IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

COMPANIES WINDING-UP NO: 28NCC-1115-12/2015

In the matter of Percetakan Warni Sdn. Bhd. (Company No. 144815-X)

And

In the matter of Section 218(1)(e) and (i) of the Companies Act, 1965

BETWEEN

GA-SENG PAPER MARKETING SDN BHD
(Company No.: 601604-M) **… PETITIONER**

AND

PERCETAKAN WARNI SDN BHD
(Company No.: 144815-X) **... RESPONDENT**

JUDGMENT

(Court Enclosure No. 15)

A. Introduction

1. This is an application by a shareholder of a wound up company to stay the court's winding up order under s 243(1) of the Companies Act 1965 (**CA**). The effect of a stay order in s 243(1) CA is far reaching. In **Vijayalakshmi**

Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830, at 833, NH Chan JCA in delivering the Court of Appeal's judgment, explained that the effect of a stay of a winding up order under s 243(1) CA is "*a total discontinuance or termination of the winding-up proceedings*".

2. This judgment will discuss what is required for a shareholder of a company [the CA employs the term "*contributory*" (as defined in s 4(1) CA)] to satisfy the winding up court to grant a "*permanent*" stay of the winding up order under s 243(1) CA and how the court should exercise its discretion in respect of such an application.

B. Background

3. On 19.12.2013, the petitioner company (**Petitioner**) filed a winding up petition in this court to wind up the respondent company (**Respondent**) on the ground that the Respondent owed a sum of RM85,111.01 as at 15.11.2013 by virtue of a monetary judgment obtained by the Petitioner against the Respondent in the Shah Alam Magistrate's Court on 10.9.2013 (**Petitioner's Judgment Sum**) and the Respondent had failed to pay the Petitioner's Judgment Sum.

4. On 19.2.2014, this court wound up the Respondent and appointed the Official Receiver (**OR**) as the liquidator of the Respondent (**Winding Up Order**).

C. <u>This application</u>

5. On 30.10.2014, Encik Nordin bin Ahmad (**Applicant**) filed a notice of motion (**Motion**) in court enclosure no. 15 (**This Application**) for the following order:

   (a) the Respondent be granted leave to stay the entire Winding Up Order under s 243(1) CA (**1st Prayer**);

   (b) as an alternative to 1st Prayer, the Respondent be granted leave to stay the entire Winding Up Order for a limited period of time as ordered by this court under s 243(1) CA (**2nd Prayer**);

   (c) the stay order be lodged with the Companies Commission of Malaysia (**SSM**) (**3rd Prayer**);

   (d) costs of This Application be borne by the Respondent; and

   (e) any other relief or order as this court deems just, fit and appropriate.

6. In support of This Application, the Applicant affirmed an affidavit (**Applicant's Affidavit**) which stated, among others, as follows:

(a) the Applicant is the majority shareholder of the Respondent. According to a copy of the search of SSM's record dated 8.10.2013 (**SSM Search Report**) -

(i) the Respondent has an issued share capital of 1 million shares with the nominal value of RM1 per share. Out of the 1 million shares in the Respondent, 310,000 shares had been paid up in cash while the balance of 690,000 shares had been issued as "*paid up otherwise than in cash*";

(ii) the Applicant holds 900,000 of the total issued shares of the Respondent;

(iii) the Applicant is a director of the Respondent;

(iv) the Applicant has "*unsatisfied*" charges by the following financial institutions –

(1) a charge registered on 14.9.2001 in favour of, at that time, Bumiputra Commerce Bank Bhd. for the amount of RM40,000;

(2) a charge registered on 8.12.2011 in favour of Public Islamic Bank Bhd. (**PIBB**) for the amount of RM2,118,780; and

(3) an "*open charge*" registered on 19.12.2011 in favour of PIBB; and

(v) the Respondent only filed its financial statements for the financial year ending 30.9.2010 (**Respondent's 2010 Financial Statements**);

(b) the Respondent did not receive any notice of the Petitioner's claim for the Petitioner's Judgment Sum until the Respondent had been informed by the Respondent's bank regarding the Winding Up Order. This was because all notices regarding the winding up proceedings in this case had been sent to the Respondent's company secretary who did not inform the Respondent; and

(c) the Winding Up Order should be stayed for the following reasons –

(i) all the Respondent's debts had been paid by payments made to the OR;

(ii) the Respondent had been incorporated on 14.9.1985 and had a good reputation in publishing school text books as well as magazines, pamphlets and documents for the Government;

(iii) the Respondent owns a piece of land in No. 5, Jalan Intan 1, Taman Cheras Permata, 43200, 9th Mile, Cheras, Selangor (**Respondent's Land**), upon which the Respondent has printing

machines. According to the Applicant, the market value of the Respondent's Land is estimated to be approximately between RM3.5 million and RM4 million;

(iv) the Respondent is a solvent company which is financially capable to continue its business operation and pay all its creditors;

(v) a stay of the Winding Up Order is in the interest of the Respondent's employees and customers; and

(vi) all the Respondent's contributories support This Application.

D. Should This Application be made by motion or summons?

7. I am of the opinion that an application under s 243(1) CA (**Section 243 Application**) should be made by way of a summons in accordance with r 7(2) of the Companies (Winding-up) Rules 1972 (**WUR**). My view is based on the following reasons:

(a) certain applications to the winding up court have to be made in open court according to r 5(1)(a) to (g) WUR. A Section 243 Application does not fall under r 5(1)(a) to (g) WUR. As such, This Application falls within r 5(2) WUR and may be heard in chambers; and

(b) if an application is to be heard in chambers, r 7(2) WUR states that such an application "*shall be made by summons in Form 1*" of the First Schedule to WUR.

8. The Petitioner's learned counsel and OR did not object to the manner in which This Application was filed. In any event, under s 221(2)(b) CA (the winding up court may "*dispense with any … steps being taken which are required by [CA], or by the rules*") and r 194(1) WUR (no proceedings under CA or WUR shall be invalidated by any formal defect or any irregularity unless the winding up court is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the winding up court), there is no substantial injustice caused to any party by proceeding to hear This Application in the form that it is filed. As such, I proceed to hear This Application. It is hoped that r 7(2) WUR is complied with in respect of future Section 243 Applications.

E. Section 243 CA

9. Section 243 CA provides as follows:

> "*(1)* ***At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings***

either altogether or for a limited time on such terms and conditions as the Court thinks fit*.*

(2) ***On any such application the Court may, before making an order, require the liquidator to furnish a report with respect to any facts or matters which are in his opinion relevant****.*

(3) ***An office copy of every order made under this section shall be lodged by the company with the Registrar and with the Official Receiver within fourteen days after the making of the order****.*

Penalty: One thousand ringgit*. Default penalty.*"

(emphasis added).

F. Legal proceedings

10. When This Application was first heard by this court on 12.11.2014 –

(a) as *per* the 2nd Prayer, the Applicant's learned counsel applied for an *ad interim* stay of the Winding Up Order pending the disposal of This Application. The OR had no objection to such an application;

(b) this court has the power to grant an *ad interim* stay of the Winding Up Order pending the disposal of This Application as is clear from Zulkefli Makinuddin J's (as His Lordship then was) judgment in the High Court

case of **Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd (Poly Glass Fibre (M) Bhd, Applicant)** [2002] 6 MLJ 632, at 642. I granted an *ad interim* stay of the Winding Up Order pending the disposal of This Application (***Ad Interim* Stay**) because of the following reasons -

(i) there was no evidence that the *Ad Interim* Stay would prejudice the liquidation of the Respondent;

(ii) there is no risk that if the *Ad Interim* Stay was granted, the Respondent's Assets would be dissipated; and

(iii) there was no objection to the *Ad Interim* Stay by the OR as the Respondent's liquidator; and

(c) this court exercised its power under s 243(2) CA to order the OR to –

(i) prepare a report in respect of the liquidation of the Respondent; and

(ii) inform this court whether OR would support or oppose This Application

(**OR's Report**).

G. <u>OR's Report</u>

11. The OR's Report was filed in 2 parts. The first part of the OR's Report dated 3.12.2014 (**OR's 1st Report**) exhibited a "*Statement of Affairs*" of the Respondent affirmed by the Applicant on 6.3.2014 before a Commissioner of Oaths (**SOA**). The SOA stated, among others, as follows:

(a) the Respondent has 15 unsecured creditors with a total debt due from the Respondent to these 15 unsecured creditors amounting to RM1,043,507.09;

(b) the Respondent has 1 secured creditor, PIBB, to whom the Respondent owed RM876,184.64;

(c) there are 3 preferential creditors of the Respondent, namely the Employees Provident Fund, the Inland Revenue Board and the Social Security Organisation. The Respondent owed a total of RM42,324 to these 3 preferential creditors; and

(d) the Respondent has the following assets –

(i) cash in the bank – RM35,934.91;

(ii) cash in hand – RM1,500;

(iii) machinery – RM505,235;

(iv) trade fixtures, fittings, office furniture, utensils, etc – RM92,828.86;

(v) Respondent's Land – RM2,177,380; and

(vi) "*good*" book debts (debts owed to the Respondent) (**Respondent's Book Debts**) – RM1,243,525.

The SOA claimed that the Respondent had an estimated total value of assets amounting to RM4,056,403.77.

12. The OR's 1st Report stated, among others -

(a) the OR had received 2 proofs of debt (**POD**) from the Petitioner and Penerbitan Pelangi Sdn. Bhd. (**PPSB**);

(b) the OR had admitted the Petitioner's POD (amounting to RM86,210.02) and was in the process of examining PPSB's POD (claim of RM510,970.56);

(c) the Respondent had paid RM94,537.58 to the OR to settle the Petitioner's Judgment Sum due to the Petitioner; and

(d) as of 3.12.2014, the Respondent's estate amounted to RM101,105.86 which consisted of the following –

(i) payment of RM94,537.58 by the Respondent to the OR; and

(ii) the Respondent's cash in the bank amounting to RM8,795.16 which had been handed over to OR.

13. The second part of the OR's Report dated 5.2.2015 (**OR's 2nd Report**) stated, among others, as follows:

(a) PPSB had obtained a default judgment in the Kuala Lumpur Sessions Court against the Respondent on 29.8.2013 (**PPSB's Judgment**). PPSB's Judgment ordered the Respondent to pay PPSB –

(i) RM510,970.56 (**PPSB's Judgment Sum**);

(ii) 5% interest per annum on the PPSB's Judgment Sum from 29.7.2013 until the date of full settlement of PPSB's Judgment Sum; and

(iii) costs of RM1,000; and

(b) the SOA did not disclose that the Petitioner and PPSB were unsecured creditors of the Respondent.

H. <u>Applicant's submission</u>

14. Encik Mohd. Iskandar Bin Ismail, learned counsel for the Applicant, submitted that This Application should be allowed for, among others, the following reasons:

(a) based on the SOA, the total value of the Respondent's Land, the Respondent's Book Debts, machinery, trade fixtures, fittings, office furniture, utensils and cash is RM4,056,403.77. The Respondent only has a total liability of RM1,085,831.09 (3 preferential debts and 15 unsecured debts) according to the SOA;

(b) the Respondent has paid RM94,537.58 to the OR to settle the Petitioner's Judgment Sum; and

(c) since the Respondent's total value of assets (RM4,056,043.77) far exceeds its total debts, the Respondent is solvent.

I. Position of OR and Petitioner

15. Both the OR and the Petitioner leave it to the winding up court to decide This Application. The Petitioner however has filed an affidavit to state, among others, the following:

(a) the Petitioner's solicitors have served the Winding Up Order on the Respondent's address registered with SSM;

(b) the Petitioner has not received any payment of the Petitioner's Judgment Sum from the OR; and

(c) the Petitioner denies that the Respondent is solvent and is capable to continue its operations and pay its debts when such debts fall due.

J. Case law on s 243(1) CA

16. I will refer to 2 Malaysian cases on the application of s 243(1) CA. The first case is **Vijayalaksmi Devi a/p Nadchatiram v Dr. Mahadevan a/l Nadchatiram & Ors** [1995] 2 MLJ 709, at 716-718, where Mohd. Dzaiddin FCJ (as His Lordship then was) delivered the Federal Court's judgment as follows:

> *"**It is clear from [s 243(1) CA] that the court has a discretion, on the application of the liquidator or Official Receiver, or any creditor or contributory to stay the proceedings under a winding-up order. But, before granting a stay, the section requires on proof to the satisfaction of the court that it ought to grant a stay**. **This means that the court has to be satisfied that it is right to stay the winding-up proceeding and if there be matters as to which the court has doubts, it should not grant a stay** (**Re Lowston Ltd** [1991] BCLC 570).*
>
> *The principles which govern the court in the exercise of its jurisdiction whether to grant or refuse a stay have been established in the following cases. In the leading case of **Re Telescriptor Syndicate Ltd** [1903] 2 Ch 174, Buckley J was dealing with an application under s 89 of the English Companies Act 1862, which is similar to our s 243, which provided that the court may at any time after a winding-up order, upon the application of any creditors or contributory and 'upon proof to the satisfaction of the court that all proceedings in relation to*

such winding-up ought to be stayed', make an order staying the same. What then should be the material considerations to induce the court to order a stay? According to Buckley J (taken from the headnote which summarized the text of his decision) [1903] 2 Ch 174 at p 174:

> ***In the exercise of its jurisdiction with reference to staying proceedings under an order for the winding-up of a company, the court should, so far as possible, act upon the principles which are applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual - in which cases the court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the rescission or annulment will be conducive or detrimental to commercial morality and to the interests of the public at large****.*
>
> *In refusing or postponing a stay of winding-up proceedings the court will have regard to the following facts:*
>
> *(a) That directors have not complied with their statutory duties as to giving information to the Official Receiver or furnishing a statement as to the affairs of the company.*
>
> *(b) That there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the former in fully paid shares forming the consideration for the purchase of property by the company on its formation.*
>
> *(c) That the promoter has made gifts of fully paid shares to the directors.*
>
> *(d) That there are any other matters connected with the promotion, formation, or failure of the company, or the conduct of its business or affairs, which appear to the court to require investigation.*

We pause here to state that we respectfully accept the above principles laid down by Buckley J *and would apply them in dealing with the present appeal.*

In ***Krextile Holdings Pty Ltd v Widdows****, Gillard J of the Supreme Court of Victoria held [1974] VR 689, at p 694:*

> *It is not merely necessary for the applicant to establish that a stay is reasonable in the circumstances. He must satisfy the court it ought to grant a stay. As was emphasized by Buckley J in* ***Re Telescriptor Syndicate Ltd*** *[1903] 2 Ch 174 at p 182:*
>
> > ***'I decline to order a stay of these proceedings until it is proved to my satisfaction that the winding up ought to be stayed. That will not be proved to my satisfaction until it is shown to me that all the facts are as I hope they are - that the trading operations of this company have been fair and above-board****.'*

The above principles have been summarized by the learned editors of 1 Palmer's Company Law (24th Ed) para 88–28 at p 1390 as follows:

> ***In exercising this discretion the court will be guided by the analogy of the former practice in bankruptcy in rescinding a receiving order — that is to say, it will consider the interests of commercial morality and not merely the wishes of creditors, and will refuse a stay if there is evidence of misfeasance or of irregularities demanding investigation****.*

In Re Calgary & Edmonton Land Co Ltd, it was held that the jurisdiction of the court was discretionary and that it was for

***those who sought a stay to make out a sufficient case**. Megarry J also dealt with the persons whose interests the court had to consider on an application for a stay. In his judgment ([1975] 1 All ER 1046 at p 1051; [1975] 1 WLR 355 at p 360), his Lordship stated:*

> *These must, of course, depend on the circumstances of each case; but where, as here, there is a strong probability, if not more, that the assets of the company will suffice to pay all the creditors and the expenses of the liquidation, and so leave a surplus for the members of the company, there are plainly three categories to consider. First, there are the creditors. … Second, there is the liquidator.… Third, there are the members of the company. No question of satisfying them by immediate payment of all that they are entitled to can very well arise; for unlike the creditors, with their ascertained or ascertainable debts, the rights of the members cannot be quantified until the liquidation is complete. Accordingly, in normal circumstances I think that no stay should be granted unless each member either consents to it, or is otherwise bound not to object to it, or else there is secured to him the right to receive all that he would have received had the winding up proceeded to its conclusion. Each member has a right of a proprietary nature to share in the surplus assets, and each should be protected against the destruction of that right without good cause.*

> *It will be observed that each of the heads is qualified by the words 'in normal circumstances'. I am not suggesting that in these cases there are hard and fast rules; but I am saying that the circumstances that I have mentioned will usually be at least highly material in deciding how the court's discretion should be exercised.*

In summary, the principles which emerge from the above authorities are these:

(1) *The granting of a stay under s 243 of the Act is discretionary and* ***the onus is on the party seeking a stay to make out a positive or sufficient case****.*

(2) *The* ***attitude of the creditors, contributories and the liquidator is a relevant consideration****.*

(3) ***That in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large****.*

(4) *Last, and which by no means least, is that* ***a stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation****.*

It must, however, be remembered that ***the above considerations are not meant to be exhaustive****, but they have been summarized to indicate that they had not been considered or discussed in the written judgment of the learned judge."*

(emphasis added).

17. The second case concerning the application of s 243(1) CA is **Ting Yuk Kiong v Mawar Biru Sdn Bhd & Anor** [1995] 3 CLJ 136. In **Ting Yuk Kiong**, at p. 139, Arifin Jaka J (as His Lordship then was) held as follows in the High Court:

"*In exercising its discretion the Court has to consider certain factors and would act on certain principles which have been established by decided cases. In* ***Re Warbler Pty Ltd*** *[1982] 6 ACLR 526 the following principles are enumerated:*

(a) *The granting of a stay is a discretionary matter and there is a clear onus on the applicant to make out a positive case for a stay:* ***Re Calgary and Edmonton Land Co. Ltd*** *[1975].*

(b) ***There must be service of notice of the application for a stay on all creditors and contributories and proof of this*** *(****Re South Barrule State Quarry Co.*** *[1969] LR 8 Eq. 688,* ***Re Bank of Queensland Ltd.*** *[1870] 2 QS CR 113 referred to).*

(c) ***The nature and extent of the creditors must be shown and whether or not all debts have been discharged****. (****Krextile Holdings Pty Ltd. v. Widdows*** *[1974] VR 689 at 694;* ***Re Dalta Homes Pty Ltd.*** *[1972] 2 NSWLR 22 at 26 referred to).*

(d) ***The attitude of creditors, contributories and the liquidator is a relevant consideration****. (****Re Calgary and Edmonton Land Co. Ltd.*** *referred to).*

(e) ***The current trading position and general solvency of the company should be demonstrated. Solvency is of significance when a stay of proceedings in the winding up is sought.*** *(****Re a Private Company*** *[1935] NZLR 120:* ***Re Mascot Home Furnishers Pty Ltd.*** *[1970] VR 593 at 598 referred to).*

(f) ***If there has been non-compliance by directors with their statutory duties as to the giving of information or furnishing a statement of affairs a full explanation of the reasons and circumstances should be given****. (****Re Telescriptor Syndicate Ltd.*** *[1963] 2 Ch. 174 referred to).*

(g) ***The general background and circumstances which led to the winding up order should be explained****. (****Krextile Holdings Pty Ltd. v. Widdows*** *supra referred to).*

(h) ***The nature of the business carried on by the company should be demonstrated and whether or not the conduct of the company was in any way contrary to the "commercial morality" or the "public interest"****. (****Krextile Holdings Pty Ltd. v. Widdows*** *supra,* ***Re Dalta Homes Pty*** *supra referred to).*"

(emphasis added).

18. The following matters in **Ting Yuk Kiong** should be highlighted:

(a) the OR's report stated, among others, the following -

(i) the wound up company's contributory had paid the sum due to the petitioner and the OR's fees;

(ii) the OR did not receive any POD in **Ting Yuk Kiong**;

(iii) the OR was of the view that the wound up company was solvent; and

(iv) the OR supported the application for a permanent stay of the winding up order in **Ting Yuk Kiong**; and

(b) despite the OR's report as stated above, the High Court held as follows, at p. 141 –

> "***It is not sufficient that the creditors had been paid in full and that the [OR's] fees and expenses have been provided for. This does not in any way reflect the solvency of the company. The payment was made by the applicant who came to the rescue of the company****.*
>
> ***The [OR] further says in his report that the company is solvent and recommends that the winding up of company be stayed. I am not convinced that the company is solvent as the [OR] appears to me to have expressed his opinion that the company is solvent based on the mere fact that the company had paid its two creditors and that the fees and expenses of the [OR] has been provided for and the fact that the company had RM120,000 cash at hand****. …*
>
> ***It appears to me that the report does not reflect that the [OR] has carried out a proper investigation into the affairs of the company as he has not stated therein that he has made references to the company's books or audited accounts or made consultations with the principal officers of the company such as the auditor and the secretary****. This to my mind he has to do before coming to a conclusion that the company is solvent****.*
>
> ***Under the circumstances of the case it is my finding that the company is insolvent and based on the fundamental***

principle that an insolvent company should be wound up: Re Mascot Home Furnishers Pty Ltd. *[1970] VR 593,* ***it is my considered opinion that the winding up petition of the company should not be stayed. For the reasons stated above I rule that the applicant has not made out a case for a stay of the winding up proceedings of the company****.*

The application is therefore dismissed with costs*.*"

(emphasis added).

19. I am of the following view regarding s 243(1) CA:

(a) whether a winding up order should be stayed or not under s 243(1) CA, depends on the exercise of the court's discretion based on the evidence adduced before the court – the Federal Court case of **Vijayalaksmi Devi**. It is trite law that the exercise of judicial discretion in a case is not a binding precedent from the view point of the *stare decisis* doctrine – please see the Court of Appeal's judgment in **Structural Concrete Sdn Bhd v Wing Tiek Holdings Bhd** [1997] 1 CLJ 300, at 306. Reasons which are considered relevant and decisive in one Section 243 Application, may not be pertinent or conclusive in another Section 243 Application;

(b) the legal burden to persuade the winding up court to exercise its discretion to stay a winding up order under s 243(1) CA is on the applicant – the Federal Court's judgment in **Vijayalaksmi Devi**. Even if the petitioner, the company's liquidator and all the creditors and contributories of the company are unanimously in

favour of a Section 243 Application, the winding court may still refuse the Section 243 Application if the applicant fails to discharge the legal onus to satisfy the court to stay the winding up order. In **Ting Yuk Kiong**, a Section 243 Application was refused despite the OR's view that the company in question was solvent and the OR's support for the Section 243 Application;

(c) as decided by the Federal Court in **Vijayalaksmi Devi**, the legal burden is on an applicant in a Section 243 Application to make "*a positive or sufficient case*". The applicant should have a heavy burden as the effect of a stay under s 243(1) CA is permanent and far-reaching – the Court of Appeal case of **Vijayalakshmi Devi**. If the Section 243 Application is allowed, there is always a risk that the "*resurrected*" company may subsequently be unable to pay its debts, to the detriment of creditors in particular and the business community in general;

(d) the factors to be considered by the winding up court in considering a Section 243 Application as explained in **Vijayalaksmi Devi** (Federal Court's judgment) and **Ting Yuk Kiong**, are not exhaustive. Judicial discretion of the winding up court in deciding a Section 243 Application should not be fettered as is clear from the phrase "*on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed*" in s 243(1) CA; and

(e) if a company is wound up under s 218(1)(e) CA on the ground that the company is unable to pay its debts –

(i) the winding up court should give more weight to the consideration of public interest and commercial morality, than the wishes of the company's liquidator, creditors and contributories. This is because the winding up court should be vigilant to ensure that s 243(1) CA is not abused to "*resurrect*" a commercially insolvent company to the detriment of the creditors in particular and the business community in general;

(ii) subject to the consideration of public interest and commercial morality, the wishes of the commercially insolvent company's contributories should be given less weight than the interest of the wound up company's creditors, especially unsecured ones. This is understandable in view of the limited liability of companies and their shareholders as embodied in s 16(5) CA (*with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up*);

(iii) to substantiate a Section 243 Application, the applicant must adduce credible evidence that if the Section 243 Application is allowed, the wound up company is likely to be commercially solvent and is likely to be able to pay its debts when such debts become due and payable in the future. In other words, there must be cogent evidence of the likelihood of the company's commercial solvency or cash flow solvency.

If there is no reliable evidence of the likelihood of the company's commercial solvency, the Section 243 Application should be dismissed on this ground alone and it does not matter if the total value of the assets of the company exceeds its total liabilities (balance sheet solvency). This is because if

such a company is "*resurrected*", the company may still be commercially insolvent and may incur debts to the prejudice of its creditors, contrary to public interest and detrimental to commercial morality.

In support of the above opinion, I rely on the Supreme Court's judgment in **Sri Hartamas Development Sdn Bhd v MBF Finance Bhd** [1992] 1 CLJ (Rep) 303. In **Sri Hartamas Development Sdn Bhd**, the Supreme Court applied the "*commercial solvency*" test or the "*cash flow solvency*" test and not the "*balance sheet solvency*" test, to ascertain whether the appellant company should be wound up on the ground of its inability to pay its debts. Gunn Chit Tuan SCJ (as his Lordship then was) decided as follows in **Sri Hartamas Development Sdn Bhd**, at p. 307 and 308 -

> "*As an alternative ground regarding insolvency, it was contended by Mr. Sri Ram that the learned Judge had applied the wrong legal test when he concluded that the appellant had not rebutted the statutory presumption and was therefore insolvent.* ***Counsel said that in the Court below the appellant had led evidence to show that it is the owner of landed assets worth more than RM500 million. The respondent did not dispute those facts in the Court below and there was therefore no challenge on that point. Nevertheless the learned Judge relied on the decision of the Privy Council in Malayan Plant (Pte) Ltd. v. Moscow Narodny Bank Ltd. [1980] 2 MLJ 53, which held that the appellant had failed to show that it was not insolvent. Counsel submitted that the correct test would be met by answering a question: "Would the appellant be capable, if necessary, of paying all debts by a realisation of its assets, including any immovable property, and of carrying on***

some other business if its shareholders so wished out of the net amount realised after payment of all liabilities?". It was further submitted that it was no part of the test that a company should have the capability to meet its liabilities out of its own monies, and in support of that submission, the appellant relied on the decision of the Singapore High Court in Re Great Eastern Hotel (Pte) Ltd. [1989] 1 MLJ 161. *…*

In dealing with "commercial insolvency", that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the Malayan Plant case and cite the following observations from Buckley on the Companies Act (13th Edn.) 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****.*"

(emphasis added);

I rely on the "*commercial solvency*" test or the "*cash flow solvency*" test as a factor to be considered in a Section 243 Application because if a company is wound up based on the "*commercial solvency*" test, this same test should be satisfied

by an applicant in a Section 243 Application to stay the same winding up order (obtained based on the "*commercial solvency*" test); and

(iv) evidence to show the likelihood of the company's commercial solvency may be given as follows –

(1) evidence of a proposal to inject funds or liquid assets into the company by a "*White Knight*";

(2) evidence that the company is likely to be given a lucrative contract or transaction which may provide a source of income to the company; and

(3) expert opinion by a qualified and reputable financial consultant or accountant, especially a "*companies restructuring specialist*", on the likelihood of the company's commercial solvency.

K. <u>No evidence of likelihood of Respondent's commercial solvency</u>

20. In this case, the Respondent had been wound up under s 218(1)(e) CA on the basis that the Respondent was commercially insolvent when the Respondent was unable to pay the Petitioner's Judgment Sum when demanded by the Petitioner.

21. This court is of the view that the Applicant has failed to discharge his burden to prove that if This Application is allowed, there is a likelihood that the Respondent will be commercially solvent and is able to pay all its debts when such debts become due and payable. This decision is premised on the following reasons:

(a) the Applicant has not adduced any evidence of a proposal by a "*White Knight*" to provide funds or liquid assets to the Respondent;

(b) the *Ad Interim* Stay was granted on 12.11.2014. Accordingly, from 12.11.2014 until the hearing of This Application on 26.3.2014, for a period of 4½ months (***Ad Interim* Period**), the Respondent's board of directors (**BOD**) had been empowered to operate the Respondent as if there was no winding up of the Respondent. Despite the BOD running the Respondent throughout the *Ad Interim* Period, there is no affidavit evidence from the BOD (the Applicant is a member of the BOD) or from the Applicant himself regarding any new printing contract or transaction during the *Ad Interim* Period which may show that the Respondent is likely to be commercially solvent. In fact, there is no affidavit evidence that the BOD has actually operated the Respondent since the granting of the *Ad Interim* Stay! Nor is there any affidavit from any of the Respondent's employees or customers to show that the Respondent has been running its printing business during the *Ad Interim* Period; and

(c) there is no affidavit from any financial consultant or accountant which affirms that if This Application is allowed, the Respondent is likely to be capable of paying all its debts when such debts fall due.

22. The fact that the Respondent has paid to the OR to "*settle*" the Petitioner's Judgment Sum, does not mean that there is a likelihood of the Respondent's financial capability to pay its debts when such debts are due and payable. In **Ting Yuk Kiong**, the High Court held that the respondent company was insolvent despite the fact that both the respondent company's creditors and the OR, had been paid in full.

23. As explained above, if there is no evidence of the likelihood of the Respondent's commercial solvency, This Application should be dismissed on this ground alone even if the total value of the Respondent's assets far exceeds its total liabilities. This judgment will discuss later whether the total value of the Respondent's assets actually exceeds its total debts.

L. <u>Evidence in support of This Application is not credible</u>

24. Section 234 CA provides for SOA. The part of s 234 CA which is relevant to This Application, reads as follows:

> "***Statement of company's affairs to be submitted to [OR]***
>
> *234(1).* ***There shall be made out and verified in the prescribed form and manner and submitted to the [OR] or the***

liquidator, as the case requires, a statement as to the affairs of the company as at the date of the winding up order showing –

(a) ***the particulars of its assets, debts and liabilities****;*

(b) ***the names and addresses of its creditors****;*

(c) *the securities held by them respectively;*

(d) *the dates when the securities were respectively given; and*

(e) *such further information as is prescribed or as the Official Receiver or the liquidator requires.*

(2) ***The statement shall be submitted by one or more of the persons who are at the date of the winding up order directors****, and by the secretary of the company, or by such of the persons hereinafter mentioned as the [OR] or the liquidator, subject to the direction of the Court, requires, that is to say, persons -*

(a) *who are or have been officers of the company;*

(b) *who have taken part in the formation of the company, at any time within one year before the date of the winding up order; or*

(c) *who are or have been within that period officers of or in the employment of a corporation which is, or within that period was, an officer of the company to which the statement relates.*

…

(5) ***Every person who without reasonable excuse makes default in complying with the requirements of this section shall be guilty of an offence against this Act****. Penalty: Imprisonment for three years or ten thousand ringgit or both. Default penalty.*"

(emphasis added).

25. Regulation 3(1) of the Companies Regulations 1966 (**CR**) provides that where a provision of the CA is specified in the first column of the First Schedule to CR (**1st Schedule**), the form set out in the Second Schedule to CR (**2nd Schedule**) with the number specified in the third column of the 1st Schedule, shall be used in relation to the provision in CA. The 1st Schedule provides that the SOA to be prepared under s 234 CA, shall be in Form 61 in the 2nd Schedule (**Form 61**). The "*Notes*" to Form 61 provide for the SOA to be verified by an affidavit in accordance with Form 62 as prescribed in the 2nd Schedule (**Form 62**).

26. The Applicant's SOA was in the format as prescribed in Form 61 but did not comply with the requirement of a verifying affidavit in Form 62. Such a non-compliance is not fatal according to reg. 3(2) CR which provides as follows:

"*3(2)* ***Strict compliance with the forms contained in the [2nd Schedule] is not necessary, and substantial compliance is sufficient.***"

(emphasis added).

27. This court is not satisfied regarding the credibility of the contents of the Applicant's SOA for the following reasons:

(a) as stated in the OR's 2nd Report, the SOA had failed to disclose the fact that the Petitioner and PPSB are the Respondent's unsecured creditors. Sections 234(1)(a), (b) and 234(2) CA read with Forms 61 and 62 require the Applicant to verify in the SOA the truth of, among others, the particulars of the Respondent's debts as well as the names and addresses of the Respondent's creditors in the form of an affidavit before a Commissioner for Oaths. Under s 234(5) CA, any default in complying with s 234 CA constitutes an offence which is punishable with imprisonment up to 3 years and/or fine up to RM10,000. The failure of the Applicant to verify in the SOA that the Petitioner and PPSB are the Respondent's unsecured creditors, shows the lack of credibility, *bona fides* and candour on the part of the Applicant;

(b) the SOA stated that the Respondent had RM35,934.91 as cash in the bank but the OR's 1st Report mentioned that the OR had only received an amount of RM8,795.16 from the Respondent's bank!;

(c) the SSM Search Report exhibited in the Applicant's Affidavit, showed an "*unsatisfied*" charge registered in favour of, at that time, Bumiputra Commerce Bank Bhd. However, such a secured debt was not disclosed in the SOA;

(d) the SOA stated that the Respondent's Land was worth RM2,177,380. No valuation report by a valuer or appraiser registered under the Valuers, Appraisers and Estate Agents Act 1981 regarding the current market value of the Respondent's Land, has been adduced by the Applicant. No weight should therefore be given to a mere assertion in the SOA regarding the value of the Respondent's Land;

(e) generally, a company's winding up will cause a default of the company's loan obligations with the bank which will then entitle the bank to enforce the security for the loan in question. In this case, if the Respondent has created fixed legal charge over the Respondent's Land and a floating charge over all moveable assets of the Respondent in favour of PIBB, upon the Respondent's winding up, PIBB is entitled to enforce its security interest in all the assets of the Respondent. In such an event, the Respondent may not be able to enjoy the Respondent's land, machinery, trade fixtures, fittings, utensils, etc. The Applicant did not adduce any letter or document from PIBB disclaiming any security interest in the Respondent's Land and its moveable properties. Accordingly, it is doubtful whether the Applicant may rely on the value of the Respondent's assets which have already been used to secure the Respondent's loan from PIBB and which may be enforced by way of sale by PIBB upon the Respondent's winding up; and

(f) the SSM Search Report exhibited in the Applicant's Affidavit, only showed the Respondent's 2010 Financial Statements. The Applicant did not exhibit the Respondent's duly audited accounts and "*profit and loss account*" [defined in s 4(1) CA as including "*income and expenditure account, revenue account or any other account showing the results of the business*"] for the financial

years ending 30.9.2011, 30.9.2012 and 30.9.2013 (before the Winding Up Order is made on 19.2.2014). This court is therefore unable to ascertain the actual financial position of the Respondent before its winding up. More importantly, the failure of the Applicant to exhibit the latest financial statements of the Respondent, indicates that there may have been a concealment of material evidence regarding the true financial situation of the Respondent from this court.

28. The Applicant's Affidavit avers that all the Respondent's debts have been paid by payments made to the OR. The SOA filed by the Applicant himself, however showed that the Respondent owed a total sum of RM1,043,507.09 to 15 unsecured creditors. Furthermore, the Respondent has yet to satisfy PPSB's Judgment Sum. Accordingly, the truth of the contents of the Applicant's Affidavit may be doubted.

29. As explained above, the legal onus is on the Applicant to satisfy the winding up court that This Application should be allowed. In view of the serious doubts on the truth of the SOA and the Applicant's Affidavit as elaborated above, the Applicant has failed to discharge the legal burden to prove "*a positive and sufficient case*" under s 243(1) CA.

M. <u>No explanation for delay in making This Application</u>

30. This Application is filed on 30.10.2014. There has been a delay of more than 8 months in making This Application [from the date of the Winding Up Order (19.2.2014) to the date of filing of This Application

(30.10.2014)]. Such a delay has not been explained in the Applicant's Affidavit. If there is a likelihood that the Respondent will be commercially solvent, the Applicant would not and should not have taken more than 8 months to file This Application. Furthermore, there is no explanation on affidavit evidence for such a delay. Unexplained and excessive delay in a Section 243 Application may itself constitute a ground for the refusal of the winding up court's exercise of discretion. In **Vijayalaksmi Devi**, at p. 722, the Federal Court decided as follows:

> "***On the issue of delay, based on the facts, we were satisfied that there had been a delay of 5½ years between the time the order for compulsory winding up was granted by the Seremban High Court (30 September 1988) and the filing of the notice of motion for stay (9 March 1994). There seemed to be no explanation offered why the application was not made within a reasonable time. Abdoolcader J (as he then was), in delivering the judgment of the Federal Court in Mookapillai [1981] 2 MLJ 114, agreed with the trial judge who dismissed the appellant's summons as having been made rather late, which was some 1½ years after the company was ordered to be wound up and after previous applications for stay were refused.*** *The Federal Court cited with approval the observation of Megarry J in* ***Re Calgary & Edmonton Land Co Ltd*** *[1975] 1 All ER 1046 at p 1050; [1975] 1 WLR 355 at pp 358-359:*
>
> > ***[T]hat the applicant for a stay must make out a case that carries conviction. It may be that where the liquidation has been proceeding for only a short while the court ought to be more ready to grant a stay than in cases where the liquidation has been proceeding for a considerable time and much has been done on the faith of it.***"

(emphasis added).

N. <u>There should not be any undue preference for Petitioner</u>

31. According to s 219(2) CA, the Winding Up Order "*shall be deemed to have commenced at the time of the presentation of the petition for the winding up*", namely on 19.12.2013.

32. In **Kredin Sdn Bhd v Development & Commercial Bank Bhd** [1995] 3 MLJ 304, at 306, 308 and 309, the Court of Appeal in a judgment given by Siti Norma Yaakob JCA (as Her Ladyship then was), decided as follows:

> "*The only matter in issue in this appeal is the interpretation to be given to s 219(2) [CA] and its practical effect when read together with s 224 of the same Act. …*
>
> ***That purpose and intent were considered by the High Court of Australia in the case of Motor Terms Co Ltd v Liberty Insurance Ltd (1967) 116 CLR 177, when the court was interpreting the provisions of s 223(2) of the Australian Companies Act 1961 (NSW), which is equivalent to our s 219(2). Barwick CJ had this to say****:*
>
> > ***The date of the presentation of the petition on which the order is made is set by the Companies Act [s 223(2)] as the date of commencement of the liquidation, that is to say, as the date of the commencement of the process of administering the assets of the company with a view to their proper distribution according to the statute amongst the***

> ***creditors. That date to my mind is both the logical and the practical date, as well as being the date chosen by the legislature, as at which to determine who are the creditors and as at which to adjust their rights****.*

…

Thus, s 219 was enacted specially as a means to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their executing their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding up to the date when the order for winding up is made. During that period, the law sees to it that the assets or effects of the company will not be dissipated to enrich one or more unsecured creditors at the expense of the other unsecured creditors*. Section 224 preserves the assets and effects of the company, and it is to safeguard this underlying principle that there is this notion of a relation back that once a winding-up order is made, it relates back to the date of the presentation of the winding up, ie the date when the winding up is deemed to have commenced. It follows that all attachments, sequestration, distress or execution put in force against the estate or effects of a company made within the interval of the presentation to wind up and the date when the order to wind up is made by the court, are void. The fact that no winding-up order will ultimately be made makes no difference to this finding, as s 219 is not concerned whether a winding-up order will ultimately be ordered or not, but that in mandatory tones it provides protection to unsecured creditors once a winding up is deemed to have commenced, that is upon the presentation of the petition. Thus, to say that protection is only present as and when the winding-up order is eventually made is to go against the very intention of what Parliament had enacted.* ***That protection arises once a winding up commences and the date of the commencement is nothing more than a question of fact ascertained from the date of the presentation of the winding up****.*"

(emphasis added).

33. Based on **Kredin Sdn Bhd**, upon the filing of a winding up petition, all unsecured creditors of the company should be treated equally in accordance with the *pari passu* principle.

34. In **Mohan Chatiram MT Ramchandani v Ketua Pengarah Insolvensi Wilayah Persekutuan** [2015] 3 CLJ 354, at 369, I express the following:

> "*[32] In* ***Commercial Banking Co of Sydney Ltd v George Hudsons Pty Ltd (in liquidation)*** *[1973] 2 ALR 1, at 5, Menzies J in the High Court of Australia held as follows:*
>
> > ***"It is a deeply rooted principle of company law that, when liquidation has commenced, one creditor should not be assisted by the Court to improve its position vis-a-vis other creditors."***
> >
> > *(emphasis added).*
>
> *Our CA is based on Australian legislation. Hence, Australian cases on company law are persuasive, especially when a matter in company law has been decided by the apex court in Australia, the High Court. In* ***Ooi Woon Chee v Dato' See Teow Chuan*** *[2012] 2 MLJ 713, at 732 and 734-735, our Federal Court has applied Australian cases in the context of compulsory winding up.*"

(emphasis added).

35. Based on **Kredin Sdn Bhd** and **Mohan Chatiram**, the payment of RM94,537.58 by the Respondent to the OR purportedly to pay the Petitioner's Judgment Sum (**Respondent's Payment**), after the making of the Winding Up Order, constitutes an undue preference for the Petitioner. This is due to the following reasons:

(a) the Respondent's Payment will confer on the Petitioner an undue preference because the Petitioner's Judgment Sum will be paid in priority over all the debts of the other unsecured creditors of the Respondent. Accordingly, the Respondent's Payment will contravene the *pari passu* principle applicable to all unsecured creditors in a company's winding up; and

(b) the Petitioner has to file a POD in respect of the Petitioner's Judgment Sum under r 91(1) WUR. Indeed, the OR's 1st Report has confirmed that the Petitioner has filed a POD regarding the Petitioner's Judgment Sum (**Petitioner's POD**). The OR is duty bound under r 92 WUR to –

(i) examine the Petitioner's POD. The OR as the Respondent's liquidator has the power under r 92 WUR to require the Petitioner to furnish further evidence to support the Petitioner's POD; and

(ii) decide whether to admit or reject the Petitioner's POD.

36. Based on the above reasons, the OR is prohibited from paying directly to the Petitioner so as to "*settle*" the Petitioner's Judgment Sum.

O. 3rd Prayer cannot be granted

37. If This Application is allowed, s 243(3) CA requires an office copy of the stay order to be lodged by the Respondent with both SSM and OR within 14 days after the making of the stay order. I am of the opinion that s 243(3) CA is a mandatory provision because of the use of the word "*shall*" in that provision – please see the Federal Court case of **Public Prosecutor v Yap Min Woie** [1996] 1 MLJ 169, at 172-173, which explains the effect of the mandatory term "*shall*". It is to be noted that any failure to comply with s 243(3) CA is an offence punishable with a maximum fine of RM1,000.

38. The 3rd Prayer did not specify a time period to lodge the stay order with SSM. Nor did the 3rd Prayer apply for the stay order to be lodged with the OR. It is trite law that a court cannot issue an order contrary to a mandatory statutory provision which has penal consequences for its non-compliance. If this court allows the 3rd Prayer, such an order will circumvent s 243(3) CA in the following manner:

(a) the mandatory fourteen-day period to serve the stay order on SSM is unlawfully by-passed; and

(b) the mandatory requirement to serve the stay order on OR within the fourteen-day period is circumvented.

Premised on the above reasons, the 3rd Prayer is refused.

P. Court's decision

39. In view of the Applicant's inability to satisfy this court that the Winding Up Order should be stayed under s 243(1) CA, This Application is dismissed. As the Petitioner and OR have not taken any position in respect of This Application, I shall not award any costs for This Application. With the dismissal of This Application, the *Ad Interim* Stay comes to an end.

40. In summary –

(a) This Application is dismissed with no order as to costs; and

(b) the *Ad Interim* Stay is forthwith discharged.

WONG KIAN KHEONG
Judicial Commissioner
High Court (Commercial Division)
Kuala Lumpur

DATE: 2 JUNE 2015

Counsel for Petitioner company:	*Mr. Andrew KJ Chan (Messrs K Y Soo)*
Liquidator for Respondent company:	*Puan Noormazlinah bt. Abdul Talib (Official Receiver)*
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