IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY OF KUALA LUMPUR
COMPANIES WINDING UP NO.: WA-28NCC-1146-12/2018

In the matter of Sections 465(1)(e) and 466(1)(a) of the Companies Act 2016;

And

In the matter of MAYLAND AVENUE SDN BHD (Company No.: 796032-U)

BETWEEN

AWANGSA BINA SDN BHD
(Company No.: 283857-T) … PETITIONER

AND

MAYLAND AVENUE SDN BHD
(Company No.: 796032-U) … RESPONDENT

GROUNDS OF JUDGMENT

1. The Petitioner has filed a winding up petition against the Respondent in respect of an alleged debt of RM5,829,742.60 (inclusive of Interim Claim Certificate No. 37a) pursuant to the Final Account certified by the Respondent's Consultant Architect. The Respondent has filed an application (en. 5) to stay the winding up proceedings pending arbitration or alternatively to strike out the winding up

proceedings. I have allowed the striking out of the winding up petition. These are the full reasons for my decision.

Salient Background Facts

2. The Petitioner carried out and completed construction works for the Respondent for a project known as “Mixed Commercial Development comprising of: i. 1 Block 15 storeys Office Tower with 2 storeys Retail; ii. 2 Blocks of 11 storeys Podium with 4-storeys Retails, 7-storeys Hotels (215 Rooms), Facilities and Offices erected on Existing 2-storeys of Basement Car Parks on Parcel of Freehold Commercial Land Held under Geran 825(formerly HSD 7978) Lot No. 3 (PT 12071), Mukim of Presinct 3, Putrajaya, Wilayah Persekutuan, For Mayland Avenue Sdn Bhd.(“**the Project**”).

3. The Project had been completed and the defects liability period had expired.

4. The Statement of Final Account had also been issued by the Quantity Surveyor and the Consultant Architect and signed by the Petitioner. However it was not signed by the Respondent.

5. Because the Respondent did not sign the Statement of Final Account, the Consultant Architect had not issued the Final Certificate.

6. Based on the Statement of Final Account, a sum of RM5,829,742.60 is due and owing by the Respondent to the Petitioner (inclusive of Interim Claim Certificate No. 37a).

7. The contract between the parties contains an arbitration clause pursuant to which all disputes between the parties shall be referred to arbitration.

8. Based on the Statement of Final Account, the Petitioner filed the winding up petition against the Respondent. The Respondent applied to stay the winding up proceedings pending arbitration, in the alternative, to strike out the winding up petition.

9. Section 10(1) of the Arbitration Act 2005 states as follows:

> "*A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those*

proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

Findings Of The Court

10. The Petitioner relied on the decision of Mohd Nazlan Mohd Ghazali J in ***NFC Labuan Shipleasing Ltd v Semua Chemical Shipping Sdn Bhd*** [2017] MLJU 900 in submitting that section 10 of the Arbitration Act 2005 has no applicability to a winding up petition. In that case, the learned Judge held as follows:

"*Is Winding –up petition a matter subject to arbitration agreement falling under section 10 of the AA?*

(A) Sui Generis

[32] For completeness, even if the above analysis of mine is incorrect, an additional if not alternative explanation, advanced by neither the petitioner nor the respondent, as to why, in my view, this stay application filed by the respondent cannot succeed is the more fundamental objection premised on the very nature of a winding-up process itself. Winding-up proceeding is plainly a class of its own. It is sui generis. It is primarily regulated by the provisions of the law enacted specifically to govern such proceedings.

[33] The English Court of Appeal in Ridgeway Motors (Isleworth) Ltd v ALTS Ltd [2005] 1 WLR 2871 in the judgment of Mummery LJ held that a winding-up petition was sui generis, was not a form of execution of the judgment on which the petition was based, and thus in that case, did not fall within the definition of "action? in s 38(1) of the UK Limitation Act 1980; and accordingly the petition w - .

[34] It bears repetition that the petition is sui generis as winding-up proceedings feature a distinct characteristic of a wider legal process. Even though it may be initiated by a single petitioning creditor, upon the granting of the order for winding-up, the process which enables what may be regarded as the collective enforcement of proven debts of the company will be activated, for the benefit of not just the petitioner but instead the general body of unsecured creditors, all on pari passu basis. 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.

[35] A stay application of a winding-up petition pending arbitration could thus be viewed to be of doubtful relevance and validity. A winding-up petition is not in the nature of a substantive claim before the Court that is contemplated by Section 10 of the AA. Section 10 talks about a matter in a substantive claim, as stated in its heading. But a winding-up process is essentially a proceeding to wind up for the inability to pay debt, as was alleged in this instant case. The respondent, in response, need only to show the debt to be disputed and to rebut presumption of insolvency. The affidavit in opposition is designed to help a debtor to achieve this.

[36] This is the legal position that obtains in this country. This is made manifest in various authorities. I only need to refer to the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd & Other Appeals where the sui generis character of a winding-up is expressed in the following terms:-

> *"But a petition for winding-up is not execution. For a winding-up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s. 218 of the Companies Act. But the issuance of such a notice is not a sine qua non for the presentation of a winding up petition. What is needed is*

compelling evidence of the company's inability to pay its debts as and when they fall due."

…

(C) Reliefs and Outcomes different

[46] Fundamentally, a petition is premised on the inability of the debtor to pay the debt of the creditor. It is not to determine whether the respondent in the instant case is legally indebted to the petitioner herein. In as much as a winding-up petition i

a stay of the same by referring the petition to arbitration is entirely incongruent with the true essence of a winding-up petition.

[47] More specifically, a dispute, if any, in respect of the Bareboat Charters is not an issue that is within the remit of a winding-up Court. And more relevantly, vice versa. Whatever averments of differences or disputes between the parties as may have been set out in the petition serve only to support the essence and substance of the winding-up petition that the respondent was unable to pay its debts which had fallen due. The petition does not therefore come within the ambit of the arbitration clause of the Bareboat Charters. It is not a "matter? which is subject to an arbitration agreement. As such, Section 10 of the AA cannot apply.

[48] For, at the risk of repetition, at the hearing of the petition, the issues to be considered by the Court before deciding to grant the order or dismiss the petition would be focused on whether the

there is any bona fide dispute over the debt on substantial grounds. It matters not that the debt arises from the Bareboat Charters. If the order is granted, the process of liquidation commences and the petitioner and other creditors proceed to file their proof of debts. If the petition is dismissed, the respondent is not wound-up and the petitioner may still consider to file a civil claim (and possibly subject to arbitration). The winding-up court will not consider to establish the liability of the parties.

[49] As such, a winding-up petition is not a 'proceeding' that is susceptible to a stay pending arbitration under Section 10 of the AA Equally significantly, neither does the petition concern a "matter? that is subject to an arbitration agreement. The petition merely raises the claim of an inability to pay a debt set out in the statutory demand. That is strictly not an issue which is subject to the arbitration clause, which as mentioned above, in clause 55(ix) requires any dispute arising from the Bareboat Charters shall be referred to arbitration in Singapore. The respondent argued that there is a dispute on the alleged breach on its part of the Bareboat Charters as well as on the purported non-payment of hire by the respondent.

[50] But these are quite different from the question on the overarching issue of the inability of the respondent to pay the debt. The winding-up petition does not and cannot seek to achieve an objective - which is the determination of a dispute - which could otherwise be resolved in the arbitration forum. Thus, in my view as a general rule, winding-up proceedings are not within the contemplated remit of Section 10 of the AA. In other words, a stay under Section 10 of the AA would be patently inappropriate and conceptually incongruent within the winding-up context.

[51] It cannot be emphasized enough that a winding-up petition is brought not as a way to resolve a dispute or to enforce an admitted debt against the respondent. The core and only issue for a winding-up court to adjudicate on is founded on the premise of the presumption that the respondent is unable to pay its debt. The winding-up court does not determine whether there is a debt payable. When the petition is heard, the presumption is there already is a debt payable, and that the respondent is unable to pay that debt.

[52] It is worthy of emphasis that prima facie a creditor who is not paid has a right to file a petition for a winding-up order (see the Supreme Court decision in Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95). This is a statutory right. Of paramount importance is this principle that the petitioner has the statutory right to present a petition for winding-up which, crucially, arises independently of and separate from the agreement, in this case the Bareboat Charters, pursuant to which the debt is

said to have arisen. The winding-up petition is not concerned with any question regarding the Bareboat Charters.

[53] It is not a form of "proceeding? and definitely not a "matter? within the ambit of Section 10 of the AA. The petition is not a matter that is envisaged to fall within the ambit of the arbitration clause of the Bareboat Charters. It simply cannot, because the existence of a petition is wholly distinct and entirely separate from the Bareboat Charters. It is a statutory right that may be invoked and exercised at any time in accordance with the law on winding-up. This statutory right cannot be modified or diluted by Section 10 of the AA.

[54] I further draw support for my view from two case-law authorities. The first is the decision of the apex court in Australia in the case of Community Development Pty Ltd v Engwirda Construction Co (1966) 120 CLR 455. It concerned a building contract which contained an arbitration clause. The High Court of Australia ruled that winding-up proceedings did not fall within the scope of the arbitration clause. Owen J held thus:-

> *"The first submission made on behalf of the appellant was that the winding-up petition should have been dismissed because, by presenting it, the respondent had commenced an action upon 'a dispute or difference' arising under the building contract between the parties and by cl 26 of that contract each of them had agreed that no such action should be commenced until the matter in dispute had been*

referred to and determined by arbitration in accordance with that clause. In my opinion this submission fails.

……but the presentation of this petition was not the commencement of proceedings based on the building contract or upon a dispute or difference arising under it. The "cause of action", if it may be so described, was that the appellant was unable to pay its debts and that it was just and equitable that it should be wound up.

[55] The other is the decision of the English Court of Appeal in Salford Estates (No.2) Ltd v Altomart Ltd [2014] EWCA Civ 1575, where the key question was not unlike presently, whether a winding-up petition was capable of being stayed pursuant to Section 9 of the UK Arbitration Act 1996, in situations where the petition debt arose pursuant to an under-lease that contained an arbitration clause.

[56] The Court of Appeal disagreed with the decision of the High Court, and held that an issue on a winding-up petition concerning a disputed debt did not become a claim falling within the said Section 9 of the UK Arbitration Act 1996. As such, the Court is not bound by the Arbitration Act to stay the winding-up petition.

[57] The Court of Appeal, in the judgment delivered by Sir Terence Etherton (the Chancellor of the High Court) held thus:-

"38. For all those reasons, at least in respect of an alleged due but unpaid debt, I do not agree with the view expressed by Warren J in Rusant at paragraph [19] that an issue on a winding-up petition which is essential to the foundation of the petition becomes a claim and falls within section 9. That section has no application to the Petition in the present case.

39. My conclusion that the mandatory stay provisions in section 9 of the 1996 Act do not apply in the present case is not, however, the end of the matter. IA 1986 s. 122(1) confers on the court a discretionary power to wind up a company. It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act. This was the alternative analysis of Warren J in paragraph [19] of Rusant.

40. Henry and Swinton Thomas LJJ considered in Halki Shipping that the intention of the legislature in enacting the 1996 Act was to exclude the court's jurisdiction to give summary judgment, which had not previously been excluded under the Arbitration Act 1975. It would be anomalous, in the circumstances, for the companies' court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding-up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration. Exercise of the

discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement - as a standard tactic - to by-pass the arbitration agreement and the 1996 Act by presenting a winding-up petition. The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding-up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds. That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act.?

[58] Thus, nevertheless, given that the Court's power to make a winding-up order is discretionary, the English Court of Appeal further decided that the Court will exercise its discretion under Section 122(1) of the Insolvency Act 1986 to decline to wind up a company where the debt upon which the petition is based is subject to an arbitration agreement and that debt is not admitted. This would be the position even where the Court takes the view that the debt is not bona fide disputed on substantial grounds. Thus the petition should be dismissed (rather than stayed) unless there is evidence that there is another creditor willing to be substituted as a petitioning creditor.

[59] Such a position is not contrary to the analysis of this Court that has found that Section 10 of the AA has no application to winding-up proceedings. Even

recognizing the potential process abuse by parties filing winding-up petitions to exert unfair pressure instead of litigating the dispute in adherence to an arbitration agreement, and in view of the need to give due regard to the clear legislative intent of arbitration statutes, there is no impediment to the winding-up court to proceed to hear the petition and decide to dismiss the same, or even in exceptional circumstances as highlighted earlier in this judgment, stay the proceedings, as the justice of the case may demand. But this does not in any valid manner equate to the proposition that the law sanctions an automatic and mandatory stay of winding-up petition for reference to arbitration under Section 10 of the AA, in terms contemplated by enclosure 18 herein.

Conclusion

[60] In view of the foregoing reasons, it is my judgment that the stay application under Section 10 of the AA herein is unsustainable either by reason of the respondent having taken steps in the proceedings which bars such reference to arbitration or on account of the more fundamental premise that winding-up proceedings, considering its nature, objective and characteristics vis-a-vis what may be determined in an arbitration forum, and considering the specific laws governing winding-up, cannot be validly made subject to Section 10 of the AA. Accordingly, I dismiss the stay application in enclosure 18, with costs.

11. The Respondent on the other hand relied on the decision of Ahmad Kamal JC in ***Goh Nguang Chian v Dynapack Eoss Packaging Sdn Bhd*** [2018] MLJU 885 where the court stayed a winding up petition pending reference to arbitration. The Court in that case did not refer to the decision in ***NFC Labuan***.

12. I am inclined to agree with the decision in ***NFC Labuan*** that Section 10 of the Arbitration Act does not apply to winding up petitions. This view is also in line with the decision of the UK Court of Appeal in ***Salford Estates (No 2) Ltd v Altomart Ltd (No 2)***[2015] Ch 589 referred to in ***NFC Labuan*** wherein the Court of Appeal held that a winding up petition based on the particular debt specified in the petition was not a "claim" for payment of that debt, since it was not certain that any winding up order which might follow would result in the right to payment of an amount equal to the debt specified; and that, therefore, where a winding up petition was based on a company's inability to pay its debts and what was in dispute was the existence of a particular debt, section 9(1)(4) of the UK Arbitration Act 1996 (which is similar to section 10(1) of our Arbitration Act) did not remove the court's jurisdiction and discretionary power to wind up a company deemed unable to pay its debts.

13. However, the Court of Appeal went on to say as follows:

"[39] My conclusion that the mandatory stay provisions in section 9 of the 1996 Act do not apply in the present case is not, however, the end of the matter. Section 122(1) of the 1986 Act confers on the court a discretionary power to wind up a company. It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act. This was the alternative analysis of Sarren J in the Rusant case at para 19.

[40] Henry and Swinton Thomas LJJ considered in Jalki Shipping Copn v Spoex Oils Ltd [1998] 1 WLR 726 that the intention of the legislature in enacting the 1996 Act was to exclude the court's jurisdiction to give summary judgment , which had not previously been excluded under the Arbitration Act 1975. It would be anomalous, in the circumstances, for the Companies' Court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration. Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement- as a standard tactic- to bypass the arbitration agreement and the 1996 Act by presenting a winding up petition. The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay

up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds. That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act.

[41] There is no doubt that the debt mentioned in the Petition falls within the very wide terms of the arbitration clause in the Lease. The debt is not admitted. In accordance with the decision in the Halki Shipping case, that is sufficient to constitute a dispute within the 1996 Act, irrespective of the substantive merits of any defence, and were there proceedings on foot to recover the debt, to trigger the automatic stay provision in section 9(1) of the 1996 Act. For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under section 122(1)(f) of the 1986 Act, it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds."

14. Section 122(1) of the Insolvency Act 1986 in UK states that : "A company may be wound up by the court if …(f) the company is unable to pay its debts…(g) the court is of the opinion that it is just and equitable that the company should be wound up."

15. In the case of ***Bdg v Bdh*** [2016] 5 SLR 977, the plaintiff entered into two contracts with the defendant for the supply of drilling units for fossil fuel production off Nigeria. The contracts included a tiered dispute resolution clause, which specified that discussions were to be held between representatives, and eventually the top management, of each company. If these dispute resolution mechanisms did not work out, the parties were to refer the dispute to arbitration.

16. As things turned out, a number of invoices from the defendant were not paid by the plaintiff. Discussions were held between the two sides. The defendant said that ultimately nothing was agreed but the plaintiff contended that there was a settlement agreement reached.

17. In June 2016, a statutory demand was issued by the defendant to the plaintiff. The plaintiff filed an application to restrain the commencement of winding up proceedings, arguing that there was a dispute between them that was governed by an arbitration clause. The plaintiff contended that an injunction could be granted to restrain the commencement of winding up if a debt was bona fide disputed. Although the usual standard was that triable issues had to be raised, where there was an arbitration agreement governing the dispute, the

applicable standard was that in ***Salford Estates (No 2) v Altomart Ltd (No 2)*** [2015] Ch 589, ie, whether *prima facie* there was a dispute which was subject to an arbitration clause. If so, the dispute was governed by that clause. The defendant argued that there was no bona fide dispute. Further, the *prima facie* test in Salford Estates was too low a standard and the requirement that a triable issue be raised should be retained.

18. The High Court granted the plaintiff an injunction to restrain the filing of the winding up application and held as follows:

a) A dispute existed whenever a claim by one side was asserted to be disputed or denied by the other;

b) The general approach to determine the existence of a bona fide dispute was whether a triable issue had been made out. The court was required to examine the affidavit evidence, and consider whether on such material, an arguable case could be made, meriting the holding of a trial of the issues. That standard would require more inquiry and assessment than a standard requiring only making out that a dispute existed *prima facie*;

c) However, where a dispute between the parties was subject to an arbitration clause, the test was that in ***Salford Estates***, ie, whether there was a *prima facie* dispute. The objective of the triable issue standard was to ensure that winding up was not staved off on tenuous grounds. However, this objective was less pressing when there was an arbitration clause. Instead, parties should be held to their agreement that disputes were to be arbitrated. Any weakness of a case should be a matter for the arbitrators, rather than the court, to decide. In addition, in these situations, the parties were essentially in dispute about the existence of a dispute. Trying to ascertain a triable issue in this context would be likely to be an exercise that would not be fruitful, efficient or proportionate, without any countervailing benefit;

d) The adoption of the lower standard in ***Salford Estates*** would not stymie the winding up regime by opening the door to gaming of the system by companies desperate to fend off creditors. First, if the issues raised were not bona fide, this would be a reason to find that there was no dispute *prima facie*. Second, since arbitration would have been

contemplated from the time the parties entered into an agreement, there would be nothing inequitable in asking the parties to go through arbitration before they invoked the winding up process;

e) In this case, a dispute existed *prima facie*, as the plaintiff asserted that there was a binding settlement, but the defendant denied that there was such a settlement;

f) The plaintiff showed that they were in prima facie compliance with the requirements of the tiered dispute resolution clause. A stricter standard should not be applied as this would be incongruent with the standard applicable to stays in favour of arbitration; and

g) The plaintiff only needed to establish a *prima facie* case that the dispute regarding the putative settlement agreement fell within the arbitration clause which they did in this case. Other than that, the scope of the arbitration clause would be a matter for the arbitrator to decide on.

19. The above cases were considered by the Hong Kong Court of First Instance ("CFI") in ***Lasmos Limited v Southwest Pacific Bauxite (HK) Limited*** [2018] HKCFI 426 where the CFI held that a winding up petition issued on the ground of insolvency should generally be dismissed if there is an arbitration clause contained in an agreement giving rise to a debt relied on to support the petition.

20. In that case, the winding up petition was issued by Lasmos Ltd against Southwest Pacific Bauxite (HK) Ltd ("**Company**") for the latter's alleged failure to pay a USD 259,700.48 service fee ("**Debt**") under a management services agreement dated 24 July 2013 between the parties ("**Agreement**"). The Agreement contains a clause referring the parties' disputes to arbitration failing mediation.

21. The Company declined to pay the Debt on the basis that the parties had never agreed on the relevant fee and the rate to be charged. In resisting the winding up petition, the Company submitted that this constitutes a "bona fide dispute on substantial grounds" as to what further sums were payable to Lasmos.

22. The CFI considered the cases of ***Salford Estates*** and ***Bdg v Bdh***. Comparing the different approaches taken by the Hong Kong authorities and the more recent ones in England and Singapore, the CFI concluded that the proper nature of a winding up petition is for a creditor to recover its debt, rather than out of "*some altruistic concern for the creditors of the company generally"* as it would be "*the most efficacious method of obtaining payment".* The CFI noted that requiring a creditor to arbitrate a dispute without first determining whether the company has a bona fide defence on substantial grounds would, in fact, be holding a creditor to his contractual bargain- namely, to resolve any dispute by arbitration. The CFI found comfort in the fact that doing so would not deprive a creditor of an advantage that it has under the existing authorities, as there are circumstances in which a creditor whose debt is disputed would be justified in issuing a petition before an arbitration had been concluded. By way of an example, if a creditor can demonstrate a prima facie case for a winding up and a risk of misappropriation of assets or some other matter, a petition could be issued and stayed other than for applications relevant to the provisional liquidation pending determination of the arbitration.

23. Based on the foregoing, the CFI decided to depart from the previous approach in Hong Kong and held that a winding up petition should generally be dismissed if (a) a company disputes the debt relied on by the winding up petitioner; (b) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and (c) the company takes steps required under the arbitration clause to commence the contractually mandated dispute resolution process and files an affirmation in accordance with Rule 32 of the Companies (winding Up) Rules (Cap 32H) demonstrating this.

24. Applying the new test to the case, since the Company disputed the Debt and required the dispute to be resolved in accordance with the arbitration clause in the Agreement, the CFI found that ***Lasmos***' petition should be dismissed. In any event, the CFI found that it would have dismissed the petition since it was arguable on the facts that the parties' discussions fell short of arriving at a binding agreement on fees resulting in the claim for a liquidated debt, i.e. there was a *bona fide* dispute on substantial grounds.

25. Applying the decisions in ***Salford Estates, Bdg v Bdh*** and the ***Lasmos*** case, I should ascertain whether there is a *prima facie* dispute

of the debt claimed by the Petitioner. Since the Respondent was relying primarily on section 10 of the Arbitration Act 2005, it did not elaborate on the basis on which it was disputing the debt claimed by the Petitioner but essentially this is what the Respondent is alleging:

a) that it is entitled to a set off against rectification costs that are needed to be incurred;

b) that the Respondent is also entitled to counterclaim for back charges that had been incurred; and

c) that the claim incorporated amounts that are owing from the nominated sub-contractors and the nominated Suppliers.

26. The Respondent had exhibited letters from some nominated sub-contractors to the effect that they have been paid directly by the Respondent and are not claiming against the Respondent.

27. It was submitted for the Petitioner that the Respondent lacks bona fides as the claims were made only very recently and not when the Accounts were being finalised. Also I note that the Respondent could have but did not quantify its counterclaim or set off. If the Respondent

has to show that the debt was disputed *bona fide* on substantial grounds, I would hold that the Respondent has not discharged that burden.

28. However, applying the lower threshold of merely showing a *prima facie* dispute, since the debt here is the subject matter of an arbitration clause, I am of the view that the Respondent has discharged the burden of showing a *prima facie* dispute, bearing in mind that a denial of the indebtedness constitutes a dispute. The merits or otherwise of the dispute are matters to be decided by the arbitrator and not by this Court and the Respondent had given notice of arbitration to the Petitioner. Accordingly, I would not stay the winding up petition pending arbitration under section 10 of the Arbitration Act 2005 but, in the exercise of my discretion under section 465 of the Companies Act 2016, I would dismiss the winding up petition on the ground that the Respondent has shown the existence of a *prima facie* dispute which ought to be referred to arbitration.

Wong Chee Lin
Judge
Kuala Lumpur High Court
Dated: 2nd May, 2019

Solicitors for the Petitioner

Adam Lee Leong Soon & Sanjay @ Jegathesan A/L S Mohanasundram
Messrs Sanjay Mohan
Advocates & Solicitors
Unit 5.01 Level 5
WORK@Clearwater
Jalan Changkat Semantan
50490 Kuala Lumpur

Tel : 03-2092 2277
Fax: 03-2775 5077

Solicitors for the Respondent

Andrew Raj Davis & Pavithara Thevi A/P Ramachandran
Messrs Andrew Davis & Co
Advocates & Solicitors
P-3-13, Plaza Damas
No. 60, Jalan Sri Hartamas 1
Sri Hartamas
50480 Kuala Lumpur

Tel : 03-6201 9230
Fax: 03-6201 9232