

Teras Kapital Sdn. Bhd v Mott Macdonald (Malaysia Sdn Bhd [2008] MLJU 256

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HIGH COURT (KUALA LUMPUR)

KANG HWEE GEE, HMT

SAMAN PEMULA NO D8-24-87-2008

24 April 2008

*D. Paramalingam (**Krish Maniam & Co.**) for the plaintiff**Tharminder Singh (Mohd Izral Khairy with him) (Izral Partnership) for the defendant***KANG HWEE GEE, HMT**

This is an application by the plaintiff to restrain the defendant from presenting the winding up petition under Section 218(1)(e) of the Companies Act 1965 (a Fortuna Injunction) on account of the company being unable to pay its debt.

The grounds relied upon by the plaintiff for making this application is as follows:

- (1) The statutory notice was issued for the sum of RM3,547,306.96 pursuant to a Settlement Agreement executed between a company known as Teras Services Sdn Bhd a subsidiary company of the plaintiff and the defendant on 6.6.2005.
- (2) The plaintiff had executed a Corporate Guarantee to guarantee the payment of the sum of the amount due and owing under the Settlement Agreement.
- (3) The defendant has not filed any civil suit to recover the settlement sum from Teras Services Sdn Bhd. The 218 notice issued by the defendant was therefore meant to pressurize the plaintiff into paying the amount without resorting to first recovering the sum from the principal debtor Teras Services Sdn Bhd.

The defendant opposed the application on the following grounds:

1. The sum claimed is an admitted sum. See Enclosure 7 Exhibit "D-1" pages 1-5 the Settlement Agreement which was signed and stamped in particular Recital D where there is an unequivocal admission of the amount due read together with the First Schedule at page 4. It is also necessary to note paragraph 1 of the Settlement Agreement in which it is clearly stated that Teras Services will pay the amount due

in the First Schedule in accordance with the instalment plan set out in the Second Schedule at page 5 and the payments were due and had only been partly paid.

2. This Settlement Agreement is secured by a Corporate Guarantee given by the plaintiff which can be found in Exhibit "D-2" of Enclosure 7 at pages 6 and 7. It is apparent from the introductory paragraph that the guarantee is to secure the Settlement Agreement and by the 1st paragraph the plaintiff had irrevocably and unconditionally agreed to pay to the defendant all sums of monies which is or may become due from Teras Services to the defendant.
3. See *Re Sunshine Securities (Pte) Ltd.; Sunshine Securities (Pte) Ltd. & Anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd.* [1978] 1 MLJ 57 at 59 with respect to admitted debt, the court would have to find there was no bona fide dispute on the amount claimed for the purpose of a petition for winding up under Section 218(1)(e) of the Companies Act 1965. See also the Supreme Court decision in *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 at 448 :

"In our judgment, as the debt of \$60,580 is not disputed the respondent company is caught under section 21 8(2)(a) as having neglected to pay it and is deem-ed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discre-tion to order winding up or not to order it."

4. It is trite law that in order to institute a winding up petition under Section 218(1)(e) the petitioner need not have a judgment. See *Syarikat Mohd Noor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd* [2005] 2 CLJ 676 at 686 :

"We are aware that it is not provided under the Act that a petitioner must be armed with a judgment debt prior to the filing of a petition to wind up a company. "

FINDINGS AND DECISION

The right to present a petition to wind up a company on the ground that it is unable to pay its debt is a statutory right under s 218(1)(e) of the Companies Act 1965, and the court would not act to undermine that right unless it is clear that the petition is bound to fail under the very broad test of *Bryanston Finance Ltd v. de Vires (No 2)* [1976] Ch 63. The Court of Appeal has since in *MOBIKOM SDN BHD v. INMISS COMMUNICATIONS SDN BHD* [2007] 3 CLJ 295 refined the test by which an intended winding up petition may be restrained following *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83 where according to Gopal Sri Ram JCA the "juridical basis for the relief was first explained". The principle is very well summarised by the editors of the CLJ in the headnotes as follows:

- (3) The kind of injunction by which an intended winding up petition is sought to be restrained is known as "Fortuna injunction". The phrase takes its name from *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* where the juridical basis

for the relief was first explained. Fortuna Holdings made it clear that the courts have established a principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. It was also clear that two distinct branches emanate from the principle - of which the first applies in cases where the presentation of the petition may produce irreparable damage to the company and where the proposed petition has no chance of success, and the second in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure. (paras 5-7)."

It is clear that given the unequivocal terms by which the plaintiff had committed itself to guarantee the payment of the debt of its subsidiary vide the Corporate Guarantee dated 6.6.2005, it could now no longer be in a position to dispute that debt in so far as it intends to oppose the winding up proceeding that would follow.

It is therefore clear that the defendant's petition if presented is not bound to fail under the Bryanston Finance test and therefore the plaintiff's application must be dismissed with costs.

The parties are agreed that the plaintiff withdraws the Originating Summons No. D8-24-87-2008 which it had filed in order to commence this interlocutory proceeding with no order as to costs. The Originating Summons is hereby struck off.