De Montfort University v Stanford Training Systems Pte Ltd
[2005] SGHC 202

Case Number : CWU 103/2005, SIC 3176/2005

Decision Date : 25 October 2005

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Chan Kia Pheng and Shaun Koh (KhattarWong) for the petitioner; Rajiv Nair and Felix Lee (Shook Lin and Bok) for the respondent

Parties : De Montfort University — Stanford Training Systems Pte Ltd

Insolvency Law – Winding up – Grounds for petition – Whether petition for winding up company should be stayed – Whether bona fide dispute on debt forming subject matter of petition

25 October 2005

Tay Yong Kwang J:

1 This was an application by the respondent for the following reliefs:

(a) that the Winding-up Petition filed by the petitioner on 17 May 2005 be struck out pursuant to the inherent jurisdiction of the court;

(b) alternatively, that the said Petition be stayed pursuant to s 258 of the Companies Act (Cap 50, 1994 Rev Ed) pending the determination of Suit No 432 of 2005; and

(c) that the costs of the application be paid by the petitioner to the respondent forthwith.

2 On 26 August 2005, after hearing the parties, I decided to stay the Winding-up Petition pending the outcome of Suit No 432 of 2005 ("Suit 432/2005"), an action commenced by the respondent and FTMS Consultants Pte Ltd ("FTMS") against the petitioner. On 1 September 2005, the petitioner wrote to ask for further arguments to be made to the court. I declined to hear further arguments.

The Petition and the chronology of events

3 On 22 April 2005, the petitioner served a statutory demand on the respondent claiming that the respondent was indebted to the petitioner in the sum of £91,931.28 for services rendered between June 2002 and December 2003 under a Memorandum of Co-operation entered into by the parties on 1 November 2000. Under the said Memorandum of Co-operation, the respondent would provide access to physical resources for the delivery of the petitioner's programmes in Singapore and would be responsible for operating, solely or jointly, the programmes or modules leading to awards of the petitioner. Attached to the statutory demand was a schedule containing a list of the invoices for which the petitioner had not received payment or full payment. These invoices were dated between 11 December 2002 and 22 December 2003.

4 On 9 May 2005, the respondent's solicitors responded, stating that they were taking the respondent's instructions and would revert. The 21-day notice under the statutory demand expired on 13 May 2005. On 16 May 2005, the petitioner's solicitors wrote to the respondent's solicitors to ask for their response by noon the next day. The respondent's solicitors replied the same day, claiming

that the respondent would be able to raise various counterclaims, including but not limited to a claim in respect of losses suffered as a result of the petitioner's failure to deliver various programmes as agreed between the parties.

5 On 17 May 2005, the petitioner filed this Winding-up Petition. On 13 June 2005, the respondent and FTMS commenced Suit 432/2005 against the petitioner. On 24 June 2005, the respondent took out the present application, which was fixed for hearing on 1 July 2005, the same date as the hearing of the Petition. On 1 July 2005, directions for the filing of affidavits by the parties were given by the court.

6 On 15 July 2005, the petitioner filed its affidavit as scheduled and also filed its Defence and Counterclaim in the suit. The respondent missed its deadline (of 29 July 2005) for the filing of its affidavit in reply. On 29 July 2005, the respondent and FTMS filed their Amended Statement of Claim and their Reply to the petitioner's Defence and Counterclaim in the suit. On 5 August 2005, the respondent filed its affidavit in reply in this Petition. On 15 August 2005, the petitioner filed its Amended Defence and Counterclaim in response to the respondent's and FTMS's Amended Statement of Claim in the suit.

The respondent's case

7 The business relationship between the parties dated back to 1997. The petitioner is an English university with which the respondent made arrangements to deliver the petitioner's courses in Singapore. The respondent's related companies in Malaysia had a similar relationship with the petitioner.

8 From 1999, with the encouragement of the Ministry of Education in Malaysia, the relationship there was placed on a more formal footing. This included the formation of a joint-venture company in 2000 and the signing of an Academic Agreement between the joint-venture company and the petitioner on 6 April 2000. This Academic Agreement covered the delivery of the petitioner's degree courses in Malaysia as well as in Singapore. The disputed debt on which the Petition was premised arose under this Academic Agreement. The degree courses in Singapore would continue to be delivered by the respondent, which incurred expenses and earned revenue in doing so. A Memorandum of Co-operation was signed between the petitioner and the respondent, described therein as "partners", on 1 November 2000, setting out the respective responsibilities of the parties in broad terms. This Memorandum of Co-operation did not purport to be the entire agreement between the parties although it evidenced the existence of a contract. It also suggested that the legal relationship between the parties was intended to be complementary to the joint venture arrangements in Malaysia.

9 In 2002, in breach of the requirements of the contractual relationship between the petitioner on the one hand and the respondent and the Malaysian companies on the other, the petitioner obstructed the delivery or continued delivery of its degree courses in Malaysia and in Singapore. As a result of the breach, there was no further intake of students in Singapore from the second half of 2002 onwards, causing the respondent to incur wasted costs and suffer loss of revenue. Legal proceedings were commenced in Malaysia in 2002 by the respondent's related companies against the petitioner.

10 A settlement of those legal proceedings was eventually reached and a settlement deed of 6 June 2003 ("the Settlement Deed") was entered into, pursuant to which there was to be a transition to a new university partner in place of the respondent. Balbeer Singh Mangat, a director of the respondent, met with the petitioner's vice-chancellor and its acting dean on 16 May 2003 when it

was orally agreed that, pending the execution and implementation of the Settlement Deed, all outstanding payments due from the respondent to the petitioner would be held in abeyance until after the said transition was completed. The respondent would forebear from commencing action against the petitioner in respect of the latter's breaches of their contractual relationship.

11 As the Settlement Deed was taking longer than expected to implement, a supplemental deed of 9 February 2004 ("the Supplemental Deed") was executed. While the Supplemental Deed was being negotiated towards the end of 2003 or at the beginning of 2004, it was also orally agreed between the parties that while outstanding invoices up to December 2003 would continue to be held in abeyance, the respondent would pay on invoices issued in 2004. Accordingly, the petitioner only demanded payment of outstanding invoices issued in 2004 and not those which had been issued earlier. Payment was subsequently made on the 2004 invoices. No party was to commence legal action before 31 July 2005, the date stipulated in cl 3.1 of the Supplemental Deed.

12 In 2005, in bad faith and/or in breach of the said oral agreements, the petitioner commenced winding-up proceedings against the joint-venture company in Malaysia and against the respondent here.

13 In Suit 432/2005, the respondent claimed for moneys paid to the petitioner by mistake in respect of fixed costs. These fixed costs, amounting to £54,080.45, were mistakenly paid as a result of invoices issued which wrongfully included fixed costs when the various annexes to the Academic Agreement expressly provided that no fixed costs were payable from the respondent to the petitioner in respect of the Master of Business Administration ("MBA") and Master of Science (Computing) ("MSc Computing") courses run in Singapore. The debt alleged in the Petition also included such fixed costs.

14 Similarly, the said annexes provided that an annual per capita cost of £375 was payable from the respondent to the petitioner in respect of the MSc Computing course. This meant that a quarterly per capita cost of £93.75 was due to the petitioner for each student enrolled in the MSc Computing course. However, the respondent mistakenly paid some £12,750 in excess of what was due because the petitioner's invoices wrongfully stated the said quarterly per capita cost as £125 instead of £93.75. The debt alleged in the Petition included such excessive per capita costs as well.

15 The respondent also claimed for loss of profits caused by the petitioner's omission, neglect or refusal to validate the Bachelor of Arts (Accounting and Finance) ("BA Accounting and Finance") and the Bachelor of Science (Computer Science) ("BSc Computer Science") courses in breach of its agreements, thus rendering the respondent unable to conduct those courses. In April 2002, the petitioner also unilaterally and wrongfully cancelled the MBA and MSc Computing courses, which were running at a profit in Singapore, and refused to provide programmes for those courses.

16 Further, the respondent and FTMS suffered losses amounting to more than $3.9m incurred in infrastructure costs expended in expectation of the petitioner's performance of its obligations under the agreements. These included renovation expenses, rental for premises paid from 1999 to 2003 and various computers and other equipment.

17 The disputed fixed costs and per capita costs components in the alleged debt of £91,931.28 amounted to some £21,000. All the claims listed above arose from the same agreements on which the Petition was based. The parties acted on the basis that there was a direct legal relationship between them. The respondent was therefore entitled to set off its claims against the petitioner's claim, thereby extinguishing the latter. The petitioner has filed a counterclaim in Suit 432/2005 in respect of the same invoices relied upon in this Winding-up Petition.

18 In any event, the respondent argued, it was not just and equitable (a ground relied upon in the Petition here) that it be wound up. When the petitioner brought its degree courses to an end here and in Malaysia, there were still students on the degree courses here. In order to ensure that these students were not prejudiced in their studies, the respondent continued to offer them facilities, at no charge, so as to enable them to complete the courses externally with the petitioner. To date, there are still such students being assisted by the respondent to complete their degree courses.

The petitioner's case

19 In respect of the respondent's claim that it paid fixed costs by mistake, the petitioner argued that the three affidavits of the respondent merely regurgitated the Statement of Claim in Suit 432/2005 instead of placing the relevant evidence before the court. The invoices in issue were not exhibited and neither was it shown how the invoices included the component of fixed costs. Further, no such claim relating to fixed costs was ever mentioned by the respondent prior to the service of the statutory demand by the petitioner.

20 There was no mistake of fact on the respondent's part in making payment to the petitioner. The petitioner and the respondent agreed that fixed costs, or a certain portion thereof, would be invoiced to the respondent and the respondent paid in accordance with the invoices issued. The e-mail correspondence between the parties showed an agreement that the respondent and the Malaysian joint-venture company would bear the fixed costs proportionately, in accordance with the number of students in Singapore and Malaysia. Although consideration was irrelevant in a claim based on quasi-contract for the recovery of money, there was actually consideration moving from the petitioner to the respondent in that the petitioner would look to another party (the respondent) for payment of the proportionate fixed costs and simultaneously not look to the Malaysian joint-venture company for the entire costs element.

21 Apart from the first four invoices, the remaining ones had accompanying e-mail passing between the parties agreeing on the form and substance of the respective invoice. For instance, in invoice No LE008941, the respondent was invoiced for 34 out of 47 students for fixed costs as there were 34 students in Singapore doing the MSc Computing (Part-time) course and the total number of MSc Computing (Part-time) students in both Malaysia and Singapore was 47. There was therefore no mistake of fact as alleged by the respondent.

22 Where the per capita costs were concerned, the respondent again did not exhibit any invoices and did not show how the quarterly per capita costs were allegedly overcharged at the higher rate. No such claim was ever raised by the respondent before the service of the statutory demand. Similarly, prior to the filing of this Winding-up Petition, the respondent did not allege that the petitioner had refused to validate two of the degree courses, that it had unilaterally imposed additional conditions on the minimum number of students for its degree courses delivered by the respondent or that it had delayed and/or withheld its approval for many applications for the courses. In any event, the annexes to the Academic Agreement stated that the BA Accounting and Finance course and the BSc Computer Science course were "not running" and the respondent was precluded by the parol evidence rule from adducing evidence of some other oral agreement in order to contradict or vary or add to the written agreement.

23 In relation to the expenses allegedly incurred, there was simply no evidence to show whether they had been incurred by the respondent, by FTMS, by both the respondent and FTMS or by some third party. Only claims pertaining to the respondent would be relevant to the winding-up proceedings. The respondent's claims about wasted expenses were nothing more than bare assertions. In any event, it could not be the case that all expenses incurred were to be attributed to

the petitioner because the petitioner could not possibly be the only foreign university that the respondent had collaborated with. The respondent was also not entitled to claim both loss of profits and expenses incurred at the same time (*Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd* [1993] 1 SLR 73 at 86, [59]).

24 If the respondent's claims against the petitioner were genuine ones, it would not only have raised them at the appropriate time and at the earliest opportunity, especially soon after the statutory demand was served, but it would also be certain of its claims. Instead, the respondent engaged in "flip-flopping" by amending its Statement of Claim quite substantially and has given notice of further amendments to be made.

The decision of the court

25 Section 258 of the Companies Act provides:

> At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

Although this section was referred to in the respondent's application, it seems to me that this section concerns the stay of suits against the company and does not apply to an application to stay a winding-up petition.

26 In *Re Sanpete Builders (S) Pte Ltd* [1989] SLR 164, the company opposed a winding-up petition filed against it on the grounds that no payment was due to the petitioner and that it had claims for liquidated as well as unliquidated damages against the petitioner. Chao Hick Tin JC (as he then was), in ordering that the company be wound up, stated the following propositions (at 175 and 176):

> (a) It is a well-established principle that a winding-up petition should not be used as a means to enforce payment of a debt which is *bona fide* disputed, *ie*, disputed on some substantial grounds.
>
> (b) It is an abuse of the process of the court to petition to wind up a company upon the basis of a debt which is so *bona fide* disputed.
>
> (c) Whether a debt is disputed on substantial grounds is a question of fact.
>
> (d) The mere fact that unconditional leave to defend an action relating to a debt is granted may not *per se* be sufficient to prevent the making of a winding-up order on the ground that it is a disputed debt.
>
> (e) A creditor need not go to court or to an arbitrator to collect an undisputed debt or a debt which is not disputed on substantial grounds.
>
> (f) When non-payment of a debt is due to a counterclaim, that counterclaim must also be based on substantial grounds for an amount equal to or exceeding the debt.
>
> (g) The winding-up court should not proceed to try a debt which is disputed on substantial

grounds.

27 In relation to point (d) above, the judge cited *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 where Lord Greene MR said at 198:

> I cannot accept the proposition that, merely because unconditional leave to defend is given, that of itself must be taken as establishing that there is a *bona fide* dispute or that there is some substantial ground of defence. The fact that such an order is made is no doubt a matter which the winding-up court will take into consideration and to which the winding-up court will in due course pay respect, but I cannot regard it as in any way precluding a winding-up judge from going into the matter himself on the evidence before him and considering whether or not the dispute is a *bona fide* dispute, or, putting it in another way, whether or not there is some substantial ground for defending the action.

The petitioner here relied on this proposition and submitted that even if leave to defend was granted in O 14 (Rules of Court, Cap 322, R 5, 2004 Rev Ed) proceedings, the judge hearing the winding-up petition could still look at the matter afresh and not be bound by the decision in the summary judgment proceedings, and here, no O 14 application was even involved.

28 With respect, I would not have taken the path indicated by Lord Greene MR above if the issue had arisen squarely before me. I prefer the view that once unconditional leave has been granted to a defendant and the order stands, either because the plaintiff decides not to appeal or because the order is affirmed on appeal, another forum should not revisit and reopen the same issues. If unconditional leave to defend has been given to a defendant in a claim on a debt, surely that means that there is a *bona fide* or a genuine dispute. Of course, it does not mean that the defendant will probably succeed in his defence at the trial of the action. It merely means that his defence is not a frivolous one or, in the words of Chao JC in the case cited above, the debt is "disputed on some substantial grounds". After all, the authority cited for proposition (a) above was Jessel MR in *Re Great Britain Mutual Life Assurance Society* (1880) 16 Ch D 246 (at 253) where the judge said:

> [I]n my opinion, it is not sufficient for the Respondents, upon a petition of this kind, to say "We dispute the claim". They must bring forward a *prima facie* case which satisfies the Court that there is something which ought to be tried, either before the Court itself, or in an action, or by some other proceeding.

This appears to me to be entirely consistent with saying that the respondents in that case must be able to persuade the court to grant it leave to defend the claim. Similarly, if the petitioner (who is the defendant in Suit 432/2005) is granted leave to defend in an O 14 application taken out by the respondent (the plaintiff in that suit), that merely means that the matters raised by the respondent in that suit should proceed to trial. It certainly does not follow that those matters are frivolous.

29 The relationship between the parties here started sometime in 1997 and a dispute between them first arose in 2002, when the joint-venture company raised the issue of the petitioner's alleged breach of its duty to co-operate. There were previous legal proceedings between the parties or their related companies arising from the same factual foundation. Documents generated over a number of years had to be gathered before a reply could be made to the petitioner's statutory demand and hence the delay in response. The fact that the Statement of Claim did not appear to have finalised the many numbers involved is not unexpected in a claim involving multiple transactions over a number of years. The respondent did not pursue its claim as it was under the belief that there was a settlement of the dispute.

30 The transactions and proceedings in Malaysia have a bearing on those taking place here. The respondent and FTMS have the same parent company. Therefore, the fact that FTMS is also a plaintiff in Suit 432/2005 does not take that legal action out of the scope of the dispute between the petitioner and the respondent in these winding-up proceedings.

31 The Petition here is not based on a judgment of a court. Further, the petitioner has claimed the same alleged debt in its Counterclaim in Suit 432/2005 and has not proceeded to apply for summary judgment under O 14. Neither has it applied to strike out the respondent's Amended Statement of Claim or its Defence to the Counterclaim in that suit. In *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980–1981] SLR 8 at 12, [18], the Privy Council stated that:

> There is no distinction in principle between a cross claim of substance … and a serious dispute regarding the indebtedness imputed against a company, which has long been held to constitute a proper ground upon which to reject a winding up petition.

32 The petitioner argued that even if the respondent's first two heads of claim were genuine ones, they would only add up to £65,767.95, leaving a difference of some £26,000 (or about $78,000), upon which the court could still make a winding-up order as that amount exceeded the statutory minimum of $10,000 provided in the Companies Act. In my view, however, it is not possible to say that the other heads of claim must necessarily fail, or that any damages awarded on those heads would not diminish the petitioner's alleged debt to below $10,000, even if the respondent's claims for wasted expenditure and for loss of profits should be substantially reduced because they would result in double recovery.

33 The petitioner also argued that the respondent was almost insolvent because in the respondent's latest available audited accounts for the financial year ending December 2003, its auditors stated that its total liabilities exceeded its total assets by $378,710 and that continuation of the respondent as a going concern was therefore principally dependent upon the continued availability of financial support from the holding company. The petitioner submitted that the respondent was insolvent if left on its own and that an insolvent company effectively belonged to its creditors. The petitioner also argued that it would be prejudiced if it had to be involved in litigation with a company that was essentially insolvent. Further, the petitioner submitted, the respondent's creditors would not be prejudiced if a winding-up order was made against the respondent because the appointed liquidator would be able to study Suit 432/2005 independently and decide whether it was a meritorious action.

34 The question that has to be answered is whether, if the respondent's claims are proved to be meritorious (even if not in all aspects), the petitioner would still have the standing to wind up the respondent. The respondent may well turn out to be a net creditor in the end. As far as Suit 432/2005 is concerned, if the petitioner believes that it has good grounds for applying for security for costs to protect its interests, there is no impediment to it doing so.

35 In my view, there is a debt which is disputed on some substantial grounds and the Winding-up Petition should therefore be stayed pending the determination of Suit 432/2005. I also ordered the costs of the application before me to be reserved to the trial judge in that suit.