IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 51

Civil Appeal No 209 of 2017

Between

LEE CHEN SEONG JEREMY

… *Appellant*

And

OFFICIAL ASSIGNEE

… *Respondent*

EX TEMPORE JUDGMENT

[Companies] — [Striking off defunct companies] — [Outstanding assets]

Lee Chen Seong Jeremy
v
Official Assignee

[2018] SGCA 51

Court of Appeal — Civil Appeal No 209 of 2017
Sundaresh Menon CJ, Judith Prakash JA and Tay Yong Kwang JA
15 August 2018

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Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

Introduction

1 When a company has applied to strike itself off the register, and in the process of doing so, indicated that it no longer has any outstanding assets, should it be taken to have abandoned and/or waived its right in relation to a proof of debt it filed against a bankrupt person several years earlier? That is the issue that has arisen in the present appeal.

2 The company in question is Northstar Systems Pte Ltd ("Northstar") which is now defunct. On or around 19 April 2002, it obtained a judgment against Mr Lee Chen Seong Jeremy, the Appellant, for about US$516,085.11 inclusive of interest and costs (hereafter, the judgment debt is referred to as the "Northstar debt").

3 On 10 July 2002, Northstar applied to make the Appellant a bankrupt. On 16 August 2002, the Appellant was adjudged a bankrupt. Northstar was one of 11 creditors who filed proofs of debt with the Official Assignee ("the OA").

4 On 31 October 2008, Northstar applied to the Registrar of Companies to strike itself off from the Companies Register ("the Register") as it had ceased business on 31 December 2007. Northstar was struck off the Register on 15 April 2009.

5 In the application form submitted by Northstar to strike itself off from the Register, its directors ticked two boxes stating that:

(a) the auditor had certified that at the time of the application, all the assets and liabilities had been "cleared"; and

(b) the company had no contingent assets and liabilities (meaning assets or liabilities that might crystallise or accrue in the future).

6 The supporting documents appended to the application form included a Northstar balance sheet (as at 31 July 2008), which stated that Northstar's current assets included bank facilities as well as a debt owing from Northstar Systems Holding (S) Pte Ltd ("NSH"), its holding company. There was no mention of the Northstar debt although this had not been repaid at that point in time. Nor was there any mention of the proof of debt that Northstar had filed with the OA.

7 On 24 September 2014, the Appellant's then solicitors wrote to the OA to inform the OA of the Appellant's desire to annul his bankruptcy, and to request the OA to provide the latest statement of accounts of all outstanding

debts due except that of Northstar so that the Appellant could take steps to settle them.

8 The OA replied on 5 December 2014 informing the Appellant that the striking off of Northstar did not in and of itself release the Appellant from the liabilities owed to Northstar.

9 Between March and April 2017, the Appellant managed to negotiate reductions in the debts owed to his other creditors that had filed proofs of debt against his estate. The Appellant succeeded in bringing such indebtedness down to a figure that would allow him to pay off the other creditors with what was left in his estate. If he was thereafter able to show that he was no longer liable to satisfy the Northstar debt, he would have paved his way to the annulment of his bankruptcy.

10 On 5 April 2017, the Appellant filed Originating Summons (Bankruptcy) No 31 of 2017 seeking an annulment of his bankruptcy. The Assistant Registrar dismissed his application. An appeal was brought against this to a High Court judge ("the Judge"), who affirmed the Assistant Registrar's decision. The Appellant now appeals against the Judge's decision.

11 To date, Northstar remains struck off the Register, and, as the Judge noted, the time period for its restoration to the Register has expired.

12 After the initial exchange of the parties' respective Cases, the Appellant informed the Court in his reply dated 20 March 2018 that he has since procured a sponsor to pay $550,000 to the OA to settle all debts proved and all the expenses of the Appellant's bankruptcy. The OA has since agreed to issue a certificate of annulment. In addition, the Official Receiver ('the OR") has

agreed to refund (through the OA) the amount paid in relation to the Northstar debt if it is shown that the proof of debt filed by Northstar ought to be treated as withdrawn or abandoned or expunged.

The decision below

13 The Judge found that the Northstar debt, being an outstanding asset of Northstar's, vested in the OR pursuant to s 346 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act"), which we set out here for convenience:

> **Outstanding assets of defunct company to vest in Official Receiver**
>
> 346.—(1) Where, *after a company has been dissolved, there remains any outstanding property*, movable or immovable, including things in action and whether in or outside Singapore *which was vested in the company or to which it was entitled*, or over which it had a disposing power at the time it was so dissolved, *but which was not* got in, realised upon or *otherwise disposed of* or dealt with *by the company or its liquidator*, such property except called and uncalled capital, *shall*, for the purposes of the following sections of this Subdivision and notwithstanding any written law or rule of law to the contrary, by the operation of this section, *be and become vested in the Official Receiver for all the estate and interest therein legal or equitable of the company or its liquidator at the date the company was dissolved*, together with all claims, rights and remedies which the company or its liquidator then had in respect thereof.
>
> [emphasis added]

14 The Judge noted that even though a party had to declare that it no longer had any assets in order for it to be struck off, s 346 of the Companies Act would nonetheless apply to companies even if they had already been struck off the Register because that provision envisaged that such companies could potentially nevertheless be found to be in possession of "outstanding assets".

15 The Judge also rejected the Appellant's arguments on waiver and abandonment. In respect of waiver, the Judge reasoned that the declarations

made by Northstar's directors were not determinative of the issue, and that the Northstar debt could have been omitted from its financial statements simply as a matter of the view it took on financial reporting. The Judge noted that the proof of debt filed in relation to the Northstar debt had not been withdrawn or varied by any specific agreement between itself and the OA. Further, the Judge juxtaposed the circumstances of the Northstar debt with how Northstar waived rights and claims in relation to a debt of US$230,342.36 owed to it by NSH. In relation to the latter, Northstar had written a letter to NSH on 31 October 2008, stating the following:

> We wish to inform you that we would like to waive all our rights and claims of US$230,342.36 due from [NSH] and we shall release and discharge NSH from all liabilities from the repayments of such amounts.

The Judge concluded, based on this, that Northstar knew and understood what the doctrine of "waiver" entailed and what was "required to 'dispose of' an asset of this nature prior to making the striking off application". No such letter, however, had been sent to the OA.

16 In respect of abandonment, the Judge took the view that abandonment could apply to intangible rights and the essential element is simply "the giving up of the right or title" to a thing. However, she found that Northstar had not abandoned the debt, referring to the same reasons why she rejected the Appellant's waiver argument.

17 The Judge also held that even if Northstar could be said to have abandoned the Northstar debt, it did not mean that the Northstar debt would have been *disposed of* within the meaning of s 346 of the CA. The Judge reasoned that when property is abandoned, it does not cease to exist; instead, the person who next comes to find the property will be able to own or deal with it and this would then fall to be dealt with in accordance with s 346 of the

Companies Act. Hence, even if Northstar gave up its rights to the Northstar debt, it would have done so without extinguishing such rights; instead, such rights would then pass to the OR to deal with.

The parties' submissions

18 The Appellant's case is that Northstar had abandoned and/or waived its right to the Northstar debt because its former directors had made declarations to the effect that its assets had been "cleared" and that it had no contingent assets, in order to secure its striking off. The Northstar debt was therefore an asset "disposed of" by Northstar and was not "outstanding property" that vested in the OR pursuant to s 346 of the Companies Act.

19 The Respondent does not dispute that an abandoned or waived asset would be an asset "disposed of" under s 346 of the Companies Act. However, the Respondent submits that the doctrine of abandonment is inapplicable as it is intended to apply only to rights which are "enjoyed or available against and to the exclusion of all the world" and are capable of being appropriated by a new owner without the further permission of the former right-holder after the right had been abandoned. The Respondent also submits that the Northstar debt had not been waived or abandoned as neither the declarations in the application form to strike off the company nor the financial statements of Northstar were unequivocal and determinative. Further, Northstar did not relinquish its claim to the Northstar debt in the way it waived the debt owed by NSH, thereby suggesting that it did not similarly intend to waive or abandon the Northstar debt.

Our decision

Whether the rights in relation to the Northstar debt were correctly characterised as a claim to recover a debt

20 We begin with a preliminary observation on the characterisation of the rights in relation to the Northstar debt that Northstar possessed prior to its dissolution. Both parties made submissions on the basis of a waiver and/or abandonment *of the Northstar debt* as if the debt continued to exist at the point in time when Northstar applied to strike itself off the register.

21 We disagree. When a debtor becomes bankrupt, all provable debts owing by the debtor are converted from rights of action against the debtor to a right to share rateably (in competition with other unsecured creditors) in the distribution of the bankruptcy estate vested in the trustee for the bankrupt: *Trustee for the Bankrupt Estate of Lasic v Lasic* (2009) 232 FLR 121 ("*Lasic*") at [204] and [206]; Ewan McKendrick, *Goode on Commercial Law* (LexisNexis, 5th Ed, 2016) at para 2.09. In other words, the effect of the debtor's bankruptcy is that the debtor is no longer obliged to pay creditors, and indeed, is disabled from doing so. Hence, if the bankrupt offered payment, creditors could not safely accept it, since at that stage their right is a right of proof against the estate and the only assets out of which it can be satisfied are assets that have vested in the trustee: *Clyne v Deputy Commissioner of Taxation* (1984) 154 CLR 589 at 594–595, cited with approval in *Pitman v Pantzer* (2001) 115 FCR 361 at [10] and *Lasic* at [205]; *Samootin v Shea* [2010] NSWCA 371 at [90].

22 The upshot of this is that the Northstar debt no longer existed after the Appellant was adjudged a bankrupt on 16 August 2002. Instead, what Northstar possessed after the Appellant became bankrupt is a right to share in the Appellant's estate to the extent of Northstar's rateable interest. This was a right

of proof exercisable against the estate vested in the trustee, not the debtor. In this connection, it was also unnecessary for Northstar's purported election to waive the Northstar debt to be communicated to the Appellant (this argument is also plagued with other difficulties, which we mention at [24] below).

23 Nonetheless, such a right of proof seems to us to be an asset that is capable of being assigned or dealt with and can therefore pass to a third party. Indeed, vulture funds commonly invest in distressed debt (which is debt owed by entities that have filed for or are on the verge of bankruptcy) with a view of securing greater recovery in the event of liquidation. We therefore proceed on the basis that a right of proof filed by a creditor is capable of being vested in another individual or legal entity. We turn now to the question of whether such a right had been abandoned and/or waived by Northstar.

Whether the right of proof in relation to the Northstar debt had been waived and/or abandoned

24 At the outset, we reject the Appellant's argument on waiver by election, which is presently conceived to be a standalone alternative to his argument on abandonment. The doctrine of waiver by election was recently discussed in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317, and it applies specifically to a situation where the putative elector is made to decide between an existing set of rights and a new set which does not yet exist, both choices being inconsistent with one another (at [54]–[55]). That was not the situation when Northstar applied to strike itself off the Register as it was not faced with inconsistent choices.

25 But we also reject the Respondent's argument that abandonment applies only in the narrow sense that it submitted for. The Respondent has not provided any legal basis for this narrow view and its argument appears to be premised

solely on an attempt to distinguish the authorities cited by the Appellant (many of which relate as a matter of *fact*, rather than *legally and normatively*, to the abandonment of tangible property). On the contrary, abandonment has been applied in other contexts, such as contracts (see *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at para 22–027) and more specifically, arbitration agreements (see generally *Ong Hong Kiat v RIQ Pte Ltd* [2013] SGHC 131 at [62]–[65]).

26 In our judgment, abandonment would be made out when there has been a *unilateral relinquishment* of a particular property: *Edward J Kearns v T A Dilleen (Inspector of Taxes)* [1997] 3 IR 287 at 298; Saw Cheng Lim, "The Law of Abandonment and the Passing of Property in Trash" (2011) 23 SAcLJ 145 at para 6. Although Professor Saw's article mainly concerns physical property, the same principles could apply in the realm of intangible property (as Professor Saw postulated, using the example of intellectual property rights; see also Tan Yock Lin, *Personal Property Law* (Academy Publishing, 2014) at para 02.068). We find the two-element test propounded by Professor Saw – namely, that there must be an *overt* act of abandonment and a *subjective* intention to completely relinquish a property – to be a usable analytical framework. We note parenthetically that the two elements are intertwined – a subjective intention to abandon is to be established inferentially from the overt acts and conduct of the proprietor. We also note that the court should be slow to make any finding of abandonment except in the clearest of cases: *Wong Seng Kwan v Public Prosecutor* [2012] 3 SLR 12 at [22].

27 On the facts, we find that Northstar had abandoned its right of proof against the Appellant's bankruptcy estate.

28 As a starting point, we observe that undue emphasis was placed on s 346 of the Companies Act. Seen in its proper context, this provision is nothing more than a sweep-up or catch-all provision. According to the existing statutory regime and the practice that prevailed at the relevant time in relation to the striking off of companies, when a company seeks to dissolve itself, ***it should resolve all outstanding matters; specifically, it must ensure that it has accounted for all its liabilities and dealt away all its assets***. Regulation 2(3)(*b*) of the Companies (Striking Off) Regulations 2015 (S 834/2015), which was promulgated with a view to set out the then-existing practice in legislation (see para 60 of Chapter 5 of the Report of the Steering Committee for Review of the Companies Act (April 2011) and para 85 of the Ministry of Finance's Responses to the Report of the Steering Committee for Review of the Companies Act (3 October 2012)), states that one of the conditions that must be fulfilled before a company can be struck off the Register is that the company must have "no assets or contingent assets and no pending liability or contingent liability".

29 But even with the best will in the world, the intention to resolve the company's affairs before dissolution may not always be accomplished. This presents a particular problem where a company's assets are concerned. The company may ordinarily be taken to know what its assets are but occasionally, it might *mistakenly or inadvertently fail to deal with an asset before dissolution*. That is where s 346 of the Companies Act comes in: if it should transpire that there is, in fact, an asset in existence that has not been dealt with, it would vest in the OR for her to deal with. That is all s 346 does and it should not be given greater significance than this.

30 What the OA seems to be suggesting is that the significance of s 346 of the Companies Act ought to be enlarged such that because of the existence of that provision, any *apparent* asset is *presumed* to exist and would vest in the OR

at the time of striking off. On this view, even though the now-defunct creditor, Northstar, has not done anything to transfer its interest in the right in question to the OR, the OR would, *by virtue of s 346 of the Companies Act*, have succeeded to that right.

31 We reject this suggestion. As a preliminary point, we note that it is ultimately a question of fact, to be determined on the basis of all the evidence, as to whether the asset remains in existence as an asset of the company that was not dealt with in the course of its dissolution such that it should now be dealt with under s 346 of the Companies Act. It might be that the inferences to be drawn in such circumstances might be different depending on whether one is dealing with tangible property or intangible property. But either way, in our view, the question of whether a company's asset continues to exist or not after its striking-off should be analysed on the basis of the facts as they stood immediately prior to the dissolution. If the said asset is found to exist even after the dissolution of the company, then and only then would s 346 of the Companies Act come into the picture.

32 In the present case, our analysis of the relevant facts at the time of striking off leads us to conclude that Northstar had overtly abandoned, with the requisite subjective intent, its right to participate in any payout from the Appellant's estate. There are three pieces of evidence that support this conclusion.

33 First, there are the **declarations** made at the time of dissolution. As mentioned above at [5], when Northstar was being dissolved, its directors made declarations to the effect that the company no longer had contingent assets and that all its assets had been cleared. The directors ought to be taken to know what the assets of the company were and their statements may be taken at face value.

Taken at face value, such statements could only mean that as far as the directors were concerned, Northstar had given up its right of proof and did not intend to pursue it. There is no reason why we should go behind this to conclude that the declarations did not extend to the right of proof of the Northstar debt, or to insist now on the need for specific proof that the creditor intended to give up or abandon *this particular right*. Significantly, the OA does not claim to have contacted the former directors or promoters of the company to query whether they had simply overlooked the Northstar debt, or whether they retained any intention of claiming what they could out of Northstar's right of proof despite the declarations suggesting the contrary at the time of the application to strike the company off the Register.

34 The OA seemed to take the position that the declarations could not be taken at face value because there were moneys in the Appellant's estate after the date of the declarations. But on that premise, the OA seems to us to be putting the cart before the horse. Any right against the bankruptcy estate is a right that accrues to a creditor only to the extent that the creditor continues to hold the intention to retain that right of proof even after and in spite of the declarations it had made suggesting the contrary. It cannot be gainsaid that if the creditor had subjectively intended to relinquish that right completely and unreservedly, it could have done so and the right of proof would then have been extinguished. That the right of proof could not have been abandoned at the time the declarations were made, as suggested by the OA, because there was *now* the possibility of a payment is a *non sequitur* and indeed, it begs the question.

35 The OA also submitted that no reliance could be placed on the declarations as they were made for the purpose of securing the application to strike Northstar off the Register. We were unable to follow this. Whatever the purpose for which the declaration was made, its broad and unlimited terms

constituted a representation that Northstar had no other assets and this plainly comprehended contingent assets as well, such as the right to a dividend out of the Appellant's estate in bankruptcy. We could see no reason at all for assuming that the declarations must have been made either mistakenly or fraudulently, as the OA sought to suggest might be the case. There was absolutely no evidence to support such a hypothesis.

36 Second, the **accounts of the company** appended to the striking-off application support the conclusion that Northstar had abandoned its right of proof. Neither the proof nor the debt featured in Northstar's accounts, and in the case of an intangible property like the right of proof, the act of taking the property off the balance sheet would seem to be a clear indication of its abandonment; in the instant case, it signalled Northstar's intention to write off the debt and that Northstar no longer wished to pursue it.

37 Finally, there is Northstar's **conduct** in relation to other debts. While Northstar did write to NSH intimating a waiver (see [15] above), that does not make the case weaker in relation to the present proof because that was for a debt that did appear in the financial statements appended to Northstar's striking off application. On the contrary, it could be seen as corroborative of Northstar's intention to abandon its interest in the outstanding amounts generally due to it and on that basis, this would extend to its right of proof in relation to the Northstar debt. In short, its willingness to write off the remaining debt on its books suggested that it could very well similarly have given up on (if it had not already) the possibility of a payout in respect of the Northstar debt in order to secure its dissolution. It would be recalled that Northstar had itself struck off some six years after it filed its proof in the Appellant's bankruptcy estate, a long enough period for it to have concluded that the prospect of recovering a cent from the estate was highly remote.

38 Taken together, we are satisfied, on a balance of probabilities, that the proper inference to be drawn in all the circumstances is that Northstar intended to and did abandon its right to participate in payment out of the Appellant's estate in bankruptcy. Accordingly, s 346 becomes irrelevant because that section only kicks in if there is an asset that has not been accounted for and on the above analysis there is no such asset.

39 On this view of the case, because we see this not as an instance where there had been a mistake or inadvertence in relation to the existence and dealing of a company's existing assets before its dissolution (which could then trigger the operation of s 346 of the Companies Act), but as one where the right in question had been abandoned, the proper conclusion is that the right in question was no longer an asset of the company's after the declarations had been made.

40 The facts of the case of *Re Fivestar Properties Limited* [2015] EWHC 2782 (Ch) ("*Fivestar*") illustrate this point. In that case, a bank had provided a loan facility to Fivestar Properties Ltd (the "Company") which was secured by way of a legal charge over the freehold in commercial premises (the "Property") owned by the Company which had been leased to a large commercial tenant. The Company defaulted on repayment. Administrators that were subsequently appointed sought to dissolve the Company. The administrators' final report stated that ***there were no further assets to be realised*** (at [6]), ***although the same report later acknowledged that the freehold was still vested in the Company***. The Company was dissolved. On dissolution, the assets remaining in the Company's ownership (*ie*, the Property) vested in the Crown as *bona vacantia* under s 1012 of the Companies Act 2006 (c 46) (UK). The Crown later disclaimed interest in the Property, and subsequent to that, the bank restored the Company to the UK Companies Register and the Property re-vested in the Company as if it had never been dissolved (at [23]).

41 Despite the declaration made by the administrators in *Fivestar*, it was evident that they had been mistaken about the Company's assets (as Cooke J alluded to at [6] of *Fivestar*). There was an asset (the Property) that had not been accounted for and this was expressly referred to in the report filed by the administrators. That is quite unlike the present case where Northstar's actions and conduct, as seen in its accounts which did not include this debt, its declarations in the application to be struck off the Register and its waiver of a debt owed by another debtor, all point towards an intention to abandon this right of proof.

Concluding remarks

42 We therefore allow the appeal for these reasons. We make no costs orders against the OA pursuant to rr 52 and 245(3) of the Bankruptcy Rules (Cap 20, R 1, 2006 Ed), and order the release of any security for costs.

Sundaresh Menon Chief Justice	Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal

Wong Soon Peng Adrian and Tao Tao (Rajah & Tann LLP) for the appellant;
Lim Yew Jin (Insolvency & Public Trustee's Office) for the respondent.