CIPAA: Injunction to Restrain the Presentation of Winding Up Petition Based on CIPAA Adjudication Decision?

ASM DEVELOPMENT (KL) SDN. BHD v ECONPILE (M) SDN BHD
[Case No. WA-24NCC-363-07/2019]

INTRODUCTION

Following the decision in the case of **Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd [2019] 3 MLJ 244**, the Court of Appeal confirmed that a successful Claimant in **Construction Industry Payment and Adjudication Act 2012** ("**CIPAA**") may issue a Statutory Notice pursuant to Section 466 of Companies Act 2016 ("**Statutory Notice**" or "**466 Notice**") and proceed to wind up the Respondent Company based on the Adjudication Decision without the need to enforce the said Adjudication Decision pursuant to Section 28 of CIPAA.

The question then arises therefrom is whether one can dispute such Statutory Notice or 466 Notice pursuant to the Adjudication Decision either by setting aside the Statutory Demand and/or by applying to High Court for a Fortuna Injunction to restrain the presentation of winding up petition?

Recently, the High Court had in the case of **ASM DEVELOPMENT (KL) SDN. BHD v ECONPILE (M) SDN BHD [Case No. WA-24NCC-363-07/2019]** shed some light on this issue, giving the much-needed certainty to the current position.

BACKGROUND FACTS

The salient facts of the case are as of following:-

1) The Plaintiff is a property developer ("**Developer**"). The Developer had appointed the Defendant as the main contractor ("**Contractor**") for the construction of a project in Kuala Lumpur.

2) Subsequently, a dispute arose between the parties and the Contractor initiated CIPAA Adjudication Proceeding against the Developer to recover a total sum of RM74,887,164.34 due to undervaluation and unpaid progress claims.

3) In response, the Developer denied that there was any undervaluation and further contended that it had counterclaims and set-off which is in excess of the amount claimed by the Contractor in CIPAA Adjudication Proceeding.

4) Amidst the CIPAA Adjudication Proceeding, the Contractor issued a Notice of Arbitration against the Developer to refer the dispute and/or differences arisen between the parties. In response, the Developer also issued a Notice of Arbitration against the Contractor for a declaration of wrongful termination by the contractor and claim of loss and damage incurred.

5) Thereafter, the Adjudication Decision was given in favour of the Contractor whereby the Learned Adjudicator decided that the Developer is to pay the Contractor the adjudicated sum of RM67,985,244.12 (which was subsequently corrected to RM59,767,269.32).

6) Following therefrom, the Contractor issued the Statutory Demand or 466 Notice pursuant to Section 466(1)(a) of Companies Act 2016 (**CA 2016**) for the adjudicated sum.

7) In response, the Developer applied for an injunction to restrain the Contractor from presenting or filing the winding-up proceedings threatened (commonly known as "***Fortuna Injunction***").

8) Pertinently, subsequent to the issuance of the Statutory Demand, the Developer also took out an application to set aside the Adjudication Decision but the application was dismissed and the High Court also granted an order for the Developer to enforce the Adjudication Decision as a judgment.

LAW RELATING TO THE WINDING UP PROCEDURE

As a matter of general principle, a creditor may resort to wind up the debtor company and liquidate its assets and utilise the excess proceeds to satisfy the debt if the debtor company is unable to pay its debts.

The winding up procedure is initiated by the issuance of the Statutory Notice or the 466 Notice. If the Debtor Company is unable to meet the demand within 21 days, then the Debtor Company will be deemed "unable to pay its debt" under Section 465(1)(e) of CA 2016, and the Creditor may proceed to present a winding up petition to wind up the Debtor company.

On this note, the court has long recognised that the Debtor Company may prevent the creditor from commencing winding up proceeding by filing a Fortuna Injunction to restrain the presentation of winding up petition in the event where:-

i) The petition has no chance of success;

ii) The presentation of petition would cause irreparable damages to the company which can be satisfied if:-

a) There is a genuine dispute on the debt based on substantial grounds;

b) The debt is not disputed but the company "genuinely have a cross-claim equal to or exceeding the petitioner's debt" based on substantial grounds

ISSUES BEFORE HIGH COURT

Given that the Debtor Company may obtain a Fortuna Injunction provided that there is a genuine dispute of the debt, the 2 pertinent issues arose before the High Court are therefore:-

1) Whether an Adjudication decision, which has been ordered to be enforced under Section 28, disputable?

2) Whether an Adjudication decision is equal to a judgment of a Court of law and therefore, indisputable?

DECISION OF THE HIGH COURT

A. Whether the Adjudication Decision, which has been ordered to be enforced under Section 28, is disputable?

The Learned Judge first turned to the wording of Section 28 of CIPAA and undertook a detailed examination on the effect of the enforcement provision on the Adjudication Decision.

In doing so, the Learned Judge compared the wording of the enforcement provisions between the 2 alternative dispute resolution legislations in Malaysia, namely the Arbitration Act 2005 and CIPAA.

The Learned Judge observed that the enforcement provision under the CIPAA regime, i.e. Section 28 of CIPAA, merely provides that the adjudication decision is to be enforced "*as if it is a judgment or order of the High Court*".

In consequence thereof, the purpose and/or effect of the enforcement provision of CIPAA, i.e. Section 28, merely allows the Adjudication Decision to be executed in accordance with the rules on execution of order or judgment of the High Court "provided under Order 45 of the Rules of Court 2012, such as enforcement by way of a writ of seizure and sale, garnishee proceedings, order of committal, charging orders and the appointment of a receiver." The enforcement procedure of CIPAA under Section 28 does not turn the nature of the adjudication decision into a judgment of the High Court.

Conversely, the enforcement provision of the Arbitration Act, i.e. **Section 38(1) of Arbitration Act 2005**, provides that the arbitration award to be entered "*as a judgment in terms of the award*". Effectively, the enforcement procedure of the Arbitration Act transformed the arbitration award into a judgment of the High Court:-

> *"[54] Under section 28 of the CIPAA, an "adjudication decision" may be enforced by applying to the High Court for an order "to enforce the adjudication decision as if it is a judgment or order of the High Court (emphasis added)".*
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> *…*
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> *[56] In my view it is significant that in respect of arbitration awards, under section 38(1), they are to be entered "as a judgment in terms of the award (emphasis added)."* ***Upon being entered "as a judgment", the arbitration award is in effect transformed into a judgment of the Court.***
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> *…*
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> *[59] Unlike the formula adopted in section 38(1) of the Arbitration Act 2005 (or section 27 of the Arbitration Act 1952), section 28 of the CIPAA does not provide that an adjudication decision may be entered "as a judgment". An application under section 28(1) is only for "an order to enforce the adjudication decision as if it is a judgment or order of the High Court" (emphasis added).*
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> *[60] The formulation adopted in section 28(1) does not provide for an adjudication decision being entered by the High Court "as a judgment". It only provides for the enforceability or enforcement of an adjudication decision "as if it is a judgment". It does not go so far as to deem or to allow for an adjudication decision to be converted into a judgment of the Court."*

Premised on the aforesaid reasons, the High Court held that based on the wording of the enforcement provisions of CIPAA, i.e. Section 28, **an Adjudication Decision remains just an Adjudication Decision following the enforcement order under Section 28. As such, even after the order is obtained under Section 28, it is still subject to the provisions of CIPAA**:-

> *"[62] As an adjudication decision is not converted into a judgment of the Court, it remains an adjudication decision even if an order is obtained under section 28 and as such, it is still subject to the provisions of the CIPAA."*

B.   Is an Adjudication Decision disputable?

Having declared that an Adjudication Decision, which has been ordered to be enforced under Section 28 remains as an Adjudication Decision, the Court then turned to examine whether an Adjudication Decision can be disputed.

The Learned Judge observed that the nature of the Adjudication Decision is merely of "temporal finality" or "provisionally final" until the dispute is finally decided by way of arbitration or litigation. As a result, "an **adjudication decision is such that it is not final in a sense equal to the finality of a judgment of a Court**". In consequence thereof, the Learned Judge held that an **ADJUDICATION DECISION IS DISPUTABLE**:-

> *[63] Being subject to the provisions of the CIPAA includes being subject to the provisions of section 13 of the CIPAA. An adjudication decision is binding unless it is inter alia set aside or the "dispute is finally decided by arbitration or the court", giving rise to the commonly used oxymoron, "temporary finality".*
> *…*
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> *[69] Having regard to the provisions of the CIPAA and the rationale for this statutory adjudication mechanism, the very nature of an adjudication decision is such that it is not final in a sense equal to the finality of a judgment of a Court.*
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> *[70] By virtue of section 13 of the CIPAA, an adjudication decision is only provisionally binding if there are concurrent arbitration or Court proceedings, or conditionally binding if there are none but there might be such proceedings to have the dispute finally determined*
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> *[71] The very nature of an adjudication decision is therefore such that while it may be enforceable as if it were a judgment debt when ordered to be so, it is nevertheless disputable. It is still open to a party against whom the adjudication decision is given, to legally dispute the decision by way of arbitration or in Court.*
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> *[72] The position therefore is that a party against whom an adjudication decision is made may still dispute the decision, but until decided otherwise, the adjudication decision is to be honoured. If not honoured, and if so ordered by the Court, the adjudication decision is enforceable as a judgment of the Court, until and unless it is set aside or a final decision is arrived at to the contrary, in an arbitration or by a Court of law*

C. **The General Principles of Winding Up Procedure remains applicable**

Having held that an Adjudication Decision is disputable, the Learned Judge clarified that the decision herein does not contradict, and in fact was in line with the Court of Appeal's decision of **Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd [2019] 3 MLJ 244** where the Court of Appeal held that a Statutory Demand / 466 Notice can be based on an adjudication decision which had not been enforced under Section 28 of CIPAA.

The Learned Judge further noted that the general principle relating to winding procedure (e.g. Fortuna Injunction) will similarly be applicable for winding up proceeding based on a debt which arises from an Adjudication Decision:-

> *[80] That being the case, the body of law that has evolved and that would admit to the issue of an injunction to restrain the presentation of a winding up petition based on a debt that is the subject of a bona fide dispute upon substantial grounds was not displaced by section 28 of the CIPAA.*

> *[82] It also does not mean that winding up proceedings cannot be commenced based on a debt that has arisen by virtue of an adjudication decision – whether ordered to be enforced by the Court or otherwise (as in Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd [2019] 3 MLJ 244).*

> *[83] All it means is that the presentation of a winding up petition based upon an adjudication decision is not a specific statutory right provided under the CIPAA and is therefore subject to the general principles relating to abuse of the process of the Court referred to in Fortuna Holdings and the cases cited.*

D. **Whether there is a genuine Dispute and counterclaims and/or set-offs upon substantial grounds?**

On the facts of the present case, the Learned Judge found that there were disputes to the Adjudicated Sum by virtue of the Notice of Arbitration issued by the Defendant which has included the payments awarded to its favour under the Adjudication Decision, and the Notice of Arbitration issued by the Plaintiff includes claims for loss, expense and damage arising from the purported unlawful termination of Contract by the Defendant:-

> *[144] Clearly, there are disputes and arguments against each party's claims. However, based on the evidence made available, I am of the view that the Plaintiff's disputes of the Defendant's claims allowed by the Adjudication Decision and its counterclaims and/or set-offs, save for its claim of RM1,524,735-62 allegedly based on the Block Purchase Agreement, are bona fide and upon substantial grounds. Whether the Plaintiff will finally be successful is a matter for the arbitrator and I am not required to and I express no views on this.*

Premised on the aforesaid, the Learned Judge was satisfied that and therefore, allowed the injunction to restrain the Defendant from presenting the winding up petition against the Plaintiff.

SIGNIFICANCE OF THE DECISIONS

Following the decision of the High Court, it would now appear that:-

1) A successful Claimant in a CIPAA Adjudication Proceeding may issue a Statutory Notice / 466 Notice on the basis of a debt which arose by virtue of an Adjudication Decision;

2) However, a Statutory Notice / 466 Notice which is based on a debt arose by virtue of an Adjudication Decision is disputable (including Adjudication Decision which has been ordered to be enforced as a judgment of High Court under Section 28 of CIPAA);

3) Arising thereof, the Debtor Company may dispute and/or challenge the Statutory Notice / 466 Notice by way of Fortuna Injunction and/or opposing against the Winding up Petition by illustrating that there is a genuine dispute on the debt upon substantial grounds or if there exists a genuine cross-claim, counterclaim or set-off against the would-be petitioner for an amount or amounts greater than the alleged debt upon substantial grounds;

4) The issuance of Notice of Arbitration (provided that there is an arbitration agreement) comprising the subject matter in the CIPAA Adjudication Proceeding may give rise to a genuine dispute on the debt upon the substantial grounds.

CONCLUSION

In view of the High Court's decision above, the successful Claimant in a CIPAA Adjudication Decision would certainly need to be more cautious and wary in issuing Statutory Notice / 466 Notice based on a debt arising from Adjudication Decision.

This is especially so where the successful Claimant intends to make use of the winding up procedure to exert undue pressure on the Debtor Company for the payment of Adjudicated Sum. The decision will prevent the occurrence of such abuse which may give rise to grave consequences, and most often than not, triggers cross default and renders the Debtor Company paralysed financially. In fact, the Learned Judge had expressly cautioned against the use of winding up procedure as a mean of enforcement to secure payment.

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