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## Can An Adjudication Decision Under CIPAA 2012<sup>1</sup> Be Used To Commence Winding Up Proceedings As Of Right?

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This alert discusses the Court of Appeal's decision in *Sime Darby Energy Solution Sdn Bhd (formerly known as Sime Darby Offshore Engineering Sdn Bhd) v RZH Setia Jaya Sdn Bhd* [2022] 1 MLJ 458, which reversed the High Court's decision that allowed an application for a Fortuna Injunction to restrain the presentation of a winding up petition based on an adjudication decision.

In this case, Sime Darby obtained an adjudication decision against RZH. Based on this and pursuant to Section 466(1)(a) of the Companies Act 2016 (CA), Sime Darby served a demand notice to RZH. In response, RZH filed an originating summons for an injunction to restrain Sime Darby from filing a winding up petition based on the said demand notice. An injunction was granted in favour of RZH by the High Court, mainly on the basis that an adjudication decision is a disputable debt in the context of winding up proceedings.

Before the Court of Appeal, Sime Darby's position was that RZH had admitted an unpaid certified amount and variation *vide* the payment response. Hence, there was no *bona fide* dispute on the debt. On the other hand, RZH's position was that after the set off against the liquidated and ascertained damages ("LAD") which RZH had against Sime Darby, there should be a nett amount payable by Sime Darby to RZH.

The Court of Appeal held that the High Court's decision is erroneous as it was premature to consider the purported LAD claim, *bona fide*, because RZH had expressly admitted the amount owing to Sime Darby in the Payment Response served on Sime Darby pursuant to Section 6 of CIPAA 2012. The Court of Appeal agreed with the High Court's decision in *UDA Holdings Bhd v Bistraya Construction Sdn Bhd & Anor and another case*,<sup>2</sup> that "a non-paying party responds to the payment claim by way of written a "payment response". That "payment response" sets out either the

<sup>1</sup> Construction Industry Payment and Adjudication Act 2012

<sup>2</sup> [2015] 11 MLJ 499

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*admission or dispute of the amount claimed*". Given that there was admission by RZH in the Payment Response, it was held that:

*"We accept that, in principle, a debt that has been admitted, cannot be considered a disputed debt based on which the grant of an injunction to restrain the presentation of a winding up petition would be justified. Any application to grant the order under such circumstances should be regarded as an abuse of process of the court".*

The Court of Appeal allowed the appeal and disallowed RZH's application for a Fortuna Injunction.

## Commentary

A common prelude to winding up proceedings is a notice of demand served under Section 466(1)(a) of the CA 2016, and a company's failure to satisfy the demand would be deemed as an inability to pay its debt. This entitles a creditor to file a winding up petition. There is no express requirement under the CA 2016 that a winding up petition must be based on a final judgment as opposed to a bankruptcy notice.<sup>3</sup> On this note, it is often that a winding up petition is opposed on the ground that the debt is genuinely disputed on substantial grounds. As an adjudication decision only has temporary finality,<sup>4</sup> the question of whether it may be used to commence winding up proceedings arises. The discussion below will demonstrate that it cannot.

In reaching the above decision, the Court of Appeal cited the principle enunciated in *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd* [2019] 3 MLJ 244, where it was held that a party who successfully obtain an adjudication decision may proceed to wind up a company based on the adjudication decision, even without having to first apply to enforce the same under Section 28 of the CIPAA 2012. In *Likas Bay*, the Court of Appeal upheld the High Court's order which granted a winding up order applied by Bina Puri.

<sup>3</sup> Section 3(1)(i) of the Insolvency Act 1967 provides that a final judgment or final order may be a basis for the issuance of a Bankruptcy Notice.

<sup>4</sup> *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* and another appeal [2020] 6 MLJ 224 at 242 and 243

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On the other hand, the decision of the High Court in *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2021] 8 MLJ 99, which allowed an application for a Fortuna Injunction, was also discussed in *Sime Darby*. In *ASM Development*, the Fortuna Injunction was allowed on the basis that there were disputes and arguments which were *bona fide*. It is pertinent to note that despite allowing the Fortuna Injunction, the High Court in *ASM Development* had expressly held that a party was only prevented from winding up another party against whom an adjudication decision was made if the adjudication decision was the subject of a genuine dispute on substantial grounds. The High Court in *ASM Development* had made clear that this caveat does not apply to a final judgment of the court. Thus, in respect of the contrary decision in *ASM Development*, the Court of Appeal in *Sime Darby* held:

*“However, in ASM Development a contrary view was expressed that it does not mean the opposing party cannot challenge the petition or even the statutory notice. The debt under the adjudication decision can still be disputed and the court will have to decide whether it is so.*

*With respect, to our minds, this does not equate to entitling the party ordered to make payment under the AD to an order to restrain the successful party from presenting a winding up petition as the former has a statutory right to challenge the statutory notice or petition before winding up the court. Until and unless the AD is set aside, it can in law form the basis for the statutory notice which was the position in the present instance. Whether or not the respondent had a bona fide cross-claim against the appellant on merits to challenge the petition is a matter to be adjudged by the winding up court. We are not convinced that an unproven cross-claim can be the basis for restraining the filing of a winding up petition based on a valid and enforceable AD.”*

Based on the above, it appears that an adjudication decision may not, as of right, be a basis for winding up proceedings. In this regard, whether a court should grant a Fortuna Injunction to restrain the filing of a winding petition is fact

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dependent. The court would consider the overall conduct of a party and the grounds advanced in seeking a Fortuna Injunction. The decisions in the *Likas Bay*, *ASM Development* and *Sime Darby* appear to be consistent with each other, in that an adjudication decision under the CIPAA 2012 may be a basis for winding up, subject to the fact that it is not a genuine dispute on substantive grounds. At this juncture, it is noted that the grounds to oppose the winding up petition in *Likas Bay* were merely procedural grounds.

It was also on this note that the Court of Appeal held that the High Court in *Sime Darby* was erroneous in holding that the adjudication decision is considered disputable merely because the final decision by the High Court or the arbitrator (in the event the dispute is re-litigated) may overturn or prevail over the provisionally binding adjudication decision. This is especially so when there was an express admission of the debt in the payment response. Further, it was held by the Court of Appeal that RZH had not provided particulars of a bona fide triable cause of action against Sime Darby but was content to merely rely on general statements in its grounds in support of the originating summons.

A crucial takeaway from the case of *Sime Darby* is that an admission by way of certifying payment certificate(s) and subsequently admitting such debt vide the payment response is crucial evidence to demonstrate that there was no genuine dispute on substantial grounds under the adjudication decision. This is the crucial difference between the facts in *Sime Darby* and *ASM Development*.

An adjudication decision may not be used to commence winding up proceedings as of right i.e., this is in the sense that it may not sustain a challenge of the winding up petition based on the ground that the debt under the adjudication decision is genuinely disputed on substantial grounds. Notwithstanding this, the party who has obtained an adjudication decision in its favour may always resort to the usual execution proceedings under the Rules of Court 2012, to secure its interests under the adjudication decision.

Authored by Stephanie Chong Keh Yin, associate with the firm's Dispute Resolution practice where she specialises in Construction Arbitration and Adjudication.

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