

# Post-ASM: is an adjudication decision a disputed debt?

13 October 2020 | Contributed by [Gan Partnership](#)

## Introduction

### [Maju Holdings](#)

### [Rzh Setia Jaya](#)

### [Comment](#)

## Introduction

In *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd*,<sup>(1)</sup> Darryl Goon J (now JCA) held that an adjudication decision, even one which has been enforced as if it were a court judgment or order pursuant to Section 28 of the Construction Industry Payment and Adjudication Act (CIPAA) 2012, is still a disputable decision. In coming to this conclusion, the judge reasoned that an adjudication decision is, by its very nature, of temporary finality. Hence, an adjudication decision is still disputable.

The judge highlighted an important distinction here wherein an application under Section 28 of the CIPAA is only for an order to enforce an adjudication decision "as if it is a judgment or order of the High Court". The judge distinguished between this and Section 38 of the Arbitration Act 2005, which uses the words "enforced by entry as a judgment". The judge further held that if a statutory demand is issued pursuant to Section 466(1) (a) of the Companies Act 2016 based on an adjudication decision, which has been ordered to be enforced as if it were a court judgment, an injunction may nevertheless be issued to restrain the presentation of a winding-up petition.

ASM was recently considered in two high court cases:

- *Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd*;<sup>(2)</sup> and
- *Rzh Setia Jaya Sdn Bhd v Sime Darby Energy Solutions Sdn Bhd*.<sup>(3)</sup>

While the court departed from ASM in *Maju Holdings*, in *Rzh Setia Jaya* it agreed with Darryl Goon J's decision.

## **Maju Holdings**

In this case, the defendant, as the unpaid party, commenced adjudication proceedings against the plaintiff and was successful. The defendant thereafter successfully applied to have the adjudication decision enforced as if it were a high court judgment or order. The plaintiff's simultaneous applications to set aside and stay the adjudication decision were both unsuccessful.

The defendant subsequently issued a statutory notice of demand pursuant to Section 466(1) of the Companies Act 2016 to the plaintiff, premised on the judgment obtained from its enforcement application. The plaintiff then applied for a Fortuna injunction to restrain the defendant from presenting a winding-up petition.

The court disagreed with the decision in ASM that a judgment or order made pursuant to Section 28 of the CIPAA is an undisputed debt. In doing so, the court took into account the following reasons, among others:

- There is no difference between the words "enforced by entry as a judgment" and "enforce the adjudication decision as if it is a judgment or order"; they are the same insofar as enforcement is concerned.
- The words "an order to enforce the adjudication decision as if it is a judgment or order of the High Court" leave little room for a judgment or order made pursuant to Section 28(2) of the CIPAA to be regarded as disputable. On the contrary, they suggest that the judgment or order will have all of the features of a high court judgment or order for the purposes of enforcement, including being undisputable in nature.
- A judge is empowered by virtue of Section 28(2) of the CIPAA to order interest. This must mean that a judgment or order made in this context is no different from any other high court judgment or order.

## AUTHORS

[Carissa How](#)



[Min Lee Tan](#)



- If a judgment made under Section 28 of the CIPAA is considered a disputed debt for the purposes of Section 466 of the Companies Act, why should it not be a disputed debt for purposes of execution under the rules of execution?
- While a winding-up petition is not a form of execution of a judgment, it is still a form of enforcement – albeit a *sui generis* form. Section 28(2) of the CIPAA does not preclude a creditor's right to present a winding-up petition. The word 'may' in Section 28(3) of the CIPAA connotes that the modes of enforcement in the Rules of Court 2012 are not the only routes available for enforcement of a judgment.

The high court opined that to regard a judgment obtained under Section 28 of the CIPAA as a disputed debt would inhibit cash flow to contractors and defeat the overall purpose of the CIPAA. However, the court did agree with the court in *ASM* that a winding-up petition is not to be regarded as a form of enforcing a judgment debt.

Where an adjudication decision is unchallenged with no pending court or arbitration proceedings, and a judgment or order is made under Section 28 of the CIPAA, a winding-up petition may be presented based on this judgment or order. In coming to this conclusion, the high court referred to *Likas Bay Precint Sdn Bhd v Bina Puri Sdn Bhd*,<sup>(4)</sup> in which the Court of Appeal had held that an adjudication decision can form the basis of a winding-up petition without the need for the same to be registered and enforced as a judgment.

Nevertheless, the high court in *Maju Holdings* held that the statutory notice could still be challenged by way of a cross-claim. Here, there was a likelihood that the winding-up petition would fail owing to the cross-claim. In view of this, the high court held that there were exceptional circumstances warranting the grant of a Fortuna injunction. The high court also noted that the defendant had, notwithstanding the plaintiff's application for a Fortuna injunction, proceeded to present the winding-up petition. Grave injustice would have been caused to the plaintiff had the Fortuna injunction not been granted.

### ***Rzh Setia Jaya***

In this case, the defendant commenced and succeeded in adjudication proceedings against the plaintiff. The defendant then applied to enforce the adjudication decision in the high court. Simultaneously, the plaintiff took steps to refer the disputes to arbitration. The plaintiff also applied to set aside the adjudication decision. The defendant then served the plaintiff with a statutory notice pursuant to Section 466 of the Companies Act 2016. The plaintiff thereafter applied for a Fortuna injunction to restrain the defendant from filing or continuing any winding-up petition against the plaintiff.

The high court held that a successful litigant of adjudication proceedings is in no way more special than other unsecured creditors. Accordingly, the high court agreed with the decision in *ASM* that an adjudication decision is to be treated as disputable in the context of winding-up proceedings so that in suitable cases where there is a *bona fide* substantial dispute of debt, the court may issue a Fortuna injunction to restrain the winding-up proceedings while preserving the rights and remedies of successful litigants.

The high court allowed the Fortuna injunction application. In addition, the court held that the plaintiff could show that the claim was *bona fide* disputed based on the facts of the case – in particular, the fact that there were *bona fide* cross-claims in excess of the defendant's claims in the adjudication.

### **Comment**

In light of the above two cases, there now appears to be two different schools of thought:

- one where the courts may regard an adjudication decision as an undisputed debt; and
- one where such decision is a disputed debt for the purposes of presenting a winding-up petition under Section 466 of the Companies Act 2016.

Nonetheless, it is evident that the courts will still examine the surrounding circumstances of each case, including the facts surrounding the cross-claim of the party which was unsuccessful in the adjudication proceedings, when deciding whether to grant a Fortuna injunction.

A decision from the apex court is necessary to finally decide whether an adjudication decision is a disputed or undisputed debt and provide clarity to stakeholders in the construction industry.

*For further information on this topic please contact Carissa How or Min Lee Tan at Gan Partnership by telephone (+603 7931 7060) or email (carissa@ganlaw.my or minlee@ganlaw.my). The Gan Partnership website can be accessed at [www.ganlaw.my](http://www.ganlaw.my).*

### **Endnotes**

(1) *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2020] MLJU 282.

(2) *Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd* [2020] MLJU 1162.

(3) *Rzh Setia Jaya Sdn Bhd v Sime Darby Energy Solutions Sdn Bhd* [2020] MLJU 1081.

(4) *Likas Bay Precint Sdn Bhd v Bina Puri Sdn Bhd* [2019] 3 MLJ 244.

---

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).