Wee Soon Kim Anthony v UBS AG
[2006] SGHC 139

Case Number : OS B57/2005, RA 348/2005

Decision Date : 02 August 2006

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Applicant in person; Kabir Singh (Drew & Napier LLC) for the respondent

Parties : Wee Soon Kim Anthony — UBS AG

Insolvency Law – Bankruptcy – Statutory demand – Whether r 94(4)(a) of the Bankruptcy Rules (Cap 20, R 1, 2002 Rev Ed) was complied with – Whether omission to mention the leave application pending determination was capable of impeaching the statutory demand – Whether the discretion to set aside a statutory demand under r 98(2)(e) of the Bankruptcy Rules should be exercised – Whether the presumption of inability to pay debts was rebutted

2 August 2006

Belinda Ang Saw Ean J:

1 This appeal was brought by Anthony Wee Soon Kim ("Wee") following the refusal of the assistant registrar, Mr Christopher De Souza, to set aside a statutory demand dated 2 August 2005, which was served on Wee on behalf of UBS AG ("the bank") on the basis of Wee's liability in respect of unpaid costs plus interest. Agreeing with the decision of the assistant registrar, I allowed the statutory demand to stand.

2 In brief outline, the background facts are as follows. Wee was the plaintiff in Suit No 834 of 2001 and the bank was the defendant. Justice Kan Ting Chiu dismissed the action with costs on 8 December 2003. Wee duly appealed against the dismissal of the action by way of Civil Appeal No 1 of 2004. The Court of Appeal dismissed that appeal with costs on 27 May 2004. The bank filed its Bill of Costs No 286 of 2004 for the action ("BC 286") and the same was taxed on 11 January 2005. After taxation, Wee applied for a review of the taxed costs. Kan J reviewed BC 286 on 28 April 2005. Thereafter, a Registrar's certificate dated 18 May 2005 was duly extracted whereby Wee was to pay the bank the total sum of $766,588.51. On 4 May 2005, Wee applied by way of Summons in Chambers No 2216 of 2005 for leave to appeal against Kan J's review of taxation ("the leave application"). The leave application came before Kan J on 27 June 2005. At the hearing, Wee made an oral application for Kan J to recuse himself alleging apparent bias as a ground of his objection to Kan J hearing the leave application. Wee was directed by Kan J to file a formal application. He did so on 30 June 2005. The recusal application was dismissed with costs fixed at $3,500 on 23 November 2005. Meanwhile, the leave application was adjourned as Wee informed Kan J that he was appealing against the latter's decision in respect of the recusal application. On 20 December 2005, Wee filed his appeal without regard to s 34(1)(*c*) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed). In the result, the bank succeeded in its application to strike out Wee's appeal for non-compliance with s 34(1)(*c*).

3 It was said that by the end of July 2005, Wee owed the bank $825,321.11 in legal costs arising from Suit No 834 of 2001 as well as from other costs orders made against Wee in separate but related proceedings. Consequently, on behalf of the bank, a statutory demand was issued in respect of the amounts arising from the costs orders, which Wee had refused to pay. Part A of the statutory demand is reproduced as Appendix A to the grounds of decision.

4 Wee applied to set aside the statutory demand on 16 August 2005. Wee appeared before me

in person. A mainstay of Wee's argument in the appeal was that r 94(4)(*a*) of the Bankruptcy Rules (Cap 20, R 1, 2002 Rev Ed) had not been complied with, and as such the statutory demand could be set aside under r 98(2)(*d*). Specifically, Part A of the statutory demand *ex facie* did not comply with r 94(4)(*a*) of the Bankruptcy Rules in that the statutory demand omitted any mention that BC 286 was the subject matter of the leave application which was pending before the court. Neither did the statutory demand provide any details in respect of the other costs matters that it alleged were outstanding. On this point, Wee took issue with Bill of Costs No 7 of 2003 ("BC 7"), Bill of Costs No 112 of 2003 ("BC 112") and Bill of Costs No 16 of 2005 ("BC 16") and his criticisms in respect of each bill of costs were as follows.

5 As for BC 7, Wee's complaint was that the bank had not produced an order of court directing him to pay the costs of ABN AMRO Bank NV. He was therefore not responsible for those costs. BC 16 was being disputed as he had requested V K Rajah J to hear further arguments and Wee's request was still pending. In an affidavit dated 15 August 2005, Wee claimed that BC 112 was disputed on the ground that the appellant in Civil Appeal No 114 of 2002 was Gerald Godfrey QC, and Wee was therefore not responsible for the costs. At the appeal, Wee also alluded to BC 112 being the subject of an earlier statutory demand that was set aside by Prakash J in Originating Summons No B36 of 2004 and, as such, the matter was now *res judicata*. Apart from this tentative assertion, Wee was of no assistance to the court having not developed his argument. I noted that this was not an issue covered in Wee's written submissions tendered below. Specifically, the objection Wee took in his affidavit of 15 August 2005 as regards BC 112 was that Gerald Godfrey QC was responsible for the costs in Civil Appeal No 114 of 2002 and not he. Consequently, I was obliged not to take the *res judicata* point seriously.

6 Using the same leave application point, Wee argued that the statutory demand could equally be set aside under r 98(2)(*e*) of the Bankruptcy Rules. In this regard, he contended that the leave application was pending as at 8 March 2006 when I heard this appeal. He relied, *inter alia*, on *Everard v The Society of Lloyd's* [2003] BPIR 1286; [2003] EWHC 1890 (Ch) for the proposition that where the court is satisfied that there is a *bona fide* appeal pending, the court should accede to an application to set aside the statutory demand. Likewise, until the leave application was heard and disposed of, the bank's statutory demand for payment was wholly premature as the status of the costs in question was in "suspended animation". Therefore, in the interests of justice, the statutory demand should be set aside pending the outcome of the decision of the court in the leave application.

7 It is convenient to set out in full the various provisions of the Bankruptcy Rules relied upon by Wee. Rule 94(4)(*a*) states:

> (4) The statutory demand shall state the consideration for the debt or, if there is no consideration, the way in which the debt arises and —
>
> > (*a*) if the debt is founded on a judgment or an order of a court, it must give details of the judgment or order, including the action under which the judgment or order was obtained and the date of the judgment or order;

Rule 98(2) reads:

> …
>
> (2) The court shall set aside the statutory demand if —
>
> > …

(*d*) rule 94 has not been complied with; or

(*e*) the court is satisfied, on other grounds, that the demand ought to be set aside.

I should mention that Wee at the appeal apparently abandoned an earlier argument based on r 98(2)(*b*).

8 As stated, the statutory demand was in respect of unpaid costs. It was not in dispute that save for the order of court dated 30 June 2004 made pursuant to Summons in Chambers No 3323 of 2004 in Civil Appeal No 114 of 2002 where costs were fixed at $1,500, all other costs orders have been taxed and the sums claimed in the statutory demand were based on the amounts stated in the Registrar's certificates. Order 59 r 33 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) makes it clear that the Registrar's certificate is conclusive as to the amount stated therein unless it is set aside. The liability arises out of the cost orders made against Wee and the Registrar's certificate evidences the quantum of costs assessed against Wee. This is borne out in *Shook Lin & Bok v Yeo Kian Teck* [1992] 2 SLR 16 where Michael Hwang JC confirmed that the Registrar's certificate is conclusive evidence of the amount of legal fees properly due from the defendant to the plaintiff.

9 In the circumstances, I agreed with counsel for the bank, Mr Kabir Singh, that Wee's allegation of non-compliance with r 94(4)(*a*) of the Bankruptcy Rules was totally unfounded. The essentials required of a statutory demand were present in this case to enable Wee to identify the debt (see *The Straits Times Press (1975) Ltd v Wong Chee Kok* [1998] SGHC 77). The statutory demand presented a sufficiently detailed debt based on three Registrar's certificates and the order of court dated 30 June 2004. Wee was provided in Part A of the statutory demand with details of the unpaid costs including interest by reference to the various bills of costs numbers and the relevant Registrar's certificates including the order of court dated 30 June 2004. Interest calculations were also furnished. Served along with the statutory demand, as attachments, were relevant copies of the Registrar's certificates and orders of court by which Wee was required to pay costs. Notably, Wee was not saying that he did not receive the attachments. Neither was Wee disclaiming any knowledge of the genesis of the various costs orders. I did not find the statutory demand defective or irregular.

10 Wee's complaints levelled at BC 112, taxed at $13,203.69, were disingenuous. Wee was made personally liable to pay costs in Civil Appeal No 114 of 2002. He was the real party for whose benefit the application for the *ad hoc* admission of Gerald Godfrey QC was brought to represent Wee in Suit No 834 of 2001. Wee's personal liability to pay costs in Civil Appeal No 114 of 2002 was again clarified by the Court of Appeal in Notice of Motion No 108 of 2004 filed in Civil Appeal No 68 of 2004. Turning to BC 16, which is in relation to Civil Appeal No 68 of 2004, the Registrar's certificate was for $16,423.53. There was no basis for disputing this debt as the Registrar's certificate was not set aside. Wee's contention that his request to Rajah J to hear further arguments was still pending was misconceived. Wee wrote to Rajah J on 27 April 2005 to dispute the amount in the Registrar's certificate issued in respect of BC 16. Wee did not hear from the judge in the course of the next fourteen days. As such, by virtue of O 56 r 2(2) of the Rules of Court, the judge is deemed to have certified that he does not require further arguments. Finally, as for the third costs order, as explained by the bank, since it won the action (*ie* Suit No 834 of 2001), the bank was entitled to recover from Wee the costs it had paid to ABN AMRO Bank NV (see BC 7 and the order of court dated 8 July 2002).

11 At the heart of Wee's submissions to me was his short point that the statutory demand should have mentioned the leave application that was pending determination. I did not see how this omission was capable of impeaching the statutory demand. Wee's argument would mean that any debtor could escape the presentation of a bankruptcy petition, or could procure the setting aside of a statutory demand, simply by urging that there was some other process going on by which the debt

was being challenged. The bankruptcy court, as a general rule, does not go behind a judgment or order to inquire into the validity of the debt nor adjourn such an application pending the outcome of an application to set aside the judgment or order (see *Supreme Court Practice Directions* (2006 Ed, 1 April 2006 release) at para 141(2)). Furthermore, an appeal does not operate as a stay of execution. *A fortiori*, an application for leave to appeal against a costs order does not operate as a stay of execution. In the present case, not only was the relevant Registrar's certificate not set aside, Wee had not applied for payment of those costs to be stayed pending the outcome of the leave application. Nothing detracts from the fact that the bank is a creditor in respect of a debt for which a statutory demand can be served on Wee.

12 At any rate, the discretion to set aside the statutory demand under r 98(2)(*e*) should be exercised only where the consequences of not doing so would be unjust to the debtor. As was observed in *In re A Debtor (No 1 of 1987)* [1989] 1 WLR 271, the power to set aside a statutory demand "on other grounds" under r 6.5(4)(*d*) of the UK Insolvency Rules 1986 (SI 1986 No 1925) (which is equivalent to our r 98(2)(*e*)) would be exercised only if the circumstances were such that it would be unjust for the creditor to present a bankruptcy petition based on the debtor's non-compliance with the demand. I did not consider the leave application which is still pending as a valid reason for setting aside the statutory demand. The decision of *Everard v The Society of Lloyd's* cited by Wee is distinguishable. In that case, the debtors argued that they had a pending application for leave to appeal to the Court of Appeal in respect of certain claims against the creditor, one of which was negligent misrepresentation. It was argued (and the evidence bears this out) that if leave to appeal succeeded, the debtors could have a counterclaim, set-off or cross demand which equalled or exceeded the amount of the debt specified in the statutory demand. There was also evidence of real prejudice if the statutory demands were not set aside. None of those considerations existed in the instant case. Wee was neither relying on r 98(2)(*a*) in this appeal nor was the nature of the potential prejudice explained by Wee. In the circumstances, no injustice would result from a refusal to set aside the demand. As indicated in Part B of the statutory demand, it was open to Wee to offer security to the bank in respect of the unpaid costs to stave off a bankruptcy petition. I noted that Wee claimed that he was a wealthy man. The failure to discharge his liability under the costs orders on which the statutory demand was based was a result of a decision not to pay.

13 Wee argued below that the statutory demand issued under s 62 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) raises the presumption that a debtor is unable to pay his debts. Wee claimed that he has rebutted the statutory presumption with evidence that he could issue a cheque for the sum of $1m to demonstrate his ability to pay his debts. This contention did not find favour with me. It is not the function of the court – in deciding whether to exercise its discretion to set aside a statutory demand – to conduct an investigation into the debtor's overall financial position. That is a matter for the court on the hearing of the bankruptcy petition if the statutory demand is allowed to stand.

14 For all these reasons, I dismissed the appeal with costs fixed at $2,000.

Appendix A

PART A [of the statutory demand]	**[Amount]**
… **[Particulars of Debt]**	

Amount owing by you to the Creditor for the various costs orders made in Suit No. 834 of 2001/R and related proceedings which costs were taxed/ordered as follows:	
(1) Registrar's Certificate under Bill of Costs No. 286 of 2004/B dated 18 May 2005	S$ 766,588.51
Plus interest on S$766,588.51 at 6 % pa from 18 May 2005 to 2 August 2005 (77 days)	S$ 9,703.12
(2) Registrar's Certificate under Bill of Costs No. 16 of 2005/B dated 20 April 2005	S$ 16,423.53
Less amount deposited with the Accountant-General, Singapore being one third of the sum of S$10,000.00 as the security for the costs of Civil Appeal No. 68 of 2004/K	(S$ 3,333.33)
	S$ 13,090.20
Plus interest on S$13,090.20 at 6 % pa from 20 April 2005 to 2 August 2005 (105 days)	S$ 225.94
(3) Costs awarded under Order of Court No. 6466 of 2004H dated 30 June 2004 made pursuant to Summons In Chamber No. 3323 of 2004/N	S$ 1,500.00
Plus interest on S$1,500.00 at 6 % pa from 30 June 2004 to 2 August 2005 (399 days)	S$ 98.38

(4) Registrar's Certificate under Bill of Costs No. 112 of 2003/N dated 19 May 2003 Less amount received from the Accountant-General, Singapore being one third of the sum of $10,000.00 as the security for the costs of Civil Appeal No. 114 of 2002/V Plus interest on S$13,203.69 at 6 % pa from 19 May 2003 to 2 August 2005 (807 days)	S$ 16,537.02 (S$ 3,333.33) ---------- S$ 13,203.69 S$ 1,751.57
(5) Registrar's Certificate under Bill of Costs No. 7 of 2003/Y dated 10 June 2003 Plus interest on S$19,137.68 at 6 % pa from 26 July 2005 to 2 August 2005 (7 days)	S$ 19,137.68 S$ 22.02
Total amount owing under the said Registrar's Certificates/Orders of Court inclusive of interest calculated up to the date of the Statutory Demand (2 August 2005)	**S$ 825,321.11**

The date the debts were incurred were:

-The 18th day of May, 2005, being the date of the Registrar's Certificate made under Bill of Costs No. 286 of 2004/B;

-The 20th day of April, 2005, being the date of the Registrar's Certificate made under Bill of Costs No. 16 of 2005/B;

-The 30th day of June 2004, being the date of the Order of Court made pursuant to SIC 3323 of 2004/N;

-The 19th day of May 2003, being the date of the Registrar's Certificate made under Bill of costs No. 112 of 2003/N; and

-The 26th day of July 2005, being the date of service of the Registrar's Certificate made under Bill of Costs No. 7 of 2003/Y on the debtor.

Copies of the said Registrar's Certificates/Orders of Court are enclosed.

The consideration for the said indebtedness is the balance amount for taxed costs which you were ordered to pay personally to the creditor.

Copyright © Government of Singapore.