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1. *Re Mohd Saiful Azuar bin Md Isa; ex parte Bank Kerjasama Rakyat Malaysia Bhd [2021] MLJU 1225*

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# Re Mohd Saiful Azuar bin Md Isa; ex parte Bank Kerjasama Rakyat Malaysia Bhd [2021] MLJU 1225

Malayan Law Journal Unreported

HIGH COURT (PERAK)

SU TIANG JOO JC

BANKRUPTCY NO AA-29PB-165-08 OF 2020

20 July 2021

*Hizri Hasshan (Yong Ke-Qin with him) (**Amir** Ruhana & Khairuddin) for the respondent/judgment debtor.*
*Ku Amirul Faiz bin Ku Seman (**Akram Hizri Azad & Amir**) for the judgment creditor.*
*Mohamed Hamdan bin Yunus (Siti bt Mohd Tajuddin with him) (Insolvency Officer) for the Insolvency Director General.*

## Su Tiang Joo JC:

GROUNDS OF JUDGMENT

Q: When two or more persons enter into a consent judgment to pay the judgment debt, may the judgment creditor in the absence of express agreement compel any one or more of the judgment debtors to satisfy the whole of the consent judgment?

Introduction

**[1]**On 16.7.2021, I had allowed an appeal filed by the Judgment Creditor ("the Bank") against the decision of the learned Senior Assistant Registrar, Puan Nurfarah Syahidah Binti Mohd Nor, who allowed an application by the Judgment Debtor ("JD") to have his bankruptcy annulled.

**[2]**The premise for my decision was that the liability of multiple judgment debtors in a consent judgment is joint and several. These are the grounds for my decision.

**[3]**In hearing the appeal, this Court was tasked to deal with the above query in the JD's application to annul an Adjudication Order and Receiving Order ("AO & RO") which is the technical name for an order making a person a bankrupt and vesting his estate unto the hands of the Director General of Insolvency.

**[4]**The AO & RO was premised upon the non-compliance by the JD with the terms of a consent judgment.

**[5]**It has been settled by our apex court that a consent judgment is a contract and this was indeed conceded by the JD in his written submissions (Encl 18 para 16 citing the Federal Court authority of *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465; [2004] 2 CLJ 301 which held that:

> *"[15]..**a consent judgment or order is not the less a contract and subject to the incidents of a contract because there is superadded the command of the court, and its force and effect derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent judgment or order**. A consent order must be given its full contractual effect, even if it relates to an interlocutory step in the action (see Halsbury's Laws of England (4th*

*Ed Vol 37)"*

**[6]**With the consent judgment being subject to the incidents of a contract, this Court turned to the Contracts Act 1950 (Revised 1974) Act 136 ("Contracts Act") for guidance and found that it is expressly provided in *section 44 (1)* thereof that:

> ***"When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise."***

**[7]**It would have followed that as the answer is statutorily provided for in subsection 44 (1) Contracts Act (supra), this would be a straightforward matter to deal with. Alas, it was not.

Factual backgroundConsent judgment

**[8]**It was undisputed (Encl 30 para 5) that on **10.5.2012** before His Lordship Mohd Zawawi Bin Salleh J. (now FCJ), the JD together with two other parties on a without admission of liability basis, recorded a consent judgment (Encl 30 p 49 to 51) where the three judgment debtors were to pay the Bank a sum of **RM670, 816.40** owing as at 10.6.2011:

i) by way monthly instalments for a period of three months, a sum of RM1,500.00 a month commencing from the date of the consent judgment;

ii) the judgment debtors were to assign 5% of the total value of a project in Manjung, Perak to the Bank;

iii) the judgment debtors were to totally assign to the Bank all other projects within one year from the date of the consent judgment;

iv) penalty in the form of ta'widh will not be imposed upon the judgment debtors after 10.6.2011;

v) each party will bear their own legal costs;

vi) in the event the judgment debtors were to default in the terms aforesaid, the Bank is at liberty to recover the legal costs paid by it to its solicitors from the judgment debtors and the Bank is at liberty to forthwith impose penalty by way of ta'widh, all other charges and financing charges given by the Bank to the judgment debtors calculated as from 10.6.2011 until full settlement. The Bank is at liberty to enforce this consent judgment and commence execution proceedings against the judgment debtors.

vii) the Bank agree to stay execution on the consent judgment against the judgment debtors for one year from the date of the consent judgment where any execution proceedings and/or winding-up and/or bankruptcy proceedings will only be initiated after 10.5.2013.

**[9]**It would be noted immediately that the consent judgment is a joint promise and there is **no** express agreement as to the portion of liability that is to be borne by each of the judgment debtors.

Bankruptcy proceedings

**[10]**The Bank did not receive any payments under the consent judgment.

**[11]**On **24.7.2013** it commenced bankruptcy proceedings by having a bankruptcy notice ("BN") issued against the JD, Mohd Saiful Azuar Bin Md Isa (Encl 30 p 45 to 47).

**[12]**It is to be observed that the BN was issued to the JD at Blok F2, Fasa 1E-1, 32040 Sri Manjung, Perak Darul Ridzuan which is the **same address** as that stated to be that of the JD in the Writ of Summons (Encl 30 p 54) and the Statement of Claim (Encl 30 p 58) issued by the High Court in Malaya at Kuala Lumpur in Civil Suit No. 22A-661-2011 and which led to the consent judgment.

**[13]**This Court also observed that no issue was taken as to the veracity of the JD's address at the time the consent judgment was recorded on 10.5.2012.

**[14]**In the BN (Encl 30 p 46) dated 24.7.2013, the Bank demanded a sum of RM670, 816.40 together with interest

thereon at 8% per annum as from 10.5.2012 until 24.7.2013 and which is said to be RM64,744.65 bringing the total demanded to be RM735,655.87.

**[15]**The BN was caused to be served upon the JD by way of substituted service.

**[16]**The JD did not respond.

**[17]**0n **29.1.2014,** the Bank caused a Creditor's Petition ("CP") to be issued to the JP and praying for an AO & RO to be made against him.

**[18]**The JD did not turn up for the hearing of the CP and he was adjudicated a bankrupt with an AO & RO made against him on **18.7.2014.**

Director General of Insolvency

**[19]**With him having been adjudicated a bankrupt, the estate of the JD in bankruptcy is now under the control of the Director General of Insolvency ("DGI").

**[20]**In his report (Encl 17) dated **9.11.2020,** the DGI reported that the **JD had filed his Statement of Affairs** on **15.9.2014** and from the JD's statement, there are 4 unsecured creditors and one secured creditor as follows:

a) Unsecured Creditors

i) the Bank RM735, 655.87

ii) Bank Islam Bhd RM40,000.00

iii) Pinjaman Pelajaran JPA RM5,000.00

iv) Pinjaman Pelajaran Kementerian Pendidikan Malaysia RM4,000.00

b) Secured Creditor

v) Pinjaman Perumahan Kerajaan RM190,000.00

**[21]**The DGI went on to report that two claimants had made claims on the JD's estate in bankruptcy, one by the Bank to the sum of RM691, 657.65 and another by Bank Islam (M) Bhd to the sum of RM42,357.36 totalling RM1,094,799.96.

**[22]**The DGI also reported that the JD has agreed to pay a monthly instalment of RM100.00 a month with effect from October 2014 and payments have been made up to date as at November 2020. The amount standing to the credit of the estate of the JD's bankruptcy stood at RM10,888.32 as at the date of the report.

**[23]**The DGI report aforesaid was signed off by Puan Azlena Binti Hashim, Pengarah Insolvensi Negeri, Jabatan Insolvensi Negeri Perak on behalf of the Director General Insolvency, Malaysia.

**[24]**With him having filed his Statement of Affairs and being up to date with his monthly payments of RM100.00 per month as at November 2020, the inferences that can be readily drawn is that the JD is aware of his bankruptcy and has no issue dealing with the Insolvency Department in Perak.

**[25]**The other inference is that as from the date of him filing his Statement of Affairs on 15.9.2014 until sometime in August 2020, that is a period of **almost 6 years** the JD accepted that he was a bankrupt.

JD's challenge

**[26]**However, on 11.8.2020, the JD took out an application (Encl 30 p 22 to 26) pursuant to *section 105* of the *Insolvency Act 1967* ("IA 1967") to have both the AO & RO made against him on 18.7.2014 annulled; the CP dated 29.1.2014 and BN dated 18.7.2013 set aside; all payments received by the DGI be refunded to him after deducting the costs of the DGI, if any, the costs of his application be borne by the Bank and such further or other relief deemed fit by the Court.

**[27]**Section 105 (1) *IA 1967* provides as follows:

> *(1)* ***Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the bankruptcy order.***

**[28]**In support of his challenge contained in his Summons In Chambers (Encl 30 p 22 to 26) and supported with two affidavits (Encl 30 p 27 to 100 and p 123 to 140), the JD relied upon 17 grounds (Encl 30 p 22 to 26) which are as follows:

i) the AO & RO was recorded by the Court ex parte without the presence and knowledge of the JD;

ii) the CP filed on 29.1.2014 and BN filed on 24.7.2013 are defective in claiming for an erroneous amount in contravention of the consent judgment dated 10.5.2012 (Kuala Lumpur High Court Civil Suit No. 22-661-2011);

iii) the amount demanded to the sum of RM735,655.87 is wrong and excessive which did not reflect the actual liability of the JD under the consent judgment;

iv) the consent judgment dated 10.5.2021 provided that it was arrived at on a without admission of liability and by reason thereof, it was not arrived at premised upon a guarantee;

v) the consent judgment also did not provide that the liability of the JD was to be on a joint and several basis and by reason thereof, any execution of the judgment ought to be on a joint basis where the judgment debt ought to be shared jointly by all three defendants;

vi) one third of the amount demanded of RM670,816.40 is RM223,605.47 only;

vii) interest of RM64,744.65 that is interest at 8% per annum claimed on the sum of RM670,816.40 is also wrong and defective as it is in contravention of the terms of the consent judgment which only allowed compensation or penalty for late payment (Ta'widh") only;

viii) interest at 8% claimed by the Bank is clearly a claim for interest ("riba") and is not valid based upon Shariah principles when the claim made by the Bank was premised upon an Islamic financing contract that is a "Bai al-Inah" contract;

ix) in the alternative, interest at 8% is excessive when the Bank which is carrying out Islamic financing is only allowed to claim Ta'widh at 1% only and claiming 8% is in breach of Bank Negara's Guidelines on Late Payment Charges for Islamic Banking Institutions - (BNM/RH/GL 008-14);

x) the claim in the BN and CP is misleading and did not set out the legal costs, Ta'widh and other charges stated in the consent judgment and computation of interest commencing 10.5.2012 was never provided in the consent judgment;

xi) no application to amend the consent judgment was made before the BN was filed and therefore all bankruptcy proceedings must be subject to the consent judgment;

xii) the BN and the CP are defective and by reason thereto the AO & RO should be set aside with the entire bankruptcy proceedings being an abuse of process of Court, defective and oppressive;

xiii) the Bank was not being transparent and did not reveal the security it held and did not inform the JD whether any payments had been received from the projects that were assigned;

xiv) as a member of the public, the JD do not have in-depth knowledge of the claims made by the Bank from a legal perspective;

xv) the JD has been adjudicated a bankrupt for a long time and should not remain so on a debt which is not correct and not valid;

xvi) the JD at all material times was not domiciled in the state of Perak Darul Ridzuan and instead reside at Taman Balakong Jaya, Seri Kembangan, Selangor Darul Ehsan as he is working with Universiti Putra Malaysia at Serdang, Selangor Darul Ehsan; and

xvii) the annulment of the AO & RO will give more space for parties to negotiate a settlement without being tied by the restrictions of the Insolvency Act 1967.

The Bank's response

**[29]**The Bank responded by way of two affidavits (Encl 30 p 101 to 122 and p 141 to 161) and in summary asserts as follows:

i) a financing facility of RM2,000,000.00 was given to Letir Jati Sdn Bhd ("LJSB") and the JD was one of two guarantors for this facility;

ii) the Bank initiated legal action against LJSB and the guarantors including the JD when LJSB breached the terms of the financing facility and following from negotiations, the consent judgment was recorded on 10.5.2012;

iii) from the time the consent judgment was recorded until the bankruptcy proceedings was initiated and in fact until the Bank's first affidavit in reply of 4.9.2020, the Bank has not received any payment;

iv) LJSB was wound up on 12.9.2012;

v) the Bank filed the BN on 24.7.2013 followed by CP against the JD on 29.1.2014 and with all procedural steps being in order an AO & RO was obtained against the JD on 18.7.2014;

vi) since the time the JD agreed to record the consent judgment with him promising to pay the Bank RM1,500.00 per month, the JD has failed to do so and instead has kept silent all this while;

vii) any difficulty the JD may have encountered by reason of his bankruptcy could have been avoided if he had been making payments towards the amount due;

viii) although LJSB had agreed to pay the Bank the proceeds of the project in Manjung, Perak and other projects as recorded in the consent judgment, it was not done and the principal amount owing remained at RM670,816.40;

ix) although under the consent judgment the Bank could levy ta'widh and legal costs, the Bank did not;

x) what was claimed was interest on the judgment sum at 8% [p.a] as from the date of the consent judgment until 24.7.2013 (date of BN) as permitted by law and in fact interest on RM670,816.40 at 8% p.a. from date of judgment until full settlement was claimed in the Statement of Claim (Encl 30 p 63 para 20 b);

xi) term (6) of the consent judgment permits the Bank to claim any other charges and as a matter of prudence the Bank had imposed interest at the statutory rate of 8% p.a. as from 10.5.2012 (date of consent judgment) when it could have imposed the statutory interest at an earlier date;

xii) it is not true that the JD is not jointly and severally liable and that he was to only pay 1/3 of the judgment debt as the consent judgment clearly provide that all [three] defendants were responsible to pay the judgment debt and all other charges if there is a default in any of the terms, and, the guarantee was on a joint and several basis;

xiii) the recording of the consent judgment on a without admission of liability basis does not immunise the JD from execution proceedings when any terms of the consent judgment have been breached;

xiv) no other security or other payments have been received by the Bank from the project assigned to the Bank; and

xv) the Bank's door to negotiations is always open and the JD's action of trying to avoid payment of his debt is tainted with malice ("niat jahat") and not reasonable.

Learned Senior Assistant Registrar's findings and decision

**[30]**On 12.1.2021 the learned Senior Assistant Registrar ("SAR") allowed the JD's application on the premise that the consent judgment which formed the basis for the amount demanded did not state whether liability was to be joint and several and found that the BN was defective after taking into account the authorities of *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and Anor* [2018] 2 CLJ 305 CA and *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian Nagappan* [2020] 1 LNS 226 CA (see Encl 30 p 10). The learned SAR proceeded to annul the AO & RO pursuant to *section 105 IA 1967*.

Appeal to Judge in Chambers

**[31]**Dissatisfied with the decision of the learned SAR, the Bank appealed by way of a Notice of Appeal to a Judge in Chambers (Encl 22) dated 22.1.2021.

**[32]**This Court is enjoined to hear the appeal as if it were doing so for the first time, see the Federal Court decision in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 AMR 215.

**[33]**By reason of the COVID-19 pandemic, this appeal was heard using remote communication technology by way of an exchange of emails on 18.6.2021.

Court's analysis and findings

**[34]**Putting aside the slurs and name-calling exchanged between the JD and the Bank, from the exchange of affidavits and submissions, the following were the issues that called for determination by this Court:

a. Whether the bankruptcy proceedings was lawfully initiated against the JD in the High Court in Ipoh;

b. Whether the amount demanded in the BN was correct as to give rise to an act of bankruptcy for a CP to be issued leading to an AO & RO. This issue requires the following sub-issues to be addressed:

   i) whether the JD was out of time to challenge the quantum demanded in the BN;

   ii) whether the liability of the defendants in the consent judgment is joint and several; and

   iii) whether interest could be imposed on the judgment sum at 8% per annum with effect from the date of the consent judgment of 10.5.2012

Whether the bankruptcy proceedings was lawfully initiated against the JD in the High Court in Ipoh

**[35]**In his affidavits (Encl 30 p 27 to 100 and p 123 to 140) the JD exhibited documentary evidence to show that he works as an Assistant Engineer in the Faculty of Engineering in Universiti Putra Malaysia in Serdang, Selangor and that he has been residing in Balakong, Selangor since 2010. Selangor is still a State within the Federation of Malaysia and it is therefore indisputable that the JD is domiciled in Malaysia.

**[36]**I observed that in the Writ of Summons (Encl 30 p 54) and Statement of Claim (Encl 30 p 58 para 4) issued against the JD, his address was stated to be Blok F2, Fasa 1E-1, 32040 Sri Manjung, Perak Darul Ridzuan. At the time of him entering into the consent judgment on 10.5.2012, he was represented by a lawyer (Encl 30 p 49) and from the DGI report signed off by Puan Azlena Binti Hashim, Pengarah Insolvensi Negeri, Jabatan Insolvensi Negeri Perak he had been paying monthly instalments of RM100.00 from October 2014 until the date of the report in November 2020 that is a period of more than six years.

**[37]**It is provided in subsection ***3 (1) (i) IA 1967*** that if service of a BN is effected in Malaysia, a debtor commits an Act of Bankruptcy if he does not within seven days after service of the BN secure or compound for it to the satisfaction of the creditor. And, subsection 3 (3) provides that:

> *"The word "debtor" in this Act shall be deemed to include any person who at the time when the act of bankruptcy was done or suffered by him-*
>
> (a) *was personally present in Malaysia;*
>
> (b) *ordinarily resided or had a place of residence in Malaysia;*
>
> (c) *was carrying on business in Malaysia either personally or by means of an agent; or*
>
> (d) *was a member of a firm or partnership which carried on business in Malaysia.*

**[38]**I had occasion to mention in *Liziz Plantation v. LiewAh Yong* [2020] 10 CLJ 94 at para [6] that Art. 121(1) of our Federal Constitution had created only two High Courts; one, the High Court in Malaya and the other, the High Court in Sabah and Sarawak. And, as was said by Lim Beng Choon J. in *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1987] 1 LNS 55; *[1988] 2 MLJ 268* **at 270** that:

> *"It is implicit that a High Court located at Penang or at Alor Setar is but a branch of the High Court in Malaya and each*

*branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of where the cause of action arose in another state."*

**[39]**In the circumstances, I am of the view that he residing in Selangor with the bankruptcy action being initiated in the High Court in Malaya at Ipoh had not caused the JD any injustice premised upon the law that obtain and does not render the bankruptcy proceedings in this action illegal, null and void.

**[40]**It is, however, open to the JD to apply to the DGI for his file on his bankruptcy to be managed by the DGI's office in Selangor and I believe the DGI would be well placed to look into this administratively.

Whether the amount demanded in the BN was correct as to give rise to an act of bankruptcy for a CP to be issued leading to an AO & RO:

i) *whether the JD was out of time to challenge the quantum demanded in the BN*

**[41]**It is to be recollected that JD had sought and successfully had the AO & RO against him annulled pursuant to the provisions of *section 105 IA 1967* on the basis that the amount claimed in the BN is wrong and by reason thereto he could not have committed an Act of bankruptcy so as to lay the foundation for a CP for the Court to grant an AO & RO.

**[42]**To challenge the BN on the basis that the amount claimed therein is wrong, the debtor has to do so within seven days upon being served with the BN, failing which he commits an Act of bankruptcy. This is expressly provided by *subsections 3 (1)(i)* and *(2) (ii) IA 1967* which is reproduced below:

"

(1) *A debtor commits an Act of banckruptcy in each of the following cases:*

*(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 issue 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 a bankruptcy notice-*

(2) *(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.***

**[43]**From the factual narrative above, the JD did not challenge the BN at the time of it having been served upon him by way of substituted service in Malaysia on 6.12.2013 and had committed an Act of Bankruptcy on 10.12.2013 (Encl 30 p 40 para 4). Therefore, if he had wanted to challenge the amount demanded of him in the BN, he ought to have done so within the statutory prescribed period of seven days after 6.12.2013. He did not. In fact, his challenge came more than 6 years later vide his Summons in Chambers dated 11.8.2020 (Encl 30 p 22 to 26).

**[44]**Such a challenge came too late and on this ground alone his application to annul the AO & RO on the basis that

the BN claimed an amount in excess of what he thinks is due must necessarily fail. In *Captain Ho Fooi v. Standard Chartered Bank Malaysia Bhd* [2009] 5 CLJ 501 at para [30], [31] and [32], the Court of Appeal held:

> *"[30] In the present appeal, the bankruptcy notice was personally served on the debtor on 13 October 1996. There was no notice given by the debtor to the creditor that he disputed the validity of the notice by reason of excess amount* ***within the stipulated seven days' period. By reason thereof the debtor would have committed an act of bankruptcy after the expiry of seven days from the date of service by virtue of*** *s. 3(1)(i)* ***of the Act.***
>
> *[31] It is trite law that any challenge to the validity of a bankruptcy notice on the ground that the amount stated therein exceeds the amount actually due must be made within the time prescribed in the said notice as required by the aforesaid proviso. In Wee Chow Yong, ex p Public Finance Bhd* [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349*, the debtor sought to impugn a bankruptcy notice on several grounds. It was contended, as one of the grounds, that the sum specified in the notice as being due by way of interest included interest not recoverable under s. 6(3)* of the *Limitation Act 1953, being interest after the expiry of the six years limitation for recovery of the same. The court dismissed the objection as the seven-day period stipulated in the bankruptcy notice for disputing the amount due had expired.*
>
> *[32]* In *Development & Commercial Bank Bhd v. Datuk Ong Kian Seng* [1995] 3 CLJ 307, *the debtor filed an affidavit opposing the petition contending that the bankruptcy notice was invalid on the ground that the interest specified was wrongly calculated. In that case the bankruptcy notice was issued on 14 June 1991 and the affidavit opposing the petition contending the bankruptcy notice was invalid on that ground was filed on 18 February 1992. Mohamed Dzaiddin FCJ (as he then was), in delivering the decision of the Federal Court said, at p 733:*
>
> > *... what is patently clear to us is that on the facts, the respondent cannot be allowed to dispute the validity of the bankruptcy notice on the ground on which he now relies because the notice of dispute by way of his affidavit affirmed on 18 February 1992 has not complied with proviso (ii) to section 3(2) of the Act,...*
>
> *[33] Based on the aforesaid authorities, the appeal on this ground must necessarily fail.*

**[45]**As the gang-plank of his challenge is premised upon the quantum claimed in the BN and with this Court having decided that the JD has failed by reason of delay, there would be no necessity to deal with the other sub- issues of whether his liability under consent judgment is joint and not several as well as that the interest levied by the Bank was excessive.

**[46]**However, in the event, this Court had erred, I will proceed to consider the other two sub-issues.

Whether the liability of the defendants in the consent judgment is joint and several

**[47]**The learned SAR was guided by the two Court of Appeal authorities of *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and Anor* [2018] 2 CLJ 305 CA and *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian Nagappan* [2020] 1 LNS 226 CA which in essence held that where there is more than one judgment debtor in a judgment, their liability is joint if the judgment does not set out that their liability is joint and several.

**[48]**Under the doctrine of stare decisis, this Court would generally be bound to dutifully follow the ratio of these cases particularly that of ***Edwin Cassian*** as the factual matrix therein is rather similar. It is to be noted immediately that in both ***Sumathy*** and ***Edwin Cassian,*** delay in challenging the quantum of the judgment debt demanded was not an issue.

**[49]**In fact, in ***Sumathy,*** the Court of Appeal referred to *section 3 (2)* of the *Bankruptcy Act 1967 (IA 1967)* and said that before a judgment debtor can raise a dispute that the amount stipulated in the BN exceeds the amount actually due and owing, "the judgment debtor is required to notify the judgment creditor within the time prescribed", (see para [9] of the CA judgment) and relied upon the Court of Appeal authority of *J Raju M Kerpaya v Commerce International Merchant Banker Bhd* [2000] 3 CLJ 104 where it was decided that:

> *"A debtor who seeks to challenge a bankruptcy notice on the ground that the amount specified therein exceeds the amount actually due, must act in accordance with proviso (i) to section 3(2) of the Act. Hence, he must, within the time prescribed in the bankruptcy notice give notice in writing to the creditor that he disputes the validity of the notice on the ground that it*

*mistakenly claims an amount larger than that lawfully due."*

**[50]**Just as in ***Sumathy,*** no issue was taken in ***Edwin Cassian*** on the delay in challenging the accuracy of the amount demanded unlike the instant case where there is an astounding delay of more than 6 years.

**[51]**At the risk of repetition, in the event, this Court erred in holding that a failure to comply with the statutory timeline provided in *section 3 (2) IA 1967* to dispute the amount due does not bar the judgment debtor from challenging the amount due, the factual matrix that obtain in ***Edwin Cassian*** would be rather similar to the instant case.

**[52]**In ***Edwin Cassian,*** premised upon a consent judgment against three defendants, the judgment creditor initiated bankruptcy proceedings against one of the judgment debtors, Edwin Cassian, demanding for the full amount under the judgment. The consent judgment was silent as to whether the liability of the three judgment debtors was to be joint and several. The Court of Appeal held that as a starting point, a consent judgment is a contract between the parties (see para [11] of the CA judgment).

**[53]**The Respondent in the instant case accepts that a consent judgment is a contract and had himself cited the Court of Appeal authority of *Lee Heng Moy & Ors v Pacific Trustees & Ors* [2016] 6 CLJ 368 in support of this principle (Encl 31 p 4 para 13).

**[54]**Coming back to ***Edwin Cassian,*** the Court of Appeal referred to and accepted as settled law what was held in ***Sumathy*** as follows:

*"Turning to the consent judgment, we can do no better than reiterate the settled law in the words of Mary Lim JCA in* ***Sumathy (supra) at para [12] of the judgment:***

*12. It is the argument of both appellants that while the respondent may be entitled to enter judgment for the same single sum, which the respondent did, the liability of each of them is necessarily joint. This is because, the summary judgment that was entered has not specified that both appellants are jointly and severally liable for that single sum. Where the judgment is silent or has not specified that liability is joint and several. The liability is necessarily joint. Where liability is joint, each of the appellants as defendant, shares that liability equally - see In Re Dato Elamaran M Sabapathy; ex p RHB Bank Bhd* [2011] 10 CLJ 262***. And so, when it comes to enforcing the judgment, the respondent has a right to enforce only half the judgment sum against each appellant. The respondent is not entitled to enforce the full sum against both of them, certainly not at the same time."***

**[55]**However, it is to be observed that the premise of the bankruptcy proceedings in ***Sumathy*** was a summary judgment and not a consent judgment unlike the position in ***Edward Cassain*** and in this case.

**[56]**As mentioned above, if a consent judgment is a contract then the incidents of a contract apply, (see *Tan Geok Lan v La Kuan @ Lian Kuan [2004] 3 MLJ 465*; [2004] 2 CLJ 301*FC)* and *section 44 (1)* of our *Contracts Act 1950* expressly provides that:

*"When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise."*

**[57]**The provisions of *section 44 (1) Contracts Act 1950* above makes it clear that if the contract is silent, the liability of the joint promisors is joint and several.

**[58]**It is unfortunate that the lawyers in ***Edwin Cassian*** had not drawn the attention of the Court of Appeal to the provisions of *section 44 (1) Contracts Act 1950* and if they had, with the greatest of respect the decision would have been different.

**[59]**The historical and common law position on liability on joint promisors being joint and several if the contract is silent is well set out in the later but differently constituted Court of Appeal in *Kejuruteraan Bintai Kindenko Sdn Bhd v Fong Soon Leong* [2021] 5 CLJ 1**.**

**[60]**In ***Kejuruteraan Bintai Kindenko*** the Court of Appeal held that while the court is inclined to conclude that a judgment entered for payment of a sum of money against several judgment debtors imposed upon each of them, a joint and several liability to honour the entire judgment debt, and not merely an equal portion of it, unless otherwise stated, this conclusion is at variance with the decision of this court in ***Sumathy.*** The Court of Appeal felt constrained by the doctrine of *stare decisis* to not depart from the ratio decidendi of its earlier decisions, especially since none of the exceptions identified in the case of *Young v. Bristol Aeroplane* existed.

**[61]**It is again unfortunate that the attention of the Court of Appeal in ***Kejuruteraan Bintai Kindenko*** was not drawn to the statutory provisions of *section 44 (1) Contracts Act 1950* and if this had been done, with the greatest of respect, the *per incuriam* rule in *Young v Bristol Aeroplane* *[1944] KB 718* would most probably have been taken into consideration and applied to make a distinction between a judgment obtained by consent which would then be subject to the incidents of a contract, see *Tan Geok Lan v La Kuan @ Lian Kuan* *[2004] 3 MLJ 465*; [2004] 2 CLJ 301 FC, and one that is not.

**[62]**On the per incuriam rule, it was explained by our Federal Court in *Merck Sharp & Dohme Group & Anor v Hovid Bhd* [2019] 9 CLJ 1 that:

> *"[106] It is established in Young v. Bristol Aeroplane Co Ltd* *[1944] 2 All ER 293* *that the Court of Appeal may depart from its own previous decisions in the following situations:*
>
> (i) *where the court is faced with two conflicting decisions of its own, it may choose which one to follow;*
>
> (ii) *the court is not bound to follow one of its own previous decisions which is inconsistent with a later House of Lords' decision; and*
>
> (iii) *the court is not bound to follow a decision of its own which was given per incuriam.*

**[63]**In *Dalip Bhagwan Singh v PP* [1997] 4 CLJ 645 at 660; [1998] I 1 MLJ 1 *at p 12-13,* Peh Swee Chin FCJ stated:

> *"A few words need be said about a decision of Court of Appeal made per incuriam as mentioned above. The words 'per incuriam' are to be interpreted narrowly to mean as per Sir Raymond Evershed MR in Morelle v. Wakeling* *[1955] 2 QB 379* **at p 406 as a 'decision given in ignorance or forgetfulness of some inconsistent statutory provision** *or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong '. It should be borne in mind that the year of Morelle's case is 1955 whereas our s. 3 of the Civil Law Act was enacted in 1956. The ratio in Morelle's case is also part of the common law applicable to us."* (emphasis added)

**[64]**This Court is, however, mindful that in *Cassel & Co. v Broome* *[1972] AC 1027* at 1054 the House of Lords held that courts in the lower tiers below the Court of Appeal could not rely on the per incuriam rule applied by the Court of Appeal for itself. See also *Mohd Sabri bin Mohamad Zin v Dr M Nachiappan & Anor* *[2017] MLJU 2443* at para [30]. However, in yet another differently constituted Court of Appeal in *Abu Bakar Ismail & Anor v Ismail Husin & Ors & other Appeals* [2007] 3 CLJ 97**,** Gopal Sri Ram JCA (as he then was) quoted with approval the following extract from Sir John Salmond's Treatise on Jurisprudence (12th edn) at pages 151 and 152:

> ***"A precedent is not binding if it was rendered in ignorance of a statute*** *or a rule having the force of statute, i.e., delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case* (*London Street Tramways v L. C. C.* *[1898] AC 375*) *and for the Court of Appeal it was given as the leading example of a decision per incuriam which would not be binding on the Court* ***(Young v Bristol Aeroplane Co Ltd (194) KR at 729 (C.A.)) The rule apparently applies even though the earlier Court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute. Similarly, a Court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such incuria as to vitiate the decision. Even a lower Court can impugn a precedent on such grounds."***
>
> *[Emphasis added by Gopal Sri Ram JCA]*

**[65]**With the greatest of respect, if this Court is found to have erred that in deciding that the JD's challenge to have his AO & RO annulled is statutorily barred by *section 3 (2) IA 1967*, this Court would proceed to further hold that his challenge grounded on the consent judgment having imposed joint liability to be unmeritorious by reason of the statutory provision of *section 44 (1) Contracts Act 1950*, which is the statutory enactment of the common law position set out with erudition in ***Kejuruteraan Bintai Kindenko (supra)*** but which was unfortunately not brought to the attention of the Court of Appeal.

iii) *Whether interest could be imposed on the judgment sum at 8% per annum with effect from the date of the consent judgment of 10.5.2012*

**[66]**It is indisputable that this is a challenge to the quantum of the amount and ought to have been raised within the statutory timeline prescribed by *section 3 (2) IA 1967*.

**[67]**Learned counsel for the Bank (Encl 36 para 4.6) drew the Court's attention to the Bank Negara Malaysia's guideline 9.3 which provides that the Shariah Advisory Council has resolved:

i) that the court may impose a late payment charge on [a] judgment debt as decided by the court on cases involving Islamic Financing transactions. And, following the resolution, Islamic Banking Institutions are required to adopt the policy on a late payment charge; and

ii) guideline 9.3.1 provides that the court may impose a late payment charge at the rate provided by the rules of the court. The imposition of [a] late payment charge is based on a combination of *ta'widh* (compensation) and *Gharamah* (penalty) mechanism.

**[68]**The effective or implementation date for the above guidelines was 1.1.2012 (Encl 30 p 68).

**[69]*Order 1 (2) of the Rules of Court 2012*** ("ROC 2012") provides that except for Order 91 (on Court Fees), the rules come into operation on 1.8.2012.

**[70]**The BN was issued on 24.7.2013 (Encl 30 p 45 to 47) which meant that it was issued at a time when the aforesaid Bank Negara Guidelines and the ROC 2012 was in force.

**[71]***Order 42 Rule 12A ROC 2012* provides that every judgment debt arising from financial transactions in accordance with Shariah shall carry a late payment charge from the date of the judgment until the judgment debt is fully satisfied at the rate of provided under *Order 42 Rule 12* with certain conditions as set out below:

(a) *the judgment creditor shall only be entitled to ta'widh as a result of late payment;*

(b) *the amount of late payment charge shall not exceed the outstanding principal amount; and*

(c) *if the amount of ta'widh is less than the amount of late payment charge, the balance shall be channelled to any charitable organizations as determined by the Shariah Advisory Council.*

**[72]**Under *Order 42 Rule 12 ROC 2012* post judgment interest is at a rate as may be determined by the Chief Justice and the Right Honourable Chief Justice had prescribed it at 5% per annum vide Practice Direction No. 1 of 2012 for it to take effect from 1.8.2012.

**[73]**In the circumstances, the BN against the JD issued on 24.7.2013 ought to have been computed at the rate 5% per annum and not 8% which meant that the JD's challenge on this sub-issue, would have merits save that it was raised outside the statutory time bar prescribed in subsections 3(1 )(i) and (2) (ii) IA 1967 ***(supra).*** However, all is not lost for the JD, as this is an issue that the JD may raise with the DGI under the insolvency scheme under the IA 1967 and in particular, on the law pertaining to admission or rejection of proofs of debts.

Conclusion

**[74]**Wherefore, this Court allowed the appeal of the Bank, the decision of the learned SAR is set aside and the AO & RO dated 18.7.2014 against the JD is restored. After having heard parties on costs, a sum of RM3,000 subject to allocatur was awarded to the JC and RM1,000 to the DGI. Upon the application of the Insolvency Officer for DGI for consequential relief, I ordered that all the monies that were refunded to the JD upon the annulment of the AO & RO by the learned SAR are to be returned by the JD to the DGI for the benefit of his estate in bankruptcy.

Postscript

**[75]**I had settled the grounds of this judgment on 14.7.2021 in preparation for the delivery of my decision on 16.7.2021. However, before releasing the grounds of this judgment, it came to my attention that the Federal Court had delivered its grounds of decision on 19.7.2021 in ***Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian A/L Nagappan @ Marie*** in Civil Appeal No. 03-3-10/2019 (W) wherein the Federal Court overturned the decision of the Court of Appeal in ***Edwin Cassian (supra),*** overruled the Court of Appeal decision in ***Sumathy (supra)*** and approved the reasoning which led to the conclusion of the Court of Appeal in ***Kejuruteraan Bintai Kindenko (supra)*** that a judgment entered for payment of a sum of money against several judgment debtors imposed upon each of them, a joint and several liability to honour the entire judgment debt, and not merely an equal portion of it, unless otherwise stated. With respect, this Court would respectfully opine that the effect of this Federal Court decision would further fortify the decision made by this Court on 16.7.2021.

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