



📍 Federal Court, Putrajaya

📅 June 22, 2020

🏛️ Legal Department, IRBM

FEDERAL COURT GRANTS LEAVE TO APPEAL BY DGIR ON THE INTERPRETATION OF SECTION 535(1) OF THE COMPANIES ACT 2016

KPHDN v. SSM & AHH

NOTICE OF MOTION UNDER PARAGRAPH 96(a) OF CJA 1964

JUDGES

YAA Tan Sri Dato' Sri Azahar Mohamed (HBM)

YAA Datuk Seri Haji Mohd Zawawi Salleh (HMP)

YAA Datuk Vernon Ong Lam Kiat (HMP)

REVENUE COUNSELS

Dr. Hazlina Hussain
Mohd Shafuddin bin Hasan

The DGIR ("the Applicant") filed a Notice of Motion for leave to appeal to the Federal Court against the decision of the Court of Appeal dated 04 December 2019. The two questions of law proposed by the DGIR for the determination of the Federal Court are:

1. Whether the provision of section 535(1) of the Companies Act 2016 ("CA 2016") must be read in its entirety with a plain and ordinary meaning or be given a purposive construction in interpreting whether the time limit of two years is applicable for making an order or making an application; and
2. Whether the court may exercise its inherent power under Order 92 Rule 4 of Rules of Court ("ROC 2012") and/or Paragraph 8 Schedule 2 Court of Judicature Act 1964 ("CJA 1964") and/or section 582 of CA 2016 to extend and/or abridge the time to hear and decide the Applicant's application even if it had exceeded the period of two (2) years from the dissolution of a company known as MB Sdn Bhd.

Previously, on 12 February 2019, the Kuala Lumpur High Court dismissed the Applicant's application seeking for a declaration under section 535 (1) of the CA 2016 that the dissolution of MB Sdn Bhd on 20 August 2016 is illegal and void. The Court of Appeal further upheld the High Court's decision and ruled in favour of the 2nd Respondent who opposed the application.

THE APPLICANT'S ARGUMENT

The Applicant's application has satisfied the conditions under paragraph 96(a) of the CJA 1964 and the guidelines in *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor & Other Applications* as-

- (a) the issue raised by the Applicant is a question to be decided for the first time by the Federal Court;
- (b) It is a new issue to be resolved by the Federal Court on the correct interpretation of section 535(1) of the CA 2016;
- (c) The would-be decision of the Federal Court is of public importance and advantage as section 535(1) of the CA 2016 also applies to "a liquidator of a company or other interested person who appears to the court to be interested"; and
- (d) The decision of the Federal Court would have a significant impact on any interested party for an application under section 535(1) as it would give clarity and certainty on the interpretation of section 535(1) of the CA 2016.

Thus, the Applicant contends –

- (a) The purposive approach is the correct approach to the interpretation of section 535(1) of the CA 2016. Otherwise, the purpose and object for which the Parliament passed the law could not be achieved.
- (b) The learned High Court JC acknowledged that two High Court decisions (*Carlson White (M) Sdn Bhd v Mutira Metropolis Sdn Bhd* and *Mohd Bakri Mohd Noor v. Ketua Pengarah Insolvency Taba Silver Sdn Bhd*) decided that the application under section 535 of the CA 2016 must be made within two years. Notwithstanding that, the learned JC refused to have a similar interpretation as the other two learned HC Judges on the basis that she is not bound to follow those decisions.
- (c) With the presence of two different interpretations given to section 535(1) of the CA 2016, it must be said that section 535(1) of the CA 2016 is unclear. In other words, the Applicant submits that section 535(1) of the CA 2016 is ambiguous. Therefore, the High Court and Court of Appeal ought to have adopted the purposive approach that promotes the purpose and objective for which the law was introduced.
- (d) Section 535(1) of CA 2016 provides the power of the court to declare the dissolution of the company to be void within 2 years from the date of dissolution, upon application made by the liquidator or interested party.

- (e) Section 535(1) of CA 2016 is silent regarding the extension of time. Order 92 Rule 4 of the ROC 2012 empowers the court with inherent power to abridge the time under Paragraph 8 Schedule 2 of CJA 1964 and/or section 582 CA 2016 to make an order under Section 535(1) of CA 2016 as the condition provided in Section 535(1) of CA 2016 is incapable of performance. Reference is made to the principles laid down by Abdul Hamid Mohamad FCJ in *Datuk Bandar Kuala Lumpur v. Kuala Lumpur Golf & Country Club Bhd* [2007] 3 MLJ 293.
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THE SECOND RESPONDENT'S ARGUMENT

1. The provision of section 535(1) of CA 2016 is plain and unambiguous. A plain reading of Section 535(1) CA 2016 makes it clear that the Court does not have the jurisdiction to grant a Declaration of voidness more than two years from the date of dissolution. *Andrew Lee Siew Ling v. United Overseas Bank (M) Sdn Bhd* 1 CLJ 24 is referred.
 2. The court should merely give effect to the laws enacted by Parliament and should not usurp the legislative function by extending a statute to meet a case for which no provision has clearly and undoubtedly been made.
 3. Unlike other provisions in CA 2016 itself, Section 535(1) CA 2016 did not expressly stipulate that the Declaration of voidness can be granted even after expiration of the two-year period prescribed within the same provision.
 4. Unlike other jurisdictions such as Hong Kong, Australia and the United Kingdom, Parliament has not amended or removed the two-year time period in section 535(1) CA 2016 when repealing CA 1965 and enacting CA 2016.
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DECISION OF COURT

A three member-bench led by Chief Judge of Malaya unanimously allows the Applicant's application with cost in the cause.