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CASE HIGHLIGHT

Insolvency Law

BATTLE OF THE ACTS IN PENDING BANKRUPTCY PROCEEDINGS

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A bankruptcy proceeding is often utilized by creditors to compel a Judgment Debtor (JD) to settle his outstanding debts. Whilst it is not an enforcement procedure, it is however an effective tool to compel a Judgment Debtor (JD) to take steps to settle his indebtedness at the risk of being declared a bankrupt where all his assets will vest in the Director General of Insolvency (DGI) under section 8(1)(b) of the Insolvency Act (IA) 1967 whose duty would be to distribute the assets of the JD to his creditors. The Insolvency (Amendment) Act 2020 raised the threshold to commence a bankruptcy proceeding from RM50,000.00 to RM100,000.00.

The previous statutory regime governing bankruptcy law was the Bankruptcy Act 1967 (BA 1967). The Bankruptcy (Amendment) Act 2017 replaced the BA 1967 with the Insolvency Act 1967 (IA 1967). One of the provisions introduced through the IA 1967 was pertaining to the protection against institution of bankruptcy proceedings against non-social guarantors and social guarantors which came into effect on 6th October 2017.

In the recent Court of Appeal decision of *Liew Hon Kong v Bank Pertanian Malaysia* [2022] 1 MLJ 836, the appellate court had an opportunity to determine on whether the previous legislation or the current legislation was the applicable statutory regime that would govern the bankruptcy action pending before it. The specific issue in this regard was whether the new Section 5(3) of the IA 1967 was applicable in the issuance of a Creditor's Petition against a non-social guarantor.

Key Events

The Judgment Creditor (JC) had granted a financing facility to one Maple Amalgamated Sdn Bhd whereby the JD had guaranteed the repayment of any outstanding amount and owing under the agreement. Due to Maple's default in repayment of the facility, the JC instituted a civil action against Maple and the JD to recover the outstanding amount. A judgment was obtained against both of them on 17th July 2017 for the sum in excess of RM63 million.

A Bankruptcy Notice (BN) was then issued against the JD (who was a non-social guarantor) on 20th September 2017. The BN was issued under the BA 1967.

On 14th May 2018, the JC had filed the Creditor's Petition against the JD as a result of non-compliance of the BN to which the JD had applied to set it aside. The JD's applications and appeals were all dismissed by the Senior Assistant Registrar and the High Court which resulted in his appeal to the Court of Appeal.

The Statutory Regimes

The BA 1967 was replaced with the IA 1967 on 6th October 2017.

Under the IA 1967, the JC is required to obtain leave of court before a Creditor's Petition can be presented against the non-social guarantor. This is provided under Section 5(3). This requirement was not present under the BA 1967.

The central issue before the Court of Appeal for its determination was whether the filing of the Creditor's Petition on 14th May 2018 was pursuant to the BA 1967 or the IA 1967 as this would determine whether the JC was required to obtain leave prior to the filing of the Creditor's Petition.

Decision of the Court of Appeal

The Court of Appeal ruled that the Creditor's Petition was filed under the BA 1967. Hence, there was no requirement for leave to be obtained by the JC. The savings provision under Section 60(2) of the Bankruptcy (Amendment) Act 2017 was the focal point to determine whether the Creditor's Petition ought to comply with the provisions under the BA 1967 or the IA 1967. Section 60(2) reads as follows:-

Any proceedings, actions or other matters required to be done under the principal Act which are still pending immediately before the coming into operation of this Act shall be continued or concluded under the principal Act as if the principal Act had not been amended by this Act.

This provision is also mirrored in Rule 287(1) of the Insolvency Rules 2017.

The Court of Appeal in its reasoning had discussed at length the arguments advanced by the JD that bankruptcy actions have 2 stages (the Bankruptcy Notice stage and the Creditor's Petition stage). It was accepted that the moment an application is made by the JC to issue the BN, the court's jurisdiction is invoked and shall continue until the very end and would only cease when the bankruptcy order is set aside or the JD discharged. Although the issuance of the BN was done under the old law, the statutory process must still be adhered to.

The Court of Appeal, through Nantha Balan JCA rejected the JD's arguments that a bankruptcy proceeding is commenced only when the Creditor's Petition is filed because there is no provision either in the BA 1967 or the IA 1967 which states that bankruptcy proceedings are deemed to have commenced only upon the filing of the Creditor's Petition.

In addition, the savings provision in Section 60(2) of the Bankruptcy (Amendment) Act 2017 uses the words *any proceedings, actions or other matters required to be done*. In interpreting the savings provision, the Court of Appeal referred to the guidance delivered by the Federal Court case of *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 on interpreting amending statutes and consequently held that the JD had a vested right to continue the bankruptcy proceedings against the JD under the old BA 1967 and its rules. The Court of Appeal held that since bankruptcy proceedings commenced upon the issuance of the BN, such proceedings are treated as *pending* for purposes of Section 60(2) of the Bankruptcy (Amendment) Act 2017. The Court of Appeal further held that even if it is argued that a BN is not to be equated with proceedings, the use of the words “*other matters required to be done*” was wide enough to encapsulate the issuance of the BN which was done under the BA 1967. As such, the proceedings, including the filing of the Creditor’s Petition would be regulated by the BA 1967.

To conclude, the legislation governing the filing of the Creditor’s Petition on 14th May 2018 is the BA 1967. Thus, there would be no necessity for the JC to obtain leave of the court prior to the filing of the Creditor’s Petition.

Observations

Based on the decision, the Court of Appeal had correctly decided the issue at hand in line with the legal principles relating to savings provisions. The Court of Appeal rightly applied the saving provisions in determining whether the BA 1967 or IA 1967 is the proper and effective legislation upon which the Creditor’s Petition is to be filed. It is noteworthy that the Court of Appeal had taken a *safe approach* when it also relied on the words “*other matters required to be done*” in Section 60(2) of the Bankruptcy (Amendment) Act 2017 as the premise of their decision to hold that the BA 1967 and Bankruptcy Rules 1969 were the applicable statutory regime to govern and regulate the filing of the Creditor’s Petition.

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