IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 118

Civil Appeal No 25 of 2020

Between

Koh Kim Teck

… *Appellant*

And

Shook Lin & Bok LLP

… *Respondent*

In the matter of Originating Summons (Bankruptcy) No 129 of 2019
(Registrar's Appeal No 353 of 2019)

Between

Koh Kim Teck

… *Plaintiff*

And

Shook Lin & Bok LLP

… *Defendant*

JUDGMENT

[Insolvency Law] — [Bankruptcy] — [Statutory demand] — [Application to set aside]

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Koh Kim Teck
v
Shook Lin & Bok LLP

[2020] SGCA 118

Court of Appeal — Civil Appeal No 25 of 2020
Sundaresh Menon CJ, Tay Yong Kwang JA and Woo Bih Li J
26 October 2020

10 December 2020 Judgment reserved.

Woo Bih Li J (delivering the judgment of the court):

1 The appellant, Mr Koh Kim Teck, appeals against the High Court judge's dismissal of his application ("the Application") to set aside a statutory demand dated 30 September 2019 ("the SD") served on him by the respondent, Shook Lin & Bok LLP. The decision of the High Court judge ("the Judge") can be found in *Koh Kim Teck v Shook Lin & Bok LLP* [2020] SGHC 86 ("the GD") and was made following a similar dismissal of the Application by an Assistant Registrar ("AR") in HC/OSB 129/2019 ("OSB 129").

2 The Application was brought firstly on the basis that the SD was not validly served. There are two potential dates on which the SD might have been validly served: 4 October 2019 and 22 October 2019. In the event we find, as the Judge did below, that the SD was validly served on 4 October 2019, the appellant seeks the requisite extension of time to bring the Application as it was filed only on 31 October 2019, *ie*, more than 14 days after 4 October 2019. The

appellant then contends that the SD should be set aside because the quantum of the debt is disputed; that he has a cross-demand that exceeds the debt under the SD; and that there was an implied term which disentitles the respondent from payment in the present case.

Background facts

The 26 October 2017 invoice

3 A chronology of the relevant events can be found in Annex A. The respondent acted for the appellant in two suits heard in the High Court ("the Consolidated Suits") from May 2013 to 22 January 2018.[1] The SD is premised on Invoice No 150722, issued by the respondent on 26 October 2017[2] ("the 26 October 2017 invoice"). This invoice was for a sum of $269,066.57, billed for the work done by the respondent between 18 February 2017 and 31 July 2017.[3] However, the debt as stated in the SD was $106,133.52 (inclusive of interest)[4] as an aggregate sum of $176,025.30,[5] held on account for the appellant in the respondent's client account, was set off against the sum originally claimed under the 26 October 2017 invoice at the time it was issued.

4 The parties spoke about the 26 October 2017 invoice over the phone on 11 December 2017, during which the appellant sought a discount of 50%.[6] Over lunch on 3 January 2018, the respondent informed the appellant that if he

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1 Respondent's supplementary core bundle ("SCB") Vol I(A) at p 33.

2 Core Bundle ("CB") Vol II(A) at p 16.

3 SCB Vol I(A) at p 49.

4 Appellant's Case at para 3; CB Vol II(A) at p 16; SCB Vol I(B) at p 201.

5 SCB Vol I(B) at p 80.

6 SCB Vol I(A) at p 134.

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disputed any part of the 26 October 2017 invoice, he was entitled to approach the court to have this taxed. The appellant stated that he would have to consider whether to continue to engage the respondent to act for him.[7] The respondent sent a follow-up electronic mail ("email") on 9 January 2018, and again on 17 January 2018,[8] seeking the appellant's confirmation as to whether he intended to continue engaging the respondent. On 19 January 2018, the appellant confirmed that he wished to continue doing so but the respondent inquired about payment of the 26 October 2017 invoice.[9] On 22 January 2018, the respondent was informed by Optimus Chambers LLC ("Optimus Chambers") that it had been instructed to take over the continuing trial of the Consolidated Suits.[10]

5 On 27 March 2018, the respondent wrote to Optimus Chambers, enclosing the 26 October 2017 invoice and another invoice, *ie*, Invoice No 152152 dated 13 March 2018 ("the 13 March 2018 invoice") for work done in the Consolidated Suits between 1 August 2017 to 22 January 2018.[11] The respondent informed Optimus Chambers that it would be setting off the sum of $176,008.04 held on account for the appellant against the unpaid invoices.[12] According to the respondent, Optimus Chambers suggested that the respondent speak to the appellant personally, and the respondent did so on 23 April 2018, informing the appellant that if he disputed any of the unpaid invoices, he was

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7 SCB Vol I(A) at pp 49 and 50.

8 SCB Vol I(A) at pp 291 and 295.

9 SCB Vol I(A) at pp 293 and 294.

10 SCB Vol I(A) at p 51.

11 SCB Vol I(B) at pp 4, 6 and 19.

12 SCB Vol I(B) at p 4.

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entitled to apply to the court to tax those invoices. On the other hand, the appellant suggested that the respondent communicate with Optimus Chambers.[13] On 7 September 2018, the respondent again wrote to Optimus Chambers to state that the sum of $176,008.04 had been set off against the "total amount owing to [the respondent]". The respondent reiterated that the appellant was entitled to proceed to taxation if he disputed any part of its professional charges. At that time, no distinction was drawn between the two invoices for the purpose of set-off.[14]

Statutory demands and service

6 The respondent then issued three statutory demands in relation to the 26 October 2017 invoice. First, the respondent wrote to Optimus Chambers on 29 November 2018 enclosing a statutory demand also dated 29 November 2018 for the full amount claimed under the 26 October 2017 invoice and enquired if Optimus Chambers had instructions to accept service of that statutory demand on the appellant's behalf (GD at [4]).[15] This was because the set-off previously mentioned by the respondent had been effected against the sum claimed under the 13 March 2018 invoice.[16] At that time, the appellant had not yet pursued taxation of either invoice.

7 On 15 January 2019, the appellant filed HC/OS 67/2019 ("OS 67/19") seeking an order for taxation in respect of the 13 March 2018 invoice, as well as leave to seek an order for taxation in respect of the 26 October 2017 invoice

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13 SCB Vol I(A) at p 52.

14 SCB Vol I(B) at pp 30 and 31.

15 SCB Vol I(B) at pp 56-61.

16 Respondent's Case at para 107.

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given that the application was not made within the 12-month period prescribed by s 122 of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA"). We note that for the 26 October 2017 invoice, the appellant did not require leave for an order for taxation so long as he satisfied the requirement of special circumstances under s 122 of the LPA. In the supporting affidavit filed for OS 67/19, the appellant stated that he had informed the respondent that there was no reason for it to have issued a statutory demand since the invoices were disputed and he was willing to have them taxed.[17] No further steps were taken in respect of the statutory demand dated 29 November 2018.

8 Aedit Abdullah J, who heard OS 67/19, granted the order for taxation of the 13 March 2018 invoice but dismissed the application in relation to the 26 October 2017 invoice. No appeal was filed by the appellant against Abdullah J's decision. Cairnhill Law LLC ("Cairnhill Law"), his current solicitors, were appointed in relation to the taxation proceedings on 20 August 2019 (see GD at [7]). The bill of costs for the 13 March 2018 invoice has since been taxed by an AR. According to the respondent, aside from Section 2 costs, 12.38% of the bill of costs relating to the 13 March 2018 invoice was taxed off.[18] The appellant's application for review of the taxation was dismissed by Abdullah J on 19 October 2020.[19]

9 Subsequently, a fresh statutory demand dated 10 May 2019 was issued by the respondent on the basis of the 26 October 2017 invoice. This was sent by registered post to a unit at 72 Bayshore Road, Costa Del Sol, Singapore 469988

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17 Record of Appeal ("ROA") Vol III(A) p 14.

18 Respondent's Case at para 28.

19 Correspondence from the Court HC/BC 95/2019 dated 19 October 2020.

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("the Bayshore Road property"). This address was referred to by the parties and the Judge as the appellant's "last known address". This statutory demand was returned uncollected. Thereafter, on 26 July 2019, the respondent attempted substituted service on the appellant by sending an email to him and LVM Law Chambers LLC, who were the appellant's solicitors in the appeal against the decision in the Consolidated Suits ("the 26 July 2019 email") which was given on 7 August 2018. LVM Law Chambers LLC went on record as the appellant's solicitors in the appeal on 6 June 2019. The respondent had previously communicated with the appellant at the email address used.[20] No reply was received from the appellant and no further step was taken by the respondent in relation to this statutory demand.

10 The SD in the present appeal is dated 30 September 2019. It is for a net sum of $106,133.52 as by then the respondent had set off an aggregate sum of $176,025.30 from the original sum of $269,066.57 in the 26 October 2017 invoice instead of setting it off against the 13 March 2018 invoice. The net sum includes interest under para 5 of the Legal Profession (Solicitors' Remuneration) Order (Cap 161, O 1, 2010 Rev Ed). The other invoice, *ie*, the 13 March 2018 invoice, was being taxed at that time. The respondent had asked Cairnhill Law on 18 September 2019 if it had instructions to accept personal service of process on behalf of the appellant, but apparently received no reply.[21] The respondent then attempted to serve the SD on the appellant in the following ways:

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20 Respondent's Case at para 61.

21 Respondent's Case at para 49; SCB Vol I(B) at pp 82 and 129.

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(a) On 30 September 2019 and 1 October 2019, the respondent's clerk attempted personal service at the Bayshore Road property, but on each occasion the door was locked. At the time these attempts were made, the respondent was aware that the appellant no longer owned the Bayshore Road property, which was instead owned by a third party. In contrast, the appellant had been the owner of the Bayshore Road property in March 2019, although a title search then had shown that the third party had already lodged a caveat as a purchaser. An Enhanced Individual Search on the appellant conducted on 29 October 2019 did not reveal any details of the appellant's residential address.[22] The appellant accepts that two unsuccessful attempts had been made at personal service.[23]

(b) Subsequently, on 4 October 2019, the respondent placed an advertisement ("the Advertisement") in the Straits Times of a *notice* of the SD. The notice referred specifically to r 96(4)(*d*) of the Bankruptcy Rules (Cap 20, R1, 2006 Rev Ed) ("BR"), the 26 October 2017 invoice, and the sum of $106,133.52.[24]

(c) A copy of the notice advertised was also sent to Cairnhill Law by email on 4 October 2019 at 12.03pm ("the 4 October 2019 email").[25] On 22 October 2019, Mr Ashok Kumar ("Mr Kumar") from Cairnhill Law replied to the email. He referred to the notice of statutory demand and requested documents such as a breakdown of the time spent by the

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22 SCB Vol I(B) at pp 139 to 141.

23 Appellant's Case at para 9.

24 CB Vol II(A) at p 36.

25 SCB Vol I(B) at p 137.

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> respondent's solicitors "which was the subject of all the invoices" issued by the respondent to the appellant. The respondent declined to provide a breakdown and sent Mr Kumar a copy of the SD on the same day. Subsequently, on 23 October 2019, Mr Kumar stated that Cairnhill Law did not, at that time, have instructions to accept service of the SD and that his email of 22 October 2019 should not be construed otherwise. On that same day, he reiterated that Cairnhill Law did not appear on the record for the appellant in any proceeding relating to the SD.[26]

11 A bankruptcy application (HC/B 2786/2019 ("B 2786")) was filed by the respondent on 29 October 2019 on the basis of the SD. Copies of the cause papers were sent to Cairnhill Law.[27] The appellant filed OSB 129 on 31 October 2019 to set aside the SD. Before the AR, the respondent argued that the Advertisement was the only way to bring the SD to the appellant's attention, aside from "the most obvious manner of service on the [appellant's] solicitors". The respondent also emphasised that a copy of the Advertisement had been immediately sent to Cairnhill Law on the same day and noted that the Advertisement was again referred to in the email to Cairnhill Law sent on 22 October 2019, which also attached a copy of the entire SD.[28] The AR held that there was good service of the SD and that the Application was unmeritorious, and dismissed it accordingly.[29]

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26 SCB Vol I(B) at pp 133-137.

27 Respondent's Case at para 7.

28 ROA Vol IV at pp 34-36.

29 ROA Vol IV at pp 87 and 88.

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Decision below

12 Before the Judge, the appellant contended that the SD should be set aside for the reasons mentioned in [2] above (except that the argument on the implied term was only raised on appeal).

Whether there was valid service

13 The Judge held that the Advertisement and the 4 October 2019 email, whether individually or collectively, constituted valid service (GD at [24] and [52]). The Judge was of the view that r 96(4)(*c*) of the BR was inapplicable in the present case since the respondent had the appellant's last known address, *ie*, the Bayshore Road property. However, this did not prevent the respondent from effecting valid service on the appellant by way of the Advertisement and/or the 4 October email under r 96(4)(*d*) of the BR (GD at [24]).

14 The Judge was of the view that the underlying purpose of the service regime under the BR is to provide the practical means for a creditor to effectually bring a statutory demand to a debtor's attention and that the limbs of r 96(4) of the BR are not mutually exclusive. Where a creditor is unable to meet the requirements under r 96(4)(*c*) of the BR, the statutory regime enables it to effect substituted service under r 96(4)(*d*) of the BR. This is consistent with the plain wording of r 96(4)(*d*) of the BR which does not require that the modes of service under the other limbs be unavailable to the creditor and which allows for service by such other mode as the court would order, *including* a mode of substituted service by advertisement which does not fall within r 96(4)(*c*) of the BR (GD at [24]–[26], [28] and [37]). While the Judge agreed with the holding in *Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 2 SLR(R) 31 ("*Wong Kwei Cheong*") that the statutory demand itself, and not a notice thereof, must be advertised under r 96(4)(*c*) of the BR, it did not follow that service by way

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of advertisement is exclusively governed by that provision, and no authority was cited by the appellant in support of such exclusivity (GD at [29] and [30]). Similarly, under O 62 r 5 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), the court may order that substituted service be effected by advertising a *notice* that an action has been commenced against the defendant, and the same ought to apply to r 96(4)(*d*) of the BR (GD at [31]).

15 In the Judge's view, the ultimate question was whether the court was satisfied that the mode of substituted service employed by a creditor was *sufficient on the facts before it* and whether it amounted to a *reasonable step* to bring notice of the statutory demand to the debtor's attention effectively. In the present case, the respondent had taken all reasonable steps to bring the SD to the appellant's attention and utilised a mode of substituted service the court would have ordered in the circumstances. Accordingly, the Advertisement constituted valid service under r 96(4)(*d*) BR (GD at [31]–[34]).

16 The Judge further accepted that the 4 October 2019 email to Cairnhill Law constituted valid service whether on its own or taken together with the Advertisement. Sending a notice of the SD by email to the appellant's solicitors was effectual in bringing the SD to his notice as the solicitors had been acting for the appellant in the ongoing taxation proceedings for the 13 March 2018 invoice. It was entirely reasonable for the respondent to presume that the 4 October 2019 email would be effective in bringing the SD to the appellant's attention. The appellant's solicitors in fact confirmed that the appellant had notice of the SD at around the time the 4 October 2019 email was sent (GD at [35]). While the appellant referred to para 33(6) of the Supreme Court Practice Directions ("Supreme Court PD") (see [46] below), neither this nor O 62 r 5(4) ROC exhaustively set out the requirements of substituted service by way of email (GD at [36]). The requirements for valid service are circumscribed

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by pragmatism and not by an overtly rigid and technical approach (GD at [37], citing *Re Ramaschayana Sulistyo (alias Chang Whe Ming)*, ex parte *The Hongkong and Shanghai Banking Corp Ltd and other appeals* [2005] 1 SLR(R) 483 ("*Sulistyo*") at [10] and [21]).

Extension of time

17 Given the Judge's finding that substituted service was validly effected on 4 October 2019, the Application (to set aside the SD) was made out of time. It ought to have been made within 14 days from the date of service of the SD on 4 October 2019, *ie*, by 18 October 2019 (r 97(1)(*a*) of the BR). Instead, it was filed on 31 October 2019. The Judge did not make a clear finding on whether an extension of time should be granted, instead considering that this question was "ultimately rendered moot" by his conclusion that the application to set aside the SD was without merit (GD at [55]) (see [18] below). Nevertheless, the Judge observed that the delay of almost two weeks was not insubstantial and that the appellant did not give any reasons for it. It appeared that the appellant had made a deliberate and tactical decision to wait until B 2786 had been filed before taking any action (GD at [35] and [55]).

18 Aside from finding that there had been valid service of the SD, the Judge also rejected the other grounds on which the appellant sought to set aside the SD. Specifically, the Judge held that taxation is the exclusive judicial recourse available to any challenge over the quantum of the defendant's fees (following *Kosui Singapore Pte Ltd v Thangavelu* [2015] 5 SLR 722 ("*Kosui*") at [56]–[57]). The appellant did not file an appeal against the court's decision in OS 67/19 that he was not entitled to an order for taxation for the 26 October 2017 invoice, and that was the end of the matter in relation to whether the 26 October 2017 invoice could be challenged. The appellant's

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arguments were a blatant attempt to circumvent the order of Abdullah J in OS 67/19 (GD at [44]). There was also no valid or genuine cross-demand equivalent to or exceeding the debt arising from the setting-off of deposits held by the respondent against the sum invoiced. While the explanation that there had been a telephone conversation in which Optimus Chambers agreed that the respondent was to utilise the funds held as part payment of the 26 October 2017 invoice had not been given on affidavit, there was no reason to disregard or disbelieve the explanation (GD at [42] and [51]).

Parties' submissions on appeal

The appellant's submissions

19 First, the appellant seeks to set aside the SD pursuant to r 98(2)(*e*) of the BR, under which the court shall set aside a statutory demand if it is satisfied it ought to be set aside. In this regard, the appellant argues that there has not been valid service of the SD. The appellant argues that the Advertisement was not good service since advertising in the newspapers is only allowed under r 96(4)(*c*) of the BR when the modes prescribed in r 96(4)(*a*) and r 96(4)(*b*) are unavailable due to the creditor's ignorance of the debtor's last known address. The Judge erred in considering that the Advertisement was valid service under r 96(4)(*d*) of the BR since this interpretation rendered r 96(4)(*c*) otiose, which could not have been the intention of the Rules Committee.[30] Further, as was held in *Wong Kwei Cheong* ([14] *supra*), r 96(4)(*c*) of the BR requires that the SD itself (as opposed to a notice of the SD) must be advertised. The Judge's analogy from the advertisement of a notice of commencement of a court action (see O 62 r 5 ROC and Form 138(e)) was erroneous since the court would first

[30] Appellant's Case at paras 31 and 32.

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need to be persuaded that Form 138(e) is the appropriate form of the advertisement and it is conceivable that the court may order the full statement of claim to be reproduced.[31]

20 The 4 October 2019 email and 22 October 2019 email also would not have been a mode of service that the court would have ordered (see r 96(4)(*d*) of the BR). Guidance can be taken from para 33(6) of the Supreme Court PD,[32] pursuant to which the email account must belong to the person to be served. Cairnhill Law also made clear on 23 October 2019 that it still did not have instructions to accept service of the SD. It would have been obvious that the emails might not have been brought to the personal attention of the appellant and therefore that it would not have been an acceptable mode of substituted service.[33] Even if the Advertisement and emails were considered collectively, there would still not be valid service.[34]

21 If the court finds that valid service had been effected on 4 October 2019, the appellant submits that an extension of time should be granted for the Application to be brought because it was only late by 12 working days and the respondent would therefore not be prejudiced by the extension. As the court held in *Liew Kai Lung Karl v Ching Chiat Kwong* [2015] 3 SLR 1204 ("*Liew Kai Lung Karl*") at [6], the threshold to grant an application for an extension of time for a debtor to apply to set aside a statutory demand is "not a particularly high one".[35] Further, he claims he has strong grounds for setting aside the

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31 Appellant's Case at paras 34 to 37; Appellant's skeletal arguments at para 5.

32 Appellant's Bundle of Authorities at Tab P.

33 Appellant's Case at paras 40 to 44.

34 Appellant's Case at para 38.

35 Appellant's Bundle of Authorities Tab I.

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application.[36] Specifically, aside from the arguments on service, the appellant also contended that:

(a) There are triable issues relating to the quantum of the debt and so the SD should be set aside pursuant to r 98(2)(*b*) of the BR. In particular, the appellant contends that his failure to seek taxation of the 26 October 2017 invoice within 12 months of that invoice, as required under s 122 of the LPA, does not preclude him from disputing the quantum of that invoice. He relies on the decision in *Turner & Co (a firm) v O Paloma SA* [2000] 1 WLR 37 ("*Turner*").

(b) The appellant has a valid cross-demand of $176,025.30 (the amount set off against the 26 October 2017 invoice) that exceeds the debt claimed under the SD and the SD should be set aside pursuant to r 98(2)(*a*) of the BR.

(c) The respondent is not entitled to payment due to its failure to comply with an implied term in the Letter of Engagement between the parties to provide a breakdown of time costs for the 26 October 2017 invoice.

The respondent's submissions

22 The respondent contends that the Judge was correct to find that there had been valid service. The principle underlying the requirements on service of a statutory demand is that a creditor should take all reasonable steps to bring it to the attention of the debtor (see r 96(1) of the BR), and the "philosophy" is one

[36] Appellant's Case at paras 19 to 22.

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of "pragmatism and substantial justice" (*Sulistyo* ([16] *supra*) at [26]–[27]).[37] The appellant in the present case had not spared any attempt to evade service including unreasonably choosing not to instruct Cairnhill Law, his solicitors in HC/BC 95/2019 ("BC 95"), the taxation proceedings in respect of the 13 March 2018 invoice, to accept service of the SD on his behalf.

23 The appellant had many opportunities to accept service of the SD: (a) the respondent had enquired with Cairnhill Law as to whether it had instructions to accept service on 18 September 2018; (b) made two attempts at personal service; (c) placed the Advertisement of a notice of the SD and sent a copy of the notice to Cairnhill Law on 4 October 2019, following which Cairnhill Law wrote to the respondent referring to the Advertisement and requesting documents relating to the 26 October 2017 invoice; and (d) provided a copy of the entire SD to Cairnhill Law subsequently on 22 October 2017. The appellant made the tactical decision not to apply to set aside the SD until B 2786 had been filed.[38] A previous statutory demand arising from the same invoice had also been sent to the appellant's email address as well as by registered post to the last known address (although the letter was returned).

24 The Judge was correct in holding that advertising a notice of the demand was sufficient. The respondent had been relying on r 96(4)(*d*) and not r 96(4)(*c*) of the BR and the requirements set out in the latter provision were inapplicable. However, the respondent also submits that *Wong Kwei Cheong* ([14] *supra*) was wrong to conclude that the entire SD had to be advertised under r 96(4)(*c*) of the BR, and that the publication of a notice of the SD was sufficient to make the

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37 Respondent's skeletal arguments at paras 13 and 14.

38 Respondent's skeletal arguments at paras 17 to 21.

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SD known publicly. It contends that in practice, creditors have routinely sought to use r 96(4)(*d*) of the BR to publish notices of statutory demands, which is a sensible and pragmatic approach. Requiring the entire demand to be published under r 96(4)(*c*) of the BR but *not* under r 96(4)(*d*) of the BR would be incongruous and may render r 96(4)(*c*) otiose.[39] Further, even though Cairnhill Law did not have authority to accept service on the appellant's behalf, on the facts, sending a notice of the SD in the 4 October 2019 email to Cairnhill Law did bring it to the appellant's attention.[40]

25 The respondent submits that an extension of time ought not to be granted because the appellant had been well aware of the SD, and his counsel had conceded that it was a *tactical* decision not to file the application to set aside the SD until after B 2786, *ie*, the bankruptcy application, had been filed. This conduct should not be allowed since it would render r 97(1) of the BR entirely otiose.[41]

26 The SD should not be set aside because the appellant is not entitled to dispute the debt though a backdoor attempt to tax the 26 October 2017 invoice. The respondent reiterates the Judge's conclusion that taxation is the only judicial process to assess the fees a solicitor may charge his client and this avenue has been exhausted by the appellant. The respondent distinguishes *Turner* since in that case there had not been an earlier (unsuccessful) application for taxation. In any event, the respondent urges the court not to follow *Turner* in the light of the express provisions of the LPA, and because doing so would

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39 Respondent's Case at paras 73 to 77.

40 Respondent's Case at para 71.

41 Respondent's Case at paras 78 to 85.

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obviate the protection afforded in s 122 of the LPA to solicitors.[42] There is also no valid cross-demand since the appellant's then solicitors, Optimus Chambers, had *requested* the respondent to apply the funds held by the respondent against the 26 October 2017 invoice to reduce the amount of interest. No loss had been suffered by the appellant from the set-off, which in fact benefitted him by reducing the interest payable.[43] Finally, there was no implied term requiring the respondent to provide a breakdown of time costs.[44]

Issues to be considered

27 The main questions in this appeal are:

(a) First, whether there had been valid service of the SD. Specifically, the issue is whether the Advertisement (placed by the respondent in the Straits Times on 4 October 2019) and/or the email sent to Cairnhill Law on 4 October 2019 constituted valid service ("Issue 1").

(b) Second, if it is held that the SD was validly served on 4 October 2019, whether an extension of time ought to be granted to the appellant to bring the Application ("Issue 2"). In determining this issue, we also consider whether there is any ground on which the SD should be set aside.

28 We turn now to address each of these questions in turn.

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42 Respondent's Case at paras 91 to 103.

43 Respondent's Case at paras 104 to 109.

44 Respondent's Case at paras 110 to 119.

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Issue 1: Whether there was valid service

29 Rule 96 of the BR provides that:

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

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…

[emphasis added in italics and bold italics]

30 As we indicated above, on 4 October 2019, the respondent placed the Advertisement in the Straits Times with a notice of the SD. We note at the outset that the Advertisement stated that notice was being given under r 96(4)(*d*) of the BR and not r 96(4)(*c*). The Judge took the view that the latter provision was inapplicable in the present case as the respondent "did have [the appellant's] last known address" (GD at [24]). This appeared to be the position of both parties as well.[45] The arguments made on r 96(4)(*c*) of the BR were therefore focused on the question as to whether the respondent can rely on r 96(4)(*d*) in *advertising a notice of the SD*. We begin by examining the correct interpretation of r 96(4)(*c*) of the BR.

***Whether the respondent could have relied on r 96(4)*(c)**

31 Rule 96(4)(*c*) of the BR allows for substituted service by "advertisement of the statutory demand in one or more local newspapers", *subject* to the creditor being unable to effect substituted service by the means provided in r 96(4)(*a*) and r 96(4)(*b*) of the BR by reason that he does not have knowledge of the last known place of residence, business or employment of the debtor (for convenience, "last known address"). Two questions arise: (a) when a creditor should be considered to have no knowledge of the debtor's last known address; and (b) what an "advertisement of the statutory demand" entails.

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45 Appellant's Case at para 29; Respondent's Case at para 65.

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Last known address

32 The first question is what knowledge of the debtor's last known address entails. In particular, where a creditor once knew of the debtor's residence, business or place of employment, the question is whether he should be considered as having knowledge of the debtor's last known address *even if* he knows, or has good reason to believe, that the debtor no longer lives, carries out business, or works there.

33 We note that at [13] of *Wong Kwei Cheong* ([14] *supra*), S Rajendran J said that "even if [the debtor] was in fact no longer residing at that address, it would not detract from the fact that that was the last known place of residence of [the debtor] in so far as the [creditor] was concerned". In so holding, Rajendran J also stated that the fact the debtor was not the registered owner of the premises did not indicate in any way that he was not resident at the premises. However, in context, that might have been because the registered owner in that case was a company (see *Wong Kwei Cheong* at [9]) and the company might have been owned by the debtor or the debtor could have been residing there pursuant to a licence or lease conferred by the company. For completeness, while *Wong Kwei Cheong* considered an earlier version of the BR, specifically, the Bankruptcy Rules (Cap 20, R1, 1996 Rev Ed), r 96(4) was identical in both versions and we therefore do not distinguish between them in this judgment.

34 The last known address should be interpreted to mean the last address at which the person is known or believed to be located or residing at. Any other previous address would be knowledge of a fact of historic interest that has nothing to do with the purpose of the provisions on service in the BR, which is to bring the statutory demand to the notice of the debtor, as we explain below.

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35 Further, r 96(4)(*c*) reflects a legislative choice to prefer the methods of service provided for in rr 96(4)(*a*) and 96(4)(*b*) over substituted service by means of advertisement. This preference would be contrary to the purpose of the service requirements *and* the creditor's obligation to take all reasonable steps to bring the statutory demand to the debtor's attention (see r 96(1) of the BR) if the reference to the debtor's last known address is fulfilled simply by virtue of the fact that he knows of a previous address even though the debtor no longer resides there. Therefore, in our view, the reference to the last known address in r 96 must be to an address which is still believed to be applicable. If that address is known or believed no longer to be applicable, then it ceases to be the last known address for the purpose of r 96.

36 In the present case, the respondent had learnt from a title search of the Bayshore Road property done on 5 September 2019 that the property had been transferred from the appellant to a third-party purchaser.[46] This transfer was not in dispute. The ordinary inference is that the appellant no longer resides there and there was nothing to rebut that inference. Indeed, the appellant does not say that he continued to reside there. Therefore, the Bayshore Road property had ceased to be the last known address of the appellant and, in the absence of any other known address, the respondent would not have been able to rely on rr 96(4)(*a*) or 96(4)(*b*). Hence, contrary to what the respondent and the Judge had thought, the respondent could have relied on r 96(4)(*c*) to effect service by advertisement in a local newspaper.

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46 SCB Vol I(B) at p 141.

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Requirement of advertisement

37 The next question is what "advertisement of the statutory demand" in r 96(4)(*c*) means. This could mean either that: (a) the statutory demand *itself* must be advertised or (b) that a notice of the statutory demand may be advertised. In our view, the former is not mandatory and the latter would be in keeping with the purpose of the provisions on service.

38 In interpreting r 96(4)(*c*) of the BR, regard must be had to the purpose of the provisions on service. The Judge held that the overarching intention or purpose underlying the service requirements is to provide the practical means for the creditor to bring effective notice of the statutory demand to the debtor (at [25] and [37]). We agree: this is reflected in the provisions of r 96 of the BR.[47] The overarching rules for service are set out in r 96(1) and r 96(3) of the BR. The former states that the creditor shall take all reasonable steps to bring the statutory demand to the debtor's attention. The latter states that where the creditor is not able to effect personal service, the demand may be served by "such other means as would be most effective in bringing the demand to the notice of the debtor". The mode of substituted service must also be one that the court would have ordered in the circumstances (r 96(6)(*b*) of the BR). In this connection, reference may be had to para 33(1) of the Supreme Court PD, which provides that in an application for substituted service, the applicant should persuade the court that the proposed method of substituted service will probably be effectual in bringing the document in question to the notice of the person to be served. Indeed, r 108(3)(*b*) of the BR expressly requires that a bankruptcy application be accompanied by a supporting affidavit stating the means

47 Appellant's Bundle of Authorities Tab A.

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whereby, if the statutory demand had been served other than by personal service, the creditor sought to bring the demand to the debtor's attention and *explain why such means would have best ensured that the demand would be brought to the debtor's attention*.

39 These provisions underscore the court's observation in *Sulistyo* ([16] *supra*) at [21] that the essence of the service requirements under the BR is to ensure that the statutory demand, bankruptcy application and other relevant processes are brought to the personal attention of the debtor prior to the hearing of the application. This is particularly so given the serious consequences that a bankruptcy order, if granted, may have for a debtor.

40 *Wong Kwei Cheong* ([14] *supra*), on its face, may be taken as suggesting a restrictive view of the "advertisement" requirement. In that case, Rajendran J held that the creditor bank could not rely on r 96(4)(*c*) to effect substituted service by advertising the statutory demand in a newspaper since it knew what Rajendran J considered to be the last known address of the debtor. Since the bank knew that a firm of solicitors, M/s Wee Tay & Lim, was acting for the debtor, the bank should have tried to communicate the statutory demand to the debtor through M/s Wee Tay & Lim (at [12]–[14]). However, even if the bank could rely on r 96(4)(*c*), that provision required the bank to advertise the statutory demand and *not* a notice of it. In this regard, Rajendran J said that (at [15]):

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> … if a creditor wants to take advantage of the provisions in the [BR] relating to substituted service, that creditor would have to comply with the procedures specified. The [BR] did not authorise the creditor to vary the procedure laid down on the grounds of costs or on any other grounds. *In this case the bank, by advertising a notice of the statutory demand and not the statutory demand itself, had not complied with r 96(4)(c) of the [BR].*
>
> [emphasis added]

41 Rajendran J further held that non-compliance with r 96 should not be treated as an irregularity or a formal defect which can be cured under s 158(1) of the Bankruptcy Act (Cap 20, 2000 Rev Ed) because the peremptory language in the BR was clear indication that the intention was to make compliance with the rules relating to service mandatory (at [18]). As such, the defect in the service of the statutory demand could not be cured under s 158(1) of the Bankruptcy Act and the statutory demand had to be set aside (at [20]).

42 On its face, the remarks made in *Wong Kwei Cheong* on r 96(4)(*c*) are suggestive of a stringent and technical approach towards the requirements set out in that provision. However, in the later case of *United Overseas Bank Ltd v Ishak bin Ismail* [2003] 3 SLR(R) 302 at [9], Rajendran J stated that *Wong Kwei Cheong* had been decided on the basis that there had been a more effective and appropriate way to effect service which the creditors had ignored. It was for this reason that the creditors were not entitled to rely on service by advertisement. Rajendran J further clarified that where there are clearly better modes of service other than those enumerated in r 96(4)(*a*) to (*c*) BR, the pre-requisite of two attempts at personal service does not absolve creditors from exploring those avenues. This is consistent with the underlying purpose we have identified above.

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43 In our view, the literal meaning of "advertisement of the statutory demand" in r 96(4)(*c*) BR is that the statutory demand itself must be included in the advertisement. However, a possible interpretation, consistent with the language of the provision, is that it suffices if the advertisement is sufficient to bring the demand to the attention of the debtor. This latter interpretation accords with the purpose of the provision. There is no meaningful difference between the advertisement of a statutory demand itself or of a notice thereof. The latter is adequate if it contains the material information such as the name of the creditor, the date of the invoice or the nature of the claim, and the amount that is allegedly owing together with information as to who the debtor may contact if he wishes to obtain the statutory demand. To insist that a creditor must advertise the statutory demand itself is to require him to incur more costs with no apparent benefit to either the creditor or the debtor. In *The Hongkong and Shanghai Banking Corp Ltd v Rasmachayana Sulistyo alias Chang Whe Ming* [2004] SGHC 87 at [11] and [12], an AR held that a purposive interpretation of r 96(4)(*c*) supports the conclusion that the advertisement of the notice of a statutory demand can constitute an "advertisement of the statutory demand". We agree. Accordingly, we hold that advertisement of a notice of a statutory demand can be sufficient to comply with r 96(4)(*c*) so long as the material information is stated therein.

44 In the present case, the advertised notice indicated that the SD was issued pursuant to a claim for "S$106,133.52 as at 30 September 2019 being the amount due and owing by [the appellant] pursuant to the [respondent's 26 October 2017 invoice]". The notice stated the amount of debt that accrued as at the date of the demand, as would have been done if the statutory demand itself had been advertised. The notice also referred to the possibility of a bankruptcy application being filed if the debt were not paid, secured or compounded within

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21 days of the notice and stated that an application to set aside must be made within 14 days from the date of the notice. It further provided the respondent's address and indicated that the SD could be obtained from the respondent's office.[48] The material information had been stated in the advertised notice. Indeed, the appellant does not contend that the notice contained inadequate or incorrect information. Instead, he relies on the technical argument that the advertisement must be of the SD and not a notice of that demand.

Whether there was valid service under r 96(4)(d)

45 The effect of our reasoning above is that the respondent could have relied upon r 96(4)(*c*). Nevertheless, there was valid service in the present circumstances under r 96(4)(*d*) given that the respondent had, in addition to advertising the notice in the Straits Times, also sent a copy of the notice to Cairnhill Law on 4 October 2019. Cairnhill Law had then been acting for the appellant in the taxation of the bill of costs in respect of the 13 March 2018 invoice.

46 The appellant asserts that the email to Cairnhill Law would not have been a mode of service which the court would have ordered in an application for substituted service of an originating summons in the circumstances. The appellant contended that guidance should be taken from para 33(6) of the Supreme Court PD:

> (6) If substituted service is by [email], it has to be shown that the [email] account to which the document will be *sent belongs to the person to be served and that it is currently active.*
>
> [emphasis added]

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48 CB Vol II(A) at p 36.

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In other words, the appellant's argument was that, by analogy with an originating summons, the court would have ordered that the email from the respondent be sent directly to the email address of the appellant and not to the email address of his solicitors, and hence the respondent's use of the email of the appellant's solicitors was not a valid mode of substituted service.[49]

47 However, in our view, the practice direction is only a guide and is based on the premise that the email address is the address of the person to be served. Just as substituted service *may* be effected by posting on the main door of an address of, say, the closest relative of a debtor (where, for example, the creditor does not know the debtor's last known address, as we have defined it above), substituted service *may* also be effected by sending an email to the address of someone whom it is reasonably believed will bring the email to the attention of the debtor.

48 In the present case, Cairnhill Law was acting for the appellant in the taxation of the 13 March 2018 invoice. There was every reason to believe that Cairnhill Law would bring the email sent to it on 4 October 2019 to the attention of the appellant even though it was in respect of the 26 October 2017 invoice, on which it did not have instructions.

49 For the above reasons, the 4 October 2019 email, which attached a copy of the notice of the SD as advertised, considered together with the Advertisement, constituted valid service under r 96(4)(*d*) of the BR.

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[49] See Appellant's Case at paras 39 to 42.

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Issue 2: Whether an extension of time should be granted

50 Rule 97(1)(*a*) of the BR provides that an application to set aside a statutory demand must be made within 14 days of service. We have found that there was valid service of the SD on 4 October 2019. It follows that the application to set aside the SD should have been brought by 18 October 2019. Since the application was only filed on 31 October 2019, we consider the question as to whether the appellant's application for an extension of time should be granted. The Judge decided OSB 129 on the basis that the application to set aside the SD was without merit, and therefore whether an extension of time should be granted was ultimately a moot question (GD at [55]).

51 The considerations which the court ought to have regard to are not disputed. These are: (a) the period of the delay; (b) the reasons for the delay; (c) the grounds for setting aside the statutory demand; and (d) the prejudice that might result from an extension of time. The weight to be given to each factor is to be determined on the facts (*Rafat Ali Rizvi v Ing Bank NV Hong Kong Branch* [2011] SGHC 114 at [32]).[50]

Delay

52 While the application was brought less than two weeks out of time, this does not mean that an extension of time should necessarily be granted. Despite the holding in *Liew Kai Lung Karl* ([21] *supra*) at [6] that the threshold to grant an extension of time for a debtor to apply to set aside a statutory demand was not a particularly high one, the test is, at the same time, not an empty one. Rather, each case must be judged on its specific facts.

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50 Appellant's Bundle of Authorities Tab J.

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The reasons for the delay

53 In the present circumstances, the length of the delay is less important than the reason for the delay. It appears that the delay in the present case resulted from a "tactical" decision made by the appellant.[51] Before the Judge, the appellant submitted that there were two "tactics" that could be taken when a statutory demand is served: namely, to actively take steps to set it aside, or to wait for the creditor to file the bankruptcy application before filing an application to set aside the SD. The explanation was that if the appellant had alerted the respondent to the perceived deficiencies in the manner in which it had attempted to serve the SD, the respondent would have rectified them and then proceeded to file the bankruptcy application.[52] Before us, it was submitted that Cairnhill Law had looked at the SD, considered that service had not been valid and taken the view that it could wait to raise a challenge. While there was an allusion to Cairnhill Law having been busy with the taxation of the 13 March 2018 invoice and an oblique remark to the effect that there would have been additional costs involved in applying to set aside the SD at an earlier stage, the main thrust of the appellant's position before us was that the delay was due to the tactical decision mentioned.

54 As we explained at the hearing of the appeal, this was not a case in which the appellant had failed to apply to set aside the SD on time due to an oversight or for some valid reason. In this regard, whether or not the view taken by Cairnhill Law on the validity of service was reasonable on the authorities then available was, with respect, beside the point. The appellant, on the advice of Cairnhill Law, had made the calculated and tactical decision not to bring the

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51 ROA Vol III(I) at p 5.

52 SCB Vol I(B) at p 220.

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requisite application within time, notwithstanding the fact that the SD had been brought to his notice on or about 4 October 2019. This militates against the granting of an extension of time since the need for this was entirely of the appellant's own choosing. Having (wrongly) assessed that there had not been proper service, the appellant decided to run the risk of allowing the time for setting aside to lapse. In the circumstances, there was no good reason for the delay. It was a deliberate attempt to make things as difficult as possible for the respondent which the appellant might have achieved to some extent if the SD were to be set aside, or if B 2786, the respondent's bankruptcy application, filed more than 21 days after 14 October 2017, were to be dismissed on the basis that the SD had not been validly served. This is sufficient to dispose of the second issue, but for completeness we go on to explain why the grounds the appellant relies on to set aside the SD also do not persuade us that the extension of time sought should be granted.

Grounds for setting aside the SD

55 We turn now to examine the grounds on which the appellant seeks to set aside the SD, which, in our view, similarly suggest that an extension of time should not be granted.

56 Aside from his arguments on the validity of service, the appellant also contends that the SD should be set aside because (a) the quantum of the debt is disputed; (b) he has a cross-demand that exceeds the debt under the SD; and (c) there was an implied term which disentitles the respondent from payment in the present case. We address these in turn.

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The disputed quantum and the taxation scheme under s 122 of the LPA

57 The question is whether the appellant may challenge the quantum of the 26 October 2017 invoice when he has not obtained an order for taxation under s 122 of the LPA within time.

58 The Judge agreed with the observation in *Kosui* ([18] *supra*) at [56]–[57] that taxation is the only judicial avenue for recourse available to the appellant to challenge the quantum of the respondent's fees. Pertinently, the appellant sought an order to tax the 26 October 2017 invoice in OS 67/19 and did not appeal against the Abdullah J's dismissal of his application to obtain an order for taxation out of time. The Judge found that that was the end of the matter in relation to whether the 26 October 2017 invoice could be challenged (GD at [44]).

59 The appellant argues that there is no reason why he should have only one year to challenge the 26 October 2017 invoice, as opposed to the usual six-year limitation period for contractual claims.[53] In this regard, he seeks to rely on the decision in *Turner* ([21(a)] *supra*),[54] in which the English Court of Appeal held that where a solicitor sued a client for unpaid fees, the client was entitled to challenge the reasonableness of the sum claimed under the common law notwithstanding that the period for invoking the taxation procedure under s 70 of the Solicitors Act 1974 (c 47) (UK) ("the 1974 Act") had expired (at 42 and 48). At the time *Turner* was decided, s 70 provided that:

> (1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring

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53 Appellant's skeletal arguments at para 24.

54 Appellant's Bundle of Authorities Tab O.

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> any sum to be paid into court, order that the bill be taxed and that no action be commenced on the bill until the taxation is completed.
>
> (2) Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the taxation), order –
>
> (a) that the bill be taxed; and
>
> (b) that no action be commenced on the bill, and that any action already commenced be stayed, until the taxation is completed.
>
> (3) Where an application under subsection (2) is made by the party chargeable with the bill –
>
> (*a*) after the expiration of 12 months from the delivery of the bill, or
>
> (*b*) after a judgment has been obtained for the recovery of the costs covered by the bill, or
>
> (*c*) after the bill has been paid, but before the expiration of 12 months from the payment of the bill,
>
> no order shall be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the taxation as the court may think fit.
>
> (4) The power to order taxation conferred by subsection (2) shall not be exercisable on an application made by the party chargeable with the bill after the expiration of 12 months from the payment of the bill.
>
> …

60 The English Court of Appeal held that the 1974 Act introduced a more convenient and advantageous taxation procedure and did not remove the "common law right to defend an action by the solicitor for his fees" (at 42). The court observed that the 1974 Act did not state that its effect was to exclude "the client's common law right to object to paying more than a reasonable sum for the solicitor's services, if he does not avail himself of the statutory procedures" (at 46). Further, s 70(2) contemplated that the solicitor would bring an action on

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the bill in order to enforce payment. The court held that the 1974 Act did not take away the need for the solicitor to prove that his fees are reasonable, if they are challenged, absent any express agreement as to what they should be. This would not disadvantage the solicitor, who may claim an order for taxation without any time limit, and thereafter obtain a form of summary judgment when the taxation certificate is issued. The court also held that the solicitor's claim is one for a *reasonable sum* under both statute and the common law, and not for a liquidated sum, and the burden of proving that the sum is reasonable rests upon the solicitor (at 48 and 51–52).

61 The decision in *Turner* was said to follow prior decisions which adopted the same position. For example, *Turner* referred to Stirling J's decision in *In re Park* (1888) 41 Ch D 326 ("*In re Park*") at 331 and 332, where Stirling J held that, in dealing with solicitors' costs, the court has a three-fold jurisdiction. First, the statutory jurisdiction conferred by the Solicitors Acts, which does apply where the time limit for taxation has expired and there are no special circumstances which justify making a taxation order. Second, the court has general jurisdiction over the officers of the court, which confers jurisdiction to deal with solicitors' bill of costs. Third (at 332):

> there remains the ordinary jurisdiction of the Court in dealing with contested claims. This action is one for the administration of a testator's estate … It is contended on their behalf that the investigation of this claim which takes place in Chambers is merely in substitution for a common law action, and that the Claimants ought to be placed as nearly as may be, having regard to the different forms of procedure, in the position in which they would have been if they had brought an action at common law against the testator's legal personal representative for the amount of this bill. To that general proposition I agree. …

62 We note that in *In re Park*, the solicitors' bills were eventually referred to the Taxing Master to assess the appropriate quantum even though they were

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not sent for taxation as such because more than 12 months had lapsed since the delivery of the bills. In other words, the appropriate quantum was in any event, not to be determined at a trial. Likewise, in *Turner*, the bills of costs were not to be determined at a trial. They were referred to a costs judge for assessment.

63 The question before us is whether a client may challenge a solicitor's bill notwithstanding his omission to seek taxation within the period prescribed in s 122 of the LPA. Put in another way, is the client's contractual right to defend against a solicitor's claim for services rendered an available alternative to the taxation mechanism in s 122 of the LPA? In this regard, we acknowledge that ss 118 and 119 of the LPA refer to the commencement of actions by solicitors in relation to the bill:

> **Solicitor not to commence action for fees until one month after delivery of bills**
>
> **118.**—(1) Subject to the provisions of this Act, no solicitor shall, except by leave of the court, *commence or maintain any action for the recovery of any costs due for any business done by him until the expiration of one month after* he has delivered to the party to be charged therewith, or sent by post to, or left with him at his office or place of business, dwelling-house or last known place of residence, a bill of those costs.
>
> …
>
> **Court may authorise action for recovery of fees before expiration of one month after delivery of bills**
>
> **119.** *The court may authorise a solicitor to commence an action for the recovery of his costs and also refer his bill of costs for taxation by the Registrar,* although one month has not expired from the delivery of the bill, upon proof to its satisfaction that any party chargeable therewith is about to quit Singapore, or to have a receiving order made against him, or to compound with his creditors or to take any other steps or do any other act which in its opinion would tend to defeat or delay the solicitor in obtaining payment.
>
> [emphasis added]

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Such provisions appear to have been a factor in the English Court of Appeal's decision in *Turner* (at 46). With respect, in our view, the fact that these provisions envisage the bringing of an action for the recovery of fees does not indicate, one way or another, whether taxation is the only avenue by which a court may review the reasonableness of the solicitor's bill. Two issues may be distinguished: the *method* of recovery (whether this is by commencing an action or through bankruptcy proceedings), and the avenues by which the court may assess the reasonableness of the sum charged. It is the latter issue that arises for determination in the present case.

64 It is true that ss 120 and 122 of the LPA do not specify that failing to seek taxation of a bill within 12 months from its delivery renders the bill conclusive as to the sum claimed by the solicitor. In *Kosui* ([18] *supra*),[55] Coomaraswamy J cited with approval *Ralph Hume Garry (a firm) v Gwillim* [2003] 1 WLR 510 ("*Ralph Hume Garry*") where the court said, at [31], that in view of the statutory background, the client's *only protection against overcharging* was to seek taxation. *Ralph Hume Garry* was similarly referred to in *Ho Cheng Lay v Low Yong Sen* [2009] 3 SLR(R) 206[56] ("*Ho Cheng Lay*") at [16] and *JWR Pte Ltd v Syn Kok Kay (trading as Patrick Chin Syn & Co)* [2019] SGHC 253 at [23]. In *Kosui*, Coomaraswamy J further observed that taxation is the only judicial process designed specifically to assess and fix the reasonable fees which a solicitor is entitled to charge a client:

> 56 … the outcome of a taxation not only establishes the solicitor's right to be paid the fees as taxed, it also relieves the client of any obligation he might have undertaken to pay more than the taxed fees.

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55 Respondent's Bundle of Authorities at Tab 6.

56 Respondent's Bundle of Authorities at Tab 5.

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> 57 … Only taxation under s 120 can yield the client a refund or remission of overcharged fees.
>
> 58 To that extent, the legal profession is unique. The members of every profession subscribe to a self-imposed ethical limit on the fees which they can charge their clients: *Lim Mey Lee Susan v Singapore Medical Council* [2013] 3 SLR 900 … at [52]. Only members of the legal profession, however, are subject in this way to an extra-contractual judicial procedure for resolving civil disputes over the reasonableness of their fees. This procedure is not a mere creature of statute but comprises part of the court's inherent jurisdiction: *Wee Harry Lee v Haw Par Brother International Ltd* [1979-1980] SLR(R) 603 … at [12] and [16]. Solicitors are subject to this unique procedure for resolving fee disputes for two reasons. First, because of their singular position as officers of the very institution – the court – which is entrusted with the duty and the power to resolve civil disputes. Second, because the court is uniquely placed, without any need for expert evidence, to assess the reasonable value of legal services as compared to any other type of professional services.

65 Coomaraswamy J's remarks aptly reflect the advantages of the taxation process for both the client and the solicitor. They also, to an extent, address the question as to *why*, unlike bills rendered by other professionals, solicitor's bills are subject to a separate regime. In *Engelin Teh Practice LLC formerly known as Engelin Teh and Partners v Tan Sui Chuan* [2006] SGDC 2,[57] it was held that these provisions exist to provide certainty for *both* the solicitor and client.

66 We also note that the 12-month time limit provided for in s 122 of the LPA is not cast in stone. An order may be made for taxation outside of the specified period if the court finds that there are "special circumstances" to so order. From the client's perspective, this provides an additional safeguard. As Coomaraswamy J held in *Kosui* at [61], there is no rigid rule as to what kind of circumstances are sufficiently special to justify taxation of a solicitor's bill.

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[57] Appellant's Bundle of Authorities Tab F.

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Where it is apparent that there has been overcharging, this would be a factor militating in favour of granting an order for taxation, even if the s 122 of the LPA time limit has elapsed (see *Ho Cheng Lay* at [28(b)]). Similarly, if the bills delivered are so lacking in particulars that the client is unable to make an informed decision as to whether to apply for taxation, or if the solicitor did not inform the client of the right to have the bill taxed, the court may lean in favour of ordering taxation, if this is appropriate in all the circumstances.

67 We add that for the purpose of s 122 of the LPA, the interest of the client is adequately protected if "special circumstances" is not construed narrowly against the client. After all, the provision is not intended to allow or encourage solicitors to take advantage of ignorant or unsuspecting clients.

68 The silence of the LPA on the *consequences* of failing to seek a taxation order within the 12-month period is equivocal. In contrast, an unqualified common law right to defend against a claim brought by solicitors in respect of an untaxed invoice would mean that there is a twin track to challenge a solicitor's charges, *ie*, by seeking taxation pursuant to s 122 of the LPA or by the common law right to defend. In our view, this would undermine the statutory 12-month period in s 122 of the LPA.

69 Accordingly, there is no twin track. The common law right to defend is qualified by s 122 of the LPA. Generally speaking, a client is to seek an order for taxation of a solicitor's bill of costs within 12 months from delivery of the bill or show special circumstances why an order for taxation should be made outside of the 12-month period. As the appellant has not obtained an order for taxation, he is precluded from challenging the amount claimed in the SD.

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70 The appellant's substantive submissions on the point that the 26 October 2017 invoice is for an excessive sum also meet the same fate. First, the appellant contended that "substantial errors" were discovered in the taxation of the 13 March 2018 invoice and that there may be inaccuracies in relation to the time recorded for the period covered by the 26 October 2017 invoice, which would in turn mean that the amount of professional fees charged under that invoice may be inaccurate.[58] As a general proposition, errors discovered in the 13 March 2018 invoice would not necessarily suggest that similar errors were made in the 26 October 2017 invoice. Furthermore, it is not open to the appellant to resist the SD on such a general argument when he had failed to obtain an order for taxation.

71 Second, the appellant attempted to estimate the reasonable amount of time the respondent would have expended on each item of work done as set out in the 26 October 2017 invoice and to provide an approximate figure for the professional fees the respondent could have reasonably charged.[59] However, this is not an appropriate exercise to undertake at this stage of the proceedings. In essence, this is a backdoor attempt to tax the bill notwithstanding the decision in OS 67/19, which is impermissible.

72 Third, the appellant also raised a more specific point. Specifically, the Letter of Engagement signed by the appellant indicated that the respondent's fees would be based on the actual time spent in connection with the Consolidated Suits, with specified hourly rates for certain solicitors who were identified therein. The hourly rate for Mr Edmund Eng ("Mr Eng") was

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58 Appellant's Case at para 55.

59 Appellant's Case at para 62.

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stipulated to be $720.[60] However, in the taxation of the 13 March 2018 invoice, the appellant discovered that the respondent had instead used an hourly rate of $790 for Mr Eng. The inference from this was that Mr Eng's rate of $790 was *also* used for the 26 October 2017 invoice, which covered the period immediately preceding that of the 23 March 2018 invoice. The respondent appeared to accept that Mr Eng's time had been charged at $790 per hour in the 26 October 2017 invoice. However, it submitted that under cl 2.1 of the General Terms and Conditions applicable to the Letter of Engagement, it was entitled to adjust the hourly rate from time to time. On the other hand, cl 9 of the Letter of Engagement stated that the respondent would notify the appellant of any changes to the hourly rates.[61] It was undisputed that the respondent did not notify the appellant of the change in the hourly rate for Mr Eng.

73 Although the respondent suggested that it was entitled to claim the higher rate despite its failure to notify the appellant of the higher rate, we are of the view that this was an arguable point which, in ordinary circumstances, the appellant would have been entitled to contest.

74 However, the difficulty for the appellant was that he had already questioned the aggregate original amount claimed in the 26 October 2017 invoice soon after it was rendered, even though he was apparently unaware of the higher rate being charged for Mr Eng. As we have elaborated above, he was informed of his right to taxation more than once and he was eventually represented by new solicitors from whom he could have sought advice on the question of taxation if he wanted to. Yet, despite his concerns over the quantum

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60 CB Vol II(A) at p 51.

61 CB Vol II(A) at pp 51 and 55.

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of fees charged, he did nothing to pursue taxation until he filed OS 67/19 on 15 January 2019. Had he pursued his right to taxation on time, it was likely that he would have learned of the higher rate in the ordinary course of taxation. His attempts to persuade Abdullah J that there were special circumstances supporting his application for an order for taxation of the 26 October 2017 invoice were unsuccessful and consequently his application for that relief was dismissed. Abdullah J observed that the fact that the trial of the Consolidated Suits had been underway at that point in time was not sufficient reason not to proceed as required by the law, and that any negotiations or alleged lack of particularisation in the 26 October 2017 invoice similarly did not constitute special circumstances under s 122 of the LPA.[62] He did not file any appeal against that decision. For completeness, we note that at para 6 of his affidavit of 20 March 2019 filed for OS 67/19,[63] the appellant stated that he was under the impression that the respondent would apply for taxation. We are of the view that as the respondent had repeatedly informed him of his right to pursue taxation and he also had access to advice from new solicitors, this was a feeble excuse which he raised for the first time then.

75 Furthermore, the appellant was not merely seeking a reduction of the amount claimed under the 26 October 2017 invoice by the difference of $70 per hour for Mr Eng multiplied by the number of hours he was engaged in. The appellant was using that difference to dispute the entire invoice. His counsel informed us that he was prepared to proceed with taxation. However, bearing in mind his earlier failure to seek taxation and the dismissal of his application in OS 67/19 for an order of taxation and the absence of an appeal against that

62 SCB Vol I(B) at p 208.

63 ROA Vol III(C) at p 51.

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dismissal, we are of the view that it was too late for the appellant to now seek taxation. Also, he was not entitled to use the higher rate as a reason to stave off the SD. That said, we leave it to the respondent to consider whether it wishes to waive its claim for the difference in respect of the 26 October 2017 invoice as it did not notify the appellant of the increase.

Cross-demand

76 We now come to the appellant's arguments on an alleged cross-demand. The appellant asserts that he has a cross-demand that exceeds the amount claimed in the SD because the respondent was not entitled to set off funds it held in its client account against the sum claimed in the 26 October 2017 invoice. Clause 12 of the Letter of Engagement provided that:

> We will therefore require an initial deposit of S$100,000 before we can start work on your matter. Please note that this sum is not an estimate of the likely fee in connection with your matter: it is merely a deposit against that fee. The deposit will be held by us and used to set off against *our final invoice in this matter.*
>
> [emphasis from original omitted; emphasis added in italics]

For completeness, we note that apart from cl 12 of the Letter of Engagement, cl 6.2 of the respondent's General Terms and Conditions provided that:[64]

> We will hold all deposits remitted to us in our client account for your benefit. Unless you give us specific instructions, it shall be in our discretion whether or not to place such monies on interest-bearing deposit. We are entitled to set off the monies standing to your credit in our client account and any interest accrued thereon against legal fees and disbursements due to us. *We will not, however, effect any set off against our legal fees and disbursements unless we have rendered an invoice to you and notified you in writing to your last-known address of our intention to effect the set-off.*

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64 CB Vol II(A) p 56.

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[emphasis added]

77 The appellant contends that as a result of cl 12 of the Letter of Engagement, the monies held on behalf of the appellant by the respondent should only have been set off against the respondent's final invoice in the matter, which was the 13 March 2018 invoice, and the utilisation of the funds held by the respondent to set off against part of the penultimate invoice, *ie*, the 26 October 2017 invoice, was therefore a breach of cl 12 of the Letter of Engagement. Since the total amount of the set-off was $176,025.30, his cross-demand exceeded the debt of $106,133.52 under the SD, and the SD should be set aside.[65]

78 The Judge relied on a statement made from the bar by Mr Goh Keng Huang ("Mr Goh"), who appeared on behalf of the respondent. Mr Goh stated that there had been an agreement reached during a telephone conversation between the respondent and Optimus Chambers for the respondent to utilise the funds in part payment of the 26 October 2017 invoice in order to stop or reduce interest from running on that invoice. Allegedly, it was pursuant to this agreement that the deposit totalling $176,025.30 was set off against the debt arising from the 26 October 2017 invoice (see GD at [42]).[66] The Judge reasoned that while this explanation had not been given on affidavit, he saw no reason to disregard or disbelieve it. He further observed that Mr Goh was from the entity which had issued the SD. The Judge was prepared to accept the explanation given, and rejected the appellant's contention that he had a valid or genuine cross-demand justifying the setting aside of the SD under r 98(2)(*a*) BR (GD at [51]). On appeal, the appellant argues that the Judge erred in placing weight on

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65 Appellant's Case at paras 72 and 73.

66 ROA Vol III(I) p 9.

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Mr Goh's unsubstantiated assertion, which was both hearsay evidence and evidence from the bar.[67] The appellant contends that such an agreement had not been reached, and the dispute on this point is a triable issue which requires further evidence or arguments.[68]

79 In our view, the Judge should not have relied on evidence from the bar on a disputed allegation. While Mr Goh was a member of the respondent, this did not in any way detract from the fact that his statement was a factual assertion that should properly have been made on affidavit, *especially* since it appears that Mr Goh was not the person on the respondent's side who was a party to the alleged conversation. Furthermore, no mention was made of this oral conversation in any of the affidavits filed for the respondent in these proceedings or in OS 67/19. For the latter, an affidavit of 1 March 2019 from Mr Sarjit Singh Gill *SC* ("Mr Gill") for the respondent alluded to a telephone discussion with Optimus Chambers on 27 March 2018 when the two invoices were sent to Optimus Chambers.[69] However, there was no mention of any oral agreement to set off, whether in that conversation or any subsequent telephone conversation. In fairness, we note that this may be because at the time that affidavit was executed, the set-off had either not been effected or the appellant had not yet complained about it. In any event, the respondent should have asked for leave to file an affidavit on the disputed conversation if it wanted to rely on it.

80 Nevertheless, we make a few other points.

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67 Appellant's Case at para 76.

68 Appellant's Case at para 77.

69 SCB Vol I(A) at p 52.

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81 First, the appellant's position is inconsistent and self-serving. He is content to take the benefit of the set-off for the 26 October 2017 invoice but yet claims the amount of the set-off separately.

82 Second, the appellant has suffered no loss and he in fact benefitted from the set-off being applied to the sum claimed under the 26 October 2017 invoice as this meant that the interest that accrued on this invoice was lower.

83 In totality, it is clear that the appellant's argument that the set-off should have been applied against the final invoice only was simply an attempt to be difficult. If he were correct, the respondent would have to issue a fresh statutory demand for the original higher sum, *ie*, without set-off, and he would be liable for the higher sum with interest. There would have been no benefit to him except to cause the respondent to incur more costs and delay matters.

84 In the circumstances, we are of the view that he does not have a *bona fide* cross-demand.

Implied term

85 The appellant seeks leave to raise a new argument, namely, that there was an implied term that the respondent had to provide the appellant with a breakdown of the time costs, and that, having failed to do so, the respondent was not entitled to payment.[70]

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[70] Appellant's Case at para 80.

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86 Following the decision in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [101], the court should adopt a three-step process in determining whether a term should be implied:

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

87 In our opinion, this argument is without merit. First, the "gap" identified by the appellant is that the Letter of Engagement does not stipulate that the respondent is to provide the breakdown of time costs upon request.[71] We are not persuaded that there is such a gap in the contract since the appellant would have been entitled to tax the invoices rendered, as reflected in cl 5.4 of the respondent's General Terms & Conditions.[72] If the invoice had been taxed, the bill of costs filed would have provided the taxing registrar (and the appellant) with ample basis on which to assess whether or not the sums claimed were reasonable, failing which the appellant would have been justified in asking for further information to be provided. It is therefore difficult to see how there is a "gap" in the contract that is not filled by cl 5.4 and the appellant's right to tax the invoices within 12 months from receipt of the invoice in question.

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71 Appellant's Case at para 82.

72 CB Vol II(A) at p 56.

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88 Furthermore, it is not necessary to imply such a term to ensure business efficacy between the parties. At most, one could say that the respondent is obliged to provide the breakdown upon timely request by the appellant but not in the absence of such a request. Here, the appellant did not ask for the breakdown until recently when his right to seek taxation had long ceased.

89 Accordingly, the appellant's argument on the implied term fails.

Prejudice

90 Finally, we agree that there is no undue prejudice to the respondent if we were to grant the appellant an extension of time to file the Application. However, that is only one factor which is much less important than the reason for the delay and the lack of merit in his arguments to set aside the SD.

Summary on Issue 2

91 In the circumstances, there was no good reason to allow the appellant an extension of time to file the Application late. The grounds on which he attempts to set aside the SD are in any event unmeritorious. His application for an extension of time is refused.

Conclusion

92 The BR provides detailed provisions to ensure that a statutory demand is brought to the notice of a debtor. The Application is short on merit and undeserving of sympathy for various reasons.

93 First, the appellant is not saying that the SD was not brought to his notice. Even before the formal service of the SD on 4 October 2019, he was aware that the respondent was seeking to serve an SD on him (see [7] above).

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Thereafter, he sought to set aside the service of the SD not because he was genuinely caught unawares and wanted more time to pay the debt. He simply wanted to make the respondent incur more costs by re-starting the process again and delay matters.

94 Secondly, instead of pursuing his right to seek taxation at the appropriate time, he chose to sit on his right. Thereafter, when it was too late for him to do so, he sought an order to tax the 26 October 2017 invoice but failed. He then attempted to challenge the amount claimed with arguments which reflected his lack of *bona fides*.

95 In the circumstances, we dismiss the appeal with costs fixed at $24,000 (including disbursements) to be paid by the appellant to the respondent. The usual consequential orders are to apply.

96 For the avoidance of doubt, the respondent may proceed with B 2786 filed on 29 October 2019 and need not file a fresh bankruptcy application.

Sundaresh Menon	Tay Yong Kwang	Woo Bih Li
Chief Justice	Judge of Appeal	Judge

Derek Kang Yu Hsien and Ashok Kumar Rai (Cairnhill Law LLC)
for the appellant;
Jamal Siddique Peer, Leong Woon Ho and
Liew Zhi Hao (Shook Lin & Bok LLP) for the respondent.

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Annex A: Chronology of Events

S/No	Date	Event
1	Early May 2013	The respondent began acting for the appellant in the Consolidated Suits.
2	26 Oct 2017	The 26 October 2017 invoice was issued for work done between 18 February 2017 to 31 July 2017.
3	11 Dec 2017	The appellant sought a 50% discount on the 26 October 2017 invoice.
4	3 Jan 2018	Over lunch, the respondent informed the appellant that if he disputed any part of the 26 October 2017 invoice, he could approach the court for taxation.
5	9 Jan 2018	The respondent sent an email to the appellant seeking his confirmation that he wished to continue engaging the respondent.
6	17 Jan 2018	The respondent sent another email seeking the appellant's decision as to whether to continue the engagement.
7	19 Jan 2018	The appellant responded confirming that he wished to continue engaging the respondent to act for him.
8	22 Jan 2018	Optimus Chambers wrote to the respondent stating that it had been instructed to take over the Consolidated Suits.
9	23 Jan 2018	The respondent wrote to Optimus Chambers enclosing the 26 October 2017 invoice and stating that it had not been paid.
10	By 9 Mar 2018	The respondent handed over all documents relevant to the Consolidated Suits to Optimus Chambers.

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S/No	Date	Event
11	13 Mar 2018	The respondent delivered the 13 March 2018 invoice to the appellant through Optimus Chambers.
12	27 Mar 2018	The respondent wrote to Optimus Chambers, enclosing the 26 October 2017 invoice and the 13 March 2018 invoice, informing Optimus Chambers that it would be setting off the unpaid invoices against the sums held on account for the appellant.
13	23 Apr 2018	According to Mr Gill, the respondent spoke to the appellant and informed him that if he disputed any of the invoices, he was entitled to apply for taxation.
14	7 Sep 2018	The respondent wrote to Optimus Chambers informing the appellant of his entitlement to taxation.
15	25 Sep 2018	The respondent sent a copy of all invoices rendered to the appellant to Optimus Chambers, including the two unpaid invoices.
16	29 Nov 2018	The respondent wrote to Optimus Chambers enclosing a statutory demand dated 29 November 2018 issued on the basis of the 26 October 2017 invoice and enquired whether Optimus Chambers had instructions to accept service.
17	15 Jan 2019	The appellant filed OS 67/19 for (a) an order for taxation in respect of 13 March 2018 invoice and (b) leave to seek an order for taxation in respect of the 26 October 2017 invoice.
18	27 Mar 2019	Abdullah J dismissed OS 67/19 in so far as it related to the October invoice.

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S/No	Date	Event
19	10 May 2019	The respondent issued a fresh statutory demand for the 26 October 2017 invoice.
20	23 Jul 2019	The respondent filed its bill of costs ("the March Bill") in BC 95 premised on the 13 March 2018 invoice. This indicated Mr Eng's rates as $790 per hour.
21	26 Jul 2019	The respondent attempted to serve the 10 May 2019 statutory demand by way of email to the appellant and his lawyers at LVM Law Chambers.
22	20 Aug 2019	Cairnhill Law filed a notice of appointment to act for the appellant in BC 95.
23	4 Sep 2019	Cairnhill Law wrote to the respondent to request breakdowns of the time spent under the March Bill in BC 95.
24	5 Sep 2019	Title search on the Bayshore Road property showed the appellant was no longer the owner of the property, as he had been in March 2019.
25	30 Sep 2019	The SD was issued and the respondent's clerk attempted personal service of the SD on the appellant at the Bayshore Road property.
26	30 Sep 2019	The respondent provided the appellant with proposed amendments to the March Bill, which was to include the breakdowns.
27	1 Oct 2019	The respondent's clerk again attempted personal service of the SD on the appellant at the Bayshore Road property.
28	4 Oct 2019	The respondents attempted service of the SD by advertising a notice of the SD in the Straits Times. An email with a copy of the advertised

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S/No	Date	Event
		notice of the SD was sent to Cairnhill Law on the same day.
29	18 Oct 2019	Deadline for application to set aside SD.
30	22 Oct 2019	The SD was sent to Cairnhill Law by email.
31	29 Oct 2019	B 2786 was filed.
32	31 Oct 2019	The appellant filed OSB 129.
33	19 Nov 2019	OSB 129 was heard by the AR.
34	16 Dec 2019, 7 Jan 2020, 20 Jan 2020 and 23 Jun 2020	The March Bill was taxed.
35	3 Feb 2020	The appeal from OSB 129 was dismissed by the Judge.
36	19 Oct 2020	Abdullah J dismissed the appellant's application for review of taxation.

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