

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
SUIT NO : 28NCC-866-10/2013**

**In the matter of Section 218 (1)(e) and
Section 218 (2) of the Companies Act
1965**

And

**In the matter of Fore-Sight Marketing
Sdn Bhd (Company No: 688500-D)**

BETWEEN

**QUINTRAZ SDN BHD
(COMPANY NO: 615668-W)**

...

PETITIONER

AND

**FORE-SIGHT MARKETING SDN BHD
(COMPANY NO: 688500-D)**

...

RESPONDENT

GROUND OF JUDGEMENT

Background

This is a case of a petition to wind-up the Respondent filed by the Petitioner on the basis of debt due under S. 218 (1) (e) of the Companies Act 1965 ('the Act').

Material Facts

The petition states that both parties entered into a written contract entitled 'Friendly Loan Agreement' ('the Agreement') where the Respondent had received a loan sum of RM 1,080,000.00 from the Petitioner. The loan was not repaid within the stipulated time.

As a consequence demands were made vide at least five letters sent by the Petitioner to the Respondent but repayment was still not made despite these letters.

Thereafter the notice under S. 218 of the Act was issued to the Respondent giving the statutory time of 21 days to settle the amount due.

As no payment was made by the Respondent pursuant to the notice, the petition asserts the same is unable to pay its debts.

Petitioner's Contention

The gist of the Petitioner's submission is as follows.

The Respondent is indebted to the Petitioner because of the friendly loan granted.

The amount of the loan for repayment far exceeds the statutory amount of RM 500.

The Respondent has not proven its ability to pay this debt and in fact had disputed this is due in the affidavit in opposition of the petition.

The Agreement is validly executed as already exhibited for the petition to be granted.

Respondent's Contention

The summary of the Respondent's argument opposing the petition is narrated below.

The Respondent was formed by the efforts of a father, Yue Kam Wah ('Kam Wah') and his son, Yew Chee Wai who is the deponent of the affidavit in opposition of the Respondent.

There was misunderstanding between the two. The father had left the Respondent and therefore at all material times was neither the officer nor a member of staff of the Respondent.

The Respondent says the Agreement is fabricated. There was also no Respondent's Board of Director's resolution authorising the entering of the same.

There was no dealings with the Petitioner and therefore the amount claimed of RM 1,080,000.00 was never received. This sum was never noted in the Respondent's audited accounts.

The Agreement is not stamped and therefore inadmissible.

Court's Findings

This court would first say there is no reason to be concerned with the alleged conflict in the personalities of the Respondent. Even if it is true there is a fall out between the two founders of the Respondent, it is still unconnected to the fact whether the Respondent itself is able to pay its debt.

There is basis also to find that the contract for friendly loan for the benefit of the Respondent was in fact duly executed. This Agreement as

exhibited is in exhibit AWD 1 of the affidavit in reply of the Petitioner renders the assertion that money is due for repayment of a friendly loan more probable.

Further, as exhibited there is no doubt that the Agreement is indeed stamped contrary to the assertion of the Respondent.

Also Kam Wah at the material time was actively involved in the Respondent and the relevant search of the Companies Commission of Malaysia reveals he was a major shareholder of the same. This is exhibited in Enclosure A of the petition. There is therefore no valid dispute that can be entertained that he was not very much authorised to act for the Respondent. In this regard, he had acted to deal for the Respondent in respect of the friendly loan.

On this note, the decision in the case of **Gemencheh Enterprises Sdn Bhd v Aikpoint Development Sdn Bhd 2005 MLJU412** is relevant where it states;

...strangers or outsiders dealing with a company in good faith are entitled to assume that matters of internal management and/or acts within such company's constitution and powers have been properly carried out and duly performed. There is no duty cast upon an outsider contracting with a company to conduct an investigation as to the capacity of the company officials dealing with him other than to rely on what is disclosed by the company's documents such as Form 49 and the memorandum and articles of association of the company.

Additionally there is no police report to affirm the allegation that the agreement is fabricated. The Respondent has not lodged a police report despite their serious allegation on the same.

On this note too, it is trite that allegation of fraud must be proven beyond reasonable doubt. (See **Asean Security Paper Mills Sdn Bhd v CGU Insurance [2007] 2 CLJ 1**). Therefore the Respondent must also prove this higher standard of proof in accusing the Agreement to be fabricated. In this regard the Respondent had failed to attain this standard because there is nothing cogent forthcoming from the Respondent in terms of evidence except the bare statement that the Agreement is fraudulent.

Gemencheh (supra) is also important to note because this case had ruled a company's resolution is for the company's to decide and the absence of the same will not impose any obligations on the part of a third party to enter into an agreement. As stated in that case;

The existing or otherwise of a company resolution for the sale of the land is exclusively an internal management for which the Plaintiff's is entitled to assume had been properly carried out and duly performed by the Defendant.

Also of relevance is that the Respondent had concealed the history of taking up friendly loan before as seen in the exhibit AWD-1 of the Petitioner's affidavit in reply. This loan taken for the sum of RM 1.5 million had shown as a fact that the Respondent is not actually averse to taking up friendly loan from other parties before. This trend on the balance of probabilities, has proven the likelihood of such loan also given by the Petitioner to the Respondent.

As for the service of the relevant papers or documents for this winding-up, this court is satisfied this has already be complied with by the Petitioner. The statutory demand and the petition accordingly had been served at the Respondent's registered address. This was duly accepted by the Company Secretary.

On the aspersion casts on the Company Secretary that she might have colluded with Kam Wah to injure the Respondent, it is the admission of the Respondent itself it is contemplating to sue her. However as at the date of hearing of this petition, this has not be undertaken by the Respondent. Because of this, it is only fair to say the Respondent actually have little or no evidence to prove this allegation against the Company Secretary. That is why no suit was filed by the Respondent even until the hearing of the petition.

The allegation of the Respondent that the petition is defective as the same did not disclose the details of the intended liquidator also cannot be accepted by this court. The intended liquidator's consent and licence had been filed in court before the Registrar's Certificate is issued. The argument of the Respondent is very weak on this issue and therefore is accordingly rejected.

This court would also say there is no reasons for the Respondent to cast doubts on the Petitioner's business address and the picture taken on this issue by the Respondent proves nothing concrete. The explanation by the Petitioner that its office is on the third floor of the relevant building is accepted by this court. The Respondent itself had been mistaken on the exact location of the Petitioner's office. Therefore the allegation of the Respondent that the Petitioner has no registered business premise is in the opinion of this court misconceived.

More importantly the issue raised here has no relevance to the issue whether the debt is incurred by the Respondent and whether the Respondent is able to settle its debt.

On the allegation that Abd Wahab Bin Debab, the director of the Petitioner is wont to wind-up companies to take over the same, this court expressed surprise to that submission as clearly this allegation of the Respondent with respect is totally irrelevant to the issue whether the Respondent is able to pay its debt to the Petitioner. Even if this allegation is accepted by this court, although vehemently denied by the Petitioner, the Respondent is still unable to discharge the presumption it is unable to pay its debt.

In any event the assertion by the Petitioner that it is absurd to allege that a company can easily be taken over upon winding-up is accepted by this court. This court agrees once a company is wound-up, it is the liquidator who takes over the conduct and affairs of the same. And it is therefore wrong for the Respondent to imply that anyone could easily then take over these companies.

Since the debt;

- (a) is already demanded,
- (b) exceeded RM 500 and
- (c) is not settled as there is no payment made within the twenty-one days given,

by virtue of S. 218 (2) (a) of the Act, the Respondent is presumed to be unable to pay its debt. S. 218 (2) (a) of the Act states;

A company shall be deemed to be unable to pay its debts if a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

In this regard, the case of **BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd [2001] 1 CLJ 591** in turn is relevant as to what is considered bona fide dispute on the debt. This case states;

*“The respondent’s point of view is that a dispute automatically arises whenever there are opposing assertions. Perhaps it is true, that whenever there are opposing assertions, there is no agreement on the matters diametrically asserted. Perhaps, in that sense of argument, debate or controversy, it is true that there is dispute whenever there are opposing assertions. But it is patently not true that a bona fide dispute automatically arises whenever there are opposing assertions. For whether or not there is a bona fide dispute wholly depends upon the evidence (see *Chip Yew Brick Works Sdn. Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 1 CLJ 5 (Rep)*). “The debt must be disputed on some substantial grounds” (*Morgan Guranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 CLJ 260; [1991] 1 CLJ 317 (Rep); [1991] 1 MLJ 95, 97 per Hashim Yeop A Sani CJ*). The facts must indicate that there is a substantial dispute (*Re NimaTravel Sdn Bhd [1982] 2 MLJ 374, 376*). “... it is not sufficient... to say ‘we dispute the claim’. (The respondent) must bring forward a*

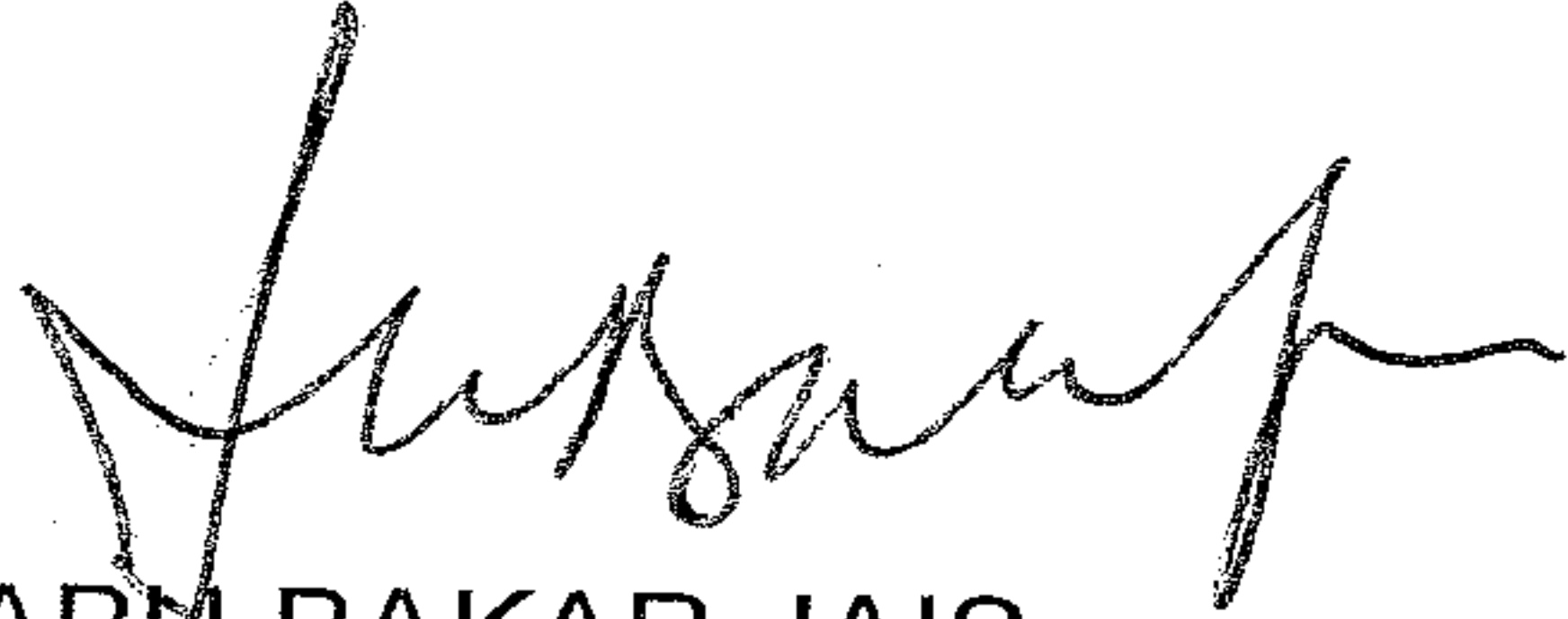
prima facie case which satisfies the court that there is something to be tried, either before the court itself, or in an action, or by some other proceeding” (*Re great Britain Mutual Life Assurance Society* [1980] 16 Ch D 246, 253 per Jessel MR). “Dispute means not just differences arising out of a party’s refusal to do something but controversy over contestable matters. Mere refusal to pay is not a dispute. See the cases of *Elf Petroleum SE Pte Ltd v Winelf Petroleum Sdn Bhd* [1984] 1 LNS 166; [1986] 1MLJ 177 and *KSM Insurance v Ong Ah Ba & Anor* [1984] 1 LNS 147; [1986] 1 MLJ 237, both decisions by George J, (as he then was)” (*Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mills Sdn Bhd* [1991] 3 CLJ 2400; [1991] 1 CLJ 362 (Rep), per Hashim Yeop A Sani CJ, and cited in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat* [1996] 1 CLJ 231, 236). “The dispute must be bona fide in both a subjective and objective sense. Thus it must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous and which the court should therefore ignore” (*Palmer’s Company Law* 23 edn. P. 1117; see also *Salak Park Development Sdn Bhd v Fajar Menyensing Sdn Bhd* [1994] 4 CLJ 580). To just say “we dispute the claim”, is most definitely not enough.” [Emphasis Added]

Taking note of the above case and because of the evidence that had been adduced by the Petitioner to the satisfaction of this court, the dispute raised by the Respondent has narrated and explained earlier, in the finding of this court is not a bona fide dispute on the debt. The dispute had not on the balance of probabilities be proven to be a bona fide dispute by the Respondent for the reasons explained by this court.

On the issue of the Agreement being fabricated too, this court is not convinced that the burden beyond reasonable doubt has been satisfied by the Respondent.

The petition is therefore allowed with costs of RM 3000 to the Petitioner.

Dated 5 March 2014



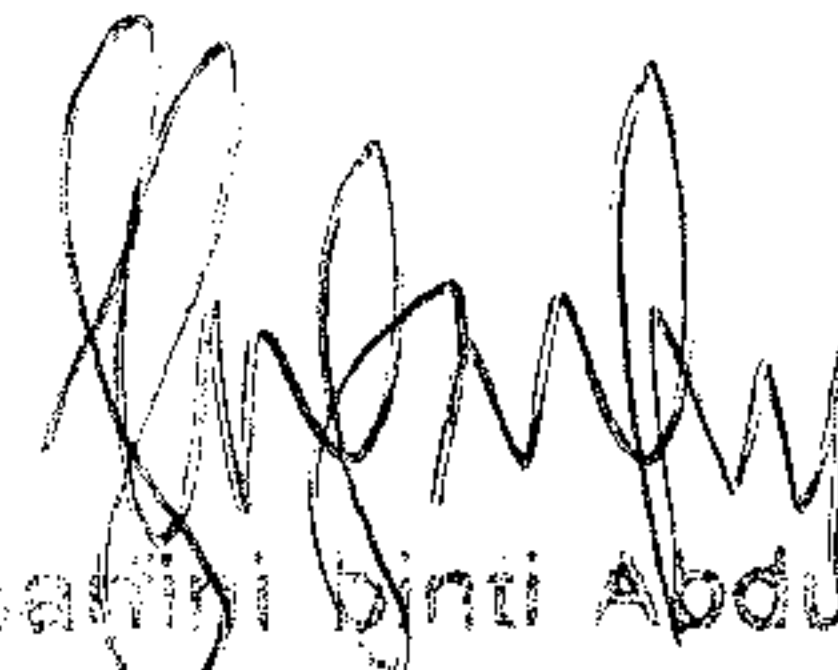
ABU BAKAR JAIS
Judicial Commissioner
High Court NCC6
Kuala Lumpur

Parties

Pamela Ephraim for Petitioner
Messrs Ephraim & Associates

Vincent Lim for Respondent
Messrs Dennis, Nik & Wong

SALINAN DIAKUI SAH



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