IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY OF WILAYAH PERSEKUTUAN

(COMMERCIAL DIVISION)

[IN THE MATTER OF A BANKRUPTCY NO. 29NCC-4423-09/2015]

RE: GOH WEE PENG
(NRIC NO: 660630-10-6381) … JUDGMENT DEBTOR

EX-PARTE: STANDARD CHARTERED BANK MALAYSIA BERHAD
(COMPANY NO: 115793-P) … JUDGMENT CREDITOR

BEFORE

Y. A. KHADIJAH IDRIS
JUDICIAL COMMISSIONER

GROUNDS OF JUDGMENT

Introduction

[1] This appeal originates from a bankruptcy proceeding Kuala Lumpur High Court of Malaya 29NCC-4423-09/2015 (Bankruptcy Proceeding) where the Judgment Debtor's application to set aside a Bankruptcy Notice dated 15 September 2015 was dismissed by the Senior Assistant Registrar (SAR) on 18 August 2016.

Factual Background

[2] The Judgment Debtor, Standard Chartered Bank Malaysia Berhad, obtained a judgment in default against the Judgment Creditor, one individual by the name Goh Wee Peng, in the Kuala Lumpur Sessions Court on 16 May 2014 (Judgment in Default). The terms of the Judgment in Default is as follows –

(a) that the Judgment Debtor and Alspec Technology Sdn Bhd (company No. 570807-M) jointly and severally pay to the Judgment Debtor a sum RM452,124.46 as at 7 April 2014;

(b) interest at the rate of 15.00% per annum in respect of the sum RM452,124.46 base on monthly calculation commencing 8 April 2014 until date of full settlement; and

(c) cost of RM1000.00

[3] On 15 September 2015 the Judgment Creditor commenced the Bankruptcy Proceeding by filing a bankruptcy notice of even date (Bankruptcy Notice) against the Judgement Debtor. Via the Bankruptcy Notice the Judgment Debtor is demanded to pay to the Judgment Debtor a sum RM379,267.95 as at 15 September 2015 within 7 days from the service of the Bankruptcy Notice. The sum RM379,267.95 was stated as the sum due and payable under the Judgment in Default obtained against the Judgment Debtor. The Bankruptcy Notice was personally served on the Judgment Debtor on 3 October 2015.

[4] The Judgment Debtor failed to remit payment as demanded in the Bankruptcy Notice within the time stipulated therein. As such an act of bankruptcy was committed by the Judgment Debtor on 13 October 2015.

[5] On 2 December 2015 the Judgment Creditor presented a creditor's petition (Creditor's Petition) against the Judgment Debtor. The Creditor's Petition was personally served on the Judgment Debtor on 16 December 2015. It was endorsed on the Creditor's Petition that the petition shall be heard on 18 January 2016.

[6] Based on record, when the petition came up for hearing on the 18 January 2016 the Judgment Debtor requested for the hearing be adjourned on the ground that he intend to discuss with the bank/Judgment Creditor and that he will pay RM150,000.00. The hearing was adjourned to 21 March 2016 on which date the Judgment Debtor informed the court that he was not able to pay the full amount and proposed partial payment of RM80,000.00. The hearing was again adjourned, to 20 April 2016. On that particular hearing date the Judgment Creditor informed the court a sum RM80,000.00 was paid by the Judgment Debtor. Hearing of the Creditor's Petition was again postponed to 10 May 2016.

[7] On 8 May 2016 a summons in chambers (Enclosure 9) was filed by the Judgement Debtor seeking for, among others, an order that the Bankruptcy Notice be set aside and the Creditor's Petition be dismissed. On 18 August 2016 the said application was heard by the SAR who dismissed the application on the same day.

Preliminary Objection

[8] At the outset the Judgment Creditor raised a preliminary objection to the filing of Enclosure 9 on the ground that no notice of intention to show cause against the Creditor's Petition was filed by the Judgment Debtor under Rule 117 of the Bankruptcy Rules 1969 (Bankruptcy Rules). As such the summons in chambers and the supporting affidavit are irregular and ought not to be entertained by court.

[9] The Judgment Debtor submits the said Rule 117 is not applicable because Enclosure 9 is premised on different grounds. It is the Judgment Debtor's position that Rule 117 of the Bankruptcy Rules is only applicable if the Judgment Debtor has any counter claim, set off or cross demand against the Judgement Creditor as provided in s. 3(1)(i) of the Bankruptcy Act 1967 (Bankruptcy Act).

[10] The summons in chambers is grounded on the basis that no act of bankruptcy was committed by the Judgment Debtor and that as a guarantor the Judgment Debtor is entitled to exercise his right for contribution.

[11] The Judgment Debtor contends the summons in chambers has duly complied with Rule 18 and 20 of the Bankruptcy Rules and it is therefore valid in law.

Enclosure 9

Judgment Debtor's contentions

[12] In support of his application to set aside the Bankruptcy Notice the Judgment Debtor advanced the following grounds via his affidavit Enclosure 4 –

(a) the Judgment Debtor did not commit an act of bankruptcy because the Bankruptcy Notice was defective and cannot be cured under the Bankruptcy Act and the Bankruptcy Rules. The Bankruptcy Notice was defective due to the following grounds –

(i) details of the debt as at 15 September 2015 which the Judgment Debtor was required to pay to the Judgment Creditor under the Judgment in Default was not stated in the Bankruptcy Notice;

(ii) only a statement of account was attached to the Bankruptcy Notice but details of the debt was not set out in the said notice. There is no provision under the Bankruptcy Act and Bankruptcy Rules which allows a statement of account to be attached to a bankruptcy notice; and

(iii) the Bankruptcy Notice did not comply with s. 3(1)(i) of the Bankruptcy Act because the statement stated therein did not made reference to the terms of the Judgment in Default.

(b) the Judgment Debtor is not entitle to Claim the sum RM397,267.95 as at 15 September 2015 on the following grounds –

(i) the action Writ Summons No. B52NCC-257-04/2014 upon which the Judgment in Default was obtained is premised on breach of terms of a banking facility for a term loan of RM500,000.00 (Term Loan Facility) obtained by Alspec Technology Sdn Bhd (Alspec Tech) from the Judgment Creditor. The terms of the Term Loan Facility is contained in a letter of offer dated 28 March 2013 (Letter of Offer) issued by the Judgment Creditor to the Judgment Creditor;

(ii) in consideration of the Term Loan Facility the Judgment Debtor, via a guarantee dated 1 April 2013, agreed to provide a personal guarantee on the principal amount of RM500,000.00 (Personal Guarantee). The Personal Guarantee was given by the Judgment Debtor in his capacity as a director to Alspec Tech;

(iii) at the same time Credit Guarantee Corporation (M) Berhad (CGC) provided 70% guarantee coverage of the Term Loan Facility, that is, RM350,000.00 (CGC Guarantee). The CGC Guarantee and the Personal Guarantee is a condition precedent to the granting of the Term Loan Facility;

(iv) as such the Judgment Debtor's liability in so far as the sum RM379,267.95 (stated in the Bankruptcy Notice) is only RM113,780.39. On 11 April 2016 the Judgment Debtor has paid a sum of RM80,000.00; and

(v) the Judgment Creditor is obliged to claim from CGC its portion of the guarantee under the CGC Guarantee. The failure by the Judgment Creditor to pursue against CGC is the Judgment Creditor's negligence which cause liability under the CGC Guarantee to be discharged and unenforceable.

(c) due to the factors set out in sub-paragraph (b) above the court ought to go behind the Judgement in Default –

(i) as there is miscarriage of justice occasioned on the Judgment Debtor when he was adjudged bankrupt even after payments were made by the Judgment Debtor; and

(ii) the Judgment Debtor has right to contribution from CGC under the CGC Guarantee.

Judgment Creditor's contentions

[13] Pursuant to the Letter of Offer, Alspec Tech which is the principal debtor had agreed to cause CGC to execute the CGC

Guarantee to guarantee 70% of the Term Loan Facility. Pursuant to the Portfolio Guarantee Guideline between the Judgment Creditor and CGC it was agreed that the Judgment Creditor shall exhaust all legal actions against the Judgment Debtor including bankruptcy proceedings before CGC pays the guaranteed money under the CGC Guarantee.

[14] Under the Personal Guarantee the Judgment Debtor agreed to pay the total outstanding amount due and owing by Alspech Tech/principal debtor to the Judgment Creditor. Pursuant to clause 17 of the Personal Guarantee the Judgment Debtor had agreed the guarantee shall be in addition to and it is not to prejudice or to be prejudiced by any other guarantee or other security hold by the Judgment Creditor.

[15] The Judgment Creditor is not required to commence action against CGC to call on the 70% of the GCG Guarantee first before suing Alspech Tech/principal debtor before and/or the Judgment Debtor under the Personal Guarantee.

Court findings

Preliminary objection

[16] Rule 117 of the Bankruptcy Rules provides as follows -

> *Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.*

[17] Based on the facts the Creditor's Petition was served on the Judgment Debtor on 16 December 2015. The said petition bore an endorsement of the hearing date of the petition which was 18 January 2016. This means notice under Rule 117 of the Bankruptcy Act ought to have been filed latest by 14 January 2016.

[18] However the Judgment Debtor argued he is not required to file the said notice because his grounds for disputing the Creditor's Petition was not based on counterclaim, set off or cross demand as stated in s. 3(1)(i) of the Bankruptcy Act.

[19] Learned counsel for the Judgment Creditor cited the case of *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng @Ong Kin Cheang* [1995] 3 CLJ 307 to support the Judgment Creditor's case. In *Datuk Ong Kian Seng @Ong Kin Cheang* (*supra*) the judgment debtor filed an affidavit to oppose the creditor's petition on the ground the bankruptcy notice was invalid on the ground that the interest specified in the said notice as shown in the "Particulars" set out in the bankruptcy notice was wrongly calculated. The judgment creditor/bank objected to the affidavit opposing the creditor's petition and contended the affidavit was not a proper notice to oppose the creditor's petition under Rule 117 of the Bankruptcy Rules which requires a notice in Form 16 to be filed with the Registrar specifying the statements in the creditor's petition which the judgment debtor intends to deny or dispute.

[20] It is to be noted the old Rule 18 of the Bankruptcy Rules requires every application shall be made by motion which is supported by affidavit. Rule 18 was subsequently amended via PU(A) 60/1993 where applications are now required to be made via summons in chambers.

[21] The High Court in *Datuk Ong Kian Seng @ Ong Kin Cheang* (*supra*) overruled the preliminary objection and held the judgment

debtor's affidavit was sufficient notice to the judgment creditor/bank that the judgment debtor intended to oppose the creditor's petition. It was also held by the High Court that the judgment debtor's failure to file a notice under the said Rule 117 was only a formal defect which did not cause substantial injustice to the judgment creditor/bank.

[22] The Federal Court allowed the appeal by the judgment creditor. With regard to Rule 117 the Federal Court held –

> *Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute. The contents of the notice can be found in Form 16 of the rules wherein it must be stated that he intends to oppose the making of the receiving order as prayed and that he intends either to dispute the petitioning creditor's debt or the act of bankruptcy or as the case may be. Rule 18 of the Rules further provides that except where the rules or the Act provide, every application shall, unless the Court otherwise directs, be made by motion supported by an affidavit. In Datuk Lim Kheng Kim, the Supreme Court held that failure to follow r. 18, which requires an application to be made by motion supported by affidavit, renders an affidavit in opposition ineffective and bad in law because unless the Court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that the debtor has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. This Court has no reason to disagree with the decision and will follow it. Accordingly, in our view, the respondent's affidavit in opposition cannot be substituted as a notice to show cause against the creditor's petition to challenge the validity of the bankruptcy notice.*

[23] The Federal Court further held that the judgement debtor's failure to file a notice under Rule 117 of the Bankruptcy Rules supported by an affidavit cannot be excused as a mere formal defect as the said provision clearly provides that if a debtor intends to show cause against the petition, he shall file a notice in Form 16. The breach of a mandatory rule like the said Rule 117 cannot be described as a formal defect or an irregularity that can be cured.

[24] Base on *stare decisis* principle I am bound by the Federal Court decision in *Datuk Ong Kian Seng @Ong Kin Cheang* (*supra*). The Judgment Debtor's failure to file the notice in accordance with Rule 117 is fatal and the summons in chambers Enclosure 9 is invalid and the SAR Registrar was right in allowing the preliminary objection raised by the Judgment Creditor. On this ground alone the Judgment Debtor's appeal ought to be dismissed.

[25] One point which merit consideration is the Judgment Debtor's contention that Rule 117 of the Bankruptcy Act is not applicable to his application Enclosure 9 because notice under the said Rule 117 is only required if the Judgment Debtor has counterclaim, set off or cross demand against the Judgment Debtor. I am of the view such contention is a fallacy for the following reasons –

(a) there is no express provision in Rule 117 of the Bankruptcy Act which limits the requirement to give notice only to cases where the basis of a judgment debtor's dispute relate to counter claim, set off or cross demand. Neither is there room in the said Rule 117 that allow that provision to be construed as such;

(b) s. 3(1)(a) – (i) of the Bankruptcy Act provides for various situation where a debtor is considered to have committed an act of bankruptcy. It includes conveying or assigning property to a trustee for the benefit of creditors generally,

fraudulent transfer or gift and declaration by a debtor of his inability to pay his debts. S. 3(1)(i) of the Bankruptcy Act specifically provide for what tantamount to act of bankruptcy in respect of a petition which is premised on a court judgment for any amount obtained against a debtor. Being a monetary judgment the issue of counter claim, set off and cross demand (which equals or exceed the amount of the judgment debt or sum) are possible grounds to invalidate the petition. No justification or basis given to the proposition that opposing petition on ground of counter claim, set off and cross demand requires notice but no notice is required where ground of opposition is other than counter claim, set off and cross demand as in the instant case;

(c) the required notice under Rule 117 of the Bankruptcy Rules is to be filed with the Registrar or the petitioning judgment creditor 3 days before the hearing day of the creditor's petition. It is a notice from the judgment debtor to the judgment creditor specifying the statements in the creditor's petition which the judgment debtor intends to deny or dispute. Such notice is a prerequisite to the filing of summons in chambers under Rule 18 for purpose of giving proper advance notice to the court and judgment creditor.

Whether Bankruptcy Notice defective

[26] For completeness, I will proceed to deal with the merits of the application Enclosure 9. The issue is whether the Bankruptcy Notice is good notice upon which bankruptcy proceeding may be founded under s. 3(1)(i) of the Bankruptcy Act which provides as follows –

(1) A debtor commits an Act of bankruptcy in each of the following cases:

(i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

[27] The Bankruptcy Notice that was filed against the Judgment Debtor read as follows –

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)
DALAM PERKARA KEBANGKRAPAN NO.

Ber: ***Goh Wee Peng***
(No. K/P: 660630-10-6381) ...Penghutang Penghakiman

Ex-Parte: ***Standard Chartered Bank Malaysia Berhad***
(No. Syarikat: 115793-P) ...Pemiutang Penghakiman

NOTIS KEBANGKRAPAN

Kepada:

Goh Wee Peng
13A-8-5
Bukit Oug Condominium
58100 Kuala Lumpur

AMBIL PERHATIAN bahawa dalam tempoh tujuh (7) hari selepas penyampaian notis ini ke atas kamu tidak termasuk hari penyampaian tersebut, kamu hendaklah membayar kepada Standard Chartered Bank Malaysia Berhad yang beralamat di Level 16, Menara Standard Chartered, No. 30, Jalan Sultan Ismail, 50250 Kuala Lumpur, wang sejumlah ***RM379,267.95 setakat 15/09/2015*** *(butir-butir untuk jumlah yang dituntut ini dilampirkan bersama-sama) yang dituntut olehnya sebagai wang yang kena dibayar atas Penghakiman yang didapati terhadap kamu di Mahkamah Sesyen di Kuala Lumpur melalui Guaman No. B52NCC-257- 04/2014 pada 16/05/2014, yang pelaksanaan atasnya telah tidak digantung, atau kamu mestilah membuat cagaran atau penyelesaian mengenai wang tersebut hingga memuaskan hati Standard Chartered Bank Malaysia Berhad atau memuaskan hati Mahkamah, atau kamu mestilah memuaskan hati Mahkamah bahawa kamu ada sesuatu tuntutan balas, tolakan atau*

tuntutan silang terhadap Standard Chartered Bank Malaysia Berhad yang sama banyaknya dengan atau yang melebihi wang yang dituntut oleh Standard Chartered Bank Malaysia Berhad dan yang kamu tidak dapat mengemuka dalam tindakan dalam mana penghakiman itu telah didapati.

BUTIR-BUTIR JUMLAH YANG DITUNTUT

Sepertimana dalam Penyata Akaun yang dilampirkan.

Bertarikh pada 15 haribulan September 2015.

t.t.

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Penolong Kanan Pendaftar
Mahkamah Tinggi
Kuala Lumpur

NOTIS PENGINDORSAN

KAMU hendaklah mengambil ingat khasnya:-

Bahawa akibat tidak mematuhi permintaan notis ini ialah bahawa kamu telah melaukan suatu perbuatan kebangkrapan dan prosiding kebrankrapan boleh diambil terhadap kamu.

Bagaimanapun, jika kamu ada sesuatu tuntutan balas, tolakan atau tuntutan silang yang sama banyaknya dengan atau yang melebihi jumlah yang dituntut oleh Standard Chartered Bank Malaysia Berhad atas penghakiman itu, dan yang kamu telah dapat mengemukakan dalam tindakan dalam mana penghakiman tersebut telah didapati, kamu mestilah dalam masa tujuh (7) hari meminta kepada Mahkamah supaya membatalkan notis ini dengan memfailkan dengan Pendaftar satu Afidavit bagi maksud di atas itu.

Berdaftar seperti Notis Kebankrapan
No. tahun pada

.....
Kerani Mahkamah Tinggi
Kuala Lumpur

[28] The Statement of Account, which is objected by the Judgment Debtor, is reproduced below –

Name : GOH WEE PENG
Loan No : 60042885
Judgment date : 16.05.2014

Judgment sum : RM 452,124.46

As at	Judgment Sum				Total	
7-Apr-14	**452,124.46**	-	-	-	**452,124.46**	

Manual Calculation

Date From	Date To	No of Days	Principal Sum	Payment received	Interest Rate	Interest Charged
8-Apr-14	30-Apr-14	23	452,124.46	-	15.00%	4,273.51
1-May-14	31-May-14	31	452,124.46	-	15.00%	5,759.94
1-Jun-14	30-Jun-14	30	452,124.46	-	15.00%	5,574.14
1-Jul-14	31-Jul-14	31	452,124.46	-	15.00%	5,759.94
1-Aug-14	31-Aug-14	31	452,124.46	-	15.00%	5,759.94
1-Sep-14	30-Sep-14	30	452,124.46	-	15.00%	5,574.14
1-Oct-14	31-Oct-14	31	452,124.46	-	15.00%	5,759.94
1-Nov-14	30-Nov-14	30	452,124.46	-	15.00%	5,574.14
1-Dec-14	31-Dec-14	31	452,124.46	-	15.00%	5,759.94
1-Jan-15	31-Jan-15	31	452,124.46	-	15.00%	5,759.94
1-Feb-15	28-Feb-15	28	452,124.46	40,000.00	15.00%	5,202.53

1-Mar-15	31-Mar-15	31	412,124.46	-	15.00%	5,250.35
1-Apr-15	30-Apr-15	30	412,124.46	-	15.00%	5,080.99
1-May-15	31-May-15	31	412,124.46	-	15.00%	5,250.35
1-Jun-15	30-Jun-15	30	412,124.46	100,000.00	15.00%	5,080.99
1-Jul-15	31-Jul-15	31	312,124.46	-	15.00%	3,976.38
1-Aug-15	31-Aug-15	31	312,124.46	25,000.00	15.00%	3,976.38
1-Sep-15	15-Sep-15	15	287,124.46	-	15.00%	1,769.95
				165,000.00	**Total**	**91.143.49**

Summary

Judgment sum	452,124.46
(+) Interest Changed	91,143.49
(+) Costs awarded by Court	1,000.00
(-) Less Payment	(165,000.00)
Total outstanding sum as at 15.09.2015	**379,267.95**

[29] The Judgment in Default which form the basis of the Bankruptcy Notice is reproduced verbatim below –

DALAM MAHKAMAH SESYEN DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
GUAMAN NO: B52NCC-257-04/2014

ANTARA

STANDARD CHARTERED BANK MALAYSIA BERHAD
(NO SYARIKAT: 115793-P) … PLAINTIF

DAN

1. ALSPEC TECHNOLOGY SDN BHD
(NO. SYARIKAT: 570807-M)

2 GOH WEE PENG
(NO. K/P: 660630-10-6381) ***... DEFENDAN-DEFENDAN***

PENGHAKIMAN INGKAR KEHADIRAN

TIADA KEHADIRAN *telah dimasukkan oleh Defendan Pertama dan Defendan Kedua dalam tindakan ini.* ***ADALAH PADA HARI INI DIHAKIMKAN*** *bahasa defendan Pertama dan Defendan Kedua hendaklah membayar kepada Plaintif:*

a) secara bersesama dan berasingan untuk jumlah sebanyak RM452,124.46 (Ringgit Malaysia: Empat Ratus Lima Puluh Dua Ribu Satu Ratus Dua Puluh Empat Dan Sen Empat Puluh Enam Sahaja) pada setakat 7 April 2014;

b) faedah pada kadar 15.00% setahun ke atas RM452,124.46 berdasarkan kiraan bulanan dan 8 April 2014 sehingga tarikh penyelesaian penuh;

c) Kos tindakan sebanyak RM1000.00.

Bertarikh pada 16 Mei 2014

t.t.
Penolong
.....
Pendaftar
Mahkamah Rendah
Kuala Lumpur

[30] S. 3(1)(i) of the Bankruptcy Act sets out the requirement which a bankruptcy notice grounded on a final judgment or final order must fulfil. This judgement will discuss only the element upon which the Judgment Debtor relies to support his contention that the Bankruptcy Notice is defective.

[31] It is the Judgment Debtor's case that the Bankruptcy Notice did not comply with s. 3(1)(i) of the Bankruptcy Act. The main challenge mounted by the Judgment Debtor on the Bankruptcy Notice was that the notice did not quantify the outstanding amount as at 15 September 2015 which is the filing date and that mere re-production of the Judgment and terms of the Judgment without specific calculation of the amount due which the Judgment Debtor has to pay renders the Bankruptcy Notice *void ab initio*.

[32] As can be seen from the Bankruptcy Notice reproduced above the sum that was demanded from the Judgment Debtor was RM379,267.95 which is said to be the sum payable as at 15 September 2015. The notice demanded the Judgment Debtor to pay the said sum within 7 days from the service of the Bankruptcy Notice or to secure or compound for it to the satisfaction of the creditor or the court. The sum RM379,267.95 was stated as the sum due and payable under the Judgment in Default obtained against the Judgment Debtor.

[33] As correctly pointed out by the Judgment Debtor, the judgment sum RM379,267.95 stated in the Bankruptcy Notice is not RM452,124.46 which is the judgment sum obtained against the Judgment Debtor via court order dated 15 May 2014. In this respect the Bankruptcy Notice specifically stated the details of the sum RM379,267.95 is attached to the said notice. The details is to be found in the Statement of Account attached thereto.

[34] A perusal of the Statement of Account shows the statement sets out how the outstanding debt is quantified. It covers a period from 8

April 2014 to 15 September 2015. The outstanding debt comprise 2 elements, namely, the principal sum and the interest charged on the principal sum. For the period commencing 8 April 2014 until February 2015 the principal sum was RM452,124.46. This sum RM452,124.46 is the sum upon which judgment was obtained under the Judgment in Default on 16 May 2014. In the Statement of Account the said sum is reflected as the principal sum for the period ended 31 May 2014. The second element which is the interest charges, at the rate of 15% on the principal sum RM452,124.46 calculated for each and every month from 8 April 2014. Based on the Statement of Account payments received in respect of the loan is utilized towards settling the principal sum.

[35] The Judgment in Default entered on 16 May 2014 was for the following –

(a) in respect of the sum of RM452,124.46 as at 7 April 2014. The said sum is the principal sum as at 7 April 2014 as reflected in the Statement of Account;

(b) in respect of interest charges, which is charged at the rate of 15% on the sum RM452,124.46 calculated for each and every month from 8 April 2014 until date of full settlement. Based on the Statement of Account the interest charged as at April 2014 was RM4,273.51 which is derived from the following calculation - RM452,124.46 (principal sum) x 15% (interest rate) x 23 days/365 days; and

(c) costs of RM1000.00.

If the Judgment Debtor were to settle the judgment sum in full immediately after the Judgment in Default entered, the total sum to be paid would be RM457,397.97 (principal sum RM452,124.46 + interest RM4,273.51 + costs RM1000.00).

[36] However only a total sum of RM165,000.00 was paid over a period from February to August 2015. At the time the Bankruptcy Notice was issued (15 September 2015) the principal sum was significantly reduced to RM287,124.46 (RM452,124.46 – RM165,000.00). In so far as the interest charged the total sum add up to RM91,143.49 being interest on the principal sum minus monies paid by the Judgment Creditor. Taking into account the costs of RM1000.00 awarded to the Judgment Creditor the total sum payable as reflected in the Statement of Account is RM379,267.95. To summarize the above, the breakdown of RM379,267.95 in simple mathematical form is –

Summary	
Judgment sum	452,124.46
(+) Interest Changed	91,143.49
(+) Costs awarded by Court	1,000.00
(-) Less Payment	(165,000.00)
Total outstanding sum as at 15.09.2015	379,267.95

[37] It was the exact sum of RM379,267.95 which was stated in the Bankruptcy Notice as the sum payable by the Judgment Debtor under the Judgment in Default. The Bankruptcy Notice had quantified, via the Statement of Account attached thereto and to which specific reference was made in the Bankruptcy Notice, the respective elements which made up the sum RM379,267.95. The elements consists of the principal sum, interest and costs. This is consistent with the decision of the Supreme Court in *Ghazali bin Mat Noor v. Southern Bank Berhad and four other appeals* [1989] 2 MLJ 142 where the court held –

> *For a bankruptcy notice to be valid, therefore, it should state the exact amount due as at the date of the bankruptcy notice. The judgment debtor must know the exact amount he has to pay to avoid bankruptcy. He does not have to make any calculations*

or enquiries. How the exact amount is arrived out should be particularized …

[38] The sum RM379,267.95 had taken into account the sum RM165,000.00 paid by the Judgment Debtor. This is consistent with the court decision in *Low Mun v. Chung Khiaw Bank Ltd* [1998] 1 MLJ 263 where it was held if part of the debt has been paid or unenforceable in bankruptcy the notice can only be issued for the balance. Thus a bankruptcy notice can only be issued for the judgment debt or that part of the debt on which the creditor can issue execution.

[39] Since the respective elements which made up the sum RM379,267.95 is specifically quantified and particularized in the Bankruptcy Notice via the Statement of Account there is no issue of uncertainty as to the exact amount to be paid by the Judgment Creditor. With such details provided the Judgment Debtor need not wonder or ponder or even make queries as to the sum which he is required to pay.

[40] It must be noted that while the Judgment Debtor desperately dispute the Bankruptcy Notice for want of details/quantification, the Judgment Debtor has not at any point in time show how exactly the Statement Account is lacking and/or in what manner is he confused as to the exact sum that he is required to pay to the Judgment Debtor. The Judgment Debtor's position in the instant case is indeed inconsistent with his conduct and the steps he took after being served with the Creditor's Petition. Based on records, hearing of the Creditor's Petition was adjourned a few times to make way for the Judgment Debtor to settle the sum demanded. There is no evidence indicating the Judgment Debtor had, after receiving the Bankruptcy Notice, enquired or sought for details and particulars of the sum RM379,267.95 demanded. No evidence that the Judgment Debtor was

confused with the sum that he has to pay under the Bankruptcy Notice.

[41] The Judgment Debtor took exception to the Statement of Account attached to the Bankruptcy Notice. According to the Judgment Creditor it is improper and invalid by way of law (void *ab initio*) to attach the Statement of Account. The Judgment Debtor submits there is no provisions which allows the Judgment Creditor to prove details of the debt by way of statement of account.

[42] The Bankruptcy Notice was issued at the request of the Judgment Creditor (Rules 91(1) and 92 of the Bankruptcy Rules). The request for issue of a bankruptcy notice and the bankruptcy notice are to be in the format of Form 4 and Form 5 of the Appendix to the Bankruptcy Rules respectively. Of significance is Form 5 which is reproduced below –

NO 5

(Rule 91)

(Title)

BANKRUPTCY NOTICE

To

Take notice that within (seven) days after service of this notice on you excluding the day of such service, you must pay to ....., of ....., the sum of RM.....claimed by him as being the amount due on a final judgment obtained by him against you in the .....Court .....dated .....whereon execution has not been stayed, or you must secure or compound for the said sum to .....satisfaction or the satisfaction of the Court; or you must satisfy the Court that you have a

counter-claim, set off, or cross demand against .....which equals or exceeds the sum claimed by ....., and which you could not set up in the action in which the judgment was obtained.

Dated this ..... day of ....., 20.....

By the Court,

.....
Registrar

INDORSEMENT ON NOTICE

You are specially to note –

That the consequences of not complying with the requisitions of this notice are that you will have committed an act of bankruptcy, on which bankruptcy proceedings may be taken against you.

If, however, you have a counter-claim, set off, or cross demand which equals or exceeds the amount claimed by ..... in respect of the judgment, and which you could not set up in the action in which the said judgment was obtained, you must within ..... days apply to the Court to set aside this notice by filing with the Registrar an affidavit to the above effect.

Name and address of solicitor suing out the notice,

or

This notice is sued by ..... in person

[43] With regard to the contents of a bankruptcy notice, Rule 94 provides –

> *94. Particulars to be endorsed on notice*
>
> *(1) Every bankruptcy notice shall be endorsed with –*
>
> *(a) the name and place of business of the solicitor who is suing out the notice, or if no solicitor is employed, with a memorandum that it is sued out by the creditor in person;*
>
> *(aa) the name and National Registration Identity Card number of the debtor;*
>
> *(b) an intimation to the debtor that if he has any counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must within the time specified in the notice file an affidavit to that effect with the Registrar.*
>
> *(2) In the case of a notice served in the Federation the time shall be seven days. In the case of a notice served elsewhere the Registrar when issuing the notice shall fix the time.*

[44] Upon perusal, the Bankruptcy Notice filed by the Judgment Creditor is in compliance with the above provisions and Form No. 5 except for the Statement of Account attached to the Bankruptcy Notice which is, of course, not stated and not found in Form No. 5.

[45] It is a fact that there is no statutory provision which provide for the inclusion of a statement of account in a bankruptcy notice. But it is also a fact that there is no statutory provision which prohibits such

inclusion. The issue is whether the inclusion of the Statement of Account render the Bankruptcy Notice void *ab initio* as contended by the Judgment Debtor. To my mind it does not. My reason for saying so is stated below.

[46] With the inclusion of the Statement of Account to the Bankruptcy Notice, it is a fact that the Bankruptcy Notice deviates from the format provided in Form No. 5 in the Appendix to the Bankruptcy Rules. However such deviation is necessary under the circumstances for purpose of complying with the bankruptcy law. In this respect reliance is placed on Rule 4 of the said Rules which states –

> *4. Use of Forms.*
>
> *The forms in the Appendix, where applicable, and where they are not applicable, forms of the like character, with such variations as circumstances may require shall be used. Where such forms are applicable any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same unless the Court shall otherwise direct.*

[47] Thus variation (in the instant case by means of including the Statement of Account which contain details and particulars of the sum RM379,267.95) is something which is contemplated and permissible to the extent that it is required and necessary under the circumstances.

[48] The inclusion of the Statement of Account is for obvious reason, that is to provide detailed information to the Judgement Creditor of the sum demanded against him under the Judgment in Default. Under the law the Judgment Creditor is obliged to quantify the sum demanded in clear and specific terms so as to enable the Judgment Debtor to know what exactly is demanded against him and how such sum is calculated. As such the inclusion of the Statement of Account

is for the benefit of the Judgment Debtor and it does not in any way prejudice the Judgment Debtor. In fact the Statement of Account which is to be read together with the Bankruptcy Notice is meant to notify the Judgment Debtor the breakdown of the sum demanded for him to make an informed decision and his next cause of action.

[49] It is obvious that the Judgment Debtor has simply choose to ignore and refused to recognized the Statement of Account attached to the Bankruptcy Notice. This is evident from the Judgment Debtor's failure to show in what manner the particulars and detail provided in the Statement of Account relating to the sum demanded in the Notice of Bankruptcy has caused confusion to him in determining the sum that he is required to pay to the Judgment Creditor. The Judgment Debtor's objection to the Statement of Account is baseless and unfounded.

[50] The Judgment Debtor mounted a challenge on the Bankruptcy Notice only about 8 months after the Bankruptcy Notice was filed and served on him. There is no evidence to show that he had filed an affidavit under Rule 95 of the Bankruptcy Rules to set aside the Bankruptcy Notice. As stated above, hearing of the Creditor's Petition was adjourned as the Judgment Debtor requested for time to discuss the matter with the Judgment Debtor. The Judgment Debtor even paid a sum of RM80,000.00 somewhere in April 2016. Obviously no issue of not knowing how much he has to pay to the Judgment Creditor then. It was only after the Judgment Debtor was not able to settle the full sum demanded of him under the Bankruptcy Notice, he decided to challenge the Bankruptcy Notice and filed Enclosure 9 to oppose the Bankruptcy Notice and the Creditor's Petition. The inference that can be reasonably made under such circumstances is that the it is a delay tactic on the part of the Judgment Debtor.

[51] The Judgment Debtor listed a string of cases to support their position. Having perused the cases cited it is my considered opinion those cases are of no assistance to the Judgment Debtor. On the contrary the cases cited lend support to the Judgment Debtor's position.

[52] In the case of *Ghazali bin Mat Noor* (*supra*) the issue raised was the validity of bankruptcy notices which, *inter alia*, states the rate of interest payable but did not quantify the sum. There were 5 appeals before the court. The relevant part of the bankruptcy notices in respect of the interest element as reported in the judgment is reproduced below –

(a) Civil Appeal No. 575 of 1987 -
the sum of RM10,459.20 plus interest thereon at the rate of 15.8% per annum on monthly rests from 31 May 1984 to date of realisation and RM373 costs...

(b) Civil Appeal No. 576 of 1987 -
plus further interest at the rate of 8% per annum as from 16 September 1986 to date of settlement...

(c) Civil Appeal No. 577 of 1987 -
plus further interest at the rate of 8% per annum as from 16 September 1986 to date of settlement...

(d) Civil Appeal No. 578 of 1987 -
together with interest thereon at the rate of 16% per annum on monthly rests calculated from 31 July 1985 to the date of realisation...

(e) Civil Appeal No. 579 of 1987 -
together with interest thereon at the rate of 8% per annum from 16 November 1985 to date of realisation...

[53] The Supreme Court rejected the argument that as the amount of interest due is calculable it need not be quantified in the bankruptcy notice. The court also rejected the basis for such proposition is a passage in the case of *Low Mun* (*supra*). This is what the court said –

> *It was argued that if the interest is not quantified it is sufficient that it be capable of calculation by stating the rate of interest and the period such interest is payable; and if this is done, the bankruptcy notice is good. The authority for this proposition is said to be the passage in Low Mun at p. 176 where the Court said:*
>
> > *Clearly, the bankruptcy notice was bad in law as it contained demand for payment of the whole judgment debt within seven days when parts of the whole debt had not been or could not be quantified, and as such were incapable of being made the subject of execution and consequently incapable of being complied with.*
>
> *We do not agree. The judgment must be read as a whole. The words "or could not be" appearing in the passage is a statement of fact of that case and not of law. That this is so is apparent from the sentences immediately following the passage, where the Court said:*
>
> > *Non-compliance with the demand to pay such unascertained sums cannot constitute an act of bankruptcy. The demand for payment in the notice must not only be quantified but must also be the correct sum owing as at the date of the notice.*

[54] Thus the Supreme Court held, at page 143 –

For a bankruptcy notice to be valid, therefore, it should state the exact amount due as at the date of the bankruptcy notice. The judgment debtor must know the exact amount he has to pay to avoid bankruptcy. He does not have to make any calculations or enquiries. How the exact amount is arrived at should be particularized as follows:

Particulars of Amount Claimed

Amount adjudged in the Sessions Court at Kota Bharu in Summon No 565 of 1985 dated 16th day of April 1986	*$21,924.76*
*Interest at the rate of 8% per annum from 1 October 1985 to 2 October 1986**	*1,753.98*
Costs	*685.00*
Total	*$24,363.74*

**Date of bankruptcy notice*

Since the interest sum payable were not quantified in all the five appeal cases the court held the said notices were invalid *ab initio*. Consequently all subsequent proceedings to the bankruptcy notices were a nullity.

[55] Coming back to the instant case, the relevant passage in the Bankruptcy Notice states –

... dalam tempoh tujuh (7) hari selepas penyampaian notis ini ... kamu hendaklah membayar kepada Standard Chartered Bank Malaysia Berhad ... wang sejumlah RM379,267.95 setakat 15/09/2015 (butir-butir untuk jumlah yang dituntut ini dilampirkan bersama-sama) yang dituntut olehnya sebagai wang yang kena dibayar atas Penghakiman yang didapati terhadap

kamu di Mahkamah Sesyen di Kuala Lumpur melalui Guaman No. B52NCC-257- 04/2014 pada 16/05/2014.

It is apparent the Bankruptcy Notice demanded the sum RM379,267.95 as at 15 September 2015. At a glance there appears to be no details of the sum demanded. However immediately after the sum RM379,267.95 was mentioned, it is specifically stated that details in respect of the sum RM379,267.95 is attached with the Bankruptcy Notice. After the last paragraph in the Bankruptcy Notice the following caption appears –

BUTIR-BUTIR JUMLAH YANG DITUNTUT

Sepertimana dalam Penyata Akaun yang dilampirkan.

The Statement of Account is as reproduced in paragraph 32 above.

[56] Thus the facts of the instant case can be distinguished from that of *Ghazali bin Mat Noor* (*supra*) where the exact amount of the interest claimed was not stated. Whereas in the instant case, as discussed at paragraphs 34 to 39 above the interest element (together with the principal amount and costs) is specifically particularized in the Statement of Account.

[57] The Bankruptcy Notice read together with the Statement of Account provides all the relevant and vital information that is required under the law in respect of the sum demanded. Thus the Bankruptcy Notice is not defective. As such there is no issue of curing it under s. 131 of the Bankruptcy Act or rule 274 of the Bankruptcy Rules. Having failed to comply with the requirements of the Bankruptcy Notice within 7 days after service of the said notice, the Judgment Debtor committed an act of bankruptcy on 13 October 2015.

[58] Another point of contention raised by the Judgment Debtor is that he is only liable for RM113,780.39 being 30% of the sum demanded in the Bankruptcy Notice. It is the Judgment Debtor's position that CGC is liable to contribute 70% of the sum demanded as agreed under the Term Loan Facility. As such it was wrong for the SAR to ruled that the Judgment Creditor can proceed against the Judgement Debtor without calling on the 70% guaranteed by CGC. The Judgment Creditor is therefore obliged to pursue against CGC for its 70% contribution.

[59] The contractual obligation of the Judgment Debtor as a guarantor is stipulated in the Personal Guarantee dated 1 April 2013. Therefore the rights and obligations of both the Judgment Creditor and Judgment Debtor is governed by the terms and conditions of the Personal Guarantee. Terms which are of significance includes the following –

(a) by virtue of clause 1 of the said guarantee the Judgment Debtor agreed, among others, to guarantee payment of all sums of money due or owing to the Judgment Creditor either alone or jointly with any other person or persons and whether in the character of principal debtor or guarantor or surety or otherwise; and

(b) pursuant to clause 17 of the Personal Guarantee the Judgment Debtor had also agreed that the guarantee he gave shall be in addition to and is not to prejudice or be prejudiced by any other guarantee or other security.

[60] Based on the above provisions the Judgment Debtor is liable to pay for all sums of money due or owing to the Judgment Creditor either alone or jointly with any other person. The Judgment Debtor's liability was triggered ever since Judgment in Default was entered against him as a guarantor and Alspec Tech as the principal debtor. As

stated by the Judgement Creditor there were no provisions in the Letter of Offer and Personal Guarantee which requires the Judgment Creditor to take action against the Judgment Debtor first before pursuing against the Judgment Debtor.

[61] The Judgment Creditor cited the case of *Mayban Finance Bhd v. Mohd Jafari Ariffin* [2003] 6 CLJ 262 where the facts were similar to the instant case. In that case there was a guarantee cover by CGCMB for a facility granted by plaintiff to the defendant. The court held the plaintiff was at liberty to sue the defendant at any point of time as there were no provisions in the loan facility which necessitate the plaintiff to commence action first against CGCMB in the event the defendant defaulted.

[62] It was also pointed out by the Judgment Creditor that under the CGC Scheme which provides for the guarantee coverage and clause 32.1 of the Portfolio Guarantee Guideline between Judgment Creditor and CGC, the Judgment Creditor is required to exhaust all legal actions against the Judgment Debtor including bankruptcy proceedings or winding up proceedings against the principal debtor before CGC pay the sum guaranteed.

[63] The Judgment Debtor by raising the issue relating to CGC contribution to the sum demanded in the Bankruptcy Notice is disputing the Judgment in Default obtained against him and urged this court to go behind the Judgment in Default. It is settle law that a court judgment is binding and effective unless and until it is set aside (*Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 CLJ (rep) 277).

[64] In the case of *Malayan Banking Bhd v. Datuk Lim Kheng Khim* [192] 2 MLJ 540 the judgment debtor disputed the rate of interest awarded in the judgment of default (which form the basis of the bankruptcy notice). He claimed the said judgment was irregular and

urged the court to go behind the judgment. The court held, *inter alia*, a bankruptcy court has power to go behind a judgment on which the bankruptcy proceedings is founded if there is evidence of fraud, collusion or miscarriage of justice. It was further held an irregularity or formal defect is no sufficient reason for going behind the judgment.

[65] In the instant case the issue of fraud or collusion does not arise as it is not the basis upon which the Judgment Debtor challenge the Bankruptcy Notice. The issue which requires consideration is whether there is miscarriage of justice on the Judgment Debtor because CGC was not made liable for the 70% guarantee coverage. In other words whether it is fair and just to make the Judgment Debtor to answer the call made by the Judgment Debtor via the Bankruptcy Notice to pay the sum RM379,267.95 without contribution from CGC.

[66] Based on the reasons stated above the Judgment Creditor is not obliged to pursue against CGC before it institute action to recover monies from the Judgment Debtor under the Personal Guarantee and the Term Loan Facility. The Judgment Debtor has contractually agreed to be liable either alone or jointly for monies due and owing from the principal debtor to the Judgment Creditor. These terms are binding on the Judgment Debtor and the Judgment Creditor is at liberty to enforce it. As such the issue of miscarriage of justice does not arise.

Conclusion

[67] Premised on the above reasons I accordingly dismissed the Judgment Debtor's appeal as it was devoid of merits.

(KHADIJAH IDRIS)
Judicial Commissioner
High Court
(Commercial Division)

Dated: 30 AUGUST 2017

COUNSEL:

For the judgment creditor - Fadil Azuwan Zainon; M/s Arifin & Partners

For the judgment debtor - Paul Aisu & Brindta Maniam; M/s Paul & Associates

Case(s) referred to:

Development & Commercial Bank Berhad v. Datuk Ong Kian Seng @ Ong Kin Cheang [1995] 3 CLJ 307

Ghazali bin Mat Noor v. Southern Bank Berhad and four other appeals [1989] 2 MLJ 142

Low Mun v. Chung Khiaw Bank Ltd [1998] 1 MLJ 263

Mayban Finance Bhd v. Mohd Jafari Ariffin [2003] 6 CLJ 262

Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ (rep) 277

Malayan Banking Bhd v. Datuk Lim Kheng Khim [1992] 2 MLJ 540

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 131

Bankruptcy Rules 1969, rr. 4, 18, 20, 91(1), 92, 94, 95, 117, 274