Standard Chartered Bank *v* Loh Chong Yong Thomas
[2010] SGCA 2

Case Number : Civil Appeal No 47 of 2009

Decision Date : 29 January 2010

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Patrick Ang, Chin Wei Lin, Jonathan Lee (Rajah & Tann LLP) for the appellant; Andre Arul (Arul Chew & Partners) for the respondent; Chan Wang Ho (Insolvency & Public Trustee's Office) for the Official Assignee.

Parties : Standard Chartered Bank — Loh Chong Yong Thomas

Civil Procedure – Striking out

Choses in Action – Assignment

Insolvency Law – Bankruptcy – Bankrupt's duties and liabilities

Insolvency Law – Bankruptcy – Bankruptcy effects

29 January 2010 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This is an appeal arising from an unsuccessful striking-out application made by the appellant in the District Court. On appeal, the High Court judge ("the Judge") affirmed the District Court's decision. The appellant then appealed to this court against the Judge's decision.

The facts

2 The appellant is a commercial bank. The respondent, a practising lawyer at the material time, maintained several bank accounts with the appellant. Some of these accounts were in his own name, and the others were office and client accounts of the law firm in which he practised, namely, M/s Y K Lim & Company ("the firm"). It appears that the appellant's former partner, Lim Yee Kai ("Lim"), embezzled a total of $413,000 from the firm's client account between June and September 1997. Unfortunately, after Lim absconded, the respondent was left to solely shoulder the liabilities of the firm.

3 The appellant commenced an action against the respondent in 1997 to recover an outstanding debt due to it. The respondent counterclaimed for damages on the grounds that the appellant had been negligent in allowing withdrawals from the firm's client account by Lim. This action was subsequently discontinued pursuant to a letter of settlement dated 18 November 1998. The terms of this settlement remain confidential.

4 Soon after Lim's embezzlement came to light, the Law Society of Singapore ("the Law Society") commenced proceedings pursuant to s 27A of the Legal Profession Act (Cap 161, 1994 Rev Ed)

against Lim and the respondent in Originating Summons No 1358 of 1997 ("the Law Society Action") to intervene in their practice as solicitors. Against Lim, the Law Society sought an order to suspend his practising certificate. It further sought a sanction against the respondent in the form of the imposition of a condition on his practising certificate, *viz*, that he should be prevented from practising as a sole proprietor or partner in a law firm. The High Court judge who heard the Law Society Action, Lee Seiu Kin JC, suspended Lim's practising certificate on the grounds that Lim had failed to comply with the Legal Profession (Solicitors' Accounts) Rules (Cap 161, R 8, 1990 Rev Ed). As far as the respondent was concerned, Lee JC found that he had adopted "a rather cavalier attitude towards the accounts of the firm" (see *Law Society of Singapore v Lim Yee Kai* [1998] 2 SLR(R) 895 at [20]) right from the outset in 1996 when he first joined the firm until 1997 when the embezzlement took place. Accordingly, the court imposed the condition sought by the Law Society. The respondent remained a practising lawyer until he was made a bankrupt on 4 July 2003 upon the application of Aston Properties Pte Ltd, to which the firm owed $85,300 in stakeholding monies.

5 On 3 May 2004, almost a year after he was made a bankrupt, the respondent commenced District Court Suit No 2018 of 2004 ("the DC Suit") in his own name against the appellant. In the DC Suit, the respondent alleged that the appellant had committed a breach of duty both in contract *and* in tort in negligently failing to discharge the requisite duty of care in relation to two bank accounts maintained by him in his own name ("the Bank Accounts"). He claimed that the appellant had without authority, on some six occasions between April 1998 and May 1999, debited from and credited to the Bank Accounts certain sums of money. [note: 1] These unauthorised transactions were for sums ranging from $12.53 to $168.52. As a consequence, the respondent alleged, the appellant had no legal basis to wrongfully dishonour three cheques issued by him for payment to various parties. The first cheque, which was dishonoured on 18 May 1998, was for the sum of $100 made in payment to one Goh Meow Heng, a client of the respondent. The second cheque, which was dishonoured on 27 May 1998, was for the sum of $259 made in payment to Hitachi Credit Singapore Pte Ltd ("Hitachi Credit") for monthly instalments on a computer leasing arrangement between the respondent and Hitachi Credit. The third cheque, which was dishonoured on 29 May 1998, was for the sum of $354.60 made in payment to the Law Society for a bill in respect of the Law Society Action. As a result of the appellant's alleged breach of duty in contract and in tort, the respondent claimed, he had suffered a grievous loss of "goodwill and reputation". [note: 2]

6 Subsequently, the respondent made two further amendments to his statement of claim, first on 24 March 2005 and for a second time, more than one and a half years later, on 27 December 2006. The amendment on 24 March 2005 included further details to buttress the respondent's claim in contract while the amendment on 27 December 2006 was to add an altogether *new* cause of action in defamation. In respect of this new cause of action, the respondent alleged that, in failing to honour the cheques issued by him and by stating on the returned cheques "Refer to Drawer", [note: 3] the appellant had defamed him. In his statement of claim, the respondent asked for general and exemplary damages to be assessed. For completeness, we should add that, in an affidavit filed on 24 June 2008, the respondent alluded to his claim as amounting to a rather remarkable amount in the region of over a million dollars. [note: 4]

7 It is common ground that *no* prior sanction from the Official Assignee ("the OA") was obtained by the respondent to commence the DC Suit on 3 May 2004 in his own name; neither were the choses in action which were the subject matter of the DC Suit ("the Choses in Action") assigned by the OA to the respondent. The OA's sanction for the respondent to proceed with the DC Suit was finally obtained on 7 October 2004, some six months *after* the writ of summons was first filed on 3 May 2004. The writ, however, was only served on the appellant on 4 November 2004. Although the OA's sanction to commence the DC Suit was retrospectively obtained, the OA was not asked to nor

did he expressly assign the Choses in Action to the respondent. We should also point out that, even after sanction had been given by the OA, the named plaintiff in the DC Suit continued to be the respondent alone. The fact that the respondent had been made a bankrupt and that his property continues to be vested in the OA cannot be gleaned from the statement of claim for the DC Suit. This has given rise to a number of legal controversies which we shall address fully below at [12]–[43].

8 On ascertaining that the Choses in Action had not been assigned to the respondent, the appellant filed an application to strike out the DC Suit on the basis that (*inter alia*) the respondent lacked *locus standi* to bring the action since the Choses in Action had vested in the OA. The striking-out application was first heard by a deputy registrar of the Subordinate Courts ("the Deputy Registrar"), who made no order on it. On appeal to a district judge ("the DJ"), the appellant's appeal against the Deputy Registrar's decision was dismissed on 29 March 2007. The DJ's written grounds are to be found in *Loh Chong Yong Thomas v Standard Chartered Bank* [2007] SGDC 82. In essence, the DJ held that there was no need for an assignment of the Choses in Action by the OA to the respondent because the requirement for a bankrupt to obtain sanction from the OA under s 131(1)(*a*) of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("the BA") implied that, once the respondent had obtained the requisite sanction, he would be competent to maintain the DC Suit in his own name.

9 The appellant appealed to the High Court against the DJ's decision. Before the Judge, the appellant repeated its argument that the respondent had no *locus standi* to bring the DC Suit in his own name because the Choses in Action were no longer vested in him. It was also contended that, as the respondent was a bankrupt, *prior* sanction had to be obtained from the OA pursuant to s 131(1)(*a*) of the BA. The respondent's failure to do so made the DC Suit a nullity *ab initio*, and that nullity could not be cured by the *retrospective* sanction of the OA. The Judge dismissed the appeal. As no written grounds have been given, we shall assume that he agreed with the reasoning of the DJ.

10 As the Judge did not grant the appellant leave to appeal, the present appeal came before us only after the appellant obtained leave from us to appeal pursuant to s 34(2)(*d*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) on 30 March 2009.

The present appeal

11 The present appeal raised four broad issues as follows:

(a) First, were the Choses in Action "*property*" that became vested in the OA upon the bankruptcy of the respondent by virtue of s 76(1)(*a*)(i) of the BA ("the first issue")?

(b) Second, if the answer to the first issue was "yes", was it necessary for the Choses in Action to be assigned by the OA to the respondent before he could commence the DC Suit in his own name ("the second issue")?

(c) Third, regardless of what the answer to the second issue was, was it necessary for the respondent to obtain the *prior* sanction of the OA under s 131(1)(*a*) of the BA before he could commence the DC Suit ("the third issue")?

(d) Fourth, in any event, was the respondent's claim for defamation "an action for damages in respect of an *injury to his person*" [emphasis added] for the purposes of s 131(1)(*a*) of the BA ("the fourth issue")?

Before we proceed to consider these issues, we should point out that it is important to bear in mind that our bankruptcy legislation, when it was first enacted, was largely modelled on England's

19th century bankruptcy legislation.

The first issue

12 The first issue turns on the meaning of "property" in the BA. Section 2(1) of this Act defines the "property" of a bankrupt to include all "things in action … whether present or future or vested or contingent, arising out of or incidental to … property", which would include all choses in action relating to property. This definition is *in pari materia* with the definition of "property" in s 436 of England's current Insolvency Act 1986 (c 45) (UK) ("the IA"), which is as follows:

> "property" includes money, goods, *things in action*, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property … [emphasis added]

13 In *Ord v Upton* [2000] Ch 352 ("*Ord*"), the English Court of Appeal had to decide whether a claim for personal injuries caused by negligence was property that formed part of a bankrupt's estate for the purposes of s 306 of the IA (which corresponds to s 76(1)(*a*)(i) of the BA in our local context). In this regard, the court affirmed the concept of "property" which has been consistently adopted by the English courts since the 19th century in (*inter alia*) delineating what property of a bankrupt is included within his estate. Aldous LJ said (at 359–360 of *Ord*):

> It follows from section 306 [of the IA, which corresponds to s 76(1)(*a*)(i) of the BA] that upon Mr. Ord being adjudged bankrupt, his estate vested in his trustee. That estate included all his property as defined in section 436 [of the IA], excluding such things as books, clothing etc [see the list of excluded items in s 283(2) of the IA, which (broadly speaking) corresponds to s 78(2)(*b*) and s 78(2)(*c*) of the BA]. His claim for negligence committed by Dr. Wadehra is a thing in action within that definition and therefore it would seem that Mr. Ord's action vested in the trustee. However that simple answer appears to conflict with the way that sections 306, 283 and 436 of the [IA] have been interpreted. Also, as both parties accept, there are certain actions which do not vest in the trustee. As Hoffmann L.J. pointed out in *Heath v. Tang* [1993] 1 W.L.R. 1421, 1423:
>
> > "The bankrupt as plaintiff
> >
> > "The property which vests in the trustee includes 'things in action:' see section 436 [of the IA]. Despite the breadth of this definition, there are certain causes of action personal to the bankrupt which do not vest in his trustee. These include cases in which 'the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property:' see *Beckham v. Drake* (1849) 2 H.L. Cas. 579, 604, *per* Erle J. and *Wilson v. United Counties Bank Ltd*. [1920] A.C. 102. Actions for defamation and assault are obvious examples. The bankruptcy does not affect [the bankrupt's] ability to litigate such claims. But all other causes of action which were vested in the bankrupt at the commencement of the bankruptcy, whether for liquidated sums or unliquidated damages, vest in his trustee. The bankrupt cannot commence any proceedings based upon such a cause of action and if the proceedings have already been commenced, he ceases to have sufficient interest to continue them. Under the old system of pleadings, the defendant was entitled to plead the plaintiff's supervening bankruptcy as a plea in abatement. Since the Supreme Court of Judicature Act 1875 (38 & 39 Vict. c. 77), the cause of action does not abate but the action will be stayed or dismissed unless the trustee is willing to be substituted as plaintiff: see *Jackson v. North Eastern Railway Co*. (1877) 5 Ch. D. 844."

Section 436 [of the IA] is not in truth a definition of the word "property." It only sets out what is included. As will appear later from the cases that have been decided over many years, actions which relate to a bankrupt's personal reputation or body have not been considered to be property and therefore they do not vest in anybody other than the bankrupt. They relate solely to his body, mind and character and any damages recovered are compensation for damage to his body, mind and character as opposed to other causes of action which have been considered to be a right of property. Thus causes of action to recover damages for pain and suffering have been held not to vest in the trustee. That has led to a number of oddities. For example, the parties agree that if at the time of the bankruptcy, the bankrupt had in his bank a sum which included money paid as damages for a libel, that sum would vest in his trustee because the right to the money formed part of his estate and therefore was available to pay off the bankrupt's creditors. That was to be contrasted with an action personal to the bankrupt, such as a libel action, which was not settled before the end of the bankruptcy. In such circumstances the cause of action would remain with the bankrupt as would any damages awarded after discharge. If a cause of action is not personal to the bankrupt, it vests in the trustee and therefore any damages awarded whether before or after the discharge will be available to discharge the bankrupt's liabilities.

[original emphasis omitted; emphasis added in italics]

14 We see no reason not to apply the decisions of the English courts (as encapsulated in the above quotation) in determining the meaning of "property" in s 2(1) of the BA. Accordingly, on this basis, the respondent's claims for breach of duty in contract and in tort *vis-à-vis* the operation of the Bank Accounts are property which vested in the OA under s 76(1)(*a*)(i) of the BA. The respondent thus had no *locus standi* to sue in his own name on these claims. However, as far as the respondent's claim for defamation is concerned, it is not property that vests in the OA upon the respondent's bankruptcy as it relates to "pain felt by the [respondent] in respect of his body, mind, or character, and without immediate reference to his rights of property" (*per* Erle J in *Daniel Beckham v William Walker Drake and John Surgey* (1849) 2 HL Cas 579; 9 ER 1213 ("*Beckham v Drake*") at 604; 1222); accordingly, the respondent may sue in his own name on this claim (*subject to* his obtaining the necessary sanction from the OA pursuant to s 131(1)(*a*) of the BA, a requirement which we shall discuss further at [17]–[28] and [34]–[43] below).

The second issue

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.

The third issue

17 Turning now to the third issue, the question which we have to decide is, in essence, this: Does the use of the words "*previous* sanction of the Official Assignee" [emphasis added] in s 131(1)(*a*) of the BA entail that a bankrupt must obtain the OA's *prior* sanction before he can maintain an action? In considering this issue, we shall limit our discussion to actions which are *not* "action[s] for damages in respect of … injury to [the] person" since s 131(1)(*a*) makes it clear that a bankrupt can sue for damages in respect of injury to his person *without* having to obtain the OA's previous sanction.

18 To determine the third issue, it is necessary for us to examine the history of s 131 of the BA. This particular provision is peculiar to Singapore and is not found in the IA. The same is true of Malaysia's equivalent of this provision, *viz*, s 38(1)(*a*) of the Bankruptcy Act 1967 (Act 360, 1988 Rev Ed) (M'sia) ("the MBA") (see further [20] below).

The background and purpose of section 131(1)(a) of the BA

19 Section 131 of the BA sets out some of the essential disabilities and disadvantages of a bankrupt. Without the leave of the OA, a bankrupt has no right to commence an action that does not constitute "an action for damages in respect of an injury to his person" (see s 131(1)(*a*) of the BA) or to travel overseas (see s 131(1)(*b*) of the BA). A breach of s 131 of the BA is an offence punishable with a fine not exceeding $10,000, or imprisonment for a term not exceeding two years, or both (see s 131(2) of the BA). For ease of reference, we set out s 131 of the BA in full below:

> **131**.—(1) Where a bankrupt has not obtained his discharge —
>
> (*a*) he 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 Official Assignee; and
>
> (*b*) he shall not leave, remain or reside outside Singapore without the previous permission of the Official Assignee.
>
> (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.

20 The genesis of s 131(1)(*a*) of the BA can be traced back to s 33(1)(*a*) of the Bankruptcy Ordinance 1888 (SS Ord No 2 of 1888) ("the Bankruptcy Ordinance 1888") of the Straits Settlements. This statute was the first consolidated bankruptcy legislation in the Straits Settlements. Although it was based largely on England's Bankruptcy Act 1883 (c 52) (UK) ("the English BA 1883"), s 33(1)(*a*) of the Bankruptcy Ordinance 1888 – the then equivalent of s 131(1)(*a*) of the BA – was an innovation in the bankruptcy legislation of the Straits Settlements. The same may be said of the Federated Malay States' equivalent of s 33(1)(*a*) of the Bankruptcy Ordinance 1888, namely, s 33(i)(*a*) of the Bankruptcy Enactment 1912 (No 2 of 1912) (FMS) ("the Bankruptcy Enactment 1912"). As far as we

know, neither of these provisions is to be found in the bankruptcy laws of England or any other Commonwealth jurisdiction. We now turn to examine the legislative materials relating to the enactment of the Bankruptcy Ordinance 1888 to ascertain its legislative objects.

21 In this connection, the report dated 29th December 1885 laid before the Straits Settlements Legislative Council relating to the then existing bankruptcy legislation – *viz*, the Report by the Commission appointed to enquire into the Working of the Bankruptcy Ordinance, and into the existing Law of Partnership ("the Commission Report") – is highly instructive. The Commission Report (a copy of which can be found in Appendix No 46 of Straits Settlements, Colony of Singapore, *Proceedings of the Legislative Council of the Straits Settlements for 1885*) was published as part of an enquiry (ordered by the then Governor of the Straits Settlements, Sir Cecil Smith) into the Straits Settlements' Bankruptcy Ordinance 1870 (SS Ord No 21 of 1870) ("the Bankruptcy Ordinance 1870") to ascertain the existing "*principal defects in … Bankruptcy Law*" [emphasis added] (see the Commission Report at para 2).

22 Included among the several suggestions in the Commission Report was a proposed provision to protect creditors. That provision bears an unmistakeable resemblance to the current s 131(1) and s 82(1) of the BA. The relevant text in the Commission Report reads as follows (at para 7):

> We cannot venture to hope that it will be possible entirely to prevent frauds on creditors, but *we suggest the following measures as desirable for the protection of trade and as calculated to check fraud to a great extent*:—
>
> (a.) Any new Bankruptcy Ordinance should provide the following consequences of not obtaining a discharge:—
>
> (1) *That the bankrupt shall be* ***incompetent*** *to maintain any civil action for a sum or cause of action above $50 without the consent of the Official Receiver*.
>
> (2) That he shall every six months render to the Official Receiver an account of all monies and property come to his hands during that period, with a provision for punishing him for having made use of any such monies … above the necessary expenses of living, and for rendering an untrue account.
>
> (3) *That no undischarged bankrupt shall leave the Colony [of Singapore] without leave of the Court; the so doing to be an offence punishable by imprisonment*.
>
> …
>
> [emphasis added in italics and bold italics]

23 The Commission Report was drawn up by a panel of eight members (collectively, "the Commission") consisting of seven leading colonial personalities and one local businessman. After completing its consultations, the Commission concluded that the escalation of fraud on creditors had reached epidemic proportions in the Straits Settlements. It was deeply troubled by the fact that (see para 5(c) of the Commission Report):

> The clannish nature of the native traders … enable[d] those fraudulently disposed to make over their property to their friends and relations with perfect confidence that it [would] be duly restored when the storm ha[d] blown over. …

There was therefore a compelling need to "materially check the frauds which [were] … so prevalent and afford some protection to the merchants and traders of [the] Colony" (see the Commission Report at para 23).

24 Similar concerns were unrestrainedly echoed in the course of the debate in the Straits Settlements Legislative Council on the Bill which was subsequently enacted as the Bankruptcy Ordinance 1888, *viz*, the Bankruptcy Bill 1887 ("the Bankruptcy Bill") (a copy of this Bill can be found in *SS Govt Gazette* (19 August 1887) at pp 1539–1605). It is apparent from the Memorandum of Objects and Reasons to the Bankruptcy Bill that bankruptcy was to be considered as being *prima facie* an offence to be investigated by the State (see *SS Govt Gazette* (19 August 1887) at p 1603):

> … It will be sufficient to point out the principal changes effected by the [Bankruptcy] Bill. *Of these the most important is the change in the manner in which insolvency is regarded in its relation to the community*. Speaking generally, the present Ordinance [*ie*, the Bankruptcy Ordinance 1870], which was based on the English Act of 1869 [*ie*, the Bankruptcy Act 1869 (c 71) (UK)], views insolvency as a matter affecting only the creditors, and the Ordinance is drawn on the assumption that the matter can be safely left in their hands, that self-interest will lead them to realise the estate in the most economical and beneficial manner, and that the sense of personal injury will prompt them, in cases where the debtor has been guilty of fraud, to bring him to justice. *This system proved a failure in England, and, as might have been expected, in a mixed community like this has been a still greater failure. This Bill, therefore, proposes that bankruptcy should be treated as being* prima facie *an offence requiring investigation on the part of the State. This investigation will be made by the Court with the assistance of the Official Assignee. …* [emphasis added]

25 The same view was emphatically reiterated by the then Attorney-General, J W Bonser, in the course of the first reading of the Bankruptcy Bill. The Attorney-General emphasised that the law on bankruptcy had malfunctioned in the Straits Settlements. In the result, cl 32(1)(*a*) of the Bankruptcy Bill, which was later enacted as s 33(1)(*a*) of the Bankruptcy Ordinance 1888 (which is, in all essential details, *in pari materia* with s 131(1)(*a*) of the BA), was introduced to rectify this problem. The Attorney-General's observations merit reproduction here (see Straits Settlements, Colony of Singapore, *Proceedings of the Legislative Council of the Straits Settlements for 1887* (15 August 1887) at pp B104–B106):

> [T]he law had entirely broken down [by 1885, the year in which the Commission Report was published], [in] that it afforded means by which dishonest debtors could defraud their creditors with impunity, so that, with many, the way to wealth was through the Bankruptcy Court. … Now, the English Bankruptcy Act of 1883 [*ie*, the English BA 1883], which forms the basis of the Bill which I have now the honour to lay before you [*ie*, the Bankruptcy Bill], takes a different view of insolvency. *It is drawn on the assumption that bankruptcy does not affect the creditors alone, but is a matter in which the community as a whole is interested; that insolvency is something approaching a crime …*
>
> …
>
> Part II of the Bill deals with the disqualifications of undischarged bankrupts. *At present the refusal of his discharge occasions little or no inconvenience to a bankrupt. It does not interfere, in practice, with his commencing and carrying on business again, and thus it has no terrors for him. But if this part of the Bill passes into law, the undischarged bankrupt will, in future, find himself in a very awkward position, and will labour under certain decided disadvantages. For instance, he will be incapable of maintaining an action without the previous sanction of the*

Official Assignee. He must render to the Assignee every six months, an account of all moneys received by him, and must pay over to the Assignee the balance which remains after providing for the necessary expenses after providing for the necessary expenses of the maintenance of himself and his family. And, thirdly, *he cannot leave the Colony without the permission of the Official Assignee or the Court*. …

[emphasis added]

26 In the light of the above, we are satisfied that the predecessor provisions of both s 131(1)(*a*) and s 131(1)(*b*) of the BA were introduced to ensure that bankrupts would be in "*a very awkward position*, and [would] *labour under certain decided disadvantages*" [emphasis added] (see Straits Settlements, Colony of Singapore, *Proceedings of the Legislative Council of the Straits Settlements for 1887* (15 August 1887) at p B106) during the entire duration of their bankruptcy. These disadvantages included an absolute bar on maintaining an action without the previous sanction of the OA, a regular six-month accounting of all income earned and an absolute restriction on travel outside the Colony of Singapore without the permission of the OA or the court (see, respectively, s 33(1)(*a*), s 33(1)(*b*) and s 33(1)(*c*) of the Bankruptcy Ordinance 1888).

27 We should pause here to observe that, while personal insolvency is today no longer viewed as being in itself suggestive of criminal behaviour, Parliament has not in the slightest manner modified the stringent disabilities imposed on bankrupts more than a century ago via s 33(1) of the Bankruptcy Ordinance 1888. Even the requirement of rendering an account to the OA every six months, which was originally stipulated in s 33(1)(*b*) of the Bankruptcy Ordinance 1888, can now be found in s 82(1) of the BA. Today, although there is a more enlightened view prevailing in the community which acknowledges that businesses and personal undertakings can falter and/or fail for entirely legitimate reasons and that bankrupts should not be permanently stigmatised, there is no gainsaying the fact that Parliament nevertheless still considers it important that significant disabilities should continue to be imposed on bankrupts during their bankruptcy. Indeed, instead of removing or diluting the painful disabilities imposed by bankruptcy which have stood for more than a century, Parliament in 1995 only opted to provide for accelerated mechanisms to discharge deserving individuals from bankruptcy (see Pt VIII of the Bankruptcy Act 1995 (Act 15 of 1995), which is now Pt VIII of the BA).

Our ruling on the third issue

28 With the foregoing legislative background in mind, we can now turn to the question which forms the crux of the third issue, namely, whether the "previous sanction of the Official Assignee" required by s 131(1)(*a*) of the BA means *prior* sanction and not *retrospective* sanction, the latter being what was granted in the present case. In our view, the answer is clear beyond doubt. Section 131(1)(*a*) of the BA was introduced to give the OA full control of the administration of a bankrupt's estate for the benefit of the creditors. If the Legislature had intended that the OA's consent could be given retrospectively, then it would not have used the word "previous" in s 131(1)(*a*). In this connection, comparison may be made with s 76(1)(*c*) of the BA, which forbids any creditor from enforcing a debt against a bankrupt "except by leave of the court", without stating whether such leave should be prior or whether it may be retrospective. In granting retrospective leave under s 76(1)(*c*)(ii) of the Bankruptcy Act (Cap 20, 1996 Rev Ed) in *Overseas Union Bank v Lew Keh Lam* [1998] 3 SLR(R) 219 ("*Lew Keh Lam*"), the Court of Appeal stated that, if Parliament had intended the court's leave to be a "precondition" (at [35]) that had to be fulfilled before a creditor could commence an action against a bankrupt, "*the Legislature would have provided for it in more emphatic terms*" [emphasis added] (at [35]). The word "previous" in s 131(1)(*a*) of the BA is certainly an "emphatic" (see *Lew Keh Lam* at [35]) and unequivocal statement that the OA's sanction cannot be granted *ex post facto*.

Whether an assignment of the property sued on is necessary if the OA's previous sanction

Whether an assignment of the property sued on is necessary if the OA's previous sanction has been obtained

29 Before we proceed to deal with the fourth issue, we should pause to address an argument made by the respondent *apropos* the scenario where a bankrupt seeks to sue in respect of *property which has vested in the OA upon bankruptcy*, namely, that "**only the OA's sanction alone** is required for a bankrupt to sue on or maintain an action [in respect of such property] … [n]o further assignment of [the property in question] is required or necessary" [note: 5] [emphasis in bold in original]. In considering this argument, it is important to bear in mind the effect as well as the scope of s 131(1)(*a*) of the BA.

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.

31 Before this court, the respondent argued, with reference to the Malaysian Court of Appeal's majority decision in *Goh Eng Hwa v M/s Laksamana Realty Sdn Bhd* [2004] 3 MLJ 97 ("*Goh Eng Hwa*"), that, where the previous sanction of the OA had been obtained as required by the Malaysian equivalent of s 131(1)(*a*) of the BA (*ie*, s 38(1)(*a*) of the MBA), no assignment of the property sued on back to the bankrupt was required before the bankrupt could sue in his own name on that property. The reasoning of the majority would seem to be (although this was not articulated clearly) as follows:

(a) if the OA were to assign the property sued on back to the bankrupt, it would be unnecessary for the OA to also give his sanction to the bankrupt to commence legal proceedings in respect of that property since the assignment would re-vest the property in the bankrupt and enable him to sue on it in his own name (see, for instance, *Goh Eng Hwa* at [21]–[22] and [30]); and

(b) conversely, this must mean that, where the OA's previous sanction had been given as required by s 38(1)(*a*) of the MBA, an assignment was unnecessary.

32 In this regard, the majority in *Goh Eng Hwa* disapproved of the decision of the Court of Appeal of the Federated Malay States in *K Ismail Ganey Rowther v M A Abdul Kader and The Official Assignee of the Property of K P Peer Mohamed, a Bankrupt* [1933] MLJ 98 ("*K Ismail*") as "archaic" (see *Goh Eng Hwa* at [30]) and declined to follow it. In contrast, the minority judge in *Goh Eng Hwa* – Abdul Aziz Mohamad JCA – was of the view (at [63]–[66]) that, given the decision in *K Ismail*, an

assignment of the property sued on to the bankrupt was necessary.

33 We have two comments to make on *Goh Eng Hwa*. First, the majority's decision – *viz*, that s 38(1)(*a*) of the MBA does not require the property sued on to be assigned to the bankrupt before he may sue on it – is correct in law, but we do not agree with the majority's reasoning. The reason why an assignment is not necessary is that the actions to which s 38(1)(*a*) of the MBA (or, in our local context, s 131(1)(*a*) of the BA) applies are, as mentioned earlier (at [30] above), necessarily actions in respect of property that *does not* vest in the OA upon bankruptcy. Since such property remains vested in the bankrupt despite his bankruptcy, it is not necessary to assign the property back to him. Second, it appears to us that the majority in *Goh Eng Hwa* misunderstood the decision in *K Ismail*, specifically, Thorne Ag CJ's statement (at 99) that:

> *[T]he Official Assignee by his sanction only intimates his consent to the bankrupt's bringing or continuing an action. The legislature did not intend, and the section* [*ie*, s 33(i)(*a*) of the Bankruptcy Enactment 1912] *does not mean, that by his sanction the Official Assignee can divest himself of the property, either real or personal, which is vested in him … and revest that property in the bankrupt for the purpose of bringing an action*. [emphasis added]

In essence, Thorne Ag CJ held that the OA's sanction of an action by a bankrupt did not have the effect of re-vesting the property sued on in the bankrupt; only an assignment could do so. We see no flaw in the legal reasoning which underlies this aspect of Thorne Ag CJ's decision in *K Ismail*. In our view, *Goh Eng Hwa* is of no assistance to the respondent where his argument at [29] and [31] above is concerned.

The fourth issue

Ambit of "injury to his person" in section 131(1)(a) of the BA

34 Turning now to the fourth issue, the question which we have to decide is whether an action for defamation is "an action for damages in respect of an injury to [the] person" for the purposes of s 131(1)(*a*) of the BA. The meaning of the words "injury to [the] person" has not hitherto been determined by any Singapore court. It is an issue of considerable importance because, as can be seen from the extract from *Ord* reproduced at [13] above, a claim for damages in respect of injury to the person is a type of claim which is personal to the bankrupt and which therefore does not vest in the OA upon bankruptcy. Since a claim for damages in respect of injury to the person remains vested in the bankrupt despite his bankruptcy, he can sue on such a claim in his own name and, in the context of the fourth issue, he need not obtain the OA's previous sanction before commencing his action. Although (as just mentioned) the meaning of the words "injury to [the] person" has not previously been decided in Singapore, it has been considered by the courts in Malaysia and England. We now turn our attention to the decisions of these courts, starting with the Federated Malay States case of *K Ismail*.

The existing case law

35 In *K Ismail*, Thorne Ag CJ rejected the trial judge's ruling that the phrase "injury to [the] person" in s 33(i)(*a*) of the Bankruptcy Enactment 1912 (which is *in pari materia* with s 131(1)(*a*) of the BA) was limited to physical injury to the body. He held, instead, that the phrase covered (see *K Ismail* at 99):

> … any injury which the bankrupt suffers in mind or body, which might give rise to an action for damages, and which cause of, or chose in action, or right to sue remain[s] in the bankrupt after

the bankruptcy …

In so far as Thorne Ag CJ's definition of "injury to [the] person" specifies that such injury is an injury for which "[the] right to sue remain[s] in the bankrupt after the bankruptcy" (see *K Ismail* at 99), this definition is consistent with English cases, which hold that a cause of action personal to a bankrupt is not property that vests in the OA (or a trustee in bankruptcy) upon bankruptcy (see the quotation set out at [13] above).

36 Thorne Ag CJ went on to state in *K Ismail* (at 99) that an action to recover damages for injury to reputation – *ie*, an action to recover damages for defamation – fell within the ambit of actions for damages in respect of "injury to [the] person" (for an example of a later Malaysian defamation case which took the same position, see *Sharifah Aini binte Syed Jaafar v Karangkraf Sdn Bhd* [1989] 2 CLJ 1269, although it should be noted that the court in that case did not actually refer to *K Ismail*). With respect, we are of the view that this particular aspect of Thorne Ag CJ's decision is questionable for three reasons.

37 First, Thorne Ag CJ did not cite any authorities in support of his ruling that the phrase "injury to [the] person" included injury to a person's reputation.

38 Second, although Thorne Ag CJ did not cite any authorities in his decision, he appeared to have had in mind English cases such as *Beckham v Drake*, where it was held (at 604; 1222) that the right to sue for damages in respect of injury to a bankrupt's mind, body or character remained vested in the bankrupt despite his bankruptcy. In this regard, Thorne Ag CJ appeared to have overlooked the fact that s 33(i)(*a*) of the Bankruptcy Enactment 1912 was unique to the bankruptcy regime of the Federated Malay States and, thus, in construing the words "injury to his person" in this provision, it might *not* be appropriate to rely on the then existing English case law delineating the types of claims which were personal to a bankrupt (*ie*, the types of claims which would not vest in a trustee in bankruptcy or the OA upon bankruptcy).

39 Third, Thorne Ag CJ's decision that injury to reputation is a type of "injury to [the] person" for the purposes of s 33(i)(*a*) of the Bankruptcy Enactment 1912 is inconsistent with English case law, which shows that the English courts have all along regarded injury to the *person* and injury to *reputation* as *different* types of injury, even though they are both examples of injury which gives rise to a cause of action personal to the plaintiff. In *Beckham v Drake*, for instance, Erle J, in discussing the types of injury in respect of which the right to sue remained vested in a bankrupt despite his bankruptcy (*ie*, the types of injury which gave rise to a cause of action personal to a bankrupt), held as follows (at 604; 1222):

> The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property. Thus it has been laid down that the assignees [*ie*, the OA, in the context of this judgment] cannot sue for breach of promise of marriage, for criminal conversation, seduction, *defamation*, battery, *injury to the person* by negligence, [such] as by not carrying safely, not curing, not saving from imprisonment by process of law … [emphasis added]

40 As can be seen from the italicised portion of the above quotation, Erle J regarded defamation (*ie*, injury to reputation) and injury to the person as different types of injury, even though both fell within the ambit of injury which gave rise to a cause of action personal to the bankrupt. At least four other judges in *Beckham v Drake* likewise regarded injury to reputation and injury to the person as *different* examples of injury which gave rise to a cause of action personal to a bankrupt, namely,

Platt B (at 601; 1221), Maule J (at 621; 1228), Parke B (at 626; 1230) and Wilde LCJ (at 635; 1233). The same view – *viz*, that injury to reputation is not the same as injury to the person – is also reflected in later English cases. In the House of Lords case of *Wilson v United Counties Bank, Limited* [1920] AC 102 ("*Wilson*"), for instance, Viscount Finlay stated that the types of claims which would "remain vested in [a bankrupt] in spite of his bankruptcy" (at 120) – *ie*, the types of claims which were personal to a bankrupt – included claims for "damage to the person *or* reputation of the bankrupt" [emphasis added] (at 120). More recently, Aldous LJ stated in *Ord* (at 360) that "actions which relate[d] to a bankrupt's personal reputation *or* body … [did] not vest in anybody other than the bankrupt" [emphasis added] and thus did not pass to the OA upon bankruptcy. If injury to reputation is part and parcel of injury to the person, Viscount Finlay in *Wilson* and Aldous LJ in *Ord* need not have specifically mentioned injury to reputation *in addition to* injury to the person when setting out examples of injury which gave rise to a cause of action personal to a bankrupt; neither would they have used the word "or" in relation to these two types of injury.

41 With respect, it seems to us that Thorne Ag CJ's definition of "injury to [the] person" in *K Ismail* confuses the concept of injury which gives rise to a cause of action personal to a bankrupt (*ie*, injury in respect of which the right to sue remains vested in a bankrupt despite his bankruptcy) with the concept of injury to the person. These two concepts are *not* the same. Injury to the person is merely a type of injury which gives rise to a cause of action personal to a bankrupt; the latter can take the form of other types of injury (apart from injury to the person) such as injury to reputation or injury in the form of false imprisonment.

Our ruling on the fourth issue

42 In our view, therefore, the respondent's claim for defamation was not "an action for damages in respect of an injury to his person" for the purposes of s 131(1)(*a*) of the BA. This phrase *does not* include an action for damages for defamation as such an action (*ie*, an action for damages for defamation) is concerned with the *character or reputation* of the bankrupt, whereas an action for damages in respect of injury to the person is concerned with physical injury to the bankrupt's *body* (which may include, *inter alia*, injury to the bankrupt's *mind* such as nervous shock and psychological or psychiatric injury). Accordingly, a bankrupt must obtain the previous sanction of the OA before he can commence an action for defamation; and, if a defamation action has already been commenced at the time when bankruptcy supervenes, the bankrupt must obtain the OA's sanction before the action can be continued.

43 In the present case, "*previous* sanction" [emphasis added] (*per* s 131(1)(*a*) of the BA) was not given by the OA to the respondent to pursue his claim for defamation in the DC Suit. It follows that that claim had no legal basis and should also (along with the claims for breach of duty in contract and in tort) have been struck out.

Conclusion

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.

45 Considering that our decision is premised upon arguments that were not adequately developed by the parties, we think that the appropriate costs order is for each party to bear its own costs here and below in respect of the striking-out proceedings. The security provided by the appellant for the respondent's costs of the appeal is to be released to the appellant.

[note: 1] See the second amended Statement of Claim filed on 27 December 2006 ("the second amended SOC") at paras 13, 16, 25 and 34–36.

[note: 2] See the second amended SOC at para 39.

[note: 3] See the second amended SOC at, *inter alia*, para 43(b).

[note: 4] See the Record of Appeal at vol III (Part E) at pp 1113–1121.

[note: 5] See para 15 of the respondent's Skeletal Arguments filed on 13 October 2009.

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