Wee Soon Kim Anthony v Lim Chor Pee and Another
[2005] SGHC 159

Case Number : OSB 3/2005, 4/2005, 5/2005, RA 35/2005, 36/2005, 37/2005

Decision Date : 30 August 2005

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : Appellant in person; Andre Arul and Ling Leong Hui (Arul Chew and Partners) for the respondents

Parties : Wee Soon Kim Anthony — Lim Chor Pee; Lim Hsi Wei Marc

Insolvency Law – Bankruptcy – Statutory demand – Appeal against solicitors' successful application to set aside statutory demands issued under s 62 Bankruptcy Act – Whether bills of costs giving rise to valid counterclaim, set-off or cross demand – Whether existence of agreement as to costs and status of firm as partnership or sole proprietorship amounting to "genuine triable issues" – Section 62 Bankruptcy Act (Cap 20, 2000 Rev Ed), rr 97, 98(1), 98(2) Bankruptcy Rules (Cap 20, R 1, 2002 Rev Ed)

Legal Profession – Bill of costs – Appeal against solicitors' successful application to set aside statutory demands issued under s 62 Bankruptcy Act on ground of counterclaim under bills of costs rendered – Whether applications amounting to action to recover costs less than a month after delivery of bill of costs to client and should be set aside – Section 62 Bankruptcy Act (Cap 20, 2000 Rev Ed), s 118 Legal Profession Act (Cap 161, 2001 Rev Ed)

30 August 2005

Lai Kew Chai J:

1 This appeal arose out of the orders of Assistant Registrar Joyce Low ("the Assistant Registrar") setting aside the statutory demands served on the respondent debtors by the appellant creditor. Being dissatisfied with the Assistant Registrar's orders, the appellant creditor appealed to this court. After considering the submissions for both sides, I decided to dismiss the appeal. I now give my reasons.

The background

2 The respondents, Lim Chor Pee ("LCP") and Marc Lim Hsi Wei ("ML"), are both partners of M/s Chor Pee & Partners ("the firm"), a firm of solicitors practising in Singapore. Anthony Wee Soon Kim ("the appellant") was a client of the firm at the material time.

3 In July 2001, the appellant brought Suit No 834 of 2001 against UBS AG for misrepresentation ("the Suit"). His solicitors then were M/s Engelin Teh & Partners ("Engelin Teh"). Subsequently, M/s Goh Aik Leng & Partners took over the matter but soon asked to be discharged as the appellant's solicitors. LCP then agreed to act for the appellant sometime in March 2003, while the Suit was part-heard.

4 The Suit was dismissed by Kan Ting Chiu J on 8 December 2003, as was the appeal from Kan J's decision, in Civil Appeal No 1 of 2004. The appellant was represented by the firm in both the Suit and the appeal. In addition, the firm had acted for the appellant in the following matters:

(a) Bill of Costs of Thomas Sim (Engelin Teh);

(b) complaint against Gerald Godfrey QC; and

(c) Bill of Costs No 112 of 2003 in Civil Appeal No 114 of 2002 relating to the admission of Gerald Godfrey QC.

5 While the above matters were ongoing, the appellant provided loans to the firm and LCP personally. It was agreed, when the advances were first extended, that LCP would make monthly repayments of $7,500 to the appellant. However, only one payment was made by LCP.

6 The appellant thus issued two statutory demands under s 62 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) claiming a total of $300,000 and $84,000 against the firm and LCP respectively. On 3 January 2005, LCP was served with both statutory demands, claiming the debts owed by him as a partner of the firm as well as by him personally. ML was likewise served with a statutory demand on the same day, in his capacity as a partner of the firm, seeking repayment of the loan to the firm.

7 On 13 January 2005, the firm issued four bills to the appellant seeking payment of a total of $610,780 as legal fees for the Suit, Civil Appeal No 1 of 2004, the Bill of Costs of Thomas Sim and the complaint against Gerald Godfrey QC, less the amount already paid on account of the retainer for the Suit. Another bill dated 1 February 2005 was later issued to the appellant claiming $24,958.50 for work done in Bill of Costs No 112 of 2003 in Civil Appeal No 114 of 2002 relating to the admission of Gerald Godfrey QC.

8 Petition of Course No 3 of 2005 was later filed by the firm on 16 March 2005 seeking an order of taxation for the five bills of costs. This petition was granted by Lai Siu Chiu J, who also dismissed the appellant's application to strike out the petition. The appellant has filed a Notice of Appeal against Lai J's decision.

9 On 14 January 2005, the respondents filed Originating Summons Nos 3, 4 and 5 of 2005 to set aside the statutory demands of 3 January 2005 on the ground that there was a valid counterclaim, set-off or cross demand against the amount claimed by the appellant. The statutory demands were set aside by the Assistant Registrar on 16 February 2005, following which the appellant appealed.

The appellant's submissions

10 There was no dispute as to the quantum of the loans extended by the appellant to the firm and to LCP in his private capacity. The primary dispute was over whether the respondents had a valid counterclaim, set-off or cross demand under the bills of costs rendered to the appellant.

11 Specifically, the appellant contended that the respondents were not entitled to render a bill for $612,300 for work done in relation to the Suit. This contention was premised on an alleged agreement between the parties to cap costs for the Suit at $275,000 on a lump sum basis, including any settlement or discontinuance but excluding all court fees and disbursements.

12 According to the appellant, this agreement was entered into through an exchange of e-mails between the parties ("the exchange of e-mails"), the first of which was sent by LCP to the appellant on 2 April 2003 at 4.45pm. It referred the appellant to an attachment, which stated:

Suit No. 843 of 2001

Fee Agreement between A S K Wee and Chor Pee & Partners

Global Brief Fee including all court attendances	$275,000.00
Payable as follows:	
1st instalment upon confirmation of retainer	$50,000.00
2nd instalment upon filing Notice of Change of Solicitors and SIC to amend Statement of Claim on or before 30 April 2003	$50,000.00
3rd instalment on or before 15 May 2003	$50,000.00
4th instalment on or before 30 May 2003	$50,000.00
5th instalment on or before 15 June 2003	$50,000.00
6th instalment on or before 30 June 2003	$25,000.00
Total	$275,000.00

13 The appellant's response at 5.10pm the same day was:

Dear Chor Pee,

I thank you for your proposal. Please let me know if you [are] prepared to cap your professional fees and not on a per day basis …

14 At 7.12pm, LCP replied as follows:

Dear Tony

Herewith revised fee agreement on a lump sum basis up to conclusion of trial including any settlement or discontinuance but excluding all court fees and disbursements.

Regards

Lim Chor Pee

There was no attachment to this e-mail.

15 The appellant submitted that, pursuant to the decision of Judith Prakash J in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR 651 ("*SM Integrated Transware*"), the exchange of e-mails satisfied the requirements under s 111 of the Legal Profession Act (Cap 161, 2001 Rev Ed) ("LPA") for agreements as to costs for contentious businesses to be in writing and signed by the client. The alleged agreement as to costs was thus valid and binding upon the

respondents.

16 It was not disputed that the sum of $275,000 had already been paid by the appellant to the firm for the costs of the Suit. Consequently, it was the appellant's submission that the respondents were not entitled to any counterclaim, set-off or cross demand for additional legal fees in relation to the Suit. The other four bills were also disputed on the ground that they were sham invoices calculated to defeat his statutory demands.

17 The appellant further submitted that the respondents were barred under s 118 of the LPA from claiming under the bills of costs until the expiry of one month after the date on which they were delivered to the appellant. He therefore contended that Originating Summons Nos 3, 4 and 5 of 2005, filed one day after the day on which the bills were rendered, were "of no legal effect".

18 Finally, the appellant argued that LCP was not entitled to set off the legal fees allegedly due to the firm against his personal debt because the firm was not a sole proprietorship, even if LCP was the sole equity partner. The statutory demand issued against LCP personally should thus not be set aside even if there was a valid counterclaim, set-off or cross demand under the bills of costs.

The respondents' submissions

19 The respondents sought to set aside the statutory demands served on them by the appellant on the ground that they have a valid counterclaim, set-off or cross demand against the appellant for legal fees due under the five tax invoices rendered to the appellant. Consequently, there was a "genuine triable issue" sufficient under the Bankruptcy Rules (Cap 20, R 1, 2002 Rev Ed), read with para 66(3) of the Supreme Court Practice Directions, to warrant the setting aside of the statutory demands.

20 The respondents submitted that the five bills of costs rendered to the appellant were valid. In particular, they were entitled to claim fees in relation to the Suit beyond the amount already paid, because the exchange of e-mails only evidenced the negotiations between the parties without any final agreement ever being reached. In fact, there was no attachment to LCP's final e-mail sent at 7.12pm and no reply from the appellant. Subsequent attempts by LCP to confirm an agreement on the costs of the Suit also appear to have been rebuffed by the appellant.

21 In addition, the respondents submitted that there was no agreement on costs in writing, let alone any signature, electronic or otherwise, by the appellant on such a written agreement. There was thus no valid agreement under s 111 of the LPA. The respondents further argued that *SM Integrated Transware* should be distinguished from the present case as it related to s 6(*d*) of the Civil Law Act (Cap 43, 1999 Rev Ed) rather than s 111 of the LPA.

22 The respondents also contended that the order made for the taxation of the bills of costs in Petition of Course No 3 of 2005 demonstrated that no agreement as to costs for the Suit had been reached between the parties. They also submitted that they were not precluded under s 118(1) of the LPA from counterclaiming or seeking a cross demand against the appellant, and that, in any event, one month had already elapsed from the date the bills were first delivered to the appellant.

23 On the issue of whether LCP could found a set-off against his personal debt on the fees due under the bills of costs, the respondents submitted that LCP was not merely the sole equity partner of the firm, but the sole proprietor as well. LCP was thus absolutely entitled to all the firm's billings and, consequently, to set off the fees due to the firm against his personal debt. Notwithstanding this assertion, I noted that LCP nonetheless submitted, in his affidavit dated 14 January 2005 at para 4,

as follows:

> It is not disputed that as partner, Marc Lim Hsi Wei is also liable for the debts of the firm.

24 Finally, in addition to seeking a set-off for the legal fees due to the firm as a partner of the firm, ML also submitted that the statutory demand against him should be set aside because he was not directly involved in the loan from the appellant to the firm and did not have any dealings with the appellant.

The law

25 Rule 97(1) of the Bankruptcy Rules provides that debtors who have been served with a statutory demand under the Bankruptcy Act may apply to court by way of originating summons for an order setting aside the statutory demand, while r 98(1) empowers the court to summarily determine such an application. Rule 98(2) further provides:

> The court shall set aside the statutory demand if —
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> (*a*) the debtor appears to have a valid counterclaim, set-off or cross demand which is equivalent to or exceeds the amount of the debt or debts specified in the statutory demand;
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> …
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> (*e*) the court is satisfied, on other grounds, that the demand ought to be set aside.

26 Pursuant to para 66(3) of the Supreme Court Practice Directions, when debtors applying to set aside statutory demands under the Bankruptcy Rules claim to have "a counterclaim, set-off or cross demand … which equals or exceeds the amount of the debt or debts specified in the statutory demand … the Court will normally set aside the statutory demand if, in its opinion, on the evidence there is a *genuine triable issue*" [emphasis added].

27 In *Re A Debtor, No 991 of 1962* [1963] 1 WLR 51, Lord Denning MR, in determining an application to set aside a statutory demand, opined that the counterclaim, set-off or cross demand of the debtor had to be "genuine". Lord Denning expressly rejected the language of a "*prima facie* case" or a claim with a "reasonable probability of success", stating that it sufficed if there was a "triable issue". The standard of a genuine triable issue was also adopted in the English *Practice Note (Bankruptcy: Statutory Demand: Setting Aside)* [1987] 1 WLR 119 which permitted the setting aside of statutory demands on grounds akin to those under the Bankruptcy Rules.

28 The decision of Lord Denning MR was followed by this court in *Goh Chin Soon v Oversea-Chinese Banking Corp Ltd* [2001] SGHC 17. Lee Seiu Kin JC (as he then was) stressed that the debtor's claim had to be valid and *bona fide*, spurious claims being insufficient to warrant the setting aside of a statutory demand. In addition, the value of the debtor's counterclaim, set-off or cross demand also had to equal or exceed the debt in the statutory demand: see also *Goh Chin Soon v Vickers Capital Ltd* [2001] 1 SLR 728.

The decision

Section 118 of the LPA

29 The issue of whether the respondents were entitled to counterclaim or set off or make a cross demand in respect of the fees due under the bills within a month of rendering the bills to the

appellant can be quickly determined. Section 118(1) of the LPA states:

> Subject to the provisions of this Act, no solicitor shall, except by leave of the court, commence or maintain any action for the recovery of any costs due for any business done by him until the expiration of one month after he has delivered to the party to be charged therewith, or sent by post to, or left with him at his office or place of business, dwelling-house or last known place of residence, a bill of those costs.

This prohibition is not absolute but is circumscribed by s 119 which empowers the court to authorise the commencement of an action for the recovery of fees due under a bill in certain circumstances, such as where the client is intentionally taking steps to thwart payment. Evidently, therefore, the bar under s 118 of the LPA may be lifted where the justice of the case so requires.

30 Order 92 r 4 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) states that the court has the inherent power "to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court". As stated by the Court of Appeal in *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 4 SLR 25 at [27] and [30]:

> It seems to us clear that by its very nature, how an inherent jurisdiction, whether as set out in O 92 r 4 or under common law, should be exercised should not be circumscribed by rigid criteria or tests. In each instance the court must exercise it judiciously. In his lecture on 'The Inherent Jurisdiction of the Court' published in *Current Legal Problems* 1970, Sir Jack Jacob (until lately the General Editor of the *Supreme Court Practice*) opined that this jurisdiction may be invoked when it is just and equitable to do so and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression and to do justice between the parties. Without intending to be exhaustive, we think an essential touchstone is really that of 'need'. …
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> …
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> … It may well be that the question of prejudice is relevant to determine whether intervention should be allowed in the circumstances of a case. But that is not to say that once no prejudice is shown, the court should invoke that jurisdiction. There must nevertheless be reasonably strong or compelling reasons showing why that jurisdiction should be invoked.

31 While no leave to file the applications has been granted to the respondents, more than a month has elapsed since the date on which the bills of costs were delivered to the appellant. Therefore, even if I were to set aside these applications on the ground that these applications amount to the maintenance of actions for the recovery of fees due under the bills before the expiry of one month under s 118 of the LPA, the respondents would simply file new applications seeking the same relief. This would only result in wasted time and costs for both parties, with no benefit to be gained by the appellant.

32 On the other hand, allowing the applications to continue would not result in any prejudice to the appellant, but would in fact ensure that the matter is determined expeditiously. I therefore found no merit in the appellant's submissions under s 118 of the LPA, and allowed the continuation of these applications so that the matter can be resolved speedily.

Genuine triable issue

Validity of the counterclaim, set-off or cross demand on the bills of costs

33 It should be noted at the outset that it is not the function of this court, in determining the applications to set aside the statutory demands, to adjudicate upon the merits of the respondents' counterclaim, set-off or cross demand: *Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 3 SLR 594. Indeed, this court need only satisfy itself that the respondents *appear* to have a valid counterclaim, set-off or cross demand amounting to a "genuine triable issue" to warrant the setting aside of the statutory demands.

34 On the facts, the five bills of costs rendered to the appellant do appear to provide the respondents with a valid counterclaim, set-off or cross demand which exceeded the debts in the statutory demands. However, the appellant disputed the work done by the firm in relation to his matters and contended that the bills of costs are shams. In addition, he claimed that no bill ought to have been rendered for the Suit because full payment had already been made pursuant to a fee agreement between the parties. Even if the bills of costs were valid, the appellant argued that LCP was not entitled to set off fees owed to the firm against his personal debts.

35 Section 111 of the LPA, which deals with agreements as to costs for contentious business, states:

> (1) Subject to the provisions of any other written law, a solicitor or a law corporation may make an agreement *in writing* with any client respecting the amount and manner of payment for the whole or any part of its costs in respect of contentious business done or to be done by the solicitor or the law corporation, either by a gross sum or otherwise, and at either the same rate as or a greater or a lesser rate than that at which he or the law corporation would otherwise be entitled to be remunerated.
>
> (2) Every such agreement shall be *signed by the client* and shall be subject to the provisions and conditions contained in this Part.
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> [emphasis added]

36 The exchange of e-mails must therefore amount to an agreement in writing that was signed by the appellant to be valid under the LPA. Section 2 of the Interpretation Act (Cap 1, 2002 Rev Ed), defines "writing" to "include printing, lithography, typewriting, photography and other modes of representing or reproducing words or figures in visible form". In *SM Integrated Transware,* it was held that e-mails satisfied the definition of "writing" under s 2 of the Interpretation Act in that they were "words … in visible form" when displayed on the screen of the computer monitor or printed out.

37 Furthermore, s 7 of the Electronic Transactions Act (Cap 88, 1999 Rev Ed) ("ETA") provides that any requirement for information to be in writing is satisfied by an electronic record "if the information contained therein is accessible so as to be usable for subsequent reference". An "electronic record" is defined in s 2 of the ETA as "a record generated, communicated, received or stored by electronic, magnetic, optical or other means in an information system or for transmission from one information system to another".

38 The second requirement of a signature by the appellant may be satisfied by an electronic signature within the meaning of s 8(1) of the ETA. Under s 2 of the ETA, an electronic signature is defined to mean "any letters, characters, numbers or other symbols in digital form attached to or logically associated with an electronic record, and executed or adopted with the intention of authenticating or approving the electronic record". Indeed, it was held by Prakash J in *SM Integrated Transware* that the signature requirement of s 6(*d*) of the Civil Law Act was satisfied by the inscription of the sender's name next to his e-mail address at the top of the e-mail.

39 Therefore, I incline towards the opinion that the exchange of e-mails is likely to satisfy both the written record and signature requirements of s 111 of the LPA. This is especially since there was no dispute as to the authenticity of the
e-mails and the parties did not deny sending and receiving the e-mails in question, as was the case in *SM Integrated Transware*.

40 However, there can be no agreement as to costs binding upon the parties if there was no meeting of minds, even if both the requirements set out in s 111 of the LPA are satisfied. The respondents rightly pointed out that there was no attachment to the final e-mail sent by LCP to the appellant at 7.12pm, even though it refers to a "revised fee agreement". More importantly, there was never any acceptance by the appellant of the revised fee offer from LCP. Indeed, in ordering the taxation of the bills of costs rendered to the appellant in Petition of Course No 3 of 2005, Lai Siu Chiu J stated (see *Chor Pee and Partners v Wee Soon Kim Anthony* [2005] SGHC 101 at [58]):

> [I]t was clear from the events which transpired before the filing of the Petition that the respondent himself did not accept there was an agreement on legal fees for [the firm's] or LCP's conduct of the Suit.

41 The bills of costs rendered by the respondents appear to present a valid counterclaim, set-off or cross demand against the debt in the statutory demands. There is therefore at the very least a genuine triable issue as to whether there is a valid counterclaim, set-off or cross demand under the bills.

Whether Chor Pee is a partnership or sole proprietorship

42 Even if the bills of costs are undisputed, there remains the question of whether LCP can set off the fees owing to the firm against his personal debt to the appellant. This turns on whether the firm is in truth a partnership or sole proprietorship, which also determines if ML is liable for the debts of the firm at all and, likewise, if he is entitled to claim a set-off under the bills of costs.

43 A partnership is defined in s 1(1) of the Partnership Act (Cap 391, 1994 Rev Ed) as "the relation which subsists between persons carrying on a business in common with a view of profit". In addition, s 2(3) of the Partnership Act provides:

> The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular …
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> …
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> (*b*) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such …

44 In *Davis v Davis* [1894] 1 Ch 393, North J stated, at 399, that where a partnership agreement in writing was absent:

> the receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in it, and, if the matter stops there, it is evidence upon which the Court must act. But, if there are other circumstances to be considered, they ought to be considered fairly together; not

holding that a partnership is proved by the receipt of a share of profits, unless it is rebutted by something else; but taking all the circumstances together, not attaching undue weight to any of them, but drawing an inference from the whole.

This approach was followed in *Chua Ka Seng v Boonchai Sompolpong* [1993] 1 SLR 482, in which the Court of Appeal held that although the respondent in that case was a "salaried partner" remunerated by a 20% share of the net profits of the firm, he nonetheless had no rights of equity participation in the firm and was not a partner in the true sense of the word.

45 It was undisputed that ML is a "salaried partner" of the firm. However, as noted by Megarry J in *Stekel v Ellice* [1973] 1 WLR 191 at 199, it is "impossible to say that as a matter of law a salaried partner is or is not necessarily a partner in the true sense". Whether or not he is a true partner depends on the "substance of the relationship between the parties", rather than "any mere label attached to that relationship" (*ibid*).

46 It was therefore necessary to examine the relationship between LCP and ML in greater detail to determine if the firm is indeed a partnership in the true sense of the word. Should the firm be found to be a sole proprietorship, LCP would be entitled to set off his personal debts against the fees owed to the firm. In addition, ML would not be personally liable for the debts of the firm, and the question of whether ML would be entitled to a counterclaim or cross demand on the bills of costs would not even arise. It should be borne in mind that the fact that ML was given a percentage of the firm's profit should not be given undue weight, but should be considered in the light of all the relevant circumstances.

47 I reached no final determination on whether the firm is in reality a partnership or sole proprietorship, and therefore made no holding as to whether LCP is entitled to set off his personal debt against that owed to the firm. However, I noted that LCP had affirmed in his affidavit that ML is a partner who is personally liable for the debts of the firm, a position which appears to contradict his contention that the firm is a sole proprietorship. Moreover, if ML is recognised by the appellant as a partner of the firm, the appellant must likewise accept that ML, as a partner, can claim a set-off under the bills of costs against the debt in the statutory demand.

Conclusion

48 In the light of the above, there appeared to be a valid counterclaim, set-off or cross demand under the bills of costs which exceeded the debts in the statutory demand. The respondents had raised the genuine triable issues of, first, the validity of their counterclaim, set-off or cross demand for fees due under the bills of costs, and second, whether the firm is a sole proprietorship so that LCP would be entitled to set off his personal debt against the fees due to the firm. The statutory demands issued by the appellant against the respondents were therefore rightly set aside, and hence, I dismissed the appeal.

Appeal dismissed.