

A Seminar

Introduction to s 218
Winding Up Petitions
for
The Advocates'
Association of Sarawak,
Bintulu Branch

by

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AN INTRODUCTION TO s 218 COMPANIES WINDING UP PETITIONS

for The Advocates' Association of Sarawak, Bintulu Branch

A Half Day Seminar by Mr Alex Chang

1 Bankruptcy and Winding up

1.1 Is a Judgment required prior to the filing of a Companies Winding Up Petition?

2 An Introduction to Companies Winding Up Petitions

2.1 Companies incorporated under the Companies Act may be wound up.

2.2 Professor Low Chee Keong LLM (Hong Kong) Associate Professor, School of Accountancy, Chinese University of Hong Kong, said:

2.3 Perpetual succession is one of the principal distinguishing characteristics of a company whereby it retains its legal persona even though its membership may change over time. Its status as a legal entity, which evolved from *Salomon v Salomon & Co Ltd* and since codified under s 16(5) of the Malaysian Companies Act 1965 ('the Companies Act'), continues until such time as the company is liquidated or wound up.

3 The distinctions between a s 181 Petition and a s 218 Petition

3.1 181 is filed as a Petition under the RHC

3.2 Under 181 (usually associated with the minority oppression type of complaint) you can get an order to buy your clients (usually the minority) out;

3.3 s218 Petitions are used an array of different reasons, two of the most popular are the ones for unable to pay debts 218(1)(e) and 218(1)(i), the Just and Equitable ground, remember the good ole case of *Ebrahimi v Westbourne Galleries Ltd [1973] AC 360, [1972] 2 All ER 492, HL*, see also *Choong Lee Kwang v Dayatera Roof [2009] 1 LNS 1718*.

4 218 Petitions- Unable to pay its debts

4.1 Definition of Unable to pay its debts

4.2 Insolvency, 20 Schillings in the Pound

4.3 Contingent liabilities, s 217

According to some judges if you do not have a judgment, you are considered as a contingent creditor.

4.3.1 *Campana Distributor Sdn Bhd v Amseal Engineering Sdn Bhd* [1998] 7 MLJ 677, [1998] 2 CLJ Supp 12, [1998] 2 AMR 1330. A Companies Winding Up order was granted in favour of the petitioners who did not first obtain judgment while the respondents maintained a counter claim against the petitioners in the form of a civil suit claiming a sum 20 times the amount claimed by the petitioners.

4.3.2 See the last part of the judgment in *Campana Distributor Sdn Bhd v Amseal Engineering Sdn Bhd* [1998] 7 MLJ 677, [1998] 2 CLJ Supp 12, [1998] 2 AMR 1330.

- 4.3.3 See also *NCK Wire Products Sdn Bhd v Konmark Corp Sdn Bhd [2001]*
6 MLJ 57 Winding Up: Bona fide dispute.

5 Affidavit Verifying Petition

5.1 4 days rule, rule 26 Companies Winding Up Rules 1972

It is best to file it within 4 days after filing the petition otherwise you may have to explain to the registrar when you are getting the Registrar's Certificate.

6 Appointment of a Provisional Liquidator under s 231

6.1 the powers of the Provisional Liquidator.

6.2 the considerations before granting the order.

6.2.1 Primary consideration is the dissipation of assets.

6.3 See also the decision of *Vearrian Tanzania Ltd v CNLT (FAR EAST) BERHAD*.

7 Advertisement of the Petition in the Newspaper, r 24 Companies Winding Up Rules 1972

7.1 twice or four times?

7.2 What did the rules say?

"...every petition shall be advertised in Form 4, 7 clear days... before the hearing of the petition..."

8 Registrar's Certificate, r 32 Companies Winding Up Rules 1972

8.1 By filing a Summons in Chambers; or

8.2 By a Notice of Appointment; or

8.3 By a letter of appointment; or

- 8.4 By not doing anything at all.
 - 8.5 Now there is a new Practice Direction 3/ 2011, which directed that a Notice be sent out to the Petitioners to attend before the Registrar on a given date, as per Appendix 'A', the list of documents which the Registrar would require are set out in appendix 'B'.
- 9 Affidavit In Opposition to Petition
- 9.1 Rule 30, Companies Winding Up Rules 1972
 - 9.2 Must be affirmed and served 7 days before the hearing date of the Petition.
 - 9.3 See paragraph 13 on Campana case.
- 10 The Unless Order: Pay up or Wind Up
- 10.1 *KTL Sdn Bhd v Azrahi Hotels Sdn Bhd [2003] 5 MLJ 503.*
 - 10.2 *Petro-Pipe Industries (M) Sdn Bhd v FW Industries Berhad* (unreported) where Unless Order was used to wind up a Berhad.
- 11 Appointment of Liquidator
- 11.1 the Official Receiver;
 - 11.2 the (Private) liquidator; see *Vearrian Tanzania Ltd v CNLT (FAR EAST) BERHAD.* decided by Dato Abdul Aziz Bin Abdul Rahim, Kuala Lumpur High Court, February 4, 2010, Company Winding Up No D3-28-754-2007, affirmed on appeal to the Court of Appeal in 2011.
 - 11.3 for the removal/ new appointment of liquidator see *Hew Kiang Hoe v Shencourt [2011] 7 CLJ 158*, where in an additional liquidator was appointed alongside the current liquidator.

12 Costs

- 12.1 How you do a Companies Winding Up Petition of RM18,000 and get a getting up of RM40,000. See *Wong See Nyam v Lemo Sdn Bhd [1995] 3 AMR 2853*
- 12.2 If you withdraw the Petition do you have to pay RM300 or RM500 to the Official Receiver?
- 12.3 What happens when you have informed the Official Receiver and he did not inform you that the company was already wound up? See *Behn Meyer v Premier Design [2012] 1 CLJ 601*, where the Official Receiver was ordered to pay costs, by the High Court Judge, on appeal to the Court of Appeal it was reversed.

13 Advocacy in the Companies Winding Up Court

- 13.1 *Campana Distributor Sdn Bhd v Amseal Engineering Sdn Bhd [1998] 2 AMR 1330* see if you can find the part where Abdul Aziz J, now FCJ, expressed his displeasures over the drafting of affidavits in opposition.
- 13.2 See the dispute on interest raised in the *NCK Case* and the comments of T S Nathan J. *NCK Wire Products Sdn Bhd v Konmark Corp Sdn Bhd [2001] 6 MLJ 57*
- 13.3 *KTL Sdn Bhd v Azrahi Hotels Sdn Bhd [2003] 5 MLJ 503*, see how the idea of Unless Order was introduced.

- 13.4 *Yian Sdn Bhd v Datuk Bandar Kuala Lumpur & Anor [1998] 5 MLJ 550*, see how Suleiman J, retired as JCA, describe a last minute affidavit.
- 13.5 How do you deal with a difficult counsel?
- 13.6 Bundle of authorities and the opposite solicitors.
- 13.7 A winding up order was given even when there are other applications pending and the applicants ask for adjournment to hear their applications first. Judge used the words ‘lame excuse’ ... *FW Industries Berhad v Suitech Sdn Bhd [2008] 3 CLJ 210*