

DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA

RAYUAN SIVIL NO. B-03-54 OF 2001

**Dalam Perkara Seksyen 253(2)
Akta Syarikat 1965**

ANTARA

**VISAGE CONTINENTAL SDN BHD
(No. Syarikat 360450 - P)**

... Perayu

DAN

SMOOTH TRACK SDN BHD

... Responden

(Dalam Mahkamah Tinggi Malaya Shah Alam
Penggulungan Syarikat No. MT2-28-79-2001)

Dalam perkara Seksyen 218 Akta
Syarikat 1965

Dan

Dalam perkara
VISAGE CONTINENTAL SDN BHD
(No. Syarikat 360450 - P)

ANTARA

SMOOTH TRACK SDN BHD

... Pempetisyen

DAN

**VISAGE CONTINENTAL SDN BHD
(No. Syarikat 360450 - P)**

... Responden

JUDGMENT OF THE COURT

Introduction

1. The matter before us is an appeal by the Appellant (the Respondent in the Court below) against the decision of the High Court made on the 28 September 2001 wherein upon the presentation and hearing of the Petition filed by the Respondent (the Petitioner in the Court below) under section 218 of the Companies Act 1965 (the Act) it was ordered that the Appellant be wound up.

Facts of the Case

2. The Appellant was incorporated in September 1995 with a paid up capital of RM3,000,000.00. Its principal business activities include shipping agency representing several shipping lines.
3. On or about 1st October 1996, the Appellant was appointed the shipping agent for a South Korean Shipping Line, Hanjin Shipping Co Ltd, (Hanjin) which has a regional office based in Singapore. The Appellant succeeded the former agent of Hanjin namely, Marine Meridien Sdn Bhd.

4. Upon the expiry of the Agreement between Hanjin and the Appellant, Hanjin appointed the Respondent as their agent for Peninsula Malaysia.
5. Pursuant to an Agency Agreement dated 1.4.2000, the Respondent with the consent of their principal, Hanjin, duly appointed the Appellant as their exclusive sub-agent for East Malaysia, i.e. Labuan and all of Sabah and Sarawak ports. Added in to the territories however, were Malacca and Kuantan (“the Territories”).
6. Not long after the appointment of the Appellant by its letter dated 23.8.2000 the Respondent unilaterally and without assigning any reason thereto terminated the sub-agency of the Appellant by giving it a 3 months’ notice in writing and effective from 24.11.2000.
7. Subsequently the parties or their representatives had several meetings to sort out, verify and settle all the accounts prior to the handing back of the agency on the Territories to the Respondent.
8. During the process of verifying the accounts both parties came out with their own claims or counterclaims against each other.

9. Whilst the Appellant admitted owing the Respondent a sum of RM33,595.60 without yet taking into account the sum of RM500,000.00 it had spent on the instruction of Hanjin to upgrade and renovate the offices in the Territories, the Respondent by its letter dated 4.1.2001 claimed that the Appellant owed it the sum of RM540,050.76 after deducting the sum of RM54,003.00 being commission due to the Appellant.
10. Arising from the claim by the Respondent the Appellant sought for a proper handing over of the business as per in the Agency Agreement which would include the verification and settlement of all accounts between the parties.
11. The Respondent did not favourably respond to the request. Instead it caused to be issued and served on the Appellant a Notice under Section 218 of the Act.
12. Subsequently a Winding up Petition was filed by the Respondent seeking to wind up the Appellant on the ground of being unable to pay its debt. There was no court judgment against the Appellant filed to support the Petition.

13. Upon being served with the Petition the new solicitors of the Appellant in its letter dated 1.8.2001 offered to settle the outstanding sum of RM194,969.00 in one payment within 7 days from the date of confirmation by the Respondent of the said sum. It was also requested that the Respondent withhold the advertisement of the Petition pending the outcome of the negotiation of the parties.
14. By a letter dated 6.8.2001 the solicitors for the Respondent informed the solicitors of the Appellant of their client's agreement to the settlement proposal except that it could not withhold the advertisement of the Petition which had been arranged earlier on.
15. A cheque for the sum of RM194,969.00 was thus deposited on 15.8.2001 by the Appellant to its solicitors with instruction to release the same to the solicitors for the Respondent upon fulfilling the request by the Appellant that the Respondent through its solicitors caused a notice to be advertised that it had withdrawn its Winding up Petition against the Appellant.
16. However in a meeting held on 7.9.2001 the Managing Director of the Respondent refused to take into account all monies advanced or spent by the Appellant on behalf and on instruction of Hanjin prior to

1.4.2000. The Respondent also failed to account being the new agent for Hanjin all monies including disbursements and advances made by the Appellant while as the agent for Hanjin.

17. Despite the differences between the parties it was agreed during that meeting for the representatives of each party to go through the invoices and claims submitted by the Appellant and to verify them with the view to reconcile them with the figures of the Respondent.
18. In view of the pending verification exercise and probable settlement of the matter it was therefore agreed that the parties should seek for a short adjournment of the hearing of the Winding up scheduled on 14.9.2001.
19. Then on the day of hearing of the Winding up Petition and despite having agreed to a short adjournment the Respondent insisted for the hearing to proceed knowing full well that the Appellant was no longer within the 7 days requirement to file an Affidavit in Opposition to the Winding up Petition.

20. At the same time in a letter dated 14.9.2001 the solicitors for the Respondent admitted a discrepancy of RM69,862.61 in the claim stated in the Winding up Petition.
21. Meanwhile, on the materials submitted to the Respondent for verification the Respondent could not dispute the invoices and the advances made by the Appellant.
22. Incidentally, by its letter dated 6.8.2001 the Respondent accepted the offer made by the Appellant the sum offered as full and final settlement of all sums due from the Appellant to the Respondent. However by its solicitors' letter dated 17.8.2001 the Respondent rejected the offer and claimed that the initial acceptance was due to typo error.
23. During the hearing of the Winding up Petition and in view of the stance subsequently adopted by the Respondent the learned Judge thus refused to adjourn and proceeded to hear the matter resulting in the order to wind up the Appellant.

24. It was also the view of the learned Judge that the Appellant only came to Court to seek for adjournment without making any other preparation in relation to the Winding up Petition.
25. Before us learned counsel for the Appellant submitted that the learned Judge should have adjourned the hearing since the parties were still negotiating for settlement. That explained for the non-filing of an Affidavit in Opposition. There was no other creditor involved or supporting the Petition.
26. Further it was argued that the winding up under section 218 was premature since the debt was disputed, there was no court judgment and the Appellant had cross-claim in the sum of RM400,000.00 against the Respondent. For these reasons it was submitted that the Respondent did not have the locus standi to present the Petition.
27. For the Respondent it was submitted that the Winding up Petition was in order and without any Affidavit in Opposition filed by the Appellant the learned Judge had no choice but to hear it in the exercise of his discretion and made the order accordingly.

28. It was also contended that the learned Judge was correct in not granting the adjournment since the Appellant only came to Court to seek for adjournment without making any preparation to answer the Winding up Petition.

29. Now, section 218(2)(a) of the Act reads as follows:

“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;’.

30. This provision has been judicially considered by our Courts in several reported cases. Basically it is intended to provide for a creditor to present a petition for winding up of a company which is unable to pay

its debt. Prima facie proof of such inability is by way of service of the statutory notice or by some other proof of insolvency. Thus a creditor who has not been paid has the right to file a petition for winding up notwithstanding his motives for doing so. (See: *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 96*). Failure of a company to pay as demanded would trigger the presumption that it is unable to pay its debt. But it is a rebuttal presumption in which the onus to rebut is upon the company to show that it is able to pay its debt. (See: *PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd [1995] 1 MLJ 21*; *Re Lympne Investments Ltd [1972] 1 WLR 523*).

31. If after being served with the statutory notice the company disputes the debt stated therein then it is for the Court to consider on the evidence whether the dispute is bona fide before it can be said that the company is to be deemed unable to pay its debts and appropriate to be wound up.
32. It is to be noted that a dispute as to the precise amount owed would not be a sufficient answer to a petition if it can be established that the petitioner is a creditor for a sum which would otherwise entitle it to a

winding-up order. (See: *Re Tweeds Garages Ltd [1962] 1 All ER 121*).

33. But if the debt is disputed on substantial grounds and the circumstances are sufficient for the Court to hold that the presentation of the petition is an abuse of process, the petitioner is either restrained from proceeding with the winding-up or the petition is dismissed.
34. In considering the petition for winding-up of a company on the ground that it is unable to pay its debt the Court must act judiciously and should only consider the allegations contained in the petition and will not go beyond it. (See: *Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd [1997] 5 MLJ 377*; *Re Lundie Bros Ltd [1965] 2 All ER 692*).
35. Indeed, vague allegations in a petition or allegations which were so unsatisfactory as to amount to an abuse of the court would certainly entitle the court to strike out the petition in limine. (See: *Re WR Willcocks & Co Ltd. [1974] Ch 163, [1973] 2 All ER 93*; *Re A Company (1985) BCLC 37, [1974] 1 All ER 256, [1973] 1 WLR 1566*).

36. Reverting to the present appeal it is obvious that the main reason for the learned Judge in not granting an adjournment is that the Appellant came to Court without making any preparation for the hearing except to seek for an adjournment. There was no affidavit in opposition filed.
37. But with respect the learned Judge should have at least listen and considered the explanation given by the learned counsel for the Appellant and sought for verification from the learned counsel for the Respondent. In that way fairness and fair play are maintained.
38. Indeed before us learned counsel for the Respondent did not dispute the fact that the parties were negotiating before the hearing and that there were meetings between the parties to verify the claims and the cross-claims and set-offs. There was also no dispute that the Respondent retracted after agreeing at first to a settlement in the sum of RM184,000.00. Hence, there must be truth in what was asserted before the learned High Court Judge.
39. Accordingly, the learned High Court Judge should have at least given the Appellant the opportunity to be heard and the time perhaps to file an affidavit in opposition even if he viewed that the Petition was in order. In our view the Respondent failed to practice fair play in this

instance. Indeed the importance of the fundamentals of fair play had been recognized in meeting and domestic enquiry. We see no reason why the same principle should not apply in judicial hearing. (See: *Chong Kok Lim & Ors v Yong Su Hian [1979] 2 MLJ 11*). On this ground alone that we allowed the appeal.

40. In the event that we are wrong in just allowing the appeal when we could have sent the matter for rehearing, we are also of the view that premised on what were said before us and not disputed by learned counsel for the Respondent we find that the Petition is incompetent to proceed.

41. It is not disputed that indeed the parties agreed to have the accounts verified first before the final figure could be ascertained. Thus, the figure and claims can be said to be vague bordering to an abuse of process by the Respondent. As such it cannot be said that there is no bona fide dispute on the claims. The only shortcoming was the failure by the Appellant to file an affidavit in opposition. But given the reason and not disputed by the learned counsel for the Respondent we are of the view that the explanation for such failure is reasonable in the circumstances. If not for the last minute retraction by the Respondent the matter might not have even reached the Court. We

would say that a party should not be allowed to approbate and reprobate. (See: *Re Lord Chesham Cavendish v Dacre [1886] 31 Ch D 466*; *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal [1995] 3 MLJ 472*; *Mascom (M) Sdn Bhd & Ors v Ken Grouting System Specialist Sdn Bhd [2004] 2 MLJ 163*; *PB Securities Sdn Bhd v Autoways Holding Bhd [2000] 4 MLJ 417*; *Sabah Finance Bhd v Addspeed Enterprises Sdn Bhd & Ors [1995] 4 CLJ 645*). It is unconscionable and plainly unfair.

42. We also say that the Respondent should be estopped from denying that it had earlier on agreed to a settlement and the sum payable. For it then to say that it was a typo error is indeed unfair and unreasonable. (See: *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331*; *Leong Huat Sawmill (Pte) Ltd v Lee Man See [1985] 1 MLJ 47*).

43. Thus, for the above reasons that we allowed the appeal with costs.

Signed.
(DATO' RICHARD MALANJUM)
Judge
Court of Appeal Malaysia
Putrajaya

Date: 13th September, 2007

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