Tan Siew Ling *v* United Overseas Bank Ltd
[2010] SGHC 43

Case Number	: Originating Summons Bankruptcy No 40 of 2009 (Registrar's Appeal No 436 of 2009)
Decision Date	: 05 February 2010
Tribunal/Court	: High Court
Coram	: Philip Pillai JC
Counsel Name(s)	: Ranvir Kumar Singh (Instructed Counsel) (Surian & Partners) for the plaintiff; Hri Kumar Nair SC and Tham Feei Sy (Drew & Napier LLC) for the defendant.
Parties	: Tan Siew Ling — United Overseas Bank Ltd

Insolvency Law

5 February 2010

Philip Pillai JC:

1 This was an appeal against the Assistant Registrar's dismissal of the plaintiff's application to set aside the defendant's statutory demand of USD 10,309,708.87 and grant of leave to the defendant to file a bankruptcy application against the plaintiff after the day of that order.

2 The appeal was based on rr 98(2)(b) and (e) of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("*Bankruptcy Rules*") *viz* that the statutory demand is disputed on grounds which appear to the court to be substantial or that the court is satisfied on other grounds that the demand ought to be set aside, respectively.

3 It was common ground that the test to be applied by the court in this determination is the same as the test to be applied for the grant of summary judgment pursuant to Order 14 of the Rules of Court (Cap 322, R 5, Rev Ed), *ie* whether or not there are triable issues to go to trial.

Is there a triable issue that the guarantee has been discharged by reason of impairment caused by the defendant?

4 The plaintiff argued that she was discharged from the joint and several continuing guarantee or that at least there was a genuine triable issue on whether or not she had been discharged.

5 The threshold for this court is helpfully set out by the Court of Appeal in *Wee Soon Kim Anthony v Lim Chor Pee CA* [2006] 2 SLR(R) at [19] that there is "some real doubt about the question, thus a triable issue, upon which further evidence or arguments [are] required." In *Manjit Kaur Monica v Standard Chartered Bank* [2000] SGHC 205, Woo Bih Li JC (as he then was) adopted the formulation in *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 at 787-788 by McLelland CJ in the following terms:

> It is, however, necessary to consider the meaning of the expression "genuine dispute" where it occurs in [s 459H of the Corporations Law]. In my opinion that expression connotes a plausible contention requiring investigations, and raises much the same sort of consideration as the "serious question to be tried" criterion which arises on an application for an interlocutory

injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavits "however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be "sufficient *prima facie* plaudibility to merit further investigation as to [its] truth" (cf *Eng Mee Yong v Letchumann* [1980] AC 331 at 341), or "a patently feeble legal argument or an assertion of acts unsupported by evidence": cf *South Australia v Wall* (1980) 24 SASR 189 at 194.

6 With respect to valid counterclaims, set-off or cross demands, *Goh Chin Soon v Overseas-Chinese Banking Corporation Ltd* [2001] SGHC 17, per Lee Seiu Kin JC (as he then was) is also germane:

> Rule 98(2)(a) provides that the court shall set aside the [Statutory Demand (the "SD")] if the debtor appears to have a *valid* counterclaim, set-off or cross demand which exceeds the amount of the debts in the SD. The word "valid" is placed there for good reason. It requires the court to examine the alleged counterclaim, set-off or cross demand to see if the debtor has a *bona fide* claim against the creditor that, if successful, would enable him to pay the debt the subject of the statutory demand. If all that rule 98(2)(a) requires were the mere existence of such a claim, no matter how spurious, then it will be only too easy for a debtor to make such a claim in order to stave off bankruptcy proceedings. … [emphasis in original]

7 The plaintiff cited *Bank of Montreal v Wilder* [1986] 2 S.C.R. 551 for the proposition that a guarantee is discharged where the creditor impairs the security, increases risk or causes default. The plaintiff referred to the following sequence of events in support of her position that the guarantee had been discharged by impairment caused by the defendant.

8 The defendant granted credit facilities to EP Carriers Pte Ltd on 11 March 2008. In December 2008 following restructuring discussions it was agreed that the credit facilities would be novated to Linford Pte Ltd whilst the security given to support credit facilities, including a mortgage on the vessel "Eagle Prestige" would remain. However, new documents would be signed together with a continuing guarantee ("Guarantee") provided by the plaintiff to the defendant. On 2 December 2008 prior to the completion of the novation and security documents, the vessel "Eagle Prestige" was arrested by TS Lines Ltd and sold by way of judicial sale. The writ of arrest escaped the notice of the defendant which proceeded to complete the novation and security documents.

9 It was the plaintiff's case that the sale of the vessel caused her loss and that the defendant ought to have conducted proper searches in connection with perfecting its security, following which they would have discovered the arrest writ. The plaintiff's argument was that had the defendant discovered the arrest writ, they would not have proceeded with the novation because it would not have met the bank's preconditions to the novated facilities and security. It was argued that had the defendant not proceeded with the novated facilities and security, EP Carriers Pte Ltd would have remained as borrower and TS Lines Ltd would have stood lower in ranking against the vessel *vis-à-vis* the defendant's mortgage over the vessel. As the new mortgage under novation was effected after the *in rem* writ, but before arrest, it was argued that by this omission, the Guarantee had been impaired. In other words, the plaintiff argued that had the defendant been vigilant in its searches, it would not have proceeded with the novation and security and the defendant could have resisted the arrest and sale or claimed against the sale proceeds. This was because the defendant, under the original security had mortgagor's priority for the indebtedness far in excess of TS Lines Ltd which arrested the vessel. Accordingly, it was argued that the statutory demand which was founded on the Guarantee had by law been discharged and the statutory demand on which it was founded was substantially disputed.

10 The defendant replied that the plaintiff's case was based on the defendant breaching a purported obligation, where the defendant owed no such obligation. Even if the novation had not been carried out, the same guarantors would have been liable for the debt under the previous guarantees. Even if the security was impaired, the impairment was only of the magnitude of USD 1.16m and not for the defendant's full statutory demand of USD 10,309,708.87. To the plaintiff's reliance on set offs and counterclaims to the Guarantee, the defendant referred to Clauses 1, 4 and 9 of the Guarantee which expressly excluded the right to raise them on a call on the guarantee: see *Bauer v The Bank of Montreal* [1980] 2 SCR 102 at 108. It was further argued that even if the defendant had taken full priority and proceeded against the vessel, the plaintiff would still have no defence against the claim of USD 10,309,708.87 as there would have remained owing and payable the sum of USD 8m. In any event, TS Line Ltd's claims had not crystallized and the sale proceeds remained with the sheriff as their claims have been disputed.

11 It was further the defendant's position that it was only obliged to set off value of any security which only the guarantors have given. In this case, the relevant security was security provided by third parties. At the time the defendant issued its statutory demand, USD 10,309,708.87 was outstanding and not paid. The defendant had and has since received nothing by way of other security.

12 In any event, the defendant's failure to make a search or discover the admiralty writ was not a breach on the part of the defendant. The obligation was placed on the borrower and mortgagor with particular reference to clause 3 of the representations and warranties in the mortgage, that there were no writs pending against the vessel as of 22 December 2008 where in fact the admiralty writ had been issued on 2 December 2008. Once the vessel had been arrested, clauses 6.2 and 10 of the mortgage obliged the borrower to have the vessel released. The defendant submitted that it was disingenuous for the plaintiff, who was a director and controller of the corporate borrowers, not having complied with these obligations, to now argue that the security had been impaired by the defendant's failure to make a search or discover the admiralty writ which it was not obliged to do. The defendant submitted that accordingly, it had not breached any obligations which would lead to the discharge of the guarantee under the authority of *Bank of Montreal v Wilder*, above, at [7].

13 Finally, on the question of whether an excessive demand in the statutory demand compels the conclusion that the statutory demand is defective, it was submitted by the defendant that if the evidence was that the plaintiff could not pay the undisputed sum, nothing could be served by setting aside the statutory demand. This was because the next step is to issue a fresh statutory demand. The pivotal consideration of the court was whether the plaintiff had a defence of the whole amount and not just the USD 1.61m or USD 1.97m claimed by the plaintiff to have been lost in the arrest of the vessel.

14 The plaintiff conceded that there had been no breach by the defendant of an express obligation under the novation agreement and security documents. It was conceded that she bore the heavy burden to establish that the obligation was a term of the guarantee by implied term or a collateral contract or by misrepresentation.

15 Having carefully considered the written and oral submissions and authorities cited I found that no triable issues have been made out which would be sufficient to justify the setting aside of the defendant's statutory demand. The issues that have been run by the plaintiff were naturally raised in order to avoid the anticipated consequences of an unsatisfied statutory demand, *viz*, bankruptcy. It did not mean, however, that any defences asserted would necessarily result in the setting aside of the statutory demand. The first threshold was whether these defences raised triable issues. The gist of the argument made before me was that the defendant had caused an impairment of the security

by reason of its not having conducted the relevant register searches, which in the first place, it was never contractually expressly obliged to do.

Would such impairment have matched or exceeded the statutory demand?

16 Even if I were to have found that a triable issue relating to the impairment of the guarantee exists, the question remains whether the effect of such counterclaim would be to fully meet the statutory demand amount of USD 10,309,708.87.

17 The plaintiff submitted that the prejudice suffered by her was the whole claim made by defendant, *viz*, USD 10,309,708.87 plus the USD 1.61m, which were the sums she was supposed to pay. In the alternative, she submitted that the extent of prejudice was the difference in the value of the vessel for the purpose of novating and the net sale proceeds. The plaintiff then relied on the valuation of the vessel at USD 8.2m in connection with the facility and submitted that the prejudice was the difference between USD 8.2m and S$1,974,492.79 (the net sale proceeds).

18 I found no merit in those submissions. The plaintiff's claim would not in my view, in any event, have equalled or exceeded the amount stated in the statutory demand and accordingly this application and appeal was flawed at the outset. There was therefore no justification for this court to exercise its powers under Rule 98(2)(a) of the *Bankruptcy Rules* (see also *Goh Chin Soon and anor v Vickers Capital Ltd* [2000] 3 SLR(R) 977). I would also add, for the purposes of this application, that there was also no justification for this court to exercise its power under Rule 98(2)(e) of the Bankruptcy Rules.

Ought a fresh statutory demand be required to be issued in these circumstances?

19 As I have found that even if triable issues were to exist, they would not have extinguished the whole of the statutory demand, the next question was whether the statutory demand was liable to be set aside and the defendant obligated to issue a fresh one. In the circumstances before me, I saw no purpose in requiring the defendant to issue a fresh statutory demand.

20 Accordingly, the appeal was dismissed and the plaintiff was ordered to pay the costs of the appeal to defendant, which was to be agreed or taxed.