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A POINT TO PONDER

Insolvency Law

WHEN DOES A BANKRUPTCY ACTION COMMENCE?

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The answer is seemingly obvious but, analogies apart, the authoritative determination of this issue is yet to be settled.

In the recent Court of Appeal decision of *Liew Hon Kong v Bank Pertanian Malaysia Bhd* [2022] 1 MLJ 836, the Court equated the issuance of the bankruptcy notice (“BN”) to that of a Writ. The Court of Appeal held that the jurisdiction of the bankruptcy court is invoked on the issuance of the BN and that bankruptcy proceeding commences by the issuance of the BN.

With respect, this proposition may not hold in the face of statutory provisions and case laws.

- (a) Under the Insolvency Act 1967 (“IA 1967”), there is sufficient legislative provisions to justify a contrary view to that taken by the Court of Appeal.
- Section 3(1) of the IA 1967 lists 10 instances where an *act of bankruptcy* will be committed. This represents the *cause of action* upon which bankruptcy action or proceeding may commence with the presentation of a bankruptcy petition.
 - Section 5 prescribes the *conditions precedent* to the presentation of the bankruptcy petition - There is no analogy here to a Writ action.
 - Section 6 deals with “*proceedings and order*” on a bankruptcy (Creditor’s) petition.

These statutory provisions clearly suggests at the lowest, that the BN is merely a statutory notice of demand which if not complied with within 7 days, results in an act of bankruptcy which then provides the creditor with the cause of action or locus standi to present a bankruptcy petition. Section 5 of the IA 1967 is the jurisdiction-conferring section that enables bankruptcy jurisdiction to be invoked. It is not the issuance of a BN that commences bankruptcy proceedings. The institution of a bankruptcy action/proceeding is when a Creditor’s Petition is presented which culminates in the adjudicating and receiving orders.

- (b) Apart from the statutory provisions, there has been judicial recognitions that a *bankruptcy action* or bankruptcy proceedings commences on the filing of the bankruptcy petition. It must be noted that the petition itself is suggestive of an originating process for the commencement of civil action/proceeding in bankruptcy.
- The Federal Court in *Hong Leong Bank Bhd v Khairulnizam Bin Jamaludin* [2016] 4 MLJ 302 explicitly held that a *bankruptcy action is equated to a bankruptcy petition*. This suggests that a bankruptcy action commences by a bankruptcy petition.
 - The Malaysian High Court in *Re V Gopal* [1987] CLJ (Rep) 602 held that it is the *filing of the petition that commences the bankruptcy proceeding*. This proposition was mirrored by the High Court of Singapore in *CNK Credit Ptl v Lee Chin Kwee Kelvin* [2003] 1 SLR 141.

With respect, whilst taking note of the Federal Court in *Hong Leong Bank Bhd*, the Court of Appeal did not place any emphasis on the Federal Court's dicta equating a *bankruptcy action* to a bankruptcy petition as envisaged under Section 5. The Court of Appeal also did not draw the significance of the impression created by Sections 3, 5 and 6 on the question of when bankruptcy action or proceeding commences. No reference was also made to the two High Court decisions which were on point.

It is necessary for the appellate or the apex court to finally give a determinative guidance on this issue by detailed reference to the relevant statutory provisions, the legislative intent and the reported cases when the opportunity arises as this issue of when bankruptcy proceeding commences impacts litigants on many fronts including one concerning limitation period.

Section 6(3) of the Limitation Act 1953 prescribes the limitation period for an action on a judgment. The Federal Court in *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 had made it clear that a bankruptcy action is an action on a judgment within the meaning of Section 6(3). If this is so, the question of whether it is the issuance of the BN or the presentation of a Creditor's Petition that commences a bankruptcy action becomes vital. The Court of Appeal's dicta in *Liew Hon Kong* stating that it is the issuance of the BN that commences bankruptcy proceedings does not, with respect reflect the statutory intent of the Bankruptcy Act 1967 and the IA 1967 and appears not to be consonant with judicial recognition of when bankruptcy proceeding commences.

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