IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN MALAYSIA
[SUIT NO.: BA-22NCvC-5-01/2023]

BETWEEN

1. **ONG CHING CHEE**
   (NO. K/P: 270622-10-5035)

2. **CHONG CHIT ENG**
   (NO K/P: 440622-04-5078)

3. **ONG KONG LEONG**
   (NO K/P: 630929-10-6215)

4. **ONG KONG KUAN**
   (NO K/P: 710406-04-5193)

5. **ONG KONG YEE**
   (NO K/P: 740118-10-5515) **... PLAINTIFFS**

AND

1. **ONG KONG BENG**
   (NO K/P: 550110-10-5265)

2. **ONG KONG SEONG**
   (NO K/P: 570404-10-5461)

3. **JASA KORPORAT SDN BHD**
   (NO SYARIKAT: 1094061-U)

4. **HILLTOP PALMS SDN BHD**
   (NO SYARIKAT: 1055317-H) **... DEFENDANTS**

GROUNDS OF JUDGEMENT

INTRODUCTION

[1] In this Judgment, I will address the two separate Appeals filed by the Second and Fourth Plaintiffs.

[2] The matter was scheduled for a hearing on enclosures 11 and 13 on 1 April 2024. Enclosure 11 pertains to the Fourth Defendant's application under Order 18 rule 19(1)(a), (b), (c), and/or (d) of the Rules of Court 2012 (ROC 2012). Enclosure 13 relates to the First, Second and Third Defendants' application under Order 18 rule 19(1)(a), (b), (d), and/or Order 92 rule 4 of the ROC 2012.

[3] On the hearing date, the learned counsel for the Defendants raised a preliminary objection regarding the Fourth and Fifth Plaintiffs' competency as bankrupts to maintain their action against the Defendants.

[4] Upon hearing the oral submissions on the preliminary objection, I decided to strike out the Fourth and Fifth Plaintiffs' claims against the Defendants, with no order as to costs. Thus, this appeal follows.

[5] However, it is noteworthy that one of the Appeals was filed by the Second Plaintiff, who was unaffected by my Order. Surprisingly, the Fifth Plaintiff, who was directly impacted, opted not to appeal.

BRIEF BACKGROUND

[6] Initially, enclosures 11 and 13 were scheduled for a hearing on 25 September 2023. On that date, the learned counsel for the Plaintiffs informed the Court that the Third Plaintiff had been declared bankrupt on 22 June 2023 and would be applying for the necessary sanction from the Director General of Insolvency (DGI).

[7] Subsequently, all the parties requested that the hearings for enclosures 11 and 13 be adjourned until the Third Plaintiff obtained the sanction from the DGI to avoid piecemeal litigation, as the applications aimed to strike out claims by all five (5) Plaintiffs.

[8] The hearing was rescheduled to 3 November 2023 but was vacated because the Third Plaintiff had yet to obtain the sanction. By a letter dated 14 November 2023, the learned counsel for the Plaintiffs informed the Court that the Third Plaintiff had obtained the sanction from the DGI, and both enclosures 11 and 13 were rescheduled for hearing on 23 January 2024.

[9] However, in a letter dated 12 January 2024, the learned counsel for the Plaintiffs notified the Court that the Fourth and Fifth Plaintiffs had also been declared bankrupt on 16 November 2023 and requested that the 23 January 2024 hearing be vacated to allow them time to obtain the necessary sanction from the DGI. The Court granted this request, rescheduling the hearing for 1 April 2024.

[10] At the hearing on 1 April 2024, the learned counsel for the Plaintiffs informed the Court that the Fourth and Fifth Plaintiffs did not apply for the required sanctions. Taking a different stance, the learned counsel argued that the bankruptcy orders against the Fourth and Fifth Plaintiffs did not affect their competency as parties to the action, despite the absence of sanctions from the DGI, and that in the present circumstances, sanctions were not required. Alternatively, the Second Plaintiff was also prepared to file the relevant application under Order 15 rule 7 of the ROC 2012 to substitute the Fourth and Fifth Plaintiffs.

FINDINGS OF THE COURT

[11] Having heard the oral submissions on the preliminary objections, I find the learned counsel for the Plaintiffs' arguments to be misconceived, unfounded and without merit. Consequently, I ordered that the Fourth and Fifth Plaintiffs' claims against all the Defendants be struck out.

[12] The learned counsel for the Plaintiffs argued that sanction was not required because the Fourth and Fifth Plaintiffs remained competent parties to the main action, despite lacking such sanction, as the bankruptcy orders ostensibly stayed pending appeal before the Judge. He informed the Court that the Fourth and Fifth Plaintiffs had appealed to the Judge against the bankruptcy orders and that the appeal had been heard and is awaiting a decision on 4 September 2024.

[13] In support of his argument the learned counsel cited the judgment of Haji Hamid Sultan bin Abu Backer J (as his Lordship then was) in *Per: Soo Shui Ching; Ex Parte: Malayan Banking Berhad* [2010] And Another Appeal [2010] CLJU 1810 **(Soo Shui Ching)**, which held:

> **"(e) In the instant case the A.O. and R.O. granted by the senior assistant registrar in law is automatically stayed when there is an appeal before the judge by virtue of Section 90(1) which reads as follows:**
>
> > **The Registrar shall have the powers and jurisdiction in this section mentioned, and any order made or act done by him in the exercise of the said powers and jurisdiction shall, subject to an appeal, be deemed the order or act of the court.**
>
> **In consequence once the appeal is filed against the decision the Director General of Insolvency has very little role to play until the disposal of the appeal in favour of the judgment creditor. This is the scheme of the Bankruptcy Act and all parties are obliged to follow the provisions of the Act in view of the dominant constitutional protection afforded in article 5(1) of Federal Constitution."**

[emphasis added]

[14] The learned counsel for the Plaintiffs also referred to the case of *Ho*

Ken Seng v. Progressive Insurance Sdn. Bhd. (Ho Ken Seng) [2013] 3 MLRA 56 and suggested that sanction was not required.

[15] Alternatively, the learned counsel for the Plaintiffs argued that if sanction were deemed necessary, consideration under Order 15 rule 7 of the ROC 2012 should apply, as the Second Plaintiff is prepared to file the relevant application.

[16] He contended that under Order 15 rule 7(1), the bankruptcy of a party to an action, such as the Fourth and Fifth Plaintiffs in this case, shall not cause the action to abate and that the Second Plaintiff can substitute them.

[17] However, he conceded that such an application had yet to be filed, citing the pending appeal, which, as mentioned above, would result in an automatic stay, as per the judgment in **Soo Shui Ching**.

[18] The learned counsel urged the Court against striking out the Fourth and Fifth Plaintiffs as parties, arguing that such a move would be draconian, especially in light of the High Court's hearing of their appeals against the Bankruptcy Order on 26 March 2024, with a decision scheduled for 4 September 2024.

[19] The learned counsel for the Defendants argued that, pursuant to section 38(1)(a) of the Insolvency Act 1967, the Fourth and Fifth Plaintiffs are incompetent to maintain this action without prior sanction from the DGI.

[20] Additionally, the counsel asserted that the Plaintiffs' reliance on **Soo Shui Ching** is misplaced, as the contention that the bankruptcy orders are automatically stayed pending an appeal before the Judge, allowing the Fourth and Fifth Plaintiffs to proceed without sanction, is misconceived.

[21] The law on the competency of a bankrupt person to maintain an action is well-settled. A plethora of cases have decided that prior sanction from the DGI is mandatory for a bankrupt to maintain an action, except in an action for damages in respect of an injury to his person. Section 38(1)(a) of the Insolvency Act 1967 provides:

> **"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;"**
>
> [emphasis added]

[22] In the present case, it is undisputed that as of 1 April 2024, the Fourth and Fifth Plaintiffs remain undischarged bankrupts, and the bankruptcy orders against them have neither been set aside nor stayed.

[23] The Federal Court in *Tong Soon Tiong & Ors v. FA Securities Sdn. Bhd*. [2013] 2 CLJ 448 held that obtaining a sanction for a bankrupt to maintain an action is mandatory, as the proprietary interest of the bankrupt passes to the DGI. The Federal Court stated:

> **"Section 38 of The Bankruptcy Act 1967 ("The Act")**
>
> **[11] When a debtor is adjudicated a bankrupt his property vests in the DGI immediately and with that property being divisible among his creditors. No conveyance, assignment or transfer is required for the bankrupt's property to vest in the DGI who now acts as the trustee of the creditors. Thenceforth the bankrupt will be subject to certain statutory restrictions and responsibilities, amongst them to give an account of all his monies and property to the DGI every six months, handing over to the DGI any unexpanded funds,**

informing him of any change of address, and the like. In a gist the bankrupt is not as free as an unadjudicated person.

[12] One of the many restrictions that curb the bankrupt's rights is found in s. 38 of the Act, and this provision reads:

> **... 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.**

[13] The bankrupt, in this case the sixth plaintiff, is obviously incompetent to maintain any action without the previous sanction of the DGI, unless the action falls under the exception "for damages in respect of an injury to his person".

...

[14] Unless it falls within the exception, and is adjudicated bankrupt subsequent to an action being filed, he is also not exempted from applying for a sanction to allow him to continue with the action. This requirement is mandatory, as the proprietary interest of the bankrupt passes to the DGI and it will be up to the latter to decide whether to adopt the action or disclaim it, or give free rein to the bankrupt to continue with the action by sanctioning it. Needless to say if the sanction is refused, before or after an action is filed, unless falling within the exception, the action dies a natural death."

[emphasis added]

[24] The Court of Appeal in *Goh Eng Hwa v. M/S Laksamana Realty Sdn. Bhd.* [2004] 3 MLJ 97 held that:

> **"...the requirement of a sanction is not just a formality. Without the sanction, a bankrupt is 'incompetent' to maintain an action. It goes to his capacity. If he is incompetent to file the counterclaim without 'the previous sanction' then the filing of the counterclaim without the previous sanction would have been null and void. The act being a nullity for lack of capacity or competency,..."**
>
> [emphasis added]

[25] Furthermore, in *Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan* [2009] 4 MLJ 201, the Court of Appeal held that:

> **"[20] We would add that the OA's previous sanction required under s.38(1)(a) is a statutory recognition of public interest and public policy considerations.**
>
> **[21] The legal process of bankruptcy does not merely concern the judgment debtor or the bankrupt alone. A large section of the public would be directly or indirectly affected. That calls for intervention by the State and the exercise of jurisdiction by the courts. Broadly speaking, in the first instance, the judgment creditor initiates the process in the High Court to obtain adjudication and receiving orders. The OA then comes into the picture to take over the assets, if any, of the bankrupt. The OA's duty is to realise the assets and distribute the proceeds thereof, if any, to the judgment creditors whose interest would require protection and safeguard through the functionary of the OA. The bankrupt is then subject to certain disabilities and**

disqualifications. He cannot willy-nilly incur further debts. Hence, s.38(1)(a) is intended, inter alia, to ensure that the bankrupt's affairs are properly regulated and supervised by the OA eg by way of the OA's previous sanction before the bankrupt is competent to maintain an action thereunder."

[emphasis added]

[26] The Federal Court in *Lai King Lung & Anor v. Merais Sdn Bhd* [2020] 9 CLJ 449 also decided that:

"[17] In the case of an undischarged bankrupt, the sanction of the Director General of Insolvency (DGI) is required in order for the bankrupt to maintain any action or proceeding (other than an action for damages in personal injury claims) – s. 38(1)(a) of the Insolvency Act 1967. This rule restricting the conduct of an undischarged bankrupt is meant for the protection of his creditor's interest and those dealing with him so as to maintain the commercial morality of his dealings".

...

[19] More importantly, the underlying principle for the requirement of a sanction is that if a bankrupt is allowed to continue with an action, he would not be able to pay costs should his action be dismissed. This would leave the defendant in a disadvantage position; in that the defendant being compelled to defend the claim will be unable to recover costs if the bankrupt's claim is dismissed."

[emphasis added]

[27] Thus, it is evident that the Fourth and Fifth Plaintiffs required prior sanction from the DGI to maintain this action. Without the sanction, they are incompetent to appear before this Court. Moreover, the Plaintiffs' counsel lacks the locus to represent the Fourth and Fifth Plaintiffs, as their proprietary interests have passed to the DGI, making the DGI the appropriate party with locus before this Court for the Fourth and Fifth Plaintiffs.

[28] I agree with the learned counsel for the Defendants' contention that the case of **Soo Shui Ching** is irrelevant and inapplicable to the present action. The argument advanced by the Plaintiffs' counsel, relying on **Soo Shui Ching**, is misconceived in law. Moreover, the decision in **Soo Shui Ching** does not bind this Court.

[29] The argument put forth by the learned counsel for the Plaintiffs, contending that no sanction was required based on **Ho Ken Seng's** decision, is misguided. In **Ho Ken Seng**, the Federal Court ruled that a bankrupt exercising their appeal rights under section 92(1) of the Bankruptcy Act 1967 does not need prior sanction when contesting bankruptcy orders. The court interpreted 'action' in section 38(1)(a) of the Bankruptcy Act 1967 to apply strictly to new and separate legal actions, not those which led to the bankruptcy itself. The Federal Court stated:

> **"[28] While we agree that the word 'action' therein should refer to civil action or civil proceeding in court (see: Re Chua Tin Hong Ex parte Castrol (M) Sdn Bhd [1997] 3 CLJ Supp 174), it should be restricted to a new and separate action and not the same upon which the bankruptcy was secured. And we would think that the scope of s. 38(1)(a), other than the saving clause therein, should be limited to a new chose in action that could affect the assets or proprietary rights of a bankrupt intended for distribution to his creditors. (see: Boaler v. Power and Ors [1910] 2 KB 229).**

> **[29]As such, s. 38(1)(a) of the Act is not relevant when a bankrupt, an aggrieved person, invokes s. 92(2) of the same Act. To that extent we agree with the decision in Re Khoo Kim Hock (supra) and the minority judgment of the Court of Appeal in this case.**
>
> **[30] It would be most unfair and unconscionable if a person is being disabled and incapacitated, unless he obtains sanction from the DGI, to challenge the very action that caused the disability and incapacitation. It would tantamount to denying him his right of access to justice and probably his constitutional right of appeal."**
>
> [emphasis added]

[30] The circumstances of the present action clearly distinguish it from **Ho Ken Seng**, as it constitutes a distinct legal proceeding separate from the bankruptcy orders affecting the Fourth and Fifth Plaintiffs.

[31] Therefore, as supported by the authorities cited above, it is undeniably mandatory for the Fourth and Fifth Plaintiffs to secure sanction from the DGI to proceed with this action. Without such sanction, the Fourth and Fifth Plaintiffs lack the competence to maintain this legal action.

[32] On the alternative argument presented by the learned counsel for the Plaintiffs, this Court was urged to consider the applicability of Order 15 rule 7 of the ROC 2012, citing the Second Plaintiff's preparedness to file the requisite application. However, the learned counsel conceded that as of 1 April 2024, no such application had been filed for the Court's consideration.

[33] Despite ample time, the Second Plaintiff did not act. Following the bankruptcy orders against the Fourth and Fifth Plaintiffs on 16 November 2023 and the subsequent vacating of the 23 January 2024 hearing date, no action was taken by the Plaintiffs between 16

November 2023 and 1 April 2024. No application under Order 15 rule 7 was filed, nor was any sanction obtained.

[34] Therefore, the contention of the Plaintiffs' counsel that the Court should grant further time now for the Second Plaintiff to file an application under Order 15 rule 7 is viewed by this Court as an abuse of the process of the Court, taking advantage of the latitude of time this Court has given to the Plaintiffs to resolve their bankruptcy status. This Court declines to entertain such a request.

[35] The Court decided to strike out the action brought by the Fourth and Fifth Plaintiffs against all the Defendants after ample opportunity was given for them to obtain necessary sanction. Enclosures 11 and 13 have been adjourned since September 2023 due to bankruptcy orders affecting three (3) out of five (5) Plaintiffs, respectively. The hearing initially set for 23 January 2024, was rescheduled to 1 April 2024, at the Plaintiffs' request to allow time for the Fourth and Fifth Plaintiffs to obtain sanction. The Court has granted leniency of time to the Plaintiffs in the interest of justice, albeit at the expense of valuable judicial time. However, as confirmed by the learned counsel for the Plaintiffs, the Fourth and Fifth Plaintiffs deliberately refused to obtain the required sanction. Given this Court's patience and the Fourth and Fifth Plaintiffs' failure to make any effort to obtain sanction by the hearing date, the Court finds it appropriate to strike out their action against the Defendants without further delay.

[36] Based on the foregoing reasons, I, therefore, ordered that the Fourth and Fifth Plaintiffs' claims against the Defendants be struck out, with no order as to costs.

Dated: 24 JUNE 2024

(JAMHIRAH ALI)
JUDICIAL COMMISSIONER
High Court of Malaya at Shah Alam
(NCVC 1)

Counsel:

For the plaintiffs - Michael Chow Keat Thye, Wendy Wong & Elisa Oyenz Jeson; M/s Michael Chow

For the 1st-3rd defendants - Jane M Pragasam & Marianne Sonia Paul Philip; M/s Ho-Noecker & Prasagam

For the 4th defendant - AG Kalidas Krishnan Gnanaprakasam & Wesley Wong Ray Fung; M/s K.Nadarajah & Partners

Cases referred to:

Boaler v. Power and Ors [1910] 2 KB 229

Goh Eng Hwa v. M/S Laksamana Realty Sdn. Bhd. [2004] 3 MLJ 97

Ho Ken Seng v. Progressive Insurance Sdn. Bhd. (Ho Ken Seng) [2013] 3 MLRA 56

Lai King Lung & Anor v. Merais Sdn Bhd [2020] 9 CLJ 449

Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan [2009] 4 MLJ 201

Re Chua Tin Hong Ex parte Castrol (M) Sdn Bhd [1997] 3 CLJ Supp 174

Soo Shui Ching; Ex Parte: Malayan Banking Berhad [2010] [2010] CLJU 1810

Tong Soon Tiong & Ors v. FA Securities Sdn. Bhd. [2013] 2 CLJ 448