

MAYBANK ISLAMIC BHD v KHEE SAN FOOD INDUSTRIES SDN BHD
(KHEE SAN BHD, INTERVENER)

CaseAnalysis
| [2022] MLJU 1239

**Maybank Islamic Bhd v Khee San Food Industries Sdn Bhd (Khee San Bhd,
intervener) [2022] MLJU 1239**

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

NADZARIN WOK NORDIN J

ORIGINATING SUMMONS NO WA-28JM-21-11 OF 2021

10 June 2022

Ng Hooi Huang (with Lim Jia Wing) (Shook Lin Bok & Co) for the applicant Maybank IslamicBhd and interveners OCBC Bank (Malaysia) Bhd dan OCBC Al-Amin Bank Bhd.

Wong Rhen Yen (with S Muhillan, Lewis Lew Wei Hung and Krishna Kumar) (Krish Maniam & Co) for the respondent, Khee San Food Industries Sdn Bhdand intervener Khee San Bhd for encl 47.

Saritha Devi (with Long Mohd Noor Adman) (Zaid Ibrahim & Co) for the interim manager of the respondent.

Valerie Yeo (with Koh San Tee) (Benjamin Dawson) for the interveners, HSBC Bank MalaysiaBhd, United Overseas (Malaysia) Bhd and Alliance BankMalaysia Bhd.

Kirubakaran (with Daljit Singh and Joshua Kong) (Daljit Partnership) for Tunai ImpianEnterprise Sdn Bhd (secured creditors).

Claudia Cheah (with Karen Tan) (Skrine) for the intervener Bank of China (Malaysia) Bhd).

Nadzarin Wok Nordin J:

GROUND OF JUDGMENT

(Enclosure 47)

[1]The Proposed Intervener, Khee San Bhd (KSB) has by way of enclosure 47 (Application) applied to this Court to intervene in the proceedings herein on the grounds that KSB is a creditor of the Respondent in the amount of RM68,934,995 as inter company owings (Amounts Owings) and that if KSB is not allowed to intervene, the rights and interest of KSB will be prejudiced.

[2]Maybank Islamic Berhad (MIB) had opposed the said Application on the following

- (i) the Respondent had defaulted in payment under the facilities granted by MIB to the Respondent where KSB stood as guarantor as well as to the other financing facilities granted by the other financiers namely HSBC, Standard Chartered Bank, Alliance Bank, OCBC Bank, OCBC AL Amin, UOB and Bank of China (Other Creditor Banks)
- (ii) the Respondent is owing MIB and the Other Creditor Banks in the sum of more than RM65 Million with interest and late payment charges continuing to accrue
- (iii) the Respondent and KSB have common directors and that they have been accused of committing breach of trust and breach of fiduciary duty by KSB and the Respondent

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- (iv) as a result of the above, the purported advances made by KSB to the Respondent must be fully investigated and cannot be accepted at face value
- (v) it was agreed by KSB and the Respondent that the advances made by KSB or amount owing to KSB by the Respondent, if any, shall be subordinated to MIB's claim against the Respondent
- (vi) the security documents executed by the Respondent and/or KSB in favour of the Other Creditor Banks contains express terms which provide for the agreement of KSB for its debt to be subordinated to the debts owing to the Other Creditor Banks
- (vii) by reason of the above KSB has no interest in the assets of the Respondent and would not be entitled to vote on the proposal that maybe put forward by the Judicial Manager (JM) in the event the JM Application is allowed
- (viii) premised on the above, KSB's application must be dismissed

[3] Applications have also been filed by creditors of the Respondent, namely HSBC, Alliance Bank, OCBC Bank, OCBC AL Amin, UOB and Bank of China to intervene and support the Judicial Management Application in enclosure 1 (JM Application).

[4] After hearing the respective learned counsels for the parties herein on 4.3.2022 with regards the Application, I had adjourned my decision on the same to 1.4.2022 at which I had allowed the Application herein.

[5] MIB being dissatisfied with my said decision, has lodged an appeal thereto and herewith are my written grounds in respect of my decision on 1.4.2022.
Court's Findings

[6] It is undisputed that the Respondent herein, Khee San Food Industries Sdn Bhd ("**Respondent**") is insolvent.

[7] In coming to my decision herein I have examined

- (a) the Respondent's Financial Statements in exhibit MIB 24 of enclosure 2 which states '*the amount due from a subsidiary company represents unsecured interest free advances with no fixed term repayment*'
- (b) MIB's Letter of Offer dated 20.8.2004 in particular the Pre- Disbursement Conditions and the Subordination of amount owing to holding company/associated companies/related companies to MIB's facilities at Exhibit "**MIB-2**" of Enclosure 2
- (c) The Master Facility Agreement dated 29.12.2004, in particular Clause 7.1 (p): whereby the Respondent undertakes with MIB from the date of this agreement until all its Indebtedness under this agreement have been discharged, it will procure and ensure that all present and future loans granted to it by any of its directors, shareholders or related companies will be subordinated to the indebtedness owing to MIB as seen in Exhibit "**MIB-2**" of Enclosure 2
- (d) Clause 12.1 (q) of the Facilities Agreement 29.12.2004 – at Exhibit "**MIB-2**" of Enclosure 2
- (e) the Letters dated 10.1.2005 issued by the Respondent and KSB in favour of MIB whereby the Respondent and KSB had irrevocably and unconditionally agree, covenant and undertake with MIB that until and unless the Facilities and all monies due and owing to Maybank Islamic ("the Preferred Debt") have been fully repaid, the advances made by KSB shall at all times be subordinated to the Preferred Debt. It was also agreed that no repayment of such advances shall be made so long as there are monies due and unpaid under the Facilities as seen at Exhibit "**MIB-4**", of Enclosure 77
- (f) Clause 13.1 (p) of the Facility Agreement 14.5.2013 at Exhibit "**MIB-2**", of Enclosure 1
- (g) MIB's letter dated 31.10.2018 with regards the renewal of facilities subject to, inter alia, subordination of advances from holding company, as per Exhibit "**MIB-5**", of Enclosure 2

- (h) the Supplementary Letter of Offer dated 29.10.2014 with regards the renewal of facilities of RM8,000,000 and MIB's Letter dated 31.10.2018 in exhibit "**MIB 5**", of Enclosure 2
- (i) exhibit OBMB 3 in enclosure 79 with regards the Letter of Guarantee dated 27.3.2009 executed by KSB for the OCBC Al Amin facility of RM15 million
- (j) exhibit OABB 3 in enclosure 80 with regards the Letter of Guarantee dated 19.12.2016 executed by KSB for the OCBC facility of RM6 million (k) Exhibit A1 in enclosure 75 as to the Letter of Guarantee and Indemnity dated 17.6.2015 entered with Bank of China for RM16 million
- (k) the table in paragraph 6 of enclosure 48 showing the breakdown of the inter company transactions of RM68,934,995 which is extracted from the Respondents ledger at exhibit ETS 3 of the same enclosure
- (l) Enclosure 104 being the Respondent's Affidavit in Reply, which prima facie shows actual payments made by KSB to the Respondent as seen in exhibit ETG 6 showing actual payments exhibited, which I hold is prima facie credible evidence of amongst others vouchers, bank transfer documents and bank statements thereto

[8] It is firstly my decision that the mere fact the Respondent and KSB have common directors and that they have been accused of committing breach of trust and breach of fiduciary duty by KSB and the Respondent and thus the purported advances and the Respondent's Financial Statements in exhibit MIB 24 of enclosure 2 cannot be accepted at face value, is a misconceived contention as this Court has to decide KSB's assertions purely based on the evidence before it and not, with respect, mere assertions.

[9] I had also considered the case of *Lee Song Chai v Ting Sheng Jewellery v Marketing Sdn Bhd* [2017] 1 LNS 1495 which was referred to be my counsel for MBI and which concerned a winding up petition and the allegation of mismanagement of the funds of the Respondent by the Petitioner in breach of a fiduciary duty that included misappropriation that ranged back quite a number of years and ran to millions of Ringgit. With respect, I find this case as being irrelevant to the proceedings before me as the causes of action in the said case and the case before me are premised on entirely different causes of action and more so where the argument of counsel in *Lee Song Chai (supra)* was that the said issues therein should be tried in a civil court and not before the winding up court.

[10] As regards the subordination issue, I find that:

- (i) the Letter of offer dated 20.8.2004, the Master Facility Agreement dated 29.12.2004, the Facility Agreement dated 14.5.2013 and MIB's Letter dated 31.10.2018 in exhibits MIB 2 and MIB 5 of enclosure 2 were entered between the Respondent and MIB only
- (ii) the letter of subordination dated 10.1.2025 at exhibit MIB 44 of enclosure 77 from KSB to MIB were only limited to the advances given by KSB to the Respondent being the sum of RM10,000,000 and RM4,000,000 banking facilities granted by MIB
- (iii) there is no evidence that KSB had agreed to the Supplementary Letter of Offer dated 29.10.2014 and MIB's Letter dated 31.10.2018
- (iv) the indebtedness or liability of KSB to the Other Creditor Banks vis a vis the various Letters of Guarantee and/or Indemnity KSB had issued to the Other Creditor Banks are limited to the amounts therein and that there would still be balance owing by the Respondent to KSB of approximately RM58,934,995

[11] As to the issue of the Respondent's Financial Statements in exhibit MIB 24 of enclosure 2 which MIB contends should not be not conclusive of the validity or the truthfulness of the Respondent's accounts; I have read the Court of Appeal decision in *Soo Boon Siong v Saw Fatt Seong* [2008] 1 CLJ 365 which was relied on by learned counsel for MIB. I find that the said case had not stated that the issue of whether the books or accounts are indeed conclusive of ownership of the properties or binding but had left it to the Court to consider the same based on the evidence before it. As such, I hold that this Court is not prevented from considering the Respondent's Financial Statements in exhibit MIB 24 of enclosure 2

and to make a finding that the said Respondent's Financial Statements are prima facie proof of KSB's averments.

[12] With regards KSB's locus to file enclosure 47, I refer to *Capital City Property Sdn Bhd v Achwell Property Sdn Bhd* [2021] MLJU 749 where this Court had held that:

"[18] I firstly hold that the Intervener has a locus to make this Application and my finding is based on Section 425 of the Companies Act 2016 which reads:

□ (1) At any time when a judicial management order is in force, a creditor or member of the company may apply to the Court for an order under this section on the ground that:

- (a) the company's affairs, business and property are being or have been managed by the judicial manager in a manner which is or was unfairly prejudicial to the interests of its creditors or members generally or of some part of its creditors or members, including at least the creditor or member himself, or of a single creditor that represents twenty-five per centum in value of the claims against the company; or*
- (b) any actual or proposed act or omission of the judicial manager is or would be so prejudicial.*

[19] As per this Court's decision in *Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd* (previously known as *Nexgram Land Sdn Bhd*) [2020] MLJU 1827, this Court has held that the term 'creditor' in section 405 of the Companies Act 2016 must include all persons having any pecuniary claims against the Respondent and quoting therein the decision of Mohamed Dzaiddn J (as he then was) in the case of *Re Butterworth Products & Industries Sdn Bhd* (Khaw Saw Mooi & Ors, Petitioners) [1992] 1 MLJ 429."

[13] In another case, *Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd* (previously known as *Nexgram Land Sdn Bhd*) [2020] MLJU 1827, this Court had also held:

"[23] Even though section 405 of the Companies Act 2016 or the said Companies Act 2016 itself does not define the term 'contingent or prospective creditor', I agree with the Applicants solicitors and respectfully adopt that guidance maybe taken from the Singapore case of Re People's Parkway Developmenty Pte Ltd [1992] 1 SLR 413 where LP Thean J following various cases in other jurisdictions had held 'The expression 'contingent or prospective creditor' has not been defined in the Act'. In the case of Re William Hockley Ltd [1962] 1 WLR 555; [1962] 2 All ER 111 at p 558,

Pennycuick J expressed his view as follows:

"The expression 'contingent creditor' is not defined in the Companies Act 1948, but must, I think, denote a person towards whom under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future date". (emphasis mine)

That definition was quoted (without any disapproval) by the High Court of Australia in the case of Community Development Pty Ltd v Engwirda Construction Co (1969) 120 CLR 455"

[14] Applying the above decisions, I therefore hold that KSB is still a creditor or at the very least a contingent creditor of the Respondent and has the locus standi to intervene in the proceedings herein.