

## **THE NEW COMPANIES ACT 2016 and the COMPANIES WINDING UP PETITIONS AN INTRODUCTION**

### **WHAT ARE THE SALIENT AMENDMENTS TO COMPANIES WINDING UP LAWS AND HOW WILL IT AFFECT THE SECURED AND UNSECURED CREDITORS**

- 1 What is the 'threshold' (the minimum amount of debt) to issue the Statutory Notice (formerly the 218 Notice)
  - 1.1 RM10,000.00 in a Gazette Notification issued informed by the Minister who is in charge of the Companies gazetted by the Government.
- 2 If I commence a Companies Winding Up petition:
  - 2.1 Do I need a Judgment?
  - 2.2 It is not mandatory to obtain a judgment to commence a Companies Winding Up Petition.
- 3 Is the Solvency Test applicable to Companies Winding Up proceedings?
  - 3.1 No.
  - 3.2 Only for capital reduction, redemption of redeemable preference shares, financial assistance or buyback shares.
  - 3.3 In CA16 the old s218 is split into new sections, namely, sections 465 and 466 with very similar provisions.
  - 3.4 In CA65 the confusion caused in the lodgment of the Winding Up Order is now clarified.
- 4 A New Solvency Test and the Personal Liabilities of Directors: financial assistance and shares buyback.
  - 4.1 the Companies Act 2016 provides a solvency test when the prior to the performance of the following corporate exercise has to be performed: capital reduction, redemption of redeemable preference shares, financial assistance or buyback shares.
  - 4.2 Pursuant to the Companies Act 2016, in a situation of capital reduction or redemption of preference shares, all directors shall sign a solvency statement.

- 4.3 In a the transaction relating to share buyback or financial assistance, the majority of the directors have to sign a solvency statement.
  - 4.4 A director is required to inquire into the affairs of the companies, prospects, liabilities and contingent liabilities before making the solvency statement, failing which the director is liable to imprisonment for a term not exceeding five (5) years or to a fine not exceeding five hundred thousand ringgit (RM500,000.00) or both.
- 5 When is the commencement of Winding Up?
- 5.1 At the date of the winding up order.
  - 5.2 You have to be careful and compare the old CA65 in the old CA65 commencement of winding up was upon the presentation, now it is upon the winding up order.
  - 5.3 However the sections which will be affected most will be the old sections against disposition of properties and distress.
  - 5.4 However in the new Companies Act 2016 the new sections have been changed to use the words "upon the presentation of Companies Winding Up Petition.
- 6 Any Priority with respect to Costs incurred by the Petitioning Creditors?
- 6.1 Under the old CA65 the petitioning creditor rank together with ALL other creditors and does not provide any priorities, the pari passu principle.
  - 6.2 Unlike the liquidator in CA65 who could take his liquidation costs first.

Payment of Preliminary Costs by Petitioner

- 7 CA 16 provides that the Petitioner who at their own costs, conduct all proceedings in the winding up until a liquidator has been appointed. The Liquidator shall reimburse the Petitioner out of assets of the company the taxed costs incurred by the petitioner in any such proceedings unless the Court orders otherwise.
- 7.1 Where the company has no assets or insufficient assets, and in the opinion of the Minister any fraud has been committed, the Minister may allow an amount not exceeding three thousand ringgit.
- 8 The position in the Disposition of Properties and Transfer of Shares of Company after winding up petition has been presented, under the new s 472 (old s 223)
- 8.1 the position in s223 of the CA65 remains unchanged despite it is now known as s472 of CA16, however, there is an exception in which an exempt disposition of the property of the company is allowed without the court order.

- 8.2 Exempt disposition  
CA16 provided that:  
However we must note that  
"exempt disposition" means a disposition made by a liquidator, or by an interim liquidator of the company in exercise of the power conferred on him under Part I of Twelfth Schedule or the rules that appointed him or an order of the Court are exempted" .
- 8.3 The old section CA65 which covers distress is also incorporated into this one section.

## **BONUS CHAPTERS**

### Getting Out of the Get Out Clause

- 9 In this matter we invited the court of appeal to interpret the word "and" see NZ New Image [2016] 9 CLI 474
- 9.1 When our client's New Zealander partner ("NZ") wanted to sell their shares by invoking the "get out clause" in the joint venture company ("JV Company") they explored many options with respect to that request.
- 9.2 One day without any warnings NZ filed an action against our client. To our client it was wrong as the parties have yet to complete the explorations of the various options to resolve our issues.
- 9.3 Our client submitted that the sale was prohibited by s 223 of the Companies Act 1965 and leave (permission) from the Companies Winding Up Court was needed ...
- 9.4 NZ did not agree and felt that they were able to proceed.
- 9.5 In the High Court, a very lengthy argument ensued and the last argument we advanced was that of whether the word 'and' in s 223 of the Companies Act 1965 was to be read conjunctively or disjunctively.
- 9.6 Section 223 Avoidance of dispositions of property, etc.  
  
"Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void ...."
- 9.7 At the High Court stage, 4 High Court decisions were with NZ, one Court of Appeal decision, one High Court decision and one English High Court decision were on our side on this point.

- 9.8 At the Court of Appeal the learned Judges agreed with the High Court and held that
1. Leave pursuant to s 223 should be applied from the Companies Winding Up Court;
  2. The word 'and' should be read disjunctively and NOT conjunctively;
  3. Section 18 of the Specific Relief Act 1950 requires NZ to pray for damages without which the court could not grant damages; and
  4. The omnibus clause "... such other reliefs as the court thinks fit. ..." may not be invoked to order damages which were not prayed for.

#### The Federal Court

- 10 Dissatisfied with the decision of the Court of Appeal, NZ applied for leave to appeal to the Federal Court. 8 grounds were put forward which their appeal is novel (new points not decided previously by the Federal Court) and that a decision of the Federal Court will be of public interest.
- 10.1 We succeed to challenge 7 out of 8 and the Federal Court allowed one Question to be posed.
- 10.2 "Whether by virtue of Section 18(2), (3) and (5) of the Specific Relief Act 1950 the High Court has the inherent power to grant an order for assessment of damages in an action for specific performance involving transfer of shares between the shareholders of a company which went into liquidation after the commencement of the action?"
- 10.3 When the Chairman of the Federal Court 5-member panel posed the Question: "... tell us why did your client not pay for the shares as per the get out clause?"
- "... what is the position in India with respect to Section 18 of the Specific Relief Act 1950 ..."
- 10.4 We calmly told them as follows:
- 10.4.1 That the High Court did not find me committing any breaches of the agreement;
- 10.4.2 That it was decided by the Privy Council in 1923 upon hearing an appeal from India that first the court must find NZ entitling to specific performance then only, if they have also asked for damages, the court could consider granting damages.

10.4.3 Since in this case NZ was not able to sell their shares to our client, without a court order from the companies winding up court, it is not legally right for a court to order our client to pay something for nothing ...

## VALUATION OF SHARES

11 LGB ENGINEERING SDN BHD V SAIFUL RAIS SHAIKS SALIM [2015] 9 MLJ 349  
11.1 We act for the first and second defendants, court awarded damages RM74 million, we were instructed to appeal against the said assessment of damages.

Saved Our Clients a Huge Sum of Rm74 Million

- 12 Our Clients sold 50% shares in company A
- 12.1 A owns 45% in Company B (the other 55% is owned by Kumpulan Perangsang Selangor Bhd (KPSB), a State Owned Investment Company)
- 12.2 B had a market value of RM441 million
- 12.3 KPSB then called for rights issues Clients sold 50% shares in company A
- 12.4 At the end when the 50% shares were transferred to the plaintiffs
- 12.5 company A's shareholding in B was reduced to 9%
- 12.6 Damages was ordered by the court to be paid due to the delay:  
 $441m \times (45\% - 9\%) \times 50\% = 74m$
- 13 The Court of Appeal and the Federal Court agreed with us.

Thank you.

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