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THEIN HONG TECK & ORS

v.

MOHD AFRIZAN HUSAIN & ANOTHER APPEAL

B

FEDERAL COURT, PUTRAJAYA

RAUS SHARIF PCA

AHMAD MAAROP FCJ

HASAN LAH FCJ

[CIVIL APPEALS NO: 02()-24-2011(W) & 02-25-2011]

C

7 DECEMBER 2011

COMPANY LAW: *Winding up - Unregistered Companies - Whether a 'partnership' with more than five members an unregistered company - Whether 'partnership' can be wound up - Companies Act 1965, s. 314*

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PARTNERSHIP: *Dissolution - Application of - Whether creditor can apply under s. 37 Partnership Act 1961 to dissolve a 'partnership' - Remedy of - Whether creditor's remedy lies under s. 314 Companies Act 1965*

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CIVIL PROCEDURE: *Disposal of action without trial - Disposal of case on point of law - Facts in dispute - Whether issues of facts interwoven with legal issues - Whether suitable to determine applicability of s. 314 Companies Act 1965 - Rules of the High Court 1980, O. 14A - Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd*

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WORDS AND PHRASES: *"Partnership" - Companies Act 1965, s. 314 - Wording of - Whether a 'partnership' with more than five members an unregistered company - Whether the words 'a foreign company and any partnership, association or company consisting of more than five members' read disjunctively*

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These appeals were in relation to the interpretation of s. 314 of the Companies Act 1965 ('the Act'). The appellants were partners in a partnership by the name of ARCI Enterprise. The respondent ('first defendant') in appeal no. 02-25-2011(W) herein, had filed a creditor's petition in the Malacca High Court to wind up the said partnership due to a certain debt owed to it by the partnership. The winding up order was granted and the respondent ('second defendant') in appeal no. 02-24-2011 (W) herein was appointed as the liquidator of the partnership ('the said orders'). The appellants filed a suit at the Kuala Lumpur High Court ('trial court') to set aside the said orders. The trial court decided the

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matter under O. 14A Rules of the High Court 1980 ('RHC') and concluded that the order of the Malacca High Court was a nullity *ab initio* as the partnership was excluded from the regime of the Act. In the learned judge's view at the trial court, the words "foreign company and any partnership" in s. 314 of the Act must have been read conjunctively and that there was a separate regime provided by law to deal with insolvency of partners or dissolution of partnership firms. As such, the trial court set aside the said orders. Dissatisfied with the trial court's decision, the first and second defendants appealed to the Court of Appeal wherein their appeal was allowed. The Court of Appeal disagreed with the trial court's interpretation of s. 314 of the Act and held that the partnership could be wound up under Part X of the Act by virtue of the definition of "unregistered company" in s. 314(1) of the Act. The appellants appealed to this court wherein they contended, *inter alia*, (i) that the requirement under s. 314 of the Act was not fulfilled since the partnership only comprised of five partners at the time when the winding up petition was presented (ii) that it would be absurd for a partnership that is registered pursuant to the Partnership Act 1961 to also be categorised as an unregistered company pursuant to s. 314 of the Act and (iii) that the provision under s. 314 of the Act must be read conjunctively. Leave to appeal was granted by this court based on the following question, *ie*, whether the partnership of ARCI Enterprise would qualify as an unregistered company pursuant to s. 314 of the Act.

Held (dismissing the appeals with costs)

Per Hasan Lah FCJ delivering the judgment of the court:

- (1) Section 314(1) of the Act is clear and unambiguous. As such, it must be given its literal interpretation. Where the words of the statute are plain and unambiguous, the court ought to give effect to its plain meaning (*MBF Holdings Bhd v. Emtex Corporation Bhd*; *refd*). (para 31)
- (2) The words "a foreign company and any partnership, association or company consisting of more than five members" in s. 314 of the Act ought to be read disjunctively. The word "foreign" qualifies only the word "company" and it is not correct to read the word "foreign" before the word "partnership" in construing the provision. (para 33)

- A (3) Under the Partnership Act 1961, only the partners can make an application to court to dissolve and wind up a partnership voluntarily. A creditor such as the respondents could not make an application under s. 37 of the Partnership Act 1961 to dissolve a partnership. On the other hand, s. 314 of the
- B Act is applicable in a situation where a creditor seeks a remedy against an insolvent partnership which has more than five members. As such, a partnership with more than five members is an unregistered company and can be wound up under Part X of the Act by virtue of the definition of
- C unregistered company in s. 314(1) of the Act. (paras 36, 38 & 44)
- (4) In the instant case, the issue of how many members of the partnership were there at the time of presentation of the winding up petition against the partnership could only be
- D determined in a full trial where witnesses ought to be called and cross-examined so that full evidence on the matter are made available for the court to make a proper finding on the issue. (para 43)
- E (5) It is trite law that O. 14A RHC may only be resorted to if there is no dispute by the parties as to the relevant facts, or that the court, upon scrutinising the pleadings concludes that the material facts are not in dispute (*Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd*; *refd*). Where the issues of
- F facts are interwoven with legal issues raised, it will be undesirable for the court to split the legal and factual determination for to do so, would in effect be to give rulings *in vacuo* or on a hypothetical ruling, which the court will not do. (para 47)
- G (5a) The trial court's notes of proceedings failed to address whether the relevant or material facts were in dispute. Besides, there were serious disputed facts involved which were interwoven with the legal issues raised. As such,
- H O. 14A RHC was not suitable to have determined the applicability of s. 314 of the Act to the partnership. (paras 46 & 48)

Bahasa Malaysia Translation Of Headnotes

- I Rayuan-rayuan di sini berkaitan dengan pentafsiran s. 314 Akta Syarikat 1965 ('Akta tersebut'). Perayu-perayu adalah rakan kongsi dalam satu perkongsian ARCI Enterprise. Responden ('defendan

pertama’) dalam rayuan no. 02-25-2011(W) di sini, telah memfailkan satu petisyen pemiutang di Mahkamah Tinggi Melaka untuk menggulungkan perkongsian tersebut kerana terdapat hutang yang masih belum dijelaskan kepadanya oleh perkongsian itu. Perintah penggulungan telah dibenarkan dan responden (‘defendan kedua’) dalam rayuan no. 02-24-2011(W) di sini telah dilantik sebagai likuidator perkongsian tersebut (‘perintah-perintah tersebut’). Perayu-perayu telah memfailkan satu guaman di Mahkamah Tinggi Kuala Lumpur (‘mahkamah perbicaraan’) bagi mengenepikan perintah-perintah tersebut. Mahkamah perbicaraan telah memutuskan perkara ini di bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980 (‘KMT’) dan telah mengulaskan bahawa perintah-perintah tersebut adalah terbatal *ab initio* memandangkan perkongsian tersebut dikecualikan daripada Akta tersebut. Pada pandangan yang arif hakim di mahkamah perbicaraan, perkataan “syarikat asing dan sebarang perkongsian” dalam s. 314 Akta tersebut semestinya dibaca bersama-sama dan terdapat rejim berasingan yang disediakan oleh undang-undang untuk mengendali berkenaan insolvensi rakan kongsi atau perubaran firma-firma perkongsian. Oleh itu, mahkamah perbicaraan telah mengenepikan perintah-perintah tersebut. Tidak puas hati dengan keputusan mahkamah perbicaraan, defendan pertama dan defendan kedua telah merayu ke Mahkamah Rayuan di mana rayuan mereka telah dibenarkan. Mahkamah Rayuan tidak bersetuju dengan pentafsiran hakim perbicaraan berkenaan s. 314 Akta tersebut dan telah memutuskan bahawa perkongsian boleh digulungkan di bawah Bahagian X Akta tersebut berdasarkan definisi “syarikat yang tidak berdaftar” dalam s. 314(1) Akta tersebut. Perayu-perayu telah merayu ke mahkamah ini di mana mereka telah berhujah, antara lain, (i) bahawa kehendak di bawah s. 314 Akta tersebut tidak dipatuhi memandangkan perkongsian tersebut hanya terdiri daripada lima rakan kongsi semasa petisyen penggulungan dikemukakan (ii) bahawa ianya tidak masuk akal bagi perkongsian yang telah didaftar berdasarkan Akta Perkongsian 1961 untuk dikategorikan juga sebagai syarikat tidak berdaftar berdasarkan s. 314 Akta tersebut dan (iii) bahawa peruntukan di bawah s. 314 Akta tersebut mesti dibaca bersama-sama. Kebenaran merayu telah dibenarkan oleh mahkamah ini berdasarkan soalan berikut, iaitu, sama ada perkongsian ARCI Enterprise layak sebagai syarikat tidak berdaftar berdasarkan s. 314 Akta tersebut.

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- A Keputusan (menolak rayuan-rayuan dengan kos)
Oleh Hasan Lah HMP menyampaikan penghakiman mahkamah:**
- B** (1) Seksyen 314(1) Akta tersebut adalah jelas dan tidak terkabur. Oleh itu, ianya perlu diberikan pentafsiran 'literal'. Di mana perkataan statut adalah nyata dan tidak terkabur, mahkamah seharusnya memberi efek kepada pengertian nyatanya (*MBF Holdings Bhd v. Emtex Corporation Bhd*; dirujuk).
- C** (2) Perkataan "satu syarikat asing dan sebarang perkongsian, persatuan atau syarikat yang mempunyai lebih daripada lima ahli" dalam s. 314 Akta tersebut sepatutnya dibaca secara disjunktif. Perkataan "asing" layak hanya bagi perkataan "syarikat" dan adalah tidak betul untuk membaca perkataan "asing" sebelum perkataan "perkongsian" dalam mentafsirkan peruntukan itu.
- D**
- E** (3) Di bawah Akta Perkongsian 1961, hanya rakan-rakan kongsi yang boleh membuat permohonan ke mahkamah untuk membubar dan menggulungkan sesuatu perkongsian secara sukarela. Pemiutang seperti responden-responden tidak boleh membuat permohonan di bawah s. 37 Akta Perkongsian 1961 untuk membubarkan sesuatu perkongsian. Selain daripada itu, s. 314 Akta tersebut dipakai dalam situasi di mana pemiutang memohon remedi terhadap perkongsian tak solven yang mempunyai lebih daripada lima orang ahli. Oleh itu, suatu perkongsian yang mempunyai lebih daripada lima orang ahli adalah syarikat yang tidak berdaftar dan boleh digulungkan di bawah Bahagian X Akta tersebut berdasarkan definisi syarikat yang tidak berdaftar dalam s. 314(1) Akta tersebut.
- F**
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- H** (4) Dalam kes ini, isu berkenaan berapa ramai ahli dalam perkongsian tersebut pada masa pengemukakan petisyen penggulungan terhadap perkongsian tersebut hanya boleh ditentukan dalam perbicaraan penuh di mana saksi-saksi semestinya dipanggil dan disoal silang supaya keterangan penuh disediakan bagi mahkamah membuat percarian yang sepatutnya terhadap isu ini.
- I** (5) Adalah undang-undang mantap bahawa A. 14A KMT hanya boleh digunakan jika tiada pertikaian oleh pihak-pihak berkenaan fakta-fakta relevan, atau pun mahkamah, selepas meneliti pliding-pliding mengulaskan bahawa fakta-fakta

material tidak dipertikaikan (*Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd*; dirujuk). Di mana isu-isu fakta tersirat dengan isu-isu perundangan yang telah dibangkitkan, adalah tidak diinginkan bagi mahkamah memisahkan penentuan undang-undang dan faktual di mana untuk berbuat demikian, secara berkesannya akan memberi keputusan *in vacuo* atau keputusan hipotesis, di mana mahkamah tidak akan berbuat sedemikian.

- (5a) Nota-nota prosiding mahkamah perbicaraan tidak menimbangkan sama ada fakta-fakta relevan atau material dalam pertikaian. Lagipun, terdapat fakta-fakta serius dipertikaikan yang tersirat dengan isu-isu perundangan yang telah dibangkitkan. Oleh itu, A. 14A KMT adalah tidak sesuai untuk menentukan pemakaian s. 314 Akta tersebut terhadap perkongsian itu.

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*)

Duport Steel Ltd v. Sirs [1980] 1 WLR 142 (*refd*)

MBF Holdings Bhd v. Emtex Corporation Bhd [1985] 1 LNS 100 SC (*refd*)

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

State Bank of India v. Marjani Marketing (CA Transcript No. 91/0304) (*refd*)

United Overseas Bank (Malaysia) Sdn Bhd v. UJA Sdn Bhd & Another Appeal [2010] 6 CLJ 204 CA (*refd*)

Vickers, Sons and Maxim, Ltd v. Evans [1910] AC 444 (*refd*)

Legislation referred to:

Bankruptcy Act 1967, ss. 98, 100, 103

Companies Act 1965, ss. 314(1), 315(1), 317(2)

Partnership Act 1961, ss. 34(1)(a), 37(f), 40, 41

Rules of the High Court 1980, O. 14A

(Civil Appeal No: 02()-24-2011(W))

For the appellants - Dato' Manpal Singh Sacdev (Dato' Rabinder Singh, Nasoha Abdul Rahman & WH Tan with him); M/s Rabinder Budiman & Assocs

For the respondent - Amir Asree Meor Nordin; M/s Zainul Rijal Talha & Amir

(Civil Appeal No: 02()-25-2011(W))

For the appellants - Dato' Manpal Singh Sacdev (Dato' Rabinder Singh, Nasoha Abdul Rahman & WH Tan with him); M/s Rabinder Budiman & Assocs

- A** *For the respondent - Hj Haniff Khatri (Amelda Md Din with him);
M/s Amelda & Partners*
- [Appeal from Court of Appeal, Civil Appeals No: W-02(NCC) 2687-10 & W-02(NCC) 2686-10]*
- B** *Reported by Kumitha Abdul Majid*

JUDGMENT

C Hasan Lah FCJ:

[1] These two appeals concern the interpretation of s. 314 of the Companies Act 1965 (“the Act”). Leave to appeal was granted by this court on 6 April 2011 on the following question:

- D** Whether the partnership of ARCI Enterprise would qualify as an unregistered company pursuant to section 314 of the Companies Act 1965.

- E** [2] These two appeals are against the decision of the Court of Appeal which had allowed the defendants’ appeal against the decision of the High Court given on 26 August 2010. The respondent in appeal no. 02-24-2011(W) was the 2nd defendant in the High Court. The respondent in appeal no. 02-25-2011(W) was the 1st defendant in the High Court. The five appellants were the plaintiffs in the High Court. The parties have agreed that both
- F** the appeals be heard together as they involved the same question of law.

- G** [3] We reserved our judgment after hearing these appeals. We now give our decision and the reasons for the same.

- H** [4] The brief facts of this case as found by the Court of Appeal are as follows. The plaintiffs claimed to be partners at some point or another in a partnership by the name of ARCI Enterprise which was registered on 8 October 1992 (“the Partnership”).
- However a partnership by this name was also registered on 29 July 2004 and 12 January 2006.

- [5] The partnership had the following persons as the first partners:

- I** (a) Yee Fook Shin (5th plaintiff);
- (b) Yee Chong Man;

- (c) Yon Kat Keong; A
- (d) Thein Hock Teck (1st plaintiff)
- (e) Yee Fook Choy (2nd plaintiff);
- (f) Yee Chong Khoon (3rd plaintiff); B
- (g) Syed Khairul Azhar bin Syed Talib.
- [6] The 4th plaintiff is the Administrator of the estate of Yong Kat Keong. Yee Chong Man is not involved in the disputes that followed. C
- [7] 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. D
- [8] Over the several years since the dispute 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 instant appeals. E
- [9] 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 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. F
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- [10] In the meantime suit no. MT(1)-22-82-2003 was filed by the 1st defendant in the High Court at Kuantan to claim a sum of RM6,157,121.57 which was said to be the amount owed by the partnership. H
- [11] While suit no. MT(1)-22-82-2003 was still pending in the High Court at Kuantan, the 1st defendant filed a creditor's petition (no. MT3-28-15-2007) in the Malacca High Court seeking to wind up the partnership for the very same amount claimed in suit no. MT(1)-22-82-2003. I

- A [12] The Malacca High Court granted the petition and the 2nd defendant was appointed as the liquidator of the partnership.
- B [13] The plaintiff then filed the suit (D-22NCC-776-2009) at the Kuala Lumpur High Court, from which the appeals before us emanated, to have the winding up order and the appointment of the 2nd defendant as the liquidator be set aside.
- C [14] Essentially the plaintiffs relied on three main grounds to support their case, 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 1st defendant had not obtained judgment for the sum claimed, and that the partnership had sufficient assets to pay its debts.
- D [15] The plaintiffs then filed a summons in chambers (encl. 3) seeking an order to set aside the winding up order made by the Malacca High Court against the partnership and the appointment of the 2nd defendant as a liquidator. They also sought an order that the partnership be allowed to continue to conduct its business.
- E [16] 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.
- F [17] The learned High Court Judge, on his own motion, decided that the entire cause or matter of the suit before him could be finally disposed off under O. 14A of the Rules of the High Court 1980 upon the determination of the two legal issues which he posed to the parties, namely:
- G (a) 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*?
- H (b) And, if so, whether this court has jurisdiction to set aside an order of concurrent jurisdiction?
- I [18] The learned High Court Judge concluded that the order of the Malacca High Court was a nullity *ab initio* as a partnership was excluded from the regime of the Act. In his view the words "foreign company and any partnership" in s. 314(1) of the Act must be read conjunctively and not disjunctively. The learned High Court Judge 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. A

[19] With that decision, the learned High Court Judge treated the entire matter of the suit as disposed off pursuant to O. 14A of the Rules of the High Court 1980. The learned High Court Judge also made an order dismissing encls. 3, 10 and 11. B

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

[21] The Court of Appeal disagreed with the learned High Court Judge's interpretation of s. 314(1) of the Act. The Court of Appeal held that the partnership could be wound up under Part X of the Act by virtue of the definition of "unregistered company" in s. 314(1). The order of the learned High Court Judge with regard to O. 14A was therefore set aside. However the Court of Appeal upheld the learned High Court Judge's decision in respect of encls. 10 and 11 as the Court of Appeal was of the view that there were issues to be tried. The plaintiffs' cross-appeal was allowed. D E

[22] Section 314(1) of the Act provides: F

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 law. G

[23] The learned High Court Judge, after having considered the corresponding provisions in the United Kingdom and India, opined that: H

12. In the Malaysian context it will appear 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. I

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A [24] As stated earlier the learned High Court Judge was of the
view that the words “foreign company and any partnership” in that
section must be read conjunctively and not disjunctively. According
to the learned High Court Judge there is a separate regime
B of partnership firms. As such Parliament did not intend that
partnership be treated as unregistered company and be wound up
by the company court. In other words, the learned High Court
Judge had read the definition of “unregistered company” in that
section as if the word “foreign” qualified not only “partnership”,
C but also “company”, as if the only partnership that could come
within that definition was a partnership which had a foreign
company as a partner.

D [25] The Court of Appeal, on the other hand, was of the view
that the word “includes” in the definition of “unregistered
company” means that in addition to whatever usual meaning that
term “unregistered company” carries, that term includes the
entities which are listed after the word “includes”. Hence, the
presence of the word “and” simply means that the term
E “unregistered company” includes a foreign company and also any
“partnership, association or company consisting of more than five
members”. However, a company incorporated under the Act or
under any corresponding previous written law is not an
unregistered company within that definition. In support of that
F finding the Court of Appeal cited the judgment of Wee Chong Jin
CJ in the Singapore’s case of *Public Prosecutor v. Wong Hong Toy
& Anor and Wong Hong Toy & Anor v. Public Prosecutor* [1986] 1
MLJ 133. That case concerns the applicability of ss. 314 and 315
of the Singapore’s Companies Act to societies. Those provisions
G are in *pari materia* with our ss. 314 and 315 of the Act.

H [26] Learned counsel for the appellants submitted that the word
‘and’ in s. 314 of the Act tended to imply that provision
specifically referred to foreign companies and partnerships which
have not been incorporated pursuant to any laws in Malaysia. In
other words, that provision must be read conjunctively.

I [27] It is the contention of learned counsel for the appellants
that it would be absurd for a partnership that is registered
pursuant to the Partnership Act 1961 to also be categorized as
an unregistered company pursuant to s. 314 of the Act. Learned
counsel for the appellants submitted that no partnership registered

in Malaysia can at the same time be categorized as an unregistered company because no partnership registered in Malaysia can be considered as a 'separate legal entity.'

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[28] Learned counsel for the appellants also submitted that the Court of Appeal had erred in law and in fact in holding that there is no regime of law apart from s. 314 of the Act to deal with insolvency of partners or dissolution of partnership firms, and in holding that there are no provisions in the Partnership Act 1961 which enabled a creditor to present a petition to wind up a clearly insolvent partnership. Learned counsel for the appellants submitted that ss. 98, 100 and 103 of the Bankruptcy Act 1967 provide for bankruptcy actions to be taken against the partners of a partnership registered in Malaysia. In addition, s. 37(f) of the Partnership Act 1961 gives the court a wide discretion to decree a dissolution of a partnership.

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[29] Learned counsel for the appellants also submitted that the regime of law dealing with the winding up of partnership is also different in its manner of administration of assets of a partnership which is registered in Malaysia as compared to an unregistered company. This is because s. 40 and s. 41 of the Partnership Act 1971 appear to be diametrically opposed to the manner of administration of assets stipulated in s. 317(2) of the Act.

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[30] As an alternative argument, learned counsel for the appellants submitted that even if the Court of Appeal was right in holding that the partnership is an unregistered company pursuant to s. 314 of the Act, at the time of the presentation of the winding up petition that is on 16 April 2007, the Partnership comprised of five partners only at that point in time. As such the Partnership did not fulfil the requirement of s. 314 of the Act which provides that a partnership must comprise of more than five members.

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[31] We are of the view that that s. 314(1) of the Act is clear and unambiguous. As such it must be given its literal interpretation. Under the circumstances it is not the function of the court to re-write the statute in a way in which it considers reasonable. In other words, the High Court was not entitled to read words into that provision. Where the words of the statute are plain and unambiguous, the court ought to give effect to its plain meaning (see *Duport Steel Ltd v. Sirs* [1980] 1 WLR 142; *MBF Holdings Bhd v. Emtex Corporation Bhd* [1985] 1 LNS 100). In *Vickers, Sons*

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- A *and Maxim, Ltd v. Evans* [1910] AC 444, which was referred to by the Court of Appeal in *United Overseas Bank (Malaysia) Sdn Bhd v. UJA Sdn Bhd & Another Appeal* [2010] 6 CLJ 204 at p. 208, Lord Loreburn, LC said:
- B My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering
- C ... The appellants' contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.
- D [32] We agree with the Court of Appeal that in s. 314(1) of the Act the term "unregistered company" includes:
- (i) a foreign company; and
- (ii) any partnership, association or company consisting of more
- E than five members,
- but does not include a company incorporated under the Act or under any corresponding previous written law.
- F [33] It is therefore our unanimous view that the words "a foreign company and any partnership, association or company consisting of more than five members" in s. 314(1) of the Act ought to be read disjunctively. It is clear that the word "foreign" qualifies only the word "company". In our view it is not correct to read the word "foreign" before the word "partnership" in construing that
- G provision. The word "foreign" does not qualify the word "partnership". That is the plain meaning of that provision.
- H [34] In its judgment, the Court of Appeal cited the decision of Wee Chong Jin, CJ, in *Wong Hong Toy* where his lordship, in rejecting the contention that the Singapore's Companies Act did not apply to a registered society, said:
- I 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.

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[35] Learned counsel for the appellants submitted that the decision in that case ought to be distinguished on the basis that in that case there were no specific provisions in law for the winding up or dissolution of an insolvent association whereas in the instant case there are specific provisions in the Partnership Act 1961 and the Bankruptcy Act 1967 for action to be taken against partnerships that become insolvent.

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[36] Part V of the Partnership Act 1961 deals with the dissolution of partnership. It is true as contended by learned counsel for the appellants that the court may decree a dissolution of a partnership under s. 37 of the Partnership Act 1961. However, it must be noted that the application can be made only by a partner of a partnership. A creditor such as the respondents in the instant case cannot make an application under that s. 37 to dissolve a partnership.

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[37] Dissolution is distinct from the “winding up” of a partnership business. Although the term “dissolution” implies termination, dissolution is actually the beginning of the process that ultimately terminates a partnership. For example, if a partner resigns or if a partnership expels a partner, the partnership is considered legally dissolved. Section 40 of the Partnership Act 1961 provides that after the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership. Under s. 41 of the Partnership Act 1961 any partner or his representative may, on the termination of a partnership, apply to the court to wind up the business and affairs of the firm.

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- A [38] It is therefore clear that under the Partnership Act 1961 only the partners can make application to court to dissolve and wind up a partnership. A creditor cannot make application under the Partnership Act 1961 to wind up a partnership. We are therefore of the view that s. 314 of the Act is applicable in situations where
- B a creditor seeks a remedy against an insolvent partnership which has more than 5 members. Not all partnership can be wound up under s. 314 of the Act. The circumstances under which a partnership may be wound up are stated under s. 315(1) of the Act. There is therefore no doubt that s. 314 and s. 315 of the
- C Act can co-exist with s. 40 and s. 41 of the Partnership Act 1961. The Partnership Act 1961 deals only with the voluntary winding up of a partnership by the partners themselves and no other. On the other hand s. 315 expressly states that s. 314 does not apply in the event a partnership is wound up voluntarily.
- D [39] The partnership was registered on 8 October 1992 for a period of 8 October 1992 to 28 October 2000. It must be noted that at the date of the winding up order the registration of the partnership was not renewed. However, the partners had
- E continued to register two other partnerships in the same name of the firm with a different composition of partners and in the absence of few partners on the ground of sale, death and/or bankruptcy. The subsequent partnership was registered on 29 July 2004 with registration no. 001502428 – X and the 3rd and final
- F partnership was registered from 12 January 2006 to 11 January 2007 under the registration no. 001593482 – D. Section 34(1)(a) of the Partnership Act 1961 provides that subject to any agreement between the partners, a partnership is dissolved if entered into for a fixed term, by the expiration of that term.
- G [40] From the facts it is unclear what was the status of the partnership at the time of the presentation of the winding up petition at the Malacca High Court by the 1st defendant.
- H [41] Learned counsel for the appellants submitted that as the partnership had only five partners at the time of the presentation of the winding up petition, which was on 16 April 2007, the partnership did not therefore fulfil the requirement of s. 314 of the Act to be categorized as an unregistered company because s. 314 provides that a partnership must comprise of more than five
- I members. In response, learned counsel for the respondents submitted that s. 314 of the Act does not say whether the requirement to have more than five members has been complied with at the time of the presentation of the winding up petition.

[42] It is to be noted that s. 314 and s. 315 of the Act are under Division 5 of Part X of the Act which deals with the winding up of unregistered companies. It is therefore our unanimous view that the requirement of having more than five members must be complied with at the time of the presentation of the winding-up petition. The issue whether the partnership had more than five members at the time of the presentation of the winding up petition against the Partnership was not considered by the learned High Court Judge. With regard to this issue the Court of Appeal held:

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 subsection 314(1) of the Companies Act 1965.

[43] The facts, in our view, are not clear whether the partnership had only five members at the time of the presentation of the winding up petition against the partnership at the Malacca High Court. On the facts of the instant case we are of the view that the issue of how many members of the partnership were there at the time of the presentation of the winding-up petition against the Partnership could only be determined in a full trial where witnesses ought to be called and to be cross-examined so that full evidence on the matter are made available to the court for the court to make a proper finding on the issue.

[44] For the reasons given we would answer the question posed to us as follows. A partnership with more than five members is an unregistered company and can be wound up under Part X of the Act by virtue of the definition of unregistered company in s. 314(1) of the Act.

[45] It is to be noted that the appellants appealed against only part of the judgment of the Court of Appeal, that is to say against the decision of the Court of Appeal which set aside the decision of the learned High Court Judge that set aside the order of Malacca High Court dated 8 May 2008 given in suit No: 28-15-2007 and the appointment of the 2nd defendant as a liquidator. In this appeal we are therefore only concerned with that part of the judgment of the Court of Appeal.

- A [46] In its judgment, the Court of Appeal, *inter alia*, held that O. 14A was not a suitable mechanism to dispose of the case as there were serious disputes of facts between the parties which needed to be tried. One of the critical disputes was 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 appellants had *locus standi* to commence this action. There was also another issue relating to the decision of the Federal Court from one of the many suits filed in connection with the partnership which appears to preserve the rights of the partnership in respect of legal actions commenced before the dissolution of the partnership if it was indeed dissolved. It is clear from the notes of proceedings in the High Court and the learned High Court Judge's grounds of judgment that the learned High Court Judge had not addressed his mind as to whether the relevant or material facts were in dispute.

- [47] It is trite law that O. 14A of the Rules of the High Court 1980 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 (see *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2007] 6 CLJ 741). Where the issues of fact are interwoven with legal issues raised, it will be undesirable for the court to split the legal and factual determination for to do so would in effect be to give rulings *in vacuo* or on a hypothetical ruling, which the court will not do (see *State Bank of India v. Marjani Marketing*, 1 March 1991, CA Transcript No. 91/0304).

- [48] Having carefully considered the facts and the issues involved in the instant case we agree with the Court of Appeal that there were serious disputed facts involved. These issues of fact are interwoven with the legal issues raised. As such we agree with the finding of the Court of Appeal that O. 14A is not suitable for the purpose of determining the applicability of s. 314 of the Act to the partnership.

- [49] For the reasons given, we dismiss both the appeals with costs.

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