Wee Soon Kim Anthony v Lim Chor Pee
[2006] SGCA 8

Case Number : CA 62/2005

Decision Date : 02 March 2006

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : The appellant in person; Andre Arul and Ling Leong Hui (Arul Chew and Partners) for the respondent

Parties : Wee Soon Kim Anthony — Lim Chor Pee

Insolvency Law – Bankruptcy – Statutory demand – Appeal against solicitors' successful application to set aside statutory demands issued under s 62 Bankruptcy Act – Whether bills of costs giving rise to valid counterclaim, set-off or cross demand – Whether agreement as to costs existing and status of firm as partnership or sole proprietorship amounting to "genuine triable issues" – Section 62 Bankruptcy Act (Cap 20, 2000 Rev Ed), r 98(2)(a) Bankruptcy Rules (Cap 20, R 1, 2002 Rev Ed)

2 March 2006

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an appeal against the decision of Lai Kew Chai J (reported at [2005] 4 SLR 367) who dismissed the appellant's appeal against the decision of the assistant registrar setting aside the statutory demands issued by the appellant to the respondent and the respondent's son, under s 62 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("s 62"). We heard the appeal on 26 January 2006 and dismissed it.

The background

2 The respondent, Lim Chor Pee and his son, Marc Lim, were partners in the law firm of M/s Chor Pee & Partners. However, it would appear that Marc Lim was only a salaried partner, drawing fixed wages, with no equity participation. The firm acted for the appellant in several matters, including the part-heard action in Suit No 834 of 2001 ("S 834/2001") where the appellant claimed in negligence and misrepresentation against a bank, as well as in the appeal to this court arising from the dismissal of that action by the High Court. The appellant also failed in the appeal.

3 In the meantime, the appellant extended a loan to the firm in the sum of $307,000 and a personal loan of $84,000 to the respondent. The respondent promised to make monthly repayments of the loans but failed to make good the same, save for a solitary repayment of $7,000 in relation to the loan to the firm. As a result, on 3 January 2005, the appellant served two statutory demands under s 62. The first was against the respondent and Marc Lim as partners of the firm for the debt of $300,000. The second was against the respondent for the debt of $84,000.

4 On 13 January 2005, the firm issued four bills to the appellant claiming a total of $610,780 as fees for professional services rendered to the appellant in various matters, namely:

(a) tax invoice no 99001 for $367,915, being the balance for work done in respect of S 834/2001;

(b) tax invoice no 99002 for $183,645, for work done in respect of the appeal from the decision in S 834/2001;

(c) tax invoice no 99003 for $20,160, for work done in respect of the bill of costs of one Thomas Sim;

(d) tax invoice no 99004 for $39,060, being work done in relation to the complaint lodged by the appellant against Gerald Godfrey QC.

5 We should add that the firm had also on 1 February 2005 issued to the appellant a tax invoice for the sum of $24,958.50, for work done in Civil Appeal No 114 of 2002 which was in relation to the proposed admission of Gerald Godfrey QC to represent the appellant in the substantive appeal against the decision of the judge in S 834/2001.

6 On 14 January 2005, three originating summonses in bankruptcy ("OSB") were filed by the respondent and/or Marc Lim to set aside the two statutory demands issued by the appellant, namely:

(a) OSB No 3 of 2005: filed by the respondent and Marc Lim to set aside the statutory demand for $300,000 ("OSB 3/2005");

(b) OSB No 4 of 2005: filed by Marc Lim alone to set aside the statutory demand for $300,000 ("OSB 4/2005"); and

(c) OSB No 5 of 2005: filed by the respondent to set aside the statutory demand for $84,000 ("OSB 5/2005").

7 On 16 February 2005, all three applications by the respondent and Marc Lim were granted by the assistant registrar who set aside the two statutory demands. The appellant filed three appeals to the High Court and they were all dismissed on 31 March 2005 by Lai Kew Chai J. However, the appellant only appealed to this court against the order made by Lai J affirming the decision of the assistant registrar in OSB 3/2005 and even in relation to this he did not cite Marc Lim as a respondent. Neither did he file any appeal against the ruling of the judge affirming the decisions of the assistant registrar made in OSB 4/2005 and OSB 5/2005.

8 In the meantime, the firm applied by way of Petition of Course No 3 of 2005 ("PC 3/2005"), to have the five invoices (see [4] and [5] above) taxed by the Registrar. PC 3/2005 came before another judge, Lai Siu Chiu J, who on 1 April 2005 granted the application. In that proceeding, the main issue was whether the firm had agreed with the appellant to cap the fee payable for handling S 834/2001 in the sum of $275,000. On the appellant's appeal against Lai Siu Chiu J's decision, this court had in Civil Appeal No 43 of 2005 ("CA 43/2005") held, having reviewed the correspondence exchanged and the conduct of the parties, that as far as tax invoice no 99001 was concerned, the firm and the appellant had in fact agreed to fix the fee for the work done in relation to S 834/2001 at the lump sum of $275,000 which sum had already been paid in full by the appellant to the firm (see *Wee Soon Kim Anthony v Chor Pee & Partners* [2005] SGCA 53). Thus, the firm was not entitled to raise tax invoice no 99001.

9 The other four tax invoices came up for taxation by the assistant registrars in November 2005 and were allowed in the following amounts in respect of part 1 of each bill:

Tax invoice no 99002	-	$75,000
Tax invoice no 99003	-	$12,000
Tax invoice no 99004	-	$18,000

Tax invoice no 99005 - $12,800

Upon the appellant's application for a review, V K Rajah J on 11 January 2006 reduced the second to fourth invoices to $9,000, $12,000 and $10,000 respectively.

The decision below

10 Lai Kew Chai J upheld the assistant registrar's decision to set aside the statutory demands on the grounds that there *appeared* to be a valid counterclaim, set-off or cross-demand under the five tax invoices which exceeded the debts in the statutory demands. While he noted that the question of the five tax invoices raised in PC 3/2005 was under consideration by Lai Siu Chiu J, and it was at that forum that the question should be canvassed and decided upon, he nevertheless also opined that there did not appear to be any agreement to cap the fees for handling S 834/2001 at $275,000, there being no meeting of minds. Lai Kew Chai J held that there was, therefore, a triable issue. He further identified another issue which was triable, namely, whether or not the firm was a sole proprietorship or a partnership. This was because even if the five tax invoices were indisputable, the question that remained was whether the respondent could set off the fees owing to the firm against his personal debt to the appellant. As earlier indicated, there was evidence that Marc Lim was a "salaried partner" which suggested that Marc Lim was not a partner in the true sense of the word.

The issues

11 Before us, the appellant summarised the real issues which this court needed to address to be the following:

(a) whether there was an agreement capping fees at $275,000 for S 834/2001;

(b) whether the respondent in his personal capacity was entitled to use the tax invoices of the firm as a set-off against his personal loan of $84,000;

(c) whether Chor Pee & Partners was a sole proprietorship as claimed by the respondent in his affidavit;

(d) whether the tax invoices gave rise to genuine triable issues.

12 However, the main aspect of the appellant's contention was that, in view of this court's ruling in CA 43/2005 that there was, in fact, an agreement between the firm and the appellant to cap the fees for handling S 834/2001 at $275,000, the firm was not entitled to raise the tax invoice no 99001. Accordingly, the assistant registrar, and in turn Lai Kew Chai J, were wrong to have set aside the two statutory demands. All the other invoices, when added together, were well short of $300,000, the amount owed by the firm to the appellant, not counting the $84,000 personal loan owed by the respondent to the appellant.

13 These grounds are issued essentially to explain why, notwithstanding our decision in CA 43/2005, we thought that the assistant registrar and Lai Kew Chai J were not wrong in principle to have set aside the two statutory demands.

Our consideration

14 Rule 97(1) of the Bankruptcy Rules (Cap 20, R 1, 2002 Rev Ed) ("the Rules") provides that a debtor who has been served with a statutory demand may within 14 days apply to court for an order

setting aside the statutory demand. Rule 98(2)(*a*) of the Rules provide that the court hearing the application shall set aside the statutory demand if "the debtor appears to have a valid counterclaim, set-off or cross demand which is equivalent to or exceeds the amount of the debt or debts specified in the statutory demand".

15 It is important to note the critical word "appears" in r 98(2)(*a*). Accordingly, it is clear that under r 98(2)(*a*) it is not the function of the bankruptcy court, on the hearing of an application to set aside a statutory demand, to conduct a full hearing of the counterclaim and adjudicate on it.

16 In our opinion, Lai Kew Chai J adopted the right approach when he said at [41]:

> The bills of costs rendered by the [firm] *appear to present* a valid counterclaim, set-off or cross demand against the debt in the statutory demands. There is therefore at the very least a genuine triable issue as to whether there is a valid counterclaim, set-off or cross demand under the bills. [emphasis added]

17 The appellant conceded that for r 98(2)(*a*) to apply there must be a "triable issue" although he would want to qualify that expression with the word "genuine". In spite of the fact that in *In re A Debtor, No 991 of 1962* [1963] 1 WLR 51, the court had used the term "genuine" to qualify the "cross-claim", it is of interest to note that Lord Denning MR had explained the use of the word "genuine" as follows (at 55–56):

> I have used the word "genuine" because I prefer not to use the words "prima facie case" or "a cross-claim with a reasonable possibility of success." Suffice it that there is a triable issue.

18 We do not think the addition of the adjective "genuine", in fact, adds anything. There is either a "triable issue" or there is not. Very often adjectives are inserted for reasons of emphasis. In every case the court must examine all the facts to determine whether the test is satisfied: see *Re Debtors (Nos 4449 and 4450 of 1998)* [1999] 1 All ER (Comm) 149 ("*Debtors 1998*"). A trumped-up dispute cannot constitute a "triable issue". The mere fact that the creditor has alleged that the "counterclaim" or "cross-claim" is a fake does not preclude there being a triable issue. The court must look at all the circumstances to determine if there is a triable issue. In *Debtors 1998*, the statutory demand issued by the respondent was set aside upon the applicant debtors showing that they had an "arguable" counterclaim against the respondent.

19 So was there an issue as to whether there was an agreement to cap the firm's fee for handling S 834/2001 at $275,000? The facts surrounding this issue were fully canvassed in the judgment of this court (see [8] above). It is wholly unnecessary for us to repeat them here. While this court had in CA 43/2005 finally determined the question, what was required of the assistant registrar and Lai Kew Chai J was not to determine definitely whether there was, in fact, an agreement to cap the fees at $275,000 but to decide, in the light of the correspondence, whether there was some real doubt about the question, thus, a triable issue, upon which further evidence or arguments were required.

20 In this regard, it is pertinent to note that on the hearing of PC 3/2005, Lai Siu Chiu J came to the conclusion that there was no agreement to cap the fee payable in respect of S 834/2001 at $275,000. Equally germane is Lai Kew Chai J's opinion on the hearing of the present matter where he was also inclined to the view that, on the correspondence, there was no meeting of minds between the respondent acting on behalf of the firm and the appellant to cap the fee. While eventually this court came to a conclusion which is at variance with those of the two judges, it did not thereby mean that the point had not been a triable issue or an arguable one. It seems to us that perhaps the

point is best illustrated by reference to an application for summary judgment under O 14 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). No such judgment will be granted if it is shown that there is a triable issue; the matter will have to go for trial. However, eventually, at the trial proper, a decision will be made. Let us assume that judgment is given in favour of the plaintiff; that does not mean that the refusal to grant summary judgment was wrong. Similarly here, the question which the assistant registrar and Lai Kew Chai J had to ask was: Did it "appear" that the respondent had a valid counterclaim or set-off? To put it another way: Was it clear that the firm was not entitled to raise the five tax invoices? It was far from being an open-and-shut issue. Indeed, two judges thought otherwise.

21 None of the cases relied upon by the appellant are relevant to the issue at hand except perhaps the Malaysian Federal Court case of *Ratna Ammal v Tan Chow Soo* [1971] 1 MLJ 277. Even so, it does not assist the appellant. In that case, the debtor owed judgment costs to the creditor. However, the debtor's application to set aside the statutory demand was refused because the counterclaim was indeterminate and uncertain. The Federal Court said (at 280):

> In our view, any counterclaim, set-off, or cross-demand set up by a debtor against the creditor must be in a liquidated sum or a money demand which is ascertainable with certainty as between the same parties and in the same right, as in ordinary actions.

The issue there was quite different from the instant case. Here, the fees claimed by the firm in the five invoices were for specific sums.

22 A related argument of the appellant was that tax invoice no 99001 could not be a genuine invoice as it was submitted some 16 months after S 834/2001 had been concluded. He said that considering the respondent's financial position then, it was most unusual that he did not raise the invoice earlier. First, we would point out that this aspect played no part in this court's determination in CA 43/2005. Second, there could be other factors which caused the late issue of the invoice. While S 834/2001 had been concluded, an appeal against the High Court decision was being pursued. The firm was also acting for the appellant in several other matters. The respondent and the appellant were then on much friendlier terms. All these could have accounted for the delay in the issue of invoice no 99001. What was clear was that the allegation of bad faith required a full airing. It was not something which could be summarily disposed of by the bankruptcy court. At the end of the day, in the present case, the critical question was: What is the correct interpretation to be given to the exchange of communications and the subsequent conduct of the parties? For the reasons earlier indicated, before the assistant registrar and Lai Kew Chai J, it was certainly arguable whether the respondent was entitled to raise invoice no 99001.

23 The last point we would note here was the argument that as the five invoices had not yet been taxed by the Registrar at the time of the hearing to set aside the statutory demands, they could not legitimately form the basis for a counterclaim, set-off or cross-claim. It is clear that a solicitor is entitled to claim payment for services when the services are completed. *Chitty on Contracts* (Sweet & Maxwell, 28th Ed 1999) vol 1, at para 29-051 states as follows:

> Unless a time for payment is otherwise agreed, the right to claim payment upon an entire contract accrues when the work is completed. This applies to work done by a solicitor, although by statute he cannot bring an action to recover costs until one month after delivery of a proper bill.

24 The fact that the amounts claimed in the invoices had not been taxed did not mean that the sums claimed were uncertain. The fact that the appellant wanted the invoices taxed only evidenced

that there was a triable issue as to the exact sums owing by the appellant to the firm, and in turn the respondent, on those invoices.

The partnership issue

25 In [11] above, we have stated that another issue raised by the appellant was that as the amounts due under the various invoices were due to the firm, a partnership, those sums could not be used to set off the personal debt of $84,000 owed by the respondent to the appellant. For the reasons alluded to in [7] above, a technical objection was taken by the respondent on this issue. The point made was that as the appellant had only appealed against the decision in Registrar's Appeal No 35 of 2005, which related to OSB 3/2005, the question of offsetting the firm's fees against the personal debt of the respondent did not arise. OSB 3/2005 related to the application by the respondent and Marc Lim to set aside the statutory demand for $300,000.

26 Without going into the merits of this technical objection, it seemed to us that in the circumstances of the case, it was certainly a triable issue whether Marc Lim was truly a partner of the firm. The respondent averred that Marc Lim was a salaried partner and also confirmed that he (*ie*, the respondent) was entitled to "all the billings of the firm".

27 In *Stekel v Ellice* [1973] 1 WLR 191, a case relied upon by the appellant, Megarry J held that the fact that a person was described as a salaried partner was not conclusive one way or the other of the question whether he was a partner in the true sense. The following passage of Megarry J at 198 was quoted by the appellant:

> The term "salaried partner" is not a term of art, and to some extent it may be said to be a contradiction in terms. However, it is a convenient expression which is widely used to denote a person who is held out to the world as being a partner, with his name appearing as partner on the notepaper of the firm and so on. At the same time, he receives a salary as remuneration, rather than a share of the profits, though he may, in addition to his salary, receive some bonus or other sum of money dependent upon the profits. Quoad the outside world it often will matter little whether a man is a full partner or a salaried partner; for a salaried partner is held out as being a partner, and the partners will be liable for his acts accordingly.

28 What the appellant failed to quote was the last sentence of the above passage which is most relevant to the context of the present case:

> But within the partnership it may be important to know whether a salaried partner is truly to be classified as a mere employee, or as a partner.

Had he done that, he would have probably appreciated the significance of that sentence. Whether the respondent would be entitled to utilise the proceeds of the invoices of the firm to offset the debt owed by him to the appellant must depend on the true arrangement between the respondent and Marc Lim. If at the material time Marc Lim was not an equity partner and was not entitled to a share of the profits of the firm, then obviously the firm was, as between them, effectively a sole proprietorship and the profits of the firm would belong to the respondent.

29 Again, as we have mentioned before, it is not for the bankruptcy court to go into a full scale inquiry into the precise relationship between the respondent and Marc Lim in the firm. We acknowledge that in an earlier affidavit of the respondent he seemed to have made a somewhat inconsistent statement that Marc Lim "is a profit sharing partner on a fixed drawing basis … [and] is also liable for the debts of the firm". On the evidence before the court, we were of the view that

there was a triable issue as to whether the respondent was entitled to use the invoices of the firm to offset the debt he personally owed the appellant.

Conclusion

30 In our opinion, in the light of the above, the proper thing for the appellant to do would have been to withdraw the statutory demands and proceed to challenge the alleged claims to a set-off in the proper fora, and upon the final determination of the same, to issue a fresh statutory demand for what remained outstanding.

31 This court was advised, at the commencement of the hearing of the present appeal, that the appeal had become academic because the respondent had, following the decision in CA 43/2005, paid up what remained owing by the firm and the respondent personally to the appellant, after offsetting the taxed amount due to the firm in respect of the four invoices (without invoice no 99001). In the circumstances, the proper course for the appellant to take would have been to withdraw the appeal. If there were any question of costs which could not be resolved, that should not preclude the withdrawal of the appeal. Any outstanding question as to costs could have been reserved for the ruling of this court.