cumming & Teo Qing Qing; M/s Gideon Tan Razali Zaini

For the contributory Tan - Renu Zechariah, Kim Choo (Administrator Pendente Lite)

For the Contributory Tan - Keith Kwan & Sarah Poh Yee Ariana

For the Contributory Tan - KY Lui, Poh Hui