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M/S LAKSAMANA REALTY SDN BHD v. GOH ENG HWA  
COURT OF APPEAL, KUALA LUMPUR  
ABDUL HAMID MOHAMAD, JCA; MOHD NOOR AHMAD, JCA; ABDUL AZIZ  
MOHAMAD, JCA  
CIVIL APPEAL NOS: M-02-347-2001, M-02-388-2001 & M-02-530-2001  
7 NOVEMBER 2003  
[2004] 1 CLJ 274

***BANKRUPTCY: Capacity of Bankrupt - Filing of counterclaim - Whether Bankrupt had locus standi to file counterclaim - Whether sanction of official assignee covered filing of counterclaim - Whether Property should be assigned to Bankrupt before filing of counterclaim - Whether issue on locus standi could be raised in submission and need not be pleaded - [Bankruptcy Act 1967, s. 38\(1\)\(a\)](#)***

This was one of three related appeals (appeal no. M-02-388-2001) in which the court had to first decide on whether the respondent who was a bankrupt had the *locus standi* to file his counterclaim in respect of the appellant's suit against him.

The issues were: (1) whether the sanction of the official assignee ('OA') given to the respondent under [s. 38\(1\)\(a\) of the Bankruptcy Act 1967 \('the Act'\)](#) was confined only to the respondent defending the action and not the filing of his counterclaim; (2) whether the OA should assign the property concerned to the respondent before the respondent was competent to file the counterclaim; and (3) whether the issue on *locus standi* should be pleaded and not raised in submission.

**Held:**

**Per Abdul Hamid Mohamad JCA**

[1] All that is required to enable a bankrupt to maintain an action as provided by s. 38(1)(a) of the Act is to obtain the sanction of the OA. No assignment is required. The respondent was competent to file the counterclaim as he had obtained the sanction from the OA prior to his filing thereof.

[2] 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 will be null and void. The case being a nullity for lack of capacity or competency, the question of pleading does not arise. Therefore the appellant was entitled to raise the issue in the course of submission.

**Diputuskan:**

**Oleh Abdul Hamid Mohamad HMR**

[1] Seperti diperuntukkan s. 38(1)(a) Akta, apa yang diperlukan oleh seorang bankrap bagi membolehkannya memulai tindakan hanyalah suatu sanksi dari PP. Serahanhak adalah tidak diperlukan. Responden berkompoten untuk memfailkan tuntutan balas oleh kerana beliau telah pun memperoleh sanksi dari PP sebelum pemfailan yang berkaitan.

[2] Keperluan sanksi bukan satu formaliti semata-mata. Tanpa sanksi, seseorang bankrap tidak berkompoten untuk meneruskan tindakan. Ia berkait dengan kapasitinya. Jika beliau tidak berkompoten untuk memfail tuntutan balas tanpa terlebih dahulu memperolehi sanksi, maka pemfailan tuntutan balasnya akan menjadi batal dan tak sah. Apabila kes menjadi terbatal atas alasan tiada kapasiti, maka soal pliding tidak timbul lagi. Oleh yang demikian, perayu berhak untuk membangkitkan isu berkenaan semasa penghujahan.

*Rayuan atas locus standi ditolak.]*

*[Appeal from High Court, Melaka; Civil Suit No: 22-144-1991]*

*Reported by Usha Thiagarajah*

**Case(s) referred to:**

[\*Chin Kon Nam v. Chai Yun Pin Development Sdn Bhd \[1996\] 1 CLJ 444 HC \(refd\)\*](#)

*K Ismail Ganey Rowther v. MA Abdul Kader [1933] 2 FMSR 98 (refd)*

*North Western Salt Co v. Electrolytic Alkali Co [1914] AC 461 (refd)*

*Ramsey v. Hartley [1997] 1 WLR 186 (refd)*

[\*Re Khoo Kim Hock \[1974\] 1 LNS 134; \[1974\] 2 MLJ 29 \(refd\)\*](#)

[\*Re Mat Sari Hamid ex p United Asian Bank Bhd \[1993\] 1 CLJ 202 HC \(refd\)\*](#)

[\*Sabah Bank Bhd v. Syarikat Bintang Teguh Sdn Bhd & Ors \[1992\] 1 LNS 41; \[1992\] 2 MLJ 588 \(refd\)\*](#)

[\*Superintendent of Lands and Surveys \(4th Div\) v. Hamit Matusin \[1994\] 3 CLJ 567 SC \(refd\)\*](#)

[\*Supreme Finance \(M\) Bhd v. Mohamad Nor & Ors \[1993\] 1 LNS 91; \[1993\] 2 MLJ 29 \(refd\)\*](#)

**Legislation referred to:**

Bankruptcy Enactment 1912, s. 33(i)(a)

Bankruptcy Act 1914 [UK], s. 55(1)

**Other source(s) referred to:**

*Malaysian High Court Practice, 1998 Desk Edition, vol 1, p 482*

**Counsel:**

*For the appellant - Trevor George De Silva; M/s Shook Lin & Bok*

*For the respondent - B Thangaraj (Azad Bashir & Shaari Nor); M/s Bashir & Asha*

*For the official assignee - Rohatul Akmar Abdullah SFC*

**JUDGMENT****Abdul Hamid Mohamad JCA:**

I have had the advantage of reading the draft judgment of my brother Abdul Aziz Mohamad who has set out the facts in great detail. In this judgment I shall only state the facts briefly.

On 11 August 1983, Laksamana Realty Sdn. Bhd. ("Laksamana") entered into an agreement with Goh Eng Hwa ("Goh"). According to the agreement, in consideration of RM30,000 paid by Laksamana to Goh, Goh agreed, *inter alia*, to deliver vacant possession of the land in question by 15 August 1984. Goh failed to do so. On 7 November 1991, Laksamana filed Civil Suit No. 22-144-1991 claiming vacant possession of the said land. On 10 April 1992 Goh entered appearance. On 16 April 1992 Goh was adjudged bankrupt. As Goh did not file his defence, on 26 May 1992, Laksamana entered judgment in default. The order required Goh to deliver vacant possession in 30 days. Again Goh failed to comply. On 20 June 1995 Laksamana obtained a writ of possession.

On 8 September 1995 the official assignee wrote to the court informing the court that "kebenaran telah diberi kepada sibankrap (Goh - added) untuk meneruskan tindakan kes Guaman Sivil No. 22-144-91".

On 15 September 1995 Goh applied for an order to set aside the judgment in default and for a stay of execution of the judgment. The application was fixed for hearing on 8 September 1995. However, one week earlier, on 1 September 1995, the writ of possession was executed.

On 17 October 1995, Goh filed another application praying for similar orders. This second application was heard and the judgment in default was set aside. An order for a stay of execution was also granted. This happened on 28 November 1995.

On 9 December 1995 Goh filed his statement of defence and counterclaim. Goh having agreed to deliver vacant possession, only Goh's counterclaim was left to be tried. In his counterclaim, Goh alleged that Laksamana had wrongfully demolished the premises and removed certain goods of his which was subsequently lost and committed trespass on land.

He claimed damages for all that.

The trial of Goh's counterclaim commenced on 3 June 1969. On 19 September 2000, in the course of his submission, Laksamana's counsel raised for the first time the issue of *locus standi*. The trial was postponed to 6 November 2000 for further submission.

On 6 November 2000 Goh filed an application to amend his statement of defence and counterclaim to add the official assignee as a party.

On 5 March 2001, the learned judge dismissed Laksamana's objection as to Goh's *locus standi*. He also dismissed Goh's application for the amendments. Goh appealed against this order (dismissing the application to amend). That appeal is appeal No. M-02-347-2001.

On 20 April 2001, the learned judge allowed Goh's counterclaim. He ordered Laksamana to pay Goh RM400,000 as general damages for trespass, conversion and negligence and RM50,000 as exemplary damages. He also ordered Laksamana to pay Goh RM70,000 as balance due to him under the agreement dated 11 August 1988. Laksamana appealed against that order - appeal No. M-02-388-2001. Goh also appealed against the quantum of damages - appeal No. M-02-530-2001.

When the appeal came up before us Goh's counsel conceded that the sum of RM70,000 ought not to have been ordered. That is, therefore, set aside.

We decided to hear the issue of *locus standi* first, ie, in appeal number M-02-388-2001.

It was argued by learned counsel for Laksamana that Goh had no *locus standi* to file the counterclaim. The sanction given did not cover the filing of a counterclaim. It was also argued that the sanction under s. 38 was insufficient for Goh "to maintain any action". The property having been vested in the official assignee, Goh had no rights or interest in the property unless it was assigned to Goh, which was not done. Lastly, it was also argued that *locus standi* need not be pleaded but may be raised at any time.

Section 38(1) of the Bankruptcy Act 1967 reads:

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 Official Assignee.

Goh had, prior to filing the counterclaim, obtained the sanction of the official assignee. The question then is whether the sanction covers the filing of the counterclaim. The sanction, reproduced earlier, is actually the Malay translation of the relevant words of s. 38(1)(a). The short answer to the question is, if those words of s. 38(1)(a) cover counterclaim, then the same words, in Malay, should cover the filing of a counterclaim. Otherwise, it would not be necessary for Goh to obtain the sanction at all.

The next question is, is it necessary for the official assignee to assign the property to the respondent (in addition to giving the sanction under s. 38(1)(a)), before Goh becomes competent to file the counterclaim?

This calls for an examination of the relevant provisions of the Act.

Section 24(4) provides:

(4) When a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the Official Assignee.

Section 38(1)(a) which has already been reproduced says that a bankrupt shall be incompetent to maintain an action without the sanction of the official assignee. The exception is as regards an action for damages in respect of an injury to his person, which is not the case here. There is no mention of divesting or assignment of the property to the bankrupt for that purpose.

Section 60 provides for the powers of the official assignee to deal with the property which includes to sell the property (s. 60(a)) and to execute any powers of attorney, deeds and other instruments for the purpose of carrying into effect of the Act (s. 60(d)).

Section 68 empowers the official assignee to allow the bankrupt to manage the property. Allowance may be given to the bankrupt for the service. Again, there is no mention of divesting or assignment of the property to the bankrupt for the purpose.

I have no doubt that the powers under s. 60(d) includes the power to execute a deed of assignment. But, that is one of the powers given to the official assignee. But must that provision be read into s. 38(1)(a) when both sections make no mention of it? I do not think so. I see no reason why the provisions of s. 60(d) should be read into s. 38(1)(a). If sanction alone is not sufficient to enable the bankrupt to maintain an action, that section would have said so, or at least a reference to it would be made in other sections. There is nothing to that effect. And, if the property is assigned to the bankrupt, there is nothing to prevent the bankrupt from disposing it. It is because the property is vested in the official assignee that the sanction of the official assignee is required for the bankrupt to maintain an action involving the property. If the property is not vested in the official assignee or if it is assigned to the bankrupt, there would be no necessity for the sanction anymore. The bankrupt, having the rights and interest in the property, clearly has an inherent right to maintain an action over it.

In conclusion, it is my view that, all that is required to enable a bankrupt to maintain an action as provided by s. 38(1)(a), is for him to obtain the sanction of the official assignee. No assignment is required. The respondent having obtained the sanction prior to his filing the counterclaim, he is competent to do so.

The other point is whether the issue of *locus standi* should have been allowed to be raised at all during the submission, it not having been pleaded in the statement of defence. 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, the question of pleading does not arise. We see, for example, in [Chin Kon Nam v. Chai Yun Pin Development Sdn Bhd \[1996\] 1 CLJ 444](#) the issue was raised as "a preliminary objection on a point of law". In [Supreme Finance \(M\) Bhd v. Mohamad Nor & Ors \[1993\] 1 LNS 91](#); [1993] 2 MLJ 29, in [Sabah Bank Bhd. v. Syarikat Bintang Tengah Sdn. Bhd. & Ors \[1992\] 2 MLJ 588](#) and in [Re Mat Sari bin Hamid, Ex Parte United Asian Bank](#)

*Bhd.* [1993] 1 CLJ 202 the issue arose in an application to set aside a default judgment.

So, I do not think it is right to say that to raise the issue, it must be pleaded. In the circumstances I am of the view that the appellant was entitled to raise the issue even in the course of submission. However, for reasons given earlier, it is my decision that the respondent has the *locus standi* to file the counterclaim.

I would dismiss the appeal on the issue of *locus standi* in appeal number M-02-388-2001 with costs. A new date will have to be given for the hearing of all the three appeals on their merits.