

Singapore High Court Outlines Factors for Granting Permission to Continue or Commence Proceedings Against Bankrupt Individuals

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The General Division of the Singapore High Court (**High Court**) has issued guidance on the factors relevant to the exercise of the court's discretion to grant permission to continue or commence proceedings against bankrupt individuals under section 327(1)(c)(ii) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (**IRDA**): *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd and another* [2022] SGHC 271.

Our Comments

In this case, the High Court granted the plaintiff's application for permission to continue the suit against the bankrupt second defendant.

In determining an application as such, the court is guided by the principle that the liquidator or the trustee in bankruptcy's task of gathering in and managing the bankrupt's assets should not be hindered by a scramble of creditors going after the bankrupt or his assets and thus potentially violating the *pari passu* principle of distribution.

Before any applicant applies for permission to continue court proceedings against insolvent companies or bankrupt, he/she must be alive to the guiding principle above and the factors relevant to the court's exercise of discretion as set out in this case.

Our Aw Wen Ni acted for the successful plaintiff before the High Court.

This update examines the High Court's decision.

Background

The first defendant was an investment holding company incorporated in Singapore. Investors could invest in the first defendant by subscribing to its preference shares. The second defendant was a director and an authorised representative of the first defendant.

The plaintiff-investor brought a High Court suit (**Suit**) against the defendants, alleging misrepresentation and/or unlawful means conspiracy and claiming that he had invested in the first defendant in reliance of and having been induced to do so by the second defendant's representations (**Misrepresentations**).

The second defendant was subsequently declared bankrupt and the High Court also ordered the first defendant to be wound up.

The plaintiff sought permission to continue the Suit against the second defendant pursuant to section 327(1)(c)(ii) of IRDA (**section 327(1)(c)(ii)**).

The High Court's Decision

The High Court granted the plaintiff's application and clarified the factors relevant to the exercise of the court's discretion to grant permission to continue or commence proceedings against bankrupt individuals under section 327(1)(c)(ii).

Policy considerations underpinning section 327(1)(c)(ii)

The High Court noted that section 327(1)(c) of the IRDA (and its predecessor provision, section 76(i)(c)(ii) of the Bankruptcy Act) was intended to alleviate the liquidator's or administrator's task of gathering in and managing the bankrupt's assets by preventing a scramble of creditors going after the bankrupt or his assets and thus potentially violating the *pari passu* principle of distribution. This was why the court was conferred the discretion, where appropriate, to grant leave for legal proceedings to continue and to impose conditions to manage such proceedings.

Following a review of jurisprudence from the United Kingdom and Australia, the High Court observed that the policy underlying section 327(1)(c)(ii) (involving insolvent individuals) is the same as that which applies to the grant of permission to continue or commence proceedings against insolvent companies, i.e., the task of both the liquidator or the trustee in bankruptcy is to collect the assets of the insolvent person and distribute them fairly among legitimate creditors in as efficient, expeditious and cost-effective a manner as possible after payment of secured and preferential debts.

Factors relevant to exercise of discretion under section 327(1)(c)(ii)

Taking the view that the factors relevant to the exercise of discretion to grant permission to continue or commence proceedings against insolvent companies apply equally to the exercise of such discretion in the context of bankrupt individuals, the High Court:

- (a) Adopted as a starting point the factors outlined in an earlier High Court decision in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671 relating to the continuation or commencement of proceedings against companies being wound up; and
- (b) Supplemented them with factors identified by the plaintiff and from foreign jurisprudence.

It found that the factors that the court should consider in the exercise of its discretion to grant permission for the continuation or commencement of proceedings against a bankrupt under section 327(1)(c)(ii) are as follows:

- (a) **Timing of the application for permission:** The stage to which proceedings have progressed, as well as any delay in bringing the application for permission and whether pre-trial procedures are likely to be required or beneficial, are relevant factors. The closer to the date of bankruptcy the application is made, the more likely a court will infer that the application was made to snatch at the bankrupt's assets. However, early application does not, by itself, assure the grant of permission. Contrariwise, mere delay by itself would also not necessarily prevent leave from being granted. The court will consider what prejudice is caused to any party by reason of the delay.

- (b) **Nature of the claim:** The claim must be of a type which should proceed by action rather than through the proofing procedure in bankruptcy. The court will consider whether it may be preferable for legal and factual issues to be resolved at a hearing instead of a proof of debt. Leave is also more appropriate where the proceedings proposed involve other parties and the bankrupt may need to become a party.
- (c) **Existing remedies:** A court is unlikely to grant permission to continue or commence proceedings against the bankrupt, if the claim *can* be dealt with adequately within the bankruptcy regime. Also pertinent are whether the company's assets will be dissipated by attending to the claim and the reasons for wanting to proceed outside the insolvency scheme.
- (d) **Merits of the claim:** The appropriate standard for assessing the merits of the proposed action is "a serious question to be tried", i.e., whether on the face of the matter there is no arguable claim and permission should be refused.
- (e) **Existence of prejudice to creditors or to the orderly administration of the bankruptcy:** If the nature of the claim is such that if prosecuted successfully, it would prejudice the claims of the other legitimate creditors in contravention of the statutorily prescribed *pari passu* treatment for all unsecured creditors, the court should not grant permission. The court will examine every application to ensure that a party is not seeking to avail itself of a benefit (i.e., unfair commercial advantages such as jumping the ranking of the priority of creditors) that would not otherwise be available through the conventional winding-up procedure or bankruptcy regime. Whether the trustee in bankruptcy opposes the grant of leave will also be a relevant consideration.
- (f) **Other miscellaneous factors** include a potential avalanche of litigation being unleashed by the grant of permission; the proportionality of the cost of the proceedings to the bankrupt's resources; and the views of the majority creditors.

Application to the facts

The High Court granted the plaintiff permission to continue proceedings against the second defendant, finding that:

- (a) **Timing of the proposed action:** The Suit, commenced more than two years before the second defendant applied for bankruptcy, was already proceeding towards trial and at an advanced stage. Thus, the Suit was not filed in a scramble to reach the second defendant's assets and obtain an unfair advantage.
- (b) **Nature of the claim:** The Suit would not offend the *pari passu* principle of distribution in bankruptcy or prevent the trustee in bankruptcy from effectively adhering to this principle because the second defendant had stated that he had no preferential or secured creditors. In addition, the trustee in bankruptcy had not objected to the present application. Further, the second defendant is a necessary party to the Suit, since the key factual issue in dispute is whether the second defendant made the Misrepresentations and did so on behalf of the first defendant.

- (c) **Existence of remedies within the bankruptcy regime:** The issues in dispute were more properly determined by a court of law with the benefit of cross-examination, instead of the trustee in bankruptcy. Although the plaintiff could file a proof of debt, the outcome of the Suit would turn on key factual issues such as the veracity of his account of the Misrepresentations. These are issues that would be better dealt with by a court of law, with the benefit of cross-examination.
- (d) **Merits of the claim:** The Suit raised serious questions to be tried and could not be described as being doomed to fail from the start.
- (e) **Miscellaneous factors:** None militated against the grant of permission.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following Partner:



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