

**A WESTECH SDN BHD v. THONG WENG LOCK**

FEDERAL COURT, PUTRAJAYA  
MD RAUS SHARIF PCA  
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)

**B** SURIYADI HALIM OMAR FCJ  
BALIA YUSOF WAHI FCJ  
DAVID WONG DAK WAH JCA  
[CIVIL APPEAL NO: 03(i)-4-10-2015(B)]  
24 JULY 2017

**C** ***BANKRUPTCY: Proceedings – Bankruptcy notice – Setting aside – Judgment debtor’s application for bankruptcy notice (‘BN’) to be set aside dismissed by Registrar – Whether act of bankruptcy committed upon Registrar’s dismissal of application – Whether application heard and determined by Registrar – Whether judgment debtor’s appeal against Registrar’s decision had effect of suspending or postponing act of bankruptcy – Whether judgment creditor entitled to present creditor’s petition after judgment debtor’s application to set aside BN dismissed but before appeal disposed of – Whether deferment of act of bankruptcy had taken place – Whether creditor’s petition filed out of time – Bankruptcy Rules 1969, r. 95***

**D** ***BANKRUPTCY: Creditor’s petition – Filing of – Whether filed out of time – Judgment debtor’s application for bankruptcy notice (‘BN’) to be set aside dismissed by Registrar – Whether act of bankruptcy committed upon Registrar’s dismissal of application – Whether application heard and determined by Registrar – Whether judgment debtor’s appeal against Registrar’s decision had effect of suspending or postponing act of bankruptcy – Whether judgment creditor entitled to present creditor’s petition after judgment debtor’s application to set aside BN dismissed but before appeal disposed of – Whether deferment of act of bankruptcy had taken place – Bankruptcy Rules 1969, r. 95***

**E** This appeal arose pursuant to bankruptcy proceedings commenced by the judgment creditor (‘the appellant’) against the judgment debtor (‘the respondent’). The appellant had served a bankruptcy notice (‘BN’) on the respondent on 24 October 2011. To strike out or stay the BN, the respondent filed a summons in chambers (‘the impugned BN application’) on 31 October 2011, pursuant to r. 18 of the Bankruptcy Rules 1969 (‘BR’). The impugned BN application had indicated that the affidavit of one Thong Weng Lock was attached to it. Premised on this affidavit, the appellant submitted that the impugned application was pursuant to r. 95 of the BR. The Senior Assistant Registrar (‘the Registrar’) on 13 April 2012 dismissed the BN application. Dissatisfied, the respondent appealed to the judge in chambers. Before the appeal was heard by a judge in chambers, the appellant filed a creditor’s petition (‘CP’) on 27 August 2012. On 27 September 2012, the respondent filed a simple notice of application (‘NOA’) to strike out or stay

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the CP. On 17 April 2013, the Registrar dismissed the striking out and stay application of the CP by the respondent and proceeded to grant a receiving order ('RO') and an adjudicating order ('AO') as prayed for in the CP. The respondent then filed an appeal to the judge in chambers on 23 April 2013, *inter alia*, against the RO and AO. It was the respondent's stance that as the BN was served on 24 October 2011, the act of bankruptcy was committed on 1 November 2011 (after having taken into account the expiry of seven days from the service of the BN (s. 3(1)(i) of the Bankruptcy Act 1967 ('BA')). Thus, according to the respondent, the CP ought to have been filed on or before 1 May 2012 and since the CP was filed on 27 August 2012, it was clearly three months outside the last allowable statutory period. The appellant argued that as the matter had been heard and determined by the Registrar, and the respondent's challenge had failed, the act of bankruptcy had been deferred to 13 April 2012, and thus the appellant had breathing space to file the CP. The judge in chambers found that the CP was filed well within the six months period and accordingly dismissed the appeal, and upheld the RO and AO. Dissatisfied, the respondent appealed to the Court of Appeal. The Court of Appeal, in allowing the respondent's appeal and setting aside the whole decision of the High Court, opined that the respondent's appeal regarding the challenge of the BN could not be said to have failed when the appeal to the judge in chambers against the Registrar's decision was still pending. That being so, the CP was issued without an act of bankruptcy having been determined to have been committed *ie*, the basis of a CP. The appellant thus applied for leave before this court and successfully obtained leave on the following questions of law (i) whether the act of bankruptcy was committed when the judgment debtor's application to set aside the bankruptcy notice was dismissed by the Registrar, notwithstanding that his appeal to the judge in chambers was yet to be heard ('question (a)'); (ii) whether the judgment debtor's appeal to the judge in chambers against the decision of the Registrar dismissing his application to set aside the bankruptcy notice had the effect of suspending or postponing the act of bankruptcy ('question (b)'); and (iii) whether the judgment creditor was entitled to present the creditor's petition after the judgment debtor's application to set aside the bankruptcy notice had been dismissed by the Registrar but before his appeal to the judge in chambers was disposed of ('question (c)').

**Held (allowing appeal with costs)**

**Per Suriyadi Halim Omar FCJ delivering the judgment of the court:**

- (1) This was an application under r. 95 of the BR, a special provision that deals with the setting aside application of a BN. When an affidavit in support of an application discloses that the deponent has an appropriate counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt (r. 94(1)(b) of the BR), that affidavit

- A operates as an application to set aside the BN. The respondent did just that *ie*, he disclosed that he had an appropriate counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt. By his unwitting act, the application was converted into an application under r. 95 of the BR. (paras 33-37)
- B (2) Rule 95 of the BR is the statutory exception which defers an act of bankruptcy committed as envisaged by s. 3(1)(i) of the BA. It is couched with stringent requirements and legal effects, in particular the portion of
- C r. 95(2) of the BR which reads, ‘... no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.’ It was factually undeniable that the impugned BN application was heard and determined by the Registrar on 13 April 2012 when he judicially dismissed it. (paras 39 & 40)
- D (3) The language of r. 95 of the BR is such that it can only admit to the construction that once the Registrar has listened with attention (with the contents of affidavit being central in the hearing) and meted down a decision, which dismisses the challenge, the matter ends there. There is no need to wait for the appeal to be heard first by the judge in chambers, like a normal litigation under appeal, before r. 95 of the BR takes effect. Shorn of all the trimmings, with the challenge having been rejected by
- E the Registrar, the act of bankruptcy had taken place and the countdown of the six months has begun. The way was now open for the CP to be filed. Thus, questions (a) and (c) were answered in the affirmative and question (b) was answered in the negative. (paras 51 & 52)

*Bahasa Malaysia Headnotes*

- F Rayuan ini timbul daripada prosiding kebangkrapan yang dimulakan oleh penghakiman pemiutang (‘perayu’) terhadap penghutang penghakiman (‘responden’). Perayu telah menyerahkan notis kebangkrapan (‘BN’) kepada responden pada 24 Oktober 2011. Untuk membatalkan atau menggantung
- G BN, responden memfailkan saman dalam kamar (permohonan BN yang dipertikaikan) pada 31 Oktober 2011, menurut k. 18 Kaedah-Kaedah Kebankrapan 1969 (‘Kaedah 1969’). Permohonan BN yang dipertikaikan mempunyai satu affidavit Thong Weng Lock yang dilampirkan bersamanya. Berdasarkan affidavit ini, perayu menghujahkan bahawa permohonan yang dipertikaikan itu adalah menurut k. 95 Kaedah 1969. Penolong Kanan
- H Pendaftar (‘Pendaftar’) pada 13 April 2012 menolak permohonan BN. Tidak berpuas hati, responden merayu kepada hakim dalam kamar. Sebelum rayuan ini didengar oleh hakim dalam kamar, perayu memfailkan petisyen pemiutang (‘CP’) pada 27 Ogos 2012. Pada 27 September 2012, responden memfailkan notis permohonan (‘NOA’) untuk membatalkan atau
- I menggantung CP. Pada 17 April 2013, Pendaftar menolak permohonan pembatalan dan penggantungan CP oleh responden dan memberikan perintah

penerimaan ('RO') dan perintah adjudikasi ('AO') seperti yang dituntut oleh CP. Responden kemudiannya memfailkan rayuan ke hakim dalam kamar pada 23 April 2013, antara lain, terhadap RO dan AO. Responden berpendirian bahawa BN telah diserahkan pada 24 Oktober 2011, perbuatan kebangkrapan telah berlaku pada 1 November 2011 (selepas mengambil kira tamat tempoh tujuh hari dari penyerahan BN – (s. 3(1)(i) Akta Kebankrapan 1967 ('Akta')). Oleh itu, menurut responden, CP sepatutnya difailkan sebelum atau pada 1 Mei 2012 dan oleh kerana CP difailkan pada 27 Ogos 2012, dengan jelasnya tiga bulan di luar tempoh statutori yang dibenarkan. Perayu menghujahkan bahawa oleh kerana perkara telah didengar dan diputuskan oleh Pendaftar, dan bantahan responden gagal, perbuatan kebangkrapan tertunda pada 13 April 2012, dan dengan itu perayu mempunyai masa memfailkan CP. Hakim dalam kamar mendapati bahawa CP telah difailkan dalam tempoh enam bulan dan oleh itu menolak rayuan responden, dan mempertahankan RO dan AO. Tidak berpuas hati, responden merayu ke Mahkamah Rayuan. Mahkamah Rayuan, dalam membenarkan rayuan responden dan mengetepikan keputusan Mahkamah Tinggi, berpendapat bahawa rayuan responden berkenaan bantahan terhadap BN belum lagi gagal apabila rayuan kepada hakim dalam kamar terhadap keputusan Pendaftar masih tergantung. Dengan itu, CP dikeluarkan tanpa perbuatan kebangkrapan iaitu sepatutnya asas satu CP. Perayu dengan itu membuat permohonan untuk kebenaran mahkamah ini dan berjaya memperoleh kebenaran atas persoalan undang-undang berikut (i) sama ada perbuatan kebangkrapan berlaku apabila permohonan penghutang penghakiman untuk mengetepikan notis kebangkrapan ditolak oleh Pendaftar, meskipun rayuannya pada hakim dalam kamar belum didengar ('soalan (a)'); (ii) sama ada rayuan penghutang penghakiman pada hakim dalam kamar terhadap keputusan Pendaftar menolak permohonannya mengetepikan notis kebangkrapan mempunyai kesan menggantung atau menangguhkan perbuatan kebangkrapan ('soalan (b)'); dan (iii) sama ada penghakiman pemiutang berhak membentangkan petisyen pemiutang selepas permohonan penghutang penghakiman mengetepikan notis kebangkrapan telah ditolak oleh Pendaftar tetapi sebelum rayuannya kepada hakim dalam kamar dihapuskan ('soalan (c)').

**Diputuskan (membenarkan rayuan dengan kos)**

**Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:**

- (1) Ini adalah permohonan bawah k. 95 Kaedah 1969, peruntukan khusus yang berurusan dengan permohonan pengetepian BN. Apabila affidavit sokongan permohonan mendedahkan bahawa deponen mempunyai tuntutan balas, penolakan atau permintaan balas teratur yang bersamaan atau melebihi jumlah hutang penghakiman (k. 94(1)(b) Kaedah 1969), affidavit itu beroperasi sebagai permohonan untuk mengetepikan BN.

- A Responden berbuat sedemikian iaitu dia telah mendedahkan bahawa dia mempunyai tuntutan balas, penolakan atau permohonan balas yang teratur yang bersamaan atau melebihi jumlah hutang penghakiman. Dengan perbuatannya yang tidak disengajakan, permohonan diubah menjadi permohonan bawah k. 95 Kaedah 1969.
- B (2) Kaedah 95 Kaedah 1969 adalah pengecualian statutori yang menanggukkan berlakunya perbuatan kebangkrapan seperti yang dibayangkan oleh s. 3(1)(i) Akta. Ini disertakan dengan keperluan ketat dan kesan undang-undang, khususnya bahagian k. 95(2) Kaedah 1969 yang menyatakan, ‘... no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.’ Tidak dapat dinafikan bahawa permohonan BN telah didengar dan diputuskan oleh Pendaftar pada 13 April 2012 apabila beliau secara rasmi menolaknya.
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- D (3) Bahasa k. 95 Kaedah 1969 adalah sedemikian rupa sehingga hanya boleh diakui bahawa sebaik sahaja Pendaftar mendengar dengan penuh perhatian (dengan kandungan affidavit diutamakan dalam perbicaraan) dan memberikan keputusan, yang menolak bantahan, perkara itu berakhir di situ. Tidak perlu untuk menunggu rayuan didengar terlebih dahulu oleh hakim dalam kamar, seperti litigasi biasa bawah rayuan, sebelum k. 95 Kaedah 1969 berkuat kuasa. Dengan bantahan ditolak oleh Pendaftar, tindakan kebangkrapan telah berlaku dan tempoh enam bulan telah pun bermula. Jalan terbuka luas untuk CP difailkan. Oleh itu, soalan (a) dan (c) dijawab secara afirmatif dan soalan (b) dijawab secara negatif.
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- F **Case(s) referred to:**  
*Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 3 CLJ 324 SC (*refid*)  
*Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* [2015] 4 CLJ 561 FC (*refid*)  
*Ng Yen Kok v. AmFinance Bhd* [2013] 1 LNS 366 CA (*refid*)
- G *Re A debtor (No. 10 of 1953) Ex parte the debtor v. Ampthill Rural District Council and Another* (1953) 2 All ER 561 (*refid*)  
*Re a debtor (No 44 of 1978), ex parte the debtor v. Chantry Mount and Hawthorns Ltd* [1979] 3 All ER 265 (*refid*)  
*Re Kamarul Ariffin Mohd Khaidzir ex p Majlis Amanah Rakyat* [2002] 8 CLJ 905 HC (*refid*)  
*Venkatlal Govindlal v. Messrs Juggilal Kamalpat Hosiery Factory* [1955] ILR 1059 (*refid*)
- H **Legislation referred to:**  
Bankruptcy Act 1967, ss. 3(1)(i), 5(1)(c)  
Bankruptcy Rules 1969, rr. 18(1), 95(2), 117  
Bankruptcy Act 1914 [UK], s. 4(1)(c)  
Bankruptcy Rules 1915 [UK], r. 140
- I Bankruptcy Rules 1952 [UK], rr. 139(2), 179

*For the appellant - Su Tiang Joo, Pang Kong Leng & Shelby Chin; M/s Cheah Teh & Su* A

*For the respondent - Bastian Vendargon & R Sarengapani; M/s RS Pani & Assocs*

*[Editor's note: Appeal from Court of Appeal; Civil Appeal No: B-03(IM)-195-11-2013 (overruled).]*

*Reported by Suhainah Wahiduddin* B

### JUDGMENT

#### **Suriyadi Halim Omar FCJ:**

[1] This appeal arose pursuant from a bankruptcy proceedings commenced by the judgment creditor (the appellant) against the judgment debtor (the respondent). The appellant had served a bankruptcy notice (BN) on the respondent on 24 October 2011. C

[2] Under s. 3(1)(i) of the Bankruptcy Act 1967 (BA), an act of bankruptcy is committed upon the expiry of seven days from the date of service of the BN. In this case, on the premise that no legal impediment exists, the act of bankruptcy begins from 1 November 2011. Any creditor's petition (CP) to be filed, must be done within six months of the latter date (s. 5(1)(c) of the BA). D E

[3] To strike out or stay the BN, the respondent filed a summons in chambers (the impugned BN application) on 31 October 2011, one day before the act of bankruptcy took effect. The words used in the application were 'dibatalkan atau digantungkan'. The respondent submitted that his application was pursuant to r. 18 of the Bankruptcy Rules 1969 (BR). F

[4] Rule 18(1) of the BR requires applications to be made by summons in chambers (SIC), and unless the Chief Justice provides otherwise, the SIC must be supported by an affidavit. The impugned BN application did indicate that the affidavit dated 31 October 2011 of one Thong Weng Lock was attached to it, as evinced in the core bundle of the respondent. Premised on this affidavit, the appellant submitted that the impugned application was pursuant to r. 95 of the BR. G

[5] Six grounds were supplied by the respondent as to why the BN could be struck out, *inter alia*, that he had a set off, counter-claim or cross-claim against the appellant (see para. 4.6 of the affidavit). H

[6] The Senior Assistant Registrar (the Registrar) on 13 April 2012 dismissed the BN application except for the stay. This stay order later lapsed. Being dissatisfied with the dismissal, the respondent filed an appeal to the judge in chambers. I

- A [7] Before the appeal was heard by a judge in chambers, the appellant filed a CP on 27 August 2012.
- [8] As said above, the BA provides that any CP must be filed within six months from the date the act of bankruptcy is committed. For purposes of this case, as said above, without any legal impediment being present, the filing date of the CP ought to be on or before 1 May 2012 ie, the very position taken up by the respondent. In this case, the CP was filed on 27 August 2012, clearly about three months outside the last allowable statutory period, as submitted by the respondent. The appellant justified the 'delay' on the ground that the act of bankruptcy had been deferred.
- B [9] The respondent in order to show cause against the CP, must file a notice with the Registrar, specifying the statements in the CP which he intends to deny or dispute (r. 117 of the BR). This the respondent did on 26 September 2012.
- C [10] A day later, ie, on 27 September 2012, the respondent filed a simple notice of application (NOA) rather than by SIC to strike out or stay the CP (dibatalkan atau digantungkan), a mode of application that again did not comply with r. 18 of the BR.
- D [11] On 17 April 2013 the Registrar dismissed the striking out and stay application of the CP by the respondent. On the same day, the Registrar proceeded to grant a receiving order (RO) and an adjudicating order (AO) as prayed for in the CP.
- E [12] The respondent then filed an appeal to the judge in chambers on 23 April 2013, *inter alia*, against the RO and AO.
- F [13] The appeal pertaining to the BN application, which was ventilated in the RO and AO appeal, was eventually heard and decided by the High Court before Mohamad Zabidin bin Mohd Diah J.
- G [14] The respondent's stance before Mohamad Zabidin bin Mohd Diah J was that as the BN was served on 24 October 2011, the act of bankruptcy was committed on 1 November 2011 (after having taken into account the expiry of seven days from the service of the BN). The CP thus was filed out of time.
- H [15] The appellant disagreed and argued that it filed the CP within the statutorily stipulated time, and was in compliance with s. 5(1)(c) of the BA. The basis of the argument of the appellant was premised on r. 95 of the BR in particular r. 95(2) of the BR. The appellant argued that as the matter had been heard and determined by the Registrar, and the respondent's challenge had failed, the act of bankruptcy had been deferred to 13 April 2012. The appellant thus had breathing space to file the CP but restricted within the statutorily stipulated time.
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**[16]** The judge in chambers in his grounds of judgment dated 9 May 2014 stated that even though the impugned BN application was filed by way of SIC the application was made pursuant to r. 95 of the BR. The basis of the Court of Appeal's decision subsequently was also premised on r. 95 of the BR. This is a finding of fact of both courts which we do not intend to disturb. **A**

**[17]** The judge in chambers decided on 27 September 2013 that the act of bankruptcy was indeed deferred. He ruled that the act of bankruptcy was committed on 13 April 2012 (the decision date of the Registrar). He found that the CP was filed well within the six months period, and accordingly dismissed the appeal, thus upholding the RO and AO. In the course of his judgment the learned judge said: **B**

[6] After going through the submission and the authorities submitted, I find the JD's application dated 31-10-2011 to set aside or stay the Bankruptcy Notice was in fact an application made pursuant to Rule 95 and not under Rule 18. The act of bankruptcy, therefore was deferred and was only committed on 13-4-2012 as stated in the Creditor's Petition and thus the filing of Creditor's Petition was made within the 6 months period. Hence I dismissed the JD's appeal ... **C**

**[18]** Being dissatisfied with the judge in chambers' decision, the respondent filed a singular notice of appeal to the Court of Appeal. On 16 May 2014 the Court of Appeal allowed the respondent's appeal and set aside the whole decision of the High Court. The Court of Appeal in gist held the view that "the act of bankruptcy is not committed until that challenge fails". **D**

**[19]** The Court of Appeal opined that the respondent's appeal regarding the challenge of the BN could not be said to have failed when the appeal to the judge in chambers against the Registrar's decision was still pending. That being so, the CP was issued without an act of bankruptcy having been determined to have been committed ie, the basis of a CP. **E**

**[20]** Dissatisfied with the decision of the Court of Appeal, the appellant applied for leave before us, and on 19 October 2015 successfully obtained leave on the following questions of law: **F**

(a) Whether the act of bankruptcy is committed when the judgment debtor's application to set aside the bankruptcy notice is dismissed by the Registrar, notwithstanding that his appeal to the judge in chamber is yet to be heard. **G**

(b) Whether the judgment debtor's appeal to the judge in chambers against the decision of the Registrar dismissing his application to set aside the bankruptcy notice has the effect of suspending or postponing the act of bankruptcy. **H**

**I**

A (c) Whether the judgment creditor is entitled to present the creditor's petition after the judgment debtor's application to set aside the bankruptcy notice has been dismissed by the Registrar but before his appeal to the judge in chambers is disposed of.

B [21] A perusal of the notice of appeal to the Federal Court filed by the appellant shows that it was an appeal against the whole decision of the Court of Appeal for having reversed the High Court's decision.

C [22] The crux of the questions relates to the issue of whether the appellant is entitled to present the CP after the respondent's application to set aside the BN had been dismissed by the Registrar, but before his appeal to the judge in chambers was heard.

#### The Appellant's Submission

D [23] The appellant submitted that the Court of Appeal erred in holding that the act of bankruptcy is not committed until the respondent's appeal to the judge in chambers against the order of the Registrar is dismissed.

E [24] This submission is based on the wordings of r. 95(2) of the BR, which includes, *inter alia*, "... until the application has been heard and determined", strongly suggesting that the deferment is until the application is dismissed at the first instance by the Registrar, rather than until the subsequent appeal is dismissed by the judge in chambers.

F [25] Counsel for the appellant contended that courts from other common law jurisdictions with similar statutory provisions have held that the act of bankruptcy is committed when the application to set aside the BN is dismissed by the Registrar, regardless of whether there is a pending appeal against such dismissal.

G [26] In support of his argument the appellant brought to our attention the United Kingdom provisions of rr. 139(2) and 179 of the Bankruptcy Rules, 1952 and two related cases *viz. Re A Debtor (No. 10 of 1953)* [1953] 2 All ER 561 and *Re A debtor (No. 44 of 1978)* [1979] 3 All ER 265.

H [27] The appellant also submitted on the comparable provision of India ie, r. 52-C of the Rules and Forms of High Court at Bombay under the Presidency Towns Insolvency Act, 1909. He also referred to the case *Venkatlal Govindlal Pittie v. Messrs Juggilal Kamalpat Hosiery Factory* [1955] ILR 1059 (per Chagla CJ), which approved the principle founded in *Re A Debtor* (No. 10 of 1953).

I [28] The Federal Court case of *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* [2015] 4 CLJ 561; [2015] 4 MLJ 1, and *Ng Yen Kok v. AmFinance Bhd* [2013] 1 LNS 366 (a Court of Appeal case) were also brought to our attention, with the latter case approving *Re A Debtor* (No. 10 of 1953).

**The Respondent's Submission**

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[29] In reply, counsel for the respondent argued that as the SIC mode for setting aside the BN was alluded to, the challenge fell under r. 18 of the BR. For any party wishing to challenge a defective BN, the latter provision was the conduit to allude to.

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[30] In the instant case, the respondent's basis for the challenge was manifold. He submitted six grounds, amongst them, that there was no final judgment from the Sessions Court, there was non-fixing of the hearing date by the Registrar by giving not less than three clear days' notice, and time was not extended to comply with the BN. The sixth ground was that he had a cross claim, a counterclaim or set off against the appellant. As the leave questions concerned only whether the act of bankruptcy was deferred after the matter was heard by the Registrar, but before the appeal was disposed of by the judge in chambers, we chose to focus on ground six only.

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[31] In the course of the appeal, the respondent conceded that r. 95 of the BR would be applicable if the grounds for setting aside the BN were 'cross-claim, counterclaim or set-off which exceeds the judgment sum'. This was an unhelpful concession for the respondent as the affidavit of the respondent did carry those words and grounds.

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[32] The respondent rested his case on the submission that he committed an act of bankruptcy seven days after having been served with the BN ie, on 24 October 2011. As the CP was filed outside the permitted period it was thus invalid.

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**Decision**

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[33] Despite the respondent contending that the application fell under r. 18 of the BR, but as both the judge in chambers and the Court of Appeal have explicitly decided otherwise, we see no reason to differ from the position that this was an application under r. 95 of the BR.

[34] For ease of reference we reproduce r. 18 of the BR and it reads as follows:

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18 Applications to be made by summons in Chambers.

- (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.
- (2) Notwithstanding subrule (1), where applicable, all applications filed by way of motion before the commencement of these Rules may be heard by the Registrar as if they were applications made under such Rules.

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[35] As an initial observation, we hold the view that r. 18 of the BR is a general procedural provision. It caters for a party that wishes to file any necessary application that falls outside r. 95 of the BR (see *Re Kamarul Ariffin*

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A *Mohd Khaidzir ex p Majlis Amanah Rakyat* [2002] 8 CLJ 905 per Ramly Ali J (as he then was). Unless the Chief Justice decides otherwise, the application must be made by SIC, supported by an affidavit.

[36] Rule 95 of the BR is a special provision that deals with the setting aside application of a BN. It reads as follows:

B 95 Application to set aside.

C (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.

D (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 ...

E [37] Construing r. 95 of the BR, when an affidavit in support of an application discloses that the deponent has an appropriate counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt (r. 94(1)(b) of the BR), that affidavit operates as an application to set aside the BN (*Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 3 CLJ 324; [1993] 2 MLJ 298 (SC)). The respondent did just that ie, he disclosed that he had an appropriate counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt. By his unwitting act, the application was converted into an application under r. 95 of the BR.

F [38] The affidavit, in short, a written sworn statement of fact made by a deponent under oath or affirmation, administered by a person authorised to do so by law, incidentally is also the evidential basis to decide on the matter.

G [39] Rule 95 of the BR is the statutory exception which defers an act of bankruptcy committed as envisaged by s. 3(1)(i) of the BA. It is couched with stringent requirements and legal effects, in particular the portion of r. 95(2) of the BR which reads, "... no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

H [40] For purposes of our appeal, it is factually undeniable that the impugned BN application was heard and determined by the Registrar on 13 April 2012 when he judicially dismissed it.

I [41] The leave questions essentially relates to questions of construction of r. 95(2) of the BR ie, whether the phrase "until the application has been heard and determined" means until the application is dismissed by the Registrar or until the subsequent appeal is dismissed by the judge in chambers. Generally speaking, an appeal is a continuation of a litigation, and it is no surprise that the Court of Appeal stated that the challenge has not been exhausted unless

finally decided by the judge in chambers. In short, the running of time was suspended until the appeal was disposed of by the judge in chambers. The Court of Appeal on the other hand stopped short at the door steps of the judge in chambers when opining that the matter is still at large unless heard and determined by him. No doubt if we answer questions (a) and (b) in the positive, the existence of any number of appeal tiers thereafter will not make the slightest difference to the issues before us.

[42] To arrive at the proper construction of the words “heard and determined” in its ordinary and natural meaning suffice if we make reference to *The New Shorter Oxford English Dictionary* (Edited by Lesley Brown, Volume 1A-M, Clarendon Press, Oxford, 1993). It states that “heard” means “listen (to) with attention or understanding” whereas “determined” means “decided or resolved on, settled”. In short, for purposes of the current appeal, the Registrar had listened to both parties intently, and at the culmination of the hearing arrived at a judicial decision.

[43] We now look at some foreign jurisdiction provisions for guidance. The United Kingdom has r. 139 of the Bankruptcy Rules 1952 as the avenue providing for a setting aside application of a BN. The rule reads as follows:

Application to set aside [Form 9]

139. (1) The filing of the affidavit referred to in Rule 137 shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall, if he is satisfied that sufficient cause is shown, fix a time and place 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.

[44] It is observed that the wordings of r. 95 of the BR are in *pari materia* with r. 139 of the United Kingdom Bankruptcy Rules 1952.

[45] In *Re A Debtor (No. 10 of 1953) Ex parte The Debtor v. Ampthill Rural District Council and Another* (1953) 2 All ER 561, the chancery division had occasion to discuss when the act of bankruptcy was completed. In this case a local authority obtained judgment against the judgment debtor. Subsequently, the local authority served a BN in respect of the judgment debt, and, pursuant to r. 140 of the Bankruptcy Rules 1915, the debtor filed an affidavit in opposition (which operates as an application to set aside the BN). On 10 September 1952 the Registrar dismissed the debtor’s application. Under s. 4(1)(c) of Bankruptcy Act 1914, the CP has to be filed within three months of that date, the last date being 10 December 1952. The debtor appealed to the divisional court of the chancery division which allowed his appeal. The matter went up further and the Court of Appeal restored the decision of the Registrar. The local authority later filed a CP against the

A debtor on 10 March 1953, and on 1 May 1953 the Registrar made a receiving order. The court decided that as the act of bankruptcy was completed on 10 September 1952 when the Registrar made his order, the CP thus had been filed out of time by about three months. Harman J at p. 564 had said:

B In our judgment, ... the only person who can extend the time for  
C complying with the bankruptcy notice is the registrar, or, having regard to the definition in r.3, his deputy. The rule is directory and compels the registrar to extend it “until the application has been heard and determined”. These words can only apply, in our judgment, to the determination before the registrar of the application to set aside the bankruptcy notice made by filing the affidavit mentioned in the rule, and cannot apply to its determination either by this court or by the Court of Appeal.

D [46] The word ‘heard’ was under scrutiny, though pursuant to r. 179 of the Bankruptcy Rules 1952, in *Re a debtor (No 44 of 1978), ex parte the debtor v. Chantry Mount and Hawthorns Ltd* [1979] 3 All ER 265. The creditor in that case had obtained judgment against the debtor and as the judgment remained unsatisfied, the creditor issued a BN against the debtor. The debtor applied to set aside the BN before the Registrar but was dismissed. The debtor appealed to the divisional court, but before the appeal was heard a CP was filed, and at the hearing of the CP an RO was granted against the debtor. An  
E appeal was filed at the divisional court against that RO on the premise that the Registrar failed to take account of the pending BN appeal. By virtue of r. 179 of the United Kingdom Bankruptcy Rules 1952, RO could not be made against the debtor until the application to set aside the BN had been ‘heard’. The appeal was dismissed. When discussing the word ‘heard’ it was held  
F that:

G *Where a registrar had completed the hearing of an application to set aside a bankruptcy notice and given his decision on it, the application had been ‘heard’ for the purposes of r. 179 of the 1952 rules even though an appeal against the decision was pending. Accordingly r. 179 did not itself prevent a receiving order being made where an appeal was pending, although normally the court would stand over the application to make the receiving order where there was a bona fide appeal against refusal to set aside a bankruptcy notice which was being pursued with diligence ... The appeal would therefore be dismissed (emphasis added).*

H [47] For further comparison, let us look at the Indian provision of r. 52-C of the Rules and Forms of High Court at Bombay under the Presidency Towns Insolvency Act, 1909 which was discussed in the case of *Venkatlal Govindlal Pittie v. Messrs Juggilal Kamalpat Hosiery Factory* [1955] ILR 1059. The brief facts are as follows: A judgment was obtained against Venkatlal Govindlal Pittie (the appellant).

I The respondent then took out an insolvency notice (IN/like a BN) against the appellant based on the judgment. The appellant then filed a notice of motion to set aside the IN. (In Malaysia, the notice of motion in r. 18 since

1 April 1993 was replaced by SIC through P.U.A (A) 60/1993). The Insolvency Registrar passed an order under r. 52-C of the Rules and Forms of High Court at Bombay under the Presidency Towns Insolvency Act, 1909 extending the time till the notice of motion was heard and determined. This Rule reads:

An application to set aside an insolvency notice, shall be made by a notice of motion, and if the application cannot be heard until after the expiry of the time specified in the notice as the day on which the act of insolvency will be complete the Insolvency Registrar shall extend the time and no act of insolvency shall be deemed to have been committed under the notice until the application shall be heard and determined.

[48] The notice of motion was heard on 8 December 1954 by the insolvency registrar (equivalent to a Registrar) and was dismissed. The appellant filed an appeal and Desai J dismissed it on 18 March 1955. On 28 March 1955 the respondent filed a petition for adjudication (similar to our CP) founded on the act of insolvency committed by the appellant. The AO was obtained on 19 July 1955. The law requires that the petition (CP) be presented within three months from the commission of the act of insolvency. The issue before the Indian Court of Appeal headed by MC Chagla CJ, like the United Kingdom cases, was when was the notice of motion filed by the appellant 'heard and determined'. The Court of Appeal found that Desai J chose 8 March 1955, ie, the date when the motion was heard and determined by him. When adopting *In re Debtor: Ex-parte The Debtor v. Ampthill Rural District Council (supra)*, Chagla CJ found that the insolvency rule in England dealing with insolvency notices was substantially in *pari materia* with that of India. He concluded that the motion was heard and determined on 8 December 1954 ie, when decided by the insolvency judge.

[49] Chagla, CJ concluded as follows:

In our opinion, all these considerations can lead only to one conclusion that the language of r. 52-C cannot admit of any other interpretation except this that application which has to be heard and determined within the language of that rule is not by any other Court except the Insolvency Court which hears the notice of motion taken out by the insolvent. This interpretation does not in any way prejudice the debtor because if a petition is presented for his adjudication after the notice of motion is dismissed and he is adjudicated insolvent on that petition and if subsequently a higher Court sets aside the insolvency notice, the order of adjudication would also be annulled because it was founded on that insolvency notice

...

Therefore, in our opinion, the appeal must succeed. The result is that the appeal will be allowed with costs. The order of adjudication will be set aside. Petition dismissed with costs.

A [50] Returning to the local scene, even though *Ng Yen Kok v. AmFinance Berhad* [2013] 1 LNS 366 had occasion to approve the English decision of *Re A Debtor (No. 10 of 1953)*, we are unwilling to make much of this Court of Appeal case as the facts and legal issues are distinguishable. At best it endorses *Re A Debtor (No. 10 of 1953)*'s view that a judgment creditor must present the CP within the period stated in the statutory provision, which is settled law. There is little discussion on the issue of whether the act of bankruptcy is deferred after the Registrar has heard and determined the setting aside application before the appeal is heard by the appeal court.

B [51] We hold the view that due to the similarities in the provisions, it is not wrong for us to construe r. 95 of the BR in line with other jurisdictions (as in the United Kingdom and India) with equipollent provisions (*Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* [2015] 4 CLJ 561; [2015] 4 MLJ 1, per Abu Samah FCJ at p. 32). The language of r. 95 of the BR is such that it can only admit to the construction that once the Registrar has listened with attention (with the contents of affidavit being central in the hearing) and meted down a decision, which dismisses the challenge, the matter ends there. There is no need to wait for the appeal to be heard first by the judge in chambers, like a normal litigation under appeal, before r. 95 of the BR takes effect. Shorn of all the trimmings, with the challenge having been rejected by the Registrar, the act of bankruptcy takes place and countdown of the six months begin. The way is now open for the CP to be filed.

C [52] On the above reasons we are satisfied that r. 95 of the BR is applicable in this case and thus answer questions (a) and (c) in the affirmative. Question D (b) is answered in the negative. In the circumstances, of the case we therefore allow the appellant's appeal with costs.

E [53] We therefore set aside the decision of the Court of Appeal and reinstate the decision of the High Court.

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