IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 38

Civil Appeal No 162 of 2019

Between

Edward Ho Yu Tat

… *Appellant*

And

(1) Joseph Chen Kok Siang
(2) Joseph Chen & Co

… *Respondents*

In the matter of Suit No 965 of 2018

Between

Edward Ho Yu Tat

… *Plaintiff*

And

(1) Joseph Chen Kok Siang
(2) Joseph Chen & Co

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure] — [Striking out]
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v
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Court of Appeal — Civil Appeal No 162 of 2019
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6 April 2020

22 April 2020

Tay Yong Kwang JA (delivering the grounds of decision of the court):

Introduction

1 This was an appeal heard by way of video-conferencing facilities as a result of the prevailing regulations to combat the health situation caused by the covid-19 virus. All the parties were agreeable to proceeding in this manner. The appellant's counsel had returned recently from abroad and was still subject to a 14-day Stay Home Notice on the date of hearing of this appeal. The appellant, who was in Malaysia and subject to the country's Movement Control Order, applied to join in the video-conference and was allowed by this court to do so on the condition that he was to have no speaking rights.

2 The sole issue in this appeal concerned the following legal question: does a bankrupt in Malaysia have to obtain the sanction of the Director General of Insolvency ("the DGI"), who is the equivalent of Singapore's Official

Assignee ("the OA"), before he commences legal proceedings in Singapore which are based on claims that are vested in the DGI?

3 Section 38(1)(*a*) of the Insolvency Act 1967 (Act 360 w.e.f 31 December 1988) (M'sia) ("the Malaysian Insolvency Act") stipulates that a bankrupt in Malaysia shall be incompetent to maintain any action without the "previous sanction" of the DGI, other than an action for damages in respect of an injury to his person. In this case, it is not disputed that the plaintiff/appellant obtained the DGI's sanction only after he commenced the present action, Suit No 965 of 2018 ("Suit 965/2018"). Accordingly, in the striking out application taken out by the defendants/respondents before the Assistant Registrar ("the AR"), the main issue was whether the DGI's sanction which was granted after the commencement of Suit 965/2018 cured the appellant's failure to comply with s 38(1)(*a*) of the Malaysian Insolvency Act.

4 The AR held that the appellant's failure to obtain the DGI's prior sanction before commencement of the action could not be cured by the DGI's sanction granted after commencement of the action. Accordingly, the AR struck out Suit 965/2018 on the ground that it was legally unsustainable as the appellant had no legal standing to commence Suit 965/2018 at the time of commencement. The appellant appealed to the High Court judge ("the Judge"). The Judge affirmed the AR's decision in her oral judgment delivered on 29 July 2019.

5 Before us, the appellant advanced a new argument. His submission was that the DGI's prior sanction was in fact not required before commencement of the action because the appellant's claims had vested in the DGI. According to the appellant, the requirement of prior sanction applies only in respect of claims

which do not vest in the DGI.[1] Therefore, both the AR and the Judge had asked the wrong question and considered the wrong issue, namely, whether the DGI's sanction had retrospective effect.[2] This ought not to be the relevant question as it was not necessary for the appellant to seek the DGI's prior sanction in the first place.

6 In the circumstances, the appellant submitted that the only irregularity in the present case was that he could not have commenced Suit 965/2018 in his own name but had to sue in the DGI's name. He argued that this was a mere procedural irregularity and was curable by amending the name of the plaintiff under O 20 r 5(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court").[3]

7 At the conclusion of this appeal, we held that this new argument was untenable as it contradicted the plain wording of s 38(1)(*a*) of the Malaysian Insolvency Act. Further, we took the view that this argument resulted from an incorrect reading of this court's decision in *Standard Chartered Bank v Loh Chong Yong Thomas* [2010] 2 SLR 569 ("*Thomas Loh*"). We therefore dismissed the appeal and indicated that we would explain our decision in greater detail subsequently. We now do so.

Facts

8 The appellant, Dr Edward Ho Yu Tat, is a Malaysian citizen. The first respondent, Mr Joseph Chen Kok Siang, was the former solicitor of the

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1 Appellant's reply para 7.

2 Appellant's reply para 6.

3 Appellant's reply para 9.

appellant. The first respondent is the managing partner of the second respondent, Joseph Chen & Co. He acted for the appellant who was the plaintiff in District Court Suit No 2230 of 2011 ("the Underlying Suit") (which was originally started as a High Court action, Suit No 657 of 2010).[4]

9 We set out the agreed facts in chronological order.

The Underlying Suit

10 On 30 August 2010, the appellant commenced the Underlying Suit in the High Court against his former employer, the Nanyang Technological University ("NTU").[5] He claimed damages against NTU for defamation. The Underlying Suit was subsequently transferred from the High Court to the Subordinate Courts (now called the State Courts).

11 On 15 October 2012, the appellant engaged the second respondent to represent him in the Underlying Suit. The first respondent was the solicitor having conduct of the matter.[6]

12 On 5 December 2013, the appellant's defamation claim was dismissed by the District Judge ("the DJ"). The DJ's grounds of decision were released on 21 April 2014 (see *Edward Ho Yu Tat v Nanyang Technology University, Singapore* [2014] SGDC 135). The DJ held that the appellant had a "hopeless" case because of various deficiencies in his statement of claim (at [61]). In any

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4 Appellant's case paras 5 and 7.

5 Appellant's case para 3.

6 Appellant's case para 6.

event, notwithstanding these deficiencies, the DJ held that the appellant's claim would have failed on its merits as well (at [62] and [84]).

13 On 26 September 2014, the appellant's appeal against the DJ's decision was dismissed by Choo Han Teck J in the High Court. By that time, the appellant was acting in person as he had terminated the respondents' retainer on 11 December 2013.[7]

Suit 965/2018

14 On 10 December 2014, the appellant was made a bankrupt in Malaysia by a bankruptcy order of the Penang High Court.[8] The appellant remained an undischarged bankrupt at the time this appeal was heard.

15 On 1 October 2018, the appellant commenced the present action against the respondents. The appellant sued the respondents for breach of contract and/or negligence arising out of their legal representation of the appellant in the Underlying Suit.

16 It was undisputed that the appellant did not seek the DGI's sanction before commencing the present action. It was only on 15 October 2018 that the appellant applied to the DGI for his sanction.[9]

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7 Appellant's case para 8.

8 Appellant's case para 9; Appellant's core bundle vol 2 page 6.

9 Appellant's case para 11.

17 On 1 November 2018, the respondents entered an appearance in the present action although they had not been served with the court documents by the appellant.[10]

18 On 14 December 2018, the DGI, by way of a letter written in the Malay language which was translated into English, informed the appellant as follows:[11]

> 2 Please be informed that the Director General of Insolvency has approved the sanction for you to start and to continue with your action at the Singapore High Court and representing yourself in this suit action and possible appeals in the case.
>
> 3 Please take note of the following:
>
> (a) The Director General of Insolvency of Malaysia will not be responsible and should not be liable for any failure, loss and any costs involved or incurred by any party involved in the suit and/or arising out of the suit and failures, losses and any costs shall be borne by the guarantor of this sanction;
>
> (b) In case the court's decision in the suit action is in favour of you, any money, compensation and interests received by you must be surrendered to the Director General of Insolvency Malaysia to be deposited into your bankruptcy estate for your creditors' beneficial; …

The relevant legislative provisions

19 Section 152 of the Singapore Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the Singapore Bankruptcy Act") provides for the reciprocal recognition of the official assignees between Singapore and Malaysia. It states as follows:

> **Reciprocal recognition of Official Assignees**
>
> **152.**—(1) The Minister may, by notification in the *Gazette*, declare that the Government of Singapore has entered into an agreement with the government of Malaysia for the recognition

10 Appellant's case para 12.

11 Appellant's core bundle vol 2 pages 3-5 (original), 6-8 (translated).

> by each government of the Official Assignees in bankruptcy appointed by the other government.
>
> (2) From the date of that notification where any person has been adjudged a bankrupt by a court in Malaysia, such property of the bankrupt situate in Singapore as would, if he had been adjudged bankrupt in Singapore, vest in the Official Assignee of Singapore, shall vest in the Official Assignee appointed by the government of Malaysia, and all courts in Singapore shall recognise the title of such Official Assignee to such property.
>
> (3) Subsection (2) shall not apply where a bankruptcy application has been made against the bankrupt in Singapore until the application has been dismissed or withdrawn or the bankruptcy order has been rescinded or annulled.
>
> (4) The production of an order of adjudication purporting to be certified, under the seal of the court in Malaysia making the order, by the registrar of that court, or of a copy of the official *Gazette* of Malaysia containing a notice of an order adjudging that person a bankrupt shall be conclusive proof in all courts in Singapore of the order having been duly made and of its date.
>
> (5) The Official Assignee of Malaysia may sue and be sued in any court in Singapore by the official name of "the Official Assignee of the Property of (name of bankrupt), a Bankrupt under the Law of Malaysia".

20 In respect of s 152(2) of the Singapore Bankruptcy Act, the parties agreed that "property" would include claims in contract and in tort, such as the appellant's present claims. This would be in line with this court's decision in *Thomas Loh* at [14].

21 Section 38 of the Malaysian Insolvency Act sets out the various duties and disabilities that the appellant is subject to as an undischarged bankrupt in Malaysia:

> **Duties and disabilities of bankrupt**
>
> **38.** (1) Where a bankrupt has not obtained his discharge —
>
> (*a*) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

(*b*) the bankrupt shall once in every six months render to the Director General of Insolvency an account of all moneys and property which have come to his hands for his own use during the preceding six months, and shall pay and make over to the Director General of Insolvency so much of the same moneys and property as have not been expended in the necessary expenses of maintenance of himself and his family;

(*ba*) notwithstanding paragraph (*b*), the bankrupt shall immediately report to the Director General of Insolvency the receipt of any moneys, property or proceeds in any form from property the value of which exceeds five hundred ringgit and which moneys, property or proceeds do not form part of his usual income and the bankrupt shall, as soon as may be required by the Director General of Insolvency, pay or make over such moneys, property or proceeds to the Director General of Insolvency;

(*bb*) the bankrupt shall immediately inform the Director General of Insolvency if there is any change of his home address;

(*c*) the bankrupt shall not leave Malaysia without the previous permission of the Director General of Insolvency or of the court;

(*d*) the bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company;

(*e*) the bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, engage in the management or control of any business carried on by or on behalf of, or be in the employment of, any of the following persons, namely —

(i) his spouse;

(ii) a lineal ancestor or a lineal descendant of his or a spouse of such ancestor or descendant; or

(iii) a sibling of his or a spouse of such sibling.

(1A) In granting permission under paragraph (*c*), (*d*) or (*e*) of subsection (1), the Director General of Insolvency or the court may impose such conditions as he or it may think fit.

(2) A bankrupt who makes default in performing or observing this section or a condition imposed pursuant to subsection (1A) shall be deemed guilty of a contempt of court, and shall be punished accordingly on the application of the Director General of Insolvency.

22 Section 38(1)(*a*) of the Malaysian Insolvency Act is in similar terms as s 131(1)(*a*) of the Singapore Bankruptcy Act. Section 131 of the Singapore Bankruptcy Act states as follows:

> **Disabilities of bankrupt**
>
> **131.**—(1) Where a bankrupt has not obtained his discharge —
>
> (*a*) unless the bankrupt has obtained the previous sanction of the Official Assignee, the bankrupt is incompetent to commence, continue or defend —
>
> (i) any action other than —
>
> (A) an action for damages in respect of any injury to the bankrupt's person; or
>
> (B) a matrimonial proceeding; or
>
> (ii) any appeal arising from any action referred to in sub-paragraph (i); and
>
> (*b*) he shall not leave, remain or reside outside Singapore without the previous permission of the Official Assignee.
>
> (1A) Despite subsection (1)(*a*), the bankrupt must notify the Official Assignee of any proceedings referred to in subsection (1)(*a*)(i)(A) or (B), or any appeal arising from any such proceedings, not later than 3 days before commencing, continuing or defending the proceedings or appeal, as the case may be.
>
> (2) A bankrupt who fails to comply with this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or to both.
>
> (3) In this section —
>
> "action" and "proceedings" include arbitration;
>
> "matrimonial proceeding" means —
>
> (*a*) a proceeding under Part VIII, IX or X of the Women's Charter (Cap. 353); or
>
> (*b*) a proceeding referred to in section 35(2)(*a*), (*b*), (*c*), (*d*) or (*e*) or 35A of the Administration of Muslim Law Act (Cap. 3).

Decisions of the High Court

The AR's decision

23 On 14 February 2019, the respondents, by way of Summons No 759 of 2019, applied to strike out Suit 965/2018 on the ground that it was legally unsustainable. They submitted that the appellant had commenced Suit 965/2018 without obtaining the sanction of the DGI and therefore failed to comply with s 38(1)(*a*) of the Malaysian Insolvency Act.

24 The appellant took the position that his failure to obtain the DGI's prior sanction was cured by the DGI's sanction granted on 14 December 2018.[12]

25 The AR agreed with the respondents that Suit 965/2018 was legally unsustainable. The AR found that the effect of ss 151(1) and 152(2) of the Singapore Bankruptcy Act was that the Singapore courts recognise the DGI's interest in the property of a person who has been made bankrupt in Malaysia. The appellant's claims against the respondents had vested in in the DGI when he was adjudged a bankrupt in Malaysia and the appellant, without having obtained the DGI's prior sanction, did not have the legal standing to commence Suit 965/2018.

26 The AR rejected the appellant's argument that the DGI's sanction could be obtained after the event. The AR found that "the position is clear, both in Singapore and Malaysia that the sanction of the [DGI] has no retrospective effect … the failure by the [appellant] to obtain the sanction from the [DGI]

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12 Appellant's core bundle vol 2 page 26.

prior to filing the writ on 1 October 2018 could not be cured by the sanction obtained on 14 December 2018".[13]

(a) In respect of the Singapore position, the AR referred to s 131(1)(*a*) of the Singapore Bankruptcy Act. He then referred to *Thomas Loh* at [28] which stated that "[t]he word 'previous' in s 131(1)(*a*) of the [Singapore Bankruptcy Act] is certainly an 'emphatic' … and unequivocal statement that the OA's sanction cannot be granted *ex post facto*".

(b) The AR found that the legal position in Malaysia was the same. He referred to s 38(1)(*a*) of the Malaysian Insolvency Act and the decision of the Malaysian Court of Appeal in *Goh Eng Hwa v M/S Laksamana Realty Sdn Bhd* [2004] 3 MLJ 97 where it was held that the filing of an action without the DGI's previous sanction would result in the action being null and void (at [23]).

The Judge's decision

27 The appellant appealed against the AR's decision by way of Registrar's Appeal No 139 of 2019. The Judge dismissed the appeal and held that the appellant had no legal standing to commence Suit 965/2018 on 1 October 2018. Her decision can be summarised as follows:[14]

(a) The Judge rejected the appellant's argument that the respondents ought to be challenging the validity of the DGI's sanction in the Malaysian courts instead of raising it as an issue in Suit 965/2018. The

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13 Appellant's core bundle vol 2 page 28.

14 Appellant's core bundle vol 1 page 9.

Judge held that the appellant's legal standing was a procedural issue which should be determined by reference to the law of the forum, *ie*, Singapore law.[15]

(b) The Judge noted the appellant's argument before the AR that his claims against the respondents were "personal injury" claims and therefore did not vest in the DGI. The Judge rejected this argument as the appellant's pleaded loss of reputation and mental distress were referable to the respondents' alleged breach of contract and negligence. Following *Thomas Loh* at [14], the appellant's claims were not personal injury claims as they did not relate to pain felt by the appellant in respect of his body, mind or character and without immediate reference to his rights of property.[16] We note here that this argument was inconsistent with the new argument advanced before us, namely, that the appellant's claims were vested in the DGI.

(c) Next, the Judge held that the appellant's claims against the respondents for breach of contract and in negligence fell within the definition of "property" under s 2(1) of the Singapore Bankruptcy Act. If the appellant was adjudged a bankrupt in Singapore, these claims would have vested in the OA. Accordingly, by operation of s 152(2), the claims vested in the DGI.[17]

(i) Following *Thomas Loh* at [15], the appellant could only sue in his own name if the DGI reassigned the property in

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15 Appellant's core bundle vol 1 page 9.

16 Appellant's core bundle vol 1 page 12.

17 Appellant's core bundle vol 1 page 13.

question back to him. Whether there was a valid assignment from the DGI was to be determined by Malaysian law. However, it was not disputed that no such assignment had taken place.[18]

(ii) The appellant could sue in the name of the DGI if he had obtained the prior sanction from the DGI, following s 38(1)(*a*) of the Malaysian Insolvency Act. Whether the sanction obtained by the appellant from the DGI had retrospective effect was to be determined by Malaysian law. In this regard, the Judge accepted the expert opinion of Mr S Murthi ("Mr Murthi"), an advocate and solicitor of the High Court of Malaysia. The respondents' expert stated unequivocally in the final paragraph of his legal opinion that "a sanction under s 38(1)(*a*) of the Malaysian Insolvency Act 1967 given to the undischarged bankrupt by the DGI after the commencement of a legal action by the bankrupt does not have a retrospective effect to validate the initial originating process commenced without the prior sanction of the DGI". The Judge also noted that Mr Murthi's evidence was backed up by Malaysian case law. In contrast, there was no expert evidence adduced by the appellant to rebut Mr Murthi's opinion.[19]

(d) For the reasons set out above, the Judge held that the appellant had no legal standing to commence Suit 965/2018 on 1 October 2018.

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18 Appellant's core bundle vol 1 page 14.

19 Appellant's core bundle vol 1 page 15.

(e) The Judge also rejected the appellant's argument that the striking out of Suit 965/2018 on a "procedural issue" would cause him grave prejudice because of the potential time-bar which could preclude him from filing a new action. The Judge held that even if there was such a time-bar, it would not be a basis for excusing the appellant's lack of legal standing. From the appellant's statement of claim, much of the impugned conduct took place in 2013 and yet the appellant only commenced Suit 965/2018 on 1 October 2018. In the intervening period, he chose to pursue various complaints and actions against a number of parties, including filing complaints against the respondents with the Law Society of Singapore in 2014. If the appellant's claims in Suit 965/2018 were indeed time-barred, the appellant was the author of his own misfortune.[20]

Summary of the parties' submissions on appeal

28 As we have stated above at [5], the appellant raised a new argument before us that was not advanced before the AR or the Judge. He claimed that the proceedings before the AR and the Judge had been "advanced on the basis of the wrong question being asked and consequently, the decisions below have both been based on the wrong reasons".[21] This was because the principal focus in those hearings was whether or not the DGI's sanction could have retrospective effect.

29 According to the appellant, the court's decision in *Thomas Loh* stands for the proposition that the prior sanction of the OA/DGI is only necessary for

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[20] Appellant's core bundle vol 1 pages 16 and 17.

[21] Appellant's reply para 5.

claims that do not vest in the OA/DGI.[22] Since the appellant's claims in contract and tort against the respondents vested in the DGI, the appellant did not have to seek the prior sanction of the DGI. The issue of whether sanction could be granted retrospectively was thus irrelevant.

30 As the striking out application and the appeal therefrom had proceeded on the wrong question, the appellant claimed that he was prejudiced in that he was denied the opportunity to cure the relevant defect in his pleadings, this defect being the commencing of Suit 965/2018 in his own name rather than in the DGI's name. This defect could have been cured by allowing the appellant to amend his pleadings under O 20 r 5(1) of the Rules of Court, which states as follows:

> Subject to Order 15, Rules 6, 6A, 7 and 8 and this Rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

31 In response, the respondents pointed out that the fact that the appellant commenced Suit 965/2018 in his own name and not in the DGI's name was only one of the defects in Suit 965/2018.[23] They submitted that it was still necessary for the appellant to seek the DGI's sanction before he commenced Suit 965/2018.

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22 Appellant's reply para 7.

23 Respondents' skeletal submissions para 10.

Our decision

32 In the circumstances, the sole issue before us was whether or not the appellant had to seek the DGI's prior sanction before the appellant commenced Suit 965/2018, on the basis that his claims were vested in the DGI by law.

Section 38(1)(a) of the Malaysian Insolvency Act governs the appellant's capacity to sue

33 We note at the outset that the relevant provision in the present case which governed the appellant's capacity to sue as a bankrupt in Malaysia should be s 38(1)(*a*) of the Malaysian Insolvency Act rather than s 131(1)(*a*) of the Singapore Bankruptcy Act. In their written submissions, the respondents contended that the basis of the prior sanction requirement was s 131(1)(*a*) of the Singapore Bankruptcy Act.[24] However, before us, counsel for the respondents, Mr Christopher Anand s/o Daniel, clarified that the governing provision which the respondents were relying on was instead s 38(1)(*a*) of the Malaysian Insolvency Act. As for the appellant, his counsel, Mr Paul Fitzgerald, accepted that it was s 38(1)(*a*) of the Malaysian Insolvency Act which governed the "substantive bankruptcy" of the appellant, rather than s 131(1)(*a*) of the Singapore Bankruptcy Act.

34 To recapitulate, s 152(1) of the Singapore Bankruptcy Act provides that the Singapore and Malaysian governments shall recognise the respective official assignees in each country. It is not disputed that the relevant declaration referred to in s 152(1) of the Singapore Bankruptcy Act was made by the Minister of Law and duly notified in the Gazette (see Reciprocal Recognition

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[24] Respondents' skeletal submissions para 9.

of Official Assignees (GN No S 106/1950)). In our view, it would be inconsistent with the legislative framework for the Singapore courts to recognise the office of the DGI in Malaysia and yet permit a bankrupt in Malaysia to commence an action in Singapore without the DGI's sanction, if the bankrupt is required to obtain the DGI's sanction as a matter of Malaysian law.

35 It follows from the above that the starting point to examine the appellant's new argument ought to be s 38(1)(*a*) of the Malaysian Insolvency Act followed by any relevant case law in Malaysia that can assist in the interpretation of that provision. For the purpose of this analysis, this court's decision in *Thomas Loh* would be useful in so far as s 131(1)(*a*) of the Singapore Bankruptcy Act is in similar terms as s 38(1)(*a*) of the Malaysian Insolvency Act.

Whether or not s 38(1)(a) of the Malaysian Insolvency Act applies to claims which are vested in the DGI

36 We set out s 38(1)(*a*) of the Malaysian Insolvency Act again for easy reference:

> **Duties and disabilities of bankrupt**
>
> **38.** (1) Where a bankrupt has not obtained his discharge —
>
> (*a*) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

37 In our judgment, the appellant's new argument was untenable as it clearly contradicted s 38(1)(*a*) of the Malaysian Insolvency Act. The appellant did not attempt to show how his new argument was supported by the text of this provision or by Malaysian case law. Section 38(1)(*a*) certainly does not state

that a bankrupt in Malaysia is not required to seek the DGI's prior sanction if his claims are vested in the DGI. Instead, it states in clear terms that so long as the action is not one for "damages in respect of an injury to his person", a bankrupt is required to obtain the "previous sanction" of the DGI before he commences "any action". Clearly, "previous sanction" is completely different from sanction that is obtained only after the event, that is, after commencement of action has taken place.

38 The appellant's argument was also unsustainable in the light of the decision of the Federal Court of Malaysia in *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537 ("*Akira Sales*"). In that case, a five-judge court stated at [20] and [21]:

> [20] Sanction is not required to challenge an order in bankruptcy. But where s 38(1)(a) applies, an undischarged bankrupt must obtain the previous sanction of the DGI to institute a claim (*Dato' Kuah Tian Nam v Tan Wrun Peng* [2009] 9 MLJ 464), file a counterclaim (*Goh Eng Hwa v M/s Laksamana Realty Sdn Bhd* per Abdul Hamid Mohamad FCJ, as he then was), defend an action (*Kesang Leasing Sdn Bhd v Dato' Hj Mat @ Mat Shah bin Ahmad & Ors* [2009] 7 MLJ 305), maintain the action and continue with the case (*Priyakumary Muthucumaru & Anor v Gunasingam a/l Ramasingam (a bankrupt)* [2006] 6 MLJ 511), 'commence an action by writ or by any of the mode provided in O 5 r 1' (*Bankruptcy Law in Malaysia and Singapore* by GK Ganesan at p 547) or file an appeal (*Amos William Dawe v Development & Commercial Bank (Ltd) Berhad*; …).
>
> [21] Only previous sanction will do. Subsequent sanction, which is not previous sanction, could not change the fact that the undischarged bankrupt was not competent to institute, maintain or defend the action at the material time. But previous sanction is not always required. Not everything vests in the DGI. Where not vested in the DGI, an undischarged bankrupt is not caught by s 38(1)(a). On that, we do not subscribe to the view expressed by the Singapore Court of Appeal in *Standard Chartered Bank v Loh Chong Yong Thomas* at paras [30] and [32] per VK Rajah JCA, delivering the judgment of the court, that an action for 'property' which does not vest in the

> assignees, still require the previous sanction coupled with assignment of the 'property' by the assignees.

39 Contrary to the appellant's arguments, s 38(1)(*a*) of the Malaysian Insolvency Act is in fact applicable to claims which are vested in the DGI. However, s 38(1)(*a*) of the Malaysian Insolvency Act does not apply to claims which are not vested in the DGI. On this point, we note that there is some divergence with the position in Singapore, which requires a bankrupt in Singapore to obtain the OA's prior sanction even in respect of claims which do not vest in the OA, so long as the claims do not fall within the exceptions listed in s 131(1)(*a*) of the Singapore Bankruptcy Act (*Thomas Loh* at [30]). However, this divergence in this limited aspect was irrelevant for the purposes of this appeal. In the present case, it was not disputed that the appellant's claims in Suit 965/2018, being claims in contract and tort, were vested in the DGI. Therefore, s 38(1)(*a*) of the Malaysian Insolvency Act was applicable to the appellant's claims in Suit 965/2018. His failure to comply with that provision meant that he had no legal standing to commence Suit 965/2018 on 1 October 2018, the date the action was taken out.

40 In our view, the appellant's failure to obtain the DGI's previous sanction affected his competence or capacity to commence his action in Singapore. If he was "incompetent to maintain" the action, surely he could not be competent to commence the action too. This is entirely consistent with *Akira Sales* cited above. This incompetence or lack of capacity was not a mere procedural irregularity which could be rectified by amendment under O 20 r 5(1) of the Rules of Court because the action could not be commenced by the appellant at all on 1 October 2018.

41 We were not persuaded by the appellant's argument that he would be prejudiced if Suit 965/2018 was struck out because of a potential time-bar

against his claims. We agree with the Judge that any potential time-bar was simply the consequence of the appellant's own delay in commencing Suit 965/2018.

Thomas Loh

42 As we have explained above, the appellant's lack of legal standing turned on his failure to comply with s 38(1)(*a*) of the Malaysian Insolvency Act. As a matter of Malaysian law, it was clear that the appellant had to comply with s 38(1)(*a*) of the Malaysian Insolvency Act but did not do so. *Thomas Loh*, which concerned s 131(1)(*a*) of the Singapore Bankruptcy Act, was not directly relevant to the above analysis. Nevertheless, since the appellant submitted that his new argument was supported by *Thomas Loh*, we shall discuss it briefly.

43 The appellant focused specifically on the following paragraph in *Thomas Loh* in support of his new argument (at [30]):

> 30 Section 131(1)(*a*) of the BA expressly restricts the competence of a bankrupt, so long as he has not obtained his discharge, to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the OA (for ease of reference, we shall, in this part of the judgment, use the term 'the s 131(1)(a) BA restriction' to denote the stipulation that the bankrupt must obtain the OA's previous sanction before commencing an action which is not an action for damages in respect of an injury to his person). This formulation of the rights and disabilities of a bankrupt implies that it is only in cases where the bankrupt would be competent – if not for the s 131(1)(*a*) BA restriction – to maintain an action *despite his bankruptcy* that he requires the previous sanction of the OA. What then are the actions which, if not for the s 131(1)(*a*) BA restriction, a bankrupt is competent to maintain notwithstanding his bankruptcy? As these actions will not, for practical reasons, be actions relating to property which vests in the OA upon bankruptcy (see [16] above), they must be actions relating to property that does not vest in the OA upon bankruptcy. In other words, the bankrupt may maintain any action with respect to property which remains vested in him

> despite his bankruptcy, but s 131(1)(*a*) of the BA declares it incompetent for him to do so without the previous sanction of the OA. In our view, this is the proper construction of s 131(1)(*a*) of the BA, having regard to the object of the legislation, which is to (*inter alia*) 'disable' some of a bankrupt's civil rights. [emphasis in original]

44 In our judgment, the context of the above paragraph shows that the court was concerned with identifying the claims which a bankrupt would be able to sue in his own name once the OA's prior sanction was obtained. It was noted that such claims "must be actions relating to property that does not vest in the OA upon bankruptcy". This is because for "actions relating to property which vests in the OA upon bankruptcy", the bankrupt may sue in his own name only if the OA assigns the property in question back to the bankrupt. However, the court pointed out that the OA would not assign property back to a bankrupt. This was explained in *Thomas Loh* earlier in that judgment at [15] and [16]:

> 15 The second issue raises the question of whether property of a bankrupt which has vested in the OA upon bankruptcy must be assigned by the OA back to the bankrupt before the latter can sue *in his own name* on that property. The guiding principle here is that, where property of a bankrupt has vested in the OA upon bankruptcy, the bankrupt no longer has any standing to commence any proceedings *in his own name* in respect of such property. He may do so (*ie*, sue in his own name *vis-à-vis* property vested in the OA) *only if* the OA assigns the property in question back to him (upon such assignment, the property re-vests in the bankrupt, which is why he can then bring an action in his own name *apropos* that property). In contrast, if the OA does not assign the property in question back to the bankrupt (and merely grants the sanction required by s 131(1)(*a*)), the bankrupt cannot sue in his own name in respect of the property, but must instead sue *in the OA's name*.
>
> 16 The second issue is, to all intents and purposes, purely hypothetical in that it has never been the practice of the OA, for practical and other reasons (one of which is s 131 of the BA, which we shall examine later), to assign property back to a bankrupt so that the latter can pursue a claim which he has in respect of that property. Such a procedure would entail more administrative oversight on the part of the OA in terms of recovering from the bankrupt any damages or restitution that he may obtain from the defendant. If the bankrupt has a viable

> claim against the defendant, the OA would have a duty to pursue the claim for the benefit of the creditors. The OA would also have full control over the proceedings. It can be envisaged that, if an assignment of property back to a bankrupt for the purposes of enabling him to sue on it is made, such assignment would be subject to so many conditions in order to safeguard the interests of the creditors that it would simply be more convenient for the OA to sue on the property rather than to delegate this duty back to the bankrupt by an assignment of that property.
>
> [emphasis in original]

45 In *Thomas Loh*, the plaintiff/respondent commenced an action in his own name against the defendant/appellant. There were three claims advanced by the respondent, namely, breach of duty in contact, breach of duty in tort and defamation. As the respondent was an undischarged bankrupt, his claims in contract and tort vested in the OA. His claim for defamation did not vest in the OA as it related to "pain felt by the respondent in respect of his body, mind, or character, and without immediate reference to his rights of property" (at [14]). It was undisputed that the respondent did not seek the OA's prior sanction before commencing the action (at [7]). It was held that the OA's sanction was required for all three claims, including the two claims that were vested in the OA, as all three claims were not for "damages in respect of any injury to the bankrupt's person". The conclusion in that case was as follows (at [44]):

> 44 In conclusion, we find for the appellant on all the essential issues. None of the respondent's claims in the DC Suit were claims for 'damages in respect of an injury to [the] person' (*per* s 131(1)(a) of the BA); thus, the respondent had to obtain the previous sanction of the OA before he could commence the DC Suit. This was not done, and this failure to comply with s 131(1)(*a*) of the BA could not be cured by the retrospective 'sanction' which the respondent received from the OA. Further, the respondent was the sole plaintiff throughout the DC Suit and currently still remains the sole plaintiff (see [7] above). However, as we pointed out earlier, the respondent cannot sue in his own name in so far as his claims for breach of duty in contract and in tort are concerned as these claims now vest in the OA because of s 76(1)(a)(i) of the BA. For these reasons, we allow the present appeal.

46 It is therefore clear to us that the appellant's new argument arose from an incorrect reading of *Thomas Loh*. The position in *Thomas Loh* is consistent with the plain wording of s 131(1)(*a*) of the Singapore Bankruptcy Act, under which a bankrupt in Singapore is required to obtain the sanction of the OA before he commences "any action", unless the action is "an action for damages in respect of any injury to the bankrupt's person" or "a matrimonial proceeding" (the latter exception was introduced after *Thomas Loh* was decided, pursuant to the Bankruptcy (Amendment) Act 2015 (No 21 of 2015)). This would include claims which vest in the OA and claims that do not vest in the OA.

Conclusion

47 For the above reasons, we dismissed the appeal. Having considered the parties' costs schedules, we ordered the appellant to pay the respondents $20,000 in costs inclusive of disbursements, with the usual consequential orders to follow.

Tay Yong Kwang
Judge of Appeal

Woo Bih Li
Judge

Fitzgerald Paul Michael (Paul Fitzgerald) for the appellant;
Christopher Anand s/o Daniel, Harjean Kaur and Keith Valentine Lee Jia Jin (Advocatus Law LLP) for the respondents.