

A Exxobrite Sdn Bhd v Value Plus Industries Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING UP)
 PETITION NO WA-28NCC-127-02 OF 2022
B NADZARIN WOK NORDIN JC
 29 JULY 2022

C *Companies and Corporations — Winding up — Opposition to petition*
 — *Petitioner filed winding up petition after respondent failed to pay outstanding*
 sum demanded in statutory notice of demand — Whether statutory notice of
 demand was invalid — Whether petition ought to be set aside — Companies Act
 2016 s 411(4)(c)

D By way of a winding up petition ('the petition') the petitioner had applied to
 wind up the respondent pursuant to ss 464, 465(1)(e), (1)(h), 466(1)(a) and
 (1)(c) of the Companies Act 2016 ('the CA 2016'). The petition averred, inter
E alia, that: (a) the respondent owed the petitioner the sum of RM73,164 being
 the outstanding sum due; (b) a statutory notice of demand dated 25 January
 2022 ('SND') was issued to the respondent demanding the outstanding sum
 within 21 days from the date of the service of the SND; (c) 21 days had since
 elapsed after service of the SND, and the respondent had failed, refused and/or
F neglected to pay the outstanding sum; (d) there was a notice of admission
 issued by the respondent's judicial manager ('JM') whereby the petitioner was
 listed as a creditor of the respondent; and (e) there was a judicial management
 order granted on 16 February 2021 ('JMO') at the Shah Alam High Court vide
 an originating summons ('OS 15') on the respondent and an extension of the
 JMO until 15 February 2022. There was also encl 34 which was the
G respondent's summons in chambers pursuant to O 18 r 19(1)(a), (b), (c) and
 (d) and/or O 57 r 1 and/or O 92 r 4 of the Rules of Court 2012 for, inter alia,
 the following orders: (i) the SND to be held as invalid; and (ii) the petition to
 be set aside. It was submitted by the respondent that the SND which was dated
 25 January 2022 was defective as it was a commencement of a legal process
H during the period of the JMO obtained in OS 15 and should not have been
 issued as it was contrary to or in breach of s 411(4)(c) of the CA 2016 as the
 JMO had only lapsed on 15 February 2022.

Held:

I (1) The term 'legal process' in s 411(4)(c) of the CA 2016 must include the
 SND in a scenario involving s 465(1)(e) when read with s 466(1)(a) of
 the CA 2016, as it was the SND which was the commencement of the
 legal process and which triggered the right to file and/or commence a
 winding up petition premised on a s 465(1)(e) read with s 466(1)(a) of

the CA 2016 ground. The moratorium period in s 411(4)(c) of the CA 2016 had been contravened, as the words used in s 411(4)(c) of the CA 2016 with particular reference to the term ‘legal process’ included the SND. The moratorium under s 411(4)(c) of the CA 2016 had by virtue of the issuance of the SND been subverted. Thus, the presumption of the respondent’s ‘inability’ to pay its debts’ due to the failure to respond and/or pay off the outstanding sum within the 21 days period in the SND could not arise in such a situation where there was a JMO in place at that time. The SND was not a sine qua non for the petition to be filed as s 466(1)(a) and (c) of the CA 2016 were mutually exclusive. This was not a plain and obvious case for the petition to be struck out and that the requirements as per *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 that the claim was on the face of it obviously unsustainable for the petition to be struck out had not been met and/or satisfied (see paras 17–21 & 25–26).

- (2) The respondent was unable to meet its existing debts and the respondent had not averred that it was solvent and/or was able to pay its debts. There had been, inter alia, various allegations being levelled by one faction of directors and shareholders against the other concerning misappropriation of funds and/or dissipation of assets, as well as fictional and transactional irregularities in the respondent’s account, and a fall out between the separate factions in the respondent. These allegations and counter allegations in toto were serious allegations of misappropriation of funds and/or dissipation of assets which would undoubtedly put the assets of the respondent in jeopardy and ultimately affected the interest of the respondent’s creditors. The said allegations and counter allegations had surely evidenced and caused a distrust in the running of the respondent which led to an irretrievable breakdown in their relationship. There was indeed overwhelming evidence of the respondent’s commercial insolvency and that the respondent was now paralysed and in a state of defunct. It was just and equitable that the respondent be wound up. Therefore, the prayer in encl 34 for the SND to be held invalid was allowed but the prayer for the petition to be dismissed was dismissed (see paras 30–32 & 34–36).

[Bahasa Malaysia summary]

Melalui satu petisyen penggulangan (‘petisyen’) pempetisyen telah memohon untuk mengguling responden menurut ss 464, 465(1)(e), (1)(h), 466(1)(a) dan (1)(c) Akta Syarikat 2016 (‘AS 2016’). Petisyen itu menegaskan antara lain bahawa: (a) responden berhutang kepada pempetisyen sejumlah RM73,164 sebagai jumlah tertunggak yang perlu dibayar; (b) notis tuntutan statutori bertarikh 25 Januari 2022 (‘SND’) telah dikeluarkan kepada responden yang menuntut jumlah tertunggak dalam tempoh 21 hari dari tarikh penyampaian SND; (c) 21 hari telah berlalu selepas penyampaian SND, dan responden telah

- A gagal, enggan dan/atau mengabaikan untuk membayar jumlah tertunggak;
(d) terdapat notis penerimaan yang dikeluarkan oleh pengurus kehakiman responden ('JM') di mana pempetisyen telah disenaraikan sebagai pemiutang responden; dan (e) terdapat perintah pengurusan kehakiman yang diberikan pada 16 Februari 2021 ('JMO') di Mahkamah Tinggi Shah Alam melalui satu saman pemula ('OS 15') ke atas responden dan lanjutan JMO sehingga 15 Februari 2022. Terdapat juga lampiran 34 iaitu saman dalam kamar responden menurut A 18 k 19(1)(a), (b), (c) dan (d) dan/atau A 57 k 1 dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah 2012 untuk, antara lain, perintah berikut: (i) SND diputuskan tidak sah; dan (ii) petisyen adalah diketepikan. Ia telah diujahkan oleh responden bahawa SND yang bertarikh 25 Januari 2022 adalah cacat kerana ia adalah permulaan proses undang-undang dalam tempoh JMO yang diperolehi dalam OS 15 dan tidak sepatutnya dikeluarkan kerana ia bertentangan atau melanggar daripada s 411(4)(c) AS 2016 kerana JMO hanya luput pada 15 Februari 2022.

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Diputuskan:

- (1) Istilah 'proses undang-undang' dalam s 411(4)(c) AS 2016 mesti memasukkan SND dalam senario yang melibatkan s 465(1)(e) apabila dibaca bersama s 466(1)(a) AS 2016, kerana SND yang merupakan permulaan proses undang-undang dan yang mencetuskan hak untuk memfailkan dan/atau memulakan petisyen penggulungan berdasarkan alasan s 465(1)(e) dibaca bersama s 466(1)(a) AS 2016. Tempoh moratorium dalam s 411(4)(c) AS 2016 telah dilanggar, kerana perkataan yang digunakan dalam s 411(4)(c) AS 2016 dengan merujuk khusus kepada istilah 'proses undang-undang' termasuk SND. Moratorium di bawah s 411(4)(c) AS 2016 telah disebabkan oleh pengeluaran SND telah ditubangkan. Oleh itu, anggapan 'ketidakupayaan' responden untuk membayar hutangnya kerana kegagalan untuk menjawab dan/atau membayar jumlah tertunggak dalam tempoh 21 hari dalam SND tidak boleh timbul dalam keadaan sedemikian di mana terdapat JMO dalam tempat pada masa itu. SND bukanlah sine qua non untuk petisyen difailkan kerana ss 466(1)(a) dan (c) AS 2016 adalah eksklusif antara satu sama lain. Ini bukanlah satu kes yang jelas dan nyata untuk petisyen itu dibatalkan dan bahawa keperluan seperti di *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 bahawa tuntutan itu pada hakikatnya jelas tidak dapat dipertahankan untuk petisyen untuk dibatalkan tidak dipenuhi dan/atau memuaskan (lihat perenggan 17–21 & 25–26).
- (2) Responden tidak dapat membayar hutang sedia ada dan responden tidak menegaskan bahawa ia adalah solven dan/atau mampu membayar hutangnya. Terdapat, antara lain, pelbagai dakwaan yang dilemparkan oleh pihak pengarah dan pemegang saham terhadap masing-masing mengenai penyelewengan dana dan/atau kehilangan aset, serta

penyelewengan fiksyen dan transaksi dalam akaun responden, dan perpecahan antara pihak yang berasingan dalam responden. Dakwaan dan dakwaan balas ini adalah dakwaan serius penyelewengan dana dan/atau kehilangan aset yang sudah pasti akan meletakkan aset responden dalam bahaya dan akhirnya menjejaskan kepentingan pemiutang responden. Dakwaan dan dakwaan balas tersebut pastinya telah membuktikan dan menyebabkan ketidakpercayaan terhadap pengendalian responden yang membawa kepada keretakan hubungan mereka yang tidak dapat dipulihkan. Sememangnya terdapat banyak keterangan tentang ketidakmampuan komersil responden dan bahawa responden kini lumpuh dan dalam keadaan tidak berfungsi. Adalah adil dan saksama bahawa responden digulung. Oleh itu, permohonan dalam lampiran 34 agar SND diputuskan tidak sah dibenarkan tetapi permohonan untuk petisyen ditolak telah ditolak (lihat perenggan 30–32 & 34–36).]

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Cases referred to

Arubaito Mukaya (M) Sdn Bhd v Wee Kian Hong & Anor [2017] MLJU 2350, HC (distd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

E

Carillion plc (in liquidation) Financial Conduct Authority v Carillion plc (in liquidation), Re [2021] EWHC 2871 (Ch), Ch D (folld)

Fulton and another v AIB Group (UK) plc [2014] NICH 8, Ch D (refd)

Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34, CA (folld)

F

Islamic Financial Services Board v Puan Marlin Fairol bt Mohd Faroque and Anor [2010] MLJU 653, HC (distd)

Khairuddin Abu Hassan v Datuk Seri Hj Ahmad Hamzah & Ors and another appeals [2019] 9 CLJ 315, FC (refd)

G

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187, CA (refd)

Tee Ah Kiat & Ors v Goldpage Assets Sdn Bhd [2021] MLJU 802, HC (refd)

Legislation referred to

Companies Act 2016 ss 410, 411(4)(c), 464, 465(1)(e), (1)(h), 466(1)(a), (1)(c)

H

Courts of Judicature Act 1964 s 3

Federal Constitution art 121(1)

Islamic Financial Services Board Act 2002 Schedule, Part 1

Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d), O 53, O 57 r 1, O 92 r 4

I

Audrey Tan (Audrey Tan Law Chambers) for the petitioner.

Joshua Kong (with Daljit Singh) (Daljit Singh Partnership) for the respondent.

A Nadzarin Wok Nordin JC:

INTRODUCTION

- B** [1] By way of the winding up petition dated 15 June 2022 ('petition') in encl 1, the petitioner has applied to this court to wind up the respondent pursuant to ss 464, 465(1)(e) and (h), 466(1)(a) and (c) of the Companies Act 2016.
- C** [2] The petition avers, inter alia, that:
- D** (a) the respondent owes the petitioner the sum of RM73,164 being the outstanding sum ('outstanding sum') due and arising from orders of industrial diesel between the period of 22 December 2020 and 10 February 2021;
- E** (b) goods ordered had been supplied to the respondent and the respondent had signed the relevant delivery orders, signifying acceptance of the goods ordered;
- (c) a statutory notice of demand dated 25 January 2022 ('SND') was issued to the respondent demanding the outstanding sum within 21 days from the date of the service of the SND;
- (d) 21 days have since elapsed after service of the SND, and the respondent has failed, refused and/or neglected to pay the outstanding sum;
- F** (e) there is a notice of admission dated 24 November 2021 issued by the respondent's judicial manager ('JM') whereby the petitioner is listed as a creditor of the respondent;
- G** (f) there was a judicial management order granted on 16 February 2021 ('JMO') at the Shah Alam High Court vide Originating Summons BA-28JM-15-12 of 2020 ('OS 15') on the respondent and an extension of the JMO until 15 February 2022;
- H** (g) the dateline for the statement of proposal to be submitted to the creditors under the JMO was 31 December 2021 which has to date not been submitted;
- (h) the JMO has since lapsed on 15 February 2022;
- I** (i) the respondent is unable to meet its existing debt and that it is now defunct as there is mismanagement within the respondent and distrust between the two directors and shareholders; and
- (j) the assets of the respondent are in jeopardy as there are serious allegations of misappropriation of assets made by the directors against each other.

[3] There is also before this court encl 34 which is the respondent's summons in chambers dated 10 March 2022 (encl 34) pursuant to O 18 r 19(1)(a), (b), (c) and (d) and/or O 57 r 1 and/or O 92 r 4 of the Rules of Court 2012 for the following orders: A

- (a) the SND to be held as invalid; B
- (b) the petition to be set aside; and/or
- (c) the proceedings be transferred to the Shah Alam High Court.

[4] The grounds in support for encl 34 are, inter alia, that: C

- (a) the SND is in breach of s 411(4)(c) of the Companies Act 2016;
- (b) the petition is an abuse of court process as the petition was filed on a statutory claim which was defective;
- (c) the petition is an abuse of court process as it was filed for the purpose of affecting/frustrating/delaying the judicial management proceedings which are being heard at the Insolvency and Muamalat High Court in Shah Alam; D
- (d) the High Court in Shah Alam was not informed of the SND; E
- (e) the alleged debt in the petition is bona fide substantially disputed;
- (f) the alleged debt in the petition cannot be determined before OS 15 is completely disposed off; F
- (g) it is in the interest of justice that the proceedings herein be transferred to the Shah Alam High Court as:
 - (i) OS 15 is being heard at Insolvency and Muamalat High Court in Shah Alam; G
 - (ii) the Insolvency and Muamalat High Court in Shah Alam has been managing the affairs of the respondent during the entire JMO period for a year since 16 February 2021 until 15 February 2022;
 - (iii) there are multiple live issues which need to be disposed off in OS 15; H
 - (iv) there will be costs and the judiciary's time saved;
 - (v) there are eight other creditors who have intervened in OS 15 to protect their rights; and I
 - (vi) the petitioner will not be prejudiced if the matter is heard at the Insolvency and Muamalat High Court in Shah Alam.
- (h) to preserve the status quo and proceedings in OS 15.

A [5] Whereas in encl 10 in the proceedings, there is an application via a form of summons dated 16 February 2022 (encl 10) for, inter alia, that an interim liquidator be appointed over the respondent.

B [6] All of the above enclosures have been fixed to be heard on the same with encl 10 being mutually agreed by the learned respective counsels to now be academic in light of the petition and encl 34 being taken and heard simultaneously.

C RESPONDENT’S AFFIDAVIT IN OPPOSITION TO THE PETITION

[7] The respondent had filed an affidavit in opposition in encl 74 with regards to the petition where it was averred amongst others:

D (a) a cross-examination conducted on a Forensic Examination Report was done in OS 15 on 21 April 2022 wherein various important matters were revealed including false transactions;

(b) the JMO was obtained via fraudulent transactions;

E (c) as a result of the above, the adjudication of the proof of debts in the JM is questionable;

(d) the JM therefore has to be questioned with regards to the findings in the said Forensic Examination Report and why he had lied in OS 15 and given a false picture to the court;

F (e) there are still live proceedings in OS 15;

(f) thus the petition is being challenged herein based on bona fide issues; and

(g) the JM has conspired with the petitioner to wind up the respondent.

G FINDINGS OF THIS COURT

H [8] I will firstly deal with encl 34 where it was submitted by the respondent that the SND which was dated 25 January 2022 was defective as it was a commencement of a legal process during the period of the judicial management order obtained in OS 15 and should not have been issued as it was contrary to or in breach of s 411(4)(c) of the Companies Act 2016 as the JMO had only lapsed on 15 February 2022. The said s 411(4)(c) states that:

I (4) During the period for which a judicial management order is in force:

(a) no resolution shall be passed or order made for the winding up of the company;

(b) no receiver or receiver and manager of the kind referred to in section 374 shall be appointed;

- (c) no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with the consent of the judicial manager or with the leave of the Court and, if the Court grants leave, subject to such terms as the Court may impose; A
- (d) no steps shall be taken to enforce security over the company's property or to repossess any goods in the company's possession under any hire purchase agreement, chattels leasing agreement or retention of title agreement, except with consent of the judicial manager or leave of the Court and subject to such terms as the Court may impose; and B
- (e) no steps shall be taken to transfer any share of the company or to alter the status of any member of the company except with the leave of the Court and, if the Court grants leave, subject to such terms as the Court may impose. C

[9] In coming to my judgment herein, this court has accordingly examined the SND in exh A3 of encl 1 and finds that the heading therein is as follows: D

Notice Pursuant to Section 465(1)(e) read with section 466(1)(a) of the Companies Act 2016 E

[10] It is therefore clear that the SND was thus a statutory notice issued pursuant to s 465(1)(e) read with s 466(1)(a) of the Companies Act 2016 which is also reflected in paras 10, 11 and 17 of the petition which refers expressly to the SND, the non-payment by the respondent thereto and the statutory period has passed and the failure to pay is a presumption that the respondent is commercially insolvent respectively. F

[11] Section 465(1)(e) read with s 466(1)(a) of the Companies Act 2016 respectively reads: G

Section 465(1)(e):

(1) The Court may order the winding up if:

...

(e) the company is unable to pay its debts; H

Section 466(1)(a)

(1) A company shall be deemed to be unable to pay its debts if:

(a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor; I

A [12] The petitioner argues that the SND is not the ‘commencement of a legal process’ and therefore does not contravene s 410 of the Companies Act 2016 and refers to the cases of *Arubaito Mukaya (M) Sdn Bhd v Wee Kian Hong & Anor* [2017] MLJU 2350 and *Islamic Financial Services Board v Puan Marlin Fairol bt Mohd Faroque and Anor* [2010] MLJU 653 where the courts therein
B had held legal process meant a summons, writ, warrant, mandate or other process issuing from a court.

C [13] After reading *Arubaito Mukaya (M) Sdn Bhd*, I find that the said case was in relation to an application for an extension of time to apply to set aside a judgment in default (‘JID’) which was alleged to be an irregular judgment and whereby the plaintiff therein had relied on the deed of covenant entered therein to contend that cl 17 also applies to the service of the JID whereby cl 17 of the deed of covenant, allowed the process of the court, which includes the writ and
D statement of claim, to be served on the defendants by registered post.

E [14] Whereas *Islamic Financial Services Board* was a case which concerned a judicial review application under O 53 of the Rules of Court, whereby the Islamic Financial Services Board (‘IFSB’), the applicant, applied for an order of certiorari to quash the entire award of the Industrial Court, and for an order to stay all proceedings to enforce this award until the final disposal of the substantive application, and where the court had to deal with the question whether proceedings before the Industrial Court under the Industrial Relations Act can be deemed to be either a ‘suit’ or ‘other legal process’ within the meaning of Part 1 of the Schedule to the Islamic Financial Services Board Act 2002.
F

G [15] I have in this regard also taken into account the case of *Fulton and another v AIB Group (UK) plc* [2014] NICH 8 which is a UK case concerning administration, which is the equivalent of judicial management in our jurisdiction, which held that a statutory demand was a legal process where the court therein stated:

H [6] For the avoidance of doubt, I consider that the service of a statutory demand is a legal process and is not akin to the service of a notice under a contract making time of the essence or the acceptance of a repudiatory breach of contract by a company in administration: see *Re Olympia and York Canary Wharf Limited* [1993] BCLC 453; [1993] BCC 154. In that case Millet J said:

I Process in each of the Bankruptcy Acts means ‘a process which requires the assistance of the court and does not extend to the service of a contractual notice, whether or not the service of such notice is a pre-condition to the beginning of legal proceedings’.

[7] In *Re Frankice (Golders Green) Limited (In Administration)* [2010] EWHC 1229 (Ch); [2010] Bus LR 1608 Norris J considered the meaning of ‘legal process’ in the

context of whether steps which had been taken by the Gambling Commission in relation to the business of three companies fell within the scope of the moratorium imposed by para 43(6) of Schedule B1 of the Insolvency Act 1986. He said at para [39]:

I think the word process suggests something with a defined beginning an ascertainable final outcome and which, in the interim, is governed by a recognisable procedure. I think *the word legal indicates that that process must in some sense invoke the compulsive power of the law, and it suggests that the procedure must be quasi-legal in nature. One indicator of that might be that the process results in an appeal rather than, for example, reconsideration by means of judicial review* (emphasis mine), but I accept the submission of Mr Bompas that an appeal, of itself, does not determine whether a process is a legal or administrative one.

Further, at para [47] he goes on to say:

In the instant case, I consider that the nature of the decision which the regulatory panel is called upon to make and the circumstances in which and the procedure according to which the decision is made, fall within the description of legal process. It is difficult to articulate why I have formed this impression. There is undoubtedly a process. It is governed by a procedure. The whole process has about it the stamp of a case being presented by the commission, being answered by the licensee and being decided upon according to legal advice and for declared reasons by an independent and impartial regulatory panel from whose deliberations employees of the commission are excluded.

[16] With respect, after reading all of the above said cases in its entirety, I hold that both *Arubaito Mukaya (M) Sdn Bhd* and *Islamic Financial Services Board* are inapplicable before me as the term ‘legal process’ were decided in the said cases based on the context of the matters which had been brought to the court for the courts determination with regards to the facts therein whereby the common thread to be found was an actual legal process being filed and to be determined in the said courts, being the setting aside of a judgment in default and a judicial review application respectively.

[17] Here before this court, the main issue as regards the term ‘legal process’ centers upon whether the SND is a legal process which comes within the context of s 411(4)(c), read with s 465(1)(e) and with s 466(1)(a) of the Companies Act 2016. After due consideration of the same, I hold that the term ‘legal process’ in s 411(4)(c) of the Companies Act 2016 must include the SND in a scenario involving s 465(1)(e) when read with s 466(1)(a) of the Companies Act 2016, as it is the SND which is the commencement of the legal process and which triggers the right to file and/or commence a winding up petition premised on a s 465(1)(e) read with s 466(1)(a) of the Companies Act 2016 ground. In other words, using the words in *Fulton and another* it is the ‘process ... (which) invoke(s) the compulsive power of the law, and it suggests that the procedure must be quasi-legal in nature’.

- A [18] I must further add that the words used by Parliament in the said
s 411(4)(c) was drafted wide enough to cover the terms ‘other proceedings’,
‘execution’ and ‘or other legal process’ which would indicate, as a matter of
construction, that Parliament would have intended that the moratorium under
the said section be applicable over not only legal proceedings in the normal
B sense of the word ie applications, proceedings or matters in court including
summons, writ, warrant, mandate or other process issuing from a court but also
over a wider spectrum of ‘legal processes’ which are not only court proceedings
but also the initiation of legal proceedings as well as modes of execution.
- C [19] In the circumstances, I do hold that the moratorium period in
s 411(4)(c) of the Companies Act 2016 has been contravened, as in my view,
the words used in s 411(4)(c) vis a vis ‘no other proceedings and no execution
or other legal process shall be commenced or continued and no distress may be
D levied against the company or its property except with the consent of the
judicial manager or with the leave of the court and, if the court grants leave,
subject to such terms as the court may impose’ with particular reference to the
term ‘legal process’ includes the SND for the reasons mentioned in the above
paragraph.
- E [20] This court therefore agrees with the respondent’s counsel that the
moratorium under s 411(4)(c) of the Companies Act 2016 has by virtue of the
issuance of the SND been subverted. I hold that this could not be the intention
of Parliament when the said s 411(4)(c) was enacted as the said section under
F the judicial management provisions must surely have been intended by
Parliament to be for the underlying general purpose of the corporate rescue
mechanism being the survival of the company or the rehabilitation of the
company; and that the SND would in such a situation undoubtedly put
pressure on the respondent to make payment to the petitioner herein and
G consequently obtain an advantage over other creditors ie in other words the
petitioner herein would be stealing a march on the other unsecured creditors by
its act of issuing the SND during such a moratorium period, which would not
fit in with the general procedure and/or purpose under the judicial
management approach.
- H [21] Thus, the presumption of the respondent’s ‘inability’ to pay its debts’
due to the failure to respond and/or pay off the outstanding sum within the
21 days period in the SND cannot arise in such a situation where there is a
JMO in place at that time. I therefore agree with and respectfully adopt the
reasoning in the UK case of *Re Carillion plc (in liquidation) Financial Conduct*
I *Authority v Carillion plc (in liquidation)* [2021] EWHC 2871 (Ch) where it
was held:

65. I have to say that, however the provisions came to be drafted, I find it difficult
to see how the word ‘proceeding’ in s 130(2) can have exactly the same meaning as

the phrase 'legal process (including legal proceedings, execution, distress and diligence)' in para 43(6). For a start, 'legal proceedings' seem to be a subset of 'legal process' which must be a wider term, so as to include at least 'execution' and 'distress' as well. As the purpose of para 43(6) is wider than that of s 130(2) (see Chapman), in particular when the administrators are trying to save the company as a going concern or preserve its business in readiness for a sale, it is important to be able to prevent any interference or prejudicial action that may undermine that purpose and so the net should be drawn as widely as possible. Parliament's intention would have been to enable the court to control anything that might detrimentally affect the administrators fulfilling the purpose of the administration.

A

B

C

[22] However, in deciding encl 34, I have also considered:

(a) whether the proceedings ought to be transferred to the Shah Alam High Court and hold that the High Courts of Malaya are of equal standing as per art 121(1) of the Federal Constitution and s 3 of the Courts of Judicature Act 1964. I also hold that the High Courts of Malaya have like jurisdiction to hear the petition, see our Federal Court in *Khairuddin Abu Hassan v Datuk Seri Hj Ahmad Hamzah & Ors and another appeals* [2019] 9 CLJ 315 which dealt with the issue of the High Courts being of coordinate jurisdiction;

D

E

(b) the respondent's contention that there are live proceedings in the JM matter in OS 15 at the Shah Alam High Court and hold that as the JMO has expired on 15 February 2020 there are no longer any live proceedings therein and that whatever ongoing applications in OS 15 as seen in exh HPL13 of encl 47, exh HPL14 of encl 48 and that referred to in para 22.2 of Hoe Poh Lin's affidavit in encl 47 respectively do not involve the respondent per se; and

F

(c) the respondent's contention that the petition ought to be struck off, wherein this court however notes that the petition was also based on s 466(1)(c) of the Companies Act 2016 which provides:

G

(1) A company shall be deemed to be unable to pay its debts if:

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

H

[23] It is expressly stated in para 17(b) of the petition which refers and avers that:

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the commercial insolvency and inability of the respondent to pay its debts is beyond disputed:

(i) when the JMO was granted;

A (ii) throughout the judicial management period, no payment, resolution and/or compromise of the respondent's debt was made as there was no tabling and approval of the SOP.

B And in para 17(c) in the petition wherein it was stated that:
the SOP (Appendix 2) reflects the respondent's current liabilities as RM19,472,071 and the net current assets as RM8,709,138.

C [24] It was thus further contended by the petitioner that the respondent was unable to meet its existing debts and/or potential claims against the respondent and that it was now defunct.

D [25] I hold that the SND is not in the circumstances herein a *sine qua non* for the petition to be filed as s 466(1)(a) and 466(1)(c) are mutually exclusive as per the Court of Appeal decision in *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 which was also applied and followed by this court in *Tee Ah Kiat & Ors v Goldpage Assets Sdn Bhd* [2021] MLJU 802 where this court held:

E there is no necessity for a statutory demand under s 466(1)(a) of the CA 2016 to be issued by the petitioner before the petition maybe filed.

F [26] I therefore hold that this is not a plain and obvious case for the petition to be struck out and that the requirements as per *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 that the claim is on the face of it obviously unsustainable for the petition to be struck out had not been met and/or satisfied.

PETITION

G [27] In deciding the petition, this court has therefore examined and finds that there is an admitted debt by virtue of notice of admission dated 24 November 2021 issued by the judicial manager of the respondent as seen in Annex 5 of the petition and that the petitioner is listed as a creditor in the
H judicial manager's statement of proposal (SOP) in Annex 6 of the petition.

I [28] I have also taken into account the presence of two other supporting creditors in these proceedings, namely Paramount Eco Wood Resources Sdn Bhd and Excellence Wood Products Sdn Bhd and that in OS 15, the SOP shows a total of 140 creditors.

[29] I have also viewed Appendix 2 of the petition which is the SOP and which reflects the respondent's current liabilities as RM19,472,071 and the net current assets as RM8,709,138 which is evidence of the respondent's

commercial insolvency. In this respect I rely on *Gulf Business Construction (M) Sdn Bhd v Israaq Holding Sdn Bhd* [2010] 5 MLJ 34 which has held that the test for commercial insolvency does not depend on the presence of its realisable assets but whether the company is able to meet its current debts.

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[30] From the documentary evidence before this court in particular taking into account the contingent and prospective liabilities of the company, I therefore find that the respondent is unable to meet its existing debts.

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[31] It is also my finding after examining the respondent's affidavit in opposition, that the respondent has not averred that it is solvent and/or is able to pay its debts.

C

[32] I also find that there has been, inter alia, various allegations being levelled by one faction of directors and shareholders against the other concerning misappropriation of funds and /or dissipation of assets, as well as fictional and transactional irregularities in the respondent's account, and a fall out between the separate factions in the respondent consisting of Hoe Poh Lin, who is a director and shareholder of 35% shareholding, and Tan Xin Jue, who is a shareholder of 15% shareholding, who are mother and son and Wong Cheng Houn another director and shareholder of 50% shareholding, numerous police reports being lodged against each other as evidenced in various affidavits filed in OS 15 as shown in encls 15, 29, 11, 42 and 30 respectively.

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[33] In fact, the evidence before this court even runs into allegations of physical and verbal assaults, see encls 28 and 42, as well as forgery of signatures in encl 28, parties therein being prevented from entering the premises of the respondent as seen in encl 42, exclusion from management as per encls 28 and 42 and even disagreement as to the signing of cheques to name but a few instances of the disarray existing within the respondent.

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[34] These allegations and counter allegations in toto are in my view serious allegations of misappropriation of funds and/or dissipation of assets which would undoubtedly put the assets of the respondent company in jeopardy and ultimately affects the interest of the respondent's creditors. The said allegations and counter allegations has surely evidenced and caused a distrust in the running of the respondent which I hold leads to an irretrievable breakdown in their relationship.

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[35] I do in the circumstances, hereby find that there is indeed overwhelming evidence of the respondent's commercial insolvency and that the respondent is now paralysed and in a state of defunct. I therefore hold that it is just and equitable that the respondent be wound up.

A [36] Based on my grounds above, I am thus allowing prayers 1 in encl 34 for the SND to be held as invalid on the sole ground that the issuance of the SND during the JMO, which SND in itself is the legal process and the precursor of the petition herein, was done without the consent of the judicial manager or leave of the court and is therefore in clear violation and/or breach of s 411(4)(c) of the Companies Act 2016 but I am dismissing prayer 2 for the petition to be dismissed.

C [37] Based on my aforesaid findings, I therefore grant order in terms of para 22(1), (2), (3) and (4) costs of RM10,000 of the petition in encl 1 herein.

Order accordingly.

Reported by Ahmad Ismail Illman Mohd Razali

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