

Wong Kwei Cheong v ABN-AMRO Bank NV
[2002] SGHC 111

Case Number : OSB 600005/2002, RA 600019/2002
Decision Date : 22 May 2002
Tribunal/Court : High Court
Coram : S Rajendran J
Counsel Name(s) : Chua Eu Jin and Melissa Lee (Rajah & Tann) for the appellants/respondents;
George Lim and Kalyani Rajendran (Wee Tay & Lim) for the respondent/applicant
Parties : Wong Kwei Cheong — ABN-AMRO Bank NV

Insolvency Law – Bankruptcy – Statutory demand – Substituted service – Creditor aware of debtor's last known place of residence – Whether creditor can rely on r 96(4)(c) of Bankruptcy Rules (Cap 20, R 1, 1996 Ed) to effect service – Whether reasonable steps taken to bring statutory demand to debtor's notice – rr 96(1), 96(4)(a), 96(4)(b) & 96(4)(c) Bankruptcy Rules (Cap 20, R 1, 1996 Ed)

Insolvency Law – Bankruptcy – Statutory demand – Setting aside – Disputes as to statutory demand – Whether disputes substantial – Function of court when hearing application to set aside statutory demand – r 98(2)(b) Bankruptcy Rules (Cap 20, R 1, 1996 Ed)

Insolvency Law – Bankruptcy – Statutory demand – Setting aside – Improper service – Substituted service – Advertising notice of statutory demand in newspaper – Non-compliance with r 96 of Bankruptcy Rules (Cap 20, R 1, 1996 Ed) – Whether non-compliance mere irregularity or formal defect curable under s 158(1) of Bankruptcy Act (Cap 20, 2000 Ed) – Whether court bound to dismiss defective statutory demand – Whether statutory presumption of inability to pay arises – ss 62(a)(i) & 158(1) Bankruptcy Act (Cap 20, 2000 Ed) – rr 96, 108(6) & 127(c) Bankruptcy Rules (Cap 20, R 1, 1996 Ed)

Words and Phrases – 'In the prescribed manner' – s 62(a)(i) Bankruptcy Act (Cap 20, 2000 Ed)

Judgment

GROUND OF DECISION

1. On 20 July 2001, ABN-AMRO Bank N.V. ("the Bank") issued a Statutory Demand under s 62 of the Bankruptcy Act 1995 against Wong Kwei Cheong ("Wong") for certain sums of monies allegedly due to the Bank from Wong under a personal guarantee executed by Wong in respect of banking facilities extended by the Bank to a company called "Dtron Singapore Pte Ltd" ("Dtron"). The Bank did not serve the Statutory Demand personally on Wong. Instead, the Bank advertised a notice of that demand in the Straits Times of 23 July 2001. The notice read:

BANKRUPTCY ACT
(CHAPTER 20)
BANKRUPTCY RULES

NOTICE OF ADVERTISEMENT OF
STATUTORY DEMAND

To: WONG KWEI CHEONG
(NRIC No. 0226068/I)

Address: Lately of 16A Dunlop Street
Singapore 209345.

TAKE NOTICE that a Statutory Demand has been issued by the Creditor, ABN-AMRO Bank N.V. (RC No. F00005N) of 63 Chulia Street, Singapore 049514.

The Creditor demands payment of US\$807,600.16 being the total amount due as at 30th June 2001 from the Debtor pursuant to the Personal Guarantee dated 23rd September 1996.

The Statutory Demand is an important document and is deemed to have been served on you on the date of the first appearance of this advertisement. You must deal with this demand within 21 days of the service on you or you could be made bankrupt and your property and goods taken away from you. If you are in any doubt about your petition, you should seek advice immediately from a solicitor or, if you qualify for Legal Aid, from the Director of Legal Aid.

The Statutory Demand can be obtained or is available for inspection and collection from:

Name: Mr Chua Eu Jin / Ms Melissa Lee
Address: No. 4 Battery Road, #15-01
Bank of China Building,
Singapore 049908.

...

You have only 21 days from the date of the first appearance of this advertisement before the Creditor may present a Bankruptcy Petition.

Dated this 23rd day of July 2001.
MESSRS RAJAH & TANN
SOLICITORS FOR THE CREDITOR.

2. Wong, on 14 January 2002, applied, under rr 97(1) and 97(3) of the Bankruptcy Rules (by way of OSB No. 600005/02) to have the Statutory Demand set aside and, as Wong was out of time within which to make this application, for an extension of the time within which to do. That originating summons was heard by the Assistant Registrar Mrs Wang Wei Chi ("AR") on 28 February 2002. The AR granted the extension of time. The AR also found that there were "genuine triable issues" and set aside the Statutory Demand. Her power to set aside the Statutory Demand was derived from r 98(2) (b) of the Bankruptcy Rules which reads as follows:

"The court shall set aside the Statutory Demand if –

(b) the debt is disputed on grounds which appear to the court to be substantial."

The Bank, dissatisfied with the AR's decision to set aside the Statutory Demand, appealed against that ruling. I upheld the AR's decision. Against that ruling the Bank again appealed and I now give my grounds.

3. On a plain reading of r 98(2)(b) of the Bankruptcy Rules, if the debtor disputes the claim in the Statutory Demand and that dispute appears to the court to be substantial, the bankruptcy court is obliged to set aside the Statutory Demand. It is not the function of the bankruptcy court, at the hearing of an application to set aside a Statutory Demand, to conduct a full hearing of the dispute and adjudicate on the merits of the creditor's claim. That would be the function of the court in its non-bankruptcy jurisdiction should the creditor institute proceedings against the debtor to obtain judgment on the claim contained in the Statutory Demand.

4. The personal guarantee in favour of the Bank that Wong had executed was an "all monies" guarantee. Mr George Lim, who appeared for Wong, submitted that although Wong had executed an "all monies" guarantee, the intention of the parties was for Wong to execute a guarantee under which he would be liable for only 35% of the debts of Dtron. To the extent that the personal guarantee purported to be an "all monies" guarantee, it did not reflect what the parties had in fact intended. Mr Lim submitted that until that mistake in the personal guarantee was rectified, the personal guarantee was void and/or unenforceable; and, as the Statutory Demand that was made was made pursuant to a void/unenforceable guarantee, that demand too was ineffective. He submitted that in view of the mistake in the personal guarantee Wong had a complete defence to any action against him based on the "all monies" guarantee.

5. Mr Lim further submitted that even if the Bank applied for rectification of the terms of the "all monies" guarantee, there would be a dispute as to how the 35% was to be computed. The Bank's practice had been to apply contributions made by Wong to reduce the overall debt of Dtron. It had also been the Bank's practice to charge interest on the total outstanding sum. Mr Lim submitted that Wong's liability under the personal guarantee ought to be on the basis that two separate accounts had been maintained and payments made by Wong ought to have been used to reduce his 35% liability. He submitted that, so treated, in the light of the fact that between November 1998 and March 1999 Wong had made substantial payments (in excess of US\$200,000) to the Bank, there would be a considerable reduction in the principal amount (and interest) payable to the Bank by Wong.

6. As indicated above, I did not, in these proceedings, have to decide whether Wong would be able to successfully resist the Bank's claim against him should the Bank institute proceedings against Wong for the recovery of the amounts claimed in the Statutory Demand. What I had to consider was whether the disputes that Wong raised to the Bank's claim under the Statutory Demand appeared to be substantial disputes. If so, then the Statutory Demand ought to be set aside. The disputes raised by Wong, as highlighted to me by Mr Lim, appeared to me to be substantial. I therefore upheld the AR's decision to set aside the Statutory Demand and dismissed the Bank's appeal with costs.

7. The AR – as appears from the Notes of Argument that she kept – set aside the Statutory Demand on the grounds that Wong had raised "genuine triable issues". In using that formulation, the AR appeared to be guided by paragraph 66(3) of the Supreme Court Practice Directions which states:

"When the debtor ... disputes the debt (not being a debt subject to a judgment or order), the Court will normally set aside the statutory demand if, in its opinion, on the evidence there is a *genuine triable issue*."
(Emphasis added.)

It may be that the phrase "genuine triable issue" in the Practice Directions and the phrase "grounds which appear to the court to be substantial" in r 98(2)(b) of the Bankruptcy Rules in effect mean the same thing. I would, however, prefer to apply the latter phrase as that is the test prescribed in the Bankruptcy Rules.

Service of Statutory Demand

8. As referred to earlier, the Statutory Demand in this case was not served personally on Wong. Instead, notice of the Statutory Demand was advertised in the Straits Times. The question that arose was whether such advertisement was good service of the Statutory Demand and, if not, whether the

Statutory Demand ought to be set aside on that ground.

9. One Basiruddin, a clerk employed by M/s Rajah & Tann, had testified on behalf of the Bank that he made three attempts to serve the Statutory Demand on Wong at the last place of residence of Wong known to the Bank, namely, No.16A Dunlop Street, Singapore 209345. On all three occasions Basiruddin had found the premises locked. A property search conducted by M/s Rajah & Tann indicated that the registered owner of No.16A Dunlop Street was a company known as Yilin Investments Pte Ltd. In view of the fact that Wong was not shown to be the registered owner of No.16A Dunlop Street, Basiruddin did not either post the Statutory Demand on the door of No.16A Dunlop Street as envisaged in r 96(4)(a) or forward the Statutory Demand by prepaid post to that address as envisaged by r 96(4)(b) of the Bankruptcy Rules. Basiruddin testified that subsequently he tried, unsuccessfully, to effect service of the Statutory Demand on three other occasions at three other possible addresses of Wong.

10. Mr Chua Eu Jin, who appeared for the Bank, submitted that these attempts by Basiruddin to effect personal service of the Statutory Demand on Wong were a sufficient compliance by the Bank of its obligations (under r 96(1) and (2) of the Bankruptcy Rules) to take all reasonable steps to bring the Statutory Demand to Wong's attention and to take all reasonable steps to effect personal service of the Statutory Demand. Mr Chua submitted that as personal service could not be effected after so many attempts, the Bank was "entitled" to effect substituted service and the Bank "elected" to advertise a notice of the Statutory Demand in the Straits Times of 23 July 2001.

11. Mr Chua, in making that submission, appears to have overlooked the requirements of r 96(4) which provides:

"(4). Substituted service under paragraph (3) may be effected in the following manner:

(a) by posting the statutory demand at the door or some other conspicuous part of the *last known place of residence* or business of the debtor or both;

(b) by forwarding the statutory demand to the debtor by prepaid registered post to *the last known place of residence, business or employment* of the debtor;

(c) where the creditor is unable to effect substituted service in accordance with sub-paragraph (a) or (b) *by reason that he has no knowledge of the last known place of residence, business or employment of the debtor*, by advertisement of the statutory demand in one or more local newspapers, in which case the time limited for compliance with the demand shall run from the date of the publication of the advertisement; or

(d) such other mode which the court would have ordered in an application for substituted service of a petition in the circumstances."

(Emphasis added.)

It is apparent from r 96(4)(c) that the creditor may advertise the Statutory Demand only where, by reason of his not knowing the last place of residence, business or employment of the debtor, he is unable to effect substituted service in accordance with sub-paragraphs (a) and (b) of r 96(4).

12. It is clear from the notice of demand advertised in the Straits Times and from the evidence of Basiruddin that the Bank knew the last known place of residence of Wong to be No.16A Dunlop Street. As the last known place of residence was known to the Bank, the Bank should have effected substituted service under r 96(4)(a) and/or (b). This the Bank failed to do. On a plain reading of r

96(4)(c), the Bank would have the option of advertising the Statutory Demand under r 96(4)(c) only if the Bank had no knowledge of the last known place of residence, business or employment of Wong. The Bank did not therefore have the option under r 96(4)(c) to effect substituted service by advertising the Statutory Demand in the newspapers. I therefore found that service of the Statutory Demand on Wong had not been effected in accordance with the requirements of r 96 of the Bankruptcy Rules.

13. In this context, I would note that the fact that Wong was not the registered owner of the premises was not in any way indicative that Wong was not resident at the premises. The company that owned the premises may have belonged to Wong, or even if it did not, Wong could be residing at the premises by leave and licence of that company or of a tenant of those premises. In any event, even if Wong was in fact no longer residing at that address, it would not detract from the fact that that was the last known place of residence of Wong insofar as the Bank was concerned.

14. The Bank was, under r 96(1) the Bankruptcy Rules, obliged to take reasonable steps to bring the Statutory Demand to the attention of Wong. Mr Lim pointed out that one of the more obvious things that the Bank could have done to comply with that requirement was to notify Wong's solicitors (M/s Wee Tay & Lim) of the Statutory Demand and enquire whether they would accept service on behalf of Wong. The Bank, Mr Lim submitted, was at that time fully aware that M/s Wee Tay & Lim were acting for Wong – there had even been meetings between the Bank and M/s Wee Tay & Lim – but despite this close contact, neither the Bank nor the Bank's solicitors had attempted to contact M/s Wee Tay & Lim before advertising the Statutory Demand. Mr Lim submitted that by advertising the Notice of Statutory Demand without (a) informing M/s Wee Tay & Lim of the Statutory Demand; and (b) complying with r 96(4)(c) of the Bankruptcy Rules, the Bank had abused the process of the court. There was merit in these submissions of Mr Lim. As the Bank knew that M/s Wee Tay & Lim were acting for Wong, one would have expected the Bank to try to communicate the Statutory Demand to Wong through M/s Wee Tay & Lim.

15. Even assuming that the Bank was justified in effecting substituted service by way of advertisement, what r 96(4)(c) required the Bank to do was advertise the Statutory Demand in the newspapers. The Bank did not do that. What the Bank did was advertise a notice of that Statutory Demand. Mr Chua submitted that the Bank did not advertise the Statutory Demand because to do so would be considerably more expensive than advertising a notice of that Demand. That may well be so but if a creditor wants to take advantage of the provisions in the Bankruptcy Rules relating to substituted services, that creditor would have to comply with the procedures specified. The Rules did not authorise the creditor to vary the procedure laid down on the grounds of costs or on any other grounds. In this case the Bank, by advertising a notice of the Statutory Demand and not the Statutory Demand itself, had not complied with r 96(4)(c) of the Bankruptcy Rules.

16. The effect of non-compliance with the requirements of r 96 relating to the service of statutory demands is specifically dealt with in r 108(6) of the Bankruptcy Rules which reads:

"The court *shall dismiss the petition* if it is not satisfied that the creditor has discharged the obligations imposed on him *by rule 96.*"

(Emphasis added.)

The same mandatory direction is again reflected in r 127(c) which provides:

"The court *shall dismiss a creditor's petition* where –

...

(c) in a case where the petition is based on a statutory demand, the petitioning creditor *has not discharged the obligations imposed on him by rule 96.*"

(Emphasis added.)

Mr Lim submitted that, in the light of the clear directions in rr 108(6) and 127(c), the court acting under r 98(2)(e) of the Bankruptcy Rules ought to set aside the Statutory Demand. Rule 98(2)(e) provides:

"(2) The court shall set aside the statutory demand if –

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

There was merit in that submission. If the Bankruptcy Rules direct that a *petition* for bankruptcy founded on a Statutory Demand ought to be set aside if that Statutory Demand has not been served in compliance with r 96, then an application that such a Statutory Demand should be set aside should, *a fortiori*, be granted.

17. Mr Chua, however, drew the attention of the court to s 158(1) of the Bankruptcy Act which provides:

"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."

(Emphasis added.)

Mr Chua submitted that non-compliance with the service requirements in r 96 was a formal defect or an irregularity and as there was no evidence before the court of any injustice to Wong as a result of such defect/irregularity, the court ought not to set aside the Statutory Demand.

18. The language of rr 108(6) and 127(c) of the Bankruptcy Rules – that the court shall dismiss the petition if r 96 was not complied with – is quite unequivocal. Such peremptory language in the Bankruptcy Rules was, in my view, clear indication that the intention behind the Rules was to make compliance of the rules relating to service mandatory. In that context, for the court to treat non-compliance with r 96 as an irregularity or a formal defect that can be cured under s 158(1) of the Bankruptcy Act would be to negate the peremptory nature of the rr 108(6) and 127(c). I agree with the submission of Mr Lim that were the court to take such a view, parties might be encouraged not to comply with mandatory provisions in the Bankruptcy Rules and then hide under the umbrella of s 158(1) should their non-compliance be later discovered.

19. The failure on the part of a debtor to comply with the terms of a Statutory Demand gives rise to a statutory presumption under s 62 of the Bankruptcy Act that the debtor is unable to pay his debt. However, one of the conditions that must be satisfied before such a presumption arises is that the Statutory Demand should have been served on the debtor "in the prescribed manner". It would be useful to set out the material portion of s 62:

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

immediately payable and –

(a) (i) the petitioning creditor to whom the debt is owned has *served on him in the prescribed manner, a statutory demand.*"

(Emphasis added.)

The "prescribed manner" in which Statutory Demands are to be served is r 96 of the Bankruptcy Rules.

20. As the Statutory Demand in this case was not served in accordance with the manner prescribed in r 96, the statutory presumption in s 62 cannot arise. The proper service of a Statutory Demand is therefore a matter of fundamental importance in the operation of the Bankruptcy Act. To cure a defect in the service of a Statutory Demand by recourse to s 158(1) of the Bankruptcy Act would, in my view, amount to a re-writing of s 62(a)(i) of the Bankruptcy Act. I do not think s 158(1) was intended to have such far-reaching consequences. In any event, such a re-writing of s 62(a)(i) would cause substantial injustice to Wong. The procedural defect in the service of the Statutory Demand on Wong was therefore a matter that could not be cured under s 158(1) of the Bankruptcy Act. The Statutory Demand in this case had, accordingly, to be set aside.

21. For the above reasons, I dismissed with costs the Bank's appeal against the orders made by the AR.

Sgd:

S. RAJENDRAN
Judge