

**IN THE COURT OF APPEAL OF MALAYSIA**

**Coram:** Hamid Sultan Abu Backer, JCA; Zaleha Yusof, JCA; Yeoh Wee Siam, JCA

**International Construction & Civil Engineering Sdn Bhd v Jittra Sdn Bhd  
and 2 Others**

**Citation:** [2018] MYCA 290 **Suit Number:** Civil Appeal No. W-02(IM)(NCC)-1505-07/2018

**Date of Judgment:** 07 September 2018

*Litigation & court procedure – Notice of motion seeking to stay a civil suit pending the disposal of a winding-up petition which was subsequently filed after the civil suit under section 44 of the Courts of Judicature Act 1964 as well as the inherent jurisdiction of the court*

*Corporate law – Winding up – Whether the stay application (a contributory petition to wind up the company on just and equitable ground as per section 465(1)(c), (f) and (k) of the Companies Act 2016 filed a week before the hearing of the civil suit) lacks bona fide and an abuse of process of the court – Jurisprudence related to section 470 of the Companies Act 2016*

**JUDGMENT**

[1] The appellant by a notice of motion (enclosure 3) seeks to stay a civil suit pending the disposal of a winding up petition which was subsequently filed after the civil suit.

[2] It must be noted that the winding up petition was filed by Dato' Sri Ong, a person who was a contributory of the appellant in the civil suit. We were informed that the civil suit was going to be tried by the High Court the following day. A stay was applied in the High Court and was not granted. Following the refusal of the stay, the applicant has filed a notice of appeal and seeks this interim stay. The respondents alleged that this application was applied to stall the civil suit. The application was also filed by certificate of urgency and in consequence the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were not able to file their reply to the affidavit. However, the 1<sup>st</sup> respondent has filed a reply. We have directed all parties to ensure their written submissions are filed or given to the court.

[3] The application for stay is made under section 44 of the **Courts of Judicature Act 1964 (CJA 1964)** as well as the inherent jurisdiction of the court. The prayer *inter alia* reads as follows:

"1. an interim order to stay any and all proceedings in the Kuala Lumpur High Court Civil Suit No: WA-22NCC-26-01/2018 (including but not limited to the 1<sup>st</sup> Respondent's claim and the 3<sup>rd</sup> Respondent's counterclaim against the Applicant) ("**the Civil Suit**") pending the disposal of the Applicant's Appeal vide Notice of Appeal dated 20.7.2018."

[4] The grounds in support of the application read as follows:

- "1. The Applicant applied to stay the proceedings at the Kuala Lumpur High Court Civil Suit No.: WA-22NCC-26-01/2018 ("**Civil Suit Court**") pending the disposal of the Winding-Up Petition filed against the Applicant in Kuala Lumpur High Court Winding-Up Petition No.: WA-28NCC-685-07/2018 ("**Winding-Up Petition**").
2. The appeal herein is against the decision of the Civil Suit Court in dismissing the Applicant's Application to stay the proceedings in the Civil Suit Court, pending the disposal of the Winding-Up Petition ("**the Stay Appeal**").
3. In the event the trial of the Civil Suit, which is fixed on 23.7.2018 to 25.7.2018 were to proceed before the Stay Appeal is heard and disposed off, the Stay Appeal will be rendered nugatory.
4. In the circumstances, there is a need to preserve the status quo of the proceedings in the Civil Suit Court pending the hearing and determination of the Stay Appeal.
5. In the premises, there are special circumstances that warrant an interim stay of the proceedings in the Civil Suit Court pending the disposal of the Stay Appeal.
6. The balance of convenience and/or justice favours the grant of the interim stay sought for herein."

[5] The chronology of events has been summarised in the 2<sup>nd</sup> respondents submission and *inter alia* read as follows:

- "(2) On 19.01.2018, The 1<sup>st</sup> Respondent filed the High Court Suit against the Appellant, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent and one Uni Construction Sdn Bhd (4<sup>th</sup> Defendant in the High Court).
- (3) At the Case Management on 04.04.2018, trial dates were fixed on 23.07.2018-25.07.2018.
- (4) On 04.06.2018, the Appellant has filed its list of witness comprising Dato' Sri Ong Teng Chai ("**Dato' Sri Ong**") and one Ms. Goh Wen Ling.
- (5) On 03.07.2018, Dato' Sri Ong together with his wife, Datin Sri Chan Seok Fong has resigned as directors of the Appellant.
- (6) On 16.07.2018, Dato' Sri Ong has presented a Winding-Up Petition against the Appellant pursuant to section 465(1)(c), (f) and (h) of the Companies Act 2016.

(7) Enclosure 39 was filed on 18.07.2018.

(8) Enclosure 39 was heard and dismissed on 20.07.2018. The Appellant's oral application for a stay pending appeal to the Court of Appeal was also dismissed.

(9) The Appellant lodged the instant appeal to appeal against the decision of the learned High Court Judge in allowing Enclosure 39.

(10) Trial proceeded on 23.07.2018.

(11) On 23.07.2018, the Appellant has filed a Notice of Motion pursuant to section 44 of the Courts of Judicature Act ("**CJA**") which is fixed for Hearing on 24.07.2018."

[6] It must be noted here that the hearing of the civil suit was already fixed on 23-07-2018 and a winding up petition was only filed a week before the hearing of the civil suit. The winding up petition is not even a creditors petition but a contributory petition to wind up the company on just and equitable ground as per section 465(1)(c), (f) and (k) of the **Companies Act 2016**. The respondent's complaint is that the stay application lacks *bona fide* and is an abuse of process of the court. The affidavit in reply of the 2<sup>nd</sup> respondent (enclosure 16) is very instructive and *inter alia* reads as follows:

"(13) Paragraph 11 of the Applicant's Affidavit is strenuously denied. I am advised by the 2<sup>nd</sup> Respondent's solicitors and verily believe that in addition to the jurisdictional point, counsel for the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent has submitted on the following issues of which the learned High Court Judge have taken judicial cognisance during the hearing of Enclosure 39.

(13.1) Enclosure 39 which was filed on 18.07.2018 (i.e. 2 working days before the scheduled trial) is tainted with bad faith in view of its filing at the eleventh hour and where all parties are ready to proceed for trial. It is further submitted that the Appellant's winding-up is self-engineered/ self-induced by Dato' Sri Ong, the shareholder of the Appellant and the main witness of the Appellant, a few days before the scheduled trial to delay the trial against the Appellant from proceeding;

(13.2) The issue on preservation of assets does not arise when the subject matter of the suit filed at the High Court is not an asset belonging to the Appellant. In addition, the Appellant's contention on the purported priority gained by a successful party in the trial ahead of other creditors is untenable as all debts proved in a winding-up shall be paid *pari passu*;

(13.3) The Appellant has failed to demonstrate how the continuance of the proceedings involving the Appellant i.e. the present suit, Suit 523 or Suit 110 would work an injustice or will have an effect to the winding-up proceedings against the 3<sup>rd</sup> Defendant bearing in mind that the Winding-Up proceedings will be heard earliest on 12.10.2018 which is way after trial of all pending suits involving the 3<sup>rd</sup> Defendant would have concluded;

(13.4) Enclosure 39 is prejudicial to the Respondents in view that the Respondents have made

necessary arrangements with their respective counsel and witnesses and comply with all directions given by the Court; and

(13.5) The Appellant's contention that in the event if stay is not granted and trial in Suit 523 and Suit 110 are allowed to proceed, there is a possibility of a conflicting judgments by different judges and in the event where a liquidator is appointed upon winding-up of the Appellant, there is a possibility of the liquidator not wanting to proceed with the suits involving the Appellant is merely speculative in nature.”

[7] Learned counsel for the applicant relies on two cases to anchor the argument that the learned judge erred in fact and/or in law when dealing with the jurisprudence related to section 470 of the **Companies Act 2016 (CA 2016)** (previously section 222 of **Companies Act 1965 (CA 1965)**). To save the court's time, we repeat the submission verbatim which *inter alia* reads as follows:

**"HC Stay Application**

3. The Applicant's HC Stay Application is filed pursuant to Section 470 of the Companies Act 2016 ("CA"), in light of the Winding-up Petition filed against the Applicant herein.

4. The learned High Court Judge in dismissing the HC Stay Application had held, *inter alia* that the HC Stay Application:-

4.1 For a section 470 CA stay, it should be filed in the Winding up Court instead of in her court, where the civil suit is pending;

4.2 in light of the above, the Honourable Judge went on to hold that the jurisdiction of her court was one of special circumstances, in which she found there were no special circumstances.

5. We humbly submit that the Applicant is bound to file the HC Stay Application in the civil suit court because the winding up court has no power to order a stay of proceedings pending in another court of coordinate jurisdiction.

6. Therefore, the appropriate test to be applied pursuant to s. 470 CA is as provided the case of *Bowkett v Fullers United Electric Works Limited* [1923] 1 KB 160, quoted with approval in *Sri Jeluda Sdn Bhd v Pentalink Sdn Bhd* [2008] 4 CLJ 359 where it was held that:-

6.1 The general principle is that a Court will not refuse to accede to a stay application made under s. 140 (in *pari materia* with s. 470 CA);

6.2 Unless very special circumstances exist to justify the Court in refusing to accede to the stay application;

7. Therefore, the learned Judge erred in fact and/or in law by failing to appreciate the burden of proof in s. 470 application is reversed. The onus is not on the Applicant to show special circumstances.

8. Instead, it is the party opposing the stay that must show exceptional circumstances, because the entire purpose of s. 470 CA is to prevent a scramble for the assets of the company which is sought to be wound up.

9. Further, the High Court in the case of *Polymath Sdn Bhd v Cabaran Minetech* [2014] 1 LNS 34 and *Zulhisyam Ayob and 1 Other v. Perunding Pakar Media Sdn Bhd & Ors Winding up Petition No. D7-28-725-2008* adopted a similar approach in allowing stay of proceedings when a winding up petition is presented against a defendant in a suit. Hence, it is our submission that the onus on the party opposing the stay application, to prove special circumstances to warrant a dismissal of the same.

### **The Interim Stay Application Ought to be Allowed**

10. Notwithstanding that only the 2<sup>nd</sup> Respondent herein filed an affidavit in reply to oppose the HC Stay Application, the Respondents had all together failed to show special circumstances for this Honourable Court and the court below to dismiss the Applicant's Interim Stay Application herein and the HC Stay Application.

11. Further, the Applicant's Appeal herein will be rendered nugatory in the event that the Interim Stay Application is refused by this Honourable Court. In any event, there is a need to preserve the status quo of the proceedings in the Suit 26 pending the hearing and determination of the Appeal.

12. The balance of convenience and/or justice also favours the grant of the interim stay sought herein."

### **Jurisprudence related to Section 470 of CA 2016**

[8] It must be noted that section 470 of the CA 2016 is similarly worded as the section 222 of the CA 1965 save that a sub-section is provided to ensure that the order of stay is lodged with the Registrar of Companies within fourteen days of the order. The said section reads as follows:

"470. (1) At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court for an order to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the action or proceeding accordingly on such terms as it thinks fit.

(2) The applicant shall lodge with the Registrar the office copy of the order within fourteen days from the making of such order under subsection (1)."

A plain reading of the said section will demonstrate that a stay application needs to be made in the suit and not in the winding up court. In fact, a winding up court in Malaysia as a general rule, will have no jurisdiction to interfere with the jurisdiction of another court, unless the court has agreed for the matter in that court to be transferred so that it can be dealt by the same judge.

[9] Learned author Walter Woon, in his 2<sup>nd</sup> edition of 'Company Law' in relation to stay of action against the company at page 702, observes:

**"Staying of Actions against the Company**

In the case of a winding up by the court, a stay of proceeding pending against the company may be obtained at any time after the presentation of the petition and before the winding up order is made. Once the winding up order is made, no action or proceeding may be commenced against the company or proceeded with except with the leave of the court and upon such terms as the court may impose. The same is true of a voluntary winding up."

[10] The **Indian Companies Act 1956 (ICA 1956)** has a similar provision. However, it specifically provides jurisdiction to the winding up court to stay proceedings even in other courts. The said section 442 of the **ICA 1956** reads as follows:

**"S. 442. Power of Court to stay or restrain proceedings against Company.** - At any time after the presentation of a winding-up petition and before a winding-up order has been made, the company, or any creditor or contributory, may-

(a) where any suit or proceeding against the company is pending in the Supreme Court or in any High Court, apply to the Court in which the suit or proceedings is pending for a stay of proceedings therein; and

(b) where any suit or proceeding is pending against the company in any other Court, apply to the Court having jurisdiction to wind-up the company, to restrain further proceedings in the suit or proceeding;

and the Court to which application is so made may stay or restrain the proceedings accordingly, on such terms as it thinks fit."

[11] The jurisprudence related to a section 442 stay was explained by the learned author of A. Ramaiya, 'The Companies Act' 11<sup>th</sup> edition at page 1185 and reads as follows:

"After an application for winding-up is made and before passing an order for winding-up, the Court having jurisdiction to wind-up the company, may restrain all further proceedings in any suits and proceedings against the company pending in any Court, other than the Supreme Court or any High Court. In the case of a suit or proceeding pending in the Supreme Court or a High Court, application for stay will have to be made to that Court.

A stay under this section should not, however, be ordered mechanically or as a matter of course, but must be made judicially upon an examination of all the facts in their several aspects: *Official Liquidator Golcha Properties (P.) Ltd. v. Dharti Dhan (P.) Ltd.* (1977) 47 Com Cases 420 (SC).

A stay is not to be granted if the object of applying for it appears to be merely to delay adjudication on a claim. (*Ibid*).

Where a director was facing Civil and Criminal proceedings, his prayer that winding-up proceedings should be stayed till the disposal of the cases against him was not granted because the aim of a winding-up proceeding is different from the relief which may be sought against an individual director. *Hind Syntex Ltd. v. Dewas Textile Mills (P.) Ltd.*, (1988) 1 Comp LJ 178 (MP).

Where it was necessary in the interest of rehabilitating the company that the Company Court should have before it a full picture of the state of affairs of the company and that the company should not become the victim of conflicting High Court orders, the Supreme Court stayed the proceeding of a secured creditor against the company in the Bombay High Court and ordered its transfer to the Gujarat High Court where the main proceedings of the company's winding up were being conducted. The court noted the fact that a secured creditor is outside winding up but even so regarded the rehabilitation of the company as the fact of superior importance to that of a secured creditor. *Shree Vallabh Glass Works, Ltd. v. Industrial Credit and Investment Corporation of India Ltd.*, (1987) 62 Com Cases 101: (1987) 2 Com LJ 123 (SC).

Stay of proceedings under a State legislation in reference to relief undertakings has been held to be constitutional and valid because it deals only with an incidental matter and is not in the nature of a repugnant law. *Jaysynth Dyechem v. Mewar Textile Mills Ltd.*, (1988) 1 Comp LJ 70 (Raj).

The section being expressed in wide terms would seem to apply to all kinds of proceedings whether civil, criminal or revenue, and it will apply also to proceedings in foreign Courts. See *Re Vocalion (Foreign) Ltd.* (1932) 2 Ch 196; *In re International Pulp & Paper Co.*, (1876) 3 Ch D 594. It will be noted that the section applies only until a winding-up order is made. On the making of a winding-up order, section 446 will apply.

Proceedings in a Magistrate's Court fall within sub-sec. (b) and the Court has this power to grant stay. *Re. J. Burrows (Leeds) Ltd.* (1982) 2 All ER 882 (Ch D).

Note that it is only a suit or proceeding against the company that comes within the section."

### **Bowkett case and Sri Jeluda**

[12] In **Bowkett v Fulles United Electric Works Limited** [1923] 1 KB 160, there were peculiar facts. In that case, the company had issued short term notes which become immediately payable if execution either by writ or by the appointment of receiver levied on any part of the property or assets charged and the debt for which the levy was made were not paid off in seven days. The application for stay was not resisted on the grounds related to *bona fide*. When the application is a genuine application in the interest of all parties as well as the company in liquidation, the court had reiterated the well-established principle that 'in the absence of special circumstances, the court ought to exercise the discretion so vested in it by staying or restraining the proceedings with a view of securing equal distribution of the assets among creditors of the same class.

[13] In **Sri Jeluda Sdn Bhd v Pentalink Sdn Bhd** [2008] 4 CLJ 359, the case of **Bowkett** was referred to by the parties and the court dealt with the case and the general principles involved in

granting the stay. **Bowkett's** jurisprudence in fact was not a material consideration before the court, as the issue was whether section 222 of the **CA 1965** permits the winding up court to stay its own proceedings. The court there held *inter alia* that:

"(1) Section 222 of the Act clearly evinces the intention of the legislature to give courts the power to stay further proceedings in actions or proceedings (other than) the hearing of the winding up petition which is pending before the court. Section 222 of the Act does not empower the court to stay the proceeding of the winding up petition before it."

[14] We have read the application, affidavits and submissions of the parties. After giving much consideration to the submissions of the learned counsel for the applicant, we take the view that the application must be dismissed with costs. Our reasons *inter alia* are as follows:

(a) The threshold to satisfy an application for stay of proceedings in contrast to stay of execution in this time and era is very high as the trial court is required to dispose of the cases within a specific time, expeditiously and fairly. The old English cases before the coming into effect of Lord Woolf's report may not be helpful. [See Zukerman, A.A.S. (1995)]. The court's position in England as well as many other countries inclusive of Malaysia is that the 'overriding objective' of the court is to ensure that a case is dealt with economically, expeditiously as well as justly. In addition, if the application *prima facie* is not *bona fide*, the **Bowkett** principle will not apply and the application must be dismissed *in limine*.

(b) The applicant in this case is seeking for stay of proceedings in the High Court in reliance of section 44 of the **CJA 1964** as well as the inherent jurisdiction of the court. Section 44 does not explicitly permit the Court of Appeal to stay the proceedings of the High Court, unless the applicant can demonstrate the 'interim order will prevent prejudice to the claims of parties pending the hearing of the proceeding'. The affidavits filed by the applicant do not demonstrate the said element and in consequence the reliance of section 44 is misconceived. Section 44(1) of the **CJA 1964** states as follows:

"44. (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal."

(c) The applicant's reliance of inherent jurisdiction is also misconceived, as there was no sufficient material in the applicant's affidavit to demonstrate that the order for stay of proceedings is necessary to prevent injustice. The threshold to invoke the inherent jurisdiction of the court is very high and it is not sufficient if the allegation is related to surmise and/or conjecture. There must be actual evidence in fact and/or law to demonstrate that if the court does not exercise its inherent jurisdiction, indeed there will be miscarriage of justice related to abuse of process, etc. The leading case on point is **Charles Forte Investment Ltd. v Amanda** [1963] 1 Ch.D 240. In this case the defendant, a shareholder, threatened the plaintiff that he will present a winding-up petition if

certain of his shares were not registered. The company sought an injunction restraining the defendants from presenting the petition on the ground that his action was an abuse of the process of the court, and claimed that the petition was one which should be struck out under the court's inherent jurisdiction. *Willmer LJ* observed:

"The plaintiffs here invoke the inherent jurisdiction of the court to stay proceedings which are vexatious or an abuse of the process of the court. They do not rely on any of the Rules of the Supreme Court, but solely upon the inherent jurisdiction. The judge held that this jurisdiction should not be exercised unless it were made perfectly clear that the plea could not succeed. He then proceeded to consider whether in his view it could be said that the plea could not possibly succeed.

He considered, first, the contention that the petition would be bound to fail on its facts, and secondly, the contention that a winding-up petition was the wrong remedy. As to the latter, he came to the conclusion present, and that it was at least arguable that it might be an appropriate remedy in this case. As to the other point, he in the end felt unable to say that on the facts this petition must necessarily be bound to fail. Consequently, he came to the conclusion that this was not a case in which he would be justified in invoking the drastic remedy of halting the proceedings *in limine*. From that decision the plaintiff company appeals to this court.

I need hardly say that I differ with reluctance from a decision of such an experienced judge as Pennycuick J., although I am encouraged by the fact that both my brothers in this court take the same view as I do. I am bound to say, however, that I have found the argument in support of this appeal wholly convincing, and I am satisfied that the judge came to a wrong conclusion.

As to the circumstances in which the inherent jurisdiction of the court may be invoked, I entirely accept the judge's caution, which he quoted from the Annual Practice, 1963, that this is a jurisdiction to be exercised with great circumspection."

Danckwerts LJ observed:

"I agree that the appeal must be allowed. In my view, the petition, if allowed to proceed, must fail and the presentation of the petition would be an abuse of the process of the court and should be prevented under the inherent jurisdiction which the court possesses."

[See Janab's Key To Civil Procedure, 5<sup>th</sup> edn., pages 253 and 254].

**[15]** It is now well established that the court will not exercise its inherent jurisdiction to stay a proceeding unless there are extremely compelling reasons to do so and not merely on the grounds of what is often referred to as 'interest of justice', etc. The strict rule in vogue is that once an action is filed, it must proceed expeditiously. The threshold to seek a stay of proceedings is very high in cases before the trial court. Very importantly, if the *bona fide* of the application is in doubt, a stay application must be dismissed *in limine*.

**[16]** For reasons stated above, the application is dismissed with costs.

We hereby ordered so.

Dated: 7 September 2018

sgd

**DATUK DR. HAJI HAMID SULTAN BIN ABU BACKER**

Judge

Court of Appeal

Malaysia

**COUNSEL**

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**LEGISLATION REFERRED TO:**

*Companies Act 1965, Section 222*

*Companies Act 2016, Sections 465(1)(c), 465(1)(f), 465(1)(k), 470*

*Courts of Judicature Act 1964, Sections 44, 44(1)*

*Indian Companies Act 1956, Section 442*

**JUDGMENTS REFERRED TO:**

*Bowkett v Fulles United Electric Works Limited [1923] 1 KB 160*

*Charles Forte Investment Ltd. v Amanda [1963] 1 Ch.D 240*

*Sri Jeluda Sdn Bhd v Pentalink Sdn Bhd* [2008] 4 CLJ 359

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