YURI ZAHARIN WAHAB

v.

ANN JOO METAL SDN BHD

Court of Appeal, Putrajaya
Ravinthran N Paramaguru, Mariana Yahya, Lim Chong Fong JJCA
[Civil Appeal No: B-03(IM)(NCC)-3-01-2023]
2 September 2024

Bankruptcy: *Setting aside — Judgment debtor's application to set aside bankruptcy notice and creditor petition on basis that no leave obtained under s 5(3)(b) Insolvency Act 1967 ('Act') — Whether leave under s 5(4) of Act required before commencing bankruptcy action against non-social guarantor — Whether partial protection granted to guarantors in bankruptcy action could only be availed in a loan case or applied generally to all guarantors including those who guaranteed trade debt*

The appellant ('judgment debtor') was one of the four individuals who had executed a personal guarantee in favour of the respondent ('judgment creditor') for the credit facility that was granted by the judgment creditor to one Leblanc Communication (Malaysia) Sdn Bhd ('Leblanc Communication') to purchase goods from the judgment creditor. A corporate guarantee for the said facility was also executed by one Leblanc Muno Ventures Sdn Bhd, which was subsequently wound up. Leblanc Communication defaulted in its payment for goods sold and delivered, and the judgment creditor obtained summary judgment against the individual guarantors including the judgment debtor, following which bankruptcy proceedings were commenced against the judgment debtor. The judgment debtor's application to set aside the bankruptcy notice and creditor petition on the ground that no leave was obtained under s 5(3)(b) of the Insolvency Act 1967 ('Act') was allowed by the Senior Assistant Registrar ('SAR'). Upon appeal by the judgment creditor, the High Court Judge ('HCJ') reversed the SAR's decision and reinstated the bankruptcy notice and creditor petition on the basis that s 5(3)(b) of the Act was inapplicable in this instance, as what was guaranteed was a trade debt and not a loan; that there was no 'borrower' in a trade debt; and that the said provision applied to a guarantor of a loan only. Hence the instant appeal and in support of which, the judgment debtor argued that s 5(3) of the Act referred to social and non-social guarantors only and that the HCJ was, therefore, wrong to have made a further distinction by characterising him as a guarantor of a trade debt instead of a guarantor of a loan, thereby, disentitling him to the protection envisaged by s 5(3) of the Act. The judgment creditor, however, argued, *inter alia,* that Leblanc Communication was not a borrower but a trade debtor; that s 5 of the Act envisaged a money lending transaction such as a bank loan and not a credit facility for the purpose of purchasing goods; and that the partial protection from bankruptcy action granted in s 5(3)(b) of the Act did not include guarantors of a trade debt. The issue that arose for determination

was whether the protection given to guarantors in a bankruptcy action could only be availed in a loan case or applied generally to all guarantors, including those who guaranteed a trade debt.

Held (allowing the appellant/judgment debtor's appeal);

(1) With respect to 'a guarantor other than a social guarantor' ie non-social guarantors, the Bankruptcy (Amendment) Act 2017 ('Act A1534'), which came into effect on 6 October 2017, provided partial protection which was similar to the protection granted to social guarantors prior to 6 October 2017. Act A1534 provided a leave stage procedure in that, obtaining leave of Court before commencing bankruptcy action was a pre-condition. At the leave application, the judgment creditor must satisfy the Court that he had exhausted all modes of execution and enforcement to recover the debts owed to him by the debtor. Hence, a judgment creditor could only commence a bankruptcy action against the guarantor after leave was granted. (para 15)

(2) Section 5(3)(b) of the Act clearly granted partial protection to non-social guarantors, generally without distinction, and imposed the requirement of obtaining leave of Court before commencing bankruptcy action against a non-social guarantor. Given that the meaning of 'social guarantor' was exhaustively defined, all other guarantors of whatever sub-category necessarily fell within the meaning of 'other than a social guarantor'. (para 21)

(3) Having regard to Parliament's aim of reducing bankruptcies that resulted from guarantees, the word 'borrower' in s 5(3) and (6) of the Act should be purposively read as having the meaning of 'debtor'. The underlying purpose of s 5(3) was to protect guarantors and ensure that judgment creditors exhausted modes of execution against the principal debtors by whatever names they were called, ie whether trade debtors or borrowers. *Hong Leong Bank Berhad v. Ong Moon Huat & Another Appeal* was the authority for the proposition that s 5(3) of the Act should be construed purposively. (paras 25 & 29)

(4) The word 'borrower' in s 5(5) and (6) of the Act carried the same meaning as in s 5(4) of the Act, ie principal debtor. Hence, leave under s 5(4) of the Act was required before bankruptcy proceedings could be commenced against any non-social guarantor, including the judgment debtor in this case. In the circumstances, and since no such leave was obtained, the SAR was, therefore, correct in setting aside the bankruptcy notice and creditor petition. (paras 30-31)

Case(s) referred to:

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 1 MLRA 356 (refd)

Hong Leong Bank Berhad v. Ong Moon Huat & Another Appeal [2018] MLRAU 504 (folld)

Legislation referred to:

Bankruptcy (Amendment) Act 2017, s 12

Insolvency Act 1967, s 5(3)(a), (b), (3), (4), (5), (6)

Counsel:

For the appellant: Prakash Chandrakant (Shashikala Anne with him); M/s Prakash & Co

For the respondent: Chong Kah Yee; M/s Shui Tai

JUDGMENT

Ravinthran N Paramaguru JCA:

Introduction

[1] The short point that arises in this appeal is this. It is whether the partial protection granted to guarantors in a bankruptcy action can only be availed in a loan case or whether it also applies generally to all guarantors including those who guaranteed a trade debt. In the case at hand, the guarantee in question was given for a trade debt as opposed to a loan. The learned Senior Assistant Registrar held that leave of court must be obtained before bankruptcy action can be instituted against the guarantor. She set aside the bankruptcy notice and creditor petition. The High Court thought otherwise and reversed the Senior Assistant Registrar's decision. Hence this appeal, which is by the guarantor, who is also the judgment debtor. For ease of reference, we shall refer to the parties as the judgment creditor and the judgment debtor. Unless otherwise indicated in this judgment, all statutory references are to the Insolvency Act 1967 (Revised 1988).

Background Facts

[2] The following undisputed background facts are gratefully extracted from the judgment of the High Court.

[3] Leblanc Communication (Malaysia) Sdn Bhd was granted a credit facility on 11 July 2014 to purchase goods from the judgment creditor. On 1 April 2015, Leblanc Muno Ventures Sdn Bhd executed a corporate guarantee for the credit facility. Subsequently, on 11 September 2015, four individuals, namely Muhammad Kuna, Daru Aswadi Bin Affendi, Yaqzan Yeap Kar Kat, and the judgment debtor executed a personal guarantee for the same credit facility in favour of the judgment creditor. It is not disputed that at the material time, the judgment debtor was a Director of Leblanc Communication (Malaysia) Sdn Bhd.

[4] The principal debtor, i.e., Leblanc Communication (Malaysia) Sdn Bhd, defaulted in paying the judgment creditor for the goods sold and delivered. Leblanc Communication (Malaysia) Sdn Bhd was wound up by a third party on 5 April 2019. The judgment creditor sued the corporate guarantor and the four individuals, including the judgment debtor in the Shah Alam High Court in Civil Suit BA-22NCC-59-05-2010. The corporate guarantor was subsequently wound up by a third-party on 16 May 2019. On 6 January 2020, summary judgment was granted in favour of the judgment creditor in the

sum of RM6,242,385.98 against all the individual guarantors including the judgment debtor. The said judgment has not been set aside to date.

[5] The judgment creditor issued the bankruptcy notice in question on 25 May 2021 and it was followed with a creditor petition on 6 April 2022. On 26 May 2022, the judgment debtor filed a summons-in-chambers to set aside the bankruptcy notice and creditor petition on the principal ground that no leave was obtained under s 5(3)(b) of the Insolvency Act 1967. The provision says that, in respect of guarantors other than social guarantors, leave must be obtained from the court before bankruptcy action can be commenced. It is not disputed that leave was not obtained in this case. The learned Senior Assistant Registrar allowed the application to set aside the bankruptcy notice and creditor petition.

Decision Of High Court

[6] Upon appeal by the judgment creditor, the High Court reversed the decision of the learned Senior Assistant Registrar and reinstated the bankruptcy notice and creditor petition.

[7] The learned High Court Judge held that s 5, which imposes the pre-condition of obtaining leave before commencing bankruptcy action, only applies to loan cases where there is a "borrower". As what was guaranteed in this case was a trade debt and not a loan, the learned High Court Judge said that s 5(3)(b) does not apply. The reason is that there is no "borrower" in a trade debt. Sub-sections (5) and (6) of s 5 mention "borrower" and, thus, the partial protection envisaged by Parliament in s 5 must necessarily apply to a guarantor of a loan only. This reasoning is found in the following passages of the judgment of the High Court:

> [18] Seharusnya ditekankan bahawa Penghutang Utama bukan merupakan peminjam ("borrower") sepertimana yang didefinasikan di bawah s 5(3), (4), (5), (6) dan (7) Akta Insolvensi 1967. Maka dengan itu, JD bukan ianya merupakan seorang pejamin untuk suatu pinjaman. Dengan itu, peruntukan s 5 Akta tersebut tidak terpakai sama sekali.
>
> [19] **Pada hemat saya, apabila Parlimen memasukkan perkataan peminjam/ borrower ini di dalam s 5(5) dan (6) Akta Insolvensi 1967 ini, ianya secara jelas mempamerkan niat murni Parlimen hanya untuk melindungi penjamin-penjamin yang telah memberikan jaminan-jaminan mereka untuk peminjam-peminjam atau penerima-penerima pinjaman sahaja dan bukannya diniatkan untuk dipanjangkan perlindungan tersebut kepada kategori penjamin-penjamin yang lain**.
>
> [20] Di atas alasan ringkas tersebut, Mahkamah Yang Mulia ini mendapati bahawa tiada keperluan bagi JC untuk memohon kebenaran mahkamah ini sebelum memulakan prosiding kebangkrapan terhadap JD kerana JD di dalam konteks rayuan ini bukannya merupakan seorang penjamin yang boleh diberikan payung perlindungan di bawah s 5(3)(b) Akta Insolvensi 1967.
>
> [Emphasis Added]

Argument Of Parties

[8] The argument of the judgment debtor is that s 5(3) only refers to two types of guarantors, ie social guarantors and non-social guarantors. Therefore, it was clearly wrong of the learned High Court Judge to make a further distinction by characterizing the judgment debtor, as a guarantor of a trade debt as opposed to being a guarantor of a loan and concluding that he is not entitled to the protection envisaged by s 5(3) of the Insolvency Act 1967 (Revised 1988).

[9] On the other hand, the argument of the judgment creditor is as follows. The facility granted to the principal debtor, i.e., Leblanc Communication (Malaysia) Sdn Bhd, is a credit facility to purchase goods and not a loan facility. Therefore, the principal debtor is not a borrower but a trade debtor who was allowed to purchase goods on credit terms. The judgment debtor as a Director of the principal debtor had a direct interest in the credit facility. It was further argued that sub-sections (5) and (6) of s 5 mention "borrower". Therefore, a money-lending transaction such as a bank loan is envisaged by s 5 and not a credit facility for the purpose of purchasing goods.

Issues

[10] As we said at the outset, only one short point arises in this appeal, i.e., whether the partial protection given to guarantors since 6 October 2017 also extends to those who guaranteed a trade debt as opposed to a loan. No direct authority that dealt with this issue previously was cited to us. We are of the view that assistance can be derived by considering the history of amendments to sub-sections (3) to (6) of s 5 and by reading the same holistically and with the purposive approach to the interpretation of statutes.

[11] Prior to 1 October 2003, a judgment creditor may, without any restriction, commence bankruptcy action against any judgment debtor regardless of whether the liability of the debtor was primary or secondary. Thus, a judgment creditor could commence bankruptcy action against any guarantor without troubling to commence or exhaust execution proceedings against the principal debtor.

[12] With effect from 1 October 2003, sub-section (3) was inserted into s 5 via the Bankruptcy (Amendment) Act 2003 (Act A1197). It introduced the concept of the "social guarantor" for the first time. The provision read as follows:

> (3) A petitioning creditor shall not be entitled to commence any bankruptcy action against a **social guarantor** unless he proves to the satisfaction of the court that he has exhausted all avenues to recover debts owed to him by the debtor.
>
> [Emphasis Added]

[13] This provision partially protected a social guarantor from bankruptcy action. A judgment creditor has to prove that he has exhausted all avenues to recover debts owed to him by the principal debtor before he can commence

bankruptcy action against a guarantor. In the same amending Act, "social guarantor" was defined to mean:

> "....a person who provides, not for the purpose of making profit, the following guarantees:
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> (a) a guarantee for a loan, scholarship or grant for educational or research purposes;
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> (b) a guarantee for a hire-purchase transaction of a vehicle for personal or non-business use; and
>
> (c) a guarantee for a housing loan transaction solely for personal dwelling."

[14] Subsequently, on 18 May 2017, another amendment was introduced by Parliament with respect to the institution of bankruptcy action against guarantors via the Bankruptcy (Amendment) Act 2017 (Act A1534). This amending Act came into force on 6 October 2017. This time, complete protection was granted to social guarantors from being subject to bankruptcy action. This meant that no bankruptcy action can be commenced against a guarantor who falls within the definition of a social guarantor. Thus, social guarantors were immune from being subject to bankruptcy proceedings without any qualification.

[15] However, with respect to "a guarantor other than a social guarantor" or in other words, non-social guarantors, Act A1534 provided partial protection. The protection is similar to the protection granted to social guarantors prior to 6 October 2017. But Act A1534 provides a leave stage procedure. Obtaining leave of court before commencing bankruptcy action is a pre-condition. At the leave application, the judgment creditor must satisfy the court that he has exhausted all modes of execution and enforcement to recover the debts owed to him by the debtor. Only after leave is granted, the judgment creditor may commence bankruptcy action against the guarantor.

[16] For ease of reference, we reproduce below the new sub-sections (3) to (7) of s 5 that came into force on 6 October 2017:

> (3) A petitioning creditor shall not be entitled to commence any bankruptcy action-
>
> (a) against a social guarantor; and
>
> (b) against a guarantor other than a social guarantor unless the petitioning creditor has obtained leave from the court.
>
> [(3) Subs. Act A1534: s 12]
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> (4) Before granting leave referred to in paragraph (3)(b), the court shall satisfy itself that the petitioning creditor has exhausted all modes of execution and enforcement to recover debts owed to him by the debtor.
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> [(4) Ins. Act A1534: s 12]

(5) Where the petition is presented against a guarantor pursuant to subsection (4), a petitioning creditor shall state in his petition the particulars of his borrower.

[(5) Ins. Act A1534: s 12]

(6) For the purposes of subsection (4), modes of execution and enforcement include seizure and sale, judgment debtor summon, garnishment and bankruptcy or winding up proceedings against the borrower.

[(6) Ins. Act A1534: s 12]

(7) If the petitioning creditor fails to comply with the requirements of this section, the court shall dismiss the petition.

[(7) Ins. Act A1534: s 12]

[17] We shall first consider the import of sub-section 5(3)(a) and (b) by reading it together. The absolute protection accorded to a social guarantor is expressed in plain words in para (a) of sub-section 5(3); no creditor can commence any bankruptcy action against a social guarantor. Parties are on common ground in respect of its meaning. In para (b) of subsection 5(3), there is an unequivocal and explicit reference to guarantors that do not fall within the category of social guarantors. It says that a creditor requires leave of court in respect of a "guarantor other than a social guarantor".

[18] It must be noted that insofar as description of guarantors is concerned, sub-section 5(3) is self-contained and independent. Its meaning is not linked to any other provision of s 5 or other provisions of the Act. Only sub-section 5(4) refers to sub-section 5(3). But it does not affect the meaning of sub-section 5(3) which, in absolute terms, says that leave is required if bankruptcy action were to be commenced against non-social guarantors. The provision only imposes the requirement of leave.

[19] Counsel for judgment creditor argued that the partial protection from bankruptcy action granted in para (b) of sub-section 5(3) does not include guarantors of a trade debt. The first reason canvassed for this argument is that the word "borrower" occurs in sub-sections (5) and (6) of s 5. Sub-section (5) says that when a petition is presented under sub-section (4), the creditor must state the particulars of his "borrower". Sub-section (6) which explains the meaning of "modes of execution and enforcement" refers to a "borrower".

[20] Counsel for judgment creditor also referred to the speech of the Minister delivered in Parliament when Act A1534 was debated. The Minister referred to "lender" and "borrower". This is the reason for the argument of counsel for judgment creditor that sub-section 5(3)(b) only covers guarantors of a loan and not guarantors of a trade debt.

[21] In our respectful view, this argument completely overlooks the clear words of para (b) of sub-section 5(3) that grants partial protection to non-

social guarantors generally without any distinction. As the meaning of a "social guarantor" is exhaustively defined, all other guarantors of whatever sub-category must necessarily fall within the meaning of "other than a social guarantor", i.e., a non-social guarantor. As we said earlier, the requirement of obtaining leave from the court when commencing bankruptcy action against a non-social guarantor is imposed in clear and unambiguous language in sub-section 5(3).

[22] Thus, whilst we acknowledge that reports of parliamentary debates that are reported in the Hansard are an aid to statutory interpretation, they should only be resorted to if the written law is ambiguous or obscure or if literally construed might lead to an absurdity. In this regard, we would have regard to the caution expressed by Edgar Joseph Jr FCJ in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 1 MLRA 356 which is as follows:

> We hasten to add, however, that when resort to Hansard is permissible, that by itself although meriting serious consideration cannot be determinative of the issue since it is only available as an aid to interpretation. To hold otherwise, would amount to substituting the words of the Minister or other promoter of the Bill for the words of the statute, and that cannot be the law.

[23] In the premises, we are constrained to think that there is no place for the narrow semantic argument that the word "borrower" is used in sub-sections (5) and (6) instead of "trade debtor" and, therefore, Parliament intended to limit the partial protection to guarantors to only those who guarantee a loan.

[24] From the history of the amendments to s 5, it is apparent that Parliament intended to limit the number of bankruptcies that result from guarantees. First, social guarantors were given partial protection. Subsequently, social guarantors were given complete protection and all other guarantors were given partial protection. The learned High Court Judge said that the judgment debtor in this case is a Director in the principal debtor company and, therefore, it was not the aim of Parliament to protect him. However, such aim is not borne out by the words of subsection 5(3) or suggested anywhere in the amending Act in question. In fact, if the argument of counsel for the judgment creditor that only loan guarantors are entitled to the protection of sub-section 5(3)(b) is accepted, it would lead to the following incongruous situation concerning Directors of companies. A Director and shareholder who guarantees a multimillion dollar loan for his company would be able to avail the partial protection accorded in s 5(3)(b). On the other hand, a Director who guarantees the credit facility for a much smaller sum to purchase goods would be bereft of such protection on the ground that the debt is a trade debt.

[25] Having regard to the aim of Parliament to reduce bankruptcies that result from guarantees, in our opinion, "borrower" in sub-sections (5) and (6) should be purposively read as having the meaning of "debtor". This approach is not without precedent with respect to the interpretation of s 5 of the Insolvency Act 1967 (Revised 1988).

[26] In the case of *Hong Leong Bank Berhad v. Ong Moon Huat & Another Appeal* [2018] MLRAU 504, one of the two issues that arose in the Court of Appeal was as follows:

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

[27] In the above-mentioned case, in the High Court, "debtor" in sub-section 5(4) was construed as including the "guarantor". The Court of Appeal disagreed on the ground that regard must be had to the purpose of sub-section 5(4) which requires exhaustion of modes of execution against the principal debtor or borrower. The Court of Appeal said as follows in the following passages:

> [4] It follows therefore that in construing s 5(4), regard must be given to s 5(6). And s 5(6) provides that the modes of execution and enforcement that must be exhausted include seizure and sale, judgment debtor summons, garnishment and bankruptcy against the borrower. It does not make sense that the reference to debtor in s 5(4) refers to the guarantor because s 5(6) specifies bankruptcy as one of the modes of enforcement that must be exhausted. As bankruptcy has not been commenced against the guarantor, it makes the entire construction that "debtor" includes the guarantor, wholly untenable and incomprehensible.
>
> [5] The only reasonable construction that can be accorded is that "debtor" in s 5(4) refers **to the principal debtor or the borrower**. The fact that the word "borrower" was not used does not preclude the construction we have adopted. On the contrary, such a construction is fully in accord with the purposive approach to be adopted in construing the section as outlined above.
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> [Emphasis Added]

[28] We are mindful that the issue that arose in the above case is not the same issue that arises in this case. Both the judgment creditor and judgment debtor have cited this case in their submissions. Counsel for the judgment debtor cited this case to support the argument that the underlying purpose of the amendment to sub-section 5(3) is to protect the guarantors. Counsel for the judgment creditor cited this case to buttress their semantic argument. Since the Court of Appeal in the abovementioned case read "debtor" in sub-section 5(4) to mean "principal debtor or borrower", it was urged upon us that the principal debtor must be the borrower of a loan.

[29] We should think that passages from a precedent should not be read as they are words of a statute. They should read in the context of the facts of the case and the purpose of the relevant written law in mind. *Hong Leong Bank Berhad v. Ong Moon Huat & Another Appeal (supra)*, in our opinion, does not support the argument of the judgment creditor. On the contrary, it is authority for the proposition that s 5(3) should be construed purposively. The underlying purpose of the provision is to protect the guarantors and ensure that judgment creditors exhaust modes of execution against the principal debtors by whatever

name they are called, i.e., whether trade debtors or borrowers. Otherwise, the entire aim of s 5(3) would be defeated on a technical and semantic argument that the draftsman had not anticipated.

[30] In our view, "borrower" in s 5(5) and (6) carries the same meaning as in s 5(4), i.e., principal debtor. Therefore, leave under s 5(4) is required before bankruptcy action can be commenced against any non-social guarantor, including the judgment debtor herein.

[31] In the instant case, as no leave under s 5(4) was obtained, we are of the view that the learned Senior Assistant Registrar was correct in her decision to set aside the bankruptcy notice and creditor petition. We shall accordingly allow the appeal and set aside the decision of the High Court with costs of RM10,000.00 here and below subject to allocatur.