Liew Kai Lung Karl *v* Ching Chiat Kwong
[2015] SGHC 122

Case Number	: Originating Summons (Bankruptcy) No 15 of 2015 (Registrar's Appeal No 89 of 2015)
Decision Date	: 30 April 2015
Tribunal/Court	: High Court
Coram	: Chan Seng Onn J
Counsel Name(s)	: The plaintiff in person; Sim Kwan Kiat and Eugene Tan (Rajah & Tann Singapore LLP) for the defendant.
Parties	: Liew Kai Lung Karl — Ching Chiat Kwong

Insolvency Law – Bankruptcy – Statutory Demand

30 April 2015

Chan Seng Onn J:

Introduction

1 The plaintiff, who was the director of Realm Capital Limited ("Realm Capital"), had applied in Originating Summons (Bankruptcy) No 15 of 2015 ("OSB 15") to set aside a statutory demand dated 14 October 2014 for a sum of $2,209,863.01 ("the SD") which was served on him through his solicitors on 15 October 2014. Prior to OSB 15, the defendant had commenced bankruptcy proceedings against the plaintiff in Originating Summons (Bankruptcy) No 2552 of 2014 (OSB 2552).

2 In OSB 15, the plaintiff applied for (a) an extension of time to make the application to set aside the SD issued against him; (b) the SD to be set aside; and (c) alternatively, that the SD be declared manifestly irregular, invalid, null and void and of no effect. The assistant registrar dismissed the plaintiff's application in OSB 15. The plaintiff appealed and the matter came before me. After hearing the parties, I dismissed the appeal. As the plaintiff has filed an appeal against my decision, I now give my reasons.

Extension of time to set aside the SD

3 Under r 97(1)(*a*) of the Bankruptcy Rules (Cap 20, s 166, 2006 Rev Ed), the plaintiff had 14 days from the date on which the SD was served to apply to court to set aside the SD. The SD was served on 15 October 2015 (the plaintiff disputed that this was valid service but this was irrelevant to the immediate issue at hand) which meant that an application to set aside the SD had to be made by end October 2014. The plaintiff filed OSB 15 on 24 February 2015. This was almost 4 months out of time. However, under r 97(3), the court was empowered to grant an extension of time to a debtor to make his application to set aside a statutory demand.

4 In *Rafat Ali Rizvi v Ing Bank NV Hong Kong Branch* [2011] SGHC 114, Kan Ting Chiu J provided the following four factors that the court would have to take into consideration when an application for an extension of time was made by a debtor: (a) the period of the delay; (b) the reasons for the delay; the grounds for setting aside the statutory demand; and (d) the prejudice that might result from an extension of time (at [32]). The weightage of each factor was not cast in stone but was fact

dependent. In that case, Kan J noted that a delay of eight days was quite long and the reasons provided for the delay were not strong. Nevertheless, the extension was granted since the plaintiff had presented a good case that the statutory demand should be set aside for non-compliance with s 61(1)(*d*) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) and the extension would not have prejudiced the defendant.

5 In *Oversea-Chinese Banking Corp Ltd v Ravichandran s/o Suppiah* [2015] SGHC 1, Aedit Abdullah JC held that a delay of about a year did not disqualify the defendant from making an attempt at setting aside the statutory demand. In that case, the defendant had been acting in person for a substantial period of that delay.

6 In *Thu Aung Zaw v Norb Creative Studio* [2014] SGHC 67, the plaintiff's application was made more than four months out time and no separate application for an extension of time was made. Despite this, Lee Seiu Kin J waived the procedural irregularity of the plaintiff and permitted the application to set aside the statutory demand. The court was of the opinion that there was no substantial injustice or prejudice suffered by the defendant as a consequence of the irregularity. The court then dispensed with the application for an extension of time and proceeded to hear the application. It thus seemed to me that the threshold to grant an application for an extension of time to a debtor to make his application to set aside a statutory demand was not a particularly high one.

7 In this case, there was a substantial delay of about four months. The plaintiff was represented during this time but claimed that he was not satisfied with the services provided by his solicitors at that time. The plaintiff then discharged his solicitors and acted in person after that. He further claimed that he only received the documents pertaining to his bankruptcy proceedings on 17 February 2015. I did not find this to be a sufficient reason to account for the delay. Counsel for the defendant pointed out that the plaintiff's solicitors had appeared at the first hearing of OSB 2552 on 22 January 2015. At that hearing, the plaintiff was granted an adjournment as he, through his solicitors, had expressed an intention to make a settlement offer to the defendant. The defendant did not accept the offer. This showed that the plaintiff was well aware of the ongoing bankruptcy proceedings against him following the service of the SD.

8 However, the defendant did not point to any prejudice suffered by him as a result of the delay. Moreover, one ground relied on the plaintiff to set aside the SD was that service of the SD was irregular. This could have had an impact on the application for extension of time since it was potentially arguable that r 97(1) of the Bankruptcy Rules proceeded on the assumption that service of the SD was valid. I therefore proceeded to hear the substantive merits of the plaintiff application to set aside the SD. In any event, I found that the plaintiff's application to set aside the SD was without any merit. Therefore, the granting of the extension was not material to my decision.

The plaintiff's arguments to set aside the SD

First argument: service of the SD was not valid

9 The plaintiff claimed that the defendant had failed to effect personal service of the SD as required by r 96(2) of the Bankruptcy Rules. The defendant did not deny that no personal service was effected on the plaintiff. The SD was served on the plaintiff's solicitors (at that time). In a letter dated 3 October 2014, the defendant's solicitors wrote to the plaintiff's solicitors asking whether they had instructions to accept service of process (including service of statutory demands) on the plaintiff's behalf. The plaintiff's solicitors replied that they had instructions to accept service on behalf of the plaintiff.

10 In *Re Rasmachayana Sulistyo (alias Chang Whe Ming), ex parte The Hongkong and Shanghai Banking Corp Ltd and other appeals* [2005] 1 SLR(R) 483 ("*Re Rasmachayana*"), V K Rajah J (as he then was) said:

> 10 The requirements for service of the statutory demand are circumscribed by pragmatism and not by an overtly [*sic*] rigid and technical approach. The emphasis is clearly on the *reasonableness* of the steps being taken to bring to the debtor's attention the existence of the relevant statutory demand. …
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> 20 … There is nothing in the [Bankruptcy Rules] or [Bankruptcy Act] pointing to the existence of a legislative scheme for an exclusive code of procedure for personal service. More importantly, there is nothing in the [Bankruptcy Rules] that precludes or militates against consensual arrangements for service of processes. In my view, the freedom to contract should not be fettered unless there is a clear contrary indication from the language used or from the purport of the relevant legislative provisions and/or underpinning public interest considerations. …
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> 21 … [T]here are no *apparent* underpinning or overriding policy reasons why a debtor cannot agree to have the various bankruptcy processes effected on him in a particular or peculiar manner that is agreeable and/or convenient to both him and the creditor. Financial institutions frequently deal with foreign debtors and it is sometimes wholly impractical and extremely costly for attempts to be made for service through a foreign judicial process. However, impracticality or difficulties *per se* cannot be a license to obviate a mandatory statutory scheme or policy. The crux of the matter really is whether parties can contractually agree on alternative modalities of service.
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> [emphasis in original]

11 In *Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 2 SLR(R) 31 ("*Wong Kwei Cheong*"), S Rajendran J accepted a suggestion by counsel that the bank could have complied with r 96(1) of the Bankruptcy Rules by notifying the debtor's solicitors of the statutory demand and inquiring whether they would accept service on behalf of the debtor (at [14]). Both *Re Rasmachayana* and *Wong Kwei Cheong* showed that service through the debtor's solicitors was sufficient to comply with r 96 of the Bankruptcy Rules if there was a prior arrangement that such a manner of service was agreeable to the debtor. This was exactly the situation in the present case where the plaintiff's solicitors had confirmed that they had instructions to accept service of process on behalf of the plaintiff. Furthermore, the plaintiff did not make any allegation that his solicitors had falsely represented this information when the defendant's solicitors specifically asked the plaintiff's solicitors whether they had instructions to accept service of process, including but not limited to the service of statutory demands on behalf of their clients. I therefore found that there was valid service of the SD under r 96 of the Bankruptcy Rules.

Second argument: there was a genuine triable issue

12 The plaintiff also claimed that there was a dispute as to the debt which gave rise to a genuine triable issue. It was on this basis that the plaintiff claimed that the SD should be set aside.

13 Rule 98(2)(*b*) of the Bankruptcy Rules provided that the court had to set aside a statutory demand if the debt was disputed on grounds which appeared to the court to be substantial. Paragraph 144(3) of the Supreme Court Practice Directions provided additional guidance on the matter

by stating that the "Court [would] normally set aside the statutory demand if, in its opinion, on the evidence there was a *genuine triable issue*" (emphasis added).

14 The Court of Appeal in *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 explained that the court was not obliged to set aside a statutory demand where there was a genuine triable issue but it would only normally do so, and that "the criterion of 'grounds which appear to the court to be substantial' under r 98(2)(*b*) constitute[d] a higher threshold" (at [29]). The Court of Appeal further explained at [30]:

> … [I]t will not suffice for a debtor to raise spurious allegations in order to fend off bankruptcy proceedings. The court must examine *all the facts* to ascertain whether the "genuine triable issue" test in para 144 of the [Supreme Court] Practice Directions is satisfied. The upshot of this is that the court will only set aside a statutory demand (and thereby require a creditor to initiate a civil suit if he wishes to pursue the claimed debt further) where the debtor is able to adduce evidence on affidavit that raises a genuine triable issue. [emphasis in original]

15 The facts of the present case were not complex. The parties entered into a Deed of Settlement dated 4 September 2012 ("the Deed of Settlement") whereby the defendant and Ever Tycoon Limited ("Ever Tycoon") agreed to forbear (up till 1 March 2013) from commencing legal proceedings against, *inter alia*, the plaintiff for an unpaid loan, which total sum was $4,000,000, in exchange for the plaintiff paying $1,500,000 by 4 September 2012 and a further sum of $500,000 by 9 September 2012 ("the Settlement Payments"). The forbearance period was extended to May 2014 through three Supplemental Deeds. It was also not disputed that the plaintiff had made the Settlement Payments.

16 Clause 1.1(ii) of the Deed of Settlement also provided that the aggregate liabilities and obligations of, *inter alia*, the plaintiff towards the defendant and Ever Tycoon after the Settlement Payments would not exceed $2,000,000. This was referred to in the Deed of Settlement as the "Balance Principal". Under cl 1.3 of the Deed of Settlement, the plaintiff and defendant agreed to, "in good faith, seek to discuss the reinvestment or settlement of the Balance Principal [and] such discussions [were] to be concluded no later than 1 March 2013". The Supplemental Deeds extended this period of discussion up till 1 May 2014. Clause 2.4 of the third Supplemental Deed provided as follows:

> For the avoidance of doubt and without prejudice to Clauses 1.3 and 1.4 of the Deed of Settlement (as amended by the Supplemental Deed, 2nd Supplemental Deed and this 3rd Supplemental Deed), the Parties agree that in the event [the defendant] and [the plaintiff] fail to conclude any reinvestment or settlement of the Balance Principal by 1 May 2014 (or such later date as [the defendant] and Ever Tycoon may agree in writing), [the plaintiff] and Realm Capital shall jointly and/or severally forthwith pay to [the defendant] the Balance Principal of S$2,000,000, in addition to all accrued interest thereof at the rate of 5% per annum on a simple, daily rest basis under Clause 1.4 of the Deed of Settlement (as amended by the Supplemental Deed, 2nd Supplemental Deed and this 3rd Supplemental Deed) from 9 September 2012 until the date of full payment. In this regard, [the defendant] shall be at liberty to claim against [the plaintiff] and Realm Capital jointly and/or severally for payment of the Balance Principal of S$2,000,000 (and accrued interest thereof) in any manner and in his absolute discretion under this clause.

17 The SD in this case was for the Balance Principal of $2,000,000. The plaintiff argued that there was double claiming by the defendant of the sum of $1,500,000 which was previously paid by the plaintiff. This according to the plaintiff raised a genuine triable issue. I did not agree. From the above, it was manifestly apparent that the SD was for a separate sum, which was the Balance Principal. The

$1,500,000 previously paid by the plaintiff was for the Settlement Payments. There was clearly no double claiming. It was a spurious allegation raised by the plaintiff in a desperate attempt to fend off the bankruptcy proceedings against him. There was no merit in this submission and I found that there was no dispute relating to the debt which was substantial under r 98(2)(*b*) of the Bankruptcy Rules.

Third argument: details of the debt provided were insufficient

18 It was a requirement under r 94(4)(*b*), that a statutory demand stated the consideration for the debt or if there was no consideration, the way in which the debt arose. If the debt was founded on grounds other than a judgment or an order of court, the SD had to give such details as would enable to debtor to identify the debt.

19 The plaintiff claimed that insufficient details were provided because the defendant failed to annex the documents relating to the debt to the SD. It was argued that in order to constitute sufficient details, the Deed of Settlement under which the debt arose and other Supplemental Deeds relating to the debt and other personal guarantees had to be annexed to the SD.

20 This argument was misconceived. Rule 94(4)(*b*) did not require that documents relating to the debt be attached. All it required was for details of the debt to be provided so that the debtor could identify the debt. The rationale behind this requirement was clear. Failure to comply with or set aside a statutory demand after 21 days of service of the statutory demand triggered a presumption under s 62 of the Bankruptcy Act that the debtor was unable to pay any debt within the meaning of s 61(1)(*c*). In order to comply with a statutory demand so that the presumption would not be triggered, a debtor had to be able to identify the debt. If not, he could not possibly be expected to comply with a statutory demand. For this purpose to be achieved, the documents relating to the debt did not have to be attached if sufficient details were provided in order for the debtor to identify the debt.

21 In the present case, the SD stated that the debt arose from a loan granted by the defendant and Ever Tycoon to the plaintiff and Realm Capital. The SD further provided the date of the Deed of Settlement entered into by the parties (4 September 2012) and the names of the parties to the Deed of Settlement (under which the current debt arose). It even provided the dates of the Supplemental Deeds entered into and the date of the letter of demand made by the plaintiff and Ever Tycoon Limited. It also provided the amount owing and the interest accrued on the principal. It also explained how the accrued interest was calculated based on the interest rate stipulated in clause 1.4 of the Deed of Settlement.

22 As the plaintiff had appended his signature as a party to the Deed of Settlement and all the three Supplemental Deeds, I expected the plaintiff to retain a copy of these important documents after due execution by all the parties concerned. At the hearing before me, I asked the plaintiff, who was in person, whether he had a copy of these documents. He candidly admitted that he did have them. Accordingly, there would be no question that he would have fully understood what the outstanding sum referred to in the SD was all about and how it arose, since he would have been able to read the SD in conjunction with the Deed of Settlement and the three Supplement Deeds that were in his possession at all times. In light of this, sufficient details were clearly given to enable the plaintiff to identify the debt. I therefore found that the SD was in compliance with r 94(4)(*b*) of the Bankruptcy Rules.

Conclusion

23 In conclusion, I found that (a) there was valid service of the SD under r 96 of the Bankruptcy Rules; (b) there was no genuine triable issue; and (c) sufficient details of the debt were provided in

the SD to enable the plaintiff to identify the debt under r 94(4)(*b*) of the Bankruptcy Rules. As none of the plaintiff's arguments had any substantive merits, I dismissed his appeal against the decision of the assistant registrar.

24 After hearing the parties on costs, I ordered that the plaintiff pay the defendant costs (inclusive of disbursements) fixed at $2,500.