Chimbusco International Petroleum (Singapore) Pte Ltd *v* Jalalludin bin Abdullah and other matters
[2013] SGHC 55

Case Number	: Bankruptcy OS No 752 of 2012 (Registrar's Appeal No 263 and 284 of 2012), Bankruptcy OS No 959 of 2012 (Registrar's Appeal No 264 and 283 of 2012), Bankruptcy OS No 961 of 2012 (Registrar's Appeal No 265 and 285 of 2012), Companies Winding Up OS No 89 of 2012, Companies Winding Up OS No 90 of 2012 and Companies Winding Up OS No 91 of 2012
Decision Date	: 28 February 2013
Tribunal/Court	: High Court
Coram	: Vinodh Coomaraswamy JC
Counsel Name(s)	: Ms Wendy Tan and Mr Tony Tan (Stamford Law Corporation) for the plaintiff; Mr Andre Maniam SC and Mr Derek Tan (WongPartnership LLP) for the defendants; Ms Karen Ang (Insolvency & Public Trustee's Office) for the Official Receiver.
Parties	: Chimbusco International Petroleum (Singapore) Pte Ltd — Jalalludin bin Abdullah

Insolvency Law – Bankruptcy – Bankruptcy Order

Insolvency Law – Winding Up – Winding Up Order

28 February 2013

Vinodh Coomaraswamy JC:

Introduction

1 The question before me is whether I should allow, dismiss or stay on conditions – and if so on what conditions – insolvency proceedings which the plaintiff, Chimbusco International Petroleum (Singapore) ("Chimbusco") has brought against six defendants. The issue arises because the plaintiff does not have a judgment which determines that the defendants are indebted to it.

2 Chimbusco trades oil. It had mutual dealings with a company known as Gas Trade (S) Pte Ltd ("Gas Trade"). Those dealings gave rise to mutual credits and mutual debits. They maintained a running account. As at 29 February 2012, the net position between the two arising was that Gas Trade owed Chimbusco US$13,015,342.03 [note: 1]. This net position arose from dealings between August 2011 and December 2011.

3 Chimbusco obviously had a direct claim against Gas Trade for this debt. In addition, Chimbusco had the benefit of personal and corporate guarantees for this debt from ten guarantors: three individuals and seven companies. But Chimbusco did not seek to obtain a judgment, either that Gas Trade was liable to Chimbusco for this debt as principal debtor or that any of the 10 guarantors was liable to Chimbusco for this debt under their guarantees.

4 On 3 April 2012, Chimbusco commenced winding up proceedings against two of the ten guarantors. On 4 April 2012, it commenced bankruptcy proceedings against one guarantor. On 16 April 2012 and 17 April 2012, it commenced winding up proceedings against two more guarantors. On 25 April 2012 all of the ten guarantors together with Gas Trade initiated Suit No 347 of 2012 ("S347")

against Chimbusco. The purpose of S347 was to secure a judicial determination that Chimbusco was not entitled to pursue Gas Trade or the guarantors. On 2 May 2012, Chimbusco commenced bankruptcy proceedings against two more guarantors. And on 31 May 2012, it commenced winding up proceedings against the final three guarantors as well as against the principal debtor, Gas Trade.

5 On 1 June 2012, Philip Pillai J ordered that four of the corporate guarantors be wound up. They were wound up not because Pillai J found that they owed money to Chimbusco. They were wound up because they admitted that they were insolvent. On 6 July 2012, Lai Siu Chiu J ordered that Gas Trade, the principal debtor, be wound up.

6 The six remaining insolvency proceedings came before me. Three of them came before me on appeal from an Assistant Registrar exercising bankruptcy jurisdiction. The other three came before me at first instance as winding up proceedings against the three remaining corporate guarantors. The guarantors invited me to dismiss all six of these insolvency proceedings. Chimbusco invited me to make six insolvency orders. I did not do either. Instead, I stayed all six proceedings on condition. The condition was that the guarantors provide security to Chimbusco for the debt claimed against them within three weeks of my order. The deadline was 14 September 2012.

7 On 18 September 2012, the six insolvency proceedings came before me again. All six guarantors had failed to provide any security at all. The papers in the insolvency proceedings were in order. Chimbusco submitted that I should make the insolvency orders which they sought. There was no impediment to my doing so. I therefore adjudicated the three individual guarantors bankrupt and ordered that the three corporate guarantors be wound up, all unconditionally.

8 Two of the three individual guarantors who appealed to me and two of the three corporate guarantors who appeared before me at first instance have now appealed against my decision. I now set out my reasons.

Factual background

Three documents executed on or around 15 July 2011

9 Chimbusco and Gas Trade's mutual business dealings and running account started in or around August 2010. As a result of these dealings, Gas Trade owed Chimbusco a net debt. Chimbusco was concerned about getting paid. To address that concern, on or about 15 July 2011, the parties before me executed three documents.

10 The first document was an undated instalment payment agreement. In this agreement, Gas Trade acknowledged its indebtedness to Chimbusco. This agreement permitted Gas Trade to repay its debt to Chimbusco by monthly instalments over time in consideration for Chimbusco refraining from forthwith commencing legal proceedings against Gas Trade. Gas Trade also agreed to pay interest on its debt at 2.5% per annum from 1 July 2011 onwards.

11 The second document was a joint and several corporate guarantee dated 15 July 2011. It was executed by all seven corporate guarantors. It secured all amounts, debts and liabilities due and owing by Gas Trade to Chimbusco plus interest and costs. The corporate guarantors also undertook, as a continuing obligation, to discharge all obligations and liabilities which were then or should at any time be owing from Gas Trade to Chimbusco [note: 2]. The corporate guarantees are unlimited in amount. All seven of the corporate guarantors are affiliated with Gas Trade through common ownership or common control.

12 Chimbusco's insolvency proceedings against three of those seven corporate guarantors came before me. They are:

(a) Paradigm Shipping Pte Ltd ("Paradigm Shipping"), the defendant in Companies Winding Up Originating Summons ("CWU") No 89 of 2012;

(b) Hir Huat Trading Pte Ltd ("Hir Huat"), the defendant in CWU 90 of 2012; and

(c) Peta Marine Services Pte Ltd ("Peta Marine"), the defendant in CWU 91 of 2012.

13 The third document was a joint and several personal guarantee dated 15 July 2011 executed by three individual guarantors. These guarantees are limited in amount: they limit the personal guarantor's joint and several liability to US$4 million plus interest and costs. [note: 3]

14 The three personal guarantors are directors of one or more of the seven corporate guarantors. They are:

(a) Mr Mohd Zain Bin Abdullah ("Mr Zain"), the defendant in B961 of 2012.

(b) Mr Jalalludin Bin Abdullah ("Mr Jalalludin"), the defendant in B959 of 2012.

(c) Mr Mohammad Bin Abdul Rahman ("Mr Mohammad"), the defendant in B752 of 2012.

15 Chimbusco's insolvency proceedings against the corporate guarantors and the personal guarantors are founded on their respective guarantees. Each of the two guarantees had a copy of Gas Trade's instalment payment agreement physically annexed to it.

16 After these three documents were executed, Chimbusco and Gas Trade continued their mutual dealings. As at 29 February 2012, Gas Trade owed Chimbusco a net debt of US$13,015,342.03, [note: 4] including interest. This debt arose from mutual dealings between August and December 2011.

Chimbusco demands payment

17 On 29 February 2012, Chimbusco demanded in writing payment of this debt from Gas Trade as principal debtor and from all ten of Gas Trade's guarantors. They did not deny that they were liable to pay. But they did not pay.

18 On various dates in March 2012, Chimbusco served statutory demands for payment of this debt on all seven corporate guarantors pursuant to s 254(2)(a) of the Companies Act (Cap 50, 2006 Rev Ed). [note: 5] They still did not deny that they were liable. But they still did not pay.

19 On various dates, also in March 2012, Chimbusco served statutory demands on the personal guarantors pursuant to s 62(a) of the Bankruptcy Act (Cap 20, 2009 Rev Ed). These demands were in the sum of US$4,202,572.12 [note: 6] because of the limit of US$4 million plus interest and costs under the personal guarantees. The personal guarantors too did not pay. Nor did the personal guarantors make any attempt to set aside the statutory demands under r 97(1) of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) on the grounds set out in r 98(2)(b): that they "disputed [the debt] on grounds which appear . . . to be substantial". Nor did the personal guarantors dispute in any other way that they were liable for the debt which Chimbusco demanded.

20 Chimbusco then applied to wind up the principal debtor and the seven corporate guarantors and to bankrupt the three personal guarantors. I have detailed the chronology of these proceedings at [4]. It was only on 25 April 2012 that the guarantors raised any dispute at all about their liability. They did so when Gas Trade and all ten guarantors commenced S347 against Chimbusco.

Bankruptcy applications heard at first instance

21 Assistant Registrar Elaine Chew ("the AR") heard the three bankruptcy applications on 3 July 2012. She found a number of triable issues of fact and law underlying the debt which formed the basis of the bankruptcy applications. So she did not make bankruptcy orders. But she found also a number of unsatisfactory points in the personal guarantors' case. [note: 7] She concluded that that the personal guarantors had only barely met the threshold of showing a substantial dispute as to the underlying debt. Therefore, she did not dismiss the bankruptcy applications either. Instead, she ordered that the bankruptcy applications be stayed pending the resolution of S347. But she imposed a condition: each personal guarantor was to furnish security of US$1 million to Chimbusco within three weeks. If they did not, the stay would lapse. The court could and would then make bankruptcy orders against the personal guarantors.

All parties appeal

22 All parties appealed against the AR's decision. Chimbusco appealed by way of Registrar's Appeals ("RA") 283, 284 and 285 of 2012. Chimbusco argued that the AR was wrong to have accepted that there were triable issues and contended that the AR should have made the bankruptcy orders outright. The personal guarantors appealed by way of RA No 263, 264 and 265 of 2012. They argued that the AR ought to have dismissed the bankruptcy applications outright. Alternatively, they argued that she was wrong to have imposed conditions on their stay.

23 All six appeals were fixed for hearing before me. I heard them together with Chimbusco's winding up applications against the last three corporate guarantors: Paradigm Shipping, Hir Huat and Peta Marine. After hearing the parties' submissions, I dismissed the personal guarantors' three appeals with costs. I allowed Chimbusco's three appeals in part. I ordered as follows:

(a) The personal guarantors would have a stay of the bankruptcy applications pending the outcome of S347 if they provided security in the full amount – US$4,202,572.12 – that was demanded from them in the statutory demands served on them.

(b) The personal guarantors were to provide that security jointly.

(c) They were to furnish the security within three weeks.

24 My order in effect gave the personal guarantors from 3 July 2012 up to 14 September 2012 to come up with the security, albeit now in the sum of US$4.2 million instead of US$3 million as had been ordered by the AR.

25 I made substantially the same order in the three winding up applications against the three corporate guarantors. The corporate guarantors would have a stay of the winding up applications pending the outcome of S347 if they provided security for the full amount which Chimbusco claimed against them as at the date of the winding up applications – US$13,015,342.03 – within 21 days. To ensure that Chimbusco was not oversecured, I permitted the corporate guarantors to deduct from their security any security which the personal guarantors may provide.

Guarantors fail to provide security

26 None of the guarantors provided any security.

27 On 18 September 2012, the parties appeared before me again on the guarantors' application for further arguments. I heard the further arguments. I affirmed my earlier decision. Counsel for Chimbusco invited me to make the bankruptcy and winding up orders. There was nothing to stop me from doing so. The guarantors had failed to provide security within the time I had stipulated. The Official Receiver confirmed that the papers were in order. But counsel for the guarantors indicated that he had instructions to appeal to the Court of Appeal against my decision of 24 August 2012 and to seek from me a stay pending appeal in respect of four of the six guarantors before me. They were Mr Jalalludin, Mr Zain, Paradigm Shipping and Hir Huat. I fixed that stay application to be heard on 20 September 2012.

28 Counsel for the guarantors further indicated that he had no instructions to appeal in respect of Mr Mohammad and Peta Marine or to seek a stay of the insolvency proceedings against them. I therefore adjudicated Mr Mohammad bankrupt in B752 of 2012 and ordered that Peta Marine be wound up in CWU 91 of 2012.

29 On 19 September 2012, I heard arguments on the remaining four guarantors' application for a stay pending appeal. I declined the stay. Counsel for the guarantors then indicated that he had instructions to renew his application for a stay before the Court of Appeal on an urgent basis. I therefore adjourned the four remaining insolvency proceedings briefly to permit him to make that application.

30 On the morning of 21 September 2012, Lai Siu Chiu J, exercising the powers of the Court of Appeal in an interlocutory matter, dismissed the four guarantors' renewed applications for a stay pending appeal. In the afternoon of 21 September 2012 the matters came back before me. There being no stay, I ordered that Hir Huat be wound up in CWU 90 of 2012, I adjudicated Mr Zain bankrupt in B961 of 2012, I ordered that Paradigm Shipping be wound up in CWU 89 of 2012 and I adjudicated Mr Jalalludin bankrupt in B959 of 2012.

31 These four guarantors are now the appellants in CA 115, 116, 117 and 118 of 2012 respectively.

The legal principles

32 The question I had to address was whether on the material before me, I should in respect of each insolvency proceeding: (i) make unconditional insolvency orders; (ii) dismiss unconditionally the insolvency proceedings; or (iii) stay the insolvency proceedings pending the outcome of S347, with or without conditions.

Summary judgment test of triable issue applies in insolvency

33 Whether the responding party owes the initiating party money is a question which a court has to determine both in a civil suit for money as well as in insolvency proceedings. But there are differences between the two types of proceedings. Those differences affect the context in which a court considers that question in each type of proceedings. Does that make a difference to the substantive test which the court applies to determine the issue?

34 The answer is no. The Court of Appeal in in *Pacific Recreation Pte Ltd v S Y Technology Inc and*

another appeal [2008] 2 SLR(R) 491 ("*Pacific Recreation")* recognised the distinction between civil proceedings and insolvency proceedings. It accepted that a winding-up order was a "draconian order" to make (at [16]-[17]). But it nevertheless held that:

(a) a judge hearing winding up proceedings is entitled to evaluate the strength of the evidence presented by a company resisting the proceedings on the grounds that it is not indebted to the initiating party; and

(b) the standard for evaluating that evidence and determining whether the company ought to be wound up is "no more than that for resisting a summary judgment application, *ie*, the debtor-company need only raise triable issues in order to obtain a stay or dismissal of the winding-up application" (at [23]).

Civil proceedings compared to insolvency proceedings

35 Despite the differences between the two types of proceedings, that must be correct. The substantive purpose of a civil suit is to adjudicate on the merits the dispute between plaintiff and defendant over their private rights. The default rule is that that adjudication will take place deploying the unabridged civil process including discovery and cross-examination at trial. That civil process can be abridged in suitable cases by way of exception to that default rule. The plaintiff will be entitled to take advantage of the abridged process and secure judgment by that means if it can show that there are no triable issues. Whichever method of adjudication is found appropriate, the civil suit's substantive endpoint is a formal adjudication of the parties' rights which is final subject only to appeal. Once the civil court has adjudicated on the civil suit, it will go on to assist the victor to receive and retain the fruits of its victory for its individual benefit.

36 Insolvency proceedings are not about individual benefit. Indeed, one of the fundamental objectives of insolvency proceedings is to *preclude* action for individual benefit. Where an entity's liabilities exceed its assets or where it is unable to pay its debts in full as they fall due, it is insolvent. It is then in the collective interest of all of the insolvent's creditors to substitute for piecemeal individual action an orderly process for conserving, collecting, realising and distributing its assets *pari passu*. Insolvency law comprises the legal rules applicable to initiate and carry out that orderly process. Where a party initiates insolvency proceedings, there are only two questions of fact for the insolvency court: (a) does the initiating party have the standing required by the insolvency proceedings it invokes; and (b) is the responding party insolvent. If the answer to both questions is yes, the court will almost invariably make an insolvency order. If it does, the insolvent's assets will be externally administered for the collective benefit of all of its creditors taken as a whole and not for any particular creditor's benefit.

37 To put it briefly:

(a) Civil proceedings determine private rights for private benefit. Insolvency proceedings alter status for collective benefit. If the court makes an insolvency order against a debtor, it ceases as against the world to be an autonomous economic entity. And if the insolvent is a company, it will eventually cease to exist even as a legal entity.

(b) In civil proceedings to recover money, determining whether the defendant indeed owes money to the plaintiff is the ultimate substantive objective of the proceedings. That question also arises when a civil court has to consider whether to abridge the ordinary civil process by which the court achieves that substantive object. In insolvency proceedings, that issue is a fundamental threshold issue which determines standing.

38 Where a creditor commences insolvency proceedings after having had its rights adjudicated in a civil suit, its standing to bring insolvency proceedings is irrefutably established: the debtor is estopped from disputing the debt on which the creditor relies for his standing. But where a putative creditor commences insolvency proceedings without having had its rights adjudicated in a civil suit, the putative debtor remains able to dispute the threshold issue of whether there is in fact a debt. And in insolvency proceedings, there is for all practical purposes only an abridged procedure – on affidavits alone – to determine this threshold issue.

39 In this situation, it is right that the insolvency court should not *automatically* refer the parties to the civil court without evaluating the merits of the dispute before it. If, on evaluating the same evidence, the civil court would find it appropriate to determine the parties' rights by the summary judgment procedure, it would be a waste of time and money to refer the parties to the civil court. The insolvency court is in just as good a position as the civil court to determine whether the putative debtor is indeed a debtor, even though the question is posed in a different context and for a different purpose. And in corporate insolvency, thought not in personal insolvency, where a company raises disputes which would, in a civil court, result in a summary judgment for the plaintiff, dismissing the insolvency proceedings prejudices the company's general body of creditors in at least one obvious way. It sets at large the commencement of the relation back period during which a liquidator can reverse vulnerable pre-insolvency transactions for the collective benefit of all creditors.

40 So the applicable standard for determining whether corporate insolvency proceedings should continue in the absence of an adjudication of the initiating party's rights is, rightly, whether the plaintiff can show that there are no triable issues, just as in summary judgment proceedings under O14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court").

41 The position is identical when it comes to personal insolvency. In bankruptcy proceedings, r 127(b) of the Bankruptcy Rules provides that the court "shall dismiss" a creditor's bankruptcy application where the statutory demand upon which the application is based is such that the court would have set it aside had the debtor made an application under r 97(1) of the Bankruptcy Rules. In order to set aside a statutory demand under r 97(1), a debtor need only show that the debt is disputed on grounds which appear to the court to be substantial (see r 98(2)(b) of the Bankruptcy Rules). This too has been interpreted to mean that there must be "some real doubt about the question, thus, a triable issue, upon which further evidence or arguments were required" (see *Wee Soon Kim Anthony v Lim Chor Pee* [2006] 2 SLR(R) 370 ("*Anthony Wee*") at [19]).

42 It appears to me, with diffidence, that all of this must be right. Both conceptually and pragmatically, it cannot be the case that a creditor or a debtor gains an advantage or suffers a disadvantage on the legal test to be satisfied in addressing the same question of fact simply because of the nature of the proceedings in which that question is raised or based on whether it is a natural person or a company.

Three observations

43 I must make three observations. The first relates to the burden of proof. In civil proceedings, the burden rests on the plaintiff to establish its case. This is so even if it invokes the summary judgment procedure. A summary judgment is – despite being summary – still a judgment on the merits. And the legal burden of proof on the merits remains always with a plaintiff. A plaintiff cannot reverse or avoid the legal burden of proof it would bear at trial by the expedient of applying for summary judgment. So too a plaintiff cannot reverse or avoid the legal burden of proof it would bear in a civil suit by commencing insolvency proceedings. So the legal burden of proof remains on the plaintiff even in insolvency proceedings.

44 There is another reason why the legal burden must rest on the applicant in insolvency proceedings. When a putative debtor alleges in insolvency proceedings that it owes no debt to the applicant – no matter the procedural form in which the challenge is raised – the debtor is in fact challenging the applicant's very standing to bring the proceedings. On that fundamental issue too, the legal burden ought to rest on the plaintiff. So while it is common to speak in the context of both civil proceedings and insolvency proceedings of a *defendant* having to establish triable issues, that must be taken as a reference to an *evidential* burden. Once the defendant has satisfied the *evidential* burden of raising one or more triable issues, the plaintiff remains obliged to discharge his legal burden to show that each issue is not triable.

45 The second observation is that the legal burden on the plaintiff is sometimes spoken of as being a burden to establish its entitlement beyond reasonable doubt. Counsel for the guarantors used that term in submissions. [note: 8] From the defendant's perspective, that would mean that all that the defendant must do to discharge its (evidential) burden is to raise a reasonable doubt. I do not consider it helpful to speak in terms of the criminal standard of proof in a civil case or in insolvency proceedings. The concept of a triable issue is well-established in the law relating to summary judgment applications. It can be transposed and applied quite easily in insolvency proceedings. It does not need embellishment. That is all the more so when that embellishment is apt to confuse instead of clarify.

46 The final observation is that a court must retain a residual discretion to dismiss insolvency proceedings even if it is satisfied that there are no triable issues. In the case of bankruptcy proceedings, this is clear from s 65(2)(e) of the Bankruptcy Act: the court may dismiss a bankruptcy application if "it is satisfied for other sufficient cause no order ought to be made thereon". In the case of winding up proceedings, a court always retains a discretion whether to make an order even if the plaintiff's debt and the defendant's insolvency are established as fact. This is analogous to the power of a civil court hearing a summary judgment application to decline to adopt the summary procedure if it feels that "there ought for some other reason to be a trial" (see order 14, r 3 of the Rules of Court). Again, transposing the concept from the summary judgment jurisprudence is helpful. Although the circumstances will be rare where this discretion will be exercised in insolvency proceedings, the discretion does exist.

47 How does a debtor discharge the evidential burden of showing a triable issue over the debt which the creditor relies upon? It is insufficient for the debtor merely to allege that a dispute exists. The court is entitled to – and in a sense obliged to – evaluate the evidence brought forward by the parties and determine whether there exists a dispute which involves to a substantial extent disputed questions of fact which requires a trial (see *Pacific Recreation* at [17] and [19] in relation to winding up applications and *Anthony Wee* at [18] in relation to bankruptcy applications).

Court has power to stay bankruptcy proceedings

48 Before I move on to discuss my reasons for granting the guarantors a stay of the insolvency proceedings and for imposing conditions on that stay, I should establish the source of the Court's power to stay a winding up application and a bankruptcy application whether unconditionally or on terms.

49 It was common ground before me that the Court has the power to stay a winding up application on condition under s 257(1) and s257(2)(f) of the Companies Act (Cap 50, Rev Ed 2006) ("Companies Act"). I therefore need say nothing further about the power to stay winding up proceedings.

50 As regards a bankruptcy application, the guarantors initially submitted that if the court finds

that the debt on which a statutory demand is based is disputed on grounds which appear to the court to be substantial, the court is obliged to set aside the statutory demand and dismiss the bankruptcy application. The guarantors rely on *Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 2 SLR(R) 31 ("*Wong Kwei Cheong*").

51 Rule 127 of the Bankruptcy Rules provides as follows:

> **Dismissal of bankruptcy application**
>
> **127**. The court ***shall dismiss*** a creditor's bankruptcy application where —
>
> …
>
> (b) the statutory demand upon which the application is based is such that the court would have set it aside had the debtor made an application under rule 97(1);…
>
> [emphasis added]

Rules 97 and 98 of the Bankruptcy Rules provide as follows:

> **Application to set aside statutory demand**
>
> **97**.—(1) Subject to paragraph (2), the debtor who has been served with a statutory demand may —
>
> (a) within 14 days; or
>
> (b) where the demand was served outside jurisdiction, within 21 days,
>
> from the date on which the demand is served or deemed in accordance with these Rules to be served on him, apply to court by way of originating summons for an order setting aside the statutory demand.
>
> (2) No appearance need be entered to an originating summons under this rule.
>
> …
>
> **Hearing of application to set aside statutory demand**
>
> **98**.—(1) On the hearing of the application, the court may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate.
>
> (2) The court ***shall*** set aside the statutory demand if —
>
> …
>
> (b) the debt is disputed on grounds which appear to the court to be substantial;
>
> …
>
> [emphasis added]

52 In *Wong Kwei Cheong* at [3], the Court said:

> On a plain reading of r 98(2)(b) of the Bankruptcy Rules, if the debtor disputes the claim in the statutory demand and that dispute appears to the court to be substantial, the bankruptcy court is ***obliged*** to set aside the statutory demand...
>
> [emphasis added]

The guarantors rely on this passage in *Wong Kwei Cheong.* They argue that once a court hearing a bankruptcy application has found that there are triable issues, the debt is disputed on substantial grounds and the mandatory "shall" obliges the court to dismiss the bankruptcy application. [note: 9] I note also that in *Wong Kwei Cheong*, the Court reiterated its view that the language in the opening sentence of r 127 of the Bankruptcy Rules is "peremptory" (at [18]) in the context of interpreting r 127(c) of the Bankruptcy Rules in relation to service of the statutory demand.

53 But "shall" in a legislative provision does not necessarily mean that the provision is mandatory: it is always a question of legislative intent (*Cheong Seok Leng v Public Prosecutor* [1988] 1 SLR(R) 530 at [47]). To glean the legislative intent behind r 98(2) and r 127, I must read those provisions in the light of ss 64(1), 65(4) and 65(5) of the Bankruptcy Act. That Act is, of course, the parent Act under which the Bankruptcy Rules are made. I must also bear in mind the strictures of section 19(c) of the Interpretation Act (Cap 1, 2002 Rev Ed) which provides that no subsidiary legislation is to be inconsistent with any primary legislation.

54 Sections 64(1), 65(4) and 65(5) of the Bankruptcy Act provide as follows:

> **Power of court to stay or dismiss proceedings on bankruptcy application**
>
> **64**.—(1) The court may at any time, for sufficient reason, make an order staying the proceedings on a bankruptcy application, either altogether or for a limited time, on such terms and conditions as the court may think just.
>
> **Proceedings on creditor's bankruptcy application**
>
> **65**.—(4) When a bankruptcy application has been made against a debtor on the ground that the debtor —
>
> (a) has failed to pay a judgment debt, and there is pending an appeal from or an application to set aside, the judgment or order by virtue of which the judgment debt is payable; or
>
> (b) has failed to comply with a statutory demand, and there is pending an application to set aside the statutory demand,
>
> the court may, if it thinks fit, stay or dismiss the application.
>
> (5) Where the debtor appears at the hearing of the application and denies that he is —
>
> (a) indebted to the applicant; or
>
> (b) indebted to such an amount as would justify the applicant making a bankruptcy application against him,

the court may, on condition that the debtor furnishes such security as the court may order for payment to the applicant of —

(i) any debt which may be established against the debtor in due course of law; and

(ii) the costs of establishing the debt,

stay all proceedings on the application for such time as may be required for trial of the question relating to the debt.

55 Both ss 64 and 65 of the Bankruptcy Act contemplate that a court hearing a bankruptcy application is not compelled to dismiss an application if the underlying debt is disputed whether on substantial grounds or otherwise. Further, s 65(5)(i) of the Bankruptcy Act expressly contemplates that the court hearing a bankruptcy application can stay bankruptcy proceedings to permit the creditor's claim to be litigated in the civil courts, on condition that the debt gives security for the creditor's debt. The Bankruptcy Act clearly gives the court a general and a specific power to stay bankruptcy proceedings and, further, to do so on terms and conditions. To that extent, the guarantors' reading of r 127 and r 98(2) of the Bankruptcy Rules was inconsistent with the broad discretionary power to stay under the parent Act.

56 The guarantors' response to this apparent inconsistency is that the court's powers to stay bankruptcy applications under ss 64 and 65(5) of the Bankruptcy Act are general powers to stay (relying on *Lee Kiang Leng Stanley v Lee Han Chew (trading as Joe Li Electrical Supplies)* [2004] 3 SLR(R) 603 ("*Stanley Lee*")) whereas r 127 and r 98(2) of the Bankruptcy Rules are specific *obligations* to dismiss the application where the debtor establishes a dispute as to the debt which is substantial. The guarantors submit that the specific provision prevails over the general provision. [note: 10]

57 I disagree with the guarantors' submission. The guarantors do not cite any authority for the proposition that a provision in subsidiary legislation can prevail over a provision of the parent Act, even if the former is more "specific" than the latter. In any event, I am of the view that ss 64(1), 65(4) and 65(5) – and in particular section 65(5)(i) – of the Bankruptcy Act are deliberately drafted widely enough to confer on the court a broad discretionary power to stay these bankruptcy applications on such terms and conditions as it thinks just which can be exercised even if the test in r 98(2)(b) is satisfied. The guarantors subsequently conceded that the court indeed has the power to stay both bankruptcy and winding up applications. [note: 11]

58 Even if I am wrong on this, in my view the words "the debt is disputed on grounds which appear to the court to be substantial" in r 98(2)(b) of the Bankruptcy Rules requires something more than an issue which is merely triable in the sense used in the authorities on summary judgment applications and in *Pacific Recreation*.

59 I therefore hold that the statutory scheme of the Bankruptcy Act – and in particular s 65(i) of the Bankruptcy Act, enables a bankruptcy court to extend the analogy with summary judgment proceedings further, and to grant in insolvency proceedings what is the functional equivalent of conditional leave to defend in a civil suit. This must again be correct for the same pragmatic reasons as underlie the decision in *Pacific Recreation*.

Application to the facts

60 I now give my reasons for staying the winding up and bankruptcy applications against the

guarantors subject to conditions.

The defences raised by the guarantors

61 Before the AR and before me, all ten guarantors deny any liability to Chimbusco. They deny liability because they claim to be entitled to rescind both guarantees. They rely on the following allegations in support:

(a) In April or May of 2011, Gas Trade and Chimbusco entered into an agreement ("April/May Agreement"). The agreement was oral. The gist of the agreement was that Gas Trade would incorporate a new company. Gas Trade would staff this new company with one or two Gas Trade employees. Gas Trade would also permit the new company to operate Gas Trade's two barges at cost. The revenue which the new company earned from operating the barges would be used to pay the new company's costs and Gas Trade's costs associated with those two barges. The profits earned by the new company would be applied to pay down Gas Trade's debt to Chimbusco and the interest accruing on it. The parties would later discuss and agree when to commence performing their respective obligations under this agreement. [note: 12]

(b) In May 2011, Mr Yeo Beng Joo ("Mr Yeo") of Chimbusco made a representation to Mr Mohammad and Mr Jalalludin, amongst others. The representation was oral. The representation was that Chimbusco would perform its obligations under the April/May Agreement only if two conditions were met. First, Gas Trade had to execute a written instalment payment agreement to pay a minimum amount of US$700,000 every month towards discharging Gas Trade's debt to Chimbusco. Second, the guarantors had to execute guarantees of Gas Trade's obligations under the instalment payment agreement. [note: 13]

(c) Mr Yeo made a further representation to Mr Mohammad and Mr Jalalludin. This too was oral. The representation was that the instalment payment agreement and the guarantees were "merely formalities required to be produced to [Chimbusco's] head office in Beijing, and that [Chimbusco's] head office would only give the green light for [Chimbusco] to proceed with the performance of the [April/May 2011] Oral Agreement" with Gas Trade if Gas Trade signed the instalment payment agreement and the guarantors signed their respective guarantees. [note: 14]

(d) Mr Yeo made these representations in order to induce Gas Trade to sign the instalment payment agreement and in order to induce the guarantors to sign their respective guarantees. Gas Trade and the guarantors relied on the representations and were so induced in executing the documents they did on 15 July 2011. [note: 15]

(e) The representations are misrepresentation for two reasons.

(i) First, Chimbusco failed, neglected or refused to enter into any discussions to perform the April/May Agreement despite repeated requests from Mr Mohammad, Mr Jalalludin and Mr Zain. These requests too were oral.

(ii) Second, Chimbusco now seeks to rely on the guarantees as being legally enforceable and therefore not "merely formalities". [note: 16]

(f) The primary case of Gas Trade and the guarantors is that Mr Yeo's representations were fraudulent misrepresentations. [note: 17] The alternative case is that they were innocent

misrepresentations. [note: 18]

(g) In either case, both Gas Trade and the Guarantors claim to be entitled to rescind the instalment payment agreement and the guarantees.

These allegations are the subject-matter of S347.

62 In addition, Paradigm Shipping and Peta Marine raised before me – but significantly not in S347 – a further defence which is unique to them. The Articles of Association of Paradigm Shipping require every instrument to which its respective corporate seal is affixed to be signed by a director of Paradigm Shipping and countersigned by a director or the company secretary of Paradigm Shipping. Peta Marine has a similar provision in its Articles of Association. These two companies' corporate seals were affixed to the corporate guarantee dated 15 July 2011. The guarantee was signed on behalf of Paradigm Shipping by a director of Paradigm Shipping. It was signed on behalf of Peta Marine by a director of Peta Marine. But Mr Zain countersigned on behalf of both companies. He is neither a director nor the corporate secretary of Paradigm Shipping or of Peta Marine. Curiously, Mr Zain's brother is a director of Peta Marine. His brother has the same name as Mr Zain. His brother's National Registration Identity Card ("NRIC") number is S13XXX61C. Mr Zain's NRIC number is S12XXX17G. The relevant article in these two companies' Articles of Association is a common one found in Table A of the Companies Act. Peta Marine and Mr Zain asserts that Chimbusco was or must have been aware of that. Further, there was no corporate benefit either to Paradigm Shipping or to Peta Marine in guaranteeing Gas Trade's debts to Chimbusco. Chimbusco was therefore put on inquiry. It should have made reasonable inquiries about Mr Zain's authority to countersign against the common seal of both Paradigm Shipping and Peta Marine. Not having done so, Chimbusco cannot rely on the corporate guarantee against these two companies. [note: 19]

Why I did not make unconditional insolvency orders

63 I considered the factual and legal issues raised by the guarantors and evaluated the evidence placed before me by both parties on those issues. Having done that, I was not satisfied that Chimbusco had put forward such evidence in response to the guarantors' evidence as to establish that it would have secured summary judgment in a civil suit.

64 Both limbs of the guarantors' common defences are based on oral agreements. On their face, of course, the issue of whether Chimbusco and Gas Trade actually reached an oral agreement in April/May 2011, whether Mr Yeo actually made the alleged oral representations to the guarantors and the issue of whether Mr Yeo had actual or ostensible authority to make those oral representations (if he indeed did so) are the quintessential triable issues. They are all incapable of resolution on affidavit evidence alone. Although it would be surprising and contrary to the inherent probabilities if all of these allegations were found to be true, I could not for the following reasons say that it was impossible that they could be true and that there therefore ought not to be a trial of them:

(a) There was no positive contemporaneous documentary evidence which directly contradicted the guarantors' account.

(b) Chimbusco had the benefit of Gas Trade's instalment payment agreement from July 2011. But it is undisputed that from the very outset, Gas Trade never made any of the instalment payments under that agreement. Despite that, Chimbusco did not seek to enforce its rights against Chimbusco until February 2012.

65 I therefore declined to make the unconditional insolvency orders sought by Chimbusco.

Guarantors' evidence shadowy

66 But I found the issues raised by the guarantors to be shadowy. If the guarantors had put this evidence forward before me on a summary judgment application in a civil action, I would have granted them only conditional leave to defend. I therefore granted them the functional equivalent of such leave in these proceedings. I stayed these proceedings on condition that they furnish security for the amounts which Chimbusco claims against them. In explaining why the defences were shadowy, I will deal first the position of Mr Yeo, then with the alleged April/May Agreement and then with the alleged oral misrepresentations in July 2011.

67 I must note at the outset that every key aspect of the issues which the guarantors raise is oral. The defence put forward before me and in S347 is founded upon on an *oral* misrepresentation said to have been made by a Mr Yeo to the principals of Gas Trade and the 10 corporate guarantors that their guarantee were mere "formalities" and not to be enforced in order to secure Chimbusco's head office's approval of yet another *oral* agreement which, the guarantors say, Chimbusco failed to perform despite the guarantors' *oral* requests that Chimbusco do so. And while it is true that there is no positive contemporaneous documentary evidence before me which directly contradicted the guarantors' account, it is also true that that account is not supported by any contemporaneous documentary evidence and, is indeed, against the tenor of that documentary evidence and the weight of the inherent probabilities.

Capacity of Mr Yeo Beng Joo

68 The guarantors rely heavily on oral discussions, agreements and representations entered into with Chimbusco. In all of these discussions, the guarantors or their representatives dealt with Mr Yeo. The guarantors describe Mr Yeo as Chimbusco's General Manager. [note: 20] Chimbusco denies this allegation and describes Mr Yeo as head of its bunker department. Mr Yeo too denies this and describes himself as "Head of the Bunker Department" of Chimbusco. [note: 21] His business card names him as such. [note: 22] The guarantors' allegation regarding Mr Yeo's status is against the tenor of the documentary evidence and the inherent probabilities.

Significance of the winding up order in respect of Gas Trade

69 Gas Trade did not dispute that it was indebted to Chimbusco or the amount of the debt which Chimbusco claimed in the winding up proceedings against Gas Trade. Gas Trade's only ground for resisting the winding up was that the April/May Agreement precluded Chimbusco from seeking immediate repayment of the entire debt. [note: 23]

70 It is *res judicata* between Gas Trade and Chimbusco that the alleged April/May Agreement does not preclude Chimbusco's from claiming immediate repayment of Gas Trade's debt. Chimbusco's winding up application against Gas Trade came up for hearing before Lai J on 6 July 2012. Gas Trade resisted it by relying on the April/May 2011 Oral Agreement. Lai J accepted Chimbusco's argument that the oral agreement raised no triable issues. So she wound up Gas Trade. [note: 24]

71 Of course, the winding up of Gas Trade is not in itself capable of raising a *res judicata* against the parties before me. The parties were different and the issues were different. None of the parties before me were parties to the insolvency proceedings against Gas Trade. The guarantors' liability under their guarantees of Gas Trade's debts was not in issue before Lai J. So I accept the submission of counsel for the defendant that Lai J's order to wind up Gas Trade does not bind me in any

particular way to approach the triable issues which the guarantors raise before me. [note: 25]

The alleged April/May Agreement

72 Having evaluated the evidence myself, however, I agreed with the AR that the guarantors' defence, at best, raises triable issues which are shadowy. I arrived at this conclusion for the following reasons:

(a) As the AR observed, there is no mention of the alleged April/May Agreement between Chimbusco and Gas Trade or any details of it in any of the contemporaneous correspondence between the parties. Given that this oral agreement had to do with repayment over time of a substantial debt of about US$13 million, it is against the weight of the inherent probabilities that there should be no contemporaneous documentary evidence of at least the broad terms of this oral agreement or even of its existence. This casts a long shadow over the guarantors' allegations of oral agreements and representations.

(b) The AR's view was that there was little commercial sense for Chimbusco to enter into the alleged agreement with Gas Trade. I agree. It is true that the alleged April/May Agreement allowed any profits made by the new company to be ring-fenced from Gas Trade's other creditors and to go exclusively to Chimbusco. But it would require Chimbusco to take on the additional business risk of the new company not being profitable. I thus find that the arrangement contemplated in the alleged oral agreement, while not inconceivable, is so improbable as to make it shadowy. I also note that the commercial sense of a commercial arrangement which a defendant to a summary judgment application relies upon to resist the application is a factor which a court may consider in deciding whether or not to impose conditions on a defendant's leave to defend (see *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [41]).

(c) In his affidavit filed on 22 May 2012 on behalf of Chimbusco, Mr Yeo denied that Chimbusco and Gas Trade reached any oral agreement in April/May 2011. [note: 26] After my decision of 24 August 2012, Mr Yeo filed a further affidavit on 19 September 2012. He affirmed this affidavit on behalf of the guarantors. The guarantors relied on that affidavit to support the further arguments which they presented to me on 19 September 2012. [note: 27] In his later affidavit, Mr Yeo explained that there *were* discussions along the lines alleged by the guarantors in April/May 2011. But those discussions never matured into an agreement because Chimbusco's head office had never approved them. It is important to note that both Gas Trade and the guarantors pleaded the April/May Agreement in S347 as a contractually-binding agreement. It is true, as the guarantors submit, that for the guarantors' defence to succeed, they need not show that what happened in April/May 2011 is contractually binding. The guarantors rely on these events not for any contractual effect but merely as the substratum for Mr Yeo's representations in July 2011. But it is, to say the least, odd that the guarantors should plead unequivocally in S347 that the April/May Agreement was contractually-binding but then in the applications before me procure, adduce and rely on Mr Yeo's evidence to the contrary. That too casts a long shadow on their defence.

Guarantors' liability under the guarantee

73 I found the guarantors' position on their liability under the guarantee to be shadowy for the following reasons:

(a) Yeo's unequivocal affidavit evidence filed on behalf of Chimbusco on 22 May 2012 was that

he made no representation that the guarantees were mere formalities [note: 28] and that he had no authority to make any such representations. [note: 29]

(b) Even if Mr Yeo made such a representation, there was no evidence before me that he had any actual or ostensible authority to do so. That authority could come only from Chimbusco and could not come from Mr Yeo himself or from the guarantors' self-engendered beliefs.

(c) Even if Mr Yeo did make such a representation, it would have been a representation as to the legal effect of the guarantees which the guarantors signed on or about 15 July 2011. It would not have been a representation of existing fact.

(d) I found the guarantors' claims to have been induced by and to have relied on Mr Yeo's alleged representation to be against the weight of the inherent probabilities. The individuals are all experienced businessmen. They handle a multi-million dollar business. They affixed their signatures and corporate seals with significant formality to documents. Those documents on their face engaged the signatories' legal liability for Gas Trade's debts. All of this casts a long shadow over their claims to have been induced by and to have relied on Mr Yeo's alleged misrepresentations.

(e) None of the 10 guarantors or Gas Trade disputed the debt which Chimbusco claimed – either as to liability or as to quantum – when they received Chimbusco's letters of demand or when Chimbusco served formal statutory demands as a precursor to insolvency proceedings.

(f) The personal guarantors made no attempt to avail themselves of their statutory right to set aside the statutory demands on the basis that they disputed the debt claimed on substantial grounds. They raised the arguments against Chimbusco's debt only at the eleventh hour when bankruptcy applications were served on them.

(g) It was only on 25 April 2012, when the 10 guarantors and Gas Trade commenced S347, that they raised for the first time the grounds of defence which they relied upon before me. Suit 347 was commenced on the eve of the first of the seven winding up proceedings against the corporate guarantors.

74 In the premises, I affirmed the AR's decision to stay the bankruptcy proceedings on condition that the personal guarantors furnish security to Chimbusco.

Affixing of Paradigm Shipping and Peta Marine's seal

75 I now deal with the corporate guarantors. With one exception, the corporate guarantors advanced no defence which the personal guarantors did not advance. The one exception is the argument raised by Paradigm Shipping and Peta Marine regarding the affixing of the corporate seal. I have summarised that argument above. But this defence too is shadowy.

76 The first point is that this issue relates only to the formal validity of the corporate guarantee. By this document, Paradigm Shipping and Peta Marine engaged their separate liability to Chimbusco for the debts of Gas Trade. Paradigm Shipping and Peta Marine do not assert, let alone support by evidence, that this underlying transaction was one which the directors of Paradigm Shipping and of Peta Marine did not authorise. So there is no basis to say that the *transaction* was in any sense unauthorised and so unenforceable. Indeed, the inherent probabilities of all of the material before me is that Paradigm Shipping and Peta Marine did authorise this transaction.

77 The only point which Paradigm Shipping and Peta Marine rely upon relates to the formal validity of the corporate guarantee. But there was no evidence before me that Chimbusco was aware of the contents of the Articles of Association of Paradigm Shipping or of Peta Marine. So the basis on which the guarantors say that Chimbusco was put on notice of these two companies' internal requirements for affixing the corporate seal is shadowy.

78 It is correct that Mr Zain is neither a director nor the company secretary of Paradigm Shipping. But he countersigned the corporate guarantee together with his daughter. She is a director of Paradigm Shipping. She is also the majority shareholder of Paradigm. Mr Zain conceded that he countersigned the guarantee because the other director of Paradigm Shipping was not available to do so. That supports the inference that Paradigm Shipping authorised the underlying transaction itself.

79 It is also correct that Mr Zain is neither a director nor the company secretary of Peta Marine. But he is the single biggest shareholder of Peta Marine. Further, he countersigned the corporate guarantee together with Mr Mohammad. Mr Mohammad is a director of Peta Marine. Mr Zain and Mr Mohamad together hold close to 60% of the shares in Peta Marine. Further, Mr Zain conceded that he countersigned the corporate guarantee on behalf of Peta Marine because the other director, his brother of the same name, was not available to do so. That again supports the inference that Peta Marine authorised the underlying transaction itself.

80 I therefore held that the issue about the invalid countersignature against the corporate seals of Paradigm and Peta Marine was, at best, a shadowy defence.

81 Thus, I made similar orders in respect of the corporate guarantors as I did in respect of the individual guarantors.

Further evidence from Mr Yeo

82 The guarantors sought to place before me further evidence in the course of the further hearings after my initial decision. This evidence came from Mr Yeo, this time affirming affidavits on behalf of the guarantors. I could not, obviously, have taken this information into account in arriving at my original decision now under appeal. But it is appropriate that I say something about this evidence. Far from dispelling the shadows which I found, this additional evidence merely deepened them.

83 Mr Yeo affirmed an affidavit on 10 September 2012. [note: 30] Exhibited to Mr Yeo's 10 September 2012 affidavit is an email dated 6 September 2012 from him to Mr Zain's personal assistant. In that email he confirmed that ". . . in order to start any form of discussion on the repayment plan to [Chimbusco], [Chimbusco's Managing Director] requested gastrade [sic] plus all the subsidiary companies to give a corporate gurantee [sic] and also 3 major share holder's personal guarantee. My understanding the gurantees [sic] is for formality to show beijing for sincerity from gastrade [sic]." [note: 31] Although the guarantors rely on this email in support of their case, it merely deepened my doubts about the guarantors' case. Its tenor is consistent with a creditor who seeks guarantees from a debtor's associates as an essential condition of extending to a principal debtor the indulgence of time by entering into discussions over a repayment plan to give the principal debtor yet further time. I also found it significant that Mr Yeo in this email describes the guarantees as "for formality to show beijing for sincerity" and not as "merely formalities". The guarantees were undoubtedly signs of sincerity given with some formality. But that does not necessarily mean that they were an unenforceable and irrelevant mere formality.

84 Mr Yeo affirmed a *second* affidavit on 19 September 2012. The guarantors relied on this in support of their application for a stay. In this affidavit, Mr Yeo said: "I understood and informed Mr

Zain that the [guarantees] were a mere formality and were required to demonstrate Gas Trade's sincerity so that [Chimbusco's Managing Director] could show them to Chimbusco's head office in Beijing to obtain the green light for Chimbusco to proceed with the suggestion that I had made to Gas Trade". [note: 32] This was a carefully crafted clarification. Mr Yeo did not say why or from whom he "understood" any of this.

85 In the same affidavit of 19 September 2012, Mr Yeo for the first time asserted that he "did . . . as a representative of Chimbusco, say to Mr Zain and others that the guarantees were merely formalities required to be produced to Chimbusco's head office in Beijing to obtain the green light for Chimbusco to proceed with" what he discussed with Gas Trade in April/May 2011. [note: 33] But Mr Yeo cannot, simply by asserting that he acted as representative of Chimbusco, clothe himself with authority to bind Chimbusco or to have his representations attributed to Chimbusco. There was still no evidence before me that Chimbusco had given Mr Yeo, expressly or impliedly, any such authority.

86 I should also note that I was not impressed by the manner in which the guarantors procured affidavits from Mr Yeo which appeared designed to address the deficiencies in his evidence which had been pointed out progressively in earlier submissions.

What conditions are appropriate?

87 I move on to the conditions which I imposed for the guarantors to secure the benefit of a stay pending the outcome of S347. The AR ordered that the personal guarantors provide security in the sum US$1 million each. Her view was that requiring an unusually high amount of security would stifle the personal guarantors' defence. She ordered that the security be provided by the personal guarantors separately. She feared a situation where, say, two of the personal guarantors furnished security but had to bear the consequences of the default of the third who did not. [note: 34]

88 I did not share the AR's views. I ordered that the personal guarantors provide joint security of the full amount claimed against them in the Bankruptcy Originating Summons: US$4,202,572.12.

89 I made this order for the following reasons. First, the sum of US$1 million per personal guarantor which the AR ordered was neither one-third of the sum claimed against the three personal guarantors nor was it the full amount of the claim against them. Section 65(5)(i) of the Bankruptcy Act gives me the power to order the guarantors to provide security up to the full amount claimed under the guarantees they have each executed (see *Stanley Lee* at [18]). When imposing a condition on a defendant's ability to resist an insolvency application or summary judgment, the full sum of the claim against it will ordinarily be the starting point for the security it is to furnish (see *Stanley Lee* at [27], *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2008] 2 SLR(R) 786 at [2] and *Gao Bin v OCBC Securities Pte Ltd* [2009] 1 SLR(R) 500 at [5] and [18]).

90 Second, I accept on the authority of *M V Yorke Motors v Edwards* [1982] 1 WLR 444 that making an order conditional on a defendant furnishing security in an amount which it would find impossible to provide is wrong in principle, as that defeats the purpose of the condition and has the same effect as granting an unconditional order against it. But counsel for the guarantors acknowledged that there was no evidence before me that the total sum which the any of the guarantors were to furnish as security was so large as to be impossible to provide. Nor did any of the guarantors seek an opportunity to place any such evidence before me. There was therefore no basis on which to say that granting security in the full amount of Chimbusco's claim would stifle any of the guarantors' ability to resist the insolvency proceedings. I therefore saw no principled basis on which to order as security anything less than the full amount which Chimbusco claimed.

91 Third, I ordered that the security be provided jointly. That mirrors the basis of the personal guarantors' liability under the personal guarantees underlying the bankruptcy application and so is correct in principle. The joint and several nature of the personal guarantee executed by them, if upheld, was such that each personal guarantor would be liable for the entire guaranteed sum should one or more of the other personal guarantors refuse to pay. I did not share the AR's concern that injustice might arise if some of the personal guarantors provided the security but the others did not. There was no evidence before her, or me, that that might happen. And an order that the personal guarantors furnish the security jointly was to their benefit: they could adjust *inter se* how much each personal guarantor was to provide so that those with greater means or greater confidence in the defences – despite my finding that they were shadowy – could furnish a greater proportion of the security, to the benefit of the others of more limited means or with less confidence in the defences.

92 For the same reasons, I granted leave to the corporate guarantors to defend the winding up applications on the condition that security be furnished on the same terms as the personal guarantors save that the quantum of the security which the corporate guarantors were to provide was to be the full sum claimed against them under the corporate guarantees as at the date of the winding up applications – US$13,015,342.03 – less the quantum of any security which the personal guarantors provided to avoid the Chimbusco being oversecured.

No stay of proceedings and stay of execution

93 I now give my reasons for refusing to grant, pending appeal, a stay of the insolvency proceedings or a stay of execution of the insolvency orders when the guarantors failed to satisfy the condition which I imposed for securing a stay of the insolvency proceedings pending the outcome of S347.

94 I did not grant a stay of the proceedings for two reasons. First, the guarantors had been given the opportunity to provide security as a condition of obtaining a stay of the proceedings but failed to do so (see *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2011] 4 SLR 997 at [67]). To grant them a stay of the proceedings pending appeal would be to give them the benefit of a stay without satisfying the condition which I had felt was necessary to address the shadowy nature of the defences. And the purpose of the stay would be to permit them to raise the very same shadowy defences on appeal. Second, there was no evidence before me that the guarantors failed to satisfy this condition because they were not in a financial position to provide the security or for reasons beyond their control. I therefore took it that the failure to satisfy the condition was a considered decision, taken because the guarantors did not wish to risk their money in the event of failure in the Court of Appeal and in S347.

95 As for a stay of execution of the insolvency orders, the law is clear. A stay of execution of insolvency orders – as much as any other type of orders – will not be granted simply because the orders are being appealed (see O 56 r 1(4) of the Rules of Court). In bankruptcy proceedings, the Bankruptcy Rules make specific provision that an appeal does not operate as a stay (see r 42(b)).

96 In insolvency proceedings as in ordinary civil proceedings, therefore, the onus is therefore squarely on the defendant to show why it is appropriate to stay the proceedings or to stay execution of the orders rather than to let the insolvency proceedings run their normal course (see *In re Calgary & Edmonton Land Co Ltd (in liquidation)* [1975] 1 WLR 355 at 358-359 interpreting a provision of the Companies Act 1948 (c 38) (UK) materially similar to s 279(1) of the Companies Act). Such stays have been granted where all the creditors had been paid or provided for or where, in relation to a company facing winding up, a scheme of arrangement has been agreed to by the creditors (see

Edward Bailey & Hugo Groves, *Corporate Insolvency: Law and Practice*, (LexisNexis, 3rd Ed, 2007) ("Bailey & Groves") at para 14.128).

97 Further, the guarantors did not show that there would be any irretrievable prejudice or damage to their business or personal interests if I did not stay the bankruptcy and winding up orders pending appeal. [note: 35] In fact, there is authority for the proposition that, as a matter of practice, a stay of execution of a winding up order will not normally be granted pending an appeal against that order. In *In re A & B C Chewing Gum Ltd, Topps Chewing Gum Inc v Coakley and others* [1975] 1 WLR 579, the English Chancery Court noted that (at 592-593):

> ...there are very good reasons for the practice of never ordering a stay, and they are these: as soon as a winding up order has been made the Official Receiver has to ascertain first of all the assets at the date of the order; secondly, the assets at the date of the presentation of the petition, having regard to the possible repercussions of section 227 of the Act of 1948 [which is materially similar to s 259 of the Companies Act]; and thirdly, the liabilities of the company at the date of the order, so that he can find out who the preferential creditors are, and also the unsecured creditors.
>
> Supposing there is an appeal and the winding up order is ultimately affirmed by the Court of Appeal, and there has been a stay, his ability to discover all these things is very seriously hampered: it makes it very difficult for him, possibly a year later, to ascertain what the position was at different times a year previously. But assuming a stay is not granted, if the business is being carried on at a profit, as I understand this business now is, no additional harm is done by refusing a stay. As I understand it, if the Official Receiver is given an indemnity, say by the [defendants], who are running this business, he will allow it to be carried on, and the [defendants], in this case, could be appointed special managers and carry on the business as they have been doing. If the business is being carried on at a profit, creditors of the business, after the date of the winding up order, would be paid in priority to the unsecured creditors at the date of the order as part of the expenses of the winding up. Then, if the appeal is allowed, the business is handed back as a going concern, it has not suffered any loss. Of course, if the business can only be carried on at a loss - it should not be carried on at all.
>
> Those, I think, are really the reasons why, in practice, a stay is not granted - a profitable business can be carried on as it was before and handed back as a going concern if the appeal is allowed. If it is not allowed then, of course, *cadit quaestio*.

This was more recently cited with approval in *In the matter of BLV Realty II Limited* [2010] EWHC 1791 (Ch) at [11]-[12].

98 The guarantors relied on another decision of the English Chancery Court in *Society of Lloyd's v Beaumont and other debtors* [2006] BPIR 1021 ("*Beaumont*") to support their argument that the *bankruptcy* proceedings or orders should be stayed pending appeal. In *Beaumont*, the plaintiff, the Society of Lloyd's ("Lloyd's"), sought bankruptcy orders against a number of its members (also known as "Names") on the basis of statutory demands sent from about November 2002 onwards. These demands were based on judgment debts against the Names obtained, in many cases, after protracted litigation which was still ongoing at the time of the hearing to set aside the statutory demands. In February 2004, a consent order was made to stay the bankruptcy petitions until the determination of, *inter alia*, an application by the Names for permission to amend their pleadings to include a new cause of action against Lloyd's. In May 2005, the Names' application was refused, and so was leave to appeal that order. The Names then sought to appeal against the latter order, and sought to stay the bankruptcy petitions pending the determination of the appeal.

99 The English High Court granted the stay sought by the Names on, amongst others, the following grounds:

(a) First, the court accepted that the approach of the courts to the exercise of their discretion under s 266(3) of the Insolvency Act 1986 (c 45) (UK) (which provides the court with a general power to dismiss or stay bankruptcy proceedings akin to s 64(1) of the Bankruptcy Act) when there is a bona fide appeal against an order or judgment on which a bankruptcy petition is based is "invariably" to adjourn the hearing of the petition until the appeal has been decided (*Beaumont* at [21], [25] and [37]).

(b) Second, the court noted that if the Names' appeal were to succeed, the claim for damages pursuant to the newly pleaded cause of action would at least equal the judgment debt upon which the bankruptcy petitions were brought (*Beaumont* at [26]).

(c) Third, the court noted the draconian effects of a bankruptcy order as well as the stigma attached to such an order (*Beaumont* at [26], [27] and [37]).

(d) Fourth, the court noted that the English courts in other related actions had found that Lloyd's had a made a misrepresentation to its members and that the Names in general were innocent victims of failings and incompetence (*Beaumont* at [26]).

(e) Fifth, the court noted that if it refused the stay of bankruptcy proceedings, the Names would appeal this order and this would only add to the costs of litigation (*Beaumont* at [37]).

(f) Sixth, the court had, prior to the hearing, made an order the effect of which was to compel the Names to put on the table all their defences to the petitions against them once and for all (*Beaumont* at [38]).

100 I did not find *Beaumont* to be persuasive authority on the facts of this case, for the following reasons:

(a) While I accepted that a bankruptcy order could have draconian effects, I noted that a bankruptcy order is not irreversible. The personal guarantors can apply to have their bankruptcy annulled should they be found not liable under the joint and several personal guarantees given by them (see s 123(1)(a) of the Bankruptcy Act).

(b) There was no evidence before me that the bankruptcy orders – or indeed the winding up orders – would have any irreversible effects on the personal guarantors or the corporate guarantors.

(c) As to the fourth ground, I noted that this worked against the personal guarantors in the present case as Lai J had expressed doubt about the existence of the alleged oral agreement in the Gas Trade winding up application.

(d) The sixth ground was not applicable on the facts of the insolvency proceedings before me.

101 In the premises, I declined to stay the proceedings or to make the orders with a stay of the orders. I accordingly made the bankruptcy orders against Mr Jalalludin and Mr Zain. I also made the winding up orders against Paradigm Shipping and Hir Huat.

Conclusion

102 For the reasons above, I dismissed the personal guarantors' appeals and rejected the corporate guarantors' submissions that no winding up orders should be made.

103 Costs following the event, I ordered a single set of costs in favour of Chimbusco for the Registrar's Appeals fixed at S$10,000 plus reasonable disbursements. Chimbusco is also separately entitled to the costs of the bankruptcy and winding up proceedings in B752 of 2012, B959 of 2012, B961 of 2012, CWU89 of 2012, CWU90 of 2012 and CWU91 of 2012, such costs to be taxed if not agreed. In B959 of 2012, B961 of 2012, CWU89 of 2012 and CWU90 of 2012, these costs will include the costs of and incidental to the guarantors' application for further arguments on 18 September 2012 and their unsuccessful stay application on 20 September 2012.

[note: 1] See Affidavit of Zhu Jian filed 2 August 2012, at para 17

[note: 2] Para 8 of Adeliene Yuana Mohd Zain's Affidavit (21 June 2012) in CWU89/2012 and para 13 of the Plaintiff's written submissions (5 July 2012).

[note: 3] Para 7 of Zain's Affidavit (Bankruptcy) (25 May 2012) in B961/2012 read with para 16(c) of Zain's Affidavit (Companies Winding Up) (4 May 2012) in CWU51/2012.

[note: 4] Para 8 of Zhu Jian's Affidavit Supporting Winding Up Application (Companies Winding Up) (31 May 2012) in CWU89/2012.

[note: 5] Paras 10 to 11 of Zhu Jian's Affidavit Supporting Winding Up Application (Companies Winding Up) (31 May 2012) in CWU89/2012, CWU90/2012 and CWU91/2012.

[note: 6] Para 7 of Zhu Jian's Supporting Affidavit (Bankruptcy) (2 May 2012) in B752/2012, B959/2012 and B961/2012.

[note: 7] Notes of Evidence ("NE") of B752/2012, B959/2012 and B961/2012, 3 July 2012, pp 16 and 17.

[note: 8] Defendant's Skeletal Arguments dated 13 June 2012, paragraph 18.

[note: 9] Para 21 of the Defendants' written submissions (3 August 2012)

[note: 10] NE, 3 August 2012, p 23 line 26 to p 24 line 4.

[note: 11] Para 13 of the Defendants' written submissions (13 August 2012)

[note: 12] Para 8 of the Statement of Claim in S347.

[note: 13] Para 9 of the Statement of Claim in S347.

[note: 14] Para 10 of the Statement of Claim in S347.

[note: 15] Para 12 to 17 of the Statement of Claim in S347.

[note: 16] Para 19 of the Statement of Claim in S347.

[note: 17] Para 20 of the Statement of Claim in S347.

[note: 18] Para 21 of the Statement of Claim in S347.

[note: 19] Defendant's skeletal arguments dated 3 August 2012, paragraph 31 to 34.

[note: 20] See paragraph 7, Statement of Claim in S347.

[note: 21] Paragraph 26 of Yeo Beng Joo's 1st affidavit filed in CWU 51 of 2012 on 22 May 2012.

[note: 22] Page 25 of Yeo Beng Joo's 1st affidavit filed in CWU 51 of 2012 on 22 May 2012.

[note: 23] Affidavit of Chan Tat Wei Norman in CWU 88 of 2012, paragraph 16 and 19.

[note: 24] NE in CWU88/2012, 6 July 2012, p 2.

[note: 25] Defendants' Skeletal Arguments in Reply dated 13 August 2012, paragraph 24.

[note: 26] Paragraph 27 of Yeo Beng Joo's 1st affidavit filed in CWU 51 of 2012 on 22 May 2012.

[note: 27] Paragraph 9 of Yeo Beng Joo's 1st affidavit filed in B961 of 2012 on 19 September 2012.

[note: 28] Paragraph 39 of Yeo Beng Joo's 1st affidavit filed in CWU 51 of 2012 on 22 May 2012.

[note: 29] Paragraph 40 and 41 of Yeo Beng Joo's 1st affidavit filed in CWU 51 of 2012 on 22 May 2012.

[note: 30] Page 9 of Yeo Beng Joo's 1st affidavit filed in B 961 of 2012 on 19 September 2012.

[note: 31] Page 12 of Yeo Beng Joo's 1st affidavit filed in B 961 of 2012 on 19 September 2012.

[note: 32] Paragraphs 14 and 19 of Yeo Beng Joo's 1st affidavit filed in B 961 of 2012 filed on 19 September 2012.

[note: 33] Paragraph 19 of Yeo Beng Joo's 1st affidavit filed in B 961 of 2012 on 19 September 2012.

[note: 34] NE, 3 July 2012, p 18 lines 6 to 8.

[note: 35] NE, 20 September 2012, p 6 lines 18 to 23.

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