



A summary of the Federal Court’s decision in *Affin Bank Berhad (Formerly Known As Perwira Affin Bank Berhad) v Abu Bakar Ismail* [Federal Court Civil Appeal No. 03(f)-05-10/2017 (W)]

*Receiving Orders and Adjudication Orders cannot be annulled based on new arguments regarding the debtor’s ability to pay his debts or subsequent change of circumstances*

*The solvency of the debtor must necessarily relate to his ability to pay his debts as they become due, as at the time of the hearing of the creditor’s petition*

#### BACKGROUND FACTS

Affin Bank Berhad (the Appellant) [**Affin Bank**] had obtained a summary judgment against Abu Bakar Ismail (the Respondent) [**Abu Bakar**] on 8.7.2004.

Affin Bank proceeded to enforce the summary judgment by way of bankruptcy. Abu Bakar resisted the bankruptcy proceedings and failed in the High Court and the Court of Appeal.

Subsequent to the Court of Appeal’s decision, a Receiving Order and Adjudication Order (“**AORO**”) was recorded against Abu Bakar on 17.1.2013.

#### *First annulment application*

Abu Bakar filed an application to annul the AORO pursuant to section 105(1) of the Bankruptcy Act 1967 (“**BA 1967**”) on 16.12.2013.

The basis for Abu Bakar’s application was that he was solvent and had the means to repay his debts and therefore ought not to have been adjudged a bankrupt.

Abu Bakar had in fact obtained a Singapore Court of Appeal judgment dated 20.2.2013 in his favour and he averred that the damages awarded (if assessed) would have a value in excess of SGD\$35 million.

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The registrar of the High Court dismissed the first annulment application. On appeal, the High Court judge reversed the registrar's decision thereby allowing Abu Bakar's annulment application. Affin Bank subsequently appealed to the Court of Appeal and the Court of Appeal agreed with the registrar's decision. Accordingly, the AORO was restored.

Abu Bakar did not apply for leave to appeal to the Federal Court against the Court of Appeal's decision.

### *Second annulment application*

Abu Bakar later filed a second annulment application on the grounds that:

(i) on 13.4.2015, the Singapore High Court had assessed damages in his favour in the sum of SGD\$9,928,473.75 together with

interest at the rate of 5.33% per annum from 15.9.2009 to date of payment;

(ii) the damages was to be paid to the Director General of Insolvency Malaysia ("DGI") as his receiver; and

(iii) he had been awarded costs of SGD\$15,000.00.

### HIGH COURT'S DECISION

The registrar of the High Court allowed Abu Bakar's second annulment application and this decision was affirmed by the High Court judge. Affin Bank, dissatisfied with the decision, appealed to the Court of Appeal.

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### COURT OF APPEAL'S DECISION

The Court of Appeal dismissed Affin Bank's appeal on the basis that:<sup>1</sup>

(i) the AORO was rightly made on 17.1.2012 as at that material time, there was no evidence of the debtor's solvency or ability to pay;

(ii) when the Singapore judgment was delivered on 20.2.2013, the debtor had a right to apply under section 105(1) of the BA 1967 as there was sufficient evidence to show that he was solvent;

(iii) there was a change of circumstances as the DGI was not able to assess damages under the

Singapore judgment since 17.1.2013; and

(iv) since there was a change of circumstances, *res judicata* does not apply.

Affin Bank subsequently applied for leave to appeal against the Court of Appeal's decision.

### FEDERAL COURT'S DECISION

Affin Bank obtained leave to appeal to the Federal Court on *inter alia* the following questions of law:<sup>2</sup>

(i) Where the Court had already found that the adjudication and receiving orders had been rightly

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<sup>1</sup> *Affin Bank Bhd (previously known as Perwira Affin Bank Bhd) v Abu Bakar bin Ismail* [2018] 2 MLJ 88, at paragraph 13

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<sup>2</sup> *Affin Bank Berhad (formerly known as Perwira Affin Bank Berhad) v Abu Bakar bin Ismail* [2020] MLJU 244, at paragraph 12



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made, whether the Court may subsequently annul the adjudication and receiving orders under section 105(1) of the BA 1967, on the basis that such orders “ought not to have been made”, based on new arguments regarding the debtor’s ability to pay his debts or subsequent change of circumstances?

(ii) Whether the solvency of a debtor, under section 6(3) read with section 105(1) of the BA 1967, must necessarily relate to his ability to pay his debts as they became due, as at the time of the hearing of the creditor’s petition, and not relate to his ability subsequent to the receiving and adjudication orders made.

The Federal Court, after having examined relevant authorities, answered the first leave question in the negative and second leave question in the affirmative.

The Federal Court held that the solvency of the debtor must necessarily relate to his ability to pay his debts as they become due, as at the time of the hearing of the creditor’s petition.<sup>3</sup>

Therefore, where the AORO had been rightly made, the Court cannot annul AOROs based on new arguments regarding the debtor’s ability to pay his debts or subsequent change of circumstances.<sup>4</sup>

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<sup>3</sup> *Affin Bank Berhad (formerly known as Perwira Affin Bank Berhad) v Abu Bakar bin Ismail* [2020] MLJU 244, at paragraph 47

<sup>4</sup> *Affin Bank Berhad (formerly known as Perwira Affin Bank Berhad) v Abu Bakar bin Ismail* [2020] MLJU 244, at paragraph 31

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