

**Morisma Sdn Bhd
Wong Yep Seng**

... **Appellant**

AND

**Perbadanan Tabung Amanah
Islam Brunei (TAIB)**

... **Respondent**

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 6 of 2011)**

Before: Mortimer, P.; Davies and Leonard, JJ.A.
10th November, 2011.

*Companies winding up order under section 163 (a) and 162 (e) of the companies act.
A winding up order will be made under a settled practice of the court if the
facts under section 163 (a) are established unless good reason is shown not to
make such an order.*

Mr Balasingham of M/S Ho & Siong for the Appellants.
Mr YC Lee of M/S Y.C. Lee & Lee for the Respondents.

Mortimer, P.:

At the conclusion of the hearing we dismissed this appeal with costs. We now give our reasons.

This is an appeal against an order to wind up Morsima Sdn Bhd (the company) made by Stephen Chong J on 17 March 2011.

The company is a developer/contractor. It was involved in the development of the Airport Mall and is said to have valuable assets. In round figures it owes B\$8.478 million under a judgment debt to the respondent, TAIB, which it has not paid. The 2nd appellant is a director of the company, a creditor and a guarantor of the debt. A Receiving Order was made against him on 14 July 2011 but he has not been made bankrupt and he may pursue the appeal.

On 23rd of August 2010 TAIB served on the company a notice under Section 163 (a) of the Companies Act requiring payment of the judgment sum which it neglected to pay for 3 weeks. Under the said section the company is deemed to be unable to pay its debts and was wound up under section 162 (e) of the Act. This is not in dispute.

The Official Receiver is the liquidator of the company and under section 182 of the Companies Act is in control of its property. He has not been served with these proceedings.

A Preliminary Issue

Mr YC Lee, who appears for TAIB, submits that the appeal is not properly constituted and ought to be dismissed at the outset. He takes a number of points in support but all save one have fallen away during argument.

His remaining submission is that the appellants ought to have served the official receiver with the proceedings as a person interested. He relies upon RSC order 57 rule 10 (1) which provides:

"The Court of Appeal may in any case direct that the record of appeal be served on any party to the proceedings in the Court below on whom it has not been served, or on any person not parties to those proceedings."

We have not made an order in this case. Whereas such an order will often be made in an appeal against a winding up, the power under the rule is discretionary and for reasons which will appear service on the official receiver in this matter is unnecessary having regard to the merits. Had he appeared he could only have put himself at risk for costs.

This is not a basis upon which the appeal ought to be dismissed and we continued to hear the merits.

The Merits

The winding up order was made under section 162 (e) of the Companies Act on the grounds that the company was shown to be unable to pay its debts as and when due under section 163 of the Act.

Section 162 provides:

"162. A company may be wound up by the court if --

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

Section 163 provides:

163. A company shall be deemed to be unable to pay its debts --

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding \$10,000 then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand and requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

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

Those opposing the petition sought to show that the company's assets far outweighed its liabilities under section 163 (c) of the Act by a detailed examination of them. They then sought to persuade the judge that even if he found the company unable to pay its

debts under section 162 (e) he should still exercise his discretion not to wind the company up if such an order would be unjust or inequitable. The use of the phrase "unjust or inequitable" in this context may be confusing because it might be thought that the appellants were relying, in some way, on section 162 (f) which they plainly could not do. But we think that they were referring to a residual, but limited discretion which arises under section 162 (e).

Having heard the evidence given under section 163 (a) and (c) the judge held insolvency to be proved and made the order.

Mr Balasingham, who appears for the appellants, wrongly submits that the three ways in which an inability to pay debts as and when due can be shown under section 163 are not alternative and seeks to reopen the issues under subsection (c) contending that the judge's decision was wrong both on the evidence and in the exercise of his discretion. He cites three Singaporean decisions decided only under section 254 (2) (c) which is a similar provision to section 163 (c).

However, this enquiry is nothing to the point. Mr Balasingham, concedes that TAIB established all the necessary facts to show that the company was unable to pay its debts under section 163 (a). When a breach of sub section (a) has been proved it is not open to the judge to embark on a consideration of section 163 (c).

Although the making of a winding up order remains discretionary it is the established practice of the court to make a winding up order when an inability to pay debts as and when due has been established under section 163(a) in the absence of some good reason such as opposition by all or a substantial majority of the creditors. There was no such good reason shown in this case.

The consequence is that the provisions of section 163 (a) of the Companies Act have been complied with. On this there is no dispute. The company is deemed to have been unable to pay its debts and TAIB was entitled to a winding up order as of right under section 162(e) of the Act. No good reason for refusing the order was demonstrated in the court below. These proceedings do not concern the wealth of a company or the value of its assets or a balance between its assets and liabilities. The only question is whether the company can pay its debts as and when they are due, deemed to be the case on the facts established under section 163 (a).

The judge's decision to order the winding up was correct.

The order

For these reasons the appeal was dismissed with an order for costs against the 2nd appellant. In circumstances where the directors of a company appeal against a winding up order and the liquidator is not a party the directors are normally liable for the costs of the appeal.

Mortimer, P.

Davies, J.A.

Leonard, J.A.