IN THE COURT OF APPEAL MALAYSIA

(APPELLATE JURISDICTION)

[CIVIL APPEAL NO: W-03 [IM][NCC]-102-12/2016]

BETWEEN

GOH WEE PENG ... APPELLANT
[I/C NO.: 660630-10-6381]

AND

STANDARD CHARTERED BANK MALAYSIA BERHAD
... RESPONDENT
[COMPANY NO.: 115793-P]

[IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR]

[IN BANKRUPTCY NO.: D-29NCC-4423-09/2015]

BETWEEN

GOH WEE PENG ... JUDGMENT DEBTOR

[I/C NO.: 660630-10-6381]

AND

STANDARD CHARTERED BANK MALAYSIA BERHAD
... JUDGEMENT

CREDITOR

[COMPANY NO.: 115793-P]

CORAM:

VERNON ONG LAM KIAT, HMR
HARMINDAR SINGH DHALIWAL, HMR
RHODZARIAH BINTI BUJANG, HMR

GROUNDS OF JUDGMENT

Brief facts of the case

[1] On 16/05/2014, vide a writ of summons and statement of claim filed in the Sessions Court of Kuala Lumpur number B52 NCC-257-04/2017, the respondent in this appeal obtained a judgment in default against the appellant [as the 2nd defendant] and Alspec Technology Sdn Bhd [the 1st defendant] for the sum of RM452,124.46 with interest and cost. That judgment was premised upon a RM500,00.00 loan granted to the 1st defendant of which the appellant was the personal guarantor. The other security for the loan was a cover guarantee for 70% of the loan from Credit Guarantee Corporation [M] Berhad ["CGC"]. These two securities are clearly stated in the letter of offer for the loan at page 104 of Part C Volume 2[2] of the Appeal Record. Pursuant to the said judgment, the respondent commenced a bankruptcy proceeding against the appellant in the High Court of Kuala Lumpur. The bankruptcy notice was personally served on the appellant on 3/10/2015 and consequential upon his failure to pay the sum demanded in the said notice, a creditor's petition was filed and the same was served on him, again personally on 16/12/2015. He attended the hearings of the petition, fixed on 18/01/2016, 21/03/2016 and 20/04/2016 but the petition was not heard on the aforesaid dates for it was adjourned to facilitate a settlement of the claim by the

appellant who first promised to pay RM150,000.00 to the respondent but subsequently on 11/04/2016, he only made payment of RM80,000.00. Then on 08/05/2016, he filed a summons in chamber to set aside both the bankruptcy notice and the creditors' petition. That application came before the learned Senior Assistant Registrar ["SAR"] who dismissed it and which decision went on appeal to the High Court. On 24/11/2017, that appeal was also dismissed. The aggrieved appellant then filed his appeal to this court. We heard the appeal on 13/11/2017 and unanimously dismissed it for the reasons given below.

Reasons for the application

[2] The appellant contended that the bankruptcy notice was defective for it did not state the particulars of the judgment - only attaching the statement of account to the bankruptcy notice, which he said was insufficient compliance with section 3[1][i] of the Bankruptcy Act 1967 ["the Act"]. His other ground for making the application was that he had a right of contribution from Credit Guarantee Corporation and since the said Corporation guaranteed 70% of the loan, he was only liable for the balance of 30%. Given that he has not only paid RM80,000.00 but even 3 other payments before that, which were RM40,000.00 on 16/02/15, RM100,000.00 on 18/06/2015 and RM25,000.00 on 11/08/2015 [totalling RM245,000.00] he had therefore paid more than 30% of the loan which works out to RM135,637.34. Therefore, he should not be made a bankrupt by the court.

The preliminary objection

[4] At the hearing of the said summons in chamber, before the learned Senior Assistant Registrar ["SAR"] the respondent raised a preliminary objection which is the failure of the appellant to file a

notice of intention to show cause against the creditor petition under Rule 117 of the Bankruptcy Rules 1969 [“the Rules”]. The appellant countered to say that this Rule 117 was not applicable to his case because his summon in chambers was not “a counter-claim, set off or a cross demand” as provided under the said Rule 117. The learned Senior Assistant Registrar [“SAR”] upheld that objection and as did the learned Judicial Commissioner when Her Ladyship heard the appeal.

The merits of the application

[5] Her Ladyship agreed with respondent’s stand that the statement of account was sufficient compliance with the Rules in that it quantified the amount stated in the bankruptcy notice and had taken into account all the payments made by the appellant. It was therefore not defective. She further considered the fact that the appellant only challenged the bankruptcy notice 8 months after it was filed and served on him and he did not file any affidavit under Rule 95 of the Rules to have it set aside and since he failed to comply with the requirements of the bankruptcy notice within 7 days from its service on him, he had committed an act of bankruptcy on 13/10/2015.

[6] We have examined the said bankruptcy notice appearing at pages 79-80 and the statement of account at page 81 of the Appeal Record Part C Volume 2[2] and would have to agree with the decision of the learned Judicial Commissioner that the attachment of the statement of account to the bankruptcy notice renders sufficient compliance with the requirement of the Act. This we say because the bankruptcy notice itself made reference to the said statement in the following words:

> *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 Standar Charterd, 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 dibyar atas Penghakiman yang didapati terhadap kamu di Mahkamah Sesyen di Kuala Lumpur melalui Guaman No. 852NCC-257-04/2014 pada 16/05/2014;*

[Emphasis added]

[7] And, if one were to go a step further and study the statement of account, it clearly shows not just the principal sum but the payments received from the appellant and the interests chargeable thereon. Thus, there was compliance with section 3[1][i] of the Act. Further there was a summary at the bottom left hand corner of the said notice which shows the total amount outstanding, that is RM379,267.95. The very conduct of the appellant in effecting payment as stated earlier, after the bankruptcy notice was served on him is proof that he was never at all misled by the non-stating of the amount demanded under the notice in the normal conventional way. It was the very conduct which not only created an estoppel against him from disputing the veracity or correctness of the bankruptcy notice but would also allow us to label his act in filing the summons in chambers as an afterthought. In other words, the genuineness of his action was very much suspect.

[8] As for the right of contribution claimed by him, with respect, the point was again taken without merit because the guarantee agreement signed by him [appearing at pages 122-138 of Part C Volume 2[2] of the Appeal Record specifically allows the respondent, in clause 17.1 [at page 127] to proceed against him for the full sum guaranteed. This clause reads:

17. <u>Other Securities</u>

17.1 This Guarantee shall be in addition to and is not to prejudice or be prejudiced by any other guarantee or other security whether by way of mortgage, charge, ban or otherwise which the Bank may now or at any time hereafter have or hold from the Guarantor, the Borrower or any other party for all or any of the monies hereby secured and on discharge by payment of otherwise shall remain line property of the Bank. And the Bank shall have full power at its discretion to give time for payment to or make any other arrangement with any such other person or persons without prejudice to his Guarantee or any liability hereunder. And all money received by the Bank from the Guarantor, the Borrower or any person or persons liable to pay the same may be applied by the Bank to any account or item of account or to any transaction to which the same may be applicable.

17.2 This Guarantee shall not be affected by any failure on the Bank's part to take any security or by the invalidity of any security taken or by any existing or future agreement by the Bank as to the application of any advances made or to be made to the Borrower.

[9] The existence of this clause in the guarantee agreement renders the appellant's counsel's reliance on the English cases cited by him at pages 26-27 of their written submission irrelevant. Likewise their reliance on s. 99 and 100 of the Contracts Act 1950 because the guarantee that he signed specifically provides that the sum recoverable from him "shall not exceed the principal sum of Ringgit Malaysia Five Hundred Thousand Only" [see clause 1 of the guarantee at page 122 of Volume 2/2 Part C of the Appeal Record].

Additionally, the respondent was also circumscribed by clause 32.1 of the agreement executed with Credit Guarantee Corporation to proceed with the legal remedy under the Act against the appellant before Credit Guarantee Corporation is required to pay the amount guaranteed to the respondent. The full clause 32 reads:

> ***32. Non-Subrogated Account***
>
> ***32.1 Termination of Recovery Action***
>
> *Any request via Form 5 [as per Appendix 6] for termination of recovery actions shall be subjected to the Corporation's prior written consent once all the recovery efforts under the account are deemed exhausted and not recoverable which are guided as follows:*
>
> *32.1.1 Total Loan Facilities Outstanding Balance More Than RM40,000:*
>
> *The Bank shall submit the following documents to the Corporation:*
>
> - *Recovery Termination Form 5*
> - *Statement of Accounts from crystallized date until to date;*
> - *Copy of Judgement against Borrower and guarantor[s]:*
> - *Copy of Winding-Up Order against Borrower [if any]:*

- *Copy of Adjudicating Order and Receiving Order [AORO] AGAINST Borrower and guarantor[s]:*
- *Copy of Proof of Debt filed against Borrower and guarantor[s]:*
- *Collateral[s] [if any] had been disposed/realized.*

[10] The appellant may not be privy to that agreement with Credit Guarantee Corporation but the fact is the existence of that agreement precluded the respondent from taking action against Credit Guarantee Corporation as rightly argued by the respondent - a legal impediment which answers the contention of the appellant on the right of contribution raised by him.

[11] As for the preliminary objection, we failed to see how it could not be applied to his detriment for Rule 117 clearly provides as follows:

> ***117. Debtor intending to show cause.***
>
> *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.*

[12] With respect to him, there is nothing in that Rule that constraints the show cause to "a counter-claim, a set off or a cross-demand" as submitted by his counsel. These quoted words are used in section 3 [1][i] of the Act, **not Rule 117.** The Federal Court's

decision in *Development & Commercial Bank Bhd v. Datuk Ong Kian Seng @ Ong Kin Cheang* [1995] 3 CLJ 307 cited by the respondent's counsel emphasized the mandatoriness of Rule 117 for the appellant for it was held at page 314 of the report as follows:

> *"Further, we are of the view that the respondent's failure to file a notice under r. 117 supported by an affidavit cannot be excused as a mere formal defect. The learned Judge relied on ex parte Dale, where in that case the solicitor had inadvertently omitted to file a notice required by r. 36 of the Bankruptcy Rules 1870 [which is similar to our r. 117], but appeared at the hearing and asked for leave to be allowed to dispute the debt notwithstanding the omission to give notice. The Registrar refused the application and made an adjudication. On appeal, the adjudication was annulled. Bacon, CJ did not give any reason for the order to be discharged and the adjudication annulled. In our view, the facts therein are clearly distinguishable and cannot therefore apply to the facts in the present appeal. It would, however, be noted in Rengasamy Pillai v. Comptroller of Income Tax, Infra, the Privy Council found that the bankruptcy notice was not issued and expressed to be issued by the Chief Justice of the High Court in the name of the Yang DiPertuan Agong as required by s. 7[1] of the Courts of Judicature Act 1964. This was held to be a formal defect which could not reasonably mislead a debtor upon whom it was served, and was validated by s. 131 of the Act. Whereas, in our case here, r. 117 clearly provides that if a debtor intends to show cause against the petition, he shall file a notice in Form 16. We hasten to add that no breach of a mandatory rule can be described as a formal defect or an irregularity that can be cured [Au-Yong v. Dicum & Anor]. [1963] 29 MLJ 349, 254, CA"*

Conclusion

[13] Thus, on the strength of the cited case and for the reasons earlier stated we found no merits in the appeal and had dismissed the same with cost.

Dated: 20 FEBRUARY 2018

(RHODZARIAH BUJANG)
Judge
Court of Appeal Malaysia
Putrajaya

COUNSEL:

For the appellant - Paul Aisu; M/s Paul & Associates Petaling Jaya

For the respondent - Fadil Azuan Zainon; Arifin & Partners Kuala Lumpur

Case(s) referred to:

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

Rengasamy Pillai v. Comptroller of Income Tax

Au-Yong v. Dicum & Anor [1963] 29 MLJ 349, 254, CA

Legislation referred to:

Bankruptcy Act 1967, s. 3[1][i]

Contracts Act 1950, ss. 99, 100

Bankruptcy Rules 1969, rr. 95, 117