

CIPAA 2012: Winding Up based on CIPAA Adjudication Decision – Revisited

MAJU HOLDINGS SDN BHD v SPRING ENERGY SDN BHD [2020] MLJU 1196

ISSUES

In *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd* [2019] 3 CLJ 499 (“*Likas Bay*”), the Court of Appeal held that “Armed with that decision the Respondent Petitioner was competent to file the winding up petition against the Appellant who had failed or neglected to pay the adjudicated sum.”

The Court of Appeal also held that, “for the purpose of filing a notice to wind up under section 465 of the Companies Act 2016, a successful litigant in an adjudication proceeding need not have to register the said adjudication decision under section 28 of CIPAA” [[read our update on Likas Bay here](#)].

In *ASM Development (KI) Sdn Bhd v Econpile (M) Sdn Bhd* [2020] MLJU 282 (“*ASM*”), the High Court held that although winding up proceeding could be commenced “based on a debt that has arisen by virtue of an adjudication decision”, the adjudication decision is still **disputable** and therefore is subjected to “the general principles relating to abuse of the process of the Court referred to in *Fortuna Holdings* and the cases cited” [[read our update on ASM here](#)].

Following the above, the laws on winding up petition based on adjudication decisions were again revisited in the recent High Court case of *Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd* [2020] MLJU 1196.

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) By Letter of Acceptance dated 31.07.2018 and Subcontract Agreement dated 22.01.2019 (collectively “**Subcontract**”), the Plaintiff appointed the Defendant as its subcontractor for a project known as “*PAVEMENT WORKS (WP700) FOR PROPOSED LEBUHRAYA PUTRAJAYA TO KLIA (MEX II) – COMMENCING FROM PUTRAJAYA INTERCHANGE AND TERMINATING AT KLIA.*”
- (b) The Plaintiff failed to make payment for work done under Interim Payment Certificates No.2 to 7, amounting to RM8,848,865.04.
- (c) Arising therefrom, the Defendant initiated adjudication under the Construction Industry Payment and Adjudication Act 2012 (“**CIPAA 2012**”). Following service of the Payment Claim and Payment Response, the Defendant issued the Notice of Adjudication on 21.05.2019.
- (d) During the course of adjudication, the Defendant had on 04.07.2019 accepted the Plaintiff’s “*repudiation of the Subcontract for repeated breaches of its payment obligations under the Subcontract*”.
- (e) In view of the disputes between parties, the Plaintiff initiated arbitration by issuance of the Arbitration Notice dated 20.08.2019. The arbitration is now pending appointment of an arbitrator by the Asian International Arbitration Centre.



- (f) On 21.08.2019, the Adjudicator delivered an adjudication decision in favour of the Defendant (“**Adjudication Decision**”). The Defendant applied to the High Court to enforce the Adjudication Decision pursuant to **section 28 of CIPAA 2012 (“OS 191”)**. Meanwhile, the Plaintiff applied to have the same set aside or stayed pursuant to **sections 15 and 16 of CIPAA 2012 (“OS 198 & OS 199”)**.
- (g) On 04.02.2020, the Kuala Lumpur Construction High Court allowed OS 191 and dismissed OS 198 & OS 199 (“**Judgment**”). The Plaintiff did not appeal against the Judgment.
- (h) On 20.02.2020, the Defendant, through its solicitors, served to the Plaintiff a statutory notice pursuant to section 466(1) of the Companies Act 2006 (“**CA 2006**”) *“claiming for the sum of RM 9,222,205.75. (**the Statutory Notice**) This Statutory Notice was premised on the Judgment.”*
- (i) Following the service of the Statutory Notice, the Plaintiff had on 12.03.2020, applied to the High Court for *“a Fortuna Injunction to restrain the Defendant from, inter alia, commencing a winding up petition against the Plaintiff pursuant to the Statutory Notice” (“**Fortuna Injunction Application**)”.*
- (j) Subsequent to the filing of the Fortuna Injunction Application but before its hearing, the Defendant engaged another set of solicitors to present a winding up petition against the Plaintiff based, amongst others, on the Statutory Notice (“**Winding Up Petition**”).

FORTUNA INJUNCTION APPLICATION

The Fortuna Injunction Application raises several important issues, namely:-

- (i) *“Whether a judgment issued by the High Court pursuant to section 28(2) of the CIPAA is a ‘disputed debt’ where there is concurrent arbitration or court proceedings?”*
- (ii) *“If the debt under the Statutory Notice is undisputed, whether the company can raise cross claim or counterclaim of an amount equivalent to or more than the debt in answer to the demand to justify the grant of an injunction to restrain the presentation of the winding up petition?”*
- (iii) If a winding up petition had already been presented at the Winding Up Court, can another Court grant a Fortuna Injunction to restrain such winding up petition?

DISPUTED DEBT?

Revisiting the case of ASM, the High Court in this case observed that the Learned Judge in ASM *“was very much influenced by the corresponding provisions”* under **section 27 of the Arbitration Act 1952** and the current **section 38 (1) of the Arbitration Act 2005** in making the distinction *“between a judgment or order made under section 28 of the CIPAA and ‘a judgment by a Court of law’*.

In relation to the distinction made in ASM, the High Court in this case finds that such distinction is a *“distinction without a difference”*:-

“[19] With respect to the learned judge, in my mind, the distinction between the formulation ‘... judgment may be entered in terms of the award’ or ‘enforced by entry as a judgment in terms of the award or by action’ under the two Arbitration Acts on the one hand and ‘... enforce the adjudication decision as if it is a judgment or order of the High Court’ under the CIPAA on the other hand is a distinction without a difference.



[20] *In my judgment, for all intents and purposes, both the arbitration award under the Arbitration Acts and the adjudication decision under the CIPAA, upon the Court making the judgment, such judgment is equivalent to a judgment by a Court of law. In both instances, the statutes provide for the arbitration award and the adjudication decision to be treated as equivalent to a judgment only for the purposes of enforcement of the arbitration award and the adjudication decision. The arbitration award or the adjudication decision does not merged into the judgment and thus remains capable of being stayed and or set aside. The adjudication decision continues to bind the parties until the dispute is finally decided by arbitration or the court under section 13 of the CIPAA.”*

To fortify the point that an order or judgment made pursuant to section 28 of CIPAA 2012 is the same as a judgment by a Court of law, insofar that both will result in an **undisputed debt**, the High Court here raised the following question:-

“[24] *It is would be odd that a judgment or order made under section 28 of the CIPAA can be executed as an ‘undisputed debt’ in accordance with the rules of execution of the orders or judgments of the High Court and yet when the same judgment is relied upon for the purposes of section 466(1) of the CA 2016, the said judgment bears the quality of a ‘disputed debt’. If it is a ‘disputed debt’ for the purpose of winding up, why should it not be a ‘disputed debt’ for the purposes of the execution under the rules of execution? ...”*

The High Court in this case also noted that the temporal nature of an adjudication decision does not render the order or judgment made pursuant to section 28 of CIPAA 2012 to be “disputable” for the purposes of winding up:-

“[27] *Again, with respect, whilst there is a specific provision in the CIPAA stating that the adjudication decision is only temporarily binding, i.e section 13, **there is nothing in the CIPAA that provides that a judgment ordered by the High Court made in respect of the adjudication decision for the purposes of enforcement of the adjudication decision shall be treated as disputable for the purposes of winding up.** On the contrary the very words ‘... an order to enforce the adjudication decision as if it is a judgment or order of the High Court’ in fact militate against such interpretation. These words in their natural and ordinary meaning suggest that the judgment or order so made will have all the features of a judgment or order of the High Court for the purposes of enforcement. This includes the ‘undisputed’ nature of an order or judgment, unless set aside.”*

[Emphasis added]

As to whether a winding up petition is a form of enforcement (per section 28 of CIPAA 2012), the High Court found that:-

“[37] *While I agree that a petition of winding up is not execution, in my judgment, **it is not correct to say that a petition of winding up is not a form of enforcement albeit a sui generis form.** Mummery LJ in *Ridgeway Motors (Isleworth) Ltd v. ALTS Ltd* [2005] 2 All ER 304 at p.311 aptly described the proceedings as follows...*

[39] *In fact, where the company is unable to pay its debts, a creditor is entitled to present a petition to wind up the company for a realisation of the company’s assets so that the creditor may at least seek to recover a portion of its admitted and or undisputed debt on a pari passu basis. **How can this not be considered as a form of enforcement of the judgment debt just because the proceedings result in the assets of the company being made available for the benefit of the other general creditors and the recovery is based on a pari passu basis rather than direct and full realisation of the creditor’s judgment debt?**”*

[Emphasis added]



In the upshot, the High Court held that a judgment or order made pursuant to section 28 of CIPAA 2012, being a valid and enforceable judgment, is an undisputed debt and can be the basis of a winding up petition:-

“[44] Accordingly and for the reasons above, I hold that the judgment dated 4.2.2020 that the Defendant obtained under section 28 of the CIPAA being a valid and enforceable judgment is an undisputed debt and is capable of forming the basis for a presentation of a winding up petition against the Plaintiff.”

BONA FIDE CROSS CLAIM / COUNTERCLAIM

Notwithstanding that an order or judgment pursuant to section 28 of CIPAA 2012 is found to be an “*undisputed debt*”, the High Court held that the Statutory Notice based on such order or judgment can still be challenged if the Plaintiff has a “*bona fide cross claim*” in answer to the Statutory Notice:-

“[47] However, just because the judgment under section 28(2) of the CIPAA is an undisputed debt does not mean that the section 466 Statutory Notice based on the same cannot be challenged. The question for consideration in this case is whether the Plaintiff has any bona fide cross claim that is an answer to the Statutory Notice and if so, whether such cross claim has been established on substantial grounds.”

[Emphasis added]

In opposing the Statutory Notice, the Plaintiff in this case contended that it has a cross-claim or counterclaim for the sum of RM 26,479,208.04, far in excess of the Defendant’s judgment of RM9,222,205.75.

The High Court reiterates that the test in such circumstances is, whether “*there is a likelihood that the intended winding up petition may fail or that it is unlikely that a winding up order will be made.*” This threshold will be met if the Plaintiff is able to show that “*its cross claim or counterclaim is bona fide and based on substantial grounds*”:-

*“[54] As stated by Mary Lim J (as she then was) in **Josu Engineering Construction Sdn Bhd** (supra), in determining whether an injunction should be issue, the test is whether the Court in assessing the cross-claim or counterclaim based on the affidavit evidence before it, there is a **likelihood that the intended winding up petition may fail or that it is unlikely that a winding up order will be made.** **In my mind, this will be met once the Plaintiff is able to show that its cross claim or counterclaim is bona fide and based on substantial grounds** as determined by our Court of Appeal in **Pontian United Theatre Sdn Bhd v. Southern Finance Berhad** (supra).”*

[Emphasis added]

In support of its cross claim or counterclaim, the Plaintiff exhibited its Adjudication Response dated 06.11.2019, which in turn sets out the various issues involved in the cross claim or counterclaim.

Having perused the same, the High Court found that the Plaintiff had established that its cross claim or counterclaim is “*based on substantive grounds*” and is in excess to the judgment sum. The High Court noted that the “*substantial disputes*” in this matter includes, but are not limited, to:-

“(a) Whether the security performance guarantee ought to have been provided by the Defendant to the Plaintiff. Clause 2.4 of the Subcontract makes express provision for the Defendant to furnish the security and there is a real dispute as to circumstances and reasons for the said security being returned to the Plaintiff;



- (b) *The Plaintiff's claim for damages by way of additional costs that the Plaintiff is required to bear by reason of having to engage third parties to complete the works arising from the Defendant terminating the Subcontract. In respect of this claim, all that the Defendant had averred in its affidavit is that the amount claimed is merely an estimate;*
- (C) *The Plaintiff's claim for overhead costs and prolongation costs arising from the delay of works by the Defendant. Again the Defendant merely disputes the quantum claimed by the Plaintiff;*
- (d) *The Plaintiff's claim relating to materials that are stored off-site which the Plaintiff has no access and which the Plaintiff claimed was wrongly certified as payable to the Defendant.*

...

[56] *The Plaintiff has also shown that under the terms of the Subcontract, in particular clause 16.3.3(b), the Plaintiff has a contractual right to reduce, withhold or defer payment where the Plaintiff has a right of set-off or deduction under the Subcontract and to withhold payment to the Defendant until the costs of execution, completion and remedying any defects, damages for delay in completion (if any) and all other costs incurred by the Plaintiff have been established under clause 19.2.4."*

Following the above, the High Court held that there is a likelihood that the Winding Up Petition may fail or it is unlikely that the winding up order will be made. Accordingly, the High Court held that the Defendant is not entitled to present the winding up petition based on the Statutory Notice:-

"[57] Accordingly, in my judgment there is therefore a likelihood that the intended winding up petition may fail or that it is unlikely that a winding up order will be made. The cross claim or counterclaim raised by the Plaintiff are bona fide and based on substantial grounds. Hence, I hold that the Defendant is not entitled to present a winding up petition based on the Statutory Notice."

For completion, the High Court noted that the Adjudicator dismissed the Plaintiff's counterclaim in the adjudication and that the Defendant proceeded to enforce the Adjudication Decision pursuant to section 28 of CIPAA 2012. In relation to the same, the High Court held that the Adjudicator's factual findings does not bind the High Court or the arbitration tribunal:-

"[51] In the instant case, the Defendant has issued a notice pursuant to section 466(1) of the CA 2016 claiming for the sum of RM 9,222,205.75 from the Plaintiff. This is based on the adjudication decision dated 21.8.2019 allowing the Defendant's claim in the sum of RM 8,848,865.04 while the Plaintiff's counterclaim was dismissed by the Adjudicator. The Defendant had proceeded under section 28 of the CIPAA to enforce the adjudication decision as if it is a judgment for the purposes of enforcing the same. It is trite that the factual findings of the Adjudicator are not binding on either the High Court or the arbitration tribunal [See: Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd and another appeal [2018] 4 MLJ 496]. In fact, it is not clear what the grounds were for the Adjudicator's decision to dismiss the Plaintiff's counterclaim."

WINDING UP PETITION ALREADY PRESENTED

The circumstances of this case is complicated by the fact that, subsequent to the filing of the Fortuna Injunction Application but before its hearing, the Defendant engaged another set of solicitors to present Winding Up Petition before the Winding Up Court.

In relation to this, the High Court held that *"an application to restrain such winding up proceedings should be made before the Winding Up Court, save in rare and exceptional cases where irreparable harm would be suffered by the company."*



On the facts of this case, the High Court found that it *“would be a grave injustice to the Plaintiff if the Plaintiff, by reason of the Defendant’s presentation of the Winding Up Petition, is now precluded from seeking the injunction as prayed and has to make a fresh application before the Winding Up Court for the same.”*

“[61] Accordingly, I find that this is an exceptional case to justify this Court to make the order for an injunction in terms of prayers 4(i) and (ii) of the Originating Summons notwithstanding that the Winding Up Petition has been filed...”

MOVING FORWARD

Following the decision, it is important to note that:-

- (a) The High Court in this case departed from the position in **ASM Development (Kl) Sdn Bhd v Econpile (M) Sdn Bhd** [2020] MLJU 282 and held that an order or judgment made pursuant to **section 28 of CIPAA 2012**, being a valid and enforceable judgment, *“is an undisputed debt and is capable of forming the basis for a presentation of a winding up petition against the Plaintiff.”*
- (b) Whilst an order or judgment made under section 28 of CIPAA 2012 is an undisputed debt, the section 466 Statutory Notice issued based on the same can still be challenged if the Plaintiff has any *“bona fide cross claim that is an answer to the Statutory Notice”*, provided such cross claim or counterclaim *“has been established on substantial grounds”*.
- (c) If Winding Up Proceedings have commenced before the Winding Up Court, any application to restrain such proceedings should be made in the Winding Up Court, *“save in rare and exceptional cases where irreparable harm would be suffered by the company”*.

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