IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
[ORIGINATING SUMMONS NO: WA-24NCC-46-01/2024]

In the matter of sections 465(1) and s.466(1) of the Companies Act, 2016

And

In the matter of Order 7, 28 and 29 of the Rules of Court 2012

And

In the matter of Order 92 Rule 4 of the Rules of Court 2012

And

In the matter of section 50, 51 and 52 of the Specific Reliefs Act 1950

BETWEEN

JENERI OIL PALM SDN BHD
[Company No: 201901028470 (1337799-K)] **... APPLICANT**

AND

DITALI PALM OIL MIL SDN BHD
[Company No: 1347035-X] **... RESPONDENT**

GROUNDS OF JUDGMENT

Introduction

[1] The Applicant in their Originating Summons as documented in enclosure 1 prayed for the following orders:

1. *Bahawa satu perintah injunksi ad interim terhadap Responden sama ada diri mereka sendiri, ejen-ejen mereka, pengkhidmat-pengkhidmat mereka atau sesiapa sahaja dihalang daripada mengemukakan dan/atau cuba untuk mengemukakan petisyen penggulungan atau permohonan untuk penggulungan syarikat Pemohon berdasarkan notis menurut Seksyen 466 Akta Syarikat 2016 bertarikh 08.01.2024 yang dikeluarkan oleh Peguamcara Responden ("Notis Seksyen 466") dan/atau hutang berkenaan yang dituntut dalam Notis Seksyen 466 tersebut sehingga Mahkamah yang Mulia ini mendengar dan melupuskan Saman Pemula ini;*

2. *Bahawa satu perintah injunksi terhadap Responden sama ada diri mereka sendiri, ejen-ejen mereka, pengkhidmat-pengkhidmat mereka atau sesiapa sahaja dihalang daripada mengemukakan dan/atau cuba untuk mengemukakan petisyen penggulungan atau permohonan untuk penggulungan Pemohon sebagaimana berdasarkan notis menurut Seksyen 466 Akta Syarikat 2016 bertarikh 08.01.2024 yang dikeluarkan oleh Peguamcara Responden ("Notis Seksyen 466") dan/atau hutang berkenaan yang dituntut dalam Notis Seksyen 466 tersebut;*

3. *Bahawa jika petisyen penggulungan atau permohonan untuk penggulungan telah difailkan oleh Responden berdasarkan Notis Seksyen 466 dan/atau berdasarkan hutang berkenaan yang dituntut melalui Notis Seksyen 466, Pemohon memohon satu perintah yang seperti berikut:-*

a) Respondendenganserta-mertamenarikbalik petisyen penggulungan tersebut; dan

b) Responden membayar ganti rugi yang ditaksirkan oleh Mahkamah kepada Pemohon

[2] The issuance of the Statutory Notice of Demand by the Respondent on the Applicant pursuant to s. 466 of the Companies Act 2016 ("the s.466 Notice") was premised on an audit confirmation report and investigation of available records, which showed a sum of RM14,342,442.15 being due from the Applicant to the Respondent. This is pursuant to the Applicant's default in complying with the Management, Operations and Maintenance Agreement between the Applicant and the Respondent where the Applicant was to be responsible for the management and operations of the Palm Oil Mill.

[3] At the conclusion of the hearing, this Court dismissed enclosure 1 and refused to issue the Fortuna Injunction. Below are the reasons for the dismissal.

Parties' contention

[4] The Applicant argued that they have a valid argument for the Court to consider that there is a bona fide disputed debt based on the following:

a) the Respondent owes the Applicant a higher outstanding sum;

b) debt is not premised on a final judgment. Basis of the claim on the debt sum is unlawful, defective and illegal;

c) admission of debt is just an administrative document and not a conclusive proof of debt; and

d) the Audit Confirmation for September 2023 in the sum of RM14,342,442.15 is unsigned and disputed.

[5] In essence, the Applicant urged this Court to allow the said injunction as it had a bona fide disputed debt.

[6] In resisting the application, the Respondent claimed that it has a right to demand for the sum stated in the s.466 Notice as the Applicant has been owing them the said sums over several years as shown in their Statement of Account.

[7] It was also contended by the Respondent that there was an Audit Confirmation signed by the Applicant that as at 31.03.2022, there was a sum of RM13,359,468.76 due and payable to the Respondent. As there were no payments made by the Applicant, sums in the Statement of Account rolled over to the following year up to the date when the s. 466 Notice was issued.

Law on Fortuna injunction

[8] In the celebrated Australian case of ***Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83***, it was held that an injunction would only be granted in circumstances where to allow the petition would be an abuse of process as the petition has no chance of success. The applicant in such a case would have to establish that, the petition if presented, would likely be dismissed.

[9] In the Court of Appeal case of *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295, Gopal Sri Ram JCA (as he then was) held that the court would have to consider whether there is bona fide dispute of debt based on substantial grounds. It was held that:

> *"The kind 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 case 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 is 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.*** "

[10] The Court of Appeal again in *Pacific & Orient Insurance Co. Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947 (***P&O v. Muniammah***) provided further clarity on the two (2) principles that courts must be guided by when considering an application for a Fortuna Injunction. They are -

i. the intended petition has no chance of success, as a matter of law as well as a matter of fact and the present of such petition might produce irreparable damage to the company; or

ii. an assertion of a disputed claim is made in the petition by way of a procedure that might produce irreparable damage, rather than by a suitable alternative procedure.

(See also *ISO Marketing & Services Sdn Bhd v. Low Ju Nai* [2018] CLJU 944; [2018] 1 LNS 944, *Klass Corporation (M) Sdn Bhd v. MKRS Management Sdn Bhd* [2018] 7 CLJ 303 and *SME Majujaya Sdn Bhd v. Oon Brothers Electrical Trading Co. Sdn Bhd* [2018] 1 LNS 945).

Analysis and findings of this Court

Issue - Whether the Applicant has succeeded in demonstrating that there is a disputed debt.

[11] The onus of demonstrating that there is a disputed debt lies on the Applicant. However, it is also critical that this Court examines the basis of the s.466 Statutory Notice issuance.

[12] I disallowed the application for the Fortuna Injunction on the following grounds:

A. No disputed debt

i. Evidence of sums due

[13] In my view, the Respondent has clearly explained to this Court how the sum stated in the S.466 Notice was derived from. It was explained during submissions that the applicable set of accounts is a running account. It originated from the Audit Confirmation signed by the Applicant dated 10.11.2022 for the sum of RM13,359,468.76.

[14] This Court is entitled to accept an Audit Confirmation signed by a party acknowledging the sum as the sums due. Case laws are replete on this point (see ***Sagujuta (Sabah) Sdn Bhd v. Trane Malaysia Sales & Services Sdn Bhd [2014] 5 MLJ 535*** and ***Ibai Golf & Country Club Bhd v. Laman Kejora Sdn. Bhd. [2019] MLJU 1226***).

[15] It is my finding that as the Applicant failed to make any payment from the date of the 2022 Audit Confirmation, the sums then snowballed to the sum as stated in the s. 466 Notice.

[16] This Court is satisfied with the meticulous explanation by Respondent counsel who managed to explain each line of the running account up until the sums claimed in the s. 466 Notice. As such, the Respondent's reliance on the 2022 Audit Confirmation signed by the Applicant as the conclusive sum for the period stated ending 31.3.2022, was not wrong. It served as a conclusive sum confirmed

by the Applicant themselves as due and owing as at the Audit Confirmation document.

[17] Even if the Applicant did not sign the 2023 Audit Confirmation, the accounts nevertheless, being a running account, show the flow of sums due and owing to the Respondent. This Court is satisfied that the Respondent has justified its entitlement to issue the s.466 Notice. From the said accounts, it is clear that no bona fide disputed debt exists.

ii. No contemporaneous conduct to dispute the sums claimed

[18] There was no evidence produced by the Applicant that they engaged the Respondent. Even after a Letter of Demand was sent to the Applicant, no response was received from the Applicant to dispute the sums demanded. The issues brought up in this application was never brought up until the hearing of this application.

[19] It is the Court's view that the best opportunity to dispute the debt or at least put the Respondent on notice was on 24.05.2023 when the Letter of Demand was issued. After all, it was a big sum that was being disputed. Only after the s.466 Notice was issued that the sum demanded was disputed.

[20] The Court finds the conduct of the Applicant is inconsistent with the conduct of a person who genuinely wants to contest a claim. Even more perplexing is the colossal sum of RM33,000,000.00 said to be in dispute. To only raise the issue after the s.466 Notice was issued reeks an afterthought.

iii. Self serving document

[21] The sum of RM33,000,000.00 claimed to be due to the Applicant originates from a document issued by the Applicant themselves. It is an un-dated document and is highly suspicious. No explanation was given as to why the document was undated or why it was created in

such a form. It is this Court's view that if such a large sum is being claimed, there would be supporting documents that can be produced to show how the said sums were arrived at.

[22] Instead, no other documents were tendered to justify the said claim. The duty of the Applicant is to prove there is a bona fide disputed debt. It must therefore entail credible evidence to be considered. Without more, the document is a self-serving document which holds no weight.

iv. Inaccurate factual submission

[23] One of the main reasons the Applicant raised to prove the disputed debt anchored on a purported *WhatsApp* conversation between the representatives of the parties. From the *WhatsApp* conversation, the Applicant claimed the Respondent had acknowledged the disputed debt. This was however shown to be otherwise. During submissions, En Ashok acting for the Respondent, showed the context of the *WhatsApp* conversation. A read of the conversation (found at A-6 of Enclosure 18) did not contain any admission of the Respondent's representative. As such it was wrong and misleading for Applicant counsel to exhibit the *WhatsApp* conversation as evidence of the Respondent's acknowledgement of dispute. Had it not been for Respondent counsel's intervention, the message would have been taken as evidence in support of the Applicant's claim that there was an acknowledgement by the Respondent that there were sums that were disputed. The error was subsequently acknowledged by Applicant counsel as an oversight.

[24] Notwithstanding the apology tendered, I find the error serious. It could have easily led this Court to reason on a non-existent admission. In the absence of any proof of admission by the Respondent, the foundation of the Applicant's claim that the Respondent admitted the existence of a disputed debt collapsed.

B. ***P & O v. Muniammah***'s conditions not met

[25] In ***P & O v. Muniammah*** *(supra)*, in expanding the principles of Fortuna Holdings, the Court of Appeal held that to succeed in obtaining an injunction, two (2) other conditions are to be met. They are-

i. that the petition, if presented, has no chance of success as a matter of law as well as a matter of fact; and

ii. the presentation of such a petition that has no chance of success might produce irreparable damage to the company.

[26] It is trite that the Applicant bears the onus of showing the two (2) conditions. Both the conditions are pegged to the chance of success to challenge the winding up petition.

[27] As earlier stated, there is an undisputed debt. A failure to show at this stage of a bona fide dispute of the judgment debt on substantial grounds is an indication of the high chance of success of the Applicant being wound up.

Conclusion

[28] The Applicant has failed to demonstrate to this Court its entitlement to a Fortuna Injunction and the application is dismissed with costs of RM5,000.00.

Dated: 23rd September 2024

(AHMAD FAIRUZ ZAINOL ABIDIN)
Judge
High Court of Malaya
Kuala Lumpur

Counsel

For the applicant - Azzan Aznan Abdul Rahim & Mohd Nor Syazwan Che Hasim; M/s Syazwan Hasim & Azeel Eskandar

For the respondent - Mishand Patmanathan; M/s. Haris Ibrahim Kandiah Partnership