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MALAYAN BANKING BHD v. GAN BEE SAN & ORS AND ANOTHER APPEAL; SKS FOAM (M) SDN BHD (INTERVENER)

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ZAINUN ALI FCJ
B ZAHARAH IBRAHIM FCJ
ALIZATUL KHAIR OSMAN FCJ
ROHANA YUSUF FCJ
[CIVIL APPEALS NO: 02(f)-99-09-2017(B) & 02(i)-101-09-2017(B)]
22 NOVEMBER 2018

C

COMPANY LAW: *Winding up – Setting aside – Appeal against – Winding up order made by Deputy Registrar – Whether Deputy Registrar had jurisdiction to issue winding up order – Whether matters and applications in court ought to be heard before judge in open court – Whether there was contravention of r. 5(1)(a)*
D *of Companies (Winding-up) Rules 1972 – Whether defect serious – Whether order ought to be set aside in interests of justice – Companies Act 1965, ss. 218 & 372(d)*

CIVIL PROCEDURE: *Jurisdiction – Deputy Registrar – Winding-up order made by Deputy Registrar – Whether Deputy Registrar had jurisdiction to issue winding up order – Whether matters and applications in court ought to be heard before judge*
E *in open court – Whether there was contravention of r. 5(1)(a) Companies (Winding-up) Rules 1972 – Whether defect serious – Whether order ought to be set aside in interests of justice – Companies Act 1965, ss. 218 & 372(d)*

WORDS & PHRASES: *'judge in open court' – Companies (Winding-up) Rules*
F *1972, r. 5(1) – Intention of lawgiver – Whether clear, precise and unambiguous – Whether matters and applications in court ought to be heard before judge in open court*

The appellant ('Maybank') presented a petition to wind up SKS Foam (M) Sdn Bhd ('SKS Foam'), the intervener herein, based on a judgment debt of
G approximately RM4 million. Maybank's solicitor attended the Shah Alam High Court for the hearing of the winding-up petition presented against SKS Foam. The winding-up petition was fixed for hearing before the Deputy Registrar. Upon confirmation from the official receiver's representative that the said office had no objections to the petition, the said Deputy Registrar
H entered the winding-up order against SKS Foam. More than three years later, the first, second and third respondents ('the respondents'), the contributories and creditors of SKS Foam, filed an application pursuant to O. 15 r. 6(2)(b) of the Rules of Court 2012 ('ROC 2012') and/or the inherent jurisdiction of the court to intervene in the winding-up proceedings and to set aside the winding-up order. The respondents contended that the winding-up order was
I invalid on the ground that the order was purportedly entered by a registrar and not the judge as stipulated in r. 5(1) of the Companies (Winding-up) Rules 1972 ('Winding-up Rules'). The High Court, however, dismissed the

respondents' application to set aside the winding-up order. The Court of Appeal, on the other hand, held that a winding-up order made by a Deputy Registrar of the High Court was null and void and ought to be set aside as it contravened r. 5(1)(a) of the Winding-up Rules. The Court of Appeal reversed the decision of the High Court. Thus, this court granted leave to appeal on the following question of law: whether the principle established in *Badiaddin Mohd Mahidin v. Arab Malaysian Finance Berhad* confers jurisdiction upon a court to set aside a perfected winding up order for breach of r. 5 of the Winding-up Rules having regard to the decision in *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram.*

Held (dismissing appeal with costs)
Per Alizatul Khair Osman FCJ delivering the judgment of the court:

(1) Section 218 of the Companies Act 1965 ('the Act') states the circumstances in which 'the court may order the winding up' of a company, with 'court' being defined in s. 4 as the 'High Court or a judge thereof'. Under s. 372(d) of the Act, the Rules Committee is duly empowered to make rules generally with respect to the winding-up of companies. Rule 5(1)(a) of the Winding-up Rules states that the matters and applications in court shall be heard before the judge in open court. The words 'judge in open court' are clear, precise and unambiguous. The court should therefore adopt the ordinary and natural meaning of the words, since it is to be presumed that the draftsmen had intended to express the intention of the lawgiver, in this context, the Rules Committee. There was no merit in counsel's attempt to read s. 218 of the Act or the Winding-up Rules to empower a Deputy Registrar to make winding-up orders. The impugned order herein was made by the Deputy Registrar and not a High Court Judge in open court. In the circumstances, there was a clear breach of r. 5(1)(a) of the Winding-up Rules. (paras 23-26)

(2) Rule 5(1) is not a mere technicality or rule of practice, but it is a rule that goes to the fundamental question of jurisdiction. Compliance with the rule is essential for the court to issue a winding-up order. The Deputy Registrar had no jurisdiction whatsoever to issue the said order. Without attempting to lay down a definitive test to distinguish between technical and substantive provisions, in the circumstances of this case, the contravention of r. 5(1)(a) fell squarely within the category of contravention of written law in *Badiaddin*, which rendered the resulting order null and void for 'lack of jurisdiction.' (para 36)

(3) Section 243 of the Act and the decision in *Vijayalakshmi* did not have the effect of removing the court's inherent jurisdiction to set aside fundamentally irregular or seriously defective orders. The Deputy Registrar's lack of jurisdiction was so fundamental as to be incurable by any order of the court. The present case constituted an 'exceptional case' envisaged in *Badiaddin*, where the defect was of such a serious nature

A that there was a real need to set the order aside in the interests of justice. Accordingly, the question of law was answered in the affirmative. (paras 43, 48 & 49)

Bahasa Malaysia *Headnotes*

B Perayu ('Maybank') mengemukakan petisyen untuk menggulung SKS Foam (M) Sdn Bhd ('SKS Foam'), pencelah di sini, berdasarkan hutang penghakiman berjumlah RM4 juta. Peguam cara Maybank hadir di Mahkamah Tinggi Shah Alam untuk perbicaraan petisyen penggulungan yang dikemukakan terhadap SKS Foam. Petisyen penggulungan ditetapkan untuk
C perbicaraan di hadapan Timbalan Pendaftar. Apabila mendapat pengesahan daripada wakil pegawai penerima bahawa pejabat tersebut tiada bantahan terhadap petisyen, Timbalan Pendaftar mengeluarkan satu perintah penggulungan terhadap SKS Foam. Lebih dari tiga tahun kemudian, responden pertama, kedua dan ketiga ('responden-responden'), peyumbang-
D penyumbang dan pemiutang-pemiutang SKS Foam, memfailkan permohonan bawah A. 15 k. 6(2)(b) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') dan/atau bidang kausa mahkamah sedia ada untuk mencelah dalam prosiding penggulungan dan mengetepikan perintah penggulungan. Responden-responden menghujahkan perintah penggulungan tidak sah atas alasan perintah telah dikeluarkan oleh pendaftar dan bukan hakim seperti yang
E ditetapkan k. 5(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972 (' Kaedah-Kaedah Penggulungan'). Mahkamah Tinggi, walau bagaimanapun, menolak permohonan responden-responden untuk mengetepikan perintah penggulungan. Mahkamah Rayuan pula memutuskan perintah penggulungan yang dibuat oleh Timbalan Pendaftar Mahkamah Tinggi tidak sah dan
F terbatal dan harus diketepikan kerana melanggar k. 5(1) Kaedah-Kaedah Penggulungan. Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi. Oleh itu, mahkamah ini memberi kebenaran untuk merayu atas persoalan undang-undang berikut: sama ada prinsip yang diasaskan dalam kes *Badiaddin Mohd Mahidin v. Arab Malaysian Finance Berhad* memberikan bidang kuasa
G pada mahkamah untuk mengetepikan perintah penggulungan yang telah disempurnakan atas alasan pelanggaran k. 5 Kaedah-Kaedah Penggulungan setelah mengambil kira keputusan dalam *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram*.

Diputuskan (menolak rayuan dengan kos)

H **Oleh Alizatul Khair Osman HMP menyampaikan penghakiman mahkamah:**

(1) Seksyen 218 Akta Syarikat 1965 ('Akta') menyatakan keadaan apabila 'mahkamah boleh memerintahkan penggulungan' sebuah syarikat, dengan 'mahkamah' ditakrifkan dalam s. 4 sebagai 'Mahkamah Tinggi
I atau hakim'. Bawah s. 372(d) Akta, Jawatankuasa Peraturan diberi kuasa untuk membuat peraturan-peraturan secara am berhubungan penggulungan syarikat-syarikat. Kaedah 5(1) Kaedah-Kaedah Penggulungan menyatakan perkara-perkara dan permohonan-

permohonan di mahkamah harus dibicarakan di hadapan hakim di mahkamah terbuka. Perkataan-perkataan 'hakim dalam mahkamah terbuka' adalah jelas, tepat dan terang. Oleh itu, mahkamah harus mengguna pakai maksud biasa dan semula jadi perkataan-perkataan itu, kerana diandaikan niat penggubal undang-undang adalah untuk menyatakan niat perundangan, dalam konteks ini, Jawatankuasa Peraturan. Tiada merit dalam percubaan peguam cara untuk membaca s. 218 Akta atau Kaedah-Kaedah Penggulungan untuk memberikan kuasa kepada Timbalan Pendaftar untuk membuat perintah-perintah penggulungan. Perintah yang dipertikaikan itu dibuat oleh Timbalan Pendaftar dan bukan Hakim Mahkamah Tinggi di mahkamah terbuka. Dalam keadaan itu, terdapat pelanggaran jelas k. 5(1)(a) Kaedah-Kaedah Penggulungan.

(2) Kaedah 5(1) bukan semata-mata alasan-alasan keteknikan atau peraturan untuk amalan, tetapi, peraturan yang melibatkan persoalan asas bidang kuasa. Pematuhan peraturan adalah penting untuk mahkamah mengeluarkan perintah penggulungan. Timbalan Pendaftar tidak mempunyai bidang kuasa untuk mengeluarkan perintah tersebut. Tanpa mencuba untuk membentangkan ujian tetap untuk membezakan antara peruntukan teknikal dan substantif, dalam keadaan-keadaan kes ini, pelanggaran k. 5(1) terangkum dalam kategori perbuatan menyalahi undang-undang bertulis dalam kes *Badiaddin*, yang telah mengakibatkan keputusan menjadi tidak sah dan terbatal kerana 'tiada bidang kuasa.'

(3) Seksyen 243 dan keputusan dalam kes *Vijayalakshmi* tidak membawa kesan membuang bidang kuasa sedia ada untuk mengetepikan perintah-perintah yang pada dasarnya tidak teratur atau teramat cacat. Fakta bahawa Timbalan Pendaftar tidak mempunyai bidang kuasa adalah sangat teras dan tidak dapat diubati oleh apa-apa perintah mahkamah. Kes ini adalah satu 'kes luar biasa' yang dibayangkan dalam kes *Badiaddin*, dan kecacatan adalah bersifat amat serius sehingga terdapat satu keperluan nyata untuk mengetepikan perintah demi kepentingan keadilan. Sewajarnya, persoalan undang-undang dijawab secara afirmatif.

Case(s) referred to:

American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd [2012] 1 CLJ 506 CA ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(foll)***

CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd [2014] 9 CLJ 1012 FC ***(refd)***

Craig v. Kanssen [1943] KB 256 ***(refd)***

Development & Commercial Bank Bhd v. Aspatra Corporation Sdn Bhd & Anor [1996] 1 CLJ 141 FC ***(dist)***

EU Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 SC ***(refd)***

A *Generation Products Sdn Bhd v. Majlis Perbandaran Klang [2008] 5 CLJ 417 FC* ***(refd)***
Harkness v. Bell's Asbestos and Engineering Ltd [1967] 2 QB 729 ***(refd)***
Hew Hooi Chun v. KL Teksi Radio Bhd [2010] 4 CLJ 657 CA ***(refd)***
Isaacs v. Robertson [1985] AC 97 ***(refd)***
Krish Maniam & Co v. Golden Plus Holdings Berhad [2014] MLRHU 466 ***(refd)***
Megah Teknik Sdn Bhd v. Miracle Resources Sdn Bhd [2010] 6 CLJ 745 CA ***(refd)***
B *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor [1996] 2 CLJ 586 FC* ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
PricewaterhouseCoopers v. Saad Investments Co Ltd [2014] UKPC 35 ***(refd)***
Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***
Sinarlim Sdn Bhd v. Waja Destinasi (M) Sdn Bhd [2012] 3 CLJ 678 CA ***(refd)***
C *Storti v. Nugent & Ors 2001 (3) SA 783 (W)* ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***
Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors [1995] 2 CLJ 392 CA ***(refd)***
D *White v. Weston [1968] 2 All ER 842* ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 4, 218, 243, 355, 372(d)
Companies (Winding-up Rules) 1972, rr. 5(1)(a), 28, 194
Courts of Judicature Act 1964, s. 78
Rules of Court 2012, O. 15 r. 6(2)(b), O. 20 r. 11
E
Companies Act 61 of 1973 [South African], s. 354(1)

For the appellant - Lua Ai Siew; M/s Soo Thien Ming & Nashrah
For the 1st, 2nd & 3rd respondents - Yusuf Khan Ghows Khan & Fong Teng Fook; M/s Yusuf Khan & Fong
F *For the 4th respondent - Gopal Sri Ram, Balbir Singh, Sukhwinder Singh, David Yii & Damien Chan; M/s Sukhwinder Singh N Mahinder Singh*
For the intervener - Vasanthi Sathasivam & Sugumaran Kumareson; M/s K Sugu & Assocs

[Editor's note: For the Court of Appeal judgment, please see Gan Bee San & Ors v. Malayan Banking Berhad & Anor [2017] 1 LNS 1475 (affirmed).]

G *Reported by Suhainah Wahiduddin*

JUDGMENT

Alizatul Khair Osman FCJ:

H **Introduction**

[1] This judgment is delivered pursuant to s. 78 of the Courts of Judicature Act 1964 as our sister Zainun binti Ali has since retired. This is a unanimous decision by the remaining members of the panel who heard this appeal.

I

[2] The appeals before us relate to the first, second and third respondents' application at the Shah Alam High Court to set aside a winding-up order dated 18 March 2013 (the said winding-up order). A

[3] The sole ground in support of the application to set aside the said winding-up order was that it contravened r. 5(1)(a) of the Companies (Winding-up Rules) 1972 (the Winding-up Rules). It was made by the Deputy Registrar of the High Court and not by a judge. B

[4] The respondents' application to set aside the said winding-up order was dismissed by the Shah Alam High Court on 23 September 2016. On 22 May 2013, the Court of Appeal reversed the decision of the High Court and set aside the said winding-up order under its inherent jurisdiction. C

[5] On 24 August 2017, this court granted leave to appeal on the following question of law, that is:

> Whether the principle established in *Badiaddin Mohd Mahidin v. Arab Malaysian Finance Berhad* [1998] 1 MLJ 393 confers jurisdiction upon a court to set aside a perfected winding-up order for breach of rule 5 of the Companies (Winding-Up) Rules 1972 having regard to the decision in *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram* [1995] 2 CLJ 392. D

[6] For ease of reference, we set down below the parties in these two appeals. E

[7] The petitioner in the High Court was Malayan Banking Berhad ('Maybank'):

(i) Maybank was the first respondent in the Court of Appeal. F

(ii) Upon leave being granted by the Federal Court, Maybank filed the notice of appeal dated 4 September 2017 herein which is registered as Appeal No. 02(i)-99-09-2017(B) ('Appeal 99').

[8] The respondent in the High Court was SKS Foam (M) Sdn Bhd (in liquidation): G

(i) SKS Foam (M) Sdn Bhd (in liquidation) was the second respondent in the Court of Appeal.

(ii) Upon leave being granted by the Federal Court, SKS Foam (M) Sdn Bhd (in liquidation) filed the notice of appeal dated 6 September 2017 herein which is registered as Appeal No. 02(i)-101-09-2017(B) ('Appeal 101'). H

SKS Foam (M) Sdn Bhd applied to intervene in these proceedings. The intervener was granted leave by the Federal Court on 24 August 2017.

[9] The applicants in the High Court are the respondents in this appeal. The appellants in these appeals are Maybank and SKS Foam (M) Sdn Bhd (in liquidation). I

A **Brief Facts**

[10] On 19 December 2012, Maybank presented a petition to wind up SKS Foam (M) Sdn Bhd, the intervener herein based on a judgment debt of approximately RM4 million.

B **[11]** On 18 March 2013, Maybank's solicitor attended the Shah Alam High Court for the hearing of the winding-up petition presented against the SKS Foam (M) Sdn Bhd. However, as was the practice then the winding-up petition was fixed for hearing before the Deputy Registrar. (It should be stated here and, as observed by the Court of Appeal, such a practice was not C supported by any provision of law nor any practice direction). No creditor or contributory appeared at the hearing of the winding-up petition on that day. Upon confirmation from the official receiver's representative that the said office had no objections to the petition, the said Deputy Registrar entered the winding-up order against SKS Foam (M) Sdn Bhd.

D **[12]** More than three years later, on 29 June 2016 the first, second and third respondents ("the respondents") who claimed to be contributories and/or creditors of SKS Foam (M) Sdn Bhd, filed an application pursuant to O. 15 r. 6(2)(b) of the Rules of Court 2012 and/or the inherent jurisdiction of the court to intervene in the winding-up proceedings and to set aside the E winding-up order. It is not disputed that prior to the abovesaid filing, the respondents did not participate in the winding-up proceedings. They did not file a notice of intention to appear in the High Court as required by r. 28 of the Companies (Winding-up) Rules 1972.

[13] The first, second and third respondents contended that the winding-up F order is invalid on the ground that the order was purportedly entered by a Registrar and not the judge as stipulated in r. 5(1)(a) of the Companies (Winding-up) Rules 1972.

[14] Maybank on the other hand, took the position that there was a typographical error in the winding-up order dated 18 March 2013. It then G applied under O. 20 r. 11 of the Rules of Court 2012 to amend the winding-up order. On 18 July 2016, the High Court allowed the application.

[15] On 23 September 2016, the High Court dismissed the respondents' application to set aside the winding-up order. On 22 May 2017, the Court of Appeal allowed the respondents' appeal.

H **Decision Of The Court Of Appeal**

[16] The Court of Appeal held that a winding-up order made by a Deputy Registrar of the High Court is null and void and ought to be set aside as it contravenes r. 5(1)(a) of the Companies (Winding-up) Rules 1972. I Essentially the Court of Appeal held that:

> [9] ... Based on rule 5(1), it is clear to us that the effect of this rule is that a winding up order must be made by a judge in open court. The Deputy Registrar, in our judgment, was bereft of any power to grant the said

winding up order which he did in chambers and thus in contravention of this rule. Consequently, the said winding up order is invalid and void *ab initio*. The question of amending the said winding up order under the circumstances did not arise, however, since the court below had allowed the application to amend an invalid order coupled with the fact that the appellants had been deprived of the right to be heard on the respondents' application, which in our view is in breach of rules of natural justice, the amending order is consequently rendered null and void as well.

Our Findings

[17] The question of law posed before us is as follows:

Whether the principle established in *Badiaddin bin Mohd Mahidin v. Arab Malaysian Finance Berhad* [1998] 1 MLJ 393 confers jurisdiction upon a court to set aside a perfected winding-up order for breach of rule 5 of the Companies (Winding-Up) Rules 1972 having regard to the decision in *Vijayalakshmi Devi d/o Nadchatiram v. Jegadevan s/o Nadchatiram* [1995] 2 CLJ 392.

General Principles

[18] It is trite that generally, a court becomes *functus officio* and has no power to vary an order after it has been drawn up. One High Court cannot set aside a final order made by another High Court of concurrent jurisdiction. An exception to this rule is where an order was irregularly obtained. The inherent jurisdiction of the court to set aside such an order was succinctly expressed in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 MLJ 30 at 247 (CLJ); 36 (MLJ):

The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms.

[19] This principle was expounded in the leading case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393. In that case, the Federal Court reaffirmed that where the final order of a court is proved to be null and void on ground of illegality or lack of jurisdiction, the court has an inherent jurisdiction to set it aside *ex debito justitiae* (per Mohd Azmi FCJ at 409 (MLJ)). The power of the court to set aside orders made in breach of written law is inherent and need not be derived from any statutory provision (per Gopal Sri Ram JCA at 117 (CLJ); 429 (MLJ):

It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist.

[20] Noting the courts in England have not closed the door as to the type of defects that render a final judgment liable to be set aside *ex debito justitiae*, Mohd Azmi FCJ explained the nature of the requisite contravention in the important passage below (at p. 93 (CLJ); p. 409 (MLJ)):

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', *the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law.* The discretion to invoke the inherent jurisdiction should also be exercised judicially *in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.* In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.
>
> (emphasis added)

[21] This passage was discussed in *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1 at [35]. The court confirmed that the reference to "exceptional cases" in *Badiaddin* should not be read as a separate category giving the courts a broad power to set aside previous orders. Rather, the phrase relating to "serious defects" should be read in the context of an order that was obtained in contravention of a statute, such that it is illegal or made outside the jurisdiction of the court.

[22] In the present case, the central issue concerns the effect of the winding-up order made by the Deputy Registrar on 18 March 2013 ("the order"), against the provision in the Companies (Winding-up) Rules 1972 ("the Winding-up Rules") which requires winding-up petitions to be heard before a judge in open court. In light of the principles summarised above, the issue in dispute can be analysed in three parts:

(i) Was there a breach of the Winding-up Rules?

(ii) If there was a breach, was it the type of serious defect described in *Badiaddin*?

(iii) If the breach was a serious defect for the purposes of *Badiaddin*, can the court set aside the winding-up order?

Was There A Breach Of The Winding-up Rules?

[23] Section 218 of the Companies Act 1965 (the Act) states the circumstances in which "the court may order the winding up" of a company, with "court" being defined in s. 4 as "the High Court or a judge thereof".

Under s. 372(d) of the Act, the Rules Committee is duly empowered to make rules generally with respect to the winding up of companies. Rule 5(1)(a) of the Winding-up Rules states:

> Matters to be heard in Court and Chambers
>
> 5. (1) The following matters and applications in Court shall be heard before **the Judge in open Court**:
>
> (a) petitions;
>
> (emphasis added)

[24] The words "judge in open court" are clear, precise, and unambiguous. The court should therefore adopt the ordinary and natural meaning of the words, since it is to be presumed that the draftsman had intended to express the intention of the lawgiver, in this context, the Rules Committee (see *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713; [2005] 2 MLJ 685 at [155], *Generation Products Sdn Bhd v. Majlis Perbandaran Klang* [2008] 5 CLJ 417; [2008] 6 MLJ 325 at [41]). In the absence of any suggestion of injustice or absurdity, the court cannot resort to an unduly strained construction (see *Foo Loke Ying & Anor. v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35 at 43). As such, we find no merit in counsel's attempt to read s. 218 of the Act or the Winding-up Rules to empower a Deputy Registrar to make winding-up orders.

[25] The appellants relied on *Development & Commercial Bank Bhd v. Aspatra Corporation Sdn Bhd & Anor* [1996] 1 CLJ 141; [1995] 3 MLJ 472 in support of the contention that the High Court Judge was acting through the Deputy Registrar. In that case, the Supreme Court stated "it is immaterial that the said order of the High Court was actually made by the learned Registrar and not a High Court Judge. The learned Registrar should be considered notionally to be making the order as if he were a Deputy High Court Judge." That case can be easily distinguished: on the facts therein, there was no allegation that the Registrar had acted in contravention of any express provision.

[26] The concurrent finding of fact by the courts below that the impugned order in this case was made by a Deputy Registrar and not a High Court Judge in open court is undisputed. The name of the Deputy Registrar as reflected in the order was not a typographical error. In the circumstances, we are of the view that there was a clear breach of r. 5(1)(a) of the Winding-up Rules.

Was The Breach A Serious Defect For The Purposes Of Badiaddin?

[27] To recapitulate, the principle elucidated in *Badiaddin* relates to contraventions of "substantive statutory provisions" so as to render the order void for "illegality or lack of jurisdiction". The contravention must be "of such a serious nature" that the order must be set aside in the interests of

justice; it must not relate to mere "procedural requirements". This requirement of seriousness is reflected in s. 355 of the Act and r. 194 of the Winding-up Rules, which provide that no proceedings shall be invalidated by any formal defect or irregularity, unless the court is of the opinion that substantial injustice has been caused, and that injustice cannot be remedied by any order of the court.

[28] The crucial question is therefore, whether the breach of r. 5(1)(a) of the Winding-up Rules constitutes a "serious defect" of the nature described so as to render the order a nullity, or whether it is a mere procedural non-compliance. The distinction between the two may be difficult to ascertain with precision as said by Lord Greene MR in *Craig v. Kanssen* [1943] KB 256 at 258:

> ... it is desirable to examine the distinction between proceedings or orders which are nullities and those in respect of which there has been nothing worse than an irregularity. No definition is to be found in the rule which draws a line between these two classes. Exactly where that line lies may not be easy to discover in some circumstances. The existence of the distinction, however, has been recognised in many authorities.

[29] In *White v. Weston* [1968] 2 All ER 842, Russell LJ in the English Court of Appeal held at 846:

> I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as 'irregular' or 'a nullity'. The defect is in my judgment so fundamental as to entitle the defendant as of right, *ex debito justitiae*, to have the judgment avoided and set aside. If as a technical matter it is a matter of discretion to set aside the judgment: '... in accordance with settled practice, the court can exercise its discretion only in one way, namely, by granting the order sought', to quote Up John LJ in *Re Pritchard (decd)* [1963] 1 All ER 873 at p 881, letter D; [1963] Ch 502 at p 521.

[30] In *Isaacs v. Robertson* [1985] AC 97, Lord Diplock in the Privy Council distilled from the authorities the proposition that (at 103):

> ... there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

[31] The serious nature of a defect that warrants the setting aside of an order *ex debito justitiae* has been emphasised in a number of cases. The defect must be "a fundamental vice" (*Craig v. Kanssen (supra)* at 265); "a failure to comply with an essential provision" (*Muniandy Thamba Kaundan & Anor. v. Development & Commercial Bank Bhd & Anor* [1996] 2 CLJ 586; [1996] 1 MLJ 374 at 381), "some impropriety which is considered to be so serious as to render the proceedings a nullity" (*Tuan Hj Ahmed Abdul Rahman (supra)* at 36). The irregularity must be "a breach of the rules of natural justice contravention of a statute which is a *sine qua non*"; the order must not be merely irregular in the sense that it was obtained in breach of a rule of court or of practice (*CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd* [2014] 9 CLJ 1012; [2014] 6 MLJ 779 at [11], quoting with approval *Hew Hooi Chun v. KL Teksi Radio Bhd* [2010] 4 CLJ 657; [2011] 3 MLJ 754).

[32] By way of illustration, the types of irregularities that have been held to fall within this category include where the court or authority had no power to make the order in contravention of written law (*Badiaddin (supra)*, *EU Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37), procedural impropriety in depriving parties of the right to be heard (*Tuan Haji Ahmed Abdul Rahman (supra)*, uncertainty in the order itself (*Tuan Haji Ahmed Abdul Rahman (supra)*), and failure to serve the notice of hearing (*Muniandy (supra)*). In those cases, the irregularity rendered the order a nullity and void.

[33] The case of *Krish Maniam & Co v. Golden Plus Holdings Berhad* [2014] MLRHU 466 involved a similar fact scenario as the present case. A Deputy Registrar heard the winding-up petition in chambers and issued a winding-up order, in the absence of the judge who was away at a meeting. However, on the face of the order, it appeared that the order was made by the judge in open court. Vernon J allowed the application to set aside the order on the basis that it was made without jurisdiction and in breach of r. 5 of the Winding-up Rules. A contrasting decision was reached in the English Court of Appeal in *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729. In *Harkness*, an order purportedly granting leave to the plaintiff to issue a writ notwithstanding the expiry of the limitation period was issued by the District Registrar. It was contended that the order was flawed in that the jurisdiction to give leave is vested in a judge-in-chambers, not a Registrar. Lord Denning MR begin by observing that the relevant rule was new and that the parties' ignorance "very pardonable" (at 734):

> The first flaw was that the district registrar had no jurisdiction to give leave at all. The jurisdiction is vested in a judge in chambers in person. That was enacted by a new rule, R.S.C., Ord. 128, r. 1 (1), which was made in December, 1963, or January, 1964. But in April, 1964, both the solicitor for Mr Harkness and the district registrar were unaware of it. I think their ignorance was very pardonable. The new rule had not been circulated or published in such a way as to come to the notice of practitioners.

A In the circumstances of the case, Lord Denning MR went on to hold that the failure was a mere irregularity and not a nullity (at 735):

> ... it was said that the failure was not merely a failure to comply with the requirements of the rules (which require the application to be made to a judge in chambers in person). There was a failure, it was said, to comply
B with the statute, because section 2 (1) of the [Limitation] Act of 1963 says that the application shall be made to the court: and 'the court,' it is said, means a judge in open court. I do not think this is right. In a section dealing with procedure, **the 'court' includes a judge in chambers: and when it includes a judge in chambers, it includes also a master or district registrar, who are his delegates**. The statute was, therefore, complied
C with. *The only requirement which was overlooked was the requirement of the rules, namely, R.S.C., Ord. 128, r. 1(1), that the jurisdiction was to be exercised by a judge in chambers in person. The failure to comply with that rule is under the new rule to be treated as an irregularity and not as a nullity*. It can be corrected simply by saying that the leave given by the registrar shall be regarded as valid.
D (emphasis added)

[34] However, if one were to read the judgment in the context of the factual matrix of the case, it is clear that the Court of Appeal in *Harkness* was concerned with the injustice of penalising a litigant for non-compliance with a new rule, which had not been published or circulated and of which the
E lawyers and the District Registrar were unaware. These concerns do not arise in the present case: the Winding-up Rules have been in place since 1972, and Maybank's application to amend the order to reflect the name of the judge instead of the Deputy Registrar appears to be an acknowledgment that the order as it originally stood was in breach of the relevant rule.

F **[35]** In addition, r. 5(1)(a) of the Winding-up Rules stipulates that the petition be heard by a "judge in open court". Even if one were to adopt the *Harkness* interpretation of "judge in chambers" to include a Registrar (on which we express no opinion), the present case would require the statutory language to be strained even further in order to read "judge in open
G court" to extend to a Deputy Registrar in chambers.

[36] In our view, r. 5(1)(a) is not a mere technicality or rule of practice, but it is a rule that goes to the fundamental question of jurisdiction. Compliance with the rule was essential for the court to issue a winding-up order. The Deputy Registrar had no jurisdiction whatsoever to issue the said
H order. Without attempting to lay down a definitive test to distinguish between technical and substantive provisions, we consider that in the circumstances of this case, the contravention of r. 5(1)(a) falls squarely within the category of contravention of written law in *Badiaddin*, which renders the resulting order null and void for "lack of jurisdiction".

I

Can The Court Set Aside The Order?

[37] It was argued that the court had no power to set aside or rescind a perfected winding-up order after it has been made. The order, it was asserted, could only be stayed pursuant to s. 243 of the Act which provides:

> Power to stay winding up
>
> 243. (1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

[38] In this regard, the appellants rely on the Court of Appeal decision in *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors* [1995] 2 CLJ 392; [1995] 1 MLJ 830, wherein NH Chan JCA held (at 395 (CLJ); 833 (MLJ)):

> A winding-up order could not be discharged or rescinded after it had been made. The only remedy is to apply for a stay of proceedings under the winding-up order: see s. 243(1) of the Companies Act 1965.

[39] Section 243 of the Act is silent on the power of the court to set aside an irregularly obtained winding-up order made without jurisdiction. It is pertinent at this juncture to reiterate that the jurisdiction of a court to set aside fundamentally irregular or seriously defective orders is inherent and not dependent on any express statutory provision. It is also noted that none of the cases relied upon by the appellants on this point (*Megah Teknik Sdn Bhd v. Miracle Resources Sdn Bhd* [2010] 6 CLJ 745; [2010] 4 MLJ 651, *Sinarlim Sdn Bhd v. Waja Destinasi (M) Sdn Bhd* [2012] 3 CLJ 678; [2011] 5 MLJ 416, *American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506; [2012] 1 MLJ 369) involved an irregular or defective order made in contravention of written law.

[40] An illumination on the proper scope of s. 243 can be gleaned from the South African case of *Storti v. Nugent & Ors* 2001 (3) SA 783 (W). Section 354(1) the Companies Act 61 of 1973 (the South African equivalent of our s. 243) likewise finds its origins in the English Companies Act. However, whereas the Malaysian and English equivalent refer only to the power to stay, the South African version specifically provides for the power of the court both to stay and to set aside proceedings. Nevertheless, Gautschi AJ held that the addition of the power to set aside did not alter the scope of the section in any fundamental way from the English position (at 794-795):

> … the section as borrowed from English legislation originally only permitted the staying of proceedings. The power to set aside was introduced in the 1926 Companies Act. The balance of the section remained largely unchanged. Although the word 'stay' means, in our law,

A to suspend, the expression has a wider meaning in English law. Apart from the usual meaning (suspend), it may also mean the total discontinuance of proceedings ... **The addition of the power to set aside has therefore not altered the scope of the section in any fundamental way**.

(emphasis added)

B **[41]** It is pertinent to note that the court held that s. 354 of the South African Companies Act did not apply in a situation where the validity of the winding-up order is challenged on the basis of some defects. Gautschi AJ held (at 795):

C A moment's reflection reveals that an application to set aside or stay winding-up proceedings may arise in two broad situations. On the one hand, the winding-up order may be attacked on the basis that it should never have been granted, by reason of some defect in the procedure or the merits of the application. On the other hand, the winding-up order may be unassailable in itself, but later events may render a stay or setting aside of the winding-up proceedings necessary or desirable.

D In my view, the section is intended to cover the latter situation, and not the former.

[42] Gautschi AJ reasoned that in respect of an assailable winding-up order, it can be rescinded under the common law without need for recourse E to any specific statutory provision. In addition, it is significant that the section refers to "proceedings" and not "order":

Although the expression 'proceedings' may therefore be accepted to be wide enough to include any order granted, generally when an order is set aside, all the proceedings which flowed from the order (for example F execution) are automatically set aside as well. The reference to 'proceedings' is therefore another indication that this section was not intended for or geared to the rescission of an assailable order. This is strengthened when 'proceedings' is read with 'stay' and 'set aside'. *The Court has the power to suspend (stay) the proceedings, or to set them aside, in which latter event the entire proceedings, including the application for winding up, would* G *be set aside. Where the winding-up order had been incorrectly granted, however, the Court would ordinarily wish merely to rescind (set aside) the order, leaving the application for winding up intact*.

(emphasis added)

H **[43]** Applying the above reasoning to the present case, we do not consider that s. 243 of the Act and the decision in *Vijayalakshmi* have the effect of removing the court's inherent jurisdiction to set aside fundamentally irregular or seriously defective orders.

[44] In general, an application to set aside an irregular order should be I made with reasonable promptitude or within a reasonable time, and before the applicant had taken any fresh step after becoming aware of the irregularity (*Tuan Haji Ahmed Abdul Rahman (supra)* at 36). It may be

possible to persuade the court that it is too late to set aside a winding-up order even if it was granted without jurisdiction. Lord Neuberger in the Privy Council decision of *PricewaterhouseCoopers v. Saad Investments Co Ltd* [2014] UKPC 35 (at [44]), *albeit* in the context of a stay application expressed the following view:

> In many cases, it may be that a court could be persuaded that it was too late for a winding up to be stayed even if it was plainly granted without jurisdiction. The liquidation will very often have proceeded too far for matters to be satisfactorily capable of being restored or otherwise re-organised, as would be required if there was to be a stay, or third party rights may have been created or varied in such a way as would render it unjust to stay the winding up (or more unjust to stay than not to stay). In the present case, there is no suggestion of the respondents (or anyone else) having done anything irrevocable pursuant to the Bermuda winding-up order …

[45] Nevertheless, lapse of time is not in itself a bar to an application to set aside an irregular order (see *Muniandy (supra)* at 384). Per Edgar Joseph Jr FCJ in *Tuan Hj Ahmed Abdul Rahman (supra)* at 253 (CLJ); 42 (MLJ):

> Nevertheless, it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:
>
> (a) no one has suffered prejudice by reason of the defendant's delay;
>
> (b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or
>
> (c) to let the judgment to stand would constitute oppression.

[46] It has also been suggested that the applicant must establish "sufficient cause" for setting aside the irregular order under the common law. An inability to establish *prima facie* solvency may be an obstacle to the relief sought (*Storti v. Nugent (supra)* at 808).

[47] The appellants have brought to our attention the long delay of 3½ years between the issuance of the order and the respondents' filing of the application to set the order aside, and the absence of any explanation for the delay from the respondents. It was submitted that the irregularity in this case did not result in any prejudice, given that the winding-up petition was uncontested and no creditor or contributory appeared at the hearing thereof. No appeal was lodged against the winding-up order. A liquidator had been appointed. Further, the respondents have not adduced any evidence to indicate at a *prima facie* level the solvency of the company.

[48] We agree that these contentions are not without merit. Nevertheless, we are of the view that the Deputy Registrar's lack of jurisdiction is so fundamental as to be incurable by any order of the court. The present case constitutes an "exceptional case" envisaged in *Badiaddin*, where the defect is of such a serious nature that there is a real need to set the order aside in the interests of justice.

A **[49]** Accordingly, the question of law is answered in the affirmative. The appeal is dismissed with costs and the decision of the Court of Appeal affirmed. We therefore order that the petition be remitted to the High Court for hearing before a judge in open court.

B **[50]** Finally, we wish to state that our decision today is based solely on the peculiar facts of this case.

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