Rafat Ali Rizvi *v* Ing Bank NV Hong Kong Branch
[2011] SGHC 114

Case Number : OSB No. 28 of 2009/D (Registrar's Appeal No.393 of 2009/W)

Decision Date : 09 May 2011

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Philip Ling (Wong Tan & Molly Lim LLC) for the plaintiff; Rebecca Chew, Paul Ng and Goh Su Sian (Rajah & Tann LLP) for the defendant.

Parties : Rafat Ali Rizvi — Ing Bank NV Hong Kong Branch

Insolvency Law – Bankruptcy – Statutory Demand

9 May 2011 Judgment reserved.

Kan Ting Chiu J:

Background

1 The plaintiff, Rafat Ali Rizvi, was served with a statutory demand issued by the defendant, Ing Bank NV Hong Kong Branch. The plaintiff disputed the validity of the statutory demand and sought to set it aside. However, as he was out of time, he had to apply for an order to extend time as well as order to set aside the statutory demand. When the applications came before an Assistant Registrar ("AR"), both were dismissed and the plaintiff is appealing against those orders.

2 The plaintiff, a British citizen and a Singapore Employment Pass holder, is the sole shareholder and ultimate beneficial owner of Arlington Assets Investments Ltd ("AAIL"), a company incorporated in the British Virgin Islands ("BVI"). The defendant is the Hong Kong branch of Ing Bank, NV AAIL is a customer of the defendant. The defendant had granted credit facilities to AAIL up to a maximum limit of US$180 million. The plaintiff had executed a continuing personal guarantee in favour of the defendant to secure the facilities.

The statutory demand

3 The defendant issued a statutory demand dated 25 May 2009 on the plaintiff under s 62 of the Bankruptcy Act (Cap 20. 2009 Rev Ed) ("BA") for the sums of US$117,143,874, €2,528,234.96, S$16,117,571.11 and ¥1,976,752,632 owing under the facilities granted by the defendant to AAIL (All references to sections refer to the BA.)

The application for extension of time

4 Under r 97(1)(*a*) of the Bankruptcy Rules (Cap 20, R1, 2006 Rev Ed) ("BR"), the plaintiff had to apply to set aside the statutory demand within 14 days from the service of the statutory demand on him. (All references to rules refer to the BR.) When the plaintiff filed his application on 6 July 2009, he was eight days out of time. However, r 97(3) provides that:

> The court may, upon the application of the debtor, allow the debtor an extension of time to make his application to set aside the statutory demand.

5 In support of his application to extend time, the plaintiff stated that he was not in Singapore when the statutory demand was served by being posted on the main door of his Singapore residence. He claimed that he was in the United Kingdom between 27 May 2009 and 26 June 2009. He explained that he was unable to return to Singapore as he had to consult his English solicitors on the statutory demand served on him and other statutory demands that were served on AAIL, and he also had to attend to his aged father who was undergoing treatment in the United Kingdom.

6 The defendant's response was that the plaintiff did not deserve an extension of time because he did not produce evidence of his being in the United Kingdom, and that in any event, he was, by his account, back in Singapore three days before the dateline for filing the application to set aside the statutory demand.

The application to set aside the statutory demand

7 In the appeal, the plaintiff did not pursue all the arguments he made before the AR and submitted that the statutory demand should be set aside on the grounds that [note: 1] :

(a) that the defendant had not satisfied the requirements of s 61(1) of the BA;

(b) the debt is disputed on substantial grounds;

(c) the debtor has a valid counterclaim and set-off which is equivalent to or exceeds the amount of the debt.

I shall refer to these grounds as grounds (a), (b) and (c) and consider each in turn.

Ground (a) – non-satisfaction of s 61(1) of the BA

8 The plaintiff directed his submissions to the requirements of s 61(1)(*d*):

> 61. —(1) No bankruptcy application shall be made to the court in respect of any debt or debts unless at the time the application is made —
>
> ...
>
> (d) where the debt or each of the debts is incurred outside Singapore, such debt is payable by the debtor to the applicant creditor by virtue of a judgment or an award which is enforceable by execution in Singapore.

9 The plaintiff's argument was that as the debt was incurred outside Singapore, and that no judgment or award obtained on the debt which is enforceable by execution in Singapore, the statutory demand should be set aside.

10 Section 61(1)(*d*) was enacted for a specific purpose. Its introduction into s 61(1) was recounted by the Court of Appeal in *AmBank (M) Bhd v Yong Kim Yoong Raymond* [2009] 2 SLR(R) 659 ("*AmBank v Yong*") and I will not repeat the complete narration of its gestation. To put it very briefly, it started at the proceedings of the Select Committee on the Bankruptcy Bill. The Select

Committee received a submission from an associate professor of law who expressed concern over the extra-territorial application of the criminal provisions in the BA. The Select Committee agreed with the concern and revised the proposed provisions to exclude debts incurred outside Singapore unless they are incorporated in judgments or awards which are enforceable in Singapore.

11 The Court of Appeal concluded at [24]:

> [T]he objective of s 61(1)(*d*) was to give some added measure of *protection*, in the light of the far-reaching amendments to the bankruptcy regime brought about by the enactment of BA 1995, to persons with property in Singapore against bankruptcy proceedings based on debts incurred outside Singapore. A preliminary requirement that such debts have a *nexus* with Singapore through "a judgment or award which is enforceable by execution in Singapore" must first and foremost be satisfied. It is also abundantly clear that s 61(1)(*d*) has purely local roots and has neither been adopted nor adapted from the UK Insolvency Act.

12 As s 61(1)(*d*) is unique to the BA, special care should be taken in construing it. The provision refers specifically to the place where a debt is incurred, and separates them into two categories, debts incurred in Singapore and debts incurred outside Singapore. The starting point is the existence of a debt. That is an amount owing by one party to another, whether or not it is repayable immediately. In other words, the debt is a chose in action, but not necessarily a cause of action. The place where the debt is incurred is the place at which the debt came into existence. In the present case where the defendant bank granted credit facilities to AAIL, it would be the place of AAIL's account. Each time AAIL operated the account on credit, a debt was incurred. If the account was in Hong Kong, the debts were incurred in Hong Kong, and if the account was in Singapore, the debts are incurred in Singapore. Other issues which relate to a debt, such as the court/s with jurisdiction to hear disputes relating to the debt, the law governing the debt, the place where the demand for repayment is to be made, the place where the debt is to be repaid, the place where a debt can be recovered, do not determine or change the place where the debt is incurred.

13 Section 61(1)(*d*) does more than control the operation of the criminal provisions of our bankruptcy law on foreign debts. It also narrows the exposure of Singapore property to claims based on debts incurred outside Singapore.

14 In *AmBank v Yong*, the Court of Appeal gave valuable guidance to the implementation of the provision when it declared at [27] that "whether a debt is incurred outside Singapore under s 61(1)(*d*) is, in the final analysis, a question of fact, not law." While it did not (probably because it could not) set out fact-finding criteria which can be applied in all cases, its finding on the facts of that case is instructive.

15 Some significant and material facts are referred to in the Court's judgment. AmBank is a Malaysian bank. The bank granted loans to two Malaysian companies. Yong, a Singaporean, stood guarantor for the two companies. When the two companies defaulted on repayment, the bank obtained judgment against Yong in Malaysia. The bank registered the judgment in Singapore under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed), but did not enforce it within six years from the date of the judgment. Because of the delay, leave of court was required to enforce the judgment in Singapore, which the bank did not obtain. The bank then served a statutory demand on Yong (the judgment did not disclose the location of service of the statutory demand.) When the demand was not met the bank instituted bankruptcy proceedings against him.

16 Against the basis of these facts, the Court of Appeal held at [32] that "there can be no doubt that the debt in question arose in Malaysia, and it is, in every way, a debt "incurred outside

Singapore"", and set aside the statutory demand.

17 From the facts set out in [14] *supra*, the only factor connecting the debt to Singapore is Yong's nationality. The place of service of the statutory demand was not disclosed, but that is unlikely to have been considered relevant as the debt was incurred before the statutory demand was served. It is also likely that the facilities were made in Malaysia as the lender and the borrowers are all Malaysia entities and it is more probable than not that the borrowers' accounts with the bank were in Malaysia. If the accounts were in Singapore, the bank would have relied on that. On the basis of the facts, the Court of Appeal had ruled that the debts were incurred outside of Singapore for the purpose of s 61(1)(*d*).

The corresponding facts

18 I do not think that all the facts relating to the relationship of the parties and the transactions would have an equal bearing in the determination of the place where the debt was incurred. In a situation involving a lender, a borrower and a guarantor, the borrower owes the debt to the lender and the guarantor guarantees the repayment of the debt. In other words, this is a one-debt-multiple-debtors situation. Moving on from that, while the same debt applies to the borrower and the guarantor, their liability may be different; defences available to one of them may not be available to the other.

19 The facts of the present case are:

(a) the lender bank is the Hong Kong branch of the Ing Bank NV;

(b) the borrower is a BVI company;

(c) the plaintiff is a British citizen holding a Singapore Employment Pass, and with a residence in Singapore;

(d) no judgment or award has been obtained against the plaintiff; and

(e) the statutory demand was served in Singapore.

20 The question to be addressed is how the facts and conclusion in *AmBank v Yong* are applicable to the present case. The lender and borrowers are outside Singapore. From the know facts, it is most likely that AAIL's account with the defendant was at the latter's branch in Hong Kong and the credit facilities were disbursed through that account. In any event, the exact place the account was maintained is not critical as long as it is not Singapore. The burden was on the defendant to establish that the statutory demand was a proper statutory demand, which did not infringe s 61(1)(*d*). The defendant had to show that the debt was incurred in Singapore, and it had not done that.

21 For the reasons given in [17] and [18] *supra*, the issuance and service of the statutory demand cannot change the place where a debt is incurred. The relevant facts in *AmBank v Yong* are also

present in the present case:

(a) the lender and borrowers are outside of Singapore; and

(b) the bank accounts were not located in Singapore.

22 As the Court of Appeal had ruled that the question whether a debt is incurred outside Singapore is a question of fact, and the Court found that the debt in *AmBank v Yong* was incurred outside Singapore, the debt in the present case, by the same reasoning, must have been incurred outside Singapore.

23 The defendant raised an objection against the plaintiff's reliance on s 61(1)(*d*). It submitted that [note: 2] :

> It should be noted that Section 61 of the Bankruptcy Act is only applicable in the context of a bankruptcy application; the Bankruptcy Act has no similar provision pertaining to statutory demands. No bankruptcy application having yet been filed by the Defendant against the Plaintiff, the Defendant takes the position that it is entirely premature for the Plaintiff to rely on Section 61 of the Bankruptcy Act at this juncture.

That objection is founded on a narrow reading of s 61(1). Inasmuch as the provision states that no bankruptcy application shall be made to the court unless the four conditions set out in (a), (b), (c) and (d) are satisfied, it can be argued that the penalty for the non-compliance of the four conditions is that no bankruptcy application can be made, and not that a statutory demand cannot be issued.

24 Such a position is based on a reading of the provision in isolation without regard to the purpose and effect of a statutory demand in bankruptcy proceedings. The effect of a statutory demand is made clear in s 62:

> For the purposes of a creditor's bankruptcy application, a debtor shall, until he proves to the contrary, be presumed to be unable to pay any debt within the meaning of section 61(1)(*c*) if the debt is immediately payable and —
>
> (a) (i) the applicant creditor to whom the debt is owed has served on him in the prescribed manner, a statutory demand;
>
> (ii) at least 21 days have elapsed since the statutory demand was served;

Bankruptcy proceedings are often made on the basis of a statutory demand (see r 102 BR), and the presumption of insolvency which arises when it is not met. That is the only purpose of a statutory demand in the BR.

25 Taken in this broader context, there is little merit in the argument that an objection under s 61(1)(*d*) can only be raised to resist a bankruptcy application, but not to set aside a statutory demand. There is no reason to deny a party served with a statutory demand the right to take immediate action to set it aside and pre-empt a bankruptcy application, and to oblige the party to put up with the presumption that it is unable to pay the debt demanded. In any event, r 97 allows a debtor who has been served with a statutory demand to apply to set it aside and r 98(2)(*e*) decrees

that a court shall set aside a statutory demand if the court is satisfied that it ought to be set aside. These rules entitle the plaintiff to apply to set aside a statutory demand for non-compliance with s 61(1)(*d*).

Ground (b) – the debt is disputed on substantial grounds

26 Section 98(2)(*b*) provides that a court shall set aside a statutory demand if "the debt is disputed on grounds which appear to the court to be substantial".

27 The plaintiff alleged that subsequent to the execution of the guarantee but before the facility letter was signed (and before any facilities were provided), he had been assured by Y N Nagendra ("Nagendra"), the defendant's Managing Director, Global Head of Marketing, India Sub-Contenent, that there was no risk that the guarantee being enforced against him because the defendant was "very comfortable with the assets that were being provided as collateral for the Facilities and ... the guarantee would not be called upon and is only there as a mere formality" [note: 3]. He also alleged that other officers of the defendant had also assured him that the guarantee was a mere formality, and he said that but for these assurances, he would not have signed the guarantee. [note: 4] In the submissions before me, the plaintiff made the point that Nagendra had not deposed any affidavit to deny the allegation.

28 A few observations can be made on these allegations:

(a) the plaintiff did not disclose when Nagendra gave the assurance;

(b) the other officers who gave similar assurances were not identified;

(c) the plaintiff acknowledges that he has been engaged in the financial industry and has "significant experience and expertise in trading distressed debt, in particular bank debt", going back to before 1999 [note: 5]; and

(d) the plaintiff had not recorded or obtained confirmation of the assurance, the significance of which must have been known to him when he executed the guarantee in reliance of it.

Ground (c) – the debtor has a valid counterclaim and set-off which is equivalent to or exceeds the amount of the debt

29 This ground was elaborated on in the plaintiff's submissions to be that "the primary debtor AAIL is not only disputing the Defendants' claim against them but has also cross-claims against the Defendants which if established would extinguish their liability to the Defendants." [note: 6]

30 There are two components to this ground, firstly the denial of the debt, and secondly the counterclaim. On the first issue, it is open to the borrower and the guarantor to dispute the debt claimed by the lender. Although the submissions are that AAIL was disputing the debt, it is evident that the plaintiff also disputes the debt on the same grounds. This has to be made clear because AAIL has been wound-up, and the liquidators of AAIL are not disputing the debt or making any

counterclaim on behalf of AAIL.

31 The crux of AAIL's dispute was that AAIL had provided to the defendant some financial notes including notes known as Tarquin Notes and Fund Linked Notes, which the defendant had been attributed with zero values when Nomura International London, the organisation the plaintiff and AAIL had instructed to structure or arrange for the structuring of the notes ceased to issue valuations for them. The plaintiff disagrees with that zero valuation and contends that the notes are "likely to be of substantial value" [note: 7], but without disclosing any basis for the statement or putting forward any value for the notes.

My decision

Extension of time to apply to set aside the statutory demand

32 Rule 97(1)(*a*) provides that the application was to be filed within 14 days from the service of the statutory demand. Rule 97(3) empowers a court to extend the period. When an application is made for an extension of time, a court would have to take into consideration:

(a) the period of the delay;

(b) the reasons for the delay;

(c) the grounds for setting aside the statutory demand; and

(d) the prejudice that may result from an extension of time;

but the weightage of each factor has to be determined on the facts.

33 In this case, the delay of eight days is quite long. The reasons put forward, *ie*, that the plaintiff was in the United Kingdom to attend to his ailing father and his financial and legal problems when the statutory demand was served, and had returned to Singapore three days before the date line for application were not strong reasons for the delay. However the plaintiff had presented a good case that the statutory demand should be set aside as it did not comply with s 61(1)(*d*), and an extension of time will not prejudice the defendant, as it will have to confront s 61(1)(*d*) if it takes out bankruptcy proceedings against the plaintiff.

34 For the sake of completeness, I add that I do not consider the plaintiff's arguments on assurances/estoppel and the valuation issues to be *substantial* grounds of disputes following within r 98(2)(*b*) because of the deficiency of content of these allegations.

35 After reviewing the matters, I conclude that the application should be granted. With the finding that the debt was incurred outside Singapore and was not recoverable by execution in Singapore, the case for setting aside the statutory demand made up for the delay in the application.

36 I allow the plaintiff's appeal and set aside the AR's orders. I grant the plaintiff's applications to enlarge time to file the application to set aside the statutory demand, and I set aside the statutory

demand. The plaintiff is to have the costs of the appeal as well as the costs before the AR.

[note: 1] Plaintiff's Skeletal Submissions, para 7

[note: 2] Defendant's/Respondent's Submissions, para 113

[note: 3] Affidavit of plaintiff, 6 July 2009, para 16

[note: 4] Affidavit of plaintiff, 6July 2009, para 20

[note: 5] Affidavit of plaintiff, 7 December 2009, para 18

[note: 6] Plaintiff's Skeletal Submissions, para 14

[note: 7] Plaintiff's Skeletal Submissions, para 32