

DHJS Hull No 2007-002 LLC v Skaugen Marine Investments Pte Ltd
[2018] SGHC 122

Case Number : Companies Winding-Up No 7 of 2018 and HC/Summons No 1931 of 2018
Decision Date : 21 May 2018
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Lin Weiwen Moses and Seet An Xiang Justin (Incisive Law LLC) for the plaintiff;
Daryll Ng, Lauren Tang Hui Jing and Ong Huijun Christine (Virtus Law LLP) for the defendant.
Parties : DHJS Hull No 2007-002 LLC — Skaugen Marine Investments Pte Ltd

Companies – winding up

21 May 2018

Choo Han Teck J:

1 The defendant chartered a vessel from the plaintiff on 28 July 2008 but did not pay after receiving invoices for the charter. On 20 December 2017, the plaintiff issued a statutory demand and a notice of arbitration, informing the defendant that disputes had arisen under the charter party, and that the plaintiff was referring the said disputes to arbitration. The defendant's solicitors wrote to the plaintiff's solicitors on 10 January 2018, stating that the debt, which formed the basis of the statutory demand, was disputed, and as "arbitration already commenced, your clients may not seek to proceed further in the Singapore courts and instead should submit their claims for determination in the arbitration". The plaintiff nevertheless commenced winding up proceedings on 15 January 2018 based on the statutory demand.

2 On 10 May 2018, counsel for the defendant, Mr Ng, applied in Summons No 1931 of 2018 for the proceedings to be abridged. I granted his application and was prepared to hear the winding up application proper. However, counsel for the plaintiff, Mr Lin, requested for time to file certain authorities in support of his submissions. I thus adjourned the hearing to 14 May 2018, where Mr Lin made an application to be substituted by a supporting creditor (DHJS Hull No. 2007-001 LLC) in the event that the winding up proceedings were dismissed, stayed, or withdrawn by the plaintiff. The supporting creditor had issued a statutory demand to the defendant, for which the last day of payment (11 May 2018) had elapsed without any payment. The supporting creditor had also obtained a partial final arbitral award in its favour, in respect of the debt which formed the basis of the statutory demand.

3 At the hearing on 14 May 2018, I made the following orders:

- (a) Companies Winding Up No 7 of 2018 is dismissed;
- (b) the plaintiff's application to be substituted by a supporting creditor is dismissed; and
- (c) costs to the defendant are fixed at \$18,000 plus reasonable disbursements.

I now furnish the grounds of my decision.

4 Mr Ng submitted that the winding up proceedings should be dismissed as the debt in question is disputed. In support of this, Mr Ng raised four points. First, the arbitral tribunal issued a ruling that there was a dispute relating to the unpaid charter hire. Second, the plaintiff conceded that there is such a dispute, and amended its claim before the tribunal to include the dispute. Third, from the outset the defendant had made it clear to the plaintiff that the debt was disputed. Fourth, the defendant has counterclaims against the plaintiff. Mr Ng further submitted that the winding up proceeding should not be stayed, as the petition is bad ab initio and an abuse of process. As for the plaintiff's application to be substituted by the supporting creditor, Mr Ng submitted that it should be dismissed for three reasons. First, the defendant is appealing against the partial final arbitral award in favour of the supporting creditor, and seeking a stay of execution of the same. Second, the defendant has substantial cross-claims against the supporting creditor which have not been dealt with by the arbitral tribunal. Third, the supporting creditor and plaintiff are utilising the winding up proceedings to improperly pressure the defendant.

5 Mr Lin submitted that the proceedings should not be dismissed as the debt is "due and owing, and cannot be validly disputed". He explained that the plaintiff's amendment of its claim in the arbitral proceedings was a result of its hand being forced by the defendant's application requesting the tribunal to consider whether it had jurisdiction over the unpaid charter hire, which led to the tribunal ruling that it had jurisdiction, and that there was a dispute over the unpaid charter hire. Mr Lin further submitted that the plaintiff's amendment of its claim was done without prejudice to its position in these proceedings. In the alternative, Mr Lin argued that the plaintiff's commencement of winding up proceedings was *bona fide* and "should not be penalised with a dismissal ... just because the subject debt was alleged to be disputed subsequent to the filing of [winding up proceedings]". Instead, Mr Lin sought a stay of the winding up proceedings pending the decision of the arbitral tribunal, in which event he also sought for the plaintiff to be substituted by the supporting creditor (see [2]).

6 Whether a debt is disputed is a question of fact. In this case, the facts show that the debt is disputed on substantial grounds. First, the defendant alleges that:

there was a common understanding and course of dealing between the [parties] that hire would not actually be paid in accordance with hire invoices and the amounts due to each other under the [charter parties] may not always be paid/collected in accordance with the terms of the [charter parties]. Instead, parties would find solutions to how each situation when it came [*sic*].

One such solution was a "pay as you earn" scheme where the hire payment regime under the various charters were suspended and instead the defendant would make payments to the plaintiff as and when. Second, the defendant has counterclaims against the plaintiff. In these circumstances, the debt cannot be said to be undisputed.

7 I agreed with Mr Ng that the proceedings should be dismissed rather than stayed. I could not see how the winding up proceedings can be said to have been commenced *bona fide* when the plaintiff was informed, before the commencement of the winding up proceedings, that the defendant disputed the debt, and the basis for the defendant's counterclaims. Arbitral proceedings over that dispute are underway and had neither been set aside nor concluded. The plaintiff's conduct also supports the defendant's claim that the winding up proceedings are being used for the collateral purpose of exerting improper pressure on the defendant. As stated earlier at [2], I had wanted to hear the parties on the merits of the winding up proceedings immediately after granting the abridgement application on 10 May 2018, which was just two working days before the winding up proceedings were set to be heard, on 14 May 2018. However, Mr Lin requested for more time to file certain authorities. The merits of the winding up proceedings were thus heard on the date it was originally fixed for (*ie* 14 May 2018), by which time the date for payment under the supporting

creditor's statutory demand (*ie* 11 May 2018) had passed. Yet, despite the fact that the time for payment under the supporting creditor's statutory demand would elapse just one day after the hearing of the abridgement application (*ie* 10 May 2018), allowing it to make a substitution application at the hearing on 14 May 2018, no mention of this was brought up in the hearing of the abridgement application. Mr Lin sought to explain the omission by saying that he did not have instructions in relation to the substitution by the supporting creditor on 10 May 2018. I did not accept his explanation, noting that the plaintiff and supporting creditor are related companies, and that the circumstances were simply too convenient to have been coincidental. The omission was suspiciously an attempt to stall for time so that the supporting creditor could apply to substitute itself as a creditor.

8 I declined to exercise my discretion to substitute the supporting creditor for the plaintiff. I accepted Mr Ng's submissions and found that the debt alleged owed to the supporting creditor is, like the debt allegedly owed to the plaintiff, disputed – for one, there are substantial cross-claims. Additionally, the application for substitution was, as elaborated at [7], for illegitimate purposes.

9 For the above reasons, I made the orders in [3].