

Thu Aung Zaw v Norb Creative Studio
[2014] SGHC 67

Case Number : Originating Summons (Bankruptcy) No 91 of 2013 (Registrar's Appeal No 427 of 2013)
Decision Date : 15 April 2014
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Alagappan s/o Arunasalam (A Alagappan Law Corporation) for the plaintiff;
Adrian Tan Wen Cheng (Camford Law Corporation) for the defendant.
Parties : Thu Aung Zaw — Norb Creative Studio

Insolvency Law – Bankruptcy – Statutory demand – Setting aside of statutory demand

15 April 2014

Lee Seiu Kin J :

1 This is an appeal against the decision of the assistant registrar (“AR”) dismissing the application of the appellant (“Zaw”) to set aside the statutory demand (“SD”) issued against him by the respondent (“Norb”). On 14 January 2014, after hearing counsel for the parties, I allowed the appeal with costs. Norb filed a notice of appeal on 12 February 2014 and I now give my grounds of decision.

2 Norb had issued a SD upon a guarantee given by Zaw on a third party debt. The issue in this appeal is whether there is a substantial dispute on the debt, which would justify setting aside the SD. A major contention between parties lies with whether or not consideration was provided for the guarantee. Zaw argued that there was no consideration provided by Norb and therefore the guarantee was null and void. Norb argued that consideration was provided for Zaw’s guarantee.

Background facts

3 Ku Swee Boon (“Ku”) is the sole proprietor of Norb, which is in the business of providing printing services. Sometime in October 2011, Zaw and his partner, one Huang Ziting (“Huang”), approached Ku for the printing of a large quantity of booklets of discount dining vouchers (“Booklets”). Ku understood from Zaw and Huang that they intended to sell the Booklets to members of the public through a limited liability partnership, Adlogic Asia LLP (“Adlogic”), of which they are partners.

4 In October 2011, Norb and Adlogic entered into an oral agreement [\[note: 1\]](#) for 100,000 pieces of the Booklets for the price of \$80,000. On 29 November 2011, Ku received the first payment of \$4,000 from Adlogic for the Booklets.

5 The Booklets were delivered to Adlogic in two batches; one in mid-December 2011, and the other in end-December 2011. [\[note: 2\]](#) Sale of the Booklets was poor and Adlogic had difficulties paying Norb. [\[note: 3\]](#) Parties came to an arrangement under which Adlogic would make the payment out of its daily takings from the sale of the Booklets to Norb. [\[note: 4\]](#) Various payments of sums ranging from \$330 to \$1,000 were then made by Adlogic during the period from 9 January 2012 to 27 January 2012. [\[note: 5\]](#) In February 2012, Action for Aids, the charity under which the Booklets

were sold, stopped Adlogic from selling the Booklets. [\[note: 6\]](#)

Signing of guarantee

6 Sometime *either* in early December 2011 *or* in the third week of February 2012, Zaw and Huang signed a document guaranteeing all sums due and payable from Adlogic to Norb. The date that the guarantee was signed is disputed.

7 According to Zaw, the signing took place in the third week of February 2012. Ku had arrived at Adlogic's office at #05-01 Prosper Industrial Building to ask when Adlogic would settle its debt to Norb. [\[note: 7\]](#) Ku told Zaw and Huang that he "did not feel secure" because the licence from Action for Aids to Adlogic to sell Booklets expired in February 2012, and Adlogic was not able to pay Nord. [\[note: 8\]](#) Ku said that he wanted the guarantee from Zaw and Huang so that he felt "secure". [\[note: 9\]](#) Although the guarantee was dated 1 December 2011, it did not represent the true date on which parties signed the document. Zaw said that the guarantee was backdated by Ku.

8 According to Ku, however, the guarantee was signed in or around mid-December 2011. Ku explained that the guarantee was dated 1 December 2011 because that was approximately when Ku requested Zaw and Huang to provide the guarantee and that was the date the guarantee was prepared. Ku felt that it would be prudent to obtain a guarantee from Zaw and Huang because he was keenly aware of the size and total price of the order placed by Adlogic and the fact that Adlogic is a limited liability partnership. [\[note: 10\]](#)

Supply of namecards

9 The existence of a further supply of namecards from Norb to Adlogic is another factual dispute of this case. Norb alleged that Adlogic had, sometime in February 2012, ordered 500 pieces of namecards costing \$50. [\[note: 11\]](#) Zaw denied having ordered namecards from Norb. Zaw also disputed the invoice for the namecards. [\[note: 12\]](#)

The decision below

10 The bankruptcy application against Zaw was first heard before an AR who found that Zaw had failed to meet the threshold for setting aside the SD. The AR disagreed with Zaw that the guarantee was null and void for lack of consideration. Because it was a "continuing guarantee", it appeared that valid consideration was provided by Norb in the form of a *promise to continue to supply*. Therefore, it also did not matter whether subsequent services were actually provided, as that was an issue which went towards performance of the contract and not the validity of consideration. [\[note: 13\]](#)

The respondent's case

11 Before me, Norb sought to oppose Zaw's application, arguing that:

(a) Zaw's application to set aside the SD was out of time and no order for an extension of time had been obtained by him; and

(b) there are no valid grounds for Zaw to dispute the debt, *ie*, Zaw would not be able to show, in accordance with r 98(2)(b) of the Bankruptcy Rules (Cap 20, R1, 2006 Rev Ed), that the debt is disputed on grounds which appear to the court to be substantial.

I shall address each issue in turn.

Can the procedural irregularity of Zaw's application be waived?

12 Rule 97(1)(a) of the Bankruptcy Rules provides that the application is to be filed within 14 days from the service of the statutory demand. Rule 97(3) empowers a court to extend the period upon the application of the debtor. While it is true that Zaw's application was made more than four months after the service of the SD, instead of within 14 days as stipulated by r 97(1)(a), and no separate application was made for an extension of time, this does not bar the court from hearing the present case. The question is, whether the court, in its discretion, should waive the procedural irregularity and permit Zaw's application. This depends on whether the court is satisfied that the other party, *ie*, Norb, will not suffer substantial injustice or prejudice as a result of Zaw's non-compliance with the Bankruptcy Rules.

13 In my view, the court's discretion ought to be exercised in favour of allowing the application. In this case, Zaw raised important objections (see [18]-[19] below) to the validity of the guarantee to show why the SD ought to be set aside. The same arguments can be raised by Zaw in the bankruptcy proceedings, and they will have to be countered by Norb there and then, if not done so at this stage. As such, it could not be said that Norb would be prejudiced as a consequence of the irregularity. I therefore dispensed with the application for an extension of time and proceeded to hear the application.

Is the debt is disputed on substantial grounds?

The applicable standard of proof

14 The standard for setting aside a statutory demand is the same as that for resisting an application for summary judgment under O 14 of the Rules of Court (Cap 322, R5, 2006 Rev Ed). If there are, in the words of the court in *Tan Eng Joo v United Overseas Bank Ltd* [2010] 2 SLR 703 at [3], "triable issues to go to trial", the statutory demand should be set aside. The role of the court has been clearly defined in *Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 2 SLR(R) 31 at [3]:

... 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.

15 In the present case, where the application to set aside the SD was made pursuant to r 98(2) (b) of the Bankruptcy Rules, all that Zaw needs to do is to show that his dispute of the debt on substantial grounds raises a triable issue, *ie*, that there is a genuine case for asserting that the guarantee was void for want of consideration.

Whether valid consideration was provided for the guarantee

16 The wording of the guarantee is as follows:

IN CONSIDERATION of your having at the Guarantor's request supplied and/or continuing to supply **M/S ADLOGIC ASIA LLP** ... with goods ...

17 Norb's argument on this issue is that "in consideration of the Guarantee, [Norb] had continued

to provide goods and services to Adlogic". [\[note: 14\]](#) If I understood Norb's argument correctly, Norb is submitting that its consideration was a *promise* to continue supply. Norb referred the court to a number of cases where similar provisions were construed to mean that valid consideration had been provided by the creditor by *promising* something. In *Overseas Union Bank v Lew Keh Lam* [1998] 3 SLR(R) 219 at [28], the guarantee in question had the pertinent words:

In consideration of your agreeing at my/our request to make or to continue to make advances or loans or otherwise give credit or other banking facilities or grant any time to or on account of [the company].

The court held (at [29]) that the consideration was the bank's promise to "make or to continue to make advances or loans or otherwise give credit or other banking facilities". In another case, *Empire International Holdings Ltd v Mok Kwong Yue and another* [2004] 4 SLR(R) 820 at [10], the preamble to the guarantee provided that the guarantee was given:

In consideration of Empire agreeing to grant, granting and/or continuing to grant loans or advances and/or otherwise giving or continuing to give credit or other facilities ... and/or providing any other services or facilities from time to time to such extent and for so long as Empire may think fit to ... Subba Mok LLC ...

The court noted (at [9]) that "a promise to advance additional funds may be consideration for a promise to guarantee the repayment of debts already incurred as well as future advances". It is trite law that a promise constitutes good consideration. On the face of this case, Norb had promised to continue to supply, and that promise would generally be good consideration.

18 However, the crux of Zaw's arguments is that at the time he signed the guarantee, Norb had already completed supplying the Booklets. It is not disputed that the last of the Booklets was supplied by end December 2011. It is Norb's case that the guarantee was signed in early December 2011. However, Zaw claimed that it was signed in February 2012. This is a triable issue. If the finding of fact was in Zaw's favour, this would mean that the promise to supply was past consideration. In this situation, the authorities cited are not relevant.

19 Ku also claimed that the promise to continue supply included the order of the 500 namecards which, he said, was the basis for Norb having "provided further goods and services to Adlogic after December 2011". [\[note: 15\]](#) However, Zaw denied making any order for 500 namecards. As evidence of the order, Norb exhibited: (a) an invoice for the 500 namecards dated 21 February 2012, and (b) a copy of the card. However, there was no explicit statement in Ku's affidavit that he had delivered the 500 namecards or that he had rendered the invoice. More significant was the fact that he did not exhibit any documentary evidence of Adlogic's order for the namecards (such as work order, or any artwork) or of the delivery of the cards (such as delivery order or receipt). This would be another triable issue.

Whether a dispute on the quantum of the debt is a dispute on substantial grounds

20 Having found that the debt is disputed on the substantial ground that the underlying guarantee was void for lack of consideration, there is no need for me to consider further whether a misstatement of the quantum of the debt is also a substantial ground for disputing the debt. If liability to pay the debt is already a triable issue, the issue of quantum of the debt will not arise. However, let me briefly say that the debt, if it exists, would have exceeded \$10,000, even after subtracting the disputed amounts. Zaw had claimed that the debt on the SD had included wrongful charges of (a) \$2,484.54 for urgent shipping [\[note: 16\]](#) and (b) \$50 for 500 namecards, [\[note: 17\]](#) and that it was

wrongly calculated on the basis that payment of \$9,960 had been made, rather than \$12,000. [\[note: 18\]](#) If this is accepted, and liability was not disputed, Zaw would still owe \$68,000. The AR had quite rightly concluded that Norb can proceed with the bankruptcy application against Zaw because the undisputed debt is more than \$10,000. [\[note: 19\]](#) In the present case, the dispute on the quantum of the debt *alone* could not have amounted to a triable issue that would be sufficient to justify the setting aside of the SD.

Would the consequences of not setting aside the SD be unjust to the debtor?

21 Zaw had relied on one other basis to set aside the SD: r 98(2)(e) of the Bankruptcy Rules. Under r 98(2)(e), the court may set aside a statutory demand if it is "satisfied, on other grounds, that the demand ought to be set aside". Zaw submitted that the consequences of not setting aside the SD would be *unjust* to Zaw as he is entitled to get contribution from the co-guarantor, Huang (who is not similarly served with a statutory demand), and his rights against Huang would be extinguished if he is made a bankrupt. [\[note: 20\]](#) The same submission was canvassed before the AR, who held that Norb is entitled to act against Zaw solely, because it is a joint and several guarantee, and Zaw's rights, upon bankruptcy, will vest in the Official Assignee, rather than extinguish. [\[note: 21\]](#) This is correct in law. I therefore see no reason to set aside the SD *on this basis*.

Conclusion

22 The parties are in dispute in relation to two key facts, namely (a) the date the guarantee was signed, and (b) whether there was a supply of the namecards. If the findings of fact were in Zaw's favour, then he would be entitled to the defence that the guarantee was given without consideration and therefore not enforceable against him. There is no evidence that Zaw's version of the events is a sham. Therefore, there are two triable issues that would affect the validity of Norb's claim against Zaw. For this reason, I allowed the appeal and set aside the SD.

[\[note: 1\]](#) Zaw's affidavit of evidence-in-chief ("AEIC") dated 21 October 2013, para 9.

[\[note: 2\]](#) Ku's AEIC dated 15 November 2013, para 15; Zaw's AEIC dated 21 October 2013, para 11.

[\[note: 3\]](#) Zaw's AEIC dated 21 October 2013, para 13.

[\[note: 4\]](#) Ku's AEIC dated 15 November 2013, para 20; Zaw's AEIC dated 21 October 2013, para 15.

[\[note: 5\]](#) Ku's AEIC dated 15 November 2013, paras 19-21. See also page 22 (exhibit KSB-4) of the same affidavit.

[\[note: 6\]](#) Zaw's AEIC dated 5 December 2013, para 8.

[\[note: 7\]](#) Zaw's AEIC dated 21 October 2013, para 17.

[\[note: 8\]](#) Zaw's AEIC dated 5 December 2013, para 16.

[\[note: 9\]](#) Zaw's AEIC dated 21 October 2013, para 18.

[\[note: 10\]](#) Ku's AEIC dated 15 November 2013, para 14.

[\[note: 11\]](#) Ku's AEIC dated 15 November 2013, para 26.

[\[note: 12\]](#) Zaw's AEIC dated 5 December 2013, para 17.

[\[note: 13\]](#) Notes of Evidence dated 20 December 2013, p 7.

[\[note: 14\]](#) Respondent's Skeletal Submissions dated 14 January 2014, para 14.

[\[note: 15\]](#) Ku's AEIC dated 15 November 2013, para 26.

[\[note: 16\]](#) Appellant's Skeletal Arguments dated 10 January 2014, para 41.

[\[note: 17\]](#) Appellant's Skeletal Arguments dated 10 January 2014, paras 46-47.

[\[note: 18\]](#) Appellant's Skeletal Arguments dated 10 January 2014, paras 55-56.

[\[note: 19\]](#) Notes of Evidence dated 20 December 2013, p 5.

[\[note: 20\]](#) Appellant's Skeletal Arguments dated 10 January 2014, paras 61, 63 and 65.

[\[note: 21\]](#) Notes of Evidence dated 20 December 2013, p 3.