

The Fine Line between Legal Rights and Legal Abuse: Carimin Engineering Services Sdn Bhd v Dynamic Navigation Sdn Bhd [2025] MLJU 112 (High Court)

In order to prevent the presentation of a winding-up petition, one would apply for a Fortuna Injunction. We analyse a recent High Court (HC) decision that granted this injunction upon finding that the Plaintiff had successfully established a *bona fide* dispute of debt, and that the Defendant's statutory notice of demand was for a collateral purpose of circumventing ongoing proceedings which tantamount to an abuse of process.

Facts of the Case

The Plaintiff and Defendant entered into two vessel charterparty agreements dated 24.03.2022 and 27.08.2022 respectively. Each of these agreements contained an arbitration agreement.

On 23.06.2023, 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 but disputed the balance sum as was recorded in a letter dated 11.07.2023.

On 10.10.2023, the Defendant commenced an action in Kuala Lumpur Sessions Court Suit Number WAA52NCvC-813-10/2023 ("**Suit 813**") for the balance RM240,260.63. In Suit 813:

- The Defendant obtained an ex parte Mareva injunction against the Plaintiff on 15.11.2023.
- The injunction was later set aside on 21.02.2024 with costs and the Plaintiff filed an application for assessment of damages pursuant to the setting aside.
- The Plaintiff had filed an application under Section 10 of the Arbitration Act 2005 for a stay of proceedings pending arbitration.

Notwithstanding the ongoing proceedings in Suit 813, on 15.07.2024, the Defendant issued a statutory notice of demand under Section 466(1) of the Companies Act for the same balance sum of RM240,260.63 ("**Statutory Notice**").

Later, on 14.08.2024, the Defendant wrote to the Sessions Court (SC) to withdraw Suit 813 without any order as to costs. This letter was not received by the SC and was only filed by the Defendant at 5.58pm on 16.08.2024 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 the Plaintiff's application for a Fortuna injunction, Suit 813 remains active with no withdrawal order made.

Issue 1 – Whether the Plaintiff established a bona fide dispute regarding the debt

The HC agreed that a *bona fide* dispute had been established. The case of *Kris*

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*Heavy Engineering*¹ was distinguished. Here, the Plaintiff had demonstrated a consistent and principled approach to the disputed sum from the outset. The letter dated 11.07.2023 was contemporaneous documentary evidence of the Plaintiff's position.

The HC further advised caution must be exercised in applying the higher threshold of a *bona fide* dispute (and not merely a *prima facie* dispute) where there is an arbitration clause given that the Court of Appeal decision in *Swissray*² is pending before the Federal Court.

Issue 2 – Whether the issuance of the Statutory Notice is justified despite ongoing civil proceedings

Although the HC accepted the general proposition that winding-up proceedings are *sui generis* in nature and serve a different function from ordinary civil suits for recovery of debt, its *sui generis* nature does not give a litigant the *carte blanche* to commence parallel proceedings without regard to the timing and the specific facts of the case.

In coming to his decision, Justice Atan Mustafa had regard to all the circumstances including the timing of events where the Statutory Notice was only issued after all the events in Suit 813 which had multiple pending interlocutory applications as well as the Defendant's later attempt to withdraw Suit 813. In light of these, the HC found the Statutory Notice to be a backdoor attempt to bypass the court process and a blatant abuse of process.

Issues 3 & 4 – Whether the Defendant's actions in issuing the Statutory Notice was legitimate; whether the granting of a Fortuna Injunction would cause irreparable harm to the Defendant

Taking into account the chronology of events, the HC could not agree with the Defendant that the Plaintiff had deliberately obstructed or delayed the recovery of the purported debt. In fact, the HC found that the delay of Suit 813 as a consequence of the Defendant's own actions as among others, the Defendant chose not to commence arbitration proceedings despite there being an agreed arbitration clause.

The HC found that the overall circumstances of the case indicated that the Statutory Notice was issued for a collateral purpose of bypassing Suit 813 and compelling payment from the Plaintiff despite the pending stay application. The court held that it cannot sanction an abuse of its process under the guise of a statutory remedy and a Fortuna Injunction was thus granted. In coming to his decision, Justice Atan Mustafa noted that “*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*” as “*this would be antithetical to established legal principles and the court's function to adjudicate genuine disputes between parties*”.

Conclusion

While creditors are free to exercise their statutory rights to pursue a debt, this case has made it clear that the courts will not condone a misuse of legal rights and remedies for a collateral purpose. This case highlights the importance of parties carefully considering the most appropriate method to pursue and recover its debts as such actions will be taken into consideration by the courts.

In addition, this case demonstrates that a party who disregards an arbitration agreement and pursues its claim through various interlocutory applications in a court proceeding cannot later accuse the other party of obstruction or delay in debt recovery.

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DISCLAIMER:

This article is for general information only and should not be relied upon as legal advice.
The position stated herein is as at the date of publication on 13 February 2025.

¹ Kris Heavy Engineering & Construction Sdn Bhd v Lewis & Co (Advocates & Solicitors) [2017] MLJU 906 Court of Appeal

² Swissray Asia Healthcare Co Ltd v Medical Services M Sdn Bhd [2024] 8 CLJ 21 Court of Appeal