DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
[RAYUAN SIVIL NO. W-03(IM)(NCC)-86-07/2018]

ANTARA

HONG LEONG BANK BERHAD
(NO. SYARIKAT: 97141-X) ... PERAYU

DAN

ONG MOON HUAT
(NO. K/P: 581109-10-6625/5483422) ... RESPONDEN

[Dalam Perkara Mahkamah Tinggi Malaya Di Kuala Lumpur
Dalam Wilayah Persekutuan Kuala Lumpur, Malaysia
(Bahagian Dagang)
Notis Kebankrapan No. WA-29NCC-1067-04/2018

Antara

Re: Ong Moon Huat
(No. K/P: 581109-10-6625/5483422) ... Penghutang Penghakiman

Dan

Ex-Parte: Hong Leong Bank Berhad
(No. Syarikat: 97141-X) ... Pemiutang Penghakiman

HEARD TOGETHER WITH
IN THE COURT OF APPEAL MALAYSIA
(APPELLATE JURISDICTION)
[CIVIL APPEAL NO. W-03(IM)(NCC)-94-08/2018]

BETWEEN

MALAYAN BANKING BERHAD
(COMPANY NO. 3813-K) ... APPELLANT

AND

LIM SOW HOON
(NRIC NO. 681102-10-6276) ... RESPONDENT

[In the High Court of Malaya at Kuala Lumpur
(Commercial Division)
In the matter of Bankruptcy No. WA-29NCC-476-02/2018

Between

Re: Lim Sow Hoon
(NRIC NO. 681102-10-6276) ... Judgment Debtor

And

Ex-Parte : Malayan Banking Berhad
(Company No. 3813-K) ... Judgment Creditor

CORUM:
NALLINI PATHMANATHAN, JCA
BADARIAH SAHAMID, JCA
ZABARIAH MOHD YUSOF, JCA

ABRIDGED GROUNDS OF JUDGMENT

[1] Two appeals were argued before us last week. The appeals relate to two specific questions namely:

(a) Whether the word *"debtor"* in *"to recover the debts owed to him by the debtor"* in **section 5(4) of the Insolvency Act** 1967 refers to the guarantor or the principal debtor;

(b) When or at what point should an application for leave under **section 5(3)(b) of the Insolvency Act 1967** be made?

Issue (a): Whether the word "debtor" in "to recover the debts owed to him by the debtor" in section 5(4) of the Insolvency Act 1967 refers to the guarantor or the principal debtor

[2] With respect to issue (a) we are satisfied upon a consideration of the judgment of the learned judge as well as the submissions both written and oral of learned counsel for the appellants in both appeals as well as the respondents, that the learned Judge erred in construing the word "debtor" in **section 5(4) of the Insolvency Act 1967.** We came to that conclusion for, *inter alia,* the following reasons.

[3] A purposive construction of the section as a whole discloses that the section seeks to introduce protection for the guarantor against whom bankruptcy proceedings are to be brought. The protection comes in the form of ensuring that enforcement has been exhausted in respect of the principal debtor prior to proceeding against the guarantor. It is to remedy the mischief of judgment creditors proceeding against the guarantors directly in bankruptcy rather than executing and enforcing against the principal debtor. We are borne out in our conclusion by **section 5(6) of the Insolvency Act** 1967that provides:

> *"…For the purposes of subsection (4), modes of execution and enforcement include seizure and sale, judgment debtor summons, garnishment and* ***bankruptcy*** *or winding up proceedings* ***against the borrower."***

[4] It follows therefore that in construing **section 5(4)** regard must be given to **section 5(6)**. And **section 5(6)** provides that the modes of execution and enforcement that must be exhausted include seizure and sale, judgment debtor summons, garnishment and bankruptcy against the borrower. It does not make sense that the reference to debtor in **section 5(4)** refers to the guarantor because **section 5(6)** specifies bankruptcy as one of the modes of enforcement that must be exhausted. As bankruptcy has not been commenced against the guarantor, it makes

the entire construction that "debtor" includes the guarantor, wholly untenable and incomprehensible.

[5] The only reasonable construction that can be accorded is that "debtor" in **section 5(4)** refers to the principal debtor or the borrower. The fact that the word "borrower" was not used does not preclude the construction we have adopted. On the contrary such a construction is fully in accord with the purposive approach to be adopted in construing the section as outlined above.

[6] We are further supported by the decision of the Federal Court in *Khairulnizam's* case (*Hong Leong Bank Bhd v. Khairulnizam bin Jamaludin* [2016] 4 MLJ 302) which in paragraph 35 stipulates that:

> *"In the instant case the High Court, as mentioned earlier, was satisfied from the affidavit evidence that* ***the appellant had proved that it had exhausted all avenues to recover debts owed to him by the hirer.*** As *such the appellant had satisfied the requirement of section 5(3) of the Act to commence the bankruptcy action against the respondent."*

[7] In that case the hirer was the principal debtor. In other words the Federal Court construed the section on social guarantors (which is identical in terms to the new **section 5(4))** such that it was incumbent upon a judgment creditor to exhaust all avenues of execution and enforcement against a principal debtor and not the guarantor himself.

[8] In this context we are unable to concur with Her Ladyship in the High Court that **Khairulnizam** is distinguishable because it deals with **section 5(3)** and not **section 5(4)**. As stated above the two sections are similar and serve a similar purpose, namely to protect guarantors.

Where previously only social guarantors were protected. Parliament has seen fit to extend such protection to all guarantors. Therefore the underlying purpose being the same, the construction in **sections 5(3) and (4)** should accord with each other.

Issue (b): When or at what point should an application for leave under section 5(3)(b) of the Insolvency Act 1967 be made?

[9] In relation to Appeal No. 86, it was postulated by learned counsel for the appellant that such an application can only be made after the bankruptcy notice has been served on the guarantor/judgment debtor such that an act of bankruptcy has been committed, and not prior to that.

[10] In relation to Appeal No. 94, the position taken by learned counsel for the appellant is that the application for leave may be applied for, soon after the issuance of the bankruptcy notice, pursuant to a request for the issue of the bankruptcy notice.

[11] We have considered the competing submissions of learned counsel on this subject. At the forefront of the argument in favour of the contention that the application for leave can only be made after the bankruptcy notice has been served such that an act of bankruptcy has been committed, is the Federal Court case of **Khairulnizam.** It was submitted before us, in reliance on particularly paragraph 34 of the judgment that leave should only be obtained after the act of bankruptcy has been committed and not at any time prior to that.

[12] The appellant in Appeal No. 94 contends otherwise and also **invokes Rule 97 of the Insolvency Rules** in support.

[13] A reading of **Khairulnizam's case**, as we understand it, discloses that the primary issue before the Federal Court was whether a judgment

creditor is bound to obtain leave PRIOR to commencing bankruptcy proceedings? In that case the learned Judicial Commissioner, despite finding that all modes of execution and enforcement against the principal debtor had been exhausted, went on to hold that there had not been compliance with **section 5(3) of the Insolvency Act 1967** because the Judgment Creditor had not obtained such leave before commencement of the bankruptcy proceedings against the judgment debtor who was a social guarantor. In short it appears that the Judgment Creditor read the section as requiring leave to be obtained either before the issuance of the request for the filing of a bankruptcy notice or soon thereafter. This, the Federal Court held, was wrong. The Federal Court accepted the appellant's submission that there was nothing provided in the **Act** or **Rules** under the bankruptcy provisions that an ex-parte application for leave to commence a bankruptcy action against a social guarantor should be made when applying for the issuance of a bankruptcy notice. The Federal Court refused to take such a narrow and restrictive meaning and held instead that all a creditor has to do is to satisfy the court at the hearing of the creditor's petition that it has exhausted all avenues to recover debts owed to it by the principal debtor. That it was held could be done by way of an affidavit pursuant to **section 6(1) of the Insolvency Act 1967**. It is in this context that the Federal Court went on to hold that a judicial decision was made at the creditor's petition stage whereas the issuance of a bankruptcy notice is more administrative in nature.

[14] However there is nothing in the judgment of the Federal Court that holds that:

(i) A judgment creditor is precluded from filing an application for leave at the point in time when the bankruptcy

proceedings are initiated;

(ii) On the contrary the Federal Court is extending time for the obtaining of leave of court to proceed against a social guarantor up to the point in time when a creditor's petition is filed, at which point it is necessary to stipulate that leave of court has been obtained;

(iii) In other words there is nothing to prevent a judgment creditor from obtaining leave at a point in time prior to the commission of an act of bankruptcy i.e. soon after the issuance of the bankruptcy notice or with the application for the issuance of a bankruptcy notice. The practical difficulty is that there will be no cause papers with an intitulement to enable the judgment creditor to file a summons in chambers and affidavit in support until the bankruptcy notice is issued. Therefore most solicitors, as a matter of practice may wish to obtain leave as a matter of prudence at this juncture, rather than wait for the act of bankruptcy to be committed. This is because it leaves a very narrow window of time for the application for leave to be filed and heard. However as stated by the Federal Court in **Khairulnizam** it is open to a judgment creditor to even simply file an affidavit in support at a later stage prior to the filing of the creditor's petition which will require confirmation, as a matter of fact, that all other avenues against the principal debtor have been exhausted.

[15] For these reasons we are of the view that on a proper reading of **Khairulnizam** which is wholly relevant coupled with **section 5(3)(b)** as

well as **Rule 97** it is open to a judgment creditor to file an application for leave to proceed against a guarantor either upon the issuance of the bankruptcy notice, or even prior to that, up to and immediately prior to the filing of a creditor's petition. This gives leeway to the judgment creditor to obtain such leave as it deems fit in the circumstances of a particular case. This will in no way prejudice the judgment debtor/guarantor who is protected by the legislation which requires such leave to be obtained as a prerequisite to the grant of receiving and adjudication orders.

[16] Therefore both appeals No. 86 and No. 94 are allowed. We award costs of RM10,000-00 for all 3 levels to the Appellant subject to allocatur in Appeal No. 86; and RM3,000-00 for the Appellant in Appeal No. 94 subject to allocatur.

Dated: 29 OCTOBER 2018

Counsel:

Appeal No. W-03(IM)(NCC)-86-07/2018

For the appellant - Satish Nair & R Kathir; M/s Satish Alli & Associates
Peguambela & Peguamcara
No. 23-2, 2nd Floor, Jalan 26/70A
Desa Sri Hartamas
50480 Kuala Lumpur

For the respondent - M. Indrani; M/s M Indrani & Associates
Peguambela & Peguamcara
2570A, Persiaran Raja Muda Musa
41100 Klang

Appeal No. W-03(IM)(NCC)-94-08/2018

For the appellant - Yap Cheng Hoe & Kingston Tan; M/s CH Yeap Maluda Cheh

Peguambela & Peguamcara
18-3A, Udarama Complex
Jalan 3/64A Off Jalan Ipoh
50350 Kuala Lumpur