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EXCESSIVE STATUTORY DEMANDS IN WINDING UP AND BANKRUPTCY

The validity of statutory demands which specify a sum greater than that truly owing by the debtor is an issue which has arisen frequently in both the corporate liquidation and bankruptcy contexts. By analysing the relevant legislation, the authorities and arguments based on both policy and principle, this article attempts to show that the over-statement of the amount in a statutory demand does not, in itself, result in the invalidity of the demand.

I. INTRODUCTION

DESPITE the widespread use of statutory demands as a means to the initiation of corporate liquidation proceedings, a simple but fundamental issue with respect to the validity of such a demand remains unresolved. This is the issue of whether a statutory demand which states a sum in excess of that truly owing by the debtor company is valid and effective. It is a problem which has not been completely resolved even though the statutory demand mechanism has been in use since the last century and is currently used in a number of jurisdictions. The persistence of the problem is all the more surprising given its practical significance and the amount of attention it has received from the courts. Recently, the revamped bankruptcy legislation also embraced the use of statutory demands as a means of proving the insolvency of individual debtors. Although the bankruptcy legislation contains more comprehensive rules to regulate the use of statutory demands, the exact same controversy has arisen. It is thus thought to be timely to examine the issue in both the liquidation and bankruptcy contexts. In particular, this article seeks to survey the authorities on the subject, analyse the arguments posed and, hopefully, identify the right approach to be taken.

II. LIQUIDATION

A. *The Statutory Framework*

By virtue of section 254(1)(e) of the Companies Act[1] (hereafter "CA"), a company may be wound up if it is unable to pay its debts. Section 254(2)(a) CA provides a very useful way of proving such insolvency of the company, a task which, if left to be established by evidence, would be considerably more onerous. The provision deems a company to be unable to pay its debts if:

> ... a creditor to whom the company owes more than $2,000 then due has served on the company a demand requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

Section 254(2)(a) CA thus facilitates and expedites the proof of the insolvency of companies where the demanded debt, of more than the sum fixed by Parliament, is unpaid.[2] The procedure is not itself a proceeding but simply a convenient method of proof of insolvency.[3]

The notice need not be in any special form.[4] It need not use the word "demand" and a peremptory "request" or "call" for payment or any clear and unconditional intimation that payment is required would suffice.[5] The whole purpose of the notice is to warn the company of an impending petition,[6]

1 Cap 50, 1994 Ed.

2 *FAI Insurances Ltd* v *Goldleaf Interior Decorators Pty Ltd* (1988) 14 NSWLR 643 at 653C-D.

3 *Clarke & Walker Pty Ltd* v *Thew* (1967) 116 CLR 465 at 467; *Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd* (1991) 5 ACSR 70 at 73.

4 *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108 at 110; *Sri Hartamas Development Sdn Bhd* v *MBF Finance Bhd* [1992] 1 MLJ 313 at 317B-C. See also *Re Crust 'N' Crumbs Bakers (Wholesale) Pty Ltd*, *supra*, note 3, at 74.

5 *Re Colonial Finance, Mortgage, Investment & Guarantee Corporation Ltd* (1905) 6 SR NSW 6 at 9; *Re a Company* [1985] BCLC 37 at 41f-i; *Sri Hartamas Development Sdn Bhd* v *MBF Finance Bhd*, *supra*, note 4, at 317C.

6 *Bateman Television Ltd* v *Coleridge Finance Co Ltd* [1969] NZLR 794 at 803; *Re Yap Kim Kee & Sons Sdn Bhd*, *supra*, note 4, at 110; *Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd*, *supra*, note 3; *Sri Hartamas Development Sdn Bhd* v *MBF Finance Bhd*, *supra*, note 4, at 317C-D; *Consolidated Press (Finance) Ltd* v *Australian Horticultural Finance Pty Ltd* (1992) 8 ACSR 341 at 342.

and it is desirable and prudent to warn the company that failure to comply with the notice will lead to a petition for winding up.[7] The normal practice is for the creditor to state in the notice that, firstly, the company must pay the sum due within 21 days from the date of service of the demand and, secondly, failing which the company will be deemed unable to pay its debts and action will be taken to wind up the company.[8] It must be clear from the notice that it is a section 254(2)(a) CA notice which clarity can be achieved, *inter alia*, by a reference in the notice to the sub-section and by the notice giving the company 3 weeks to meet the demand.[9] But it is not necessary for the demand to expressly state the three options available to the company to avoid the presumption of insolvency, that is, to pay the sum or secure or compound for it to the reasonable satisfaction of the creditor.[10]

It appears that, to a certain extent, non-compliance with the above rules will not invalidate the demand. A notice is valid notwithstanding that it states incorrectly that the debt must be paid within 21 days of *the date of the demand*,[11] though the opposite conclusion was reached where the notice stated that the company had two weeks instead of three weeks to meet the demand.[12] It has also been held that there is no strict requirement for the notice to state that the company will be deemed to pay its debts if it neglects to pay the sum demanded or fails to secure or compound for it to the reasonable satisfaction of the creditor.[13] Errors in identifying the legislation pursuant to which the notice was issued would not invalidate the notice,[14] and neither would a trivial misdescription of the name of the

7 *Helicarr Consolidated Ltd* v *Royal Insurance Fire & General (NZ) Ltd* [1993] 2 NZLR 46 at 49. See also *Re Yap Kim Kee & Sons Sdn Bhd*, *supra*, note 4, where the fact that the notice threatened to institute legal proceedings against the company and not winding-up proceedings was held to be one of the factors which resulted in the invalidation of the notice.

8 *Re Yap Kim Kee & Sons Sdn Bhd*, *supra*, note 4, at 111. See also *Re Manda Pty Ltd* (1991) 6 ACSR 119.

9 *Re Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 2 MLJ 370.

10 *Richardson* v *Whitsunday Yachting World Pty Ltd* (1992) 10 ACLC 1401; *Re Kemajuan Bersatu Enterprise Sdn Bhd*, *supra*, note 9; *Helicarr Consolidated Ltd* v *Royal Insurance Fire & General (NZ) Ltd*, *supra*, note 7. *Cf Consolidated Press (Finance) Ltd* v *Australian Horticultural Finance Pty Ltd*, *supra*, note 6.

11 *Sri Hartamas Development Sdn Bhd* v *MBF Finance Bhd*, *supra*, note 4. *Cf Re Yap Kim Kee & Sons Sdn Bhd*, *supra*, note 4, where the court held that the fact that the notice demanded "immediate payment" was one of the circumstances which rendered the notice invalid.

12 *Re Manda Pty Ltd*, *supra*, note 8.

13 *Re Kemajuan Bersatu Enterprise Sdn Bhd*, *supra*, note 9.

14 *Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd*, *supra*, note 3.

company[15] or the creditor[16] if the company has not been misled.

As can be seen, the rules with regard to the general contents of a statutory demand have been made reasonably clear by the courts. Rules have also been laid down with regard to the demanded sum. It has been established that the debt asserted by the demand must be one which is immediately payable and presently recoverable by action,[17] and a demand which demands the payment of a sum which has not yet become indisputably due[18] or a contingent or prospective debt[19] is invalid. It has also been held that a notice which demands a smaller sum than that actually due is valid.[20] However, uncertainty remains as to the question of whether a statutory demand which states an amount larger than the true amount owed by the company is invalid on that ground.

B. *The Authorities*

There has been a division of opinion between the Singapore and the Malaysian courts[21] as to whether a statutory demand which states a sum which exceeds that truly owing by the company is valid and effective to found a winding up petition against the company. This has no doubt been fueled by the conflict of authority in the Australian courts.

1. *The Singapore authorities*

The position in Singapore appears to be that a statutory demand for an excessive sum is valid. This proposition has the authority of three Singapore High Court decisions – *Re Sanpete Builders (S) Pty Ltd*,[22] *Re Inter-Builders*

15 *Allen Properties (Qld) Pty Ltd* v *Encino Holding Pty Ltd* (1985) 10 ACLR 104; *Pro-Image Productions Pty Ltd* v *Catalyst Television Productions Pty Ltd* (1988) 14 ACLR 303. *Cf Re Willes Trading Pty Ltd* [1978] 1 NSWLR 463, which was apparently approved by the Singapore Court of Appeal in *Pac Asian Services Pte Ltd* v *European Asian Bank AG* [1989] 3 MLJ 385 at 388. With respect, it is submitted that this endorses an overly strict approach. See also *Re Waldcourt Investment Co Pty Ltd* (1986) 4 ACLC 589 at 592-593.

16 *Transfloors Pty Ltd* v *SWF Hoists Equipment Pty Ltd* (985) 3 ACLC 66.

17 *Re Elgar Heights Pty Ltd* (1985) 9 ACLR 846.

18 *Re Bryant Investment Co Ltd* [1974] 1 WLR 826. See also *Re North Sunbury Development Pty Ltd* (1983) 1 ACLC 644 at 645; *Fire & All Risks Insurance Co Ltd* v *Southern Cross Exploration NL (No 2)* (1983) 1 ACLC 1088 at 1090; *Re Elgar Heights Pty Ltd*, *supra*, note 17, at 851-852; *Re Madi Pty Ltd* (1987) 12 ACLR 45 at 47-48.

19 *Re North Sunbury Development Pty Ltd*, *supra*, note 18.

20 *Wichita Pty Ltd* v *Elders IXL Ltd* (1990) 8 ACLC 704.

21 A division that has been noted even in the Australian courts: see *Ataxtin Pty Ltd* v *Gordon Pacific Developments Pty Ltd* (1991) 102 ALR 245 at 251.

22 [1989] 1 MLJ 393.

Development[23] and *Re Makin Nominees Pte Ltd*.[24] These decisions in turn have the support of the decisions of the English courts[25] and the Australian courts in Victoria,[26] South Australia,[27] Tasmania,[28] Western Australia[29] and the Northern Territory.[30] It is perhaps too early, however, to say that the position in Singapore is well-settled. The above line of cases has yet to be expressly recognised as existing harmoniously with the rule that section 254(2)(a) CA must be strictly complied with in order to trigger its deeming effect. This rule of strict compliance has the support of the Singapore Court of Appeal decision in *Pac Asian Services Pte Ltd* v *European Asian Bank*[31] and is a favourite argument in the arsenal of those who advocate the view that an excessive statutory demand is *ipso facto* invalid.

There is, further, an important qualification to the simple proposition that an excessive statutory demand is valid. One well-established rule of practice[32] is that a winding-up petition is not a legitimate means to enforce payment of a debt which is *bona fide* disputed.[33] It is equally clear, however, that if the *existence* of the debt is not disputed, the fact that there is a dispute as to the *precise amount* of the debt is not a sufficient answer to the petition.[34] This latter rule does not apply in its full force in a case of a statutory demand.

[23] [1991] 3 MLJ 259.

[24] [1994] 3 SLR 429.

[25] *Cardiff Preserved Coal and Coke Co* v *Norton* (1867) 2 Ch App 405.

[26] *Re Convere Pty Ltd* (1976) VLR 345 at 350; *Re Fabo Pty Ltd* [1989] VR 432.

[27] *Re Gem Exports Pty Ltd* (1984) 8 ACLR 755.

[28] *Re Pardoo Nominees Pty Ltd* (1987) 11 ACLR 573; *International Factors (Singapore) Pty Ltd* v *Speedy Tyres Pty Ltd* (unreported, 11 June 1991, 1991 TASectionLEXISection2205).

[29] *Mine Exc Pty Ltd* v *Henderson Drilling Services Pty Ltd* (1989) 1 ACSR 118.

[30] *Arafura Finance Corporation Pty Ltd* v *Kooba Pty Ltd* (1987) 52 NTR 43.

[31] *Supra*, note 15.

[32] *Re Claybridge Shipping Co SA* [1997] 1 BCLC 572; *Alipour* v *Ary* [1997] 1 WLR 534; *Re a Company (No 006685 of 1996)* [1997] 1 BCLC 639.

[33] A small sample of the innumerable authorities which espouse this principle would be: *Re King's Cross Industrial Dwellings Co* (1870) LR 11 Eq 149; *Cadiz Waterworks Co* v *Barnett* (1874) LR 19 Eq 182; *Re Gold Hill Mines* (1883) 23 Ch D 210; *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 at 198; *Re K L Tractors Ltd* [1954] VLR 505 at 512; *Re Ban Hong Co Ltd* (1959) 25 MLJ 100; *Mann* v *Goldstein* [1968] 1 WLR 1091; *Re Lympne Investments Ltd* [1972] 1 WLR 523; *Stonegate Securities Ltd* v *Gregory* [1980] 1 All ER 241; *Club Marconi of Bossley Park Social Recreation Sporting Centre Ltd* v *Rennat Constructions Pty Ltd* (1980) 4 ACLR 883; *Re Hong Huat Realty (M) Sdn Bhd* [1987] 2 MLJ 502; *Australian Mid-Eastern Club Ltd* v *Elbakht* (1988) 13 NSWLR 697; *Mageleine Investments Pte Ltd* v *Swiss Levingston (Property Consultants) Pte Ltd* [1990] 1 MLJ 470; *Taylors Industrial Flooring Ltd* v *M & H Plant Hire (Manchester) Ltd* [1990] BCLC 216 at 220; *Leong Yick Realty Co Sdn Bhd* v *Asia Commercial Finance (M) Sdn Bhd* [1994] 2 MLJ 308.

[34] This proposition is again supported by numerous authorities including: *Re Tweeds Garage Ltd* [1962] 1 Ch 406; *Re Metropolitan Fuel Pty Ltd* [1969] VR 328 at 329; *Re R A Foulds*

In *Re Mechanised Construction Pte Ltd*,[35] the Singapore High Court held that a petitioner must be able to point to a specified undisputed sum owed by the company on the date of service of the statutory demand and which was known to the company. As long as he was able to do this, it was irrelevant that the statutory demand stated an excessive sum; conversely, if he could not do this, the excessive statutory demand would be invalid. This exception to the rule that an excessive statutory demand is nonetheless effective is one which is also recognised by English and certain Australian authorities.[36] The validity of the notice thus depends on whether the company has been prejudiced. Where on the date of the issue of the notice the company could not reasonably know what was the true amount due to the petitioner, a notice demanding an excessive figure would be bad; however, if the notice demanded a larger sum when a smaller sum was indisputably due and known[37] to the company and the company failed to pay the smaller sum, then the notice is not invalidated.

2. *The Malaysian authorities*

The position in Malaysia is somewhat more uncertain. Although the earliest cases on the point appeared to favour the view that an excessive

Ltd (1986) 2 BCC 99,269 at 99,274; *The Oriental Bank Bhd* v *CSJ Pengangkutan Sdn Bhd* [1989] 2 CLJ 1076; *Taylors Industrial Flooring Ltd* v *M & H Plant Hire (Manchester) Ltd*, *supra*, note 33, at 218f; *Re a Company (No 0013734 of 1991)* [1993] BCLC 59 at 71d-e.

35 [1989] 3 MLJ 9.

36 *Re a Company (No 003729 of 1982)* [1984] 1 WLR 1090; *Re a Company*, *supra*, note 5, at 40; *Re a Company (No 008122 of 1989), ex parte Trans Continental Insurance Services Ltd* [1990] BCLC 697; *Re Clemence plc* (1992) 59 BLR 56 at 70-71; *Fiesta Girl of London Ltd* v *Network Agencies* [1992] EGLR 28. See also *Re Madison Avenue Carpets Pty Ltd* (1974) ACLC 27,895; *Club Marconi of Bossley Park Social Recreation Sporting Centre Ltd* v *Rennat Constructions Pty Ltd*, *supra*, note 33, at 887; *Re Gem Exports Pty Ltd*, *supra*, note 27, at 765-766; *Re R A Foulds Ltd*, *supra*, note 34, at 99,274; *Arafura Finance Corporation Pty Ltd* v *Kooba Pty Ltd*, *supra*, note 30, at 49-50; *Re a Company (No 11102 of 1991)* [1992] EGCSection79; *Commonwealth Bank of Australia* v *Individual Homes Pty Ltd* (1994) 119 ACTR 1 at 7-8. *Cf* the early English authorities: *Re The Brighton Club and Norfolk Hotel Co* (1865) 35 Beav 204; *Re London and Paris Banking Corporation* (1874) LR 19 Eq 447. On the other hand, in *Bateman Television Ltd* v *Coleridge Finance Co Ltd*, *supra*, note 6, at 816, it appears to have been thought that a dispute as to the true quantum of the debt will *never* invalidate a notice. A similar suggestion was apparently made in *Sungei Rinching Sdn Bhd* v *Sri Keluarga Sdn Bhd* [1996] 2 MLJ 199 at 204H-205C. This position is probably incorrect, and was dissented from in *Re First Fifteen Holdings Ltd* (1988) 4 NZCLC 64,108 at 64,112.

37 It may be enough if the company was *in a position* to know what it ought to pay: *Re a Debtor (No 10 of 1988)* [1989] 1 WLR 405 at 406H; *Fiesta Girl of London Ltd* v *Network*

demand is valid,[38] the contrary view was affirmed by three decisions of the Malaysian High Court[39] and the decision of the Supreme Court in *Sri Hartamas Development Sdn Bhd* v *MBF Finance Bhd*.[40] This position is supported by Australian decisions, specifically, those of the New South Wales Supreme Court,[41] the Queensland Supreme Court[42] and the Federal Court of Australia,[43] as well as the High Court of New Zealand.[44]

If one accepts this requirement of strict compliance, then *a fortiori* the notice would be invalid if the overstatement in the notice is not due to inadvertence or mistake but because the company has a *bona fide* dispute with respect to part of the sum stated in the notice. No presumption of insolvency of the company being unable to pay its debts will therefore arise if the company does not pay pursuant to such a notice.[45] It follows that the rule that a *bona fide* dispute as to part of the debt is not a defence to a winding up petition does not apply in a case where reliance is placed on the statutory demand mechanism to prove insolvency.[46]

Two recent Malaysian cases have introduced some doubt into this position.

Agencies, *supra*, note 36, at 31.

38 *Chip Yew Bricks Works Sdn Bhd* v *Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447; *The Oriental Bank Bhd* v *CSJ Pengangkutan Sdn Bhd*, *supra*, note 34; *Patel Holding Sdn Bhd* v *Estet Pekebun Kecil Sdn Bhd* (1990) 1 MSCLC 90,380; *Kampat Timber Industries Sdn Bhd* v *Bensa Sdn Bhd* [1990] 2 MLJ 46.

39 *Re Yap Kim Kee & Sons Sdn Bhd*, *supra*, note 4; *Re Perusahaan Jenwatt* [1990] 2 MLJ 178; *Lim Tok Chiow* v *Dian Tong Credit & Development Sdn Bhd* [1994] 2 MLJ 345.

40 *Supra*, note 4, at 316I-317H.

41 *Processed Sand Pty* v *Land Thiess Contractors* [1983] 1 NSWLR 384; *Irani* v *Asian Boutique Pty Ltd (No 2)* (1983) 8 ACLR 481 at 482; *Chapmans Ltd* v *Brinds Ltd* (1985) 9 ACLR 943 at 948; *Deputy Commissioner of Taxation* v *Cye International Pty Ltd (No 2)* (1985) 10 ACLR 305; *Buying Systems (Aust) Pte Ltd* v *Tien Mah Litho Printing Co Pte Ltd* (1986) 5 NSWLR 317 at 326F-327B; *Re National Computer Systems and Services Ltd* (unreported, 17 October 1991, 1991 NSW LEXISection9107). See also the decision of the Court of Appeal in *Re Vendas (Wholesale) Pty Ltd* (1991) 9 ACLC 1,049.

42 *Deputy Commissioner of Taxation* v *Cye International Pty Ltd* (1983) 7 ACLR 956; *General Welding and Construction Co (Qld) Pty Ltd* v *International Rigging (Aust) Pty Ltd* [1983] 2 Qd R 568. *Cf Thiess Peabody Mitsui Coal Pty Ltd* v *A E Goodwin Ltd* [1966] Qd R 1 at 6; *Re Great Barrier Reef Flying Boats Pty Ltd* (1982) 6 ACLR 820.

43 *Ataxtin Pty Ltd* v *Gordon Pacific Developments Pty Ltd*, *supra*, note 21.

44 *Re First Fifteen Holdings Ltd*, *supra*, note 36.

45 *Thiess Peabody* v *A E Goodwin*, *supra*, note 42, at 5; *L & D Audio Acoustics Pty Ltd* v *Pioneer Electronics Aust Pty Ltd* (1982) 7 ACLR 180 at 184; *National Mutual Life Association of A/asia Ltd* v *Oasis Developments Pty Ltd* (1983) 7 ACLR 758 at 762; *Processed Sand Pty Ltd* v *Thiess Contractors Pty Ltd*, *supra*, note 41; *Frank Hermens (Wholesale) Pty Ltd* v *Palma Pty Ltd* (1985) 10 ACLR 257; *Re First Fifteen Holdings Ltd*, *supra*, note 36. See also *Vanguard Insurance Co* v *Darley Trading* (1981) 1 ANZ Insurance Cases 77,311 at 77,315.

46 See *Processed Sand Pty Ltd* v *Thiess Contractors Pty Ltd*, *supra*, note 41, at 388G-389A; *National Mutual Life Association of A/asia Ltd* v *Oasis Developments Pty Ltd*, *supra*, note

In *YPJE Consultancy Service Sdn Bhd* v *Heller Factoring (M) Sdn Bhd*,[47] the Malaysian Court of Appeal held that the failure to quantify the interest due on the principal debt does not invalidate the notice. Refusing to follow the earlier Malaysian authorities, the Court further decided that a demand which over-states the amount owing is not invalid. Unexpectedly, the Supreme Court's decision in *Sri Hartamas Development Sdn Bhd* v *MBF Finance Bhd*[48] was not cited at all. Exactly one month after *YPJE Consultancy Service* was decided, the Court of Appeal in *Sungei Rinching Sdn Bhd* v *Sri Keluarga Sdn Bhd*[49] apparently held that the failure to precisely quantify the debt and interest thereon in the demand did not invalidate it.[50] *Sri Hartamas* was referred to but summarily rejected on the ground that the demand in the instant case did not mislead the company. This distinction must, however, be regarded as doubtful in so far as the Supreme Court in *Sri Hartamas* did not indicate in any way that the rule it was laying down applied only in cases where the company had been misled. Indeed, the Supreme Court went out of its way to endorse the proposition that "... a demand does not fall within section 218(2)(a) of the Act[51] if the amount demanded exceeds the sum actually due".[52]

C. *The Competing Arguments*

Seemingly compelling arguments may be canvassed in support of each of the above views. These may be considered under several headings.

1. *Strict interpretation of section 254(2)(a) CA*

This is the lynchpin argument of those who advocate that an over-stated statutory demand is invalid. The basic premise is that, in order to trigger its deeming effect, there must be strict compliance with section 254(2)(a) CA,[53] especially since the service of a statutory demand does not require

45, at 762; *Re First Fifteen Holdings Ltd*, *supra*, note 36, at 64,112-64,113.

47 [1996] 2 MLJ 482

48 *Supra*, note 4, at 316I-317H.

49 *Supra*, note 36.

50 Unfortunately, it is difficult to extract the exact and detailed facts of the case from the report.

51 The Companies Act 1965. Section 218(2)(a) of this Act is *in pari materia* with section 254(2)(a) CA.

52 *Supra*, note 4, at 317H-I.

53 *Re Willes Trading Pty Ltd*, *supra*, note 15; *Collins Bros Stationers Pty Ltd* v *Zebra Graphics Pty Ltd* (1985) 10 ACLR 267 at 268; *R* v *Pavanui Investments Pty Ltd* (1986) 4 ACLC 607; *Re Kieran Byrne & Associates Geotechnical Consultants Pty Ltd* (1987) 12 ACLR

any prior judgment of a court.[54] Accordingly, section 254(2)(a) CA should be given a literal interpretation as its effect is to provide a statutory admission that a company is unable to pay its debts and the demand should state the sum which is actually due.[55] As noted earlier, it is significant that this attitude of strict construction towards section 254(2)(a) CA was approved, in the context of a different issue, by the Singapore Court of Appeal in the *Pac Asian Services Pte Ltd* v *European Asian Bank AG*.[56]

In response to this, however, it has been pointed out that, as the word "deemed" in section 254(2) CA is not used to create a statutory fiction, strict proof is not required of the basic facts and the matter should be approached with a practical rather than an exacting frame of mind.[57] This appears to be a more convincing argument. It is established that non-payment of a debt after demand[58] may prove insolvency quite independently of a notice of demand under section 254(2)(a) CA,[59] as neglect in payment of the sum stated in a statutory demand is not the only way to show the company's inability to pay its debts.[60] Indeed, as long as the company has failed to pay an undisputed debt which is due and in respect of which a demand for repayment has been made, it is proved that the company is unable to pay its debts, even where the company appears to be or is obviously solvent.[61]

367 at 369; *Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd*, *supra*, note 3, at 73; *Re Manda Pty Ltd*, *supra*, note 8, at 121-122. See also *Re Hodges* (1873) 8 Ch App 204 at 205; *Re Williams* [1919] VLR 566 at 575-576; *Syd Mannix Pty Ltd* v *Leserv Constructions Pty Ltd* [1971] 1 NSWLR 788 at 790E-F, affirmed (1972) 46 ALJR 548; *Re Mannum Haulage* (1974) 8 SASR 451 at 452; *Re Elgar Heights Pty Ltd*, *supra*, note 17, at 858; *Re P H & J P Harding Pty Ltd* (1986) 10 ACLR 365 at 366; *National Roads & Motorists' Association* v *Parker* (1986) 4 ACLC 609 at 608; *Deputy Commissioner of Taxation* v *Players Entertainment Network Pty Ltd* (1988) 13 ACLR 541 at 544-5.

54 *Ataxtin Pty Ltd* v *Gordon Pacific Developments Pty Ltd*, *supra*, note 21, at 253.

55 *Processed Sand Pty Ltd* v *Thiess Contractors Pty Ltd*, *supra*, note 41, at 389E-F; *Re Perusahaan Jenwatt*, *supra*, note 39; *Re Yap Kim Kee & Sons Sdn Bhd*, *supra*, note 4; *Sri Hartamas Development Sdn Bhd* v *MBF Finance Bhd*, *supra*, note 4, at 317B-I.

56 *Supra*, note 15.

57 *Re Pardoo Nominees Pty Ltd*, *supra*, note 28; *Re Fabo Pty Ltd*, *supra*, note 26; *Re Sanpete Builders (S) Pte Ltd*, *supra*, note 22, at 402; *Re Inter-Builders Development Pte Ltd*, *supra*, note 23, at 261.

58 Such a demand for payment need not, of course, amount to a notice of demand under section 254(2)(a) CA: *Re Capital Annuities Ltd* [1979] 1 WLR 170 at 187G-H; *Re Great Eastern Hotel (Pte) Ltd* [1989] 1 MLJ 161 at 170.

59 *Syd Mannix Pty Ltd* v *Leserv Constructions Pty Ltd*, *supra*, note 53; *Southern Steel Supplies Pty Ltd* v *Utility Brute Trailers Pty Ltd* (1984) 2 ACLR 686; *Re Sanpete Builders (S) Pte Ltd*, *supra*, note 22, at 401.

60 *Re Globe New Patent Iron & Steel Co* (1875) LR 20 Eq 337; *Re Capital Annuities Ltd*, *supra*, note 58, at 187H.

61 *Mann* v *Goldstein*, *supra*, note 33; *Cornhill Insurance plc* v *Improvement Services Ltd* [1986] 1 WLR 114; *Taylors Industrial Flooring Ltd* v *M & H Plant Hire (Manchester) Ltd*, *supra*,

Furthermore, it is clear that non-compliance with a *defective* statutory demand under section 254(2)(a) CA may itself be evidence of the company's insolvency, despite the demand not complying with the statutory requirements.[62]

Since non-compliance with an ordinary demand for payment may result in an inference that the debtor company is unable to pay its debts, section 254(2)(c) CA should be regarded as no more than providing for a statutorily-regulated mode of making a demand for payment of a debt which, at the highest, *enhances the evidential value* of non-compliance with the demand. It effects a formal presumption of insolvency upon facts which, in any event, would have succeeded or at least gone a long way in establishing insolvency by way of ordinary proof. It would be a gross overstatement to accord to section 254(2)(c) CA the status of a statutory fiction.

2. *The right of the company to a properly quantified demand*

The argument here is that section 254(2)(a) CA should be interpreted literally so as to ensure that the statutory purpose is not frustrated and the company is not deprived of a right or opportunity to exercise a right.[63] It is important that the company should be given the opportunity to conclude whether a particular sum alleged to be owing is in truth owing to the creditor making the demand so that, if the debt is admitted, it can be paid, secured or compounded and the risk of a winding up avoided.[64] If the view is taken that an excessive demand is valid, the company may suffer prejudice. If part of the demanded amount is not due or genuinely in dispute, the company will not be protected by simply paying the undisputed part of the demand; it will be forced to seek an injunction against the commencement of winding up proceedings.[65]

It is submitted that this cluster of arguments does not really offer any support for a rule that an excessive statutory demand should *always* be invalid. One can well understand the anxiety that a company might be seriously prejudiced if the law permits it to be wound up on the basis of

note 33. See also *Re United Strength Ltd* [1992] 1 HKC 386.

62 *Syd Mannix Pty Ltd* v *Leserv Constructions Pty Ltd*, *supra*, note 53; *L & D Audio Acoustics Pty Ltd* v *Pioneer Electronics Aust Pty Ltd*, *supra*, note 45, at 185; *Southern Steel Supplies Pty Ltd* v *Utility Brute Trailers Pty Ltd*, *supra*, note 59, at 687; *Re Vendas (Wholesale) Pty Ltd*, *supra*, note 41, at 1,050; *Ataxtin Pty Ltd* v *Gordon Pacific Developments Pty Ltd*, *supra*, note 21, at 253-4.

63 *Pro-Image Productions Pty Ltd* v *Catalyst Television Productions Pty Ltd*, *supra*, note 15; *Helicarr Consolidated Ltd* v *Royal Insurance Fire & General (NZ) Ltd*, *supra*, note 7, at 49.

64 *Ataxtin Pty Ltd* v *Gordon Pacific Developments Pty Ltd*, *supra*, note 21, at 253.

a statutory demand which states an excessive sum. While at common law a debtor in respect of a debt payable on demand is not entitled to a demand which specifies the true amount owing or, indeed, *any* amount,[66] this somewhat harsh position should not apply with respect to a statutory demand served under section 254(2)(a) CA because of the dire consequences of non-compliance with the demand. It is surely too blunt, on the other hand, to say that in order to protect the company from any prejudice it must have an *unqualified* right to a properly quantified demand. Even where no resort is had to the statutory demand mechanism, the mere refusal of a company to pay an *undisputed* debt is sufficient basis from which to infer its insolvency for the purposes of winding up;[67] it is no injustice to wind up a company if it refuses to meet its undisputed obligations without any justification. It is difficult to see why, in the case where a statutory demand is in fact served, a similar rule should not apply; the company should not be excused from paying up when it knows the exact sum that is owing and cannot or does not dispute it.

The proper balance to be struck, therefore, is that as long as the company knows of an undisputed and specific sum which is owed to the creditor, the fact that the statutory demand over-states the debt will not invalidate it. The demand should be invalidated only if no such undisputed and specific sum is known to the company, for only in such a situation is there any potential of prejudice being caused to the company if the demand were held to be valid.

3. *The absurdity argument*

The absurdity argument is a double-edged sword. One way to present the argument is to say that, if an excessive statutory demand is invalid, every winding up order will be bad as long as the creditor has demanded the smallest sum above what was actually due to him.[68] On the other hand, the contention can also be made that it would be ludicrous if a statutory demand which states a hugely excessive sum should be valid.[69] Since the validity of an excessive statutory demand cannot depend on the amount of the over-statement,[70] it is argued, all such demands should be invalid.

65 *Processed Sand Pty Ltd* v *Thiess Contractors Pty Ltd*, *supra*, note 41, at 389F-G.

66 *Bunbury Foods Pty Ltd* v *National Bank of Australasia Ltd* (1984) 153 CLR 491 at 503-503; *Bank of Baroda* v *Panessar* [1987] Ch 335 at 346H-347D.

67 See the cases cited, *supra*, note 61.

68 *Cardiff Preserved Coal and Coke Co* v *Norton*, *supra*, note 25, at 410; *Re Inter-Builders Development Pte Ltd*, *supra*, note 23, at 262.

69 See *Ataxtin Pty Ltd* v *Gordon Pacific Developments Pty Ltd*, *supra*, note 21, at 253.

The latter argument overlooks an important distinction between the *jurisdiction* of the court to make a winding up order and its *discretion* to do so. Upon a company being established to be unable to pay its debts, the court has the jurisdiction to wind up the company, that is, the court *may* wind up the company.[71] It is clear that the court is given an overriding discretion as to whether the winding up order should be made,[72] and judicial decision cannot fetter or limit the discretion conferred by statute or even create a rule of binding practice.[73]

It becomes apparent, then, which of the two "absurdity" arguments is the more convincing one. The argument that absurdity will result from holding that an excessive statutory demand is valid loses much force since, notwithstanding a valid demand, the court retains an overriding discretion to refuse to make the winding up order. The discretion may usefully be relied on to protect a company from being wound up on the basis of a grossly excessive and inaccurate statutory demand. For instance, it has been said that if the amount demanded in the demand is large and much of it is *bona fide* disputed on substantial grounds, leaving only a small amount not disputed, the court may exercise its discretion to refuse to grant a winding up order.[74] The possibility of absurd consequences being reached is thus negligible, since the court may, of course, be expected to exercise its discretion sensibly. In contrast, if one were to take the view that an excessive statutory demand is invalid *per se*, the court has no alternative, when faced with any excessive demand regardless of the extent of the inaccuracy, but to dismiss the petition for want of jurisdiction to make a winding up order. There is thus a real possibility of absurdity in a case where the demand exceeds the true debt by an insignificant amount or where the excessive demand has caused no actual prejudice caused to the company.

D. *Verdict*

To adopt the view that an excessive statutory demand is *ipso facto* invalid is unnecessarily burdensome to the creditor. Further, it allows a company to rely on the technicality of an excessive statutory demand to defeat the winding up proceedings, when there is really no dispute as to the creditor's claim against the company and its quantum.

[70] *Ibid.*
[71] Section 254(1) CA.
[72] See *Re Emmadart Ltd* [1979] 1 Ch 540 at 547-548.
[73] See *Re P & J MacRae Ltd* [1961] 1 WLR 229 at 237; *Re J D Swain Ltd* [1965] 1 WLR 909 at 911F-G.
[74] *Re Sanpete Builders (S) Pte Ltd*, *supra*, note 22, at 402. See also *Re Madison Avenue Carpets*,

The opposite view that an excessive statutory demand is not invalid unless the company does not know of an undisputed and specific sum which is due, on the other hand, strikes the balance at the right place. If the company is not prejudiced, there is no reason why the excessive demand should not be valid. The court's overriding discretion to refuse to make a winding up order provides an additional and reassuring control mechanism.

III. BANKRUPTCY

A. *The Statutory Framework*

The statutory demand mechanism in relation to individual debtors is more elaborate than in the case of corporate liquidation. Pursuant to sections 59 and 61(1)(c) of the Bankruptcy Act[75] ("BA"), a bankruptcy order may be made upon the presentation of a bankruptcy petition against an individual debtor on the ground that he is unable to pay the debt on which the petition is founded. A debtor is presumed to be unable to pay the debt if the petitioning creditor has served on him a statutory demand and the debtor has neither complied with it nor applied to the court to set it aside within a period of 21 days from the service of the demand.[76]

The form and contents of a demand are prescribed by rule 94 of the Bankruptcy Rules ('BR'). The demand must be in the appropriate statutory form[77] and must be dated and signed by the creditor himself or by a person authorised to make the demand on the creditor's behalf.[78] For present purposes, the crucial provision is rule 94(2) BR which states:

> The statutory demand shall state the actual amount of the debt that has accrued as of the date of the demand.

The demand is further required to separately identify the actual amount of any interest, penalties, charges or pecuniary consideration in lieu of interest which is included in the demanded sum and the rate at which and the period for which it was calculated.[79] The demand must state the consideration for

supra, note 36; *Re Great Barrier Reef Flying Boats Pty Ltd*, *supra*, note 42.

75 Cap 20, 1996 Ed.

76 S 62 BA.

77 Form 1, The Schedule, BR. This may be contrasted with statutory demands in s 254(2)(a) CA for which no statutory form is prescribed and the form for which has had to be clarified by the courts.

78 Rule 94(1) BR.

the debt or, if there is no consideration, the way in which the debt arises and any details of any judgment or order of court upon which it is based or any other details as would enable the debtor to identify the debt.[80] A secured creditor must specify the full amount of the debt and the nature and value of the security or the assets held by him.[81] The demand must also contain prescribed information which explains the purpose and effect of the demand and advises the debtor of his rights.[82]

The debtor may apply to court for an order setting aside the statutory demand[83] and the court may either summarily determine the application or adjourn it.[84] Upon an application under rule 98(2) BR, the court has to either set aside the statutory demand or uphold it as valid; it cannot make a conditional order.[85] This procedure for setting aside demands is a filtering process designed to protect debtors against the presentation of petitions based on demonstrably unjustified statutory demands.[86]

Rule 98(2) BR states the grounds for setting aside a statutory demand:

> (2) The court shall set aside the statutory demand if –
>
> (a) the debtor appears to have a valid counterclaim, set-off or cross-demand which is equivalent to or exceeds the amount of the debt or debts specified in the statutory demand;
>
> (b) the debt is disputed on grounds which appear to the court to be substantial;
>
> (c) it appears that the debtor 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;
>
> (d) rule 94 has not been complied with; or
>
> (e) the court is satisfied, on other grounds, that the demand ought to be set aside.

79 Rule 94(3) BR.
80 Rule 94(4) BR.
81 Rule 94(5) BR.
82 Rule 95 BR.
83 Rule 97(1) BR.
84 Rule 98(1) BR.
85 *Re a Debtor (No 90 of 1992)* [1993] TLR 387; *Re a Debtor (No 32 of 1991) (No 2)* [1994] BCC 524. *Cf Re a Debtor (No 517 of 1991)* [1991] TLR 534.

These provisions are modelled on corresponding English provisions in the Insolvency Rules 1986 ("IR86"). Decisions on the English provisions, while very useful especially in the absence of any reasoned decisions on the local provisions, cannot be applied without qualification. There are some very significant differences in wording between those provisions and their Singapore counterparts.[87]

Firstly, rule 6.1(3) IR86, which is the English equivalent of rule 94(2) BR, provides that the demand must state "the amount of the debt...". This is to be compared with the more elaborate formula used in rule 94(2) BR of requiring the demand to state "the *actual amount* of the debt that has accrued as of the date of the demand". Secondly, rule 6.5(4) IR86, the English equivalent of rule 98(2) BR, opens with the words "[t]he court *may* grant the application if...".[88] The use of the permissive[89] word "*may*" here is to be contrasted with the use of the directory word "*shall*" in the opening words of rule 98(2) BR. The third key difference is that rule 6.5(4) IR86 does not have any sub-paragraph equivalent to rule 98(2)(d) BR, that is, rule 6.5(4) IR86 does not expressly state that the court may set aside the demand if rule 6.1(3) BR has not been complied with.

B. *The English Position*

In England, there are two grounds upon which an excessive statutory demand may be set aside: firstly, where the debt is disputed on grounds which appear to be substantial,[90] and, secondly, where the court is satisfied, on other grounds, that the demand ought to be set aside.[91] Both grounds exist under the Singapore legislation in identical form.[92]

The English courts have decided that neither of these grounds justifies the setting aside of a statutory demand on the basis of the mere over-statement of the amount of the debt. With respect to the first ground, a debt will usually be regarded as being disputed on substantial grounds if there is

86 *Platts* v *Western Trust & Savings Ltd* [1996] BPIR 339 at 347B.

87 It is probably a futile inquiry, but this writer cannot think of any good reason why such differences were introduced. There does not seem to be any glaring weaknesses in the drafting of the IR86 such as to justify our drafters to tinker with it before putting it in our statute books. With respect, the modified product is more problematic and perplexing than the English original while having no compensating advantages or strengths.

88 Italics added.

89 *Khan* v *Breezale Sarl* [1996] BPIR 190 at 192E.

90 Rule 6.5(4)(b) IR86.

91 Rule 6.5(4)(d) IR86.

a genuine triable issue on the evidence[93] or if there is a complicated issue of law requiring substantial argument and which might have a considerable effect outside the ambit of the particular case.[94] More importantly, such dispute must extend to *the full amount of the debt*; therefore, if the debt in the demand is over-stated because there is a dispute on substantial grounds as to *part of the debt*, the demand will not be set aside on the ground of the dispute.[95] The exception to this rule is where the undisputed part of the debt falls below the bankruptcy level for statutory demands;[96] in such a situation the court will usually set aside the demand, especially where the consequence otherwise would be to permit the presentation of a bankruptcy petition which is bound to fail.[97]

With respect to the second ground, it has been held that it affords the court a residual discretion to set aside a statutory demand in a case where it would be unjust for the demand to give rise to the presumption that the debtor is unable to pay his debts, and it is to be exercised with regard to all the circumstances before the court at the time of the hearing of the application.[98] Thus, the court may set aside a statutory demand containing terms which are so confusing or misleading that, having regard to all the circumstances, justice requires that it should not be allowed to stand while, on the other hand, a statutory demand which is defective in content but which occasions no prejudice to the debtor may not be set aside.[99] The court may also set aside a statutory demand if there is evidence that the debt will in substance be immediately paid[100] or if the debtor has paid off

92 Rule 98(2)(b) BR and rule 98(2)(e) BR respectively.

93 *Practice Note (Bankruptcy: Statutory Demand: Setting Aside) (No 1/87)* [1987] 1 WLR 116 at para 4. See also *Cale* v *Assiudoman KPS (Harrow) Ltd* [1996] BPIR 245 at 248A-C.

94 *Cale* v *Assiudoman KPS (Harrow) Ltd*, *supra*, note 93. *Cf Platts* v *Western Trust & Savings Ltd*, *supra*, note 86, at 350A-D.

95 *Re a Debtor (No 1 of 1987)* [1989] 1 WLR 271 at 279F-G; *Re a Debtor (No 490-SD-1991)* [1992] 1 WLR 507; *Re a Debtor (Nos 49 and 50 of 1992)* [1995] Ch 66 at 70C-D; *Neely* v *Commissioners of Inland Revenue (No 383/SD/92)* [1996] BPIR 473 at 476D-E. As Hoffmann J (as he then was) pointed out in the second case at 509F-G, his own earlier decision in *Re a Debtor (No 10 of 1988)*, *supra*, note 37, has been impliedly overruled.

96 £750 for England and $2,000 for Singapore: s 267(2) IA86 and s 61(1)(c) BA respectively.

97 *Re a Debtor (Nos 49 and 50 of 1992)*, *supra*, note 95. See also *City Electrical Factors Ltd* v *Hardingham* [1996] BPIR 541.

98 *Re a Debtor (No 1 of 1987)* , *supra*, note 95, at 276D-E and 279B-E. See also *Re a Debtor (No 490-SD-1991)*, *supra*, note 95, at 508H-509B; *Re a Debtor (No 51-SD-1991)* [1992] 1 WLR 1294 at 1301F-1302D; *City Electrical Factors Ltd* v *Hardingham*, *supra*, note 97, at 545B-G.

99 *Re a Debtor (No 1 of 1987)*, *supra*, note 95, at 279C-E.

100 See *Re a Debtor (No 415-SD-1993)* [1994] 1 WLR 917 at 923C-F. See also *Re a Debtor*

part of the demanded debt so as to reduce to below the bankruptcy level.[101] Similarly, a demand may be set aside, in appropriate circumstances, if the amount by which the demand exceeds the bankruptcy level is trivial and the debtor offers to make a payment which has the effect of reducing the debt to below the bankruptcy level.[102] But the mere over-statement of the amount of the debt in the statutory demand is not by itself a ground for setting it aside.[103] Further, it is irrelevant that the amount of over-statement is large or that the excess is attributable to a cross-claim on the part of the debtor,[104] and neither is it material that the debt is not a judgment debt.[105]

C. *Controversy in Singapore*

Given the affinity of the local courts to English decisions in general and the eminently sensible approach taken by the English courts on this particular issue, there is a strong case for saying that the position with regard to the English equivalents of rule 98(2)(b) and (e) BR should apply equally in Singapore. As such, an excessive demand is unlikely to be set aside by a Singapore court on the grounds enumerated in those two provisions.

However, rule 98(2)(d) BR appears to compel one to the conclusion that in Singapore an excessive demand will always be set aside. Reading this sub-paragraph together with the opening words of rule 98(2), the legislative command reads:

> The court shall set aside the statutory demand if … rule 94 has not been complied with…

It will be recalled that one of the requirements stated by rule 94(2) BR is that the statutory demand shall state the actual amount of the debt that has accrued as of the date of the demand. As such, it may seem that a court has no choice but to set aside a statutory demand which does not comply with rule 94, including a demand which does not state the actual amount of the debt owed at the date thereof. This would mean that the position in Singapore is very different from that in England.

(No 51-SD-1991), *supra*, note 98, at 1301B-C.

101 *City Electrical Factors Ltd* v *Hardingham*, *supra*, note 97.

102 *City Electrical Factors Ltd* v *Hardingham*, *supra*, note 97.

103 *Re a Debtor (No 1 of 1987)*, *supra*, note 95; *Re a Debtor (No 51-SD-1991)*, *supra*, note 98; *Re a Debtor (No 657/SD/91)* [1992] STC 751; *Neely* v *Commissioners of Inland Revenue (No 383/SD/92)* [1996] BPIR 473 at 476C-D.

104 *Re a Debtor (No 657/SD/91)*, *supra*, note 103, at 755j-756a.

The issue has given rise to what could well be an unprecedented level of interest and discussion amongst practitioners.[106] At first glance, it would appear that those advocating that an overstated bankruptcy demand is *ipso facto* invalid have a stronger case. Their stand draws much support from the *prima facie* ordinary meaning of the relevant provisions. Further, the significantly and apparently deliberately different wording of the Singapore provisions as compared to the corresponding English provisions is a strong suggestion that the English authorities were not intended to be directly applicable.[107]

[105] *Re a Debtor (No 51-SD-1991)*, *supra*, note 98, at 1302G.

[106] If the sheer number of notes published in the Singapore Law Gazette discussing the issue is any indication. First off the mark was Seah and Coomaraswamy ("Statutory Demand under New Bankruptcy Laws" *Singapore Law Gazette*, August 1995, at 21) who expressed the view that an excessive statutory demand could *ipso facto* be set aside under the BR. It was subsequently reported by an Assistant Official Assignee that Rajendran J in the decision of *Re Joseph Michael Nathan (Bankruptcy Petition No 3854 of 1995)* (24 October 1995, Singapore High Court) had, unfortunately without any reasoned judgment, accepted the English authorities and made a bankruptcy order against a debtor even though the statutory demand in question did not comply with rule 94 BR: Subramaniam, "Defective Statutory Demand Under Bankruptcy Act 1995" *Singapore Law Gazette*, February 1996, at 36. This in turn prompted two responses. The first response by Yeo ("Interpretation of Statutory Demands" *Singapore Law Gazette*, July 1996, at 20) highlighted the differences between the material provisions in the BR and the IR86 and concluded that the English position was not intended to apply in Singapore. He further thought that the English authorities took a view which was unduly favourable to the creditor. The second response by Coomaraswamy ("Overstatement in Statutory Demands" *Singapore Law Gazette*, August 1996, at 34) submitted that *Re Joseph Michael Nathan* was wrongly decided, citing a subsequent decision of the Singapore High Court in *Ng Lai Aik* v *Azen Manufacturing Pte Ltd (Bankruptcy Petition No 15 of 1996)* (Lim Teong Qwee J, Singapore High Court, date not ascertainable) in which an excessive statutory demand was set aside apparently on the ground that the court had no discretion in the matter. Unfortunately, again, no reasoned judgment was delivered. This drew a final retort from the Assistant Official Assignee (Subramaniam, "Statutory Demands – the Last Word?" *Singapore Law Gazette*, November 1996, at 49) that *Re Joseph Michael Nathan* was good law and was being applied by the Supreme Court Registrars. Two instances were cited: *Re Kong Keng Seng et al (Bankruptcy Petition Nos 621, 696 and 715 of 1996)* and *Lim Seng Huat* v *PAE Singapore Pte Ltd (Bankruptcy Originating Summons No 23 of 1996)*. It was asserted that the statutory demand in *Ng Lai Aik* suffered from defects other than the overstatement which could have prejudiced the debtor, and that the decision was actually not irreconciliable with *Re Joseph Michael Nathan*.

[107] Another argument which has been advanced is that the English approach is, in any event, unduly harsh to debtors since a debtor against whom an excessive demand was served could not have it set aside until the hearing of the petition. It would be more efficient, it is argued, for the court to set aside the demand under rule 98(2) BR and for the creditor to issue a fresh demand which complies with rule 94(2) BR: Yeo, *supra*, note 106, at 22. With respect,

Those advancing the contrary view have in turn raised a number of arguments to support it, though some of them are less than convincing. One possible argument is that the compliance with rule 94 BR required by rule 98(2) BR may not be *full* compliance but only *substantial* compliance. As such, an excessive demand may not be invalid if it nevertheless substantially complies with rule 94 BR. This argument may be dismissed without much hesitation. Not only is it difficult to reconcile with the crystal clear meaning of rule 94(2) BR, it may mean that the validity of the statutory demand will depend solely on the quantum of the over-statement, an equally doubtful proposition.

Another contention is that section 158 BA may be invoked. In essence, this provision states that no proceedings in bankruptcy shall be invalidated by any formal defect or irregularity unless substantial injustice has been caused thereby which cannot be remedied by any order of the Court. However, a provision in such terms, in the context of previous legislation, had been held to be incapable of curing an overstated bankruptcy notice since the defect was a fundamental error and not a formal defect or irregularity.[108] This draws further support from the specific requirement in rule 94(2) BR that the statutory demand must state the actual amount of the debt owing coupled with the equally specific reference in rule 98(2)(d) BR to non-compliance with rule 94 BR.

this argument is unconvincing. If the position is taken that an excessive demand could not *ipso facto* be set aside under rule 98(2) BR, it must surely follow that the court will also not set it aside on that ground at the hearing of the bankruptcy petition unless there is fresh evidence of other circumstances placed before it or, perhaps, where there are exceptional circumstances. Conversely, if an excessive demand has caused injustice, it is inconceivable that the court will refuse to set it aside under rule 98(2)(e) BR and instead insist that the petition proceed for hearing. Citing *Platts* v *Western Trust & Savings Ltd*, *supra*, note 86, Yeo further asserted that the English position is that generally a lax approach will be taken in an application by the debtor to set aside the statutory demand since the possibility of genuine injustice will be subsequently rectified at the hearing of the petition. But the case does not bear out the proposition; it was concerned with the question of whether the court was obliged to determine the value of the security held by a debtor on the application to set aside the demand. It was held that the court was not always obliged to do so, since there might be cases where justice would be served best if the point were to be determined at the hearing of the petition. It is submitted that nothing in that case was intended to apply to excessive demands. It must further be noted that Yeo's suggestion that the creditor issue a fresh notice involves an additional 21-day delay for the creditor before he can present a petition and be entitled to the benefit of statutory provisions such as section 77(1) BA (avoidance of dispositions of the debtor's property after presentation of bankruptcy petition).

[108] *Re a Debtor* [1908] 2 KB 684. This decision was referred to by Thean J in *Re Lim Kim*

A further possible argument[109] is that the new bankruptcy legislation is intended to streamline and update "cumbersome, complex and archaic bankruptcy procedures".[110] This argument, while having some persuasiveness, is ultimately of insufficient force to displace the *prima facie* mandatory direction in rule 98(2) BR that an excessive statutory demand must be set aside. The stated policy behind the new legislation is simply too general to support the specific argument that an excessive statutory demand should not *ipso facto* be invalid. It is impossible to assert with confidence that the legislature thought that to allow the setting aside of an excessive demand would be to perpetuate "cumbersome, complex and archaic bankruptcy procedures".

Nevertheless, the view that an excessive statutory demand need not necessarily be set aside under rule 98(2) must be correct. It is not necessary to rely on any of the above arguments which, as has been seen, are not particularly forceful. The much more persuasive argument, it is submitted, is that, on a proper interpretation of rule 98(2) BR, the word "shall" in its opening words should be read as "may". The next section will attempt to make out a case for such an interpretation.

D. *Reading "Shall" in Rule 98(2) BR as "May"*

There is no doubt that when legislation says that something "shall" be done the presumption of parliamentary intention is that the performance of that something is mandatory.[111] But it is equally clear that this is not an irrebuttable presumption. The word "shall" does not always impose an absolute and imperative duty to do or omit the act prescribed; it is a facultative word: it confers a faculty or power.[112] Therefore, it cannot be construed without reference to its context.[113] Whether the word is to be read as imposing an obligatory rule depends on the legislative intent which is to be ascertained by examining, *inter alia*, the whole scope of the statute, its nature and design, the consequences which would follow from construing it one way or the other, the provision of any contingency or penalty for non-compliance with the provision in question and, above all, whether the object of the legislation

Guan [1990] 1 MLJ 261 at 266.

[109] Advanced by Subramaniam, "Statutory Demands – the Last Word?", *supra*, note 106, at 50.

[110] *Singapore Parliamentary Debates*, 25 August 1994, col 403. See also The Official Assignee and Public Trustee, *A Guide to the New Bankruptcy Act 1995* (1995) at 5.

[111] See, *eg*, *Ting Seh Hing* v *PP* [1985] 1 MLJ 463 at 463-364; *Cheong Seok Leng* v *PP* [1988] 2 MLJ 481 at 489.

[112] *Re Davis* (1949) 75 CLR 409 at 418.

will be defeated or furthered.[114] Adopting these guidelines, it is submitted that there are several considerations indicating that the word "shall" in the opening words of rule 98(2) BR should not be read as imposing an imperative direction but should be read in its empowering sense.

1. *The nature of the Bankruptcy Act and bankruptcy proceedings*

There is a general reluctance to accept an interpretation of a bankruptcy provision which fetters the discretion of the court. Such reluctance is understandable and well-justified, for the reason that bankruptcy proceedings are court proceedings over which the court should have the fullest control. As such, if the word "shall" appears in bankruptcy legislation in a context which, if the word is given its *prima facie* meaning, would cut down the power of the court to control its own proceedings, that *prima facie* meaning may be displaced more easily than in a non-bankruptcy context. Indeed, it may be said that in bankruptcy legislation the word "shall", in so far as it may tend to reduce the power of the court, should not bear its *prima facie* meaning. In the words of Lord Esher MR:[115]

> It appears to me that the Court of Bankruptcy is a Court to whose procedure the rule, that, as far as possible, mere technicalities should be brushed away in favour of what is fair and just, is especially applicable. In so far as the power of the Court is limited by Act of Parliament, the Court must of course obey the Act, but *the Bankruptcy Acts ought in my opinion to be construed as far as possible so as to give the largest discretion to the Court of Bankruptcy*. The administration of bankruptcy matters from beginning to end takes place under the supervision and absolute control of the Court of Bankruptcy, except so far as its powers are limited by Act of Parliament. It is not for the creditors in the case to decide how the bankruptcy law shall be administered; the Court constantly overrules their views, if it thinks they have been persuaded to agree to some course which the Court thinks an improper one: nor is it for the official receiver to decide how the bankruptcy law shall be administered, except subject to the

[113] *Ibid*, at 419.

[114] See *Cheong Seok Leng* v *PP*, *supra*, note 111, at 489. See also *Hee Nyuk Fook* v *PP* [1988] 2 MLJ 360 at 362.

[115] *Re Lord Thurlow* [1895] 1 QB 724 at 728-729. This passage was cited with approval by McTiernan J in the High Court of Australia in *McIntosh* v *Shashoua* (1931) 46 CLR 494 at 520. See also *Re Crawford* (1943) 13 ABC 201 at 202; *Re Fletcher* [1956] 1 Ch 28 at

> control of the Court. No government department has any right to interfere with the administration of the law of bankruptcy by the Court. It is the Court of Bankruptcy alone which has to administer the law of bankruptcy through its various officials… *The word "shall" is not always absolutely obligatory. It may be directory. It may no doubt be absolutely obligatory, but one would not be inclined to construe it to be so in the case of the Court of Bankruptcy, if one could avoid it.* (Emphasis added.)

Thus, where a bankruptcy provision provided that where a receiving order is made against a debtor and if the creditors resolve that he be adjudged bankrupt or if no composition or scheme is accepted or approved within a certain period the court "*shall* adjudge the debtor bankrupt", it was held that the court nevertheless had a discretion not to make an adjudication order where the aforesaid conditions were satisfied.[116] Similarly, in the context of rule 98(2) BR, there is strong justification for saying that the court should have an overriding discretion whether to set aside a bankruptcy demand, even where one or more grounds for setting aside enumerated in that provision have been established.

2. *Disputed debts*

As has been seen, rule 98(2)(b) BR allows the setting aside of a statutory demand where "the debt is disputed on grounds which appear to the court to be substantial". If the word "shall" in the opening words of rule 98(2) BR is construed as imposing a mandatory directive, rule 98(2)(b) BR will cease to have any meaningful role to play. For on every occasion where there is a substantial dispute as to the debt, the court has no discretion but to set aside the demand under rule 98(2)(d) BR, since the dispute will render the demand an excessive one.

The two provisions cannot be satisfactorily reconciled by contending that rule 98(2)(b) BR applies to demands which are excessive because of a dispute as to the underlying debt while rule 98(2)(d) BR applies to demands which are excessive because of other reasons such as oversight or miscalculation. It is simply not a logical distinction. In any event, such a method of reconciling the two provisions is not available if one accepts the view of the English authorities that the ground in rule 98(2)(b) BR is made out only where there is a substantial dispute on *the whole of the debt*.[117] It would

47.

[116] *Re Lord Thurlow*, *supra*, note 115. See also *Re Pinfold* [1892] 1 QB 73.

be nonsensical to say that a demand may be set aside on the ground of a substantial dispute only if the dispute extends to the whole of the debt, but that a demand which inadvertently states a sum which exceeds by any amount the true debt owing may *ipso facto* be set aside. Harmony between rule 98(2)(b) BR and rule 98(2)(d) BR may thus be achieved only if the word "shall" in the opening words of rule 98(2) BR is read as empowering the court to set aside a demand rather than mandating it to do so.

3. *Set-offs*

The same point may be made with respect to the relationship between rule 98(2)(a) BR, in so far as it refers to set-offs, and rule 98(2)(d) BR. The former provides that it is a ground for setting aside a statutory demand if "the debtor appears to have a valid … set-off … which is equivalent to or exceeds the amount of the debt or debts specified in the statutory demand". The "set-off" referred to in rule 98(2)(a) BR must include an equitable set-off. However, an equitable set-off will raise a dispute as to the debt which forms the subject of the demand.[118] This is because an equitable set-off, which arises when the claim and cross-claim arise out of the same contract or transaction and are so inseparably connected that one ought not to be enforced without taking account of the other, is a defence to the petitioner's claim and, if it is arguable that the company is entitled to assert an equitable set-off, there would be a *bona fide* dispute on substantial grounds.[119]

If this reasoning is correct, then again rule 98(2)(a) BR cannot sit comfortably with rule 98(2)(d) BR unless the word "shall" in the opening words of rule 98(2) BR is read as "may".

4. *Understated demands*

What of a statutory demand which *understates* the true amount owing by the debtor? Such a demand does not comply with rule 94(2) BR, since

[117] *Supra*, note 95.

[118] See, in the context of corporate liquidation, *Re Clem Jones* [1970] QWN 6; *Altarama Ltd* v *Camp* (1980) 5 ACLR 513; *McDonald's Restaurants Ltd* v *Urbandivide Co Ltd* [1994] 1 BCLC 306. It may be that *Viking Consultants Pte Ltd* v *Syarikat Jaya Utara Construction (Kedah) Sdn Bhd* CSLR XX [1633] may be explained as a case of an equitable set-off, though this was not expressly mentioned in the judgment. See also *General Welding and Construction Co (Qld) Pty Ltd* v *International Rigging (Aust) Pty Ltd*, *supra*, note 42, at 570.

it does not state the actual amount of the debt that has accrued as of the date of the demand. But surely there is nothing objectionable about such a demand; the only consequence of an understated demand is that the bankruptcy proceedings will fail as long as the debtor pays off the understated amount, even though he leaves the balance outstanding. Yet, if one takes the view that the word "shall" in the opening words of rule 98(2) BR imposes a mandatory directive on the court, there seems to be no escape from the conclusion that an understated demand *must* be set aside by the court. Reading "shall" as "may" will avoid this ludicrous result.

E. *Verdict*

It is submitted that, on balance, there are sufficient considerations to justify the displacement of the *prima facie* meaning of "shall" in the opening words of rule 98(2) BR and the conferring on the court of an overriding discretion not to set aside a statutory demand notwithstanding that one or more of the grounds in that provision has been made out. The contrary position causes prejudice to the creditor while being unduly benign to the debtor. Giving the court the discretion to refuse to set aside an overstated demand will prevent the bankruptcy proceedings from being defeated by technicalities but, at the same time, protect the debtor from any oppressive or unfair treatment by the creditor.

This, however, does not necessarily mean that the rules governing excessive statutory demands in bankruptcy proceedings may be completely harmonised with those applying to excessive statutory demands in winding up proceedings. Neither does it compel the conclusion that the English authorities with regard to the setting aside of an overstated bankruptcy demand in England may be applied without qualification. This is because, unlike the corporate liquidation legislation and the English bankruptcy legislation, the failure to state the actual amount of the debt in the statutory demand is expressly singled out as a ground for setting aside the statutory demand. This must be accorded some weight. It would appear that the legislative intention is that the courts should take a less liberal approach towards excessive demands in bankruptcy than is the case in winding up proceedings or English bankruptcy proceedings.

It is therefore submitted that a creditor who has served an excessive statutory demand on an individual debtor has a somewhat heavier burden of showing that no prejudice has thereby been caused to the debtor, as compared to the case of an excessive statutory demand in winding up proceedings or English bankruptcy proceedings. Obviously, if the individual debtor is unable to point to a specific and undisputed sum which is due, the overstated demand will probably be deemed ineffective, as is the case in winding up proceedings. But this should not always be necessary. Even

if the debtor is able to identify a specific and undisputed sum that is due, the court may, in an appropriate case, set aside the statutory demand. The court must take into account all the circumstances and the dealings between the parties as well as balance their respective interests. In particular, the court should be entitled to consider any relevant personal circumstances of the debtor such as his awareness of the consequences of non-compliance with the statutory demand or lack thereof, any attempts on his part to pay or compromise the debt or part thereof, his explanations for not complying with the demand, whether he has been legally advised and so on.

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[119] See, in the context of corporate liquidation, *McDonald's Restaurants Ltd* v *Urbandivide Co Ltd*, *supra*, note 118.

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