# Tan Hup Yuan Patrick *v* The Griffin Coal Mining Co Pty Ltd (administrators appointed) and others
# [2014] SGHC 156

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| **Case Number** | : Originating Summons (Bankruptcy) No 13 of 2013, (Registrar's Appeal No 170 of 2013), (Summons No 3041 of 2013 and No 5261 of 2013) |
| **Decision Date** | : 06 August 2014 |
| **Tribunal/Court** | : High Court |
| **Coram** | : Woo Bih Li J |
| **Counsel Name(s)** | : Dominic Chan (Characterist LLC) for the plaintiff; Chan Leng Sun, SC and Sheik Umar (Wong & Leow LLC) for the defendants. |
| **Parties** | : Tan Hup Yuan Patrick — The Griffin Coal Mining Co Pty Ltd (administrators appointed) and others |

*Insolvency Law – Bankruptcy – Statutory demand – Debtor setting aside statutory demand*

*Res judicata*

6 August 2014

**Woo Bih Li J:**

**Introduction**

1 This was an appeal by Patrick Tan Hup Yuan ("the Plaintiff") against the decision of the Assistant Registrar dismissing the Plaintiff's application in Originating Summons (Bankruptcy) No 13/2013 ("the OSB 13/2013") for the following orders:

(a) that the statutory demand ("the Statutory Demand") dated 13 February 2013 issued by the defendants ("the Defendants") against the Plaintiff demanding payment of AUD3,037,236.88 be set aside;

(b) that the bankruptcy proceedings by the Defendants against the Plaintiff be stayed; and

(c) that the Defendants pay the Plaintiff costs of the originating summons.

2 After hearing arguments, I dismissed the Plaintiff's appeal. I set out my reasons below.

**The main issue**

3 The main issue was whether the Plaintiff could rely on allegations of certain facts to resist the Statutory Demand in the light of a settlement agreement and a consent judgment which I will elaborate on below. I decided that he could not.

**The background**

4 The Defendants commenced Suit No 749 of 2010 ("the Singapore Suit") against the Plaintiff for, *inter alia*, an alleged breach of a deed of guarantee dated 27 August 2010 ("the Guarantee"). The

Plaintiff had guaranteed the performance of the obligations of Montreal Capital Group Limited ("Montreal") under an agreement ("the Implementation Agreement") with the Defendants to, *inter alia*, inject fresh capital to the first defendant in voluntary administration.

5 The Statutory Demand which was the subject of OSB 13/2013 was issued when the Plaintiff failed to pay the sums due under a consent judgment dated 20 November 2012 ("the Consent Judgment") made in the Singapore Suit by Prakash J. This Consent Judgment was made pursuant to a settlement agreement dated 19 November 2012 entered into by the parties ("the Settlement Agreement"). Clause 6 of the Settlement Agreement was an entire agreement clause which provided:

> **Entire Agreement.** This Agreement contains the entire agreement and supersedes any prior understandings, negotiations and agreements with respect to the subject matter hereof.

**The Plaintiff's case**

6 The Plaintiff made two arguments to support his application to set aside the Statutory Demand. First, the Defendants had assigned to another party, through a Deed of Assignment and Appointment of Attorney dated 28 February 2011 ("the Deed of Assignment"), its interests under the Guarantee dated 27 August 2010 entered into between the Plaintiff and the Defendants. Since the Defendants' claim in the Singapore Suit was on the basis of a breach of this guarantee which had been assigned to another party, the Defendants were not entitled to maintain the Singapore Suit and enter judgment against the Plaintiff. I will refer to this argument as "the *locus standi* argument".

7 Secondly, the Plaintiff argued that he had a valid cross-claim against the Defendants arising from the Defendants' breach of an alleged agreement made at a meeting on 27 August 2012 in Sydney which I will refer to as "the Sydney Agreement". I will refer to this argument as "the cross-claim argument".

8 The thrust of the Sydney Agreement was as follows. The Plaintiff had allegedly agreed to discount five standby letters of credit totalling AUD250m which the Defendants were looking to discount, at between 5% to 6%. In consideration of this, the Defendants allegedly agreed before the Settlement Agreement dated 19 November 2012 and the Consent Judgment dated 20 November 2002 that the Singapore Suit would be considered settled. The Defendants were to furnish information showing the primary text of the standby letters of credit, which would allow the Plaintiff's bank to quote the applicable rates. AUD250m was to be held on escrow by the Plaintiff's counsel. If the Defendants were to receive confirmation from the Plaintiff's bank that the bank was prepared to discount the letters of credit, this sum would not be remitted to the Defendants.

9 Pursuant to the Sydney Agreement, the Plaintiff contacted JP Morgan, Singapore, and secured it as the discounting bank at a rate of 5.5%. At the Defendants' request, the Plaintiff and JP Morgan signed a non-disclosure agreement before the Defendants would release the wording of the standby letters of credit. However, the Defendants allegedly failed to provide the Plaintiff with the wording of the standby letters of credit despite repeated requests to do so. Accordingly, the Plaintiff claimed to have suffered loss and damage from the Defendant's breach of the Sydney Agreement.

**The Defendants' case**

10 In respect of the *locus standi* argument, the Defendants argued that:

(a) The Plaintiff was attempting to go behind the Consent Judgment and inquire into the validity of the debt, and this was not permissible.

(b) The fact that the Plaintiff had not proceeded to set aside the Consent Judgment showed that he did not believe that he had legitimate grounds to do so.

(c) The Plaintiff's argument was in effect, a plea that there was no cause of action between the Defendants and the Plaintiff. This was prohibited by cause of action estoppel by virtue of the Consent Judgment. In the alternative, the issue was fundamental to the finding of the Plaintiff's liability established by the Consent Judgment. Accordingly, an issue estoppel operated to prevent the Plaintiff from raising this argument.

11 In respect of the cross-claim argument, the gist of the Defendants' argument was that:

(a) the Plaintiff was precluded from relying on the Sydney Agreement in view of cl 6 of the Settlement Agreement, which was the entire agreement clause; and

(b) the cross-claim argument was not credible.

**The court's reasons**

12 As regards the *locus standi* argument, the starting point was r 98(2) of the Bankruptcy Rules (Cap 20, R 1, 2006 Revised Edition) ("the Rules"), which set out the grounds which a court could rely on to set aside a statutory demand:

**98.**—(1) On the hearing of the application, the court may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate.

(2) The court shall set aside the statutory demand if —

(a) 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;

(b) the debt is disputed on grounds which appear to the court to be substantial;

(c) it appears that the creditor holds assets of the debtor or security in respect of the debt claimed by the demand, and either rule 94(5) has not been complied with, or the court is satisfied that the value of the assets or security is equivalent to or exceeds the full amount of the debt;

(d) rule 94(1) has not been complied with; or

(e) the court is satisfied, on other grounds, that the demand ought to be set aside.

13 Rule 98(2)(e) of the Rules is to be read with para 144 of the *Supreme Court Practice Directions* (2013 Ed, 1 January 2013 release) ("the PD") which provided:

**144. Applications to set aside statutory demands made under the Bankruptcy Rules**

(1) Rule 97 of the Bankruptcy Rules allows debtors to apply to set aside statutory demands within 14 days from the date of service; or, where the demand was served outside jurisdiction, within 21 days.

(2) Without prejudice to Rule 98 of the Bankruptcy Rules, on an application to set aside a statutory demand based on a judgment or an order, the Court will *not go behind the judgment or*

*order* and *inquire into the validity of the debt*.

(3) When the debtor:

(a) claims to have a counterclaim, set-off or cross demand (whether or not he could have raised it in the action or proceedings in which the judgment or order was obtained) which equals or exceeds the amount of the debt or debts specified in the statutory demand; or

(b) disputes the debt (not being a debt subject to a judgment or order),

the Court will *normally* set aside the statutory demand if, in its opinion, on the evidence there is a *genuine triable issue*.

[emphasis added]

14 Where there is a genuine triable issue, the court will normally set aside the statutory demand, but it is not obliged to do so: *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 ("*Chimbusco*") at [29]. It will not suffice for a debtor to raise spurious allegations in order to fend off bankruptcy proceedings. The court will only set aside a statutory demand where the debtor is able to adduce evidence on affidavit that raises a triable issue: *Chimbusco* at [30].

15 In my view, there was no dissonance between the Rules and the PD. The effect of para 144(2) of the PD was to supplement r 98(2)(b) because r 98(2) is not confined to the situation where the statutory demand is based on a judgment, *ie*, the statutory demand may not be based on a judgment. However, where it is based on a judgment, para 144(2) of the PD states that the court will not inquire into the validity of the debt. In other words, any dispute on the debt will not appear to be substantial under r 98(2)(b). While practice directions do not have the force of law (see *BNP Paribas (formerly known as Banque National De Paris) v Polynesia Timber Services Pte Ltd and another* [2002] 1 SLR(R) 539 at [37]; *Odex Pte Ltd v Pacific Internet Ltd* [2008] 3 SLR(R) 18 at [29] and [30]), they are directions from the court nonetheless and a court will not normally depart from its directions unless there is a good reason for doing so. Moreover, para 144(2) is consistent with what is already the law on *res judicata* which I will elaborate on below.

16 In the present case, the *locus standi* argument challenged the Defendants' entitlement to commence the Singapore Suit against the Plaintiff as the *locus standi* argument was that the Defendants were not the right parties to make the original claim in the Singapore Suit. In my view, by making this argument, the Plaintiff was asking the court to go behind the Consent Judgment and inquire into the validity of the debt, namely, whether the debt was indeed owed to the Defendants. The Plaintiff was not entitled to do this pursuant to para 144(2) of the PD. By consenting to the Consent Judgment, he had accepted that the Defendants were entitled to make the claim. The proper step for him would have been to apply to set aside the Consent Judgment but he did not do so.

17 Moreover, I was of the view that the Plaintiff was prevented from making the *locus standi* argument by a principle of *res judicata*, namely cause of action estoppel. Cause of action estoppel was explained by Diplock LJ (as he then was) in *Thoday v Thoday* [1964] 2 WLR 371 ("*Thoday*") at 384:

"[C]ause of action estoppel," is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in

previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, … If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped *per rem judicatam*.

18 In the present case, the Consent Judgment provided that final judgment had been entered against the Plaintiff:

> **UPON HEARING** Counsel for the [Defendants] and the [Plaintiff], **IT IS ORDERED BY CONSENT** that final judgment be entered against the [Plaintiff] **AND IT IS ORDERED** that:-
>
> (1) The [Plaintiff] pay to the [Defendants] the sum of AUD 3,000,000;
>
> (2) Interest on the Judgment sum of AUD3,000,000 at the rate of 5.33% per annum to be calculated from the date of the Judgment until the Judgment is satisfied;
>
> (3) Execution of this Judgment by the [Defendants] shall be stayed until 31 January 2013; and
>
> (4) No order as to costs.

19 In my view, since the Consent Judgment provided that final judgment be entered against the Plaintiff and that the Plaintiff was to pay the Defendants the above-stated sum, the Plaintiff was to be taken to have consented to the Defendants' *locus standi* to make the claim. A consent order was as efficacious as orders pronounced after a contest in creating cause of action estoppel: see KR Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 4th Ed, 2009) at para 2.16; *Poh Huat Heng Corp Pte Ltd and others v Hafizul Islam Kofil Uddin* [2012] 3 SLR 1003 at [18]. The Plaintiff's *locus standi* argument, in essence, was that the Defendants were not entitled to commence the Singapore Suit based on the guarantee because the rights under the guarantee had been assigned to another party. In effect, this was a plea that the Defendants had no cause of action against the Plaintiff and hence contradicted the Consent Judgment which was given on the basis that the Defendants have a cause of action against the Plaintiff. Therefore, the Plaintiff was precluded from making the *locus standi* argument.

20 I was also of the view that the Plaintiff was precluded by the defence of abuse of process from raising the *locus standi* argument. The defence of abuse of process, although distinct, was accepted as "the extended doctrine of *res judicata*" or "doctrine of *res judicata* in the wider sense": see *Lee Hiok Tng (in her personal capacity) v Lee Hiok Tng and another (executors and trustees of the estate of Lee Wee Nam, deceased) and others* [2001] 1 SLR(R) 771 at [21]–[22]. Essentially, this defence does not permit matters to be raised which ought to have been raised in earlier proceedings. The traditional formulation of the defence was articulated by Wigram VC in *Henderson v Henderson* [1843–1860] All ER Rep 378 at 381–382. The modern restatement of the defence is found in *Johnson v Gore Wood & Co (a Firm)* [2002] 2 AC 1 ("*Johnson*") at 31.

> But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that

> the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. …
>
> It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on *the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.* As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.
>
> [emphasis added]

21 The modern restatement of the defence in *Johnson* has been followed in *Kwa Ban Cheong v Kuah Boon Sek and others* [2003] 3 SLR(R) 644 at [25]–[26], *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565 at [62], and *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie"*) at [52].

22 I refer to the helpful guidance provided by *Goh Nellie* at [53]:

> … To put it shortly, a court should determine whether there is an abuse of process by looking at all the circumstances of the case, including whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed. The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant. In the context of cases such as the present, the inquiry is directed not at the theoretical possibility that the issue raised in the later proceedings could conceivably have been taken in the earlier but rather at whether, having regard to the substance and reality of the earlier action, it reasonably ought to have been.

23 In the present case, the Plaintiff failed to raise the *locus standi* argument in the Singapore Suit, but instead agreed to the Consent Judgment to be entered. In reaching the conclusion that the Plaintiff's raising of the *locus standi* argument warranted the operation of the defence of abuse of process, I was guided by the need to consider the balance between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court, and the recognition that there would come a point beyond which repeated litigation would be unduly oppressive to a defendant. In my view, the Plaintiff should not have agreed to the Consent Judgment if he did not accept that the Defendants were the correct claimants. No reason was given as to why he raised the *locus standi* argument so late. In the circumstances, the Plaintiff's attempt to set aside the Statutory Demand in the present case had become unduly oppressive to the Defendants and was nothing more than a collateral attack on the Consent Judgment. I found that the *locus standi* argument was, in substance, an attempt by the Plaintiff to deny the Defendants, through the back door, their fruits of the Consent Judgment. Therefore, the defence of abuse of process operated against the Plaintiff.

24 In the circumstances, it is unnecessary for me to elaborate on issue estoppel.

25 I now come to the cross-claim argument.

26 As stated above at [7]–[8], the Plaintiff argued that he had a valid cross-claim against the Defendants arising from the Defendants' alleged breach of the Sydney Agreement, which in turn provided that in consideration of the Plaintiff agreeing to discount the Defendants' standby letters of credit, the Singapore Suit would be considered settled. In my view, the Plaintiff's cross-claim argument was not correctly characterised as a cross-claim or counterclaim. Instead, the Plaintiff's cross-claim argument would in substance be a defence to the Defendants' claim in the Singapore Suit because the Plaintiff appeared to be alleging that the Plaintiff's benefit from the alleged Sydney Agreement was that the Singapore Suit would be considered settled. Accordingly, the same objections against the Plaintiff raising the *locus standi* argument apply to the Plaintiff's cross-claim argument, namely, the Plaintiff was precluded from raising the cross-claim argument pursuant to para 144(2) of the PD. Also, the defence of abuse of process applied (see above [16] and [23]). Therefore, I did not find that the debt was disputed on grounds which appeared to be substantial or that there were any genuine triable issues.

27 In any event, any alleged Sydney Agreement was clearly and expressly superseded by cl 6 of the Settlement Agreement, which provided that the Settlement Agreement superseded any prior understandings, negotiations and agreements with respect to the Singapore Suit (see above at [5]).

**Conclusion**

28 For the reasons set out, I dismissed the appeal with costs fixed at $8,000 to the Defendants inclusive of disbursements.