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Leave to Commence Bankruptcy Against Guarantor

Hong Leong Bank Berhad v Ong Moon Huat

| by Edmund Yee Chung Hoong |

Under the Insolvency Act 1967, a creditor is required to obtain prior leave of court to commence bankruptcy proceedings against a

^[1] guarantor. For this, the Act requires the creditor to satisfy the court that he has:

“... exhausted all modes of execution and enforcement to recover ^[2] debts owed to him by the debtor”.

The term *modes of execution and enforcement* is defined in the Act to include seizure and sale, judgment debtor summon, garnishment and

^[3] bankruptcy or winding up proceedings. The term *debtor*, however, is not defined in the Act.

In *Ong Moon Huat*, the Court of Appeal had to decide on two issues:

- (a) Whether the word *debtor* refers to the principal debtor or to both the principal debtor and the guarantor; and
- (b) When the application for leave should be made.

The court held that the word *debtor* refers only to the principal debtor. Therefore, once a creditor has exhausted all the modes of execution and enforcement against the principal debtor, he may proceed to apply for leave without having to show that similar steps had been taken against the guarantor.

On the second issue, the court held that the application for leave may be made at any time before presentation of the creditor's petition. The court also made it clear that such leave is not required for the issuance of the bankruptcy notice.

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The abridged grounds of judgment of the Court of Appeal may be viewed [here](#).

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If you have any queries on bankruptcy, please contact the author or his team partner [Mong Chung Seng](mailto:mcs@lh-ag.com) (mcs@lh-ag.com).

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- [\[1\]](#) Section 5(3)(b)
[\[2\]](#) Section 5(4)
[\[3\]](#) Section 5(6)