Re Rasmachayana Sulistyo (alias Chang Whe Ming); ex parte The Hongkong and Shanghai Banking Corp Ltd and Other Appeals
[2004] SGHC 281

Case Number : B 115/2004, 116/2004, 117/2004

Decision Date : 30 December 2004

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Rodney Keong (Rodyk and Davidson) for the appellants/debtors; Andrew Chan and Desmond Ho (Allen and Gledhill) for the respondent/petitioning creditor

Parties : —

Insolvency Law – Bankruptcy – Statutory demand – Service of statutory demand and bankruptcy petition on debtors – When s 11 Bankruptcy Act may be invoked to supplement Bankruptcy Rules – Relationship between Bankruptcy Rules and Rules of Court – Section 11 Bankruptcy Act (Cap 20, 2000 Rev Ed), O 1 r 2(4), O 62 r 3(2) Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Insolvency Law – Bankruptcy – Statutory demand – Service of statutory demand and bankruptcy petition on debtors – Whether Bankruptcy Rules stipulating how personal service could be effected – Whether method of service exclusively prescribed by Bankruptcy Act and Bankruptcy Rules – Whether consensual arrangements for service of process between parties valid – Section 11 Bankruptcy Act (Cap 20, 2000 Rev Ed), rr 96, 109(1), 110 Bankruptcy Rules (Cap 20, R 1, 2002 Rev Ed)

Words and Phrases – Guarantee executed by parties containing consensual arrangement for service of process in "proceedings" – Whether steps in bankruptcy regarded as "proceedings" under guarantee – Construction of phrase "any legal action or proceedings arising out of or in connection with this agreement"

30 December 2004 *Judgment reserved.*

V K Rajah J:

1 The petitioner is an international financial institution. The three judgment debtors ("the debtors"), all whom are foreign nationals, are former directors of Andover Pte Ltd ("the borrower") to whom the petitioner extended substantial banking facilities. As part of the security arrangements for the facilities, the debtors signed a "Personal Guarantee and Undertaking" dated 2 August 1996 ("the Guarantee"). When the borrower defaulted on repayment of its loan obligations to, *inter alia*, the petitioner, the latter commenced proceedings against the debtors to recover the outstanding amounts. Judgments were subsequently entered by the petitioner against the debtors. As the terms of the judgments were not complied with the petitioner thereafter initiated the present bankruptcy proceedings. The petitioner asserts that as at 9 January 2004, *ie*, the date of the filing of these bankruptcy petitions, each of the debtors was severally indebted to it in the aggregate sums of US$58,064,279.35 and US$27,820.08 exclusive of accruing interest.

2 Before filing these bankruptcy petitions, several attempts were made by the petitioner to effect personal service of each of the requisite statutory demands on the debtors at various addresses within the jurisdiction. According to the affidavit of service filed by the petitioner's process server, three different modes of service were employed to serve the statutory demand: the process server left a copy of the demand at the address of the debtors' nominated forwarding agent in Singapore; the petitioner also issued an advertisement of the notice of the statutory demand in *The Straits Times*, an English newspaper circulating in Singapore; and, finally, copies of the statutory

demands were left at the last known residential addresses, *ie*, at 331 River Valley Road, #13-02, and 61 Meyer Road, #15-04. The bankruptcy petitions themselves were, however, only served on the debtors' nominated forwarding agent. In these proceedings, the petitioner relies principally on a contractual stipulation in the Guarantee to assert that proper service of the relevant bankruptcy documents has in fact been duly effected. The debtors vigorously dispute this.

3 An assistant registrar first heard these petitions on 2 April 2004. When the petitions were heard, the debtors' counsel launched a root and branch attack on the bankruptcy proceedings; he contended, *inter alia*, that there was no jurisdictional basis to grant the petitions and that the statutory demands upon which these petitions are predicated had not been effectively served. These contentions were rejected and the petitions for bankruptcy were summarily granted on 10 September 2004: see [2004] SGHC 87. When I heard the appeals against the learned Assistant Registrar's decision, I dismissed them albeit on altogether different grounds from those relied upon by the learned Assistant Registrar. The debtors now appeal against my decision.

4 When the appeals came up for hearing before me, the debtors' counsel conceded that the court did indeed have jurisdiction to hear and grant the relevant petitions. Notwithstanding, counsel resolutely maintained the debtors' position that on the existing factual matrix, no proper service of process had been effected. First of all, he argued that parties could not contractually obviate the provisions of the Bankruptcy Rules (Cap 20, R 1, 2002 Rev Ed) ("BR") that mandated personal service of the statutory notice of demand as well as the bankruptcy petition. Secondly, he contended that the actual contractual stipulations did not in any event envisage or sanction the service of bankruptcy-related documents on the nominated forwarding agent. The first contention, given that it raises an issue of some importance to both legal practitioners and the financial community, entails a detailed and proper consideration of the relevant provisions of the BR as well as an evaluation of any underpinning policy considerations.

5 Prior to addressing the main issues in the present proceedings, I should, however, refer to one of the grounds relied on by the learned assistant registrar. She had held that though the express terms of O 1 r 2(4) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("RC") *ex facie* precluded its general application to bankruptcy proceedings, O 62 r 3(2) of the RC which expressly sanctions the service of court process "in such other manner as may be agreed" between the parties, could nevertheless be relied upon by the petitioner ([3] *supra*, at [5]):

> I disagree … that O 62 r 3 is irrelevant to bankruptcy proceedings. Section 11 of the Bankruptcy Act reads "[i]n any matter of practice or procedure for which no specific provision has been made in the Act or the Bankruptcy Rules, the practice or procedure of the Supreme Court shall be followed and adopted as nearly as may be". *The Rules are silent as to how personal service may be effected and whether this includes service in a manner as may be agreed between the parties. Therefore, by s 11 of the Bankruptcy Act ("the Act"), the practice of the Supreme Court in this regard that is embodied in O 62 r 3 of the Rules of Court should be followed*. In any case, O 1 r 2(4) is qualified by O 1 r 2(5) of the Rules of Court which provides that O 1 r 2(4) shall not be taken as affecting any provision by which the Rules of Court are applied. Applying O 1 r 2(5) to the instant case, O 1 r 2(4) does not affect s 11 of the Act pursuant to which O 62 r 3 of the Rules of Court may be applied to bankruptcy proceedings. [emphasis added]

In my view, the learned assistant registrar fell into error by importing wholesale the provisions of the RC into this aspect of bankruptcy procedure. Contrary to what she has suggested, specific provision has indeed been made in the BR to address the issue of service of the various bankruptcy processes: rr 96 and 109 of the BR expressly and specifically deal with the issue of service of statutory demands and bankruptcy petitions. Indeed, r 109(1) of the BR encapsulates not just the concept of personal

service but states precisely *how* such personal service is to be *effected*:

> Subject to rule 110, a creditor's petition shall be served personally on the debtor by an officer of the court, or by the petitioning creditor or his solicitor, or by a person in their employment, and service shall be *effected* by delivering a sealed copy of the petition to the debtor. [emphasis added]

With all due respect, the learned assistant registrar is incorrect in asserting that the BR "is silent as to how personal service may be *effected*".

6 Section 11(1) of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("BA") should only be resorted to in instances where lacunae in procedural issues exist, *ie*, where *no specific provision* has been made. This is decidedly not such an instance, in light of the express and fairly comprehensive regime addressing the modalities for service enacted in the BR. The express reference to "any matter of practice or procedure for which *no specific provision* has been made by this Act or the rules" in s 11(1) of the BA is not to be interpreted as a statutory charter to whimsically fill in any perceived gaps or supposed interstices existing in the BR; rather it should be construed as a safety net to address issues of general procedure/and or schematic issues. There is a patent and critical difference between "*no specific provision*" which really means the absence of *any* relevant provision(s), as opposed to any perception of *incomplete* or *inadequate* provisions dealing with a particular aspect of procedure. The BR, while specifically stating that personal service of process is to be employed in serving bankruptcy petitions, has, in addition, stipulated in no uncertain terms how such service is to be *effected*. If the learned assistant registrar's approach were correct, then virtually the entire RC could be invoked to *supplement* the provisions of the BR. Such a startling proposition would be tantamount to driving a coach and fours right through the BR by superimposing the RC on it.

7 Having dealt with the main thrust of the learned Assistant Registrar's decision, it now remains for me to explain my conclusion on why contractual service of the relevant bankruptcy documents is permissible in the present bankruptcy proceedings. In my view, the crux of the issue is not whether the RC applies or not but whether parties could properly contract out of, waive or modify the relevant provisions of the BR dealing with service of process. In dealing with the issues at hand it will be helpful to first consider the actual contractual stipulations.

The contractual stipulations

8 Sub-clause 14(F)(1) of the Guarantee states:

> The Borrower and each of the Personal Guarantors *irrevocably appoint Forward Investment Pte Ltd* (now of 3rd Storey, Crown Prince Hotel, 270 Orchard Road, Singapore 238857) *to receive, for* the Borrower or, as the case may be, [*the*] *Personal Guarantor* and on its or his behalf, *service of process in any Proceedings* in Singapore. Such service shall be deemed completed on delivery to the process agent (whether or not it is forwarded to and received by the Borrower or the relevant Personal Guarantor). [emphasis added]

9 The issue of whether or not bankruptcy petitions constitute "proceedings" for the purposes of sub-cl 14(F)(1) in turn depends on the scope of that term. Sub-clause 14(B) of the Guarantee reads:

> For the benefit of the Secured Parties, the parties irrevocably agree that in relation to any dispute which may arise out of or in connection with this Agreement, such dispute shall at the sole discretion of the Secured Parties be referred to and resolved (1) by the courts of Singapore

or (2) by arbitration at the Singapore International Arbitration Centre in accordance with the rules of UNCITRAL *and* that, *accordingly*, *any* legal action or proceedings *arising out of or in connection with this agreement* ("*Proceedings*") may be brought in those courts or arbitration tribunals. [emphasis added]

The Bankruptcy Rules and personal service – the policy point

10 The requirements for service of the statutory demand are circumscribed by pragmatism and not by an overtly rigid and technical approach. The emphasis is clearly on the *reasonableness* of the steps being taken to bring to the debtor's attention the existence of the relevant statutory demand. Rule 96 of the BR stipulates:

(1) The creditor shall take *all reasonable steps* to bring the statutory demand *to the debtor's attention*.

(2) The creditor shall make *reasonable attempts* to effect personal service of the statutory demand.

(3) Where the creditor is not able to effect personal service, the demand may be served by *such other means as would be most effective in bringing the demand to the notice of the debtor*. [emphasis added]

11 Rule 108 expressly requires proof of service of the statutory demand to be filed in support of the bankruptcy petition. It states:

(1) Where a creditor's petition is based on non-compliance with a statutory demand, an affidavit proving service of the statutory demand shall be filed in support of the petition.

(2) The affidavit shall state the mode, date and time of the service and shall exhibit a copy of the statutory demand and any acknowledgment of service.

(3) Where the statutory demand has been served other than by personal service, the affidavit shall —

(a) give particulars of the steps taken to effect *personal service* and the reasons for which they have been ineffective;

(b) state the means whereby (attempts at personal service having been unsuccessful) it was sought to bring the demand to the debtor's attention and explain why such means would have best ensured that the demand would be brought to the debtor's attention;

(c) exhibit evidence of such alternative mode or modes of service; and

(d) specify a date by which to the best of the knowledge, information and belief of the person making the affidavit, the demand would have come to the debtor's attention.

(4) The steps of which particulars are given for the purposes of paragraph (3) (a) *must be such as would have sufficed to justify an order for substituted service of a bankruptcy petition being made by the court.* [emphasis added]

The legislative scheme *vide* r 9(3) and r 108(3) of the BR accepts that alternative modes of service other than personal service are permissible as far as the statutory demand is concerned.

12 Rule 109(1) of the BR, which deals with the service of the bankruptcy petition, provides:

> Subject to rule 110, a creditor's petition *shall be served personally* on the debtor by an officer of the court, or by the petitioning creditor or his solicitor, or by a person in their employment, and service *shall be effected by delivering* a sealed copy of the petition to the debtor. [emphasis added]

13 Rule 110 of the BR addresses the issue of substituted service of a bankruptcy petition. It states:

> (1) If the court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of a creditor's petition, or for any other cause, *the court may order substituted service to be effected in such manner as it thinks fit*.
>
> (2) If the debtor is not in Singapore, the court may order service to be made within such time and in such manner and form as it thinks fit.
>
> (3) Where an order for substituted service has been carried out, the petition shall be deemed to have been duly served on the debtor. [emphasis added]

14 Interestingly, counsel's research did not unearth any cases in Singapore or England dealing with this point, that is to say, the extent of the parties' autonomy to provide for contractual service of bankruptcy-related documents outside the statutorily-prescribed procedures. Admittedly, a conservative school of thought prevails among some academics as reflected in the older treatises advocating that bankruptcy proceedings are *sui generis* and that the draconian effects accompanying a change of status merits nothing less than the actual personal service of all bankruptcy processes; failing that, only court-sanctioned substituted service would suffice. The foundation for such an approach is arguably to be found in the *dicta* of Bowen LJ in *Re Howes, ex parte Hughes* [1892] 2 QB 628 at 632:

> I do not regard this as a merely technical matter, for bankruptcy proceedings are of a peculiar character. *They involve quasi-penal consequences to the debtor, and it is essential that all those forms, the objects of which is to prevent injustice, should be strictly followed*. [emphasis added]

15 In this context it is pertinent to note that earlier versions of the English rules of civil *and* bankruptcy practice also took a strict and uncompromising view of personal service of process. Non-compliance of prescribed procedures would almost invariably be treated as vitiating proceedings. Not surprisingly, the English courts adopted a symmetrical approach in applying the then strict rules of personal service in civil matters to bankruptcy matters. In *Re A Debtor* [1939] 1 Ch 251 at 256–257, Greene MR observed:

> It is no exaggeration to say that the practice in regard to writs and the requirements of the law in regard to service of writs are, and have always been, regarded as matters strictissimi juris. *In the case of the service of a bankruptcy petition, I can see nothing in the section and Rules which can fairly be construed as relaxing the strict requirements which are to be found in the case of the service of writs and other documents under the Rules of the Supreme Court.* [emphasis added]

The rules of personal service of process in civil proceedings have now been relaxed to allow for and

recognise contractual arrangements for service of process. As a matter of principle, it is appropriate to reassess why the old rigid, doctrinaire approach for service of process in bankruptcy matters advocated by older case law should continue to hold sway and be unthinkingly applied by the court today.

16 The legitimacy of providing for contractual service of process outside the statutory scheme has previously been appraised in Singapore in the context of the winding-up regime for insolvent companies. In *Re Griffin Securities Corporation* [1999] 3 SLR 346, the service of a winding-up petition on the company's solicitors in lieu of the company's registered office was the subject of a spirited challenge. Rule 25(1) of the Companies (Winding-Up) Rules (Cap 50, R 1, 1990 Rev Ed) ("CWUR") stipulates:

> Every petition *shall*, unless presented by the company, be served upon the company at the registered office of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if any can be found, by leaving a copy with any member, officer or employee of the company there, or in case no such member, officer, or employee can be found there, then by leaving a copy at such registered office or principal place of business, or by serving it on such member or members of the company as the Court may direct; and where the company is being wound up voluntarily, the petition shall also be served upon the liquidator (if any) appointed for the purpose of winding up the affairs of the company. The affidavit of service of the petition may be in the Form 5 or 6 set out in the First Schedule. [emphasis added]

17 Rajendran J was not impressed by the contention that the CWUR provides an exhaustive and mandatory code for service of process on insolvent companies. He pointedly and correctly observed at [19]:

> The Rules of Court, such as r 25 of the Companies (Winding-up) Rules, relating to service of documents, are for the protection of the party being served with the document. *The rules do not preclude a party, if it so wishes, from accepting service by some other mode*. [emphasis added]

18 In a similar vein, Knox J had earlier observed in the English case of *Re Fletcher Hunt (Bristol) Ltd* [1989] BCLC 108 at 113:

> The Companies (Winding-Up) Rules 1949, SI 1949/330, in terms require service at the registered office, but it is very well settled that, if solicitors are properly instructed, they can accept service on behalf of the company. *That is a salutary state of affairs which saves costs*, and that, it seems to me, was what occurred in this case. [emphasis added]

19 It should also be noted that the word "shall" is not invariably used in a mandatory sense in the bankruptcy regime. As in the case of the RC it is often used as a convenient and abbreviated reference indicating a *directory* rather than *mandatory* tilt in the legislative scheme. Perhaps the best evidence of pragmatism in approaching the BR (and its English progenitor) is to be found in the observations of Lord Esher MR in *Re Lord Thurlow, ex parte Official Receiver* [1895] 1 KB 724 at 728–729:

> *It appears to me that the Court of Bankruptcy is a Court to whose procedure the rule, that, as far as possible, mere technicalities should be brushed away in favour of what is fair and just, is especially applicable*. In so far as the power of the Court is limited by Act of Parliament, the Court must of course obey the Act, but the Bankruptcy Acts ought in my opinion to be construed as far as possible so as to give the largest discretion to the Court of Bankruptcy. The administration of

bankruptcy matters from beginning to end takes place under the supervision and absolute control of the Court of Bankruptcy, except so far as its powers are limited by Act of Parliament. … *The word "shall" is not always absolutely obligatory. It may be directory. It may no doubt be absolutely obligatory, but one would not be inclined to construe it to be so in the case of the Court of Bankruptcy, if one could avoid it*. [emphasis added]

20 The bankruptcy rules on service of process are mandatory in the sense that there must be actual or deemed service of the various processes but only directory in the sense that the indicated method of service has not been exclusively prescribed. There is nothing in the BR or BA pointing to the existence of a legislative scheme for an exclusive code of procedure for personal service. More importantly, there is nothing in the BR that precludes or militates against consensual arrangements for service of processes. In my view, the freedom to contract should not be fettered unless there is a clear contrary indication from the language used or from the purport of the relevant legislative provisions and/or underpinning public interest considerations. The objectives of insolvency legislation will continue to be well served by sanctioning agreements between competent contracting parties on personal issues such as the modalities of service and notice. The principal purposes of such legislation are to prevent fragmentation of assets and to sterilise certain legal rights of an insolvent debtor and these objectives are clearly not contravened or impeded by consensual arrangements on such issues.

21 The essence of the service requirements under the BR is to ensure that the statutory demand, bankruptcy petition and other relevant processes are brought to the *personal* attention of the debtor prior to the hearing of the petition. A bankruptcy order results in the transformation of the legal status of the debtor and ought not to be made unless the court is satisfied that the debtor had actual or deemed notice of the proceedings. This is a quintessential aspect of due process and natural justice. That said, there are no *apparent* underpinning or overriding policy reasons why a debtor cannot agree to have the various bankruptcy processes effected on him in a particular or peculiar manner that is agreeable and/or convenient to both him and the creditor. Financial institutions frequently deal with foreign debtors and it is sometimes wholly impractical and extremely costly for attempts to be made for service through a foreign judicial process. However, impracticality or difficulties *per se* cannot be a license to obviate a mandatory statutory scheme or policy. The crux of the matter really is whether parties can contractually agree on alternative modalities of service.

22 While, for example, an attempt to contract out of the *pari passu* rules relating to the distribution of assets would prejudice other creditors or third parties and would be patently contrary to the policy of the BA and BR, the procedures relating to service of bankruptcy processes are an altogether different matter, arising in a different context. Strictly speaking, they are a personal issue *inter se* between the creditor and the debtor. Public policy should not and does not intrude into such arrangements. The statutory directive and legislative predisposition for personal service is designed to protect the debtor by ensuring actual notice of the relevant steps before the statutorily-sanctioned change of legal status is implemented apropos an insolvent debtor. It is clearly not an inalienable statutory right or process but rather a protective mechanism that can be contractually modified. It stands to reason that, as a matter of general principle, where a procedural rule is intended to benefit a particular party, that party ought to be able to waive or modify compliance with that particular rule.

23 It is a general principle of law that a person can renounce a right introduced for his benefit. The maxim "*quilibet potest renunciare juri pro se introducto*" (see Broom, *A Selection of Legal Maxims* (10th Ed, 1939) at p 477) when translated means "anyone may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour". In applying this principle it is essential to have an identifiable beneficiary. In this instance of procedure dealing with the service of process the intended beneficiary is undeniably the debtor. There are no conceivable issues of unfairness or impropriety when an independent contracting party enters into an agreement with his

eyes wide open and agrees to certain modalities for service and the requisite procedure for deeming effective notice of legal proceedings.

24 In any event there is nothing in the BR that either expressly or impliedly indicates that failure to adopt and comply with the precise terms of the statutory directives on service would be fatal, thereby ineluctably precluding alternative modalities for service. It is also pertinent to note that r 278 of the BR expressly stipulates, *inter alia*, that *"Non-compliance with any of these Rules or with any rule of practice shall not render any proceedings void unless the court so directs…"* This very plainly and emphatically articulates the legislative intent of according precedence to substance over form and/or technicalities. The elusive historical approach of characterising procedural provisions as either directory or mandatory is largely anachronistic today. The preferred approach in modern times in determining the validity of an Act is to understand the purpose of the relevant procedural rule as well as the scope and intent of the governing statute. This approach does not entail ignoring the usage of words such as "shall" or "must" in legislation. It suggests that any *prima facie* inference raised by such words may be dislodged after taking into consideration the scope and objectives of the legislation and the consequences arising from alternative constructions.

25 Finally, there is much to be said for the attainment and implementation of a symmetrical approach in dealing with this procedural thicket *vis-à-vis* both insolvent debtors and companies. After all, the objectives of and policy considerations relating to bankruptcy and liquidation mirror each other in many essential aspects. Both procedures signal a change in the status of the debtor. To protect the community at large, the debtor is prevented by the abasement of his or its contracting status from pursuing further commercial activity. Both procedures herald the onset of a process that permits the equitable and fair distribution of the assets of the insolvent debtor amongst creditors. The maxim "equity is equality" is the underpinning policy percolating through all aspects of insolvency, whether corporate or personal. As mentioned earlier, public policy will require the court to intervene and avoid contractual provisions that purport to exclude or modify the principle of *pari passu* distribution whether in bankruptcy or liquidation.

26 Given the underlying similarity between both processes and in light of the fact that the procedure pertaining to service of winding-up proceedings may be contractually agreed upon (see [17]–[18]), it is only logical that a similar approach be adopted for bankruptcy proceedings. The BR does not *ex facie* preclude this approach. On the contrary it appears to support this by providing *inter alia* that substituted service of the bankruptcy petition is permissible in *such manner* as the court thinks fit: r 110(1) of the BR. This clearly signifies legislative sanction for "reasonable" steps to be taken in order for notice to be deemed to be properly effected. Furthermore it should be noted that the emphasis in r 96 of the BR as regards the statutory notice is once again on *reasonable* steps being taken. If the BR contemplates and sanctions the adoption of reasonable steps in drawing the debtor's attention to proposed or actual bankruptcy proceedings, why should the parties not resolve this issue themselves by prior agreement at the outset by agreeing on what in fact constitutes *reasonable steps*?

27 This underlying philosophy of pragmatism and substantial justice permeates through the entirety of the BA and BR and is further exemplified by s 158(1) of the BA which states in no uncertain terms:

> No proceedings in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceedings is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

This is reinforced in s 11(2) of the BA which reads:

> Where in respect of any matter of practice or procedure it is not possible to apply subsection (1), the court may make such orders and give such directions as are likely to secure substantial justice between the parties.

28 Needless to say, the court will always be vigilant and anxious to ensure that breaches of the BR and BA do not cause substantial injustice to a debtor. A statutory provision validating substantial compliance cannot by its very definition render unessential an essential rule. However, arid contentions by debtors over-emphasising and dogmatically demanding an unthinking, rigid and punctilious adherence to the letter of every aspect of the bankruptcy process and procedure should be examined with circumspection, if not with scepticism. If no substantial injustice has been occasioned, then perhaps most arid technical objections should not see the light of day. Even if a formal defect or irregularity may have engendered some perceived injustice, careful consideration should be given as to whether or not it can be rectified by the court so as to redress any perceived imbalance. One must bear in mind that bankruptcy rules, like the rules of court, are the handmaidens and not the mistresses of our judicial system. These rules have been enacted to secure substantial justice, not thwart it by trapping litigants in prickly procedural labyrinths and the incurring of unnecessary legal costs. A wrong turn need not necessarily be viewed as a fatal step. Older case law authorities such as *Re Howes* ([14] *supra*) that advocate or lean towards a rigid and technical approach by insisting on the fastidious compliance with even the most banal technicalities need to be assessed in the current enlightened pragmatic legislative and judicial environment (in this context see also the dicta of Chan Seng Onn JC in *The Straits Times (1975) Limited v Wong Chee Kok* [1998] SGHC 77 at [23]–[24]).

29 An objective interpretation of the BA and BR today needs also to take into account the radical changes the legislation has undergone and the prevailing consequences of bankruptcy, which are far less dire than they used to be. This is to be contrasted with the older legislation that viewed bankruptcy as a quasi-penal punishment. Rule 278 of the BR was intended to confer on the court a considerable degree of flexibility in addressing procedural issues in order to achieve substantial justice. It is not however to be construed as an imprimatur for slipshod practices but rather as a statutory directive for judicial pragmatism. I must also emphatically articulate that solicitors, should they engage in slipshod practices, may find that while the proceedings are not vitiated by procedural irregularities, unpalatable cost consequences may well ensue for them and/or their clients.

30 To conclude this consideration of the rules of service in bankruptcy proceedings, I refer to the endorsement by the House of Lords in *Kenneth Allison Ltd v A E Limehouse & Co* [1992] 2 AC 105 of Lord Donaldson's astute and succinct summary of the approach to be taken in relation to the rules of court in dealing with the issue of personal service in civil proceedings (at 119–120 *per* Lord Bridge of Harwich):

> Lord Donaldson of Lymington MR summed the matter up in words with which I entirely agree and on which I could not hope to improve when he said [1990] 2 QB 527, 533–534:
>
> > "The rules are the servants of the courts and of their customers, not their masters, *unless expressed in a wholly mandatory and exclusive fashion which these rules are not*. *It would be wholly contrary to the spirit of the times that the rules should be construed in a manner which would forbid parties to litigation to act reasonably with a view to eliminating the acerbities inevitable in litigation, when to do so creates no problems whatsoever for the defendant in terms of deciding precisely when service was effected for the purposes of the Limitation Acts or otherwise*." [emphasis added]

31 In my estimation the maxim *pacta privata juri publico derogare non possunt* (which means that a public right is not overridden by the agreements of private persons) does not apply in the context of the modalities of service of processes under the BR. In the final analysis, if parties agree on what constitutes effective personal service, as they did in the existing factual matrix, this can hardly be considered as objectionable in any way.

The provisions of the Guarantee – the construction point

32 It is not disputed that the relevant statutory notices of demand and the bankruptcy petitions were served on the process agent in accordance with sub-cl 14(F)(1) of the Guarantee. It is also noteworthy that in the appeals the debtors' counsel had not complained that the debtors did not have *de facto* notice of the statutory demand and/or the bankruptcy petition. The debtors through their counsel, however, vigorously and adamantly contend that the relevant contractual provisions have no application to bankruptcy proceedings. Those provisions, it is argued, apply only to ordinary civil proceedings or in instances where an actual "dispute" has arisen.

33 The answer to this controversy lies in the construction to be accorded to the word "proceedings" appearing in sub-cl 14(F)(1) of the Guarantee and the contractual definition apparently attributed to that word in sub-cl 14(B).

34 It is immediately apparent that there are actually two clearly-demarcated limbs in sub-cl 14(B) of the Guarantee. The first part of the definition or "first limb" commences with the words "the parties irrevocably agree" and concludes with the phrase "rules of UNCITRAL". The second part or "second limb", which defines the term "proceedings", begins with the words "any legal actions or proceedings" and ends with the words "or arbitration tribunals". The critical portion of the second limb clarifying the definition of "proceedings" is the phrase "any legal actions or proceedings arising out of or in connection with this agreement".

35 It is plain that the first limb deals expressly with the right of the secured parties to commence proceedings in the courts of Singapore or the Singapore International Arbitration Centre ("SIAC") at their discretion. It is in effect a non-exclusive jurisdiction clause inserted for the benefit of the petitioner and other secured parties. As a consequence of this express manifestation of intention in sub-cl 14(B) of the Guarantee, the debtors are precluded from raising any jurisdictional issues apropos the courts of Singapore or SIAC in relation to any dispute arising "out of or in connection with" the Guarantee. The first limb does not purport to define the term "proceedings". I reiterate that the intention to employ the term "proceedings" as a defining term is only found in the second limb. I also note that the words "and that accordingly" have been inserted as a preface to the second limb. This can only mean that the second limb should be viewed as arising consequentially from the agreement reached in the first limb, *ie*, the non-exclusive submission to the courts of Singapore and the SIAC by, *inter alia*, the debtors.

36 Counsel for the debtors strenuously contended that bankruptcy proceedings were not embraced by sub-cl 14(B) of the Guarantee as there was no "dispute" involved or arising in these bankruptcy proceedings. Judgment had already been entered against all the debtors. It was not disputed that the debtors owed to the petitioner the adjudicated amounts. It was further asserted that bankruptcy proceedings are in essence executionary steps and not proceedings revolving around a dispute in the true sense of the word. I had no hesitation in dismissing these nebulous contentions. With respect, his contention was akin to using the tail to wag the dog.

37 The phrase "legal action or proceedings" has a wide intent and purport both in the Guarantee and in everyday usage. Steps in bankruptcy ought to be regarded as proceedings for the purposes of

the Guarantee. For instance, Pt VI of the BA that outlines court procedures in bankruptcy matters is captioned "*Proceedings* in Bankruptcy" [emphasis added]. This part of the BA *inter alia* deals with bankruptcy petitions and orders. There are indeed many other such references in both the BA and the BR. Interestingly enough, Pt VI of the BR which includes steps pertaining to the onset of bankruptcy commencing from the statutory demand is captioned "Proceedings in Bankruptcy". Indeed it bears mention that r 109 of the BR, on which the debtors rely as purportedly having stipulated a mandatory code for personal service is also to be found in this very part of the BR.

38 For completeness I should add that the word "action" is also to be viewed as having an extensive meaning and scope. For example, in *Re A Debtor* [1997] 2 WLR 57, the court held that bankruptcy proceedings to be commenced in relation to a stale default judgment was an "action" which was time-barred.

39 Counsel for the debtors additionally contended that the words "legal action or proceedings" should be narrowly interpreted, given that other provisions in the Guarantee referred to the terms "enforcement", "execution" and "attachment" as separate and distinct terms from the term "proceedings". As a consequence, he tenuously argued, the term "proceedings" was only intended to encompass civil proceedings without extending to include steps in execution such as attachments or enforcement proceedings and hence did not embrace bankruptcy proceedings. I do not agree with this. The tenor of the Guarantee suggests nothing in principle or on construction that warrants whittling down the otherwise broad intent encapsulated by the term "proceedings". The use of the word "*any*" preceding and in juxtaposition to the words "legal action or proceedings" illustrates an intention to cast a wide net to embrace every conceivable variety of legal proceeding. Indeed, the nebulous basis of this argument becomes manifest when reference is made to sub-cl 14(G) of the Guarantee which states:

> The Borrower and each of the Personal Guarantors irrevocably and generally consent in respect of any Proceedings anywhere to the giving of any relief or *the issue of any process in connection with those Proceedings including, without limitation, the making, enforcement or execution against any assets whatsoever* (irrespective of their use or intended use) [or] any order or judgment which may be made or given in those Proceedings. [emphasis added]

In addition, assuming *arguendo* that these bankruptcy proceedings are not considered to be proceedings *stricto sensu*, they are in any event incontrovertibly "legal action[s]" in connection with "Proceedings".

40 It is overly simplistic to refer to bankruptcy proceedings purely as *enforcement* or *attachment* proceedings. Bankruptcy proceedings, like winding-up proceedings, involve the initiation of a process to alter the legal status of an insolvent debtor. It is in effect a collective and representative action on behalf of all creditors to ensure equal distribution of the available assets of an insolvent debtor. In this regard, I find the observations of Millet J (as he then was) in *Re International Tin Council* [1987] 1 Ch 419 at 455–456 particularly instructive:

> But it is not necessary to decide this, for in my judgment the winding up process is plainly not a method of enforcing a judgment or arbitration award, and there is nothing in the language of Brightman LJ in *In re Lines Bros Ltd* [1983] Ch 1, which in any case is descriptive and not intended to be by way of classification, to suggest the contrary. *Far from enabling any judgment or award to be enforced, the making of a winding up order prevents it*. The great object of insolvency law, whether individual or corporate, is to protect the debtor from harassment by the creditors, and the assets from piecemeal realisation and unequal distribution as the creditors scramble for them. *Whether the petition is presented by a creditor or by the debtor, its purpose*

is to obtain an order which will preclude the creditors from enforcing any judgments or awards which they may have obtained, and substitute the right to participate in a pari passu distribution out of an insufficient fund in full satisfaction of their claims. That is not the enforcement of their judgments or awards, but the opposite.

In any case, whatever else it may be, the presentation of a winding up petition is not simply a means of enforcing a judgment or award; as Fletcher Moulton LJ said of an application for a bankruptcy notice in *In re A Bankruptcy Notice* [1907] 1 KB 478, 482: "[I]t is not a method of enforcing a judgment. It is the commencement of proceedings of far wider effect." [emphasis added]

These observations are of similar relevance and import in the context of bankruptcy proceedings.

41 Finally, it must also be noted that the phrase "arising out of *or* in connection with [the] Agreement" has a wide and generous meaning and would in the existing context encompass matters having both a direct and indirect nexus with the Guarantee; see *Sabah Shipyard (Pakistan) Ltd v Government of the Islamic Republic of Pakistan* [2004] 3 SLR 184 at [18]. The bankruptcy proceedings commenced by the petitioner irrefutably arose "in connection with" the undertaking given by the debtors in the Guarantee.

Conclusion

42 In the circumstances there are, in fact, no meritorious grounds available to the debtors to resist these bankruptcy petitions. The debtors were plainly attempting to frustrate the petitioner's legitimate rights by raising a multitude of arid, if not fatuous, contentions in a misguided and desperate attempt to evade the consequences of failing to honour their contractual responsibilities and undertakings.

Appeals dismissed.