IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 1

Originating Summons (Bankruptcy) No 51 of 2018
Registrar's Appeal No 169 of 2018

Between

Lalwani Ashok Bherumal

… *Plaintiff*

And

(1) Lalwani Shalini Gobind
(2) Malti Gobind Lalwani

… *Defendants*

GROUNDS OF DECISION

[Insolvency Law] — [Bankruptcy] — [Statutory Demand]
[Equity] — [Maxims] — [Equity sees as done that which ought to be done]

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v
Lalwani Shalini Gobind and another

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Valerie Thean J
23 July, 24 October 2018

2 January 2019

Valerie Thean J:

Introduction

1 Beneficiaries under a will obtained judgment against the sole executor and trustee of the estate for the payment of certain sums into the estate. When the said sums remained unpaid after the executor's appeal was dismissed by the Court of Appeal, the beneficiaries followed on with letters of demand and eventually a statutory demand for the judgment debt. The executor sought thereafter to set aside the statutory demand on the footing that the amount was not accurate, and that the debt was in part owed to the estate and not the beneficiaries.

2 The beneficiaries' impasse raises two questions: may a fiduciary rely upon his own dereliction of duty to resist a statutory demand; and if not, should

a statutory demand be set aside on a technicality of an inaccurate sum, despite there being no substantial injustice to the debtor?

Background

3 The defendants are two sisters, who are the surviving beneficiaries ("the Beneficiaries") of the estate of their late father, Mr Lalwani Gobind Bherumal ("the Testator").[1] The plaintiff, Mr Lalwani Ashok Bherumal, is the sole executor and trustee of the estate ("the Executor"), and is the younger brother of the Testator and uncle of the defendants.[2]

4 The Testator passed away on 9 July 1999. His son, Lalwani Ameet Gobind, was named as an executor, trustee and a beneficiary under the Testator's handwritten will ("the Will"), but died on 20 March 2002. With his passing, the Beneficiaries became equally entitled to their father's estate ("the Estate"), and the plaintiff became the sole executor and trustee of the Estate.[3]

5 On 7 April 2015 the Beneficiaries commenced Suit 323 of 2015 ("Suit 323") against the Executor for the recovery of sums misappropriated and for accounts to be taken.

6 Suit 323 was heard by Aedit Abdullah JC (as he then was), who ordered on 29 November 2016 as follows:

(a) The Executor to account for various assets in the Estate;

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1 Bundle of Affidavits ("BA") Tab 2, p 2.

2 BA Tab 2, p 3.

3 BA Tab 2, pp 3–4.

(b) The sums of $136,561.76 and $118,000.00 to be repaid to the Estate with interest at 5.33% per annum; and

(c) Costs of $106,000.00 and disbursements of $5,393.91 to be paid by the Executor.

7 The account ordered was thereafter taken by a Senior Assistant Registrar ("SAR") from 6 January to 21 September 2017.

8 The Executor's appeal against the orders of Abdullah JC, Civil Appeal No 2 of 2017, was heard and dismissed by the Court of Appeal on 20 March 2018. The Court of Appeal clarified their order on 28 March 2018 in relation to the interest payable on certain sums. The cumulative effect of the various orders was as follows:[4]

(a) The sums of $136,561.76 and $118,000.00 were to be repaid to the Estate with interest at 5.33% per annum accruing from 8 February 2012 (the "Equitable Compensation Sums").

(b) The costs awarded to the Beneficiaries in respect of the High Court action were reduced to $80,000.

(c) The costs of the appeal were ordered against the Executor and fixed at $25,000.

9 A demand for payment of the judgment sum was made by letter by the Beneficiaries on 4 April 2018 when the draft judgments were sent to the Executor, requesting a response by 11 April 2018. The draft judgments were engrossed and returned on 6 April 2018 without a response to the demand for

[4] BA Tab 2, pp 5–6

payment of the judgment sums. On 11 April 2018, the Executor's solicitors responded to say that they were in the process of taking instructions, and requested that the Beneficiaries hold their hands in the meantime. After two further weeks passed without any response from the Executor or his solicitors, the Beneficiaries proceeded to issue a statutory demand dated 25 April 2018 under s 62 of Bankruptcy Act (Cap 20, 2009 Rev Ed) ("Bankruptcy Act").[5] This was served on the Executor on 28 April 2018.[6]

10 On 11 May 2018, the Executor filed an application to set aside the statutory demand. On 27 June 2018, an Assistant Registrar ("AR") set aside the statutory demand. The Beneficiaries filed an appeal against that decision on 4 July 2018 and the matter came before me.

Legal context, arguments and issues

11 Rule 98(2) of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("Bankruptcy Rules") provides as follows:

> **Hearing of application to set aside statutory demand**
>
> …
>
> (2) The court shall set aside the statutory demand if –
>
> > (*a*) the debtor appears to have a valid counterclaim, set-off or cross demand which is equivalent to or exceeds the amount of the debt or debts specified in the statutory demand;
> >
> > (*b*) the debt is disputed on grounds which appear to the court to be substantial;
> >
> > (*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

5 BA Tab 1, p 7.

6 BA Tab 2, p 7.

> court is satisfied that the value of the assets or security is equivalent to or exceeds the full amount of the debt;
>
> (*d*) rule 94 has not been complied with; or
>
> (*e*) the court is satisfied, on other grounds, that the demand ought to be set aside.

12 The Executor, in his application to set aside the statutory demand, initially relied solely upon r 98(2)(*d*), arguing that the sum specified in the statutory demand was incorrect. As may be seen from the paragraph above, while the emphasis of r 98(2)(*a*), (*b*), (*c*) and (*e*) is on substantive issues relating to the debt, subsection (*d*) appears to mandate absolute compliance with formal requirements in r 94, and it was on this requirement of absolute compliance that the Executor sought to rely. The Executor's argument rested on two errors in the quantum of the debt specified in the statutory demand. The first related to two interlocutory costs orders made in his favour which the Beneficiaries had omitted to take into account. The second was a contention that the debt included interest upon interest.

13 The Beneficiaries conceded that there were miscalculations in the debt, and it was common ground that these miscalculations resulted in a technical breach of r 94 of the Bankruptcy Rules. They highlighted, however, that they stood ready to re-calculate the debt and that these irregularities did not warrant a setting aside of the statutory demand.

14 When the matter went before the AR, he held that a joint statutory demand could not be issued by two or more creditors with different debts. In this case, although the statutory demand was premised upon a single court judgment, on the face of the judgment, the Equitable Compensation Sums were owed to the Estate while the other debts relating to the costs orders were owed

to the Beneficiaries.[7] This argument was also adopted by the Executor on the appeal.

15 On appeal, accordingly, the issues were essentially twofold. First, should a miscalculation in the sum specified in the statutory demand be fatal to the validity of the statutory demand? Second, should the statutory demand be set aside because one part of the sum demanded by the Beneficiaries was in fact ordered to be paid into the Estate rather than to the Beneficiaries?

Decision

16 In my judgment, no prejudice was caused to the Executor by the miscalculation. He would have known as early as 28 March 2018 the sums due under the judgment of the Court of Appeal. In relation to the issue of the sums owed to the Estate, the facts showed that they were in substance owed to the Beneficiaries. The Executor, being a fiduciary of the Beneficiaries, ought not to be able to rely upon his own dereliction of duty as a fiduciary. The payment sought was, on the specific facts presented by the case, one he was duty-bound to make to the Beneficiaries. The statutory demand ought not to be set aside. Instead, the sum outstanding was corrected and the Executor was given a further 21 days, the period allowed under the Bankruptcy Act for payment in respect of statutory demands prior to a bankruptcy application, to pay. He has appealed, and I now elaborate on the reasons for my decision.

The effect of inaccuracies in the sum specified in the statutory demand

17 It was common ground that the sum specified in the statutory demand was inaccurate (see [13] above); the parties joined issue on the *effect* of that inaccuracy. The Executor, relying on the mandatory language which r 98(2)(*d*)

[7] Plaintiff/Respondent's Bundle of Documents Tab 8.

puts upon compliance with r 94, argued that this breach would be fatal to the validity of the statutory demand. The Beneficiaries contended that it would not.

18 I agreed with the Beneficiaries that r 278 of the Bankruptcy Rules gives the court discretion to deal with irregularities in compliance with the rules. Rule 278 states:

> **Non-compliance with Rules**
>
> **278.** Non-compliance with any of these Rules or with any rule of practice shall not render any proceeding void unless the court so directs, but such proceeding may be set aside wholly or in part, amended or otherwise dealt with in such manner and upon such terms as the court thinks fit.

19 As pointed out by Woo Bih Li J recently in *Wheeler, Mark v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 205 at [17] and [20], the procedural or technical emphasis of r 98(2)(*d*) is an anomaly when contrasted with the other four grounds in r 98(2), which relate to reasons of substance; Singapore courts have generally adopted an approach that suggests that a statutory demand will not be set aside if no substantial injustice to the debtor has been caused.

20 In *Re Rasmachayana Sulistyo (alias Chang Whe Ming), ex parte The Hongkong and Shanghai Banking Corp Ltd and other appeals* [2005] 1 SLR(R) 483 ("*Rasmachayana*"), V K Rajah J (as he then was) explained at [29] that "Rule 278 of the [Bankruptcy Rules] was intended to confer on the court a considerable degree of flexibility in addressing procedural issues in order to achieve substantial justice." In the same case, the learned judge (at [27]) referred to the "underlying philosophy of pragmatism and substantial justice" that was

further exemplified by s 158(1) of the Bankruptcy Act (Cap 20, 2000 Rev Ed), which reads:

> **Formal defect not to invalidate proceedings or acts**
>
> **158**.—(1) No proceedings in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceedings is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

Although the version of the Bankruptcy Act cited in *Rasmachayana* has since been consolidated into a new revised edition, s 158(1) of the Bankruptcy Act remains unchanged.

21 In *Ramesh Mohandas Nagrani v United Overseas Bank Ltd* [2016] 1 SLR 174 ("*Ramesh Mohandas*"), the debtor applied to set aside the statutory demand. One of the grounds was that the amount claimed in the statutory demand was not the amount due as at the date it was served, but on a specific earlier date. Chua Lee Ming JC (as he then was) held that this was not in compliance with r 94 of the Bankruptcy Rules and that this non-compliance was a ground for setting aside under r 98(2)(*d*) (see *Ramesh Mohandas* at [8]). Referring, however, to *Rasmachayana*, and s 158(1) of the Bankruptcy Act, Chua JC held that there was no evidence of any injustice caused by the defect and that the non-compliance with r 94(1) was not fatal. In *iTronic Holdings Pte Ltd v Tan Swee Leon* [2018] 4 SLR 359 at [53] and [74]–[85], George Wei J adopted a similarly pragmatic approach in relation to non-conformity with r 94.

22 In my judgment, the overall effect of non-compliance with r 98(2)(*d*) of the Bankruptcy Rules is not, as contended by the plaintiff, that a statutory demand would automatically be set aside. Rather, when seen in the context of r 278, and in light of the "underlying philosophy of pragmatism and substantial

justice" that is evident in our bankruptcy legislation, the court has the discretion to scrutinise the statutory demand and make appropriate orders to ensure that substantial justice is done as between the parties.

Is the debt owed to the Beneficiaries?

23 It was common ground that both the orders of the High Court and the Court of Appeal make clear that the Equitable Compensation Sums were owed to the Estate. It was also not disputed that the Estate was not yet fully administered, and that the beneficiaries have no equitable or beneficial interest in any particular asset comprised in an unadministered estate: see *Wong Moy (administratrix of the estate of Theng Chee Khim, deceased) v Soo Ah Choy* [1996] 3 SLR(R) 27 at [11]*; Shaan Taseer and others v Aamna Taseer* [2012] 4 SLR 1049 at [20]).

24 The beneficiaries do, on the other hand, have a right to institute an action to protect the estate in special circumstances: see *Fong Wai Lyn Carolyn v Kao Chai-Chau Linda and others* [2017] 4 SLR 1018 at [8]–[16]; *Roberts (FC) v Gill & Co Solicitors and others* [2010] UKSC 22; and similarly *Omar Ali bin Mohd and others v Syed Jafaralsadeg bin Abdulkadir Alhadad and others* [1995] 2 SLR(R) 407 at [23], [28]–[31]. This was the premise upon which the Beneficiaries brought Suit 323 on behalf of the Estate against the Executor.

25 That action was brought on behalf of the Estate and the judgments issued for equitable compensation and interest thereon were in favour of the Estate. At the same time, the costs orders made in the High Court and Court of Appeal stood in favour of the Beneficiaries. The statutory demand issued by the Beneficiaries, while premised on a single judgment debt, therefore contained both a debt payable to the Estate, and debts payable to the Beneficiaries. In *Toh*

Khim Eak v United Overseas Bank Ltd and another [2001] 1 SLR(R) 47 ("*Toh Khim Eak*") at [10]–[12], Lee Seiu Kin JC (as he then was) held that a joint statutory demand could not be issued by two or more creditors for different debts. This was because the provisions in the Bankruptcy Act in respect of a statutory demand consistently referred to "creditor" in the singular (see *Toh Khim Eak* at [11]). A statutory demand in respect of different debts owed by the debtor to different banks was thus set aside. This decision was the basis upon which the AR set aside the statutory demand, and without further elucidation, would have been dispositive of the matter. In my view, the rule in *Toh Khim Eak* serves a practical purpose when the court, in the light of *Rasmachayana*, is assessing how to achieve substantial justice. The form of a statutory demand is a demand to pay the person named as payee in the demand. Such a demand, if containing different debts payable to various parties, could potentially embarrass the debtor who may then be concerned that if he purported to satisfy the demand by making payment to a particular creditor, he could subsequently discover that he has paid the wrong person. On its face, the debt was partially owed to the Estate, which was the property not of the Beneficiaries but of the Executor until it was fully administered. When this was pointed out to him at the hearing on 23 July 2018, counsel for the Beneficiaries, Mr Prakash, was of the view that on the facts of this particular case, payment to the Beneficiaries would be as good as payment to the Estate; there was no risk that the Executor would subsequently discover that he has paid the wrong person. *Toh Khim Eak* was distinguishable. An adjournment was granted, as requested, to enable him to reference the necessary evidence in the accounts that had been taken by the SAR.

26 At the next hearing on 24 October 2018, I found the following facts from the accounts taken to be of particular significance:

(a) The debts of the Estate have been wholly paid; and if they had not, the relevant limitation period would likely have elapsed as the Testator died on 9 July 1999.[8] The Schedule of Assets for the Estate was filed on 31 December 2008, and as at that date the Commissioner for Estate Duties certified that all estate duties had been paid.[9]

(b) The Estate's bank account was in surplus, and between 30 September 2014 to 30 April 2017, there had been no activity save for the monthly debit of the bank's administrative charge and the credit of interest payments into the account.[10] This resulted in a slight increase in amount each month. The Executor had omitted to pay the sum out to the Beneficiaries or to take steps to close the account.

(c) While the Estate was owed monies from three businesses (Bob's Partnership, Basco Enterprises Pte Ltd and Eltee Development Pte Ltd),[11] again, it would have been the Executor's responsibility to pursue those debts.

(d) The Will provided for the payment of cash to the Beneficiaries once funeral expenses, debts and taxes had been paid. The Equitable Compensation Sums in the present statutory demand that the court had directed be paid into the Estate (see [8(a)] above) came from a part of the Estate that the Executor had purported to have already distributed. The sum of $136,561.76 arose from the Estate's half share of the sum in a UOB account which the Testator and the Executor jointly held. The account was closed by the Executor in October 2000 and the sum was

8 Appellant's Written Submissions II, pp 5 and 7.

9 Affidavit of Lalwani Ashok Bherumal dated 6 June 2017, p 9.

10 Affidavit of Lalwani Ashok Bherumal dated 6 June 2017, pp 283–284 to 359–360.

11 Appellant's Written Submissions II, p 6.

> pocketed by the Executor instead of being distributed to the Beneficiaries. The sum of $118,000.00 came from thirteen unauthorised withdrawals made by the Executor between December 2010 and February 2012 from the Estate's bank account. The Executor purported to make a "final distribution" to the Beneficiaries out of the Estate's bank account on 1 August 2014.[12]

27 Counsel for the Executor, Mr Assomull, argued that the Will gave the Executor absolute and unfettered discretion whether to disburse money to the Beneficiaries.[13] However, this premise is factually incorrect. The Will states:[14]

> …
>
> 3. I hereby bequeath devise and give my entire estate to my executors and trustees with power of sale and postponement.
>
> 4. I give one-half of my entire estate to my son … I give the balance one-half of my estate to my daughters … in equal shares …
>
> 5. My executors and trustees shall only give cash to my beneficiaries and my executors and trustees shall have unfettered discretion to postpone the sale and conversion of any assets into cash.
>
> 6. Prior to any distribution or interim distribution of my estate my executors and trustees shall firstly pay out of my estate
>
> a) my funeral expenses
>
> b) my just and true debts
>
> c) estate and other taxes

28 In my view, a fair reading of the Will is that the intention of the Testator was for the assets of the Estate to be sold and converted into cash, which would

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12 Affidavit of Lalwani Ashok Bherumal dated 6 June 2017, p 189.

13 Respondent's Reply Submissions, p 7.

14 Plaintiff/Respondent's Bundle of Documents Tab 5, p 7.

then be distributed to the beneficiaries once the debts of the Estate are settled. It was in the sale and conversion of assets that the Executor has discretion, and this was made clear by the contrast between the express conferment of an "unfettered discretion" to postpone the sale and conversion of any assets into cash and the lack of a similar provision vesting the Executor with discretion to postpone the distribution of cash. While paragraph 3 contains a general power of postponement, any such power must be exercised in line with the Court of Appeal's guidance in *Foo Jee Seng and others v Foo Jhee Tuang and another* [2012] 4 SLR 339 ("*Foo Jee Seng*"), (at [52], [55] and [79]) that a Trustee's power must be exercised *bona fide* and in the best interest of the beneficiaries. As such, barring any good reasons to retain cash in the Estate (and no reasons were proffered by the Executor), cash remaining in the Estate ought to have been distributed within a reasonable time.

29 Seen in light of the obligation to distribute cash within a reasonable time, it is apparent that if not for the Executor's misconduct, the Equitable Compensation Sums would have been distributed to the Beneficiaries. The sum of $136,561.76 should have been deposited into the account of the Estate in 2000, and distributed to the Beneficiaries shortly after the debts of the Estate had been paid off, which would appear to have been 31 December 2008. The sum of $118,000.00 should have been distributed to the Beneficiaries instead of being withdrawn in the Executor's favour. At the very latest, both these sums should have been distributed when the Executor purported to make the "final distribution" on 1 August 2014. The fact that the Estate has not been fully administered is not critical in this case. The onus remained on the Executor to distribute cash within a reasonable time. Post-March 2018, the Executor ought to have paid the Equitable Compensation Sums into the Estate as directed by the High Court and the Court of Appeal and, in accordance with the Will, paid

out to the Beneficiaries shortly thereafter. He has done neither and is hence in breach of a court order, as well as his obligations under the Will.

30 What were the Beneficiaries to do, faced with the Executor's intransigence? Rather than to start another action to replace the Executor, they have issued a statutory demand, on the footing that if the debt remained unpaid, his resulting insolvency would lead to the same result. Having the right to institute an action to protect the Estate, they would have the right to issue a statutory demand to compel him to pay the Estate. On that hypothesis, if they so compelled him, they would then also have a right to enforce the terms of the Will. It would follow then, that in circumstances such as these where there are no debts outstanding and no *bona fide* reason preventing distribution, they would have the right to compel him to distribute monies. Here they have issued a statutory demand for him to pay them directly. This could, so to speak, be viewed as a summation of the otherwise multiple steps. The critical question is hence whether there are any rules or principles that enabled the court to acknowledge the substance of the matter, and regard the Beneficiaries as the creditor.

31 Mr Prakash's submission was that the maxim, "equity looks on as done that which ought to be done", enabled the Beneficiaries to take this route.[15] In *HR Trustees Limited v Wembley Plc (In Liquidation), Mr Paul Lorber* [2011] EWHC 2974 (Ch) ("*HR Trustees*"), the claimant sought directions on a scheme amendment made to a pension scheme. The power of amendment contained in the scheme's trust deed was to be exercised "in writing under their hands". The declaration ought to have been signed by all five trustees. One failed to do so arising purely from an administrative error. Justice Vos applied the same

15 Appellant's Written Submissions II, p 13.

equitable maxim and decided that the amendment was valid as at the date signed by the four trustees. At [66]–[67] Vos J explained the matter in the following terms:

> 66. Here it seems clear to me that the trustees exercised their discretion to amend the rule in the way contained in the amendment. They were obliged, having done so under clause 16, to make an appropriate declaration in a particular form. They could have been compelled on behalf of the members, who are not volunteers, to specifically perform their exercise of the power. Not to make a valid declaration was a breach of the terms of the definitive deed. Thus, in my judgment, this is a classic case in which the maxim of equity can and should properly be applied. Mr Moeran is wrong, in my judgment, to submit that this is an extension of the doctrine. It may be that there has never been before a case on all fours with the present, but law and equity would be made to look ridiculous if it were powerless to correct what has been an obvious administrative error like the one made in this case. Moreover, none of the members of the scheme in any category have any reason to feel aggrieved. The members, apart from those in former scheme B, were told about the change at the time in July 2000. They never expected to continue to accrue rights on the previous basis. If they did so, they would be receiving a windfall which they had no right to expect. They cannot have known until much later that the amendment had been defectively executed.
>
> 67. In my judgment, therefore, this is not the exercise of an exorbitant or unpredictable or even unorthodox jurisdiction. It is the stuff of equity, refined and clarified over many years. It is, in short, the proper application of equitable principles to an unfortunate situation. I have considered whether by applying the maxim I might be falling into a trap, deciding a case according to its obvious merits with the risk that hard cases make bad law, but I do not think so. I have considered also why a document that was invalidly executed according to the proper construction of a definitive deed should, by an equitable maxim, suddenly be declared validly executed. But as it seems to me, that is the necessary result of the proper application of, as I have said, a well established equitable principle. It is not arbitrary or unreasonable. It is what would have been expected.
> …

32 Justice Vos's rationale was premised on the enforceability of the trustees' obligation. This was made clear from his last line in the paragraph prefacing the two extracted above: "as Snell makes clear, the maxim is usually

applied where specific performance would be appropriate because there has been an agreement to which effect should be given by a court of equity." This aspect of specific enforceability was also emphasised in a passage from R P Meagher, J D Heydon, M J Leeming, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (Butterworths LexisNexis, 4th Ed, 2002) that Vos J cited at [56]:

> At paragraph 3-210 Meagher, Gummow and Lehane said:
>
> > "It is to be noted that the applicability of the maxim is limited to circumstances where that which ought to be done can be done; the maxim does not require one to believe that equity will regard as done that which no court (of law or equity) would ever order to be done. Therefore, it can be availed of, not by everybody, but only by those who would have the right to seek in equity the enforcement of the contract. This is often expressed by saying with approximate accuracy that in cases of contract the maxim depends on the specific enforceability of the contract."

33 Analogous reasoning may be applied here. The Beneficiaries have obtained a court order compelling the Executor to pay the sums into the Estate. They are also able to compel the Executor to make a distribution to them. The request for the statutory demand to be set aside rests on an arid technicality. There is a point of difference from *HR Trustees*, and this is that the Beneficiaries are volunteers. Nevertheless, because of the trust relationship, on the facts of this case the Beneficiaries possess the set of legal rights that allow them to compel the Executor to do his duty. The relationship between the Executor and the Beneficiaries is one that equity will recognise, and one in which equity will enforce the Executor's duty of fidelity. The "specific enforceability" of the Executor's obligation to pay arises from the trust relationship and the fiduciaries' duties arising out of that relationship.

34 In this context, the case of *T Choithram International SA and others v Pagarani and others* [2001] 1 WLR 1 ("*Choithram*") is pertinent. In *Choithram*, the donor executed a trust deed for a foundation, and declared, in effect, "I now give all my wealth to the trust". The Privy Council held that the words were a declaration of trust and that the completely constituted trust was enforceable by the beneficiaries thereunder. The fact that the beneficiaries in that case were volunteers did not affect the enforceability of the trust, as Lord Browne-Wilkinson explained at 11H and 12C:

> Although equity will not aid a volunteer, it will not strive officiously to defeat a gift …
>
> …
>
> … beneficiaries under a trust, although volunteers, can enforce the trust against the trustees. Once a trust relationship is established between trustee and beneficiary, the *fact that a beneficiary has given no value is irrelevant*.
>
> [emphasis added]

35 A second feature of the case was that while the donor named himself as a trustee of the trust which he set up, the gifted assets were not transferred to the rest of the other named trustees. Lord Browne-Wilkinson was of the view that, the donor having appointed himself trustee of the trust property, it would be unconscionable and contrary to the principles of equity to allow such a donor-trustee to resile from his gift, and held that he was bound to give effect to it by transferring the trust property into the name of all the trustees. He explained at 12D–F:

> What then is the position here where the trust property is vested in one of the body of trustees, viz [the donor]? In their Lordships' view there should be no question. [The donor] has, in the most solemn circumstances, declared that he is giving (and later that he has given) property to a trust which he himself has established and of which he has appointed himself to be a trustee. … There can in principle be no distinction between the case where the donor declares himself to be sole trustee for a

> donee or a purpose and the case where he declares himself to be one of the trustees for that donee or purpose. In both cases *his conscience is affected and it would be unconscionable and contrary to the principles of equity to allow such a donor to resile from his gift.* Say, in the present case, that [the donor] had survived and tried to change his mind by denying the gift. In their Lordships' view *it is impossible to believe that he could validly deny that he was a trustee* for the purposes of the foundation in the light of all the steps that he had taken to assert that position and to assert his trusteeship. In their Lordships' judgment in the absence of special factors where one out of a larger body of trustees has the trust property vested in him *he is bound by the trust and must give effect to it by transferring the trust property into the name of all the trustees.* [emphasis added]

36 *Choithram* thus highlights two important principles. First, in the context of a trust relationship, equity will enforce obligations between a trustee and a volunteer beneficiary. Second, a trustee cannot validly take a position inconsistent with his duties as a trustee, and in fact, the court would compel the trustee to perform his duties under the trust.

37 The principle that a trustee cannot adopt a position that is contrary to his duties as a trustee has also been expressed in other contexts where the rules of equity have been applied. In the context of tracing, for example, where a trustee mixes trust monies with the trustee's own assets and some of the assets in the mixed fund are dissipated, it is presumed that it is the trustee's money that has been dissipated, rather than the trust monies (see *In re Hallett's Estate* (1880) 13 Ch D 696 at 727–728). The rationale of this rule, as explained by Lord Greene MR in *In re Diplock* [1948] Ch 465 at 525, was that where a trustee is a party to the tracing action, "he is, of course, precluded from setting up a case inconsistent with the obligations of his fiduciary position".

38 In the context of trustee exemption clauses, the English Court of Appeal has held in the case of *Armitage v Nurse and Others* [1998] Ch 241 that a trustee

is not entitled to raise the defence that he has been exempted from a breach of duty by virtue of an exemption clause, if that breach of duty involved a breach of an irreducible core obligation of the fiduciary. Lord Millett stated at 253H–254A:

> I accept the submission … that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts … The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts …

39 The underlying principle behind equity's intervention was summarised by Justice David Hayton, writing extra-judicially, in "The development of equity and the 'good person' philosophy in common law systems" (2012) 4 Conv 263–273. Justice Hayton stated at p 268:

> Essentially, Equity has picked on particular instances where it considers the common law to produce inequitable or unconscionable results so that it needs to intervene with a more nuanced approach so that the defendant acts in good conscionable fashion so as to do substantial justice between the parties.

40 In my judgment, these authorities illustrate that where a trustee has failed to perform his duty, equity can be invoked to compel the trustee to perform the same; it is equally open for equity to intervene by viewing the trustee as having performed his duty in order to do substantial justice between the parties. Therefore, the Executor, in this case, may not seek to set aside the statutory demand on grounds that the Equitable Compensation Sums were owed not to the Beneficiaries but to the Estate because he was duty-bound under court order to pay the misappropriated money to the Estate, and thereafter duty-bound as a fiduciary to distribute that money to the Beneficiaries in accordance with the directions of the Will. If he had complied with his duties, the Equitable

Compensation Sums would have rightfully been paid to the Beneficiaries in accordance with the intentions of the Testator as expressed in the Will. In sum, to draw a line between sums due to the Estate and sums due to the Beneficiaries in circumstances where it is undeniable that the sums due to the Estate are ultimately and presently due to be distributed to the Beneficiaries would be an exercise in artificiality. Worse, it would appear to endorse the Executor's attempt to deny his duty to distribute the cash proceeds of the judgment debt to the Beneficiaries. Such a position would be inconsistent with his duties as a trustee and is not a course open to him.

41 Accordingly, the Executor cannot deny the demand of the Beneficiaries for the Equitable Compensation Sums in their own names. Sums were recovered in proceedings instituted by the Beneficiaries on behalf of the Estate, and, as I have explained, the Beneficiaries' entitlement to those sums flows through the Estate. Any payment made upon the statutory demand in favour of the Beneficiaries would, without a doubt, be a good discharge of the debt owed under the order made and clarified by the Court of Appeal on 28 March 2018.

Should the Court inquire into the rights and obligations of the parties?

42 Mr Assomull raised one final argument in relation to the Equitable Compensation Sums. He suggested that "Equity … has no role in this matter as the provisions of the Bankruptcy Act and Bankruptcy Rules are clear".[16] It was also strenuously argued that it was not for the court sitting in its bankruptcy jurisdiction to "transgress" from the High Court judgment and Court of Appeal orders, which expressed the Equitable Compensation Sums as being due to the Estate instead of the Beneficiaries.[17] At its core, both these arguments go to the

16 Respondent's Reply Submissions, p 9.

17 Respondent's Reply Submissions, p 5.

issue of whether it is open to a court in its bankruptcy jurisdiction to undertake an inquiry into the rights and obligations of the parties, and determine, as the court has done, that the Beneficiary can be viewed, in the eyes of equity, as the true creditor in the present case.

43 In my view, this is permissible and entirely consistent with the underlying philosophy behind bankruptcy proceedings. The Court of Appeal in *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 ("*Chimbusco*") at [18] held that it was appropriate to extend the analogy of a summary judgment application to the imposition of conditions for granting a stay of bankruptcy proceedings. In explaining the rationale for this decision, the court stated at [22]:

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

44 The reminder from the Court of Appeal that a court exercising its bankruptcy jurisdiction should "avoid taking an overly formalistic approach in exercising its jurisdiction" is consistent with the underlying philosophy of pragmatism and substantial justice in our bankruptcy legislation that was

highlighted by the court in *Ramaschayana* (see [20] above). The suggestion by Mr Assomull, that the rules and principles of equity have no role in matters involving the court exercising its bankruptcy jurisdiction, rings hollow in light of the robust approach espoused by the Court of Appeal.

45 Bankruptcy proceedings involve the careful balancing of the interests of the creditor, in enabling the creditor to enforce a debt without unnecessary delay, and the protection of the debtor, in ensuring that only undisputed debts are pursued against him. In my judgment, bearing in mind the philosophy espoused in *Chimbusco* and *Ramaschayana*, the balance is struck in the present case by assessing whether there is a triable issue as to whether the Equitable Compensations Sums are in substance owed to the Beneficiaries. For the reasons stated above (see [31]–[40]) there was no triable issue, and Mr Assomull's final argument could not be sustained.

The appropriate steps to take in relation to the miscalculated sums

The correct sum

46 Having dealt with the issue of the Equitable Compensation Sums, I return to address the miscalculated sums.

47 Mr Assomull contended that the amount in the Statutory Demand was inaccurate for two reasons. The first was that costs of $6,000 and $8,000 previously ordered against the Beneficiaries had not yet been paid by them. This was conceded by the Beneficiaries, who were willing to amend the statutory demand and set off the $14,000. It should be noted that this was not a set-off within the meaning of r 98(2)(*a*) of the Bankruptcy Rules: it was not equivalent to or exceeding the amount of the debt.

48 The second objection raised by Mr Assomull related to the quantification of interest. His view was that the calculation was erroneous because it comprised "interest upon interest". This was a red herring. Conceptually, interest awarded by the court is classified into two distinct categories: pre-judgment interest and post-judgment interest. Courts have traditionally applied post-judgment interest to a combined sum of pre-judgment interest plus the original debt upon which the pre-judgment interest was applied. The practice was examined and explained by the Law Reform Committee of the Singapore Academy of Law in 2005: "… it is to be noted that the interest rate for judgment debts is based on a sum which already capitalises any pre-judgment interest ordered by the court. Thus, the interest on the judgment debt is necessarily compounded in this limited sense" (see Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Pre- and Post-Judgment Interest* (August 2005) at para 152 (Chairman: Associate Professor Yeo Tiong Min)). Hence, there was nothing objectionable about the mere fact that post-judgment interest was applied on top of the pre-judgment interest calculated.

49 Notwithstanding this, the Beneficiaries' amended sum which was proposed during the first hearing before me on 23 July 2018 was erroneous for another reason. The components of the crystallised judgment debt proposed included: (a) the sums of $136,561.76 and $118,000.00, (b) costs and (c) pre-judgment interest on the sums of $136,561.76 and $118,000.00. The pre-judgment interest on the sums of $136,561.76 and $118,000.00 was taken as crystallised on 29 November 2016, the date of Abdullah JC's judgment, and post-judgment interest was applied on the entire crystallised sum. However, pre-judgment interest was only subsequently clarified by the Court of Appeal to commence from 8 February 2012. This was done on 28 March 2018. In this

context, the guidance of the Court of Appeal in *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 ("*Grains*") is relevant. In that case, the Court of Appeal, in reversing the High Court's decision not to award pre-judgment interest, awarded pre-judgment interest up to the date of the Court of Appeal judgment (see *Grains* at [143]). In doing so, the Court of Appeal made clear at [138] that the entitlement to such pre-judgment interest, the relevant rate of interest, the proportion of the sum which should bear interest, and the period for which interest should be awarded were matters of judicial discretion. In this case, while pre-judgment interest was awarded by the High Court, its date of commencement was not at that time settled. This was determined, in an exercise of judicial discretion by the Court of Appeal, on 28 March 2018. It would thus be more appropriate to take 28 March 2018 as the applicable date for the crystallisation of the pre-judgement interest which ran from 8 February 2012.

50 Mr Prakash clarified at the hearing on 24 October 2018 that taking into account the errors highlighted at [47] and [49] above, the correct sum payable as at 24 October 2018 was therefore $425,338.87.[18] Mr Assomull declined to comment on the sum although opportunity was given to him to do so. His view was that it was not his obligation to assist in ascertaining the sum owed by his client.

Ensuring the absence of prejudice

51 In the case at hand, the Beneficiaries had not yet filed any bankruptcy application as at 24 October 2018. Any prejudice to the debtor could be dealt with under r 278 of the Bankruptcy Rules. The court was able to give the debtor

[18] Annex C tendered at the hearing on 24 October 2018.

an opportunity to pay a rectified sum, so there could be no issue of irreparable prejudice.

52 Rule 98(3) stipulates that if a court dismisses the application to set aside a statutory demand, it shall make an order authorising the creditor to file a bankruptcy application either on or after the date specified in the order. In this case, more than four months had elapsed since the service of the statutory demand. Rule 102(2) mandates that no bankruptcy application shall be made if the statutory demand is served more than four months prior to the application. While no express reference is made to r 98(3), reading the two rules together with r 278 must mean that r 102(2) does not operate to bar a bankruptcy application when an order of the court expressly authorising such an application is made under r 98(3). Leave was therefore given to the Beneficiaries to proceed with a bankruptcy application if the sum of $425,338.87 remained unpaid after 21 days. 21 days was granted for payment because that is the time period specified under s 62 of the Bankruptcy Act in relation to the presumption of the debtor's inability to pay his debts following an unpaid statutory demand, such presumption allowing a creditor to proceed thereafter with a bankruptcy application.

Conclusion

53 In my judgment, while the sum was erroneously calculated, this was not fatal to the validity of the statutory demand. Nor could the Executor mount a defence to the statutory demand that derogates from his fiduciary obligation to pay the corrected sum to the Beneficiaries. He was duty-bound to pay the correct amount on the facts as they stood. The correct sum was stipulated, with a direction given to the Beneficiaries that a further 21 days be given to the Executor to pay, before any bankruptcy application could be filed.

54 The appeal was thus allowed and the orders made below were set aside. Mr Assomull argued that the costs ordered below ought to remain the Executor's as the points taken on appeal were not made earlier. I rejected this argument because the Executor's application has, from the outset, lacked substantive merit. On the one hand, he sought to argue that the judgment debt was owed to the Estate, yet on the other, he has not paid any sum into the Estate account. His continued refusal to pay in the face of judgments obliging him to do so reflects a disdain for court orders which ought to be discouraged. Having regard to all the circumstances, I awarded the Beneficiaries half their costs, in the round, of the summons and of the appeal. These I fixed at $6,000, inclusive of disbursements.

Valerie Thean
Judge

Madan Assomull (Assomull & Partners) for the plaintiff;
Nandwani Manoj Prakash and Henry Li-Zheng Setiono (Gabriel Law Corporation) for the defendants.