THE UPDATE

T&HW LAW PRACTICE • AMALAN GUAMAN

The Quarterly Law Bulletin of TAY & HELEN WONG Law Practice

Special Issue 1/2015 PP16300/03/2013(033194)

PREAMBLE

The recent Federal Court decision on 6.4.2015 in *Dr Shamsul Bahar Abdul Kadir v RHB Bank Berhad* effectively reverses its own decision made just two years ago in *Ambank (M) Berhad v Tan Tem Son* on whether leave of court is required to commence bankruptcy action based on a judgment that is more than 6 years old. This change of law is particularly important for bankers and creditors, hence this special issue in alert.

LEAVE REQUIRED TO FILE BANKRUPTCY ACTION BASED ON JUDGMENT AGED ABOVE 6 YEARS OLD

The question of "whether leave of the court must be obtained to file a bankruptcy action based on a judgment which is more than 6 years old" **(the Question)** continues to plague the legal circle, despite a seemingly determinative and conclusive ruling from the Federal Court, the highest court of the land, in 2013 in the case of *Ambank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son & Another Appeal*[1] **(*Tan Tem Son*)**. You may recall, the answer to that Question was negative, as decided by the apex court, effectively putting to an end a plethora of conflicting decisions on the same Question. And in Issue Q2 of 2013 of THE UPDATE, we rounded off our write-up on *Tan Tem Son* by remarking that following the decision, there is no longer any doubt that a judgment creditor does not need to apply for leave of the court to initiate a bankruptcy action based upon a judgment which is more than 6 years old.

Our remark is no longer sustainable and *Tan Tem Son* is no longer good law, following the recent decision of *Dr Shamsul Bahar Abdul Kadir v RHB Bank Berhad & Anor Appeal*[2] **(*Dr Shamsul Bahar Abdul Kadir*)** where the Federal Court OVER-RULED its own decision in *Tan Tem Son.* The apex court re-visited the Question. The Chief Justice, delivering the judgment of the court, held that the Question turned upon the construction of s.3(1)(i) of the Bankruptcy Act 1967 **(the BA 1967)**, the effect of which was that a judgment creditor who had obtained a final judgment against a judgment debtor for any amount and "*execution thereon not having been stay*" **(the Significant Phrase)** was entitled to commence a bankruptcy proceeding against the judgment debtor (*emphasis ours*). In their Lordship view, the Significant Phrase had not been given proper consideration in *Tan Tem Son* where a differently constituted panel of the Federal Court had instead focused on O 46 r 2 of the Rules of the High Court 1980 **(RHC)** (now Rules of Court 2012) **(the RC 2012)** to hold that:

(i) O 46 r 2 did not apply to bankruptcy proceeding which was an action upon a judgment within the meaning of s 6(3) of the Limitation Act 1953 **(the LA 1953)**;

(ii) O 46 r 2 could not be employed to construe the Significant Phrase to mean that in addition to there being no stay of execution, the creditor must be in a position to issue immediate execution; and

(iii) the only bar to institution of bankruptcy proceedings was the limitation under s 6(3) of the LA 1953.

Whilst *Tan Tem Son* did also consider the Significant Phrase read together with the *proviso* in s.3(1)(i) of the BA 1967 *ie*. "any person who is for the time being entitled to enforce a final judgment shall be deemed to be a creditor who has obtained a final judgment", *Tan Tem Son* ruled that:

> "...if the judgment creditor institutes a bankruptcy proceeding (to enforce a final judgment) within that 12 year period [as provided for under s.6(3) of the LA 1953], he "shall be

[1] [2013] 3 MLJ 179
[2] [2015] 4 CLJ 561, [2015]3 MLRA 456

> deemed to be a creditor who has obtained a final judgment" within the meaning of s.3(1)(i) of BA 1967. Further,...since O.46 r.2 of RHC does not apply to bankruptcy proceeding, there is no reason or justification to use it to read into the phrase, "execution thereon not having been stayed" in s.3(1)(i) of BA 1967, the implication that in addition to there being no stay of execution by the court, the creditor must be in a position to issue immediate execution."

In arriving at its decision, the apex court in *Dr Shamsul Bahar Abdul Kadir* made reference to English decisions on statutory provisions that contained wordings almost identical to the Significant Phrase, namely *Re ex parte Woodall*[3], *Re ex parte Ide*[4], *Re Connan ex parte Hyde*[5]. These authorities clearly established that the Significant Phrase meant that the creditor must be in a position, when he issued the bankruptcy notice, to levy immediate execution upon the judgment, should he choose to levy execution. Therefore, although a bankruptcy proceeding was not execution, the right of the creditor to issue bankruptcy was pegged to the right of the creditor to proceed to execution. It follows that a creditor was not entitled to issue bankruptcy if he was not in a position to issue execution on his judgment at the time when he issued the bankruptcy notice.

In *Dr Shamsul Bahar Abdul Kadir*, the judgment was dated 10.10.2000 whilst the bankruptcy notice **(the BN)** was issued on 3.1.2011 by which time the judgment was more than 6 years old. When the BN was issued, the judgment creditor **(the JC)** was not in a position to execute the judgment without leave of court. Leave should and could have been obtained by the JC, the failure of which resulted in the JC being not in a position to execute the judgment and thus not entitled to issue the BN.

In conclusion, it was held that the answer to the Question was positive, that is to say, upon a true and proper interpretation of s.3(1)(i) of the BA 1967, it is mandatory requirement that **a judgment creditor who intends to commence bankruptcy proceedings after more than 6 years from the date of the judgment, must obtain prior leave of court pursuant to O 46 r 2 of the RC 2012.**

In no uncertain terms, the Federal Court has regarded *Tan Tem Son* as clearly departed from history and case law and they saw no alternative but to put it back where it was, in line with other jurisdictions[6] with a provision equipollent to s.3(1)(i) of the BA 1967. Their Lordship also disagreed with *Tan Tem Son's* decision that the *proviso* "any person who is for the time being entitled to enforce a final judgment" in s.3(1)(i) of the BA 1967 did not require a judgment creditor to obtain leave pursuant to O 46 r 2(1)(a) of the RHC prior to initiating a bankruptcy proceeding based on a final judgment which has been obtained more

[3] [1884] 13 QBD 479
[4] [1886] 17 QBD 755
[5] [1886-90] All ER Rep 869

[6] For Singapore position, see *AmBank (M) Bhd v Yong Kim Yoong Raymond* [2009] 2 SLR 659; for Australia position, see *Pepper v McNiece* - BCLH 00016.

than six years ago. On the contrary, their Lordship held that any person who was for the time being entitled to enforce a final judgment in the *proviso* to s.3(1)(i) of the BA 1967 must be a person who was entitled to enforce a final judgment without prior leave of court.

It is our earnest hope that *Dr Shamsul Bahar Abdul Kadir* has finally and conclusively ended the saga on requirement of leave of court to commence bankruptcy proceedings based on a judgment of more than 6 years old. Another 360° change in the legal position on the same Question will definitely reflect unconvincingly on our courts and give rise to continuing undesirable uncertainty.

****