

Is the time frame in RULE 30(2) immutable?

By Syafinaz Vani

Syafinaz Vani explains the Federal Court's decision on rule 30(2) of the Companies (Winding-Up) Rules 1972.

In the recent case of *Kilo Asset Sdn Bhd v Hew Tai Hong* [2016] 1 MLJ 785, the following question of law was posed to the Federal Court: "Whether a Winding-Up Court has the discretion to accept an affidavit in reply to an affidavit in opposition to a petition which is filed more than three (3) days of the date of service on the petitioner of the said affidavit in opposition, contrary to provision of Rule 30(2) of the Companies (Winding-Up) Rules 1972."

The Winding-Up Petition

On 24 October 2012, Hew Tai Hong ("Petitioner") filed a petition ("Petition") to wind up Kilo Asset Sdn Bhd ("Company") pursuant to sections 218(1)(f) and 218(1)(i) of the Companies Act 1965 ("Act") on the grounds that: (a) the directors had conducted the affairs of the Company in their own interests rather than in the interests of the Company as a whole which appeared to be unfair and unjust to other members; and (b) it is just and equitable that the Company be wound up. On 6 December 2012, the Company filed and served two affidavits in opposition to the Petition. The Petitioner filed two affidavits in reply to the Company's affidavits on 7 January 2013 and a third affidavit in reply on 14 January 2013.

As the Petitioner's affidavits in reply were not filed within the time frame prescribed under rule 30(2) of the Companies (Winding-Up) Rules 1972 ("Rules") which, inter alia, requires any affidavit in reply to an affidavit in opposition to a petition to be filed and served within three days of the date of service on the Petitioner, the Petitioner applied to Court for an extension of time pursuant to rules 193 and 194 of the Rules which respectively confer discretion on the court to allow enlargement of time and preclude proceedings from being invalidated by any formal defect or any irregularity, unless the court is of the view that substantial injustice has been caused.

The High Court dismissed the Petitioner's application for an extension of time on various grounds, including the following:

- (a) Compliance with the time frame prescribed in rule 30(2) of the Rules in relation to the filing and service of an affidavit in reply is mandatory;
- (b) The court has no discretion to extend or abridge the time specified in rule 30(2) of the Rules; and
- (c) The reasons given for the delay that there was insufficient time to obtain evidence and to meet with the client were inadequate to enable the court to exercise its discretion to grant an extension of time.

In view of the dismissal of the Petitioner's application for extension of time, the Petitioner's affidavits in reply were not accepted or considered by the High Court and the Petition was dismissed. Dissatisfied with the decision of the High Court, the Petitioner appealed to the Court of Appeal.

Decision of the Court of Appeal

The Court of Appeal unanimously allowed the Petitioner's appeal and remitted the Petition back to the High Court for a full hearing on, inter alia, the following grounds:

- (a) The High Court had failed to consider the effects of rules 193 and 194 of the Rules and should have considered the current approach to non-compliance with rules of procedure, namely, with regard to justice and not only to technical non-compliance; and
- (b) The High Court had erred in failing to consider the fact that a petition under sections 218(1)(f) and 218(1)(i) of the Act stood on a very different footing from a petition under section 218(1)(e) of the Act — in an unfair prejudicial conduct case, such as the present, which involves equitable considerations, it will not be possible or advisable for the court to adopt a rigid approach on technical non-compliance.

The Company obtained leave to appeal to the Federal Court on the question of law which has been set out at the beginning of this article.



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Decision of the Federal Court

At the Federal Court, the Company contended that rule 30(2) of the Rules is mandatory in nature as it uses the word “shall” and in the circumstances, the court has no power to extend or abridge time.

The Company relied on the decision of the Court of Appeal in *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank* [1997] 2 MLJ 756 which held that the similarly worded rule 30(1) of the Rules which, inter alia, requires an affidavit in opposition to a winding-up petition to be filed and served on the petitioner or his solicitor at least seven days before the hearing of the petition is mandatory in nature. The Federal Court, however, took the view that although the wording of rule 30(2) appears to be mandatory in nature, the general powers of the court to extend and abridge time pursuant to rules 193 and 194 must be given due consideration. These Rules provide as follows:

“193 Enlargement or abridgment of time

The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding. 194 Formal defect not to invalidate proceedings.

(1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.”

The Court also referred to section 221(2)(b) of the Act which reads as follows:

“(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 –

(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;” The Federal Court held that rules 193 and 194 of the Rules read with section 221(2) of the Act clearly give the court power to exercise its discretion to extend or abridge the time prescribed in rule 30(2) of the Rules. According to the Court, the Rules have to be read harmoniously and the rigours of rule 30(2) must be tampered by rules 193 and 194 and section 212(2) of the Act.

The Court also referred to section 355(1) of the Act which provides, inter alia, that no proceedings under the Act shall be invalidated by any defect or irregularity unless the court is of the view that substantial injustice has been or may be caused thereby which cannot be remedied by an order of the court. The Federal Court pointed out that *Crocuses & Daffodils* did not consider the discretionary powers of the court under rules 193 and 194 of the Rules and section 221(2)(b) of the Act which empower the court to validate formal defects or irregularities. The Federal Court held that *Crocuses & Daffodils* is confined to the facts of that case which is a petition founded on inability to pay debts under a valid and enforceable judgment. Their Lordships also pointed out that in that case, there had been inordinate delay and blatant disregard of the mandatory time frame prescribed under the Rules. Thus, the Federal Court agreed with the Court of Appeal that the High Court had erred in failing to consider the facts and circumstances relating to this case which is not a simple petition based on inability to pay debt under section 218(1)(e) of the Act, and held that it would not be right to adopt a purely mechanistic approach to the issue of time limits and completely ignore the discretion of the court to extend time under rule 193 of the Rules.

The Court also said that in exercising the powers under rules 193 and 194 of the Rules, the courts must be wary of all the surrounding circumstances of each case and must weigh the interest of both parties in accordance with those facts and circumstances. Having done so in the present case, the Court concluded that no injustice, let alone substantial injustice, had been caused by the defect or irregularity and accordingly the irregularity could be safely condoned under rules 193 and 194 of the Rules and sections 221(2)(b) and 355 of the Act.

In view of the above findings, the Federal Court answered the question of law in the affirmative and dismissed the Company’s appeal.

Conclusion

The decision of the Federal Court is a welcomed decision which moves away from the rigid and mechanical approach taken when dealing with technical non-compliance under the Rules. However, it must be noted that the decision of the Federal Court is in relation to a “just and equitable” winding-up petition which usually involves heavily disputed facts and exchange of numerous affidavits.

This decision does not overrule the decision in *Crocuses & Daffodils* concerning a petition based on inability to pay debt under a valid judgment in which the Court of Appeal emphasised on strict compliance with the mandatory time limits prescribed by law.

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