IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 98

Registrar's Appeal No 11 of 2016

Between

LIEW KAI LUNG KARL

… *Appellant*

And

CHING CHIAT KWONG

… *Respondent*

In the matter of Originating Summons (Bankruptcy) No 89 of 2015

In the matter of Sections 64 And 65 of the Bankruptcy Act (Cap. 20)

And

In the matter of an Application for a Bankruptcy Order in Case No. B 2552/2014

Between

LIEW KAI LUNG KARL

… *Plaintiff*

And

CHING CHIAT KWONG

… *Defendant*

GROUNDS OF DECISION

[Insolvency Law] — [Bankruptcy] — [Bankruptcy application disputed by debtor]

[Abuse of Process]

Liew Kai Lung Karl
v
Ching Chiat Kwong

[2016] SGHC 98

High Court — Originating Summons (Bankruptcy) No 89 of 2015 (Registrar's Appeal No 11 of 2016)
Edmund Leow JC
15 February 2016

16 May 2016

Edmund Leow JC:

Introduction

1 Liew Kai Lung, Karl ("the appellant") applied in Originating Summons (Bankruptcy) No 89 of 2015 ("OSB 89/2015") to dismiss the application by Ching Chiat Kwong ("the respondent") for a Bankruptcy Order in Case No B 2552/2014 against the Plaintiff filed on 19 December 2014 ("the Application"), or in the alternative, to stay all proceedings on the Application for such time as it is necessary to determine by trial whether the appellant is indebted to the respondent. The appellant's application was dismissed by the Assistant Registrar ("the AR") and he filed this Registrar's Appeal No 11 of 2016 against the AR's decision.

2 At the conclusion of the hearing before me, I affirmed the decision below with costs. The appellant has filed a notice of appeal (in Civil Appeal No 21 of 2016) against my decision. I thus set out my reasons.

Factual and procedural background

3 The appellant was the director of Realm Capital Limited ("Realm Capital"), and the respondent was the director of Ever Tycoon Limited ("Ever Tycoon").[1] After Realm Capital failed to make payment to Ever Tycoon under certain facility agreements[2] and the appellant failed to make payment to Ever Tycoon under certain personal guarantees,[3] the appellant and respondent entered into the following:

(a) a deed of settlement dated 4 September 2012 (the Deed of Settlement");[4]

(b) a supplementary deed of settlement dated 4 March 2013;[5]

(c) a second supplementary deed of settlement dated 3 May 2013;[6] and

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[1] The respondent's affidavit dated 3 December 2015, para 8

[2] The appellant's 1st affidavit dated 26 October 2015, pp 45-163

[3] The appellant's 1st affidavit dated 26 October 2015, pp 164-227

[4] The appellant's 1st affidavit dated 26 October 2015, pp 366-370

[5] The appellant's 1st affidavit dated 26 October 2015, pp 371-374

[6] The appellant's 1st affidavit dated 26 October 2015, pp 375-377

(d) a third supplementary deed of settlement dated 16 December 2013.[7]

4 Under the Deed of Settlement, the respondent and Ever Tycoon agreed to refrain from commencing legal proceedings against, *inter alia*, the appellant till 1 March 2013 in respect of an unpaid loan of $4m. The appellant was to repay $1.5m by 4 September 2012 and a further sum of $500,000 by 9 September 2012 ("the Settlement Payments") in exchange. It was undisputed that the appellant had made the Settlement Payments. Clause 1.1(ii) of the Deed of Settlement also provided that the aggregate liabilities and obligations of, *inter alia*, the appellant towards the respondent and Ever Tycoon after the Settlement Payments would not exceed $2m; this was referred to in the Deed of Settlement as the "Balance Principal". Under cl 1.3 of the same deed, parties agreed to reach an agreement regarding the reinvestment or settlement of the Balance Principal by no later than 1 March 2013. The three supplementary deeds ("the Supplementary Deeds") served to extend the deadline and forbearance period up till 1 May 2014. Under cl 2.4 of the third supplementary deed, it was also provided that if the parties failed to reach agreement under cl 1.3, the appellant and Realm Capital would be jointly and/or severally liable to pay to the respondent and Ever Tycoon the Balance Principal in addition to all accrued interest at the rate of 5% per annum from 9 September 2012 until the date of full payment.

5 Parties failed to reach an agreement under cl 1.3; the respondent then served a statutory demand on the plaintiff dated 14 October 2014 for a sum of

[7] The appellant's 1st affidavit dated 26 October 2015, pp 378-385

$2,209,863.01 ("the SD") pursuant to cl 2.4 of the third supplementary deed.[8] The plaintiff had attempted, unsuccessfully, to set aside the SD in Originating Summons (Bankruptcy) No 15 of 2015 ("OSB 15/2015") and in the consequent Registrar's Appeal No 89 of 2015 ("RA 89/2015") (See *Liew Kai Lung Karl v Ching Chiat Kwong* [2015] 3 SLR 1204). The main grounds relied on by the appellant in RA 89/2015 were that the service of the SD was irregular and that there was a dispute as to the debt owed, giving rise to a genuine triable issue. The appellant attempted to argue that the respondent was double claiming for the Settlement Payments, which was a genuine triable issue; Chan Seng Onn J found the argument completely unmeritorious since it was quite apparent that the SD was for the Balance Principal and thus a separate sum and dismissed the appeal. The Court of Appeal in Civil Appeal No 77 of 2015 ("CA 77/2015") agreed with Chan J and dismissed the appeal.[9] The appellant failed to comply with the SD, so the respondent applied for a Bankruptcy Order in the Application. The appellant brought OSB 89/2015 for a dismissal or, in the alternative, a stay of the Application.

6 The appellant's main arguments in OSB 89/2015 before the AR were first, the facility agreements forming the foundation for the SD were never utilized and so there were no disbursement of funds by Ever Tycoon to Realm Capital, and second, the appellant was acting under a mistake of fact that he had executed the personal guarantees in favour of Ever Tycoon which formed the foundation for the SD, when he had never done so.[10] Curiously, the

[8] The respondent's affidavit dated 3 December 2015, para 16

[9] CA/ORC 231/2015

[10] The appellant's outline submissions for OSB 89/2015 dated 6 January 2016, paras 9 and 10

appellant appeared to contradict himself in his submissions by also claiming that he was labouring under incessant moral pressure exerted by the respondent when he executed those personal guarantees.[11] The appellant claimed that the personal guarantees that formed the basis of the dispute were "contrived".[12] He also claimed that he was misled by his former solicitors, who were discharged in May 2015, into believing that he had executed those personal guarantees. The appellant also alleged that the respondent was fully aware of the lack of disbursement under the facility agreements and the non-execution of the personal guarantees.[13] The appellant implied that the Deed of Settlement and the Supplementary Deeds were invented,[14] or should be void by virtue of the respondent's knowledge.[15]

7 The appellant's counsel argued that the appellant did not know and did not understand the issues as he was unrepresented when he filed the Appellant's Case for CA 77/2015 in July 2015. Even when appellant's counsel came on-board in late September 2015, it was too late to raise those arguments, and so benefit of the doubt should be given to the appellant.[16]

8 When the AR pointed out that CA 77/2015 was heard in November 2015, and so it was open to the appellant's counsel to file an application for

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[11] The appellant's outline submissions for OSB 89/2015 dated 6 January 2016, para 10

[12] The appellant's 1st affidavit dated 26 October 2015, para 57(c)

[13] The appellant's outline submissions for OSB 89/2015 dated 6 January 2016, para 11

[14] The appellant's outline submissions for OSB 89/2015 dated 6 January 2016, para 13

[15] The appellant's outline submissions for OSB 89/2015 dated 6 January 2016, para 15

[16] Transcript of hearing before the AR on 6 January 2016, p 11

leave to adduce further evidence, the appellant's counsel merely responded that he was too busy and did not have time to do so.[17]

9 The AR was of the view that the issue of whether the deed was signed under mistake was a substantive one that impinged on the validity of the SD; thus it should have been dealt with in Originating Summons (Bankruptcy) No 15 of 2015. Given that the Court of Appeal had already affirmed the validity of the SD in CA 77/2015, there was no basis to dismiss the Application which was premised on a valid statutory demand; thus she dismissed Prayer 1 of OSB 89/2015.[18] The AR found that the documents and facts that formed the basis for the appellant's arguments in OSB 89/2015 were already in the appellant's possession by May 2015 and were in fact canvassed in the Appellant's Case for CA 77/2015, though those arguments were not raised at the appeal.[19] She was of the view that there was no cogent explanation as to why the arguments that were being raised before her could not have been canvassed before the Court of Appeal in CA 77/2015 by way of an application to adduce new evidence.[20] She thus decided that there was no basis to exercise the discretion to stay the Application and dismissed Prayer 2 of OSB 89/2015.

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[17] Transcript of hearing before the AR on 6 January 2016, p 12

[18] Transcript of hearing before the AR on 6 January 2016, p 14: 11-15

[19] Transcript of hearing before the AR on 6 January 2016, p 14:23-28

[20] Transcript of hearing before the AR on 6 January 2016, p 15:2-7

Parties' Arguments

10 The appellant essentially repeated the same arguments that were put before the AR at para 6 above, and also pointed out that there were at least three major triable issues, namely:[21]

(a) Whether the appellant had executed the Deed of Settlement under a unilateral mistake of fact;

(b) Whether the respondent was aware of the fact that the appellant had executed the Deed of Settlement under a unilateral mistake of fact; and

(c) Whether the appellant only realised his unilateral mistake of fact only after 11 May 2015.

11 The appellant proffered the same reasons that were given to the AR at para 7 to explain why these issues could not have been raised in CA 77/2015. In addition, the appellant also claimed that he had indicated in para 15 of Appellant's Case for CA 77/2015 that he would be taking out an application for dismissal or stay of the proceedings in Case No B2552/2014.[22] The appellant also proffered another rather peculiar reason which made no sense to me: that he was under the impression that his application in OSB 89/2015 was distinct from his appeal in CA 77/2015, [23] and so it could not be said that there

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[21] The appellant's outline submissions for RA 11/2016, para 10

[22] The appellant's outline submissions for RA 11/2016, para 11(e)

[23] The appellant's outline submissions for RA 11/2016, para 14

was an abandonment of the OSB 89/2015 arguments covered in the Appellant's Case for CA 77/2015.[24]

12 The respondent took the same position as in OSB 89/2015, that the SD was valid and unimpeachable given the CA's decision in favour of the respondents in CA 77/2015. They argued that this was the appellant's attempt to get a second bite of the cherry by trying to stay the Application on grounds that were raised at the stage of setting aside the statutory demand but abandoned on appeal in CA 77/2015, thus constituting an abuse of process.[25]

My decision

13 In *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 ("*Chimbusco*"), it was held by the Court of Appeal that the standard for obtaining a stay or a dismissal of bankruptcy proceedings was no more than that for resisting a summary judgment application, *ie*, a debtor need only raise triable issues (at [16]-[17]). However, the Court of Appeal was also careful to note that one could not stave off bankruptcy proceedings *merely* by alleging that there is a substantial and *bona fide* dispute over the debt claimed by the applicant-creditor. The court has to take into account the protection of the interests of a meritorious creditor and minimization of wastage of court resources.

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[24] The appellant's outline submissions for RA 11/2016, para 15

[25] The respondent's written submissions for RA 11/2016, para 5

14 I was of the view that the standard set out in *Chimbusco* had not been met here. I was very doubtful that the issues raised by the appellant in this case were genuine. It appeared incredible to me that the appellant only raised these purportedly triable issues after having gone through the proceedings in OSB 15/2015 and RA 89/2015, when these issues were very fundamental to whether there is even a debt in the first place. The position up till CA 77/2015 had always been that the debt was not disputed; the appellant's former counsel took that position explicitly when he was queried at the hearing of OSB 15/2015.[26] The appellant had also made the Settlement Payments pursuant to the Deed of Settlement. The appellant was essentially asking me to believe that after nearly three years, during which deeds were signed that reflected outstanding loans under the facility agreements and were in fact admissions of the appellant's liability to the respondent, there had never been any monies disbursed from Ever Tycoon and the respondent in favour of the appellant. This was plainly unconvincing. Further, the claim that the appellant was misled by his former solicitors, who were discharged in May 2015, into believing that he had executed personal guarantees giving rise to the debt when he had not, was frivolous to me. Whether or not he signed those personal guarantees was a fact that he would be in the best position to know, not his solicitors. There was no shred of evidence to indicate that the appellant had been misled by his former solicitors, other than bare allegations. There was also no shred of evidence to show that the Deed of Settlement and the Supplementary Deeds were not genuine; it was undisputed that parties entered into the facility agreements and personal guarantees with the benefit of legal

[26] Transcript of hearing before the AR in OSB 15/2015 on 30 March 2015, p 2

advice. There was also no shred of evidence that the respondent had knowledge of the appellant's purported mistake.

15 Merits of the appellant's claims on the triable issue aside, given that the issues raised in the present case effectively go to the validity of the SD, they should have been raised before the CA in the Appellant's Case for CA 77/2015. The AR was right to find that the appellant had in fact already covered these identical issues in his Appellant's Case for CA 77/2015, under Section B of the Appellant's Case which pinpointed issues for the appeal.[27] The appellant's claim that these points were raised only by way of "background information"[28] was thus plainly untrue. It was undisputed that the appellant did not pursue the arguments arising out of these issues before the Court of Appeal during the November hearing, and also did not seek leave to adduce fresh evidence on these issues. This decision also appeared to be a conscious one, rather than one made because of the lack of time, judging from the appellant counsel's response to the AR at the hearing that had leave not been granted to adduce new evidence, there could have been an issue of estoppel.[29]

16 I agreed with the respondent's submissions that the present case falls into the situation described in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal*

[27] The respondent's affidavit dated 3 December 2015, pp 41, 45-- 47

[28] The appellant's 2nd affidavit dated 22 December 2015, para 14

[29] Transcript of hearing before the AR on 6 January 2016, p 13:7

[2015] 5 SLR 1104 ("*TT International*") (at [101]) where a litigant seeks to "argue points which were not previously determined by a court or tribunal because they were not brought to the attention of the court or tribunal in the earlier proceedings even though they ought properly to have been raised and argued then." The Court of Appeal in *TT International* noted that the "extended" doctrine of *res judicata*, also known as abuse of process, would apply in such situations; absent special circumstances, a litigant should not be permitted to argue those points in order that there might be finality in litigation. In this aspect they also highlighted (at [101]) Sir James Wigram V-C's comments in *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313 that this doctrine applied "not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which [the] parties, exercising reasonable diligence, might have brought forward at the time." The Court of Appeal in *TT International* (at [104]) recognized that in dealing with situations where the extended doctrine of *res judicata* applies, the approach should be a flexible, merits-based one like that described in *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453. The court must look at all circumstances of the case, such as whether there is fresh evidence that might warrant re-litigation or whether there are *bona fide* reasons why a matter was not raised in the earlier proceedings.

17 On the facts of the case, the triable issues that the appellant sought to ventilate were clearly available at the time of the earlier proceedings, and were in fact covered in the Appellant's Case; this was not fresh evidence warranting re-litigation. There were no *bona fide* reasons for not raising them during the

hearing before the Court of Appeal; the failure to apply for leave to adduce new evidence was unjustifiable since it was not as though the appellant's counsel had come on-board right before the hearing. Even if that were to be the case, if the appellant's position was really that these issues were genuine and should be ventilated, he should have sought an adjournment of the Court of Appeal hearing to prepare an application for leave. As noted earlier, the appellant's counsel's reason for not applying for leave was that he was too busy and did not have time to do so. In my view, the only plausible inference that I could draw from the handling of the matter was that the appellant had no confidence in the merits of those triable issues and chose to abandon them on appeal. The appellant failed to raise these issues before the Court of Appeal in CA 77/2015 when he could have, and it would be an abuse of process to allow him to try and raise them in the present proceedings.

Conclusion

18 There were no merits in the purportedly triable issues raised by the appellant, and more importantly, he should not be allowed to raise them as it would constitute an abuse of process. I therefore dismissed the appeal with costs.

Edmund Leow
Judicial Commissioner

Balasubramaniam Albert Selvaraja (Mohan Das Naidu & Partners) for the appellant;
Sim Kwan Kiat and Tan Zhi Han Eugene (Rajah & Tann Singapore LLP) for the respondent.
