

## TRA MINING (MALAYSIA) SDN BHD

A

v.

## THEIN HONG TECK &amp; ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA

B

ZAINUN ALI JCA

MOHAMED APANDI ALI JCA

ZAHARAH IBRAHIM JCA

[CIVIL APPEALS NO: W-02(NCC)-2686-2010 &  
W-02(NCC)-2687-2010]

C

11 JULY 2011

**COMPANY LAW:** *Winding-up - Setting aside - Partnership - Whether partnership an unregistered company and could be wound-up - Companies Act 1965, s. 314(1) - Applicability of*

D

**COMPANY LAW:** *Winding-up - Unregistered companies - Partnership with more than five members - Whether could be wound-up - Companies Act 1965, s. 314(1) - Applicability of*

**PARTNERSHIP:** *Winding-up - Setting aside - Whether partnership an unregistered company and could be wound-up - Companies Act 1965, s. 314(1) - Applicability of*

E

**CIVIL PROCEDURE:** *Summary application - Rules of the High Court 1980, O. 14A - Winding-up of partnership - Whether a partnership is an "unregistered company" under s. 314 Companies Act 1965 - Whether O. 14A a suitable mechanism to dispose of case*

F

**WORDS & PHRASES:** *"Unregistered company" includes a foreign company and any partnership ..." - Section 314(1), Companies Act 1965 - Whether word "and" means term includes a foreign company and also any "partnership, association or company consisting of more than five members" - Whether inclusive definition*

G

The plaintiffs (Thein Hong Teck & Ors), claimed to be partners in a partnership by the name of ARCI Enterprise. The partnership had several persons as the first partners. Disputes, however, arose in relation to a portion of shares held by one partner, Syed Khairul Azhar, who had purportedly sold his rights, title and interest in his shares to the first defendant, *ie*, Tra Mining (Malaysia) Sdn Bhd. The first defendant filed a creditor's petition in the High Court at Melaka seeking to wind-up the partnership. The said High Court granted the petition and the second

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- A defendant was appointed as the liquidator of the partnership. The plaintiffs then filed a summons in chambers seeking an order to set aside the winding-up order made by the High Court at Melaka against the partnership and the appointment of the second defendant as liquidator. The first and second defendants
- B subsequently filed a summons in chambers seeking to have the plaintiffs' writ of summons and statement of claim struck out under O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980 ('RHC'). The High Court judge, on his own motion, decided that the entire cause of matter of the suit could be determined under
- C O. 14A of the RHC. The High Court judge concluded that the order of the High Court at Melaka was a nullity *ab initio* since a partnership is excluded from the regime of the Companies Act 1965 ('the Act') and held that a winding-up order could be set aside by a court of concurrent jurisdiction. Thus, the High Court
- D judge set aside the winding-up order as well as the order appointing the second defendant as liquidator of the partnership. Dissatisfied with the decisions, the first and second defendants filed this appeal *vide* their respective suits accordingly. The plaintiffs also cross-appealed, seeking to have their writ of
- E summons and statement of claim reinstated. The issues that arose for consideration herein were (i) whether O. 14A of the RHC was a suitable mechanism to dispose of the case and (ii) whether a partnership was an "unregistered company" under s. 314 of the Act.
- F **Held (setting aside the order of the High Court judge pursuant to O. 14A RHC; dismissing appeals; allowing plaintiffs' cross-appeal)**  
**Per Zaharah Ibrahim JCA delivering the judgment of the**
- G **court:**
- H (1) The statement of claim and the memorandum of appeal showed that there were serious disputes between the parties. Order 14A of the RHC was thus a manifestly unsuitable route to take to dispose of the cause or matter in this case. It may only be resorted to if there was no dispute by the parties as to the relevant facts, or that the court, upon scrutinising the pleadings, concludes that the material facts were not in dispute. (para 31)
- I (2) The issue of applicability of s. 314 of the Act to partnerships was not a "question of law ... arising in any cause or matter at any stage of the proceedings" in this case before the High

Court. That being the case, O. 14A of the RHC was not suitable for the purpose of determining the applicability of s. 314 of the Act to partnerships. (para 35)

(3) The High Court Judge had misunderstood the purpose of the word “and” appearing after the words “foreign company” in the definition of “unregistered company” under s. 314(1) of the Act. That definition is an “inclusive” definition. The word “includes” in that definition means that in addition to whatever usual meaning that the term “unregistered company” carries, that term includes the entities which are listed after the word “includes.” Hence, the word “and” simply means that that term includes a foreign company and also any “partnership, association or company consisting of more than five members.” (para 42)

(4) A partnership with more than five members, as was the case of the partnership wound up by the Melaka High Court, was an unregistered company and could be wound up under Part X of the Companies Act by virtue of the definition of “unregistered company” in s. 314(1) of the Act. To conclude that ss. 314(1) and 315 of the Act did not apply to partnerships would result in a partnership which is unable to pay its debts being able to continue to incur more debts and liabilities until the partnership is finally dissolved under the Partnership Act 1961. (paras 47 & 52)

*[Suit to be proceeded to be heard in the High Court.]*

***Bahasa Malaysia Translation Of Headnotes***

Plaintif-plaintif (Thein Hong Teck & Ors) mendakwa bahawa mereka adalah pekongsi-pekongsi di dalam satu perkongsian yang bernama ARCI Enterprise. Perkongsian itu mempunyai beberapa rakan kongsi. Walaubagaimanapun, pertikaian timbul berhubungan dengan sebahagian saham yang dipegang oleh satu pekongsi, Syed Khairul Azhar, yang dikatakan telah menjual hak, hakmilik dan kepentingan di dalam saham-sahamnya kepada defendan pertama, iaitu, Tra Mining (Malaysia) Sdn Bhd. Defendan pertama memfailkan petisyen pemiutang di Mahkamah Tinggi Melaka untuk menggulungkan perkongsian tersebut. Mahkamah Tinggi membenarkan petisyen dan defendan kedua dilantik sebagai likuidator perkongsian tersebut. Plaintif-plaintif kemudiannya memfailkan saman dalam kamar memohon perintah untuk mengenyakan perintah penggulangan yang dibuat oleh Mahkamah

- A Tinggi Melaka terhadap perkongsian dan perlantikan defendan kedua sebagai likuidator. Defendan pertama dan kedua pula memfailkan saman dalam kamar memohon supaya writ saman dan pernyataan tuntutan plaintif ditolak di bawah A. 18 k. 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Hakim
- B Mahkamah Tinggi telah memutuskan bahawa keseluruhan perkara guaman itu boleh ditentukan atas penentuan di bawah A. 14A KMT. Hakim Mahkamah Tinggi membuat kesimpulan bahawa perintah Mahkamah Tinggi Melaka adalah terbatal *ab initio* memandangkan perkongsian dikecualikan dari rejim Akta Syarikat
- C 1965 ('Akta tersebut') dan memutuskan perintah penggulangan harus diketepikan oleh mahkamah bidangkuasa setaraf. Oleh itu, Hakim Mahkamah Tinggi mengenepikan perintah penggulangan dan perintah yang melantik defendan kedua sebagai likuidator perkongsian. Tidak puas hati dengan keputusan-keputusan
- D tersebut, defendan pertama dan kedua telah memfailkan rayuan ini melalui guaman mereka masing-masing. Plaintif-plaintif juga merayu balas dengan membuat tuntutan supaya writ saman dan pernyataan tuntutan dihidupkan semula. Isu-isu yang timbul untuk pertimbangan disini adalah (i) sama ada A. 14A KMT adalah
- E mekanisma yang sesuai untuk melupuskan kes dan (ii) sama ada perkongsian adalah "syarikat tidak berdaftar" di bawah s. 314 Akta.

**Diputuskan (mengenepikan perintah Hakim Mahkamah Tinggi berhubungan A. 14A KMT; menolak rayuan-rayuan; membenarkan rayuan balas plaintif-plaintif)**  
**Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah:**

- G (1) Pernyataan tuntutan dan memorandum rayuan menunjukkan bahawa terdapat pertikaian-pertikaian serius di antara pihak-pihak terlibat. Aturan 14A KMT adalah laluan yang jelas tidak sesuai diambil untuk melupuskan hal atau kausa di dalam kes ini. Ia hanya boleh digunakan jika tidak terdapat pertikaian oleh
- H pihak-pihak berhubungan fakta-fakta relevan, atau mahkamah, apabila meneliti pliding-pliding, memutuskan bahawa fakta-fakta material tidak harus dipertikaikan.
- I (2) Isu pemakaian s. 314 Akta terhadap perkongsian-perkongsian bukan "soalan undang-undang ... yang berbangkit di dalam sebarang hal atau kausa pada mana-mana peringkat prosiding" di dalam kes ini di hadapan Mahkamah Tinggi. Oleh itu, A. 14A KMT tidak sesuai bagi maksud menentukan pemakaian s. 314 Akta terhadap perkongsian-perkongsian.

- (3) Hakim Mahkamah Tinggi telah salah faham maksud perkataan “dan” yang terdapat selepas perkataan “syarikat asing” dalam definisi “syarikat tidak berdaftar” di bawah s. 314(1) Akta. Definisi itu adalah definisi “termasuk”. Perkataan “termasuk” di dalam definisi itu bermaksud sebagai tambahan kepada apa jua maksud biasa terma “syarikat tidak berdaftar”, terma itu termasuk entiti-entiti yang disenaraikan selepas perkataan “termasuk”. Oleh itu, perkataan “dan” hanya bermakna bahawa terma itu termasuk syarikat asing dan juga apa-apa “perkongsian, persatuan atau syarikat yang terdiri daripada lebih daripada lima orang ahli.”
- (4) Perkongsian yang terdiri daripada lebih daripada lima orang ahli, seperti kes perkongsian yang digulungkan oleh Mahkamah Tinggi Melaka, adalah syarikat tidak berdaftar dan boleh digulungkan di bawah Bahagian X Akta Syarikat menurut takrif “syarikat tidak berdaftar” di bawah s. 314(1) Akta. Untuk menyimpulkan ss. 314(1) dan 315 Akta tidak boleh digunapakai terhadap perkongsian-perkongsian akan menyebabkan satu perkongsian yang tidak berupaya untuk membayar hutang dibenarkan terus menanggung lebih hutang dan tanggungjawab sehingga perkongsian akhirnya dibubarkan di bawah Akta Perkongsian 1961.

*[Guaman diteruskan untuk didengar di Mahkamah Tinggi.]*

**Case(s) referred to:**

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

*Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2007] 6 CLJ 741 CA (*refd*)

*Wong Hong Toy & Anor v. Public Prosecutor* [1986] 1 MLJ 133 (*refd*)

**Legislation referred to:**

Companies Act 1965, ss. 314(1), 315(1)(c)(ii)

Rules of the High Court 1980, O. 14A, O. 18 rr. 19(1)(b), (d)

Companies Act [S’pore], ss. 314, 315

Companies Act [UK], s. 398

*(Civil Appeal No: W-02(NCC)-2686-2010)*

*For the appellant - Amelda Md Din; M/s Amelda & Partners*

*For the respondents - Dato’ Manpal Singh (Dato’ Rabinder Singh & Nasuha Abdul Rahman with him); M/s Rabinder Budiman & Assocs*

- A *(Civil Appeal No: W-02(NCC)-2687-2010)*  
*For the appellant - Amir Asree Meor Nordin; M/s Zainul Rijal Talha & Amir*  
*For the respondents - Dato' Manpal Singh (Dato' Rabinder Singh & Nasuha*  
*Abdul Rahman with him); M/s Rabinder Budiman & Assocs*
- B *[Appeal from High Court, Kuala Lumpur; Civil Suit No: D-22NCC-776-2009]*
- [Editor's note: For the High Court judgment, please see Thein Hong Teck & Ors v. TRA Mining (Malaysia) Sdn Bhd & Ors [2011] 6 CLJ 953.]*
- C *Reported by Suhainah Wahiduddin*

## JUDGMENT

### Zaharah Ibrahim JCA:

- D **The Parties**
- [1] The appellant in Appeal No. W-02(NCC)-2686-2010 was the 1st defendant in the court below.
- E [2] The appellant in Appeal No. W-02(NCC)-2687-2010 was the 2nd defendant in the court below.
- F [3] In the court below there was a 3rd defendant, by the name of Cedric David Joseph Williamson, who is not a party to either appeal.
- [4] The respondents were the plaintiffs in the court below.
- [5] For ease of reference, they will be referred to in this judgment by their capacities in the court below.
- G **Background Facts**
- [6] The background facts of this case are rather convoluted. However, an understanding of the facts are useful in order to understand what eventually transpired in the court below.
- H [7] The plaintiffs claimed to be partners at some point or another in a partnership by the name of ARCI Enterprise. However, a partnership by this name was registered under different registration numbers during various periods of time. The statement of claim listed three different registration numbers for a partnership by that name. The first partnership by that name with
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the registration number 000915175-X was registered on 8 October 1992 (“the Partnership”). the second, with the registration number 001502428-X was registered on 29 July 2004. The third was registered on 12 January 2006, with the registration number 001593482-D.

**[8]** The partnership had the following persons as the first partners:

(a) Yee Fook Shin (5th plaintiff)

(b) Yee Chang Man

(c) Yong Kat Keong

(d) Thein Hong Teck (1st plaintiff)

(e) Yee Fook Choy (2nd plaintiff)

(f) Yee Chong Khoon (3rd plaintiff)

(g) Syed Khairul Azhar bin Syed Talib

**[9]** The 4th plaintiff is the administrator of the estate of Yong Kat Keong. Yee Chang Man is not involved in the disputes that followed.

**[10]** Disputes arose in relation to the 5% shares held by Syed Khairul Azhar. He purportedly sold his rights, title and interest in his shares in the partnership to the 1st defendant who then appointed the 3rd defendant to be its “representative” in relation to Syed Khairul Azhar’s shares in the partnership.

**[11]** Over the several years since the dispute first arose, not less than NINE actions had been commenced in various courts prior to the filing of suit no. D-22NCC-776-2009, which is the suit in the appeals before us.

**[12]** The “prize” that is the subject-matter of the struggle between the partners and purported partners of the partnership in its various reincarnations is the Mining Permit (Sijil Perlombongan) MC 1/113 in respect of all that land to the south of Lot 1986 Sungai Kemoi, Mukim Ulu Jerai in the district of Lipis, Pahang.

**[13]** Among the suits filed was Suit No. 22-76-2001 which was filed by the 3rd defendant in the High Court at Kuantan. The High Court at Kuantan apparently made an order dissolving the

- A Partnership. That order was apparently set aside. However, pursuant to that order a meeting of creditors (which included the 1st defendant) of the partnership was held on 11 May 2007 and the 2nd defendant was appointed as the provisional liquidator of the partnership.
- B [14] In the meantime suit no. MT(1)-22-82-2003 was filed by the 1st defendant (TRA Mining) in the High Court at Kuantan to claim a sum of RM6,157,121.57 it said was owed to it by the partnership.
- C [15] While suit no. MT(1)-22-82-2003 was still pending in the High Court in Kuantan, the 1st defendant filed a creditor's petition (no. MT3-28-15-2007) in the High Court at Melaka seeking to wind up the partnership for the very same amount claimed in suit no. MT(1)-22-82-2003.
- D [16] The High Court at Melaka granted the petition and the 2nd defendant was appointed as the liquidator of the partnership.
- E [17] The suit (D-22NCC-776-2009), from which the appeals before us emanated, arose mainly out of that winding up order given by the High Court at Melaka.
- F [18] The plaintiffs in their statement of claim sought, *inter alia*, to have that winding up order set aside, and sought to have the appointment of the 2nd defendant as the liquidator of the partnership set aside. They also sought a declaration that the appointment of the 2nd defendant as provisional liquidator by the creditors at their meeting on 11 May 2001 was invalid and should be set aside.
- G [19] The grounds for the plaintiff's application to set aside the winding up order can be gleaned from paras. 55 to 64 of the statement of claim. Three main grounds were advanced, namely, that the petition was not served on the partnership but was served on the 2nd defendant as the purported provisional liquidator of the partnership, that the petitioner had not obtained judgment for the sum claimed, and that the partnership had sufficient assets to pay its debts.
- H [20] The plaintiffs then filed a summons in chambers (encl. 3) seeking an order to set aside the winding up order made by the High Court at Melaka against the partnership and the appointment of the 2nd defendant as liquidator. They also sought an order that the partnership be allowed to continue to conduct its business.
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[21] The 1st and 2nd defendants later filed summons in chambers (encls. 10 and 11) seeking to have the plaintiffs' writ of summons and statement of claim struck out under O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980 (RHC). Their applications relate to the jurisdiction of the High Court to set aside an order of another High Court.

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[22] The learned High Court judge, on his own motion, decided that the entire cause or matter of the suit before him could be finally determined upon the determination, under O. 14A of the RHC, of two legal issues which he posed to the parties, namely:

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(i) Whether the order of the Malacca High Court dated 8.5.2008 can be set aside by this court on the ground that it is a nullity *ab initio*?

(ii) And, if so, whether this court has jurisdiction to set aside an order of concurrent jurisdiction?"

D

[23] The learned High Court judge concluded that the order of the High Court at Melaka is a nullity *ab initio* as a partnership is excluded from the regime of the Companies Act 1965. He therefore held that, based on the Federal Court decision in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, that winding up order can be set aside by a court of concurrent jurisdiction. He therefore set aside that winding up order as well as the order appointing the 2nd defendant as the liquidator of the partnership.

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[24] The learned High Court judge also ordered that such decision on the basis of O. 14A "shall be the final order for this suit and the deputy registrar shall treat this suit as disposed off pursuant to O. 14A".

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[25] Further, apparently by way of a housekeeping exercise, the learned High Court judge made an order dismissing encls. 3, 10 and 11. However, the learned High Court judge stated his view that if not for the order he made in setting aside the winding up order and the appointment of the second defendant as the partnership's liquidator, he would have allowed the defendants' application to strike out the plaintiffs' action.

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[26] Against those decisions of the High Court the 1st and 2nd defendants appealed. The plaintiffs also cross-appealed, seeking to have their writ of summons and statement of claim reinstated.

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A [27] Those are the appeals before us.

**Was O. 14A A Suitable Mechanism To Dispose Of The Case?**

B [28] The statement of claim and the memorandum of appeal show that there were serious disputes between the parties. One of the critical disputes is the issue of whether the partnership had in fact been dissolved even before the filing of the petition for winding up. This led to the question of whether the plaintiffs had *locus standi* to commence this suit.

C [29] To add to the confusion, there was a decision of the Federal court from one of the many suits filed in connection with the partnership which appear to preserve the rights of the partnership in respect of legal actions commenced before the dissolution of the partnership, if it was indeed dissolved.

D [30] After scrutinizing the Records of Appeal, we were of the considered view that there were issues to be tried.

E [31] With the background of seriously disputed facts, and issues to be tried, O. 14A is a manifestly unsuitable, to put it mildly, route to take to dispose of the cause or matter in this case. This court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2007] 6 CLJ 741 and in had made it clear that O. 14A of the RHC may only be resorted to if there is no dispute by the parties as to the relevant facts, or that the court, upon scrutinizing the pleadings, concludes that the material facts are not in dispute.

G [32] We noted that the notes of proceedings and the grounds of judgment do not state whether the learned High Court judge had addressed his mind as to whether the relevant or material facts were in dispute.

[33] We also noted that none of the parties had raised any dispute or doubts that s. 314 of the Companies Act 1965 applies to partnerships.

H [34] In fact, in para. 40 of the statement of claim, the plaintiffs, in addressing the issue of insolvency which was apparently raised at the meeting of purported creditors on 11 May 2007, state that the issue of the partnership's insolvency "merupakan suatu keputusan yang hanya boleh diberi oleh mahkamah berdasarkan suatu Petisyen Penggulangan". Their application in encl. 3 was stated to have been made under ss. "232(1), 243(1) dan 307 Akta Syarikat 1965".

[35] The issue of applicability of s. 314 of the Companies Act 1965 to partnerships is therefore not a “question of law ... arising in any cause or matter at any stage of the proceedings” in this case before the High Court. That being the case, O. 14A of the RHC is not suitable for the purpose of determining the applicability of s. 314 of the Companies Act 1965 to partnerships.

**Is A Partnership An “Unregistered Company” Under s. 314?**

[36] However, in view of the fact that the learned High Court judge had made a decision to proceed under O. 14A of the RHC and made several orders pursuant to that decision, we were of the considered view that it was incumbent upon us to determine whether the basis of those orders, namely his conclusion that the order of the High Court at Melaka is a nullity *ab initio* because a partnership is excluded from the regime of the Companies Act 1965, is correct in law.

[37] Section 315 of the Companies Act 1965 provides that any unregistered company may be wound up under Part X of the Companies Act 1965 and that Part applies to unregistered companies subject to the adaptations set out in subs. 315(1). The adaptations in para. 315(1)(c) stipulate that an unregistered company may only be wound up in one of three specified circumstances:

- (i) if the company is dissolved or has ceased to have a place of business in Malaysia or has a place of business in Malaysia only for the purpose of winding up its affairs or has ceased to carry on business in Malaysia;
- (ii) if the company is unable to pay its debts; and
- (iii) if the court is of the opinion that it is just and equitable that the company should be wound up.

[38] The winding up order made by the High Court at Melaka was made on a creditor’s petition presented on the basis of the partnership’s insolvency. It was therefore clearly made under subpara. 315(1)(c)(ii) of the Companies Act 1965.

[39] The term “unregistered company” is defined in subs. 314(1) of the Companies Act 1965, and is as follows:

A      **“Unregistered company”**

314. (1) For the purposes of this Division “unregistered company” includes a foreign company **and any** partnership, association or company consisting of more than five members but does not include a company incorporated under this Act or under  
B      any corresponding previous written law. (emphasis added)

[40] After having discussed and differentiated the corresponding provisions in the United Kingdom and India the learned High Court judge concluded in para. 12 of his judgment that:

C      12. In the Malaysian context it will appear that parliament in its wisdom had as early as 1965 has disentangled from the UK Companies Act 1948 relating to unregistered company and had specifically excluded ‘partnership’ to be wound up pursuant to CA 1965 unless it involves a foreign company” [sic].

D      [41] In other words, the learned High Court judge had read the definition of “unregistered company” as if the word “foreign” modifies also “partnership”, not just “company”, and as if the only partnership that can come within that definition is a partnership  
E      which has a foreign company as a partner. That can be the only conclusion one can make from the words “unless it involves a foreign company” in para. 12 of the judgment.

[42] The learned High Court judge had unfortunately misunderstood the purpose of the word “and” appearing after the  
F      words “foreign company” in the definition of “unregistered company”. That definition is an “inclusive” definition. The word “includes” in that definition means that in addition to whatever usual meaning that the term “unregistered company” carries, that  
G      term includes the entities which are listed after the word “includes”. Hence, the word “and” simply means that, that term includes a foreign company and also any “partnership, association or company consisting of more than five members”.

[43] In other words, for the purpose of subs. 314(1) of the  
H      Companies Act 1965, a foreign company is an unregistered company. So is a partnership, an association or a company which consists of more than five members. However, a company incorporated under the Companies Act 1965 or under any corresponding previous written law is not an unregistered company  
I      within that definition.

[44] As mentioned above, the learned High Court judge had compared the wordings of subs. 314(1) of the Companies Act 1965 to the corresponding provisions in the company laws of the United Kingdom and India. A comparison was made to s. 398 of the UK Companies Act 1948 which is reproduced in the judgment. It reads as follows:

398. For the purposes of this part of this Act, the expression “unregistered company” shall **include** any trustee savings bank certified under the Trustee Savings Bank Act, 1963, **and any partnership**, whether limited or not, any association and any company with the following exceptions. (emphasis added)

[45] The learned High Court judge commented that “It must be noted that the above section in the UK clearly differentiates “partnership” as one category, and to be read disjunctively”.

[46] We were not able to see how the learned High Court judge could have come to the conclusion that the presence of the words “and any partnership” in our subs. 314(1) requires the words “partnership” to be read conjunctively with the words “a foreign company” while at the same time accepting that in the UK law the words “and any partnership” are to be read disjunctively from those words which describe a trustee savings bank.

[47] In our view, a partnership with more than five members, as is the case of the Partnership wound up by the Melaka High Court, is an unregistered company and can be wound up under Part X of the Companies Act by virtue of the definition of “unregistered company” in subs. 314(1) of the Companies Act 1965.

[48] We were unable to find decided cases on the application of s. 314 of the Companies Act 1965 to partnerships. However, we found support for our view in the views expressed by Wee Chong Jin, CJ, in the case of *Public Prosecutor v. Wong Hong Toy & Anor* and *Wong Hong Toy & Anor v. Public Prosecutor* [1986] 1 MLJ 133, in relation to the applicability to societies of ss. 314 and 315 of the Companies Act in Singapore, which are in *pari materia* with our ss. 314 and 315.

[49] Although those cases deal with the applicability of ss. 314 and 315 of the Companies Act in Singapore to societies, nonetheless they are relevant in the context of our case as the definition of a society in the Singapore Societies Act, as noted by

- A his Lordship, includes any association of ten or more persons. As  
has been stated above, the second group of entities included in  
the definition of “unregistered company” in subs. 314(1) of our as  
well as Singapore’s Companies Act consists of “any partnership,  
association or company consisting of more than five members”. In  
B other words, if s. 315, read with subs. 314(1), applies to a society  
(association) of more than five members, it applies equally to a  
partnership of more than five members.

- C [50] The views of Wee Chong Jin CJ we referred to are as  
follows:

- D The contention was raised at the trial that a society, registered  
under the Societies Act, (Cap. 262) cannot be wound-up on the  
ground of insolvency. It was submitted that there is no provision  
under the Societies Act for a registered society to be wound-up  
on the ground of insolvency and that both the Bankruptcy Act  
(Cap. 18) and the Companies Act (Cap. 185) do not apply to a  
society such as the Worker’s Party and accordingly, that “there  
is no law governing the distribution of its property among its  
creditors”. In the result, it was submitted that there could be no  
successful prosecution under Section 421 of the Penal Code in  
E respect of fraudulent disposal of property belonging to a society  
registered under the Societies Act and consequently, on this  
ground alone, Wong and Jeyaretnam were entitled to be acquitted.

- F Though the submissions as regards the position in law under the  
Societies Act and the Bankruptcy Act are well founded, the  
submission that the Companies Act do not apply to a registered  
society is, in my opinion, untenable.

- G An examination of sections 314 and 315 of the Companies Act is  
necessary. Section 314(1) of the Companies Act provides:

- H 314. - (1) For the purposes of this Division ‘unregistered  
company’ includes a foreign company and any partnership  
association or company consisting of more than five  
members but does not include a company incorporated  
under this Act or under any corresponding previous written  
law.

- I It is clear that the Worker’s Party which is an association, *albeit*  
a political association, consisting of more than five members, is  
an unregistered company within the meaning of section 314(1).  
Section 315(1) so far as material provides:

315. - (1) Subject to this Division any unregistered company may be wound up under this Part, which Part shall apply to an unregistered company with the following adaptations:

(c)

(i) ...

(ii) if the company is unable to pay its debts;

(iii) if the Court is of opinion that it is just and equitable that the company should be wound up.

It is therefore plain that section 315 can be invoked as the Worker's Party was, on the facts before the court, "unable to pay its debts" and could on that ground be wound-up.

...

In my judgment, it cannot be attributed to the legislature the intention to exempt societies registered under the Societies Act from the jurisdiction of the Courts to make a winding up order. Section 314 (1) of the Companies Act expressly defines the term "unregistered company" to include any association of five or more members and section 2 of the Societies Act expressly defines the term "society" to include "any ... association of ten or more persons whatever its nature or object". I am of the opinion that it could not have been the intention of the Legislature to exempt any association of ten or more persons which is registered as a society under the Societies Act from the provisions of section 315 of the Companies Act especially when the Act and the regulations made thereunder require it to have a registered place of business. *To conclude otherwise would result in a registered society which is unable to pay its debts, however recklessly incurred, being able to continue its activities and incur more liabilities until it can be dissolved under the provisions of the Societies Act.* (emphasis added)

[51] The learned High Court judge was of the opinion that there are separate regimes to deal with insolvency of partners and/or dissolution of partnership firms. The Partnership Act 1961 and the Bankruptcy Act 1967 were cited. However, it must be observed that the Partnership Act 1961 does not contain any provision which enables a creditor to present a petition to wind up a clearly insolvent partnership. Neither does the Bankruptcy Act 1967.

- A [52] To paraphrase His Lordship Wee Chong Jin, CJ, to conclude that s. 315 and subs. 314(1) of the Companies Act do not apply to partnerships would result in a partnership which is unable to pay its debts being able to continue to incur more debts and liabilities until the partnership is finally dissolved under the Partnership Act 1961.
- B

**Decision**

- C [53] We were therefore set aside the order of the learned High Court judge with regard to O. 14A.

- D [54] However, in view of our findings that there were issues to be tried, we upheld the decision of the learned High Court judge in dismissing the applications under O. 18 r. 19 (namely the applications in encls. 10 and 11).

- E [55] We therefore dismissed both appeals, subject to our decision on the learned High Court judge's order under O. 14A, and allowed the plaintiffs' cross-appeal.

- F [56] Consequentially, we order that the suit be proceeded with to be heard in the High Court.

[57] We further ordered that the deposits for both appeals be paid to the plaintiffs (respondents) as costs.

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