Carl Zeiss Sdn Bhd
v
Delphax Sdn Bhd

High Court, Kuala Lumpur – Companies Winding Up No. D-28NCC-621-07/2012
Lee Swee Seng JC

December 21, 2012

Company law *– Winding-up – Petition – Validity – Petition executed by general manager of petitioner instead of by solicitor – Whether petition null and void – Whether general manager had valid authority to execute petition on behalf of petitioner – Whether statutory notice and petition properly served – Whether petition if allowed would jeopardise intention of "white knight" to purchase 100% equity interest in group of companies of which respondent is part of – Test to be applied in determining if respondent insolvent – Companies (Winding-Up) Rules 1972, rules 22, 25, 26, 194(1) – Companies Act 1965, ss 4, 20(2), 218(2)(a), 243(1), 350*

The petitioner had through its solicitors, taken out a winding-up petition ("the petition") against the respondent on the ground of the respondent's inability to pay an undisputed judgment debt. The petition which was signed by one Yap Chun Chong ("Yap") as the General Manager of the petitioner, was opposed by the respondent on the grounds that the same is null and void for not having been executed by a solicitor and that there was no valid authority shown by Yap in his purported capacity as general manager to execute the said petition on behalf of the petitioner. It was also contended that there had been no proper service of the statutory notice issued under s 218(2)(a) of the Companies Act 1965 ("the Act") and that there was a possibility of a "white knight" in the form of one Dufu Technology Corp ("Dufu") which intends to purchase 100% equity interest in the Delphax group of companies of which the respondent is part of.

Issues

1. Whether the petition is null and void for having been executed by Yap in his purported capacity as a general manager of the petitioner, instead of by a solicitor.
2. Whether Yap has the valid authority in his purported capacity as a general manager, to execute the petition on behalf of the petitioner.
3. Whether the statutory notice was properly served on the respondent.
4. Whether the petition if allowed, would seriously jeopardise the intention of the "white knight".

Held, granting order in terms of prayer 10(a), (b) and (c) of the petition; Director General of Insolvency to be made provisional liquidator

1. (a) Rules 22 of the Companies (Winding-Up) Rules 1972 ("the Rules") which prescribes the form of a winding-up petition, states that every petition may be in Forms 2 or 3 with such variations as the circumstances may require. Neither the Rules

nor the court forms stipulate that a petition must be signed off by the solicitors representing the petitioner. Since the petition and its contents are to be verified as is required by rule 26 of the Rules, it is only natural and proper for the petition to be signed by the deponent of the affidavit verifying the petition. [*see p 555 para 12 line 41 - p 556 para 14 line 14*]

(b) A manager, as defined under s 4 of the Act, is the principal executive officer of the company for the time being by whatever name called and whether or not he is a director. The fact that the petitioner's manager had signed the petition, does not and will not render the petition void and or invalid because the principal officer of the company is entitled to do so as he is required pursuant to rule 26 of the Rules, to swear an affidavit verifying the contents thereof which will be treated as prima facie evidence of the contents. [*see p 556 para 15 line 15 - para 16 line 25*]

(c) It would be retrogressive an argument to pursue, to say that a petition that is signed by a petitioner and not by its solicitors, is null and void as being not properly taken out by its solicitors and that the petitioner is not being represented by the solicitors. Even if the respondent is correct in saying that the petition must be signed by the solicitors and not the petitioner, such error only goes to the form and not the substance of the petition. As is provided by rule 194(1) of the Rules, such defect would not invalidate the proceedings. The non-signing of the petition by the petitioner's solicitors, would neither prejudice nor cause any substantial injustice. [*see p 557 para 19 line 4 - para 21 line 21*]

2. (a) The allegation that Yap has no authority to sign the petition on behalf of the petitioner, and which was specifically raised by the respondent's counsel at the hearing, is one that cannot be made by way of a statement from the Bar. It has to be the respondent's own averment as to why it said so and not a statement simpliciter on the basis of an "I said so" from the Bar. [*see p 558 para 25 line 1 - para 28 line 22*]

(b) It is pertinent that this "challenge" was neither raised in the respondent' affidavit in opposition as a preliminary objection nor in a proper allocation to challenge the petitioner's general manager's said authority to commence the winding-up petition on the petitioner's behalf. A challenge of authority must be made expressly so as to give clear and proper notice to the petitioner in order for the matter to be ventilated properly in affidavit evidence. This, the respondent had failed to do. [*see p 558 para 31 line 33 - p 559 para 33 line 4*]

(c) The opening statement in the petition is prima facie true in that it is genuinely and validly the petition of the petitioner, bearing in mind rule 26 of the Rules which specifically states that the affidavit verifying petition which in this case was signed by Yap who was duly authorised to do so on behalf of the petitioner, shall be prima facie evidence of the statements in the petition. No evidence was adduced by the respondent to rebut that prima facie evidence. [*see p 559 para 34 line 6 - para 38 line 37*]

(d) The respondent, as an outsider, may not question the authority of the petitioner's manager to sign the petition on its behalf. If at all there is any complaint of lack of

authority, then the complainant should be the petitioner itself as it is the principal providing the authority and has the locus to withdraw or revoke that authority. [*see p 559 para 39 lines 38-42*]

(e) Unless the respondent is able to prove that one of the exceptions in s 20(2) of the Act applies, which was clearly not the case in this instance, the petition will be valid even in the absence of any proof of authority by the petitioner to authorise its general manager to sign the same on its behalf. [*see p 561 para 47 line 11 - para 48 line 21*]

3. On the facts, the statutory notice was left at the table of the receptionist at the respondent's registered office and the receptionist had confirmed that the said address is the respondent's company secretary's office. For all intents and purposes, the conduct of leaving the statutory notice at the receptionist's table was in compliance with s 350 of the Act and rule 25 of the Rules. Further, the process server had affirmed that a copy of the petition and the affidavit verifying the same was left by him at the front door of the respondent's address. In the circumstances, there was sufficient service in accordance to the Act and the Rules. [*see p 570 para 75 line 1 - para 79 line 21*]

4. (a) It is an established principle that a company is insolvent if it is unable to meet its current debt as it falls due event if it has substantial wealth which cannot be immediately realised and liquidated. The test to be applied is the test of "inability to pay". It is one of commercial insolvency. In this regard no evidence was adduced that the respondent is solvent and able to pay its debts. Based on the written and oral submissions of the respondent, it appeared that the real reason for the objection to the petition was to buy time for a possible restructuring as evidenced by the announcement made by a possible "white knight". That however should not in the absence of a restraining order affect the inescapable and inexorable course of a winding-up petition that has been put in motion and which is to be disposed based on the commercial insolvency test. [*see p 571 para 85 line 11 - para 87 line 28*]

(b) In the event the "white knight" is able to discharge the liability of the respondent, the liquidator or any creditor or contributory of the respondent may apply for a permanent stay of the winding-up proceedings under s 243(1) of the Act. [*see p 573 para 90 lines 15-18*]

Cases referred to by the court

Bumiputera Merchant Bankers Bhd v Supreme-QBE Insurance Bhd [1998] 1 CLJ (Rep) 394, HC *(ref)*

HSBC Malaysia Bhd v Lionel Rao a/l R Simon Rao & Anor [2006] 4 MLJ 245, HC *(ref)*

Kok & Co Tax Services Sdn Bhd v Eastway Engineering Sdn Bhd [2003] 8 CLJ 204, HC *(ref)*

Kotabato Corporation (M) Sdn Bhd & Anor v Wisma Central Management Corp [2003] 6 AMR 81; [2003] 4 MLJ 473, HC *(ref)*

Lafarge Concrete (Malaysia) Sdn Bhd v Gold Trend Builders Sdn Bhd [2012] 5 AMR 104, CA *(ref)*

Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd [2003] 5 AMR 577; [2003] 4 MLJ 409, HC *(ref)*

Malaysia Land Investment Co (Pte) Ltd v Sathask Realty Sdn Bhd & 2 Ors [2001] 2 AMR 1575; [2001] 1 MLJ 451, HC *(ref)*
Mohd Sari b Datuk Hj Nuar, Datuk v Idris Hydranlic (M) Bhd [1997] 5 MLJ 377 *(ref)*
Molop Corp Sdn Bhd v Uniperkasa (Malaysia) Sdn Bhd [2003] AMEJ 0109; [2003] 1 LNS 280, HC *(ref)*
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & 12 Ors [1998] 1 AMR 169; [1998] 1 CLJ 793, FC *(ref)*
Shaharuddin b Mohd Idros, Re; Ex parte Esso Malaysia Bhd [2009] 5 AMR 163; [2009] MLJU 469, HC *(ref)*

Legislation referred to by the court

Companies (Winding-Up) Rules 1972, rules 22, 25, 26, 32, 194(1), Forms 2, 3
Companies Act 1965, ss 4, 20(1), (2), 127, 176(10), 218, 218(2)(a), 243(1), 350
Evidence Act 1950, s 106
Rules of Court 2012, Order 5 r 6(2)

Sara Keshini Anthony (Wong Lu Peen & Tunku Alina) for petitioner
Alvin Lai and *Christine Ooi Wai Ching* (Justin Voon Chooi & Wing) for respondent

Judgment received: January 4, 2013

Lee Swee Seng JC

[1] The petition to wind up filed by the petitioner against the respondent was a typical winding-up petition. It was premised on a judgment debt which together with accruing interest came up to slightly over RM1,000,000. The relevant notice under s 218(2)(a) of the Companies Act 1965 had been duly served on the respondent to activate the presumption of inability to pay its debt after the expiry of 21 days from the date of service of the said notice. The ground for winding up was the respondent's inability to pay the petitioner an undisputed judgment debt.

[2] The relevant paragraphs of the petition filed read as follows:

5. The company is indebted to your petitioner in the sum of RM1,064,018.99 as at the 22 day of May 2012 calculated as follows:

Judgment sum	:	RM 865,492.84
Interest on RM865,492.84 at the rate of 8.00% Per annum from 22 July 2009 to 22 May 2012 (1036 days) [8% x RM865,492.84 X 1036/365 days]	:	RM 196,526.15
Costs	:	RM 2,000.00
Outstanding Sum Due As At 22 May 2012	**:**	**RM1,064,018.99**

6. The said sum of RM1,064,018.99 is due under a judgment obtained by your petitioner against the company on the 22 day of March 2011, issued by the Shah Alam High Court Pursuant to the Civil Suit No. 22-1105-2009.

7. Your petitioner has, on the 22 day of May 2012, made an application to the company by delivery at the registered address and at the business address of the company, a notice pursuant to section 218(2)(a) of the Company Act 1965 dated the 22 day of May 2012 for payment of the sum of RM1,064,018.99, but the company has failed and neglected to pay the said sum or any part thereof within twenty-one days (21) from the date of service of the said notice.

8. The company is therefore unable to pay debts.

9. In the circumstances, it is just and equitable that the company should be wound up.

Prayers

[3] The last paragraph of the petition is important as the respondent has taken umbrage on the fact that the petition was signed off by one Mr Yap Chun Chong as the General Manager of Carl Zeiss Sdn Bhd, the petitioner. The petitioner had prayed for the respondent to be wound up as follows:

10. Your petitioner thereof humbly prays as follows:

    a. That Delphax Sdn Bhd be wound up by this Honourable Court under the provisions of the Companies Act 1965;

    b. That the Director General of Insolvency be appointed as the provisional liquidator of Delphax Sdn Bhd;

    c. That the costs of and occasioned by this petition be paid out of the assets of Delphax Sdn Bhd;

    d. That there be such other order as may in the premises be just.

Dated this 26 July 2012.

Sgd

Yap Chun Chong
General Manager
CARL ZEISS SDN BHD

[4] It is also apposite to state that there was an endorsement at the bottom of the last page of the petition that reads:

This Petition is taken out by Wong Lu Peen & Tunku Alina, 21-6, Block B, The Bouvelard, MidValley City, Lingkaran Syed Putra, 59200, Kuala Lumpur, solicitors for the petitioner above named whose registered address is at Level 8, Symphony House, Block D13, Pusat Dagangan Dana 1, Jalan PJU 1A/46, Petaling Jaya, Selangor Darul Ehsan.

[5] The respondent on the other hand opposed the petition and prayed that the petition be struck out based on the following grounds:

(a) The petition signed by a "Yap Chun Chong" in his purported capacity as a "general manager" is null and void as it was not executed by a solicitor;

(b) There was no valid authority shown by "Yap Chun Chong" in his purported capacity as a "general manager" to execute the petition on behalf of the petitioner;

(c) There was no proper service of the said statutory notice on the respondent; and

(d) There is a possibility of a "white knight" in Dufu Technology Corp Bhd (a public listed company) who intends to purchase 100% equity interest in Delphax Group of Companies which includes the respondent.

Principles

(a) The petition signed by a "Yap Chun Chong" in his purported capacity as a "general manager" is null and void as it was not executed by a solicitor

[6] The above proposition of the respondent is said to stamp from Order 5 r 6(2) of the Rules of Court 2012 where it provides that:

> Except as expressly provided by or under any written law, a body corporate may not begin or carry on such proceedings otherwise than by a solicitor.

[7] Learned counsel for the respondent highlighted that at p 3 of the petition, it will be noted that a Yap Chun Chong, the general manager of the petitioner signed the petition on the petitioner's behalf and *there was no accompanying signature by the solicitor in the petition*. In the case of *Kok & Co Tax Services Sdn Bhd v Eastway Engineering Sdn Bhd* [2003] 8 CLJ 204 it was observed that:

> Order 5 r 6 of the Rules of the High Court 1980 expressly provides that a body corporate may not begin or carry on any such proceedings before the High Court otherwise than by a solicitor. It would therefore appear that the rule does not contemplate for a body corporate to sue "in person" as being an artificial entity, it cannot attend and argue "personally".

[8] He further submitted that it is trite law that a body corporate may not begin or carry on any such proceedings otherwise that by a solicitor. Applying the principle in the above case, he argued that it is clear that the petition *must be executed by a solicitor acting on behalf of the petitioner*.

[9] He continued his line of argument by contending that in this case, Yap Chun Chong is clearly not a person who represents the legal firm of Messrs Wong Lu Peen & Tunku Alina (the petitioner's solicitors) and *obviously* cannot sign the petition on the said legal firm's behalf. Since Yap Chun Chong signed the petition, which is the mode of commencement of the proceedings herein, from the outset and inception, the proceedings herein is invalid. The petitioner purports to "begin" proceedings "otherwise than by a solicitor".

[10] He argued that winding-up petitions are signed by the petitioner's solicitor or sometimes by both the petitioner and the petitioner's solicitors together, but never only by the petitioner's purported signature.

[11] Learned counsel then brought his argument to its logical conclusion that on this ground alone, the petition ought to be struck out.

[12] I agree with learned counsel for the petitioner that the form of a winding up petition is as prescribed in rule 22 of the Companies (Winding-Up) Rules 1972 which states that every petition may be in Forms 2 or 3 with such variations as circumstances

may require it. There is nothing in the rules and or the court forms that stipulate that the petition filed by the petitioner must be signed off by the solicitors representing the petitioner.

[13] As the petition and its contents are to be verified as required by law in rule 26 of the Companies (Winding-Up) Rules 1972, it is only natural and proper for it to be signed by the deponent of the affidavit verifying the petition.

[14] Rule 26 states that every winding-up petition shall be verified by an affidavit referring thereto verifying the petition. The form of the affidavit is as stated in Form 7 and shall be made by the petitioner or by one of the petitioners, if more than one, or, in case the petition is presented by the a corporation, by some director, secretary or *other principal officer therefore*, and shall be sworn after and filed within four days after the petition is presented, and the affidavit shall be prima facie evidence of the statement in the petition. (Emphasis added.)

[15] Further s 4 of the Companies Act 1965 defines an officer of the company to include any director, secretary or employee of the corporation. A manager of the company is defined under the same provision as the principal executive officer of the company for the time being by whatever name called and whether or not he is a director.

[16] I agree with learned counsel for the petitioner that the fact that the general manager of the petitioner had signed the petition does not and will not make the petition void and or invalid because the principal officer of the company is entitled to do so as he is required under the law to swear an affidavit to verify the contents thereof which will be treated as prima facie evidence of the contents pursuant to rule 26 of the Companies (Winding-Up) Rules 1972.

[17] The fact that the said solicitors for the petitioner had filed the petition is not in doubt as clearly indicated in the endorsement at the bottom of p 4 of the petition which reads:

> This Petition is taken out by Wong Lu Peen & Tunku Alina, 21-6, Block B, The Bouvelard, MidValley City, Lingkaran Syed Putra, 59200, Kuala Lumpur, solicitors for the petitioner above named whose registered address is at Level 8, Symphony House, Block D13, Pusat Dagangan Dana 1, Jalan PJU 1A/46, Petaling Jaya, Selangor Darul Ehsan.

[18] The said petition was filed electronically and it could not have been filed by the said petitioner personally as payments have to be made for the filing fees and the said solicitors have to have an account linked to the court and the bank providing the electronic payment gateway. Indeed the solicitors' number as registered with the court is reflected in the endorsement setting out the case number and the date and time of filing and fees paid.

[19] Throughout the proceedings the petitioner was represented by the said solicitors in the person of its learned counsel Miss Sara Keshini Anthony. I cannot comprehend how a lack of signature of the said solicitors on the petition document would mean that the petitioner is not properly represented by the said solicitors.

In this day and age when progressively everyone is moving towards being paperless (as in no papers) instead of just merely paper less (as in using less papers) and that identity of firms filing documents already have their accounts number and password registered with the courts, it would be retrogressive an argument to pursue to say that the said petition signed by the petitioner but not by its solicitors is null and void as being not properly taken out by the said solicitors and the petitioner not being represented by the solicitors. It is pedantic bordering on preposterous to pursue such an argument. Attractive as the argument is to the respondent it is apathetically anachronistic and ought to be abandoned.

[20] I agree with learned counsel for the petitioner that even if learned counsel for the respondent is correct in stating that solicitors must signed the petition filed and not the petitioners, such error only goes to the form of the petition and not substance and rule 194(1) of the Companies (Winding-Up) Rules 1972 states that such defects are not to invalidate the proceedings. It reads:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

[21] In addition to the above, there is no prejudice to the respondent with respect to the non-signing of the petition by the petitioner's solicitors, let alone a substantial injustice caused to the respondent.

(b) There was no valid authority shown by "Yap Chun Chong" in his purported capacity as a "general manager" to execute the petition on behalf of the petitioner

[22] Learned counsel for the respondent Mr Alvin Lai submitted that there is no evidence to indicate that Yap Chun Chong, in his purported capacity as a general manager was an authorised signatory and had the valid authority to execute the petition on behalf of the petitioner.

[23] The challenge to the said authority of Yap Chun Chong was purportedly raised by the respondent in paragraph 3 of the respondent's affidavit of Encik Azman where it said that the respondent verily believe that the petition signed by "Yap Chun Chong" as a "general manager" is invalid. Such being the argument advanced, the petitioner in paragraph 3 of Yap's further affidavit replied as follows at paragraph 4.2:

> The fact that I had signed the petition on behalf of the Petitioner and or that the Petitioner had commenced this Petition does not invalidate the Petition in any manner whatsoever.

[24] Learned counsel for the respondent, Mr Alvin Lai submitted that paragraph 3 of Azman's affidavit would encompass a challenge that "Yap Chun Chong" described as a "general manager" has *no authority* to sign the petition on behalf of the petitioner. I do not think so. The argument was raised by the respondent in the context that the said Yap Chun Chong could not sign the petition and that it is the solicitors that should sign the petition.

[25] Learned counsel then said that in any event, this issue of Yap Chun Chong's lack of authority was specifically raised by him during the hearing on September 28, 2012 before the court. Therefore, it was argued, there can be no surprise by the petitioner that they are not aware of this.

[26] Again I do not find that a proper averment and assertion as to the lack of authority of the deponent of the affidavit verifying the petition has been made. This is certainly an allegation that cannot be made by way of a statement from the Bar. It has to be the respondent's own averment as to why it said so and not a statement simpliciter on the basis of an "I said so" from the Bar.

[27] The respondent's written submission that amounts to an admission of this failure to make a specific averment or assertion on the allegation of a lack of authority is apparent as follows:

> Although the Petitioners counsel argued that paragraph 3 of Azman's Affidavit do not raise such issue of "lack of authority", this is now further placed beyond doubt by the *Respondent's counsel's argument raised on 28/9/2012 which specifically raised this iss*ue. (Emphasis added.)

[28] It is no longer then a case where more than adequate notice has been given to the petitioner's solicitor on this issue, which respondent said can also be raised by way of "a preliminary objection" but rather a case where the respondent had not raised under oath the lack of capacity of Yap Chun Chong to affirm the affidavit verifying the petition.

[29] Learned counsel for the respondent argued that there was until the deadline fixed by the court to file written submission *no evidence at all* of such authority given of a "general manager" to sign a petition (even if possible, which was denied) on behalf of the petitioner or to affirm the affidavit verifying petition on behalf of the petitioner. Paragraph 1 of Yap's affidavit, it was contended, is a bare allegation of authority which also do not assist the petitioner.

[30] Finally it was argued that it is trite law that once a challenge to authority in commencing proceedings has been made, the burden shifts to the petitioner to prove the same.

[31] I would agree with learned counsel for the petitioner that it is pertinent to note that this "challenge" was neither raised in the respondent's affidavit in opposition as a preliminary objection nor in a proper application to challenge the petitioner's general manager's said authority to commence the winding-up petition on behalf of the petitioner.

[32] In paragraph 3 of the respondent's affidavit, the respondent merely states that the petition is void and or invalid because it was commenced by a company i.e. the petitioner who ought to have been represented by solicitors and therefore the petition signed by "Yap Chun Chong" as the general manager of the petitioner is invalid.

[33] There is merit in the petitioner's submission that should a challenge of authority be made, it must be made expressly to give clear and proper notice to the petitioner in order for the matter to be ventilated properly in affidavit evidence. The respondent however, had failed to do so.

[34] It is pertinent to note that for winding-up proceedings, rule 26 of the Companies (Winding-Up) Rules 1972 specifically states that the affidavit verifying petition shall be prima facie evidence of the statements in the petition. Rule 26 of the Companies (Winding-Up) Rules 1972 reads as follows:

> Every petition for the winding-up of a company by the Court shall be verified by an affidavit referring thereto. The affidavit in Form 7 shall be made by the petitioner or by one of the petitioners, If more than one, or, in case the petition is presented by a corporation, by some director, secretary or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and *the affidavit shall be prima facie evidence of the statements in the petition*. (Emphasis added.)

[35] The affidavit verifying petition stated that the deponent Yap Chun Chong as the general manager of the petitioner is duly authorised by the said petitioner to make the affidavit on its behalf. The affidavit verifying petition further went on to say that "Such of the statements in the petition now produced and shown to me marked with the letter 'A' as relate to the acts and deeds of the said petitioner are true and such of the statements as relate to the acts and deeds of any other person or persons I believe to be true."

[36] One such statement referred to is the opening statement of the petition that reads:

> The humble petition of CARL ZEISS SDN BHD [Company Registration No. 201737-H] of Level 8, Symphony House, Block D13, Pusat Dagangan Dana 1, Jalan PJU 1A/46, Petaling Jaya, Selangor Darul Ehsan shows as follows:

[37] I shall thus accept pursuant to rule 26 of the Companies (Winding-Up) Rules 1972 that this opening statement in the petition is prima facie true in that it is genuinely and validly the petition of the petitioner. What has the respondent produced to displace this statement that has been accepted as prima facie true? Nothing whatsoever except a mere say-so of the respondent's learned counsel from the Bar by way of a preliminary objection.

[38] I agree with the petitioner's learned counsel that the respondent must adduce evidence and state its ground or basis to rebut the prima facie evidence. I could not agree more with the petitioner's learned counsel that a mere call for challenge of authority is not sufficient or reasonable to rebut a statutory right accorded to the petitioner.

[39] It is trite that the respondent as an outsider, may not question the authority of the manager of the petitioner to sign the petition on the petitioner's behalf. If at all there is any complaint of lack of authority, the complainant should be the petitioner itself, who is the principal providing the authority and who has the locus to withdraw or revoke the authority of the said general manager. See *Molop Corp Sdn Bhd v Uniperkasa (Malaysia) Sdn Bhd* [2003] AMEJ 0109; [2003] 1 LNS 280.

[40] It is instructive to refer to s 4 of the Companies Act 1965, where a "manager" of a company is a principal executive officer of the company whether or not he is a director. A principal executive officer of a company will be subject to the supervision, control, and direction of the board of directors and has management of the company affairs whether in whole or substantial. The manager, by virtue of its position has an express or implied authority to bind the company in respect of his normal business and normal business (as in this case) will include the collection of debts due and owing to the company and to take such action as may be necessary and effective to recover the judgment debt.

[41] The powers of a company are limited to those conferred expressly or impliedly from its memorandum of association or any statute. It is to be noted that a company, being an artificial person can only act through human agents i.e. for e.g. director, secretary or an officer of the company. When such agent exceeds his actual authority, the company may under general law of agents and principal refuse to be bound by it.

[42] Pursuant to the *Turquand* rule, an accepted legal concept in our Malaysian courts through the Federal Court judgment in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & 12 Ors* [1998] 1 AMR 169; [1998] 1 CLJ 793, the respondent, being taken to know the contents of statutes and other public documents cannot complain of any statement as to powers, the correctness of which he can estimate by reference thereto. They are not required to do more, they need not enquire into the regularity of the internal proceedings (indoor management) and may assume that all is being done regularly.

[43] I cannot do better than to quote the learned counsel's submission on behalf of the petitioner:

> It is pertinent to note at this juncture that the Respondent in this case have not at all material times disputed the debt owed to the Petitioner and or the Petitioner's right to claim the debt from the Respondent. What the Respondent is purporting to do is merely to enquire into the Petitioner's general manager's authority to sign the petition on the Petitioner's behalf i.e. if at all to raise a procedural ultra-vires. With all due respect, it is submitted that this falls squarely within the scope of the *Turquand* rule.
>
> The existence or not of a board's resolution giving authority to the general manager to sign the winding-up petition does not affect and or prejudice the Respondent in any manner. The irregularity if any, does not affect the Respondent as the Respondent is entitled to invoke the *Turquand* rule.

[44] His Lordship Edgar Joseph Jr FCJ in the *Pekan Nenas* case held as follows:

> In *Mahony v East Holyford Mining Co* [1875] LR 7 HL 869, a decision of the House of Lords in which the *Turquand* rule was first upheld Lord Hatherly said (at p 894):
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> > " When there are persons conducting the affairs of a company in a manner which appears to be perfectly consonant with articles of association, those so dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company."

[45] Moreover, s 127 of the Companies Act 1965 states that the acts of a director or manager or secretary shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

[46] In addition to the above, I agree with Sara Anthony's submission on behalf of the petitioner that the company cannot act ultra vires if it does or attempts to do something which falls within the ambit of any one of the objects of the company as set out in the memorandum of association. So far, there is no allegation made and or evidence from the respondent to allege and or prove that the commencement of the winding-up proceedings to collect a debt owed to the petitioner is against the object of the petitioner's memorandum and or articles of association.

[47] Furthermore, s 20(1) of the Companies Act 1965 states that no act or a purported act of a company (including any done on behalf of the company by an officer or agent of the company under any purportedly authority, whether express or implied, of the company) shall be invalid by reason only of the fact that the company was without capacity or power to do the act.

[48] This basically means that the winding-up petition filed will be valid even in the absence of any proof of authority by the petitioner to authorise its general manager to sign the winding-up petition on its behalf unless the respondent is able to prove that one of the exceptions in s 20(2) of the Companies Act 1965 applies, which is clearly not the case here.

[49] In the case of *Bumiputera Merchant Bankers Bhd v Supreme-QBE Insurance Bhd* [1998] 1 CLJ (Rep) 394, His Lordship VC George J (as he then was) held as follows:

> A company cannot act ultra vires if it does or attempts to do something which falls within the ambit of any one of the objects of the company as set out in the memorandum of association. *Re Horsley & Weight Ltd*; [1982] 3 All ER 1045; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1985] 3 All ER 52. In any event by s 20(1) of the Companies Act no act or purported act of a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act. The section abolishes the absolute effect of the ultra vires doctrine.
>
> In the premises the answer to each of the first three questions has to be and is in the affirmative.
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> That left for adjudication the issues posed by the fourth question which has reference to the effect of s 20(2) of the Companies Act 1965.
>
> Section 20(2) of the Companies Act 1965 has the effect of somewhat watering down the subsection 20(1) abolishment of the doctrine of ultra vires by providing that lack of capacity or power may be asserted or relied on but only:
>
> (a) in proceedings against the company by any member of the company or by the holder (or the trustees for the holders) of debentures;
>
> (b) in proceedings by the company or by any member of the company against the officers, present or past, of the company; and
>
> (c) in any petition by the Minister to wind up the company.

> In the instant case the proceedings are against QBE brought by the bank. There is no suggestion that the bank is a member of QBE or the holder (or trustee for the holders) of any debenture. The situation that obtains does not fall within any of the exceptions specified in s 20(1) of the Act.

[50] Learned counsel Miss Sara Anthony may be pardoned when with an almost audible sigh of exasperation she submitted that "this is a clear cut case where the respondent acknowledges the debt but is unable to settle it and instead nit-picks where possible to delay the winding-up proceedings."

[51] I embraced fully the petitioner's submission that the respondent's challenge from the Bar must be rejected as a challenge must be premised on some grounds or basis. In the absence of any, the affidavit verifying petition filed on behalf of the petitioner MUST be taken as prima facie evidence of the statements in the petition and this includes the deponent's authority to affirm the statements of the petition on behalf of the petitioner.

[52] Learned counsel for the respondent cited as authority for his proposition the case of *Malaysia Land Investment Co (Pte) Ltd v Sathask Realty Sdn Bhd & 2 Ors* [2001] 2 AMR 1575 at 1585; [2001] 1 MLJ 451 at 461-463:

> Before considering the merits of the plaintiff's contentions, a point needs to be made, it is this: where a challenge to authority in commencing proceedings has been made, the burden of proving that the suit has been instituted with the authority of the company, rests on the plaintiff. (See *Daimler*'s case, per Lord Atkinson at p 198 A, *United Investment & Finance Ltd v Tee Chin Yong & Ors* [1967] 1 MLJ 31 at 35G-H, and *Yukilon Manufacturing Sdn Bhd & Anor v Dato Wong Gek Meng* [1997] 2 MLJ 212 at 220E.)

[53] Further, Mr Alvin Lai submitted for the respondent that it is a trite principle of law that this issue of "lack of authority" or otherwise is a *matter solely within the petitioner's knowledge and therefore it is for them to prove the same affirmatively*. He submitted that the evidence by Yap merely amounts to a bare denial and there was no evidence in support thereof of Yap's statement. This principle is said to be found in the case of *Malaysia Land Investment Co (Pte) v Sathask Realty Sdn Bhd & 2 Ors* [2001] 2 AMR 1575 at 1588; [2001] 1 MLJ 451 at 463:

> With reference to the plaintiff's attempt to discharge its evidential burden by the use of the principle governing the evaluation of affidavit evidence as stated in the case of *Ng Hee Thoong & Anor v Public Bank Berhad*, I regret to say the principle is of no avail to the plaintiff in this case as firstly, it was the defendants who had by their affidavit made the allegation of lack of authority and what was said by Lo Kok Kee was said in reply to the defendants' allegation; there had, *accordingly, been a joinder of issues on the question of authority* and therefore this was not a case in which a positive assertion on a matter in issue had gone unchallenged; and secondly, the assertion made by the plaintiff regarding the authority it had allegedly given Wong Nam Loong *concerned matters solely within its own knowledge and it was for the plaintiff to make good that bald assertion by producing evidence in support thereof*, but none was. The failure or omission of the defendants to refute or contradict the assertion does not in the circumstances give rise to any inference that the defendants admitted the truth of the assertion. Nor does it follow that the court ought to accept the assertion. (See *Cold Storage Singapore (1983) Pte Ltd v Management Corp of Chancery Court* [1992] 1 SLR 521.)" (Emphasis added.)

[54] Further, under s 106 of the Evidence Act 1950 "*when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him*".

[55] The respondent submitted that it is solely within the petitioner's own knowledge on whether "Yap Chun Chong" is an authorised signatory on behalf of the petitioner to commence legal proceedings and the petitioner ought to make good that bald assertion by producing evidence in support thereof i.e. power of attorney or board resolution, which duly authorised him. He reiterated that it is trite law that a company can only act through the powers conferred by the board of directors.

[56] It must first be pointed out that the principle so stated must be restricted to the context of the case where there were specific applications made by the defendants to strike out the writ action on account of a lack of authority of one Mr Wong Nam Loong to bring an action against the defendants. It was also a case where there was evidence adduced by the defendants on the apparent lack of authority on the part of Mr Wong to commence the action. The following passage at pp 1579-1581 (AMR); pp 456-458 (MLJ) reproduced in extenso is necessary lest the principle propounded above by His Lordship Clement Skinner J (now JCA) is applied out of context:

> There are two applications before me. The first is filed by the first and third defendants and the second by the second defendant. Both applications seek the same orders and rely upon the same grounds. At the request of counsel, both applications were heard together. By these applications, the defendants seek to invoke the inherent jurisdiction of the court to strike out this suit on the ground that it was improperly commenced in the name of the plaintiff company without the authority of the company and, as such, constitutes an abuse of the process of the court. The defendants also seek an order that a person named in the application as Wong Nam Loong, the manager of the plaintiff company, be personally liable to pay the defendants' costs as they say he is the person responsible for the bringing of this suit without the authority or sanction of the board of directors of the plaintiff or of its general meeting.
>
> First, the facts giving rise to these applications. The matters complained about in this suit go back some 30 years ago, but this suit itself was only commenced on September 11, 1997. In it, the plaintiff, a company duly incorporated with limited liability, claims that two parcels of land ("the said lands") which were transferred to the first defendant in 1965 were held in trust for it by the first defendant, but that in breach thereof, the first defendant transferred the said lands to the second defendant in 1991. The third defendant, a director of the first defendant, is being sued for the part he allegedly played in the transfer of the said lands to the second defendant. The defendants have all appeared and filed defences in this action. They deny that the first defendant held the said lands in trust for the plaintiff as alleged or that there has been any fraud involved in the transfer of the said lands to the second defendant.
>
> The trial of this action was fixed to commence on February 22, 2000, but did not proceed as the solicitors then on record for the plaintiff applied for an adjournment on the grounds that the plaintiff's witnesses had migrated to Australia, England, Hongkong and Taiwan. The court accordingly granted a final adjournment and fixed the trial for May 3 to 5, 2000 with costs to the defendants. However, before the new hearing date, the solicitors then on record for the plaintiff applied to discharge themselves and gave as a reason the plaintiff's continuous, wilful and deliberate failure to give instructions despite numerous letters to the plaintiff. On May 2, 2000, the court duly discharged the plaintiff's former solicitors from further acting for them.

On the new date fixed for the trial of this suit, that is, May 3, 2000, an advocate appeared on behalf of the plaintiff to request for an adjournment on the ground that Mr Wong Nam Loong (the manager of the plaintiff company) was taken ill and produced a medical certificate as evidence of such fact. Apparently, the court was not satisfied with the certificate produced but, nevertheless, felt compelled to grant an adjournment and so fixed this case for trial on October 19, 2000 with an order that if the plaintiff did not proceed on that day, this suit would be struck out. The court also ordered costs to be paid to the defendants.

Alerted by the fact that the plaintiff's former solicitors could not get instructions, the defendants' solicitors wrote on May 27, 2000 to the advocate who had appeared on behalf of the plaintiff on May 3, 2000 to enquire from him whether he had filed a notice of change of advocates and whether he had authority to act for the plaintiff company, and if so, to make available to the defendants a copy of such authority. On June 5, 2000 that advocate replied that he had no instructions to act any further for the plaintiff. Having received such a reply, the defendants' solicitors on June 21, 2000 wrote to the plaintiff asking "on whose authority the company sanctioned the commencement of this action, and when such sanction was given and whether such sanction was given by the board of director's resolution or by the general meeting."

The defendants' solicitors received no reply to their challenge to the plaintiff to show that it had authorised the bringing of these proceedings.

The defendants also found support for their belief that the bringing of this action had not been authorised by the company from a reading of certain documents signed by Mr Wong Nam Loong in which he claimed to have the authority and sanction of the plaintiff company in taking certain actions on behalf of the plaintiff company in respect of the said lands. Those documents were a statutory declaration dated November 14, 1996 ("the statutory declaration") sworn in support of a caveat lodged against the said lands and a police report lodged against the third defendant on March 25, 1998.

The defendants accordingly said that this suit was commenced on the instructions of Wong Nam Loong, when in actual fact he did not hold any authority from the plaintiff company to do so, nor has the plaintiff company authorised the bringing of this action. Hence these applications.

[57] As can be seen there was evidence before the court to rebut the presumption that prima facie the suit had been properly commenced. When such evidence is produced, the evidential burden then shifts to the plaintiff to show that it nevertheless has the authority of the board to commence the suit.

[58] Mr Alvin Lai then went on to argue that even a person who describes himself as a "managing director" is not spared of this requirement of proving his authority when challenged. In *Kotabato Corporation (M) Sdn Bhd & Anor v Wisma Central Management Corp* [2003] 6 AMR 81 at 84; [2003] 4 MLJ 473 at 476 it was observed as follows:

In this application before us, the supporting affidavit is filed by one Lim Heng Lin. He has described himself as the managing director of the appellant and granted the authority to file such affidavit. *Aside from this assertion, there is no supporting document to indicate that he actually holds this position*, and is clothed with authority from the wound up company to move this application … *A mere description of being a managing director without evidence to support this claim coupled with authority to specifically pursue this*

matter is insufficient to convince us that Lim Heng Lin is qualified and armed with authority from the appellant to file such affidavit for and on behalf of the appellant to support this application. (Emphasis added.)

[59] Again the context for the said proposition must be appreciated and such an appreciation can be had by reference to the introduction at pp 83-84 (AMR); pp 475-476 (MLJ) below:

> On November 1, 1999, the respondent obtained a judgement in default against the appellant for a sum of RM9,960.58 with interest and costs. Due to the failure of the appellant to settle this sum a winding-up petition was brought against the appellant. On October 12, 2001, Justice Wan Adnan Muhamad allowed the petition and the official receiver was appointed the provisional liquidator. Unhappy over this, we believe, the appellant and the applicant/contributor wish to appeal against this High Court decision. Thus the application before us.
>
> Reasons
>
> The first factor for consideration in our minds is the locus standi of the appellant and the applicant/contributor.
>
> For the appellant, though by the authority of *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325, that ruled that the appellant, besides the court appointed liquidator, also possesses a right to be heard in an appeal against the winding-up order after such order was made against it, the court must still be satisfied as to the status of the person in the appellant moving the appeal. In Sri Hartamas, the Supreme Court decided that the affidavit in support of an application by the company's solicitor could not be considered to be that of the company.

[60] It was plainly obvious that after a company has been wound up, the directors are functus officio. Further the Court of Appeal there had serious doubt as to whether the applicant who was represented by one Mr Lim Heng Lin in person and not through a firm of solicitors had the locus to represent the wound up company. That was the question in the mind of the Court of Appeal that caused it to make the observation above. For context the following dicta at pp 84-85 (AMR); pp 476-477 (MLJ) is reproduced below:

> Above all, the appellant being a company is not represented in this proceedings by solicitors. This is in contravention of Order 5 r 6(2) of the Rules of High Court 1980 read with r 4 of the Rules of the Court of Appeal 1994 and s 372 of the Companies Act 1965 where it declares:
>
> " Except as expressly provided by or under any written law, a body corporate may not begin or carry on any such proceedings otherwise than by a solicitor."
>
> Moving now to the status of the applicant/contributor, we have doubts as to whether he is permitted by law to bring an application of this nature. As a contributor, s 243(1) of the Companies Act 1965 provides:
>
> " At any time after an order for winding up has been made the court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit."

But this is in respect of a stay of proceedings. It does not speak of an appeal against the decision in winding up of a company. In an appeal against a winding-up order made, we believe that s 253(2) of the Companies Act 1965 should be more appropriate. Here it caters for:

> " Subject to the rules an appeal from any order or decision made or given in the winding up of a company shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the court in cases within its ordinary jurisdiction."

If s 253(2) of the Companies Act 1965 is to be utilised then it is for the company to institute such proceedings, not for a contributor. *When such a task is within the province of the company then the demand for authority on a person in the company to bring such matter before the court, as well as the need for a solicitor to begin and carry out such proceedings as expressed above, are necessary. In this case, as announced earlier, there is insufficient evidence before us to hold Lim Heng Lin was a person sufficiently armed with authority by the appellant to move this application, and he is not a solicitor by profession to begin and carry on with this proceedings as required by law*. (Emphasis added.)

[61] Also, in the case of *Re Shaharuddin b Mohd Idros; Ex parte Esso Malaysia Bhd* [2009] 5 AMR 163; [2009] MLJU 469 it was observed that:

It would appear that Shaharuddin's challenge has not been met. Apart from a bare statement there has been no effort to produce any evidence to show that Puan Sri Junaidah Mohd Said was duly authorised as of February 9, 1990 to sign the creditor's petition on behalf of Esso. *She may well have been authorised by a resolution of the Board at the material time, or a power of attorney or some other instrument or form of authorisation. However nothing was produced to evidence such authorisation*, which is required where, as in this case, specific challenge is made on this issue.

[62] The petitioner's general manager who is also the deponent of the affidavit verifying petition and the affidavit in reply had stated in both affidavits of his employment and that he has been duly authorised to affirm on behalf of the petitioner.

[63] It is an accepted practice under the law for an employee of a corporation to be able to depose an affidavit on behalf of the corporation. Even an affidavit made without stating any specific authorisation has been accepted by courts in Malaysia. In *Molop Corp Sdn Bhd v Uniperkasa (Malaysia) Sdn Bhd* [2003] AMEJ 0109; [2003] 1 LNS 280. His Lordship Low Hop Bing J (as he then was) held as follows:

An affidavit made without stating any specific authorisation has been accepted by Skinner JC (now J) in *Syarikat Ying Mui Sdn Bhd v Muthusamy a/l Sellapan and 15 Other Appeals* [2001] 1 AMR 830; [1999] 6 MLJ 622, on the following grounds:

> " It is pertinent to note that by virtue of rule 1(4) of the Order, an employee of a party to a cause or matter may swear an affidavit but the affidavit must state that fact. There is however no requirement that such employee must go on further to state that he is also authorised to swear the affidavit before it can be read in the cause or matter. This shows that authority is not a prerequisite to swearing an affidavit … Perhaps the position becomes clearer by looking at how evidence is adduced in the court at different stages of a cause or matter. At trial, evidence will normally be introduced through the oral testimony of a witness but there is no requirement that

before a person testifies, he must be authorised to do so by the party who calls him. If the authority to testify is not prerequisite at a trial that position must surely not change just because a matter is at an interlocutory stage when evidence is introduced through affidavit evidence."

[64] Learned counsel for the respondent further argued that it was too late for the petitioner to file further affidavits to "cover up" this issue of a lack of authority to represent the petitioner and quoted the dicta from the following cases:

(i) *Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd* [2003] 5 AMR 577 at 589; [2003] 4 MLJ 409 at 422:

> We were wondering how the respondent was allowed to file and use that affidavit. It is to be noted that the proceedings of this application are by way of affidavit evidence. *As such in our view when the parties begin their submission the evidence by way of affidavit is deemed to be closed and the parties are only allowed to submit on the evidence as found in the various affidavits*. (Emphasis added.)

(ii) *HSBC Malaysia Bhd v Lionel Rao a/l R Simon Rao & Anor* [2006] 4 MLJ 245 at 249:

> [6] I disallowed the plaintiff's application to file further affidavit on the following grounds:
>
> (1) a date for hearing, i.e. January 27, 2006 was fixed in the presence of a chambering student (Sri Hati) representing the plaintiff;
>
> (2) the fixing of the hearing date would indicate that parties had exhausted all their affidavit evidence; and
>
> (3) there must be an end to the filing of affidavit evidence.
>
> [7] In the case of *Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd* [2003] 5 AMR 577; [2003] 4 MLJ 409, Mokhtar Sidin JCA said:
>
> > It is to be noted that the proceedings of this application are by way of affidavit evidence. As such, in our view when the parties begin their submissions the evidence of affidavits is deemed to be closed and the parties are only allowed to submit on the evidence as founds in the various affidavits.
>
> [8] The case cited is directly in point with the case before me. When the date of hearing was fixed, the chambering student representing plaintiff agreed to it and *since the written submissions had already been filed (the plaintiff written submissions had already been filed (the plaintiff written submission having been filed on the December 9, 2005 and the first defendant on the January 5, 2006), "the evidence of affidavits is deemed closed" and therefore there should be no more filing of affidavit evidence*. (Emphasis added.)

[65] The strictures in the cases above would apply in my mind, more to the respondent who after the exhaustion of affidavits, realising that there had not been a specific reference to a lack of authority on the part of Yap Chun Chong as a general manager to affirm the affidavits on behalf of the petitioner, then sought to raise this lack of authority by way of counsel's preliminary objection, by passing any evidential reference to a lack of authority to affirm affidavits by Yap Chun Chong on behalf of the petitioner.

[66] The respondent's contention that there was no valid authority shown by "Yap Chun Chong" in his purported capacity as a "general manager" to execute the petition on behalf of the petitioner is misplaced and therefore dismissed as being baseless.

(c) No proper service of the statutory notice on the respondent

[67] The respondent submitted that there was no proper service of the statutory notice under s 218(2)(a) of the Companies Act 1965 on the respondent. The respondent argued that in the statutory declaration by the process server Rajendra Chander a/l Appalanaidoo in paragraph 2 of exh "CZSB2" of the petition, it merely stated:

> I did on Tuesday, 22/5/2012 at 4.50 pm serve Statutory Notice pursuant to Section 218(2)(a) of the Companies Act 1965 dated 22/5/2012 on DELPHAX SDN BHD (Company No. 367921-H) ("the company") by *delivering the same on the table of the receptionist* located at the registered address of the Company at No. 6, Jalan Bangsar Utama, 59000 Kuala Lumpur, whereby a female Chinese staff at the said registered address confirmed that the said address is Delphax Sdn Bhd's company secretary office *but refused to accept service of the said statutory notice*.

[68] Mr Alvin Lai for the respondent pointed out that upon perusing the statutory declaration, it would be noted that as the female Chinese staff had refused to accept service of the said statutory notice, *no further elaboration or explanation was given as to whether the said notice was left on the table or had been taken back by the process server* affirming the statutory declaration.

[69] On this point, the respondent submitted that there is no averment in the said statutory declaration nor indication as to whether there was proper service of the said notice. Further, the respondent had *vehemently denied receiving the said notice* as stated in paragraph 5 of Azman's affidavit.

[70] Further, a comparison of paragraph 2 of the said statutory declaration by Raajendra Chander a/l Appalanaidoo and paragraph 3 of the said statutory declaration will show in paragraph 3, the said process server did say that "I leave the same under the main door at the said address", which is the purported "business address" of the respondent.

[71] He contended that the *conspicuous absence* of such an averment in paragraph 2 of the said statutory declaration that the said s 218 notice was "left" at the registered office of the respondent *shows that this was never done*.

[72] He then urged this court that this is where we have to go back to the "basic principles":

(i) The "basic principle" is that the notice under s 218(2)(a) of the Companies Act 1965 must be left at the registered office (and not the business address).

Section 218(2)(a) of the Companies Act 1965

[2] A company shall be deemed to be unable to pay its debts if –

(a) 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 authorised 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. (Emphasis added.)

(ii) The equally "basic principle" that the petitioner is bound by its pleading i.e. the contents of the petition. As authority he cited the case of *Datuk Mohd Sari b Datuk Hj Nuar v Idris Hydranlic (M) Bhd* [1997] 5 MLJ 377 at 400-401 where it was held as follows:

> I hold that other than the statement of accounts which the petitioner had adduced, he cannot rely on any other extrinsic fact or ground in support of *his petition because the petitioner is bound by his petition and cannot traverse outside it*. In *Re Lundie Brothers Ltd* [1965] 2 All ER 692 (ref) Plowman J said at p 699 (per curiam):
>
> > "It seems to me that it would be wrong for the court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or some lack of probity."
>
> In *Ng Tai Tuan & Anor v Chng Gim Huat Pte Ltd* [1991] 1 MLJ 338 (ref), Chao Hick Tin JC disallowed a petitioner from straying outside his petition when he said at p 343:
>
> > "Other than a bare statement in paragraph 8 of the petition which reads 'alternatively the company is insolvent and unable to pay its debts' there is no other statement or allegation in the petition setting out facts to show that the company is generally insolvent. The affidavit filed by the petitioners at the eleventh hour was an attempt to introduce evidence on the company's general insolvency even though nothing on that is stated in the petition itself. I agree with the submission of the counsel for the company that it would be grossly unfairly to permit the introduction of such facts by affidavit at that late stage. The company had hardly an adequate opportunity to rebut.
>
> I think the following comments by Meggary J in *Re Fildes Bros Ltd* [1970] 1 All ER 923 at p 923."

[73] Based on paragraphs 7, 8 and 9 of the petition, it was urged upon this court that from the usage of the phrase "The company is *therefore unable*" to pay its debts in paragraph 7 and "*In the circumstances*, it is just and equitable that the company be wound up" in paragraph 9, that all these are *predicated* upon paragraph 7 i.e. the presumption ("of insolvency") by reason of the *operation of s 218(2)(a) of the Companies Act 1965* (*which the respondent never received*).

[74] Therefore when the service of the said s 218(2)(a) notice [matter solely with the petitioner's knowledge which the petitioner has to prove as well – *Malaysia Land Investment*'s case (*supra*)] *cannot be proven, the whole petition ought to fail in limine.*

[75] However, as pointed out by learned counsel for the petitioner, pursuant to s 350 of the Companies Act 1965, a document may be served on a company by leaving it at or sending it by registered post to the registered office of the company.

[76] Rule 25 of the Companies (Winding-Up) Rules 1972 states that every petition shall be served on the company at the registered address, and if there is no registered office, at the principal or last known principal place of business that can be found by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at the registered office or principal place of business.

[77] According to the statutory declaration annexed to the petition, the statutory notice was left at the table of the receptionist at the registered address of the respondent, who also confirmed that the said address is the respondent's company secretary's office. The conduct of leaving the statutory notice at the receptionist's table is for all intents and purposes in compliance with s 350 of the Companies Act 1965 and rule 25 of the Companies (Winding-Up) Rules 1972.

[78] According to the affidavit of service affirmed by Mokhtar bin Ahmad on August 9, 2012, a copy of the petition along with the affidavit verifying petition was left at the respondent's registered address at the front door.

[79] I agree that there is therefore sufficient service in accordance to the Companies Act 1965 and the Companies (Winding-Up) Rules 1972.

[80] It is pertinent to note that the respondent had not disputed that the addresses where the statutory notice and the petition were left are correct. The denial of receipt and or allegations of irregular service are of bare denial and an afterthought by the respondent.

[81] Even assuming for a moment that the service of the statutory demand had not been properly done, it would only mean that the petitioner cannot rely on the rebuttable presumption of inability to pay the judgment debt. The petitioner will nevertheless have to show that the respondent is unable to pay the judgment debt. It is not disputed that since the service of the petition on the respondent, the respondent has not been able to come up with a viable proposal to pay the judgment debt, let alone to pay it in full. The reality of its inability to pay its debt as and when it falls due is a sufficient ground for winding it up. The reality becomes incontrovertible when one considers the real reason for asking for a breather from the court for time to await the finalising of a "white knight" to assume its liability.

(d) There is a possibility of a "white knight" in Dufu Technology Corp Bhd (a public listed company) who intends to purchase 100% equity interest in Delphax Group of Companies which includes the respondent

[82] Learned counsel for the respondent on the last hearing on September 28, 2012 informed the court that there is a possibility of a "white knight" i.e. Dufu Technology Corp Bhd (a public listed company) who intends to purchase 100% equity interest

in Delphax Group of Companies which includes the respondent, Delphax Sdn Bhd. The public announcement made in the "Bursa Malaysia" website appeared on September 25, 2012.

[83] As submitted the announcement by Dufu Technology was only made on September 25, 2012 and parties require time to finalise the "take-over" of the respondent's company.

[84] The respondent argued that to allow the winding-up petition at this point would seriously jeopardise the intention of the "white knight" which would benefit all parties and would cause grave injustice to the respondent.

[85] The test for the consideration of this court is the test of "inability to pay". It is one of commercial insolvency and it is an established principle that a company is insolvent if it is unable to meet its current debt as it falls due even if it has substantial wealth which cannot be immediately realised and liquidated.

[86] There is not a shred of evidence produced to this court to state that the respondent is solvent and is able to pay its debt to the petitioner. The respondent has to date not been able to pay its debts which is a judgment debt and appeal against that judgment had been withdrawn by the respondent itself. Upon service of the petition, the respondent had more than enough opportunity to pay but failed to. Looking at the submission both written and oral of the respondent, it would appear that the real reason for objection to the petition is primarily more an exercise to buy some time for a possible restructuring as evidenced from the announcement made by a possible "white knight".

[87] That would be a different story altogether and it should not affect, in the absence of a restraining order under s 176(10) of the Companies Act 1965, the inescapable and inexorable course of a winding-up petition that has been put in motion. The petition is to be disposed of based on the commercial insolvency test.

[88] The test was reiterated by the Court of Appeal recently in *Lafarge Concrete (Malaysia) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 5 AMR 104 where His Lordship Jeffrey Tan Kok Wha (now FCJ) reminded all of the basic underlying test of commercial insolvency in a winding up as follows:

> [15] The ability of a company to meet current demands upon it goes to the solvency or otherwise of a company. In *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53, the Privy Council opined that the following observations in *Buckley on the Companies Act*, 13th edn at 460, dealing with "commercial insolvency, that is, of the company being unable to meet current demands upon it", were impeccable:
>
> > " In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound-up."

[16] In *Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21, Siti Norma Yaakob J, as she then was, pointed out that the scope or the meaning to be given to the phrase "unable to pay its debts" appearing in s 218(1)(e) of the CA was explained by McPherson J in *The Law of Company Liquidation*, 3rd edn, at 54 as follows:

> "The phrase "unable to pay its debts" is susceptible to two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets. But to require proof of this in every case would impose upon an applicant the often impossible task of establishing the true financial position of the company, and the weight of authority undoubtedly supports the view that *the primary meaning to the phrase is insolvency in the commercial sense – that is inability to meet current demands irrespective of whether the company is possessed of assets which, if realised, would enable it to discharge its liabilities in full*."

[17] "In short, the question is not whether the debtor's assets exceed his liabilities as appeared in the books of the debtor, but *whether there are moneys presently available to the debtor, or which he is able to realise in time, to meet the debts as they become due. It is not sufficient that the assets might be realisable at some future date after the debts have become due and payable*" (*Lian Keow Sdn Bhd (In Liquidation) & Anor v Overses Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449 at 454, per Seah SCJ). "The test of commercial insolvency simply means that the respondent company is unable to meet current debts as they fall due" (*System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd* [1999] 1 AMR 1187 per Abdul Malik Ishak J, as he then was). "… the test for the insolvency of the respondent does not depend on the presence of their realisable assets" (*Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd*).

[18] It was a bare allegation that there was a dispute. On the evidence, there was no doubt about the liability of the respondent, and there was no question or issue to be decided and or tried.

[19] The respondent who could not meet the current demand of the appellant was insolvent. The respondent produced its banking statements for the period August 2008 to December 2008 (see pp 180-188 of the appeal record) to substantiate that it was a going concern. But those banking statements only substantiated that the respondent had no funds to meet the demand of the appellant at the material time. Even when the petition was heard in 2009, there was still no evidence that the respondent had the funds and would meet the demand of the appellant. In those circumstances, the refusal of the winding-up order was wholly unjust, for it altogether deprived the appellant of the remedy conferred by statute. All said, the winding-up order should have been made.

[20] The winding-up order should have been made even if the respondent was solvent (*Cornhill Insurance plc v Improvement Services Ltd & Ors* [1986] BCLC 26 at 29, where it was held by Harman J that where a creditor's debt is clearly established, then the creditor has the right to present a winding-up petition and obtain relief even though the company was solvent). "*Where the creditor's debt is clearly established it seems to me to follow that this court would not, in general, at any rate, interfere though the company would appear to be solvent … to persist in non-payment … would itself either suggest inability or that the application was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt*" (*Mann v Goldstein* [1968] 2 All ER 769 at 773 per Ungoed-Thomas J). The solvency of a company counts for nothing if it is not ready, willing and able to meet the demand of the creditor. The discretion to refuse

winding up could be exercised if the respondent was ready, willing and able to meet the demand of the appellant (see *Re The Imperial Hydropathic Hotel Company, Blackpool Ltd* (1883) 49 TLR 147 at 151, where the company was solvent and the creditor accepted the proposal to pay the debt within one month, the Court of Appeal (Jessel MR, Cotton and Bowen LJJ) ordered the debt to be paid within one month, in default of which "there will be the usual winding-up order"). But it was not that in the instant case.

[89] As clear as crystal, the respondent has more than ample opportunity to pay the judgment debt but has no means to pay it. The petition was filed on July 26, 2012. The certificate pursuant to rule 32 of the Companies (Winding-Up) Rules 1972 was issued on August 29, 2012. Hearing of the petition was on October 31, 2012. More than ample time and allowance have been given to the respondent to pay an undisputed judgment debt if it could pay. The fact remains and indeed underscores the respondent's inability to pay the judgment debt. It is a harsh reality that the respondent must accept with the attendant consequence of being wound up.

[90] In the event that the "white knight" is able to discharge the liability of the respondent, the liquidator or any creditor or contributory of the respondent may apply for a permanent stay of the winding-up proceedings altogether under s 243(1) of the Companies Act 1965.

Pronouncement

[91] In the circumstance, the papers being in order, I made an order in terms of prayer 10(a), (b) and (c) of the petition for the winding up of the respondent and for the Director General of Insolvency to be made the provisional liquidator.