

---

MASCON SDN BHD v. KASAWA (M) SDN BHD  
HIGH COURT, KUALA LUMPUR  
ABDUL HAMID MOHAMAD J  
COMPANY WINDING UP NO: D8-28-25 OF 2000  
17 JULY 2000  
[2000] 1 LNS 203

**COMPANY LAW:**

**Case(s) referred to:**

*Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345; [1995] 2 MLJ 57 (refd)*

*Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 303 (Rep); [1992] 1 CLJ 637; [1992] 1 MLJ 313 (refd)*

*Usahabina v. Anuar bin Yahya [1998] 2 CLJ SUPP 131; [1998] 2 AMR 1370 (refd)*

*YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd [1996] 3 CLJ 51; [1996] 2 MLJ 482 (refd)*

**Legislation referred to:**

Companies Act 1965, s. 218

**Counsel:**

*For the petitioner - J Appukuttan; M/s SK Yeoh & Jeganathan*

*For the respondent - Aerrene Eng Tiong Mei; M/s Jal & Lim*

**Abdul Hamid Mohamad J**

This is a winding up petition under s. 218 of the Companies Act 1965 ('the Act'). The ground is that the respondent is insolvent and unable to pay its debt. The debt is not a judgment debt.

According to the petitioner, pursuant to a letter of award dated 15 December 1995 and a building contract dated 5 September 1996, the respondent employed the petitioner to build a six-storey business and entertainment centre in Malacca for the sum of RM56,900,000.

Among the terms of the contract are:-

- (a) the respondent shall pay the petitioner progressively against the presentation of progressive certificates issued by the respondent's architect;
- (b) such progressive payments shall be made within thirty days after the presentation of the *interim* certificates;
- (c) the respondent will retain as trustee a sum of RM2,845,000 until completion of the development;
- (d) upon the issuance by the architect of a certificate of practical completion, the architect shall issue a certificate for the release of part of the retention sum and the balance will be retained until the expiration of the defect liability period.

The architect had issued the *interim* certificates upon the progressive completion of the development. However, the respondent has failed to pay the petitioner on the *interim* certificates presented to the respondent. The petitioner says that the respondent is indebted to the petitioner the undisputed sum of RM4,734,255.94. That amount does not include other sums which the petitioner claims to be due to the petitioner from the respondent.

[Section 218 of the notice](#) was served on 4 October 1999 at the respondent's registered address. The respondent has failed to pay the sum demanded. The petitioner says that the respondent is unable to pay its debt. The petitioner prays that the respondent be wound up and for the consequential orders.

The respondent filled an affidavit in opposition. The respondent says that the petition is premature. The main reasons are:-

- (a) the petitioner should terminate the contract and refer the dispute to arbitration; and
- (b) the sum claimed by the petitioner is still subject to adjudication. In other words, it is still not final, in particular, regarding the liquidated ascertained damages (LAD), retention sum and deduction of RM10,000 made by the petitioner to Palmac Plumbing and Construction Co.

Under [s. 218 of the Act](#), a company is deemed to be unable to pay its debt if a creditor to whom the company is indebted in the sum exceeding RM500 has served a demand to the company requiring the company to pay the sum due and the company has for three weeks thereafter neglected to pay the sum.

The petitioner has complied with the requirements of [s. 218 the Act](#). It is then for the respondent to prove that it is able to pay its debt. In order to rebut the presumption, the respondent is required to prove on the balance of probabilities that there is a *bona fide* dispute to the sum claimed or that the respondent is able to pay its debt. See [Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd \[1992\] 1 CLJ 303 \(Rep\); \[1992\] 1 CLJ 637; \[1992\] 1 MLJ 313 \(SC\)](#).

The respondent says that the petitioner should have terminated the contract and referred the dispute to arbitration. In this respect, cl 26 of the contract reads:-

Without prejudice to any other rights and remedies which the contractor may possess, if....

... the contractor may thereupon by notice by registered post or recorded delivery to the Employer or Architect forthwith determine the employment of the contractor under the...

It is clear that the petitioner has a choice whether or not to terminate the contract or to claim for any unpaid sum.

The next issue is whether there is a *bona fide* dispute of the sum claimed. The amount is the total amount contained in the *interim* certificates Nos 1-17 issued by the respondent's architect. In [Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd \[1995\] 2 CLJ 345](#); [1995] 2 MLJ 57 at p. 81 the Supreme Court quoted with approval from the book *Building Contracts* (4th Ed) by the Donald Keating at p. 279 that a certificate by a defendants' (in that case) architect or engineer is 'a special and formal kind of admission'.

Augustine Paul JC (as he then was) in [Usahabina v. Anuar bin Yahya \[1998\] 2 CLJ SUPP 131](#); [1998] 2 AMR 1370 at p. 1399 said:-

The law that I have adverted to makes it clear that if the defendant wished to dispute the amounts stated in the two certificates he ought to have asked the architect to make appropriate adjustments in another certificate or take the dispute to arbitration both of which he did not do.

It is the same here. All that the respondent does and in this petition, is to say that the sum is arbitrary. He has failed to show what the correct figure should be. It is true that the respondent mentions the sum of RM10,000.50 which the respondent alleged to have been wrongly deducted. This again is a bare allegation. Anyway, even if that amount is wrongly claimed (there is no evidence that it is) considering the debt claimed is more than RM4.7m, the balance is still many times over the RM500 minimum provided by law. In [YPJE Consultancy Service Sdn Bhd v. Heller Factoring \(M\) Sdn Bhd \[1996\] 3 CLJ 51](#); [1996] 2 MLJ 482 the Court of Appeal held that even if the notice overstated the amount owing, it is legitimate to look at the circumstances in order to determine the critical issue upon which the application depends, namely whether or not the company is unable to pay its debts.

The respondent has failed to show that there is a *bona fide* dispute as to the amount claimed or that it is able to pay the debt.

In the circumstances, I made the winding up order as well as other consequential orders prayed for.