

SINGAPORE'S BANKRUPTCY JURISDICTION AND THE ABSCONDING DEBTOR

When businesses fail, it is not unheard of for businesspersons to abscond from the jurisdiction or to hide behind corporate vehicles, leaving debts unsatisfied. This article is concerned with the reach of Singapore's bankruptcy courts over the "absconding debtor", a person who deliberately keeps out of Singapore to avoid his creditors. The Singapore bankruptcy courts have not had much opportunity to deal with the absconding debtor. On the other hand, the English, Hong Kong, and Australian courts have interpreted their own bankruptcy jurisdiction provisions widely to address the mischief of the absconding debtors. This article will argue that their approach is consistent with our own bankruptcy legislation and may be considered by the Singapore courts in dealing with the absconding debtor.

TAY Yong Seng
MA (Oxford), BCL (Oxford);
Partner, Allen & Gledhill LLP.

Jonathan CHAN Tuan San
JD (Singapore Management University);
Associate, Allen & Gledhill LLP.

I. Introduction

1 When businesses fail, it is not uncommon for businesspersons to abscond from the jurisdiction or to hide behind corporate vehicles, leaving debts unsatisfied. This problem has become more acute in recent decades with the rise of affordable air travel and the influx of foreign businesses. This article is concerned with the reach of Singapore's bankruptcy courts over the "absconding debtor". The absconding debtor is usually a foreign national with a domicile outside Singapore. He is someone who may spend significant periods outside Singapore (and have homes overseas), but returns to Singapore for settled purposes such as business, employment or family. He may have incorporated a number of corporate vehicles, of which he is the directing mind and will, to conduct his business here. Through his corporate vehicles, the absconding debtor enters into various transactions in Singapore. When he is unable to meet those obligations, the absconding debtor keeps out of Singapore to avoid his creditors. Proceedings against the corporate vehicles yield a worthless paper judgment. Should the creditor be left without an effective remedy?

2 It is submitted that the absconding debtor should properly be within the reach of Singapore's bankruptcy jurisdiction. He should not be allowed to flee the jurisdiction to avoid bankruptcy when his business fails. England, Hong Kong, and Australia have all dealt with the absconding debtor and interpreted their own bankruptcy jurisdiction provisions to address the mischief brought by him. The Singapore bankruptcy courts have not had much opportunity to consider the approach taken by the England, Hong Kong, and Australian decisions in relation to the absconding debtor. It is submitted that such an approach is consistent with our own bankruptcy legislation and should be adopted.

II. The bankruptcy jurisdiction of the Singapore courts

3 Singapore's bankruptcy jurisdiction is set out in s 60 of the Bankruptcy Act¹ which provides, *inter alia*, that no bankruptcy application shall be made against an individual debtor unless the debtor:²

- (a) is *domiciled* in Singapore;
- (b) has *property* in Singapore; or
- (c) has, at any time within the period of one year immediately preceding the date of the making of the application —
 - (i) been *ordinarily resident* or has had a place of residence in Singapore; or
 - (ii) *carried on business* in Singapore.

[emphasis added]

There is little controversy over the jurisdiction requirements of domicile³ or property.⁴ Those two requirements are tolerably clear as there have been a number of local decisions on them.⁵ However, the absconding debtor often neither is domiciled nor possesses significant property in Singapore. Often, the creditor will be left with having to prove the other two threshold requirements against the absconding debtor: that he is “ordinarily resident” or “carried on business” in

1 Cap 20, 2009 Rev Ed.

2 A series of amendments were made to the Bankruptcy Act (Cap 20, 2009 Rev Ed) with the passing of the Bankruptcy (Amendment) Act 2015 (Act 21 of 2015) by Parliament on 14 July 2015, assented to by the President on 4 August 2015. However, no changes were made to s 60.

3 *Peters Roger May v Pinder Lillian Gek Lian* [2009] 3 SLR(R) 765 at [15]–[25]; *Algemene Bank Nederland NV v Loo Choon Yow* [1989] 1 SLR(R) 272.

4 *AmBank (M) Bhd v Yong Kim Yoong Raymond* [2009] 2 SLR(R) 659.

5 *AmBank (M) Bhd v Yong Kim Yoong Raymond* [2009] 2 SLR(R) 659.

Singapore. However, there does not appear to be any reported decision dealing with the scope of either requirement in the specific context of bankruptcy. It is submitted that these two requirements are capable of being, and should be, read widely to catch the mischief of the absconding debtor, having regard to English, Australian, and Hong Kong jurisprudence.

III. “Ordinarily resident”

4 If the absconding debtor travels into Singapore on a regular basis, but does not otherwise keep a permanent home in Singapore, can jurisdiction be founded on the basis that he is “ordinarily resident” in Singapore under s 60(1)(c)(i) of the Bankruptcy Act?

A. *Singapore*

(1) “Settled purpose”

5 The Singapore High Court decision of *Tjong Very Sumito v Chan Sing En*⁶ (“*Tjong*”) interpreted the term “ordinarily resident” in the context of a security for costs application under O 23 of the Rules of Court.⁷ In *Tjong*, the term “ordinarily resident” was construed to mean a place which a person has adopted voluntarily for a “settled purpose” such as education, business or profession, whether for a short or long duration.

6 In coming to this meaning of “ordinarily resident”, the High Court applied the following *dicta* of the House of Lords in *R v Barnet London Borough Council, ex parte Nilish Shah*⁸ (“*Shah*”):⁹

... ‘ordinarily resident’ refers to a man’s abode in a particular place or country which he has *adopted voluntarily and for settled purposes* as part of the regular order of his life for the time being, *whether of short or of long duration*.

... The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. *This is not to say that the ‘propositus’ intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period.* Education, business or profession, employment, health, family, or merely love of the place spring to mind ...

6 [2011] 2 SLR 360.

7 Cap 322, R 5, 2006 Rev Ed.

8 [1983] 2 AC 309.

9 *Tjong Very Sumito v Chan Sing En* [2011] 2 SLR 360 at [11] and [27], citing *R v Barnet London Borough Council, ex parte Nilish Shah* [1983] 2 AC 309 at 343 and 344.

It is the settled purpose that would be determinative. Once this purpose is established, temporary absence from a place does not per se alter the fact that a company or an individual is still ordinarily resident there.

[emphasis added]

The High Court decision in *Tjong* was upheld on appeal to the Court of Appeal.¹⁰

7 *Shah* was a case dealing with the meaning of “ordinarily resident” for the purposes of tax legislation. In the context of tax, there is a similar policy imperative to dealing with the absconding tax payer who is domiciled overseas.¹¹ The Singapore High Court in *Tjong* held that the *Shah* meaning of “ordinarily resident” could be adopted for more general purposes:¹²

While these authorities did not concern applications for security for costs, I concur with Lindsay J’s view in *In re Little Olympian Each Ways Ltd* [1995] 1 WLR 560 ... at 566 that ‘so far as concerns individuals the test applied in tax cases have without any awkwardness or consciousness of injustice been adopted for other more general purposes’ and ‘one need not be especially shy in this area about adopting the conclusion of tax cases to cases outside tax’.

(2) *A debtor can be ordinarily resident in more than one jurisdiction*

8 In upholding the High Court decision in *Tjong*, the Court of Appeal noted that:¹³

... it is now becoming more common for individuals to have multiple homes and places of business across the globe, more than one of which they might possibly have adopted as their ordinary residence.

It also unequivocally stated that “[i]t seems to us that as a matter of principle, we cannot see any reason why a person cannot be ordinarily resident in more than one jurisdiction”.¹⁴

9 In *Lee Mei-Chih v Chang Kuo-Yuan*,¹⁵ the High Court applied the *Shah* meaning of “ordinarily resident” even further, to the Women’s

10 *Tjong Very Sumito v Chan Sing En* [2011] 4 SLR 580.

11 Indeed, as outlined below, many of the bankruptcy cases discussed in this article involve bankruptcy applications made by tax authorities against tax defaulters who have absconded. See, for example, *Theophile v Solicitor-General* [1950] AC 186.

12 *Tjong Very Sumito v Chan Sing En* [2011] 2 SLR 360 at [12], which applied the meaning of “ordinarily resident” in *R v Barnet London Borough Council, ex parte Nilish Shah* [1983] 2 AC 309 in the context of security for costs.

13 *Tjong Very Sumito v Chan Sing En* [2011] 4 SLR 580 at [29].

14 *Tjong Very Sumito v Chan Sing En* [2011] 4 SLR 580 at [33].

15 [2012] 4 SLR 1115.

Charter.¹⁶ It concluded that the *Shah* meaning of “ordinarily resident” was in fact of “general application”:¹⁷

[T]he construction of the phrase ‘ordinarily resident’ ... [is] of general application and apply across the wide statutory field in which the phrases appear.

Notwithstanding the above, there has been no reported Singapore decision that has construed the meaning of the phrase “ordinarily resident” in the specific context of bankruptcy. Other jurisdictions have, however, examined that requirement in bankruptcy. The key principles developed in the leading cases will be examined.

B. England

(1) “Settled purposes” – Not a closed list

10 In *Shah*, the range of “settled purposes” for ordinary residence included education, business or profession, employment, health, family, or “merely love of the place”. It is clear that this was not intended to be a closed list.

11 In *In re Charles Bright*¹⁸ (“*Charles Bright*”) (a bankruptcy case), it was held that a debtor can be ordinarily resident in a jurisdiction if he was there for the settled purpose of conducting litigation. In that case, an American citizen had gone to England for the purposes of conducting litigation there. During this period, he stayed in various English hotels and periodically left England to visit continental Europe. On those facts, the Court of Appeal found that he was ordinarily resident in England:¹⁹

[H]e was in London for a *definite purpose* which made it necessary, or, at any rate, convenient, that he should be there, and though he made occasional excursions to the Continent the central place of his dwelling was in London, where he was mainly engaged in the useful work of litigation, and other purposes which could not be so conveniently served by any one who was not in London. [emphasis added]

(2) Absence of an identifiable residential address not determinative

12 *Charles Bright* was subsequently cited with approval in the English Court of Appeal decision in *In re Brauch, ex parte Britannic*

16 Cap 353, 2009 Rev Ed.

17 *Lee Mei-Chih v Chang Kuo-Yuan* [2012] 4 SLR 1115 at [6].

18 (1903) 19 TLR 203.

19 *In re Charles Bright* (1903) 19 TLR 203 at 204.

*Securities and Investments Ltd*²⁰ (“*Brauch*”). In *Brauch*, the debtor spent the majority of his time in the Channel Islands, a group of self-governing territories outside the UK.²¹ The debtor was engaged in the business of property speculation in England. He prospected for properties, arranged for valuations to be done on those properties and made the financial arrangements for the acquisition of those properties by corporate vehicles under his control. When conducting business in England, the debtor stayed at various hotels and did not otherwise have a permanent residential address. He did, however, have a London office and telephone number, from which he carried on his business in England.

13 The English Court of Appeal considered that notwithstanding the absence of an identifiable residential address, the possession of a business address and a telephone number in England by the debtor was sufficient for the court to find that the debtor was ordinarily resident in England.²²

(1) [T]he office in London at 60, Grosvenor Street, where the debtor obviously had occasion to come for business purposes – and it matters not whether or not it was his own. (2) The length of time the debtor spent in England according to Mr. Cadot. (3) Whilst Mr. Cadot could not of course say where the debtor was all the time, his evidence was that it was a fairly regular thing for him to phone the debtor at 60, Grosvenor Street and that he generally made contact. (4) The fact that he was given a phone number, and particularly at 51, Connaught Street, where he could and did phone the debtor in the evenings. (5) The debtor’s admissions that it was only sometimes that he came over to England and went back the same night and that he spent only half of his nights in England in hotels.

...

I can see no reason why the court should be precluded from finding that he ordinarily resided here within the meaning of section 4(1)(d) merely because the evidence does not disclose where in England he was living.

[emphasis added]

Thus, in examining the facts of a particular case, it is clear that the absence of an identifiable residential address is not itself determinative. If the creditor can otherwise present evidence of the debtor’s presence in Singapore for a settled purpose, such evidence (eg, business addresses or

20 [1978] Ch 316; [1977] 3 WLR 354.

21 The Official Website of the British Monarchy, “Channel Islands” <<http://www.royal.gov.uk/MonarchUK/QueenandCrowndependencies/ChannellIslands.aspx>> (accessed 17 June 2015)

22 *In re Brauch, ex parte Britannic Securities and Investments Ltd* [1978] Ch 316 at 334 and 337; [1977] 3 WLR 354 at 367–368 and 370.

business telephone numbers) or proof could be sufficient to establish the debtor's ordinary residence in Singapore.

C. *Hong Kong*

(1) *Length of absence is not determinative*

14 Like Singapore, ordinary residence is one of the threshold jurisdiction requirements in the Hong Kong Bankruptcy Ordinance.²³ Section 4(1)(c)(i) of the Hong Kong Bankruptcy Ordinance provides:

(1) A bankruptcy petition shall not be presented to the court under section 3(1)(a) or (b) unless the debtor –

...

(c) at any time in the period of 3 years ending with that day –

(i) has been *ordinarily resident*, or has had a *place of residence*, in Hong Kong; or

(ii) has carried on business in Hong Kong.

[emphasis added]

15 In *Re Ku Chu Keung*,²⁴ the debtor had outstanding credit card debts owed to the applicant bank. When the debtor failed to pay, the bank commenced bankruptcy proceedings against him. The debtor claimed, amongst other things, that he was living in Hebei in mainland China and therefore no longer ordinarily resident in Hong Kong for the purposes of s 4(1)(c)(i) of the Hong Kong Bankruptcy Ordinance.²⁵ Prior to the commencement of bankruptcy proceedings against him, the debtor ran a business in Hong Kong and had provided Hong Kong correspondence addresses to the Hong Kong Companies Registry for that purpose. The debtor sought to distance himself from those addresses and claimed that those were the addresses of the properties owned by other directors of the business.²⁶

16 On those facts, the Hong Kong High Court had to make a determination on whether the debtor in *Re Ku Chu Keung* was ordinarily resident in Hong Kong. The court held that he was, citing *Shah*:²⁷

23 Cap 6.

24 Bankruptcy 3394 of 2005.

25 *Re Ku Chu Keung* (Bankruptcy 3394 of 2005) at [11].

26 *Re Ku Chu Keung* (Bankruptcy 3394 of 2005) at [26].

27 *Re Ku Chu Keung* (Bankruptcy 3394 of 2005) at [50]–[51].

I refer to paragraph 4.06 of the Butterworths Hong Kong Bankruptcy Law Handbook (2nd Edition), which states as follows:

In R v Barnett London Borough Council, ex p Shah [1983] 2 AC 309 ... the natural and ordinary meaning of the words 'ordinarily resident' had been authoritatively determined ... to mean 'that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration', and the word 'habitually' connoted two characteristics of residence, namely that of residence adopted voluntarily and for settled purposes.

It has been held that in determining whether a person is 'ordinary resident' in Hong Kong, the following guidelines were helpful: (i) whether a person is ordinary resident in Hong Kong is a question of fact and degree and must be determined in all the circumstances; (ii) *a person can have ordinary residence in two countries at the same time*; (iii) the residence must be voluntary and cannot be forced against the person's free will; (iv) involuntariness may negative ordinary residence; and (v) temporary or occasional absences of long or short duration do not negative ordinary residence

In light of the above discussion, as Mr Ku said that he was compelled by financial reasons to move to the Mainland and that he wished to return to Hong Kong for residence, his absence from Hong Kong was forced against his will. Although he had allegedly left Hong Kong for a few years, such absence was temporary and not permanent. Therefore, he is still ordinarily resident in Hong Kong. Even if he may also be ordinarily resident in Hebei, there are still sufficient reasons for adjudging Mr Ku bankrupt under the first limb of Section 4(1)(c)(i).

[emphasis added]

17 From *Re Ku Chu Keung*, the length of the debtor's temporary absence from Hong Kong was not itself determinative in finding ordinary residence. In this decision, the court considered the fact the debtor was forced from Hong Kong against his will for financial reasons and that he wished to return to Hong Kong eventually. A person can have ordinary residence in two countries at the same time. Notwithstanding that he had been absent from Hong Kong for some time, the court still regarded his absence from Hong Kong as only temporary and that he remained ordinarily resident in Hong Kong. This approach is also consistent with that taken in Australia, which is discussed below.

D. Australia

- (1) *A person can be ordinarily resident in more than one jurisdiction, and the length of temporary or occasional absences is not determinative*

18 As noted by the Singapore Court of Appeal in *Tjong Very Sumito v Chan Sing En*,²⁸ it is clear that a person can be ordinarily resident in more than one jurisdiction. The rationale for recognising that a person might be ordinarily resident in more than one jurisdiction was explained in the Australian Federal Court decision of *Mathai v Kwee*²⁹ (“*Mathai*”).

19 In *Mathai*, a bankruptcy order was made against a debtor on the basis of a judgment debt. The debtor applied to have the bankruptcy order annulled on the ground that, *inter alia*, the debtor was not ordinarily resident in Australia at the time when the act of bankruptcy was committed.³⁰ In *Mathai*, the debtor was a Malaysian businessman who conducted business in Malaysia. On the facts, it was found that the debtor spent only 12.5% of his time in Australia in the period between 1981 and 2003.³¹ The little time that he did spend in Australia was primarily for the purposes of visiting his wife and children who were living in Australia.³² Though he did possess an Australian passport, the debtor was at pains to point out that he was not an Australian resident, never had a Medicare card in Australia and was not enrolled on the State or Federal Electoral Rolls. Against this, the debtor emphasised that he held a Malaysian driving licence and a Malaysian identity card, spent most of his time living in Kuala Lumpur, was a Malaysian taxpayer, served on the boards of companies in Malaysia, and was also the holder of a Malaysian passport.

20 The Australian Federal Court had to decide whether the debtor was ordinarily resident in Australia. The court held that he was. It was observed that:³³

28 [2011] 4 SLR 580.

29 [2005] FCA 932.

30 *Mathai v Kwee* [2005] FCA 932 at [13]. Section 43 of the Australian Bankruptcy Act 1966 provides:

43(1). Subject to this Act, where

(a) a debtor has committed an act of bankruptcy; and

(b) at the time when the act of bankruptcy was committed, the debtor:

(i) was personally present or ordinarily resident in Australia ...

31 *Mathai v Kwee* [2005] FCA 932 at [60].

32 *Mathai v Kwee* [2005] FCA 932 at [60].

33 *Mathai v Kwee* [2005] FCA 932 at [125].

In the era of wide bodied jet aircraft it is not quite so unusual for people to be ordinarily resident in more than one country. One only has to contemplate the position of tennis and golf professionals who travel away from the place or places where they are ordinarily resident so as to pursue their livelihoods and earn their incomes. Much the same can be said in respect of (say) concert pianists on the world stage who may ordinarily reside in Australia but travel extensively overseas to earn their incomes. Much the same could be said in relation to a taxation consultant ordinarily resident in Australia whose business or employment takes him to places such as Hong Kong, Singapore, Kuala Lumpur, India and England so that he may exploit his expertise. One might say of them that they 'still call Australia home'.

In my opinion having regard to all of the circumstances of this case as set out above, Mr Mathai was, at the time of the commission of the relevant act of bankruptcy, ordinarily resident in Australia. I reach this conclusion notwithstanding the fact that he held a Malaysian driving licence, a Malaysian identity card, was involved in the affairs of the Cathedral of St John in Kuala Lumpur and spent much of each year living overseas and in particular in accommodation in Kuala Lumpur belonging to a company owned by friends of his, not to overlook the fact that he was a Malaysian taxpayer and served on the boards of companies in Malaysia, that he did not file income tax returns in Australia and did not hold an Australian Medicare card. Mr Mathai was the holder of a Malaysian passport but also of an Australian passport. Until he was served with the Creditor's Petition he invariably departed Australia and returned to Australia using his Australian passport. He also had a bank account at the Australian & New Zealand Banking Group Ltd in Melbourne. *When Mr Mathai was asked whether he read the Bankruptcy Notice 'at the airport or at home' his spontaneous response was 'at home'. Whilst he proceeded to back off from a suggestion that 69 Wellington St, Kew was 'home', I am satisfied that that is how he viewed it. Leaving a wardrobe of clothing at that address is a strong indication, when taken with all the other matters referred to above, that it was a place at which he was ordinarily resident in Australia.*

[emphasis added]

Hence, in *Mathai*, it was held that the debtor was ordinarily resident in Australia notwithstanding the fact that the particular debtor spent the vast majority of his time away from Australia. The court in *Mathai* took notice of cues such as the fact that the debtor had kept a wardrobe of clothes in his family's house, and that the debtor had inadvertently, and tellingly, referred to the Australian house as his "home" under cross-examination.

21 In this manner, consistent with the approach taken in *Re Ku Chu Keung*, the Hong Kong and Australian courts have indicated a readiness to look beyond the actual amount of time the debtor spent within jurisdiction. Instead, they take a more holistic approach in

assessing whether a debtor was ordinarily resident within the jurisdiction.

E. “Ordinarily resident” – Conclusion

22 Several principles can be gleaned from the above decisions. First, the list of “settled purposes” to establish “ordinary residence” is not closed. In *Shah*, the list included education, business or profession, employment, health, family, or “merely love of the place”. In *Charles Bright*, the conduct of litigation was also found to be such a settled purpose. There is no reason to not expand this list of settled purposes in an appropriate case.

23 Second, the length of time the debtor spends within the jurisdiction is not itself determinative. The courts do not embark on a “passport-page-counting” exercise to determine “ordinary residence”. Instead, it is the nature of the purpose of the debtor’s presence in the jurisdiction that is key.

24 Third, it is possible to have more than one place of ordinary residence. In this respect, the courts in *Re Ku Chu Keung* and *Mathai* have recognised that with the advent of modern air travel, people are able to travel regularly and quickly between multiple jurisdictions, and make their home in more than one place.

25 Fourth, in analysing a given factual matrix to determine whether a debtor is ordinarily resident within the jurisdiction, the fact that the debtor lacks a residential address is not fatal to the finding of ordinary residence. The courts in *Re Ku Chu Keung* and *Brauch* were prepared to find the debtor ordinarily resident in their respective jurisdictions notwithstanding the lack of an identifiable residential address. Thus, alternative evidence establishing the debtor’s presence for a settled purpose such as business addresses or local phone numbers could be accepted by the court as relevant to establishing ordinary residence. In addition, a debtor can be physically absent from jurisdiction for significant periods of time and still found to be ordinarily resident. In *Re Ku Chu Keung* and *Mathai*, notwithstanding that both debtors had spent significant periods out of jurisdiction, the courts in both cases made findings that the debtors were still ordinarily resident within jurisdiction based on more “qualitative” factors in each case.

26 It is respectfully submitted that these are reasonable and sensible principles which can be considered for adoption by the Singapore courts in interpreting the “ordinarily resident” requirement of bankruptcy jurisdiction.

IV. “Carrying on business”

27 Other than the “ordinarily resident” requirement, the “carrying on of business” in Singapore is an alternative ground for establishing bankruptcy jurisdiction.³⁴ Under s 60(1)(c)(ii) of the Bankruptcy Act, jurisdiction can be established if the debtor carries on business in Singapore in the year immediately preceding the filing of the bankruptcy application against him.

A. *Singapore*

(1) *Must “business” be carried on by the debtor personally?*

28 In *United Malayan Banking Corp Bhd v Khoo Boo Hor*³⁵ (“*Khoo Boo Hor*”), the Singapore High Court was concerned with the phrase “carrying on business” in the context of s 3(2)(b) of the Reciprocal Enforcement of Commonwealth Judgments Act³⁶ (“RECJA”). Section 3(2) of the RECJA provides for certain restrictions on the registration of foreign Commonwealth judgments in Singapore. Section 3(2)(b) itself provides:

3. (2) No judgment [from a Commonwealth court] shall be ordered to be registered under this section if —

...

(b) the judgment debtor, being a person who was *neither carrying on business* nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court ...

[emphasis added]

The court decided that in cases where s 3(2)(b) was sought to be applied to natural persons, the “carrying on” of business must be that of the individual himself. This requirement would not be fulfilled if the individual had, for example, transacted business as a director of a company. In that case, the individual would be transacting business as an agent of the company, and it was therefore the company, not the individual, which was carrying on business for the purposes of s 3(2)(b) of the RECJA.

29 *Khoo Boo Hor* has been cited by a local text as potentially applicable to bankruptcies in Singapore, and as authority for the

34 Bankruptcy Act (Cap 20, 2009 Rev Ed) s 60(1)(c)(ii).

35 [1995] 3 SLR(R) 839.

36 Cap 264, 1985 Rev Ed.

proposition that the “business” carried on for the purposes of s 60(1)(c) of the Bankruptcy Act must be that of the debtor personally, not that of a company.³⁷

30 On one hand, this interpretation by local commentators is reasonable to the extent that it upholds the doctrine of separate legal personality.³⁸ For instance, it would be difficult to accept that an employee could be made a bankrupt on account of debts owned by his corporate employer.

31 On the other hand, this requirement, if applied inflexibly without exception to every case, would mean that every absconding debtor who enters into transactions through the use of a corporate vehicle can escape Singapore’s bankruptcy jurisdiction. To that extent, such an absolute and unqualified position may be unsatisfactory. The modern reality is that most contractual or business relations are entered into via companies, and not by individuals. If applied inflexibly, the requirement that the business must be the debtor’s own personally, could render the “carrying on of business” limb of jurisdiction otiose and redundant in today’s business environment.

32 It is therefore submitted that the requirement that business must be carried on by the debtor “personally” should not be applied as an immutable rule to bankruptcy in all circumstances. In any event, there is no clear statutory basis for the requirement that business be carried on “personally” by the debtor. Section 60(1)(c)(ii) of the Bankruptcy Act merely states that:

... no bankruptcy application shall be made against an individual debtor unless the debtor has, at any time within the period of one year immediately preceding the date of the making of the application, *carried on business in Singapore*. [emphasis added]

In contrast, s 4(1)(d) of the English Bankruptcy Act 1914³⁹ provided that:

... [a] creditor shall not be entitled to present a bankruptcy petition against a debtor unless the debtor is ... *has carried on business in England, personally* or by means of an agent or manager, or (except as aforesaid) is or within the said period has been a member of a firm or partnership of persons which has carried on business in England by

37 Kala Anandarajah *et al*, *Law and Practice of Bankruptcy in Singapore and Malaysia* (Butterworths Asia, 1999) at p 77.

38 *United Malayan Banking Corp Bhd v Khoo Boo Hor* [1995] 3 SLR(R) 839 itself relied heavily on *Adams v Cape Industries plc* [1990] Ch 433; [1991] 1 All ER 929.

39 c 59. Note that the English Bankruptcy Act 1914 (c 59) has since been repealed and replaced by the Insolvency Act 1986 (c 45).

means of a partner or partners, or an agent or manager. [emphasis added]

Notably the word “personally”, which appeared in the English provision to qualify the phrase “carried on business”, does not appear in the equivalent Singapore provision.

33 Further, *Khoo Boo Hor* itself accepted that the “personal” requirement to “carrying on business” should not be applied inflexibly. The learned court held that there could be an exception to the “personal” requirement where the individual in question is found to be the *alter ego* of the relevant company, such that the veil of incorporation can be lifted.⁴⁰ It is respectfully submitted that this exception is sensible and reasonable. This has also been the approach in England, which is discussed below.

B. England

(1) Carrying on business through corporate vehicles

34 As described above, the debtor in the English Court of Appeal decision in *Brauch* conducted the business of property speculation in England. The debtor prospected for properties, arranged for valuations to be done on those properties and made the financial arrangements for the acquisition of those properties by corporate vehicles under his control. Each property was purchased by the debtor via a single company which he used to hold the land. The debtor himself was not a director or shareholder of all of these companies. The Court of Appeal described the structure behind these companies as being “extremely obscure”, but nevertheless held that:⁴¹

... it is clear that by some link in the chain he intended to make a profit for himself out of these transactions. It is also clear that he controlled them all, and in the case of the transaction which led to the debt to the petitioning creditors the minute of the directors authorising him to effect the transaction has been produced, and it will be seen that the board authorised him to use the proceeds of the loan at his discretion.

35 The court in *Brauch* found that the debtor was carrying on business in England, even though he had used corporate vehicles to enter into his transactions. The court was prepared to make this finding notwithstanding the fact that the relevant bankruptcy provision in

40 *United Malayan Banking Corp Bhd v Khoo Boo Hor* [1995] 3 SLR(R) 839 at [15].

41 *In re Brauch, ex parte Britannic Securities and Investments Ltd* [1978] Ch 316 at 325; [1977] 3 WLR 354 at 358–359.

England at the time expressly required that business be carried by the debtor “personally”.⁴² The court was prepared to look beyond the veneer of the transactions and examine the substance of the debtor’s role in England.

36 The applicable bankruptcy provision in England at the time *Brauch* was decided in 1977 was s 4(1)(d) of the English Bankruptcy Act 1914.⁴³ That provision has been discussed above.⁴⁴ The word “personally” appears in that provision to qualify the phrase “carrying on business”. Nevertheless, the word “personally” did not act as a legislative obstacle to prevent the English Court of Appeal from finding that the debtor was carrying on business through his corporate vehicles.

37 Section 60(1)(c)(ii) of Singapore’s Bankruptcy Act does not contain the word “personally” in the phrase “carrying on business”. It is respectfully submitted that the Singapore courts should therefore be prepared to make a similar finding as the English Court of Appeal in *Brauch* in suitable cases.

(2) *A business is carried on as long as there are unpaid debts*

38 In England, it is well established that “carrying on business” need not connote active trading. A person does not cease to trade because he “shut up shop and went away”. Instead, a person is deemed to “carry on business” so long as (a) a debt arising out of the course of the business remains unpaid; or (b) he seeks to collect the assets of his business.

39 In *In re Reynolds, ex parte White Brothers Ltd*⁴⁵ (“*Re Reynolds*”), the debtor carried on her father’s business as a corn merchant after his death. She ceased the business after less than two years, and sold the whole of the stock and machinery by auction. A bankruptcy petition was subsequently served on her. The court held:⁴⁶

Two principles have been laid down – I might almost say for centuries, at any rate many years – at a time when traders alone, and not ordinary members of the public, could be made bankrupt. It was held that *for the purpose of bankruptcy law a man did not cease to be a trader because he shut up shop and went away; he continued to be a trader so long as any of the trade debts remained unpaid. It was further held, and even more clearly, that when a trader not merely omitted to*

42 Bankruptcy Act 1914 (c 59) (UK) s 4(1)(d).

43 See n 39 above.

44 See para 32 above.

45 [1915] 2 KB 186.

46 *In re Reynolds, ex parte White Brothers Ltd* [1915] 2 KB 186 at 190.

pay his debts but got in the assets of the business he was still carrying on.
[emphasis added]

40 *Re Reynolds* was followed and applied by the House of Lords in *Theophile v Solicitor-General*⁴⁷ (“*Theophile*”). In that decision, the House of Lords held that it was well established by “a long series of cases ... that *a business does not cease to be carried on ... until all the debts incurred in the course of it have been discharged*” [emphasis added].⁴⁸ In *Theophile*, the appellant had carried on a leather business in England, but thereafter ceased active trading and left England with tax liabilities undischarged. The Crown brought a bankruptcy petition against him in respect of those tax liabilities. Lord Porter, with whom the rest of the lords agreed, held:⁴⁹

In a sense it is true that the appellant was not actively carrying on business within three months of the presentation of the petition, but there is a series of cases beginning with *In re Dagnall* and ending with *In re Reynolds* which in unbroken sequence have decided that *trading does not cease when, as the expression is, ‘the shutters are put up’, but continues until the sums due are collected and all debts paid.* [emphasis added]

41 The outstanding debt that would qualify as “carrying on business” need not be a pure “trade debt” in the sense of a debt that arises from the buying and selling of goods. *Theophile* held that a *tax debt* would suffice, and that such debts are not limited to *trade debts per se*:⁵⁰

There is, however, one further matter which requires consideration. In all the cases referred to, the debts which were to be paid or collected were strictly trade debts, and it is maintained that in that respect they differ from the case under appeal in that the debt claimed by the Crown to be due is in respect of excess profits tax and that such a debt is not a trade debt but a sum due for taxes and no more connected with the appellant’s business than income tax or any other tax liability. Whatever else may be said about excess profits tax, however, it is imposed upon the debtor because he has been trading, *and I do not see any reason for confining trade debts to those incurred in buying or selling.* [emphasis added]

42 *Theophile* was followed and applied by Hoffmann J (as he then was) in the English High Court decision of *In re a Debtor*.⁵¹ In this case, the debtor carried on the business of running a nursing home in

47 [1950] AC 186.

48 *Theophile v Solicitor-General* [1950] AC 186 at 194.

49 *Theophile v Solicitor-General* [1950] AC 186 at 201.

50 *Theophile v Solicitor-General* [1950] AC 186 at 202.

51 [1992] Ch 554.

England, and subsequently sold the business as a going concern. The debtor then left England. No debts remained outstanding, apart from a tax liability in excess of £500,000. It was held that the debtor did not cease to carry on business until all the trading debts of the business had been paid, and that, accordingly, since the tax liability had not been discharged, the debtor was still carrying on business and the court had jurisdiction to make the bankruptcy order.

43 Other than a tax liability, a judgment debt would suffice as well, so long as it arose out of the course of business. In *Re Allen, ex parte Shaw*,⁵² the debtor carried on the business of a carter. She had been found vicariously liable for a personal injury claim arising from her employee's negligence. Thereafter, she ceased carrying on active trading and discharged her trade debts. However, she left the judgment debt from the personal injury claim unsatisfied. It was held that leaving an outstanding liability for a judgment debt undischarged amounted to "carrying on business" for the purposes of a bankruptcy application against her.

44 It is submitted that this principle – that a business carries on for the purposes of bankruptcy so long as there are unpaid debts – is sound. Otherwise, a debtor would be given the perverse incentive to avoid bankruptcy jurisdiction simply by his own voluntary act of ceasing to trade. It is precisely against such businesses which have ceased to trade that creditors need remedies, via the law of bankruptcy.

(2) *Can a single transaction amount to carrying on business?*

45 Can a single transaction amount to the carrying on of business? Much would depend on the facts of the particular case, but a single transaction is not necessarily fatal to a finding that a debtor has carried on business via that one transaction.⁵³

46 In *In re Clark, ex parte Pope & Owles*,⁵⁴ a debtor had carried on the business as a financier dealing in the purchase of land and building hotels. One of the issues that arose was whether the debtor had "carried on business" because the debtor had carried on only a single transaction in which she had established and promoted a company for such purposes.

52 [1915] 1 KB 285.

53 *Cf Halsbury's Laws of England* vol 5 (LexisNexis, 5th Ed, 2013) at para 131.

54 [1914] 3 KB 1095.

47 In the Court of Appeal, Lord Cozens-Hardy MR observed that the isolated transaction in that case was sufficient to amount to the carrying on of business.⁵⁵

But then it is said that *one isolated transaction* is not enough to lead the Court to hold that a person is carrying on business. *The fact that this hotel company has not proved a success, and that the hotel has not yet been built, does not, it seems to me, in the least affect the question of whether the debtor is carrying on the business of a promoter.* It has long ago been held, and I do not refer to the authorities, that *a person does not cease to be a trader when he puts up his shutters and does not come near the place, but he is deemed to be for all purposes a trader until he has paid all the debts relating to the trade.* [emphasis added]

48 A bankrupt can cause harm to creditors when he defaults and absconds, regardless of whether he defaulted on many transactions or just one. There is no principled distinction to be drawn between the two scenarios. It is thus submitted that the single transaction rule is a sensible rule which may be considered for application in Singapore.

C. Conclusion for “carrying on business”

49 Three principles can be gleaned from the above survey. First, the use of corporate vehicles by an absconding debtor to carry on business should not preclude the bankruptcy courts from taking jurisdiction over him. In an appropriate case, it is submitted that the court should be prepared to make a finding that a debtor was carrying on business in Singapore, through the use of corporate vehicles by the debtor. Second, it is well established that the carrying on of business does not cease when the “shutters have been put up” and trading stops. The carrying on of business continues as long as there are unpaid debts. Such debts need not be actual “trade” debts, but can be tax liabilities or judgment debts. Third, in appropriate cases, a single isolated transaction can constitute the carrying on of business.

50 It is submitted that these principles are practical solutions to address the problem of the absconding debtor and can be considered for application in Singapore.

V. Post-bankruptcy order

51 Having obtained the bankruptcy order against the absconding debtor, what utility and relief can creditors expect? Normally a measure of last resort, creditors should realistically not expect a perfect remedy

55 *In re Clark, ex parte Pope & Owles* [1914] 3 KB 1095 at 1104.

from obtaining a bankruptcy order. Nevertheless, it is submitted that the utility in obtaining a bankruptcy order against an absconding debtor is twofold and may provide some relief to creditors who may otherwise have be left with no remedy.

52 First, a bankruptcy order against the absconding debtor may allow a creditor to participate in the potential distributions from his assets.⁵⁶ Amongst other requirements, the absconding debtor would be required to file its statement of affairs and submit accounts,⁵⁷ which could disclose further assets in Singapore that creditors may not have previously been aware of.⁵⁸ Though the absconding debtor can avoid complying with such requirements by remaining out of Singapore, this would attract penalties which may then be potentially enforced should the absconding debtor subsequently return to Singapore.

53 Second, it is submitted that the utility of obtaining a bankruptcy order also lies in its effect in deterring prospective absconding debtors from potentially defrauding creditors in Singapore. In this respect, if made bankrupt, an absconding debtor would be subject to certain disabilities and disqualifications from holding office in the future.⁵⁹ Bankrupts would be required to obtain the prior approval⁶⁰ of the official assignee (“OA”) before travelling, so as to allow the OA to monitor their movements and prevent them from dissipating their assets overseas.⁶¹ To enforce this, the OA has the discretion to issue a direction to the controller of immigration to prevent a bankrupt from leaving Singapore and to detain his passport.⁶² Such sanctions could potentially prevent an absconding debtor from unscrupulously incurring further debts to unwitting creditors in Singapore.

56 Bankruptcy Act (Cap 20, 2009 Rev Ed) s 78.

57 Bankruptcy Act (Cap 20, 2009 Rev Ed) ss 81 and 82.

58 Sections 151 and 152 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) provide that the Singapore courts may act in aid of the courts of Malaysia and provide for the reciprocal recognition of official assignees between Singapore and Malaysia. See also s 104 of the Malaysian Bankruptcy Act 1967 (Act 360). In this respect, a bankruptcy order of the Singapore court would cause the bankrupt’s assets located in Malaysia to vest in the Singapore official assignee. The same would apply *mutatis mutandis* to a bankrupt’s assets in Singapore to a bankruptcy order by the Malaysian courts.

59 Bankruptcy Act (Cap 20, 2009 Rev Ed) ss 130 and 131.

60 Bankruptcy Act (Cap 20, 2009 Rev Ed) s 116.

61 *Singapore Parliamentary Debates, Official Report* (19 January 2009) vol 85 at col 1157 (Assoc Prof Ho Peng Kee, Senior Minister of State for Law).

62 Bankruptcy Act (Cap 20, 2009 Rev Ed) s 116.

VI. Conclusion

54 The mischief presented by the absconding debtor is a real one for Singapore. The absconding debtor presents certain difficulties in establishing bankruptcy jurisdiction under the traditional “domicile” and “property” limbs of s 60 of the Bankruptcy Act. The other two jurisdictional requirements of “ordinarily resident” or “carrying on business” may potentially apply in Singapore to the absconding debtor. However, there do not appear to be any reported decisions on the scope of either requirement.

55 As shown above, the English, Hong Kong, and Australian courts have interpreted the jurisdictional requirements of “ordinarily resident” and “carrying on of business” widely, so as to address the mischief presented by the absconding debtor. It can be seen that this approach has not stifled the economic development of those jurisdictions. For these reasons, it is submitted that the same approach may be taken by the Singapore courts when dealing with the absconding debtor.
