Preference shares may only be redeemed strictly in accordance with the provisions of the Companies Act 2016. In particular, **Section 72 of the Companies Act 2016** provides that preference shares are only redeemable if the shares are fully paid up and the redemption is out of the profits of the company, a fresh issue of shares, or the capital of the company.

This poses a challenge to financiers who may be interested to finance a company based on the redemption of preference shares. For instance, consider a circumstance where a financier subscribes to preference shares in a company with the stipulation that these shares will eventually be redeemed by the company at a premium. In this scenario, if the company is unable to comply with Section 72 of the Companies Act 2016, then how is the financier to ensure that its financing will be repaid?

One way in which a financier may choose to secure its financing is by placing an obligation on the shareholders of the company to ensure that the company is kept afloat. This was the exact circumstance before the Court of Appeal in the case of **MyCreative Ventures Sdn Bhd v Haslina Binti Ali & 2 Ors (Civil Suit No.: W-04(IM)(NCC)-375-08/2022) ("Haslina Case")** which concerned the failure by a company to redeem redeemable convertible cumulative preference shares ("**RCCPS**"). In this case, the Respondents had issued a letter to the financier in which they had irrevocably undertaken to "*promptly fund and pay in full (or cause to be paid and settled in full) or make available such sufficient funds to the Company to meet any and all cash shortfall and cost overruns in connection with the business and operations of the Company.*"

In connection the above, the Respondents advanced the submission that such a letter of undertaking only covers a circumstance where the Respondents were obliged to make payment in relation to the "*day-to-day running expenses and/or costs*" of the company and not a circumstance in relation to the redemption of the RCCPS. However, the Court

of Appeal disagreed with the Respondents. In delivering the unanimous decision of the Court of Appeal, His Lordship Yang Arif Datuk Ravinthran a/l N. Paramaguru held that:

> "*Our holistic reading of the letter of undertaking leads us to conclude that the respondents undertook to keep H&H Connection* **[the Company]** *afloat so that H&H Connection does not breach its obligation under the Share Subscription Agreement that it signed with the Appellant. It is not in dispute that H&H Connection Sdn. Bhd. failed to honour its obligation to the Appellant under the said agreement. It was unable to redeem the convertible cumulative preference shares in question. Consequently, under the letter of undertaking, the respondents are obliged to indemnify the Appellant for its losses.*"

The decision in the **Haslina Case** firmly establishes the position in law that the shareholders of a company who have provided letters of undertaking to "*top up*" the "*cash shortfall*" and/or "*costs overruns*" of a company may also be held liable if the company fails to redeem preference shares. A similar finding was also made by the Court of Appeal in the case of **MyCreative Ventures Sdn Bhd v Tsyahmi Group Sdn Bhd & 2 Ors (Case No.: B-02(IM)(NCC)-305-02/2022)** ("**Tsyahmi Case**"). This case concerned a similar agreement to subscribe to RCCPS and a similar obligation on the part of the company's shareholders to "*top up any cash shortfall or costs overrun.*"

The decisions of the Court of Appeal in the **Haslina Case** and **Tsyahmi Case** (where Messrs. Azmi & Associates acted for Appellant in both cases) are also consistent with the findings of the High Court of Singapore in the case of **UOB Ventures Investments Ltd v Tong Garden Holdings Pte Ltd and others [2000] SGHC 228** ("**UOB Ventures Investments**"). In this case, the High Court of Singapore held that a company's contractual obligation to redeem preference shares "***implies that they must bustle about to bring in the funds. They must expend all their energy in their veins to find the funds in the manner permitted by s 70(3) of the Companies Act.***" **Section 70(3) of the Singapore Companies Act (Cap 50)** referred to by the Court of Appeal in the case of **UOB Ventures Investments** is in pari materia with **Section 61(3) of the Companies Act 1965** that is in turn substantially similar to the present **Section 72 of the Companies Act 2016**. Thus, the case of **UOB Ventures Investments** is also of assistance in the interpretation of the equivalent provision in the Companies Act 2016 in Malaysia.

In addition, the Court in the case of **UOB Ventures Investments** also held that:

> "***Their contractual obligation implies that they will see to it that their subsidiary and related entities and persons will put them in sufficient profits or take up new shares to produce sufficient funds. Finding the funds by those two options, I repeat, is an absolute obligation…***"

The above decisions provide that the shareholders of companies which fail to redeem preference shares may not simply hide behind **Section 72 of the Companies Act 2016** in

order to evade liability to make payment for such a failure to redeem. The shareholders themselves may be held liable if such shareholders have undertaken to top up the cash shortfall or cost overruns of the company. To borrow the words of the Court of Appeal in the **Haslina Case**, such shareholders have undertaken to keep the company "*afloat*."

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