Ramesh Mohandas Nagrani *v* United Overseas Bank Ltd
[2015] SGHC 266

Case Number	: Originating Summons (Bankruptcy) No 78 of 2014 (Registrar's Appeal No 117 of 2015)
Decision Date	: 20 October 2015
Tribunal/Court	: High Court
Coram	: Chua Lee Ming JC
Counsel Name(s)	: Assomull Madan D T (Assomull & Partners) for the plaintiff; Chew Ming Hsien Rebecca and Ang Siok Hoon (Rajah & Tann Singapore LLP) for the defendant.
Parties	: Ramesh Mohandas Nagrani — United Overseas Bank Ltd

Insolvency Law – Bankruptcy – Statutory Demand

20 October 2015

Chua Lee Ming JC:

Introduction

1 This was an appeal by the plaintiff ("the Debtor") against the Senior Assistant Registrar's decision dismissing his application to set aside the statutory demand ("the SD") issued against him by the defendant ("the Bank").

2 The debt claimed in the SD arose out of three guarantees ("the Guarantees") signed by the Debtor in respect of banking facilities obtained by three companies ("the Borrowers") from the Bank. The Debtor was the sole director and shareholder of each of the Borrowers.

3 Before me, the Debtor sought to set aside the SD on three distinct grounds:

(a) First, under r 98(2)(*d*) of the Bankruptcy Rules (Cap 20, R1, 2006 Rev Ed) ("the Rules") for non-compliance with r 94(1) in that:

(i) the amount of the debt stated in the SD was as of a date earlier than the date of the SD, and/or

(ii) the note in Part B of the SD referred to "bankruptcy petition" instead of "bankruptcy application".

(b) Second, under r 98(2)(*c*) of the Rules for non-compliance with r 94(5) in that:

(i) the SD did not specify the nature and value of the Debtor's property held by the Bank; and/or

(ii) the SD reflected property that was not property of the Debtor.

(c) Third, under r 98(2)(*b*) of the Rules on the ground that the debt was disputed on substantial grounds.

4 I disagreed with the Debtor's submissions and dismissed the appeal. The Debtor has appealed against my decision.

Whether there was non-compliance with r 94(1) of the Rules, and if so, whether the SD must be set aside under r 98(2(d)

5 The SD was dated 25 February 2014 but the amount of the debt claimed in the SD was stated to be as of 20 February 2014. In addition, the note to the Debtor in Part B of the SD stated as follows:

> If you do not comply with this statutory demand or set it aside, the creditor may file a bankruptcy *petition* against you.
>
> If you wish to avoid a bankruptcy *petition* being presented against you, you must pay the sum demanded … [emphasis added]

6 Rule 94(1) of the Rules provides that a statutory demand "shall be in Form 1". Form 1 is the prescribed form for a statutory demand and requires the creditor to state the "[e]xact sum due as of date of demand". The note in Part A of Form 1 explains that the particulars of the debt must include the "actual amount of debt as of the date of the demand". The note to the Debtor in Part B of Form 1 uses the expression "bankruptcy application" instead of "bankruptcy petition". For these two reasons, the Debtor submitted that the SD failed to comply with r 94(1) since it did not conform to the specifications of Form 1.

7 The Bank accepted that the note in Part B of the SD should have referred to a "bankruptcy application" but submitted that the Rules did not require the SD to state the amount of the debt due on the date of the SD. The Bank submitted that under the Rules, a statutory demand can state an amount that is different from the amount actually owing by the debtor as at the date of the statutory demand; all that is required is that the amount demanded must have accrued by the date of the statutory demand. In support, the Bank referred to r 94(2) which provides that the "statutory demand shall state the actual amount of the debt that has accrued as of the date of the demand". According to the Bank, the SD had complied with r 94(2) of the Rules since on 25 February 2014, the amount of the debt stated on the SD (which was expressed to be the amount owing as of 20 February 2014) had already accrued.

8 I disagreed with the Bank's submissions. The Bank had to comply with r 94(1); failure to do so was a ground for setting aside the SD under r 98(2)(*d*). Rule 94(1) requires the SD to be in Form 1. Form 1 unequivocally requires the SD to state the *amount due as of the date of the demand*. The "date of the demand" referred to in Form 1 has to mean the date of the SD which in this case was 25 February 2014. In my view, the requirement under r 94(2) was the same – the SD had to state the amount that had accrued due as of the date of the SD. It did not make sense to interpret r 94(2) to allow a statutory demand to state an amount due on a date earlier than the date of the demand when this would be contrary to what was required in Form 1. This was all the more so when non-compliance with r 94(1) was expressly stated to be a ground for setting aside the statutory demand under r 98(2) whereas non-compliance with r 94(2) was not.

9 The next question was whether the two defects in the SD were fatal. The Debtor argued that strict compliance with r 94(1) of the Rules was necessary and submitted that as r 98(2)(*d*) of the Rules uses the word "shall", it was mandatory to set aside the SD if r 94(1) was not complied with. Rule 98(2)(*d*) provides that the "court shall set aside the statutory demand if … rule 94(1) has not been complied with".

10 The Debtor also submitted that strict compliance with r 94(1) was necessary because of the "draconian" and "quasi-penal" consequences of bankruptcy. The Debtor referred to *Re Peh Kong Wan, ex p United Malayan Banking Corp Bhd* [1992] 2 MLJ 292, which was cited in *Re: Wong Kin Heng, ex parte Imperial Steel Drum Manufacturers Sdn Bhd* [1998] SGHC 237 at [33].

11 I disagreed with the Debtor's submissions. The Debtor's submissions meant that any non-conformity with Form 1, no matter how trivial or inconsequential, would invalidate a statutory demand. In my view, this could not have been the intent behind rr 94(1) and 98(2)(*d*) of the Rules. The interpretation of the Act and Rules must take "into account the radical changes the legislation has undergone and the prevailing consequences of bankruptcy, which are far less dire than they used to be" (see *Re Rasmachayana Sulistyo (alias Chang Whe Ming), ex parte The Hongkong and Shanghai Banking Corp Ltd and other appeals* [2005] 1 SLR(R) 483 ("*Rasmachayana*") at [29]). The legislative intent is to accord "precedence to substance over form and/or technicalities" and "any *prima facie* inference raised by [words such as 'shall' or 'must'] may be dislodged after taking into consideration the scope and objectives of the legislation and the consequences arising from alternative constructions" (see *Rasmachayana* at [24]).

12 I agreed with the Bank's submission that s 158(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the Act") applies to situations of non-compliance with r 94(1) of the Rules. It reads as follows:

> No proceedings in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceedings is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

As noted in *Rasmachayana* at [27], s 158(1) of the Act exemplifies the "underlying philosophy of pragmatism and substantial justice [which] permeates through the entirety of the [Act] and [Rules]". However, lest it be thought otherwise, I would also echo the learned judge's reminder in *Rasmachayana* at [29] that a more flexible approach under the new Act is not to be "construed as an imprimatur for slipshod practices but rather as a statutory directive for judicial pragmatism".

13 The Bank also referred to *Re A Debtor (No 1 of 1987)* [1989] 1 WLR 271. That case involved an application to set aside a statutory demand on the grounds that it was not in the form prescribed, had overstated the amount of the debt, and the particulars of the calculation of the amount claimed set out in the supporting affidavit were perplexing and inconsistent with the supporting exhibits. The Court of Appeal refused to set aside the statutory demand because there was no evidence of prejudice to the debtor and no evidence to suggest that he would have taken steps to satisfy a non-defective demand (at 279D–E). Although the Insolvency Rules 1986 (SI 1986 No 1925) (UK) which the court was considering are not on all fours with our Rules, in my view, the court's pragmatic approach makes good sense.

14 In the present case, there was no evidence of any injustice (let alone substantial injustice) suffered by the Debtor as a result of the two defects in the SD. It cannot seriously be suggested that the use of the term "bankruptcy petition" instead of "bankruptcy application" had caused any injustice to the Debtor. As for the amount of the debt stated in the SD, it was clear to the Debtor what he had to pay to discharge the SD. Had the Debtor paid the amount due as of 20 February 2015 (which was stated in the SD), the SD would have been spent. I therefore concluded that the non-compliance with r 94(1) of the Rules in this case was not fatal and I declined to set aside the SD under r 98(2)(*d*).

Whether there was non-compliance with r 94(5) of the Rules

The Debtor's property under a hire-purchase agreement

15 The Debtor had a car that was financed under a hire-purchase agreement with the Bank ("the HP Agreement"). According to him, as at the date of the SD, the value of the car exceeded the remaining amount owed to the Bank under the HP Agreement. The Debtor submitted that the car or, alternatively, his interest under the HP Agreement, was property which fell within the scope of r 94(5) of the Rules.

16 Rule 94(5) provides that:

> If the creditor holds any property of the debtor or any security for the debt, there shall be specified in the demand –
>
> (I) (*a*) the full amount of the debt; and
>
> (II) (*b*) the nature and value of the security or the assets.

Although r 94(5)(*b*) uses the word "assets", it is clear that the word refers to "property of the debtor".

17 The SD did not make any reference to the car or any interest that the Debtor had under the HP Agreement. The Debtor submitted that, pursuant to r 98(2)(*c*) of the Rules, the SD had to be set aside since r 94(5) was not complied with. Rule 98(2)(c) states as follows:

> The court shall set aside the statutory demand if … 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 …

Clearly, the expression "assets of the debtor" in r 98(2)(*c*) means the same thing as "property of the debtor" (which is the expression used in r 94(5)). Similarly, the expression "value of the assets" has to mean "value of the property of the debtor".

18 The question, then, was whether the Debtor had any property under the HP Agreement that was held by the Bank within the meaning of r 94(5).

19 The Bank first referred me to *Goh Chin Soon v Oversea-Chinese Banking Corporation Limited* [2001] SGHC 17 ("*Goh Chin Soon*"). In that case, the debtor controlled two companies, Grandlink Group Pte Ltd ("Grandlink") and Galleries Development Pte Ltd ("Galleries"). Both companies took loans from the bank ("OCBC") and the debtor acted as guarantor for both loans. A statutory demand was issued against the debtor in respect of the *Galleries debt*. It was argued that the statutory demand did not comply with r 94(5) of the Rules because it did not specify four properties belonging to the debtor which had been mortgaged to OCBC in respect of the *Grandlink loans*. On the facts, the Grandlink debt far exceeded the value of the four properties. The court held that OCBC was not required under r 94(5) to specify the four properties in the statutory demand for the Galleries debt.

20 The Bank submitted that *Goh Chin Soon* was authority for the proposition that properties held as security for another debt which was not the subject matter of a statutory demand need not be specified in that statutory demand. According to the Bank, it followed that the HP Agreement was irrelevant in the present case since the HP Agreement was not the subject matter of the SD. I disagreed with the Bank's submission. The learned judge in *Goh Chin Soon* had dealt with this specific

issue at [10] and noted that r 94(5) appeared to be "wide enough to include all property of the creditor held by the Bank, including any property held as security in respect of another debt… because the term 'any property of the debtor' is not qualified." In my view, the *ratio* of the case is that property of the debtor need not be specified in a statutory demand *if it is not available to satisfy the debt claimed in the statutory demand*. As the learned judge said (at [11]):

> … the intent of rule 94(5) 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. However, in the present case, *the assets held by [OCBC] are not available to satisfy the debt* the subject of the [statutory demand]. No purpose is served in requiring [OCBC] to specify the 4 properties as they were held as security in respect of a different debt and there is no surplus accruing to [the debtor]. [emphasis added]

The reference to the security being held in respect of a different debt should be read in context. It was because the security was in respect of a different debt that the question arose whether there was a surplus available to satisfy the debt.

21 The Bank next submitted that as of the date of the SD, the car was not the Debtor's property since the owner of the car was the Bank. Under the HP Agreement, the Debtor was only a hirer and had not acquired ownership of the car since full payment of the hire-purchase price had not yet been made.

22 The Debtor did not dispute that legal title to the car resided with the Bank. However, he pointed out that under clause 24 of the HP Agreement ("clause 24"), the Bank has a right to set off any sums due to the Debtor or to appropriate moneys payable to the Debtor against any other liabilities of the Debtor. He submitted that he therefore had an interest under the HP Agreement which fell within the wide definition of "property" in s 2 of the Act, which reads:

> … money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of or incidental to, property …

23 In my view, this submission was misconceived. There was no evidence that the Bank was holding any sums due or payable to the Debtor so clause 24 was simply inapplicable.

24 The Debtor next submitted that although he was not the owner of the car, he had an option to purchase the car under the terms of the HP Agreement, and that this option constituted property as defined in s 2 of the Act. In support, he cited the decision of the Malaysian High Court in *M Hashimi bin Ibrahim v Asia Commercial Finance (M) Bhd* [2001] 4 MLJ 67 ("*M Hashimi*"). There, the court referred to para 124 of *Halsbury's Laws of England* Vol 22 (Butterworths, 4th Ed) and held that the hirer's option to purchase in a hire-purchase agreement was "property" within the meaning of the Bankruptcy Act 1967 (Act 360) (M'sia) ("Malaysian BA 1967"). The definition of "property" in s 2 of the Malaysian BA 1967 is identical to that in our Act.

25 I agreed with the decision in *M Hashimi* and held that the Debtor's option to purchase under the HP Agreement was "property" within the meaning of s 2 of the Act. However, I still concluded that r 94(5) did not require the Bank to specify the Debtor's option to purchase in the SD for two reasons.

26 First, under r 94(5) of the Rules, property of the debtor must be *held by the creditor*. In the present case, the Bank did not "hold" the option to purchase; the option was held by the Debtor.

27 Second, I agreed with the Bank that r 94(5) does not apply to *all* property of the debtor that is held by the creditor. In my view, property of the debtor held by the creditor falls within the scope of r 94(5) only if it is property that the creditor is *entitled to apply towards payment of the debt claimed in a statutory demand*. The reason for this lies in r 94(6).

28 Rule 94(5) requires a creditor to specify in a statutory demand, the full amount of the debt and the nature and value of any security for the debt or any property of the debtor held by him (see [16]). Rule 94(6) of the Rules then states as follows:

> 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.

The word "assets" in r 94(6) is clearly a reference to what is described in r 94(5) as "property of the debtor".

29 Rule 94(6) is clear – the value of the security or property is to be deducted from the full amount of the debt and only the balance can be claimed in the statutory demand. It stands to reason that the expression "property of the debtor" in r 94(5) means property of the debtor that the creditor is entitled to apply towards payment of the debt, since he is required by r 94(6) to deduct the value of the property from the total amount of the debt and is only entitled to claim the balance. Requiring a creditor to specify property that he is not entitled to apply towards payment of the debt would serve no purpose. Worse, it would be illogical and unfair to require him to deduct the value of the debtor's property from the amount he can claim in a statutory demand if he is not entitled to apply that property towards payment of the debt.

30 The interpretation that I have adopted is also consistent with the decision in *Goh Chin Soon*. If a creditor is not entitled to apply the property of the debtor towards payment of the debt claimed in a statutory demand, that property would not be available to satisfy the debt claimed in the statutory demand and therefore would not need to be specified in the statutory demand.

31 I would mention one other point. Rule 94(5) refers to "any property of the debtor *or* any security for the debt" [emphasis added]. The use of the disjunctive "or" suggests that the expressions "property of the debtor" and "security for the debt" refer to two different categories of assets. I am not sure if this is correct. Section 63 of the Act stipulates that a creditor who is *applying for a bankruptcy order* is required to either give up his security or deduct the estimated value of his security from the amount claimed by him. Section 63 refers only to security; there is no reference to any other property. If the only deduction to be made when making a bankruptcy application is the value of security, it seems to me that there is no reason why a creditor should be required to deduct the value of any other property (*ie*, property which is not security for the debt claimed) of the debtor from the amount claimed in a statutory demand. However, this point was not raised in the present case, and as I have not had the benefit of counsel's submissions on it, I shall say no more.

32 In conclusion, the Debtor's option to purchase under the HP Agreement was "property" as defined in the Act. However, r 94(5) does not require the SD to specify the nature and value of this property for two reasons: (a) the Bank did not hold this property; and (b) it was not property that the Bank was entitled to apply towards payment of the debt claimed in the SD.

The SD referred to property belonging to third parties

33 The SD set out the particulars of the debt as was required by the Rules. These included the

amounts owed by each of the Borrowers to the Bank. The amount owed by one of the Borrowers included an amount outstanding under a "Commercial Property Loan Account". The Debtor noted that r 94(5) of the Rules referred to "property of the debtor". The Debtor then submitted that since he was not the owner of the commercial property for which the loan had been taken, the SD should not have factored in that property. Alternatively, the Debtor argued that if the property were considered security for the debt, then the SD was incorrect as it did not specify the nature and value of the security as required under r 94(5) of the Rules.

34 In my view, the Debtor's submissions were simply misconceived. The reference to the Commercial Property Loan Account merely described the loan under which there was an outstanding amount owed to the Bank by one of the Borrowers. This outstanding amount was a debt that the Debtor was liable for *as guarantor*. Rule 94(5) had not relevance whatsoever.

Whether the debt was disputed on substantial grounds

35 The Debtor disputed the debt on five grounds and submitted that the SD should be set aside under r 98(2)(*b*) of the Rules. Rule 98(2)(*b*) states that the court "shall set aside the statutory demand if … the debt is disputed on grounds which appear to the court to be substantial".

36 First, the Debtor pointed out that he had signed other guarantees which could also apply to the same debts and that the total amount under all the guarantees exceeded the loans to the Borrowers. Therefore, the Debtor submitted, the Guarantees were not binding on him. I agreed with the Bank's submissions that this did not afford the Debtor any defence. It was clear from the SD that the claim against the Debtor was based on the Guarantees and did not exceed the limit provided for under each Guarantee. The fact that he had signed other guarantees was neither here nor there.

37 Second, the Debtor submitted that he was released from liability under the Guarantees because he had entered into a settlement agreement with the Bank under which the Borrowers and the Debtor were permitted to make monthly repayments ("the Settlement Agreement"). Clause 4 in each of the Guarantees provided that the Debtor would not be released from his obligation of repayment because of, among other things, any time given or extended by the Bank. I rejected the Debtor's submission that clause 4 was illegal and against public policy. As the Bank submitted, such a clause had been upheld by this court (see *Oversea-Chinese Banking Corp Ltd v The Timekeeper Singapore Pte Ltd and others* [1997] 1 SLR(R) 392).

38 The Debtor also submitted that the Settlement Agreement did not provide that the Guarantees would continue to be enforceable in the event of a breach of the agreement so the Bank could not now enforce the Guarantees against him. I did not agree. The Settlement Agreement provided that in the event of default by the Debtor, the Bank shall proceed to enforce its rights against the Debtor including but not limited to instituting bankruptcy action against the Debtor. In May 2014, the Debtor defaulted on the monthly repayments that he had agreed to make under the Settlement Agreement. I agreed with the Bank's submission that the Bank was entitled to maintain the claim under the Guarantees against the Debtor once he defaulted under the Settlement Agreement.

39 Third, the Debtor submitted that the Guarantees were not binding as his signatures to the Guarantees had not been witnessed by the Bank's representatives personally. I agreed with the Bank's submissions that s 6(*b*) of the Civil Law Act (Cap 43, 1999 Rev Ed) only requires the guarantee to be in writing and signed by the guarantor. There was no requirement, whether under the Civil Law Act or the Guarantees, that the Debtor's execution of the Guarantees had to be witnessed by a representative of the Bank.

40 Fourth, the Debtor submitted that the Guarantees were not binding as they were not explained to the Debtor and there was no clause to the effect that the Debtor had obtained independent legal advice or that he understood the Guarantees. I agreed with the Bank's submissions that these did not amount to substantial grounds of dispute. The Debtor was a savvy businessman and there was no suggestion that he did not understand the content of the Guarantees.

41 Fifth, the Debtor pointed out that he had not initialled on every page of the Guarantees but had only initialled the last page of each. He submitted that, therefore, only the terms in the last page of each Guarantee were binding on him. The last page of each Guarantee contained only the governing law and submission to jurisdiction clauses. In my view, the Debtor's submissions on this ground were made in desperation and were wholly devoid of merit.

42 In summary, the Debtor had not shown any substantial grounds for disputing the debt. By contrast, the Bank had shown that the debt was clearly owed. The Bank pointed out that it first demanded payment in October 2013 and filed a bankruptcy application against the Debtor on 10 July 2014. The Debtor did not dispute his liability then. Instead, on 14 February 2014, the Debtor, through his then solicitors, informed the Bank's solicitors that he intended to fully repay the debt and proposed monthly repayments of $33,000. The Settlement Agreement was entered into on 30 April 2014. The Debtor made two payments of $33,000 each before defaulting. It was only when he filed the present application in October 2014 that the Debtor first disputed the debt. I had no doubt that the Debtor was liable for the debt claimed in the SD.

Conclusion

43 I dismissed the Debtor's appeal and ordered him to pay the Bank costs of the appeal which I fixed at $8,000 plus reasonable disbursements. The costs were fixed on an indemnity basis which the Bank was entitled to under the Guarantees.