IN THE COURT OF APPEAL AT KOTA KINABALU, SABAH

CIVIL APPEAL NO S-02(NCVC)(A)-1361-07/2017

BETWEEN

LIKAS BAY PRECINCT SDN BHD ... APPELLANT

AND

BINA PURI SDN BHD ... RESPONDENT

[In the matter of High Court of Sabah and Sarawak at Kota Kinabalu

Companies Winding Up No. BKI-28NCC-11/3-2017

Between

Bina Puri Sdn Bhd ... Petitioner

And

Likas Bay Precinct Sdn Bhd ... Respondent]

CORAM:

DAVID WONG DAK WAH, JCA

ABANG ISKANDAR BIN ABANG HASHIM, JCA

YEOH WEE SIAM, JCA

JUDGMENT OF THE COURT

Brief facts of the case

[1] Bina Puri Sdn Bhd ("the Petitioner") obtained an Adjudication Award dated 31 December 2016 ("Adjudication Award") against Likas Bay Precinct Sdn Bhd ("the Respondent") in the matter of an adjudication conducted pursuant to the Kuala Lumpur Regional Centre for Arbitration Rules ("KLRCA Rules") and Construction Industry Payment and Adjudication Act 2012 ("CIPAA 2012") for the certified sums amounting to RM16, 439, 628.24.

[2] The Petitioner served a Statutory Notice of Demand dated 31 January 2017 ("the Statutory Notice") pursuant to Section 465 of Companies Act 2016 ("CA 2016") together with their letter dated 31 January 2017 on the Respondent at its registered office in Kota Kinabalu.

[3] The Petitioner further stated that as at the date of the Petition the Respondent has neglected and/or failed to pay or satisfy the Adjudicated

Sum or any part thereof or to secure or compound for it to the reasonable satisfaction of the Petitioner.

[4] Consequently, the Petitioner presented this Petition dated 17 March 2017 to wind-up the Respondent pursuant to section 465(1)(e) and 465(1)(h) of the Companies Act 2016, i.e., on the ground that the Respondent was unable to pay its debt and that it was just and equitable that the Respondent be wound up.

[5] The Respondent resisted this application on two grounds;

i. The Statutory Notice which was premised on an Adjudication Award was defective as under the said award no payments were ordered to be paid to the Petitioner by the Adjudicator but instead, the payments were ordered to be made by the company to the KLRCA.

ii. It was not just and equitable for the company to be wound up when the company was expecting progress payment amounting to RM18, 606, 483. 03 from Malaysia Building Society Berhad ("MBSB") which was the financier for Yayasan Universiti Malaysia Sabah and that the company had gross development value amounting to RM237, 817, 686. 00 in

connection with the construction of a proposed 25-storey student hostel for Yayasan Universiti Malaysia Sabah.

[6] The Petitioner submitted that the Respondent's current bank balance was not sufficient to pay the debts owed to the Petitioner. As at 05 April 2017, the amounts available in the Respondent's bank accounts only totalled up to RM 6, 162. 38.

Findings of High Court

[7] Upon hearing the parties, the High Court granted the winding up order as applied by the Petitioner. Dissatisfied with the decision of the learned Judicial Commissioner ("JC"), the Respondent had since appealed to this Court.

The Appeal

[8] We heard this appeal on 17 November 2017. After perusing the Records of Appeal and considering submissions from both parties, we unanimously dismissed the appeal with costs of RM 10, 000. 00 to be paid by the directors of the Respondent, Likas Bay Precinct Sdn Bhd being the Appellant in this appeal, subject to payment of allocator fees. These are now our grounds for having so decided. By way of reiteration, in our

ensuing grounds, Likas Bay Precinct Sdn Bhd will be hereinafter referred to as the Appellant and Bina Puri Sdn Bhd will be referred to as Respondent Petitioner.

[9] Before us, the Appellant raised three main issues namely:

i. The defective Statutory Notice and the Court is *functus officio* on the adjudicated mode of payment of the adjudicated sum under the Adjudicated Decision dated 31 December 2016.

ii. Winding up of the Appellant on the just and equitable ground was not made out by the Respondent Petitioner nor supported by any evidence.

iii. That it was premature for the Respondent Petitioner to rely on the unregistered Adjudication Decision dated 31 December 2016 as the sole basis to issue the Statutory Notice for Winding Up dated 31 January 2017.

[10] Essentially, the three points were raised before us by learned counsel for the Appellant could be summed up to be these:

i. That the winding-up notice by the Respondent Petitioner had been premature in that the adjudication decision had not been registered with the High Court which would convert it to a High Court order pursuant to section 28 of CIPAA.

ii. That the adjudication order did not name the Respondent Petitioner as the recipient of the monies due from the Appellant, and such it was wrong for the Respondent Petitioner to pursue this petition in the circumstances, in the sense that there was nothing owing to it under the adjudicator's order.

iii. It was also the complaint of the Appellant that it was not just and equitable for the High Court to have granted the petition.

[11] We will deal with the ground on the alleged prematurity of the filing of the winding-up petition first. The contention by the Appellant on this point may be summarised as follows. It was its position that as the adjudication decision dated 31 December 2016 had not been registered with the High Court under section 28 of CIPAA, it follows therefore that there was no Judgement that could be used by the Respondent Petitioner as a basis to file the winding-up petition against the Appellant. According to the learned counsel for the Appellant, registering the adjudication order with the High Court was a prerequisite that must be complied with by the Respondent Petitioner before a petition pursuing the Appellant's winding up could be undertaken by the Respondent Petitioner in the name of realising its fruit of successful adjudication. In support of this contention, the learned counsel for the Appellant had placed reliance on the decision

of this Court in the case of **Mobikom Sdn Bhd V. Inmiss Communications Sdn Bhd** [2007] 3 CLJ 295 ("the **Mobikom** case"). A High Court decision, in the case of **Hing Nyit Enterprise Sdn Bhd v. Bina Puri Construction Sdn Bhd** [Case no. BKI-28NCC-6/2-2015] ("the **Hing Nyit Enterprise** case") which had followed the **Mobikom** case [supra] was also cited before in support of the Appellant's contention. It was not indicated to us what happened to the High Court decision, in terms of whether there was any appeal made against it and if there was, what the outcome of such appeal was.

[12] Suffice for us to note here that the Respondent Petitioner had submitted that the **Mobikom** case [supra] could be distinguished on the facts and circumstances as it was concerned with the provisions under the Arbitration Act 1952, whereas this instant appeal before us had been concerned with the provisions under the CIPAA.

[13] It was submitted before us that a subsequent High Court in Kota Kinabalu in the case of **Hing Nyit Enterprise** [supra] had followed the **Mobikom** case [supra]. Learned counsel for the Appellant before us had urged us to also follow the same, as the circumstances obtaining in the High Court was intrinsically similar with our case, whereby the successful claimant in an adjudication proceeding had filed in a winding up petition

against the losing party but without first having registered the adjudication decision in the High Court under section 28 of CIPAA.

[14] In that **Hing Nyit Enterprise** case [supra] the learned High Court had stated as follows:

> "However, to my mind, as the respondent had refused to pay in accordance with the Adjudication Decision, the petitioner is, to all intents and purposes, actually attempting to "enforce" the said decision by filing the instant winding up petition. Therefore, petitioner is obliged to comply with the clear provision of section 28 which stipulates that a party who enforces the decision of the Adjudicator must apply for an order as if it is a judgment or order of the High Court. In other words the Adjudication Decision must be converted to a High Court judgment or order if it is to be enforced. In the instant case, it is common ground that the petitioner failed to do so. I also find that the case of *Mobikom Sdn Bhd Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 which was cited by counsel for respondent is relevant by way of analogy. The said case concerns a provision in the repealed Arbitration Act 1952. Section 27 of the repealed Act read as follows:

> An award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and, where leave is so given, judgment may be entered in terms of the award.

In the above mentioned case, the Court of Appeal accepted the observation of the High Court in the case of *Malayan Flour Mill v Raja Lope & Tan Co* [2000] 7 CLJ 288 that the arbitration award must be converted into a judgment or order of the court before the successful party can levy execution. It was held in that case that the defendant's action to issue notice under section 218 of the Companies Act 1965 to the plaintiff without first registering the award under section 27 of the Arbitration Act 1952 was pre-mature. Similarly, as I noted earlier, under section 28 of CIPAA an Adjudication Decision may be enforced after an order is sought from the High Court. Arbitration Act 2005 does not contain a similar provision as section 27 of the repealed Arbitration Act 1952. Be that as it may, section 28 of CIPAA has a similar provision. Therefore, I see no good reason why I would lightly ignore the principle enunciated in *Malayan Flour Mill Bhd v Raja Lope & Tan Co* (supra) and *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* (supra) in respect of

the need to convert an Adjudication Decision into a judgment of the court. On this ground alone, I hold that the instant winding up petition is pre-mature and should be struck out. For sake of completeness, I shall consider below the other grounds."

[*Emphasis underlined*]

[15] As we had alluded to earlier, we were not advised by parties as to what had subsequently happened to the **Hing Nyit Enterprise** decision [supra] of the High Court. Be that as it may, even noting from the observation of the learned High Court himself, he was aware that the existing Arbitration Act 2005 does not carry with it anymore provisions similar to the section 27 of its repealed predecessor, where the latter had been interpreted by the **Mobikom** case [supra] the way it did. As is to be recalled, the learned Judge chose to follow the ratio in the **Mobikom** case [supra] and the **Malayan Flour Mill Bhd v Raja Lope & Tan Co** [2000] 7 CLJ 288 as well.

[16] Now, in our view, the language employed under section 28 of CIPAA, does not convey such an interpretation, in the sense that the decision of the adjudicator must be registered with the High Court before a statutory notice under section 465(1)(e) and (h) of the Companies Act

2016 could be issued. Rather, it was our view that for the purpose of issuing a notice to wind-up a company pursuant to section 465(1)(e) and (h) of the Companies Act 2016, it is not a mandatory requirement that there must be a *judgement* entered in favour of the Respondent Petitioner for the amount that was being claimed and pursued against the Appellant debtor for payment of the same. In the case of **NCK Wire Products Sdn Bhd v Konmark Corp Sdn Bhd** [2001] 6 MLJ 57 ("the **NCK Wire Products** case") the petition to wind-up the respondent company was resisted, among others, on the ground that the petitioner had *failed to obtain judgement* for the amount *prior* to bringing the winding up proceedings against the respondent. The debt was in relation to non-payment of bills for goods sold and delivered by the petitioner to the respondent company. This objection was dismissed by learned Justice T Selventhiranathan J (as he then was) whereby he was of the view that the crux of the matter was whether the respondent was indebted for the amount claimed and that it was unable to pay its debt to the petitioner. On the facts of that case, since the petitioner had shown that the respondent could not pay the said debt, the 2 enclosures by the respondent, objecting to the winding-up petition were dismissed with costs.

[17] Again, *prima facie*, a creditor who is not paid, has a right to file a petition to wind up the debtor company. That appears to be the law. In this

regard, the case of **Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd** [1991] 1 MLJ 95 ("the **Morgan Guaranty Trust** case") in our view deserved mention. Briefly, the relevant facts in this **Morgan Guaranty Trust** case [supra] are as follows. The petitioner had demanded a sum of $33,323,593.91 from the respondent but the respondent had failed or refused or neglected to pay the said sum. The petition for winding up also relied on the profit and loss account of the respondent company which showed that liabilities exceed assets and that the respondent company had incurred a loss, and also on just and equitable grounds that the company should be wound up. The respondent company filed a notice of motion seeking that the winding-up petition be set aside on the grounds that the petitioner was not entitled to present the petition and that the petition did not disclose a cause of action. The learned trial Judge set aside the petition on the sole ground that in his view the petitioner had no locus standi to present the petition (see [1990] 1 MLJ 282). He stated that he was 'far from satisfied that the petitioner was at the material time qualified to petition the court as it did'. The learned Judge took the view that the demand for payment was stage-managed and he also referred to a sharing formula agreed to by the creditors of the company which he regarded as a moratorium of the claims against the company.

[18] On appeal against the High Court's decision, and in the course of his judgement in the **Morgan Guaranty Trust** case [supra], Hashim Yeop Sani, CJ (Malaya) had proceeded to say the following:

> "There are many tests to be applied to see whether a petitioner for a winding-up order has locus standi. Insolvency is always a ground relied on in a petition. Prima facie an unpaid creditor is entitled to petition for a winding-up order against a company which fails to pay its debt. Macpherson says that the only test which seems capable of resolving all difficulties is that suggested by Crossman J in Re North Bucks Furniture Depositories Ltd, namely, that the term 'creditor' 'includes every person who has the right to prove in winding-up'.

[19] Indeed, the learned Justices of the Supreme Court in the **Morgan Guaranty Trust** case [supra] went on to say that the learned trial Judge was wrong to have struck out the petition *in limine* when instead it should have been heard on its merits. The appeal was allowed.

[20] Now, compared to the situation obtaining in the instant appeal before us, it was worthy of note that the debt which was the central factum of the petition had been subjected to a mutually agreed specialised litigation between the parties, albeit by way of an adjudication proceeding

which had resulted in a decision by the adjudicator dated 31st December 2016. That adjudication decision in favour of the Respondent petitioner had thereby evinced the fact that an amount as stated in the said adjudication decision was due and owing to the Respondent from the Appellant. There was no application by the Appellant to set aside the said adjudication decision. In the premises, we were of the view that such an adjudication decision was good and proper as a basis upon which a winding up petition notice against the Appellant may be filed for a debt in the amount, as stated in the said adjudication decision against the Appellant. Armed with an adjudication decision, as it were, the Respondent Petitioner in the instant case stands on a stronger footing than a petitioner, say in the **NCK Wire Products Sdn Bhd** case [supra]. As such, we were inclined to agree with the proposition that, for the purpose of filing a notice to wind up under section 465 of the Companies Act 2016, a successful litigant in an adjudication proceeding need not have to register the said adjudication decision under section 28 of CIPAA. As was stated with clarity by the Supreme Court Justices in the **Morgan Guaranty Trust** case [supra] having approved of Crossman J decision in Re North Bucks Furniture Depositories Ltd, namely, that the term 'creditor' 'includes every person who has the right to prove in winding-up'. It is without doubt that the Respondent Petitioner was a creditor to whom the Appellant had been adjudicated to have owed monies to. And, *prima facie*,

a creditor who is not paid, has a right to file a petition to wind up the debtor company.

[21] Also, we were of the view that section 31 of CIPAA can be invoked by a successful party. There is nothing in the language employed in both sections 28 and 31 of CIPAA which would liberally suggest that section 31 is subject to section 28 therein. One thing is conspicuous. There is no specific reference made by either of the sections to each other. In fact section 31(2) expressly provides that "remedies provided by CIPAA are without prejudice to other remedies available in the construction contract or *any written law*..." So, it is in addition to section 28, not in derogation thereto.

[22] As such, we were of the view that the winding up petition was not premature, contrary to what was contended by the learned counsel for the Appellant before us.

[23] On the issue of the adjudication decision directing payments to be made to KLRCA as appeared in para (h) of the same, it was the complaint of the Appellant that the adjudication decision dated 31 December 2016 had specifically mentioned the KLRCA as the party to whom the payments be made to by the Appellant. The said decision did not mention nor state

that the payments due from the Appellant were to be made to the Respondent Petitioner. As such, there was nothing owing to the Respondent Petitioner from the Appellant on the strength of the said decision of the adjudicator, according to the Appellant. On the part of the Respondent Petitioner, it was argued that the Appellant had never, at any time applied to set aside the adjudication decision despite the Respondent Petitioner enforcing the same and such payment pursuant to the decision was for the benefit of the Respondent Petitioner.

[24] The same argument was raised for the Appellant in the High Court and this was how the learned JC had dealt with it, and we quote him *verbatim*:

> "I am incline[d] to agree with the Petitioner's counsel submission that the adjudicator has made it very clear that the sums stated therein are payable by the Respondent to the Petitioner. The relevant part of the award above, notably, paragraphs (a), (b), (c), (d), (e) and (f) the phrases "*to be paid by the Respondent to the Claimant*" and "*The Respondent to pay the Claimant*" are used. Although it is stated in paragraph (h) above that "*adjudicated amounts in paragraphs (a), (b), (d), (e) above, interests as in paragraphs (b) and (f) above and cost as in paragraph (g) above are to be paid by the Respondent to*

KLRCA" there is no denying that the sums are to be paid to KLRCA for the benefit of the Petitioner, the successful Claimant in the adjudication. It matters not that the sums are not to be paid directly to the Petitioner. That being the case, the Respondent's contention that the Statutory Notice is defective is devoid of merit."

[25] With respect, we were in agreement with the finding of the JC when he ruled that for all intents and purposes, the payments due from the Appellant referred to in the said order were for the benefit of the Respondent Petitioner. It was undisputed that the adjudication order was issued pursuant to an adjudication proceedings which had involved only the Respondent Petitioner and the Appellant as litigating parties. The Respondent Petitioner was the party that had claimed from the Appellant for work it had performed for the Appellant under an agreement between them that was not in dispute. In light of the Appellant's clear passivity when the action was taken against it by the Respondent Petitioner, we were in agreement with the submission of the learned counsel for the Respondent Petitioner that the belated demur by the Appellant was but an afterthought devoid of any merit, aimed at staving off the winding-up notice. As such, we found nothing to fault the learned JC for having arrived at such a

decision, a decision which, in the circumstances of this case, is a reasonable one and which a reasonable tribunal similarly circumstanced would have found acceptable.

[26] On the just and equitable ground, it was submitted by the learned counsel for the Appellant that there was no just and equitable ground for the High Court to have granted the petition against the Appellant. On this issue, the learned JC had stated in his Grounds of Judgement like so:

> "The Respondent second ground to resist the Petition is that it is not just and equitable that the company be wound up. The Respondent claimed that the company is expecting progress payment amounting to RM18,606,483.03 from Malaysia Building Society Berhad which is the financier for Yayasan Universiti Malaysia Sabah based on exhibit "LYH-3" amounting to RMI6,794,764.00; and exhibit "LYH-4" amounting to RMI ,811,719.03 and that the company has gross development value amounting to RM237,817,686.00 in connection with the construction a proposed 25-storey student hostel for Yayasan Universiti Malaysia Sabah based on exhibits "LYH-5", "LYH-6" and "LYH-7".

To which the submission of learned counsel for the Respondent Petitioner had been as follows:

"The Petitioner submitted that the Respondent's current bank balance is not sufficient to pay the debts owed to the Petitioner. As at 05.04.2017, the amounts available in the Respondent's bank accounts only total up to RM6,162.38. This is evident by Exhibit **CWY-1** of the Petitioner's Affidavit 3 (Enclosure 5) which is a Letter from Public Bank Berhad dated 5.4.2017."

[27] The learned JC then adverted to the submission by the Respondent Petitioner who opined that the test for insolvency is whether it is able to meet its current debts based on assets presently available. As such, with the debt of approximately RM20 million claimed under this Petition, it is clear that the Appellant's current bank balance is not sufficient to pay the debts owed to the Respondent Petitioner. The Respondent Petitioner's counsel referred to the test of commercial insolvency as expounded in **Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449** where Seah SCJ at p.454C had stated:

"In short, the question is not whether the debtor's assets exceed his liabilities as appeared in the books of the debtor, but whether there are moneys presently available to the debtor, or which he is able to realize in time, to meet the debts as they become due.

It is not sufficient that the assets might be realizable at some future date after the debts have become due and payable".

[28] Indeed, a company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it has not assets available to meet its current liabilities it is commercially insolvent and may be wound up. [See Buckley on the Companies Acts, 13th Edition, at page 460]

[29] The learned JC was therefore correct in granting the petition as it was just and equitable for him to grant the petition in the circumstances of this case. We therefore, saw no merits in the complaint by the Appellant in that regard on the part of the learned JC.

[30] We were of the view that there was nothing objectionable regarding the notice of demand as well as the petition to wind up the Appellant by the Respondent Petitioner, in the circumstances of this case.

[31] In the context of the factual matrix of this appeal before us, there was an adjudication decision given in favour of the Respondent Petitioner pursuant to the adjudication proceedings between them, albeit to be paid to KLRCA, as in para (h) of the decision of the adjudicator. In substance,

the award was for the benefit of the Respondent Petitioner as the successful litigant in the adjudication proceedings between the parties. This fact was never disputed by the Appellant. It could not have, because that was a fact, pure and simple. To even dispute it would be wholly disingenuous to say the least. Armed with that decision the Respondent Petitioner was competent to file the winding up petition against the Appellant who had failed or neglected to pay the adjudicated sum. With a paltry sum standing to the credit of the Appellant in its bank account, it was just and equitable for the High Court to grant the winding-up petition against it.

Our findings

[32] As such, premised on the above, it was our considered view that the learned JC was not plainly wrong when he came to his decision in favour of granting the winding-up petition against the Appellant. To reiterate, we found that this petition was not premature and that the petition had been properly filed by the Respondent Petitioner in the circumstances.

Conclusion

[33] To recapitulate, we dismissed the appeal with costs of RM 10, 000. 00 to be paid by the directors of Likas Bay Precinct Sdn Bhd being the

Appellant in this appeal to the Respondent Petitioner, subject to payment of allocator fees. We ordered that the deposit be refunded to the Appellant.

Dated: 9 January 2019

Sgd.

ABANG ISKANDAR BIN ABANG HASHIM

Judge

Court of Appeal

Parties appearing:

For the Appellant: Mr. Lim Pitt Kong; Messrs P. K. Lim & Co.

For the Respondent: Mr. Michael Chow; Messrs C. T. Tan & Co.

Cases referred to:

1. Hing Nyit Enterprise Sdn Bhd v. Bina Puri Construction Sdn Bhd [Case no. BKI-28NCC-6/2-2015]

2. Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449
3. Malayan Flour Mill v Raja Lope & Tan Co [2000] 7 CLJ 288
4. Mobikom Sdn Bhd V. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295
5. Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95
6. NCK Wire Products Sdn Bhd v Konmark Corp Sdn Bhd [2001] 6 MLJ 57

Note: This copy of the Court's Grounds of Judgment is subject to formal revision.