IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHCR 07

Bankruptcy No 359 of 2019

Between

MARINA BAY SANDS PTE LTD

… *Plaintiff*

And

OSUKI YOHEI

… *Defendant*

JUDGMENT

[Insolvency Law] — [Bankruptcy] — [Statutory demand]

TABLE OF CONTENTS

BACKGROUND FACTS 2

THE LAW ON SERVICE OF STATUTORY DEMANDS 4

ANALYTICAL FRAMEWORK 6

THE GENERAL ISSUE 7

THE PRECEDENT PERSPECTIVE 7

THE FIRST PRINCIPLES PERSPECTIVE 10

CONCLUSION ON THE GENERAL ISSUE 14

THE SPECIFIC ISSUE 15

CONCLUSION 17

Version No 1: 27 Oct 2020 (22:41 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Marina Bay Sands Pte Ltd
v
Osuki Yohei

[2019] SGHCR 07

High Court — Bankruptcy No 359 of 2019
Jonathan Ng Pang Ern AR
14 March, 11 April 2019

3 May 2019 Judgment reserved.

Jonathan Ng Pang Ern AR:

1 Bankruptcy No 359 of 2019 ("B 359") is an application by the plaintiff, Marina Bay Sands Pte Ltd, for a bankruptcy order to be made against the defendant, Osuki Yohei. B 359 is founded on a statutory demand dated 17 December 2018 (the "SD").[1] Not unusually, the plaintiff's solicitors purported to serve the SD by mailing, pursuant to the parties' agreement, a copy of the SD to the defendant's last known business address. Unusually, however, the SD was returned unclaimed. Was the SD validly served in such circumstances? Counsel for the plaintiff, Mr Victor Choy, submitted that it was. After hearing Mr Choy on two occasions, I reserved judgment. This is my decision.

---

[1] Affidavit of Service of Statutory Demand under section 62 of the Bankruptcy Act at pp 12-16.

Background facts

2 On 5 October 2018, the plaintiff obtained judgment in default of appearance against the defendant in High Court Suit No 923 of 2018. The judgment was for the sum of $2,000,000, together with contractual interest and costs.[2]

3 Pursuant to this judgment, the plaintiff issued the SD for the sum of $2,030,598.65.[3] The SD was dated 17 December 2018.[4] Two days later, on 19 December 2018, the plaintiff's solicitors mailed a copy of the SD in a prepaid envelope by way of certificate of posting via Singapore Post Limited to the defendant's last known business address.[5] This was pursuant to cl 10 of a Credit Agreement between the plaintiff and the defendant ("cl 10"), which provided as follows:

> 10 … [The plaintiff] may effect service of any legal process on the [defendant] by sending it by ordinary post from Singapore to, (i) [the defendant's] last known address (being a post office box, or a place of residence or business, or otherwise) and/or, (ii) the address provided by the [defendant] above. Such process or documents shall be deemed validly served on the [defendant].[6]

4 As it turned out, however, the SD was returned unclaimed to the plaintiff's solicitors with the remark "[n]o such name/company".[7]

---

2 Affidavit in Support of Creditor's Bankruptcy Application at p 12.

3 Affidavit of Service of Statutory Demand under section 62 of the Bankruptcy Act at pp 12-16.

4 Affidavit of Service of Statutory Demand under section 62 of the Bankruptcy Act at pp 12-16.

5 Affidavit of Service of Statutory Demand under section 62 of the Bankruptcy Act at para 6.

6 Affidavit of Service of Statutory Demand under section 62 of the Bankruptcy Act at para 4 and p 6.

7 Affidavit of Service of Statutory Demand under section 62 of the Bankruptcy Act at

Version No 1: 27 Oct 2020 (22:41 hrs)

5 Relying on the SD and the presumption under s 62(*a*) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) (the "BA") (see [9] below),[8] the plaintiff commenced B 359 against the defendant on 13 February 2019. The application was mailed to the defendant in a similar manner as the SD.[9]

6 B 359 first came up for hearing before me on 14 March 2019. The defendant was absent. However, I was prepared to give him a chance as this was the first hearing, and therefore adjourned B 359 for four weeks. At this hearing, I also highlighted to Mr Choy my concern that the SD was returned unclaimed. To this, Mr Choy submitted that service was nonetheless successful and briefly brought me through two High Court decisions: *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*") and *Oversea-Chinese Banking Corp Ltd v Measurex Corp Bhd* [2002] 2 SLR(R) 684 ("*OCBC*"). At the end of the hearing, I invited Mr Choy to put in written submissions for the next hearing, if he thought this necessary.

7 The defendant was again absent at the next hearing on 11 April 2019. Mr Choy did not take up my invitation to put in written submissions, but maintained his earlier position in oral submissions. He emphasised that the operative word in cl 10 (see [3] above) was "sending". As I understand it, the crux of Mr Choy's submissions was that the act of sending the SD alone was sufficient for there to be valid service; whether the SD was delivered was a separate (and irrelevant) issue.

---

para 9.

8 Affidavit in Support of Creditor's Bankruptcy Application at para 3(d).

9 Affidavit of Service of Bankruptcy Application at para 6.

Version No 1: 27 Oct 2020 (22:41 hrs)

The law on service of statutory demands

8 The BA and the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) (the "BR") prescribe a comprehensive list of requirements in respect of a creditor's bankruptcy application. For present purposes, it suffices to refer only to some of the key provisions relating to service of statutory demands.

9 Section 61(1)(*c*) of the BA provides that one of the cumulative grounds of a bankruptcy application is that "the debtor is unable to pay the debt or each of the debts". Section 62(*a*) of the BA then creates a rebuttable presumption in favour of s 61(1)(*c*) of the BA when, in a creditor's bankruptcy application: (a) the debt is immediately payable; (b) the creditor has served on the debtor in the prescribed manner, a statutory demand; (c) at least 21 days have elapsed since the statutory demand was served; and (d) the debtor has neither complied with it nor applied to set it aside:

> **Presumption of inability to pay debts**
>
> **62.** For the purposes of a creditor's bankruptcy application, a debtor shall, until he proves to the contrary, be presumed to be unable to pay any debt within the meaning of section 61(1)(*c*) if the debt is immediately payable and —
>
> (*a*) (i) the applicant creditor to whom the debt is owed has served on him in the prescribed manner, a statutory demand;
>
> (ii) at least 21 days have elapsed since the statutory demand was served; and
>
> (iii) the debtor has neither complied with it nor applied to the court to set it aside;
>
> …

10 The "prescribed manner" of service referred to in 62(*a*)(i) of the BA is in turn set out in r 96 of the BR. Rule 96(2) of the BR contemplates personal

Version No 1: 27 Oct 2020 (22:41 hrs)

service as the default modality of service. However, r 96(3) of the BR allows for substituted service when a creditor is not able to effect personal service:

> **Requirements as to service**
>
> **96.**—(1) The creditor shall take all reasonable steps to bring the statutory demand to the debtor's attention.
>
> (2) The creditor shall make reasonable attempts to effect personal service of the statutory demand.
>
> (3) Where the creditor is not able to effect personal service, the demand may be served by such other means as would be most effective in bringing the demand to the notice of the debtor.
>
> (4) Substituted service under paragraph (3) may be effected in the following manner:
>
> (*a*) by posting the statutory demand at the door or some other conspicuous part of the last known place of residence or business of the debtor or both;
>
> (*b*) by forwarding the statutory demand to the debtor by prepaid registered post to the last known place of residence, business or employment of the debtor;
>
> (*c*) where the creditor is unable to effect substituted service in accordance with sub-paragraph (*a*) or (*b*) by reason that he has no knowledge of the last known place of residence, business or employment of the debtor, by advertisement of the statutory demand in one or more local newspapers, in which case the time limited for compliance with the demand shall run from the date of the publication of the advertisement; or
>
> (*d*) such other mode which the court would have ordered in an application for substituted service of an originating summons in the circumstances.
>
> …
>
> (6) A creditor shall not resort to substituted service of a statutory demand on a debtor unless —
>
> (*a*) the creditor has taken all such steps which would suffice to justify the court making an order for substituted service of a bankruptcy application; and

Version No 1: 27 Oct 2020 (22:41 hrs)

> (*b*) the mode of substituted service would have been such that the court would have ordered in the circumstances.
>
> …

11 Notwithstanding the modalities of service set out in r 96 of the BR, it is settled law that parties can contractually agree on alternative modalities of service (*Rasmachayana* at [10]–[31]). Accordingly, statutory demands may be served by: (a) personal service; (b) substituted service; and (c) contractually-agreed modalities of service.

Analytical framework

12 There is no question that the plaintiff was entitled to effect service in the way that it did (see [3] and [11] above). There would therefore have been valid service of the SD *at, or at least shortly after, the time the SD was mailed*. The difficulty in the present case arises because the SD was *subsequently* returned unclaimed (see [4] above). The central question that has to be answered is whether the SD was validly served in such circumstances. This depends on the answer to two subsidiary issues:

(a) first, whether, as a *general* principle, a statutory demand can be validly served when it is returned unclaimed (the "General Issue"); and

(b) second, whether the parties' agreement in this *specific* case covers a situation where the statutory demand is returned unclaimed (the "Specific Issue").

13 If the General Issue is answered in the negative, that will be the end of the matter. The conclusion that must follow is that the SD was not validly served. However, if the General Issue is answered in the positive, it will still be necessary to consider the Specific Issue. It is only if the Specific Issue is

Version No 1: 27 Oct 2020 (22:41 hrs)

similarly answered in the positive that the conclusion will follow that the SD was validly served.

The General Issue

14 I first consider the General Issue. This is whether, as a general principle, a statutory demand can be validly served when it is returned unclaimed. It will be helpful to approach this from two perspectives: (a) precedent; and (b) first principles.

The precedent perspective

15 Turning first to precedent, both *Rasmachayana* and *OCBC*, which were the decisions relied on by Mr Choy, were decisions of High Court Judges. If the present case cannot be distinguished, I would be bound by the *ratio decidendi* of these decisions (*Peter Low LLC v Higgins, Danial Patrick* [2017] SGHCR 18 at [31]). In my view, however, neither *Rasmachayana* nor *OCBC* provides a direct answer to the General Issue.

16 In *Rasmachayana*, the High Court noted (at [21]) that the "crux of the matter" in that case was whether parties could contractually agree on alternative modalities of service. The High Court's concern was, therefore, with the *modalities* of service, and not with whether there *was service at all*. Accordingly, while *Rasmachayana* settles the issue as to whether parties can contractually agree on alternative modalities of service, it does not shed light on the *further* issue as to what happens when such alternative modalities of service fail. This latter issue did not arise in *Rasmachayana*: there was no complaint that the debtors in that case did not have *de facto* notice of the statutory demand and/or the bankruptcy petition (*Rasmachayana* at [32]).

Version No 1: 27 Oct 2020 (22:41 hrs)

17 This final point is also significant because it gives rise to a critical difference between *Rasmachayana*, on the one hand, and the present case, on the other. In *Rasmachayana*, the debtors were represented by counsel. This was the case on appeal (*ie*, in *Rasmachayana* itself), as well as at first instance (*The Hongkong and Shanghai Banking Corp Ltd v Rasmachayana Sulistyo alias Chang Whe Ming* [2004] SGHC 87). It must have therefore been the case that the debtors became aware of the bankruptcy proceedings against them at some point or another. In the present case, there is no evidence that the defendant is even aware of B 359. In fact, the evidence points to the contrary. As I have noted earlier, the application (which bore the hearing date of the first hearing on 14 March 2019) was mailed to the defendant in a similar manner as the SD (see [5]) above). Mr Choy informed me, however, that it was similarly returned unclaimed with the same remark. Mr Choy then informed the defendant of the second hearing on 11 April 2019 by sending a notice of the adjournment pursuant to r 122(3) of the BR. However, this was also returned unclaimed with the same remark. In all likelihood, the defendant remains unaware of B 359 even up till now, and Mr Choy very fairly accepted as much.

18 As for *OCBC*, the defendant in that case ("M-Bhd") had executed two deeds of guarantee which provided, among other things, that service of process in any legal action or proceedings in Singapore against M-Bhd shall be deemed to be good service on M-Bhd if served on its subsidiary ("M-Singapore"), which was named the process agent in Singapore for the purpose of receiving such process on behalf of M-Bhd. The writ was served on M-Singapore. At the time the writ was served, M-Singapore was under judicial management, and it was alleged that the judicial managers did not forward or notify M-Bhd of the writ. Judgment in default of appearance was entered against M-Bhd, and M-Bhd claimed that it came to know of the writ and the default judgment only

Version No 1: 27 Oct 2020 (22:41 hrs)

subsequently. M-Bhd argued, among other things, that the service of the writ was irregular. The High Court rejected this contention. The relevant clause in the deeds of guarantee was cl 33(2), which is set out at [40] below. The High Court held (at [14]) that:

> … OCBC [*ie*, the plaintiff in that case] had complied with the requirements of cl 33(2) in that the writ had been delivered to M-Singapore. Once delivery has been effected, whether M-Singapore forwarded the writ to M-Bhd or not is not the concern of OCBC. That is a matter between M-Bhd and M-Singapore.

19 In my view, *OCBC* is distinguishable from the present case in several respects. First, *OCBC* concerned service of a writ. It did not involve a bankruptcy application. This is significant because service of bankruptcy processes is governed by an entirely different set of rules and procedures (*Rasmachayana* at [5]–[6]). Second, M-Bhd ultimately came to know of the proceedings against it, even if this was (on M-Bhd's case) only after default judgment had been entered. The present case stands in sharp contrast (see [17] above). Third, one can perhaps understand the High Court's reluctance to find that service of the writ was irregular. M-Singapore was not only M-Bhd's subsidiary, but also the beneficiary of the banking facilities which M-Bhd had guaranteed. Notwithstanding that the two were separate legal entities, one cannot help but notice some artificiality in the argument that service on M-Singapore was not sufficient. Fourth, M-Bhd had possible recourse against M-Singapore. As the High Court noted (at [14]; see [18] above), whether M-Singapore forwarded the writ to M-Bhd or not was "a matter between M-Bhd and M-Singapore". No such possible recourse exists in the present case.

20 In the premises, neither *Rasmachayana* nor *OCBC* provides a direct answer to the General Issue. In addition, My Choy informed me that he had not

Version No 1: 27 Oct 2020 (22:41 hrs)

managed to find any other authority that was factually on point. Precedent, therefore, is silent on the General Issue.

The first principles perspective

21 Precedent being silent on the General Issue, it becomes necessary to consider the General Issue from first principles. In this regard, the High Court in *Rasmachayana* held (at [20]) that:

> The bankruptcy rules on service of process are mandatory in the sense that *there must be* ***actual or deemed service*** *of the various processes* but only directory in the sense that the indicated method of service has not been exclusively prescribed. … [emphasis added in italics and bold italics]

22 While the second part of the above passage deals with the issue of whether parties can contractually agree on alternative modalities of service, the first part is a statement of general principle. It cannot be seriously disputed that there can be no *actual* service when a statutory demand is returned unclaimed. If there is any valid service at all, such service must necessarily be *deemed* service. However, I am of the view that there cannot be deemed service of a statutory demand that is returned unclaimed.

23 First, it is linguistically and conceptually difficult to conclude that there can be deemed service of a statutory demand that is returned unclaimed. Linguistically, it is contradictory to say that there is deemed service (which is a form of *valid* service) when there has been, as a matter of fact, *no* service. Conceptually, deemed service covers, in my view, situations where the Court *does not know* whether there has been actual service, but is prepared to accept that there is valid service notwithstanding. One instance where the Court would be prepared to do so is where service has been effected via a contractually-

Version No 1: 27 Oct 2020 (22:41 hrs)

agreed modality of service (see [11] above). At some risk of oversimplification, the position can be summarised as follows:

Court's knowledge as to actual service	**Type of service**
Court knows that there has been actual service	Actual service
Court does not know whether there has been actual service, but is prepared to accept that there is valid service notwithstanding	Deemed service
Court does not know whether there has been actual service, and is not prepared to accept that there is valid service	No service
Court knows that there has been no actual service	No service

24 I stress that this summary is simply an aid for the purposes of the present analysis. Although it should apply in most circumstances, it is not intended to be an exhaustive categorisation. But seen in this light, deemed service is really just a proxy for actual service. It fills in evidential gaps relating to actual service in certain situations. However, a proxy, by definition, cannot be the diametrical opposite of the very thing it is a proxy for. Deemed service (which is a form of valid service) cannot, conceptually, cover situations where the Court knows that there has been no actual service.

25 Second, to conclude that there can be deemed service of a statutory demand that is returned unclaimed would require the Court to shut its eyes to reality. It cannot, in my judgment, be correct for the law to allow a legal conclusion that is fundamentally at odds with factual reality.

Version No 1: 27 Oct 2020 (22:41 hrs)

26 Third, the service requirements in our bankruptcy regime are closely tied to the notion of notice. In the case of statutory demands, r 108(3)(*d*) of the BR provides as follows:

> (3) Where the statutory demand *has been served* other than by personal service, the affidavit shall —
>
> …
>
> (*d*) specify a date by which to the best of the knowledge, information and belief of the person making the affidavit, the demand *would have come to the debtor's attention*.
>
> [emphasis added]

27 In a similar vein, the High Court in *Rasmachayana* drew a link between service and notice, holding (at [21]) that:

> The essence of the *service requirements* under the [Bankruptcy Rules (Cap 20, R 1, 2002 Rev Ed)] is to ensure that the statutory demand, bankruptcy petition and other relevant processes are *brought to the personal attention of the debtor* prior to the hearing of the petition. A bankruptcy order results in the transformation of the legal status of the debtor and ought not to be made unless the court is satisfied that the debtor *had actual or deemed notice of the proceedings*. This is a quintessential aspect of due process and natural justice. … [original emphasis omitted; emphasis added in italics]

28 The fact that the service requirements in our bankruptcy regime are closely tied to the notion of notice is significant. If this is correct, then it cannot be said that there is deemed service of a statutory demand if the debtor has had no notice of the same (which would be the case where the statutory demand is returned unclaimed).

29 Returning to r 108(3)(*d*) of the BR (see [26] above), this provision, in my view, leaves no room for a situation where the statutory demand is returned unclaimed. In such a situation, the person who makes the affidavit proving service of the statutory demand is simply unable to specify the relevant date

Version No 1: 27 Oct 2020 (22:41 hrs)

because he knows that the statutory demand would *not* come to the debtor's attention. In fact, this is evident from Mr Choy's Affidavit of Service of Statutory Demand under Section 62 of the Bankruptcy Act. In this affidavit, Mr Choy deposed as follows:

> … I verily believe that the [SD] *was served* on the [d]efendant by 20 December 2018, that is, one working day after the [p]laintiff's letter enclosing the [SD] was mailed. [emphasis added][10]

30 Presumably, this was meant to comply with r 108(3)(*d*) of the BR. However, the choice of words is telling. Mr Choy could only say when he believed the SD "was served". He could not depose to when, to use the language of r 108(3)(*d*) of the BR, the SD "would have come" to the defendant's attention. The SD having been returned unclaimed, Mr Choy knew for a fact that the SD would *not* come to the defendant's attention.

31 Fourth, and finally, the provisions governing the bankruptcy regime are ultimately enacted to secure substantial justice (*Rasmachayana* at [28]). If there can be deemed service of a statutory demand that is returned unclaimed, then what would follow, if all the other requirements are satisfied, is the making of a bankruptcy order. Although the consequences of a bankruptcy order should not be overstated (*Rasmachayana* at [29]), the fact remains that a bankruptcy order results in the transformation of the legal status of the debtor (*Rasmachayana* at [21]; see [27] above). Given this consequence, it would not be substantially just for the Court to make a bankruptcy order when it knows that there has been no actual service of the statutory demand which forms the basis of the bankruptcy application. This is especially so when the debtor remains unaware of the bankruptcy application (which is, in all likelihood, the

---

[10] Affidavit of Service of Statutory Demand under Section 62 of the Bankruptcy Act at para 8.

Version No 1: 27 Oct 2020 (22:41 hrs)

case as regards the defendant (see [17] above)). For the Court to proceed to make a bankruptcy order in such circumstances would, in my assessment, result in precisely what the High Court in *Rasmachayana* cautioned against (at [28]): substantial injustice.

32 For the above reasons, I am of the view that there cannot be deemed service of a statutory demand that is returned unclaimed. First principles, therefore, answer the General Issue in the negative.

Conclusion on the General Issue

33 Drawing the various threads together, precedent is silent on the General Issue (see [20] above), but first principles answer it in the negative (see [32] above). The net result is that the General Issue is answered in the negative: as a general principle, a statutory demand cannot be validly served when it is returned unclaimed. I make two further points at this juncture.

34 First, the above analysis does not impose on a creditor a requirement to *verify* whether there has been actual service of the statutory demand on the debtor. It is clear from [23] above that valid service does not require knowledge of actual service. There can still be valid service in the form of deemed service when the Court does not know whether there has been actual service, but is prepared to accept that there is valid service notwithstanding. The main point of the above analysis is that there cannot be deemed (and, therefore, valid) service of a statutory demand when the Court knows that there has been no actual service of the same.

35 Second, I accept that that the above analysis is not without its difficulties. For instance, the High Court in *Rasmachayana* noted (at [23]) that it is a general principle of law that a person can renounce a right introduced for

Version No 1: 27 Oct 2020 (22:41 hrs)

his benefit, and that in the instance of procedure dealing with the service of process the intended beneficiary is undeniably the debtor. At the same time, the above analysis can be sidestepped so long as parties agree to a mode of service that does not allow the creditor to know whether service has been successful. Further, in a case such as the present, the state of service would effectively change, somewhat artificially, from deemed service to no service. Notwithstanding these difficulties, the line must be drawn at some point. For the reasons set out at [23]–[31] above, I am satisfied that the present case falls safely on the wrong side of the line.

The Specific Issue

36 As I have answered the General Issue in the negative (see [33] above), it is not, strictly speaking, necessary for me to go on to consider the Specific Issue (see [13] above). Nonetheless, I will proceed to briefly do so for completeness. To recapitulate, the Specific Issue is whether the parties' agreement in this specific case covers a situation where the statutory demand is returned unclaimed.

37 The parties' agreement in this specific case can be found in cl 10, which I reproduce again for ease of reference:

> 10 … [The plaintiff] may effect service of any legal process on the [defendant] by sending it by ordinary post from Singapore to, (i) [the defendant's] last known address (being a post office box, or a place of residence or business, or otherwise) and/or, (ii) the address provided by the [defendant] above. Such process or documents shall be deemed validly served on the [defendant].[11]

---

11 Affidavit of Service of Statutory Demand under section 62 of the Bankruptcy Act at para 4 and p 6.

Version No 1: 27 Oct 2020 (22:41 hrs)

38 What is evident is that cl 10 does not expressly state that the "process or documents" shall be deemed validly served on the defendant *whether or not the "process or documents" are successfully delivered*, or something to similar effect. This contrasts the relevant clauses in both *Rasmachayana* and *OCBC*.

39 In *Rasmachayana*, the relevant clause read (see *Rasmachayana* at [8]):

> The Borrower and each of the Personal Guarantors irrevocably appoint Forward Investment Pte Ltd (now of 3rd Storey, Crown Prince Hotel, 270 Orchard Road, Singapore 238857) to receive, for the Borrower or, as the case may be, [the] Personal Guarantor and on its or his behalf, service of process in any Proceedings in Singapore. Such service shall be deemed completed on delivery to the process agent (*whether or not it is forwarded to and received by the Borrower or the relevant Personal Guarantor*). [emphasis added]

40 Similarly, in *OCBC*, the relevant clause read (see *OCBC* at [14]):

> We irrevocably appoint Measurex Engineering Pte Ltd at its address in Singapore which at the date hereof is at 994 Bendemeer Road #05-03, Kallang Basin Industrial Estate, Singapore 339943, Singapore (the 'process agent') to receive, for us and on our behalf, service of process in any legal actions or proceedings in Singapore. Such service shall be deemed completed on delivery to the process agent (*whether or not it is forwarded to and received by us*) and we hereby authorise and declare that such service in the manner aforesaid shall be deemed to be good and effectual service of the writ or legal process or judgment on us. If for any reason the process agent ceases to be able to act as such or no longer has an address in Singapore, we irrevocably agree to appoint a substitute process agent acceptable to you, and to deliver to you a copy of the new process agent's acceptance of that appointment, within 30 days. [emphasis added]

41 In my view, cl 10 does not go so far as to cover a situation where the "process or documents" are returned unclaimed. In the usual course, items sent by ordinary post *are* delivered. Thus, when the parties agreed in cl 10 for the plaintiff to effect service on the defendant by sending by ordinary post, the assumption must have been that the "process or documents" so sent by the

Version No 1: 27 Oct 2020 (22:41 hrs)

plaintiff would be delivered to the defendant. If the parties had intended for cl 10 to also cover a case where delivery has not been successful (such as when the "process or documents" are returned unclaimed), this would have been expressly provided for.

42 I should also add (very briefly, as this point was not put to Mr Choy) that even if I am wrong on the above, the most that can be said of cl 10 is that it is ambiguous. In this case, the *contra proferentem* rule would operate so as to resolve the ambiguity against the plaintiff.

43 Either way, the Specific Issue is answered in the negative: the parties' agreement in this specific case does not cover a situation where the statutory demand is returned unclaimed.

Conclusion

44 I have concluded that, as a general principle, a statutory demand cannot be validly served when it is returned unclaimed (see [33] above). Returning to the framework set out at [13] above, it follows that the SD was not validly served. However, even if I am wrong on this point, the parties' agreement in this specific case does not cover a situation where the statutory demand is returned unclaimed (see [43] above). Accordingly, the same conclusion would result: the SD was not validly served.

45 Rule 127 of the BR prescribes the circumstances where the Court shall dismiss a creditor's bankruptcy application. These include: (a) where the creditor is not entitled to make the bankruptcy application by virtue of s 60, 61 or 62 of the BA; and (b) where, in a case where the application is based on a statutory demand, the creditor has not discharged the obligations imposed on him by r 96 of the BR:

Version No 1: 27 Oct 2020 (22:41 hrs)

> **Dismissal of bankruptcy application**
>
> **127.** The court shall dismiss a creditor's bankruptcy application where —
>
> (*a*) the applicant creditor is not entitled to make the bankruptcy application by virtue of section 60, 61 or 62 of the Act;
>
> …
>
> (*c*) in a case where the application is based on a statutory demand, the applicant creditor has not discharged the obligations imposed on him by rule 96.

46 I deal first with r 127(*c*) of the BR. This provision refers to r 96 of the BR, which deals with the requirements as to service of a statutory demand. Rule 96 of the BR has been partly set out at [10] above, but it does not deal with contractually-agreed modalities of service. While an argument can be made that r 127(*c*) of the BR should nevertheless apply in the present case, it is not necessary to go so far because r 127(*a*) of the BR clearly applies in any event. Section 62(*a*) of the BA (which the plaintiff relies on (see [5] above)) only creates a rebuttable presumption in favour of s 61(1)(*c*) of the BA when, among other things, the creditor has served on the debtor in the prescribed manner, a statutory demand (see [9] above). Since the SD was not validly served, no such presumption is triggered. Section 61(1)(*c*) of the BA is not satisfied and the plaintiff is not entitled to make B 359.

Version No 1: 27 Oct 2020 (22:41 hrs)

47 In the circumstances, I dismiss B 359 pursuant to r 127(*a*) of the BR. It is not necessary for me to consider if the other requirements of the BA and the BR are satisfied. For the avoidance of doubt, my decision does not affect the plaintiff's right to take out a fresh bankruptcy application on the same debt, if it manages to subsequently comply with the applicable requirements.

Jonathan Ng Pang Ern
Assistant Registrar

Choy Wai Kit, Victor (Drew & Napier LLC) for the plaintiff;
The defendant absent and unrepresented.

Version No 1: 27 Oct 2020 (22:41 hrs)