Ng Shu Yi (alias Wu Shuyi) *v* Tan Yew Wei

[2021] SGHCR 6

Case Number	: Bankruptcy No 1124 of 2021
Decision Date	: 02 August 2021
Tribunal/Court	: General Division of the High Court
Coram	: AR Randeep Singh Koonar
Counsel Name(s)	: Diana Foo (Tan See Swan & Co) for the plaintiff; Liew Tuck Yin David (David Liew Law Practice) for the defendant.
Parties	: Ng Shu Yi (alias Wu Shuyi) — Tan Yew Wei

Insolvency Law – Bankruptcy – Jurisdiction

Insolvency Law – Bankruptcy – Bankruptcy order

2 August 2021

AR Randeep Singh Koonar:

Introduction

1 Must a creditor subjectively know or be given advance notice of a payment before that payment will be deemed effective in reducing a debt? Related to this, can a creditor refuse to accept part payments by a debtor, or even reverse those part payments, for the purpose of ensuring that the outstanding debt remains above the statutory threshold for commencing a bankruptcy application?

2 These novel (or perhaps, unusual) questions arise out of acrimonious circumstances. The parties are warring former spouses. They have been, and remain, locked in a bitter battle in the State Courts and the High Court relating to the ancillary matters of their divorce, where both parties have had costs orders made against them.

3 In the midst of those proceedings, the Plaintiff filed the present bankruptcy application ("the Bankruptcy Application") against her former husband, the Defendant. The Bankruptcy Application and the statutory demand preceding it ("the Statutory Demand") were based on a costs order the Plaintiff had obtained against the Defendant for the sum of $20,612.50 ("the Debt").

4 Within the 21-day period after the Statutory Demand was served on the Defendant, the Defendant made part payment of the Debt by transferring $6,500 to the Plaintiff's bank account. The Defendant did not inform the Plaintiff of the transfer prior to this and the Plaintiff did not learn of the transfer until *after* filing the Bankruptcy Application. After learning of the transfer, the Plaintiff transferred $6,500 back to the Defendant's bank account.

5 This was in fact the second time the Plaintiff had reversed a part payment of the Debt made by the Defendant. About a month earlier, the Plaintiff had reversed a similar transfer of $6,000. As will be seen, the Plaintiff's clear motive in reversing these transfers was to ensure that the Debt remained above the $15,000 threshold for filing a bankruptcy application.

6 The Defendant filed a notice of objection to the bankruptcy application. The Defendant's principal objection was that by reason of the part payment of $6,500, the Debt had been reduced to $14,112.50 at the date the bankruptcy application was filed, which was below the $15,000 threshold.

The Defendant's further objection was that because part payment was made within 21 days after the Statutory Demand was served, the presumption of insolvency did not arise and the Plaintiff had failed to independently prove his inability to pay his debts. The Defendant submitted that the Bankruptcy Application should be dismissed on these grounds.

7 I delivered a brief oral judgment on 7 July 2021. I found that the Defendant's objections were sustained and I dismissed the Bankruptcy Application. I now set out the detailed grounds of my decision.

Facts

8 The relevant facts are as follows.

9 On 3 March 2021, the High Court ordered the Defendant to pay the Plaintiff costs in the sum of $20,612.50. This related to the costs of the parties' divorce proceedings.

10 On 24 March 2021, the Plaintiff issued a statutory demand for the sum of $20,612.50, which was served on the Defendant on 29 March 2021 ("the Initial Statutory Demand").

11 On 8 April 2021, the Defendant transferred $6,000 to the Plaintiff's bank account, in part payment of the amount claimed under the Initial Statutory Demand.

12 On 9 April 2021, the Defendant's solicitors wrote to the Plaintiff's solicitors. The Defendant's solicitors alleged that the Initial Statutory Demand was defective because it was filed pursuant to the Bankruptcy Act (Cap 20, 2009 Rev Ed), which had since been repealed (as of 30 July 2020). The Defendant's solicitors further informed the Plaintiff's solicitors of the $6,000 part payment made on 8 April 2021 and proposed that the balance be paid in instalments.

13 On 12 April 2021, the Plaintiff's solicitors replied to the Defendant's solicitors to inform that the Plaintiff was rejecting the Defendant's part payment and his proposal to pay the Debt in instalments. The Plaintiff's solicitors informed that the Plaintiff had also transferred the $6,000 back to the Defendant's bank account on 12 April 2021.

14 Also on 12 April 2021, the Plaintiff issued a fresh statutory demand against the Defendant pursuant to the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018) (i.e. the Statutory Demand). The Statutory Demand was similarly for the sum of $20,612.50. The Statutory Demand was served on the Defendant on 14 April 2021. Hence, the Defendant had until 5 May 2021 to comply with the Statutory Demand.

15 On 4 May 2021, the Defendant transferred $6,500 to the Plaintiff's bank account, as part payment of the Debt. The Defendant did not inform the Plaintiff of the transfer until 31 May 2021. The Plaintiff's position was that she did not know of the transfer until she was informed by the Defendant' solicitors.

16 On 10 May 2021, the Plaintiff filed the Bankruptcy Application. Her supporting affidavit was filed on the same day. In the supporting affidavit, the Plaintiff deposed that the whole of the Debt remained outstanding as at the date of filing.

17 On 31 May 2021, the Defendant's solicitors wrote to the Plaintiff's solicitors. The Defendant's solicitors informed the Plaintiff's solicitors that the Defendant had made part payment of the Debt in the sum of $6,500 on 4 May 2021, which the Plaintiff had not transferred back to the Defendant to

date. The Defendant's solicitors asserted that the part payment meant that the debt owing by the Defendant to the Plaintiff at the date the Bankruptcy Application was filed was $14,112.50, and below the statutory threshold. The Defendant's solicitors invited the Plaintiff's solicitors to withdraw the Bankruptcy Application.

18 The Plaintiff's solicitors replied on 1 June 2021. The Plaintiff's solicitors claimed that the Plaintiff was unaware of the $6,500 transfer (presumably until she received the Defendant's solicitor's letter dated 31 May 2021). As they did in their 12 April 2021 letter, the Plaintiff's solicitors stated that the Plaintiff rejected any form of part payments and instalments and that the Plaintiff had transferred the $6,500 back to the Defendant's bank account.

19 There was some dispute between parties as to whether the Plaintiff knew of the $6,500 part payment prior to 31 May 2021. I did not consider it necessary to make a finding on this issue. I was prepared to proceed on the basis that the Plaintiff first came to know of the $6,500 part payment on 31 May 2021, after receiving the Defendant's solicitor's letter.

20 On 11 June 2021, the Defendant filed a notice of objection to the Bankruptcy Application. As mentioned at [6] above, the Defendant's objections were two-fold. The first was the condition for filing a bankruptcy application under s 311(1)(*a*) of the IRDA was not satisfied as the quantum of the Debt was below $15,000 at the time the Bankruptcy Application was made, because he had part-paid the Debt on 4 May 2021. The second was that s 311(1)(*c*) of the IRDA was not satisfied as the Plaintiff had not shown that he was unable to pay his debts at the time the Bankruptcy Application was made. In particular, the Defendant claimed that the Plaintiff could not rely on the presumption of insolvency under s 312 of the IRDA because he had part-paid the Debt during the 21-day period for complying with the Statutory Demand and the part payment had the effect of reducing the outstanding debt below the $15,000 threshold for filing a bankruptcy application.

Decision

The Plaintiff's preliminary challenge to the form of the notice of objection

21 In her submissions, Plaintiff's counsel, Ms Diana Foo ("Ms Foo"), raised a preliminary challenge to the *form* of the Defendant's notice of objection. Ms Foo claimed that the notice of objection was defective because it was filed by Defendant's counsel, Mr David Liew ("Mr Liew"), and not by the Defendant personally. Ms Foo claimed that the notice of objection was inherently flawed and should be struck out on this ground alone.

22 Ms Foo cited r 91 of the Insolvency, Restructuring and Dissolution (Personal Insolvency) Rules 2020 (S 585/2020) ("PIR") as the source of the purported requirement that a notice of objection must be filed by a debtor personally, and not through counsel:

> **Bankruptcy application opposed by debtor**
>
> **91.** Where a debtor intends to oppose a creditor's bankruptcy application filed against the debtor, the debtor must do the following not later than 3 days before the hearing of the bankruptcy application:
>
> (a) file in court a notice specifying the grounds upon which the debtor will object to the making of a bankruptcy order;
>
> (b) serve a copy of the notice on the applicant creditor and the Official Assignee.

23 According to Ms Foo, the reference to "debtor" and the absence of the words "solicitor of the debtor" in the provision meant that only a debtor could file a notice of objection. I disagreed. Statutory interpretation does not only require an application of the purposive approach mandated by s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed), it also requires the exercise of basic common sense. Where a party is represented by a solicitor, his solicitor acts on his behalf, and the solicitor's acts are taken as the party's own. There is nothing in the purpose of r 91 to suggest that a debtor must file a notice of objection personally and cannot do so through a solicitor. In any event, there was no issue of evidence being given from the Bar since the Defendant filed an affidavit on 15 June 2021, setting out the evidence supporting the notice of objection.

24 The sheer absurdity of Ms Foo's submission was also evident from r 88 of the PIR which states the persons who may be heard at a creditor's bankruptcy application. Notably, the provision refers to "the creditor" and "the debtor" and makes no mention of their solicitors. If Ms Foo was correct in her interpretation of the PIR, this meant she had no standing to appear at any of the hearings.

The relevant statutory provisions

25 To recapitulate, the Defendant's principal objection to the Bankruptcy Application was that the conditions for making a bankruptcy application under s 311(1)(*a*) and (*c*) of the IRDA were not satisfied in this case. I set out s 311(1) of the IRDA in its entirety:

> **Grounds of bankruptcy application**
>
> **311.**—(1) Subject to section 314, *no bankruptcy application made may be made* to the Court in respect of any debt or debts *unless at the time the application* is made —
>
> (a) the amount of the debt, or the aggregate amount of the debts, is not less than $15,000.
>
> (b) the debt or each of the debts is for a liquidated sum payable to the applicant creditor immediately;
>
> (c) the debtor is unable to pay the debt or each of the debts; and
>
> (d) where the debt or each of the debts is incurred outside Singapore, such debt is payable by the debtor to the applicant creditor by virtue of a judgment or an award which is enforceable by execution in Singapore.
>
> [emphasis added]

26 Two points bear emphasis here.

27 The first is that s 311(1) of the IRDA sets out four *conjunctive* requirements which must be satisfied for a bankruptcy application to be made; and this is assessed as *at the time the application is made*: *HSBC Bank (Singapore) Ltd v Shi Yuzhi* [2017] 5 SLR 859 at [31]. In the present case, it was undisputed that limb (*b*) was satisfied and limb (*d*) was inapplicable. The dispute concerned limbs (*a*) and (*c*).

28 The second is that a failure to satisfy any of the requirements is a fatal defect and the application must be dismissed. This is evident from the mandatory language of s 311(1). It is also provided for by r 99(a) of the PIR, which reads:

Dismissal of bankruptcy application

99. The Court *must dismiss* a creditor's bankruptcy application where —

(a) the applicant creditor is not entitled to make the bankruptcy application by virtue of section 310, 311 or 312 of the Act…

[emphasis added]

29 This is also a convenient juncture to address the relevance of a statutory demand to s 311 of the IRDA. In her submissions, Ms Foo contended that the Plaintiff had a right to file the Bankruptcy Application under s 311 of the IRDA *simply because* the Plaintiff had served a statutory demand on the Defendant, and the Defendant had not fully complied with the statutory demand or applied to have it set aside within the stipulated 21-day period.

30 Ms Foo's contention was misconceived.

31 First, it misunderstood the legal implications of a debtor's failure to comply with a statutory demand under the IRDA. In this regard, a debtor's non-compliance with a statutory demand is not an independent ground for a creditor to commence a bankruptcy application. Instead, it has the more limited effect of raising a *rebuttable presumption* that the debtor is unable to pay his debtors, for the purposes of s 311(1)(*c*) of the IRDA. This is provided for in s 312(*a*) of the IRDA, which reads:

Presumption of inability to pay debts

312. For the purposes of a creditor's bankruptcy application, a debtor is, until the debtor proves to the contrary, presumed to be unable to pay any debt within the meaning of section 311(1)(*c*) if the debt is immediately payable and any one of the following applies:

(a) the applicant creditor to whom the debt is owed has served on the debtor in the prescribed manner, a statutory demand, and —

(i) at least 21 days have elapsed since the statutory demand was served; and

(ii) the debtor has neither complied with it nor applied to the Court to set it aside…

32 Put simply, the mere fact that the Defendant did not comply with the Statutory Demand within the stipulated period did not mean that the Plaintiff was entitled to file a bankruptcy application. The Court had to consider whether the $15,000 threshold for filing the Bankruptcy Application was satisfied at the date the application was filed. To this end, the salient issue in the present case was whether the Debt was part-paid on 4 May 2021.

33 Second, it failed to appreciate that the Defendant's other objection to the Bankruptcy Application was that the presumption of insolvency did not even arise because the Debt was part-paid on 4 May 2021. To simply assert that the presumption of insolvency arose only because the Debt was not paid in full was question begging. I will return to this issue later in my grounds.

The Debt was part-paid on 4 May 2021

34 It will be clear by now that the key question before me was whether the Debt was part-paid on 4 May 2021, when the Defendant transferred $6,500 to the Plaintiff's bank account.

35 I agreed with the Defendant's submission that part payment was made. This was evident from the objective facts. The Defendant had transferred funds to the Plaintiff's bank account. As a result of this transfer, the funds ceased to be in the Defendant's possession and came within the exclusive control of the Plaintiff instead. The transfer was also referable to the judgment debt. It was marked with the reference "HCF DCA 152 2018", which was the case number of the appeal where the costs order giving rise to the Debt was made. At the time of the transfer, there were no other judgments debts owing by the Defendant in relation to that appeal or the suit below. While the Defendant owed a separate debt of $2,200 to the Plaintiff, this comprised the costs of a distinct personal protection order application the Plaintiff had taken out against the Defendant. In any event, the $2,200 was not a debt on which the Bankruptcy Application was founded.

36 Against these objective facts, the Plaintiff's reasons for submitting that the Debt was not part-paid were unpersuasive.

37 Ms Foo's first submission was that the Debt was not part-paid because the Plaintiff did not subjectively know of the transfer when it was made and was not given advance notice of it. Ms Foo did not cite any authority for the proposition that a creditor must know or be informed of repayments in advance for them to be legally effective. I also found that wrong as a matter of principle. In my view, whether a debt has been paid is a question of fact and must be determined objectively. In the absence of contractual provisions to the contrary, I do not see how a creditor's subjective knowledge is relevant to the issue of whether repayment has in fact been made.

38 Ms Foo's second submission was that the Plaintiff had a right to insist on full payment and reject any part payments. Put differently, her submission was that the Plaintiff had to expressly agree to accept part payments before they would be legally effective in reducing the Debt. Again, this was unsupported by authority. Ms Foo's reliance on *Bombay Talkies (S) Pte Ltd v United Overseas Bank Ltd* [2016] 2 SLR 875 ("*Bombay Talkies*") was misplaced as the issue there was whether the debt was *compounded*, and not paid. As the Court of Appeal observed in *Bombay Talkies* (at [8]):

> [T]o compound a debt connotes the acceptance of an alternative obligation in lieu or in satisfaction of the debt in question. To put it another way, a debt is compounded when it is discharged or rendered unenforceable pursuant to an agreement between the debtor and the creditor. In such circumstances, it will frequently be the case that a new obligation is created and this will be the consideration for the discharge of the original debt.

39 It is evident from the above that composition requires express acceptance by a creditor because it discharges the previous debt and replaces it with a new contractual obligation. The same is not true in relation to part payments of a debt, which do not discharge the debtor's liability on the debt, but simply reduce the amount he remains liable to pay under the subsisting debt. *Bombay Talkies* does not establish that a creditor must expressly agree to accept part payments before the law will deem them effective in reducing a debt.

40 But what I found most disconcerting was the Plaintiff's reasons for refusing to accept part payments. It was clear from the evidence and Ms Foo's submissions that the Plaintiff primary, if not sole, motivation was to ensure that the debt remained above the $15,000 threshold for filing a bankruptcy application. In my judgment, it would be repugnant to the legislative intent underlying the IRDA to find that a creditor can deliberately reject and reverse part payments of a judgment debt for such a purpose.

41 Recently, in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] SGCA 60 ("*Sun Electric*"), the Court of Appeal considered the legislative intent behind the

$10,000 threshold prescribed by the since repealed s 254(2)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed) to serve a statutory demand on a company for the purpose of winding up proceedings.

42 Before examining the Court's decision, the facts of Sun Electric merit mention because they bear some similarities with the present case. In *Sun Electric*, the creditor served a statutory demand on the debtor company for the sum of $11,568.88. The company responded within the prescribed period, admitting that it owed the debt, and offering to pay in instalments. This proposal was rejected by the creditor on the same day. Nevertheless, the company paid $3,000 into the creditor's solicitor's client account within the prescribed period for complying with the statutory demand. No further payments were made thereafter. The difference between *Sun Electric* and the present case is that in *Sun Electric*, the part payment was not reversed by the creditor. It is not apparent from the judgments of the Court of Appeal or the High Court (see *RCMA Asia Pte Ltd v Sun Electric Power Pte Ltd (Energy Market of Singapore, non-party)* [2020] SGHC 205) whether the creditor was given advance notice of the part payment.

43 In *Sun Electric*, the Court of Appeal's view (at [102]) was that the $10,000 threshold for serving a statutory demand on a company was meant to be a "safe harbour" for debtors and intended to strike a balance between the interests of creditors and debtors. In my view, the same must apply to the $15,000 threshold for making a bankruptcy application under s 311(1) of the IRDA. I say this for two reasons.

44 First, in *Sun Electric* (at [100]–[101]), the Court of Appeal referred to the statutory threshold applicable to bankruptcy proceedings to discern the legislative intent in relation to winding up proceedings. The Court of Appeal did not suggest that Parliament's intent differed in relation to the two types of insolvency proceedings, depending on whether an individual or corporate debtor was involved. If anything, the Court of Appeal's reasoning suggests it was the same.

45 Second, the IRDA, and the Bankruptcy Act before it, expressly provide for a minimum debt threshold which must be met at the time a bankruptcy application to be made. There is no similar threshold for a creditor's application for a court ordered winding up of a company. Instead, the debt limit in winding up proceedings concerns the conditions which must be met to *issue a statutory demand* against a company: see s 125(2) of the IRDA and the now repealed s 254(2)(*a*) of the Companies Act. The point is that the statutory provisions governing bankruptcy proceedings make it crystal clear that a safe harbour exists for debtors who owe less than $15,000 when the bankruptcy application is made. Parliament simply did not intend for such debtors to be made bankrupt.

46 The upshot of the above is that the law encourages debtors to pay their debts as far as possible to bring themselves within the statutory safe harbour and avoid bankruptcy. This would be thwarted by a rule permitting creditors to unilaterally reject part payments of a debt, let alone, to do so with the *intention* of making the debtor bankrupt.

47 I was unpersuaded by Ms Foo's submission that a rule recognising part payment in cases like the present would invite abuses by debtors making part payment to bring themselves just below the statutory threshold. I simply do not see how that constitutes an "abuse" since the statutory scheme expressly recognises that bankruptcy proceedings are not in the public interest where the debt owing is even $1 below the statutory threshold when the application is filed. Moreover, there is no serious injustice to the creditor. Absent a stay of execution, the creditor is at liberty to enforce the debt using all modes of execution available to him or her at law.

48 I was similarly unpersuaded by Ms Foo's submission that the Plaintiff would be prejudiced in the present case. Ms Foo's claims regarding the futility of other methods of execution was a bare

assertion. The Plaintiff had not attempted *any* other method of execution prior to commencing the Bankruptcy Application. Moreover, the Plaintiff's complaints about her purported difficulties in recovering the debt were somewhat ironic, having *twice returned* significant sums of $6,000 and $6,500 to the Defendant. Any prejudice, quite plainly, was self-induced.

49 Ms Foo's final submission for suggesting the Debt was not part-paid was that the Defendant owed the Plaintiff a separate debt of $2,200 and the Plaintiff had a right to use the 4 May 2021 transfer to off-set this debt first. If so, the Debt remained above $15,000 threshold when the bankruptcy application was filed.

50 I also disagreed with this submission.

51 First, as I found above (at [35]), the $6,500 was paid with reference to the Debt. The Plaintiff did not identify the nature or source of the purported legal right entitling her to use that money to off-set other debts first.

52 Second, and more importantly, the Plaintiff's submission was an afterthought. The $2,200 debt was never mentioned in correspondence between parties' solicitors. Nor was it mentioned in the Plaintiff's affidavit filed on 15 June 2021, in response to the Defendant's notice of objection. It was raised belatedly in a further affidavit filed by the Plaintiff on 24 June 2021, without the leave of court and a day before the matter was originally fixed for hearing. The correspondence between parties' solicitors also shows that the Plaintiff was well aware that the part payment related to the Debt, and not the $2,200. In fact, I had little doubt that the Plaintiff was bent on rejecting all part payments and set-off was never within her contemplation.

The Bankruptcy Application was defective and had to be dismissed

53 My finding that the Debt was part-paid on 4 May 2021 meant that when the Bankruptcy Application was filed on 10 May 2021, the debt owed by the Defendant to the Plaintiff was below $15,000 threshold prescribed by s 311(1)(*a*) of the IRDA. The subsequent refund of $6,500 made by the Plaintiff on 1 June 2021 had no bearing on this. Accordingly, the bankruptcy application was filed in breach of s 311(1)(*a*) of the IRDA and had to be dismissed pursuant to r 99(*a*) of the PIR.

54 The Defendant's further and alternative objection was that the Bankruptcy Application should be dismissed because s 311(1)(*c*) of the IRDA was not satisfied. In particular, Mr Liew submitted that the presumption of insolvency did not arise because the Defendant's part payment was made within the 21-day period for complying with the Statutory Demand, and the part payment had the effect of bringing the Debt below the statutory threshold for filing a bankruptcy application. Mr Liew cited *Sun Electric*, where the Court of Appeal held (at [103]) that "a company that pays the debt demanded in a statutory demand in part within the prescribed period such that the remaining amount payable falls below $10,000 should not be deemed to be unable to pay its debts pursuant to s 254(2)(*a*) of the Companies Act". Mr Liew further submitted that the Plaintiff had only relied on the presumption of insolvency in filing the Bankruptcy Application and not adduced any other evidence proving the Defendant was insolvent.

55 I agreed in principle with Mr Liew's submission that the Court of Appeal's *dicta* in *Sun Electric* could also apply to bankruptcy proceedings. But in my view, the question of whether the presumption of insolvency arises against an individual (as opposed to a corporate) debtor is likely to be of little practical significance in most cases. This is because s 311(1)(*a*) of the IRDA imposes a $15,000 threshold which must be met at the time a bankruptcy application is filed, and not just when the statutory demand is issued. As discussed at [45] above, there are differences in the statutory

provisions concerning bankruptcy and winding up in this regard. If part payment results in the debt falling below the minimum sum for filing of a bankruptcy application under s 311(*a*) of the IRDA, the question of whether the presumption of insolvency arises under s 311(*c*) is moot. I therefore express no definitive view on this issue.

Conclusion

56 For the above reasons, I found that the Defendant's objections to the Bankruptcy Application were sustained and I dismissed the Bankruptcy Application. I made no order on a separate application the Defendant had filed for a stay of the bankruptcy proceedings since that application had become moot. I also ordered that the Plaintiff pay the Defendant's costs of the Bankruptcy Application fixed at $1,500 (all-in).

57 Finally, I make a brief observation on the Plaintiff's ability to commence fresh bankruptcy proceedings, relying on the same Debt. In my view, there are grounds to question the propriety of her doing so, having deliberately reversed part payments to keep the Debt above the $15,000 threshold. On the other hand, I accept that the situation between parties is fluid, given their ongoing litigation. It is conceivable that a future application may be made based on a different debt or combination of debts (which may include the present debt). In dismissing the application, I make no finding on whether a future application by the Plaintiff relying on any part of the Debt would constitute an abuse of process. This issue should be left for consideration should a further application actually be made and determined based on the circumstances prevailing then.