IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: A-02-1231-05/2013

BETWEEN

HIEW TAI HONG	**...**	**APPELLANT**

AND

KILO ASSET SDN BHD **(No. Syarikat: 457390-P)**	**…**	**RESPONDENT**

(In the matter of Civil Suit No. 28-77-10/2012
In the High Court of Malaya at Ipoh)

Between

Hiew Tai Hong	é	Pempetisyen

And

Kilo Asset Sdn Bhd (No. Syarikat: 457390-P)	é	Responden

CORAM:

AZAHAR MOHAMED, JCA

MOHAMAD ARIFF MD YUSOF, JCA

HAMID SULTAN ABU BACKER, JCA

GROUNDS OF JUDGMENT

[1] This was an appeal against the decision of the High Court in Ipoh which dismissed the winding up petition in Enclosure 1 against the respondent (Kilo Asset Sdn Bhd) with costs and further, dismissed the Notice of Application of the petitioner (Hiew Tai Hong) for extension of time to file, serve and use the affidavits in reply to the affidavits to oppose the petition in Enclosure 17 with costs for the sum of RM70,000.00 payable by the petitioner, the appellant in this appeal, to the respondent.

[2] The dismissal of Enclosure 17 led the learned judicial commissioner to then state that the two affidavits to oppose the petition had not been challenged, and therefore there was a sufficient explanation given by the respondent to conclude the allegations in the petition had no merits. In a very short judgment, the learned judicial commissioner applied the settled general principle in *Ng Hee Thoong v Public Bank Berhad* [1995] 1 CLJ 609 that a failure to contradict a positive assertion in an affidavit is usually treated as an admission of it by the party who has failed to contradict it.

[3] To quote the learned judicial commissioner in this context:

> *"Oleh kerana affidavit-affidavit jawapan Pempetisyen terhadap Affidavit No. 1 dan No. 2 ini tidak diterima oleh Mahkamah (kerana difailkan di luar masa yang ditetapkan oleh statut (Kaedah 30(2) KKPS) melalui Permohonan Lampiran 17), pengataan atau dakwaan Pempetisyen tanggal sebagai dakwaan semata-mata tanpa disokong oleh bukti yang memuaskan. Dengan adanya penjelasan dari pihak Responden melalui Affidavit No. 1 dan No. 2 yang tidak disangkal oleh Affidavit Pempetisyen (kerana tidak diterima oleh Mahkamah kerana difailkan di luar masa yang dibenarkan)*

maka didapati pengataan-pengataan Pempetisyen tiada merit dan tidak berasas.

(Rujuk nas kes Ng Hee Thoong v Public Bank Berhad…dan kes Loh Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd & Ors…)

[4] In terms of sequence and the affidavits filed, the affidavit in support of the petition of the appellant/petitioner was filed on 24.10.2010. Two affidavits in opposition followed (affirmed by Goh Cheng Kee and Mohd Mokhtar bin Ismail respectively and noted in the judgment of the High Court as Affidavit No. 1 and Affidavit No. 2), both filed on 6.12.2012. The petitioner then filed a reply affidavit together with a second affidavit in reply on 7.1.2013. On 14.1.2013, there was another affidavit filed on behalf of the petitioner and this was filed on 14.1.2013 (affidavit affirmed by Soh Siew Yeng). There were five other affidavits in opposition filed for the respondent on 11.1.2013 and 16.1.2013. When the High Court dismissed Enclosure 17, the High Court merely decided on the basis of three affidavits. Seven other affidavits by the parties were ignored resulting from a non-compliance by the petitioner with procedure.

[5] The particular rule of procedure singled out by the High Court is Rule 30(2) of the Companies (Winding-Up) Rules, 1972:

> ñ(2) Any affidavit in reply to an affidavit 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.ò

[6] On the facts, it evident that the three affidavit in reply were not filed within three days of the service of the two affidavits in opposition.

[7] The Winding-Up Petition itself was filed under s. 218 (1)(f) and (i), namely on the grounds (a) the directors have acted in the affairs of the company in their own interests rather that in the interests of the company as a whole which appears to be unfair or unjust to other members (ñunfair conductò ground) and (b) it is just and equitable that the company be wound up (ñjust and equitableò ground). This was not an ordinary petition under s. 218 (1)(e), i.e. where ñthe company is unable to pay its debtsò

[8] On the record, this appeared to be a keenly contested petition between competing shareholders and directors, and had nothing to do with any non-payment of a debt due. The petition itself contain a detailed narration of the events leading to the dispute between the shareholders/directors.

[9] Perusing the petition, the appellant/ petitioner is a Director and one of the shareholders of the respondent. The petitioner holds 75,000 shares representing 30% of the share capital. Goh Cheng Kee, is the major shareholder holding 150,000 shares representing 60% of the share capital. The remaining 10% of the share capital, comprising of 25,000 shares, belongs to Mr. Mohd Mokhtar Ismail.

[10] The respondent is principally engaged in property development.

[11] The appellant, who claims to have 30 years of experience in the construction and development industry, was persuaded by Goh Cheng Kee to join the respondent to develop a project known as ñBaldwin Business Parkò with Intervax Corporation Sdn Bhd as the landowner and the respondent as the developer. A joint venture contract was entered into by the respondent and Intervax Corporation Sdn Bhd on 14.04.2008 to

develop the land in which the profit would be shared on a 77% and 23% basis respectively. It was agreed by the parties that the development would comprise of 2 phases in which Phase 1 comprises of 36 units and Phase 2 comprises of 42 units and a commercial complex with 1 ½ storey building thereon.

[12] Pursuant to the said joint venture, a supplemental agreement was entered on 12.07.2010 wherein a joint venture company was incorporated named Kilo Intervax Sdn Bhd. The shareholders of this company would be the respondent holding 77% of the paid up share capital and Intervax Corporation Sdn Bhd holding 23% of the paid up share capital. However, for the shareholders of the respondent, the profits would be distributed according to the shareholding of the shareholders in the respondent.

[13] The appellant claims that there was an agreement between him and Goh Cheng Kee whereby he will always be entitled to permanent representation on the Board of the respondent and all business decisions would be taken on equal basis between the two.

[14] The disputes between these two shareholders is said to have been sparked when Goh Cheng Kee intended to appoint an independent sales team for the project, a decision which was strongly opposed by the appellant. According to the appellantôs argument, besides incurring additional expenses to the respondent, the appointment of an independent sales team was not needed as the respondent already had its own sales team. Further, on 18.9.2012, a Circular Resolution was issued by Goh Cheng Kee which sought to change the respondentôs mandate to the Bank on signatories to cheques by naming himself as the sole signatory for the respondentôs account with Hong Leong Bank

Berhad. On top of that, the appellant also avers that business decisions of the respondent have been made by Goh Cheng Kee without even consulting him and thus worsened the relationship between them.

[15] Being aggrieved, the appellant wrote a letter, through his solicitors, to Goh Cheng Kee setting out his grievances with an offer for the sale of his shares to Goh Cheng Kee at the price of RM3,200,000.00, or for the purchase of the Goh Cheng Keeôs shares at RM6,400,000.00. Goh Cheng Kee negotiated to purchase the appellantôs shares at RM2,029,335.00 for Phase 2 and informed that Phase 1 would only be distributed after an audit was conducted on the profits of Phase 1. From Goh Cheng Keeôs conduct, the appellant alleges Goh Cheng Kee has refused to purchase his shares at the price offered or even sell his shares at the higher price as offered by the appellant, and thus the only recourse for him is to apply to have the respondent wound up.

[16] Relying on Section 218(1)(f) and/or Section 218(1)(i) of the Companies Act 1965, the appellant filed the petition to wind up the respondent on the grounds stated earlier.

[17] In his Affidavit to oppose the appellantôs Petition, Goh Cheng Kee denied all the appellantôs allegations against him. According to him, there was no reason for him to sabotage their own company and he had no problems working with the appellant. Goh Cheng Kee also denied having any agreement whatsoever with the appellant in giving him the permanent representation on the respondentôs Board. By filing this Petition, according to Goh Cheng Kee, the appellant was trying to force him to buy the appellantôs shares at the appellantôs price. Further, Goh Cheng Kee averred that the appellant has no grounds whatsoever to wind up the

respondent which is a healthy, profit-making company. Goh Cheng Keeôs averments in his affidavit is supported by the affidavit affirmed by Mohd Mokhtar Ismail.

[18] As earlier indicated, the appellant filed the affidavits in reply to these Affidavits respectively, but these were out of time. The appellant then filed a Notice of Application pursuant to r. 193 and r. 194 Companies (Winding-Up) Rules 1972 for an extension of time to file, serve and use his Affidavits and other Affidavits filed by him.

[19] As seen above, the learned judicial commissioner found that there was a non-compliance of r. 30(2), and dismissed the application for extension of time (Enclosure 17) and dismissed the petition consequently.

[20] It did not appear to us that the learned judicial commissioner even considered the effects of r. 193 and r. 194, although these were submitted before him as included in the written submission of counsel for the petitioner in the High Court. The Winding-Up Rules, in our opinion, have to be read harmoniously, and the rigours of r.30 must be tempered by r. 193 and r.194, and equally important, the High Court should have considered the current approach to non-compliance with rules of procedure, as reflected in Ord. 1A of the Rules of Court 2012 that a ñcourt or judge shall have regard to justice of the particular case and not only to the technical non-complianceò. Although ROC 2012 does not directly apply on the facts, this being a winding-up matter, the current jurisprudence on the effects of non-compliance should not be completely ignored.

[21] R.194 of the Winding-Up Rules is very clear on this: ñé no proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion substantial injustice has been causedé and that the injustice cannot be remedied by any order of courtò R.194 further provided the court can on application made extend time to do any act under these Winding-Up Rules.

[22] In the course of the submissions, counsel for the appellant indicated to us that the High Courtôs decision was influenced by the line of authorities as reflected by the decision of the Court of Appeal in *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank* [1997] 2 MLJ 756. To start with, this Court of Appeal decision concerns a non-payment of debt in a normal banking scenario. The winding-up is not based on minority oppression, prejudicial or unfair conduct or just and equitable winding-up. Secondly, and this has been highlighted in subsequent cases, r. 193 was not referred to by the Court of Appeal then.

[23] The High Court was, in our opinion, in error when the learned judicial commissioner failed to direct his mind to the fact that a s. 218(1) (f) and (i) stands on a very different footing from a s. 218(1) (e) petition, and that in an unfair or prejudicial conduct case where equitable considerations invariably would come into play, it will not be possible or advisable for the Court to adopt such a rigid approach on non-compliance. In such a case, it is not uncommon for the facts to be highly contested and cross-examination of deponents allowed. We did not believe any injustice would have been caused to the respondent had the High Court allowed the application for extension of time, so that there will be a proper consideration of all the evidence for justice to be done.

[24] Thus, we were of the unanimous opinion that in respect of Appeal No. A-02(IM)-1230-05/2013 (in respect of the dismissal of Enclosure 17), this appeal should be allowed as it was in the interest of justice to do so. The judgment of the High Court was set aside and orders in terms of prayers (a) and (b) only of Enclosure 17 were to be entered.

Consequently, in respect of Appeal No A-02(IM)-1231-05/2013 (dismissal of the petition), this appeal was also allowed with a further order that the Winding-Up Petition be remitted back to the High Court for a full hearing. The judgment of the High Court was set aside.

Costs was ordered to be costs in the cause, with the deposit refunded to the appellant.

Sgd.

(MOHAMAD ARIFF MD YUSOF)
Judge
Court of Appeal
Malaysia

Dated: 21th January 2015

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