Mohd Zain bin Abdullah *v* Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal
[2014] SGCA 8

Case Number	: Civil Appeals Nos 116 and 118 of 2012
Decision Date	: 23 January 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: N Sreenivasan SC, Ahmad Khalis and Pravin Raj s/o Shanmugaraj (Straits Law Practice LLC) for the appellants; Wendy Tan, Eugene Leong, Charmaine Fu and Tony Tan (Stamford Law Corporation) for the respondent.
Parties	: Mohd Zain bin Abdullah — Chimbusco International Petroleum (Singapore) Pte Ltd

Insolvency Law – Bankruptcy

23 January 2014

V K Rajah JA (delivering the grounds of decision of the court):

1 These were two appeals against the decision of the judicial commissioner ("the Judge") in *Chimbusco International Petroleum (Singapore) Pte Ltd v Jalalludin bin Abdullah and other matters* [2013] 2 SLR 801 ("the GD"). We dismissed the appeals after hearing submissions from counsel. However, we thought it might be useful if we provided guidance on some of the issues that arose for consideration. We now do so in these grounds.

The facts

2 The factual matrix has been set out in detail in the GD and as such, we shall set out only such facts as are necessary to understand our decision on the relevant legal issues.

3 Chimbusco International Petroleum (Singapore) Pte Ltd ("Chimbusco"), a wholly-owned subsidiary of China Marine Bunker (PetroChina) Co Ltd, was in the business of supplying and trading in fuel oil. It supplied bunkers to a company known as Gas Trade (S) Pte Ltd ("Gas Trade"), which in turn was in the business of supplying bunkers to ship owners.

4 The two companies maintained a running account. As at 1 July 2011, Gas Trade owed Chimbusco US$13,024,322.48. On 15 July 2011, Gas Trade and Chimbusco executed an agreement for the debt to be repaid in minimum monthly instalments of US$700,000, with the latter to refrain from commencing legal proceedings if the arrangement was observed ("the Instalment Agreement"). Seven related companies extended joint and several corporate guarantees for all amounts owing from Gas Trade to Chimbusco from time to time. Three individuals, who were directors of one or more of the seven corporate guarantors, also extended joint and several personal guarantees for debts not exceeding US$4,000,000, plus interest and related costs. These individuals were:

(a) Mr Mohd Zain Bin Abdullah ("Zain"), the appellant in Civil Appeal No 116 of 2012 ("CA 116");

(b) Mr Jalalludin Bin Abdullah ("Jalalludin"), the appellant in Civil Appeal No 118 of 2012

("CA 118"); and

(c) Mr Mohammad Bin Abdul Rahman.

We shall hereafter refer to the corporate and the personal guarantors collectively as "the Guarantors".

5 It is not clear what the formal relationship between the Guarantors and Gas Trade was. However, both Zain and Jalalludin ("the appellants") represented Gas Trade in its dealings with Chimbusco, and it is likely that Gas Trade and the seven corporate guarantors were related companies, with the appellants as the controlling minds behind them.

6 On 29 February 2012, the Guarantors received letters of demand from Chimbusco's solicitors for the payment of US$13,015,342.03 and US$4,202,572.12 respectively. This was followed by statutory demands in March 2012 and insolvency proceedings early in April 2012.

7 On 26 April 2012, the eve of the first scheduled hearing of the winding-up applications against two of the corporate guarantors, Gas Trade and the Guarantors filed Suit No 347 of 2012 ("Suit 347") against Chimbusco seeking the rescission of the Instalment Agreement and all the corporate and personal guarantees issued to Chimbusco ("the Guarantees"). Zain filed affidavits opposing the winding-up applications, the contents of which affidavits were adopted by Jalalludin. It was denied in Suit 347 and Zain's affidavits that the Guarantors were indebted to Chimbusco.

8 According to Zain, there were discussions in April or May 2011 between Gas Trade and Chimbusco regarding the former's existing debt. This led to an oral agreement for Chimbusco to incorporate a new company which would operate two barges chartered by Gas Trade ("the Oral Agreement"). Gas Trade would let the new company have the use of the two barges at cost, and the expected profits of US$700,000 per month would be treated as repayment of Gas Trade's debt. Under this agreement, the parties would discuss and mutually agree on when to commence performing their respective obligations.

9 However, the head of Chimbusco's bunker department, Yeo Beng Joo ("Yeo"), subsequently told Gas Trade's representatives that Chimbusco would only perform its obligations under the Oral Agreement if the Instalment Agreement and the Guarantees were executed. Yeo is alleged to have said that the Guarantees were mere formalities to be produced to Chimbusco's head office in Beijing, and that the head office would allow Chimbusco to commence performance of the Oral Agreement once this was done. The Instalment Agreement and the Guarantees were allegedly executed on the basis of Yeo's representations. Chimbusco never performed the Oral Agreement, despite being urged by the appellants to do so.

10 The appellants alleged that Yeo's representations were false and had wrongfully induced them to issue the Guarantees to Chimbusco. The appellants raised the same allegations in the bankruptcy proceedings commenced against them and sought the dismissal of those proceedings.

The decision below

11 The bankruptcy applications against the appellants were first heard before an assistant registrar ("the AR"), who found that the appellants barely met the threshold of showing that there was a substantial dispute of the underlying debt. The AR stayed the applications on condition that each of the appellants furnished US$1m as security.

12 On appeal, the Judge found that the allegations raised by the appellants were quintessential triable issues incapable of resolution based on affidavit evidence alone, and that Chimbusco had failed to put forward such clear-cut evidence as would have secured summary judgment in a civil suit. However, like the AR, he declined to make unconditional insolvency orders as he found the appellants' case shadowy. He varied the AR's order, revising the amount of security to be provided from US$1m per appellant to joint security for the full amount claimed against them, *viz*, US$4,202,572.12.

13 The appellants failed to provide the security ordered. The Judge declined to stay the execution of insolvency orders pending appeal and adjudicated them bankrupt.

The appellants' case

14 Before us, the appellants sought an unconditional stay of the bankruptcy proceedings pending the resolution of Suit 347, arguing that the Judge was incorrect to find that their case was shadowy. Alternatively, the appellants sought the reduction of the sum to be provided as security. Relying on *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 ("*Abdul Salam Asanaru Pillai*") at [44], the appellants argued that the provision of security was primarily to show "some demonstration of commitment on the part of the defendant to the claimed defence", and that the amount of security ordered by the Judge was too high.

15 Zain also filed Summons No 1964 of 2013 ("SUM 1964") to admit, for the purposes of both CA 116 and CA 118, an affidavit deposed by Yeo after the GD was released. However, that application was withdrawn with leave at the hearing before us.

The relevant principles

16 The Judge had to rule on how applications for stays of bankruptcy proceedings should be approached by the court. He held that the standard for obtaining a stay or a dismissal of winding-up proceedings set out in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") should apply. The applicable standard was no more than that for resisting a summary judgment application, *ie*, the debtor need only raise triable issues in order to obtain a stay or a dismissal of bankruptcy proceedings.

17 In our view, the Judge was correct in so ruling. In *Pacific Recreation*, this court approved the following submissions (at [16] and [17]):

> 16 The appellants argued that the learned judge had wrongly applied the discretionary principles relevant to the granting of a winding-up order. Case law, they argued, had clearly established that a winding-up petition was not an appropriate means of enforcing a disputed debt, and that it would be an abuse of the process of the court to allow a creditor to wind up a company on the basis of a disputed debt. It was also submitted that a winding-up court was generally not in the best position to adjudicate on the merits of a commercial dispute without a proper ventilation of the evidential disputes through a trial. The appellants further stressed that a winding-up order was often the "death knell" for a company and was a "draconian order" to make. Thus, a court should proceed cautiously in deciding whether to grant a winding-up application.
>
> …
>
> 17 We broadly agreed with the principles laid out by the appellants as summarised in the preceding paragraph. However, that is not to say that a company can stave off a winding-up

application merely by alleging that there is a substantial and bona fide dispute over the debt claimed by the applicant-creditor. It is up to the court to evaluate whatever evidence the company has raised and come to a conclusion on whether the alleged dispute exists. …

It is axiomatic that these concerns are equally applicable to bankruptcy proceedings. In this regard, the Judge's observation at [42] of the GD – *viz*, that "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" – was eminently sensible. We also agreed with the Judge that it would be a waste of court resources for an insolvency court not to summarily determine clear-cut issues that were not factually controversial.

18 We agreed with the Judge that it was correct to extend the analogy of a summary judgment application to the imposition of conditions for granting a stay of bankruptcy proceedings. A bankruptcy court may grant in insolvency proceedings what is the "functional equivalent" of conditional leave to defend in a civil suit. Further, the usual standard for the imposition of conditions should apply – namely, whether the case advanced by the defendant/debtor is shadowy. This approach is supported by the provisions in the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the Bankruptcy Act") which provide for the court's power to stay bankruptcy proceedings on terms and conditions. Section 64(1) frames this in broad terms:

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.

Section 65 addresses situations where the putative debtor challenges his indebtedness:

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.

19 Given the breadth of s 64(1), the High Court in *Lee Kiang Leng Stanley v Lee Han Chew (trading as Joe Li Electrical Supplies)* [2004] 3 SLR(R) 603 observed that the then equivalent of s 65(5) of the Bankruptcy Act (*viz*, s 65(5) of the Bankruptcy Act (Cap 20, 2000 Rev Ed)) was superfluous unless it was used as an illustration of what the court might do under s 64(1) (at [17]). In our view, s 65(5) clarifies the scope of the court's powers when determining the appropriate relief to be granted in contested bankruptcy applications. In relating the ordering of security to disputes over the existence of a debt, and in relating the quantum of the security to the size of the purported debt and the costs of establishing that debt, it indicates that the considerations that govern the grant of conditional leave to defend in summary judgment proceedings also govern the grant of conditional stays of bankruptcy proceedings.

20 The objective of the summary judgment procedure is to minimise any delay to a meritorious claimant/creditor before his unchallengeable rights are recognised and enforced. It is not merely the waste of time that is sought to be addressed. As rightly noted in *Singapore Court Practice 2009* (Jeffrey Pinsler SC gen ed) (LexisNexis, 2009) at para 14/1/1, "[b]y the time of the trial, [the defendant] may no longer be in the same business, he may be bankrupt or he may have moved out of the jurisdiction with his assets". Summary judgment therefore seeks to ensure that a claimant obtains the fullest measure of his rights promptly. Thus, where a defendant is only able to raise a shadowy defence but the court wishes to give him the benefit of the doubt, the imposition of conditions on the grant of leave to defend will preserve the claimant's interests to the extent that it is possible (bearing in mind that the defendant should not be denied his right to defend by the imposition of conditions that are impossible for him to meet: see *M V Yorke Motors (A Firm) v Edwards* [1982] 1 WLR 444).

21 This concern to protect the interests of a meritorious creditor is also present where a debtor meets a bankruptcy application with a weak case denying that he is indebted to the applicant-creditor or that he is indebted to such an amount as would justify the making of the bankruptcy application. Under the Bankruptcy Act, such a situation usually arises where the applicant seeks to directly prove that the debtor is indebted to him and is unable to pay the debt (see s 61(1)), or relies on one of the presumptions of inability to pay debts, such as the debtor's failure to comply with or apply to set aside a statutory demand (see s 62(*a*)) or his departure from Singapore with the intention of obstructing the applicant's recovery of the debt (see s 62(*c*)). The strength of the applicant's evidence in the first case, the debtor's omissions in the second and his suspicious behaviour in the third, each coupled with his inability to raise more than a shadowy case, may be such as to raise concerns that the applicant's interests are at risk. It is therefore appropriate in such instances for the applicant's interests to be preserved to such an extent as is possible by an order that security be provided by the debtor.

22 If a bankruptcy court were unwilling to grant a conditional stay of bankruptcy proceedings and were to dismiss outright a bankruptcy application on the strength of a shadowy case, the creditor

would necessarily have to safeguard his interests in different proceedings. This would involve his filing a writ and statement of claim and making a summary judgment application, whereupon the very same issues that were canvassed before the bankruptcy court would have to be rehearsed in detail. This could involve the same waste of resources that justifies the extension of summary judgment principles to the insolvency context in the first place (see [17] above). Worse still, it could unfairly prejudice the interests of the creditor as he faces the risk of the debtor using the delay to dissipate his assets. The court should therefore be astute to avoid taking an overly formalistic approach in exercising its jurisdiction: matters that a bankruptcy court can determine as well as a civil court should be resolved to the fullest extent possible at the first opportunity. After all, in Singapore, the bankruptcy court is the same court as the civil court, albeit exercising a different jurisdiction.

23 The appellants also submitted that if the court found that the debt upon which a statutory demand was based was disputed on grounds which appeared to the court to be substantial, the court was obliged to set aside the statutory demand and dismiss the bankruptcy application. This submission was made on the basis of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("the Bankruptcy Rules"). Rule 127 provides that the court *shall* dismiss a creditor's bankruptcy application where the statutory demand upon which it is based would have been set aside had the debtor made an application under r 97(1):

> **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); …

Rules 97 and 98 in turn provide that a statutory demand *shall* be set aside if the debt specified in the statutory demand is disputed on grounds which appear to the court to be *substantial*:

> **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.
>
> …
>
> **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 —

(*a*) the debtor appears to have a valid counterclaim, set-off or cross demand which is equivalent to or exceeds the amount of the debt or debts specified in the statutory demand;

(b) the debt is disputed on grounds which appear to the court to be substantial …

…

24 In *Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 2 SLR(R) 31, which the appellants also relied upon, the High Court said (at [3]):

> On a plain reading of r 98(2)(*b*) of the Bankruptcy Rules [(Cap 20, R 1, 1996 Rev Ed)], 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. It is not the function of the bankruptcy court, at the hearing of an application to set aside a statutory demand, to conduct a full hearing of the dispute and adjudicate on the merits of the creditor's claim. That would be the function of the court in its non-bankruptcy jurisdiction should the creditor institute proceedings against the debtor to obtain judgment on the claim contained in the statutory demand.

25 The Judge addressed the appellants' submission by noting that the word "shall" in a legislative provision – in this case, r 127 – did not necessarily mean that the provision was mandatory, and that it was always a question of legislative intent. The Judge read the Bankruptcy Rules in the light of ss 64(1), 65(4) and 65(5) of the Bankruptcy Act (reproduced above at [18]) in order to glean the legislative intent behind them. The Judge observed that these sections of the Bankruptcy Act contemplated that a court hearing a bankruptcy application was not compelled to dismiss the application where the underlying debt was disputed, whether on substantial grounds or otherwise. Further, s 65(5)(i) of the Bankruptcy Act expressly contemplated that the court hearing a bankruptcy application could stay bankruptcy proceedings to permit the creditor's claim to be litigated in the usual manner, on condition that the debtor gave security for the creditor's debt. Given that the Bankruptcy Act clearly gave the court both a general and a specific power to stay bankruptcy proceedings and, further, to do so on terms and conditions, the Judge held that the appellants' reading of rr 127 and 98(2) of the Bankruptcy Rules was inconsistent with the broad discretionary power to stay under the parent Act.

26 In effect, the Judge was doing one of two things. He was either disapplying rr 127 and 98(2), or he was reading into r 127 the words "unless the grounds raised under r 98(2)(*b*) are shadowy". Although the appellants did not take issue with this aspect of the GD on appeal, we were of the view that there was in fact no inconsistency between the Bankruptcy Rules and the Bankruptcy Act, and that the position taken by the Judge was, with respect, incorrect.

27 The Judge might have been concerned that the appellants' reading of the Bankruptcy Rules would compel the dismissal of a bankruptcy application even if the debtor could raise only a shadowy case. This would not have been a just result, bearing in mind the observations made at [20]–[22] above. However, the Judge need not have been unduly concerned. In placing emphasis on the mandatory word "*shall*" [emphasis added] in r 127, the Judge overlooked the crucial proviso of "*substantial*" [emphasis added] grounds in r 98(2)(*b*). The Judge indirectly recognised this when he observed, as a fallback for the analysis summarised at [25] above, that (see the GD at [58]):

> … [I]n 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* …

28 Additional guidance on the requirements of r 98(2)(*b*) has been given in para 144 of the Supreme Court Practice Directions ("the Practice Directions"), which was first issued as para 71 of Practice Direction No 1 of 1996:

> **144. Applications to set aside statutory demands made under the Bankruptcy Rules**
>
> …
>
> (3) When the debtor:
>
> (a) claims to have a counterclaim, set-off or cross demand (whether or not he could have raised it in the action or proceedings in which the judgment or order was obtained) which equals or exceeds the amount of the debt or debts specified in the statutory demand; or
>
> (b) disputes the debt (not being a debt subject to a judgment or order),
>
> the Court will ***normally*** set aside the statutory demand if, in its opinion, on the evidence there is a ***genuine triable issue*** .
>
> [emphasis added in bold italics]

29 This suggests that the court is not *obliged* to set aside a statutory demand where there is a genuine triable issue. It will only *normally* do so. It follows, therefore, that the criterion of "grounds which appear to the court to be substantial" under r 98(2)(*b*) constitutes a higher threshold. In *Wee Soon Kim Anthony v Lim Chor Pee and another* [2005] 4 SLR(R) 367, the High Court commented on the provenance of the "genuine triable issue" phraseology (at [27]):

> In Re A Debtor, No 991 of 1962 [1963] 1 WLR 51, Lord Denning MR, in determining an application to set aside a statutory demand, opined that the counterclaim, set-off or cross demand of the debtor had to be "genuine". Lord Denning expressly rejected the language of a "*prima facie* case" or a claim with a "reasonable probability of success", stating that it sufficed if there was a "triable issue". The standard of a genuine triable issue was also adopted in the English Practice Note (Bankruptcy: Statutory Demand: Setting Aside) [1987] 1 WLR 119 which permitted the setting aside of statutory demands on grounds akin to those under the Bankruptcy Rules.

30 On appeal, this court observed in *Wee Soon Kim Anthony v Lim Chor Pee* [2006] 2 SLR(R) 370 (at [17] and [18]):

> 17 The appellant conceded that for r 98(2)(a) to apply there must be a "triable issue" although he would want to qualify that expression with the word "genuine". In spite of the fact that in *In re A Debtor, No 991 of 1962* [1963] 1 WLR 51, the court had used the term "genuine" to qualify the "cross-claim", it is of interest to note that Lord Denning MR had explained the use of the word "genuine" as follows (at 55–56):
>
> > I have used the word "genuine" because I prefer not to use the words "prima facie case" or "a cross-claim with a reasonable possibility of success." Suffice it that there is a triable issue.
>
> 1 8 ***We do not think the addition of the adjective "genuine", in fact, adds anything.***

> ***There is either a "triable issue" or there is not. Very often adjectives are inserted for reasons of emphasis.*** **In every case the court must examine all the facts to determine whether the test is satisfied** : see *Re Debtors (Nos 4449 and 4450 of 1998)* [1999] 1 All ER (Comm) 149 ("*Debtors 1998*"). **A trumped-up dispute cannot constitute a "triable issue".** The mere fact that the creditor has alleged that the "counterclaim" or "cross-claim" is a fake does not preclude there being a triable issue. The court must look at all the circumstances to determine if there is a triable issue. In *Debtors 1998*, the statutory demand issued by the respondent was set aside upon the applicant debtors showing that they had an "arguable" counterclaim against the respondent.
>
> [emphasis added in bold italics and bold underlining]

While the first-emphasised portion of the excerpt suggests that one should not make too much of the qualifier "genuine", the second makes clear that it will not suffice for a debtor to raise spurious allegations in order to fend off bankruptcy proceedings. The court must examine *all the facts* to ascertain whether the "genuine triable issue" test in para 144 of the Practice Directions is satisfied. The upshot of this is that the court will only set aside a statutory demand (and thereby require a creditor to initiate a civil suit if he wishes to pursue the claimed debt further) where the debtor is able to adduce evidence on affidavit that raises a triable issue.

31 Moreover, while there will either be or not be a triable issue, not all triable issues have equal merit. The inclusion of the qualifier "normally" in para 144 of the Practice Directions reflects the fact that a range of triable issues may be raised. In bankruptcy proceedings, as with summary judgment applications, these can be conveniently split into two categories. First, there are the cases where the defendant/debtor can demonstrate a fair case for defence, reasonable grounds for setting up a defence or a fair probability of a *bona fide* defence (see *Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 at [21]). In such cases, the defendant/debtor ought to be granted unconditional leave to defend or an unconditional stay or a dismissal of the bankruptcy proceedings as the plaintiff/creditor in either case would not have demonstrated that there is no reasonable doubt that he is entitled to what he seeks. Second, there are the cases where the defendant's/debtor's defence, although not hopeless, calls for a demonstration of commitment through the satisfaction of appropriate conditions (see *Abdul Salam Asanaru Pillai* at [44]). Paragraph 144 of the Practice Directions indicates that rr 127 and 98(2) of the Bankruptcy Rules do not oblige the court to dismiss such bankruptcy proceedings merely because a triable issue, however shadowy, has been raised. Such a result would significantly undermine the court's power to order a stay of proceedings.

32 We think that rr 127 and 98(2) are in fact consistent with the fundamental principle that the insolvency mechanism, whether in the corporate or the personal context, is not meant to be used as a parallel procedure to procure the payment of disputed debts. The bankruptcy court which finds that the claimed debt is genuinely disputed to the knowledge of the creditor may characterise the bankruptcy application as an abuse of process and dismiss it with costs: see John Briggs & Christopher Brougham, *Muir Hunter on Personal Insolvency* (Sweet & Maxwell, Looseleaf Ed, 1987, March 2013 release) at vol 1, para 3-418. In Christopher Berry, Edward Bailey & Stephen Schaw Miller, *Personal Insolvency: Law and Practice* (Butterworths, 3rd Ed, 2001) it was observed at para 4.73 that:

> **4.73 Abuse of process.** A bankruptcy petition may be dismissed on the ground that it is, or has been tainted by, an abuse of process.
>
> It is an abuse of process to present a winding-up petition against a solvent company in respect of a debt which the petitioner knows is disputed on substantial grounds. The consequence is that

an injunction will be granted to stay advertisement of the petition (or an order made dismissing it) and the petitioner may be ordered to pay costs on the indemnity basis. Bankruptcy proceedings against individuals differ from winding-up proceedings against companies because a bankruptcy petition must be preceded by a statutory demand served on the debtor, whereas a winding-up petition may be presented without any preliminary step. So, in bankruptcy, a precisely analogous situation ought not to arise. For the debtor has the opportunity to dispute the debt before the petition is presented and the proof of his insolvency is that he failed to comply with or set aside the statutory demand.

…

33 Rules 97 and 98(2) of the Bankruptcy Rules ensure that a presumption of indebtedness will not arise on the basis of a disputed debt by obliging the court, in such cases, to set aside the statutory demand in question on the application of the putative debtor. Rule 127 merely ensures the same result where the debtor fails to challenge the statutory demand, but does so after a bankruptcy application has been made.

34 It is for these reasons that we are of the view that there is no inconsistency between the Bankruptcy Rules and the court's power to order a stay of proceedings under the Bankruptcy Act.

Our decision

The appellants' evidence was shadowy

35 Although the nature of the appellants' evidence was not canvassed at the hearing before us, we agreed with the Judge's finding that it was shadowy. We summarise our reasons briefly.

36 First, the Judge correctly noted that the appellants' allegations were not supported by any contemporaneous documents, and that this created real doubt about the appellants' allegations regarding the Oral Agreement and Yeo's representations. It was simply not plausible that agreements relating to a substantial debt of more than US$13m would not be documented.

37 Second, in his affidavit filed on 22 May 2012 on Chimbusco's behalf, Yeo unequivocally denied the existence of the Oral Agreement. He also denied making any of the representations which he was alleged to have made. Even if the appellants' allegations were true, and Yeo had indeed represented that the Guarantees were mere formalities, there was no evidence that he had any actual or ostensible authority to do so. Further, we agreed with the Judge's observation that it was against the weight of the inherent probabilities that experienced businessmen such as the appellants would have been induced by and relied on Yeo's representations.

38 Third, and most importantly, there was correspondence between the appellants and Chimbusco which suggested that the appellants' allegations were untrue and that the Guarantors considered themselves bound by the Guarantees. In February 2012, Chimbusco sought the financial details of the corporate guarantors to assure itself that its position was secure. Instead of expressing puzzlement over the relevance of such documents, given that the Guarantees were supposed to be mere formalities, these financial details were provided to Chimbusco. On 8 March 2012, a representative of Chimbusco e-mailed to Zain saying "we do hope you can *increase* the amount of personal guarantee" [note: 1] [emphasis added]. Zain did not dispute the existence of any personal guarantees in his reply later that day. If the appellants' assertion that the Guarantees were mere formalities were true, why was this not stated in response?

The appropriate amount of security

The appropriate amount of security

39 The Judge held that the full sum claimed would ordinarily be the "starting point" for the amount of security to be furnished (see the GD at [89]). We respectfully disagree. The court's discretion, both under s 64(1) of the Bankruptcy Act and under O 14 r 4(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), is unqualified and widely framed. A starting point would detract from the latitude which these provisions seek to grant the court. Further, the court may impose any condition which it sees fit and need not confine itself to ordering that security be provided. We are therefore of the view that the court ought not to begin with any starting point in mind in determining the amount of security to be provided, and should instead exercise its discretion flexibly to meet the needs of the case before it.

40 We also did not agree with the appellants' submission that "the 'demonstration of commitment on the part of the defendant' informs both the need for condition as well as the appropriateness of the condition" [note: 2] [emphasis in original omitted]. The tenor of the appellants' argument appeared to be that the amount of security necessary to demonstrate such commitment should not be too high. In our view, the High Court in *Abdul Salam Asanaru Pillai* was articulating the underlying principle upon which conditions are imposed on a grant of leave to defend, rather than departing from established principles. It was providing guidance on when, rather than what, conditions ought to be imposed. In any event, insofar as the amount of security should be determined with reference to the demonstration of commitment on the defendant's part, it should be noted that the *degree* of commitment which is appropriate will naturally vary with the circumstances. In the final analysis, the court will have to mediate between various competing concerns in deciding what conditions ought to be imposed, including, *inter alia*, protecting the pecuniary interests of the plaintiff/creditor, the size of the debt, avoiding the stifling of triable issues and responding to different degrees of shadowiness.

41 Turning to the security ordered in the case before us, it could not be said that the Judge exercised his discretion incorrectly when he ordered the appellants to jointly provide security in the sum of US$4,202,572.12. The appellants did not provide any evidence of their inability to provide such a sum. Instead, they invited the court to infer, from their failure to satisfy the statutory demands and the fact that they had previously asked Chimbusco for more time to make repayments, that they did not have the means to satisfy the condition. We were not willing to draw this inference. Consequently, we upheld the Judge's decision and dismissed both appeals with costs fixed at $35,000 (inclusive of disbursements and the costs of withdrawing SUM 1964). We also made the usual consequential orders.

[note: 1] Respondent's Supplemental Core Bundle at p 78.

[note: 2] Joint Appellants' Case at para 105.

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