
BUILDCON-CIMACO CONCRETE SDN BHD v. FILOTEK TRADING SDN BHD
HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMAD J
WINDING-UP PETITION NO: 28-61-98
2 SEPTEMBER 1999
[1999] 4 CLJ 135

***CIVIL PROCEDURE**: Striking out - Winding-up petition - Multiplicity of proceedings - Winding-up petition based on same subject matter as summons - Summons not served and discontinued - Whether winding-up petition vitiated by multiplicity of proceedings - Whether to be struck out - Whether court could dismiss winding-up petition for multiplicity of proceedings - Courts of Judicature Act 1964, para 11 of Schedule - Rules of the High Court 1980, O. 18 r. 19- Companies Act 1965, s. 221(2)(f)*

***CIVIL PROCEDURE**: Striking out - Winding-up petition - Whether O. 18 r. 19 Rules of the High Court 1980 applicable to winding-up petitions - Whether court had inherent jurisdiction to strike out winding-up petitions - Whether could strike out winding-up petition under s. 221(2)(f) Companies Act 1965*

***CIVIL PROCEDURE**: Jurisdiction - High Court - Inherent jurisdiction - Amendment to art. 121 Federal Constitution - Whether having any effect on O. 92 r.4 Rules of the High Court 1980 - Whether inherent jurisdiction under O. 92 r. 4 preserved by s. 25 Courts of Judicature Act 1964- Whether powers vested in High Court prior to Malaysia Day remain vested notwithstanding amendment to art. 121 Federal Constitution*

***COMPANY LAW**: Winding-up - Petition - Striking out - Multiplicity of proceedings - Winding-up petition based on same subject matter as summons - Summons not served and discontinued - Whether winding-up petition vitiated by multiplicity of proceedings - Whether to be struck out - Whether court could dismiss winding-up petition for multiplicity of proceedings - Courts of Judicature Act 1964, para 11 of Schedule - Companies Act 1965, s. 221(2)(f)*

***COMPANY LAW**: Winding-up - Petition - Striking out - Whether O. 18 r. 19 Rules of the High Court 1980 applicable to winding-up petitions - Whether court had inherent jurisdiction to strike out winding-up petitions - Whether could strike out winding-up petitions under s. 221(2)(f) Companies Act 1965*

The respondent filed a notice of motion ('this motion') to strike out the petitioner's winding-up petition under O. 18 r. 19(1)(b), (c) and (d) of the Rules of the High Court 1980 ('the RHC') or, alternatively, under the inherent jurisdiction of the court. The ground advanced by the respondent for filing this motion was multiplicity of proceedings in that there was a summons filed earlier ('S1') by the petitioner for the same amount as that forming the basis of the winding-up petition. S1, which named the respondent and two guarantors as defendants, was not served on the respondent. Subsequent to filing and serving the winding-up petition on the respondent, the petitioner's solicitors wrote to the respondent's solicitors informing them that S1 was against the guarantors only, and that they had never served S1 on the

respondent. Notwithstanding this, the respondent proceeded to file this motion to strike out the petitioner's winding-up petition. Shortly after the respondent filed this motion, the petitioner's solicitors filed a notice of discontinuance of S1 as against the respondent.

Held:

[1]S1 was never served on the respondent and counsel for the petitioner had, by letter, informed counsel for the respondent that S1 was only against the guarantors. This was done about three weeks before this motion was filed i.e. about six months before this motion was heard. Further, S1 was discontinued, as against the respondent, about a week after this motion was filed. Therefore, although para 11 of the Schedule to the Courts of Judicature Act 1964empowers the court to dismiss proceedings by reason of multiplicity of proceedings, this is not a proper case for dismissing the winding-up petition on that ground.

Obiter:

[1]Pursuant to O. 1 r. 2(2) of the RHC, the Companies (Winding-Up) Rules 1972 are clearly rules which have been made "205 under any written law for the specific purpose of such proceedings 205". If O. 1 r. 2(2) of the RHC is to be applied strictly, the RHC cannot apply in a winding-up petition at all and thus no application to strike out may be made under O. 18 r. 19 of the RHC in a winding-up petition. However, as the authorities now stand, the weight is in favour of the view expressed by the Supreme Court in *Si & Si Sdn Bhd v. Hazrabina* and by the Court of Appeal in *Fairview Schools Bhd v. Indrani Rajaretnam*, that is, O. 18 r. 19 of the RHC is applicable to a s. 218 winding-up petition.

[2]Not all the provisions of the RHC apply in a winding-up petition. To hold otherwise would render O. 1 r. 2(2) of the RHC and the Companies (Winding-Up) Rules 1972 nugatory.

[3]Section 221(2)(f) of the Companies Act 1965does not clothe the court with jurisdiction to strike out a winding-up petition. Subsection (2)(f) should be read together with the other paragraphs in that subsection. The "directions as to the proceedings" stated therein appear to be directions of things to be done before or during the hearing of the petition.

[4]The amendment to art. 121 of the Federal Constitution has removed the vesting of judicial power of the Federation in the courts. The courts now have to look at federal law to see whether they have jurisdiction or powers on a matter. The only provision which provides for inherent jurisdiction is O. 92 r. 4 of the RHC, that too if the RHC can be considered as federal law. Then there is the issue of whether these powers are preserved by s. 25 of the Courts of Judicature Act 1964notwithstanding the amendment to the Federal Constitution. Section 25 of the Courts of Judicature Act 1964cannot be read to mean that whatever powers vested in the High Courts immediately prior to Malaysia Day will remain vested in the High Courts notwithstanding amendments subsequently made to art. 121 of the Federal Constitution. Be that as it may, this court is bound by the decision of the Supreme Court in *Si & Si Sdn Bhd v. Hazrabina Sdn Bhd* where it was held that High Courts have jurisdiction to strike out a winding-up petition under their inherent powers.

[Application dismissed with costs.]

Case(s) referred to:

Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 1 LNS 26 [1989] 2 MLJ 423 ***(not foll)***

Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1991] 3 CLJ 2768 ***(refd)***

Fairview Schools Bhd v. Indrani Rajaretnam & Ors (No 1) [1997] 1 LNS 590 [1998] 1 MLJ 99 ***(foll)***

Mohamed Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 ***(refd)***

Ngan Tuck Seng & Anor V. Ngan Yin Groundnut Factory Sdn Bhd [1999] 3 CLJ 26

Nkm Development Sdn. Bhd. V. Irex Sdn. Bhd. [1988] 2 CLJ 56

Lai Kim Loi v. Dato' Lai Fook Kim & Anor [1989] 1 CLJ 61 [1989] 2 MLJ 290 ***(refd)***

Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor [1996] 4 CLJ 828; [1997] 4 MLJ 198 ***(not foll)***

R Ramachandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147 ***(refd)***

Re Lo Siong Fong [1994] 1 LNS 188; [1994] 2 MLJ 72 ***(not foll)***

Si & Si Sdn Bhd v. Hazrabina Sdn Bhd [1996] 3 CLJ 657 ***(foll)***

Shahamin Faizul Kung Abdullah V. Asma Hj. Junus [1991] 3 CLJ 723

Soon Singh Bikar Singh V. Pertubuhan Kebajikan Islam Malaysia (perkim) Kedah & Anor [1999] 2 CLJ 5

Syed Ahamed Abdul Salam & Ors V. Naina Mohamed & Sons (penang) Sdn Bhd [1998] 3 BLJ 81

Legislation referred to:

Civil Law Act 1956, s. 3

Companies Act 1965, ss. 181, 218, 221(2)(f)

Courts of Judicature Act 1964, s. 25

Federal Constitution, art. 121

Rules of the High Court 1980, O. 1 r. 2(2), O. 18 r. 19(1)(d), (3), O. 41 r. 3, O. 92 r. 4

The Inherent Jurisdiction of the Court, Sir Jack Jacob QC, 1970, Current Legal Problems 23

Counsel:

For the petitioner - Prakash C Mehta; M/s Prakash Baljit & Co

For the respondent - Anoop Singh; M/s Anoop & See

For the official assignee - DharmasegaranReported by S Dharmendran

JUDGMENT

Abdul Hamid Mohamad J:

A winding-up petition was filed on 22 July 1998 on the ground that the respondent company was unable to pay its debts.

On 15 October 1998 the respondent filed a notice of motion to strike out the petition under O. 18 r. 19 of the Rules of the High Court 1980 (RHC 1980) and, alternatively, under the inherent jurisdiction of the court. I dismissed the notice of motion. The respondent now appeals to the Court of Appeal.

Order 18 r. 19 Of The RHC 1980

The case has again raised the question whether an application under O. 18 r. 19 of the RHC 1980 may be made in a winding-up petition.

The law is in a rather confused state on this point.

Order 1 r. 2(2) of the RHC 1980 provides:

> (2) These rules shall not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

In respect of companies winding-up, the Companies (Winding-Up) Rules 1972 were made pursuant to s. 372 of the Companies Act 1965and s. 16 of the Courts of Judicature Act 1964. Clearly they are rules which have been made "under any written law for the specific purpose of such proceedings...". If the provision of O. 1 r. 2(2) of the RHC 1980 is to be applied strictly, then RHC 1980 are not applicable at all and no application may be made under O. 18 r. 19 of the RHC 1980 in a winding-up petition.

Now, let us look at the case law. The cases now referred are by no means exhaustive. I will refer to them in chronological order.

First, the case of *Nkm Development Sdn. Bhd. V. Irex Sdn. Bhd. [1988] 2 CLJ 56*. In that case

the respondent company applied to have the petition struck out or dismissed pursuant to O. 18 r. 19(1)(d) of the RHC 1980 on the ground that the petition was an abuse of the process of court and pursuant to the inherent jurisdiction of the court.

On the applicability of O. 18 r. 19 to a winding-up petition, V.C. George J (as he then was) said at p. 66:

> Encik George Proctor on behalf of the petitioners had argued that the issue of whether the petition should be dismissed should only be considered at the actual hearing of the petition. Encik T. Thomas disagreed as I also did. Order 18 rule 19(3) explicitly provides that the jurisdiction given by Order 18 rule 19(1) applies to a Petition as if the petition is a pleading. Applications to strike out pleadings (and a *fortiori* petitions), should be made promptly.
> See 1982 White Book 18/19/2 and *Re St. Piran Ltd.* [1981] 3 All ER 270 at 273 b.)

In short, the learned judge held that O. 18 r. 19(1)(d) could be used to strike out a winding-up petition.

In the following year L.C. Vohrah J followed this decision in *Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 1 LNS 26*[1989] 2 MLJ 423. The learned judge, like V.C. George J (as he then was) in *Nkm Development Sdn. Bhd. V. Irex Sdn. Bhd. [1988] 2 CLJ 56*, struck out the petition. The learned judge said, at p. 425:

> Order 18 r. 19(3) specifically provides that the rule applies to a petition which must include a winding-up petition (see *Nkm Development Sdn. Bhd. V. Irex Sdn. Bhd. [1988] 2 CLJ 56*...

It should be noted that sub-r. (3) of r. 19 of O. 18 says:

> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

In the same year, the Supreme Court decided the case of *Lai Kim Loi v. Dato' Lai Fook Kim & Anor [1989] 1 CLJ 61*[1989] 2 MLJ 290. In that case, the petitioner presented a winding-up petition, presumably under s. 218 of the Companies Act 1965. In it, the petitioner also alleged oppressive conduct on the part of the first respondent under s. 181 of the Act. The petitioner also filed a writ of summons and statement of claim against the first respondent in which substantially the same facts were averred as those stated in the petition and praying for substantially similar relief. The first respondent applied for an order that the petition be struck out or alternatively that all proceedings relating to the petition be stayed on the grounds that the petition was frivolous, vexatious and an abuse of the process of the court. Unfortunately the judgment of the Supreme Court did not say whether the application was made under O. 18 r. 19 of the RHC 1980, but from the grounds of the application, it appears to be so. The reason for striking out the petition does not concern us here. But, what the Supreme Court, through the judgment of Gunn Chit Tuan SCJ (as he then was), said is relevant. This is what the learned judge (as he then was) said, at pp. 294-295:

> As for the procedure, it is provided in O. 88 r. 5 of the Rules of the High Court 1980that certain applications under the Companies Act 1965, including an application under s. 181 of the said Act for relief in cases of oppression, must be by petition.

> After presentation of the petition, the petitioner must take out a summons for directions under r. 7 of O. 88. On the hearing of the summons the court may by order give such directions as to the proceedings to be taken before the hearing of the petition as it thinks fit including, in particular, directions for the publication of notices.
> In other words, a petition under s. 181 of the said Act cannot be published without the prior order of the court, as was done in this case.
> On the other hand, an order for a company to be wound up on a petition under s. 217 of the Companies Act 1965may only be made by a court if one of the circumstances specified in the following s. 218(1) of the Companies Acthas been proved:

In such a case the Rules of the High Court 1980do not apply.

> The Companies (Winding-Up) Rules 1972 apply...

In short, the judgment says that in a petition under s. 181 of the Companies Act 1965, the RHC 1980 apply. In a petition under s. 218 of the Act, the RHC do not apply, in which case it is the Companies (Winding-Up) Rules 1972 that apply. Unfortunately, it is not clear whether the petition was struck out under O. 18 r. 19(c) RHC 1980 being "frivolous, vexatious and an abuse of the process of the court". The use of the words quoted appears to refer to that rule. The petition, being a petition under s. 218 "rolled-up with s. 181," and as the court held that the RHC 1980 do not apply to a winding-up petition, one wonders how an application under O. 18 r. 19(1) of the RHC 1980 may be allowed.

The judgment also makes no mention of the inherent jurisdiction of the court.

In 1994, V.C. George J (as he then was) had occasion to consider the issue again. This time in *Re Lo Siong Fong [1994] 1 LNS 188;*[1994] 2 MLJ 72. That case was a s. 218 petition for winding-up. The petitioners also filed an *ex parte* summons to place the respondent company in the hands of a provisional liquidator. The order was granted. By encl. 11 the respondent company and its contributories sought to have the order appointing a provisional liquidator set aside. Enclosure 12, was an application by the respondent company and the said contributories seeking a permanent injunction restraining the petitioner "from further acting on or prosecuting the petition or advertising or gazetting it". Both applications were heard together. So, the applications before the court did not include an application under O. 18 r. 19 of the RHC 1980. However in his judgment, V.C. George J (as he then was) said:

> I pause to note that by enclosure (12), the applicants have asked for a permanent stay and not for the petition to be struck off. In *Re A Company*, a permanent stay rather than a striking out was sought. Order 18 r. 19 of the Rules of the High Court 1980(the 'RHC') provides the court with specific jurisdiction to have struck out proceedings that are, *inter alia*, frivolous or an abuse of the process. However O. 1 r. 2(2) provides that the RHC 'shall not have effect in relation to proceedings in respect of which rules have been made... for the specific purpose of such proceedings...' The instant petition is, as has been seen, a s. 218 winding-up petition in respect of which the Companies (Winding-Up) Rules 1972 have been made. It seems to me that it follows that O. 18 r. 19 *per se* has no application to a s. 218 petition. One has to look to the winding-up rules. Those rules do not *per se* empower the court to strike out a petition that is an abuse of the process.
> However, there is no doubt that the court has the inherent jurisdiction to strike out any

abuse of its process.

In brief, the learned judge appears to have changed his mind on the applicability of O. 18 r. 19, RHC 1980 in a winding-up petition. He is now of the view that O. 18 r. 19 of the RHC 1980 is not applicable to a windingup petition. One has to look at the winding-up rules which do not *per se* empower the court to strike out a petition that is an abuse of the process of the court. However, he says that the court has the inherent jurisdiction to strike out any abuse of its process.

So, we see that in the first two cases, referred to above, the courts were of the view that O. 18 r. 19 of the RHC 1980 is applicable to a s. 218 windingup petition. The reason given was because of the existence of the word "petition" in sub-r. (3) of that rule.

Unfortunately no reference was made to O. 1 r. 2(2), of the RHC 1980. Perhaps, realising this that V.C. George J (as he then was) changed his mind later, in *Re Lo Siong Fong [1994] 1 LNS 188;*[1994] 2 MLJ 72. In his judgment in this later case the learned judge (as he then was) specifically referred to O. 1 r. 2(2) of the RHC 1980. And it is to be noted also that this case was decided after the decision of the Supreme Court in *Lai Kim Loi v. Dato' Lai Fook Kim & Anor [1989] 1 CLJ 61*[1989] 2 MLJ 290.

In 1996 the judgment of the Supreme Court in *Si Si Sdn. Bhd. v. Hazrabina Sdn. Bhd.* [1996] 3 CLJ 657; [1996] 2 MLJ 509 was reported. In that case the petitioner filed a s. 218 petition. An order for winding-up was made. However, by consent of the parties the order was set aside and the petition was set down for full trial. Meanwhile the respondent filed an application by way of a notice of motion pursuant to O. 18 r. 19(1) (b), (c) and (d) of the RHC 1980 for an order to strike out the petition. The respondent further claimed damages in that notice of motion on the basis that its bank accounts were frozen and that it was unable to carry on its business activities following the issuance of the winding-up petition against it. The High Court judge found that the presentation of the winding-up petition by the petitioner was an abuse of the process of the court under O. 18 r. 19(1)(d). He went on to order, *inter alia*, that the winding -up petition be struck out and that damages be paid to the respondent to be assessed by the Senior Assistant Registrar. The issue before the Supreme Court was whether the learned trial judge was right in awarding damages against the petitioner. Mohamed Dzaiddin FCJ, delivering the judgment of the court said, at p. 514:

> In our view, it is not within the contemplation of Order 18 rule 19(1) of the RHC 1980 to grant damages to the successful applicant, in addition to its powers under the Rule or under its inherent jurisdiction.
> Clearly, the policy of O. 18 r. 19 RHC 1980 is to prevent the improper use of the court's machinery, and therefore, in a proper case, it will summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation...

The court also held that if the respondent wished to claim for damages against a petitioner for malicious prosecution or for abuse of process of the court, he should file a separate action by way of a writ.

From the judgment, it is clear that the case was decided on the basis that O. 18 r. 19 of the RHC 1980 was applicable to a s. 218 petition. However, it appears that the issue whether O.

18 r. 19 was applicable at all was never raised or argued.

In the following year (1997) the judgment of Kamalanathan Ratnam JC (as he then was) in *Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor [1996] 4 CLJ 828;*[1997] 4 MLJ 198 was reported. The learned Judicial Commissioner (as he then was) held that, first, the RHC 1980 were not applicable to a s. 218 winding-up petition. Therefore, both O. 18 r. 19 and O. 92 r. 4 of the RHC 1980 were not applicable to a s. 218 winding-up petition. However, the learned Judicial Commissioner (as he then was), relying on the provision of s. 221(2) of the Companies Act 1965held that the court had power to strike out the petition.

It is to be noted that the learned Judicial Commissioner (as he then was), relied on the Supreme Court judgment in *Lai Kim Loi v. Dato' Lai Fook Kim & Anor [1989] 1 CLJ 61*[1989] 2 MLJ 290 which he held to be binding on him. No reference was made to the judgment of the Supreme Court in *Si & Si Sdn. Bhd. V. Hazrabina Sdn. Bhd. [1996] 2 BLJ 115* One wonders what his decision would have been had that judgment been brought to his attention.

In the following year (1998) the judgment of the Court of Appeal in *Fairview Schools Bhd v. Indrani Rajaretnam & Ors (No 1) [1997] 1 LNS 590*[1998] 1 MLJ 99 was reported. In that case, a s. 218 petition was filed against the appellant company. The appellant applied for a stay of proceeding and was refused. In the High Court 98 creditors and 58 contributories had filed notices of intention to appear in the proceedings. At the appeal stage two contributories (the proposed interveners) who did not appear in the High Court applied for permission to intervene in the appeal.

The Court of Appeal dismissed the proposed interveners' applications for leave and granted the appellants' directors the right to appeal. It was argued by learned counsel for the respondent that there was nothing in the Companies (Winding-Up) Rules 1972 that permitted the intervention and that the RHC 1980 were irrelevant to the proceedings.

The Court of Appeal held, and I quote the head-note which I find to be quite accurate:

> (1) The petition was filed under s. 218 of the Companies Act 1965('the Act') Order 88 r. 5 of the RHCdoes not refer to application to wind up under s. 218 of the Act. Therefore, the initiation of such petitions, their form, etc must of necessity be governed by the special provisions contained in the Winding-up Rules. However, interested parties are not so straitjacketed by the Winding-up Rules as to be without a remedy on matters where these rules are silent. Where the Winding-up Rules make specific provisions for a particular matter, it would exclude a parallel provision in the rules of the court but where the Winding-up Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provision exists.
> If not, it can always resort to O. 92 r. 4 of the RHC. The powers of the court on hearing a petition provided by s. 221 of the Act are exercised in conformity with the RHC and the appeal is a rehearing (see p. 106F, I).

In the same year (1998) my own judgment in *Syed Ahamed Abdul Salam & Ors V. Naina Mohamed & Sons (penang) Sdn Bhd [1998] 3 BLJ 81* was reported. In that case the respondent applied to have a s. 218 petition struck out under O. 18 r. 19 of the RHC 1980 and also under the inherent jurisdiction of the court. Learned counsel for the petitioner did not

dispute that O. 18 r. 19 of the RHC 1980 was applicable or that the court had inherent jurisdiction to strike out the petition. There was no argument on those issues. I decided the application on the merits of the application and allowed it. However, it should be pointed out that the ground was multiplicity of proceedings, which would clearly fall under the provisions of para. 11, Schedule to the Courts of Judicature Act 1964 which, *inter alia*, empowers the court to dismiss proceedings by reason of multiplicity of proceedings.

Perhaps I should now summarise the various views expressed by the cases referred to above:

> (a) RHC 1980 are not applicable to a section 218 winding-up petition - *Lai Kim Loi v. Dato' Lai Fook Kim & Anor [1989] 1 CLJ 61*[1989] 2 MLJ 290 (SC), *Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor [1996] 4 CLJ 828;*[1997] 4 MLJ 198 (Kamalanathan Ratnam JC as he then was).
> (b) RHC 1980 are not applicable to a section 218 winding-up petition where there are parallel provisions in the Companies (Winding-up) Rules 1972 but applicable where the latter are silent - *Fairview Schools Bhd. v. Indrani a/p Rajaretnam & Ors. (No. 1)* [1998] 1 MLJ 99 (CA).
> (c) Order 18 rule 19 of the RHC 1980 is not applicable to a section 218 winding-up petition - *Re Lo Siong Fong [1994] 1 LNS 188;*[1994] 2 MLJ 72 (V.C. George J, as he then was), *Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor [1996] 4 CLJ 828;*[1997] 4 MLJ 198 (Kamalanathan Ratnam JC as he then was)
> (d) Order 18 rule 19 is applicable to a section 218 winding-up petition - *N.K.M Development Sdn. Bhd. v. Irex Sdn. Bhd.* [1988] 1 CLJ 65 (V.C. George J, as he then was),*Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 1 LNS 26*[1989] 2 MLJ 423 (L.C. Vohrah J);
> (e) Order 18 rule 19 of the RHC 1980 was applied to a section 218 windingup petition though it is not known whether the issue of applicability was argued - *Si & Si Sdn. Bhd. V. Hazrabina Sdn. Bhd. [1996] 2 BLJ 115*

As far as this court is concerned, the choice is really between the earlier decision of the Supreme Court in *Lai Kim Loi v. Dato' Lai Fook Kim & Anor [1989] 1 CLJ 61*[1989] 2 MLJ 290 on the one hand and the later decision of the Supreme Court in *Si & Si Sdn. Bhd. v. Hazrabina Sdn.Bhd.* [1996] 3 CLJ 657; [1996] 2 MLJ 509 which can be said to be supported by the Court of Appeal in *Fairview Schools Bhd v. Indrani Rajaretnam & Ors (No 1) [1997] 1 LNS 590*[1998] 1 MLJ 99.

As the authorities now stand, I think the weight is in favour of the view expressed in the more recent judgments of the Supreme Court and the Court of Appeal *ie*, that O. 18 r. 19 of the RHC is applicable to a s. 218 windingup petition and I think I am bound by that view.

However, with the hope that the higher court(s) will take this opportunity to clarify the issue, I shall give my comments.

First, are the RHC 1980 not applicable at all?

The strongest argument against the application of the RHC 1980 is the provision of O. 1 r. 2(2), of the RHC 1980itself.

Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s. 218 winding-up petition which is more simplified and geared for speedy disposal. RHC

1980, for example, provide for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O. 14), striking out of pleadings (O. 18 r. 19), summons for directions and setting down for trial. Hearing date is only given after the directions made in the summons for directions are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear-cut cases.

The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg, service, advertisement, compliance with r. 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the Rules envisage. In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.

Furthermore, more often than not, resort to O. 18 r. 19 of the RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time.

In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

Do all the provisions of the RHC 1980 apply in a winding-up petition? The answer is clearly "no". First, to hold otherwise would render not only the provisions of O. 1 r. 2(2) of the RHC 1980,but also the Companies (Windingup) Rules 1972 nugatory. I do not think I need to say more.

The only ground so far advanced to support the applicability of the provisions of O. 18 r. 19 of the RHC 1980 is that r. 19(3) mentions "petition" as well - see *N.K.M Development Sdn. Bhd v. Irex Sdn. Bhd.* [1988] 1 CLJ 65 and *Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 1 LNS 26* [1989] 2 MLJ 423 both High Court decisions. But the learned judge who decided *N.K.M Development Sdn. Bhd v. Irex Sdn. Bhd.* [1988] 1 CLJ 65 has since changed his mind - see *Re Lo Siong Fong [1994] 1 LNS 188;*[1994] 2 MLJ 72.

With respect, this reasoning is not plausible. The word "petition" in O. 18 r. 19(3) of the RHC 1980 must have been inserted to refer to petitions provided under the RHC 1980 itself, eg, petition for letters of administration in non-contentious probate proceedings (O. 71) and petitions under the Companies Act 1965(O. 88 r. 5).

That leaves us with the other choice *ie*, that the provisions of the RHC 1980 is applicable where the Companies (Winding-up) Rules 1972 are silent on a matter - see *Fairview Schools Bhd v. Indrani Rajaretnam & Ors (No 1) [1997] 1 LNS 590*[1998] 1 MLJ 99.

That view does make sense. For example r. 26 of the Companies (Windingup) Rules 1972 requires an affidavit verifying petition in Form 7 to be filed. Form 7 is very brief. It only states the essential. If for example, the deponent of the affidavit does not understand Malay or English language, would not a jurat be required? Certainly that is required. Where does one look to if not to O. 41 r. 3 of the RHC 1980?

But, the difficulty is to determine which provisions of the RHC 1980 are applicable and which are not.

Now, coming back to the present case. I have held that as the authorities now stand, the weight appears to be in favour of the view that O. 18 r. 19 of the RHC 1980 are applicable in a s. 218 winding-up petition, even though my personal view is that it should not apply.

Inherent Jurisdiction

The next point is whether the court has the inherent jurisdiction to strike out a petition. First, I shall refer to the cases so far decided, though I must say that there may be other cases that escape my notice.

In *N.K.M Development Sdn. Bhd v. Irex Sdn. Bhd.* [1988] 1 CLJ 65, the application was made both under O. 18 r. 19 RHC 1980 and under "the inherent jurisdiction of the court." No specific view was expressed by the learned judge on the inherent jurisdiction of the court.

In *Re Lo Siong Fong [1994] 1 LNS 188;*[1994] 2 MLJ 72, the same learned judge while holding that O. 18 r. 19 of the RHC 1980 could not be resorted to to strike out a winding-up petition, held that the court had the inherent jurisdiction to strike out any abuse of its process. Unfortunately, no reason was advanced regarding the power of the court to resort to its inherent jurisdiction in a winding-up petition.

In *Si & Si Sdn. Bhd. V. Hazrabina Sdn. Bhd. [1996] 2 BLJ 115*Dzaiddin SCJ, delivering the judgment of the court said, at p. 514:

> In our view, it is not within the contemplation of O. 18 r. 19(1) of the RHC 1980 to grant damages to the successful applicant, in addition to its powers under the Rule or under its inherent jurisdiction.

As has been said earlier, that case was decided on the assumption that the provisions of O. 18 r. 19 of the RHC 1980 and the inherent jurisdiction of the court may be resorted to in a winding-up petition, but damages was not allowed as it was outside the contemplation of the provision of that rule or the inherent jurisdiction of the court.

The first time (as far as I know) that the question whether the court may exercise its inherent powers to strike out a winding-up petition was discussed at length was in the case of *Lyn Country Sdn. Bhd. v. EIC Clothing Sdn. Bhd. & Anor*. [1997] 4 MLJ 198. In that case Kamalanathan Ratnam JC (as he then was) held that, as RHC 1980 had no place in a s. 218 petition, he was unable to rely on O. 92 r. 4 of the RHC 1980 to hold that the court had inherent jurisdiction to strike out the petition. However, he held that he had power to do the same thing under s. 221(2)(f) of the Companies Act 1965. That section reads:

> 221 Powers of court on hearing petition

> (1) On hearing a winding-up petition the Court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit, but the Court shall not refuse to make winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of a petition by a contributory that there will be no assets available for distribution amongst the contributories.

(2)The court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition -

> (a) direct that any notices be given or any steps taken before or after the hearing of the petition;
> (b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the court;
> (c) direct that oral evidence be taken on the petition or any matter relating thereto;
> (d) direct a speedy hearing or trial of the petition or any issue or matter;
> (e) allow the petition to be amended or withdrawn; and
> (f) give such directions as to the proceedings as the court thinks fit.
> (3) (omitted).

With respect, I am unable to agree with that view. I do not think para. (f) of s. 221(2) contemplates such a situation. Subsection (2)(f) should, I think, be read together with the other paragraphs in that subsection. The "directions as to the proceedings" appear to me to be directions of things to be done before or during the hearing of the petition.

But, I agree with his view that if the RHC 1980 is not applicable to a windingup petition at all, then O. 92 r. 4 of the RHC 1980 cannot be relied on to give the court the inherent jurisdiction.

As I was finalising this judgment the case of *Ngan Tuck Seng & Anor V. Ngan Yin Groundnut Factory Sdn Bhd [1999] 3 CLJ 26*was reported. In that case, a petition to wind-up the company was filed by two directors. The respondent and the other two directors applied to have the petition struck out on the ground that it was an abuse of the process of the court under the inherent jurisdiction of the court.

On the preliminary issue whether the court has inherent jurisdiction Clemant Skinner JC relied on the Federal Court case of *R Ramachandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147* ***(refd)*** [1997] 1 MLJ 145 and held that the court had inherent jurisdiction to hear and determine the application. The learned Judicial Commissioner, summarised the effects of the Federal Court judgment in *R. Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147; [1997] 1 MLJ 145 as follows:

> It is clear from the decision in *R. Rama Chandran* that inherent jurisdiction, being part of the common law powers enjoyed and possessed by a High Court, of which a companies court is one, is a separate and distinct source of jurisdiction enjoyed by a court independent of any enabling statute or legislation. It follows therefore that on Malaysia Day, when by virtue of art.
> 121 of the Federal Constitution, the High Court of Malaya and of Sabah and Sarawak

> came into existence, they came invested with that reserve fund of powers necessary to fulfill themselves as superior courts in Malaysia. And, as pointed out in *R. Rama Chandran*, they enjoyed such powers as a separate and distinct source of jurisdiction from the statutory powers of the court.
> Accordingly, I have no hesitation in holding that a companies court does exercise inherent jurisdiction.

Going back to *R. Rama Chandran's* case, the first thing that should be noted is that in that case the appellant had applied for judicial review *ie*, *certiorari* to quash the order of the Industrial Court. The order was quashed. The High Courts in this country are clearly conferred with such powers by para 1 of the Schedule to the Courts of Judicature Act 1964- see judgment of Eusoff Chin (Chief Justice), at p. 181 para G. So, the court did not have to rely on its "inherent jurisdiction" to issue a writ of *certiorari* to quash the Industrial Court's decision. However, the issue of "inherent jurisdiction" became relevant when the court was considering whether or not to stop there, or award consequential relief. On this issue Wan Yahya FCJ delivered a dissenting judgment holding that the Federal Court had no jurisdiction to proceed to hear and award compensation after the Industrial Court's order had been quashed. The majority held otherwise.

I am only concerned with the grounds forwarded in support of the view that the courts in this country have "inherent jurisdiction" similar to the courts in England.

In his second or "rebuttal judgment", (rebutting Wan Yahya FCJ's dissenting judgment, the first of its kind in this country as far as I know), Edgar Joseph Jr. FCJ quoted at length from an article by Sir Jack Jacob QC, the former Senior Master of the Supreme Court in the United Kingdom in his article *"The Inherent Jurisdiction of the Court"* [1970] Current Legal Problems 23. Part of them have been reproduced by Clement Skinner JC in *Ngan Tuck Seng & Anor V. Ngan Yin Groundnut Factory Sdn Bhd [1999] 3 CLJ 26*I do not intend to reproduce them again. The effects are aptly summarised by the learned Judicial Commissioner in the passage I have reproduced earlier.

Sir Jack Jacob was speaking about the common law of England and the courts in England. Before the common law of England becomes applicable in this country it must pass the test provided by s. 3 of the Civil Law Act 1956. Of more importance, in this case, is the question whether those observations of Sir Jack Jacob are applicable in this country which has a written constitution, in particular, art. 121 of the Federal Constitution after the amendments by Act 704 effective from 10 June 1988.

Article 121(1) prior to the amendment reads:

> 121(1) Subject to Clause (2) the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status,namely:
> (a) one in the States of Malaya...,
> and
> (b) one in the States of Sabah and Sarawak...
> (c) (repealed)
> and in such inferior courts as may be provided by federal law. (emphasis added)

After the amendment the article reads:

> 121(1) There shall be two High Court of co-ordinate jurisdiction and status, namely:
> (a) one in the States of Malaya...; and
> (b) one in States of Sabah and Sarawak...
> (c) (Repeated)
> and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law. (emphasis added)

A few months prior to the amendment, the Supreme Court had decided the case of *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12. In his dissenting judgment Seah SCJ, *inter alia* said, at p. 34:

> The recent trend in England, after the passing of he English Crown Proceedings Act 1947, seems to be that the rule of *locus standi* must be developed to meet the changing times.
> In broadening the requirement that must be met to give the plaintiff a standing in a public interest litigation, the High Court must always bear in mind that under the Federal Constitution of Malaysia, the judicial power is vested in the judges.And judicial power includes judicial control or review of government/executive actions except when the jurisdiction of the High Court is expressly excluded by the Constitution... (emphasis added)

Of course the learned judge was speaking about *locus standi*, there. However, it is clear that he was referring to the provisions of art. 121(1) of the Federal Constitution then.

The amendment has removed the vesting of judicial power of the Federation in the courts. The courts now have to look at the federal law to see whether they have jurisdiction or powers on a matter. I do not think that there can be another interpretation to that provision.

Which federal law provides for inherent jurisdiction? The only provision I can find is O. 92 r. 4 of the RHC 1980, that too, if RHC 1980 can be considered as a federal law. (I do not include the provision of the Schedule to theCourts of Judicature Act 1964as they are specific powers mentioned therein (*eg, res judicata*, vexatious litigants) conferred on the High Courts by the federal law and therefore cannot be said to fall within the meaning of "inherent jurisdiction").

However Edgar Joseph Jr, FCJ in *R. Rama Chandran*, was of the view that O. 92 r. 4 RHC 1980 only served as a reminder and confirmation of the common law powers of the court which the courts always had even without that provision. The learned judge said, at p. 238-239:

> In my view, O. 92 r. 4 is a unique rule of court for while it neither defines nor gives jurisdiction, yet it serves as a reminder and confirmation - lest we forget - of the common law powers of the court, which are residuary or reserve powers and a separate and distinct source of jurisdiction from the statutory powers of the court.

In other words, even without O. 92 r. 4, the inherent powers of High Court would still be there. In the United Kingdom, for instance, there is no provision in the Supreme Court Rules, equivalent to our O. 92 r. 4, yet the inherent powers occupy a position of great importance in

the High Court there as the article by Sir Jack Jacob amply demonstrates.

> And, the Court of Appeal there also exercises an inherent jurisdiction (see *Aviagents v. Balstravest Investment Ltd* [1966] 1 WLR 150) notwithstanding the absence of any provision in any written law or rule of court providing for inherent powers.

If that be the case, then the question is whether the provisions of O. 92 r. 4 RHC 1980 were affected by the amendments to art. 121?

Are those powers preserved by s. 25 of the Courts of Judicature Act 1964notwithstanding any amendment to the Federal Constitution? Section 25 of the Act provides:

> 25(1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

I am of the view that to read the provisions of s. 25 of the Courts of Judicature Act 1964to mean that whatever powers vested in the High Courts immediately prior to Malaysia Day will remain vested in the High Courts notwithstanding amendments subsequently made to art. 121 of the Federal Constitution is not tenable. A good illustration is the amendment to that article by the addition of art. 121(1A) (added by Act (A) 704 effective from 10 June 1988). The Supreme Court and the Federal Court have on a number of occasions given effect to that amendment to the effect that where a matter falls within the jurisdiction of the Syariah Court the High Courts do not have jurisdiction over it - See *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1991] 3 CLJ 2768* ***(refd)****Mohamed Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264* ***(refd)*** [1992] 2 MLJ 793 and more recently *Soon Singh a/l Bikar Singh & Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5; [1999] 1 MLJ 489.

Indeed in*Mohamed Habibullah*, the Supreme Court disagreed with the view expressed by Edgar Joseph Jr. J (as he then was) in *Shahamin Faizul Kung bin Abdullah v. Asma bte Haji Junus* [1991] 3 CLJ 2220; [1991] 3 MLJ 327 that art. 121(1A) was rendered ineffective by the provisions ofs. 4 of the Courts of Judicature Act 1964.

So, the questions which will have to be answered are:

(a) If the inherent jurisdiction of the court is part of the common law power enjoyed and possessed by the High Courts independent of any enabling statute, have the amendments to art. 121 of the Federal Constitution by Act A 704 removed that power from the court?

(b) Even if O. 92 r. 4 of the RHC 1980 is a federal law, have the said amendments nullified that position?

If the answer to (a) is in the affirmative then the High Courts do not now have any inherent jurisdiction at all from that source. Then the courts will have to look at federal law that

provides the source. As I have said, the only source to be found is O. 92 r. 4, of the RHC 1980. Then the question will be whether the amendments have nullified that provision. Even if they do not, then whether O. 92 r. 4 RHC 1980 is applicable to a winding-up petition.

Fortunately for me I do not have to answer all these questions to decide this case. I hold myself bound by the decision of the Supreme Court in *Si & Si Sdn. Bhd. V. Hazrabina Sdn. Bhd. [1996] 2 BLJ 115*that the High Courts have jurisdiction to strike out a winding-up petition under their inherent powers, even though the source was not stated in that case.

Indeed, as will be seen later, in deciding this case I do not even have to rely on the inherent jurisdiction of the court nor O. 18 r. 19 of the RHC 1980. Instead, I can rely on para. 11 of the Schedule to the Courts of Judicature Act 1964 namely, multiplicity of proceedings.

I shall now come back to the facts of and issues in this case.

The petition was filed on 22 July 1998. The ground was that the respondent company was unable to pay its debt. On 15 October 1998 the respondent filed a notice of motion to strike out the petition under O. 18 r. 19(1)(b), (c) and (d) of the RHC 1980 and, alternatively, under the inherent jurisdiction of the court. The ground forwarded was that there was a civil suit filed earlier in the Sessions Court in which the petitioner claimed for the amount which is now the subject matter of the petition. That civil suit (52-1421-98) was filed on or about 24 April 1998. The respondent company and two guarantors were named as defendants. The claim was for the principal sum of RM96,647 being the price of goods sold and delivered to the respondent company, interests and costs. (It is that same amount which forms the basis of the petition). The summons (Civil Action 52-1421-98) was served on the guarantors, but not on the respondent company. The petition was filed on 22 July 1998 and served on the respondent on 20 August 1998. On 29 September 1998 solicitors for the petitioner wrote to the solicitors for the respondent company informing him that the civil suit was against the 2nd and 3rd defendants only, and that the they had never served the summons on the respondent company. (However all the three defendants in the civil suit filed a defence dated 27 August 1998)

On 15 October 1998 the notice of motion was filed by the respondent.

On 22 October 1998 the petitioner's solicitors filed the notice of discontinuance of the civil suit as against the respondent. The notice was addressed to the respondent's solicitors.

Learned counsel for the respondent argued that since, as at the date of the filing of the petition, there was a civil suit pending claiming for the same debt, there was a multiplicity of proceedings and an abuse of the process of the court and therefore the petition should be dismissed.

Learned counsel for the petitioner argued that as the summons was never served against the respondent company and was withdrawn subsequently (after the notice of motion) there was no multiplicity of proceedings and no prejudice to the respondent.

As can be seen, in effect, the real ground for this application is multiplicity of proceedings. This would fall under para 11 of the Schedule to the Courts of Judicature Act 1964. So, even if O. 18 r. 19 and O. 92 r. 4 of the RHC 1980 do not apply, it is still within the jurisdiction of

the court to make an order in proper cases.

In this case, the summons (civil suit) was never served on the respondent, and learned counsel for petitioner had informed learned counsel for the respondent by letter that the suit was only against the guarantors about three weeks before the notice of motion was filed and about six months before the motion was heard and that the suit against the respondent was discontinued about a week after the motion was filed. I do not think that this is a proper case for dismissing the petition on the ground of multiplicity of proceedings.

I therefore dismissed the application with costs.