Tang Yong Kiat Rickie *v* Sinesinga Sdn Bhd (transferee to part of the assets of United Merchant Finance Bhd) and others
[2014] SGHCR 6

Case Number : OSB No 84 of 2013

Decision Date : 11 March 2014

Tribunal/Court : High Court

Coram : Chan Wei Sern Paul AR

Counsel Name(s) : Chia Foo Yeow (Loo & Partners LLP) for the plaintiff; Chua Beng Chye, Raelene Pereira and Cherie Tan (Rajah & Tann LLP) for the first defendant; Ryan Loh and Matthew Teo (Rajah & Tann LLP) for the second, third and fourth defendants.

Parties : Tang Yong Kiat Rickie — Sinesinga Sdn Bhd (transferee to part of the assets of United Merchant Finance Bhd) and others

Insolvency Law – Bankruptcy – Annulment of bankruptcy order

Insolvency Law – Cross-border insolvency – Recognition of foreign insolvency proceedings

11 March 2014 Judgment reserved.

Chan Wei Sern, Paul AR:

1 The plaintiff is a Singapore citizen who for many years carried on business activities in Malaysia. As a result of unsatisfied personal guarantees which he issued in favour of Malaysian companies, two separate judgments were rendered against the plaintiff by the High Court of Malaya in Kuala Lumpur. The rights to these judgments were subsequently transferred to the first defendant. On the basis of one of these judgments, the 1st defendant petitioned for the plaintiff to be adjudged a bankrupt in Malaysia. On the basis of the other, the 1st defendant applied for the plaintiff to be adjudged a bankrupt in Singapore. On both counts, the 1st defendant was successful and the plaintiff was declared a bankrupt in Malaysia and Singapore in turn. In respect of the Singapore bankruptcy, the 2nd, 3rd and 4th defendants were appointed as private trustees to act in place of the Official Assignee.

2 The plaintiff now seeks to annul the Singapore bankruptcy order. To persuade this court to make such an order, three main grounds were provided:

(a) The Singapore bankruptcy order ought not have been made in the first place because the 1st defendant had not obtained leave of the Malaysian courts to institute bankruptcy proceedings in Singapore;

(b) Proceedings are pending in Malaysia for the distribution of the plaintiff's estate and effects under the bankruptcy law of Malaysia and the distribution ought to take place there; and

(c) A majority of the creditors are resident in Malaysia, and that from the situation of the property of the plaintiff or for other causes, the plaintiff's estate and effects ought to be distributed among the creditors under the bankruptcy law of Malaysia.

In support of these arguments, section 123(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("Bankruptcy Act") was relied upon. There being precious little literature on this provision, I now explain my decision for refusing the plaintiff's application.

Circumstances leading up to the bankruptcy orders

3 Beginning from 1986, the plaintiff resided mostly in Malaysia. It appeared that he was involved in various business ventures there although the full extent of them was never quite made clear. At any rate, he was sufficiently involved to act as guarantor to secure the indebtedness of two companies, Metrosharp Sdn Bhd and Madihill Development Sdn Bhd. The creditor of these companies was United Merchant Finance Berhad ("UMFB"). The debts not having been repaid, the plaintiff soon found himself the subject of two separate judgments for about RM 11 million and RM 9 million respectively. In the affidavits and submissions placed before me, these judgments were named the "Suit 893 Judgment" and the "Suit 888 Judgment" respectively and I shall adopt the same terminology for ease of reference.

4 On 11 February 2009, the assets of UMFB, including the Suit 893 Judgment and the Suit 888 Judgment, were transferred to the 1st defendant. It turned out that the plaintiff was unable to either satisfy these judgments or come to a compromise with the 1st defendant. As a result, and on the basis of the unsatisfied Suit 893 Judgment only, bankruptcy proceedings were commenced in Malaysia against the plaintiff. The Malaysian bankruptcy order was obtained on 16 March 2010. The plaintiff appealed against the Malaysian bankruptcy order but to no avail.

5 While the Malaysian bankruptcy proceedings were ongoing, the 1st defendant decided to register the Suit 888 Judgment in Singapore under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed). This was unsuccessfully challenged by the plaintiff. Thereafter, on 5 August 2011, the 1st defendant took the next step of seeking a bankruptcy order in Singapore on the basis of the now Singapore-registered Suit 888 Judgment. Again, the plaintiff attempted to resist the application but failed. Thus, after a rather protracted process, the plaintiff was adjudged a bankrupt in Singapore on 12 January 2012.

6 The 2nd, 3rd and 4th defendants are involved in the present action as they were, on 8 October 2012, appointed as private trustees to act in place of the Official Assignee in the Singapore bankruptcy. They did not, however, actively participate in the present application, their only interest being in the consequential orders that may be made in the event of an annulment.

The Singapore bankruptcy order ought not have been made

7 As mentioned previously, three arguments were made in favour of annulment of the Singapore bankruptcy order. The first string to the plaintiff's bow was that the Singapore bankruptcy order should never have been made in the first place. This was because the 1st defendant should have but did not obtain leave of the Malaysian High Court to institute the bankruptcy proceedings in Singapore, the plaintiff having been adjudged a bankrupt in Malaysia before bankruptcy proceedings were commenced in Singapore. This contention was founded upon section 123(1)(a) of the Bankruptcy Act:

> The court may annul a bankruptcy order if it appears to the court that –
>
> (a) on any ground existing at the time the order was made, the order ought not to have been

made;

…

8 That no leave was obtained from the Malaysian courts for the 1st defendant to commence Singapore bankruptcy proceedings was readily conceded. The contest between the parties revolved around whether leave was required. On this point, multiple expert affidavits were filed by both parties to persuade this court to their respective positions. Counsel for both parties urged me to examine the authorities underlying the views of the experts to ascertain the strength of the opinions. While this would normally have been the proper course of action, it was, to my mind, unnecessary in the present application.

9 In essence, both sets of counsel had viewed matters from the perspective of Malaysian law, venturing on whether the Malaysian bankruptcy order has extraterritorial effect. This was not irrelevant but there was, in my view, a more fundamental issue germane to the plaintiff's claim – even if, assuming for a moment, the Malaysian bankruptcy order had extraterritorial effect, what implications should this have on a Singapore bankruptcy court's determination of whether to grant a bankruptcy order against the plaintiff? After all, it is beyond dispute that the power to make a bankruptcy order pursuant to the Bankruptcy Act belonged wholly to the Singapore bankruptcy court: see section 65 of the Bankruptcy Act. That it is the Singapore jurisdiction which determines whether the Malaysian bankruptcy order should be accorded any recognition or effect in Singapore is also a proposition echoed by Ian Fletcher in *The Law of Insolvency*, (London: Sweet & Maxwell, 2009), (at [28-020]):

> While it may be possible for all courts within the country which constitutes the *forum concursus* to act on the assumption that the order enjoys effectiveness over persons and property both inside that jurisdiction and beyond, there is no means of compelling the courts of other jurisdictions to concede that it enjoys the attribute of universality *proprio vigour*: such a contention flies in the face of the fundamental principle of the sovereign autonomy which must be accorded to the legal system of every independent country. Therefore the extent, if any, to which a given judgment or order made in insolvency proceedings will possess international effectiveness is a matter for determination by the foreign systems of law concerned.

The pertinent anterior question then is whether any failure by the 1st defendant to obtain leave from the Malaysian authorities to commence proceedings against the plaintiff in Singapore constitutes a valid and sufficient ground on which the Singapore bankruptcy order against the plaintiff "ought not to have been made" by the Singapore bankruptcy court. This is a matter of Singapore law, not Malaysian.

10 When this was pointed out to counsel, counsel for the plaintiff then made two points. First, he pointed out that section 65(2)(e) of the Bankruptcy Act allows the Singapore bankruptcy court to dismiss a bankruptcy application for any "sufficient cause":

> The court may dismiss the application if –
>
> …
>
> (e) it is satisfied that for other sufficient cause no order ought to be made thereon.

This, while significant, does not conclude the analysis; it simply provokes the further question of what constitutes "sufficient cause".

11 Counsel for the plaintiff then submitted that as a matter of common law, the failure to comply with the bankruptcy rules and regulations of Malaysia - failing to obtain leave before commencing Singapore bankruptcy proceedings in the present case - constitutes "sufficient cause". Unfortunately, no authority was cited in favour of this proposition. At the highest, the expert opinion rendered on behalf of the plaintiff and the English authorities cited therein stood for the proposition that, in certain circumstances, a domestic bankruptcy court may restrain creditors from pursuing actions in other foreign jurisdictions against a person already adjudged to be bankrupt under its jurisdiction. They shed no light on whether a domestic bankruptcy court should not make a domestic bankruptcy order because the potential bankrupt had already been declared a bankrupt in other foreign jurisdictions.

12 Indeed, from my research, I know of no common law case which held that the fact that a person has already been declared a bankrupt in a foreign jurisdiction is, without more, a valid and sufficient reason for not making a domestic bankruptcy order against him. There appears to be no local case law in relation to the "sufficient cause" ground for dismissing a bankruptcy application. However, there are several reported foreign cases in which a dismissal of a bankruptcy petition was or may have been founded upon a similar "sufficient cause" provision or pursuant to the court's general power to dismiss a bankruptcy application: see section 6(3) of the Malaysian Bankruptcy Act 1967 (Act 360), section 9(2) of the Hong Kong Bankruptcy Ordinance (Cap 6) and section 266(3) of the Insolvency Act 1986, UK. These cases involve situations where:

(a) the debtor has a reasonable prospect of being able to repay the debt: see *Re Latifah Bte Hussainsa, ex p Perbadanan Pembangunan Pulau Pinang* [2005] 2 MLJ 290 and *Re MS Ward* [1933] MLJ 69;

(b) the date of the act of bankruptcy was wrongly stated: see *Stephen Wong Leong Kiong v HSBC Bank Malaysia Bhd (formerly known as Hongkong Bank (M) Bhd)* [2011] 4 MLJ 207);

(c) there is a subsisting bankruptcy order made against the debtor *in the same jurisdiction* and the creditor did not act in good faith in bringing a subsequent bankruptcy petition: see *Sama Credit & Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia* [1995] 1 MLJ 274;

(d) the judgment on which the debt is founded is unsound, unfair or in some manner defective: see *Re Victoria* [1894] 2 Q.B. 387 and *Re Davenport* [1963] 1 W.L.R. 817;

(e) the creditor is estopped from petitioning for bankruptcy: see *Re Stray* (1867) 22 Ch. App. 374 and *Re A Debtor (No. 11 of 1935)* [1936] Ch. 165;

(f) it is certain, as opposed to probable, that the debtor has no assets nor is there any hope of assets to accrue in future: see *Re Robinson* (1883) 22 Ch.D. 816;

(g) the effect of the bankruptcy order is to stifle a claim, with a real prospect of success, which the bankrupt might otherwise have been able to pursue against the petitioning and only creditor to which the debtor was indebted: see *Re Ross (a bankrupt*) *(No 2)* [2000] BPIR 636; and

(h) there is or has been an abuse of the bankruptcy process by the creditor: see, for instance, *Bank of Scotland v Bennett* [2004] EWCA Civ 988.

13 Even if one were to rely on section 123(1)(a) alone without reference to section 65(2)(e) of

the Bankruptcy Act, precedence is still not kind to the plaintiff. Under section 123(1)(a) of the Bankruptcy Act, two requirements must be satisfied. First, the bankruptcy order ought not to have been made on a ground existing at the time when it was made. Secondly, the court should in the circumstances annul the bankruptcy order, the court having been vested with overriding discretion to decide this question even if the first requirement is made out. Where the first requirement is concerned, the situations in which the requirement was found to have been satisfied include:

(a) an abuse of process: see *Re Painter, ex p Painter* [1895] 1 QB 85;

(b) the bankruptcy order was made on the basis of evidence which turned out to be untrue: see *Re Bright, ex p Wingfield and Blew* [1903] 1 KB 735;

(c) the bankruptcy order was made under a defective petition: see *Re Skelton, ex p Coates*(1877) 5 CH D 979;

(d) the debtor was dead at the time the proceedings were commenced: see *Re Stanger, ex p Geisel* (1882) 22 CH D 436;

(e) the debtor was a minor and the debt was not legally enforceable against him: see *Re Davenport, ex p Bankrupt v Eric Street Properties Ltd* [1963] 2 All ER 850 as explained in *Re Noble, ex p Bankrupt v Official Receiver* [1965] Ch 129; and

(f) the debtor was not domiciled in the jurisdiction at the time the bankruptcy order was made: see *Re Peh Kong Wan, ex p United Malayan Banking Corp Bhd* [1992] 2 MLJ 292.

14 A study of precedence of course does not conclude the matter. The court's powers to dismiss a bankruptcy application for a "sufficient cause" under section 65(2)(e) and annul a bankruptcy order under section 123 (1)(a) of the Bankruptcy Act are clearly discretionary ones and that discretion is wide and flexible. The situations enumerated above are certainly not exhaustive of the circumstances which would justify the exercise of that discretion. However, if a general thread may be drawn through the situations in which the exercise of such discretion is justified, this would be that the making of or persisting with a bankruptcy order in those circumstances would be in some way inequitable or ineffective. This is not so in the present application.

15 There is in principle no reason why a person who has already been adjudged a bankrupt in Malaysia should not, without more, be similarly declared a bankrupt in Singapore if the application is well-founded. That the plaintiff is adjudged a bankrupt twice over does not mean that his creditors would be able to recover twice. A creditor is only entitled to be paid for the debt actually owing by the bankrupt and any amount overpaid to the creditor must be repaid: see section 231 (2) of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed). Further, there is no issue of wastage of time and resources as in the case where a creditor brings a bankruptcy proceedings against a person already adjudged a bankrupt *in the same jurisdiction*. In the latter situation, there is no real benefit to be had from multiple bankruptcy proceedings – the same Official Assignee would administer the bankrupt's assets and the same amount of assets would be available for distribution. Rather than incur the additional cost and time involved in making a second bankruptcy application, the creditor should instead file a proof of debt with the Official Assignee.

16 This is different where bankruptcy in respect of the same individual is declared in separate jurisdictions. While two separate sets of costs would have to be incurred, such disadvantage may be offset by a reasonable possibility of a benefit for the creditors if bankruptcy is declared in two jurisdictions instead of one. Such a benefit includes the possibility that the pool of assets available for

distribution may be augmented as would usually be the case when the debtor has assets in both jurisdictions. Practically speaking, a local official assignee would generally have greater power and more effective means to control assets within his jurisdiction as compared to a foreign official assignee. There is no question in the present case that the plaintiff had assets in Singapore at the time the Singapore bankruptcy order was made. Counsel for the plaintiff argued to the contrary on the ground that any Singapore assets the plaintiff owned had vested in the Malaysian Official Assignee by operation of section 152(2) of the Bankruptcy Act. This contention is wholly incorrect as section 152(3) states that such vesting only takes effect if the Singapore bankruptcy application against the plaintiff had been dismissed or withdrawn or the bankruptcy order rescinded or annulled. Since the Singapore bankruptcy application was granted in the plaintiff's case and the order not rescinded or annulled, the plaintiff's property in Singapore did not vest in the Malaysian Official Assignee at the time of the making of the Singapore bankruptcy order.

17 It may perchance be argued that multiple bankruptcies will result in duplication of efforts by the different Official Assignees. While that may be true – and it is certainly ideal of the different Official Assignees can cooperate to eliminate the wastage of resources – that is a matter to be sorted out in the course of the administration of the bankrupt's assets. On this point, I am fortified by the decision in *Re A Debtor (No. 737 of 1928)* [1929] CH 362 where the English Court of Appeal held (at p 370) that:

> [i]f difficulties arise hereafter in the carrying out of the bankruptcy proceedings in this country as well as in Switzerland, they will be matters to be dealt with in the course of bankruptcy proceedings.

That there may possibly be duplication of efforts alone is no reason to dismiss a well-founded bankruptcy application. Certainly, the phenomenon of multiple bankruptcy orders, in respect of the same individual, emanating from separate jurisdictions is hardly unknown under English law: see *Re McCulloch* (1880) 14 Ch.D. 716 and *Re A Debtor (No. 199 of 1922)* [1922] 2 Ch 470. In fact, section 152(3) of the Bankruptcy Act appears to contemplate the very situation that the plaintiff takes offence at – bankruptcy orders made in respect of the same individual in both Singapore and Malaysia.

18 It will be observed that an abuse of process by the creditor is a sufficient ground to dismiss a bankruptcy application or annul a bankruptcy order: see [12(h)] and [13(a)], above. Such an allegation was indeed made in the present case. It was asserted by the plaintiff that the 1st defendant had, by commencing the Singapore bankruptcy action, circumvented the Malaysian bankruptcy regime. This was because the proofs of debt filed against the plaintiff's estate in Malaysia was RM 38,209,683.24 while an aggregate of only S$9.9 million worth of proofs of debt was filed in Singapore. Since the 1st defendant had filed proofs of equal value in both jurisdictions, it was a much larger creditor in the Singapore bankruptcy regime in comparison to the Malaysian bankruptcy regime. The plaintiff alleged that this gave "unlawful priority to the 1st defendant's debts over other unsecured creditors…"

19 In my view, the act by the 1st defendant of starting a bankruptcy action in Singapore while participating in the bankruptcy regime in Malaysia did not, without more, constitute an abuse of process. In the first place, it is unlikely for the 1st defendant to have started the Singapore bankruptcy proceedings with the intention of obtaining any such advantage. After all, it was open to all of the plaintiff's creditors to file proofs of debt under the Singapore bankruptcy regime, including those that had earlier filed proofs of debt in Malaysia (assuming that such creditors have not yet recovered their debts). Thus, any attempt to seek an advantage in this manner may easily be

thwarted. More importantly, the presentation of a bankruptcy petition for the collateral purpose of obtaining some advantage which will result from the debtor being made a bankrupt is generally not conceived as an abuse of process, so long as the petition was well-founded and the recovery of debt remains the primary goal. To this end, the case of *Strongmaster Ltd v Kaye & Ors* [2004] BPIR 335 is instructive. In that case, it was alleged that the real impetus for the bankruptcy application was that the director of the creditor had a personal vendetta against the debtor. This argument was roundly rejected (at [9]) on the basis that the fact that there are "additional reasons for seeking [the debtor's] discomfiture does not make the pursuit of the petition an abuse of the process." In the present case, there is absolutely no evidence before me that the 1st defendant's intention in commencing bankruptcy proceedings in Singapore was not for the primary purpose of recovering its debts.

20 In short, there is no reason in law or principle why the Singapore bankruptcy order obtained on 12 January 2012 "ought not to have been made", even if the plaintiff had been adjudged a bankrupt in Malaysia prior to that date. The first requirement under section 123(1)(a) of the Bankruptcy Act not having been satisfied, there is no question of me exercising my discretion under the second requirement.

Proceedings are pending in Malaysia for the distribution of the plaintiff's estate and the distribution ought to take place there

21 The next argument made on behalf of the plaintiff in support of his application for annulment was that proceedings are pending in Malaysia for the distribution of the plaintiff's estate and effects amongst creditors under the bankruptcy law of Malaysia and that the distribution ought to take place there. This argument is based on section 123(1)(c) of the Bankruptcy Act:

> The court may annul a bankruptcy order if it appears to the court that –
>
> …
>
> (c) proceedings are pending in Malaysia for the distribution of the bankrupt's estate and effects amongst the creditors under the bankruptcy law of Malaysia and that the distribution ought to take place there
>
> …

To the knowledge of both sets of counsel, there are no local or foreign cases that expound on this provision.

22 To my mind, the utilisation of the court's power under section 123(1)(c) of the Bankruptcy Act requires the satisfaction of three separate criteria:

> (a) proceedings are pending in Malaysia for the distribution of the bankrupt's estate and effects amongst the creditors under the bankruptcy law of Malaysia;
>
> (b) the distribution ought to take place in Malaysia; and
>
> (c) the bankruptcy order ought to be annulled when all relevant circumstances are considered.

23 The first element is an entirely factual and objective one and is not in dispute in the present application. The second element, in my view, is one where the court is required to consider the

efficacy and efficiency of the bankruptcy proceedings. It must be shown by the plaintiff seeking annulment that it is more efficacious and efficient for the bankrupt's estate to be distributed in Malaysia alone rather than in both Singapore and Malaysia. To that end, many factors may be possibly relevant. Suffice to say, the primary concern should be the maximisation of value for the creditors. Finally, the last element, by virtue of the bankruptcy court's overriding discretion to annul bankruptcy orders, allows the court to take into account all relevant circumstances beyond efficacy and efficiency of distribution.

24 In the present application, the plaintiff puts forth the following the case for the distribution to take place in Malaysia rather than in both Singapore and Malaysia. First, all of the plaintiff's creditors who have filed proofs of debt in the Malaysian bankruptcy proceedings are Malaysian entities and resident in Malaysia. Such proofs, as mentioned previously, amounted to RM 38,209,683.24. In contrast, the value of the proofs filed in Singapore amounted only to about S$9.9 million, of which less than 20% of the creditors are in Singapore. Secondly, there are hardly connecting factors between the Malaysian creditors and Singapore.

25 I acknowledge the pertinence of these facts. On the other hand, I also note that, as the plaintiff himself admitted, he did not and does not own any asset in Malaysia. In Singapore, it cannot be gainsaid that the plaintiff had property at the time of the making of the Singapore bankruptcy order. In addition, although no evidence was forthcoming about the status of the administration of the plaintiff's estate in both Singapore and Malaysia, it is at least equally relevant that a not insubstantial amount of time has passed from the time the bankruptcy orders were made to the time the present application was filed – almost three years and seven months in the case of the Malaysian bankruptcy and almost one year and nine months in the case of the Singapore bankruptcy. The expiration of time in the present case is of such length as to cast a pall over the plaintiff's application. Barring any evidence to the contrary, one must assume that a substantial amount of work has been put in by the Official Assignees and/or the private trustees to administer the plaintiff's estate. To negate such work now may do more harm than good. It is also not insignificant that there are Singapore-based creditors who have filed proofs of debt in the Singapore bankruptcy regime, even though they may be in the minority. Considering all the relevant evidence holistically, I am not of the view that the plaintiff has made out a persuasive case that the distribution ought to take place solely in Malaysia.

26 On the question of whether the bankruptcy ought to be annulled when all relevant circumstances are considered, counsel for the plaintiff made several points. First, he argued that the plaintiff's estate has been administered in Malaysia since 2010. The plaintiff has also been making monthly and regular payments to his creditors under the Malaysian bankruptcy regime. This did not entirely persuade me for, as stated above, the administration of the plaintiff's estate in Singapore is not in its infancy either. Further, the plaintiff has been, as far as I am aware and to his credit, duly making monthly payments to discharge his debts under the Singapore bankruptcy regime too. Secondly, it was argued on behalf of the plaintiff that there is no evidence that the Malaysian authorities are incapable of administering the plaintiff's estate or investigating into the plaintiff's affairs. Indeed, counsel for the 1st defendant tried to advance such an argument but the evidence, such as there was, was inconclusive. Even so, the plaintiff's argument did not aid him much. It must be remembered that this is a case where both bankruptcy regimes had co-existed for a substantial period of time. To alter this state of affairs, more persuasive reasons, other than the fact that the Malaysian Official Assignee is not incapable, must be had. Finally, the plaintiff repeated his contention that a majority of his creditors are located in Malaysia. However, the existence of the Singapore-based creditors should not be discounted.

27 On the other hand, counsel for the 1st defendant also made a point that would be relevant to the third requirement under section 123(1)(c): see [22], above. His contention was raised as a freestanding argument to dismiss the plaintiff's application on the basis of what is known as the extended doctrine of *res judicata* but it is equally germane here. Essentially, counsel for the 1st defendant argued that the plaintiff was at all material times fully aware of his bankruptcy in Malaysia. Thus, when the plaintiff sought to challenge the bankruptcy application in Singapore, he ought to have raised this point. However, the only issue he raised then was for want of proper service, a contention which was rejected. The plaintiff having ought to have raised the issue of his Malaysian bankruptcy during the application for the plaintiff to be made a bankrupt in Singapore but did not, counsel for the 1st defendant submitted that it amounted to an abuse of process for the plaintiff to do so now.

28 As was explained in *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 (at [53]), the determination of an abuse of process is one that requires the balancing of the two competing factors of allowing genuine claims and disallowing oppressive litigation:

> [i]n determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant.

On this count, I am particularly mindful that in applications to annul bankruptcy orders, any costs incurred by a creditor in resisting the application may not be recovered if the application was found to be unmeritorious. However, in the present case, I am not of the view that there has been repeated litigation which has been unduly oppressive to the 1st defendant. It is true that the plaintiff challenged the bankruptcy proceedings, both in Malaysia and in Singapore. It is also true that he should have raised the point about his Malaysian bankruptcy much earlier. But given the novelty of the arguments made before me, I am of the view that the plaintiff was not abusing the court process in making the present application.

29 On the whole, where section 123(1)(c) of the Bankruptcy Act is concerned, the plaintiff has not demonstrated, on a balance of probabilities, that the distribution ought to take place in Malaysia or that, looking at all relevant circumstances holistically, the Singapore bankruptcy order ought to be annulled.

A majority of the creditors are resident in Malaysia, and that from the situation of the property of the plaintiff or for other causes, the plaintiff's estate and effects ought to be distributed among the creditors under the bankruptcy law of Malaysia.

30 The plaintiff's final throw of the dice was based on section 123(1)(d) of the Bankruptcy Act. That particular subsection reads:

> The court may annul a bankruptcy order if it appears to the court that –
>
> …
>
> (d) a majority of the creditors in number and value are resident in Malaysia, and that from the situation of the property of the bankrupt or for other causes his estate and effects ought to be distributed among the creditors under the bankruptcy law of Malaysia.

As with section 123 (1)(c), case law renders no assistance in the understanding of this provision. A plain reading of the provision, however, suggests that there are similarly three criteria to be satisfied:

(a) the majority of the creditors in number and value are resident in Malaysia;

(b) the bankrupt's estate and effects ought to be distributed under the bankruptcy law of Malaysia either because of:

(i) the situation of the property of the bankrupt; or

(ii) other causes; and

(c) the bankruptcy order ought to be annulled when all relevant circumstances are considered.

31 Again, the first element is a purely factual one and is to be ascertained by reference to objective evidence. Unlike section 123(1)(c), section 123(1)(d) of the Bankruptcy Act does not require proceedings to be pending in Malaysia. Thus, a bankrupt may utilise section 123(1)(d) to annul his bankruptcy in Singapore even if there are no current or immediately foreseeable endeavour to have him be declared a bankrupt in Malaysia, although one must imagine that a very strong case has be mounted in order for him to succeed in that situation. On the other hand, section 123(1)(d) requires that the majority of the bankrupt's creditors in number and value be resident in Malaysia, a criterion that need not necessarily be satisfied under section 123(1)(c). Thus, the difference between the two subsections may be found in the objective element that must be satisfied. In the present case, there is no question that the majority of the plaintiff's creditors, both in number and in value, are resident in Malaysia.

32 The second criterion under section 123(1)(d) is not unlike the second criterion under section 123(1)(c) of the Bankruptcy Act. In both cases, the enquiry focuses on the efficacy and efficiency of the bankruptcy proceedings and the predominant objective is to provide the greatest value for the creditors of the bankrupt. Again, relevant to this enquiry may be many possible factors. In particular, although special mention is made of the situation of the bankrupt's property under section 123(1)(d), that does not mean that that factor becomes determinative of the issue. In my view, the discretion afforded by the use of "ought" necessarily implies that all factors bearing on whether it would be more efficacious and efficient for the bankrupt's estate to be distributed under the bankruptcy law of Malaysia may be taken into consideration. Accordingly, even if the entirety of the bankrupt's property is situated in Malaysia, the court may still come to the conclusion that it is more efficacious and efficient for the Singapore bankruptcy order not to be annulled.

33 Finally, the third criterion allows the court to consider all relevant considerations beyond those bearing on the efficacy and efficiency of the bankruptcy administration. This, as mentioned, is a nod to the bankruptcy court's wide and flexible discretion to grant annulments as conferred by the phrase "[t]he court may annul a bankruptcy order.."

34 It is not clear to me which of the arguments by the plaintiff's counsel were directed at the second criterion and which the third. This is understandable for the criteria has not been hitherto been properly established. The arguments put before me include the following: (1) the Malaysian bankruptcy order was made in 2010; (2) the relevant Malaysian authority is fully capable of administering the plaintiff's estate; (3) the 1st defendant, by commencing the Singapore bankruptcy action, has stolen a march on other creditors; and (4) the 1st defendant's action in commencing the Singapore bankruptcy action was an abuse of process. Suffice to say, all of these contentions have been rehearsed previously and need not be dealt with again. I will simply highlight that even the one

factor that has been singled out for special mention under the second criterion of section 123(1)(d) - that of the situation of the plaintiff's property – does not lean in favour of the plaintiff.

35 Needless to say, there is no reason provided for me to think that the estate and effects of the plaintiff ought to be distributed under the bankruptcy laws of Malaysia or that the Singapore bankruptcy order should be annulled.

Conclusion

36 If one takes a step back, as one must from time to time, and examine the circumstances holistically, there is nothing inherently inequitable, unjust or unfair for the plaintiff to be subjected to bankruptcy both in Singapore and in Malaysia. After all, the plaintiff owes debts to a whole host of creditors most of whom are located in Malaysia but some of whom are situated in Singapore. In commencing the Singapore bankruptcy application, the 1st defendant seeks full or greater repayment of debts owed to it. Even then, these debts, as well as debts due to other creditors, remain unrecovered. It is unlikely that the recovery process will be expedited if the Singapore bankruptcy order is annulled. There is simply no good reason to annul the Singapore bankruptcy order, especially when the order had been in effect for a not insubstantial period.

37 For all of the above reasons, the application is dismissed. Costs will be dealt with in a subsequent hearing.

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