Winding up petition based on adjudication decision under CIPAA - Court of Appeal reaffirms *Likas Bay*

Where a party has obtained an adjudication decision in its favour, that party may seek to bring a winding up petition premised on that adjudication decision. Darryl Goon J (as he then was) in A*SM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd*[1] previously decided that an injunction may nevertheless be issued to restrain the presentation of such a petition. This has been discussed in an earlier article[2].

That article looked at two decisions of the High Court made subsequent to *ASM*, namely, *Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd*[3] and, *RZH Setia Jaya Sdn Bhd v Sime Darby Energy Solutions Sdn Bhd*.[4] In the latter decision, the High Court adopted and agreed with the *dictum* of Darryl Goon J (as His Lordship then was) in *ASM*.

RZH Setia recently came up for appeal before the Court of Appeal, where the Court of Appeal considered the central question of whether the High Court had properly exercised its discretion in granting the *Fortuna* injunction sought by RZH Setia.

High Court

Briefly by way of background, Sime Darby Energy Solutions Sdn Bhd ('**Sime Darby**') brought adjudication proceedings against RZH Setia Jaya Sdn Bhd ('**RZH Setia**') and was successful. Sime Darby then applied to enforce the adjudication decision in the High Court, while RZH Setia simultaneously sought to refer the dispute to arbitration. Upon Sime Darby's successful enforcement application, Sime Darby then commenced winding up proceedings against RZH Setia. RZH Setia responded in turn by seeking to obtain an injunction to restrain Sime Darby from doing so, i.e. a *Fortuna* injunction. Here, RZH Setia contended that the debt was *bona fide* disputed and had a cross-claim against Sime Darby. RZH Setia was successful, hence, Sime Darby's appeal before the Court of Appeal.

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[1] *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2021] 8 MLJ 99.
[2] Post-ASM: is an adjudication decision a disputed debt?
[3] *Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd* [2020] 1 LNS 1332.
[4] *RZH Setia Jaya Sdn Bhd v Sime Darby Energy Solutions Sdn Bhd* [2020] 1 LNS 889.

In delivering His Lordship's decision, the Learned Judicial Commissioner was of the view that as the final decision by the High Court or the arbitrator may overturn the adjudication decision, which is itself of temporary finality under the adjudication regiment under the Construction Industry Payment and Adjudication Act 2012 ("**CIPAA**"), the adjudication decision should be considered disputable in the context of winding up proceedings to enforce the debt arising from the adjudication decision.

Court of Appeal

The main issue before the Court of Appeal was whether a *Fortuna* injunction ought to have been granted to restrain the presentation of a winding up petition based on an unenforced adjudication decision.

Following the Court of Appeal's decision in *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd*,[5] a successful party in an adjudication proceeding is entitled to present a winding up petition based on an adjudication decision under CIPAA without having to first apply to enforce the adjudication decision under section 28 of the CIPAA. It is fundamental that a winding up petition need not be founded on a court judgment.

In *Likas Bay*, the Court of Appeal agreed with the High Court that an unpaid party was entitled to present a winding up petition based on an adjudication decision.

The Court of Appeal in *RZH Setia* accordingly held that whilst the adjudication decision is disputable in the sense that it is of temporary finality and may be overturned in a subsequent arbitration or writ action, this should not be used to preclude the statutory right of a successful party, such as Sime Darby, to pursue a winding up petition. An unproven cross-claim cannot therefore be the basis for restraining the presentation of a winding up petition based on a valid and enforceable adjudication decision.

The Court of Appeal found that the High Court had erred by taking RZH Setia at its word that they had commenced arbitral proceedings when in fact, no such proceedings had commenced at the time RZH Setia had brought its application for a *Fortuna* injunction. RZH Setia's conduct in failing to act timeously to dispute the debt and bring an action in respect of its cross-claim also appeared to be inconsistent with RZH Setia's stance that it would suffer irreparable loss should an injunction not be granted. The Court of Appeal also found that RZH Setia's application for the injunction, was premature as Sime Darby had not presented a winding up petition, as at the date RZH Setia's application was made.

[5] *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd* [2019] 3 MLJ 244.

It was also relevant to the Court of Appeal that RZH Setia in its payment response had also admitted that the debt is admitted, and so could not be *bona fide* disputed.

Accordingly, a *bona fide* dispute was found not to have been established by RZH Setia.

In principle, where a debt is due and payment is not made upon service of a statutory notice of demand under section 466(1)(a) of the Companies Act 2016, the solvency of the debtor does not justify the granting of an order restraining the presentation of a winding up petition. In this regard, the Court of Appeal held that RZH Setia failing to pay the demanded debt within the stipulated 21 days of service of the winding up notice, would mean that RZH Setia is deemed to be unable to pay its debts for the purposes of section 466(1) of the Companies Act 2016. Accordingly, the solvency of RZH Setia in this context is of little relevance.

In conclusion, the Court of Appeal found against the grant of the *Fortuna* injunction sought by RZH Setia, and reversed the decision of the High Court.

Commentary

After a trilogy of cases at the High Court – *ASM*, *Maju Holdings* and *RZH Setia* – the Court of Appeal in *RZH Setia* affirmed the settled position of law in *Likas Bay*, that a winding up petition may be brought on the basis of an adjudication decision. This is in line with the fundamental principle that a winding up petition need not be based on a judgment of court (see: *Maril- Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd And Other Appeals*)[6].

This decision settles any doubt arising from the trilogy of cases, if there was one.

It is clear now that winding up proceedings remains an option for the enforcement of an adjudication decision, and this is notwithstanding its temporarily final nature.

The test for the grant of a *Fortuna* injunction remains as held in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd*,[7] namely an injunction may be granted where the presentation of the petition might produce irreparable damage to the company; or where the proposed petition has no success, and where the petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.

[6] *Maril- Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd And Other Appeals* [2001] 4 MLJ 187.
[7] *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295.

The existence of a pending application to set aside the adjudication decision may not on its own be sufficient basis for a *Fortuna* injunction, unless the adjudication decision has been stayed. Whilst the setting aside application in RZH Setia was considered by the Court of Appeal, including the timing of when such an application was brought, the Court of Appeal only went so far as to say that an adjudication decision, unless set aside, can form the basis of a statutory notice of demand.

More consideration was given by the Court of Appeal to the admission of the debt by RZH Setia. However, this should not have mattered in this case, as the adjudication decision had been issued, and that was of finality until set aside, settled or superseded by arbitration or the court.

On the same note, whether or not the arbitration had been commenced ought not have mattered in this case. The commencement of an arbitration would have been relevant for a section 16(1)(b) stay application, but not a *Fortuna* injunction application. In the case of the latter, the question is whether one of the two branches of the *Fortuna* test arises. The fact that a party has commenced the arbitration may at best show his belief in his dispute, but does not satisfy the test in *Mobikom*.

Where an adjudication decision has been issued, in order to obtain a *Fortuna* injunction against the presentation of a winding up petition, the non-paying party must establish a substantial cross claim that would at least reduce the adjudication decision sum to below the statutory minimum for the presentation of a winding up petition.

Such a cross claim is not precluded simply because an adjudication decision exists. For example, the cross claim may be a development after the adjudication decision was issued, or a cross claim that the adjudicator may not have considered for jurisdictional reasons.

In conclusion, the Court of Appeal's decision in *RZH Setia* is consonant with trite principles in insolvency law. However, the consideration of the other factual aspects of the case, such as the purported admission of RZH Setia and the commencement of the arbitration between the parties, in our respectful view, was unnecessary in that case.

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