Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd [2009] SGCA 35

Case Number : CA 112/2008

Decision Date : 30 July 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Indranee Rajah SC and Daniel Tan (Drew and Napier LLC) for the appellant; Kannan Ramesh, Paul Seah and Joanna Poh (Tan Kok Quan Partnership) for the respondent

Parties : Fustar Chemicals Ltd (Hong Kong) — Liquidator of Fustar Chemicals Pte Ltd

Companies – Winding up – Members' voluntary winding up – Proof of debt in winding up – Related party claiming proof of debt on basis of audit confirmations and audited accounts – Whether liquidator should reject proof of debt when creditor was a related party unable to produce primary supporting documents of underlying transactions

Evidence – Proof of evidence – Proof of debt owed by related company – Related company proving debt when primary supporting documents unavailable – Whether primary supporting documents of underlying transactions necessary for proof of debt

Insolvency Law – Winding up – Liquidator – Liquidator's power to look behind documents – Duty of liquidator in voluntary winding up – Duty of liquidator to be fair and independent – Whether liquidator entitled to reject audited accounts as evidence of debt

30 July 2009 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of a High Court Judge ("the Judge") affirming the decision of a liquidator to reject a proof of debt lodged against a company in members' voluntary liquidation.

2 The appellant is Fustar Chemicals Ltd (Hong Kong) ("FCL"), the plaintiff below. The respondent is Ms Ong Soo Hwa ("OSH"), the liquidator of Fustar Chemicals Pte Ltd (the "Company"). FCL filed a proof of debt on 18 November 2005 for $614,560.71 but this proof was rejected by OSH on 3 July 2007 on the basis of insufficient evidence. In Originating Summons No 1088 of 2007 filed on 23 July 2007, FCL applied pursuant to r 93 of the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed) to reverse the decision of OSH not to admit the proof of debt submitted by FCL and for FCL's proof of debt to be admitted in full. We now set out the pertinent facts.

Background

3 The Company was incorporated in Singapore on 30 July 1987 with an issued and paid up-capital of 5,000 ordinary shares of $1 each. From financial year ("FY") 1997 to FY 1999, Wong Ser Wan ("WSW") was the sole shareholder of the Company. From FY 2000 to FY 2004, WSW held 4,998 shares; WSW's ex-husband Ng Cheong Ling ("NCL") held one share; and their daughter, Ng Eharn ("NE"), also held one share. It bears mention that there is no evidence on record (nor has it been suggested otherwise in submissions) that either WSW or NE made any payments for their shares. At the point of winding up, the Company's only directors were NE and WSW. They passed a special

resolution for the Company to be placed under Members' voluntary liquidation on 24 July 2004 as a solvent company. OSH was appointed the liquidator by WSW and NE at the same extraordinary general meeting.

4 FCL was incorporated in Hong Kong and was in the business of selling (mainly) paraffin wax obtained from the People's Republic of China ("China"). Its shareholders were another Hong Kong company, Dynamic Pacific Ltd (9,999 shares out of a total of 10,000) and NCL's brother, Ng Cheong Bian (one share). FCL was part of a group of companies with trade links to China that were controlled by the Ng family. It was represented in Singapore by NCL.

5 The Company's primary business was that of an intermediary between FCL in Hong Kong and customers in Taiwan and South Africa. During that period, China had banned the sale of paraffin wax to Taiwan and South Africa. Goodwood Ltd, a company belonging to the same group of companies controlled by the Ng family, would buy paraffin wax from Chinese companies and sell them to Goodray Ltd, another Ng family controlled company. Goodray Ltd would in turn sell the paraffin wax to FCL which then resold them to the Company. FCL was the point of contact with customers in Taiwan and South Africa, but the actual sale and collection of revenue was made through the Company. In other words, the Company was mainly responsible for collecting debts that were in reality owed to FCL. It can be said that it discharged the role of a facilitator rather than that of a real trading company. There has been no suggestion by OSH that any of these arrangements offended the laws of Singapore. It is also not disputed that NCL was both the directing and controlling mind behind both FCL and the Company during the relevant trading period. WSW was, at all times, a homemaker and had neither any interest nor involvement in the business. According to NCL, the Company's business activities stopped in 1997 when the relationship between NCL and WSW became intractable. This has not been disputed by either WSW or OSH.

6 NCL and WSW were married in 1976 but the marriage began to sour in 1993. WSW eventually filed a divorce petition in October 1996. The divorce proceedings were both protracted and acrimonious and resulted in several different lawsuits between NCL and WSW as well as the companies controlled by them. A *decree nisi* was finally granted in 2000. A detailed history of their legal skirmishes can be found in the case report of the ancillary proceedings in *Wong Ser Wan v Ng Cheong Ling* [2006] 1 SLR 416. We note that the Judge attached some significance to the finding in those proceedings that NCL had attempted to dissipate his assets to reduce the pool of matrimonial assets available for division. In *Wong Ser Wan v Ng Bok Eng Holdings Pte Ltd* [2004] 4 SLR 365 ("*Ng Bok Eng Holdings*"), Judith Prakash J allowed WSW's claim that a series of property transfers by NCL to other related companies were in fact fraudulent conveyances. In due course, in 2002, NCL was made a bankrupt for failing to satisfy the judgment in another case involving Aromate Ltd, a company in which WSW was a shareholder and NCL a director. He currently remains an undischarged bankrupt.

7 The directors of the Company, WSW and NE, filed a Declaration of Solvency on 7 July 2004 ("the Declaration of Solvency")[note: 1] affirming that its assets exceeded its liabilities. The Declaration of Solvency further stated it was a true and correct statement of the company's assets and liabilities as at 31 March 2004. It listed under the Liabilities column "trade accounts" a sum of $691,088 owing to unsecured creditors. The individual identities of these unsecured creditors were however not disclosed. WSW and NE eventually passed a special resolution on 26 July 2004 to wind up the company. We pause here to make, what is in our view, a crucial observation. While FCL is the major creditor of the Company, WSW is on the flip side its major debtor. The Declaration of Solvency records the amount due from one of the Company's director as $857,222. Counsel for OSH clarified at the hearing of this appeal in response to a query from us that this debt was actually due from WSW. It is not clear from the documents filed when and how WSW withdrew this amount from the Company. However, as the amount is not in dispute, we need say no more. What is material for the purposes of

these proceedings is to point out that the amount due from WSW to the Company substantially exceeds the claim of FCL. It also bears mention that there is no evidence before us that this debt has been paid by WSW or collected by OSH. *This state of affairs could give rise to the perception that OSH regarded her principal role as liquidator was to search for reasons to reject the proof of debt filed by FCL*. We now turn to examine the basis for FCL's proof of debt.

The proof of debt

8 FCL submitted a proof of debt ("FCL's debt") in December 2005 for the sum of HKD2,832,891.04 (equivalent to $614,560.71) which it claimed was a debt incurred by the Company since 1988 for goods supplied. FCL was then invited by OSH to provide supporting evidence in the form of invoices, purchase orders, delivery orders, shipping documents and other relevant documents. However, all FCL could submit as proof of its claim were the following supporting documents: (a) copies of audit confirmations from the Company for FY 1997 to FY 2001; (b) copies of FCL's own audited accounts for FY 2000; and (c) copies of ledger entries of the Company for FY 1995 to FY 1999. The audit confirmations signed by WSW acknowledged that in FY 1997, the Company owed FCL a sum of $2,615,269.56. This sum was reduced by $582,537.21 in FY 1998. Finally, in FY 1999, an audit confirmation also signed by WSW recorded the sum of $614,560.71 (*ie*, the sum of FCL's debt). Each of these figures was matched by ledger entries made during the relevant accounting period. FCL's own audited accounts for FY 2000 recorded that the Company owed FCL a debt of HKD2,832,891 (equivalent to FCL's debt). FCL claimed that the primary documents were no longer available. Under Hong Kong law, it was only obliged to keep the documents and records for seven years.

9 Other than these materials, OSH also had the benefit of evaluating the Company's audited financial statements from FY 1997 to FY 2003. These audited financial statements recorded the total debt the Company owed without detailing the individual trade creditors. The FY 1997 audited financial statement recorded the Company's debt to trade creditors as $2,663,520. By FY 1998 this figure had been reduced to $634,389. In FY 1999, the Company's debt to trade creditors increased marginally to $691,088. This amount remained constant in the audited financial statements of FY 2000 to FY 2003. The auditors for the Company were originally Chan & Chan Certified Public Accounts ("C&C") for FY 1997 to FY 1998. After WSW commenced divorce proceedings, Goh Boon Kok & Co ("GBK") were appointed as auditors of the Company by her. They took over the auditing of the Company's accounts from FY 1999 onwards. A qualification was subsequently inserted in all of the following years' audited financial statements to the effect that GBK had not received independent confirmation of the trade balance.

10 OSH rejected FCL's proof of debt on 3 July 2007. The following reasons were given:

(a) FCL was a related company and OSH considered it necessary to look behind the acknowledgment of debt between the parties;

(b) the Company's auditors, GBK, qualified the accounts from FY 1999 to FY 2003 because it could not obtain independent confirmation of trade creditors, directors, shareholders and related party balances;

(c) FCL's own audited financial statements contained a disclaimer that the auditors could not form an opinion on the accounts for that year, and a provision for doubtful debt for the amount had been made since at least 31 December 1999;

(d) other than the ledger entries, there were no primary supporting documents for FCL's claim;

(e) no reason was given by FCL as to why the debt was allowed to remain outstanding for such a long period; and

(f) the interviews with NCL, WSW and another unrelated ex-director of the company, Mr Ng Chan Ho, were inconclusive as they were unable to provide a satisfactory explanation of the primary transactions underlying the trade debts.

The decision below

11 The only issue before the High Court was whether, on a balance of probabilities, FCL's debt was a valid or invalid debt. Opinions of expert witnesses were extensively canvassed by both parties. Timothy Reid, for FCL, unsurprisingly opined that he would have accepted the existing documentary evidence as proof of debt in the absence of contradictory evidence. Timothy Reid views were not tested by cross-examination. On the other hand, Tam Chee Chong ("Tam"), the expert witness for OSH, who had earlier assisted her in evaluating the validity of the proof of debt, took the view that the Company's accounts called for an explanation which was not forthcoming; therefore OSH was justified in her rejection of the proof of debt. Tam had earlier interviewed the auditors C&C and GBK. He ascertained that both C&C and GBK relied on NCL for information and documents on audit matters.

12 The Judge agreed with OSH's decision and rejected FCL's application to admit the debt in full. In her view, the actual liabilities between the Company and FCL could not be accurately or completely ascertained because of the lack of primary accounting documents. The absence of these documents, she pointed out, had materially affected the decision of the second auditor GBK to insert the qualification in the audited financial statements that he was unable to obtain independent confirmation of the Company's trade balance. Any reasonable person in the position of OSH, put on notice by the qualification, would carry out other checks and enquiries to substantiate the balance (see *Fustar Chemicals Ltd v Liquidator of Fustar Chemicals Pte Ltd* [2008] SGHC 198 ("GD") at [40]). The Judge also noted that the only source of the auditors' information was NCL, and it would be "imprudent" (GD at [41]) to accept NCL's testimony at face value because of his past conduct – FCL and the Company were part of a web of companies that NCL used for his personal benefit. Lastly, the Judge appeared to have discounted Timothy Reid's opinion on the ground that it was contrary to the position in law. Why this was the case is not apparent from the grounds of decision.

An overview of a liquidator's duty in assessing a proof of debt

13 The established principles of law are not disputed in the present case. In the winding up of a solvent company, the unsecured assets of the company will ordinarily be applied *pari passu* in satisfaction of its liabilities (subject to any preferential payments) and the surplus distributed among its members. The duty to pay the company's debts resides with the liquidator, who may exercise powers given to a liquidator in a winding up by the court as provided under s 305 Companies Act, Cap 50 2006 Rev Ed. In a winding up, a creditor bears the burden of proving the debt on a balance of probabilities (see *Westpac Banking Corporation v Totterdell* [1997] 142 FLR 137 and *The Trustee in Bankruptcy of Lo Siu Fai Louis v Toohey* [2005] 4 HKC 51). The liquidator must assess every proof of debt lodged and may call for further evidence in support of the claim. In considering a proof, the liquidator is not bound by the audited accounts or audit confirmations entered into by the company, and is entitled to go behind them to determine the veracity of the debt claimed (*In re Van Laun, ex p Pattulo* [1907] 1 KB 155 at 162; *Re Ice-Mack Pte Ltd; AA Valibhoy & Sons (1907) Pte Ltd v Official Receiver* [1989] SLR 876 ("*Re Ice-Mack*")).

14 These principles apply to the winding up of both solvent and insolvent companies. In *Re Menastar Finance Ltd (in liq.), Menastar Ltd v Simon* [2003] 1 BCLC 338 (a case of an insolvent

company), Etherton J said the liquidator has a duty to "ensure that the assets of the *insolvent* company 'are distributed amongst those who are justly, legally and properly creditors …'" [emphasis added] at [46]. Only the *true* liabilities of a company should be met. This principle had been earlier clarified by the High Court of Australia in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at [184]:

> As the parties whose interests are affected by admission of a proof of debt are the general body of creditors and contributories rather than the company in liquidation, there are some liabilities which would be enforceable against the company but which a liquidator is not bound to admit to proof of debt lest the interests of creditors and the contributories may be unjustly affected. A liquidator may openly reject a proof of debt if the liability, though enforceable against the company, is not a true liability of the company but is found merely on some act or omission on the part of the company which unjustly prejudices the interests of the creditors or contributories in the assets available for distribution.

15 In *Re Ice-Mack*, a proof of debt was lodged against a company that had been compulsorily wound up. The creditor and the debtor company were 'associated' in that one person, Mr Valibhoy, controlled both. Although the creditor's own audited financial statements were provided, pertinently, the statements did not attest to any debt owed by the company at all. All that was shown was that Mr Valibhoy himself owed a debt to the creditor. Mr Valibhoy tried to explain that, in reality, he had agreed to bear the debt that was originally incurred by the company personally so that the creditor would not be put to loss as a result of the company's winding up. This reason was rejected by the court because Mr Valibhoy's debt to the creditor was incurred before the company was wound up. Further, the company's own audited accounts did not lend any support to the existence of the alleged debt. Instead, the only documentary evidence in support of the proof of debt was a solitary audit confirmation by the debtor company signed by Mr Valibhoy himself, the same person controlling both debtor and creditor. Unsurprisingly, in light of the conflicting accounts stated and the close relationship between the parties, the audit confirmation was rejected by the High Court as sufficient evidence of the debt. Yong Pung How J, as he then was, observed at [11]:

> In anything resembling an arms-length situation, an audit confirmation would of course be strong evidence against a party of the correctness of the credit or debit balance which it has confirmed. This particular confirmation was signed on behalf of the company, however, by Mr Valibhoy and, in all the circumstances, unless it was corroborated by other more independent evidence, could not be accepted as evidence of the debt which it purported to confirm.

It appeared to the court that Mr Valibhoy was attempting to secure a claim at the expense of other legitimate creditors. Given the absence of any primary supporting documents, the presence of worrying discrepancies in the creditors' own audited accounts and Mr Valibhoy's own contradictory explanations, the court unhesitatingly rejected the proof of debt.

16 In *Re Adam Holdings Ltd* [1985] 2 HKC 608 ("*Re Adam Holdings*"), a creditor which was the subsidiary of a company that was also compulsorily wound up submitted a proof of debt to the Official Receiver. The proof was supported by ledger entries of the group of companies as well as a draft account sent to the creditor by the debtor company, prepared by accountants, to confirm the balance due. No audited statements were produced, and the primary supporting documents were lost. Jones J found that the ledger entries were riddled with discrepancies. Records of payments made to the debtor company were also produced as evidence of the debt. However, these records of payments received by the debtor company did not reflect a debt to the applicant creditor. Instead, they painted a completely different picture; the records of payment showed that the wound up company owed debts to other parties. In the result, the proof of debt was rejected.

17 On the other hand, in *Capital Realty Pte Ltd v Chip Thye Enterprises (Pte) Ltd* [2000] 4 SLR 548 ("*Capital Realty*"), Chao Hick Tin J held that an audit confirmation was *prima facie* evidence of debt. He distinguished *Re Ice-Mack* as being "wholly inapplicable" (at [30]) since there were no circumstances warranting suspicion on the signing of the audit confirmation despite the close friendship of the debtor and creditor. Unlike both *Re Adam Holdings Ltd* and *Re Ice-Mack*, there were no discrepancies in the record of debts in any of the audited accounts. This case can more properly be classified as an "arms-length transaction" unlike the case of *Re Ice-Mack*.

18 Similarly, the Hong Kong High Court in *Grand Gain Investment Ltd v Cosimo Borrelli* [2006] HKCU 872 (unreported) ("*Grand Gain Investment*") distinguished *Re Adam Holdings* on the basis that the accounts in the latter case were audited. In *Grand Gain Investment*, a creditor filed proofs of debt against three companies accompanied by a copy of the audited accounts of the companies concerned. The creditor held shares, either directly or indirectly, in all three companies. One of the creditor's directors gave evidence to explain the accounts and any differences therein. Barma J held at [18]–[19] that:

> While it is no doubt correct to say that the court is not bound to accept the accounts of a company at face value, it seems to me that, nonetheless, weight should be given to the fact that the accounts in question have been audited, a process which requires the auditor to satisfy himself that the accounts provide a true and fair view of the company's financial position. Where there is evidence to show that the accounts are, or may be, inaccurate, or to cast doubt on the way in which the auditor carried out his duties, this will be a factor to take into account.
>
> However, it seems to me that there is no evidence before me on which I could conclude that the audited accounts which have been put forward may be (still less, are) inaccurate or incorrect. The position here is rather different in this respect from that in either *Re Adam Holdings* or *Louis Lo v Toohey*. In *Re Adam Holdings*, it is not clear whether the court was considering audited accounts of the company, or ledgers which had been written up by its auditors. Nonetheless, it is clear from Jones J's summary of the evidence in relation to the various advances relied on in that case (at pages 610G to 612A of the judgment) that such evidence indicated that the advances were not made by the applicants in that case, but by other companies or entities associated with it. In those circumstances, it is not surprising that Jones J did not think it right to rely on accounts which suggested that the loans had been made by the applicant.

It seems to us that the overriding concern of the courts in all the above cases was to ensure that that legitimate creditors and contributories of a company should not be prejudiced by spurious claims made by related parties under the guise of being creditors. What is spurious would depend on the facts of each case. The principle that can also be gleaned from this brief overview is that the duty of the liquidator in assessing a proof of debt is to ensure that while genuine debts are admitted and false claims are rejected, he must act *fairly* in discharging his duties. He must, at all times, be independent and hold an even hand in dealing with the often competing interests of creditors, contributories and his appointers. *A liquidator must never favour the interests of his appointers over that of the other legitimate claimants to the company's assets*.

Our decision

19 The main issue in this appeal simply boils down to this: whether the liquidator ought to have accepted the proof of debt as supported by the various documents tendered without more. In this case, we have a running account that the Company's directors and shareholders had unequivocally accepted as correct between 1988 and 2000 (see [8] above). It is, in these circumstances, that the question of whether FCL's proof of debt is genuine or false should be approached by the liquidator and

taking into account the reasons why FCL was not able to produce the supporting primary documents that OSH required.

The extent of a liquidator's duty in relation to the verification of a proof of debt

20 The verification of a proof of debt is not a mere administrative function. Only debts that are legally due are admissible. The liquidator has to ensure that the assets of the company are only distributed to creditors who have debts that have been genuinely created and remain legally due. He has extensive powers to go behind documents. Even judgments and compromise agreements can be re-evaluated to ensure that the debts are genuine. That said, a liquidator must have a reasonable basis on which to query a debt that appears to be genuine. Although a liquidator "is not bound to admit" any proof of debt which, if admitted, would affect the interests of creditors and contributories, he *is* only bound to take extraordinary steps to scrutinise a proof of debt on the basis that it could be a false claim in cases where he has reason to be suspicious about its genuineness or legal validity. Factors to be considered include, *inter alia*, the origins of the debt, the length of time the debt has been due, how the company has treated the debt in its financial statements, the business of the debtor company and, where relevant, the relationships between the claimants and the controlling shareholders of the company. In assessing these factors, the liquidator must rely on: (a) knowledge of the general principles of company accounting; (b) the auditing practice of companies by independent auditors; (c) the effect and implication of directors' and shareholders' approvals annually of company accounts made in compliance with the law; (d) the customary insolvency practice in verifying debts; and (e) some degree of common sense in understanding human relationships. In taking into account these matters, he should also apprise himself of the nature of the business of the company, and other facts peculiar to the company in liquidation. In the case of the present company, the relationship between the directors and the shareholders, *inter se*, is obviously a relevant factor to be considered.

21 Therefore, although a liquidator has a duty to scrutinise all proofs of debt, the level of scrutiny required by the liquidator to discharge this duty must, in the final analysis, depend on the circumstances of the case. In the present case, OSH rejected FCL's proof only because it could not produce the related primary documents, even though FCL had explained that they had been destroyed or lost due to effluxion of time. This was not an unbelievable reason since the claimed debt was originally acknowledged by the Company as far back as January 1995, more than 9 years before the Company was wound up. OSH was aware that under Hong Kong law, FCL was not obliged to preserve indefinitely the related documents concerning a debt due to the Company (which is, in any case, from a related company or at least part of a group of companies controlled by NCL and his family). OSH was also aware that FCL's proof of debt was a debt that the Company itself had consistently acknowledged as owing in its own annual accounts, which had been approved by the WSW *qua* director and shareholder. In our view, although a liquidator has the power to look behind the audited financial statements and audit confirmations, a creditor's proof of debt should not be lightly rejected if the debt has been consistently acknowledged in audited accounts and or through audit confirmation statements. Such acknowledgments amount to an admission of the debt. Furthermore, a long effluxion of time inevitably creates evidential difficulties, as in the present case. Witnesses may be difficult to locate or may not be able to recollect essential details, and some may even become uncooperative. The relevant primary documents can also be destroyed or lost through the passage of time. In essence, while we accept that the burden of proof ordinarily rests on the creditor to substantiate a proof of debt this does not mean that the only means by which a creditor can prove a proof of debt must be through the production of primary documents.

A liquidator must not only act independently but be seen to do so

22 All liquidators have to uncompromisingly observe their obligations to maintain independence and act fairly regardless of the manner of their appointment and the identity of their appointer. For instance, in a voluntary liquidation, the liquidator must act independently, and not be open to influence from the appointing directors, especially when any of them has a vested interest in *denying* creditors their proofs of debt. In our opinion, OSH actions herein could be perceived as a failure to maintain independence and to act fairly. Here, WSW had previously taken out most of the surplus assets (see above at [7]). She now owes at least $857,222 to the Company. OSH has taken no steps to either collect this amount or to satisfactorily secure it. It is plain that if FCL's proof of debt were to be accepted, OSH would then have no alternative but to take steps to recover this substantial debt due to the Company from her true appointer. On the other hand, if OSH's decision were allowed to stand, the only person to benefit from it would be WSW.

23 In our view, having regard to the factors we have identified, the context in which FCL's proof of debt (in respect of a longstanding and consistently acknowledged debt) was rejected gives rise to real concerns as to whether OSH had gone out of her way to reject it on the mere basis that the primary documents relating to the debt could not be produced, and simply because the law conferred on her the power to do so. Given the original spousal relationship between WSW and NCL, and how the Company came to be involved in the trading outside Singapore, we find it difficult, if not impossible, to believe that WSW (as a director and a shareholder) did not know or accept that FCL's debt had been properly incurred, as confirmed by the approved annual accounts over many years. In rejecting FCL's debts, OSH did not appear to have directed her mind to all these relevant factors that we have mentioned earlier (above at [20]). *Her failure to do so has created real doubts in our mind about her independence of action*. Instead, she appears to have made strenuous efforts to reject the proof of debt, such as by her misplaced reliance on FCL's directors having characterised in their books the claim against the Company as a doubtful debt (see 10(c) above). It must have been obvious to anyone with an accounting background that doubtfulness about the collectability of a debt by a creditor has no effect on a legal obligation to make payment by the debtor.

OSH acted in excess of her duties

24 The primary reasons for holding an inquiry have been amply set out in the Judge's decision below, as well as the findings of Tam and OSH herself. Substantially, the Judge below as well as the liquidator, OSH, thought that the transactions between FCL and the Company were not at arms length because one person, NCL, was the controlling mind of both FCL and the Company at the same time. This was exemplified by the prevalence of related party balances on the balance sheets of the companies (see GD at [41]). This, the Judge agreed, was especially troubling because the Company's auditors for the financial statements for FY 1999 to FY 2003 (after divorce proceedings had been initiated), GBK, added a qualification that it could not obtain independent confirmation of the trade balance. On the other hand, C&C, the auditors for FY 1997 and FY 1998, did not similarly qualify the financial statements though they did say that they relied entirely on NCL for information regarding the Company. *Grand Gain Investment* did not apply in this case because of these difficulties faced by the auditors. There was no reason to take NCL's word for the existence of the debt since NCL had previously tried to dissipate his assets to related companies in an attempt to hide them from WSW during their divorce proceedings (see *Ng Bok Eng Holdings*), and had used the companies "like an ATM network to withdraw funds as and when required" (GD at [42]). Because the transactions were considered as not being at arms length, the proof of debt should be rejected, as was the case in *Re Adam Holdings* and *Re Ice-Mack*.

25 Further, despite the debt being on the books for a long time, NCL did not attempt to recover the debt at all. The primary supporting documents were destroyed even though NCL knew there could be difficulties in establishing his proof of debt, should the need arise. NCL's assertion that the

supporting documents were sent to the law firm Allen & Gledhill in relation to his divorce proceedings with WSW remained unproved.

26 With respect, we are not persuaded that this approach is correct. Instead, we are inclined to agree with the appellant that the liquidator had wrongly exercised her discretion in rigorously insisting on proof of the debt exclusively through primary documents and had in fact acted in excess of her duties in the circumstances. These are our reasons for so doing.

27 First and foremost, prior to the winding up, the Company consistently acknowledged the debt through audit confirmations and reflected this debt throughout the years in its audited financial statements continuously. It is also pertinent that WSW, *qua* director and shareholder, had herself confirmed the accuracy of the company's accounts repeatedly when she approved the same at director's and shareholders' meetings. Audit confirmations that the sum of $614,560.71 was due from the company to the appellant were signed by WSW in 1999, 2000 and 2001.

28 OSH argued that although WSW signed off on the Company's accounts, these accounts were based on the information provided by NCL. However, there is no evidence of any wrongdoing on NCL's part in the preparation of these accounts. None of the alleged circumstances grounding the liquidator's decision to reject the proof of debt actually suggested that the debt was fictional. The most that could be said was that the financial statements, ledger entries and audit confirmations relied upon by FCL were not as credible as actual primary supporting documents. But this does not mean that they were of no evidential value. The Company's audited financial statements were unqualified during the material period from 1988 to 1998. Only after WSW's matrimonial difficulties with NCL became intractable and WSW and her daughter NE appointed GBK, were the accounts qualified (see [9] above). The accounts were in fact complete and did not appear to, *prima facie*, contain errors or omissions. The figures recorded in the Company's audited financial statements, the audit confirmations, the ledger entries and FCL's audited financial statements all corroborated each other. Even if NCL was the source from which the auditors gleaned their information, this was consistent with the fact that NCL was the controlling mind of the Company. Who else but NCL would have extensive information about the Company at his finger tips? The fact that the auditors relied on NCL for information does not in itself suggest that the accounts stated were wrong.

29 Secondly, this situation is quite unlike that in either *Re Adam Holdings Ltd* or *Re Ice-Mack* in that there were no discrepancies between the accounts stated and other documents. In contrast to *Re Ice-Mack*, there was not just one audit confirmation signed shortly before the debtor was wound up (that in fact conflicted with the debtor's own audited accounts), but rather a long history of audit confirmations that consistently stated the sum of money owed to FCL. However, although the primary supporting documents were destroyed, they were destroyed because, as explained by the appellant, they were no longer required to be kept under the law. No doubt in certain circumstances the destruction of documents might point to an attempt to conceal evidence, but in this case FCL should not be expected to keep documents longer than necessary under the law to establish its claim especially when, prior to the winding up, there was no challenge to the debt. Only through the unforgiving lens of hindsight could it be said that these documents ought to have been kept because of the liquidator's demand for further evidence.

30 Thirdly, the Judge failed to take into consideration the fact that the Company was only an entity to park the trading receipts of FCL, and only whatever was left unclaimed by FCL represented the payment to the Company for its services. As noted in *Capital Realty*, a transaction will not be at arms length when the circumstances were such as to warrant suspicion of improprieties having been perpetrated, and not merely because the parties were related. Here, the Company was quite plainly a conduit for the receipts from goods sold by FCL to customers in South Africa and Taiwan; the

Company's task essentially was to collect payment from these customers to *pay for goods received by these customers from FCL*. FCL's assertion that it was the Company's main trade creditor was thus not at all surprising, given that FCL (and its related entities) was, by virtue of the Company's business model, the Company's primary supplier of goods. There was no suggestion that the trade dealings between the Company and FCL were concocted from the outset. There was also no question of any of the dealings of the company with FCL being at arm's length. The reality was that the claim was based on entries which the Company and WSW as a director and shareholder had accepted and content to accept as genuine between the Company and FCL. These entries were not fictitious as they were represented by actual cash or receivables in the company's accounts. FCL's debt was a genuine debt *vis-à-vis* the company. In contrast, the alleged debt in *Re Ice-Mack* did not arise from the company's ordinary course of business. Essentially, the circumstances surrounding the incidence of the debt in that case were shrouded in mystery. Coupled with the discrepancies in the accounts stated, there were many reasons for the court in *Re Ice-Mack* to doubt the existence of the alleged loans. That is not the case here. Even if NCL was the controlling mind behind both FCL and the Company, it was never disputed in this appeal that the two related companies had an established creditor-debtor relationship well before the marriage between WSW and NCL broke down. Before OSH initiated her train of inquiry she ought to have simply asked herself this obvious question: *How else could the Company's assets been accumulated other than through the dealings it had with FCL at the behest of NCL?* The Company had no other source of revenue other than through its dealings with FCL.

Concluding remarks

31 Although a liquidator has a duty to scrutinise all proofs of debt, there are certain debts which speak for themselves. These are debts which are included as part of the audited accounts of the company and approved by the directors and shareholders at annual shareholders' meetings. Such acknowledged debts *prima facie* bind the shareholders although they may not bind creditors of the company. In such cases, the liquidator has no duty to expend or waste company's funds to scrutinise such debts unless he has reason to suspect that they were entered in the books to defraud creditors. This is not the case here. There is really nothing to suggest that the debt was fictional. On the contrary, the documents provided consistently recorded the existence of the Company's debt to FCL.

32 We reiterate that although OSH had the legal right to inquire beyond the accounts in examining proofs of debt, this was not a case which called for such an inquiry. The Company itself had acknowledged that it was solvent and that it owed the debts claimed by FCL. The liquidation was voluntary. It is irrelevant for the purposes of these proceedings that NCL may have taken steps in other unrelated matters to conceal his assets (see [6] above). Indeed, the relationship between the company and FCL began long before the marriage between WSW and NCL floundered. It is also not insignificant that the ultimate balance due to FCL, in the running account reflected in the Company's books, had been very substantially reduced when the business relationship stopped (see [8] above). The accounts were historically complete and there was no evidence of wrongdoing on the part of NCL in finalising the accounts at the material times. WSW herself had consistently acknowledged the existence of the debt to the appellant by, *inter alia*, signing the audit confirmations. She cannot approbate and reprobate and now employ the liquidation proceedings as another legal forum to continue wrangling with NCL.

33 It appears that OSH decided to do what she did *not* because she was an exceptionally conscientious liquidator. On the contrary, the facts suggest that she was in a position of conflict of interest, because what she set out to do was not reasonable and could only benefit her appointer, WSW, and no one else.

Conclusion

34 At the end of the day, it is plain to us that there was no valid reason to reject FCL's proof of debt. In the result, we allow the appeal and direct OSH to accept FCL's proof of debt, inclusive of interest at the rate of 3% per annum which is to be calculated on the basis it commences 3 months after the date the proof of debt was lodged with the Company. The appellant will be entitled to costs here and below, with the usual consequential orders. In light of our findings above, it is our view that all of OSH's costs and disbursements in relation and incidental to FCL's proof of debt were not properly incurred. Therefore, she is entitled to be paid her costs and disbursements from the assets of the Company only after all the Company's creditors have been paid.

[note: 1] Appellant's Core Bundle Vol II Part B at p 276