IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 134

Originating Application No 328 of 2023

In the matter of Section 327(1)(*c*)(ii) of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Teo Fook Keong

Between

Tonghuai @ Nanhang Pte Ltd

… *Applicant*

And

Teo Fook Keong

… *Respondent*

EX TEMPORE JUDGMENT

[Insolvency Law — Bankruptcy — Leave to commence proceedings — Applicable standard for assessing merits of action]

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Tonghuai @ Nanhang Pte Ltd
v
Teo Fook Keong

[2023] SGHC 134

General Division of the High Court — Originating Application No 328 of 2023
Goh Yihan JC
10 May 2023

10 May 2023

Goh Yihan JC:

1 This is an application by Tonghuai @ Nanhang Pte Ltd ("the applicant") for permission pursuant to s 327(1)(*c*)(ii) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") to commence proceedings against the respondent, Mr Teo Fook Keong, who is a bankrupt, to confirm the validity of Caveat No IH/605662U ("the Caveat") lodged over a property ("the Property") on 31 October 2022. Although there is no objection against the application, I provide the brief reasons for my decision to allow the application because this case raises a question about the standard with which to assess the merits of the claim in an application for permission to commence proceedings against a bankrupt. In addition, this application also raises a question about the appropriate costs order in such a situation.

Background facts

2 In brief, the applicant entered into three loan agreements with V Spec Engineering & Supplies Pte Ltd ("V Spec"), in which the applicant was the lender and V Spec was the borrower. The first loan agreement was entered into on 18 February 2022 for the sum of $300,000 ("the First Loan Agreement"). It was secured by a guarantee ("the First Guarantee") executed by the following persons: the respondent, Mdm Wong Lai Kuan ("Mdm Wong"), and Mr Teo Fook Chai (Zhang Fucai) ("Mr Teo"). I will collectively refer to these three persons as "the Guarantors". As such, under this arrangement, V Spec and the Guarantors are jointly and severally liable for the repayment of the loan sum.

3 Further to the First Loan Agreement, the respondent and Mdm Wong, as the registered proprietors of the Property, executed a document authorising and consenting to the lodgment of a caveat by the applicant on the Property, which I will hereafter term as an "Authorisation to Caveat" in favour of the applicant.

4 On 13 April 2022, the applicant entered into another loan agreement with V Spec for the sum of $200,000 ("the Second Loan Agreement"). The Second Loan Agreement was again secured by a guarantee executed by the Guarantors ("the Second Guarantee"). Further to the Second Loan Agreement, the respondent and Mdm Wong executed an Authorisation to Caveat in favour of the applicant.

5 Finally, on 20 April 2022, the applicant entered into another loan agreement with V Spec for the sum of $190,000 ("the Third Loan Agreement") secured by a guarantee executed by the Guarantors ("the Third Guarantee").

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Further to the Third Loan Agreement, the respondent and Mdm Wong similarly executed an Authorisation to Caveat in favour of the applicant.

6 Relying on the three Authorisations to Caveat, the applicant lodged the Caveat over the Property on 31 October 2022. This was done on the basis that the applicant has an "interest in the sale proceeds of the [P]roperty", which are the words stated in the Authorisations to Caveat.

7 However, on 9 February 2023, following earlier correspondence, the applicant's solicitors received a letter from the solicitors of the private trustees of the respondent's bankruptcy estate ("the Private Trustees"). In the letter, the Private Trustees stated that the Caveat had been wrongfully lodged and demanded that it be withdrawn by no later than 14 February 2023. On 17 February 2023, the applicant's solicitors replied to say that it would withdraw the Caveat in exchange for the payment of the debt in the three Loan Agreements and all legal fees.

8 On 23 March 2023, the respondent and Mdm Wong, being registered proprietors of the Property, made an "Application to Cancel Vexatious Caveat" to the Singapore Land Authority. A day later, on 24 March 2023, the Singapore Land Authority issued a Notice to the applicant pursuant to s 127(2) of the Land Titles Act 1993 (2020 Rev Ed) ("LTA"). The Notice provided that the Caveat would be cancelled on the expiration of 30 days from the date of service, unless a court order to the contrary is served on the Registrar of Titles within the same period. This application to cancel the Caveat required the applicant to make an application to determine the validity of the Caveat. However, as the respondent had become a bankrupt as of 5 January 2023, the applicant cannot bring such an application against the respondent without permission of the court.

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9 It is against this background that the applicant brings the present application. As I mentioned at the outset, the Private Trustees do not object to this application. Nevertheless, they filed an affidavit to set out their position in relation to the application. Most relevantly, they maintained their view that "the Caveat has been wrongfully lodged by the [a]pplicant over the Property". This is because they were advised that: (a) the various Authorisations to Caveat do not confer on the applicant any legal, equitable or contractual interest in the sale proceeds of the Property, and (b) the Loan Agreements likewise do not confer on the applicant any pre-existing interest in the Property, or any interest in the sales proceeds of the Property. As such, the Private Trustees maintain that there is no caveatable interest for the Caveat to secure.

My decision: the application is allowed

10 In the High Court decision of *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd and another* [2022] SGHC 271 (at [32]), the court found the following to be relevant factors that a court should consider in the exercise of its discretion whether to grant permission for the continuation or commencement of proceedings against a bankrupt under s 327(1)(*c*)(ii) of the IRDA:

(a) the timing of the application for permission;

(b) the nature of the claim;

(c) the existing remedies;

(d) the merits of the claim;

(e) the existence of prejudice to the creditors or to the orderly administration of the bankruptcy; and

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(f) other miscellaneous factors such as the potential of an avalanche of litigation being unleashed by the grant of permission, the proportionality of the cost of the proceeding to the bankrupt's resources, and the views of the majority creditors.

11 In my view, the relevant factors point in favour of allowing the application:

(a) first, the applicant has brought the present application as soon as practicable after being served with the Notice;

(b) second, the nature of the action as to the validity of the Caveat is one that cannot be determined through the bankruptcy regime;

(c) third, I do not think there is any discernible prejudice to the other creditors as the adjudication of the validity of the Caveat does not directly affect any distribution; and

(d) fourth, the Private Trustees do not object to the application.

12 I turn now to the merits of the claim, which, notwithstanding the Private Trustees' lack of objection to the present application, is in fact the most contentious factor. Indeed, the Private Trustees have quite strongly maintained that the Caveat was wrongfully lodged. In this regard, the High Court decision of *Salbiah bte Adnan v Micro Credit Pte Ltd* [2015] 1 SLR 601 ("*Salbiah*") laid down the rule that a mere contractual interest in the sale proceeds of property cannot be a caveatable interest (at [41]). A direct application of that authority would lead to the result that the applicant does not have a caveatable interest because its justification for the Caveat is founded on a contractual interest in the sale proceeds of the Property. On the other hand, there are decisions which have taken a different position from *Salbiah* in relation to the question of whether a

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right to the sale proceeds of property is a caveatable interest (see *Salbiah* at [35]–[38] for a summary of these decisions). Indeed, it is clear that the issue is not settled, as evidenced by Edmund Leow JC's comments in *Salbiah* that this is an "area of law raising difficult issues that might merit re-examination in the future" (at [42]).

13 Although the applicant's action raises issues of law that are not yet settled, I find that this alone is not a factor that points against granting permission under s 327(1)(*c*)(ii) of the IRDA. In assessing whether the merits of an action points in favour of granting permission, the applicable standard is that of "a serious question to be tried", similar to that required for interlocutory relief. As V K Rajah JC (as he then was) opined in the High Court decision of *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671 ("*Korea Asset Management*"), this is "not a high hurdle to surmount" (at [41]). While the learned judge said this in the context of the grant of permission to continue or commence proceedings against companies being wound up, this should apply equally in the present context as well.

14 Applied to the present case, I accept that there is no binding Court of Appeal decision, and the applicant's position, that a contractual interest in the sale proceeds of property is a caveatable interest, is not an unarguable one. This would be sufficient for me to conclude that the merits of the proposed action do *not* point against granting permission. To be clear, given that the likelihood of the applicant's action succeeding is also very much unclear at this point, I likewise do not think that the merits of the proposed action points strongly in favour of granting permission. Be that as it may, I shall say no more due to the pending action, save to reiterate that it suffices that the applicant's action is not clearly unsustainable.

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15 I conclude with some observations in relation to the applicable standard with which to review the merits of a claim for which permission is being sought to commence under s 327(1)(*c*)(ii) of the IRDA. In my view, the threshold of a serious question to be tried strikes a balance between two considerations. The primary consideration is that the court should not go into a detailed examination of the merits of the action in deciding whether to grant permission at the leave stage. This is balanced against the countervailing consideration that a court will be "loath to lend its imprimatur to sterile litigation" and that permission ought not to be given where "there is no likelihood of the claim being satisfied in any way" (see *Korea Asset Management* at [48]; see also the English High Court decision of *Bristol & West Building Society v Trustee of the property of Back and another (bankrupts)* [1998] 1 BCLC 485 at 489). Accordingly, while this means that a court should not engage in detail with the merits of the proposed action at the grant of permission stage, it should not ignore this as well. The rationale for this is clear. If the proposed action is doomed to fail from the start, then it would not serve any good purpose to grant permission to commence what would likely be an exercise in futility. It would be better to preserve the resources of the bankrupt for distribution, rather than expending a part of those on defending sterile litigation.

Conclusion and the appropriate costs order

16 Accordingly, for the above reasons, I allow the present application and grant an order-in-terms of prayer one.

17 As for the costs of this application, the applicant seeks costs from the respondent as Clause 2 of each of the Authorisations to Caveat state that the respondent (and Mdm Wong) "[a]gree to indemnify you and your successors and assigns and to hold you and/or your successors and assigns harmless against

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all actions claims demands costs and expenses [*sic*] which may be brought against or suffered by you and/or [your] successors and assigns as a result of my aforesaid authorisation direction and consent [*sic*]".

18 In response, the Private Trustees say that the applicant is not entitled to costs because they have repeatedly asked the applicant to withdraw the Caveat but the applicant chose instead to commence the present application.

19 In my view, the Private Trustees cannot say that the applicant is not entitled to costs because it (the applicant) chose to commence the present application when they (the Private Trustees) have not objected to the application. It is inconsistent for them to, in effect, take offence at the applicant's choice to commence the present application but, at the same time, choose not to file a formal objection as such. However, I do not think that the applicant should be entitled to costs on the basis of Clause 2. This is because Clause 2 does not cover the present application. The clause plainly only applies to actions and claims that are brought *against* the applicant. In this case, the applicant is the one bringing an application. This application may have been occasioned by an action brought against the applicant, but I do not think that the clause is wide enough to cover that situation.

20 Be that as it may, the applicant may still be entitled to some costs depending on the outcome of any further application. I therefore order costs to be in the cause.

Goh Yihan
Judicial Commissioner

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Naidu Priyalatha (Advocatus Law LLP) for the applicant;
The respondent absent and unrepresented;
Wong Wan Chee (Rev Law LLC) for the private trustee.

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