

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)**

[(COMPANIES WINDING UP) NO: D6-28-508-2008]

ANTARA

CHOONG LEE KWANG

... PEMPETISYEN

DAN

DAYATERA ROOF SYSTEMS SDN BHD

... RESPONDEN

COMPANY LAW: Winding up - Opposition to winding up - Just and equitable rule - Substratum of company - Whether winding up sought was to defraud creditors - Nomination of liquidator by petitioner, whether in bad faith - Allegation that liquidator would be petitioner-friendly, whether supported by evidence - Companies Act 1965, s. 218(1)(i)

[Winding up ordered; liquidator appointed.]

Legislation referred to:

Companies Act 1965, ss. 218(1)(i)

ALASAN PENGHAKIMAN

OLEH YANG ARIF HAKIM

DATO' TENGKU MAIMUN BINTI TUAN MAT

Encl 1 is the petition filed by Choong Lee Kwang (the petitioner) to wind up Dayatera Roof Systems Sdn Bhd (the company) under section 218(1) (i) of the Companies Act 1965. The shareholdings of the company are as follows:-

1. The petitioner 30%
2. Lim Theam Aik (JL) 30%
3. Richard Choo 40%

Richard Choo became a director of the company since 21.6.2002 until the end of 2006 when he was, together with his subordinates hired by him, dismissed through a domestic enquiry on 28.12.2006. Richard Choo has filed an Industrial Court action against the company for wrongful dismissal and there were several suits between the company and Richard Choo together with others. The petitioner and JL had offered to buy the shares of Richard Choo but the exercise was not successful.

The ground for winding up the company is essentially that the substratum of the company was gone. As averred by the petitioner, the company was established to trade in and manufacture roof trusses; the land where the company's factory was located was auctioned off pursuant to foreclosure proceedings; the subordinates who were dismissed were the core design team for the company and the customers who were brought in by Richard Choo not only ceased trading with the company but were owing monies to the company.

The petition was not opposed by the company and there were seven (7) creditors in support of the petition. There was one opposing creditor, Lionsquare (M) Sdn Bhd and one opposing contributory, Richard Choo. Lionsquare's affidavit in opposition (encl 10) averred *inter alia* that:-

"8) I categorically state that the said Choong Lee Kwang should not be allowed to wind-up the Company nor to appoint the said SFW & Associates as the Liquidators for the reason that the whole Winding-up process is orchestrated to defraud creditors, including, *inter alia*, Lionsquare.

10) ... At the same time, major debtors of the Respondent Company were as follows:

i) Dayatera Engineering Sdn Bhd RM3,138,424.82

.....

I annex hereto a copy of the Debtor's Ageing Report of the Respondent Company dated 30/9/2006 ...

14) in the circumstances, the action by the Petitioner to wind-up the Respondent Company is extremely suspicious and tantamounts to an abuse of the legal process in appointing Liquidators for the Respondent Company who will be "friendly" to the Petitioner."

As for Richard Choo, his affidavit in opposition (encl. 17) states *inter alia*:-

- “3) I state that the application of the Petitioner to wind-up the said Company is one of bad faith and *mala fides*, showing a dishonest intention of trying to control the said Company after winding-up through liquidators appointed by him.
- 6) The Company if it is to be wound up, should be by liquidators who are not appointed by the Petitioner or his co-conspirator Lim Theam Aik in order for the proper audit and investigations to be done into the accounts of the Company..”

Further, *vide* paragraph 8(a) of encl 19 Richard Choo avers that ‘The Debtor’s Ageing Report of the Company as at 30/9/2006 shows that the Petitioner’s and Lim Theam Aik’s Companies owed as follows:

- (i) Dayatera Engineering Sdn Bhd RM1,187,409.07”,

At the outset it is to be noted that although both Lionsquare and Richard Choo referred to the “Debtor’s Ageing Report” of the company bearing the same date, ie, 30.9.2006, both averred to a different amount as being owed by Dayatera Engineering. Be that as it may, from paragraph 6 encl, 17 it is apparent that Richard Choo is not actually opposing the winding up of the company except on the issue of liquidator. Lionsquare’s position is made clearer by the fact that it had, on 14.10.2008 issued a section 218 notice to the company (the present petition was filed on 22.7.2008) and hence could not be heard to oppose the winding up.

The petitioner has nominated Wong Soon Fong as the liquidator of the company. Shortly after the filing of this petition Wong Soon Fong has in fact been appointed the provisional liquidator pursuant to a court order dated 3.9.2008. The reason for opposing the appointment of Wong Soon Fong as could be seen from the affidavit in opposition is that the liquidator would be “friendly” to the petitioner and thus would not be able to carry out a proper audit and investigations into the account of the company. I am not able to accept this contention simply because apart from the bare averment referred to above, there is no ground advanced by Lionsquare and Richard Choo to support the allegation that the liquidator will not be impartial. In the circumstances I ordered that the company to be wound up; that Mr. Wong Soon Fong be appointed the liquidator and that costs be taxed and paid by Lionsquare and Richard Choo.

(DATO' TENGKU MAIMUN BINTI TUAN MAT)
HAKIM
MAHKAMAH TINGGI MALAYA
BAHAGIAN DAGANG
KUALA LUMPUR.

Dated 24 JULY 2009

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