IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 48

Civil Appeal No 157 of 2020 (Summonses No 6 and 19 of 2021)

Between

Aathar Ah Kong Andrew

… *Appellant*

And

OUE Lippo Healthcare Ltd

… *Respondent*

In the matter of Originating Summons Bankruptcy No 8 of 2019

In the matter of the Bankruptcy Act (Cap 20, 2009 Rev Ed)

And

In the matter of Part V of the Bankruptcy Act (Cap 20, 2009 Rev Ed)

Aathar Ah Kong Andrew

… *Applicant*

JUDGMENT

[Civil Procedure] — [Appeals] — [Notice]
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Aathar Ah Kong Andrew
v
OUE Lippo Healthcare Ltd

[2021] SGCA 48

Court of Appeal — Civil Appeal No 157 of 2020 (Summonses Nos 6 and 19 of 2021)
Andrew Phang Boon Leong JCA, Woo Bih Li JAD and Quentin Loh JAD
15 April 2021

10 May 2021 Judgment reserved.

Andrew Phang Boon Leong JCA (delivering the judgment of the court):

Introduction

1 CA/SUM 19/2021 ("SUM 19") and CA/SUM 6/2021 ("SUM 6") are applications arising from CA/CA 157/2020 ("CA 157"), which is an appeal by Mr Aathar Ah Kong Andrew ("Mr Aathar") against the decision of the High Court Judge ("the Judge") in HC/RA 310/2019 ("RA 310"). SUM 19 is an application by the respondent in CA 157, OUE Lippo Healthcare Limited ("OUELH"), to strike out the notice of appeal in CA 157 ("NOA"). SUM 6 is an application by Mr Aathar's solicitors, Ang & Partners ("A&P"), to discharge themselves from acting for Mr Aathar in CA 157.

2 While we would ordinarily regard SUM 19 and SUM 6 as straightforward matters, they are complicated by the fact that Mr Aathar has been less than forthcoming in disclosing relevant information to this court.

Owing to Mr Aathar's evasive conduct, there were several important pieces of information which only came to light during the hearing itself, and even then, only after several rounds of questioning on our part.

3 Having considered the parties' arguments and the material before us in detail, our view is that both SUM 19 and SUM 6 should be allowed. These are the grounds of our decision.

Facts

Background

4 The full facts and procedural history of this matter are set out in the Judge's written judgment in *Re Aathar Ah Kong Andrew* [2020] SGHC 173 ("the Judgment").

5 In brief, Mr Aathar is an investor who ran into serious financial difficulties in or around 2015 and eventually faced bankruptcy proceedings in February 2016. In his attempt to stave off these proceedings, Mr Aathar has proposed a total of three voluntary arrangements ("VA(s)").

6 The first two VAs, which were proposed by Mr Aathar in 2016 and 2017 respectively, were passed at creditors' meetings. However, on the application of objecting creditors, approvals for the first and second VAs were revoked by an Assistant Registrar and by a High Court Judge, respectively. Mr Aathar's appeal in respect of the second VA was subsequently dismissed by this court (see *Aathar Ah Kong Andrew v CIMB Securities (Singapore) Pte Ltd and other appeals and another matter* [2019] 2 SLR 164).

7 On 24 January 2019, Mr Aathar proposed the third VA. The third VA also passed at a creditors' meeting but was objected to by OUELH, which then applied in HC/SUM 3309/2019 ("SUM 3309") to revoke approval for the third VA. SUM 3309 was allowed by an Assistant Registrar, whose decision was upheld on 17 August 2020 by the Judge in RA 310. Notably, Mr Aathar was adjudged bankrupt on 13 November 2019, during the course of the proceedings for RA 310. He remains an undischarged bankrupt to date.

Facts and procedural history pertaining to CA 157

8 On 17 September 2020, A&P filed the NOA, ostensibly on Mr Aathar's behalf, seeking to appeal against the Judge's decision in RA 310 by way of CA 157.

9 There is some inconsistency between A&P's and Mr Aathar's accounts of the circumstances surrounding the filing of the NOA. A&P alleges that it filed the NOA solely on the instructions of Mr Aathar's wife, and that she did not represent herself to be Mr Aathar's agent at the material time. Consequently, A&P takes the position that the NOA was filed without Mr Aathar's authority. Mr Aathar, on the other hand, claims that he had requested his wife to instruct A&P to file the NOA on his behalf, and therefore regards himself as having indirectly authorised A&P to file the NOA.

10 Notwithstanding this discrepancy, there are two crucial facts pertaining to the filing of the NOA which are not in dispute. The first is that, as at the time of filing the NOA, A&P did not possess a warrant to act from Mr Aathar. The second is that Mr Aathar did not obtain the Official Assignee's ("OA") consent to commence CA 157 prior to the filing of the NOA. We will elaborate on the significance of these two facts below.

11 On 9 November 2020, OUELH filed CA/SUM 125/2020 ("SUM 125"), seeking a stay of the proceedings in CA 157 pending Mr Aathar's payment of outstanding costs in the proceedings below and in earlier proceedings. SUM 125 was heard by Quentin Loh JAD on 19 January 2021. Loh JAD made no order as to SUM 125 as he found that the requirements for a stay were not satisfied. However, as it had transpired during the hearing that, *inter alia*: (a) A&P did not have a warrant to act from Mr Aathar; and (b) Mr Aathar had not obtained the OA's prior sanction to commence CA 157, Loh JAD observed that there might be sufficient grounds for OUELH to obtain an order to strike out the NOA.

12 On the same day as the hearing for SUM 125, A&P applied in SUM 6 to discharge itself from acting for Mr Aathar in CA 157, on the basis that Mr Aathar wished to engage new solicitors, namely, LVM Law Chambers LLC ("LVM"), to take over the conduct of the matter. However, on 17 February 2021, one day before SUM 6 was heard, OUELH filed SUM 19 seeking to strike out the NOA. As SUM 19 touched on issues pertaining to Mr Aathar's and A&P's solicitor-client relationship, SUM 6 was adjourned to be heard together with SUM 19 on 15 April 2021 ("the Hearing").

13 On the afternoon of 14 April 2021 (*ie*, the eve of the Hearing), Mr Aathar wrote to court requesting to adjourn the Hearing, asserting that: (a) he required proper legal advice to file his submissions against the striking-out application; (b) LVM was presently in contact with the OA regarding his prosecution of CA 157; and (c) he believed that he could obtain the OA's consent to prosecute CA 157. At 9.20pm on the same day, Mr Aathar sent a further e-mail to the court stating that he would not attend the Hearing as he did not have any lawyers to advise him on whether he could do so without the OA's

consent. We directed Mr Aathar to attend the Hearing and to make any application for adjournment in person. Mr Aathar eventually attended the Hearing as directed.

14 During the Hearing, we made clear to Mr Aathar that we were unable to accede to his request to adjourn the Hearing for two reasons. First, Mr Aathar had not produced any objective evidence whatsoever to prove that LVM had indeed been in contact with the OA. Second, Mr Aathar had been informed of the date of the Hearing since 9 March 2021. He had not taken issue with the hearing date then and had even written to court on 19 March 2021 stating that he could attend the Hearing via Zoom. Given the extremely belated and unsubstantiated nature of Mr Aathar's request, it was evident to us that Mr Aathar was simply trying to game the system and prolong the proceedings without having any legitimate reason to do so. We thus allowed the Hearing to proceed as scheduled.

Preliminary issue: Deemed withdrawal of CA 157

15 Before addressing the substantive issues in SUM 19 and SUM 6, we first address the preliminary issue as to whether CA 157 ought to be deemed withdrawn.

16 This issue was brought to our attention by way of a letter from OUELH to court dated 13 April 2021. In this letter, OUELH highlighted that Mr Aathar had not filed the Appellant's Case for CA 157 by 2 April 2021, being the deadline by which this court had directed him to do so. Consequently, OUELH argued that CA 157 had to be deemed withdrawn pursuant to O 57 r 9(4) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), subject to the court's powers to extend time for the filing of the Appellant's Case.

17 Order 57 r 9(4) (read with O 57 r 9(1)(*b*)) of the ROC provides that an appeal to this court shall be deemed to have been withdrawn if the appellant omits to file the Appellant's Case within two months of the service of the notice of appeal, but that "nothing in this Rule shall be deemed to limit or restrict the powers of extending time conferred upon the Court of Appeal".

18 In this case, the NOA was filed on 17 September 2020, which means that the Appellant's Case would ordinarily have been due for filing on 17 November 2020. However, OUELH subsequently applied for and was granted an order for the timelines for the filing of the parties' respective cases to be stayed pending the disposal of SUM 125. Upon the disposal of SUM 125, the deadline for serving and filing the Appellant's Case was extended to 2 April 2021. As Mr Aathar has failed to meet even the extended deadline, there is no doubt that CA 157 must be deemed withdrawn unless we grant Mr Aathar an extension of time to file his Appellant's Case.

19 The principles governing the court's power to grant an extension of time in the context of O 57 r 9(4) are well-established. In short, this power is "purely discretionary", and the burden lies squarely on the party seeking an extension to raise sufficient grounds to persuade the court to show sympathy to him (see the decision of this court in *BNP Paribas SA v Jacob Agam and another* [2019] 1 SLR 83 at [87], citing *Singapore Civil Procedure 2018* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2018) at para 57/9/12). In our view, Mr Aathar has not discharged this burden. First, and as explained above, the deadline for filing and serving the Appellant's Case has already been stayed once, pending the determination of SUM 125. While it may have been OUELH, and not Mr Aathar, who applied for this stay, the fact remains that Mr Aathar also enjoyed the benefit of having a longer duration to prepare his case. Second,

although Mr Aathar suggests that he requires more time because LVM is still in discussion with the OA regarding his ability to prosecute CA 157, he has yet to adduce objective evidence of this allegation (see [14] above). Third, it is fully open to Mr Aathar to appear in the appeal as a litigant-in-person if he so wishes, but he continues to prolong the disposal of CA 157 by insisting that he be represented by solicitors. Far from warranting sympathy, Mr Aathar's conduct evinces blatant disregard for the procedural rules in question.

20 In the circumstances, we agree with OUELH that CA 157 should be deemed withdrawn. While this technically obviates the need for us to consider SUM 19, we nevertheless proceed to examine the issues therein given that the respondent has spent a considerable amount of time and effort fleshing out its contentions before us.

SUM 19

21 In relation to SUM 19, OUELH contends that there are two grounds for striking out the NOA:

> (a) First, pursuant to s 401(1)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("IRDA"), there is an absolute bar against bankrupts commencing or maintaining legal proceedings without the previous sanction of the OA. A&P has confirmed on two separate occasions to this court that Mr Aathar has not obtained such sanction. This is a fundamental defect that cannot be ratified by subsequent consent from the OA.

(b) Second, A&P filed CA 157 without a warrant to act from Mr Aathar, and without having received any instruction or authority from Mr Aathar to do so.

OUELH further seeks that the costs of SUM 19 and CA 157 be paid from the security for costs provided for under CA 157, or that they be borne personally by A&P.

22 Mr Aathar, on the other hand, suggests that there were extenuating circumstances which justified or excused his failure to obtain the OA's sanction *before* instructing A&P to file the NOA. Consequently, Mr Aathar argues, he should be allowed to retrospectively obtain the OA's sanction in order to remedy his initial failure to do so. Mr Aathar also claims that he had authorised A&P to file CA 157 (see [9] above).

Whether this court should grant an extension of time for the striking-out application to be made

23 We begin by addressing the problem that OUELH's striking-out application was filed out of time. Pursuant to O 57 r 16(10)–(11) of the ROC, any application to this court to strike out a notice of appeal should be filed and served by the applicant on the parties to the application within 14 days after the notice of appeal is served on the applicant. In this case, SUM 19 was only filed on 17 February 2021, which was *153 days* after the NOA was filed and served on 17 September 2020. Accordingly, it was necessary for OUELH to seek an extension of time for its striking-out application to be made.

24 While there are no rules or provisions in the ROC that specifically address extensions of time for the filing of striking-out applications under O 57

r 16(10)–(11) of the ROC, OUELH is entitled to rely on O 3 r 4(1) of the ROC, which provides that this court has a discretion to "extend or abridge the period within which a person is required or authorised by [the ROC]… to do any act in any proceedings". We find the decision of *Ong Cheng Aik v Dayco Products Singapore Pte Ltd (in liquidation)* [2005] 2 SLR(R) 561 to be instructive in setting out the factors that are relevant to this inquiry. In that case, this court held that in deciding "an application for an extension of time to do an act in relation to proceedings in court", what is important is that there must be "some material" upon which the court can exercise its discretion (at [10]–[11]). This encompasses an assessment of the following four factors: (a) the length of the delay; (b) the reason for the delay; (c) the merits of the "proceeding" in question; and (d) the question of prejudice.

25 In our view, there is sufficient material before us to justify allowing an extension of time for the filing of OUELH's striking-out application. Although the length of the delay was substantial, we are satisfied that Mr Aathar and A&P were responsible for a significant portion of this delay, as they had failed to respond to OUELH's solicitors' repeated requests for confirmation that Mr Aathar had obtained the OA's consent to proceed with CA 157. Given this context, it would be disingenuous for Mr Aathar to allege that he has suffered substantial prejudice as a result of OUELH's delay. Furthermore, for reasons that will be elaborated upon shortly, we are of the view that OUELH's striking-out application should succeed on its merits. We would therefore have granted OUELH's application for an extension of time to file a striking-out application, if it had indeed been necessary for us to decide SUM 19.

Whether the NOA should be struck out

26 We now turn to consider the substantive issue of whether the NOA should be struck out.

27 In relation to Mr Aathar's failure to obtain prior sanction from the OA, OUELH has devoted a significant portion of its submissions to the question of whether Mr Aathar's disabilities arising from his bankruptcy are governed by s 131(1) of the now-repealed Bankruptcy Act (Cap 20, 2009 Rev Ed) ("BA") or by s 401(1) of the IRDA. We think it unnecessary to make any findings on this issue, as our view is that the two provisions are identical in all material respects and therefore ought to be given the same interpretation and effect.

28 Section 131(1)(*a*) of the BA provides that an undischarged bankrupt cannot commence, continue or defend certain actions or appeals without the "previous" sanction of the OA:

> **Disabilities of bankrupt**
>
> **131.**—(1) Where a bankrupt has not obtained his discharge —
>
> (a) unless the bankrupt has obtained the *previous sanction* of the Official Assignee, the bankrupt is incompetent to commence, continue or defend —
>
> (i) any action other than —
>
> (A) an action for damages in respect of any injury to the bankrupt's person; or
>
> (B) a matrimonial proceeding; or
>
> (ii) any appeal arising from any action referred to in sub-paragraph (i);
>
> …
>
> [emphasis added]

29 Section 401(1) of the IRDA provides, in a similar vein, as follows:

> **Disabilities of bankrupt**
>
> **401**.—(1) Where a bankrupt has not obtained his or her discharge —
>
> (a) unless the bankrupt has obtained the *previous sanction* of the Official Assignee, the bankrupt is incompetent to commence, continue or defend —
>
> (i) any action other than —
>
> (A) an action for damages in respect of any injury to the bankrupt's person; or
>
> (B) a matrimonial proceeding; or
>
> (ii) any appeal arising from any action referred to in sub paragraph (i);
>
> …
>
> [emphasis added]

30 It is undisputed by the parties that CA 157 is an appeal falling within either s 131(1)(*a*)(ii) of the BA or s 401(1)(*a*)(ii) of the IRDA (depending on which provision is applicable). However, Mr Aathar takes the view that his failure to seek the OA's prior consent is remediable because it was not the result of any fault on his part. According to Mr Aathar, A&P (who represented him in RA 310) was supposed to send him the Judgment for RA 310 upon its receipt of the same. However, A&P mistakenly sent the Judgment to the wrong e-mail address, as a result of which Aathar was only informed of the existence of the Judgment on 15 August 2020, *two days* before the deadline for filing a notice of appeal against the Judge's decision. Faced with this situation, Mr Aathar reacted instinctively by asking his wife to instruct A&P to file the NOA, in the hope that the OA would retrospectively sanction his commencement of CA 157. Mr Aathar avers that this course of action was not motivated by an intention to

deceive the court, but was done "sincerely" and "honestly" to "preserve the timelines".

31 At the Hearing before us, A&P agreed that they had sent the Judgment to the wrong e-mail address. Hence, Mr Aathar should not be blamed for the predicament which he found himself in, *ie*, with a very short time to take action. Nevertheless, Mr Aathar was aware of the need to obtain the OA's prior sanction. After the appeal was filed, neither Mr Aathar nor A&P disclosed to OUELH's solicitors that such sanction had *not* been obtained or that they were taking any step to address the situation, until the truth was subsequently revealed.

32 Moreover, and in any event, Mr Aathar's suggestion that the OA can grant retrospective sanction is entirely devoid of merit. In *Standard Chartered Bank v Loh Chong Yong Thomas* [2010] 2 SLR 569 at [28], this court unequivocally endorsed the proposition that the term "previous sanction of the Official Assignee" in s 131(1)(*a*) of the BA refers to *prior* sanction, and that the OA's sanction *cannot* be granted *ex post facto*:

> … [W]e can now turn to the question which forms the crux of the third issue, namely, whether the 'previous sanction of the Official Assignee' required by s 131(1)(*a*) of the BA means *prior* sanction and not *retrospective* sanction, the latter being what was granted in the present case. ***In our view, the answer is clear beyond doubt.*** Section 131(1)(*a*) of the BA was introduced to give the OA full control of the administration of a bankrupt's estate for the benefit of the creditors. ***If the Legislature had intended that the OA's consent could be given retrospectively, then it would not have used the word 'previous' in s 131(1)(a).*** In this connection, comparison may be made with s 76(1)(*c*) of the BA, which forbids any creditor from enforcing a debt against a bankrupt 'except by leave of the court', without stating whether such leave should be prior or whether it may be retrospective. In granting retrospective leave under s 76(1)(*c*)(ii) of the Bankruptcy Act (Cap 20, 1996 Rev Ed) in *Overseas Union Bank v Lew Keh Lam* [1998] 3 SLR(R) 219

> ('*Lew Keh Lam*'), the Court of Appeal stated that, if Parliament had intended the court's leave to be a 'precondition' (at [35]) that had to be fulfilled before a creditor could commence an action against a bankrupt, '*the Legislature would have provided for it in more emphatic terms*' [emphasis added] (at [35]). The word 'previous' in s 131(1)(*a*) of the BA is certainly an 'emphatic' (see *Lew Keh Lam* at [35]) and unequivocal statement that the OA's sanction cannot be granted *ex post facto*. [emphasis in original in italics; emphasis added in bold italics]

33 In our view, the principles set out in the preceding paragraph are equally applicable to the phrase "previous sanction of the Official Assignee" found in s 401(1) of the IRDA.

34 Thus, regardless of the circumstances at hand, Mr Aathar ought to have sought the OA's sanction *prior to* commencing CA 157. However, this was not done. In fact, Mr Aathar conceded before us that he has not even obtained such sanction *to date*. The effect of this must be that Mr Aathar is "incompetent", or lacks the requisite *locus standi*, to commence CA 157.

35 In *Riduan bin Yusof v Khng Thian Huat and another* [2005] 2 SLR(R) 188 ("*Riduan*"), it was held that this court has the inherent jurisdiction to strike out a notice of appeal where, *inter alia*, the appeal is "frivolous, vexatious or an abuse of process of the court" (at [17]). The court in *Riduan* further endorsed *Afro-Asia Shipping Co (Pte) Ltd v Haridass Ho & Partners and another* [2003] 2 SLR(R) 491 for the proposition that the words "frivolous or vexatious" denote "cases which are obviously unsustainable or wrong" (see *Riduan* at [29]). In our view, an appeal which is commenced without the requisite *locus standi* is clearly "frivolous or vexatious" in the sense of being "obviously unsustainable or wrong". Accordingly, we find that Mr Aathar's failure to obtain prior sanction from the OA constitutes an appropriate basis for striking out the NOA.

36 We turn to the second ground proffered by OUELH for striking out CA 157, which is that CA 157 was filed without Mr Aathar's authority. We accept that a solicitor's failure to obtain proper authority can justify the striking out of proceedings commenced by the solicitor for or on behalf of that client (see *Kementerian Pertahanan Malaysia & Anor v Malaysia International Shipping Corp Bhd and another suit* [2003] 2 MLJ 226 ("*Kementerian*") (cited in *Singapore Civil Procedure 2020* vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 2020) at para 64/7/1), and *Tung Hui Mannequin Industries v Tenet Insurance Co Ltd and others* [2005] 3 SLR(R) 184 ("*Tung Hui*"), where Judith Prakash J (as she then was) opined that the plaintiff's solicitors' initial refusal to provide the defendants with any evidence of its authority provided the defendants with "a reasonable basis on which to file their respective applications to strike out the action as against them" (at [48])). Although *Kementerian* and *Tung Hui* each involved an application to strike out a first-instance action, we find that there is no reason why the principles therein cannot be extended to the context of an application to strike out a notice of appeal. In both situations, the concerns of prejudice that arise from a solicitor's failure to act without authority are equally significant, and therefore equally capable of justifying a striking-out order being made.

37 A&P has confirmed before us that it does not possess a warrant to act from Mr Aathar. The absence of such a warrant constitutes *prima facie* evidence that A&P does not have Mr Aathar's authority to act in commencing CA 157 (see O 64 r 7(2) of the ROC and *Tung Hui* at [40]). Furthermore, there is no evidence to show that A&P's initial failure to procure Mr Aathar's authority to act was remedied at a later stage. On the contrary, A&P continues to maintain the position that it filed CA 157 on the instructions of Mr Aathar's wife, who is not a party to the appeal, and who has not been shown by Mr Aathar or A&P to

be an agent authorised by Mr Aathar. In the premises, we agree with OUELH that A&P has not obtained Mr Aathar's authority to commence CA 157, and that this constitutes an independent basis for the NOA to be struck out.

38 For the above reasons, we would have allowed SUM 19 if it had been necessary for us to decide the matter.

SUM 6

39 We now turn to A&P's application to discharge itself from acting for Mr Aathar in CA 157. Even if CA 157 were not deemed to be withdrawn, we are of the view that it would not be appropriate to keep A&P's name on the record as Mr Aathar's solicitor since A&P did not act on Mr Aathar's instructions in the first place. We are therefore minded to allow A&P's discharge application, and to remove A&P's name from the record accordingly.

Conclusion

40 For the above reasons, SUM 6 is allowed. As CA 157 is deemed withdrawn, we make no order as to SUM 19.

41 Having regard to the parties' submissions on costs and the costs guidelines in Appendix G of the Supreme Court Practice Directions, we order Mr Aathar to pay OUELH costs thrown away amounting to $8,000 for SUM 19 and SUM 125. This includes disbursements. Of this, $4,000 is to be borne by A&P personally pursuant to O 59 r 8(1) of the ROC, as we find that A&P did not act responsibly, both in filing CA 157 without Mr Aathar's authority, and in failing to ensure that Mr Aathar had obtained the OA's prior consent to commence CA 157. As A&P's conduct has contributed to OUELH incurring

unnecessary costs, it is just for A&P to compensate OUELH for a portion of the costs incurred by it. Further, pursuant to the undertaking furnished by A&P as security for the costs of the appeal, A&P shall also pay OUELH or its solicitors $4,000 in respect of the costs awarded to OUELH. A&P's solicitors' undertaking for the security for costs of the appeal shall remain in place until the costs orders in this judgment are satisfied. In relation to SUM 6, there shall be no order as to costs. The usual consequential orders will apply.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Chow Chao Wu Jansen and Sasha Anselm Gonsalves (Rajah & Tann Singapore LLP) for the applicant in CA/SUM 19/2021;
Henry Li-Zheng Setiono and Daniel Tan An Ye (Ang & Partners) for the applicant in CA/SUM 6/2021;
The respondent in CA/SUM 6/2021 and CA/SUM 19/2021 in person;
Beverly Wee (Insolvency & Public Trustee's Office) for the Official Assignee (watching brief).