Oversea-Chinese Banking Corp Ltd *v* Ravichandran s/o Suppiah [2015] SGHC 1

Case Number : Bankruptcy No 2808 of 2013 (Registrar's Appeal No 355 of 2014)

Decision Date : 02 January 2015

Tribunal/Court : High Court

Coram : Aedit Abdullah JC

Counsel Name(s) : Koh Jean (Yeo-Leong & Peh LLC) for the appellant; Krishna Morthy (S K Kumar Law Practice LLP) for the respondent.

Parties : Oversea-Chinese Banking Corp Ltd — Ravichandran s/o Suppiah

Insolvency Law – Bankruptcy – Bankruptcy application disputed by debtor

2 January 2015

Aedit Abdullah JC:

Introduction

1 In this case, the Defendant contended that he should not be held to a guarantee given by him to the bank, because of a bare allegation that he had not signed the appropriate document. He made this contention though he had on multiple occasions negotiated with the bank, had been sent for assessment for a debtor programme and only raised the issue of not signing very late in the day. He also provided no explanation of the use of his particulars or personal documents in the application to the bank.

2 Seven years ago, the Defendant, Mr Ravichandran stood as a guarantor for the hire-purchase of a vehicle by one Mr Gunasekaran. Mr Gunasekaran was unable to keep up payment, and the bank, the Plaintiffs, called on the Defendant's guarantee. The Defendant negotiated with the Plaintiffs on a number of occasions. Bankruptcy proceedings were eventually started by the Plaintiffs against the Defendant. After a number of hearings, and after instructing his solicitors, the Defendant then said that the signature on the guarantee was not his. On the Defendant's application, the Assistant Registrar set aside the statutory demand.

3 On appeal by the Plaintiffs from the Assistant Registrar, I allowed the appeal. I found that the Defendant had not raised a triable issue as he had only made a bare allegation, which was not supported by any other evidence before me and which was contradicted by other evidence instead. Dissatisfied with my decision, the Defendant has appealed.

Background

4 On 1 December 2007, the Defendant was supposed to have signed a guarantee of a hire purchase agreement over a vehicle SJA4808L, purchased by one Karuppiah Gunasekaran. A copy of the application form, identity card of the Defendant and his payslips for June, July and August 2007 were submitted to the Plaintiffs.

5 Following Mr Gunasekaran's default, a notice under the Hire Purchase Act (Cap 125, 1999 Rev Ed) ("the Act") was issued to Mr Gunasekaran on 20 March 2013, and a copy was sent to the

Defendant's address in Choa Chu Kang. Subsequently, following the failure of Mr Gunasekaran to make payment of the arrears, the vehicle was repossessed by the Plaintiffs in April 2013. Another statutory notice, dated 2 May 2013, under the Hire Purchase Act was sent to Mr Gunasekaran and copied to the Defendant. This notice, referred to as the Fifth Schedule Notice, informed the Defendant that he should seek advice. That portion of the notice read:

> Cc Ravichandran s/o Suppiah
>
> [Chua Chu Kang Address]
>
> This notice is sent to you as a guarantor of KARRUPIAH GUNASEKARAN.
>
> As guarantor you have certain rights under the Hire Purchase Act, Chapter 125 and you are advised to seek advice at once.

6 The vehicle was sold in June 2013. A shortfall of $11,301.94 remained after the sale. On 18 June 2013, letters of demand for that shortfall were sent to both Mr Gunasekaran and the Defendant. This letter was received personally at the Choa Chu Kang address. The Defendant gave his hand phone number to the Plaintiffs at this time.

7 On 17 September 2013, a statutory demand was served on the Defendant at the Choa Chu Kang address, in respect of the debt. Thereafter, the Plaintiffs were unable to contact the Defendant. A further letter was sent on 27 November 2013, warning the Defendant that bankruptcy proceedings were imminent. On 27 December 2013, the Plaintiffs filed the bankruptcy application from which these proceedings stemmed. This was served personally on the Defendant on 2 January 2014.

8 Hearings were held on 6 occasions between January and August 2014. Some of the hearings were adjourned for proposals, and on at least one occasion, the Defendant was to be assessed for suitability for the Debt Repayment Scheme administered by the Insolvency and Public Trustee's Office. On 28 August 2014, the Defendant's solicitors finally informed the court that they would be applying to set aside the statutory demand. This was heard on 10 October 2014. On 24 October 2014, after hearing further arguments from the parties, the Assistant Registrar set aside the statutory demand.

The Plaintiffs' Case

9 On appeal before me, an application was firstly made by the Plaintiffs to adduce new evidence, not available at the hearing before the Assistant Registrar. The Plaintiffs also contended that the application by the Defendant to set aside the statutory demand was irregular as it had been made one year out of time.

10 As to the substantive issues, the Plaintiffs argued that the Assistant Registrar had erred in finding that a triable issue had been raised by the Defendant. The test is the same as that for the granting of summary judgment under O 14 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Citing a decision of the Court of Appeal examining paragraph 144 of the Supreme Court Practice Directions, it was further contended that a higher threshold than a genuine triable case was in fact required, and the burden lay on the Defendant. Here, the Plaintiffs had in fact proven a *prima facie* case. The Defendant's behaviour showed that he had signed the guarantee, and he had not behaved in the manner that a reasonable layman would have. Furthermore, where the evidence of the Defendant is incredible in any material respect, there cannot be said to be any reasonable probability of a triable issue. And even if fraud is alleged, but there is no prospect of the defence succeeding at trial,

summary judgment is to be given, as is the case here. The Plaintiffs argued that in the present case, the Defendant had merely denied the signature, without raising sufficient evidence to invoke a triable issue. His actions were consistent with someone who thought he was bound by the guarantee. Allowing the Defendant's setting aside would open the floodgates.

The Defendant's Case

11 In oral argument, Counsel for the Defendant maintained that the statutory demand should be set aside. The Defendant denied the signature was his when he was shown the guarantee in August 2014. The requirements of the Hire Purchase Act had to be complied with, and the Plaintiffs should have obtained the testimony of the witness to the signature. The hirer should also be brought in to testify, and the matter tested at trial. On the facts, there was a difference between the Defendant's actual signature and that on the guarantee. His behaviour as relied on by the Plaintiffs was the product of his inexperience. He did not know the consequences. It was maintained that the Defendant did ask for a copy of the guarantee.

The Procedural Matters

12 I declined to allow the Plaintiffs to adduce new evidence, and did not rule against the Defendant on the lateness of his application to set aside the statutory demand.

The application to adduce new evidence

13 The subject of this application was an affidavit made by an officer of the Plaintiffs to convey the evidence of the witness to the signing of the guarantee by the Defendant. That witness was not willing to depose her own affidavit. The immediate problem with this application, even if it fulfilled the some of the criteria specified in *Ladd v Marshall* [1954] 1 WLR 1489, was that the evidence of the Plaintiffs' officer would have clearly been hearsay. While the Plaintiffs argued that this was within the exceptions under s 32 of the Evidence Act (Cap 97, 1997 Rev Ed), I was of the view that it did not come within any of the provisions there. Its eventual reliability would have been in significant doubt. I thus disallowed the new evidence and dismissed the application.

The lateness of the application to set aside the statutory demand

14 The Plaintiffs also took issue with the lateness of the application by the Defendant to set aside the statutory demand. While the Defendant only did so about a year or so out of time, he had only instructed his counsel in July 2014. As the Defendant was before then acting on his own, I did not consider that his failure to comply with the proper procedural requirements specified under r 97 of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) to be such as to disqualify him from making the attempt.

The Substantive Issue

15 What was before me was whether the Defendant raised a genuine triable issue, such that the statutory demand should be set aside.

The Decision

16 It was my decision that no genuine triable issue was raised. The Defendant made only a bare allegation that the guarantee was not signed by him; this would have constituted a defence under the Hire Purchase Act. However, in these bankruptcy proceedings, the Defendant had to go beyond a bare allegation, and provide sufficient material to the court to justify a conclusion that the matter

should be left to trial rather than dealt with summarily under the bankruptcy procedure. Specifically, the Defendant's allegation that the signature on the guarantee was not his did not gel with his conduct in respect of the Plaintiffs' claim on the guarantee and the use of his documents, among other things. In the context of the facts arising in this case therefore, the Defendant failed to raise even a shadow of a defence sufficient as to require the matter to be sent for trial.

The Legal Framework

17 The Bankruptcy Rules provide the framework for the determination of this case. Rule 97, as noted above lays down the procedure for the application to set aside a statutory demand. As in the present case, once a statutory demand is served on a debtor by a creditor, the debtor can seek to set it aside under Rule 98. Rule 98(2)(*b*) states that the statutory demand shall be set aside if "the debt is disputed on grounds which appear to the court to be substantial". Paragraph 144(3) of the Supreme Court Practice Directions gives guidance as to the approach to be taken:

> (3) When the debtor:
>
> …
>
> (b) disputes the debt (not being a debt subject to a judgment or order),
>
> the Court will normally set aside the statutory demand if, in its opinion, on the evidence there is a genuine triable issue.

18 Paragraph 144 makes it clear that it does not always follow that there will be a setting aside. The reference to normal practice was explained in *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 ("*Mohd Zain*") at [29] as follows:

> 29 This suggests that the court is not *obliged* to set aside a statutory demand where there is a genuine triable issue. It will only *normally* do so. It follows, therefore, that the criterion of "grounds which appear to the court to be substantial" under r 98(2)(*b*) constitutes a higher threshold… [emphasis in the original]

The Court of Appeal in *Mohd Zain* examined *Wee Soon Kim Anthony v Lim Chor Pee* [2006] 2 SLR (R) 370 ("*Wee Soon Kim*"), and accepted that not too much should be made of the word "genuine". It then went on to explain (at [30]) that:

> … it will not suffice for a debtor to raise spurious allegations in order to fend off bankruptcy proceedings. The court must examine *all the facts* to ascertain whether the "genuine triable issue" test in para 144 of the Practice Directions is satisfied. The upshot of this is that the court will only set aside a statutory demand (and thereby require a creditor to initiate a civil suit if he wishes to purse the claimed debt further) where the debtor is able to adduce evidence on affidavit that raises a triable issue. [emphasis in the original]

The Court of Appeal stated that not all triable issues have equal merit. A range of triable issues may be raised. Again, drawing a parallel with summary judgment cases, there are instances where the debtor shows a fair case for defence, reasonable grounds for setting up a defence or a fair probability of a *bona fide* defence. If so, unconditional leave, unconditional stay or dismissal of bankruptcy proceedings should follow. In other instances, where there is a need for a demonstration of commitment, appropriate conditions may be imposed. The Court of Appeal noted further (at [32]) that the insolvency regime is not meant to be used as a parallel procedure to procure payment of disputed

debts.

19 The upshot of the guidance given by the Court of Appeal is that if the threshold is crossed, the Defendant here can have the statutory demand set aside. However to get to that point, the Defendant must show that there is a triable issue; the Court of Appeal in *Wee Soon Kim* was clear that 'genuine" in this context just indicates emphasis. In the words of that court (at [18]), "[a] trumped-up dispute cannot constitute a 'triable issue'".

20 The consequences of too lax an approach would be, as noted in *Mohd Zain* (at [22]), as follows:

> 22 If a bankruptcy court were unwilling to grant a conditional stay of bankruptcy proceedings and were to dismiss outright a bankruptcy application on the strength of a shadowy case, the creditor would necessarily have to safeguard his interests in different proceedings. This would involve his filing a writ and statement of claim and making a summary judgment application, whereupon the very same issues that were canvassed before the bankruptcy court would have to be rehearsed in detail. This would involve the same waste of resources that justifies the extension of summary judgment principles to the insolvency context in the first place… Worse still, it could unfairly prejudice the interests of the creditor as he faces the risk of the debtor using the delay to dissipate his assets.

21 As noted in *Mohd Zain* as well as in another case cited by the Plaintiffs, *Tan Eng Joo v United Overseas Bank Ltd* [2010] 2 SLR 703, the test is the same as that for O 14 cases. Cases on O 14 therefore would give useful guidance. The defendant in an O 14 case has the burden of satisfying the court why judgment should not be given against him. The essential test is whether there is a triable issue to be tried. Merely asserting a particular factual position does not by itself support leave to defend. The defendant's contentions have to be found to be credible, and it has to be assessed whether there is a fair or reasonable probability of a real or *bona fide* defence.

22 Though not cited in argument, *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2014] SGHC 225 is illustrative of the general approach in O 14 cases, and fortifies my decision in this case. In that case, it was found that the defendant there had not put forward a credible account: what was asserted by the defendant was not substantiated by the affidavit evidence. It was clear that in that case there were significant inconsistencies in the defence. Prakash J noted (at [27]):

> 27 The Defendant failed to discharge this burden because the version of events put forward by the Defendant was not capable of belief. I reached this conclusion for two reasons. First, the defence he mounted had undergone numerous changes and he had taken inconsistent positions along the way when all the facts that he finally relied on were within his knowledge from the outset. This suggested to me that his final defence was more an afterthought than a genuine one. Second, several key planks of his defence were merely assertions on affidavit that were not adequately substantiated...

23 So also, in *Republic Airconditioning (S) Pte Ltd v Shinsung Eng Co Ltd (Singapore Branch)* [2012] SGHC 46, it was noted by Lai J:

> 9 The power of the court to grant summary judgment is found under O 14 rr 1 and 3 of the Rules of Court … The primary concern of the court in determining whether summary judgment ought to be granted is whether the plaintiff is truly entitled to relief at this stage and, by the same token, whether it is just to deprive the defendant of the opportunity to challenge the plaintiff's claim at trial…

> 10 The Court of Appeal in *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR (R) 32 held that leave to defend will not be granted based upon "mere assertions" by defendants; instead, the court will look at the whole situation critically to examine whether the defence is credible…

Lai J then cited Lord Diplock's statement in *Eng Mee Young v Letchumanan* [1979] 2 MLJ 212 at 217 that a judge is not bound to accept uncritically as raising a dispute of fact, every defence, even if it is equivocal, imprecise, inconsistent or inherently improbable. Lai J then stated:

> 11. Indeed, while the summary jurisdiction of the court is to be exercised with great circumspection, the court must also be wary of defendants who seek to evade summary liability by throwing out spurious allegations, assertions and afterthoughts as convenient smoke screens, which they neatly label as *bona fide* defences raising triable issues. In seeking to delay the inevitable, as it were, such defendants end up not only wasting precious court resources, but more importantly, could potentially cause serious hardship and irreparable loss to the plaintiff seeking vindication of his/her claim, for some of whom time is of the essence…

24 These same considerations must underlie the approach to be taken towards determining whether a genuine triable issue is raised which would justify setting aside the Plaintiffs' statutory demand here.

Whether a genuine triable issue was raised

The Defendant's assertion

25 In the present case, the Defendant's position was that he did not sign the guarantee. In his first affidavit, affirmed on 10 September 2014, the Defendant deposed that he did not recall signing:

> 4. To the best of my recollection, I don't recall signing the Guarantee at any time.

He had then asked for a copy of the Guarantee, and this was given.

> 5. Recently, after much reflection and on a careful recollection of the events, I instructed my solicitors to write to the Plaintiffs for a copy of the Guarantee that I had apparently or allegedly signed and based on which the statutory demand was made.
>
> 6. On the 26 of August 2014, the Plaintiff's Solicitors forwarded the Hire Purchase Agreement and the Guarantee dated 11 December 2007 to my Solicitors.
>
> 7. He denied being the signatory, saying simply:
>
> 8. A careful perusal of the said Guarantee by me revealed that I am not the signatory. The Guarantee is invalid.

No explanation was given for his conduct how his documents came to be used, or any denial that his supporting documents were provided to the Plaintiffs when the Hire Purchase Agreement was entered. He only further deposed in respect of the extension of time, that that he was inexperienced in legal matters.

26 In his second affidavit, affirmed on 7 October 2014, he only maintained that he had only seen the guarantee when a copy was obtained for him, and that he was not the signatory to the guarantee, despite what had been told to him before and what the Plaintiffs had thought. He then

contended that the witness to the signing, one Ms Jasmine Teo, should be called by the Plaintiffs, and stated, presumably on advice, legal arguments that since he denied he was the signatory, the Plaintiffs had the burden to prove that he was. Again, no explanation has been raised, let alone substantiated by him for his conduct, or the use of his documents.

27 The Defendant's general position was thus one of simple denial: he did not sign the guarantee. He attacked the Plaintiffs' case, raising issues about the absence of the witness to the signing. But it was also a position of silence. Nothing, as noted above, was said in explanation for his conduct, the use of his documents and the other aspects of the case which showed, at least until the raising of his denial, that the Defendant acted as if he owed the Plaintiffs money.

The Defendant's conduct and surrounding circumstances

28 In making out a triable issue, the Defendant must show that some facts at least on the surface support his contention that a defence exists. Even if he invokes a particular fact, that may not be sufficient if other facts in the case point against what he alleges. If he denied signing the guarantee, did not receive a copy of it, and there was no available witness to his signing, all that could possibly be sufficient to raise a triable issue, except when set against other circumstances.

29 As noted by the Plaintiffs, in communications between the Defendant and the Plaintiffs there was never any mention by the Defendant that he had not signed the guarantee. Additionally, over 5 hearings, the Defendant had not raised the issue of his not signing. Notices under the Hire Purchase Act, were also copied to him, without any indication that of the position he has taken now. He had also participated in an assessment for suitability for the Debt Repayment Scheme administered by the Official Assignee. With all of this, the Defendant has to go beyond his denial of the signature.

30 What is more, he has not put forward any explanation of how his documents, including his Identification Card and salary documents, came to be copied and used to support the hire purchase agreement. At no point did the Defendant deny knowing the debtor or his wife. Indeed, he told the court at a hearing that he had been in contact with them. Again, in his affidavits in the present case the Defendant did not deny receiving the communications from the Plaintiffs. There was no issue therefore of the Plaintiffs' communications not reaching him at all, leaving him in total ignorance. There was no assertion by him that there was any change of address. I do note that the Defendant did deny receiving a copy of the guarantee earlier, but that does not raise any question about the other notices copied to him.

31 While the Respondent only retained counsel some time after proceedings had been commenced against him, this could not be an excuse or explanation for his conduct. A guarantor or debtor would in the normal course of things raise concerns about his liability when contacted by the bank or other creditor, whether or not he is legally represented. This is even more so when there is an express note that advice should be sought. Any reasonable debtor or guarantor would not have gone into all the discussions and actions that the Defendant did had he believed he had not signed the guarantee.

32 The fact that the Hire Purchase Act requires a signature does not create an automatic right to set aside, that operates independently of the requirements under Rule 98 and the applicable case law. While non-compliance with s 3 of the Hire Purchase Act gives a possible ground for setting aside a statutory demand founded on a hire purchase agreement, the assessment of whether the ground is substantial must still be weighed. Thus, the contention that s 3 is not complied with – in that the signature on the form was not signed by the guarantor – must be weighed by the court in terms of whether it is a substantive ground capable of raising a triable issue. For instance, a wholly unsigned guarantee would more readily make out a substantive ground that would require the matter to be sent

for trial.

Possible plausible explanations or triable issues that were not deposed in the Defendant's affidavits

33 It is noteworthy that the Defendant did not even contend, in his affidavit, that he was under a mistaken assumption that he had signed, but then eventually recalled that he did not sign after all. Counsel for the Defendant, when asked by me at the hearing, did say that that was the Defendant's position. But when I asked for at least an indication of this in the Defendant's affidavit, it could not be found. There was nothing at all, and it is apparent that this cannot then be his true defence.

34 A denial can be a valid defence raising a triable issue in an appropriate case. Much will depend on the precise facts and circumstances. A triable issue could perhaps be raised in some situations, such as the following:

(a) Where the guarantor denies signing the guarantee, and has proof that he was out of the country at the time the document was supposedly signed.

(b) Where the guarantor denies knowing the debtor, and this is supported by evidence from those who know him or his family members.

and

(c) Where the guarantor denies signing the guarantee, and the creditor does not have any evidence at all that a guarantee was indeed signed, such that there is no compliance with the terms of the Act and its regulations.

Certainly, whether there is a triable issue is not simply a question of mere quantity of evidence, and some assessment will have to be made of the likelihood of a defence being made out. But as indicated by the O 14 cases, a bare assertion would not be sufficient. And an assertion backed up by inherently questionable supporting evidence may not pass muster either.

Consequences of a loose approach

35 Readily setting aside a statutory demand on denial simply that a necessary document was signed by the debtor would set the bar far too low. A disavowal of a signature is easily done – signatures can be changed, and the same person may have different signatures for different occasions. A low bar will make it easier for defaulting debtors to circumvent the summary nature of bankruptcy proceedings, frustrating the objective of the bankruptcy regime. Setting aside a statutory demand on the factual grounds relied upon by the Defendant will open the floodgates. The Plaintiffs themselves expressed this fear in their affidavits and submissions.

36 A flood of denials would not be farfetched, given how easily the assertion can be made. In turn, what will result will be a shunting of creditors' claims to the full civil process, with its attendant costs and time required. With an increased cost in pursuing these clear claims against debtors, the likely consequence for all would be a lower availability of finance and greater transaction costs.

Balancing of interests

37 The position of debtors, on the other hand, is not made dire by the requirement that a debtor raise a genuine triable issue to stop the bankruptcy process. All that is required is a defence sufficiently plausible on the facts that the matter should be sent for a trial, rather than dealt with

summarily. Such a burden is not onerous and strikes an appropriate balance between the interests of creditors and debtors. For instance, as noted above, in relation to the present facts, various explanations could have been put forward for the conduct of the Defendant. In other instances, evidence could be brought in to substantiate the defence. This could take the form of documents and supporting affidavits by other witnesses. What is needed is something to separate the wheat from the chaff.

38 In assessing what was before me, I was mindful not to shut out the Defendant prematurely. Not setting aside the statutory demand would result in his being found a bankrupt. That, no doubt, would have significant consequences for him. On the other hand, I could not find that the bare assertion made by him, set against his conduct, gave rise to a triable issue. That, as I have stated above, would have set the threshold too low and defeated the summary nature of the bankruptcy proceedings.

Miscellaneous issues

39 While the Defendant made much of the absence of the witness to the signature, that was irrelevant. Had the matter proceeded to trial, it may have been possible to argue that her absence weakened the Plaintiffs' case irrevocably. However, the burden on the Defendant to raise a triable issue had not been discharged yet.

40 There is also an issue of whether a copy of the guarantee was in fact sent to the Defendant. The Plaintiffs relied on their general practice. Even if it were accepted that a copy of the guarantee was not sent to the Defendant, this could not assist him. His bare denial cannot be bolstered whether or not he had the guarantee in hand, and in the circumstances would not be sufficient to raise a triable issue.

41 The bare assertion made in this case did not even raise such a shadow of a defence that the equivalent of conditional leave should be granted. I did not therefore go into consideration of whether the approach adopted by Coomaraswamy J at first instance in *Chimbusco International Petroleum (Singapore) Pte Ltd v Jalalludin bin Abdullah and other matters* [2013] 2 SLR 801 could be adopted here, with a stay of the bankruptcy proceedings on condition of the provision of some security.

Conclusion

42 I accordingly allowed the appeal against the setting aside of the statutory demand. I also awarded costs of $3000 including disbursements to the Plaintiffs, taking into account their failure in their application to adduce new evidence.