

Perniagaan HLH Sdn Bhd v Funway Express Sdn Bhd [2007] MLJU 204

Malayan Law Journal Unreported

High Court (Kuala Lumpur)

Kang Hwee Gee, J

SAMAN PEMULA NO D8-24-83-2007

26 March 2007

Case Summary

CIVIL PROCEDURE — Injunction — Injunction to restrain party from presenting a winding-up petition against company — Decision due on appeal against judgment in default obtained against company

D. Paramalingam (*Krish Maniam & Co*)

KC Chow (Wong Choo & Partners)

Kang Hwee Gee, J

ALASAN PENGHAKIMAN LISAN OLEH YANG ARIF HAKIM DATO' KANG HWEE GEE

(Oral Judgment delivered immediately after submission.)

This is my oral judgment: (ex-tempore)

This is an application by the plaintiff seeking an interlocutory injunction to restrain the defendant from representing the winding-up petition pursuant to Section 218 (1)(e) of the Companies Act 1965 on account of the plaintiff being unable to pay its debt.

The defendant had obtained the judgment in default of defence against the plaintiff in the sum of RM732,553.75 at the Civil Court No. 2 arising from its claim against the plaintiff for a subcontract work that it had performed for the plaintiff.

The grounds upon which the plaintiff is seeking the order are as follows:

1. There is an application to set aside the default judgment. The said application was heard by the Senior Assistant Registrar and was dismissed. The plaintiff had proceeded to appeal to the Judge in Chambers and the decision would be forthcoming on 19.6.2007.
2. The judgment in default would mean that the merits of the case had not been adjudicated upon. The judge is due to give judgment and in the event that the judgment in default is reversed the plaintiff would suffer irreparable damage if the petition is presented.

The application is opposed by the defendant on the ground that:

1. According to case law *RHB Bank Berhad v Gunasingam a/l Ramasingam* [2002] 7 MLJ 492, the plaintiff must show that the petition is prima facie bound to fail adopting the test laid down in *Bryanston Finance Ltd v De Vires (No. 2)* [1976] Ch 63. The plaintiff must show that they are commercially solvent. See *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 per Gunn Chit Tuan SCJ.
2. We had to resort to recovering our judgment debt by seeking to wind up the plaintiff company as we had discovered that there is not much assets to enable the defendant to adopt a softer option of recovering the judgment debt by a writ of seizure and sale.

FINDINGS AND DECISION

Having heard the submission of parties it is clear to me that the defendant has in its hand a valid claim against the plaintiff which by the default judgment had crystallized into a debt thereby allowing the defendant to petition this court to wind up the plaintiff after having served the statutory notice. The petition if presented is therefore not bound to fail. There is accordingly no ground to restrain the defendant from pursuing its statutory right in rem under Section 218 (1)(e) of the Companies Act 1965.

However given the fact that the appeal before the judge is due to be decided upon on 19.6.2007, it would be fair and just to make an order that the defendant be allowed to present the petition only if the judgment in default is confirmed. This is on account of the fact that a hearing of an appeal before the judge in chambers is to be treated as an extension of the hearing before the Senior Assistant Registrar "as though the matter comes before him for the first time". See *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97.

The defendant shall only be entitled to costs of this application if the judge hearing plaintiff's appeal decides in its favour in the appeal before him.