

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
[ORIGINATING SUMMONS NO: WA-24NCC-359-07/2024]**

IN THE MATTER OF CARIMIN
ENGINEERING SERVICES SDN BHD
[COMPANY NO: 200501028221(710356-T)]

AND

IN THE MATTER OF SECTION 466(1)
COMPANIES ACT 2016

AND

IN THE MATTER OF STATUTORY NOTICE
OF DEMAND UNDER SECTION 466(1)
COMPANIES ACT 2016 DATED 15.7.2024

AND

IN THE MATTER OF SECTION 50, SECTION
51, SECTION 52 SPECIFIC RELIEF ACT 1950

AND

IN THE MATTER OF ORDER 7, ORDER 28,
ORDER 29, ORDER 88 AND ORDER 92
RULE 4 RULES OF COURT 2012

BETWEEN

CARIMIN ENGINEERING SERVICES SDN BHD
[COMPANY NO: 200501028221(710356-T)]

... PLAINTIFF

AND

DYNAMIC NAVIGATION SDN BHD

[COMPANY NO: 201401011427(1087503-D)]

... DEFENDANT

Abstract: Despite the existence of civil proceedings premised on the same debt where multiple interlocutory applications have been filed and are pending disposal, the issuance of the section 466 notice is a backdoor attempt to bypass the court process and a blatant abuse of process. The *sui generis* nature of winding-up proceedings does not give a litigant the *carte blanche* to commence parallel proceedings without regard to the timing and the specific facts of the case. The improper issuance of a statutory demand for a collateral purpose would entitle the court to grant a *Fortuna* injunction to restrain the presentation of a winding-up petition.

CIVIL PROCEDURE: *Injunction - Fortuna injunction - Injunction to restrain presentation of winding up petition - Statutory notice under s. 466(1) of Companies Act 2016 was issued while civil proceedings between parties claiming for same debt pending in court - Whether there exists a bona fide dispute regarding debt - Whether issuance of statutory notice constitutes an abuse of process - Whether issuance of statutory demand was done for collateral purpose of bypassing civil suit - Whether issuance of winding up notice was legitimate - Whether injunction should be granted - Whether granting of fortuna injunction would cause irreparable harm to defendant*

[Plaintiff's application allowed with costs.]

Case(s) referred to:

Cosco Shipping Heavy Industry (Dalian) Co Ltd & Anor v. Registrar Of Malaysian Ships At The Port Of Kota Kinabalu Osta Fleet Sdn Bhd & Anor [2021] CLJU 872 HC (**refd**)

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA (**refd**)

Kris Heavy Engineering & Construction Sdn Bhd v. Lewis & Co (Advocates & Solicitors) [2017] CLJU 964 CA (**dist**)

Lai Kim Loi v. Datuk Lai Fook Kim & Co [1989] 1 CLJ Rep 61 SC (**refd**)

NFC Labuan Shipleasing Ltd v. Semua Chemical Shipping Sdn Bhd [2017] CLJU 943 HC (**dist**)

Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd [2016] 9 CLJ 1 FC (refd)

Pembinaan Bukit Timah Sdn Bhd v. Hiform (M) Sdn Bhd [2024] 5 CLJ 1015 HC (refd)

Swissray Asia Healthcare Co Ltd v. Medical Services M Sdn Bhd [2024] 8 CLJ 21 CA (refd)

Sanjung Suria Sdn Bhd v. PLB-KH Bina Sdn Bhd [2013] CLJU 1004 HC (refd)

Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd [2007] 2 CLJ 305 CA (refd)

Legislation referred to:

Companies Act 2016, s. 466(1)

Arbitration Act 2005, s. 10

JUDGMENT

[1] Before the court is an application for a Fortuna injunction to restrain the presentation of a winding-up petition pursuant to a statutory notice of demand issued under section 466(1) of the Companies Act 2016. The statutory notice was issued while civil proceedings between the parties claiming for the same debt are still pending before the Sessions Court, where applications for stay of proceedings pending arbitration and assessment of damages for a wrongfully obtained Mareva injunction remain to be disposed of. The key issues before this court are whether there exists a bona fide dispute regarding the debt, whether the issuance of the statutory notice constitutes an abuse of process given the pending civil proceedings, and whether a Fortuna injunction should be granted in the circumstances.

Background Facts

[2] The salient facts leading to this application are as follows. The Plaintiff and Defendant entered into two vessel charterparty agreements dated 24.3.2022 and 27.8.2022 respectively. Both

agreements contained arbitration clauses providing for disputes to be referred to the Kuala Lumpur Regional Centre for Arbitration. The arbitration clause appears in both charterparty agreements (Time Charter Party OS One dated 24.3.2022 and Time Charter Party TP1 dated 27.8.2022). The clause is found in Box 34 and reads as follows:

“34. BIMCO Dispute Resolution Clause

(c) This Charter Party shall be governed by and construed in accordance with the laws of Malaysia and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration at Kuala Lumpur Regional Centre for Arbitration, Malaysia subject to the procedures applicable there.”

- [3] On 23.6.2023, the Defendant’s former solicitors issued a notice of demand for RM368,315.93 against the Plaintiff. The Plaintiff paid RM187,136.00 in July 2023, being the undisputed portion, and the Plaintiff’s former solicitors issued a letter dated 11.7.2023 disputing the balance sum.
- [4] On 10.10.2023, the Defendant commenced an action in Kuala Lumpur Sessions Court Suit Number WA-A52NCvC-813-10/2023 (*“Suit 813”*) claiming for RM240,260.63 being the outstanding sum under the charterparty agreements. The Defendant obtained an ex parte Mareva injunction against the Plaintiff on 15.11.2023, which was subsequently set aside by the Sessions Court on 21.2.2024 with costs.
- [5] The Plaintiff filed an application under section 10 of the Arbitration Act 2005 in Suit 813 for a stay of proceedings pending arbitration, which is fixed for decision on 6.12.2024. The Plaintiff also filed an application for assessment of damages pursuant to the setting aside of the ex parte Mareva injunction, which is pending further directions by the Sessions Court.
- [6] Despite Suit 813 being active, on 15.7.2024, the Defendant issued the impugned statutory notice of demand under section 466(1) of the

Companies Act 2016 against the Plaintiff claiming for the same sum of RM240,260.63. The Plaintiff wrote to the Sessions Court and Defendant on 22.7.2024 seeking to expedite the decision of the stay application and the Defendant's position on the same. The Defendant did not respond to the Plaintiff's letter.

- [7] Instead, on 14.8.2024, the Defendant wrote to the Sessions Court to withdraw Suit 813 without any order as to costs. This letter was not received by the Sessions Court and was only filed by the Defendant at 5.58pm on 16.8.2024 after the Plaintiff's solicitors highlighted this omission. The Plaintiff objected to the withdrawal of Suit 813 as being prejudicial to the Plaintiff. As at the date of hearing of Enclosure 1, Suit 813 remains active with no withdrawal order made.

The Plaintiff's Originating Suumons

- [8] The Plaintiff's Originating Summons seeks: (1) a declaration that the statutory notice of demand under Section 466(1) Companies Act 2016 dated 15.7.2024 issued by the Defendant is invalid and an abuse of process; and (2) an injunction (and/or interim injunction pending disposal of the Originating Summons) to restrain the Defendant from filing, presenting, proceeding with, advertising and/or gazetting any winding up petition against the Plaintiff based on the statutory notice.
- [9] The main grounds for the application are: (1) the statutory notice is not based on any judgment/order but only on allegations by the Defendant; (2) the Defendant had filed Suit 813 in the Sessions Court claiming the same sum which is being disputed by the Plaintiff; (3) the claims arise from agreements containing arbitration clauses and the Plaintiff has filed an application in Suit 813 to stay proceedings pending arbitration which is fixed for decision on 6.12.2024; (4) allowing the Defendant to file a winding up petition would create duplicity of proceedings between the Sessions Court, High Court and potentially arbitration which could lead to conflicting decisions; (5) the statutory notice constitutes an abuse of process and is being used

as a tool to oppress the Plaintiff to force payment of the disputed sum; (6) the Plaintiff has filed an application for assessment of damages against the Defendant in Suit 813 for wrongfully obtaining a Mareva injunction, with the potential damages exceeding the Defendant's claim; and (7) presentation of a winding up petition would irreparably damage the Plaintiff's reputation and seriously affect its status and business operations.

Respective parties' submissions

- [10] The Plaintiff's submissions are essentially that the issuance of the statutory notice and intended winding up petition amounts to an abuse of process because: the Defendant had already filed Suit 813 claiming the same debt; multiple interlocutory applications including a stay application pending arbitration are still pending in Suit 813; the debt is disputed as evidenced by the Plaintiff's letter dated 11.7.2023; payment of RM187,136 was made for the undisputed portion only; the arbitration clause in the agreements requires disputes to be referred to arbitration; presentation of a winding up petition would render nugatory the stay application and create multiplicity of proceedings with risk of inconsistent findings; and the Defendant's attempt to withdraw Suit 813 after obtaining the interim injunction shows it acknowledges the multiplicity issue despite claiming winding up proceedings are *sui generis*.
- [11] The Defendant's submissions are that: a judgment is not required before issuing a statutory notice; the Plaintiff has failed to establish even a *prima facie* dispute, let alone a *bona fide* dispute, to the debt; the Plaintiff's partial payment amounts to an admission of the debt; the mere existence of an arbitration clause cannot be used to evade payment; winding up proceedings are *sui generis* and serve a different function from civil suits, thus there is no multiplicity; any alleged irreparable harm can be avoided by the Plaintiff simply paying the debt; the Plaintiff has not initiated arbitration despite relying on the arbitration clause; and the statutory notice was issued as a last resort

after the Plaintiff blocked other avenues of recovery.

Analysis and findings of the court

Whether the Plaintiff has established a bona fide dispute regarding the debt

- [12] The Defendant submitted that the Plaintiff has failed to establish a bona fide dispute, let alone a prima facie dispute, regarding the debt claimed under the statutory notice. The Defendant relied on the Court of Appeal decision in *Swissray Asia Healthcare Co Ltd v. Medical Services M Sdn Bhd* [2024] 8 CLJ 21 which held that a higher threshold of bona fide dispute, rather than a mere prima facie dispute, applies when seeking a Fortuna injunction even where there is an arbitration clause. Collin Lawrence Sequerah, JCA held:

“[67] This can only translate into the position that the party applying for a Fortuna injunction must show the existence of a bona fide dispute and not merely a prima facie dispute even in the face of an arbitration clause.

[68] We are constrained therefore to hold that it is the bona fide dispute test which is the applicable test to be applied when dealing with the question of whether to grant a Fortuna injunction in such circumstances.”

- [13] The Defendant further submitted that the Plaintiff’s partial payment in July 2023 amounted to an admission of the debt, relying on *Kris Heavy Engineering & Construction Sdn Bhd v. Lewis & Co (Advocates & Solicitors)* [2017] MLJU 906 where the Court of Appeal held:

“[30] Secondly, having examined the affidavit of parties, it is quiet manifest that the Plaintiff had in fact made several part-payments towards the first and second bill, even though these were each described as “Estimated Bill”. There is no dispute that these payments were effected in pursuance of these bills. For the first bill, as stated earlier, the part-payments were made in 2003 and 2004, whilst for the second bill, on four occasions in 2016, the last being August 2016.

[31] As such, it cannot be doubted that these part-payments signify a form of acknowledgment and admission of indebtedness on the part of the Plaintiff.”

- [14] The Defendant argued that the mere assertion of an arbitration clause is insufficient and the Plaintiff's belated raising of a dispute upon filing of Suit 813 cannot be said to be in good faith.
- [15] The Plaintiff rebutted that a bona fide dispute was raised as early as 11.7.2023 vide its former solicitors' letter disputing the balance sum after making partial payment of the undisputed portion. The Plaintiff contended that the *Swissray* decision imposing a higher threshold is pending appeal in the Federal Court.
- [16] The Plaintiff argued that *Kris Heavy* is distinguishable as that case involved a dispute of the entire bill after partial payment was made on each bill, whereas in the present case, partial payment was made for the undisputed portion and the balance was disputed before filing of suit. The Plaintiff submitted that section 10 of the Arbitration Act 2005, as amended in 2011, no longer requires establishment of a dispute and the issue of dispute is to be determined by the arbitral tribunal.
- [17] I am inclined to agree with the Plaintiff that a bona fide dispute has been established in this case. The contemporaneous documentary evidence shows that the Plaintiff, through its former solicitors, had disputed the debt claimed vide letter dated 11.7.2023 after making partial payment of RM187,136.00 as the undisputed portion of the original RM368,315.93 demand. This was well before the filing of Suit 813 by the Defendant on 10.10.2023.
- [18] The sequence of events is particularly telling - the Plaintiff received the Defendant's demand on 23.6.2023, promptly paid the undisputed portion in July 2023, and formally disputed the balance through its solicitors on 11.7.2023. The Plaintiff's actions demonstrate a consistent and principled approach to the dispute from the outset - acknowledging and paying what was legitimately owed while disputing the contested portions.

- [19] This systematic conduct stands in stark contrast to the Defendant's characterisation of the dispute as an afterthought raised only after Suit 813 was filed. Furthermore, the dispute arises from substantive disagreements over the items and amounts claimed under the charterparty agreements dated 24.3.2022 and 27.8.2022, which contained arbitration clauses specifically contemplating the possibility of such disputes arising between the parties.
- [20] In my view, this clear chronology of events, supported by contemporaneous documentation and the Plaintiff's prompt partial payment, raises a bona fide dispute that was established well before any litigation commenced, and not a mere afterthought upon filing of suit as alleged by the Defendant.
- [21] The *Kris Heavy* case relied upon by the Defendant is distinguishable and inapplicable to the present facts. In *Kris Heavy*, partial payments were made on the same bills which the plaintiff later sought to dispute in its entirety and to tax. The Court of Appeal held that the partial payments in those circumstances constituted an acknowledgment and admission of the debt in those bills. That is not the situation here where the Plaintiff made prompt payment of the undisputed portion and disputed the balance vide solicitors' letter before suit was filed.
- [22] As for the applicable threshold of dispute, while the Court of Appeal in *Swissray* did hold that a higher threshold of bona fide dispute applies in Fortuna injunction applications even where there is an arbitration clause, this decision is pending appeal in the Federal Court. Given the unsettled position of the law on this issue, I am of the view that caution must be exercised in applying the higher threshold laid down in *Swissray*.
- [23] Notwithstanding the above, I am satisfied that the Plaintiff has in any event established a bona fide dispute based on the contemporaneous letter of dispute dated 11.7.2023. There is no necessity for me to delve into the detailed merits of this dispute as the issue is one to be

determined by the arbitral tribunal pursuant to the mandatory stay provisions in section 10 of the Arbitration Act 2005, as held by the Federal Court in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1.

- [24] Therefore, I find that the Plaintiff has successfully established a bona fide dispute in respect of the debt claimed under the section 466 notice.

Whether the issuance of the winding-up notice is justified despite the ongoing civil proceedings

- [25] The Defendant argued that winding-up proceedings are *sui generis* in nature and therefore can exist in parallel with other civil proceedings. The Defendant relied on *NFC Labuan Shipleasing Ltd v. Semua Chemical Shipping Sdn Bhd* [2017] CLJU 943 where the High Court held that a winding-up proceeding is a class of its own and is not a debt recovery claim offering the same relief or outcomes as in civil litigation or arbitration. Mohd Nazlan Ghazali J (as he then was) held:

“It must be recognized that a winding up petition is not a claim for payment. It is, instead, what may be regarded as a class action in the public interest which brings into operation the statutory regime for realizing and distributing the assets of a company for the benefit of its creditors. This is manifestly not the objective of having the alleged dispute referred to arbitration. The reliefs are certainly not the same and the end results, of a successful civil dispute subject to arbitration and a winding up petition, if granted could not be more different and are miles apart.”

- [26] The Defendant submitted that it is justified in issuing the statutory notice and pursuing winding-up as it is primarily regulated by specific provisions of law and does not amount to duplicity or multiplicity of proceedings. The Defendant contended that the timing of the notice does not constitute an abuse of process as the Defendant is simply

exercising its statutory rights due to the Plaintiff's continued failure to pay the debt.

- [27] The Plaintiff argued that the issuance of the statutory notice based on the same debt and facts in Suit 813 which is still pending amounts to an abuse of process of court. The Plaintiff highlighted that multiple interlocutory applications were filed in Suit 813 prior to the issuance of the statutory notice, in particular the Plaintiff's application for stay pending arbitration which is scheduled for decision on 6.12.2024.
- [28] The Plaintiff submitted that if a winding-up petition is allowed to be presented, it would render nugatory the Plaintiff's stay application and be contrary to the mandatory stay provisions in section 10 of the Arbitration Act 2005 where the requirements are met.
- [29] The Plaintiff contended that the Defendant's attempt to withdraw Suit 813 after the grant of the interim injunction by this court shows that the Defendant itself believes winding-up proceedings will lead to multiplicity and conflict of findings, despite the Defendant's stance that winding-up is *sui generis*. The Plaintiff argued that this attempt to withdraw is a desperate move to avoid the consequences of multiplicity which the Defendant initially denied.
- [30] The Plaintiff urged this court to adopt the approach in *Cosco Shipping Heavy Industry (Dalian) Co Ltd & Anor v. Registrar Of Malaysian Ships At The Port Of Kota Kinabalu Osta Fleet Sdn Bhd & Anor* [2021] CLJU 872 where the High Court held that parallel proceedings will give rise to the undesirable risk of inconsistent findings and decisions by two different courts, which would be vexatious and an abuse of process. It was held:
- “[42] *The duplicity and/or multiplicity of proceedings will give rise to the undesirable risk of inconsistent findings of decision by two different Court.*

[43] In Orange Business Services (Network) Sdn Bhd v. Dealtel (Malaysia) Sdn Bhd and another suit [2019] 1 LNS 771; [2019] MLJU 477, Court of Appeal Judge Harmindar Singh Dhaliwal (as he then was) opined as follows:

“The objection to multiplicity of proceedings is well- grounded and underscored by the public interest to avoid conflicting decisions by two different courts on the same issue between parties (see Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] CLJ (Rep) 160 and Taunton Collins v. Cromie and Anor [1964] 2 All ER 332). Conflicting decisions on the same issue not only brings embarrassment to the court or tribunal but may also undermine public confidence in the administration of justice.”

...[52] After considering the Notice of Application, Affidavits and Submissions filed by the parties, this Court finds that the two sets of proceedings, one in Kuala Lumpur and another in Kota Kinabalu has given rise to lis alibi pendens and the risk of multiplicity of proceedings and inconsistent findings or decisions. This runs counter to public policy and is not in the interest of justice. It is vexatious and an abuse of the process of the Court which falls within the ambit of Paragraph 11 of the Schedule to the Courts of Judicature Act 1964 and O. 18 r. 19 (1)(b) and (d) ROC 2012.”

[31] I have anxiously considered the issue of multiplicity and abuse of process. I accept the general proposition advanced by the Defendant that winding-up proceedings are sui generis in nature and serve a different function from ordinary civil suits for recovery of debt. The *NFC Labuan* case illustrates that a winding-up proceeding is not a matter subject to arbitration and does not come within the ambit of section 10 of the Arbitration Act 2005.

[32] However, I am of the considered view that *NFC Labuan* is distinguishable from the instant case. In *NFC Labuan*, the defendant

filed an application to stay the winding-up proceedings pending referral to arbitration after the winding-up petition was presented. There was no pre-existing civil suit based on the same debt and facts. The issue was whether winding-up proceedings fell within the meaning of “proceedings” under section 10 of the Arbitration Act 2005.

- [33]** In contrast, the present factual matrix is materially different. The Defendant filed Suit 813 in October 2023 claiming for the debt. The Defendant obtained an ex parte Mareva injunction which was later set aside with costs. The Plaintiff filed an application for stay pending arbitration under section 10 of the Arbitration Act 2005 which is scheduled for decision in December 2024. The Plaintiff also filed an application for assessment of damages for the wrongful Mareva injunction obtained, which is pending further directions.
- [34]** It was only after all these events in Suit 813 that the Defendant issued the section 466 notice in July 2024 based on the same debt. The timing of the issuance, in my view, is highly suspect and lends credence to the Plaintiff’s contention that it is an afterthought and an attempt to circumvent the pending applications in Suit 813 particularly the stay application.
- [35]** I find support for this inference in the Defendant’s attempt to withdraw Suit 813 after my grant of the interim injunction. If Suit 813 and the proposed winding-up proceedings do indeed serve distinct purposes with no overlap as the Defendant initially claimed, there would be no logical reason to seek a withdrawal of Suit 813. The Defendant’s conduct in seeking to withdraw Suit 813 at this highly belated stage, while being met with objections by the Plaintiff, speaks volumes.
- [36]** The Defendant is effectively trying to eliminate Suit 813 to avoid the very multiplicity and inconsistency which it asserted would not arise from parallel proceedings. This smacks of hypocrisy and a desperate

attempt to remedy the abuse of process created by the section 466 notice. I agree with the Plaintiff that the Defendant cannot be allowed to approbate and reprobate on its stance.

- [37] I am also mindful of the mandatory nature of a stay under section 10 of the Arbitration Act 2005 where the stipulated requirements are met i.e. an existing and binding arbitration agreement which is not null and void, inoperative or incapable of being performed. The issue of whether there is in fact a dispute is no longer relevant and is to be determined by the arbitral tribunal - *Press Metal Sarawak*.
- [38] While a winding-up proceeding may not be a “matter” coming within section 10, any stay order granted would be rendered ineffective and nugatory if winding-up is allowed to proceed in respect of the same debt. It would be an incongruity and not in keeping with the comity of court orders to allow one court order to neutralise and undermine another, as held by the High Court in *Sanjung Suria Sdn Bhd v. PLB-KH Bina Sdn Bhd* [2013] CLJU 1004 in considering a Fortuna injunction sought in light of a pending stay application.
- [39] The present case also bears striking similarity to the Supreme Court decision in *Lai Kim Loi v. Datuk Lai Fook Kim & Co* [1989] 1 CLJ Rep 61 where the petitioner filed a winding-up petition and a civil suit at the same time based on similar facts and reliefs. The Supreme Court struck out the winding-up petition as an abuse of process as the substantial duplication of issues and reliefs amounted to multiplicity of proceedings and was vexatious. The Supreme Court held:

“On the question of multiplicity, Mr. Lim has conceded that the issues raised and the relief sought in Suit No. S. 235 of 1985 have been largely duplicated in the said petition. Although the issues raised and the relief sought are not totally similar yet we consider that the substantial duplication of issues and relief sought in both actions amounted to multiplicity of actions and in all the circumstances of this

case, the petition presented is vexatious and is an abuse of the process of the Court and ought to be struck out as the learned Judge has done”

- [40] Accordingly, having regard to all the circumstances, I am constrained to find that the Defendant’s issuance of the section 466 notice, in light of the pending Suit 813 premised on the same debt where multiple interlocutory applications have been filed and are pending disposal, is a backdoor attempt to bypass the court process and a blatant abuse of process. The *sui generis* nature of winding-up proceedings does not give a litigant the carte blanche to commence parallel proceedings without regard to the timing and the specific facts of the case.

Whether the Defendant’s actions in issuing the winding-up notice were legitimate

- [41] The Defendant contended that the Plaintiff’s conduct in blocking and obstructing its attempts to recover the debt justifies the issuance of the winding-up notice after a long delay. The Defendant submitted that the winding-up notice was a necessary step after exhaustion of other avenues and is simply an exercise of the Defendant’s statutory rights.
- [42] The Plaintiff refuted the allegations of obstruction and delay. The Plaintiff highlighted that any delay was attributable to the Defendant’s filing of multiple applications in Suit 813, including the *ex parte* Mareva injunction and appeal against the setting aside order, all of which were fruitless and withdrawn with costs. The Plaintiff submitted that the Defendant cannot blame the court’s case management for the delay as this is not a valid ground.
- [43] The Plaintiff further argued that the Defendant, as the claimant, has the duty to commence arbitration proceedings and cannot fault the Plaintiff for not referring the matter to arbitration. The Plaintiff highlighted that the Defendant itself failed to adhere to the agreed arbitration clause by filing Suit 813 and objecting to the Plaintiff’s stay application.

- [44] Having considered the chronology of events, I am unable to agree with the Defendant that the Plaintiff had deliberately obstructed or delayed the recovery of the purported debt. The documentary trail shows that the Plaintiff had been proactive and prompt in dealing with the Defendant's demand from the outset.
- [45] The Plaintiff issued a letter of dispute on 11.7.2023 through its former solicitors after making payment of the undisputed portion. Upon being served with Suit 813, the Plaintiff filed an application for stay pending arbitration pursuant to the arbitration clause in the charterparty agreements. This can hardly be described as an attempt to evade payment.
- [46] Any delay in the disposal of Suit 813 is not attributable to the Plaintiff, but rather a consequence of the Defendant's own actions in filing multiple interlocutory applications which were later withdrawn or dismissed with costs. The Defendant obtained an ex parte Mareva injunction which ought not to have been granted and was rightly set aside. The Defendant filed an appeal and applied for an Erinford injunction but withdrew these applications with costs. The Defendant cannot be heard to complain that the Plaintiff had impeded the recovery process.
- [47] Further, as the Plaintiff rightly submitted, the Defendant as the claimant should have commenced arbitration proceedings in respect of its claim rather than instituting court proceedings in breach of the agreed arbitration clause. The Defendant's attempt to pin the blame on the Plaintiff for not referring the matter to arbitration is misconceived and untenable.
- [48] As for the Defendant's argument that it is simply exercising its statutory rights under the Companies Act 2016, it is trite law that legal rights and remedies must be exercised bona fide and not for a collateral purpose. The court retains the inherent jurisdiction to prevent an abuse of process and ensure its process is not misused, as

recognised by the Court of Appeal in *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651.

- [49] The improper issuance of a statutory demand for a collateral purpose would entitle the court to grant a Fortuna injunction to restrain the presentation of a winding-up petition, as held in *Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd* [2007] 2 CLJ 305. The Court of Appeal held:

“[6] Every court has inherent jurisdiction to prevent an abuse of its process. It is a jurisdiction that is essential to ensure that the court’s process is not used for a collateral purpose; that is to say for a purpose other than to obtain redress for a genuine grievance. This court has recognised that jurisdiction on more than one occasion. In Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 CLJ 340, this court observed as follows:

Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court’s process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.”

- [50] In the present case, the surrounding circumstances and the timing of the Defendant’s issuance of the section 466 notice strongly indicate that it was done for the collateral purpose of bypassing Suit 813 and compelling payment from the Plaintiff despite the pending stay application. The Defendant’s ensuing attempt to withdraw Suit 813 reinforces the finding that the statutory notice was driven by an oblique motive.

- [51] I am therefore satisfied that the Defendant's issuance of the statutory notice, when viewed in light of all the prevailing facts, was not a bona fide exercise of its statutory rights but rather a stratagem to exert undue pressure on the Plaintiff. The court cannot sanction such an abuse of its process under the guise of a statutory remedy.

Whether granting the Fortuna Injunction would cause irreparable harm to the Defendant

- [52] The Defendant submitted that any potential harm to the Plaintiff as a result of the winding-up proceedings can be easily remedied by payment of the disputed debt. The Defendant argued that the balance of convenience does not lie in the Plaintiff's favour as the alleged harm is not substantiated and damages would be an adequate remedy.
- [53] The Plaintiff contended that the presentation of a winding-up petition would irreparably damage the Plaintiff's reputation and status, and have a serious effect on its business and operations. The Plaintiff, being a subsidiary of a public listed company, would suffer wider adverse consequences not confined to itself. The Plaintiff submitted that if the injunction is refused, the Plaintiff would be exposed to the risk of liquidation before its claim for damages in Suit 813 is determined.
- [54] The Plaintiff relied on *Pembinaan Bukit Timah Sdn Bhd v. Hiform (M) Sdn Bhd* [2024] 5 CLJ 1015 where the High Court held that in a Fortuna injunction application, a fair balance must be struck between the defendant's right to recover payment expeditiously and the plaintiff's right to make payment to avoid liquidation. The Plaintiff argued that the balance lies in favour of granting the injunction in the present case.
- [55] It is well established that the presentation of a winding-up petition, even if unsuccessful, can have a devastating impact on a company's commercial reputation and operations. Banks, creditors and

counterparties may be unwilling to have further dealings with a company which is facing the spectre of liquidation. The damage suffered in such instances would be unquantifiable and cannot be adequately compensated by an award of damages.

- [56] While the Defendant may have the right to invoke winding-up proceedings in respect of an undisputed debt, this does not extend to disputed debts which are subject to pending litigation. As elaborated above, the Defendant's attempt to present a winding-up petition in respect of the same debt being claimed in Suit 813 amounts to an abuse of process. If unchecked, it would cause severe and irreversible prejudice to the Plaintiff which is a going concern and part of a larger corporate group.
- [57] The Defendant's argument that this can all be resolved by the Plaintiff paying the disputed sum is wholly misconceived and without basis. A party cannot be compelled to forego its bona fide defence and objections and submit to a contested claim simply because the other party has threatened liquidation proceedings. This would be antithetical to established legal principles and the court's function to adjudicate genuine disputes between parties.
- [58] The Plaintiff has demonstrated a bona fide dispute in respect of the sum claimed under the statutory notice and has further applied to stay Suit 813 premised on the same debt pending arbitration. Until and unless the Plaintiff's defences and/or counterclaim are adjudicated upon, the Plaintiff cannot be forced to make payment as a precondition to avoid a winding-up petition.
- [59] I accept the Plaintiff's submission that the fair balance and equities in the present case tilt heavily in favour of granting the Fortuna injunction to restrain the presentation of a winding-up petition pending disposal of the stay application and/or conclusion of the arbitration proceedings between parties.

Conclusion

[60] Based on all the foregoing reasons, I find that the Plaintiff has established the requirements for a Fortuna injunction. The Plaintiff has demonstrated a bona fide dispute regarding the debt claimed under the section 466 notice. More importantly, the Defendant's issuance of the statutory notice while Suit 813 is still pending, with multiple interlocutory applications yet to be disposed of including the Plaintiff's stay application under section 10 of the Arbitration Act 2005, amounts to an abuse of process. The Defendant's subsequent attempt to withdraw Suit 813 after obtaining the interim injunction reinforces the finding that the statutory notice was issued for the collateral purpose of circumventing the pending proceedings.

[61] Having carefully weighed all the circumstances, including the risk of irreparable damage to the Plaintiff's reputation and business operations if a winding-up petition is allowed to be presented, I am satisfied that the balance of convenience lies firmly in favor of granting the injunctive relief sought. Accordingly, I allow Enclosure 1 and grant orders in terms with costs of RM8,000 for the Plaintiff.

Dated: 15 JANUARY 2025

(ATAN MUSTAFFA YUSSOF AHMAD)

Judge

Kuala Lumpur High Court

(Commercial Division)

Counsel:

For the plaintiff - Wong Chee Wing; M/s Rabinder Budiman & Associates

For the defendant - Nurul Fatihah; M/s Lope Maizura