iTronic Holdings Pte Ltd
v
Tan Swee Leon

[2017] SGHC 264

High Court — Bankruptcy No 2618 of 2016 (Registrar's Appeal No 125 of 2017)
George Wei J
10 July 2017

Insolvency law — Bankruptcy — Statutory demand
Insolvency law — Bankruptcy — Counterclaim, set-off or cross demand
Insolvency law — Bankruptcy — Stay of proceedings
Res judicata — Abuse of process

25 October 2017

George Wei J:

Introduction

1 This was an application brought by the plaintiff, iTronic Holdings Pte Ltd ("the Plaintiff"), for a bankruptcy order to be made against the defendant, Tan Swee Leon ("the Defendant"). The present bankruptcy application was premised upon the Defendant's failure to satisfy its judgment debt from Suit No 982 of 2012 ("Suit 982"), in which this court allowed the Plaintiff's claims against the Defendant after a trial.

2 On 8 May 2017, the learned Assistant Registrar Wong Baochen ("the AR") granted the bankruptcy order against the Defendant. The Defendant brought a Registrar's Appeal in respect of the AR's decision. I heard and dismissed the appeal on 10 July 2017. The Defendant has further appealed against my decision, and I shall now give my reasons.

Background facts

3 The factual background surrounding the dispute between the parties is set out at length in my earlier judgment, *iTronic Holdings Pte Ltd v Tan Swee Leon and another suit* [2016] 3 SLR 663 ("*iTronic*"). Here, I will only summarise the key facts in the dispute that are pertinent to the present application.

4 The Plaintiff was a Singapore-incorporated company. It was represented by its directors, Poh Eng Kok (also known as Eric Poh) ("Eric") and Phua Chee Meng (also known as Derek Phua) ("Derek") (*iTronic* at [2]).

5 Tronic International Pte Ltd ("TIPL") was a Singapore-incorporated company that has been wound up. Prior to its winding up, TIPL was in the business of providing technology solutions in various countries including Singapore, Taiwan and Russia (*iTronic* at [3]). Eric and Derek were directors of TIPL at the material time.

6 The Defendant was the founder of the Mactus group of companies, which includes Mactus Corporation Pte Ltd ("MCPL"), Mactus Leisure Pte Ltd ("Mactus Leisure"), Mactus Pte Ltd, and Carrindon Inc. For ease of narration, I will refer to these entities collectively as the Mactus Group. The Mactus Group was primarily in the business of organising entertainment events and providing

event management and exhibition services. The defendant was a director and the sole shareholder of MCPL (*iTronic* at [5]).

7 Around 2009, the defendant embarked on plans to list MCPL on Catalist, the sponsor-supervised board of the Singapore Stock Exchange ("the Listing Exercise"). He approached Ang Boo Hock Stephen ("Stephen"), a business consultant specialising in assisting and facilitating the listing of companies, to advise MCPL on its proposed listing. On 17 December 2009, Stephen introduced the defendant to Eric. On various other occasions in December 2009, the defendant, Stephen and Eric met to discuss the defendant's business plans. These discussions culminated in the execution of a series of transactions. Derek was present during some of these discussions (*iTronic* at [7]).

8 Among other arrangements and transactions, it is most relevant for the present application to note that on 4 June 2010, TIPL and the Defendant entered into a convertible loan agreement ("CLA"), under which TIPL agreed to extend a convertible loan in the sum of $1m to the Defendant ("the Loan") (*iTronic* at [16]-[17]). The Plaintiff was entitled under the CLA to convert the Loan into MCPL shares worth twice the value of the loan amount, just before MCPL's listing. At the time, it was envisaged that MCPL's listing would be completed by 31 December 2010. Pertinently, in the event that the listing did not take place by 31 December 2010, the CLA provided that *only* a compensation sum of $50,000 was to be repaid to TIPL. This $50,000 sum was referred to by the parties as "Compensation Sum B" (*iTronic* at [17] and [19]).

9 On or about 5 August 2010, Eric was informed by Stephen that the listing would be delayed to March 2011. This was confirmed by the Defendant who assured Eric that there were no adverse circumstances that would affect MCPL as a going concern or its listing plans (*iTronic* at [21]).

10 According to Eric, the understanding of the parties at the time when the CLA was executed was that if the listing did not take place by 31 December 2010, the Defendant would be obliged to return TIPL the principal of the Loan and Compensation Sum B. However, the CLA stated that only Compensation Sum B would be returned. To correct the error, a supplemental agreement ("1SA") was executed by TIPL and the Defendant in early 2011, providing that the Defendant was to repay the Loan, Compensation B, plus a further compensation sum of S$50,000 ("Compensation Sum C") in the event that the listing did not take place by 30 June 2011 (*iTronic* at [22]-[23]).

11 On 8 April 2011, Eric was informed during a meeting with Stephen and the Defendant that MCPL was unlikely to be listed in time. Indeed, by 30 June 2011, the listing had not taken place and the sums that were due under the CLA (as amended by 1SA) remained outstanding. Eric expressed his interest to call back the Loan, and the parties met to discuss repayment (*iTronic* at [24] and [26]).

12 Two days later, the Defendant gave Eric the following cheques:

No	**Date of cheque**	**Amount ($)**	**Status**
1	7 September 2011	100,000	Cleared
2	30 September 2011	250,000	Not banked in
3	30 October 2011	250,000	Not banked in
4	30 November 2011	250,000	Not banked in
5	30 December 2011	250,000	Not banked in

I simply note for now that the parties had differing positions as to the purpose of the $100,000 cheque dated 7 September 2011 ("the $100,000 cheque") (*iTronic* at [27]-[28]).

13 On 16 November 2011, the Defendant emailed Eric, *inter alia*, draft letters pertaining to the early redemption of the Loan. These letters were drafted as an offer from the Plaintiff to the Defendant to rescind the CLA and 1SA in exchange for the repayment of the principal under the Loan (but not Compensation Sums B or C) (*iTronic* at [30]-[31]).

14 The parties commenced negotiations, and entered into a new supplemental agreement ("2SA") on 1 October 2011. The terms of 2SA included the following:

(a) The Defendant was to pay $250,000 as an upfront settlement fee to TIPL, in consideration for TIPL agreeing to vary/amend/alter the terms and conditions in relation to the CLA and 1SA ("the Upfront Settlement Fee").

(b) TIPL was to grant a further convertible loan in the sum of $250,000 to the Defendant ("the Further Loan"). The Further Loan was to be set off against the Upfront Settlement Fee.

(c) The total convertible loan granted to the Defendant by TIPL was in the sum of $1,250,000 (being the aggregate sum of the Loan and the Further Convertible Loan) ("the Total Loan").

(d) In the event that MCPL's listing failed to take place by 30 June 2012, the Defendant was to repay to TIPL the Total Loan together with an additional sum of $125,000 ("the Additional Compensation Sum") by 30 July 2012 (*iTronic* at [34]).

15 The listing did not materialise. In October 2014, the benefit of the CLA (as amended by 1SA and 2SA) was assigned by deed to the Plaintiff (*iTronic* at [4] and [36].

16 I note that another company, PPS Capital Pte Ltd ("PPS"), entered into a similar convertible loan agreement with the Defendant. The terms in the agreements entered into between PPS and the Defendant were similar to those in the CLA, 1SA and 2SA. Eric and Derek were also directors of PPS, and Eric handled the negotiations with the Defendant as a representative of both the Plaintiff and PPS (*iTronic* at [2] and [16]-[35], generally).

Procedural history

The consolidated action

17 On 19 November 2012, the Plaintiff commenced Suit 982 against the Defendant for the repayment of the loan it had granted to the Defendant under the CLA. Suit 982 was later consolidated with Suit No 149/2012 ("Suit 149"), which involved a similar claim by PPS against the Defendant for repayment of the loan under PPS's separate CLA. I will refer to Suits 982 and 149 collectively as "the consolidated action" (*iTronic* at [38]).

18 The Plaintiff claimed for $1.375m, which was the sum of the Total Loan plus the Additional Compensation Sum pursuant to 2SA. PPS claimed for $825,000, being the total loan sum under its CLA with the Defendant (as amended by a separate set of supplemental agreements akin to 1SA and 2SA) plus a further compensation sum of $75,000 (*iTronic* at [52]).

19 The Defendant's case in the consolidated action was essentially that he had secretly repaid the loans from the Plaintiff and PPS in cash after they were

disbursed. He asserted that these loans were part of an elaborate sham that was meant to make MCPL more attractive for listing, and that the CLAs (between the Defendant and both the Plaintiff and PPS) were fictitious agreements. Further, he contended that the compensation sums provided for in the CLAs were unenforceable as they amounted to penalties (*iTronic* at [42]).

20 I heard the trial for the consolidated action. On 21 April 2016, I allowed the Plaintiff's and PPS's claims against the Defendant with costs (*iTronic* at [180]). In reaching my decision, I made, *inter alia*, the following findings based on the evidence before me:

(a) Contrary to what was alleged by the Defendant, there was no "Tronic Group" comprising the Plaintiff, TIPL, PPS, Tronic Technocrystal Pte Ltd and ARG International Ltd, and certainly not in the sense that Eric exercised *de facto* control over these entities in the alleged group (*iTronic* at [74]).

(b) There was insufficient evidence to support the Defendant's position that the alleged Tronic Group had provided "strategic advice on the restructuring of Mactus Group's business and capital structure to make it more attractive for listing" (*iTronic* at [77] and [78]).

(c) The CLAs and the loans made thereunder were genuine and unpaid, and provided by way of financial support to the Defendant in his attempt to list MCPL. This finding was further reinforced by the fact that third parties were procured by the Defendant to act as guarantors (*iTronic* at [121]), as well as by various audit confirmations signed by the Defendants (*iTronic* at [122]) and numerous contemporaneous e-mails between the parties. In these e-mails, Eric clearly expressed nervousness and frustration as to the Plaintiff's and PPS's investments,

the listing exercise and the Defendant's persistent failure to repay the loans under the CLAs (see *iTronic* at [83]-[93] and [113]).

(d) The fact that the CLAs originally only provided for the repayment of the compensation sums and not the loan principals did not undermine the Plaintiff's and PPS's case that the loans were genuine and unpaid (*iTronic* at [120]).

(e) Based on bank statements adduced by the Defendant and other supporting evidence, I accepted that some cash payments may have been made by the Defendant to Eric. However, it did not necessarily follow that these payments related to the CLAs or that similar cash payments on other occasions were made, as the Defendant alleged. I also noted that the evidence on the cash payments was "thin" (*iTronic* at [128]). Looking at the evidence as a whole, I found that there were no cash repayments made for the purpose of discharging the Defendant's repayment obligations under the CLAs (*iTronic* at [130]).

(f) The $100,000 cheque given by the Defendant to Eric (see [12] above) was for the payment of Compensation Sums B and C. I did not accept the Defendant's assertion that the $100,000 cheque was intended as partial repayment of the Loan (*iTronic* at [132]-[134]).

(g) Although the Defendant adduced a payment voucher stating that the loan extended by TIPL had been fully returned, he did not sufficiently discharge his burden of proving its authenticity (*iTronic* at [147]).

21 The Defendant then appealed against my decision in the consolidated action. On 3 May 2016, I granted a conditional stay of exercise of the judgment on the conditions that:

(a) a banker's guarantee for $300,000, previously furnished by the Defendant as security to defend Suit 982 ("the Banker's Guarantee"), be released by RHB Bank Bhd and paid to the Plaintiff's solicitors as stakeholders; and

(b) $1.075m, being the balance of the judgment debt owed to the Plaintiff, be paid by the Defendant to the Plaintiff's solicitors as stakeholders, both pending the Court of Appeal's determination of the appeal.

These sums were to be paid within 14 days. As the Defendant failed to satisfy condition (b) relating to payment of the balance of $1.075m, the Plaintiff was entitled to enforce the judgment, and the $300,000 sum under the Banker's Guarantee was released to the Plaintiff.[1]

22 On 11 July 2016, the Plaintiff and PPS issued a writ of seizure and sale ("the WSS"), which was served on the Defendant on 15 July 2016. Pursuant to the WSS, the Defendant's ordinary shares in five private companies – namely, MCPL, Mactus Leisure, Events HQ International Pte Ltd, Mactix.com Pte Ltd and Mactus International Pte Ltd – were seized by the Sheriff.[2]

23 Hearings for the examination of the Defendant as a judgment debtor were held on 1 July and 24 August 2016. The Defendant, *inter alia*, disclosed

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1 Order of Court No 2819/2016.

2 Sheriff's letter on the WSS dated 25 July 2016.

the shares he held in a number of companies, and estimated that the aggregate value of his shareholding in seven publicly listed companies was $40,950. The Defendant also stated that he did not know the value of the shares seized under the WSS, as he had not performed any valuation of these shares.[3]

24 On 26 October 2016, upon the Plaintiff's and PPS's applications, I granted a post-judgment *Mareva* injunction restraining the Defendant from dealing in his assets up to $1.9m, pending the Court of Appeal's determination of the appeal.[4]

25 The Court of Appeal dismissed the Defendant's appeal on 14 November 2016, stating that there was no basis to disturb the decision of this court. The learned Chao Hick Tin JA simply remarked that "businessmen who indulge in shady under the table arrangements have to live by their own arrangements."[5]

26 Subsequently, on 22 March 2017, I granted the Plaintiff's application to extend the post-judgment *Mareva* injunction against the Defendant, which was to remain in force until the Defendant satisfied his judgment debt in full.

Commencement of Suit 1259

27 On 25 November 2016, less than two weeks after the Court of Appeal's dismissal of his appeal in the consolidated action, the Defendant initiated fresh proceedings against the Plaintiff, PPS and Eric in Suit No 1259 of 2016 ("Suit 1259"). I will outline the Defendant's pleadings and the amendments thereto, as

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3 Notes of Evidence ("NE") of Examination of Judgment Debtor hearing on 24 August 2016, pp 24-25.

4 Order of Court No 7313 of 2016.

5 NE of Civil Appeal No 137 of 2016 on 14 November 2016.

their contents were relied upon by the Plaintiff in its submissions for the present bankruptcy application.

28 In the original writ of summons ("1WOS"), the Defendant asserted that it had paid TIPL an aggregate sum of $1.7m in cash, plus the $100,000 cheque. According to the Defendant, these monies (totalling $1.8m) were paid through Eric in his capacity as a director of TIPL, and that they were subsequently disbursed to the Plaintiff. The Defendant also alleged that it had paid a further $500,000 in cash to PPS, through Eric in his capacity as a director of PPS.

29 The Defendant claimed:

(a) for the sum of $1.8m against the Plaintiff, being money had and received by the Plaintiff, and/or paid for a consideration which has totally failed, and/or paid under a mistake of fact;

(i) further or in the alternative, for a declaration that the Plaintiff is liable as a constructive trustee for the $1.8m sum and to account to the Defendant in respect of such receipt;

(b) for the sum of $500,000 against PPS, being money had and received by the Plaintiff, and/or paid for a consideration which has totally failed, and/or paid under a mistake of fact;

(i) further or in the alternative, for a declaration that PPS is liable as a constructive trustee for the $500,000 sum and to account to the Defendant in respect of such receipt;

(c) in the alternative to (a) and (b), for the sum of $2.2m against Eric, being money had and received by him, and/or paid for a

consideration which has totally failed, and/or paid under a mistake of fact;

(i) further or in the alternative, for a declaration that Eric is liable as a constructive trustee for the $2.2 sum and to account to the Defendant in respect of such receipt; and

(d) interest; costs; and other appropriate relief.

Commencement of the present bankruptcy application

30 On 16 December 2016, the Plaintiff filed the present application for the Defendant to be adjudged a bankrupt, on the ground that the Defendant was unable to pay his debts. The application was premised on the fact that the Defendant had not attempted to satisfy or set aside the Plaintiff's statutory demand under s 62 of the Bankruptcy Act (Cap 20, 2009 Rev Ed), which was dated 22 November 2016 and served on the Defendant on 24 November 2016 ("the Statutory Demand").[6]

31 The Statutory Demand was for the total amount of $1,366,738.20. This amount comprised:

(a) the judgment sum of $1.375m awarded in the consolidated action, less $300,000 which had been repaid by way of the Banker's Guarantee;

(b) interest on the sum in (a) above;

(c) interest on the Banker's Guarantee; and

6 Affidavit of service dated 16 December 2016.

(d) outstanding costs and disbursements due to the Plaintiff.[7]

32 The bankruptcy application proceeded in parallel with Suit 1259. I pause to note that this narrative will alternate back and forth between the bankruptcy application and Suit 1259, as I will set out the relevant procedural history chronologically in order to present a clearer idea of the overall timeline and the sequence of steps taken by the parties in the litigation.

Amendments to the pleadings in Suit 1259

33 On 11 January 2017, the Defendant amended his writ of summons in Suit 1259. By way of these amendments, the Defendant added Stephen as the fourth defendant and modified some of the claims against the existing defendants to the suit.

(a) The Defendant was now only alleging that he had paid TIPL a total of $900,000 in cash payments (rather than $1.7m per the original writ of summons), plus the $100,000 cheque. This meant that he had purportedly paid TIPL the aggregate sum of $1m.

(b) The Defendant specifically stated that he had paid this $1m sum to TIPL, and the $500,000 sum in cash to PPS, both pursuant to a mistake of fact.

(c) It was also asserted by the Defendant that the Plaintiff, PPS, Eric and Stephen had, wrongfully and with the intent to injure him by unlawful means, conspired to defraud him of the aforementioned sums.

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7 NE of hearing on 7 March 2017.

(d) Finally, the Defendant added the new assertion that around March 2010, he had loaned Eric two sums of $400,000 pursuant to an oral loan agreement. This purported loan of $800,000 corresponded to the cash payments that the Defendant was no longer alleging to have been paid to TIPL (see claim (a) above). According to the Defendant, this loan became due and payable in July 2012, and Eric has not repaid any portion of this loan to date.

34 In the amended writ of summons ("2WOS"), the Defendant now claimed:

(a) for the sum of $500,000 against PPS, as money had and received by PPS to the Defendant's use, pursuant to a mistake of fact;

(b) further or in the alternative, for Eric's return of the aggregate sum of $1.4m, being money had and received by him to the Defendant's use, pursuant to a mistake of fact;

(i) in the alternative, a declaration that Eric is liable as a constructive trustee for the sum of $1.4m and to account to the Defendant in respect of such receipt;

(ii) all income, proceeds and assets derived from or acquired in respect of the $1.4m sum by Eric;

(c) further or in the alternative, an order that all four defendants in Suit 1259 be jointly and severally liable to the Defendant in damages for conspiracy;

(i) an order that the four defendants be liable to account for the receipt of the aggregate sum of $1.5m as well as the income,

proceeds and assets derived from or acquired in respect of the $1.5m sum;

(d) for Eric's repayment of the alleged $800,000 loan; and

(e) interests; costs and other appropriate relief.

35 As the Plaintiff pointed out, the original claim against the Plaintiff for cash payments allegedly had and received by the Plaintiff, whether in the sum of $1.8m, $1.7m, $1m or $900,000, was conspicuously absent from the list of claims in 2WOS. I also note that it was no longer pleaded in 2WOS that any money was paid to the Plaintiff, PPS or Eric for a lack of consideration.

36 The Defendant subsequently filed his statement of claim on 25 January 2017 ("1SOC"). According to the pleadings in 1SOC, there were discussions about TIPL and PPS entering into a series of fictitious CLAs with the Defendant, under which the loans extended to the Defendant were to be repaid immediately. Although no agreement was concluded, the Defendant asserted that it had made unrecorded payments totalling $1m to TIPL and $500,000 to PPS, both through Eric, under the mistaken belief that the loan arrangements were fictitious. The Defendant repeated its claims as stated in 2WOS.

37 Stephen filed his defence on 17 February 2017 as the fourth defendant in Suit 1259, whereas an extension of time was granted for the Plaintiff, PPS and Eric to file their defence, pending this court's determination of the bankruptcy application.[8]

[8] NE of pre-trial conference in Suit 1259 on 19 May 2017.

The preliminary findings below on the bankruptcy application

38 At the hearing before the AR on 7 March 2017, the Defendant attempted to resist the bankruptcy application on the ground under r 98(2)(*a*) of the Bankruptcy Rules (Cap 20, R 1). The Defendant argued that in light of his claims in Suit 1259, he possessed a valid counterclaim, set-off or cross demand against the Plaintiff for an amount exceeding what he owed to the Plaintiff.

39 As a starting point, the learned AR noted that the Plaintiff already had a judgment in its favour, and that the Defendant was not disputing the debt it owed to the Plaintiff. As for the Defendant's argument that it had a valid counterclaim, set-off or cross demand under r 98(2)(*a*), the AR found it "evident" from an examination of 1SOC that Suit 1259 was "an abuse of process based on the extended doctrine of *res judicata*."[9] The AR also made the following findings:

> (a) The Defendant was, in substance, seeking the repayment of monies on the same basis as that he which previously raised in the consolidated action, *ie*, that the payments were made following discussions on and as contemplated by a proposed scheme of fictitious CLAs. This was a collateral attack upon the court's decision in the consolidated action.[10]
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> (b) It was "illogical and inconsistent" for the Defendant to assert in 1SOC that there were prior discussion to enter into fictitious loans, while still accepting that the loans were ultimately genuine.[11]

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9 NE of the hearing on 7 March 2017, para 10.

10 NE of the hearing on 7 March 2017, para 13.

11 NE of the hearing on 7 March 2017, para 12.

(c) The Defendant had elected to focus his case in the consolidated action on the argument that the CLAs were fictitious, notwithstanding that he discovered his alleged mistake in August 2012 according to 1SOC. The Defendant's current position on mistake was diametrically opposed to the one he took during the consolidated suit, and amounted to an unexplained *volte face*.[12]

(d) As for the claim in conspiracy, this was similarly objectionable for being grounded on the same assertion previously raised in the consolidated action that the payments were made as contemplated by the proposed scheme of fictitious CLAs.[13]

(e) Thus, there were no triable issues in Suit 1259, which was a "trumped-up dispute".[14]

40 Accordingly, the AR did not accept that the Defendant had discharged his burden of showing that he had a valid counterclaim, set-off or cross demand such that the bankruptcy application should be dismissed. Nonetheless, prior to granting the Plaintiff's bankruptcy application and its prayer for the appointment for private trustees, the AR granted a final adjournment of four weeks until 4 April 2017 for the Defendant to raise funds to avoid the bankruptcy order. The AR emphasised that this was the Defendant's final chance to raise the necessary funds to satisfy its debt to the Plaintiff, failing which she would make the bankruptcy order against the Defendant at the next

12 NE of the hearing on 7 March 2017, para 15.

13 NE of the hearing on 7 March 2017, para 14.

14 NE of the hearing on 7 March 2017, para 16.

hearing.[15] I note that the next hearing before the AR was subsequently re-fixed for 8 May 2017 upon the Defendant's request.[16]

RA 74/2017

41 Following the hearing before the AR on 7 March 2017, the Defendant appointed new solicitors to represent it in both the bankruptcy application and Suit 1295.[17] On 20 March 2017, the Defendant filed an appeal against the AR's findings on 7 March 2017 ("RA 74/2017").[18]

42 I heard RA 74/2017 on 2 May 2017. Without making any comments or findings on the substantive matters, I held that the appeal was procedurally premature as the AR had not made any order against which the Defendant could appeal. I thus dismissed the appeal and ordered that the next hearing of the bankruptcy application proceed before the AR as scheduled.[19]

Further amendments to the pleadings in Suit 1259

43 The Defendant, represented by his new solicitors, then amended his statement of claim in Suit 1259 on 5 May 2017. The amended statement of claim ("2SOC") differed from 1SOC in two major respects:

(a) First, 2SOC reintroduced the Defendant's claim for repayment and/or an account of the $900,000 sum that the Defendant had purportedly paid the Plaintiff (through Eric). As noted above at [35], the

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15 NE of the hearing on 7 March 2017, paras 17-18.

16 Registrar's Notice dated 24 March 2017.

17 Notice of Change in Solicitor dated 17 March 2017; see also the Notice of Change in Solicitor dated 3 April 2017 in Suit 1259.

18 Notice of Appeal dated 20 March 2017.

19 NE of the hearing on 2 May 2017.

Defendant's claim for the sum purportedly paid to the Plaintiff was omitted in 2WOS and 1SOC.

(b) Second, 2SOC also reintroduced the Defendant's assertion that he had received no consideration for the payments he had allegedly made to the Plaintiff and PPS (through Eric). According to 2SOC, this lack of consideration constitutes another basis upon which these payments should be returned to the Defendant, apart from the mistake of fact and the conspiracy to defraud.

The decision below on the bankruptcy application

44 The bankruptcy application was again heard by the learned AR on 8 May 2017 as scheduled. It will be recalled that the AR had granted a "final adjournment" at the previous hearing to allow the Defendant one last chance to raise funds to satisfy its debt to the Plaintiff and avoid a bankruptcy order.[20] The Defendant did not further canvass his earlier argument that his claims in Suit 1259 constituted a valid counterclaim, set-off or cross demand under r 98(2)(*a*) of the Bankruptcy Rules, as he accepted that this had already been rejected by the AR at the last hearing on 7 March 2017.

45 However, the Defendant relied on a new basis to challenge the validity of the Statutory Demand. This related to the Defendant's shares seized by the Plaintiff under the WSS (see [22] above). Rule 94(5) of the Bankruptcy Rules required the Plaintiff to specify in the Statutory Demand any property of the Defendant it held, but the Plaintiff failed to disclose these shares in the Statutory Demand and in the affidavit supporting the bankruptcy application. The Defendant contended that this omission on the Plaintiff's part was not a mere

[20] NE of the hearing on 7 March 2017, paras 17-18.

formal defect or procedural irregularity. He thus sought for the dismissal of the bankruptcy application, on the ground that the Statutory Demand was fundamentally defective.

46 The AR agreed that the Plaintiff ought to have disclosed the fact of the seizure of the shares in its Statutory Demand and in the affidavits filed in support of the bankruptcy application. However, she did not think that the Plaintiff's failure to do so ought to result in the dismissal of the application. The AR considered that the seizure of the shares was well within the Defendant's knowledge, and there was no evidence of any injustice or prejudice caused to him as a result of the Plaintiff's omission. There was also no evidence that the shares were of substantial value, having regard to the total amount of the outstanding debt. As such, the AR granted an order in terms of the bankruptcy application, including the Plaintiff's prayer for the appointment of private trustees.[21]

47 The Defendant appealed against the AR's decision, and I heard the present Registrar's Appeal on 10 July 2017. I note that a stay of execution of the bankruptcy order was granted by the AR until the final disposal of the appeal by this court.[22]

The relevant legal principles

48 Prior to examining the parties' cases on appeal, I will set out the basic legal principles relating to bankruptcy. I do so at this juncture in order to provide more context to the relevant statutory provisions and rules relied upon by the parties in their submissions.

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21 NE of the hearing on 8 May 2017, pp 7-8.

22 NE of the hearing on 8 May 2017, p 8.

49 Section 61 of the Bankruptcy Act sets out the grounds of a bankruptcy application. Under s 61, the court may order bankruptcy against a debtor if the debtor is unable to pay his debt, and where the debt is for a liquidated sum payable to the applicant creditor immediately and for an aggregate amount of at least $15,000.

50 A presumption of the debtor's inability to pay his debts arises under s 62(*a*) for the purposes of a creditor's bankruptcy application, when the debt is immediately repayable and:

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

In other words, after the service of the statutory demand upon the debtor, he has 21 days to comply with the statutory demand or apply to the court to set it aside. If the debtor neglects to do so, he is presumed to be unable to pay his debts for the purposes of the creditor's bankruptcy application. Section 62(*b*) provides that the presumption may also arise when the debt is immediately repayable and "execution issued against [the debtor] in respect of a judgment debt owed to the applicant creditor has been returned unsatisfied in whole or in part".

51 The procedural requirements relating to the issuance of the statutory demand and the filing of the bankruptcy application are set out in the Bankruptcy Rules. I highlight the following rules which are relevant to this case:

(a) Rule 94 states the requisite form and contents of the statutory demand. In particular, rr 94(5)-(6) provide that:

> (5) 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.
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> (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.

(b) Rule 98(2) sets out certain grounds upon which the court shall set aside the statutory demand. For now, I focus on the grounds in rr 98(2)(*c*)-(*d*):

> (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; [or]
>
> (d) rule 94 has not been complied with[.]

On the basis of these provisions, the statutory demand will be set aside if the creditor has failed to comply with the requirements under r 94(5).

(c) Rule 101(2) further requires the creditor to account in his affidavit supporting the bankruptcy application for any property of the debtor and security for the debt that he holds. He shall provide a description of the assets or security held, and the value of such assets or security as at the date of the application. The amount claimed in the bankruptcy application must take into account the value of such assets or security.

(d) Rule 97(1) allows a debtor served with a statutory demand to apply by way of originating summons to have the court set it aside within 14 days of the date of service (or 21 days where the demand was served

> out of jurisdiction). Under r 127(*b*), the court *shall* dismiss a creditor's bankruptcy application when the statutory demand "is such that the court would have set it aside had the debtor made an application under r 97". I note that r 127(b) should not be read to mean that it is mandatory for the court to dismiss the bankruptcy application whenever the statutory demand is defective, simply by virtue of the use of the word "shall". Indeed, the express wording of r 127(*b*) instead indicates that the court must still consider the question of whether it would have set aside the statutory demand had the debtor made an application under r 97(1) for the court to do so.

52 Turning back to the provisions of the Bankruptcy Act, s 158(1) provides that:

> 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.

In other words, irregularities and formal defects do not invalidate bankruptcy proceedings unless it is shown that the irregularity or defect has caused substantial and irremediable injustice. I note, however, that the wording of s 158(1) makes clear that only formal defects and irregularities may be validated by this section provided that no substantial and irremediable injustice has been caused (see the Privy Council decision of *N Rengasamy Pillai v Comptroller of Income Tax* [1978] 2 WLR 1053 ("*Pillai*") at 1062A-B, which was based on s 147(1) of the English Bankruptcy Act 1914, an equivalent provision to s 158(1) of our Bankruptcy Act).

53 On this point, V K Rajah J (as he then was) in *Re Rasmachayana Sulistyo (alias Chang Whe Ming), ex parte The Hongkong and Shanghai Banking Corp Ltd and other appeals* [2004] 1 SLR(R) 483 ("*Re Rasmachayana*") observed at [27] that s 158(1) exemplified the "underlying philosophy of pragmatism and substantial justice [which] permeates through the entirety of the [Bankruptcy Act] and the [Bankruptcy Rules]". Indeed, the parties did not dispute the legal principles in this regard.

54 Finally, r 98(2)(*a*) of the Bankruptcy Rules states that the court shall set aside the statutory demand if "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". The word "valid" in this provision indicates that a mere allegation by the debtor is not enough; the court must examine the alleged counterclaim, set-off or cross demand to see if the debtor has a *bona fide* claim against the creditor (*Goh Chin Soon v Oversea-Chinese Banking Corporation Ltd* [2001] SGHC 17 ("*Goh Chin Soon*") at [7]).

55 That said, the word "appears" in r 98(2)(*a*) also serves as a reminder that it is not the function of the court hearing the bankruptcy proceedings to conduct a full hearing into the alleged counterclaim, set-off or cross demand and adjudicate upon it, but simply to determine whether there is a genuine triable issue on the evidence (*Wee Soon Kim Anthony v Lim Chor Pee* [2006] 2 SLR(R) 370 at [15] and [17]; *Goh Chin Soon* at [7]). The court will, however, examine all the facts to ascertain whether there is a genuine triable issue (*Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd and another appeal* [2014] 2 SLR 446 ("*Chimbusco*") at [30]). The Defendant must go beyond bare allegations and provide sufficient material to the court to justify the existence of a triable issue (*Oversea-Chinese Banking Corp Ltd v Ravichandran s/o Suppiah* [2015] SGHC 1 at [16]).

56 The Supreme Court Practice Directions, para 144(3) provides that if there is a triable issue on the evidence as to whether the debtor has a valid counterclaim, set-off or cross demand that equals or exceeds the debt, then the court "will normally set aside the statutory demand". The Court of Appeal in *Chimbusco* further observed at [31] that the inclusion of the qualifier "normally" in para 144 of the Practice Directions reflects that rr 127 and 98(2) of the Bankruptcy Rules do not oblige the court to dismiss bankruptcy proceedings "merely because a triable issue, however shadowy, has been raised."

The parties' arguments

The Defendant's arguments

57 I begin with the arguments raised by the Defendant on appeal. Broadly, the Defendant submitted that the bankruptcy application should be dismissed on two main grounds.

58 The first of these two grounds was relied upon by the Defendant in the last hearing of the bankruptcy application before the AR on 8 May 2017. The Defendant contended that the Plaintiff had failed to disclose or account for property of the Defendant it had seized in the statutory demand. Specifically, the Defendant was referring to his shares which had been seized by the Plaintiff by way of the WSS. Such non-disclosure, the Defendant argued, was in breach of r 94(5) of the Bankruptcy Rules. The seized shares were also not specified in the Plaintiff's affidavit in support of the bankruptcy application, as required under r 101(2). The Defendant submitted that given the Plaintiff's total non-compliance with these rules, these omissions could not be considered to be mere formal defects or irregularities. The Defendant thus sought for the Statutory Demand to be set aside for being defective, and for the bankruptcy application be dismissed under r 127(*b*).

59 Further or in the alternative to the above, the Defendant argued that the Plaintiff's failure to account for the seized shares had deprived the Defendant of the use and value thereof, and had handicapped the Defendant in his means to satisfy the Statutory Demand. The Defendant pointed to a statement made by Eric in the affidavit filed in support of the Plaintiff's application for a pre-trial *Mareva* injunction which indicated Eric's belief that the Defendant's shareholding in MCPL (which constituted part of the shares seized under the WSS) formed "a significant part, if not the bulk of the Defendant's assets."[23] The Defendant argued that given the Plaintiff's lack of proper accounting for the shares seized under the WSS, it was unsafe to infer that the Defendant was unable to pay its debt due to the Plaintiff.

60 Secondly, the Defendant submitted that he had a valid counterclaim, set-off or cross demand under r 98(2)(*a*) in light of his claims in Suit 1259, which was still pending before the court. This was the basis on which the Defendant had initially contested the bankruptcy application, in the earlier hearing before the AR on 7 March 2016. As matters in Suit 1259 stood at the time (and currently still stand), the Defendant had the following claims against the Plaintiff which had not been determined by the court:

(a) a claim in the sum of $900,000 as monies had and received by the Plaintiff;

(b) a claim in the sum of $1.4m based on conspiracy to defraud;

(c) income, proceeds and assets derived from the above sums; and

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[23] Eric's 9th affidavit in the consolidated action dated 10 June 2015, para 17; see also paras 24(a) and (c).

(d) damages, interest and costs.[24]

The Defendant thus sought to have the Statutory Demand set aside under r 98(2)(*a*), and for the bankruptcy application to be dismissed.

The Plaintiff's arguments

61 In response, the Plaintiff disputed both grounds raised by the Defendant. First, in relation to its non-disclosure of the seized shares, the Plaintiff explained that these shares were being held by the Sheriff rather than the Plaintiff. Upon the making of a bankruptcy order, the Sheriff would deliver the shares to the private trustees and the Plaintiff would not retain the benefit of the transaction (see ss 105 and 106 of the Bankruptcy Act). The Plaintiff thus contended that there would have been no purpose in disclosing the seized shares in the Statutory Demand.

62 Further, the Plaintiff argued that it was not possible for it to have specified the value of the seized shares due to the Defendant's obstructive actions. For example, when the Plaintiff required financial statements of the privately companies to perform a valuation of the seized shares, the Defendant simply claimed that he did not have these documents in his possession, in spite of the fact that he owned and/or controlled these companies. Moreover, the Defendant would have given a valuation of the shares if they had been of any significant worth.

63 In any event, the Plaintiff took the position that no substantial injustice or prejudice had been caused to the Defendant by virtue of the non-disclosure,

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[24] See the Defendant's closing submissions, [37], while noting that the figure of $1.5m therein should instead be $1.4m based on 2SOC, [49] to account for the $100,000 cheque which was no longer part of the Defendant's claim.

as the Defendant was fully aware about the seized shares. As such, the Plaintiff argued that pursuant to s 158(1) of the Bankruptcy Act, even if there were any formal defect or irregularity with the Statutory Demand, the Statutory Demand should not be invalidated by the court.

64 In respect of the Defendant's argument under r 98(2)(*a*) of the Bankruptcy Rules, the Plaintiff countered that the claims in Suit 1259 did not amount to a *bona fide* or valid counterclaim, set-off or cross demand against the Plaintiff. The Plaintiff characterised Suit 1259 as "an ill-disguised ploy to stave off the Defendant's bankruptcy", and submitted that the Defendant's case was unmeritorious and wholly at odds with the evidence adduced at the trial of the consolidated action. The Plaintiff also pointed out certain defects in the Defendant's pleadings in Suit 1259, such as the pleading of contradictory facts and other logical inconsistencies, as well as the omission of certain causes of action in 2WOS that were later included in 2SOC.

(a) In particular, the Plaintiff argued that the Defendant's claim premised on mistake was a *volte face* from the position he took at the trial of the consolidated action that the CLAs were not genuine. This indicated the Defendant's lack of *bona fides* in bringing the claim in Suit 1259. If the Defendant had genuinely been mistaken, he would have raised this point in the course of the consolidated action. According to the Plaintiff, the Defendant's new claim of mistake amounted to a collateral attack on my decision and findings in the consolidated suit.

(b) The above contentions similarly applied to the Defendant's claim of conspiracy. The Defendant's pleadings in 2SOC stated that the Plaintiff, PPS, Eric and Stephen had failed to alert the Defendant of his mistaken belief that the CLAs were fictitious, and had instead

dishonestly continued to accept payments from the Defendant. The Plaintiff argued that this version of events contradicted my findings set out in *iTronic*, and should have been raised by the Defendant in the consolidated action if it were genuine.

(c) As for the Defendant's claim based on a total failure of consideration, the Plaintiff submitted that this claim had been abandoned when the Defendant amended his writ of summons to 2WOS. Moreover, this claim was unmeritorious as there was no contract upon which any "consideration" was based.

65 Accordingly, the Plaintiff's position was that the Defendant's claims in Suit 1259 were unsupported, contradictory, and/or amounted to an abuse of process. Therefore, they did not amount to a *bona fide* or valid counterclaim, set-off or cross demand under r 98(2)(*a*) and did not constitute a basis upon which the Statutory Demand should be set aside.

Issues to be determined

66 There were two main issues before me on appeal:

(a) First, there was the procedural issue of whether the Statutory Demand should be set aside for failing to disclose the shares seized by the Plaintiff.

(b) Second, there was the question of whether the Defendant had a valid counterclaim, set-off or cross demand under r 98(2)(*a*) of the Bankruptcy Rules.

Decision and reasons

Whether the Statutory Demand should be set aside due to the Plaintiff's failure to mention the seized shares

67 I begin with the procedural question of whether the Plaintiff's non-disclosure of the shares it seized from the Defendant under the WSS meant that the court should set aside the Statutory Demand and dismiss the bankruptcy application. This may be broken up into three sub-issues to be considered sequentially:

(a) First, was the Plaintiff required under the Bankruptcy Rules to disclose the seized shares in the Statutory Demand and its affidavit in support of the bankruptcy application?

(b) If so, was the Plaintiff's non-compliance with the Bankruptcy Rules a formal defect or procedural irregularity?

(c) And if so, would there be substantial injustice or irremediable prejudice caused to the Defendant if the Statutory Demand was not set aside?

Whether the Plaintiff was required to mention the seized shares

68 On the foremost question of whether the Plaintiff was required to disclose the seized shares, I look first to the text of the relevant Bankruptcy Rules. Rule 94(5) applies to "property of the debtor" that is held by the creditor issuing the statutory demand. Similarly, r 101(2) requires the creditor to account for property of the debtor held by the creditor in the affidavit in support of the bankruptcy application. It was not disputed that the shares seized under the WSS constituted property of the Defendant.

69 The Plaintiff's contention, however, was that the obligation of disclosure under rr 94(5) and 101(2) did not arise in respect of the seized shares, which were not being held by the Plaintiff but by the Sheriff. Indeed, the execution of the WSS had still not been completed at the time. Upon the grant of a bankruptcy order, the Sheriff would deliver the seized shares or the proceeds from their sale to the private trustees in bankruptcy in accordance with s 106 of the Bankruptcy Act. The Plaintiff thus argued that it did not hold the seized shares as property and would not retain any benefit of the execution – thus, there would have been no purpose in disclosing the seized shares in the Statutory Demand.[25]

70 First, I agreed that the Plaintiff did not "hold" the shares that had been seized under the WSS. When a WSS has been issued against specific property, the interest or property in the subject goods or land continues to reside in the judgment debtor pending sale (*United Overseas Bank v Chia Kin Tuck* [2006] 3 SLR 322 at [10]). In this case, the execution of the WSS had not been completed at the material time, and seized shares were also not within the Plaintiff's possession nor at its disposal. Even upon the grant of any bankruptcy order, it was not certain that the Plaintiff would have an interest in the proceeds from the sale of the seized shares. For instance, there could be a situation where the Defendant's property is insufficient to satisfy all his debts, while debts held by other creditors must be satisfied in priority over the Plaintiff's debt. Even if a purposive interpretation is given to the word "hold" in rr 94(5) and 101(2), it must nonetheless be recognised that the Plaintiff had no certain interest over the seized shares nor their sale proceeds.

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[25] Plaintiff's closing submissions, [184]-[186].

71 This view is further confirmed by r 94(6), which states that the debt claimed in the statutory demand "shall be the full amount of the debt less the amount specified as the value of the security or assets." The same applies for r 101(2), which provides that the amount claimed in the bankruptcy application "shall take into account such assets or security." Even if the Plaintiff knew the value of the seized shares, the uncertainty of the Plaintiff's interest in the proceeds from the potential sale of the shares would have made it impossible or at least extremely speculative for the Plaintiff to identify the amount to set off the debt by.

72 In *Ramesh Mohandas Negrani* [2015] 1 SLR 174 ("*Ramesh*") at [29], Chua Lee Ming JC (as he then was) held that "property of the debtor" in r 94(5) did not refer to *all* property of the debtor held by the creditor. Instead, Chua JC interpreted r 94(5) to only refer to "property of the debtor that the creditor is entitled to apply towards payment of the debt". If a creditor is not entitled to apply certain property of the debtor towards payment of a debt claimed in a statutory demand, then that property would not be available to satisfy the debt claimed, and therefore would not need to be specified in the statutory demand (*Ramesh* at [30]). In my view, the same principle applies when it is uncertain as to whether a creditor may eventually be entitled to apply certain property (or the proceeds from its sale) towards payment of the debt, as in the present case.

73 Given that the shares seized under the WSS were not "held" by the Plaintiff and did not fall within the scope of rr 94(5) and 101(2), I found that the Bankruptcy Rules did not require the Plaintiff to disclose the seizure and the value of the shares, whether in the Statutory Demand or in the affidavit supporting the Plaintiff's bankruptcy application.

Whether any non-compliance with the relevant Bankruptcy Rules was a formal defect or irregularity

74 Although the above finding was sufficient to dispose of this issue, I proceeded further to consider the remaining two questions as outlined above at [67(b)] and [67(c)] as well. Even if rr 94(5) and 101(2) of the Bankruptcy Rules are interpreted so widely as to apply to the shares seized under the WSS, I nonetheless found that the Plaintiff's non-compliance with the Rules did not warrant the setting aside of the Statutory Demand or the dismissal of the bankruptcy application.

75 As I noted above at [53], it was undisputed that the court is not required to invalidate bankruptcy proceedings if the non-compliance in question amounts to an "irregularity" or "formal defect", as long as no substantial and irremediable injustice or prejudice is caused (s 158(1) of the Bankruptcy Act; *Re Rasmachayana* at [27]). However, the Defendant argued that the complete omission on the Plaintiff's part to declare the seized shares was not a mere formal defect or procedural irregularity.

76 The Defendant cited several cases in which the court invalidated the bankruptcy proceedings for certain defects in the process, despite arguments being canvassed by the respective creditors under s 158(1) or the equivalent English provision:

(a) *Re A Debtor* [1908] KBD 684 involved a claimed debt that was never due, and there was a mistake in the calculation of the interest. The English Court of Appeal did not regard it as a mere formal defect that the creditor "claim[ed] payment from a man of that which never was due from him" (at 687).

(b) In *Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 2 SLR(R) 31 at [18], it was held that the creditor's non-compliance with the Bankruptcy Rules' requirements on service of the statutory demand was not an irregularity or formal defect that could be cured under s 158(1), considering the peremptory language in the relevant rules on service (*cf Re Rasmachayana*, where the court preferred to focus on the reasonableness of the steps taken to bring the statutory demand to the debtor's attention).

(c) On the other hand, the English Court of Appeal in *In re A Debtor (No. 1 of 1987)* [1989] 1 WLR 271 ("*In re A Debtor*") held that "the mere over-statement of the amount of the debt in a statutory demand is not, by itself and without more, a ground for setting aside a statutory demand" (at 279E-F). I note, however, that the court did not explicitly pronounce such an error to be a "formal defect or irregularity" within the meaning of the corresponding English provision.

77 Even supposing that the Plaintiff was required under rr 94(5) and 101(2) of the Bankruptcy Rules to specify the seized shares in the Statutory Demand and the affidavit supporting its bankruptcy application, I nonetheless considered that such non-compliance would at least qualify as an irregularity or formal defect under s 158(1) of the Bankruptcy Act. The proceedings here were not "so defective as to render them a nullity" (*Pillai* at 1062A).

78 First, the value of the seized shares was still unknown, and I accepted that the Plaintiff had at least made effort to obtain a valuation. As such, even if the Plaintiff had disclosed the seizure of the shares in the Statutory Demand or supporting affidavit, the amount of the debt claimed would not have been any different. Moreover, even assuming that the shares were being "held" by the

Plaintiff for the purposes of rr 94(5) and 101(2), it must at least be acknowledged that the Plaintiff's interest in these shares was not altogether clear or certain.

79 In any event, on the basis of the Defendant's statement during the examination of judgment debtor hearing that the total estimated value of his shares across public and private companies was $40,950, it seemed that at the very most, the value of the shares was not likely to be much more than 3% of the debt owing. Indeed, at this stage, the Defendant still did not contend that the value of the shares was significantly higher. The Defendant only pointed to a statement made in an affidavit by Eric filed in support of the application for the pre-trial *Mareva* application expressing the belief that the Defendant's shareholding in MCPL formed "a significant part, if not the bulk of the Defendant's assets."[26] However, this was no more than a statement of Eric's *belief* very early on in the proceedings of the consolidated action, and clearly held no weight as to the value of the shares which was evidently unknown to the Plaintiff. The omission of the seized shares from the Statutory Demand and the supporting affidavit therefore had no effect on the court's ability to ascertain whether the creditor in fact had sufficient assets or security that he could satisfy the debt in full.

80 I also placed emphasis on the fact that the Defendant was fully aware of the WSS and the fact that the shares in question had been seized. There was thus no risk that the Defendant was being misled as to the amount of debt owed.

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[26] Eric's 9th affidavit in the consolidated action dated 10 June 2015, para 17; see also paras 24(a) and (c).

81 In these circumstances, I found that there was in substance no significant difference whether or not the seized shares were specified in the Statutory Demand and the supporting affidavit. The claimed amount of debt and the Defendant's awareness as to the amount of debt owing were both unaffected by the Plaintiff's omission. Indeed, the Defendant's position that the entire bankruptcy application should be set aside on this basis strikes me as being no more than an attempt to invalidate the proceedings on a technicality. Accordingly, I held the view that any non-compliance with the Bankruptcy Rules here would have been no more than a formal defect or an irregularity that did not render the proceedings a nullity.

Whether any substantial and irremediable injustice was caused to the Defendant

82 The Defendant did not seriously allege any substantial and irremediable injustice and prejudice that had been caused to him by the Plaintiff's omission to mention the seized shares in the Statutory Demand and the supporting affidavit.[27] In any event, it was clear to me that no injustice or prejudice whatsoever had been caused to the Defendant, let alone substantial or irremediable.

83 The points discussed at [78] to [80] above on whether any non-compliance here qualified as a "formal defect or irregularity" are also relevant to the question of whether "substantial injustice" was caused to the Defendant. In that sense, the inquiries in respect of these two limbs or requirements under s 158(1) of the Bankruptcy Act are overlapping rather than distinct. The Defendant's knowledge of the seizure of the shares, and the fact that the value of the shares was unknown and in any event likely to be no more than a small

[27] NE of the hearing on 8 May 2017, p 6.

fraction of the total debt, were both factors relevant to the finding that no substantial and irremediable injustice was caused.

84 Furthermore, as the Plaintiff argued, this issue was only raised by the Defendant during the second hearing before the AR on 8 May 2017. It will be recalled that the earlier hearing on 7 March 2017, the AR had granted time for the Defendant to raise funds to avoid bankruptcy, rather than to canvass new arguments before the court. If he had truly been substantially prejudiced by the Plaintiff's failure to mention the seized shares, he would likely have raised this argument from the very beginning. As I remarked above at [79], at the time of the present appeal, the Defendant still had not clearly articulated any position or view as to how much the seized shares were in fact worth. I also briefly note that there were allegations that the Defendant resisted the Plaintiff's efforts to value and realise the shares, but I did not need to rely on this in my decision. I simply make the point that it was no argument for the Defendant to contend that the Plaintiff should have taken out an application for the shares to be valued.

85 For the above reasons, I held that the Plaintiff's omission of any mention of the seized shares in the Statutory Demand and the supporting affidavit did not warrant the dismissal of the bankruptcy application. I also found this outcome to be in line with the "philosophy of pragmatism and substantial justice" underlying the Bankruptcy Act and Bankruptcy Rules, as observed by Rajah J in *Re Rasmachayana* at [27].

Whether the Defendant appeared to have a valid counterclaim, set-off or cross demand

86 I now turn to the second issue of whether the Defendant had a valid counterclaim, set-off or cross demand under r 98(2)(*a*) of the Bankruptcy Rules, in light of the Defendant's pending claims against the Plaintiff in Suit 1259.

87 I begin with a few general points about Suit 1259. I first make note of the timing of the commencement of the action. Suit 1259 was commenced on 25 November 2016, less than two weeks after the Court of Appeal's dismissal of the Defendant's appeal in the consolidated action. While this ordinarily would not be indicative of anything *per se*, I found that many of the claims and alleged facts *should* have been brought up at the trial of the consolidated action, and in all probability *would* have been brought up much earlier if the facts had indeed been according to what the Defendants alleged in Suit 1259. I will elaborate on this in greater detail below.

88 Next, I observed that the Defendants had made several amendments to their pleadings. Between 1WOS which was initially filed upon commencement of Suit 1259, to 2SOC which presently stands, the Defendant added, dropped and modified several of its claims against the different parties including the Plaintiff, and also re-characterised the nature of certain alleged payments made by the Defendant to the Plaintiff, Eric and other parties in Suit 1259. For instance, the Defendant did not appear to take a consistent position as to whether its claim against the Plaintiff was in the sum of $1.8m, $1.7m, $1m or $900,000. This variation was due in part to the Defendant's re-characterisation of $800,000 in alleged cash payments, from being payments that were made to TIPL (as pleaded in 1WOS) to being a loan to Eric (as pleaded in 2WOS). Also, the Defendant's initial $1.8m claim in 1WOS included a claim for the repayment of monies paid to TIPL under the $100,000 cheque. But this part of the claim appeared to have been dropped in the Defendant's later pleadings, likely due to the Defendant's belated realisation that this was a hopeless point in light of my earlier finding in *iTronic* that the $100,000 cheque was for the payment of Compensation Sums B and C rather than for the repayment of any loan (see [20(f)] above). It suffices for me to simply remark that the multiple

amendments and inconsistent stance as to the nature of certain payments inevitably raised the spectre that the Defendant's case on this was shadowy, while emphasising that there was indeed very little evidence before me as to the nature of these purported repayments, let alone their very existence.

89 On a related point, the Plaintiff made detailed submissions about the Defendant's apparent abandonment of certain claims and causes of action in 2WOS, which he later attempted to reintroduce by way of 2SOC. For one, 2WOS did not make any mention of the Defendant's claim of a "total failure of consideration" for the alleged payments made to the Plaintiff. In fact, the Plaintiff also argued that the entire claim against the Plaintiff for monies had and received had been deleted and abandoned in 2WOS. The Plaintiff, relying on O 18 r 15 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), argued that 2SOC was fundamentally defective for containing such a claim when the corresponding cause of action was not mentioned in 2WOS. However, I did not think it was for the court hearing the bankruptcy proceedings to make such findings in respect of the pleadings. Instead, such an assessment had to be made by the court hearing Suit 1259, who may very well grant leave to the Defendant to amend his writ of summons even if the Plaintiff's procedural contentions are in fact valid. It was only appropriate for me to consider whether the Defendant had, in substance, a valid counterclaim, set-off or cross demand that satisfied the requirements of r 98(2)(*a*), rather than to inquire into whether the proceedings in Suit 1259 were procedurally defective. Hence, the Plaintiff's arguments concerning the purported defectiveness of the Defendant's pleadings in Suit 1259 did not factor into my decision on this issue.

90 I will now discuss the Defendant's claims against the Plaintiff in Suit 1259 more closely. The Defendant's position was essentially that he had paid $900,000 in cash payments to the Plaintiff, pursuant to a mistake of fact and/or

for no consideration. Separately, the Defendant was also claiming $1.4m against the Plaintiff, PPS, Eric and Stephen, as he argued that these four persons or entities were jointly and severally liable for having wrongfully and unlawfully conspired to defraud him of the $900,000 cash payment made to TIPL and the $500,000 cash payment made to PPS. The remaining claims in Suit 1259 were not against the Plaintiff.

Mistake

91 First, the Defendant's case as to mistake was that he had mistakenly believed that monies had been loaned to him by TIPL (and PPS) pursuant to a scheme of fictitious CLAs.[28] According to the Defendant, he immediately repaid these loans to TIPL through Eric, believing that this was the arrangement under the scheme.

92 It was clear that the Defendant's assertions of mistake concerned the exact same matrix of facts in the consolidated action, in which the Defendant alleged that there were discussions of entering into a scheme of fictitious CLAs, and that he had repaid the loans advanced to him under the fictitious CLAs. In the consolidated action, I had already found that the CLAs were genuine and that TIPL and the Defendant had not entered into such a scheme of fictitious CLAs (see [20(c)] above). Although I accepted that the issue as to whether the CLAs were fictitious (which was decided in the negative in the consolidated suit) was not the same as the present issue of whether the Defendant *mistakenly believed in* the fictitiousness of the CLAs, I nonetheless found the Defendant's claim here to be barred on the basis of the extended doctrine of *res judicata*.

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[28] Defendant's closing submissions, [30].

93 *Res judicata* is an umbrella doctrine which encompasses three distinct but related principles, namely, cause of action estoppel, issue estoppel and the defence of abuse of process (*Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [17]-[19]; *Zhang Run Zi v Koh Kim Seng and another* [2015] SGHC 175 ("*Zhang Run Zi*") at [35]). Although I did not find cause of action estoppel or issue estoppel to be applicable to the present case, I found that the last of the three principles, *ie*, the defence of abuse of process, applied.

94 As described by Wigram VC in *Henderson v Henderson* [1843-60] All ER Rep 378:

> The plea of res judicata applies, except in special case[s], 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 above passage has been frequently cited by the Singapore courts as an explication of the defence of abuse of process (*Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and another appeal* [2000] 1 SLR(R) 53 ("*Ching Mun Fong*") at [22]; *Zhang Run Zi* at [60]; *Goh Nellie* at [51]). In other words, the defence of abuse of process allows the court to bar an action from proceeding even if the issues raised therein were never litigated or decided on before, but ought to have been raised in previous litigation (*Zhang Run Zi* at [61]). The basis for the defence is the public interest in protecting the court's processes from abuse and in protecting defendants from oppression (*Ching Mun Fong* at [23]; *Zhang Run Zi* at [61]).

95 In *Goh Nellie* at [53], Sundaresh Menon JC (as he then was) enumerated a number of considerations for the court to bear in mind when determining whether there is an abuse of process, including "whether the later proceedings

in substance is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed." Menon JC emphasised as well the importance of the balance between ensuring that litigants with genuine claims are allowed to press their cases in court, and "recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant."

96 In my view, the defence of abuse of process applied squarely to the Defendant's claim against the Plaintiff which was based on mistake. Given that the relevant factual matrix was identical to that of the consolidated action, the Defendant should have made these assertions in the consolidated suit instead of raising them in fresh litigation which was commenced immediately after the Court of Appeal's dismissal of his appeal. If the Defendant had genuinely been mistaken about the genuineness of the CLAs, he would have realised this mistake much sooner. There was extensive e-mail correspondence from Eric demanding repayment of the loans, and the Defendant himself conceded during cross-examination that Eric was genuinely seeking redemption of the loan. There was also an e-mail from Stephen dated 17 May 2012 and demands from debt collectors in July 2012,[29] not to mention the fact that the Plaintiff and PPS took the clear stance in the consolidated action that the CLAs were genuine. I agreed with the Plaintiff that it was simply inconceivable that the Defendant did not realise any such "mistake" until after the conclusion of the consolidated action.

[29] See the Plaintiff's closing submissions at [128]-[133].

97 The claim based on mistake was thus a collateral attack upon this court's earlier decision in consolidated action, and I saw no fresh evidence, *bona fide* reasons or other special circumstances which would justify litigating this claim in Suit 1259. In my view, it would be an abuse of process to allow such a claim to be used by the Defendant to avoid bankruptcy, and any repeated litigation would plainly be oppressive to the Plaintiff who had already succeeded in the consolidated action (see *Ching Mun Fong* at [23]).

98 Further, in the context of winding-up proceedings, the ability of a debtor-company to litigate a cross-claim has been recognised as "a highly persuasive factor in determining whether the cross-claim is a genuine one" (*Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2011] 4 SLR 997 at [28] and [31]). In my view, this principle should similarly apply to the assessment of counterclaims, set-offs and cross demands in the bankruptcy context. The Defendant's attempt to bring a claim in Suit 1259 which he could have and should have raised earlier in the consolidated action not only amounted to an abuse of process, but also constituted a persuasive factor in showing that the claim was not a genuine one.

Conspiracy

99 The claim against the Plaintiff, PPS, Eric and Stephen in Suit 1259 alleging conspiracy was problematic for similar reasons. The Defendant was essentially saying that the defendants in Suit 1259 had conspired to defraud him by making him believe that he was repaying money under a fictitious loan, when he really was not. Similar to the claim grounded in mistake, the Defendant would need to have been under some erroneous impression as to the nature of

the payments. Again, there was no reason why the Defendant waited until Suit 1259 to allege conspiracy, when he should have realised this before or during the consolidated action.

100 Not only that, I was simply unconvinced on the basis of the evidence before me that the defendants in Suit 1259 had in fact conspired to defraud the Defendant wrongfully and with the intent to injure him by unlawful means as alleged. I had already made the finding in the consolidated action that the CLAs were genuine, and the Defendant was unable to present anything beyond bare assertions as to the parties' intentions at the material time. The conspiracy claim was thus shadowy at best, and unsupported by evidence other than the Defendant's bare allegations. This was reminiscent of my observation in *iTronic* that the Defendant's evidence in the consolidated action was "uncorroborated, inconsistent, illogical and sometimes contradictory" (at [101]).

101 As such, I found the conspiracy claim to also be a collateral attack upon the outcome of this court's earlier decision in the consolidated action, and in any event, not a genuine counterclaim, set-off or cross demand.

Lack of consideration

102 Last but not least, I turn to the Defendant's claim against the Plaintiff for $900,000 that had allegedly been paid to TIPL for a lack of consideration. The basis for this claim was intrinsically linked with the conspiracy claim and the claim based on mistake, and in my view, failed for similar reasons. In *iTronic* at [128], I had accepted that some cash payments may have been made by the Defendant to Eric, but also noted that the evidence on the cash payments was "thin". For the purposes of dealing with the issues in the consolidated action, I simply came to the conclusion that no cash payments had been made

by the Defendant for the purpose of discharging his repayment obligations under the CLAs (*iTronic* at [130]). As mentioned above, it was puzzling to me as to why the Defendant did not bring a counterclaim in the consolidated action in respect of these alleged cash payments paid to TIPL and PPS, regardless of whether the basis was in mistake, fraud or lack of consideration. He also had every opportunity to adduce all evidence concerning these alleged payments at the trial of the consolidated action.

103 The Defendant's claim based on lack of consideration seemed to stem from my aforementioned finding in *iTronic* that *some* cash payments *may* have been made by the Defendant to Eric. As mentioned earlier however, the evidence on the cash payments at the trial of the consolidated action was "thin". I did not make any finding as to the amount that the Defendant did pay to Eric, as this was not possible on the basis of the available evidence. It was also unclear whether the payments were made for the benefit of the Plaintiff, PPS or Eric. To this, I echo Chao JA's comment that "businessmen who indulge in shady under the table arrangements have to live by their own arrangements."[30]

104 Even if any triable issue existed with regard to these alleged payments, r 98(2)(*a*) of the Bankruptcy Rules still requires that the debtor appear "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*" [emphasis added] (see also *Goh Nellie* at [8]). It was at least apparent to me that any payments made would not have equalled or exceeded the amount of $1,366,738.20 claimed in the Statutory Demand as r 98(2)(*a*) requires.

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30 NE of Civil Appeal No 137 of 2016 on 14 November 2016.

105 In summary, the Defendant's claims against the Plaintiff in Suit 1259 did not amount to a valid counterclaim, set-off or cross demand that at least equalled the debt stated in the Statutory Demand. These claims amounted to collateral attacks against the findings of this court and the Court of Appeal in the consolidated action, and partly aimed at staving off the bankruptcy application against him. The change in position taken by the Defendant as to the nature of the payments and the genuineness of the CLAs struck me as opportunistic and lacking in *bona fides*. Just as I noted in *iTronic* at [158] in light of "the inherent inconsistencies and the loopholes in his evidence", the Defendant here again "appeared to be making things up as he went along to extricate himself from difficult positions." I therefore agreed with Plaintiff that Defendant's claims against it were not genuine and amounted to an abuse of process (see *Goh Chin Soon* at [12]).

106 For completeness, I add that I saw no other grounds or sufficient cause for the setting aside of the Statutory Demand or the dismissal of the bankruptcy application (see s 65(2)(*e*) of the Bankruptcy Act; r 98(2)(*e*) of the Bankruptcy Rules).

Conclusion

107 Accordingly, I dismissed the appeal. The presumption of the Defendant's inability to pay his debts under s 62(1) of the Bankruptcy Act was not displaced, and it was proper for the court to order that the Defendant be adjudged a bankrupt under s 61.

108 I also granted the Plaintiff's prayer to appoint Mr Chee Yoh Chuang and Mr Abuthahir s/o Abdul Gafoor of RSM Corporate Advisory Pte Ltd to be appointed as joint and several private trustees of the Defendant's estate.

109 I ordered that the costs of the appeal be fixed at $5,000 inclusive of disbursements, and paid by the Defendant to the Plaintiff.

The Defendant's interim stay application

110 The Defendant then requested the court to grant: (i) a stay of the bankruptcy order pending the appeal of my decision, notwithstanding that no formal application had been filed yet; or (ii) an interim stay for him to file a formal stay application. Although I appreciated the severe consequences of a bankruptcy order, I denied this request for several reasons.

111 First, my findings, as stated in no uncertain terms in these grounds of decision, were that the Defendant's claims in Suit 1259 amounted to an abuse of process and evidenced a lack of good faith. The facts of the matter simply did not warrant a stay in my view.

112 I rejected the Defendant's submission that his right of appeal would be fettered if a stay was denied, as it was still open for him to pursue an appeal as long as he had the consent of his private trustees in bankruptcy. After all, r 42(b) of the Bankruptcy Rules makes clear that an appeal does not operate as an automatic stay of the bankruptcy proceedings under the order appealed from. If Parliament had truly intended that an adjudged bankrupt should be completely unfettered in his ability to file an appeal, it would not have given the courts the discretion to refuse to grant a stay. Indeed, I pause to make the observation that it would likely be advantageous to have experienced private trustees involved in the evaluation as to whether an appeal would be worth pursuing or a further waste of time and costs for both sides.

113 Any arguments in favour of a stay must undoubtedly be balanced against the potential prejudice caused to the Plaintiff, who had already contended with

years of litigation. With regard to the Defendant's conduct of the present bankruptcy proceedings, it will be recalled that the AR had granted him four weeks from 7 March 2017 hearing to raise funds to avoid the bankruptcy order. Instead, the Defendant brought a premature appeal in RA 74/2017 and subsequently raised new objections against the Statutory Demand at the 8 May 2017 hearing.

114 I note that the Defendant had not satisfied any part of his judgment debt from the consolidated suit, save for $300,000 which was paid out to the Plaintiff under the Banker's Guarantee. Troublingly, it was also brought to my attention that there were numerous costs orders from the consolidated action, Suit 1259, the present bankruptcy application and RA 74/2017, totalling over $25,000, which were still outstanding and unpaid by the Defendant. The Plaintiff thus had a serious concern that it was continuing to expend costs in litigation, with little assurance that the Defendant would be able to make good on the costs ordered made against him.

115 For the above reasons, I did not grant the Defendant's request for a stay of the bankruptcy order.

George Wei
Judge

Sim Chong (Sim Chong LLC) for the plaintiff;
Philip Ling and Ho Wei Li (Wong Tan & Molly Lim LLC) for the defendant.