

Is Prior Sanction of the Director General of Insolvency (“DGI”) required for a Bankrupt to file Proceedings?

A CASE NOTE BY NADIA ABU BAKAR.

Introduction

There has always been an issue whether an undischarged bankrupt can file proceedings under section 20(3) of the **Industrial Relations Act 1967** (“IRA”) in view of sections 8(1)(b) and 38(1)(a) of the **Insolvency Act 1967** (“IA”). These provisions provide that an undischarged bankrupt is incompetent to maintain any action without the prior sanction of the DGI. This was uncertain until the decision of the Federal Court in **Akira Sales & Services (M) Sdn Bhd v Nadiah Zee Binti Abdullah**¹.

Brief facts

The respondents (“Nadiah Zee Abdullah and Yong Peng Kean”) were dismissed by TT Electrical Electronics Corporation (M) Sdn Bhd. The appellant, Akira Sales & Services (M) Sdn Bhd (“Akira”), was joined as a party pursuant to a court order dated 6 July 2006.

The Industrial Court held that the alleged misconduct committed by Nadiah Zee Abdullah and Yong Peng Kean was not proven and hence the dismissals of Nadiah Zee Abdullah and Yong Peng Kean were without just cause or excuse (“Award”). Aggrieved by the Award, Akira filed a judicial review application at the High Court challenging the Award. The High Court quashed the Award. On appeal, the Court of Appeal set aside the order of the High Court and restored the Award.

Akira subsequently discovered that Nadiah Zee Abdullah and Yong Peng Kean were bankrupt during the application for a stay of execution of the Award at the Court of Appeal. This was discovered when Nadiah Zee Abdullah and Yong Peng Kean disclosed the sanction of the DGI dated 13 May 2015.

Akira was granted leave to appeal to the Federal Court on three questions of law. This article discusses the first questions as follows:

- It transpired that Nadiah Zee Abdullah and Yong Peng Kean were bankrupt when they filed their respective appeals to the Court of Appeal, therefore, the issue arose as to whether a judgment by the Court of Appeal for a monetary sum in favour of an undischarged bankrupt was a nullity when there was a failure to disclose to the Court that the undischarged bankrupt did not have the sanction of the DGI to prosecute the appeal (“the first question of law”);

Decision of the Federal Court

The timeline of this case is as follows:

EVENTS	DATE
Nadiah Zee Abdullah and Yong Peng Kean filed representations under section 20(3) of the IRA	20 April 2002

Nadiah Zee Abdullah was adjudged bankrupt	2 August 2006
Yong Peng Kean was adjudged bankrupt	24 November 2011
Industrial Court handed down its Award	17 July 2012
High Court delivered its judgment	29 January 2013
Nadiah Zee Abdullah and Yong Peng Kean lodged their appeals to the Court of Appeal	21 February 2013
Nadiah Zee Abdullah and Yong Peng Kean applied for sanction from the DGI to lodge their appeals	27 June 2014
Court of Appeal allowed the appeal	7 August 2014
Nadiah Zee Abdullah and Yong Peng Kean obtained sanction from the DGI	13 May 2015

Akira submitted that, amongst others, as the sanction was obtained after the Court of Appeal had delivered its decision, Nadiah Zee Abdullah and Yong Peng Kean had no sanction to prosecute their appeals at the Court of Appeal. Hence, their appeals were void.

Nadiah Zee Abdullah and Yong Peng Kean submitted that, amongst others, a reference under section 20(3) of the IRA is not an action and therefore does not require the sanction of the DGI. The right to pursue a claim for wrongful dismissal is not a property vested in the trustee of bankruptcy.

The Federal Court first considered the effect of a bankruptcy order as stipulated in section 8(1)(b) of the IA which states as follows:

“(b) all the property of the bankrupt shall become divisible among his creditors and shall vest in the Director General of Insolvency and the Director General of Insolvency shall be the receiver, manager, administrator and trustee of all properties of the bankrupt.”

Section 38(1)(a) of the IA further states that where a bankrupt has not obtained his discharge, 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 prior sanction of the DGI.

The Federal Court then considered the definition of “*action*” as defined under section 3 of the **Courts of Judicature Act 1964** as “*a civil proceeding commenced by writ or in such manner as is prescribed by Rules of Court, but does not include a criminal proceeding*”.

The Federal Court further noted that the prior sanction of the DGI is not always required as not everything is vested in the DGI. According to section 2 of the IA, “*property*” includes money, goods, things in action, land and every description of property, whether real or personal and whether situated in Malaysia or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined.

As the proceeding under section 20(3) of the IRA is a personal claim in this case, the Federal Court held that Nadiah Zee Abdullah and Yong Peng Kean did not require the prior sanction of the DGI. Accordingly, Nadiah Zee Abdullah and Yong Peng Kean were competent to lodge their appeals at the Court of Appeal. With this judgment, the Federal Court answered the first issue in the negative.

Conclusion

In view of this decision, it is settled law that, for a reference under section 20 of the IRA 1967, an undischarged bankrupt would not require the prior sanction of the DGI to proceed with the proceeding at the Industrial Court and to file further appeals in such proceeding.

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¹ [2018] 1 ILR 433.

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