Mammoth Empire Construction Sdn Bhd
v
Kenwise Sdn Bhd

High Court, Shah Alam – Originating Summons No. 24NCC-139-10/2019
Gunalan Muniandy J

February 10, 2020

Civil procedure *– Injunctions – Fortuna injunction – Plaintiff seeking to restrain defendant from proceeding upon statutory notice pursuant to s 466 of the Companies Act 2016 and filing winding-up petition based on arbitration award – Award yet to be recognised and enforced as a judgment pursuant to s 38 of the Arbitration Act 2005 – Bona fide dispute as to validity of award – Plaintiff a solvent company – Pending action by plaintiff to set aside award – Whether premature and improper for winding-up petition to be presented – Whether grant of ad interim Fortuna injunction warranted – Whether principles enunciated in Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd (dahulunya dikenali sebagai 600 Information Services Sdn Bhd) [2007] 3 AMR 195 still applicable – Arbitration Act 1952, ss 17, 27 – Arbitration Act 2005, ss 36, 37, 38, 42 – Companies Act 2016, s 466*

Company law *– Winding up – Inability to pay debt – Plaintiff seeking to restrain defendant from proceeding upon statutory notice pursuant to s 466 of the Companies Act 2016 and filing winding-up petition based on arbitration award – Award yet to be recognised and enforced as a judgment pursuant to s 38 of the Arbitration Act 2005 – Bona fide dispute as to validity of award – Plaintiff a solvent company – Pending action by plaintiff to set aside award – Whether premature and improper for winding-up petition to be presented – Whether grant of ad interim Fortuna injunction warranted – Whether principles enunciated in Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd (dahulunya dikenali sebagai 600 Information Services Sdn Bhd) [2007] 3 AMR 195 still applicable – Arbitration Act 1952, ss 17, 27 – Arbitration Act 2005, ss 36, 37, 38, 42 – Companies Act 2016, s 466*

The plaintiff had pursuant to a letter of award dated March 31, 2015, appointed the defendant as its subcontractor for the supply and installation of chillers for a particular project. The plaintiff subsequently terminated the contract due to the defendant's failure to perform its obligations according to the terms of the letter of award. Thereafter, the defendant commenced arbitration proceedings against the plaintiff, claiming payment of the purchase price of the chillers and in the alterative, damages. The arbitrator found in favour of the defendant and dismissed the plaintiff's counterclaim. Subsequently, the plaintiff by way of two separate applications, applied respectively to set aside the award pursuant to s 37 of the Arbitration Act 2005 ("the AA 2005") and for reference on a question of law under s 42 of the AA 2005. The defendant in turn applied for recognition and

enforcement of the award pursuant to s 38 of the AA 2005. Based on the said award which is yet to be registered and subsequent to the filing of the plaintiff's setting aside application, the defendant issued and served on the plaintiff a statutory notice pursuant to s 466 of the Companies Act 2016 ("the CA").

The plaintiff commenced the instant proceedings ("encl 1") and applied for an ad interim Fortuna injunction to restrain the defendant from proceeding or acting upon the statutory notice and proceeding with a winding-up petition against it ("encl 3"). In support of its application the plaintiff contended inter alia that the award is not in force and still not binding on the plaintiff; that it is solvent and that the winding-up proceedings if allowed, will cause serious loss of its commercial reputation and goodwill in its business. The plaintiff further contended that bearing in mind its pending application to set aside the award, the debt in question must be considered a disputed debt.

The defendant in response contended inter alia that the plaintiff's application is mala fide and without merits. The defendant in essence argued that a winding-up proceeding is not an execution which requires the accompaniment of a court judgment and that under the latest s 36 of the AA 2005, an arbitration award itself is final and binding and can be sufficiently relied on for any proceedings in court without having to first enforce the said award by way of an entry as a judgment under s 38 of the AA 2005.

Issue

Whether in the circumstances, the grant of an ad interim Fortuna injunction is warranted.

Held, allowing encl 3 with costs in the cause subject to allocator fee; encl 1 allowed with costs of RM2,000 subject to allocator fee

1. The plaintiff's case falls squarely within the principles enunciated in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd (dahulunya dikenali sebagai 600 Information Services Sdn Bhd)* [2007] 3 AMR 195 ("*Mobikom*") for the award to be considered a disputed debt so as to justify the grant of the Fortuna injunction as prayed for. [*see p 690 para 14 - p 691 para 15; p 692 para 19*]

2. The defendant's proposition that "Unlike the repealed s 17 of the Arbitration Act 1952 (relied on in *Mobikom*) the wordings of the new s 36 of the Arbitration Act 2005 grants sufficient power to the party to rely on the arbitration award to initiate court proceedings" is plainly misconceived as there is in effect hardly any significant differences which renders the principles in *Mobikom* case inapplicable. There is hardly any significant difference in the wording of the finality clause in both sections, except for the usage of different words which for all intents and purposes

convey the same meaning. In the premises, it cannot be said that the principles in *Mobikom* which was decided pre the AA 2005 are no longer applicable by reason of the new provision. [*see p 692 para 21*]

3. In view of the serious and bona fide dispute as to the validity of the award it would be premature and improper for a winding-up petition to be presented at this stage before the pending actions by the plaintiff are disposed of bearing in mind the fact that the plaintiff was shown to be a solvent company. In the circumstances, the grant of the ad interim Fortuna injunction as prayed for is warranted so as to prevent any possible abuse of court process or undue pressure being exerted on the plaintiff to settle the disputed debt. [*see p 692 para 24 - p 693 para 24*]

Cases referred to by the court

Fortuna Holdings Pty Ltd v Deputy Commissioner of Taxation [1978] VR 83, SC (Aust) *(ref)*
Lai Yak Kee v Pembinaan Alam Cemerlang Sdn Bhd [2012] MLJU 1802, FC *(ref)*
Malayan Flour Mill Bhd v Raja Lope & Tan Co (didakwa sebagai sebuah firma) [2000] 3 AMR 3750; [2000] 6 MLJ 591, HC *(ref)*
Maril-Rionebel (M) Sdn Bhd (dahulunya dikenali sebagai Kredin Sdn Bhd) & Anor v Perdana Merchant Bankers Bhd (dahulunya dikenali sebagai Intradagang Merchant Banks (M) Berhad) (and 4 Other Appeals) [2001] 3 AMR 2893; [2001] 4 MLJ 187, CA *(ref)*
Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd (dahulunya dikenali sebagai 600 Information Services Sdn Bhd) [2007] 3 AMR 195; [2007] 3 MLJ 316, CA *(foll)*
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217, FC *(ref)*

Legislation referred to by the court

Malaysia
Arbitration Act 1952, ss 17, 27
Arbitration Act 2005, ss 36, 37, 38, 42
Companies Act 2016, s 466, 466(1)(a)

Justin TY Voon and *Lin Pei Sin* (Justin Voon Chooi & Wing) for plaintiff
Loi Kwong Fon (Loi & Co) for defendant

Judgment received: March 11, 2020

Gunalan Muniandy J

[1] Both the plaintiff and defendant are locally incorporated limited companies. The plaintiff's core business is building construction.

[2] The plaintiff/applicant filed an originating summons (encl 1) and notice of application ("encl 3") against the defendant and prays for an ad interim fortuna injunction to restrain the defendant from proceeding/acting upon the statutory notice dated September 12, 2019 pursuant to s 466 of the Companies Act 2016 and filing the winding-up petition which was served on the plaintiff on September 17, 2019. The plaintiff states that the 21 days' notice lapsed on October 8, 2019.

Brief facts

[3] A summary of facts adopted from the plaintiff's submission is as follows.

(1) The plaintiff had appointed the defendant by way of a letter of award dated March 31, 2015 including a "Specifications: Chiller & Auxiliary Equipment Requirement" ("letter of award") to inter-alia supply and install the Chiller LG Water-Cooled Centrifugal ("chillers") in the Empire City Mall. The contract sum was RM12,480,000.00 (kindly refer: letter of award dated March 31, 2015 at exh "CJY1" of encl 2.

(2) The plaintiff contends that the defendant has breached the terms in the letter of award and accordingly, the plaintiff has terminated the said letter of award pursuant to clause 9.2 of the letter of award vide the notice of termination dated April 6, 2017 (kindly refer: notice of termination dated April 6, 2017 at exh "CJY2" of encl 2).

(3) Subsequently, the defendant initiated an arbitration proceeding against the plaintiff to claim for payment of the full purchase price of the chillers or alternatively general damages.

(4) The arbitrator, Nahendran Navaratnam has awarded the sum of USD1,100,000.00 and RM1,165,605.78 as damages to be paid by the plaintiff to the defendant for unlawful termination of the letter of award together with the costs of RM258,879.03 vide the final award dated June 12, 2019. The plaintiff's counterclaim of RM1,248,000.00 for the refund of 10% down payment paid towards the purchase price of the chillers was dismissed (kindly refer: final award dated June 12, 2019 at exh "CJY5" of encl 2).

(5) The defendant subsequently filed an application for recognition and enforcement of the award pursuant to s 38 of the Arbitration Act 2005 in Kuala Lumpur High Court vide Originating Summons No. WA-24-27-06/2019 ("OS27") (kindly refer: exh "CJY6" of encl 2).

(6) However, the defendant has withdrawn the OS27 in Kuala Lumpur High Court on September 5, 2019 after the plaintiff filed an application to transfer the OS27 to Shah Alam High Court ("SAHC") and the applications

to set aside the award pursuant to s 37 and s 42 of the Arbitration Act 2005 in SAHC.

(7) The plaintiff applied to SAHC to set aside the award pursuant to s 37 of the Arbitration Act 2005 on August 15, 2019 vide Originating Summons No. BA-24NCC(ARB)-2-08/2019 (setting aside application at exh "CJY9" of encls 2 and 6). The plaintiff also applied under s 42 of the Arbitration Act 2005 for reference on question of law vide Originating Summons No. BA-24NCC(ARB)-1-07/2019 (application for reference on question of law at exh "CJY8" of encl 2).

(8) The defendant filed another application for recognition and enforcement of the award in SAHC vide Originating Summons No. BA-24C(ARB)-6-09/2019 (recognition and enforcement application at exh "CJY10" of encl 6).

(9) All three applications as above.

(10) Relying on the award which has yet to be registered and after the plaintiff has filed the setting aside application, the defendant issued to the plaintiff a notice dated September 12, 2019 under s 466(1)(a) of the Companies Act 2016 demanding for the payment of the sum awarded to the defendant i.e. USD1,100,000.00 and RM1,424,484.81 ("the alleged debt").

Grounds in support

[4] In support of encl 3 for an ad interim injunction the plaintiff states as follows:

(1) The plaintiff is the main contractor appointed by Cosmopolitan Avenue Sdn Bhd for the project called Empire City, Damandara Perdana, Petaling Jaya, Selangor.

(2) Vide a letter of award dated March 31, 2015, the defendant was appointed by the plaintiff as a subcontractor to supply and install chillers for the said project.

(3) The defendant failed to perform its obligations according to the terms stated in the letter of award and the plaintiff had terminated the said letter of award.

(4) The defendant then commenced an arbitration proceedings against the plaintiff and the arbitrator awarded a sum of RM1,165,605.78 with costs of RM258,879.03 to the plaintiff. The plaintiff submits that the award is not in force and still not binding against the plaintiff.

(5) The plaintiff had filed an application pursuant to ss 37 and 42 of the Arbitration Act 2005 to challenge the award granted to the defendant.

(6) The plaintiff is a solvent company.

(7) The plaintiff avers that the winding-up proceedings will cause serious loss of its commercial reputation and goodwill in the business.

(8) The plaintiff has a strong financial standing and that is a solvent company that is able to pay the alleged debt.

Grounds in opposition to encl 3

[5] It was defendant's basic contention that the Fortuna injunction applied for by the plaintiff should be dismissed by this court, as it was filed with a male fide intention with the sole purpose of denying the defendant's right of recovering its damages caused by the plaintiff as a result of its unlawful termination, and it has caused undue prejudicial effects against the defendant.

[6] On the issue of mala fide, it was alleged that the plaintiff had adopted numerous legal tactics to delay the defendant's entitlement to the arbitration award. Inter alia, it was pointed out that the plaintiff had applied to set aside the award pursuant to a repealed provision of the law, i.e., s 42, Arbitration Act ("AA") 2005 alongside s 37 of the same Act. Hence, it is purportedly a double application causing an unreasonable delay in the enforcement of the award. Further, that the defendant's application for enforcement under s 38, AA could not proceed because of a last minute stay application by the plaintiff.

[7] On the merits, it was contended that the main *crux* of the plaintiffs argument for a Fortuna injunction had no merits, as it only hinges on the ground that the statutory notice is invalid and pre-mature, because the plaintiff argued that the arbitration award obtained against the plaintiff has yet to be confirmed by a court order to be enforced as a judgment under s 38 of the AA. Besides that, apart from bare and unsubstantiated allegations made by the plaintiff, they had failed to demonstrate and/or explain how the statutory notice was defective and invalid. Reliance was placed on the Federal Court case of *Lai Yak Kee v Pembinaan Alam Cemerlang Sdn Bhd* [2012] MLJU 1802 which recognised that a statutory demand is deemed to be valid so long as the prescribed requirements of the relevant section were complied with. The defendant, therefore, submitted that as they had fully complied with the prescribed requirements in issuing the statutory notice to the plaintiff under s 466 of the Companies Act 2016 there is no reason to find that the statutory notice was invalid for non-compliance with any particular rule or provision of law, and there is also absolutely no merit in the plaintiff's argument that the statutory notice was defective and invalid.

[8] As to the plaintiff's contention that it was premature for the defendant to serve the statutory notice before enforcing the arbitration award by entry as a judgment under s 38 of the AA, it was argued that the fallacy of this argument is that it was premised on the misconceived proposition that a winding-up petition is a form of execution that must be based upon a judgment of a court. Reference

was made to the Court of Appeal decision in *Maril-Rionebel (M) Sdn Bhd (dahulunya dikenali sebagai Kredin Sdn Bhd) & Anor v Perdana Merchant Bankers Berhad (dahulunya dikenali sebagai Intradagang Merchant Banks (M) Berhad) (and 4 Other Appeals)* [2001] 3 AMR 2893; [2001] 4 MLJ 187 as follows:

> But a petition for winding up is not execution, for a winding-up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Act. But the issuance of such a notice is not a sine qua non for the presentation of a winding-up petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due. There are two cases that support this view.

[9] In short, that there are two main justifications as to why a statutory notice may properly be issued before the entry of a judgment under s 38 of the AA to enforce the arbitration award:

(1) A winding-up proceeding is not an execution which requires the accompaniment of a court judgment; and

(2) Under the latest s 36 of the AA 2005, an arbitration award itself is final and binding, and shall be sufficient to be relied by any party for any proceedings in any court.

[10] Importantly, it was highlighted that this has to be distinguished with some of the pre-Arbitration Act 2005 cases that relied on the repealed s 27 of the AA 1952 which has been replaced by the AA 2005, such as *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd (dahulunya dikenali sebagai 600 Information Services Sdn Bhd)* [2007] 3 AMR 195; [2007] 3 MLJ 316 and *Malayan Flour Mill Bhd v Raja Lope & Tan Co (didakwa sebagai sebuah firma)* [2000] 3 AMR 3750; [2000] 6 MLJ 591, which required the arbitration award to first be registered as a judgment by leave of the court.

[11] Hence, that in accordance with the latest s 36 of the AA 2005, with the arbitration award alone, the defendant is equipped with the necessary power to commence the winding-up proceeding against the plaintiff, without having to first enforce the arbitration award by way of an entry as a judgment under s 38 of the AA 2005.

[12] Lastly, that under the new s 36, the arbitration award obtained against the plaintiff is (i) final and binding, and (ii) may be relied for court proceeding, hence, the debt is indisputable. As such, that the Fortuna injunction ("FI") sought by the plaintiff ought to be rejected by this court. (Reference made to the Federal Court decision of *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217 had clearly outlined at length the governing principles in relation to an application for an FI.)

Decision

[13] First and foremost, it is important to bear in mind that encl 3 is only for an interim injunction ("Int. Inj.") pending the hearing of the originating summons ("OS") proper (encl 1) which is for a FI pending the plaintiff's challenge to the arbitration award under ss 37 and 42 of the AA 2005. The award has also yet to be recognised and registered pursuant to s 38 of the same Act. The plaintiff's applications vide OS No. 2-08/2019 and OS No. 1-07/2019 are still pending in the SAHC. So is the defendant's recognition and enforcement application vide OS No. 24C(ARB)-6-09/2019.

[14] The thrust of the plaintiff's case for the present Int. Inj. is that despite the final award by the arbitrator the debt in question must be considered a disputed debt in view of the pending applications to set aside the award in accordance with legal procedures. Reliance was placed substantially on principles for the grant of a FI as propounded in the Court of Appeal case of *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd (dahulunya dikenali sebagai 600 Information Services Sdn Bhd)* [2007] 3 AMR 195; [2007] 3 MLJ 316:

Brief facts:

In this case, the plaintiff entered into a contract with the defendant and a dispute arose between them in relation to that contract. The dispute was referred to an arbitrator who found for the defendant. The plaintiff was dissatisfied and applied to have the award set aside. The defendant relied on the award and issued a notice under s 218 to the plaintiff. The plaintiff applied for a Fortuna injunction but the application was dismissed by the High Court judge. The plaintiff appealed to the Court of Appeal and the appeal was allowed.

Principles applied in the decision of the Court of Appeal:

(i) Page 200 (AMR); p 321 (MLJ) paragraph 4:

> ... a party may be restrained from presenting a winding-up petition if ... there is a bona fide dispute about the debt on which the notice of demand ... is based. ... Once the debt on which the proposed petition is based is bona fide disputed it matters not that the debtor company is in fact insolvent.

(ii) Page 202 lines 37 to 41 (AMR); p 323 paragraph H (MLJ):

> ... the defendant proposed to adopt the method of a petition rather than the other and more appropriate remedies because he hoped to bring pressure on the directors to alter their attitude. This was an improper use of the process, and the company should be freed from the improper pressure being used by the defendant, and an injunction should be granted ...

(iii) Page 202 lines 26 to 31 (AMR); p 323 paragraph F (MLJ):

> ... the winding-up petition is misconceived even if the allegations contained in it could be substantiated, having regard to the existence of an alternative and more suitable remedy. It is to be observed that by bringing an action the defendant, if he has a good case, would not only more easily obtain what he is really after, but he could do so without incurring the risk of inflicting damage, possibly irreparable damage, on the company, and possibly also on other innocent shareholders.

[15] It would appear that the principles as enunciated above are clearly applicable to the present scenario as *Mobikom* is wholly in point on the facts as well.

[16] It was rightly brought to the court's attention by the plaintiff that they had been disputing the alleged debt, both on liability and quantum, right from the stage when the dispute was referred to arbitration and when the award was made by the arbitrator, until the matter was brought to the SAHC wherein the plaintiff has filed the setting aside application and the application for reference on question of law to challenge the award, both of which applications are now pending.

[17] The Court of Appeal in *Mobikom* adopted the principle enunciated in the celebrated case of *Fortuna Holdings Pty Ltd v Deputy Commissioner of Taxation* [1978] VR 83 and quoted from the case the dicta of McGarvie J as follows at p 322:

> ... The law has long recognised that with proceedings to wind up a company, intervention after the commencement of proceedings would often be too late to relieve the company of oppression and damage. The courts have recognised that irreparable damage may be done to a company merely through public knowledge of the presentation of a petition. Usually the damage flows from the loss of commercial reputation which results. The courts have also been conscious of the pressure which may be put on a company, by a person with a disputed claim against it, threatening to present a winding-up petitions unless, the company meets his claim. While that threat exists, the company, in order to avoid the damage involved in the presentation of a petition, is pressed to meet the claim although it way have substantial and genuine grounds for regarding itself as not required to do so.

[18] And:

> ... Here too the defendant has no registered award. All it has is a cause of action at common law to enforce the award in the usual way by means of a civil suit. The application by the plaintiff to set aside the award constitutes, in my judgment, a bona fide dispute of the alleged debt. The present case, in my view, comes within the second branch of the Fortuna principle.

[19] On the present facts, the plaintiff's case, in my view, falls squarely within the principles of *Mobikom* for the award relied upon by the defendant for the proposed W/U petition to be considered a disputed debt to justify a FI being granted. The defendant sought to dispute the applicability of the *Mobikom* principles to this case by reliance on the new s 36 AA 2005 enacted after that case. It was submitted that:

> Unlike the repealed Section 17 of Arbitration Act 1952 (relied by Mobikom case), the wordings of the new Section 36 of the Arbitration Act 2005 grants sufficient power to the party to rely on the Arbitration Award to initiate a court proceeding.

[20] For ease of reference the repealed and subsequent sections are as follows:

> Repealed s 17 AA 1952
>
> > Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.
>
> New s 36 AA 2005
>
> > (1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.
> >
> > (2) The arbitral tribunal shall not vary, amend, correct, review, add to or revoke an award which has been made except as specifically provided for in section 35.

[21] This proposition was, in my view, plainly misconceived as there is in effect hardly any significant difference in the wording of the finality clause in both the sections, except for the usage of different words which for all intents and purposes convey the same meaning. It is, thus, erroneous to argue that the Mobikom principles no longer have any applicability by reason of the new provision.

[22] For the foregoing reasons, my conclusion on encls 3 and 1 as well, by agreement to follow encl 3, is as follows.

[23] Upon having considered the background facts of this case, the grounds advanced by the plaintiff in support of encl 3, the contentions of both parties through counsel, the law applicable to the issues in dispute and the principles applicable to Fortuna Injunctions, the court finds as follows.

[24] In view of there being a serious and bona fide dispute between the parties as to the validity of the arbitration award which is the alleged debt in respect of any

proposed winding-up petition and the fact that there are three important related actions via OS pending before the SAHC i.e., the setting aside and the reference of question of law applications by the plaintiff and the recognition and enforcement application by the defendant, it would be premature and improper for a winding-up petition to be presented at this stage before the pending actions are properly disposed of. Till to date the plaintiff was also shown to be a solvent company and ongoing concern involved in the construction industry. Hence, under the circumstances, the court agrees with the plaintiff's contention that an ad interim FI is fit and proper in this case to prevent any possible abuse of the court process or undue pressure being exerted on the plaintiff to settle the disputed debt.

[25] Enclosure 3) is, therefore, found to have merits and an OIT is granted for prayers a), b) and c).

[26] Costs in the cause subject to allocatur fee.

[27] As the parties have put on record that the same grounds, arguments, issues and contentions would be advanced for the OS proper (encl 1) and agreed that it should be decided together, I, therefore, for the same reasons, grant an OIT of prayers a), b) and c) of the OS (encl 1). Costs of RM2,000.00 to plaintiff subject to allocatur fee.