

**IN THE COURT OF APPEAL OF MALAYSIA AT PUTRAJAYA  
(CIVIL APPEAL NO. W-02-336-2004)**

**BETWEEN**

**PEOPLE REALTY SDN BHD ... APPELLANT**

**AND**

**RED ROCK CONSTRUCTION SDN BHD ... RESPONDENT**

**APPEAL FROM HIGH COURT KUALA LUMPUR  
(PETISYEN UNTUK PENGGULUNGAN SYARIKAT NO. D3-28-1000-2003)**

**QUORUM**

**DENIS ONG JIEW FOOK, JCA (since retired)  
HASHIM BIN DATO' HAJI YUSOFF, JCA (now FCJ)  
NIK HASHIM BIN NIK AB. RAHMAN, JCA (now FCJ)**

**26 OCTOBER 2007**

## **Judgment of the Court**

1. This judgment is delivered pursuant to section 42 of the Courts of Judicature Act 1964 (Act 91) as Denis Ong Jiew Fook, JCA, who presided at the hearing of the appeal, has since retired.
2. The undisputed facts are that the petition for winding-up was presented against the appellant after the service of a statutory notice under section 218 of the Companies Act 1965 (the Act) on the appellant requiring payment of RM1,117,179.68 based on a judgment obtained by the respondent dated 11 June 2003 which had been converted from an arbitral award pursuant to section 27 of the Arbitration Act 1950.
3. The appellant had, after service of the statutory notice but before the filing of the petition, filed a cross claim against the respondent in High Court Pulau Pinang Civil Suit No. 22-597-2003 (MT4) for RM2,107,171.67 special damages and general damages.

4. An application to set aside that arbitral award for misconduct under section 24 of the Arbitration Act 1950 was then the subject of civil appeal P-02-905-2002 in the Court of Appeal. On 22 June 2004 the Court of Appeal dismissed the appeal.
5. Both the High Court and the Court of Appeal had before the filing of the cross claim dismissed the appellant's applications for a stay of execution proceedings on the judgment pending the hearing and disposal of the appeal against the judgment.
6. The appellant's cross claim against the respondent in the High Court Pulau Pinang has not been disposed of.
7. On 27 December 2003 the appellant filed the notice of motion (Encl.6) i.e. after the winding-up petition was filed and served on the appellant on 8 December 2003. The motion prayed for an order that the respondent be restrained by injunction from taking any further proceeding upon the petition by advertising the same and that the petition be removed from the file of proceedings.

8. On 24 March 2004 the learned judge of the High Court Kuala Lumpur dismissed the motion with costs on the following grounds :

“(1) Permohonan responden (appellant) adalah suatu penyalahgunaan proses undang-undang kerana responden (appellant) tidak boleh menghalang pempetisyen dari mengiklankan danewartakan petisyen penggulungan yang difailkan.

Ini adalah kerana di bawah kaedah 24 Kaedah-Kaedah Penggulangan Syarikat 1972, sesuatu petisyen penggulungan itu mesti diiklankan dan diwartakan. Ini adalah suatu peruntukan mandatory.

(2) Selain dari itu, permohonan responden (appellant) untuk menangguhkan perlaksanaan penghakiman yang diperoleh oleh pempetisyen (respondent) terhadap responden (appellant) juga telah ditolak oleh Mahkamah Rayuan pada 19-8-2003.

Ini menunjukkan Mahkamah Rayuan berpendapat tiada sebarang keadaan khas yang wujud untuk menjadi alasan kenapa penghakiman tersebut tidak boleh dikuatkuasakan.

(3) Petisyen penggulungan ini adalah berdasarkan satu penghakiman Mahkamah yang sempurna dan boleh dikuatkuasakan.

(4) Walaupun responden (appellant) dikatakan mempunyai satu tuntutan balas terhadap pempetisyen (respondent) yang mana

dinafikan oleh pempetisyen (respondent) ianya masih boleh diteruskan walaupun syarikat responden (appellant) digulungkan. Ini adalah kerana tuntutan balas tersebut adalah tersendiri dan berasingan daripada tindakan ini.

- (5) Notis di bawah seksyen 218 Akta Syarikat 1965 telah diserahkan kepada responden (appellant) di alamat berdaftarnya pada 15-9-2003 dan alamat perniagaannya pada 23-9-2003.

Walaubagaimanapun responden (appellant) tidak berbuat apa-apa sehinggalah petisyen penggulungan difailkan pada 4-11-2003 dan tarikh pendengaran petisyen ini telah ditetapkan pada 11-2-2004.

- (6) Tiada keadaan khas yang ditunjukkan oleh responden (appellant) bagi membenarkan permohonan responden (appellant) ini.”

9. Before us, learned counsel for the appellant contended

that :

- (a) the respondent had no standing to file the winding up petition against the appellant because the appellant has a valid cross claim which exceeds the amount in the judgment obtained by the respondent and in support he cited two cases :

- (i) **Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd (1980) 2 MLJ 53** where Lord Edmund – Davies in delivering the judgment of the Judicial

Committee of the Privy Council said at p55 para A-B :

“There is no distinction in principle between a cross-claim of substance (such as in the Wools case) and a serious dispute regarding the indebtedness imputed against a company, which has long been held to constitute a proper ground upon which to reject a winding-up petition.”

- (ii) **In re Bayoil S.A (1999) 1 W.L.R. 147** where the English Court of Appeal held that where a winding-up petition was based on an undisputed debt but the company had a genuine and serious cross-claim, which it had been unable to litigate, exceeding the amount of the petitioner’s debt the court would, in the absence of special circumstances, exercise its discretion by dismissing or staying the petition; and that, accordingly, in the circumstances, the judge should have either dismissed or stayed the petition.

And

- (b) the High Court has powers under section 221 of the Act, rule 193 of the Companies (Winding-Up) Rules 1972 (the Rules) and under its inherent jurisdiction to restrain the

advertisement of the petition and to make consequential orders.

10. With respect, we do not agree. The respondent's winding-up petition was grounded on a valid judgment the execution of which had not been stayed. In fact both the High Court and the Court of Appeal had before the filing of the cross claim dismissed the appellant's application for a stay of execution of the judgment. Hence the respondent should not be prevented from pursuing its right to have the appellant wound up for its inability to pay its debt. Only on the hearing of the petition the court would be able to consider the cross claim and determine whether it should exercise its discretion to order winding-up or not to order it. In the event the appellant is ordered to be wound up the cross claim can still be proceeded by the liquidator on behalf of the appellant under section 236 (2) of the Act (**Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Ltd (1997) 3 CLJ 485 CA** at p491). Thus, to consider the cross claim, which is a separate issue altogether, before the hearing of the

petition is premature and therefore, it should not be considered at that stage. (See **Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd (1988) 1 CLJ (Rep) 5 SC**).

11. The test in **re Bayoil**, supra, regarding cross claim is not applicable in the present case. **re Bayoil** was decided upon consideration of a foreign statute. The case, like **Malayan Plant**, supra, also fortifies the view that the power of the court to dismiss or stay the petition is to be exercised only ‘on the hearing of the petition’ and not earlier. Therefore, the need to show special circumstances why the appellant should be wound up before the cross claim is determined does not arise.

12. We agree with the respondent that the cross claim at this stage of the proceedings remains illusory and uncertain since it had still to go through the process of litigation before it could eventually graduate into a judgment. (See **RHB Bank Bhd v Pembinaan MCP Sdn Bhd (2003) 5 CLJ**

**335).** Even if there exists the cross claim, the petition should not be struck out in limine and should be heard on its merit (**Morgan Guaranty Trust Co. New York v Lian Seng Properties Sdn Bhd (1991) 1 CLJ (Rep) 317 SC**).

13. With regard to the appellant's contention that the High Court has powers under section 221 of the Act, rule 193 of the Rules and under its inherent jurisdiction to restrain the advertisement of the petition, we hold that the contention has no merit. Section 221 clearly provides for powers of court 'on hearing a winding-up petition' and not before the hearing of the petition and whereas rule 193 provides for enlargement or abridgment of time which clearly has no relevance to the issue before us. The request for invocation of inherent powers of the court is misplaced. Rule 24 of the Rules clearly governs this case and prescribes a requirement of advertisement of petition upon it being filed. By its terms, the requirement is mandatory; and surely the court cannot disregard the provision and act outside it.

14. In our judgment, once a winding-up petition is filed, the court is precluded from granting an injunction against advertisement or gazettal of the petition. In this regard, we agree with Vincent Ng J (later JCA) in **Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd (2002) 4 CLJ 391** at p396 where he said :

“I would hold that the court is not empowered to make any order to restrain or injunct the petitioners from carrying out their statutory obligation to comply with r.24.”

Therefore, the appellant is not entitled to the injunctive relief prayed for as the appellant’s cross claim for damages was purely monetary in nature; there was nothing to be preserved by the grant of the injunction and indeed, there is no evidence of any irreparable harm. Thus, the learned judge was right in dismissing the motion with costs.

15. Accordingly, we dismiss the appeal with costs and order that the deposit be paid to the respondent to account of its taxed costs.

16. My learned brother Hashim Yusoff, FCJ has seen this judgment in draft and has expressed his agreement with it.

26 October 2007

**(Dato' Bentara Istana Dato' Nik Hashim bin Nik Ab. Rahman)**  
Judge  
Federal Court  
Malaysia

Counsel:

For the appellant : A. Kanesalingam, K. Shanmuga  
Solicitors : Kanesalingam & Co.

For the respondent : S.J. Ooi  
Solicitors : Wong-Chooi & Mohd. Nor