Fustar Chemicals Ltd v Ong Soo Hwa (liquidator of Fustar Chemicals Pte Ltd) [2008] SGHC 198

Case Number : OS 1088/2007

Decision Date : 10 November 2008

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : N Sreenivasan (Straits Law Practice LLC) for the plaintiffs; Kannan Ramesh (Tan Kok Quan Partnership) for the defendant

Parties : Fustar Chemicals Ltd — Ong Soo Hwa (liquidator of Fustar Chemicals Pte Ltd)

Companies – Winding up – Proof of debt – Debt owed by associated company – Effect of lack of primary documents – Whether liquidator entitled to go behind audited accounts and account confirmations to require satisfactory evidence of the debt proved for – Whether liquidator bound by estoppels against the company or an account stated with the company

10 November 2008

Belinda Ang Saw Ean J:

1 This application made by way of Originating Summons No 1088 of 2007 was brought by the plaintiff, Fustar Chemicals Limited ("FCL"), under Rule 93 of the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Ed) to reverse the decision of the liquidator in respect of the proof of debt filed by FCL in the liquidation of Fustar Chemicals Pte Ltd ("the Company"), and for an order that FCL's proof of debt be admitted in full. The defendant, Ong Soo Hwa ("OSH"), is the liquidator of the Company. FCL's application was dismissed with costs on 31 July 2008. I now publish the reasons for my decision.

Background facts

2 FCL was incorporated in Hong Kong with an issued and paid up capital of 10,000 ordinary shares of HK$1 each. At all material times, the majority shareholder of FCL with 9999 ordinary shares was another Hong Kong incorporated company called Dynamic Pacific Ltd. One remaining share in FCL was held in the name of Ng Chong Bian, the brother of Ng Cheong Ling ("NCL"). NCL was one of the founders of FCL, an entity which was part of a group of companies owned and controlled by members of his family. NCL himself held 50% of the shares in Dynamic Pacific Ltd. He was FCL's representative in these proceedings. NCL is an undischarged bankrupt.

3 The Company was incorporated in Singapore on 30 July 1987 with an issued and paid up capital of 5000 ordinary shares of $1 each. The Company was placed in Members' voluntary liquidation on 26 July 2004 and OSH was appointed as the liquidator. At the time of the Members' voluntary liquidation, Wong Ser Wan ("WSW") was one of its directors along with Ng Eharn, who is NCL's and WSW's daughter. WSW is the registered owner of 4998 ordinary shares in the capital of the Company, and Ng Eharn and NCL hold one share each. Prior to Ng Eharn's appointment as director on 17 July 2001, Ng Chan Ho was a director of the Company.

4 On 30 July 2004, OSH advertised in the Singapore Government Gazette and the Business Times to invite, *inter alia*, the creditors of the Company to file proof of debt in the liquidation of the Company. On 2 December 2005, FCL submitted its proof of debt dated 18 November 2005 for $614,560.71.

5 The proof of debt filed by FCL related to the supplies of goods such as paraffin wax. To substantiate its claim, the proof of debt was accompanied by an audit confirmation dated 22 November 2000. OSH requested further supporting documents and corresponded with FCL's solicitors on the matter. At different point in times, FCL made available the following documents:

a. Copies of the Company's audited financial statements for the financial years ended 31 March 1997 to 2003;

b. Copies of the Company's unaudited draft financial statement as at 25 July 2004;

c. Copies of the Company's ledger sheets of the FCL account for the period January 1995 to March 1999;

d. Copies of the Company's audit confirmations sent by its auditors to FCL for the financial years ended 31 March 1997 to 2002; and

e. Copy of FCL's audited financial statement for the financial year ended 31 December 2000.

6 No books or other records relating to the business that gave rise to the indebtedness such as contracts, invoices, delivery orders, bills of lading and other shipping documents were produced by FCL to the liquidator. In addition to seeking supporting documentation, OSH also interviewed the Company's current and former directors as well as NCL in relation to the proof of debt. OSH also wrote to the Company's auditors for clarification and verification of the debt.

The liquidator's rejection of the proof of debt

7 FCL's proof of debt was rejected on 3 July 2007 on account of the deficiencies in the evidence presented to the liquidator. On the face of it, the indebtedness arose from inter-company transactions. Significantly, the Company's auditors had highlighted in each of the financial years ended 31 March 1999 to 2003 that they were unable to obtain independent confirmation of the amount due to FCL. The liquidator came to the view that the books or other records relating to the alleged indebtedness were limited and incomplete – FCL was only able to produce the Company's ledger sheets that apparently related to the outstanding balances due to FCL for the financial years ended 31 March 1995, 1996, 1997, 1998 and 1999 respectively. The problem was further compounded by Ng Chan Ho, a former director of the Company, who was unable to give information concerning the business dealings between FCL and the Company, and, in particular, the debt in question. Likewise, the current directors of the Company were unable to shed light on the past transactions between the Company and FCL.

8 The plaintiff challenged the rejection of its proof of debt by filing these proceedings. In these proceedings, the parties each relied on expert testimony which, unsurprisingly, gave diametrically opposed conclusions as to whether the proof of debt ought to have been accepted.

Merits of FCL's application against the liquidator

Audited accounts and audit confirmations

9 It is convenient to begin by examining the audited accounts and the audit confirmations placed before this court.

(i) Financial years ended 31 March 1997 and 1998

10 Emphasis was placed by FCL on the audited financial statements and audit confirmations of the Company for the financial years ended 31 March 1997 and 1998 where the line item on "trade creditors" in the balance sheet showed a balance of $2.6m and $634,389 respectively. The Company's auditors at that time were Chan & Chan Certificate Public Accountants ("Chan & Chan"). The auditors did not comment on those amounts and it was argued that Chan & Chan must have been satisfied that the amount reflected as owing was true and fair. It was pointed out that there were also corresponding audit confirmations sent by the Company to FCL and they were signed by both FCL and the Company. The audit confirmation dated 22 November 2000 was signed by WSW. The signatory of audit confirmation dated 18 September 1997 and 18 September 1998 respectively was identified as Ng Chan Ho by the former solicitors of FCL, M/s B Rao & K S Rajah, in a letter dated 24 November 2006 to OSH. Since NCL was the key person in both entities, it was more probable than not that the audit confirmations were signed on his instructions. OSH had interviewed the former director, Ng Chan Ho, who signed the Company's audited accounts for 1997 and 1998 together with WSW. Ng Chan Ho took and acted on instructions from his employer, whom OSH understood to be NCL, and Ng Chan Ho would sign documents as requested by NCL.

11 Mr Tam Chee Chong, the expert witness appointed by the liquidator, stated in his report that he had interviewed Chan & Chan on 7 March 2008 and obtained confirmation that Chan & Chan had dealt with NCL on *all* of the Company's audit matters. In other words, the management representations relied on by Chan & Chan in expressing their opinion on financial statements came from NCL. Chan & Chan has since destroyed their working papers and, due to the passage of time, could not recall how they had formed their views on the financial statements of the Company.

(ii) Financial years ended 31 March 1999 to 2003

12 The Company changed its auditors from Chan & Chan to Goh Boon Kok & Co ("GBK") after the financial year ended 31 March 1998. GBK prepared the Company's audited statements for the financial years ended 1999 to 2003. GBK was interviewed by Mr Tam on 21 February 2008 and he learned that, apart from sending out audit confirmations, GBK did not carry out any substantive audit work on the balances attributed to the Company's trade creditors.

13 The audited statements for the financial years ended 31 March 1999 and the following financial years up to 2003 reflected the balance due to trade creditors as $691,088, and that amount included FCL's claim. However, the auditors' report to members contained a statement every year to the effect that the auditors had not obtained independent confirmation of that amount. GBK was unable to confirm when the audit confirmations purportedly countersigned by FCL were received from FCL as there was no receipt dates stamped on any of the audit confirmations, except that they were probably received after the date of the respective financial year's report by the auditors to the members. In other words, at no time did GBK have sight of any primary supporting documents, nor had he received some other form of independent confirmation that the balance from trade creditors was correct. Of relevance is GBK's further confirmation that the balance shown for trade creditors was a figure brought forward from the trade creditor ledger and his firm had only worked with the journals and ledgers provided by NCL. The disclosures by GBK (which was not challenged) reduced somewhat the evidential value and weight that would otherwise be normally accorded to audited accounts.

14 OSH had interviewed the former director, Ng Chan Ho, who signed the Company's audited statements for 1997 and 1998 together with WSW. Ng Chan Ho did not know what transpired between FCL and the Company. He merely took instructions from his employer, whom OSH understood to be NCL, and Ng Chan Ho would sign documents as requested by NCL. Separately, NCL deposed in

his affidavit of 23 July 2007 that "Wong Ser Wan was at all times a housewife and [was] not directly involved in the business." It was apparent that the Company's audit was undertaken with documents and information provided by NCL solely. The directors of the Company did not appear to be even aware of the nature of the transactions giving rise to the alleged debt.

15 Mr Sreenivasan urged the court to draw an adverse inference against WSW as she had not filed an affidavit in these proceedings. More to the point, she must be taken to have been aware of what she was signing on behalf of the Company as she had by then a team of lawyers and accountants assisting in her divorce proceedings against NCL. I was not persuaded by the arguments raised here by Mr Sreenivasan. First, there was no evidence that WSW had instructed her then counsel to advise her on this aspect of the Company's affairs. It is noteworthy that even *after* the Company had changed auditors and WSW, allegedly, had a team of lawyers and accountants looking after her interest, it was NCL who provided GBK with "only the journal and ledger books".[note: 1] That showed that the accounts of the Company were still controlled by NCL even after his relationship with WSW broke down. Whilst NCL maintained that FCL no longer had any primary supporting documents, GBK also did not have sight of *any* supporting primary documents from the Company to facilitate the audit of the Company's accounts. Second, as WSW was not actively involved in the business, any affidavit from WSW would have very limited evidential value.

(iii) FCL's audited financial statement for the year ended 31 December 2000

16 In reviewing FCL's audited financial statement for 2000, one would see a provision for doubtful debt of HK$25,922,469 which included the amount due from the Company. Mr Sreenivasan contended that it did not matter that the debt was classified as "doubtful" since that provision did not do away with the Company's liability to pay. Whilst that might be so, the liquidator in discharge of her duty is entitled to go behind the audited accounts to investigate the underlying indebtedness. The position taken by FCL is that all relevant documents had been destroyed as they were more than seven years old.

Ledger entries

17 The ledger entries of the Company that were provided by FCL were patchy, vague and did not make sense without the underlying primary documents, and they were also incomplete. They were irrefragably of limited evidential value. A close inspection of the Company's ledger sheets of the inter-company account between FCL and the Company for the period January 1995 to 1999 revealed several disturbing points. An inter-company account with a related company such as in the case of the Company and FCL is not an uncommon feature. However, as the inter-company account is a reflection of the trading between the two parties, the entries would normally mirror each other such that purchases from FCL are identifiable to purchase invoices and that payments by the Company are easily matched to specific purchase invoices that it relates to. This is to facilitate better control and ease of reconciliation of the accounts. However, this was not the case here. Leaving aside the balance brought forward from 31 December 1994 of $2,637,035.11 owing to FCL of which no details were given, substantially all of the entries could not be matched and a significant number of the entries were entered into the ledger account on the basis of journal entries. Whilst it is normal to expect journal entries in the ledgers of a company, the frequency of the use of journal entries in a ledger account which is primarily a trading account between two related companies does raise some concern. This concern was clearly noted by GBK in his audit report for the financial years ended 31 March 1999 to 2003 respectively. I am here referring to the statement in his audit reports that highlighted the absence of independent confirmation of trade creditors and related party balances.

Analysis of the parties' competing views

18 Given the state of the documentary evidence (see [10] to [17]), and seeing *how* the weight of the evidence could be affected when the creditor and debtor companies were controlled by a single person, Mr Kannan stated that the onus was still on FCL to adduce independent evidence to corroborate NCL's story. He cited *Re Ice-Mack Pte Ltd; AA Valibhoy & Sons (1907) Pte Ltd v Official Receiver* [1989] SLR 876 ("*Re Ice-Mack*") in support of his proposition that since FCL and the Company were related entities, the liquidator is entitled to go behind the audit confirmations and audited accounts. He reminded that FCL's claim arose from supplies of paraffin wax between related companies and as such, the liquidator had rightly put FCL to strict proof of the debt.

19 Mr Kannan drew the court's attention to the acrimonious legal proceedings between NCL and WSW: see, for example, *Wong Ser Wan v Ng Bok Eng Holdings Pte Ltd and Anor* [2004] 4 SLR 365 *("Ng Bok Eng Holdings (HC)")*, *Ng Bok Eng Holdings Pte Ltd and Anor v Wong Ser Wan* [2005] 4 SLR 561 *("Ng Bok Eng Holdings (CA)") and Wong Ser Wan v Ng Cheong Ling* [2006] 1 SLR 416. In the first case Ng Bok Eng Holdings (HC) which was upheld on appeal by the Court of Appeal (see *Ng Bok Eng Holdings (CA)*), NCL was found to have been involved, *inter alia*, in the fraudulent conveyance of a property in Mountbatten Road that was designed to dissipate his asset by taking it out of the pool of matrimonial assets available for division between WSW and NCL. The present set of proceedings, so the arguments developed, was characterised as nothing more than another round of acrimonious courtroom battles between WSW and NCL seeing that NCL, who represented FCL in the proof of debt, was unable to establish, on a balance of probabilities, that there was a real debt provable in the liquidation.

20 Mr Kannan made three separate points in support of his contention that the debt was probably nothing more than a paper liability. First, NCL had not made available the documents required by the liquidator, being documents relevant to the contracts for the supply of paraffin wax and their performance. NCL explained that under Hong Kong law there was no obligation on companies to retain documents beyond seven years. In FCL's case, the documents requested were more than seven years old and they had all been destroyed. Rejecting the veracity of NCL's explanation, Mr Kannan noted that FCL's audited accounts for the financial year ended 31 December 2000 were signed off by the auditors in Hong Kong on 15 October 2004. Until the audit was completed, so he argued, documents in relation to the audit for the financial year ended 31 December 2000 was probably still available as late as 15 October 2004. As to why they were withheld, he offered two explanations: the documents did not substantiate the indebtedness, or that they never existed for there was no debt as alleged. Second, it was "baffling" that FCL made provision to treat the recoverability of the debt as doubtful when all the while the Company was solvent. Third, at the relevant time, NCL and an associated company, Aromate Pte Ltd ("Aromate") were in financial difficulties and it was surprising that the debt was not called upon to help ease the financial burdens of NCL and Aromate. I saw much force in Mr Kannan's three points. For completeness, I should add that I was not persuaded that NCL had sent to Allen & Gledhill (WSW's lawyers in the divorce proceedings) relevant documents that would shed light on the debt.

21 Counsel for FCL, Mr N Sreenivasan, accepted that the onus of proof rested on FCL to establish the debt owing by the Company to FCL; but he contended that on the evidence, FCL had discharged that onus, or that FCL had, at any rate, discharged it to a sufficient extent to shift the evidential burden of proof to the liquidator to show that the debt was not recoverable. He relied in the main on admission and account stated in his arguments (see [23] to [26] below).

22 Mr Sreenivasan opened with an explanation of how the debt arose. According to NCL, it was not possible to sell paraffin wax directly from the People's Republic of China to Taiwan and South Africa because of trade prohibitions. Therefore to overcome the trade prohibitions, Goodwood Ltd (one of the Ng family's Hong Kong registered companies) would buy paraffin wax from Chinese state-

owned companies directly and then sell them to Goodray Ltd (another family-owned Hong Kong registered company). Goodray Ltd would then sell the paraffin wax to FCL who dealt with the customers in Taiwan and South Africa. The Company was used as an intermediary for FCL to put through sales to customers in Taiwan and South Africa. The Company marked up the goods to make a profit, and this arrangement was its only source of revenue. FCL ceased using the Company as its intermediary in or around the middle of 1997. At the point the trading stopped, NCL said that the running balance owing by the Company to FCL was HK$2,832,891.04 (equivalent to S$614,560.51).[note: 2]

23 Mr Sreenivasan maintained that the liquidator ought to have accepted the audited accounts at face value. The accounts in question have been audited and as such weight should be given to them (see *Grand Grain Investment Ltd v Cosimo Borrelli & Anor* [2006] HKCU 872). In addition, he contended that the audit confirmations constituted *prima facie* evidence of FCL's claim citing *Gobind Lalwani v Basco Enterprises Pte Ltd* [1999] 3 SLR 354 and *Capital Realty Pte Ltd v Chip Thye Enterprises (Pte) Ltd* [2000] 4 SLR 548 for that proposition. The audit confirmation by itself was enough to give rise to a cause of action on an account stated ("the accounts stated issue").

24 It was also argued that the accounting documents signed by WSW as director of the Company constituted an admission of the debt by the Company. Mr Sreenivasan relied on ss 17 and 18 of the Evidence Act (Cap 97, 1997 Rev Ed) and *Sarkar's Law of Evidence* (14th Ed, 1993) at 307 to establish the admissions of the Company ("the admissions issue"). The audit confirmations sent out by the Company from 1999 to 2001 were signed by WSW; the Company's audited accounts were signed off by the directors of the Company, *viz* WSW and Ng Chan Ho for the financial years ended 31 March 1997 and 1998 and by WSW and Ng Eharn from 1999 to 2003; the debt in question was reflected in the declaration of solvency signed by WSW and Ng Eharn dated 7 July 2004 and in the Company's management accounts as at 25 July 2004. By 1999, WSW had fallen out with NCL and it was argued that she could no longer claim that she signed documents pertaining to the Company at NCL's behest.

25 Lastly, in relation to the absence of base or primary documents and other records, the argument is that the liquidator should have accepted the audited accounts at face value by reason of the common course of business presumption in s 116 (illustration (f)) of the Evidence Act. In other words, the presumption is that the accounts would have been audited with supporting documents made available to the auditors for that would have happened in the common course of business ("the s 116 issue").

26 Mr Sreenivasan went on to conclude as completely baseless the liquidator's complaint that the proof of debt was unsubstantiated. He stressed that NCL was the person who controlled and was in charge of FCL and the Company. The liquidator should have accepted his evidence as NCL was aware of all the facts relating to the transactions between the Company and FCL. In contrast, WSW had not filed an affidavit to rebut NCL's evidence that WSW was not involved in the Company. This led to Mr Sreenivisan's criticism of the liquidator's approach which he described as one whereby everything NCL had said was treated with "scepticism" and whatever WSW had to say was accepted "at face value". He then went on in the same paragraph to submit that the liquidator's approach appeared to have found "at least tentatively some sympathy" with this court. His criticism of OSH hints of bias against NCL seeing that OSH was appointed by WSW. There was a suggestion that OSH must have been partial towards WSW as she had not called in the Company's loan to WSW. Mr Sreenivasan's criticism which impugns the liquidator's integrity was baseless and inexcusable. By venturing to add that the court was "sympathetic" to the liquidator's one-side approach, counsel was viewed as being imprudent and offensive. Mr Sreenivsan must be familiar with the quasi-judicial role of a liquidator whose approach to the entire process of proof (admission or rejection), just like that of a judicial manager's, must, as explained by Lai Kew Chai J in *ERPIMA SA v Chee Yoh Chuang & Anor*

[1998] 1 SLR 83 at 86, "be entirely as if he is sitting in judgment like a judicial officer. As his role is quasi-judicial, he cannot act unjudicially, capriciously or arbitrarily." The liquidator, as I have elaborated below, is under a duty to examine and investigate the debt. Suffice it to say at this point that the liquidator in discharge of his duty is not bound by estoppels against the company or an account stated with the company and as such is entitled to go behind the audited accounts and audit confirmations as was the case here.

27 I now turn to consider in detail each of the matters canvassed by Mr Sreenivasan in [23] to [25] above. It is common ground that the court hears the application to reverse the liquidator's adjudication of a proof of debt *de novo* (see *Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore Pte Ltd (in liquidation)* [2001] 3 SLR 437). On the hearing of the application *de novo*, FCL has to show that the liquidator's decision was wrong as there was a real debt provable in liquidation (see *Westpac Banking Corporation and Others v Totterdell and Another* [1997] 142 FLR 137). It was conceded in the course of the hearing by Mr Kannan that he was not advocating a higher standard of proof, accepting without reservation the general proposition that the burden of proof is on the plaintiff to establish, on a balance of probabilities, the existence of the debt in respect of which it seeks to prove in liquidation (see *The Trustee in Bankruptcy of Lo Siu Fai Louis v Toohey* [2005] 4 HKC 51). Consequently, a failure to provide evidence and documents supporting the proof by the proving creditor justifies the liquidator in rejecting the proof (see *Bellmex International Ltd (in liquidation) v British American Tobacco Ltd and Anor* [2001] 1 BCLC 91 at 97).

28 The real issue in these proceedings is whether the liability referred to in the proof of debt is a true liability of the Company enforceable against it. The onus of proof is on FCL to show that there was a real debt provable in liquidation. Mr Timothy James Reid's conclusions as the expert appointed by FCL are summarised as follows:

(a) The liquidator paid little regard to the fact that the directors of the Company have stated that the Audited Financial Statements of the Company which record the debt to FCL represent the true and fair view of the state of affairs of the Company.

(b) The liquidator placed undue weight on the Company's auditor's statement that there was no independent verification of the debt. Such qualification, in Mr Reid's view, cannot diminish the clear statements and declarations of the directors concerning the truth and fairness of the accounts of the Company.

(c) A doubtful debt provision made by FCL in its Audited Financial Statements for the year ended 31 December 2000 is irrelevant as such provision is made on the basis or assessment of recoverability and not the legal obligation to make payment.

(d) As an experienced liquidator, Mr Reid would have accepted the proof of debt submitted by FCL subject upon obtaining a formal declaration from FCL.

29 Mr Reid also highlighted the following points:

(a) The debt was shown in the declaration of solvency signed by WSW and the other director on 31 March 2004;

(b) The debt was shown in the Liquidator's Account of Receipts and Payments.

(c) The debt was shown in the audited accounts of the Company and that the auditors for 1997 and 1998 (the years with the last significant trading activities) made no commentary or

qualification on the trade creditors with the directors also signing off the accounts as true and fair.

(d) Five audit confirmations, with the last three (dated 22 November 2000, 21 October 2001 and 4 April 2002) signed by WSW, were sent by the Company to FCL.

(e) The debt was recorded as a receivable in FCL's audited accounts.

(f) WSW as the majority shareholder of the Company stands to benefit from the liquidator's rejection of the proof of debt.

30 In contrast, Mr Tam, for the liquidator, opined that the liquidator was entitled to look behind the audited accounts and audit confirmations. He agreed with the liquidator that there were good grounds for not accepting the audited accounts as evidence of a debt due from the Company to FCL in the amount indicated in those accounts and audit confirmations.

31 In the end, Mr Reid's opinion was discounted by the court as it did not accord with the role of the liquidator in the proof process and the liquidator's duty to distribute the assets in his hands or under his control among the persons truly entitled. Similarly, Mr Sreenivasan's submissions on the three issues - admissions, the account stated and s 116 – were untenable and without merit. As explained below, in considering whether or not to admit or reject a proof of debt, the liquidator is not bound by the audited accounts and audit confirmations, and he is entitled to go behind them to form his own conclusions as to the existence or otherwise of the debt (see [33] to [35] below). Neither is the liquidator bound to assume that all relevant documents were available when the accounts were prepared (see [36] and [39] below). Consequently, the liquidator is entitled to require satisfactory evidence of the debt proved for. For completeness, I must state that the liquidator's statutory declaration of 23 August 2007 which continued to provide for the debt even after OSH had rejected the proof of debt, whether it was made in error or not, did not adversely affect the conclusions reached here.

32 It must be remembered that the role of the liquidator in the proof process and his duty to distribute the assets in his hands or under his control among the persons truly entitled applies to all forms of winding up of solvent and insolvent companies. In the words of Viscount Simonds in *Government of India v Taylor* [1955] AC 491 at 509:

> I conceive that it is the duty of the liquidator to discharge out of the assets in his hands those claims which are legally enforceable, and to hand over any surplus to the contributories. I find no words which vest in him a discretion to meet claims which are not legally enforceable. It will be remembered that, so far as is relevant for this purpose, the law is the same whether the winding up is voluntary or by the court, whether the company is solvent or insolvent, and that an additional purpose of a winding up is to secure that creditors who have enforceable claims shall be treated equally, subject only to the priorities for which the statute provides.

33 It is trite law that the liquidator has a duty to examine and investigate every proof of debt and the grounds of the debt. Rule 92 of the Companies (Winding-Up) Rules provides the "[t]he liquidator shall examine every proof of debt lodged with him and the grounds of the debt" and may call for "further evidence in support of it". To that end, the liquidator may go behind, for instance, the covenant in a mortgage and the account stated and to require satisfactory evidence before admitting the proof. The law recognises that the liquidator is in the same position as the trustee in bankruptcy (see *Re Adam Holdings Ltd* [1985] 2 HKC 608 at 613 following *Re Home and Colonial Insurance Co Ltd* [1930] 1 Ch 102), and since the liquidator is not generally bound by estoppels against the company or

an account stated with the company, he may properly reject a proof of debt if the liability, though enforceable against the company, unjustly prejudices the interests of the creditors or contributories of the assets available for distribution (see *Rosseau v Jay-O-Bees* [2004] NSWSC 818 at [34]). The English Court of Appeal approved and adopted Bingham J's judgment in *Re van Laun, ex p Chatterton* [1907] 1 KB 155. Bingham J at 162 stated as follows:

> The trustee's right and duty when examining a proof for the purpose of the admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against [the trustee].

3 4 *Re van Laun, ex p Chatterton* was a case where there were a series of accounts stated between the bankrupt and the creditors. The bankrupt had assented to his solicitor's bills being charged and agreed to their amounts. Plainly, he would have been estopped from denying them as they were accounts stated and was liable upon those accounts. Buckley LJ ([1907] 2 KB 23 at 31 and 32) stated:

> Whether the creditor alleges that there has resulted, and that he relies upon an account stated, or a covenant entered into by the debtor, or a judgment which he has obtained, the principle, I apprehend, is exactly the same, and is this – that the trustee is not the person who has stated the account, is not the covenantor, is not the judgment debtor, but is entitled to say, "It is my business to see that those who seek to rank against this estate are persons who are really creditors of that estate."
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> …
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> I think the trustee is entitled in every case, whether there be an account stated, covenant or judgment, to say to the creditor who comes into the bankruptcy to prove, "Very well, you say you are a creditor; make out your case as if there was no account stated or no covenant or no judgment. Satisfy me that the amount for which you say you are creditor is right". That, of course must be done reasonably.

35 The reason that the liquidator is not necessarily bound by an estoppel, or an account stated, or even a judgment against the company, is that the liquidator was not the person who defaulted on the judgment or engaged in the conduct that led to the estoppel being created or account stated. If an estoppel or a judgment or other binding obligation such as an account stated were allowed to operate against the liquidator then the liquidator would be unable to exercise his or her duty to consider the true liabilities of the company (see Andrew R Keay in *McPherson's Law of Company Liquidation,* Sweet & Maxwell, 2001 at 705).

36 *Re Adam Holdings* ([33] *supra*) illustrates the principles outlined above. In that case, the debtor company, Adam Holdings, was wound up. The creditor who filed a proof of debt was a subsidiary of Adam Holdings. The creditor submitted as evidence the ledgers of the various companies within the group, draft accounts of the applicant and a letter from Adam Holdings to the creditor enclosing an account prepared by auditors requesting confirmation of the balance due to the creditor. The primary source documents, as was the case here, had either been lost or destroyed. Counsel for the creditor argued that all available evidence had already been placed before the Official Receiver and urged for a rebuttable presumption that the documents established the validity of the claim. Jones J held (at 614 and 615):

> [A] creditor is not entitled to say this is all the evidence that I have and because the best evidence has been lost or destroyed my claim should be admitted. The Official Receiver is not obliged to assume that when the accounts were prepared all the vouchers and other documents were available to the accountants. If this submission were to be accepted the Official Receiver's powers of investigation would be severely curtailed. …
>
> The case for the applicant is essentially based upon the accounts prepared by the three firms of accountants. … In order to prepare the accounts the accountants must apart from documentary evidence produced, necessarily rely upon the information and explanations given to them by the officers of the company by whom they were instructed. The Official Receiver is not bound by the accounts and is entitled to go behind them to form his own conclusion as to the truth …

37 Likewise, nothing said by Mr Sreenivasan and Mr Reid (see [28] and [29]) would affect or defeat the liquidator's entitlement in these proceedings to go behind an account stated or admissions, if any, in order to ascertain the true liability. By the same token, the presumption in s 116 of the Evidence Act (even if it applies) also does not affect the liquidator in his role as an adversary in these proceedings.

38 On the admissions issue raised by Mr Sreenivasan, the same argument was attempted by counsel for the creditor in *Re Adam Holdings Ltd* at 613 where she contended that a letter from the debtor to the creditor constituted proof of an admission of the debt. In that connection, Jones J rejected the argument and held (at 614) that "whether or not the letter amounts to an admission is irrelevant for it does not affect the trustee's [and that includes the liquidator's] power to admit or reject proofs of debt." As such, the liquidator was not bound by the admission (at 615).

39 Jones J rightly observed (at 614) that the liquidator is not obliged to assume that when the accounts were prepared all the vouchers and other documents were available to the accountants. He reasoned that if this "submission were to be accepted the [liquidator's] powers of investigation would be severely curtailed". In the context of the presumption that was raised in argument, namely *omnia praesumuntur rite esse acta* (an inference which might reasonably be drawn when an intention to do some formal act was established or when the evidence was consistent with that intention having been carried into effect in a proper way), Jones J said that the presumption did not apply to a proof of debt because "the [liquidator] is under a public duty to investigate claims, and to be satisfied on the evidence that there is a genuine debt due."

40 In summary, the documents submitted call for explanation. Apart from the ledger sheets, there were no other documents emanating from and involving both entities that would afford or support details of the transactions entered into the ledger sheets. Little could be derived from NCL's response for further information. NCL's claim that the Company was used as a conduit for trade between FCL and its related companies with Taiwan and South Africa ended in mid-1997, was not borne out by an examination of the records that purportedly relate to some of the transactions. If trading had ceased in mid-1997, there was no explanation as to why there were still sales of $82,653 and expenses amounting to $31,253 incurred in the financial year ended 31 March 1999.[note: 3] Notably, NCL in his affidavit stated that WSW was at all times not directly involved in the business and it only leaves NCL still orchestrating operations in the Company. The absence of base or primary accounting documents was significant. It was because of their materiality that the auditor exercised his judgment and deemed it necessary to make a statement in his audit report that he was unable to obtain independent confirmation of trade creditors and related party balances. This is a factor that has to be taken into account in evaluating the weight to be given to audited accounts. The statement puts the reader of the financial statements on notice. Once on notice, any reasonable person in the position of the liquidator would carry out other checks and enquiries to substantiate the balance.

41 It is not surprising that in the light of the limited and patchy evidence before this court, it is not possible to extract an accurate and complete picture of the actual and prospective liabilities of both the businesses and family side of NCL. However, a pattern is discernable from the evidence before the court. Related party balances feature prominently in the balance sheets of the companies. With the limitation of details, it is difficult to determine how the balances were derived except to accept NCL's assertions that they were due to trading. With the auditors highlighting in the audit opinion the inadequacy and/or lack of information and documentation to independently verify the balances, it would be imprudent to just accept what NCL says. By way of example, in the account ledger sheets of the Company with FCL, there are two journal entries referenced J17 in December 1997 in the Company's ledger attributable to Aromate for amounts of $2,022,963.35 and $10,000 respectively.[note: 4]At a stroke, these entries have the effect of reducing the then outstanding balance owing to FCL of $2,613,652.56 to $580,689.21. No explanation was afforded as to the reasons for the set-off or for that matter documents showing FCL's acquiescence to the arrangement as the debt has been substantially reduced. This was not surprising as FCL's audited financial statements for the year ended 31 December 2000 revealed that the Hong Kong auditors, Gary Yam & Chan, had stated that they were unable to form their opinion as to whether the financial statements show a true and fair view and whether the financial statements have been properly prepared in accordance with the Hong Kong Companies Ordinance.

42 NCL stated in his affidavit that as part of a family business, the Taiwan and South African markets were his territory and for him to deal with as he saw fit. The inter-company deals between FCL and the Company was characterised as a supplier and middleman relationship. However, the reality is far more complex. Indeed, NCL was one of the principal architects of the group of trading companies if not the mastermind. In *Wong Ser Wan v Ng Cheong Ling* (*supra* [19]), it appeared that Aromate was a major hub in a web of companies and was used to pay for the living expenses of the family and they were booked under NCL's current account. The source of the funds for the family's expenditure was indisputably the businesses. Aromate's footprint could be found in both the Company and FCL and it would appear that NCL made use of the web of companies like an ATM network to withdraw funds as and when required.

Result

43 At the conclusion of the hearing, evidence to corroborate FCL's claim was found to be wanting. Accordingly, FCL had not established, on a balance of probabilities, the debt proved for. The application was therefore dismissed with costs.

[note: 1]Affidavit of Ng Cheong Ling filed on 23 July 2007 at 118

[note: 2]Affidavit of Ng Cheong Ling filed on 23 July 2007 para 7

[note: 3]Affidavit of Ong Soo Hwa filed 28/9/07 p 193 p 193

[note: 4]Affidavit of Ong Soo Hwa exhibit marked "OSH 2".