Unless Order: An 'Alternative Ending' For Companies Winding Petition

In the years preceding 2003 when we 'win' in a companies winding up petition, the Respondent (debtor) will be wound up.

In the year 2003 an idea was conceived after some research on Australian authorities, on an 'alternative end'[1] and suggested it in court, the following is an extract from the Judgment of Dato Vincent Ng J (as he then was):

> *"Mr. Alex Chang, who appeared for the second supporting creditor, suggested that the Respondent be given an opportunity to resolve the matter, failing which the winding up order be made. In all fairness, he suggested a later date, sometime in mid April 2002. His suggestion was enthusiastically received by Mr. Puspanathan."*

Prior to making the making of the unless order, the court was, (I must stress that this has to be a prerequisite) satisfied that the company ought to be wound up. His Lordship continued,

> *"I had of course, by this time, had the benefit of reading not only the cause papers but also the lengthy submissions prepared by parties for and against the winding up of the respondent. I was minded to grant the winding up order, as I was entirely satisfied that the respondent's case was without merit on law or fact. Clearly, there was no real or bona fide dispute that the debt was due to the petitioner and that the respondent was unable to pay its debts æ within the meaning of s 218 of Companies Act 1965 ('the Act'). Indeed, the essential focus of its case is that it needs time to sell its hotel to enable it to pay the respondent. This request for time to sell the very core of its assets ipso facto shows that the respondent was insolvent; and no attempt was made to persuade this court otherwise, as to its solvency. In any event, my view is that, actual solvency of a respondent company in a winding up application is only relevant to establish the presence of a real dispute as to the debt, since the company is deemed to be insolvent upon failure to pay a sufficiently established debt in accordance with the s 218 notice. In the above circumstances, the petitioner is entitled to a winding up*

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[1] This is partly inspired by the generations of authors and subsequently adapted by *Hollywood* where presence of alternative endings may be found in many movies.

order ex debito justitiae (see IOC Australia Pty Ltd v Mobil Oil Australia Ltd (1975) 49 ALJR 176) though even then the court's discretion, in appropriate cases, to grant grace to settle should be untrammelled. Also, in The Orleans Marketing Co Pty Ltd v Neydharting Moor (Aust) Pty Ltd [1985] 3 ACLC 147, Helsham CJ had this to say, at p 153:

> *The submissions made to Master on 1 November 1984 and to me on behalf of the plaintiff were to the effect that having found, as he did, that there was no dispute on substantial grounds as to the plaintiff's claim the Master was bound to make a winding-up order. There being no such dispute, and the plaintiff being unable to have its debt paid, it was entitled ex debito justitiae to have a winding up order made. Where in the absence of any real dispute as to the debt, the failure by a company to pay in accordance with a valid s 364 notice results in there being a deemed insolvency of the company, then the question of its actual solvency is not relevant. The general rule is that the company will be wound up, and there is no reason why a creditor whose debt is not in dispute should be sent off to sue for it in another court. There is no reason why the general rule should not be applied in this case. So run the submissions. The submissions are valid. ... But the undisputed evidence was that the defendant was solvent, ... there was a genuine dispute about the claim, ...*

[Usha the underlined part may be taken out for want of space]

> *Notwithstanding the aforesaid, yet bearing in mind what I thought was the imminent resolution of the matter, I agreed to stand the petition over till 15 April 2002 and recorded an order which was extracted by the supporting creditor in the following terms:*
>
> > ***IT IS HEREBY ORDERED by consent that unless the above matter is settled on or before 15 April 2002 between your petitioner, the supporting creditors and the respondent, a companies winding up order shall be made against the respondent on that date****. (Emphasis added.)"*

His Lordship went on to expound on the history and practical benefits of these

'Unless Orders':

> *"The 'unless order' is not a new creature. Australian cases where such orders are made are legion. The rationale underpinning this approach is both compelling and highly persuasive. Modern day courts, in this new era of rapid development, are lumbered with an ever-increasing backlog of cases. Encompassed within this truism are cases where the clearly manifest intention of a defendant or respondent in a proceeding is to secure time to settle rather than to contest the matter, though he may also have filed rebuttal papers as a matter of formality. A court is naturally impelled to obviate unnecessary expenditure of its time entailed in managing and adjudicating upon a matter bereft of a serious intention on the part of the defendant or respondent to join battle. Obviously, in such situations, if the intention is to do battle, armed with cogent or even arguable grounds, the predominant focus would not be to request for time to settle the amount claimed as in the current case where, indeed, the respondent was given more time than it requested."*

His Lordship was mindful that in the absence of proper guidance, some of the Respondents may take advantage of the time granted to be 'creative':

> *"Thus, in the interests of justice and good grace a defendant's or respondent's request for an adjournment of the hearing to another date to settle the matter amicably ought to be allowed; but allowed on terms such that the court's time is not wasted in permitting the latter party to renege on his promise to settle, especially after being given reasonable time to pay, such time as requested to settle. This is how the concept of 'unless orders' took root in jurisprudence."*

This case was subsequently reported, see KTL SDN BHD V. AZRAHI HOTELS SDN BHD [2003] 3 CLJ 49 at page 51

Wide Application: Winding Up of A BERHAD

Since the 'formal' introduction of this concept it has been widely applied in the commercial courts. One example can be seen in the decision in PETRO-PIPE INDUSTRIES (M) SDN BHD V. FW INDUSTRIES BERHAD, HIGH COURT [KUALA LUMPUR] by ABDUL WAHAB SAID AHMAD, J [2006] 1 LNS 254.

In conclusion, this is the ‘Pay up Or Wind Up’ concept, it gives the Respondents one last opportunity to resolve the matter with the Petitioners, but limiting their options to be ‘creative’ in the interim and assist the Respondents to channel all their energy into settling the matter.