AMBANK (M) BERHAD & ORS

v.

LIM SUE BENG

Federal Court, Putrajaya
Azahar Mohamed, Balia Yusof Wahi, Alizatul Khair Osman Khairuddin, Rohana Yusuf, Mohd Zawawi Salleh FCJJ
[Civil Appeal No: 03-1-03-2018 (W)]
15 May 2019

Bankruptcy: *Notice — Amendment by court — Application for removal of co-petitioner — Whether bankruptcy notice and creditor's petition could be amended by deletion of one or more petitioners under s 93(3) Bankruptcy Act 1967 and/or r 276 Bankruptcy Rules 1969 — Whether proposed amendment would cause prejudice to respondent*

This appeal arises from the decision of the Court of Appeal in allowing the respondent's appeal and reversing the order of the High Court. The High Court had earlier allowed the appellants' application and ordered that one of the judgment creditors, RHB Bank Berhad ('RHB') do cease to be a party to the bankruptcy proceedings and that, consequential amendments be made to the bankruptcy notice and creditors' petition. The present suit had been collectively brought by the appellants together with RHB in respect of a syndicated loan where the respondent stood as a guarantor to that loan and was sued as a defendant in that capacity. It was not disputed that even though the judgment provided for specific amounts to be paid to each of the appellants and RHB, their respective entitlements were stated within a single judgment. Hence, each of the appellants and RHB had to refer back to the judgment to establish their respective interests under the same. In this appeal, the question of law raised by the appellants was, whether in the case of petition presented by multiple petitioners, could the bankruptcy notice and creditor's petition be amended by way of deletion of one or more petitioners under s 93(3) of the Bankruptcy Act 1967 ('BA 1967') and/or r 276 of the Bankruptcy Rules 1969 ('1969 BR').

Held (dismissing the appeal with costs):

Per Azahar Mohamed, Rohana Yusuf, Mohd Zawawi Salleh FCJJ (majority):

(1) Section 93(3) of the BA 1967 was the only provision that allowed for any amendment to the "written process or proceeding". However, the exercise of the High Court's powers under the provision was limited to clerical or minor errors that cause no prejudice to the judgment debtor. (*Amit Chhabra Ashok Kumar Chhabra v. A2K Vision Pte Ltd (refd)*; and *Re Liow Fong Mooi Ex P Malayan Banking Bhd (refd)*). (paras 22-24)

(2) In the present case, the proposed amendments were not due to a minor or clerical error made by the appellants but instead an attempt to withdraw

a party namely, RHB. The appellants and RHB had elected to proceed collectively in pursuing bankruptcy proceedings against the respondent. In the circumstances, it was not open to the appellants, to recharacterise the creditor's petition as having been grounded on a different act of bankruptcy, ie as involving only the appellants, excluding RHB as the proposed amendment would cause prejudice to the respondent. Here, the proposed amendments went to the substance of the bankruptcy notice and creditor's petition and could not be regarded as a technical one or a mere slip. Hence, s 93(3) of the BA 1967 could not be invoked. (para 29)

(3) Since there was already a specific framework to address amendment as provided in s 93(3) of the BA 1967 and for the substitution of party as provided in s 95 of the BA 1967, the relevant provisions of the Rules of Court 2012 were not applicable. Therefore, it was not for the courts to rely on r 276 of the 1969 BR to extend the scope of the said framework. In this instance, the withdrawal of a judgment creditor as one of several co-petitioners was not within the contemplation of the BA 1967. In the circumstances, the High Court did not have the power to make such an order in the exercise of its bankruptcy jurisdiction or to rely on r 276 of the 1969 BR in order to widen it to allow for the same. (para 35)

Per Alizatul Khair Osman Khairuddin FCJ (dissenting):

(1) In the present case, the act of bankruptcy was complete on 30 May 2011 when the respondent failed to pay the amount stated in the Bankruptcy Notice which was personally served on him. The amendment to the creditor's petition and the bankruptcy notice therefore did not change the above position as the act of bankruptcy had already been committed on 30 May 2011. Thus, there was no prejudice to the respondent if the court were to allow the amendment to remove or exclude RHB Bank as a co-petitioner. (paras 73-75)

(2) If a petitioning creditor could be substituted in the circumstances set out in s 95 of the BA 1967 then there was no reason why the court, cannot, under s 93(3) of the BA 1967 allow for the petition to be amended to remove RHB Bank as a co-petitioner and for the amount of the judgment debt to be correspondingly reduced following the settlement of the debt by the respondent. Such an amendment would not affect the validity of the act of bankruptcy as the amount remaining due following the deduction was well above the statutory limit and based on the case of *Ex parte Dearle,* there was nothing in law to prevent the remaining petitioning creditors from continuing with the bankruptcy proceedings against the respondent based on the amended petition. (paras 82-83)

(3) The Court of Appeal in the present case had erred in holding that the court only had power to amend parties to the proceeding under s 95 of the BA 1967 and that it misdirected itself when it failed to take into account the court's power to amend proceedings under s 93(3) of the BA 1967. (para 88)

Case(s) referred to:

Amit Chhabra Ashok Kumar Chhabra v. A2K Vision Pte Ltd (Encl 14) [2013] MLRHU 109 (refd)

Dr Shamsul Bahar Abdul Kadir v. RHB Bank Berhad & Another Appeal [2015] 3 MLRA 456 (refd)

Ex parte Dearle [1884] 14 QBD 184 (refd)

Ex parte Owen, in Re Owen [1884] 15 QBD 113 CA (refd)

Lovell and Christmas v. Gilbert Walter Beauchamp [1894] AC 607 (refd)

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 1 MLRA 67 (refd)

Re Liow Fong Mooi Ex P Malayan Banking Bhd [2000] 2 MLRH 470 (refd)

Legislation referred to:

Bankruptcy Act 1914 [UK], ss 109(3), 105(3)

Bankruptcy Act 1967, ss 3(1)(i), 93(3), 95, 105

Bankruptcy Rules 1969, rr 267, 276

Courts of Judicature Act 1964, s 78 Insolvency

Act 1986 [UK], s 271(5) Insolvency Rules 1986

[UK], rr 6.22, 6.30, 6.31 Interpretation Acts

1948 And 1967, s 23(1) Rules of Court 2012, O

15 r 6(2)(a), O 20 r 8

Other(s) referred to:

Halsbury's Laws of England, 4th edn Reissue, vol 3(2), paras 173, 174

Counsel:

For the appellants: Lua Ai Siew (Elyazura Md Shaarani with her); M/s Soo Thien Ming & Nashrah

For the respondent: Malik Imtiaz Sarwar (Tony Woon Yeow Thong & Chan Wei June with him); M/s Woon & Co

[For the Court of Appeal judgment, please refer to Lim Sue Beng v. RHB Bank Berhad & Ors [2018] 2 MLRA 133]

JUDGMENT

Azahar Mohamed, Rohana Yusuf, Mohd Zawawi Salleh FCJJ (Majority):

Introduction

[1] This appeal arises from the decision of the Court of Appeal allowing the respondent's appeal and reversing the order of the High Court. The Court of Appeal allowed the appellants' application and ordered that one of the judgment creditors, RHB Bank Berhad ("RHB") do cease to be a party to the

bankruptcy proceedings and that consequential amendments be made to the bankruptcy notice and creditors' petition.

Background Facts

[2] The appellants and RHB collectively brought an action under Suit No: MTKL D5-22-1648-2005 ("Suit") in respect of a syndicated loan granted to Gula Perak Berhad. The respondent stood as a guarantor to that loan facility and was joined in the Suit as a defendant in that capacity.

[3] After a full trial, on 29 October 2010, a joint judgment ("Judgment") was obtained by the appellants and RHB against the respondent in the Suit.

[4] Subsequently, on 24 February 2011, the appellants and RHB as judgment creditors collectively commenced bankruptcy proceedings against the respondent. The bankruptcy proceedings were based on the Judgment.

[5] The act of bankruptcy grounding the creditor's petition dated 25 November 2011 was the failure of the respondent to comply with a bankruptcy notice issued jointly by the appellants and RHB dated 24 February 2011.

[6] The respondent then issued a letter dated 30 September 2015 to RHB and proposed a full and final settlement of the portion of the judgment debt due to RHB by the payment of RM3,851,200.00.

[7] By a letter dated 15 December 2015, RHB informed the appellants' solicitors that the debt payable by the respondent to RHB had been fully settled and accordingly, it intended to withdraw itself as a party in the bankruptcy proceedings against the respondent. It is a term of the settlement that RHB will upon full payment of the settlement sum seek leave to withdraw the bankruptcy proceedings against the respondent. The respondent had fully paid the settlement sum. These facts are not in dispute.

[8] Then, the dispute in the present matter arose. As RHB was no longer desirous of continuing as a party in the bankruptcy proceedings, by a summons in chambers dated 16 December 2015 (encl 46), the appellants and RHB collectively applied for, among others, an order pursuant to s 93(3) of the Bankruptcy Act 1967 (the BA 1967), O 15 r 6(2)(a) and O 20 r 8 of the Rules of Court 2012 (the 2012 Rules), as well as r 276 of the Bankruptcy Rules 1969 (the 1969 BR), that RHB do cease to be a party to the bankruptcy proceedings and that consequential amendments be made to the bankruptcy notice and the creditors' petition to remove references to RHB. Enclosure 46 is the subject matter of the present appeal.

[9] The respondent opposed encl 46. The respondent anchored his opposition on the primary ground that the application was misconceived and thus an abuse of process. The essential point made by the respondent was that given the settlement between the respondent and RHB, the appellants were not entitled

to rely on the original act of bankruptcy. Premised on this, it was argued that the amendment to the bankruptcy notice could not validly be treated as having retrospective effect. Further, as the BA 1967 did not make provision for the withdrawal of a co-petitioner in the manner proposed, the circumstances did not validly allow for the proposed amendments to the creditor's petition.

Decision Of The High Court

[10] The High Court allowed the appellants' application in encl 46. In its judgment, the High Court made numerous findings, which can be summarised as follows:

i. Since encl 46 is not for the substitution of a judgment creditor or a change of carriage of petition, the issue of s 95 of the BA 1967 and paras 173 and 174 of *Halsbury Laws of England*, are not relevant. In cases involving substitution and change of carriage, they are only relevant where the judicial creditor does not proceed with due diligence or has no intention to prosecute the petition, and other judgment creditor want to continue with the proceedings. In this case there is no issue of intention for the other seven judgment creditors wanting to continue with the petition.

ii. Section 93(3) of the BA 1967, read with r 267 of the 1969 BR meant that the 2012 Rules is applicable where the provisions on amendment and parties are silent in the BA 1967 and the 1969 BR. Thus O 15 r 6 and O 20 of the 2012 Rules are applicable.

iii. The application for leave for RHB to cease to be a party in these proceedings should be allowed as the sum payable by the respondent to RHB Bank has been settled.

iv. In view of RHB ceasing to be one of the judgment creditors, then the amount owing must necessarily be reduced to reflect the true sum owing under the bankruptcy notice and the creditor's petition. The reduced sum, which is still above the statutory minimum limit, can still form the basis of the bankruptcy notice and the creditor's petition.

Decision Of The Court Of Appeal

[11] Against the decision of the High Court, the respondent appealed to the Court of Appeal. The Court of Appeal allowed the appeal and as indicated earlier reversed the order of the High Court.

[12] The Court of Appeal held that in the exercise of its bankruptcy jurisdiction, the High Court has no power to grant the appellants' application as that there is no express provision in the BA 1967 to allow amendment to withdraw and substitute petitioner save and except in accordance with s 95 of the BA 1967.

[13] The Court of Appeal further held that the appellants could not resort to r 276 of the 1969 BR. The proper course of action is for the appellants to file a fresh bankruptcy proceeding against the respondent.

The Question Of Law On Appeal To The Federal Court

[14] The appellants then filed a motion to seek leave to appeal to the Federal Court. This court granted the appellants leave to appeal on the following question of law:

> Whether in the case of petition presented by multiple petitioners, could the bankruptcy notice and creditor's petition be amended - the deletion of one or more petitioners be allowed under s 93(3) of the Bankruptcy Act 1967 and/or r 276 of the Bankruptcy Rules 1969.

[15] The point in this appeal is a very short but an important point which revolves around the proper construction of s 93(3) of the BA 1967 and r 276 of the 1969 BR.

[16] To start with, it is necessary for contextual apprehension and appreciation to set out both the provisions. The two provisions are these:

Section 93(3) of the BA 1967

> "(3) The court may at any time amend any written process or proceeding upon such terms, if any, as it thinks fit to impose."

Rule 276 of the 1969 BR

> "In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, *mutatis mutandis*."

[17] At the outset, it must be stated that the BA 1967 is a complete code within the framework of which must be found all the powers exercisable by the High Court in bankruptcy jurisdiction when dealing with the subject matter of bankruptcy (see *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 1 MLRA 67).

[18] A key point to note is that the Suit was collectively brought by the appellants together with RHB in respect of a syndicated loan. The respondent stood as a guarantor to that loan and was sued as a defendant in that capacity. It is not disputed that even though the Judgment provided for specific amounts to be paid to each of the appellants and RHB, their respective entitlements were stated within a single judgment. Each of the appellants and RHB had to refer back to the Judgment to establish their respective interests under the same.

[19] It is also an important point to bear in mind that the appellants and RHB collectively issued the bankruptcy notice. Similarly, they presented the creditor's petition on 25 November 2011. The appellants and RHB in this

case had elected to proceed collectively on the strength of a single Judgment; this was central to the character of the bankruptcy notice and the creditor's petition.

[20] It is against the above background that we should consider the appellants' application in encl 46, which sought for leave from the High Court for RHB, one of the co-petitioners in the creditor's petition who had initially elected to proceed collectively pursuant to a single Judgment against the respondent to cease to be a party to the bankruptcy proceedings commenced against the respondent. In addition to the prayer for the cessation of RHB as a party to the proceedings, the appellants had also sought for leave for certain consequential amendments to be made to the bankruptcy notice and the creditor's petition.

[21] It is plain for us to see that these amendments would have the effect to change the bankruptcy notice, which form the basis or substance of the creditor's petition being issued as if RHB was never a party to the bankruptcy proceedings from the outset. If such amendments were not made, the creditor's petition would not be able to proceed as proposed. The amendments reflect the change in the bankruptcy notice as well as the creditor's petition.

Section 93(3) Of The BA 1967

[22] This brings us to s 93(3) of the BA 1967, which under the legislation is the only provision that allows for any amendment to the "written process or proceeding". However, the exercise of the High Court's powers under the provision is limited to clerical or minor errors that cause no prejudice to the judgment debtor. This can be seen in the cases cited by learned counsel for the respondent.

[23] First, the case of *Amit Chhabra Ashok Kumar Chhabra v. A2K Vision Pte Ltd (Encl 14)* [2013] MLRHU 109 where the High Court allowed an amendment to include the second judgment creditor's name on the bankruptcy notice as it was inadvertently omitted. It was correctly held that the judgment debtor would not be in any way prejudiced by the amendment.

[24] The next case cited by learned counsel for the respondent is *Re Liow Fong Mooi Ex P Malayan Banking Bhd* [2000] 2 MLRH 470, where there was amongst others, an error in stating the date of the act of bankruptcy. The High Court allowed the proposed amendment to the same. The High Court found that the amendment was merely to correctly state the date on which the act of bankruptcy occurred and to that extent must be regarded as a technical one which did not go to the substance of the creditor's petition.

[25] On the other hand, learned counsel for the appellants brought our attention to two cases to support her arguments that under s 93(3) of the BA 1967, the High Court has the power to amend bankruptcy proceedings and process to add or remove petitioner in the manner advocated in encl 46. These cases were decided on the basis of the Bankruptcy Act 1914 of the United Kingdom, which is equivalent to our s 93(3) of the BA 1967.

[26] First, the case of *Ex parte Dearle* [1884] 14 QBD 184. In this case, the petition presented by a bare trustee was dismissed because the law requires the *cestui que* trust to be joined as co-petitioner. The Court of Appeal allowed the appeal and granted leave to amend the petition to add the *cestui que* trust. Lord Coleridge CJ held as follows:

> "Then arises the question whether we ought to allow an amendment of the petition. I think we have clearly power to do so under s 105, and the only question is whether the case is a proper one for the exercise of the power? I think it is. A blunder by no means unnatural has been made in the construction of the Act; it is a mere slip. I think it would be just to allow the name of the sister, on proper terms, to be added as a co-petitioner, and that the proceedings should then be continued with the addition of her name; but I think that the person who has made the blunder must pay for it. The appellant will have a week within which to make the amendment, for which he must obtain the consent of his sister, and he must pay the costs of the appeal, and the costs (if any) occasioned by the amendment. The petition when amended must be reserved within a week. The amendment must be taken to have been made at the time when the petition was presented."

[27] The second case referred to by learned counsel for the appellants is *Lovell and Christmas v. Gilbert Walter Beauchamp* [1894] AC 607 (HL). In this case, judgment was entered against the firm of Beauchamp Brothers. The respondent was a partner in the firm and he was an infant. Based on the judgment, bankruptcy proceedings were taken against the firm, and receiving order was made against Beauchamp Brothers. The Court of Appeal upon the ground that one of the partners of Beauchamp Brothers being an infant, the receiving order could not properly be made against the firm rescinded the order. On appeal to the House of Lords, Lord Herschell held as follows:

> "Supposing the judgment thus amended, I think the bankruptcy proceedings may be amended in conformity therewith by adding throughout after the words 'Beauchamp Brothers' the words 'other than Gilbert Walter Beauchamp'.
>
> The Bankruptcy Act gives ample powers of amendment. By s 105, the court may at any time 'amend any written process or proceeding under this Act or such terms, if any, as it may think fit to impose'. Instead, therefore, of setting aside the receiving order, I think the proper course will be to amend it in the manner which I have suggested. It will thus constitute as from its date a valid receiving order against Ralph Beauchamp, and I think the receiver appointed under that order should also be appointed receiver of the partnership assets for the purpose of protecting them for the benefit of the creditors."

[28] In our opinion, the cases relied by counsel for the appellants do not support her submission. It does not take the appellants' case any further. The first case as aptly described by Lord Coleridge CJ, "a mere slip", was to amend the petition to add the *cestui que* trust, which cause no prejudice to the judgment debtor. It was not a fatal error. While the second case was an

application to correct the name of the party, which was a correctible clerical defect that must be regarded as a technical error which did not go to the substance of the creditor's petition. These cases fall more within the principle that the exercise of the High Court's powers under s 93(3) of the BA 1967 is limited to correctible clerical or minor error, which cause no prejudice to the judgment debtor.

[29] However, as seen earlier, the proposed amendments in our present case are not due to a minor or clerical error made by the appellants but instead an attempt to withdraw a party namely RHB. The appellants and RHB had elected to proceed collectively in pursuing bankruptcy proceedings against the respondent. Clearly, the High Court erred in treating encl 46 as an application to correct a misnomer and or a formal defect in the bankruptcy notice and creditor's petition when the case was concerned with substantive change to the character of the bankruptcy notice upon which the creditor's petition was issued. In our opinion, the appellants are not permitted to change the character of the bankruptcy notice and creditor's petition in the manner it was done in this case. The creditor's petition was filed on the basis of a specific act of bankruptcy. The judgment creditors elected to proceed collectively and they must live with their election to do so. Having filed the creditor's petition on the basis that the respondent's failure to comply with the bankruptcy was an act of bankruptcy, it was not open to the appellants, to recharacterise the creditor's petition as having been grounded on a different act of bankruptcy, ie as involving only the appellants, excluding RHB. The proposed amendment would therefore cause prejudice to the respondent. In our opinion, the proposed amendments in the present case go to the substance of the bankruptcy notice and creditor's petition and could not be regarded as a technical one or a mere slip. Hence, in the present case s 93(3) of the BA 1967 could not be invoked for the purposes of encl 46.

[30] There are no provisions in the BA 1967 and the 1969 BR that allow a co-petitioner to withdraw as a party to the bankruptcy proceedings when there are multiple judgment creditors. However, it bears noting that the BA 1967 only confers the bankruptcy court the power to substitute a judgment creditor who does not proceed with due diligence, by virtue of s 95 that read as follows:

> "Power to change carriage of proceedings
>
> 95. Where the petitioner does not proceed with due diligence on his petition, the court may substitute as petitioner any other creditor to whom the debtor is indebted in the amount required by this Act in the case of the petitioning creditor, or may give the carriage of the proceedings to the Director General of Insolvency, and thereafter the proceedings shall, unless the court otherwise orders, be continued as though no change had been made in the conduct of the proceedings."

[31] Materially, the said provision is narrower in scope than the equivalent provision under the English Insolvency Rules 1986, rr 6.30 and 6.31, which provide as follows:

"Substitution of petitioner

6.30. (1) This Rule applies where a creditor petitions and is subsequently found not entitled to do so, or where the petitioner-

(a) consents to withdraw his petition or to allow it to be dismissed, or consents to an adjournment, or fails to appear in support of his petition when it is called on in court on the day originally fixed for the hearing, or on a day to which it is adjourned, or

(b) appears, but does not apply for an order in the terms of the prayer of his petition.

(2) The court may, on such terms as it thinks just, order that there be substituted as petitioner any creditor who—

(a) has under r 6.23 given notice of his intention to appear at the hearing,

(b) is desirous of prosecuting the petition, and

(c) was, at the date on which the petition was presented, in such a position in relation to the debtor as would have enabled him (the creditor) on that date to present a bankruptcy petition in respect of a debt or debts owed to him by the debtor, paras (a) to (d) of s 267(2) being satisfied in respect of that debt or those debts.

Change of carriage of petition

6.31. (1) On the hearing of the petition, any person who claims to be a creditor of the debtor, and who has given notice under r 6.23 of his intention to appear at the hearing, may apply to the court for an order giving him carriage of the petition in place of the petitioning creditor, but without requiring any amendment of the petition."

[32] It is evident therefore that the scope of our s 95 is limited. It allows a substitution of a petitioner or providing the Director General of Insolvency carriage of the proceedings where a petitioner does not proceed with diligence, which is not applicable to the present case. The case before the High Court was not a case where the petitioner does not proceed with the bankruptcy proceedings with due diligence but a co-petitioner who had received his portion of the judgment sum, wished to cease from being a party to the bankruptcy proceedings.

Rule 276 Of The 1969 BR

[33] We now move on to deal with r 276 of the 1969 BR. Learned counsel for the appellants argued that Court of Appeal failed to give any or sufficient consideration to r 276. Learned counsel submitted that even assuming there is a lacunae in the BA 1967 or the 1969 BR, O 15 r 6(2)(a) and O 20 r 8 of the 2012 Rules apply in this case by virtue of r 276.

[34] This line of argument cannot be right. The key point here is that, as discussed earlier, there is already a specific provision in the BA 1967, s 93(3) to deal with amendments. In *Dr Shamsul Bahar Abdul Kadir v. RHB Bank Berhad & Another Appeal* [2015] 3 MLRA 456, the Federal Court held that the explicit provisions of an Act of Parliament should not be ignored against a provision of a subsidiary legislation. In the event of conflict between these provisions then the provisions in an Act of Parliament should prevail. The Federal Court in that case explained the effect of r 276 as follows:

> "[32] It was urged upon me by counsel for the judgment creditor that I should decline to follow the cases of *Re Ide* [1886] 17 QBD 755 and *Woodall, Re, ex p Woodall* [1884] 13 QBD 479 because, in this country, unlike in the UK, we have r 276 of the Bankruptcy Rules 1969 (the BR), which expressly provides that the Rules of the Supreme Court (now the Rules of the High Court 1980) regulating the procedure in its civil jurisdiction shall not apply to any proceedings in bankruptcy. Accordingly, it was submitted that there being no requirement in the BR that leave was required for commencing bankruptcy proceedings founded on a judgment entered more than six years previously no such leave was required. As such, the only bar to the commencement of bankruptcy proceedings would be if and when a judgment creditor is barred by s 6(3) of the Limitation Act 1953, so ran counsel's submission.
>
> I regret I find counsel for the judgment creditor's submission regarding this part of the case unacceptable. In my opinion, the overriding consideration here is, as I have indicated, the proper interpretation of s 3(1)(i) of our Act. I am not at liberty to brush aside the explicit provisions of s 3(1)(i) merely because of r 276 of the BR. Accordingly, if there is any conflict between these two measures I would regard s 3(1)(i) as having overriding effect since it ranks as principal legislation whereas the BR are subsidiary legislation (see s 23(1) of the Interpretation (States of Malaysia) Act 1967). In my view, therefore, the UK decisions are of direct relevance when construing s 3(1)(g) of our Act and I would respectfully follow them."

[35] Likewise, in our opinion, since there is already a specific framework to address amendment as provided in s 93(3) and for the substitution of party as provided in s 95 of the BA 1967, the relevant provisions of the 2012 Rules are not applicable. We agree with the submissions of learned counsel for the respondent that it is not for the courts to rely on r 276 of the 1969 BR to extend the scope of the said framework. We do not believe it would be right to extend what is a clear statutory provision to a fact situation not covered by the BA 1967 or the 1969 BR. In our opinion, the withdrawal of a judgment creditor as one of several co-petitioners is not within the contemplation of the BA 1967. The High Court does not have the power to make such an order in the exercise of its bankruptcy jurisdiction or to rely on r 276 in order to widen it to allow for the same.

Conclusion

[36] In consequence and in view of all the above our answer to the question of law must be answered in the negative.

[37] The result is that this appeal fails and must be dismissed with costs.

[38] My learned sister, Justice Rohana and my learned brother, Justice Mohd Zawawi have read this majority judgment in draft and have expressed their agreement with it. My learned sister, Justice Alizatul has indicated that she has a dissenting decision.

[39] Finally, we wish to state that this judgment is delivered pursuant to s 78 of the Courts of Judicature Act 1964 as our learned brother, Dato' Sri Balia has retired.

Alizatul Khair Osman Khairuddin FCJ (dissenting):

Introduction

[40] The background facts leading to the present appeal has been set out quite comprehensively in my learned brother Justice Azahar bin Mohamed's judgment. However for the purpose of this judgment, the salient facts bear repeating.

Salient Facts

[41] The appellants together with RHB Bank (the judgment creditors) brought an action against Gula Perak Berhad (Gula Perak) for the recovery of a sum of RM28,170,931.83 (Civil Action No: D5-22-1648-2005 (the suit)) pursuant to a syndicated loan granted by the judgment creditors to Gula Perak, the 1st defendant in the suit. The respondent stood as guarantor to that loan facility and was added on as a 2nd defendant.

[42] On 29 October 2011, after a full trial, judgment was obtained by the judgment creditors against Gula Perak and the respondent.

[43] As the judgment obtained was based on the syndicated loan granted by the judgment creditors to the 1st defendant (guaranteed by the respondent), the judgment sets out specifically the amounts payable to each judgment creditor. The (total) judgment sum payable under the judgment is RM28,651,503.00 (as at 7 November 2012). RHB Bank's portion is RM9,268,336.25.

[44] Premised on the aforesaid judgment, the judgment creditors on 24 February 2011, initiated bankruptcy proceedings by issuing a bankruptcy notice against the respondent in respect of the judgment sum outstanding.

[45] On 23 May 2011, the bankruptcy notice was served on the respondent personally.

[46] The respondent failed to comply with the bankruptcy notice within the stipulated period, resulting in an act of bankruptcy being committed by the respondent.

[47] Based on the said act of bankruptcy, the judgment creditors presented a creditors' petition against the respondent on 29 November 2011.

[48] The respondent filed various applications to challenge the bankruptcy proceedings which culminated in the Court of Appeal dismissing on 31 March 2014, the respondent's appeal against the decision of the High Court dismissing his application to oppose and set aside the bankruptcy notice.

[49] Much was made by the respondent of the judgment creditors' act in issuing a single bankruptcy notice (and creditors' petition). This is what was said by the respondent in their written submission:

> "It appears that the Judgment Creditors took the view that bankruptcy proceedings in respect of the judgment had to be approached as a collective exercise on the part of the Judgement Creditors, their interests being inter-connected by reason of the nature of the claim and the terms of the judgment. The appellants collectively issued the BN. In the like manner, on or about 25 November 2011, they presented the CP."

[50] It must be remembered that although the judgment on which the bankruptcy notice is premised provides for specific amounts to be paid to each judgment creditor, the judgment sum payable to the judgment creditors under the judgment is RM28,651,503.00.

[51] That amount represents the judgment debt due and owing to the judgment creditors and they are therefore entitled under the law to issue a (single) bankruptcy notice requiring the debtor (the respondent) to pay the said judgment sum within the period stipulated under s 3(1)(i) of the Bankruptcy Act 1967.

[52] The fact that the courts have upheld the validity of the bankruptcy notice despite the attempts of the respondent to impugn it lends support to the above proposition.

[53] The creditors' petition was finally fixed for hearing on 15 February 2015.

[54] On 30 September 2015, the respondent wrote to RHB Bank proposing full and final settlement of the portion of the judgment debt due to RHB Bank by paying the sum of RM3,851,200.00.

[55] Pursuant thereto, RHB Bank informed the appellants' solicitors that as the respondent had settled the judgment debt owed to RHB Bank, it no longer wished to continue as a party to the bankruptcy proceedings and requested the appellants' solicitors to withdraw RHB as a party in the bankruptcy proceedings against the respondent. This was in accordance with the terms of settlement agreed upon by the respondent and RHB Bank. (See pp 103-104 of the Record of Appeal (ROA), Vol 2). That part of the terms of settlement is reproduced below:

"(8) Upon full payment of the Settlement Sum, the Bank will:

(i) seek leave to withdraw the **Bank's claim** in the bankruptcy proceedings against Datuk Lim Sue Beng, with liberty to file afresh and with no order as to costs.

(ii) __"

[Emphasis Added]

[56] The appellants and RHB Bank then applied vide summons in chambers dated 16 February 2015 (encl 46) for, *inter alia*, an order that RHB Bank cease to be a party to the bankruptcy proceedings and that consequential amendments be made to the bankruptcy notice and the creditors' petition to remove any reference(s) to RHB Bank.

[57] Despite agreeing to the terms of settlement, the respondent nonetheless objected to the application on the ground that it was misconceived and thus an abuse of process. It was contended by the respondent that given the settlement between the respondent and RHB Bank, the appellants (the judgment creditors) were not entitled to rely on the original act of bankruptcy. Further, as the Bankruptcy Act 1967 did not make provision for the withdrawal of a co-petitioner in the manner proposed, the circumstances did not validly allow for the proposed amendments to the creditors' petition.

[58] The respondent's argument did not find favour with the High Court Judge as Her Ladyship allowed the appellants' application with costs. On appeal, however, the Court of Appeal reversed the High Court's decision holding, *inter alia*, that the High Court had no power to grant the appellant's application as there is no express provision in the Bankruptcy Act 1967 to allow any amendment to withdraw and substitute the petitioner save and except in accordance with s 95 of the Bankruptcy Act 1967.

[59] The Court of Appeal further held that the appellants could not resort to r 276 of the Bankruptcy Rules 1969. The proper course of action, according to the Court of Appeal, was for the appellants to file a fresh bankruptcy proceeding against the respondent.

[60] On 12 March 2018, the appellants were granted leave to appeal to this court.

Question of Law

[61] The question of law allowed by this court is as follows:

Whether in the case of petition presented by multiple petitioners, could the bankruptcy notice and creditors' petition be amended - the deletion of one or more petitioners be allowed under s 93(3) of the Bankruptcy Act 1967 and/or r 276 of the Bankruptcy Rules 1969.

[62] The crux of the appeal before us revolves essentially around the construction of s 93(3) of the Bankruptcy Act 1967 and/or r 276 of the Bankruptcy Rules 1969, based on the factual matrix of this case and the findings of the Court of Appeal.

[63] I propose to deal with s 93(3) of the Bankruptcy Act 1967 first. Section 93(3) of the Bankruptcy Act 1967 reads as follows:

> "The court may at any time amend any written process or proceeding upon such terms, if any, as it thinks fit to impose."

[64] As stated earlier, the Court of Appeal in allowing the appeal had expressed the view that there is no express provision in the Bankruptcy Act 1967 to allow an amendment to withdraw save and except in accordance with s 95 of the Bankruptcy Act 1967. This is what the Court of Appeal said:

> "We have anxiously perused the relevant provision of the BA 1967 and the 1969 BR. We are satisfied that there are no express provisions in the above-mentioned laws which allow for RHB Bank, a co-petitioner in the BN and CP to withdraw from being a party to the bankruptcy proceedings when there are multiple judgment creditors. In this case RHB Bank had elected to proceed collectively and this election was central to the character of the BN and the CP.
>
> Unlike the UK position, where substitution and change of carriage are permitted in additional circumstances, amongst others, in the event of disentitlement of the petitioner to do so, or where the petitioner consents to withdraw or allow the petition to be dismissed or non-appearance of the petitioner on the date of the hearing (see paras 173 & 174 of *Halsbury Laws of England*, 4th edn Reissue).
>
> Under s 95 of the BA 1967 the bankruptcy court is only empowered to substitute a judgment creditor in a situation where the judgment creditor does not prosecute his petition with due diligence and in no other circumstances.
>
> …
>
> We were of the view as there is no express provision in the relevant laws as discussed above for RHB Bank to withdraw as a party to the bankruptcy proceedings when there are multiple judgment creditors, the decision of the learned judge to allow for RHB Bank to do so is erroneous."

[65] As pointed out by learned counsel for the appellant, the Court of Appeal, in concluding that there is no express provision in the Bankruptcy Act 1967 or the Bankruptcy Rules 1969 allowing for RHB Bank to withdraw from being a party to the bankruptcy proceedings, made specific reference to *Halsbury's Laws of England*, 4th edn Reissue vol 3(2), paras 173 and 174 and drew comparison between the UK position which allows for substitution and change of carriage in additional circumstances (see s 271(5) of the UK Insolvency Act 1986 and rr 6.22, 6.30 and 6.31 of the UK Insolvency Rules 1986) and our Bankruptcy Act 1967 and Bankruptcy Rules 1969 which do not contain similar provisions.

[66] However, our Bankruptcy Act 1967 is modelled not on the UK Insolvency Act 1986 but on the UK Bankruptcy Act 1914. The precursor to the UK Bankruptcy Act 1914 is the UK Bankruptcy Act 1883.

[67] Contrary to the Court of Appeal's finding that there is no express provision in the Bankruptcy Act 1967 to allow for the withdrawal and substitution of a petitioner except in accordance with s 95 of the Bankruptcy Act 1967, the English courts have long recognised the principle of law that such withdrawal and substitution may be effected by the court under s 109(3) of the UK Bankruptcy Act 1914.

[68] Our s 93(3) of the Bankruptcy Act 1967 is in *pari materia* with s 109(3) above and its precursor s 105(3) of the UK Bankruptcy Act 1883. Our s 93(3) reads as follows:

> "The court may at any time amend any written process or proceeding upon such terms, if any, as it thinks fit to impose."

[69] Section 109(3) of the UK Bankruptcy Act 1914 states in almost identical terms as follows:

> "The court may at any time amend any written process or proceeding under this Act upon such terms, if any, as it may think fit to impose."

[70] Thus in the UK, the courts have, using the aforesaid provision, allowed amendments to be made to a bankruptcy petition not merely to correct clerical or minor errors as seen in *Ex parte Dearle* [1884] 14 QBD 184, *Lovell and Christmas v. Gilbert Walter Beauchamp* [1894] AC 607 and *Ex parte Owen, in Re Owen* [1884] 15 QBD 113 CA.

[71] In the latter case, a firm with two partners presented a bankruptcy petition against a debtor, based on an act of bankruptcy of the debtor for his failure to comply with the bankruptcy notice. Before the petition came to be heard, one of the partners went into liquidation and a trustee in liquidation was appointed. The Court of Appeal held that in order to justify the receiving order made on the petition, the trustee ought to have been made a party to it, and ought to have been before the court at the hearing of the petition and that the proper course is to give leave to amend the petition by adding as a co-petitioner the trustee in liquidation.

[72] The court (per Cotton LJ) in granting leave to amend, made the following observation:

> "I am of the opinion that the **bankruptcy notice was a good notice**, and that **the act of bankruptcy was complete** though, when the petition came on to be heard, a receiving order could not properly be made on it in the absence of the trustee in the liquidation."
>
> [Emphasis Added]

[73] Similarly here, the act of bankruptcy was complete on 30 May 2011 when the respondent failed to pay the amount stated in the Bankruptcy Notice which was personally served on him on 23 May 2011.

[74] The amendment to the creditor's petition and the bankruptcy notice therefore does not change the above position as the act of bankruptcy had already been committed on 30 May 2011.

[75] In other words, there is no prejudice to the respondent if the court were to allow the amendment to remove or exclude RHB Bank as a co-petitioner.

[76] As noted by noted by the authors William and Muir Hunter in their book, the Law and Practice in Bankruptcy, in relation to the court's power to amend under s 105(3) of the UK Bankruptcy Act 1914:

> "The court will not permit an amendment, nor will the court invalidate valid proceedings, **unless it is satisfied that by so doing no injustice will be done to the other parties**."
>
> [Emphasis Added]

[77] Thus in *Ex Parte Dearle*, a bankruptcy petition presented by a bare trustee of a debt was dismissed on the ground that the *cestui que* trust (the beneficiary) ought to have been joined as a petitioner. The Court of Appeal however granted leave (more than three months after the petition had been presented) to amend the petition (under s 105(3) of the UK Bankruptcy Act 1914) by joining the *cestui que* trust with her consent, as a co-petitioner.

[78] As observed by Brett MR:

> "In order to maintain a bankruptcy petition under the present Bankruptcy Act, there must be a **good petitioning creditor's debt, a good act of bankruptcy**, and the **proper petitioning creditor**. In the present case it cannot be doubted that there is a good petitioning creditor's debt–the debt is a judgment debt– and to my mind it is equally clear that there is a good act of bankruptcy."
>
> [Emphasis Added]

[79] The same can be said of the case before us, as all the elements required to maintain a bankruptcy petition under our Bankruptcy Act 1967 as set out by Brett MR above, have been satisfied.

[80] *Ex parte Dearle* (at pp 190-192) further held that where the act of bankruptcy consists of a failure to comply with a bankruptcy notice, any creditor who has a good petitioning creditor's debt may present a bankruptcy petition founded on that act of bankruptcy.

[81] This principle is reflected in s 95 of our Bankruptcy Act 1967 which allows a petitioner to be substituted (if he fails to proceed with due diligence on his petition) as petitioner and obtain the necessary bankruptcy orders.

[82] If a petitioning creditor can be substituted in the circumstances set out in s 95 of the Bankruptcy Act 1967 then I can see no reason why the court, cannot, under s 93(3) of the Bankruptcy Act 1967 allow for the petition to be amended to remove RHB Bank as a co-petitioner and for the amount of the judgment debt to be correspondingly reduced following the settlement of the debt by the respondent.

[83] Such an amendment in my view would not affect the validity of the act of bankruptcy as the amount remaining due following the deduction is well above the statutory limit and based on *Ex parte Dearle,* there is nothing in law to prevent the remaining petitioning creditors from continuing with the bankruptcy proceedings against the respondent based on the amended petition.

[84] In this regard I am unable to agree, with respect, with the Court of Appeal's view that such an amendment cannot be allowed for the reason alluded to in their judgment which is as follows:

> "The JCS in this case had elected to proceed collectively on the strength of a single judgment, therefore, the election is central to the character of the BN and CP.
>
> … the JCS are not permitted to change the character of the BN and CP in the manner it was done in this case …"
>
> (See para 20 of the Court of Appeal's judgment).

[85] The Court of Appeal did not however provide us with any authority to support their proposition neither did they go on to say that such an amendment would render the bankruptcy notice defective or irregular such as to affect its validity.

[86] In my view to hold that such an amendment is not permitted for the reasons stated by the Court of Appeal would result in an absurd situation whereby each time the respondent settles his debt with one of the petitioning creditors, a fresh bankruptcy notice would have to be issued.

[87] This would defeat the purpose of the appellants obtaining a joint judgment and a single bankruptcy notice (all of which have not been impugned by the court) particularly since this is a syndicated loan granted to the respondent by a consortium of lenders (ie the petitioning creditors).

[88] For the above reasons, I would agree with the appellant that the Court of Appeal erred in holding that the court only has power to amend parties to the proceeding under s 95 of the Bankruptcy Act 1967 and that it misdirected itself when it failed to take into account the court's power to amend proceedings under s 93(3) of the Bankruptcy Act 1967.

[89] As I have found that the court is empowered under s 93(3) of the Bankruptcy Act 1967 to amend the bankruptcy proceedings in the manner

proposed in encl (46), it is not necessary for me to consider whether the court can rely on r 276 of the Bankruptcy Rules 1969 to invoke the provisions of the Rules of Court 2012 to allow for such an amendment.

[90] I would accordingly answer the question of law in the affirmative. The appeal is therefore allowed with costs. The Order of the Court of Appeal is set aside and the Order of the High Court reinstated.

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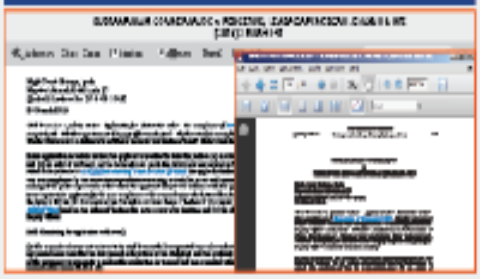

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