IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 23

Civil Appeal No 32 of 2015

Between

JANNIE CHAN SIEW LEE

… *Appellant*

And

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

… *Respondent*

In the matter of Originating Summons (Bankruptcy) No 2 of 2015

In the matter of the Bankruptcy Act (Cap. 20)

And

In the matter of Rule 97 of the Bankruptcy Rules (Cap. 20, Rule 1)

And

In the matter of the Statutory Demand dated 3 October 2014

Between

JANNIE CHAN SIEW LEE

… *Plaintiff*

And

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

… *Defendant*

GROUNDS OF DECISION

[Insolvency Law] — [Bankruptcy] — [Statutory Demand]

[Civil Procedure] — [Extension of Time]

TABLE OF CONTENTS

Chan Siew Lee Jannie
v
Australia and New Zealand Banking Group Ltd

[2016] SGCA 23

Court of Appeal — Civil Appeal No 32 of 2015
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Tay Yong Kwang J
21 January 2016

6 April 2016

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 This appeal concerns a simple but important point of bankruptcy practice. The issue is whether "third party security" – and in this context we mean security which is held by the petitioning creditor in respect of the debt but which was not provided by the debtor against whom bankruptcy proceedings are being taken – has to be specified in a statutory demand.

2 This issue arises because rr 94(5) and 98(2) of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("the Rules") provide that the nature and value of "any property of the debtor or any security for the debt" which the creditor holds must be specified in the statutory demand and that non-compliance is a ground for setting the statutory demand aside. In this case, certain banking facilities were secured both by a pledge provided by the principal debtor as

well as a personal guarantee furnished by the Appellant. When the debtor defaulted on repayment, the Respondent issued a statutory demand against the Appellant but did not include details of the pledge. The Appellant argued that, by reason of this omission, the statutory demand was defective and applied to set it aside. The High Court Judge ("the Judge") dismissed the application and his decision is reported at *Jannie Chan Siew Lee v Australia and New Zealand Banking Group* [2015] SGHC 157 ("the GD").

3 The precise question for determination, therefore, was whether the expression "security" in the aforementioned provisions only refers to security provided by the person against whom the creditor is proceeding in bankruptcy (*ie*, the Appellant) or whether it extends also to security which has been provided by a third party (*ie*, the principal debtor). After hearing the parties, we decided that it was the former. As a result of our decision, we held that the statutory demand was not procedurally defective and that there was therefore no reason to set it aside. We now give full reasons for our decision.

Background

4 The Appellant, Chan Siew Lee, Jannie, is a shareholder and director of Timor Global LDA ("TG"), a company incorporated in Timor-Leste. The Respondent, the Australia and New Zealand Banking Group Limited, is the Timor-Leste branch of a bank incorporated in Australia.

5 On 12 September 2012, the Respondent extended banking facilities ("the facilities") in the sum of $7.8m to TG. In the letter of offer ("LO"), it was stated that these facilities were to be secured by: (a) a pledge provided by TG over certain of its assets ("the pledge"); and (b) a joint personal guarantee executed by the directors of TG. Clause 9 of the LO further specified that in

the event of default, the facilities shall be immediately repayable with interest. Whilst the parties disagreed on the precise scope of the pledge and the valuation of the assets pledged, this dispute was not relevant to the present appeal. The only point of note was that the Respondent did not deny that the value of the assets pledged exceeds the sum of $6.5m claimed in the statutory demand (and, for that reason, the Respondent would have been precluded from proceeding against TG in bankruptcy). On 13 September 2012, each of TG's directors (including the Appellant) entered into a personal guarantee ("the guarantee") under which they contracted to pay all sums of money which were owed by TG to the Respondent under the facilities.

6 TG subsequently defaulted on repayment of the facilities and the Respondent commenced a suit against the directors on 2 October 2013. Only the Appellant and one other director entered an appearance, each filing brief defences which were bereft of substantial particulars. Neither of them filed affidavits in support of their defences. The Respondent applied for summary judgment and it was granted on 10 January 2014, with judgment being entered against the directors for the sum of US$5.8m, plus interest and costs. The Appellant did not appeal against the judgment. On 15 October 2014, the Respondent served a statutory demand on the Appellant for a sum of $6.5m.

7 In the statutory demand, the Respondent disclosed that it held an "all-monies" mortgage over a property in Singapore which was co-owned by the Appellant and which it intended to enforce in satisfaction of the debt owed under the guarantee. This property had been provided as security for a separate loan but was available to be used in satisfaction of the debt owed to the Respondent. The statutory demand contained an estimate of the value of the mortgaged property and the quantum of the debt owed by the Appellant under

the other loan. The sum of $6.5m demanded in the statutory demand was calculated by deducting the surplus value from a potential sale of the property (*ie*, the sale proceeds less the amount owed under the other loan) from the sum owed under the judgment debt. Pertinently, the statutory demand did not specify the value of the assets under the pledge.

8 Between 15 October 2014 and 7 January 2015, the parties engaged in without-prejudice negotiations but were unable to come to an agreement. On 8 January 2015, the day after these negotiations fell through, the Appellant commenced the present application seeking (a) an extension of time to apply to set aside the statutory demand; and (b) to set aside the statutory demand under r 98(2) of the Rules.

Decision Below

9 In the court below, the Appellant submitted that a petitioning creditor was required to disclose details of all security held by the creditor in relation to the debt, irrespective of whether the security was provided by the debtor or by a third party. Her contention was that the expressions "any security for the debt" in r 94(5) and "security in respect of the debt" in r 98(2) ought to be read widely to mean all security which may be applied in satisfaction of the debt, howsoever and whosoever provided. For that reason, she submitted that the statutory demand should be set aside as details of the pledge were not specified therein. In contrast, the Respondent submitted that only security provided by the debtor to whom the statutory demand was issued needed to be specified. These contrasting interpretations were referred to respectively as "the all-security construction" and "the debtor's-security construction" by the Judge (see the GD at [5]). The Judge eventually concluded, on the basis of

authority and policy, that the latter construction was to be preferred and so there was no basis to set the statutory demand aside.

10 On the issue of the extension of time, the Judge noted that the present application was 70 days late and that the only reason proffered for the delay was that the parties had been in negotiations. The Judge held that the delay was substantial and the explanation was unpersuasive since there was no agreement between the parties that time would not continue to run while negotiations were on-going. While he accepted that little or no prejudice would accrue if an application for an extension of time were granted he held, based on (a) the period of the delay (which was substantial), (b) the reasons for the delay (which were unpersuasive), and (c) the grounds put forward for setting aside the statutory demand (which were unmeritorious), that this was not a case where the court should not exercise its discretion to grant an extension of time (see the GD at [23]).

The parties' cases on appeal

11 Mr Eugene Thuraisingam ("Mr Thuraisingam"), counsel for the Appellant, first dealt with the issue of the extension of time. He argued that the Judge erred in holding the reason given for the delay was unsatisfactory. He accepted that there was no explicit agreement that there would be no need to apply to set aside the statutory demand. However, he pointed out that the singular object of the negotiations was to forestall the initiation of bankruptcy proceedings. Seen in this light, he argued, it could be said that the Appellant had always acted expeditiously since she had always been taking "active steps to ensure the Respondent would not present a bankruptcy petition against her" and had filed the present application the day after negotiations fell through.

12 Turning to the substantive merits of the application, Mr Thuraisingam submitted that the Judge had erred in holding that debtor-security construction was the right one. Broadly summarised, his argument was put in two ways.

(a) First, he argued that the Judge had failed to appreciate that the bankruptcy regime had become "more debtor-centric". This error, he submitted, was the reason why the Judge did not adopt the all-security construction, which he argued would give debtors greater opportunities to forestall the institution of bankruptcy proceedings against them since it would preclude bankruptcy applications from being brought where the creditor may enforce security which is provided by the principal debtor to satisfy the debt claimed. Bankruptcy is inherently punitive, he contended, and so the court should, as far as it was possible, prefer a construction which benefited the debtor.

(b) Second, he submitted that the Judge had failed to recognise the unfairness inherent in the debtor's-security construction. He argued that it would place guarantors in a disadvantaged position *vis-à-vis* the principal debtors because it meant that the creditor might be able to present a bankruptcy petition against the guarantor in circumstances where it might not be able to do so against the principal debtor (chiefly, because the security provided by the principal debtor would be sufficient to discharge the debt).

13 The Respondent − not surprisingly − argued the contrary. Mr Chou Sean Yu ("Mr Chou"), counsel for the Respondent, first submitted that the Judge had rightly refused the application for an extension of time. The entry into "without prejudice" negotiations did not operate to stay the timeline

specified in the Rules. This was a point which the Appellant, being who was legally represented throughout the process of negotiation, ought to have been well aware of. In any event, he submitted that the Appellant's application to set aside the statutory demand was unmeritorious and ought to be dismissed because it was clear that third party security did not have to be specified in a statutory demand. He gave two reasons for this.

14 First, he submitted that there was ample authority that the only security which has to be specified in a statutory demand was that which was held over the property of the debtor. In particular, they pointed to the decisions of the Singapore High Court in *Re Loh Lee Keow and another,* ex parte *Keppel TatLee Bank Ltd* [2000] 3 SLR(R) 283 ("*Re Loh Lee Keow*") and *Sia Leng Yuen v HKR Properties Ltd* [2001] 3 SLR(R) 587 ("*Sia Leng Yuen*"). He submitted that in both these cases, the courts had approached the matter textually and held that the debtor's security construction was the "only one possible" when examined in the light of the other provisions of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the Act") and the Rules (citing *Sia Leng Yuen* at [9]).

15 Second, he argued that the debtor's security construction would be consistent with principle. For one, it would accord with the position under the common law which has long held that a creditor who has security against a third party need not give it up before being admitted to the bankruptcy process to prove his debt. Mr Chou argued that, by extension, third party security need not be specified in a statutory demand, which merely served as a preliminary to the presentation of a bankruptcy application. Furthermore, it would be consonant with the well-established principle that a creditor is not obliged to

pursue the other remedies available to him (including the enforcement of security provided by the principal debtor) before proceeding against a surety.

Our analysis

16 Given the shape that the parties' arguments have taken, the two issues which arose for our consideration were, first, whether an extension of time ought to have been granted; and, second, whether the pledge needed to have been specified. As a matter of logic, these two issues should be examined in that order for if the application for an extension of time was not granted then the merits of the setting aside application would not even arise for consideration. However, as the Judge recognised, the merits of the application were an important factor that must be taken into consideration when deciding whether to grant an extension of time. For that reason, we likewise elected to hear the parties on the merits first.

Secured creditors and their place in the bankruptcy process

17 In his submissions, Mr Thuraisingam framed this as a contest between two opposing views of what the "overarching object" of the bankruptcy regime was. The issue turned on whether this court saw the purpose of the Act and its Rules was to "give debtors an opportunity to make a fresh start" (as he contended) or to "balance and protect the debtors, bankrupts, creditors and society" (as found by the Judge at [12] and [16] of the GD). With respect, we do not agree. For a start, this is a false dichotomy. One can have a bankruptcy scheme that allows bankrupts to make a fresh start while still ensuring that this opportunity for a fresh start takes place within a system that balances the competing interests of other stakeholders in the bankruptcy process. Furthermore, to frame the matter in this way would leave it at too high a level

of generality. In our view, a proper consideration of this matter required an examination of the proper relationship between secured creditors and the bankruptcy process.

18 Our inquiry brought us to the first principle of bankruptcy law, which is that bankruptcy proceedings are *not* intended as a means for a single creditor to enforce his debt but is instead a method for the collective realisation of the assets of the debtor in order to maximise recovery for the general body of creditors (see the English Court of Appeal decision of *White v Davenham* [2012] 1 BCLC 123 ("*White*") at [9] *per* Lloyd LJ). The object of the bankruptcy process is to bring within the control of the court all the estate of the bankrupt in order that it can be distributed in a simple, inexpensive, and expeditious manner for the benefit of all creditors (see the Canadian decision of *Re Toronto Wood & Shingle Co* (1894) 30 Can LT 353 at 356). In order to achieve this goal, a number of things take place automatically upon the issuance of a bankruptcy order: the rights of unsecured creditors are frozen, the bankrupt's assets are automatically vested in the official assignee, and the administration of the bankrupt's estate is centralised in the bankruptcy court, which is given wide powers to decide all issues which may arise in the bankruptcy proceedings.

19 It goes without saying that what is best for the body of creditors *as a whole* might *not* be in the best interests of an *individual* creditor. The initiation of bankruptcy proceedings forecloses the prospect that the debtor might be able to recover and pay back his debts in full and it also subjects any distribution of the realisable assets to the statutory order of priority set out in s 90 of the Act. For these reasons, the benefits and burdens of bankruptcy fall unequally and not all creditors would be similarly in favour of the initiation of

bankruptcy proceedings. Some, particularly those with greater staying power, might prefer to hold out for the prospect of greater recovery in the future. Others, particularly those who need to recover their debts quickly or those with no appetite for litigation, would be in favour of the initiation of the bankruptcy proceedings.

20 As a matter of fairness, therefore, it stands to reason that the petitioning creditor who sets the wheels in motion should be one with no special claim to the estate of the bankrupt and therefore stands *pari passu* with the general body of creditors to await the proportionate recovery of his debts. A *secured* creditor, however, is not such a creditor. Section 76(3) of the Act provides that a secured creditor can continue to realise or otherwise deal with his security outside the bankruptcy process and thus, property subject to the rights of a secured creditor is effectively taken out of the *corpus* of assets available for general distribution. For this reason, it has long been a cardinal principle of bankruptcy law that a person is not allowed to prove against a bankrupt's estate (or, *a fortiori*, to initiate bankruptcy proceedings) and yet retain a security which, if given up, would go to augment the estate against which he proves (see the English Court of Appeal decision of *In re Turner, ex parte West Riding Union Banking Company* (1881) 19 Ch D 105 ("*In re Turner*") at 112 *per* Jessel MR). If a secured creditor wishes to initiate bankruptcy proceedings, he must surrender his security for the general benefit of the creditors as a whole (or if his security is inadequate to cover the full amount of his debt and he elects to present an application on that portion of his debt which is unsecured). This principle is statutorily enshrined in ss 63(1) and 63(2) of the Act, which read as follows:

> 63(1) Where the applicant for a bankruptcy order is a secured creditor of the debtor, he shall in his application —

> (*a*) state that he is willing, in the event of a bankruptcy order being made, *to give up his security for the benefit of the other creditors* of the bankrupt; or
>
> (*b*) *give an estimate of the value of his security, in which case he may to the extent of the balance of the debt* due to him, after deducting the value so estimated, *be admitted as a creditor* in the same manner as if he were an unsecured creditor.
>
> 63(2) *Where an applicant for a bankruptcy order who is a secured creditor of the debtor fails to disclose his security in the application, he shall be deemed to have given up his security for the benefit of the other creditors of the debtor* and upon the making of a bankruptcy order —
>
> (*a*) he shall not be entitled to enforce his security against the estate of the bankrupt or to retain any proceeds from the realisation of such security; and
>
> (*b*) he shall execute such document of release as is required by the Official Assignee or account and pay over to the Official Assignee all proceeds from any realisation of his security.
>
> [emphasis added]

21 But what about a creditor who holds third party securities? The short answer is that third party securities are irrelevant. The subject of s 63 of the Act is the regulation of the *bankrupt's estate* and the object of the provision is to prevent secured creditors – who stand in a privileged position by virtue of the security which they hold – from initiating bankruptcy proceedings *unless* they are willing to give up their security to augment the bankrupt's estate. However, third party securities, even if given up, will not form part of the eventual estate of the debtor divisible among his creditors. They are accordingly irrelevant for the purposes of determining if a creditor may present a bankruptcy application and consequently, there is no reason why a creditor who holds third party securities should be precluded from presenting a bankruptcy application (see *White* at [35]).

22 This is the consistent position which has been taken in a long and unbroken line of common law authorities which stand for the proposition that the existence of third party security does not affect the right of a creditor to be admitted to the bankruptcy process and to prove the full amount of his debt: see, for example, the English decisions of *In the Matter of John Plummer and William Wilson, Bankrupts* [1841] 1 Ph. 56 ("*John Plummer*"), *In re Turner*, and *Steamship Enterprises of Panama Inc., Liverpool (Owners) v Ousel (Owners) and others (The Liverpool (No. 2)* [1960] 2 WLR 541 at 604. Even in *John Plummer's* case, which was decided in the mid-nineteenth century, it was already described as a point which was "too clearly settled to be disputed" (at 59 *per* Lord Lyndhurst LC).

23 This principle is reflected in the statutory definition of a "secured creditor" which appears at s 2 of the Act. It provides that a "secured creditor" is one who holds "a mortgage, pledge, charge or lien *on or against the property of the debtor or any part thereof* as security for a debt due to him from the debtor" [emphasis added]. The use of the phrase "on or against the property of the debtor or any part thereof" is a clear indication that the security in question must be supplied by the debtor himself and not by a third party (see also the Malaysian Supreme Court decision of *Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan* [1993] 2 MLJ 423 at 432F–I). Thus, only creditors who hold security against the property of the debtor need to state their willingness to give it up before they will be permitted to present a bankruptcy application. This is also reflected in the the words of Form 3, which is the standard form to be used in the preparation of an affidavit supporting a creditor's bankruptcy application. Paragraph 5 of Form 3 reads as follows:

> I/We do not, nor does any person on my/our behalf, hold any *security* ***on the debtor's estate***, or any part thereof, for the payment of the abovementioned sum.
>
> OR
>
> I/We hold *security* for the payment of [part of] the above-mentioned sum.
>
> I/We will give up such security for the benefit of all the creditors in the event of a bankruptcy order being made.
>
> OR
>
> I/We hold *security* for the payment of part of the above-mentioned sum and I/we estimate the value of such *security* to be $. This petition is not made in respect of the secured part of my/our debt.
>
> [emphasis added in italics and bold italics]

24 Mr Thuraisingam acknowledged all of this, but he submitted that this is of limited utility in the present context. He contended that s 63 of the Act relates to the rights and obligations of a "secured creditor", whereas rr 94(5) and 98(2) of the Rules, with which we are presently concerned, relate to the form and content of a statutory demand. For that reason, the definition of a "secured creditor" in the former does not form a guide to the interpretation which is to be placed on the expression "security" in the latter. With respect, we do not agree. The provisions in the Rules relating to the form of a statutory demand cannot be interpreted *in vacuo*, but must instead be read in the context of the requirements of the Act. When that exercise is performed, it will be clear, as we propose to show, that they are intimately and, indeed, inextricably bound up with each other.

*Rules 94(5) and 98(2)(*c*)*

25 The service of a statutory demand is commonly used as a means through which applicant-creditors may prove a debtor's inability to pay his

debts, which is a statutory condition precedent to the presentation of a bankruptcy application (see ss 61(*c*) and 62(*a*) of the Act). Part VI of the Rules, in which rr 94(5) and 98(2)(*c*) are to be found, deal with the manner, form and content of a statutory demand and the service requirements which accompany its presentation. The expression "property of the debtor or any security" and its cognates may be found at four points in Part VI: at ss 94(5), 94(6), 98(2), and 101(2). For ease of reference, we set out the first three *seriatim*, as follows:

> 94(5) If the creditor holds ***any property of the debtor or any security for the debt***, there shall be specified in the demand —
>
> (a) the full amount of the debt; and
>
> (b) the ***nature and value of the security or the assets***.
>
> 94(6) The debt of which payment is claimed shall be the full amount of the debt less the amount specified as the ***value of the security or assets***.
>
> …
>
> 98(2) The court shall set aside the statutory demand if —
>
> (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;
>
> [emphasis added in bold italics]

26 The parallels with s 63 of the Act are unmistakable. Broadly summarised, the purpose of these provisions is to ensure that access to the statutory demand procedure (and, by extension, the bankruptcy procedure as a whole) is available only to *unsecured creditors*. The lynchpin is r 94(5), which requires (a) the full amount of the debt, and (b) the value of the property and assets held by the petitioning creditor to be stated. The underlying purpose of

this disclosure requirement, as explained by the Singapore High Court in *Goh Chin Soon v Oversea-Chinese Banking Corporation Ltd* [2001] SGHC 17 at [11], is to "make a creditor declare that he holds any asset of the debtor or any security in respect of the debt claimed so that the court may ascertain whether the creditor has sufficient security or assets of the debtor that will satisfy the debt in full". Without the information specified in r 94(5), the court will not be able to ascertain whether the petitioning creditor is a secured or unsecured creditor. Thus, non-compliance with r 94(5) mandatorily results in the setting aside of the statutory demand.

27 The other two provisions flow from this. Rule 94(6) of the Rules states that the amount claimed in the statutory demand must be the sum remaining *after* the value of any "securities or assets" held by the creditor has been subtracted from the full amount of the debt. This mirrors s 63(1)(*b*) of the Act, which states that a secured creditor may only be admitted to the bankruptcy process to the extent that he has an unsecured claim. Likewise, r 98(2)(*c*) of the Rules states unequivocally that an statutory demand shall be set aside if the value of the assets or security exceeds the full amount of the debt. This reflects the general position (embodied in s 63 of the Act) that a creditor with a fully secured claim has no place in the bankruptcy process *unless* he is willing to give up his security for the general body of creditors.

28 When seen in this light, it is clear that the purport of the foregoing provisions is that creditors who hold property belonging to the bankrupt should be excluded from the bankruptcy process unless they are willing to give up their security. These provisions are not intended to exclude creditors who hold third party securities because, *as against the bankrupt*, they stand in no better position than other unsecured creditors and the security they hold,

even if given up, will not form part of the debtor's estate which is divisible among his creditors. This point was succinctly made by Lloyd LJ at [40] of *White*:

> … if a creditor has security over that debtor's assets which is more than sufficient, there is no reason to allow the creditor to pursue bankruptcy proceedings because the existence of the security means that the creditor has no interest in that debtor's estate. … If, however, the security given to the creditor is over the assets of a different person, then the existence of that security does not constitute any reason why the particular creditor should not proceed against this other debtor, who has given no security over his assets, for an undoubted debt by way of a personal claim or by way of insolvency proceedings. There is no bar to the creditor presenting a bankruptcy petition in relation to such a debtor and there is therefore no reason why the creditor should not serve a statutory demand as a preliminary to the presentation of a petition if the demand is not satisfied.

29 In his submissions, Mr Thuraisingam pointed out that the expression "security" does not appear alone in these provisions, but always as part of a wider turn of phrase – either "security for the debt" (r 94(5)) or "security in respect of the debt" (r 98(2)(*c*)). On that basis, he contended that a wider meaning should be ascribed and that rr 94(5) and 98(2)(*c*) of the Rules should be interpreted as referring to security generally, rather than security held over the property of the debtor only. However, he was unable to provide us with a reason why Parliament might have intended that the aforementioned rules ought to be read thus, other than to advert to his general argument that the contrary reading would be unfair (see above at [12(b)]). We will come to his argument on fairness slightly later but, for present purposes, we will focus only on his textual argument – *viz*, that the expression "security" should bear a wider meaning in the Rules because it is part of the phrases "security for the debt" or "security in respect of the debt". In our judgment, this argument is, with respect, untenable.

30 The phrase "security for the debt" appears at two points in the Rules: once at r 94(5) and the other at r 101(2), which pertains to the matters which must be stated in the affidavit accompanying a creditor's bankruptcy application. Rule 101(2) reads as follows:

> 101(2) If the creditor holds any property of the debtor or *any security for the debt,* he must account for such assets or security in the affidavit and, in particular, provide the following information:
>
> (*a*) a description of the assets or security held; and
>
> (*b*) the *value of the assets or security* as at the date of the application,
>
> *and the amount claimed in the application shall take into account such assets or security.*
>
> [emphasis added]

31 If Mr Thuraisingam were correct, then the effect of r 101(2) is that a creditor presenting a bankruptcy application would *only* be able to make a claim for the *unsecured* element of his debt that is not covered either by security provided either by the debtor *or by a third party*. This would contradict s 63(1)(*b*) of the Act. As explained above at [21]–[23], s 63(1)(*b*) states that a secured creditor may, after giving an estimate of his security (which only refers to security *over the property of the debtor*: s 2 of the Act), be admitted to the bankruptcy process to prove the *full amount* of his debt which is unsecured by the security which he holds over the property of the *debtor*. The fact that Mr Thuraisingam's interpretation would bring the Act into conflict with the Rules militates strongly against its adoption.

32 Furthermore, in *Re Loh Lee Keow*, Woo Bih Li JC (as he then was) reviewed the Act and its Rules in their entirety before arriving at the conclusion that the word "security" in rr 94(5) and 98(2)(*c*) of the Rules can

only refer to security provided by the debtor in question. This was subsequently followed by Lee Seiu Kin JC (as he then was) in the Singapore High Court decision of *Sia Leng Yuen*. We agree substantially with the reasons given by Woo JC in *Re Loh Lee Keow* and do not propose to repeat them save to add one further general point.

33 Section 21 of the Interpretation Act (Cap 1, 2002 Rev Ed) states that the expressions used in subsidiary legislation "shall, unless the contrary intention appears", "have the same respective meanings as in the [empowering] Act". The ambit of this section is not restricted only to expressions which have been specifically defined (such as "secured creditor") and would include, as in this case, the expression, "security", which forms part of the operative provisions of the parent act. Mr Thuraisingam's inability to explain why Parliament might have intended rr 94(5) and 98(2)(*c*) of the Rules to bear a different meaning from the parent provisions they were so plainly intended to give effect to was, in our view, fatal to his case.

34 In our judgment, therefore, the expression "security" in rr 94(5) and 98(2)(*c*) of the Rules can only refer to security which is provided by the *debtor* against whom bankruptcy proceedings are being taken. This is the *only* construction which makes sense in the light of the overall purpose and intent of the Act and its Rules – it is not only consistent with principle, it is also congruent with the text of the relevant provisions, and supported by authority. We also note, in passing, that this was the conclusion reached by the English High Court in the decision of *Re A Debtor (No 310 of 1988)* [1989] 1 WLR 452, after considering the equivalent provisions in the Insolvency Act 1986 (c 45) (UK) and the Insolvency Rules 1986 (SI 1986 No 1925) (UK) ("the UK Insolvency Rules 1986").

Is the debtor's security construction unfair?

35 The consequence of our decision is that it would be entirely possible for a guarantor to be made a bankrupt when the principal debtor (because the value of the security he provided exceeds the value of the debt) could not be. Mr Thuraisingam submitted that this was unfair. It was "oppressive" and unnecessarily punitive, he contended, to allow the Respondent to commence bankruptcy proceedings against the Appellant when the security provided by TG was sufficient to discharge the debt. This was particularly so, he argued, when seen in the light of the fact that the TG was the one who enjoyed the benefits of the loan, not the Appellant. Mr Thuraisingam urged us to hold that a creditor cannot proceed against a guarantor in bankruptcy unless he first realises the securities provided by the principal debtor.

36 With respect, Mr Thuraisingam's argument cannot be supported. While many civil law jurisdictions confer a right upon sureties to compel creditors to exhaust their remedies against the principal before having recourse to sureties (see Geraldine Mary Andrews QC & Richard Millett QC, *Law of Guarantees* (Sweet & Maxwell, 6th Ed, 2011) ("*Law of Guarantees*") at para 11-002), this has never been the position under the common law. It has long been the position that a creditor with several remedies at his disposal can choose whether to enforce and, if so, which one to enforce, at what time, in which order, and in whatever way, subject only to the rule that he cannot recover more than is due to him (see, for example, the decision of this court in *Anwar Patrick Adrian and another v Ng Chong & Hue LLC* [2015] 5 SLR 1071 ("*Anwar Patrick Adrian*") at [53]–[56]). The election is solely one for the creditor to make. A surety has no right as such to require the creditor to proceed against the principal (or any of the co-sureties), or against any

security provided for the debt guaranteed before proceeding against himself (see the English decision of *Ewart v Latta* (1865) 4 Macq 983 (HL) at 987 and 989 *per* Lord Westbury LC).

37 The position across the Commonwealth appears to be uniform: there is no principle in law which requires a creditor to first realise the security it holds in respect of the debt before issuing a bankruptcy application against a surety. In *Re Yohan Chandra, ex p United Overseas Bank Ltd* [2001] 2 HKC 568 (affirmed, *Re Yohan Chandra, ex p United Overseas Bank Ltd* [2002] 2 HKC 64), a bank extended banking facilities to a company which were secured (a) by a joint and several guarantee executed by the appellant and one "Mr Soh"; and (b) security provided by one of the company's shareholders. The company defaulted on repayment and the bank proceeded against the guarantor in bankruptcy. Before the Hong Kong Court of First Instance, it was argued that the bank should first have realised the security provided by the company's shareholder or proceeded against Mr Soh (who was alleged to be solvent) before it proceeded against the guarantor. This argument was rejected. At 573B–C, Deputy Judge Susan Kwan put it the following way:

> It is not the law that a creditor can be compelled to proceed against a solvent principal debtor or a solvent co-surety before he is allowed to place the whole burden of the debt upon a particular surety. The debtor's argument that the bank was obliged to pursue its remedy against Mr Soh who was alleged to be solvent before the bank could enforce its rights against the debtor is not an argument of substance.

38 In *Caisse populaire Desjardins Saint-Jean Baptiste de Lasalle v 164375 Canada inc.*, 1999 CanLII 13771 (QC CA), a bankruptcy petition had been dismissed at first instance, *inter alia*, because the trial judge found that the petitioning creditor's claims could be satisfied on the guarantees and securities which had been provided by third parties. On appeal, the Court of

Appeal of Quebec held that the trial judge had erred in law in taking these third party guarantees into account in refusing to grant the bankruptcy order. Rothman JA wrote (at 3):

> But these third party guarantees did not in any way preclude the Caisse from proceeding against its principal debtor, whether by way of bankruptcy petition or otherwise. The debtor had no right to contest these proceedings on the basis that the Caisse held guarantees from third parties for respondent's debt of $342,000, and the trial judge erred in law in dismissing the bankruptcy proceedings on that basis (Banque de Montréal v. Maroist 1989 CanLII 1292 (QC CA), [1989] R.L. 497 (C.A.).

In a similar vein, the Court of Appeal for Ontario, affirmed the following principle of law in *Mastronardi (In Bankruptcy) (Re)*, 2000 CanLII 17002 (ON CA) (at [28] *per* MacPherson JA):

> … if the petitioner can satisfy the requirements of the [Bankruptcy and Insolvency Act], I see no reason for denying him access to the process and remedies of the Act because there may be other civil routes open to him. The BIA is not a second-rate or fallback statute that can only be invoked if other avenues fail. I agree with Ground J. who said in *Re Cappe* (1933), 18 C.B.R. (3d) 229 at 235 (Ont. Gen. Div.):
>
> > I know of no statutory or common law which requires that a petitioning creditor have exhausted all other remedies available to that creditor to collect the debt owing to him or her before proceeding with a petition for a receiving order. In fact the jurisprudence would seem to be to the contrary.

39 Of course, the decisions in each of these cases must turn, in the ultimate analysis, on the wording of the respective statutory provisions under consideration but it appears to be clear to us that the principle of law which undergirds them all is that a creditor has an unfettered election as to his remedies. As a matter of legal policy, this must be correct. As we explained in *Anwar Patrick Adrian* at [56], a major attraction of obtaining a guarantee is

that it simplifies the process of enforcing the primary obligation. Were we to hold that creditors must exercise their rights to securities provided by the principal debtor before proceeding against the guarantors in bankruptcy, then we would not only be re-writing the express terms of the parties' contract, but we would also be diminishing the attraction of guarantees as a securing mechanism. That would not only be unfair to the respondent, but also unwise, as a matter of legal policy.

40 Quite apart from the position under the authorities, it seemed to us that, on these facts, it would be unfair to deny the Respondent the opportunity of proceeding against the Appellant when the availability of multiple routes of recovery was the very contractual basis upon which it had agreed to extend the banking facilities. The parties had agreed, at cl 9 of the guarantee, that the Respondent may exercise its rights under the guarantee without first taking proceedings against TG. There is nothing before us to suggest that the Appellant did not know what she was getting into when she signed the guarantee. In particular, she never pleaded, when faced with the Respondent's application for summary judgment, that she did not understand the guarantee. In these circumstances, we found that the Appellant had signed the guarantee with her eyes wide open and it did not strike us as being unfair that she should be held to account.

41 The Singapore High Court decision of *Re Ho Kok Cheong,* ex parte *Banque Paribas* [2000] 2 SLR(R) 98, though decided on different facts, is instructive. In that case, the appellant, a finance company, extended banking facilities to two companies which were secured, *inter alia*, by mortgages provided by the companies and by a personal guarantee furnished by one "Ho". Both companies fell into arrears. Separately, Ho was made a bankrupt

on the petition of another creditor. In the meantime, the appellant proceeded to realise its securities but they proved insufficient to satisfy the debts owed. The appellant then lodged a proof of debt for the sum of $9.5m, which it said was outstanding under the banking facilities, against Ho's estate. In deriving this sum, the appellant first applied the proceeds of the securities it sold towards the payment of the interest outstanding under the facilities before applying it in reduction of the principal amounts owing. The Official Assignee ("OA") rejected the proof of debt. Among other things, it argued that the appellant ought first to have applied the proceeds of the securities sold towards a reduction of the principal amount due before applying it in reduction of the interest. The difference between these two approaches was significant. Because of the time which had elapsed (three years) and the rate of contractual interest agreed to under the facilities (17% and 14.5% per annum, respectively, with the default interest fixed at 1.5% per month), the interest alone accounted for almost the entirety of the difference between the $9.5m submitted by the appellant and the sum of $204,291.91 that the OA argued ought to be admitted.

42 Judith Prakash J agreed with the appellant. The fundamental error of principle committed by the OA, she held, lay in the attempt to cause securities which belonged to the principal debtors (the companies) to enure to the benefit of the guarantor (Ho). The respondent, as a secured creditor of the companies, was fully entitled to apply the proceeds of the securities in discharge of whatever liabilities of the companies which it thought fit (including by applying it in discharge of the interest first before applying it in discharge of the principal sum). Ho, as the guarantor of the loan, was contractually obligated to make good whatever balance might remain due from the companies *after* the securities had been realised. However, he was not in a

position to dictate how the respondent was to apply the securities or to expect that the appellant would apply the realised sums in a manner which was most advantageous to him. Prakash J explained her decision in the following way (at [33]):

> The appellant submitted that what the Official Assignee was attempting to do was to cause securities that belonged to the liquidation of [the companies] to enure to the bankruptcy of [Ho]. *I agreed that to deny the appellant its full rights of recovery against the bankrupt would be unjust. As a prudent lender, the appellant took separate securities, the personal guarantees, so that sums that could not be recovered by realising the mortgaged properties would nonetheless be recoverable from the guarantors.* ***Accepting the Official Assignee's position would have meant agreeing that the appellant did not improve its position one iota by taking the additional security*** *and its aggregate recovery was limited to what would have been recoverable had the appellant taken the guarantee alone as security.* Legally, this could not be the position. [emphasis added in italics and bold italics]

43 In the alternative, Mr Thuraisingam relied on the "principle of co-extensiveness", submitting that as a matter of law "a surety's liability must not be different in kind or greater in extent than that of the principal debtor." When he appeared before us, he put things even more broadly. It was a "general principle of law", he said, that "whatever defences [which are] available to a principal borrower are always available to the guarantor meaning the guarantor is no worse off than the principal debtor". It was therefore unfair that the TG, the principal debtor, was able to secure the loan with the Appellant's assistance but she is unable to rely on the security of the principal debtor when faced with bankruptcy.

44 In our judgment, his reliance on the principle of co-extensiveness was misplaced. As explained by Phillips J in the English High Court decision of *Wardens and Commonalty of the Mystery of Mercers of the City of London v*

New Hampshire Insurance Company (Queen's Bench Division, 18 January 1991), a guarantee is an accessory contract by which the promisor (the guarantor) undertakes to be liable for the debt, default or miscarriage of another person (the debtor), whose primary liability must exist or be contemplated in order for the guarantee to be enforced. A corollary of this is that the guarantor's liability is secondary to that of the debtor and, accordingly, should be neither different in kind nor degree. This is the basis for the principle of co-extensiveness. And, in the House of Lords decision of *Moschi v Lep Air Services Ltd and others* [1972] 2 WLR 1175 at 1183F–H, Lord Diplock put it in the following terms:

> The legal consequence of this is that whenever the debtor has failed voluntarily to perform an obligation which is the subject of the guarantee the creditor can recover from the guarantor as damages for breach of his contract of guarantee whatever sum the creditor could have recovered from the debtor himself as a consequence of that failure. The debtor's liability to the creditor is also the measure of the guarantor's.

45 The true statement of law was that which Mr Thuraisingam advanced in his written submissions, which is that the principle of co-extensiveness provides that a guarantor's *liability* must mirror that of the principal debtor – *ie*, the *primary obligation* of the guarantor (*ie*, the quantum of his liability) should be co-extensive with that of the principal debtor. It is only in this very specific sense that it is correct to state that a guarantor is "no worse off" than the principal debtor and that he may avail himself of "whatever defences" the principal debtor has. However, the principle of co-extensiveness says nothing about whether guarantors should be equally vulnerable to whatever compulsory process of law the creditor might have at his disposal for the recovery of the debt. It is therefore incorrect for Mr Thuraisingam to have extended this principle to submit, as he did in oral argument, that this means

that a creditor should only be allowed to proceed against a guarantor in bankruptcy if he would also have been able to proceed against the primary debtor in bankruptcy.

46 The decision of the English Court of Appeal in *Remblance v Octagon Assets Ltd* [2010] 2 All ER 688 ("*Remblance*"), which Mr Thuraisingam cited in support of his argument, is readily distinguishable. *Remblance* concerned a situation where *liability* itself was contested. There, the respondent, a landlord, had sued JBR (a company) for unpaid arrears arising out of a lease and served a statutory demand for this sum on the appellant. The appellant was the guarantor of the lease and he had covenanted that he would (a) ensure the principal debtor (a tenant) would at all times pay the reserved rent and (b) make good any losses which might accrue to the creditor as a result of the principal debtor's default. Critically, it was common ground that JBR had a cross-claim against the creditor such that if the statutory demand had been served on him instead, it would have been set aside on the basis that the debtor appeared to have a counterclaim which exceeded the amount of the debt (at [34]). Applying the principle of co-extensiveness, therefore, the liability of the guarantor was held to be equally disputed and the appropriate recourse was for matters to be adjudicated in civil proceedings rather than through the insolvency process. On that basis, a majority of the English Court of Appeal held that the guarantor was likewise entitled to set aside the statutory demand.

47 There are two important differences between *Remblance* and the present case. First, the provisions we are chiefly concerned with (rr 94(5) and 98(2)(*c*) of the Rules) are not the provisions which were discussed in *Remblance*. In that particular case, the English Court of Appeal was concerned with r 6.5(4)(a) of the UK Insolvency Rules 1986 ("r 6.5(4)(a)"), which states

that a court may set aside a statutory demand if it appears that there is a "counterclaim, set-off or cross demand which equals or exceeds the amount of the debt". The object of r 6.5(4)(a) – which is *in pari materia* with r 98(2)(a) of the Rules – is to protect the debtor from facing the consequences of bankruptcy proceedings when he might have a counterclaim which might negate his obligation to pay the debt in question (see *Remblance* at [44] *per* Dyson LJ). In other words, r 6.5(4)(a) deals with the issue of liability. For this reason, possible "defences" available to the principal debtor under r 6.5(4)(a) should also be available to the guarantor. The position under rr 94(5) and 98(2)(c) of the Rules is quite different. It relates, instead, to the regulation of the estate of the bankrupt. We have already explained how third party securities are irrelevant to the estate of the bankrupt because they can never form part of the assets available for distribution among his creditors. Thus, the fact that the principal debtor might have a basis for setting aside a statutory demand under r 98(2)(*c*) does not, without more, mean that a guarantor should likewise have such a basis.

48 Second, on the facts of this appeal, it is clear that the Appellant is fully liable for the sum specified in the statutory demand. The Appellant covenanted, under cl 1 of the guarantee, to be liable for the full sum owed by TG to the Respondent under the facilities "on demand as principal debtor and not merely as surety." The fact that the principal debtor has provided security which might be sufficient to cover the full sum of the Appellant's liability is quite beside the point. It does not affect the Appellant's liability, which is still to make good the full sum owing under the facilities. It also does not affect the Respondent's entitlement to elect between the different remedies available to him, which are, *inter alia*, to realise the security, to sue TG, and/or to proceed against the other guarantors.

49 In any event, the question before this court is whether rr 94(5) and 98(2)(*c*) of the Rules require a petitioning creditor to specify the details of securities provided by third parties in their statutory demands. We have already concluded, based on the text and the purpose of the provisions in question, that they do not. Neither the Appellant's argument from fairness nor his argument from the principle of co-extensiveness has persuaded us to depart from this position.

Extension of time

50 Given our decision on the substantive issue, the question whether an extension of time ought to have been granted did not arise for consideration. For that reason, we do not propose to dwell on that in these grounds suffice to say that we agreed substantially both with the reasoning and the analysis of the Judge on this issue. On that ground alone, we would have dismissed this appeal. We would only wish to emphasise that entry into settlement negotiations does not and cannot stop time from running. Parties (and their solicitors) who are in the midst of negotiations must prepare for any eventuality and must take such steps as are necessary to preserve their legal positions in the event that settlement negotiations fail and they wish to pursue other legal options. If they do not do so, then they run the risk that they will be out of time (for a useful statement as well as illustration of this principle, reference may be made to the Supreme Court of Zambia decision of *Twampane v Msorti* [2011] ZMSC 18).

Conclusion

51 In the premises, we dismissed the appeal with the usual consequential orders. We fixed the costs of the appeal at $20,000 plus reasonable disbursements and ordered that the Appellant pay that sum to the Respondent.

52 In addition to the usual consequential orders, we also directed that if the Respondent wished to file a bankruptcy application based on the statutory demand, it should do so within three weeks of the dismissal of the appeal.

Chao Hick Tin	Andrew Phang Boon Leong	Tay Yong Kwang
Judge of Appeal	Judge of Appeal	Judge

Eugene Thuraisingam and Jerrie Tan Qiu Lin (Eugene Thuraisingam LLP) for the appellant;
Chou Sean Yu, Aw Wen Ni and Daniel Chan (WongPartnership LLP).