Exxobrite Sdn Bhd v Value Plus Industries Sdn Bhd [2022] MLJU 1799

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

NADZARIN WOK NORDIN JC

COMPANIES (WINDING UP) PETITION NO WA-28NCC-127-02 OF 2022

29 July 2022

Audrey Tan (Audrey Tan Law Chambers) for the petitioner.
Joshua Kong (with Daljit Singh) (Daljit Singh Partnership) for the respondent.

Nadzarin Wok Nordin JC:

GROUNDS OF JUDGMENT

(Enclosure 1, 10 & 34)
Introduction

[1]By way of the Winding Up Petition dated 15.6.2022 (Petition) in enclosure 1, the Petitioner has applied to this Court to wind up the Respondent pursuant to sections 464, 465(1) (e) (h), 466 (1)(a) and (c) of the Companies Act 2016.

[2]The Petition avers *inter alia* that:-

(i) the Respondent owes the Petitioner the sum of RM73,164.00 being the outstanding sum (Outstanding Sum) due and arising from orders of industrial diesel between the period of 22.12.2020 and 10.2.2021;

(ii) goods ordered had been supplied to the Respondent and the Respondent had signed the relevant delivery orders, signifying acceptance of the goods ordered;

(iii) a Statutory Notice of Demand dated 25.1.2022 (SND) was issued to the Respondent demanding the Outstanding Sum within 21 days from the date of the service of the SND;

(iv) 21 days have since elapsed after service of the SND, and the Respondent has failed, refused and/or neglected to pay the Outstanding Sum;

(v) there is a Notice of Admission dated 24.11.2021 issued by the Respondent's Judicial Manager (JM) whereby the Petitioner is listed as a creditor of the Respondent;

(vi) there was a Judicial Management Order granted on 16.2.2021 (JMO) at the Shah Alam High Court vide Originating Summons BA-28JM-15-12/2020 (OS 15) on the Respondent and an extension of the JMO until 15.2.2022;

(vii) the dateline for the Statement of Proposal to be submitted to the creditors under the JMO was 31.12.2021 which has to date not been submitted;

(viii) the JMO has since lapsed on 15.2.2022;

(ix) the Respondent is unable to meet its existing debt and that it is now defunct as there is mismanagement within the Respondent and distrust between the 2 directors and shareholders;

(x) the assets of the Respondent are in jeopardy as there are serious allegations of misappropriation of assets made by the directors against each other.

[3]There is also before this Court Enclosure 34 which is the Respondent's Summons in Chambers dated 10.3.2022 (Enclosure 34) pursuant to Order 18 Rule 19 (a), (b), (c) and d and/or order 57 Rule 1 and/or Order 92 Rule 4 of the Rules of Court 2012 for the following orders:

(i) the SND to be held as invalid;

(ii) the Petition to be set aside; and/or

(iii) the proceedings be transferred to the Shah Alam High Court.

[4]The grounds in support for enclosure 34 are *inter alia* that:

(i) the SND is in breach of section 411(4)(c) of the Companies Act 2016;

(ii) the Petition is an abuse of court process as the Petition was filed on a Statutory claim which was defective;

(iii) the Petition is an abuse of court process as it was filed for the purpose of affecting/frustrating/delaying the Judicial Management proceedings which are being heard at the Insolvency and Muamalat High Court in Shah Alam;

(iv) the High Court in Shah Alam was not informed of the SND;

(v) the alleged debt in the Petition is *bona fide* substantially disputed;

(vi) the alleged debt in the petition cannot be determined before OS 15 is completely disposed off;

(vii) it is in the interest of justice that the proceedings herein be transferred to the Shah Alam High Court as :

(a) OS 15 is being heard at Insolvency and Muamalat High Court in Shah Alam;

(b) the Insolvency and Muamalat High Court in Shah Alam has been managing the affairs if the Respondent during the entire JMO period for a year since 16.2.2021 till 15.2.2022;

(c) there are multiple live issues which needs to be disposed off in OS 15;

(d) there will be costs and the judiciary's time saved;

(e) there are 8 other creditors who have intervened in OS 15 to protect their rights;

(f) the Petitioner will not be prejudiced if the matter is heard at the Insolvency and Muamalat High Court in Shah Alam;

(viii) to preserve the status quo and proceedings in OS 15

[5]Whereas in enclosure 10 in the proceedings, there is an application via a Form of Summons dated 16.2.2022 (Enclosure 10) for *inter alia* that an interim liquidator be appointed over the Respondent.

[6]All of the above enclosures have been fixed to be heard on the same with Enclosure 10 being mutually agreed by the learned respective counsels to now be academic in light of the Petition and Enclosure 34 being taken and heard simultaneously.
Respondent's Affi davit In Opposition to the Petition

[7]The Respondent had filed an Affidavit in Opposition in enclosure 74 with regards to the Petition where it was averred amongst others:

(i) a cross examination conducted on a Forensic Examination Report was done in OS 15 on 21.4.2022 wherein various important matters were revealed including false transactions;

(ii) the JMO was obtained via fraudulent transactions;

(iii) as a result of the above, the adjudication of the Proof of Debts in the JM is questionable;

(iv) the JM therefore has to be questioned with regards to the findings in the said Forensic Examination Report and why he had lied in OS 15 and given a false picture to the Court;

(v) there are still live proceedings in OS 15;

(vi) thus the Petition is being challenged herein based on *bona fide* issues;

(vii) the JM has conspired with the Petitioner to wind up the Respondent.

Findings of this Court

[8]I will firstly deal with Enclosure 34 where it was submitted by the Respondent that the SND which was dated 25.1.2022 was defective as it was a commencement of a legal process during the period of the Judicial Management Order obtained in OS 15 and should not have been issued as it was contrary to or in breach of section 411(4)(c) of the Companies Act 2016 as the JMO had only lapsed on 15.2.2022. The said section 411(4)(c) states that:-

"(4) During the period for which a judicial management order is in force:

(a) *no resolution shall be passed or order made for the winding up of the company;*

(b) *no receiver or receiver and manager of the kind referred to in* section 374 *shall be appointed;*

(c) *no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with the consent of the judicial manager or with the leave of the Court and, if the Court grants leave, subject to such terms as the Court may impose;*

(d) *no steps shall be taken to enforce security over the company's property or to repossess any goods in the company's possession under any hire purchase agreement, chattels leasing agreement or retention of title agreement, except with consent of the judicial manager or leave of the Court and subject to such terms as the Court may impose; and*

(e) *no steps shall be taken to transfer any share of the company or to alter the status of any member of the company except with the leave of the Court and, if the Court grants leave, subject to such terms as the Court may impose."*

[9]In coming to my judgment herein, this Court has accordingly examined the SND in exhibit A-3 of enclosure 1 and finds that the heading therein is as follows:

"Notice Pursuant to Section 465(1)(e) **read with** section 466(1)(a) of the Companies Act 2016"

[10]It is therefore clear that the SND was thus a statutory notice issued pursuant to section 465(1)(e) read with section 466(1)(a) of the Companies Act 2016 which is also reflected in paragraphs 10, 11 and 17 of the Petition which refers expressly to the SND, the nonpayment by the Respondent thereto and the statutory period has passed and the failure to pay is a presumption that the Respondent is commercially insolvent respectively.

[11]Section 465(1)(e) read with section 466(1)(a) of the Companies Act 2016 respectively reads :

section 465 (1) (e):

"(1) The Court may order the winding up if:

(e) the company is unable to pay its debts;"

section 466 (1)(a)

"(1) A company shall be deemed to be unable to pay its debts if:

(a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;"

[12]The Petitioner argues that the SND is not the "commencement of a legal process" and therefore does not contravene section 410 of the Companies Act 2016 and refers to the cases of *Arubaito Mukaya (M) Sdn Bhd v Wee Kian Hong & anor* [2017] MLJU 2350 and *Islamic Financial Services Board v Puan Marlin Fairol bt Mohd Faroque* [2010] MLJU 653 where the Courts therein had held legal process meant a Summons, writ, warrant, mandate or other process issuing from a court.

[13]After reading ***Arubaito Mukaya (M) Sdn Bhd (supra)***, I find that the said case was in relation to an application for an extension of time to apply to set aside a judgment in default (JID) which was alleged to be an irregular judgment and whereby the Plaintiff therein had relied on the Deed of Covenant entered therein to contend that Clause 17 also applies to the service of the JID whereby Clause 17 of the Deed of Covenant, allowed the process of the court, which includes the writ and statement of claim, to be served on the defendants by registered post.

[14]Whereas ***Islamic Financial Services Board (supra)*** was a case which concerned a judicial review application under Order 53 of the Rules of Court, whereby the Islamic Financial Services Board ("IFSB"), the Applicant, applied for an order of certiorari to quash the entire award of the Industrial Court, and for an order to stay all proceedings to enforce this award until the final disposal of the substantive application, and where the Court had to deal with the question whether proceedings before the Industrial Court under the Industrial Relations Act can be deemed to be either a "suit" or "other legal process" within the meaning of Part 1 of the Schedule to the IFSB Act.

[15]I have in this regard also taken into account the case of *Fulton and another v AIB Group (UK) plc* [2014] Nich 8 which is a UK case concerning administration, which is the equivalent of judicial management in our jurisdiction, which held that a statutory demand was a legal process where the Court therein stated:

"[6] *For the avoidance of doubt, I consider that the service of a statutory demand is a legal process and is not akin to the service of a notice under a contract making time of the essence or the acceptance of a repudiatory breach of contract by a company in administration: see Re Olympia and York Canary Wharf Limited* [1993] BCLC 453; [1993] BCC 154. *In that case Millet J said:*

"'Process in each of the Bankruptcy Acts means 'a process which requires the assistance of the court and does not extend to the service of a contractual notice, whether or not the service of such notice is a pre-condition to the beginning of legal proceedings."

[7] *In Re Frankice (Golders Green) Limited (In Administration)* [2010] EWHC 1229 (Ch); [2010] Bus LR 1608 *Norris J considered the meaning of "legal process" in the context of whether steps which had been taken by the Gambling Commission in relation to the business of three companies fell within the scope of the moratorium imposed by para 43(6) of Schedule B1 of the Insolvency Act 1986. He said at para [39]:*

"I think the word process suggests something with a defined beginning an ascertainable final outcome and which, in the interim, is governed by a recognisable procedure. I think the word legal indicates that that process must in some sense invoke the compulsive power of the law, and it suggests that the procedure must be quasi-legal in nature. One indicator of that might be that the process results in an appeal rather than, for example, reconsideration by means of judicial review (emphasis mine), but I accept the submission of Mr Bompas that an appeal, of itself, does not determine whether a process is a legal or administrative one."

Further, at para [47] he goes on to say:

"In the instant case, I consider that the nature of the decision which the regulatory panel is called upon to make and the circumstances in which and the procedure according to which the decision is made, fall within the description of legal

process. It is difficult to articulate why I have formed this impression. There is undoubtedly a process. It is governed by a procedure. The whole process has about it the stamp of a case being presented by the commission, being answered by the licensee and being decided upon according to legal advice and for declared reasons by an independent and impartial regulatory panel from whose deliberations employees of the commission are excluded."

[16]With respect, after reading all of the above said cases in its entirety, I hold that both ***Arubaito Mukaya (M) Sdn Bhd (supra)*** and ***Islamic Financial Services Board (supra)*** are inapplicable before me as the term "legal process" were decided in the said cases based on the context of the matters which had been brought to the Court for the courts determination with regards to the facts therein whereby the common thread to be found was an actual legal process being filed and to be determined in the said Courts, being the setting aside of a judgment in default and a judicial review application respectively.

[17]Here before this Court, the main issue as regards the term 'legal process' centers upon whether the SND is a legal process which comes within the context of section 411(4)(c), read with section 465(1)(e) and with section 466(1)(a) of the Companies Act 2016. After due consideration of the same, I hold that the term "legal process" in section 411(4)(c) of the Companies Act 2016 must include the SND in a scenario involving section 465(1)(e) when read with section 466(1)(a) of the Companies Act 2016, as it is the SND which is the commencement of the legal process and which triggers the right to file and/or commence a winding up petition premised on a section 465(1)(e) read with section 466(1)(a) of the Companies Act 2016 ground. In other words, using the words in ***Fulton and another(supra)*** it is the "*process … (which) invoke(s) the compulsive power of the law, and it suggests that the procedure must be quasi- legal in nature".*

[18]I must further add that the words used by Parliament in the said section 411(4)(c) was drafted wide enough to cover the terms '*other proceedings', 'execution'* and *'or other legal process'* which would indicate, as a matter of construction, that Parliament would have intended that the moratorium under the said section be applicable over not only legal proceedings in the normal sense of the word i.e applications, proceedings or matters in Court including Summons, writ, warrant, mandate or other process issuing from a court but also over a wider spectrum of 'legal processes' which are not only Court proceedings but also the initiation of legal proceedings as well as modes of execution.

[19]In the circumstances, I do hold that the moratorium period in section 411(4)(c) of the Companies Act 2016 has been contravened, as in my view, the words used in section 411(4)(c) vis a vis "*no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with the consent of the judicial manager or with the leave of the Court and, if the Court grants leave, subject to such terms as the Court may impose*" with particular reference to the term 'legal process' includes the SND for the reasons mentioned in the above paragraph.

[20]This Court therefore agrees with the Respondent's counsel that the moratorium under section 411(4)(c) of the Companies Act 2016 has by virtue of the issuance of the SND been subverted. I hold that this could not be the intention of Parliament when the said section 411(4)(c) was enacted as the said section under the judicial management provisions must surely have been intended by Parliament to be for the underlying general purpose of the corporate rescue mechanism being the survival of the company or the rehabilitation of the company; and that the SND would in such a situation undoubtedly put pressure on the Respondent to make payment to the Petitioner herein and consequently obtain an advantage over other creditors i.e in other words the Petitioner herein would be stealing a march on the other unsecured creditors by its act of issuing the SND during such a moratorium period, which would not fit in with the general procedure and/or purpose under the judicial management approach.

[21]Thus, the presumption of the Respondent's '*inability' to pay its debts'* due to the failure to respond and/or pay off the Outstanding Sum within the 21 days period in the SND cannot arise in such a situation where there is a JMO in place at that time. I therefore agree with and respectfully adopt the reasoning in the UK case of *Re Carillion plc (in liquidation) Financial Cinduct Authority v Carilliom plc (in liquidation)* [2021] EWHC 2871 where it was held :

"65. I have to say that, however the provisions came to be drafted, I find it difficult to see how the word "proceeding" in s.130(2) *can have exactly the same meaning as the phrase "legal process (including legal proceedings, execution, distress and diligence)" in para. 43(6). For a start, "legal proceedings" seem to be a subset of "legal process" which must be a wider term, so as to include at least "execution" and "distress" as well.*

As the purpose of para. 43(6) is wider than that of s.130(2) *(see Chapman), in particular when the administrators are trying to save the company as a going concern or preserve its business in readiness for a sale, it is important to be able to prevent any interference or prejudicial action that may undermine that purpose and so the net should be drawn as widely as possible. Parliament's intention would have been to enable the court to control anything that might detrimentally affect the administrators fulfilling the purpose of the administration*."

[22]However, in deciding Enclosure 34, I have also considered :

(i) whether the proceedings ought to be transferred to the Shah Alam High Court and hold that the High Courts of Malaya are of equal standing as per Article 121 (1) of the Federal Constitution and section 3 of the Courts of Judicature Act 1964. I also hold that the High Courts of Malaya have like jurisdiction to hear the Petition, see our Federal Court in *Khairuddin Abu Hassan v Datuk Seri Hj Ahmad Hamzah & ors and othjer appeals* [2019] 9 CLJ 315 which dealt with the issue of the High Courts being of coordinate jurisdiction;

(ii) the Respondent's contention that there are live proceedings in the JM matter in OS 15 at the Shah Alam High Court and hold that as the JMO has expired on 15.2.20202 there are no longer any live proceedings therein and that whatever ongoing applications in OS 15 as seen in exhibit HPL 13 of enclosure 47, exhibit HPL-14 of enclosure 48 and that referred to in paragraph 22.2 of Hoe Poh Lin's affidavit in enclosure 47 respectively do not involve the Respondent per se;

(iii) the Respondent's contention that the Petition ought to be struck off, wherein this Court however notes that the Petition was also based on section 466 (1)(c) of the Companies Act 2016 which provides:

> *(1) A company shall be deemed to be unable to pay its debts if:*
>
> *(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.*

[23]It is expressly stated in Paragraph 17(b) of the Petition which refers and avers that:-

"*the commercial insolvency and inability of the respondent to pay its debts is beyond disputed*

(i) *when the JMO was granted*

(ii) *throughout the judicial management period, no payment, resolution and/or compromise of the Respondent's debt was made as there was no tabling and approval of the SOP"*

and in paragraph 17 (c) in the Petition wherein it was stated that:

"the SOP (Appendix 2) reflects the Respondent's current liabilities as RM19,472,071 and the net current assets as RM8,709,138"

[24]It was thus further contended by the Petitioner that the Respondent was unable to meet its existing debts and/or potential claims against the Respondent and that it was now defunct.

[25]I hold that the SND is not in the circumstances herein a *sine qua non* for the Petition to be filed as section 466(1)(a) and section 466(1)(c) are mutually exclusive as per the Court of Appeal decision in *Maril Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001[4 MLJ

187 which was also applied and followed by this Court in *Tee Ah Kiat & Ors v Goldpage Assets Sdn Bhd* [2021] MLJU 8092 where this Court held:

> "*there is no necessity for a statutory demand under* section 466(1)(a) of the CA 2016 *to be issued by the Petitioner before the Petition maybe filed."*

[26]I therefore hold that this is not a plain and obvious case for the Petition to be struck out and that the requirements as per *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 that the claim is on the face of it obviously unsustainable for the Petition to be struck out had not been met and/or satisfied.
Petition

[27]In deciding the Petition, this court has therefore examined and finds that there is an admitted debt by virtue of Notice of Admission dated 24.11.2921 issued by the Judicial Manager of the Respondent as seen in Annex 5 of the Petition and that the Petitioner is listed as a creditor in the judicial Manager's Statement of Proposal (SOP) in Annex 6 of the Petition.

[28]I have also taken into account the presence of 2 other supporting creditors in these proceedings, namely Paramount Eco Wood Resources Sdn Bhd and Excellence Wood Products Sdn Bhd and that in OS 15, the SOP shows a total of 140 creditors.

[29]I have also viewed Appendix 2 of the Petition which is the SOP and which reflects the Respondent's current liabilities as RM19,472,071.00 and the net current assets as RM8,709,138.00 which is evidence of the Respondent's commercial insolvency. In this respect I rely on *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34 which has held that the test for commercial insolvency does not depend on the presence of its realisable assets but whether the company is able to meet its current debts.

[30]From the documentary evidence before this Court in particular taking into account the contingent and prospective liabilities of the company, I therefore find that the Respondent is unable to meet its existing debts.

[31]It is also my finding after examining the Respondent's Affidavit in Opposition, that the Respondent has not averred that it is solvent and/or is able to pay its debts.

[32]I also find that there has been *inter alia* various allegations being levelled by one faction of directors and shareholders against the other concerning misappropriation of funds and /or dissipation of assets, as well as fictional and transactional irregularities in the Respondent's account, and a fall out between the separate factions in the Respondent consisting of Hoe Poh Lin, who is a director and shareholder of 35% shareholding, and Tan Xin Jue, who is a shareholder of 15% shareholding, who are mother and son and Wong Cheng Houng another director and shareholder of 50% shareholding, numerous police reports being lodged against each other as evidenced in various affidavits filed in OS 15 as shown in enclosure 15, 29, 11, 42 and 30 respectively.

[33]In fact, the evidence before this Court even runs into allegations of physical and verbal assaults, see enclosure 28 and 42, as well as forgery of signatures in enclosure 28, parties therein being prevented from entering the premises of the Respondent as seen in enclosure 42, exclusion from management as per enclosures 28 & 42 and even disagreement as to the signing of cheques to name but a few instances of the disarray existing within the Respondent.

[34]These allegations and counter allegations in toto are in my view serious allegations of misappropriation of funds and /or dissipation of assets which would undoubtedly put the assets of the Respondent company in jeopardy and ultimately affects the interest of the Respondent's creditors. The said allegations and counter allegations has surely evidenced and caused a distrust in the running of the Respondent which I hold leads to an irretrievable breakdown in their relationship.

[35]I do in the circumstances, hereby find that there is indeed overwhelming evidence of the Respondent's commercial insolvency and that the Respondent is now paralysed and in a state of defunct. I therefore hold that it is just and equitable that the Respondent be wound up.

[36]Based on my grounds above, I am thus allowing prayers 1 in Enclosure 34 for the SND to be held as invalid on the sole ground that the issuance of the SND during the JMO, which SND in itself is the legal process and the precursor of the Petition herein, was done without the consent of the judicial manager or leave of the Court and is therefore in clear violation and/or breach of section 411(4)(c) of the Companies Act 2016 but I am dismissing prayer 2 for the Petition to be dismissed.

[37]Based on my aforesaid findings, I therefore grant order in terms of paragraph 22 (1), (2), (3) and (4) costs of RM10,000 of the Petition in enclosure 1 herein.

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