RE CHEAH WEE LIAM, EX P ROBERT TENG LYE HOCK
HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMAD J
BANKRUPTCY NO: 29-993-1998
4 AUGUST 1999
[1999] 4 CLJ 305

BANKRUPTCY: *Notice - Setting aside - Grounds for challenging notice - How many - Counterclaim, set off or cross demand - Summons in chambers - Mistake - Bankruptcy Rules 1969, rr. 18, 95- Bankruptcy Act 1967, s. 3(2)(iii), 3(1)(i)*

The judgment creditor issued a bankruptcy notice against the judgment debtor in 1998. The judgment debtor filed an affidavit purportedly under r. 95 Bankruptcy Rules 1969to set aside the bankruptcy notice stating various grounds but none related to a counterclaim, set off or cross-demand. The application to set aside was dismissed by the SAR and the judgment debtor appealed to the judge-in-chambers.

Held:

[1] Since the affidavit filed by the judgment debtor under r. 95 Bankruptcy Rules 1969 did not say that the debtor had a counterclaim, set off or cross demand, the affidavit could not operate as an application to set aside the bankruptcy notice within the contemplation of s. 3(1)(i) Bankruptcy Act 1967, and the case should have been treated as if no affidavit under r. 95 had in fact been filed.

[2] Further, the affidavit did not attract the provisions of s. 3(2)(ii) Bankruptcy Act 1967because it did not condescend to particulars of the alleged amount actually due.

[Judgment debtor's appeal dismissed.]

Case(s) referred to:

Datuk Lim Kheng Kim V. Malayan Banking Bhd. [1993] 3 CLJ 324

*Re Tan Chong Keat ex p Asia Commercial Finance Bhd [1997] 4 CLJ Supp 355 (**refd**)*

Legislation referred to:

Bankruptcy Act 1967, s. 3(1)(i), (2)(ii), (iii)

Bankruptcy Rules 1969, rr. 18(1), 94(1)(b), 95

Counsel:

For the judgment debtor - Khaw Seng Chuan; M/s Ismail, Khoo & Assoc

For the judgment creditor - Albert Kang Gim Swee; M/s Kang AssocReported by Izzaty Izzuddin

JUDGMENT

Abdul Hamid Mohamad J:

On 7 August 1998, the judgment creditor issued a bankruptcy notice against the judgment debtor in the usual form for payment of RM26,687.04 being the amount of costs taxed by the senior assistant registrar in Originating Summons No. 24-792-1995.

On 12 August the judgment debtor filed an affidavit purportedly under r. 95 of the Bankruptcy Rules stating that he objected to the bankruptcy notice on the following grounds:

> First, the judgment creditor, in the bankruptcy notice, did not state that he was the trustee of Liam Hood Tong Chor Seng Thuan;
> Secondly, that the amount stated therein was not the latest amount due;
> Thirdly, there was an "appeal" pending against the allocator;
> Fourthly, another trustee by the name of Cheah Phin Cheang should be included in the notice;
> Fifthly, there was a dispute between the two trustees as to who was the lawful trustee, and until the dispute is resolved, all costs should be paid by the judgment creditor.

On 28 November 1998, the senior assistant registrar dismissed the application (encl. 4). The judgment debtor appealed to judge-in-chambers. I dismissed it on 21 May 1999. The judgment debtor now appeals to the Court of Appeal.

This case has again raised the confusing state of affairs regarding challenge to a bankruptcy notice. I have, in *Re Tan Chong Keat ex-parte Asia Commercial Finance Bhd* [1997] 4 CLJ Supp 355 highlighted the problems.

I shall first reproduce the relevant provisions of the law:

Section 3(1) of the Bankruptcy Act 1967, *inter alia*, provides:

> (1) A debtor commits an act of bankruptcy in each of the following cases:
> (a)...
> (b)...
> (c)...
> (d)...

(e)...

(f)...
(g)...
(h)...
(i)... if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order [with interest quantified up to the date of the bankruptcy notice] or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;
(j)...
(2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non compliance therewith and shall be served in the prescribed manner:
Provided that a bankruptcy notice -
(i)...

(ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

Rule 18(1) of the Bankruptcy Rules 1969 provides:

(1) Except where these Rules or the Act otherwise provide, every application to the court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by Affidavit.

Rule 94 provides:

(1) Every bankruptcy notice shall be endorsed with:
(a) the name and place of business of the solicitor who is suing out the notice, or if no solicitor is employed, with a memorandum that it is sued out by the creditor in person;
(aa) the name and National Registration Identity Card number of the debtor.
(b) an intimation to the debtor that if he has any counter-claim, set off or cross

demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must within the time specified in the notice file an affidavit to that effect with the Registrar.

(2) In the case of a notice served in the Federation the time shall be seven days.

In the case of a notice served elsewhere the Registrar when issuing the notice shall fix the time.

Rule 95 provides:

(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.
(2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

The leading case on the subject is *Datuk Lim Kheng Kim v. Malayan Banking Berhad* [1993] 3 CLJ 324; [1993] 2 MLJ 298 (SC).

In that case Mohamed Dzaiddin SCJ delivering the judgment of the court, *inter alia,* said at p. 302:

We would observe here that the above Affidavit, purportedly an Affidavit to set aside the bankruptcy notice, fails to follow, both in form and substance, Form No. 7 of the Rules, which contains the requirements of s. 3(1)(i) pertaining to a debtor to 'satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained....

The learned judge went on to say at p. 303:

We are concerned here with the content of the said Affidavit. It merely denies and disputes that the appellant was indebted to the respondent in the sum of RM2,603,913.28, but fails to disclose that he has a counterclaim, set-off or cross demand, etc against the respondent, which he is required to depose under s. 3(1)(i) of the Bankruptcy Act ('the Act') and provided for in Form 7. Following the above decision and in the face of the above Affidavit, we are of the opinion that the said Affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s. 3(1)(i) of the Act, and the case should have been treated as if no affidavit under r. 95had in fact been filed.
Similarly, as para 3 of the enclosure merely disputes his indebtedness in the said sum to the respondent 'based on an erroneous calculation and grossly exaggerated' without condescending to particulars of the amount actually due, we say that the said Affidavit does not attract proviso 2(ii) of s. 3 which states that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due

> exceeds the actual amount due.

At p. 305:

> In our opinion, failure on the part of the appellant to follow r. 18renders his 'Affidavit in opposition' ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an Affidavit.
> Unfortunately, he has failed to do so in this case.

That case effectively says that there are two ways of challenging a bankruptcy notice:

(a) if the challenge is on the ground that the judgment debtor has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or a sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained, he should file an affidavit under r. 95within seven days after the service of the notice on him;

(b) if the judgment debtor wants to challenge the bankruptcy notice on other grounds, then he should file a notice of motion (now a summons in chambers) under r. 18.

That is very clear. But, there is another point that is bothering me. That is the provision of s. 3(2)(ii) of the Act which says that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment (meaning seven days from the date of service of the bankruptcy notice) gives **notice** to the judgment creditor that he disputes the validity of the notice on ground of such **mistake**.

Note that that subsection talks about the judgment debtor giving **notice** to the judgment creditor disputing the amount and giving ground of such **mistake**. This provision appears to say that there is a third way of challenging the bankruptcy notice besides the two provided underr. 95andr. 18. In other words to challenge the bankruptcy notice on ground that he has a counterclaim etc., he can file an affidavit under r. 95 within seven days after the service on him of the bankruptcy notice. If he wants to challenge the bankruptcy notice on other grounds he should file a summons in chambers under r. 18. If he wants to challenge the sum specified in the bankruptcy notice on ground on mistake he is only required to give notice to the judgment creditor within seven days from the date of service of the bankruptcy notice on him.

But, to read the provision of s. 3(2) of the Act as providing a third method of challenging the bankruptcy notice will also give rise to problems. First that subsection only talks about notice to the judgment creditor. If the judgment debtor gives such a notice to the judgment creditor and the judgment creditor does not agree that there is a mistake, what happens? Is the bankruptcy notice invalidated automatically, without the issue being heard and decided by the court? Indeed, there is no application before the court for it to hear and decide. The notice is only required to be given to the judgment creditor.

Secondly, the notice is required to be given "within the time allowed" which means within seven days after the service of the bankruptcy notice on the judgment debtor. Does it refer to the affidavit under r. 95. In other words, does it mean that the judgment debtor may give

notice to the judgment creditor by filing an affidavit under r. 95 Support for this view is the requirement of giving such notice "within the time allowed for payment" which is seven days from the date of service of the bankruptcy notice on the judgment debtor. Indeed the Supreme Court in *Dato' Lim Kheng Kim's* case appears to have taken such a view - see the passage reproduced earlier. It is to be noted that observation was made during the discussion of the application (affidavit) under r. 95.

But, if we look at the relevant provisions of the Act and the Rules, it is quite clear that the affidavit under r. 95 is only applicable where the ground of challenge is the existance of counter-claim etc, and not any other ground.

First, s. 3(1)(i), so far as is relevant for the present discussion says that if the judgment debtor does not within seven days after the service of the bankruptcy notice, satisfies the court that he has a counterclaim etc, the judgment debtor commits an act of bankruptcy.

Secondly,r. 94(1)(b)requires that the bankruptcy notice be endorsed with an intimation that if he has a counter-claim, set off or cross demand, he must within the seven days file an affidavit under r. 95. The form is provided in the rules - Form 7:

No. 7
(Rule 95)
(Title)
AFFIDAVIT ON AN APPLICATION TO SET ASIDE
BANKRUPTCY NOTICE

I,... of... affirm and say:
1. That I was, on the... day of..., served with the notice hereunto annexed (or describe the notice).
That I have satisfied the judgment debt claimed by..... by (state nature of satisfaction)
Or
2. That I have a counter-claim (or set-off or cross demand) for $... being a sum equal to (or exceeding) the claim of the said... in respect of (here state grounds of counter-claim).
3. That I could not have set up the said counter-claim (or as the case may be) in the action in which the said judgment was obtained against me.
Affirmed at, etc...

It should be noted that the form of the affidavit speaks of only two things:

(a) that the judgment debtor has satisfied the judgment debt;

(b) that he has a counter-claim, set off or cross demand which would not have been set up in the action in which the judgment was obtained.

Nowhere does it speak about the mistake in the amount specified in the bankruptcy notice.

Furthermore, if the affidavit under r. 95 is applicable, why should s. 3(2)(ii) talk about notice to be given to the judgment creditor?

Does he (the judgment debtor) then "gives notice" by filing a summons in chambers under r. 18? No doubt that this ground (mistake in the sum specified in the bankruptcy notice) can be

considered as "other grounds" mentioned in r. 18, meaning grounds other than the existence of a counter-claim etc. But, r. 18 does not provide the time limit for the filing of the summons in chambers, whereas s. 3(2)(ii) provides that the notice must be given "within the time allowed", meaning within seven days after the service of the bankruptcy notice. The question is, if the challenge under s. 3(2)(ii) of the Act is meant to be done through r. 18, why should there be a time limit for doing so, and, whatmore, that time limit is similar to an application under r. 95?

In the circumstances, perhaps I am justified in suggesting that these provisions be amended to simplify and clarify the procedure for challenging the bankruptcy notice as I did in *Re Tan Chong Keat Ex Parte Asia Commercial Finance Bhd [1997] 4 BLJ 355*.

Be that as it may, my duty is to decide this case according to the law as it now stands, as I understand it. This court is bound by *Dato' Lim Kheng Kim's* case. There are only two ways to challenge the bankruptcy notice, *ie*, under r. 95 on the ground of the existance of counter-claim etc and under r. 18 on other grounds.

This application is clearly made under r. 95 by way of an affidavit files within seven days after the service of the Bankruptcy Notice. The affidavit does not say anything about the existance of a counter-claim, set-off or cross demand. Following *Datuk Lim Kheng Kim's* case, I hold that the affidavit "cannot operate as an application to set aside the bankruptcy notice within the contemplation of s. 3(1)(i) of the Act, and the case should have been treated as if no affidavit underr. 95had in fact been filed". Similarly, following the same judgment of the Supreme Court, the affidavit does not attract the provisions of proviso 2(iii) of s. 3 of the Act because, first, it does not condescend to particulars of the amount actually due. Indeed, the affidavit merely alleges that the amount stated in the bankruptcy notice is not the latest amount ("bukan merupakan amaun yang terakhir")

Again, following the approach of the Supreme Court in the same case I do not think I have to decide the other issues raised either in the affidavit and at the hearing. (See [1992] 2 MLJ 540 to see the numerous issues raised in *Datuk Lim Kheng Kim's* case at the High Court level, which the Supreme Court did not deem necessary to deal, on appeal).

I dismissed the appeal with costs.