Tan King Hiang v United Engineers (Singapore) Pte Ltd
[2005] SGCA 32

Case Number : OM 8/2005

Decision Date : 04 July 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Choo Han Teck J; Yong Pung How CJ

Counsel Name(s) : Gopinath Pillai (Tan Peng Chin LLC) for the applicant; Andre Yeap SC and Adrian Wong (Rajah and Tann) for the respondent

Parties : Tan King Hiang — United Engineers (Singapore) Pte Ltd

Civil Procedure – Costs – Principles – Solicitors taking further steps in proceedings without obtaining Official Assignee's sanction despite client being adjudged bankrupt – Whether costs wasted due to failure of applicant's solicitors to conduct proceedings with reasonable competence and expedition – Whether applicant's solicitors personally liable for costs – Orders 59 r 8(1), 59 r 8(2) Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Insolvency Law – Bankruptcy – Bankruptcy effects – Bankrupt taking further steps in proceedings without obtaining Official Assignee's sanction – Conditional sanction subsequently granted by Official Assignee – Bankrupt failing to satisfy condition by time of hearing – Whether bankrupt competent to pursue matter – Section 131(1)(a) Bankruptcy Act (Cap 20, 2000 Rev Ed)

4 July 2005

Chao Hick Tin JA (delivering the judgment of the majority):

1 This was an application by Tan King Hiang ("TKH"), made by way of Originating Motion No 8 of 2005 ("OM 8/2005"), seeking an extension of time to file a notice of appeal against the decision given by Judith Prakash J on 30 September 2004 in Suit No 13 of 2004 ("S 13/2004"). We heard the application on 25 April 2005 and dismissed it with costs on the ground that TKH was not competent to proceed with the application. We also fixed costs at $1,500 and ordered that it be paid by the solicitors personally. These grounds are issued to explain why costs were ordered against the solicitors**.**

The background

2 In S 13/2004, United Engineers (Singapore) Pte Ltd ("UE") sued three parties, one of which was TKH, the second defendant, for conspiracy to corruptly secure contracts from UE by offering secret commissions to an employee of UE, one Lee Lip Hiong ("LLH"), the first defendant to the action. The third defendant to the action was Sin Yong Contractor Pte Ltd ("Sin Yong Ltd") which was owned by TKH and two other persons.

3 Criminal charges under s 6(*a*) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) were brought against LLH, who pleaded guilty and was convicted of ten charges, with 95 other charges taken into account. He was sentenced to 18 months' imprisonment and a fine of $364,758. In S 13/2004, UE sought the return of the secret commissions paid to LLH from the three defendants.

4 Summary judgment in favour of UE was granted by the Senior Assistant Registrar, whose judgment was upheld by Prakash J on 30 September 2004, and the latter decision was the subject of the proposed appeal.

5 TKH should have filed his notice of appeal against the decision of Prakash J within the period

of one month from the date thereof: see O 57 r 4 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). However, it was not done until 25 February 2005, a delay of some 118 days (reckoning from 30 October 2004, the date on which the notice of appeal should have been filed), when TKH applied to this court to grant him an extension of time to file the notice of appeal.

6 Pursuant to the judgment obtained in S 13/2004, UE filed a winding up petition against Sin Yong Ltd and it was granted on 12 November 2004. By a letter dated 9 November 2004, which was faxed to Prakash J on 12 November 2004, Sin Yong Ltd set out certain facts and asked the judge for advice. The letter was signed by TKH and two other directors. Quite naturally, the judge could not give any advice and the Registrar of the Supreme Court, in a reply dated 17 November 2004 and addressed to the three directors of Sin Yong Ltd, told them that they should seek advice from their own lawyers and that if they still wanted to appeal against the decision of 30 September 2004, they should seek an extension of time as the period for filing an appeal had by then expired.

7 Nothing was done by TKH until 19 January 2005 when he applied by way of Summons in Chambers No 336 of 2005 ("SIC 336/2005") to the High Court, seeking for an extension of time to file a notice of appeal against Prakash J's decision.

8 In the meantime, on the basis of the judgment, bankruptcy proceedings were instituted by UE against both TKH and LLH. On 20 January 2005, LLH was adjudged a bankrupt. However, the assistant registrar decided to adjourn the making of an order against TKH until after TKH's application, made in SIC 336/2005 for an extension of time to file a notice of appeal, had been dealt with.

9 On 2 February 2005, SIC 336/2005 came before Andrew Ang JC (as he then was) who made no order as he was of the view that the High Court had no power to grant an extension of time to file a notice of appeal out of time; it should have been made to the Court of Appeal.

10 On 25 February 2005, at about 3.00pm, TKH was adjudged a bankrupt by the assistant registrar. Later, on the same day, TKH filed the present application in OM 8/2005 to the Court of Appeal. The electronic record showed that the motion was filed at 1926 hours, although counsel for TKH said that the motion was, in fact, left with the Registry of the Supreme Court much earlier in the day.

11 However, the solicitors for TKH proceeded to serve the papers on UE's solicitors without obtaining the sanction of the Official Assignee ("OA"). It was only by 14 April 2005, some ten days before OM 8/2005 came up for hearing before the Court of Appeal, that TKH's solicitors wrote to the OA for approval to continue with the proceeding. The next day, the OA gave his conditional consent but soon qualified it further to require TKH to deposit a sum of $40,000 as the OA's security for costs in relation to the motion.

12 Up to the date of the hearing of the motion, TKH was not able to furnish the security required by the OA. The result was that TKH was incompetent to pursue the matter. The motion was accordingly dismissed by this court with costs. As TKH was already a bankrupt, an order for costs in favour of UE would give the latter very little comfort. Thus, UE's counsel asked that an order on costs be made against the solicitors personally.

13 Order 59 r 8(1)(*c*) of the Rules of Court provides that:

> Subject to this Rule, where it appears to the Court that costs *have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition*, the Court may make against any solicitor whom it

considers to be responsible (whether personally or through an employee or agent) an order directing the solicitor personally to indemnify such other parties against costs payable by them. [emphasis added]

14 For the purposes of the present matter, the issue which we had to address was whether costs had been wasted due to the failure of TKH's solicitors to conduct proceedings "with reasonable competence and expedition". This test is different from that prescribed under the earlier rules (pre-1991) which was that the costs were incurred "improperly or without reasonable cause or wasted by undue delay or by any other misconduct or default". Thus, under the previous rules, some element of fault must be present before costs could be awarded against the solicitor personally. It would appear that under the previous rules a high degree of impropriety was required to be established before the solicitor should be made personally responsible for costs: see Pinsler, *Singapore Court Practice 2003* (LexisNexis, 2002) para 59/8/1. Under the present rules there are no references to "misconduct or default".

15 The rationale for the provision in O 59 r 8(1) seems to us to be based essentially on the considerations that:

(a) the law imposes a duty on solicitors to exercise reasonable care and skill in conducting their clients' affairs although an advocate enjoys immunity from claims for negligence by his clients in respect of his conduct and management of a case in court and the pre-trial work immediately connected with it; and

(b) a litigant should not be financially prejudiced by the unjustifiable conduct of litigation by his opponent or his opponent's solicitor.

16 In *Ho Kon Kim v Lim Gek Kim Betsy* [2001] 4 SLR 340 at [58], this court had reaffirmed the correctness of the three-stage test conceived in *In re a Barrister (Wasted Costs Order) (No 1 of 1991)* [1993] QB 293 at 301 and enunciated in *Ridehalgh v Horsefield* [1994] Ch 205 ("*Ridehalgh*") at 231 as to how the jurisdiction of the court under O 59 r 8(1) should be exercised:

(1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently? (2) If so, did such conduct cause the applicant to incur unnecessary costs? (3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

17 In England, the applicable rule (O 62 r 11 of the Rules of the Supreme Court) between 1986 and 1991 was *in pari materia* with our O 59 r 8(1). However, in 1991, the English rule was amended to supplement s 51 of the Supreme Court Act 1981 (c 54). While the wording of the amended O 62 r 11 omits any reference to the words "improper", "unreasonable" and "negligent" found in its unamended version, it does make reference to s 51 which provides that wasted costs may be ordered against the lawyer responsible for the waste and the term "wasted costs" has been defined to mean, *inter alia*, costs incurred by a party "as a result of any improper, unreasonable or negligent act or omission" on the part of the lawyer concerned. Hence, despite the recent introduction of the UK Civil Procedure Rules in 2001, English cases that interpret s 51 may still be helpful.

18 In *Ridehalgh*, the English Court of Appeal had the occasion to consider the meaning and scope of the three terms "improper", "unreasonable" and "negligent". While we acknowledge that such terms are, by their very nature, not amenable to precise definition, the court there did provide some very useful guidelines. Sir Thomas Bingham MR, delivering the judgment of the court, said (at 232–233):

> The adjective ["improper"] covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
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> … The expression ["unreasonable"] aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.
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> ...
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> [The term] "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

19 We should hasten to add that the court in *Ridehalgh* did not think that these three terms were mutually exclusive. It explained the overlap as follows (at 233):

> Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended.

20 However, as a word of caution, a solicitor should not be held to have acted improperly or unreasonably simply because he acted for a client who has a bad case. The role of a solicitor is to present the case for the client and it is for the judge to adjudicate upon it. It would be different if a solicitor should give his assistance to proceedings which are an abuse of the process. While the line between these two situations could be fine, it should not, in reality, be too difficult to determine on which side of the line the case falls and if there is any doubt about it, the court should give the benefit of the doubt to the solicitor: see *Ridehalgh* at 234.

21 Reverting to the present case, as we have mentioned at [14] above, we need only be concerned with that part of O 59 r 8(1) touching on costs wasted on account of the failure on the part of the solicitors to "conduct proceedings with reasonable competence and expedition". While the concept of "reasonable competence" need not in every instance imply that where reasonable competence is not demonstrated there will be negligence, in most cases it will probably be so.

22 The solicitor, Mr Gopinath Pillai, acting for TKH, was present before the assistant registrar when the order was made adjudicating TKH a bankrupt. Thus, he was fully aware that his client was a bankrupt. Under s 131(1)(*a*) of the Bankruptcy Act (Cap 20, 2000 Rev Ed), a bankrupt "shall be incompetent to maintain any action, other than an action for damages in respect of an injury to his person, without the previous sanction of the Official Assignee".

23 Of course, it does not mean that all pending actions of a party who has become a bankrupt will lapse or abate on that account or that that the bankrupt is required to withdraw the actions pending the obtaining of sanction from the OA: see *Richland Trade & Development Sdn Bhd v United Malayan Banking Corp Bhd* [1996] 4 MLJ 233 at 242. What that party cannot do without such a

sanction is to take any further steps in the proceeding. Upon a person being adjudicated a bankrupt, his estate, including causes of action, vests in the OA.

24 Therefore, it was essential, in order for TKH to proceed with the application in the present motion, that his solicitors should have applied to the OA for the sanction and only upon receipt of the sanction should TKH and his solicitors proceed to take further steps in the proceedings. Even accepting Mr Gopinath Pillai's version of the events, that he had filed the motion papers with the Registry some hours before TKH was made a bankrupt, once he knew of the bankruptcy order made against TKH, he should not have taken any further steps in relation to the motion without first obtaining the sanction of the OA. The solicitor should have realised that if the motion should fail, UE would not be able to recover its costs from TKH, the latter being a bankrupt.

25 TKH's solicitors had failed to apply for any sanction until 14 April 2005 and even then they did not copy their letter to UE's solicitors. Although the OA replied the following day that he had no objection to TKH's solicitors appealing against the judgment rendered on 30 September 2004 with a condition that one Mr Tan See Hion would bear "all the legal fees and disbursements incurred on the matter", the OA had, subsequently on 18 April 2005, qualified his earlier consent. Pursuant to UE's solicitors' letter of reminder that the OA could be made personally responsible for the costs ordered against a bankrupt, the OA required, in furtherance to the condition of his consent, that Tan See Hion put up security for costs in the sum of $40,000 by way of a banker's guarantee. This precondition to the consent not having been fulfilled, there was thus no consent for TKH to proceed with OM 8/2005.

26 TKH's solicitors sought to shift the blame to UE's solicitors on the ground that the latter had not previously raised the question of obtaining sanction from the OA. We did not think there was any merit in this point. Under s 131 of the Bankruptcy Act, the party who is rendered incompetent is the party who is made a bankrupt. It is thus the bankrupt's duty, and in turn his solicitors' duty, to obtain the necessary sanction from the OA. We did not see how TKH, and his solicitors, could justifiably turn the tables on the respondent and say "Why did you not query me earlier?" In fact, the query did not come from UE or its solicitors, but another source. Since the work done in relation to the motion had gone to waste, it was only fair, since TKH could not pay, that as between UE's and TKH's solicitors, the latter should bear the loss.

27 Neither did we think the fact that the OA modified his conditional consent by his second letter of 18 April 2005 lessened the responsibility of TKH's solicitors. No further steps were taken by either party during the three-day period between 15 and 18 April 2005 (a weekend). It was only on 21 April 2005 that the solicitors of both parties filed their respective skeletal arguments and bundles of authorities. TKH's solicitors did not at any time, on or after 18 April 2005, notify UE's solicitors whether the modified condition imposed by the OA would be satisfied. Work had to be carried on by UE's solicitors in preparation for the motion. The position would be different if at the very commencement of the motion the solicitors had sought and obtained the consent of the OA and the OA had subsequently withdrawn his consent or imposed a more onerous condition which the bankrupt, or those people who were helping him, could not meet.

28 There are clear precedents which show that a solicitor could be held personally liable for costs where the party for whom he acted was incapacitated or incompetent, even in a case where the solicitor was unaware of the disability of the client. In *Yonge v Toynbee* [1910] 1 KB 215, a solicitor entered a defence to an action for a client without realising that the client had already been certified as being of unsound mind. It was sometime later that the defendant's incapacity came to light. The master struck out the appearance and other steps taken by the defendant but refused to award costs against the defendant's solicitor personally. The judge affirmed that decision. The English Court of Appeal reversed that decision on the ground that the solicitor in so acting for the defendant

had impliedly warranted that he had authority to do so and should be made personally liable to pay for the plaintiff's costs.

29 In *Simmons v Liberal Opinion Limited* [1911] 1 KB 966, the plaintiff took out an action for an alleged libel in a newspaper purportedly published by the defendant company. The solicitor entered appearance on behalf of the defendant. It later transpired that the defendant was never incorporated nor in existence. The solicitor for the defendant company was ordered to pay for all the costs thrown away following the appearance entered. Fletcher Moulton LJ, at 972, reiterated the principle that a solicitor who entered an appearance warranted that he had the authority from his client to do so.

30 Two Malaysian cases come even closer to the facts of the present case. First is the case of *Amos William Dawe v Development & Commercial Bank (Ltd) Berhad* [1981] 1 MLJ 230 ("*Amos Dawe*") where the defendant was made a bankrupt in Singapore (and which by reciprocal arrangement was recognised in Malaysia) even before the action was instituted. Summary judgment was obtained by the plaintiff and the defendant appealed, including making an application to adduce further evidence. Later, it was discovered that the defendant was a bankrupt. The plaintiff conceded that the judgment obtained against the defendant was of no effect. It was established that the defendant's then solicitors handling the case only knew of the fact of his bankruptcy on 12 September 1980. The Malaysian Federal Court struck out the appeal and ordered that all costs incurred after 12 September 1980 be borne personally by the solicitors.

31 The second Malaysian case is *Mohd Yusof bin Awang v Malayan Banking Bhd* [1995] 4 MLJ 493 ("*Mohd Yusof*"). That case went further than the ruling in *Amos Dawe*. There, the first plaintiff, who was a bankrupt, a fact not known to his solicitors, started an action with another against the two defendants. Following *Yonge v Toynbee* ([28] *supra*), Arifin Zakaria J held that, by taking out the action, the solicitor was deemed to have warranted that he had the authority to act on behalf of the first plaintiff. The solicitor was ordered to bear the costs which were due from the first plaintiff to the second defendant.

32 In our view, TKH's solicitors were negligent (in the non-technical sense: see [18] above), when they continued to take steps in relation to OM 8/2005 without first obtaining the sanction of the OA. The situation came within the scope of O 59 r 8(1) where costs have been wasted by the failure of the solicitors to conduct the proceedings with reasonable competence. Bankruptcy gives rise to disability and this is a basic principle of law which every reasonably competent solicitor would have known. In this case, there was a lapse on the part of the solicitors acting for TKH.

33 Finally, we would add a word on a point of procedure. Order 59 r 8(2) of the Rules of Court provides that:

> No order under this Rule shall be made against a solicitor unless he has been given a reasonable opportunity to appear before the Court and show cause why the order should not be made …

What is required is that the solicitor should be given a reasonable opportunity to show cause before he can be made personally liable for costs. There is no prescribed formality. The procedure to be applied in each case must depend on its circumstances.

34 In *Mohd Yusof*, in answer to the argument that no notice to show cause was given to the defaulting solicitor, Arifin J said at 497:

> In my view, the party concerned may in appropriate cases, apply for such an order at the close of the proceedings and the court may then ask the advocate and solicitor to show cause why

such an order should not be made against him. In the case of *Mitra & Co v Thevar & Anor* [1960] MLJ 79, Hepworth J without any application being made called upon the appellant there and then to show cause under O 65 r 11 why the costs incurred by the plaintiff there should not be disallowed as between solicitor and client and also why he should not repay to his client the costs awarded to the defendant in the action. On appeal, even though the order of Hepworth J against the advocate and solicitor was reversed, Thomson CJ noted with approval the procedure adopted by Hepworth J. Further support may be found in what was said by Scott LJ in *Brendon v Spiro* [1938] 1 KB 176 at p 192:

> But in my view there is no rule of procedure which affects the judge's jurisdiction. The summary jurisdiction which he possessed over the solicitors as officers of the court is, for the reasons I have already given, clear. I think it was for him to exercise his own discretion as to the appropriate procedure, taking care that the solicitor[s], who were in the position of respondents to the application, should have due notice of what the claim was against them, and sufficient opportunity to meet the claim in any way that was reasonably necessary.

This jurisdiction of the court is exercisable summarily upon application by originating summons, or motion or summons, or at the hearing of the proceedings. (See 44 *Halsbury[']s] Laws of England* (4th Ed) para 252).

From the above authorities it may be gleaned that the court's jurisdiction over the matter is summary in nature and may even be made at the hearing of the proceedings itself, as it was done in the present case. The court, however, in exercising such jurisdiction should ensure that the advocate and solicitor against whom the application was made had due notice of the claim and he had sufficient opportunity to meet the claim as is reasonably necessary.

35 The facts in this case were straightforward. Mr Gopinath Pillai knew the full facts of the case as he was the solicitor in charge of it. He was present before the court and was given an opportunity to explain himself. As indicated in [26] above, he even sought to lessen his own default by stating that the opposing solicitor did not raise the question of obtaining sanction from the OA earlier. It was after hearing both parties that we made the order.

Choo Han Teck J (delivering the dissenting judgment):

36 I have read the judgment of my learned brother, Chao JA, in respect of the order of costs made against the applicant's solicitors personally and now set out below my reasons for my disagreement with it. The applicant was one of three defendants in Suit No 13 of 2004. There, the plaintiff, now the respondent, succeeded in its action against all three defendants. The applicant did not appeal within the time permitted for appeal and, by this motion, sought leave of this court to file his notice of appeal out of time. The applicant was, however, adjudicated a bankrupt at 3.00pm on the same day that this motion was filed, that is, 25 February 2005. There is some uncertainty as to the precise time the application was filed and whether it was before or after the bankruptcy adjudication order, bearing in mind that if the applicant left the papers with the court's registry, he may not know when they were actually filed electronically, which, in this case, was recorded as 7.26pm. The facts as to the sequence were not clearly established, but, for the reasons set out below, were not crucial.

37 The sanction or consent of the Official Assignee was not obtained until 15 April 2005. This motion was scheduled for hearing on 25 April 2005. After the applicant's solicitors were alerted to the omission in obtaining the Official Assignee's consent, they wrote to the Official Assignee on 15 April 2005 and received a reply on the same day stating:

> We write to inform you that the Official Assignee has no objection to your acting for the insolvent person in the appeal against the Judgment in Suit No 13/2004C entered against him provided that Mr Tan See Hion bears all the legal fees and disbursements incurred in this matter.

The respondent's solicitors then wrote twice on 18 April 2005 to the Official Assignee, the first time asking for an undertaking as to costs, and the second telling him that "there [is] a long line of authorities stating that the Official Assignee shall be personally liable for any costs ordered against a bankrupt". Consequently, the Official Assignee wrote on the same day to the applicant's solicitors asking that the applicant provide security for costs by way of a cashier's order or a banker's guarantee in the sum of $40,000, a figure proposed by the respondent's solicitors. A second letter was sent by the Official Assignee on 21 April 2005 asking that payment of the security be made by 4.00pm the next day (22 April 2005). At the hearing on 25 April 2005, the solicitors for the applicant informed the court that no payment had been made at the close of business on Friday 22 April 2005, and thus, the applicant would not be able to proceed because the Official Assignee's consent was deemed withdrawn. The motion was consequently struck out. No issue arose from that order. But counsel for the respondent then asked that costs be ordered against the applicant's solicitors personally, citing, as reasons, the applicant's delay in obtaining the consent of the Official Assignee and the fact that an order of costs against the applicant would unlikely be satisfied by reason of his bankruptcy. Costs of $1,500 were ordered by this court against the applicant's solicitors personally. I set out below my reasons, not against the award of costs or the quantum, but only against the narrow issue of making the order of costs against the solicitors personally in this case.

38 The failure to obtain the consent of the Official Assignee is fatal to any application by a bankrupt. By the same token, the consent, once given, permits the bankrupt to proceed. In this case, the Official Assignee initially granted an unconditional sanction to the applicant, and only imposed a condition after the respondent's solicitors gave notice that it would look to the Official Assignee for costs personally. The condition was not imposed on the applicant's solicitors but on the applicant himself; so when the condition was not satisfied, there was no reason to hold the applicant's solicitors personally responsible. What could the solicitors for the applicant have done in the circumstances? The fact that the Official Assignee had given consent is significant. He was entitled to refuse to grant his sanction on the very ground that the respondent's solicitors complained of, namely, that the request for sanction was made late. It is arguable whether a one and a half months' delay might be considered late (the full account was not before the court), but that question was not asked. Once the Official Assignee has given his sanction, any question arising from the prejudice, if any, to the respondent as to costs, must be directed not at the delay in seeking the Official Assignee's sanction, but at the granting of the sanction. It is also undisputed that until the morning of the hearing on 25 April 2005, the respondent's solicitors were looking to the Official Assignee personally for costs. It would thus be wrong to focus on the question of whether the solicitor knew that his client was a bankrupt at the time he filed the motion for the simple reason that had the applicant provided the security required by the Official Assignee, there would have been no question of an order of costs against the solicitor personally.

39 The authorities cited in support of the award of costs against the solicitor personally in the majority judgment, namely the Malaysian cases of *Amos William Dawe v Development & Commercial Bank (Ltd) Berhad* [1981] 1 MLJ 230, and *Mohd Yusof bin Awang v Malayan Banking Bhd* [1995] 4 MLJ 493 ("*Mohd Yusof*") differed significantly in that in those cases the Official Assignee's consent was never obtained at all. The principle that the Malaysian courts applied was the principle enunciated in the English authorities, notably, *Yonge v Toynbee* [1910] 1 KB 215, that in such cases, the solicitor "is deemed to have warranted that he had the authority to act" (*per* Arifin Zakaria J in *Mohd Yusof* at 499).

40 That the abovementioned point, or any other points that the applicant's solicitors might have argued, was not fully made at the hearing may be indicative that the applicant's solicitors had not been given a reasonable opportunity to show cause under O 59 r 8(2) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) which provides that:

> No order under this Rule shall be made against a solicitor unless he has been given a reasonable opportunity to appear before the Court and show cause why the order should not be made, except where any proceedings in Court or in Chambers cannot conveniently proceed, and fails or is adjourned without useful progress being made —
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> (*a*) because of the failure of the solicitor to attend in person or by a proper representative; or
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> (*b*) because of the failure of the solicitor to deliver any document for the use of the Court which ought to have been delivered or to be prepared with any proper evidence or account or otherwise to proceed.

4 1 *Mohd Yusof* was a case in which the court appeared to have relied on the inherent jurisdiction of the court when it approved the passage from Scott LJ's judgment in *Brendon v Spiro* [1938] 1 KB 176, in which Scott J held, at 192:

> But in my view there is no rule of procedure which affects the judge's jurisdiction. The summary jurisdiction which he possessed over the solicitors as officers of the Court is, for the reasons I have already given, clear. I think it was for him to exercise his own discretion as to the appropriate procedure, taking care that the solicitors, who were in the position of respondents to the application, should have due notice of what the claim was against them, and sufficient opportunity to meet the claim in any way that was reasonably necessary.

There appears to be no Malaysian or English equivalent to our O 59 r 8(2). Nonetheless, the basic necessity of giving notice of the case and providing reasonable opportunity to respond have been fully endorsed in both of those jurisdictions. What constitutes reasonable opportunity within the meaning of O 59 r 8(2) will depend on the individual circumstances of the case. It is not clear what form the application against the solicitors in *Mohd Yusof* took, or how much time was given for them to respond.

42 In the present case, I do not think that the mere fact that the solicitor was present when the application for costs against him personally was made (for the first time) constituted adequate notice. If no other form of prior notice was given, as it appears in this case, the presence of the applicant's solicitor in court only made the ambush by the respondent's counsel possible. Had the former not been present in court, a notice of the application for costs against him personally would have to be served, setting out the grounds and under what limb of O 59 r 8(1) the application was made. The notice would also have to state whether, and how, in the words of that rule, costs had been "incurred unreasonably or improperly" or whether costs had been "wasted by failure to conduct proceedings with reasonable competence and expedition". These are two separate grounds. Unreasonable and improper conduct is not the same as a failure to conduct proceedings with competence and expedition, although they may share some common features such as doing something which reasonably ought not to be done, or failing to do something which reasonably ought to be done. But even so, such act or omission alone is not normally grounds for making the solicitor pay costs personally. Any principle in respect of which such orders might be made must be broad and capable of general application without leading the court to constantly draw distinctions on the facts so as to avoid the obvious harshness of the rule. It is unfortunate that the word "*negligent*" had been

slipped into the interpretation of O 59 r 8(1) when that word was not part of our statutory language. Consequently, the notion of negligence in an "untechnical way" had to be introduced to distinguish this negligence from the common law negligence when in substance, it was just another way of expressing "a failure to act with the *competence reasonably* to be expected of ordinary members of the profession" [emphasis added] *per* Sir Thomas Bingham MR in *Ridehalgh v Horsefield* [1994] Ch 205 at 233.

43 Hence, it was important for the applicant's solicitors to know precisely what conduct was complained of. Unfortunately, it was not clear in this case. If the complaint was that the solicitors had acted without the sanction of the Official Assignee, then, as explained above, that omission had been corrected when the Official Assignee gave his consent. In the circumstances of the present case, it was unclear what the applicant's solicitors were obliged to have done. In other words, what could they have done to avert the situation of their client (or their client's guarantor) not being able to provide the security subsequently imposed by the Official Assignee that was required to be complied with on a day's notice? What, in the present circumstances, was the unreasonable or improper conduct of the applicant's solicitors? If, on the other hand, they were penalised for wasted costs (the second limb of r 8(1)), it was not shown in what way the applicant's solicitors had failed to conduct the proceedings with reasonable competence or expedition. If the complaint was that the applicant's solicitors were "negligent" in an "untechnical way" – that was not in fact the complaint – then the solicitors ought to have been given time to argue that there is no such concept under O 59 r 8(1). If the complaint was that they did not apply for the Official Assignee's consent with reasonable expedition, the fact that such consent was in fact given, meant that the Official Assignee did not consider that to be an issue. The Official Assignee was expected to exercise his discretion properly and judiciously. No one is deprived of his legal rights just because he has become a bankrupt, and it is not only the duty of the Official Assignee to see that a bankrupt does not make unreasonable requests to commence or maintain proceedings, it is also the Official Assignee's duty to see that a bankrupt is not prejudiced by his bankruptcy from pursuing his lawful claims. The fact that the court might ultimately dismiss his claim is not a sufficient ground for holding that the Official Assignee was wrong to have given his consent. These are two separate levels of inquiry. The Official Assignee must not be deterred from his responsibility merely by the prospects of costs being awarded against him, which, in any event, would not normally be done unless strong evidence exists to show that he clearly ought not to have given his consent. Similarly, a solicitor must not be deterred from his duty to advance his client's case, which might be the case if the consent of the Official Assignee is not regarded as sufficient to absolve him from any potential personal liability for costs should the consent be subsequently withdrawn.

44 The procedure for making an order of costs against a solicitor personally as envisaged in O 59 r 8(2) requires the party seeking such an order to adduce strong *prima facie* evidence to justify making the solicitor concerned show cause as to why such an order should not be made. The solicitor in question is entitled to challenge this application. But should the court agree that there is strong *prima facie* evidence, then, and only then, would the solicitor in question be asked to show cause (and be given a reasonable opportunity to do so). In that event, the burden of proof shifts to the solicitor in question to show cause. The gist of this procedure as extracted from the authorities cited is set out at para 59/8/3 of *Singapore Civil Procedure 2003* (Sweet & Maxwell, 2003) as follows:

> Before making an order that a solicitor be personally liable for costs, the court may, if it thinks fit, refer the matter (except in the case of undue delay in the drawing up of, or in any proceedings under, any order or judgment which the registrar has reported to the court) to the registrar for inquiry and report, and the court may direct the solicitor in the first place to show cause before the registrar. The court may not make an order that a solicitor be personally liable for costs unless the solicitor has been given a reasonable opportunity to appear before the court and show

cause why the order should not be made. In making a show cause order of this nature, the court has to balance two important public interests. The first is that solicitors should not be deterred from pursuing their clients' interest by fear of incurring a personal liability to their clients' opponents. The second is that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their or their opponents' solicitors: *Ridehalgh v. Horsefield & Anor.* [1994] Ch. 205, CA (England), approved by the Court of Appeal in *Tang Liang Hong v. Lee Kuan Yew & Anor. and other appeals* [1998] 1 S.L.R. 97, CA. …

45 A show cause procedure is therefore different from an application for costs, which normally follows the event, unless the circumstances justify a different order as to costs. An order against a solicitor to pay costs personally does not normally follow the event and is not a parcel of any circumstances concerning the merits of the litigant's case. It is an accusation against a solicitor which is connected, but only in a collateral sense, to the merits of the litigant's case. Hence, the importance of the need for a reasonable opportunity to show cause. In the present instance, the application by the respondent's solicitors was a mangled version in which the main arguments revolved around the two questions: namely, whether the applicant's solicitors knew that their client was a bankrupt when the motion was filed, and secondly, whether the respondent's solicitors' letter to the Official Assignee (asking for security for costs) was copied to the applicant's solicitors. The critical question as to the applicant's solicitors' purported unreasonable or improper conduct, or their incompetence or failure to act expeditiously resulting in wasted costs, was not engaged. The importance of a strict adherence to the rules lies in the universal application of those rules – in all cases – so that (and especially in complicated cases) the solicitors concerned may be given a fair and reasonable opportunity to answer the allegations made against them.

46 For these reasons, I am of the opinion that the order for costs should not have been made against the applicant's solicitors personally.