MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Tengku Maimun Tuan Mat, JCA; Nallini Pathmanathan, JCA; Zabariah Yusof, JCA

Redmax Sdn Bhd v PSI Incontrol Sdn Bhd

Citation: [2018] MYCA 292 **Suit Number:** Civil Appeal No. B-02(NCC)(A)-2585-12/2017

Date of Judgment: 07 September 2018

Corporate insolvency – Winding Up – Whether the debt disputed – Whether the respondent a creditor within the meaning of section 218(2) of the Companies Act – Whether the respondent entitled to present the winding up petition

JUDGMENT

Introduction

[1] This is an appeal filed by Redmax Sdn Bhd ("the appellant") against the winding up order made by the High Court upon the petition presented by PSI Incontrol Sdn Bhd ("the respondent") under section 218(1)(e) of the **Companies Act 1965 ("the Companies Act")**.

[2] We had unanimously allowed the appeal and we now give our reasons.

Background facts

[3] The appellant was the main contractor for a project known as *"Merekabentuk, Membina dan Menyiapkan Kerja-Kerja Tebatan Banjir Sungai Muda (Bahagian Hilir) Kedah Darul Aman-Pakej 2"* ("the main contract") by the Government of Malaysia, under Jabatan Pengairan dan Saliran ("JPS").

[4] The appellant entered into a sub-contract with the respondent for the *"Design, Supply, Install, Testing and Commissioning of Automation System and SCADA System"*.

[5] The completion of the main contract was delayed and several extensions of time (EOT) were given by JPS to the appellant. Due to the delay of the main contract, the respondent's works were also delayed including the installation of the SCADA/ Automation System, as the installation room for the system has yet to be completed.

[6] By a letter dated 6.8.2013, the respondent applied for EOT to the appellant (EOT 1). In the said letter, the respondent stated that any additional costs incurred by the respondent will be forwarded to the appellant. The application for EOT 1 was approved by the appellant until 2.3.2014.

[7] The respondent then requested payment of RM1,461,050.00 being the additional costs incurred in respect of EOT 1 ("EOT 1 claim"). The respondent issued a letter of demand to the appellant on 27.11.2015 demanding the said sum as payment due and owing in respect of the EOT 1 claim.

[8] Vide a letter dated 4.12.2015, the appellant denied owing the respondent the said sum. The appellant stated inter alia that it is not in a position to pay for the EOT 1 claim to the respondent as it has not received any payment from JPS and was contemplating to arbitrate the matter with JPS. The appellant invited the respondent to join and share legal costs for the arbitration.

[9] The respondent contended that it was not privy to the agreement under the main contract and was not therefore obliged to participate or await the outcome of the arbitration. The respondent asserted that there is a genuine debt due and accrued which is not bona fide disputed by the appellant.

[10] By a letter dated 21.6.2016, the respondent served a statutory demand on the appellant pursuant to section 218(2)(a) of **the Companies Act**, demanding payment within 21 days from the date of service of the notice.

Proceedings in the High Court

[11] On 5.7.2016, the appellant filed an Originating Summons in the High Court seeking for inter alia an injunction to restrain the respondent from filing a winding up petition against the appellant premised on the statutory demand dated 21.6.2016 ("the fortuna injunction"). The application for the fortuna injunction was dismissed by the High Court.

[12] On 9.9.2016, a winding up petition was filed by the respondent. The petition was opposed by the appellant on several grounds, namely that the respondent is not a creditor as its debt is unascertained and is being assessed and that pursuant to the sub-contract, the respondent had to refer any dispute with the appellant to arbitration.

[13] The only issue before the High Court was whether there was a bona fide dispute on the sum of RM1,461,050.00 claimed by the respondent against the appellant.

[14] The learned judge resolved the issue in favour of the respondent for the reasons inter alia:

(i) that there was no dispute that the respondent had completed the works during the period of EOT 1;

(ii) since works had been done, the respondent is entitled to be paid;

(iii) the respondent's claim is a matter between the respondent and the appellant and had nothing to do with JPS;

(iv) that during the hearing of the fortuna injunction, the issues raised by the appellant on the bona fides of the respondent's claim were rejected by the court;

(v) that the clause 'pay when paid' in the sub-contract is not applicable; and

(vi) the appellant's failure to pay the respondent within 21 days triggers the presumption that the appellant is unable to pay its debt.

The Appeal

[15] Before us, learned counsel for the appellant highlighted that the sub-contract is back to back with the main contract and that the respondent's claim is disputed on liability and quantum. Learned counsel referred us to several letters exchanged between the parties to show that the respondent's claim was accepted for submission to, and subject to assessment by JPS. The respondent's claim is thus not ascertained and this is not a fit and proper case for the appellant to be wound up.

[16] For the respondent, learned counsel submitted that the learned judge was correct in his finding. Learned counsel emphasized that the appellant had accepted the respondent's claim. The claim is a clear bona fide claim which is not disputed by the appellant. It was also submitted for the respondent that the bona fides of the respondent's claim had been ventilated in the fortuna injunction hearing and in the appellant's application to strike out the petition which was dismissed. Hence it was argued for the respondent that the appellant is estopped from raising the same issues and that the appellant is caught by the doctrine of res judicata twice over. Learned counsel reiterated that the clause 'pay when paid' is not applicable to the respondent.

Our Decision

[17] The respondent sought to wind up the appellant not based on a judgment debt, but based on a claim by the respondent for works done during the period of EOT 1. In this regards, we echo the words of Mohd Ghazali J (as he then was) in **Metal Reclamation Industries Sdn Bhd v JRC Tenaga Sdn Bhd** [2000] 6 CLJ 290 at pg 295:

"Section 218 of the Act provides the circumstances in which a company may be wound up by court and sub-s. (1)(e) of the same provides the court may order the winding up if 'the company is unable to prove its debts'. ... Section 218(2) of the Act provides for the 'definition of inability to pay debts' and it read ...

A company shall be deemed to be unable to pay its debts if-

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company ... a demand ... requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

...

What is a "creditor"? According to Osborn's *Concise Law Dictionary*, 7th edn, a "creditor" is "a person to whom a debt is owing". In the instant case, is the petitioner a creditor? To entitle the petitioner to call itself a creditor, there must be a debt owing from the respondent to the creditor. The petitioner has not obtained a judgment against the respondent for the sum claimed which would have clearly shown it is a creditor. That being the situation it has to show that there is a debt owing from the respondent to them. The debt must also be undisputed.".

[18] In granting the winding up order, the learned judge accepted the respondent's contention that there exists a genuine debt due and accruing from the appellant to which there is no bona fide dispute.

[19] With respect we disagreed. Contrary to the findings of the learned judge, we found on the face of the records that the debt alleged to be due and owing by the appellant to the respondent is a disputed debt. And we were satisfied that the learned judge erred in his approach and conduct of the winding up proceedings. The winding up court should undertake a prima facie study to ascertain whether a debt is genuinely disputed. It does not warrant a minute examination of the factual basis as done by the learned judge, which is more properly dealt with by a civil court or arbitration as the case may be.

[20] Vide a letter dated 21.10.2013, the appellant wrote to the respondent stating inter alia that:

"2. Untuk makluman, keputusan kelulusan permohonan lanjutan masa pihak kami telah diluluskan.

3. Oleh yang demikian, pihak tuan diberi kelulusan tambahan seperti yang pihak tuan hasratkan sehingga 2/3/2014.

4. Sebarang hasrat menuntut kerugian dan/atau perbelanjaan tambahan adalah tertakluk dibawah kelulusan JPS dan pihak tuan boleh membuat tuntutan tambahan terbaru ini melalui pihak kami dengan kadar segera."

[21] The respondent, by a letter dated 25.2.2014 submitted a claim for RM1,461,050.00. The letter reads:

"... Regarding to the extension of time agreement, we would like to request addition cost variation due to additional cost that incurred during the remaining of above named project.

...

Your cooperation to get this claim approved is highly appreciated.".

[22] On 22.12.2014, the respondent wrote another letter to the appellant wherein the respondent states inter alia:

"2. ... we have discussed with JPS Projek Khas and they have agreed for PSI to proceed with these claims. However, Redmax has to pay PSI first before JPS can consider it as cost incurred in this

project. Redmax may claim back from JPS as a variation order for the SCADA works.".

[23] In its reply to the respondent solicitor's statutory demand, the appellant's solicitors wrote as follows:

"... Our client denies that the amount claimed by your client has become accrued and demandable by your client. Your client's demand is therefore pre-mature.

Our client states further that on a goodwill basis they have included your client's claim with theirs for payment of Extension of Time in relation to a project known as "Design, Supply, Deliver, Installation, testing and Commissioning of Automation System and SCADA System-Sungai Muda-Pakej 2".

At this juncture, your client's attention is drawn to the fact that at all times they have been receiving instructions directly from JPS's engineers on all works pertaining to the Extension of Time. Following that your client has been dealing directly with the QS department of JPS with their claims and now all of a sudden making the claim with our client.

Our client would like to make it clear that they have exercised reasonable endeavor to claim for this contractual benefits from JPS but due to delay our client has not received any payment from JPS. Since this contractual benefits from JPS have not been awarded to our client, hence they are also not in a position to award your client the same.".

[24] From the above exchanges, it is apparent that the appellant had not accepted the respondent's claim. What was accepted was the submission of the respondent's claim which remains to be assessed and ascertained by JPS. This fact was also averred to by the appellant in its affidavit in opposition to the winding up petition, where the appellant had stated inter alia that the Summary of Cost Variation Claim submitted by the respondent was incorrect and unsubstantiated (see pages 38-50 of Record of Appeal Part B).

[25] In its affidavit in opposition, the appellant had also alluded to clause 4 of the letter of award which states:

"The Sub-Contractor shall submit his interim progress claim on a monthly basis and carry out a joint site valuation with the Contractor and/or the Government's Representative(s).

All interim payments shall be made to the Sub-Contractor no later than the expiry of thirty (30) days from the date of receipt by the Contractor payment from the Government in respect of the claim for the work.".

[26] The appellant also relied upon clause 11.2 of the sub-contract to oppose the petition. Clause 11.2 reads:

"11.2 Subject to the Sub-contractor's compliance with this Sub-Clause, the Contractor shall take all reasonable steps to secure from the Employer (including the Consultant) such contractual

benefits (including additional payments, extensions of time or both), if any, as may be claimable in accordance with the Main Contract. The Sub-contractor shall in sufficient time, afford the Contractor all information and assistance that may be required to enable the Contractor to claim such contractual benefits. On receiving any such contractual benefits from the Employer, the Contractor shall pass on the Sub-contractor such proportion thereof as may in all circumstances be fair and reasonable, it being understood that, in the case of any claim of the Contractor for an additional payment, the Contractor's receipt of payment therefrom from the Employer shall be a condition precedent to the Contractor's liability to the Sub-contractor in respect of such claim. Sub-contractor will only be paid for any variation claims if Contractor's obtain the same from the Employer less any cost mutually agreed upon. ...".

[27] That the sub-contract is back to back with the main contract is also stipulated under the following clauses 3.1 and 4.2:

"3.1 The following documents shall be deemed to form and be read and construed as the Sub-contract, viz.:

a. The Main Contract Document (except for details of commercial related information);

b. The Sub-contract Document;

c. The Letter of Award or Acceptance between the parties hereto and all attachments and all annexure thereto.".

"4.2 The Sub-contractor shall deemed (*sic*) to have sighted the Main Contract and Sub-Contract documents ... and is fully aware and have full knowledge of the Contractor's obligations to the Employer and the Employer's requirements to the extent as it relates to the Sub-contract works. Where and to the extent of such obligations in the Main Contract relates to the Sub-contract, the same shall bind the Sub-contractor in a "back to back" basis with the Contractor. ...".

[28] It is further provided under clause 7.2 of the sub-contract as set out below that the respondent's claim under the EOTs would be investigated:

"Provided that the Sub-contractor shall not be entitled to such extension of time unless he has submitted to the Contractor notice of the circumstances which are delaying him within 7 days of such delay first occurring together with detailed particulars in justification of the extension of time claimed in order that the claim may be investigated at the time...".

[29] The respondent, vide paragraph 12 of the petition states that "... the Petitioner was informed by JPS that if the Respondent wishes to make a claim for the Petitioner's EOT 1 claim from JPS, the Respondent must first pay the Petitioner...". The respondent's statement is with respect, devoid of any basis and contrary to the terms of the sub-contract. There was nothing in the sub-contract that the respondent should be paid first by the appellant. Rather clause 13(b) states:

"The Contractor shall not be held responsible for any delay caused by the Employer or any third

party involved with the project that is beyond the control of the Contractor. The Contractor shall use all reasonable endeavours to claim for contractual benefits from the Employer should any delay occur. The Sub-Contractor shall only be accorded the same if the Contractor obtains the contractual benefits from the Employer.".

[30] Given the contemporaneous documents and the relevant provisions of the sub-contract, we found much force in the submission of learned counsel for the appellant that the respondent knew from the outset that the claims for additional costs forwarded to the appellant was for approval and payment from JPS and that only when the approval and payment was received from JPS would the appellant remit the approved payment to the respondent. In other words, there was some basis for the appellant to contend that the respondent's claim once forwarded to the appellant did not mean that the respondent would automatically be paid by the appellant.

[31] The appellant's claim against JPS, which includes the respondent's claim for additional costs incurred during the EOT 1, has not been resolved. It is pending in the arbitration proceedings. Thus, it cannot be said that there is no bona fide dispute on the respondent's claim against the appellant. The issues pertaining to the dispute, in particular 'pay when paid' ought to be dealt with in arbitration or in civil proceeding, should such proceedings be filed by the parties here.

[32] On estoppel and res judicata, we disagreed with the respondent that as a result of the dismissal of the applications for fortuna injunction and the striking out, the appellant is prevented from litigating the issue whether there was a bona fide dispute to the debt. Those two applications were interlocutory applications which were decided on certain established principles. The issue to be considered by us in this appeal was whether there was a genuine dispute about the debt. On this issue, we had a statutory duty to review the decision of the High Court. Res judicata and issue estoppel simply did not arise.

Conclusion

[33] On the facts before us, we were convinced that the learned judge was plainly wrong because:

(i) The main contract is clearly incorporated in the sub-contract;

(ii) As the sums payable to the appellant by JPS under the main contract are currently the subject matter of arbitration, it is clear that it cannot be said that the sums claimed by the respondent is not disputed;

(iii) The correspondence between the parties bears out the fact that the claim is disputed in that it requires proper assessment; and

(iv) There was no acceptance of the claim made in substance.

[34] Since the petition was based on a debt which was disputed on substantial grounds, we found that the respondent was not a creditor within the meaning of section 218(2) of **the Companies Act** and the respondent was thus not entitled to present the winding up petition.

[35] The appeal was consequently allowed with costs. The order of the High Court was set aside.

Dated: 7th September 2018

signed

TENGKU MAIMUN BINTI TUAN MAT
Judge
Court of Appeal

COUNSEL

For the Appellant: Renu Zechariah (Baskaran Manikam with him), Messrs. Bas Vin Associates

For the Respondent: Balvinder Singh (Nur Zalika Mohd Asri Redha with him), Messrs. Kenth Partnership

LEGISLATION REFERRED TO:

Companies Act 1965, Sections 218(1)(e), 218(2), 218(2)(a)

JUDGMENTS REFERRED TO:

Metal Reclamation Industries Sdn Bhd v JRC Tenaga Sdn Bhd [2000] 6 CLJ 290