Ong Han Ling *v* Low Ai Ming Sally (Tito Isaac & Co LLP, garnishee) [2013] SGHC 27

Case Number	: Suit No 179 of 2010/Q (Summons No 4491 of 2012/F)
Decision Date	: 29 January 2013
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: K Anparasan and Haresh Kamdar (KhattarWong LLP) for the plaintiff; Defendant not present; Anthony Soh and Lee Xian Cong (Engelin Teh Practice LLC) for the plaintiff in Suit No 388 of 2012.
Parties	: Ong Han Ling — Low Ai Ming Sally (Tito Isaac & Co LLP, garnishee)

Civil Procedure – Judgment and Orders – Enforcement

29 January 2013

Woo Bih Li J :

Introduction

1 Ong Han Ling ("Ong") was a client of Low Ai Ming Sally ("Low") who was an insurance agent. Ong commenced this action ("the Ong action") against Low for fraudulent misrepresentation made by Low as a consequence of which he paid over US$5 million to an insurer to obtain a non-existent policy of insurance. The money was instead used to pay other policies, which I need not elaborate on.

2 As a consequence of Low's default in failing to comply with an order of court requiring her to exchange her affidavit of evidence-in-chief with Ong's solicitors by 4pm of 23 August 2012, final judgment was entered in favour of Ong against her on 24 August 2012. Under the final judgment, Low was to pay Ong the following:

(a) the sum of US$2,253,514 and $2,991,519;

(b) the sum of US$221,506 and $360,458;

(c) interest; and

(d) costs.

3 Ong then applied by way of Summons No 4491 of 2012 for a garnishee order to show cause by first attaching all debts due or accruing due from Tito Isaac & Co LLP ("Tito Isaac LLP") to Low. The application was contested by Engelin Teh Practice LLC ("ETP") who claimed to be a creditor of Low. After hearing arguments, I dismissed Ong's application for a garnishee order to show cause. Ong has filed an appeal to the Court of Appeal.

Background

4 As intimated above, the Ong action was filed (on 16 March 2010) to recover money from Low which Ong had paid in reliance of alleged fraudulent misrepresentation from Low.

5 Ong also applied for a Mareva Injunction ("MI") against Low by way of an *ex parte* Summons No 1166 of 2010 filed on 16 March 2010. I heard the application on the same day and granted the MI. Para 6 of the MI ordered Low to disclose all her assets in writing to Ong within 14 days after the MI was served on her. Paras 7 and 8 of the MI stated:

> 7. This order does not prohibit the Defendant from spending S$2,000 a week towards her ordinary living expenses and the Defendant utilize [*sic*] a fixed sum of S$10,000 for legal advice and representation. But before spending any money, the Defendant must tell the Plaintiff's solicitors where the money is to come from.
>
> 8. The Defendant may agree with the Plaintiff's solicitors that the above spending limits should be increased or that this order should be varied in any other respect but any such agreement must be in writing.

6 Subsequently, various applications were made by Ong and by Low. Ong was applying, *inter alia*, for committal orders to be made against Low for her alleged failure to disclose all her assets as required by the MI. Low was applying for, *inter alia*, an increase in the amount she could utilise for legal advice and representation.

7 I directed that all the applications should be heard together as the information and arguments used in one application might be relevant and material to another application. For example, if indeed Low had failed to disclose all her assets and she had assets in Indonesia, as Ong was alleging, that would have a bearing as to whether the court should allow her to use assets in Singapore to pay for her legal advice and representation beyond the $10,000 which had initially been allowed under the MI.

8 These applications were not fully heard as there was delay, for reasons which I need not elaborate on. After Ong obtained his final judgment, he did not pursue his applications for committal for the time being although I have recently learned that his solicitors have sought a hearing date for these applications. Neither did Low pursue her applications.

9 In the meantime, Low had obtained the services of ETP to advise and represent her in respect of Ong's claim. She was also facing criminal charges for which she was apparently also represented first by ETP and then by another set of solicitors.

10 Subsequently, ETP decided not to continue to act for Low. They applied for an order to discharge themselves and on 22 February 2012, such an order was granted.

11 On 11 May 2012, ETP commenced Suit No 388 of 2012 ("the ETP action") against Low for outstanding legal fees and disbursements (collectively referred to as "legal costs"). They obtained a final judgment in default of appearance against Low on 4 June 2012 for $296,237.84, interest and costs. Thereafter, ETP filed Summons No 3074 of 2012 to obtain a garnishee to show cause by attaching all debts due or accruing due from United Overseas Bank Limited ("UOB") to Low. ETP managed to obtain the garnishee order to show cause before an assistant registrar on 27 June 2012. The garnishee order to show cause is the first of two parts in the process. The first is to obtain a garnishee order to show cause on an *ex parte* application for that purpose. If and when the garnishee order to show cause is granted, the relevant debt is attached pending the outcome of a creditor's application, to be heard on a specified date (known as the return date), for a final garnishee order which is the second part of the process. The final garnishee order, if granted, will order the garnishee to pay to the creditor the debt due from the garnishee to the debtor or so much of the debt as may be sufficient to satisfy the amount owing to the creditor. The garnishee process is available to a creditor who has obtained a judgment against a debtor.

12 As stated above, ETP obtained a garnishee order to show cause on 27 June 2012. The return date was 11 July 2012.

13 Before 11 July 2012, Ong and his solicitors had learned about the steps which ETP was taking to obtain a final garnishee order. Ong filed Summons No 3298 of 2012 on 3 July 2012 to ask for leave for Ong to intervene in ETP's action, *ie*, Suit No 388 of 2012 and to seek various orders including an order to set aside the final judgment which ETP had obtained against Low. If that judgment was set aside, then ETP's garnishee proceedings would become academic before me. Ong's application was fixed for hearing before me on 4 July 2012, *ie*, seven days before the return date of ETP's application for a final garnishee order on 11 July 2012. I directed that both Ong's application to intervene and ETP's application for a final garnishee order be adjourned to a date to be fixed and gave directions in respect of the applications.

14 The two applications were eventually fixed for hearing before me on 5 September 2012. By then, Ong had obtained his final judgment on 23 August 2012. He had also filed three more applications:

(a) Summons No 3845 of 2012 filed on 27 July 2012 for an extension of time to file an affidavit to support his earlier summons to intervene in ETP's action.

(b) Summons No 4433 of 2012 (in Ong's action) filed on 30 August 2012 for, *inter alia*, an order to vary para 2 of the MI so that certain money held by Tito Isaac LLP in a conveyancing account with UOB would be paid out to Ong.

(c) Summons No 4491 of 2012 (in Ong's action) filed on 4 September 2012 for a garnishee order to show cause.

15 However, only Summons Nos 3845 and 4433 of 2012 were also fixed for hearing on 5 September 2012 and not the last one. Hence, on 5 September 2012, the following four applications were fixed for hearing before me:

(a) Summons No 3074 of 2012 for a final garnishee order.

(b) Summons No 3298 of 2012 for leave for Ong to intervene in ETP's action.

(c) Summons No 3845 of 2012 for an extension of time for Ong to file an affidavit to support his application to intervene in ETP's action.

(d) Summons No 4433 of 2012 to vary para 2 of the MI as stated above.

16 Summons No 4433 of 2012 was an inappropriate application because there was no reason to vary the MI so that Ong would effectively become a secured creditor and obtain some payment ahead of other creditors. Generally, an MI is not intended to give the applicant for the MI priority over other creditors. If it obtains priority by means of some mode of execution, that is a different matter. I dismissed Summons No 4433 of 2012 after I stated that the MI was to continue after judgment which Ong had obtained. This continuation was to avoid any argument that the MI had ceased to have effect when Ong obtained his final judgment and may, in turn, have a bearing on the question of whether ETP was entitled to obtain judgment for its legal costs or whether the quantum of its judgment could be challenged by Ong.

17 Summons No 3845 of 2012 became uncontentious and I granted it.

18 As regards Ong's application to intervene in ETP's action, *ie*, Summons No 3298 of 2012, the primary purpose of that application was because Ong wanted to challenge the amount claimed by ETP for their legal costs which he thought was excessive. I was of the view that Ong had no *locus standi* to intervene in ETP's action for that purpose. Generally, it was not for one creditor to intervene in another creditor's action to question the quantum of that liability. Otherwise, ETP would in turn be entitled to ask for leave to intervene in Ong's action if ETP had a reason to question the amount owing by Low to Ong. If Low was made a bankrupt, the Official Assignee ("OA") would be entitled to take the step which Ong was contemplating. As for the MI, it did appear that ETP's final judgment might conflict with the MI which restricted Low to using 10,000 for legal advice and representation. Nevertheless, I was of the view that it was not necessary for Ong to intervene in the ETP action to raise the MI in ETP's garnishee proceeding because, as a creditor of Low, Ong was entitled to appear and oppose ETP's garnishee proceeding without more. I dismissed Ong's application to intervene in ETP's action.

19 I come back now to ETP's application for a final garnishee order. It is useful to bear in mind that Ong had filed his action earlier, *ie*, on 16 March 2010. ETP's action was filed more than two years later on 11 May 2012. Yet ETP obtained its final judgment earlier on 4 June 2012 whereas Ong obtained his on 23 August 2012. This was because ETP's final judgment was a judgment in default of appearance by Low whereas Ong's was a default judgment only because Low had failed to comply with an unless order, as stated above at [2]. Consequently, ETP was ahead of the game when it came to applying for a final garnishee order.

20 In the light of para 7 of the MI which restricted Low to utilising only $10,000 for legal advice and representation, I was doubtful whether ETP's final judgment was in order since there was no variation of the MI in the first place to allow Low to incur more than $10,000. It seemed to be a backdoor means of circumventing the MI without an application being made for a variation of the MI first. It seemed to me that ETP should not have obtained a judgment in default of appearance without first applying for and obtaining an order to vary the MI to allow Low to incur more than $10,000 for legal advice and representation especially since ETP was aware of the MI as it was acting for Low to vary the MI. ETP should also have disclosed the MI to the assistant registrar granting the judgment in default of appearance before obtaining the judgment. However, it was not necessary for me to reach a conclusion on this point as there was another factor militating against the making of a final garnishee order in favour of ETP.

2 1 *Singapore Court Practice 2009* (Jeffrey Pinsler gen ed) (LexisNexis, 2009) ("*Singapore Court Practice 2009*") states at para 49/1/6:

> **49/1/6. Discretion.** Garnishee proceedings have been brought, and have succeeded, in a large variety of instances. The court's power to make a garnishee order, whether it is a provisional or final order, is discretionary. A garnishee order is basically an equitable remedy, and it may be refused where the attachment of the debt would be inequitable or unfair. ... The court will exercise its discretion in deciding whether an order should be made. ... In doing so, the court will want to ensure that the order will do justice not only between the parties, but to any other persons who may be affected by the order. Hence, the court will be reluctant to make the order if it would have the effect of prejudicing the rights of other creditors in respect of the judgment debtor's assets. (The court will take into account the interests of other creditors in the assets that the judgment debtor might have. See *Pritchard v Westminster Bank* [1969] 1 WLR 547; *Hudson's Concrete Products v D B Evans* (*Bliston*) (1961) 105 Sol Jo 281; *Rainbow v Moorgate Properties* [1975] 1 WLR 788.) In particular, if the debtor or his estate is insolvent, the court will not grant the order if to do so would unjustifiably give the judgment creditor priority over other creditors. (See *Pritchard v Westminster Bank* [1969] 1 WLR 547. Also see *George Lee & Sons*

(Builders) v Olink [1972] 1 WLR 214, in which the court ruled that an order should not be made final if there is real uncertainty about the solvency of the debtor's estate.)

22 ETP and Ong appeared to be on common ground that Low was insolvent. In the light of that and the fact that Ong's cause of action had arisen first and that he had not been shown to have been dilatory in pursuing his claim and given my doubt about the validity of ETP's final judgment, it seemed to me unjust to make the final garnishee order which ETP was seeking. In the circumstances, I dismissed ETP's application for the same and discharged the garnishee order to show cause.

23 However, as Ong's own garnishee proceeding was still pending, I directed that it be heard before me.

24 There was no appeal against any of the decisions I made on 5 September 2012 in respect of the four applications I mentioned.

25 Ong's application for a garnishee order to show cause came up for hearing before me on 8 November 2012. He was seeking a garnishee order to show cause to attach money held by Tito Isaac LLP for Low. The money apparently comprised the net sale proceeds arising from the sale of an apartment owned by Low at Cairnhill Plaza. The money had been deposited in an account held by Tito Isaac LLP with UOB. Accordingly, although ETP's garnishee proceeding had named UOB as the garnishee and Ong's garnishee proceeding had named Tito Isaac LLP as the garnishee, both ETP and Ong appeared to be targeting the same money.

26 At the hearing on 8 November 2012, Ong's counsel Mr Kamdar took the point that Low was not necessarily insolvent because Ong was alleging that Low has assets in Indonesia. Specifically, Ong was alleging that he had learned that Low has trading accounts with two Indonesian stockbrokers PT Mahastra Capital and PT Valbury Asia Securities.

27 Although I was aware about Ong's allegations regarding Low's trading accounts with Indonesian stockbrokers, which allegations had been made in his applications in respect of the committal proceedings, Mr Kamdar's argument took me by surprise because, as I mentioned above, it appeared to be common ground at the hearing on 5 September 2012 that Low was insolvent. Mr Kamdar was present then. He must have known from my reference to para 49/1/6 of *Singapore Court Practice 2009* on that day that Low's insolvency was the main reason why I was not inclined to grant ETP the final garnishee order. If he was not accepting that Low was insolvent, he ought to have said so then. Yet he was content not to say so when it suited Ong's interest.

28 In any event, I was not persuaded that Low was solvent. It was unclear as to exactly what Low's assets in Indonesia comprised of and the value of such assets. Furthermore, there might be considerable difficulty in taking steps to recover those assets.

29 It seemed to me that Ong knew that, at the very least, it would be difficult to recover any of Low's assets in Indonesia. It was telling that in a letter from his solicitors to the Registrar of the Supreme Court dated 3 July 2012, p 3 thereof stated that, "there appears to be a strong suspicion of funds overseas beyond reach". That was why he was trying so hard to obtain a garnishee order to show cause with a view to obtaining a final garnishee order eventually.

30 It seemed to me unjust to grant Ong a garnishee order to show cause in the light of what had transpired. As I mentioned above, his application was not fixed for hearing on 5 September 2012 when I heard ETP's application for a final garnishee order. Fortunately, I had ensured that his application be heard by the same judge who had heard ETP's application so that the court hearing his application

would be fully aware of what had transpired.

31 In the circumstances, I dismissed Ong's application. If and when a receiving and adjudication order is made against Low and if the OA is appointed, the OA can look into the quantum of ETP's legal costs and the question of applying or continuing Low's application to vary the MI to allow Low to incur more than $10,000 for her legal costs. It would also be for the OA to take such step as is appropriate to recover Low's assets and distribute them to creditors.