HCB 6083/2018
[2019] HKCFI 2782

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

BANKRUPTCY PROCEEDINGS NO 6083 OF 2018

RE :	LI XIAOMING	Debtor
EX PARTE :	DILIGENT MYRIA LIMITED	Petitioner

Before: Deputy High Court Judge William Wong SC in Court
Date of Hearing: 6 November 2019
Date of Decision: 15 November 2019

D E C I S I O N

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1. On 24 October 2019, Diligent Myria Limited (the "Petitioner") presented a bankruptcy petition ("the Petition") against Li Xiaoming (the "Debtor") based on a statutory demand dated 26 July 2018 (the "Statutory Demand").

2. The Petition is based on a debt arising out of a settlement agreement dated 13 February 2018 (the "Settlement Agreement"), whereby the Debtor agreed, *inter alia*, to pay the Petitioner US$5,000,000 on 30 June 2018 (the "Petitioning Debt") (see clause 3, sub-clauses 1(1) and (2) of the Settlement Agreement).

3. There is no dispute that the Debtor signed the Settlement Agreement. The Debtor, however, submitted that he signed the Settlement Agreement under duress or at least there are triable issues as to whether he signed the Settlement Agreement under duress which renders the Settlement Agreement voidable.

APPLICABLE LEGAL PRINCIPLES

4. The relevant legal test is well established. The burden rests on a debtor to demonstrate to the Court with sufficiently precise factual evidence that there is a *bona fide* dispute of the petitioning debt on substantial grounds. It is not enough for a debtor to simply raise some factual disputes and submit that such factual disputes have to be resolved in a trial.

5. There are *dicta* to the effect that the threshold test for resisting a petition would require a higher standard (see *Re ICS Computer Distribution Ltd* [1996] 1 HKLR 181 at 183G–J *per* Rogers J (as he then was)). In practice, I do not see how this higher standard will yield a different result when applying to the facts of a particular case. Recently, in *Re Leung Cherng Jiunn (debtor)* [2016] 1 HKLRD 850, Kwan JA (as she then was) at §27(4) said:

> " Notwithstanding this difference, it is fair to say that the threshold tests in both situations are broadly similar, as noted in the two recent English authorities. If a petition is dismissed on the basis there is a *bona fide* dispute on substantial grounds, it would be most unlikely that summary judgment could be obtained. Most probably, the defendant would be given leave to defend, whether unconditionally, or with conditions imposed if his defence is regarded as shadowy. Conversely, where a defendant has obtained leave to defend, unconditionally or with conditions, it would be most unlikely that a petition would be granted. See *Markham v Karsten* at [45]. The statements of Rogers J in *ICS Computer* at 183E–F did not suggest otherwise."

6. I am of the view that the key is for the Court to assess whether there are real and substantial disputes of facts which render the summary procedure of a bankruptcy and/or winding up proceedings unsuitable for the determination of such real and substantial disputes of fact. In such scenario, the validity of the petitioning debt would need to be fully investigated in a trial. However, peripheral and/or disputes of fact which do not go to the foundation of the petitioning debt are normally distractions and are irrelevant in determining whether there are *bona fide* disputes to the petitioning debt on substantial grounds.

MATERIAL FACTS

7. Prosper Huge Limited, a British Virgin Islands incorporated company, is 100% owned by the Debtor ("Prosper Huge"). By an agreement dated 9 September 2009 entered between Prosper Huge and the Petitioner, Prosper agreed to sell and the Petitioner agreed to purchase 833 shares in Prosper Huge for US$4,998,000 (the "2009 SPA").

8. Clause 4.2 of the 2009 SPA provided that Prosper Huge would acquire the mining rights to 16 mines in Cambodia, and seek to raise funds by selling those rights for not less than US$1 billion. If within 24 months the mining rights could not be sold for the said amount, the Petitioner had a right to require Prosper Huge to redeem the 833 shares at a price which would give the Petitioner an internal rate of return of 25% on its initial investment.

9. On 9 September 2009, Prosper Huge and the Petitioner also signed an "irrevocable guarantee" (the "Guarantee") which provided the Debtor agreed to guarantee the performance of Prosper Huge's obligations under clause 4.2 of the 2009 SPA. The Debtor said that he signed the Guarantee only as the authorized representative of Prosper Huge but not in his personal capacity.

10. In 2014, Prosper Huge signed a supplemental agreement (the "Supplemental Agreement") which provided in clause 3 that "*Mr Li agreed to make payment of US$32.483 million by 20 February 2014 in two tranches*" to Caslin Holdings Ltd ("Caslin"), the Petitioner, Goodwill Return Limited ("Goodwill") and Brightest Group Limited ("Brightest Group").

11. The Debtor again said that he signed the 2014 Supplemental Agreement only as the authorized representative of Prosper Huge but not in his personal capacity.

12. By an agreement dated 22 May 2015 entered into between Prosper Huge, Caslin, the Petitioner, Goodwill, Brightest Group and Shengjie (Beijing) Investment Consulting Company Limited ("Shenghie") (the "2015 Supplemental Agreement"), Shengjie agreed to transfer proceeds due and payable to Prosper Huge under a sale and purchase agreement entered into between Shengjie as purchaser and Prosper Huge as seller directly to respectively Caslin, the Petitioner, Goodwill and Brightest Group.

13. The Debtor again said he signed the 2015 Supplemental Agreement only as the authorized representative of Prosper Huge but not in his personal capacity.

14. On 5 February 2018, the Debtor met with Wang Le Tian ("LT Wang") and others. Niu Shiming's ("Niu") evidence is that Li "*reconfirmed his personal obligations as a guarantor to repay the debts owed to the Petitioner and Brightest Group Ltd regarding their respective investments in Prosper Huge Limited.*" Niu is a shareholder of the Brightest Group Limited.

15. The Debtor's evidence is that the parties met to discuss the 2009 SPA and he "*did not admit any personal obligation*" as he only "*participated in the discussions and negotiations in my capacity as the representative of Prosper Huge.*"

16. On 6 and 8 February 2018, Zhang Jianfeng ("Zhang") (being Vice President in a company founded by LT Wang and who assisted LT Wang in the matters giving rise to these proceedings) sent by email various draft agreements to Wang Yuanheng ("Wang") (being the Chief Counsel of Lung Ming Mining Company Limited ("Lung Ming"), a company established by the Debtor.

17. It is significant that on 9 February 2018, the Debtor, LT Wang, Li Bing and Niu signed a memorandum which recorded a timetable for repayment by the Debtor personally ("the Memorandum").

18. On 10 February 2018, Zhang sent further draft agreements to YH Wang by email.

19. On 12 February 2018, Zhang and YH Wang engaged in further email correspondence. YH Wang asked Zhang for the underlying investment agreements signed by the Debtor but Zhang refused to provide them to YH Wang.

20. On 13 February 2018, LT Wang, Li Bing, Niu, Xiong Yan and Zhang ("Five Individuals") went to Lung Ming's office on the 68th Floor of Central Plaza, Wan Chai (the "Debtor's Office") at around 11 am and did not leave until 10 – 11 pm.

21. By the time the Five Individuals left the Debtor's Office, the Debtor has signed four agreements, including the Settlement Agreement.

22. The Debtor's case is that he signed the Settlement Agreement under duress. He has elected to avoid the Settlement Agreement. Hence the same is unenforceable.

23. The Settlement Agreement contains the following terms and provisions:

(1) Recital 1 referred to the 2009 SPA and provided that Li had provided an irrevocable guarantee;

(2) Recital 2 set out the principal amounts invested by respectively the Petitioner, Goodwill, Brightest Group and Well Victory;

(3) Clause 1 provided that the Settlement Agreement superseded and replaced all previous agreements; and

(4) Clause 2 provided that the Debtor shall pay other parties US$51.67 million by 30 June 2018 (being US$37.48 million in principal and US$14.19 million in interest).

ANALYSIS

Duress

24. The legal principles relating to duress are well established.

25. First, there are two elements in the wrong of duress. First, pressure amounting to compulsion of the will of the victim. Second, the illegitimacy of the pressure. The legitimacy of the pressure must be examined from two aspects. First, the nature of the pressure and second, the nature of the demand which the pressure is applied to support. (See *Universe Tankships v International Transport Workers Federation* [1983] 1 AC 366 at 400 – 401 *per* Lord Scarman.)

26. Secondly, duress of the person is a threat to the life, health or liberty of an individual to induce the person threatened to enter into a contract or to make a payment. An unlawful detention or an illegitimate threat to imprisonment can constitute duress, even though there is no threat to life or limb. (See Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (3rd ed) at §§5-002 to 5-003.)

27. Thirdly, in the case of duress of the person, the complainant only needs to prove that the pressure was *a reason* why he entered into the contract and the court will conclude that the illegitimate pressure induced the contract unless there is evidence that the illegitimate pressure in fact contributed nothing to the decision to enter the contract. It follows that it is unnecessary for the complainant in the case of threats to the person to demonstrate that he had no practical alternative but to enter into the challenged contract. (See *Duress, Undue Influence and Unconscionable Dealing* at §§4-003 to 4-024.)

28. Fourthly, the legal principles in relation to economic duress are succinctly summarised by Mr Justice G Lam in *Zebra Industries (Orogenesis Nova) Ltd v Wah Tong Paper Products Group Ltd* [2016] 1 HKC 213 at 234 – 237 as follows:

(1) Economic pressure may be sufficient to amount to duress, provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract;

(2) Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed;

(3) In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract.

29. Having carefully considered the evidence and despite Mr Chen's able and admirable submissions, I am of the view that the Debtor has failed to discharge his burden that there are *bona fide* disputes on the issue of duress. On the facts of the present case, it is quite clear to this Court that there is no substance in the defence of duress.

30. First, it is significant that just four days prior to the signing of the Settlement Agreement, the Debtor willingly signed the Memorandum. Clause 3 specifically provided that between 31 March 2018 and 30 June 2018, the Debtor agreed to repay a total of US$77,948,800 to LT Wang, Li Bing and Niu. The Debtor did not then state that he was not personally liable. As the Debtor is the 100% beneficial owner of Prosper Huge, it is most natural that the Petitioner would look to the Debtor for a personal guarantee in respect of Prosper Huge's liabilities. There is also no question that he signed the Memorandum voluntarily and without any duress. It does not matter that the signatories of the Memorandum were individuals' and not their corporate entities' as the core issue is the Debtor's acknowledgement of his personal obligations on a voluntary basis.

31. Secondly, Mr Chen for the Debtor submitted that the Debtor's evidence is that after the Debtor said that he had more important and urgent

matters to attend to, the Five Individuals said that "*they would not allow [him] to leave until [he] concluded the repayment agreements with them*". The Debtor "*refused to read the documents, and the [Five Individuals] refused to let [him] exit the conference room*".

32. I am of the view that the complained conducts in no way amount to unlawful detention or imprisonment. The alleged event happened in the Debtor's own office. He was at liberty to call security guards and/or his own staff if he really would like to leave his own office. He could have called the Hong Kong Police.

33. Further, there is no evidence that the Debtor protested after he signed the Settlement Agreement. He did not even seek to avoid the Settlement Agreement after 13 February 2018. He did not apply to set aside the Statutory Demand on the ground of duress. He only raised this as a defence when the Petition was presented against him.

34. Mr Chen for the Debtor submitted that it could well be that the Debtor would like to maintain an amicable commercial relationship albeit that he was coerced to sign the Settlement Agreement against his will. I do not find such version of event capable of being believed. If the Debtor was indeed coerced to sign the Settlement Agreement by reason of duress or a threat to his personal safety or that he would be followed as alleged, I find it incredible that he would not have tried to avoid the Settlement Agreement at the first available opportunity at the least shortly after the Reverse Takeover deal ("RTO Deal").

35. Thirdly, Mr Chen for the Debtor submitted that the Five Individuals stayed at the Debtor's Office for at least 10 hours and, by the end of the 10 hours, the Debtor had signed four agreements including the

Settlement Agreement. It was submitted that this supports the Debtor's case that he was detained in the Office against his will. I disagree. Very often, commercial negotiations and/or mediations took substantial period of time. They could even go into early hours. That by itself does not render any deals and/or agreements reached voidable by reason of duress. Mr Chen submitted that the four agreements were signed by the Debtor only after a marathon, 10-hour negotiation without the presence of any lawyers supports the conclusion that the Debtor signed the agreements under duress. I have no difficulties in rejecting such submission. If it were otherwise, many hard bargained commercial deals could be set aside easily. That cannot be correct.

36. Fourthly, it is also important to note that the 2014 Supplemental Agreement which was signed by the Debtor contains a clear statement that the Debtor provided irrevocable personal guarantee to the other parties including the Petitioner. The document is in Chinese and he voluntarily signed it.

37. The 2015 Supplemental Agreement also clearly states that the Debtor agreed to repay both the principal and interest to the other parties, again, including the Petitioner. Mr Chen for the Debtor placed great emphasis on the fact that the Debtor signed in the capacity as the representative of Prosper Huge and not in his capacity. In my view, that is irrelevant. What is important is that both the 2014 Supplemental Agreement and the 2015 Supplemental Agreement contain clear statements of fact which the Debtor willingly appended his signatures to. The Debtor is a seasoned businessman. If there are statements of fact which are incorrect in contractual documents, it is hard to believe that he will not have proposed amendments to the same.

38. Mr Oh for the Petitioner submitted that it is inherently incredible that the Five Individuals could have threatened not to let the Debtor leave the conference room when the whole event took place in the Debtor's Office. The staff of the Debtor's Office and of the property management responsible for the Debtor's Office would have likely outnumbered the Five Individuals and had the legal right to evict the Five Individuals from the Debtor's Office. The Debtor could have sought help from the Hong Kong Police to remove the Five Individuals if indeed they were trespassing. All these accord with common sense and I agree.

39. I also agree that the so-called threat by the Five Individuals that they would not leave Hong Kong without the Debtor signing the Settlement Agreement could hardly be considered as a threat. The mere presence of the Five Individuals in Hong Kong could hardly be a threat to the Debtor.

40. At the end of the day, other than bare allegations, there is no sufficiently precise factual evidence that the Debtor was subject to unlawful detention or threats to personal safety. In view of the overall circumstances of the case including the execution of the Memorandum, I do not find the defence of duress of the person capable of being believed.

41. Insofar as economic duress is concerned, the Debtor's evidence is that the Five Individuals threatened to "*submit reports to the SEHK to jeopardize the RTO Deal [Li] was working on*" if the matter was not concluded to their satisfaction. The RTO Deal was a reverse takeover transaction involving an entity listed on the Hong Kong Stock Exchange. It is said that its value to the Debtor far outweighed the Debtor's liabilities under the Settlement Agreement.

42. Mr Chen for the Debtor referred to an email dated 28 September 2018 from Zhang to YH Wang in which Zhang demanded the Debtor to make payment by 10 October 2018, failing which LT Wang would commence legal proceedings, Zhang stated that LT Wang's side was "*preparing an open letter, and will disclose the details of the dispute with Li to other investors and organizations such as the SEHK*."

43. At the hearing, Mr Chen for the Debtor very fairly agreed that the said email did not amount to economic duress. Creditors of the Debtor are entitled to commence legal proceedings and to disclose the details of such disputes to other investors. It is hard to imagine that that would amount to economic duress.

44. Mr Oh for the Petitioner submitted that the Debtor simply has not adduced sufficiently precise factual evidence as to how the Five Individuals had threatened to jeopardise the RTO Deal. For example, did the RTO Deal involve illegality or impropriety that the Five Individuals knew and could be disclosed to the SEHK? It was further submitted that if what the Five Individuals did was like what were set out in the email dated 28 September 2018, it could hardly be considered as sufficient basis for the Court to even consider whether any duress had taken place. I agree.

45. Mr Oh further submitted that the allegation of an economic duress is not capable of being believed as the fact is that the Five Individuals never submit any reports to the SEHK despite the Debtor's failure to abide by the terms of the Settlement Agreement.

46. Further, the Debtor had the independent advice of YH Wang, a qualified solicitor in Hong Kong not only on 13 February 2018 but also on the days leading up to and after 13 February 2018.

47. Crucially, I am of the view that the allegation of duress in both forms has to be viewed and analysed against the contemporaneous documents at the relevant time.

48. First, the Settlement Agreement was signed on 13 February 2018. On 10 September 2019, some seven months after the event, HY Wang on behalf of the Debtor emailed three copies of a draft supplemental settlement agreement to Zhang. In the recital to the draft supplemental settlement agreement, the Settlement Agreement was specifically referred to and relied upon.

49. I accept Mr Chen's submission that the email specifically stated that the content of the draft supplemental settlement agreement was subject to the perusal and comments of the Debtor. However, the mere fact that the Settlement Agreement was referred to and relied on by HY Wang on behalf of the Debtor does not at all sit well with a case that the Settlement Agreement was concluded as a result of duress.

50. Secondly, a sum of US$650,000 was paid by one of the Debtor's company, Business Universe Limited to Li Bing in June 2018. Mr Chen submitted that it was not a payment made on behalf of the Debtor. However, there is no credible explanation as to why the Debtor had to arrange his corporate vehicle to make such payment to Li Bing other than for the purpose of effecting partial repayment under the Settlement Agreement.

51. Further, the payment of RMB 400,000 to LT Wang's corporate vehicle is evidenced by the WeChat records in February 2019 (after the commencement of the Petition). Although the Debtor claims that the said payment was unrelated to the Settlement Agreement, LT Wang has confirmed that there is no other reason for his corporate vehicles to receive the said sum of RMB 400,000.

52. Thirdly, draft settlement agreements were sent to YH Wang by Zhang from 6 February 2018 to 12 February 2018. On 12 February 2018, YH Wang himself acknowledged that the Settlement Agreement and other agreements would be signed on the following day, namely, 13 February 2018. All the emails sent by Zhang to YH Wang on 13 February 2018 indicate that there were changes and amendments made to the draft agreements, contrary to the Debtor's assertion that the Five Individuals had refused him to make any changes. All these objective facts do not sit well with the Debtor's case of duress.

53. Fourthly, as in January 2019, the Debtor still reassured the Five Individuals through Xiong Yun that he would settle the outstanding debts under, *inter alia*, the Settlement Agreement. In a WeChat message dated 7 January 2019 from Xiong Yun, it is recorded that the Debtor asked him to relate a message and he was trying his best to prepare some funds for repayment and also the opposition in court was only for the purpose of buying time.

54. For the sake of completeness, Mr Chen for the Debtor sensibly did not take the point that the Settlement Agreement is not supported by consideration. As far as Mr Oh's reliance of the doctrine of estoppel by convention is concerned, I agree with Mr Chen for the Debtor that this adds nothing to the analysis on the central issue, namely, whether there is a *bona fide* dispute that the Settlement Agreement is voidable by reason of duress. In any event, I am of the view that there are sufficient contemporaneous documentary evidence which support the Petitioner's case that the Debtor had personally guaranteed Prosper Huge's liabilities under the 2000 SPA.

DISPOSITION

55. For all the reasons stated above, I make the following orders:

(1) A bankruptcy order be made against the Debtor;

(2) A costs order *nisi* that the Debtor is to pay the costs of and incidental to the Petition to the Petitioner, on a party to party basis, to be taxed if not agreed. The costs order *nisi* will be made absolute unless the parties take out applications to vary the same within 14 days from the date hereof.

56. Finally, it remains for me to thank Mr Oh for the Petitioner and Mr Chen for the Debtor for their helpful assistance to this Court.

(William Wong SC)
Deputy High Court Judge

Mr Nicholas Oh, instructed by Li & Partners, for the petitioner

Mr David Chen, instructed by Livasiri & Co, for the debtor

Attendance of the Official Receiver was excused