

Sia Leng Yuen v Ko Chun Shun Johnson
[2002] SGHC 55

Case Number : OSB No 600118/2001
Decision Date : 25 March 2002
Tribunal/Court : High Court
Coram : Lee Seiu Kin JC
Counsel Name(s) : Prakash P Mulani and Karen Quek (J Koh and Co) for applicant; Rebecca Leong (John Tan and Chan) for respondent
Parties : Sia Leng Yuen — Ko Chun Shun Johnson

Insolvency Law – Bankruptcy – Statutory demand – Security pledged by debtor to creditor as collateral for debt – Security given zero value in statutory demand – Whether statutory demand should be set aside by court – Bankruptcy Rules (Cap 20, R 1, 1996 Rev Ed) rr 98(2)(c) and 98(2)(e)

Judgment

GROUNDS OF DECISION

The facts

1 In this summons the Applicant ("Sia") applies to set aside the statutory demand ("SD") of the Respondent, ("Ko") in respect of the sum of US\$2,197,260.27. On 6 February I allowed Sia's application and set aside the SD. Ko has since appealed and I now give my grounds of decision.

2 The SD is based on a promissory note dated 4 January 2001 made by Sia and Michael John Shone as attorney-in-fact for Ko. Under the promissory note, Sia acknowledged that he was indebted to Ko in the sum of US\$2 million and undertook to pay a sum of US\$166,666.67 on the first of each month from May 2001 to May 2002 in full and final settlement of the debt. Clause 3 of the promissory note states that, as collateral for the debt, Sia has pledged 50 membership certificates of the Blue Canyon Country Club ("BCCC"). In the promissory note Sia authorised Ko, in the event of default of any instalment payment, to sell the memberships and apply the proceeds to reduce the outstanding amount of the debt.

3 Sia submits the SD is in breach of r 94(5)(b) of the Bankruptcy Rules and seeks an order of the court to set aside the SD under r 8(2)(c). Rule 94(5) provides as follows:

If the creditor holds any property of the debtor or any security for the debt,
there shall be specified in the demand-

- (a) the full amount of the debt; and
- (b) the nature and value of the security or the assets.

I set out below, r 98(2)(c). I set out also r 98(2)(e) which is the ground upon which I set aside the SD. They provide as follows:

The court shall set aside the statutory demand if —

...

- (c) it appears that the creditor holds assets of the debtor

or security in respect of the debt claimed by the demand, and either rule 94 (5) has not been complied with, or the court is satisfied that the value of the assets or security is equivalent to or exceeds the full amount of the debt;

...

(e) the court is satisfied, on other grounds, that the demand ought to be set aside.

4 The content of the SD is not in dispute. Under the "Demand" section of the SD, the following statement is made:

The Creditor claims that you owe at 31 August 2001 the sum of US\$2,197,260.27 and interest accruing at US\$21.91 full particulars of which are set out in Part A of this demand, and that it is payable immediately and, to the extent of the sum demanded, is secured to the value of the US\$NIL. (The Company providing security has been placed in Bankruptcy Re-Organisation by its creditors under Thai Law. This renders the security of no or negligible value.)

And under the "Particulars of Debt" section, the following statement is made:

The creditor holds no valuable security on your estate, or part thereof for the payment of the abovementioned amount or any part thereof.

5 Mr Mulani, counsel for Sia, submits that the SD did not specify the nature and value of the security and therefore is not in compliance with r 94(5)(b). In his affidavit in support of this application, Sia stated that pursuant to the promissory note, he had pledged as security for the debt, the 50 membership certificates in the BCCC which were assets belonging to him personally. He said that the debt owing to him should have been offset by the said amount.

6 Ms Leong, counsel for Ko, submits that the SD is in compliance with the said rules as the pledged membership certificates are worthless. A Thai lawyer, Amornwat Thirakrittaporn, had filed an affidavit on 29 October 2001 in which he stated that the BCCC was owned by a Thai company, Murex Company Limited ("Murex"), which is also the co-issuer of the membership certificates. Pursuant to the petition of Siam City Bank plc, Murex was placed under a "Restructuring Proceeding" by order of the Central Bankruptcy Court on 26 April 2001. That court has since appointed managers – called Planners – to take control of the business and assets of Murex and under Thai law these are protected against any action by any other creditor. He was of the opinion that any sale of memberships from that date would require the Planners' consent and *"clearly, such consent will not be forthcoming until the Planners and the court have been able to ascertain whether the project can be restructured as a viable golf course operation, or, alternatively, must be sold."* Consequently, he concluded:

"The Membership Certificates are rendered effectively worthless, as they cannot be sold in the manner described in the promissory note or at all and, therefore, have no value. As such, they cannot be regarded as security for the debt of the Applicant."

7 Sia's response to this was that the membership certificates belonged to him and not to Murex. An affidavit was filed in his behalf by Nuthavuth Chatlertpipat, another Thai lawyer, giving the opinion

that there was no applicable provision in the Bankruptcy Act of Thailand which allows or entitles the Planners or official receiver to manage the assets belonging to a third party. He therefore disagreed with the opinion of Mr Thirakrittaporn that any proposed sale of the club membership belonging to Sia would require the approval of the Planners.

8 In the SD, it was asserted that:

- (i) the security was provided by a company, presumably Murex;
- (ii) Murex had been placed in "Bankruptcy Re-Organisation" by its creditors under Thai law; and
- (iii) this has rendered the security of no or negligible value.

Sia does not dispute assertion (ii). However he disputes (i) and (iii). Sia's position is that the security was provided by him and that the re-organisation of Murex does not affect the value of the security given. In respect of (i), the promissory note does not mention Murex at all. It states that Sia had pledged the 50 membership certificates. Therefore on the face of the note, which is an agreement with Ko, Sia is the owner of the 50 membership certificates pledged. Therefore, to the extent that Ko is asserting in the SD that the basis upon which he is saying that the security is worthless because the company that provided the security had been placed in Bankruptcy Re-organisation, this is incorrect.

9 In reality, the true value of any asset is the sum that it will fetch in the open market. If there are persons prepared to pay money for each membership certificate notwithstanding that Murex is under Bankruptcy re-organisation, then the value of the 50 membership certificates would be the total sum that can be raised by their sale in the open market. There has been no evidence in this regard. Although there were affidavits filed in Ko's behalf attesting to the impossibility of the sale of those membership certificates, there were also affidavits filed in Sia's behalf asserting the converse. In order to determine the truth of the matter, it would be necessary to cross-examine the deponents.

10 Section 61(1) of the Bankruptcy Act prescribes four conditions to the presentation of a bankruptcy petition:

- (a) the debt is not less than \$10,000;
- (b) the debt is for a liquidated sum payable to the petitioning creditor immediately;
- (c) the debtor is unable to pay the debt; and
- (d) where the debt is incurred outside Singapore, such debt is payable by the debtor to the petitioning creditor by virtue of a judgment or award which is enforceable by execution in Singapore.

The issue in the present petition pertains to limb (c), i.e. whether the debtor is unable to pay the debt. Section 62 of the Act provides that a debtor shall be presumed to be unable to pay any such debt that is immediately payable under three situations. The present case concerns the first one, viz. where an SD has been served on the debtor in the prescribed manner, at least 21 days have elapsed since service, and the debtor has neither complied with the SD nor applied to court to set it aside.

11 Section 2 of the Act defines "statutory demand" as:

"a demand in the prescribed which requires the person to whom it is addressed to pay, secure or compound to the reasonable satisfaction of the creditor making the demand, any debt owed by him to the creditor"

The form of the SD is prescribed in rule 94 of the Bankruptcy Rules. The bone of contention, r 94(5) which is set out above, provides that if the creditor holds any security for the debt, the SD shall specify the full amount of the debt and the nature and value of the security. Ko concedes that he holds the 50 membership certificates as security. But he has valued the security as "nil". I accept that the realisable value of the security may well be substantially lower than the US\$2 million stated in the promissory note, or it may even be worthless. But Ko has not only misstated in the SD the basis for his conclusion as to its zero value, he has not provided any cogent evidence for this valuation in the affidavits filed on his behalf. Ms Leong had submitted that this did not prejudice Sia because in any event, the debt was clearly greater than the value of the security. While I accept that the debt would in all probability be higher than the value of the security and it was only a matter of how much, I was of the view that the circumstances of the present case justify setting aside the SD for the reasons that follow.

12 Firstly, r 94(6) of the Bankruptcy Rules provides as follows:

(6) The debt of which payment is claimed shall be the full amount of the debt less the amount specified as the value of the security or assets.

And s 62(a) of the Act provides as follows:

For the purposes of a creditor's petition, a debtor shall, until he proves to the contrary, be presumed to be unable to pay any debt within the meaning of section 61(1)(c) if the debt is immediately payable and –

- (a) (i) the petitioning creditor to whom the debt is owed has served on him in the prescribed manner, a statutory demand;
- (ii) at least 21 days have elapsed since the statutory demand was served; and
- (iii) the debtor has neither complied with it nor applied to the court to set it aside; ...

Read together, this means that the SD is complied with if payment is made within 21 days of the amount of the debt claimed less the amount specified as the value of the security.

13 In the present case, Ko has valued the security as "nil". This means that in order to comply with the SD, Sia would have to pay the full sum of the debt claimed. On the one hand, Ko has held, and is holding, on to the security which was valued at US\$2 million in the promissory note. And on the other hand he has valued it as "nil", without providing reasonable evidence thereof. Further, although pursuant to the promissory note, he is entitled to sell the memberships in the event of default, he has not done so. It would appear that Ko: (a) does not wish to sell the memberships to reduce the amount owed; (b) values them in the SD to be of zero value; (c) has not produced any cogent evidence for the basis of this valuation; and (d) yet does not wish to return the membership certificates to Sia so that the latter can sell them to raise money to repay at least part of the debt. It does not seem fair to me that Ko can have his cake and eat it in this manner. Rule 98(2)(c)

requires the court to set aside the SD if r 94(5) has not been complied with. Even if it can be argued that there has been compliance, r 98(2)(e) gives the court the discretion to set aside the SD on other grounds. If Ko had in the SD given a value to the security that Sia had considered reasonable, the latter might have elected, or been placed in a position, to pay the balance to satisfy the debt. If Ko had considered the security to be worthless, he ought to have returned them to Sia so that the latter would be given the opportunity to use them to raise funds to repay the debt or part of it. For Ko to hold on to them in the present circumstances is, in my view, unfair and justifies the court exercising its discretion under r 98(2)(e) to set aside the SD.

Sgd:

LEE SEIU KIN
JUDICIAL COMMISSIONER

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