

Proper construction of Section 93(3) of Bankruptcy Act and Rule 276 of Bankruptcy Rules

ganpartnership

30 July 2019 | Contributed by Gan Partnership

Litigation, Malaysia

- 📌 Introduction
- 📌 Facts
- 📌 Court of Appeal
- 📌 Federal Court's decision

Introduction

The Federal Court recently addressed the proper construction of Section 93(3) of the Bankruptcy Act 1967 and Rule 276 of the Bankruptcy Rules 1967 in *Ambank (M) Berhad v Lim Sue Beng*.⁽¹⁾ In this appeal, the Federal Court was requested to decide on the following question of law:

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

Facts

The appellants, including RHB Bank Berhad, commenced an action in the high court against Gula Perak Berhad and the respondent for recovery of RM28,170,931.83 under a syndicated loan that had been granted to Gula Perak. The respondent was a guarantor of the syndicated loan. RHB Bank's portion of the syndicated loan was RM9,268,336.25. On 29 October 2010, after a full trial, the appellants and RHB Bank obtained judgment against Gula Perak and the respondent.

On 24 February 2011 the appellants and RHB Bank commenced bankruptcy proceedings against the respondent based on the judgment. By way of a letter dated 15 December 2015, the respondent's solicitors notified the appellants' solicitors that the respondent had settled the debt due to RHB Bank.

Consequently, the appellants applied for leave to:

- remove RHB Bank as a party to the bankruptcy proceedings; and
- make consequential amendments to the bankruptcy notice and creditors' petition to remove references to RHB Bank on the basis that the respondent had settled the debt due to RHB Bank.

The respondent objected to the application and contended that the appellants' application had been misconceived as the bankruptcy notice and the creditors' petition was based on a single judgment; as such, the appellants could not rely on the original act of bankruptcy. The respondent contended that the bankruptcy notice should be withdrawn and that fresh

bankruptcy proceedings should be commenced. The high court judge allowed the appellants' amended application. The respondent appealed to the Court of Appeal.

Court of Appeal

The Court of Appeal allowed the respondent's appeal and held that in the exercise of its bankruptcy jurisdiction, the high court had no power to grant the appellants' application, as the Bankruptcy Act contains no express provision allowing an amendment to withdraw and substitute the petitioner, except in accordance with Section 95 of the act. The Court of Appeal further held that the appellants could not resort to Rule 276 of the Bankruptcy Rules. The proper course of action was for the appellants to file a fresh bankruptcy proceeding against the respondent. Aggrieved, the appellants brought the current appeal to the Federal Court.

Federal Court's decision

The Federal Court held that Section 93(3) of the Bankruptcy Act is the only provision that allows for any amendment to the "written process or proceeding". However, the exercise of the high court's powers under the provision is limited to clerical or minor errors that cause no prejudice to the judgment debtor. As the proposed amendments in the appellants' application sought to withdraw RHB Bank from being a party to the bankruptcy proceedings, the proposed amendments were not due to a minor or clerical error made by the appellants. The creditors' petition was filed based on a specific act of bankruptcy and the appellants elected to proceed collectively. The appellants could not recharacterise the creditors' petition as having been grounded on a different act of bankruptcy, involving only the appellants (and excluding RHB Bank).

The proposed amendments related to the substance of the bankruptcy notice and the creditors' petition and could not be regarded as a minor or clerical error. Thus, Section 93(3) of the Bankruptcy Act could not be invoked for the purposes of the appellants' application.

The Federal Court held that neither the Bankruptcy Act nor the Bankruptcy Rules allow a co-petitioner to withdraw as a party to the bankruptcy proceedings when there are multiple judgment creditors. The court further held that Section 95 of the Bankruptcy Act, which allows a petitioner to be substituted or provides the director general of insolvency power over the proceedings where a petitioner fails to proceed with due diligence, did not apply in the case at hand.

As for the appellant's argument regarding Rule 276 of the Bankruptcy Rules, the Federal Court held that since there is already a specific framework to address the amendment as provided in Section 93(3) and the substitution of a party as provided in Section 95 of the Bankruptcy Act, Order 15 Rule 6(2(a)) and Order 20 Rule 8 of the Rules of High Court 2012 did not apply. The court held that it would be wrong to extend a clear statutory provision to a fact situation not covered by the Bankruptcy Act or the Bankruptcy Rules. The withdrawal of a judgment creditor as one of the co-petitioners is not contemplated by the Bankruptcy Act. Hence, the question of law presented to the Federal Court must be answered in the negative.

For further information on this topic please contact Gan Khong Aik at Gan Partnership by telephone (+603 7931 7060) or email (khongaik@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Endnotes

(1) Civil Appeal 03-1-03/2018(W) [2019] 1 LNS 776.

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription.



Gan Khong Aik