Re Soh Seow Poh, ex parte Hong Leong Bank Bhd
[2008] SGHC 219

Case Number	: B 602271/2001
Decision Date	: 25 November 2008
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: Chong Kuan Keong and Tan Joo Seng (Chong Chia & Lim LLC) for the appellant; Eric Tin Keng Seng (Donaldson & Burkinshaw) for the bankrupt; Moey Weng Foo for the Official Assignee
Parties	: —

Insolvency Law – Bankruptcy – Application – Proper approach to application – Object and purpose of s 124(4)(c) Bankruptcy Act (Cap 20, 2000 Rev Ed) – Whether existence of special facts precluded unconditional discharge under s 124(4)(c) Bankruptcy Act (Cap 20, 2000 Rev Ed)

25 November 2008 Judgment reserved

Judith Prakash J:

Introduction

1 These grounds are in respect of an appeal by Hong Leong Bank Berhad ("HLB") against the decision of Assistant Registrar Jason Chan Tai-Hui ("the AR") to grant Soh Seow Poh ("Soh") an unconditional discharge from bankruptcy. Soh was the guarantor for loans given by HLB's predecessor, Hong Leong Finance Berhad ("HLFB"), to four Malaysian companies of which Soh was a director and shareholder. These companies were badly affected by the Asian economic crisis and thus could not repay the loans. As guarantor, Soh was called to pay $26,353,903.26 to HLFB. Soh had also incurred other liabilities and was saddled with a total debt of $31,126,626.06. Unable to pay, he was made a bankrupt on 24 August 2001.

2 Six years later, the Official Assignee considered it suitable for Soh to be discharged from bankruptcy and filed Summons No. 600307/2007 on 21 September 2007 to apply to discharge him under s 124 of the Bankruptcy Act (Cap. 20, 2000 Ed) ("the Act"). This application was granted by the AR.

Arguments against a discharge from bankruptcy

3 Counsel for HLB made two main arguments against discharging Soh from bankruptcy:

(a) the inadequacy of the Official Assignee's reports prevented the granting of a discharge; and

(b) the existence of special facts within s 124(5) of the Act militated against an unconditional discharge.

Alleged inadequacy of the Official Assignee's reports

4 HLB argued that the Official Assignee's reports were so inadequate that a discharge from bankruptcy should not be granted. For support, counsel referred to the Malaysian case of *Re Kelvin*

Lee See Fooi; ex p BSN Commercial Bank Malaysia Bhd [2006] 3 MLJ 683 in which the High Court of Kuala Lumpur refused to grant an order of discharge because the Official Assignee's report failed to disclose the actual financial situation of the bankrupt.

5 It is conceivable that in certain cases, the inadequacy of the Official Assignee's report would prevent the court from granting a discharge. This would be so where the court has insufficient facts before it to make a just decision. Hence, the adequacy of the Official Assignee's report is a factor for the court's consideration when it exercises its discretion under s 124 of the Act.

6 In this instance, however, I considered that the three reports filed by the Official Assignee were adequate. It should be noted that when HLB raised the issue of adequacy the Official Assignee looked at the matter again. He then produced two further reports that dealt specifically with further investigations taken by the Official Assignee into the matters complained of by HLB. HLB's allegation of inadequacy rested primarily on an assertion that the reports lacked detail. HLB suggested that the Official Assignee should have, amongst other things, elaborated on the nature of Soh's income, his family expenditure and the reason why Soh was allowed to travel abroad. I did not agree with this. The reports could not include every nuance of each investigation into complaints made against the bankrupt. To hold the Official Assignee to such an exacting standard would hinder its function. The Official Assignee is a public official discharging a public duty. Unless there is good reason for not doing so, the assertions in its reports must be accepted at face value without requiring details of every single investigation that was made before the report was issued. In this case the first report was issued in September 2007 when the discharge application was made. The second and third reports were filed in response to further investigations undertaken after HLB had drawn attention to areas which were not covered by the first report. Together the reports were, in my judgment, adequate to furnish the court with sufficient information on which to make a decision.

Proof of special facts in s 124(5)

Bankruptcy brought on by recklessness or want of reasonable care and attention

7 HLB also alleged that Soh had brought on or contributed to his bankruptcy by recklessness or want of reasonable care and attention to his business and affairs within the meaning of s 124(5)(d) of the Act. In support, counsel relied primarily on the fact that Soh had agreed to guarantee the huge loans taken out by the companies in which he was involved.

8 I was not convinced that this proved that Soh was reckless or that he had failed to pay reasonable care and attention to his business. It is not uncommon for banks to obtain a guarantee from directors for their companies' loans. This is to incentivise them to work hard to ensure the companies' success. This must have been the case here. HLFB must have made a considered decision before agreeing to take Soh as a guarantor for the huge loans. Having carried out the requisite background checks, it must have been satisfied that there was a reasonable prospect of repayment from the business of the companies. Soh himself must have believed the same thing when he agreed to guarantee the loans.

9 The reason why the debts were not repaid was that Soh's companies, like many others, were badly affected by the Asian economic crisis. This was genuine business failure. There was no evidence that could lead me to conclude that Soh had brought on his bankruptcy through recklessness or want of reasonable care and attention to his business.

Unfair preference given to Wei Sin Construction Pte Ltd

10 HLB also asserted that Soh had given unfair preference to Wei Sin Construction Pte Ltd ("WSCPL") within the meaning of s 124(5)(l) of the Act. That section refers to the definition in s 99 and it is helpful to set this out in full:

> **99.** —(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has, at the relevant time (as defined in section 100), given an unfair preference to any person, the Official Assignee may apply to the court for an order under this section.
>
> (2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not given that unfair preference.
>
> (3) For the purposes of this section and sections 100 and 102, an individual gives an unfair preference to a person if —
>
> > (a) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities; and
> >
> > (b) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.
>
> (4) The court shall not make an order under this section in respect of an unfair preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3) (*b*).
>
> (5) An individual who has given an unfair preference to a person who, at the time the unfair preference was given, was an associate of his (otherwise than by reason only of being his employee) shall be presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (4).
>
> (6) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of an unfair preference.

11 This definition of unfair preference is two-fold: first, there has to have been a preference to a creditor, surety or guarantor which was influenced by a desire to put that party in a better position and which in fact did so. Second, such preference had to be made within the relevant time as defined in s 100. This definition was satisfied on the facts. Soh had paid out $157,391.81 to WSCPL, an unsecured creditor. In doing so, he put it in a better position than it would otherwise have been in. Under s 99(5), Soh therefore had to be presumed to have been influenced by a desire to put WSCPL in a better position because of his association with it as director and shareholder. Hence, the requirements of the first part of the definition had been met.

12 Soh's payment to WSCPL was also made at the relevant time. Under s 100(1)(b) read with s 100(2), the relevant time includes the 2 years before the debtor was made bankrupt provided he was insolvent at the time. Soh made these payments in 2001, months before he was made bankrupt. Section 100(4) provides that the debtor is regarded as insolvent if the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities. At the point of payment, Soh's assets were less than the amount of his total liabilities which exceeded $30 million. He was thus insolvent. Therefore, Soh's payments to WSCPL satisfied the definition of unfair

preference.

13 However, proof of unfair preference is not an absolute bar to granting a discharge from bankruptcy. Section 124(4) provides the following:

> (4) Where the bankrupt has committed an offence under this Act or under section 421, 422, 423 or 424 of the Penal Code (Cap. 224) or upon proof of any of the facts mentioned in subsection (5) [which includes unfair preference within the meaning of section 99], the court shall —
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> (a) refuse to discharge the bankrupt from bankruptcy;
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> (b) make an order discharging him subject to his paying a dividend to his creditors of not less than 25% or to the payment of any income which may be subsequently due to him or with respect to property devolving upon him, or acquired by him, after his discharge, as may be specified in the order and to such other conditions as the court may think fit to impose; or
>
> (c) if it is satisfied that the bankrupt is unable to fulfil any condition specified in paragraph (*b*) and if it thinks fit, make an order discharging the bankrupt subject to such conditions as the court may think fit to impose.

14 Under s 124(4)(c), I had the discretion to discharge Soh from bankruptcy subject to any conditions that I saw fit to impose. Counsel for HLB argued that some conditions must be imposed because the option to grant an absolute discharge is not available in s 124(4). He referred to the comments of Warren Khoo J ("Khoo J") in *Re Seah Ooi Choe, ex p Hongkong and Shanghai Banking Corporation* [1998] 1 SLR 903 for support. The judge made the following observations (at [14]):

> 14 It can be seen from these provisions that cases of court discharge are divided into two broad categories. Subsection (3) deals with cases without what I would call special facts, and sub-s (4) deals with cases with special facts. *The orders that the court may make are significantly different. In both cases, the court may refuse the application, but in the ordinary cases (those without special facts), the court has the option of ordering an absolute discharge, whereas in the special cases, this option is not available.* Secondly, in the ordinary cases, if the court decides to make an order of discharge, it may impose such conditions (relating to postdischarge income and property) as it sees fit; but there is no mandatory requirement of imposing any condition. Note the word "may" in sub-s (3). In the special cases, however, if the court decides to make an order of discharge, it must consider the option of requiring the applicant to pay a dividend of not less than 25% among other conditions, such as conditions relating to post-discharge income and property. Note the word "shall" in sub-s (4). The general intention is that the special cases are to be considered more rigorously than the ordinary cases. [emphasis added]

15 The Court of Appeal also appeared to have taken this position in *Jeyaretnam Joshua Benjamin v Indra Krishnan* [2005] 1 SLR 395 at [9]:

> 9 It is clear that under the regime as set out in s 124, it is entirely a matter for the court, in the exercise of its discretion, no doubt to be exercised judicially, and taking into account all the circumstances of the case, whether to make an order of discharge. While subsection (3) is subject to subsection (4), it is clear that the court may still refuse a discharge where subsection (4) does not apply. *Where the factors mentioned in subsections (4) and (5) come into play, the court is prevented from granting an absolute discharge.* [emphasis added]

16 These comments were made in dicta since neither case dealt with a situation in which the

special facts within s 124(5) were proved. While I would agree that a discharge under s 124(4) differs from that under s 124(3), I would not go so far as to say that an order for unconditional discharge is not available under s 124(4). Rather, s 124(4) differs from s 124(3), as Khoo J pointed out, in the sense that the court must go on to consider the option of requiring the applicant to pay a dividend of not less than 25%. Having considered this option and finding that it is inappropriate, the court is not prevented from granting a discharge under s 124(4)(c) without imposing any conditions where none is appropriate.

17 This interpretation would give effect to the parliamentary intention behind the section. From the Report of the Select Committee on the Bankruptcy Bill [Bill No. 16/94] ("the Report"), it is clear that s 124(4)(c) was included to enlarge the court's discretion rather than limit it. Before s 124(4)(c) was inserted, the Bankruptcy Bill provided the court with only two options once the special facts within s 124(5) were proved: either refuse to discharge or discharge subject to the condition that dividends amounting to 25% or more of the bankrupt's income be paid to the creditors. The Report shows that after considering public representations, the Select Committee added s 124(4)(c) to give the court an additional option. The relevant section from the Report (at p iv) is as follows:

> (e) Clause 124 (4)
>
> Clause 124 specifies the manner in which a discharge from bankruptcy by the court is obtained. Bankrupts who do not satisfy the conditions specified in clause 125 (2) for discharge by the Official Assignee may apply under this clause to be discharged by the court.
>
> Where any of the facts referred to in clause 124 (5) are proved against a bankrupt, the court may only discharge him subject to the conditions specified in clause 124 (4) (b).
>
> Many representors have expressed the concern that bankrupts who do not satisfy the conditions specified in clause 125 (2) for discharge by the Official Assignee and who, because of old age, ill-health or other unfortunate personal circumstances, cannot fulfil the conditions specified in clause 124 (4) (b), would not be able to obtain a discharge from the court under clause 124.
>
> After considering the representations carefully, the Committee felt that the representors' concern could be addressed by amending clause 124 (4) to empower the court, where it is satisfied that the bankrupt is unable to fulfil the conditions specified in paragraph (b) of that sub-clause, and if it thinks fit, to discharge the bankrupt subject to such other conditions as the court may think fit to impose.

18 Thus, s 124(4)(c) was not added to limit the court's discretion but to enlarge it. It might be argued that s 124(4)(c) enlarged the court's discretion only in a limited fashion such that the court had to impose conditions although it had a wide discretion to decide what these would be. Such an interpretation could not, however, have been intended by Parliament because it would lead to absurd results. Take, for instance, a case where a discharge could only be granted under s 124(4) because a special fact within s 124(5) had been proven. Under a restrictive interpretation of s 124(4)(c), in order to grant a discharge, the court would have to impose a condition even though none might be appropriate. The court would be compelled to impose a nominal condition simply for the sake of doing so. This nominal condition would benefit no one: not the creditor, not the official assignee and certainly not the bankrupt. Parliament could not have intended this result.

19 A broader interpretation of s 124(4)(c) suffers no such flaws. It would also be consistent with the express wording of the section which provides that the court shall "impose such conditions as [it] may think fit to impose." These are broad terms. They suggest that the court need not impose any

condition where it thinks that none is appropriate. Consequently, Parliament must have intended for the court to have the discretion to discharge a bankrupt unconditionally under s 124(4)(c). It must always be remembered that in statutory interpretation, the prime function of the court is to give the legislation a purposive interpretation notwithstanding that this may differ somewhat from a literal interpretation of the words in question.

20 The case at hand was an appropriate one for an unconditional discharge. The circumstances surrounding the unfair preference were important. WSCPL was not merely Soh's creditor. It was also a debtor of HLFB. Soh made the payments to WSCPL to keep it afloat so that it could eventually repay the debts to HLB. Therefore, while Soh's payments to WSCPL constituted an unfair preference within the strict definition of s 99, his actions were not entirely blameworthy. Further, Soh's personal circumstances also suggested that this was an appropriate case for an unconditional discharge. Soh had been in bankruptcy for seven years. This was not a short time. At the time of the application he was 48 years old. He was unemployed at that time and, although he found employment between then and the appeal hearing, his salary was moderate. He did not have any substantial assets save for his Housing Development Board flat and would never be able to repay his huge debt even if he remained a bankrupt all his life. HLB would not be able to recover much even if Soh remained a bankrupt. Thus, keeping Soh in bankruptcy would benefit no one. On the other hand, according to the Official Assignee, Soh was not living lavishly and was in fact trying to make good with whatever he had by taking up employment in China and providing for his family.

21 I did consider the option of imposing conditions on Soh's discharge but, bearing in mind the enormity of his debt, I concluded that any condition that required repayment of even a fraction of the debt could not be fulfilled unless that fraction was so small as to be ludicrous as a condition. During the years of his bankruptcy, Soh had made regular payments to the Official Assignee but had in total only been able to pay some $12,000 towards his debts. By the time the matter came before the AR, an unrelated third party (in fact Soh's current employer) had offered to pay $40,000 into the bankruptcy estate if Soh were to be discharged and this offer prompted the application for discharge. The Official Assignee took the view, in my opinion correctly, that it would be better to procure that payment so that at least a small dividend could be declared and paid to the creditors, rather than to keep Soh in bankruptcy which would have meant only drips and drabs being collected for the bankruptcy estate over the next several years. It would, on his past record, take Soh some 20 years to pay the Official Assignee anything close to the $40,000. It appeared to me that refusing the application would not prompt any larger payment from the third party and, as I stated, Soh himself would not have the resources to settle even a small portion of the debt during the rest of his working life.

Conclusion

22 Having considered the interests of all the parties, I agreed with the AR that Soh should be unconditionally discharged from bankruptcy. I therefore dismissed the appeal and ordered the appellant to pay costs to the Official Assignee fixed at $900.

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