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Temporary Breather Against Winding-Up Actions

In line with the initiatives announced by the Companies Commission of Malaysia to ease the burden of the business community, the government on 23 April 2020 gazetted the Direction of the Minister Under Paragraph 466(1)(a) (**Direction**)¹ and the Companies (Exemption) (No 2) Order 2020 under s 615 of the Companies Act 2016 (**Order**).²

The Direction

A company that fails to respond to a statutory demand for debt owed in a sum exceeding the prescribed amount by the Minister within 21 days under s 466(1)(a) of the Companies Act 2016 (**the Act**) shall be deemed “unable to pay its debts” and will be susceptible to winding-up proceedings.

The previous threshold for indebtedness under s 466(1)(a) was RM10,000. Pursuant to the Direction, the threshold has been increased to **RM50,000** from 23 April 2020 to 31 December 2020. This means that any statutory demand issued between that period shall be for a sum exceeding RM50,000.

Although the threshold of RM50,000 is arguably still relatively low, the increase is nevertheless a step forward in reducing winding-up actions against companies, particularly the smaller SMEs, in the near future.

The Order

Under usual circumstances, a company has 21 days to respond to a statutory demand. The Order, in effect, now gives a company **six months**, instead of the prescribed 21 days, to respond to a statutory demand.

However, the Order only applies to statutory demands served on

¹ The Direction of the Minister Under Paragraph 466(1)(a) can be accessed at [https://www.ssm.com.my/Pages/Legal_Framework/Document/Direction%20of%20Minister%20under%20para%20466\(1\)\(a\).pdf](https://www.ssm.com.my/Pages/Legal_Framework/Document/Direction%20of%20Minister%20under%20para%20466(1)(a).pdf)

² Companies (Exemption) (No 2) Order 2020 [PU(A) 123/2020] can be accessed at https://www.ssm.com.my/Pages/Legal_Framework/Document/PUA123_2020.pdf

a company within the period from 23 April 2020 to 31 December 2020. Therefore, any statutory demand served outside this time frame would still have to observe the 21 days prescribed under s 466(1)(a).

This measure would effectively give companies the much-needed protection against winding-up actions by creditors until the end of the year while attempting to remedy the damage caused by COVID-19 and the Movement Control Order.

Correct exercise of the Minister's powers?

The initiatives above, although very much welcomed by businesses on the road to recovery, have raised concerns as to the validity of the Minister's exercise of his powers.

On the one hand, the Direction is made pursuant to the Minister's express power provided under s 466(1)(a) of the Act, which allows him to determine the threshold for indebtedness. Therefore, it is clear that the Minister had acted within his authority in increasing the threshold to RM50,000.

The Order, on the other hand, is made pursuant to the exercise of the Minister's powers under s 615 of the Act. The relevant portion of s 615 is reproduced below:

- “(1) The Minister may, upon the recommendation of the Commission, by order exempt any person, corporation or class of corporations from all or any of the provisions of this Act*
- (2) In exercising his power under this section, the Minister may —*
- ...*
- (c) impose any terms and conditions as he thinks fit”*

Pursuant to the Order, the Minister:

- (a) exempts **all** companies from the provision of s 466(1)(a) that provides that a company is deemed “unable to pay its debts” if they fail to respond to a statutory demand within 21 days;
- (b) the exemption is subject to the condition that a company shall be deemed ‘unable to pay its debts’ if the company fails to respond to a statutory demand within six months.

Although a rather creative approach in applying s 615, there has been concern as to whether the Order is *ultra vires* the Act. This is because:

- (a) under the express wording of s 615, the only power the Minister has is to exempt a company from provisions of the Act on terms and conditions as he thinks fit;
- (b) the Minister is not bestowed with the power to amend the wording of a particular provision under the Act;
- (c) although termed as a “*condition*”, the six months provided for under the Order can be construed as a re-writing of s 466(1)(a), which clearly states that a company shall have only 21 days to respond to a statutory demand.

When a piece of legislation provides for a delegation of power, especially to the Executive, it must be exercised within the four walls of the power conferred by the statute.³ Therefore, in imposing any terms or conditions, the Minister cannot exceed the authority bestowed upon him under s 615(1). Consequently, creditors whose rights are affected by the Order may seek to argue that the imposition of six months as a “condition” is beyond the powers conferred under s 615(1).

Other jurisdictions such as Singapore and Australia have implemented similar measures by way of temporary legislation enacted through Parliament. In this regard, perhaps it is timely for our Parliament to consider our own temporary legislation to do away with these issues as businesses prepare to move forward with the “new normal”.

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