Hong Leong Bank Bhd v Soh Seow Poh
[2009] SGCA 37

Case Number : CA 144/2008

Decision Date : 05 August 2009

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA

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 respondent; Malcolm Tan for the Official Assignee

Parties : Hong Leong Bank Bhd — Soh Seow Poh

Insolvency Law – Bankruptcy – Discharge – Whether to grant unconditional discharge from bankruptcy where bankrupt gave unfair preference to creditor – Section 124(4)(c) Bankruptcy Act (Cap 20, 2000 Rev Ed)

5 August 2009

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 This was an appeal against the decision of the High Court judge (the "Judge") who affirmed the decision of the assistant registrar (the "AR") to grant the respondent Mr Soh Seow Poh ("Soh") an unconditional discharge from bankruptcy under s 124 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("the Act") (see *Re Soh Seow Poh* [2009] 2 SLR 35 ("the Judgment")). The appellant, Hong Leong Bank Berhad ("HLB"), was one of Soh's creditors and the only creditor objecting to Soh's discharge from bankruptcy. After hearing counsel for both parties, we affirmed the Judge's decision. These are our reasons for dismissing the appeal.

2 One significant fact about this case was that the Judge had determined that Soh gave unfair preference to one of his creditors, which would be a consideration under s 124(5) of the Act (also known as a "special fact") to be taken into account in the court's decision to discharge a bankruptcy. This finding was not disputed before us. The existence of this special fact meant that the Judge could only grant a discharge under ss 124(4)(*b*) or 124(4)(*c*), both of which on a plain reading seemed to contemplate the discharge of bankruptcy subject to the imposition of some sort of condition. Nonetheless, the Judge chose to discharge Soh unconditionally as she felt there was no appropriate condition to impose in this case. This issue, *ie*, whether the court was entitled to grant an unconditional discharge, was the main issue in contention in this appeal.

Background facts

3 Soh was indebted to HLB on account of personal guarantees which he gave to Hong Leong Finance Berhad ("HLFB"), the predecessor of HLB, in respect of loans which HLFB had granted to four Malaysian companies in which Soh was a director and shareholder. These four companies were engaged in property development and construction. Due to the Asian Financial crisis, the companies were unable to repay the loans. In turn, HLFB looked to Soh for the repayment of the total outstanding of $26,353,903.26.

4 Soh also borrowed extensively from several companies he owned including a certain Wei Sin

Construction Pte Ltd ("WSCPL"). Together with his debts to HLFB, Soh's total liability came up to $31,126,626.06. He was adjudged a bankrupt in August 2001.

5 After being made a bankrupt, Soh contributed $100 per month to the Official Assignee ("OA") towards his debt. From 1 July 2002, Soh found employment and earned a gross salary of $5,000 per month, of which $4,700 went into family expenses. From November 2003, he increased his contribution to the OA to $200 per month, and, from November 2004, his contributions increased further to $250 per month. From 1 September 2005 to 31 July 2007, Soh's salary from his employment increased to $6,100 a month. Before the application was made for his discharge from bankruptcy, he was employed in China earning $7,000 a month.

History of the proceedings

6 On 21 September 2007, the OA applied to the High Court for Soh to be discharged from bankruptcy. In his report on Soh's bankruptcy submitted in support of the application ("the First Report"), the OA stated that a third party had proposed to pay $40,000 to settle part of Soh's debts. The First Report further stated that the administration of Soh's bankruptcy had been completed, the case was more than five years old, and that Soh had become unemployed with medical problems. HLB challenged the application on two main grounds, namely, that there were special facts within s 124(5) of the Act and that Soh's conduct during bankruptcy was not satisfactory.

7 In response, Soh filed an affidavit dated 28 November 2007 ("Soh's first affidavit") explaining that his bankruptcy was a result of the Asian financial crisis and not due to any personal fault of his. The OA also filed a second report ("the Second Report") stating that Soh had not travelled without the OA's authorisation and that Soh's conduct during bankruptcy was satisfactory. Soh was granted an unconditional discharge by the AR on 15 February 2008.

8 On HLB's appeal to the Judge (in chambers), Soh filed a second affidavit dated 24 June 2008 ("Soh's second affidavit"). Furthermore, in order to ensure that the assessment made on the case was fair and objective, the OA assigned a new case officer to have a fresh look into the merits of the case. The new officer submitted yet another report ("the Third Report"). The conclusion remained that there was nothing to warrant a refusal to discharge Soh from bankruptcy.

The Judge's decision

9 Two main arguments were canvassed before the Judge below, *viz*, firstly, that the OA's reports (*ie*, the First Report, the Second Report, and the Third Report (collectively referred to hereafter as "the OA's Reports")) were inadequate; and, secondly, that there were special facts under s 124(5) of the Act that would not allow for an unconditional discharge for Soh (Judgment at [3]).

10 Specifically, HLB alleged that, in the present case, there existed several special facts, namely:

(a) Soh had unfairly preferred WSCPL when he sold two cars and two club memberships and paid part of the sale proceeds to WSCPL (*per* s 124(5)(*l*);

(b) Soh had recklessly and without reasonable care took on or stood as guarantor for the large loans obtained by the Malaysian companies from HLFB (*per* s 124(5)(*d*));

(c) Soh's assets were not of a value equal to 20% of his unsecured liabilities (*per* s 124(5)(*j*)); and

(d) Soh had continued to trade even after knowing or having reason to believe that he was insolvent (*per* s 124(5)(*b*)).

11 In relation to the first argument, the Judge acknowledged that there would be cases where a lack of information could prevent the court from making a just decision (Judgment at [5]). However, she found that the OA's Reports were adequate in Soh's case. In this regard, she stated (*id* at [6]):

> The [OA's Reports] could not include every nuance of each investigation into complaints made against the bankrupt. To hold the [OA] to such an exacting standard would hinder its function. The [OA] 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 Report and the Third Report] 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 [OA's Reports] were, in my judgment, adequate to furnish the court with sufficient information on which to make a decision.

12 In relation to the second argument, the Judge considered two special facts under s 124(5) of the Act, namely, that the bankruptcy was brought on by recklessness or want of reasonable care and attention (*per* s 124(5)(*d*)) and that the bankrupt had given unfair preference to a person as defined in s 99 of the Act (*per* s 124(5)(*l*)). However, she did not consider two other facts alleged by HLB, namely, that the bankrupt's assets were not of a value equal to 20% of the amount of his unsecured liabilities (*per* s 124(5)(*j*)) and that the bankrupt had continued to trade after knowing or having reason to believe himself to be insolvent (*per* s 124(5)(*b*)).

13 The Judge found that Soh had indeed given unfair preference to a WSCPL within the meaning of s 124(5)(*l*) of the Act (Judgment at [12]). She nonetheless exercised her discretion and granted an unconditional discharge from bankruptcy to Soh, pursuant to s 124(4) of the Act (*id* at [13]–[22]).

14 In so exercising her discretion, the Judge first distinguished the decision of Warren L H Khoo J in *Re Siah Ooi Chee* [1998] 1 SLR 903 ("*Siah Ooi Chee*") and the decision of this court in *Jeyaratnam Joshua Benjamin v Indra Krishnan* [2005] 1 SLR 395 ("*JBJ*") on the basis that neither of them concerned a situation in which the court considered the possibility of granting an unconditional discharge when special facts under s 124(5) were present (Judgment at [16]). Hence, in her view, the comments made in those cases which did not support the granting of an absolute discharge were merely *dicta* (*ibid*). Second, she acknowledged that there was a difference between ss 124(3) and 124(4) in that the court must go on to consider the option of requiring the applicant to pay a dividend of not less than 25%; but where the court had considered this option and found it inappropriate, the court could still make an order granting an unconditional discharge (*ibid*). Third, the Judge reasoned that her exercise of discretion was in line with the parliamentary intention behind s 124(4) since s 124(4)(*c*) was included to enlarge the court's discretion rather than fetter it – the original Bankruptcy Bill having only contained s 124(4)(*a*) and s 124(4)(*b*) (*id* at [17]–[19]). Fourth, taking a literal reading of s 124(4)(*c*) would lead to absurd results (*id* at [18]). The court would have to impose a condition even if it found none to be suitable; the condition imposed would be merely nominal and be of use to neither the creditor nor the debtor (*ibid*).

15 Finally, she considered whether this was an appropriate case for the grant of an unconditional discharge. She gave weight to, *inter alia*, the fact that although Soh had given unfair preference to WSCPL, it was for the broader purpose of repaying his loans (Judgment at [20]). In the final analysis, she found that Soh's personal circumstances warranted an unconditional discharge (*id* at [20]–[21]).

Issues raised in this appeal

16 Three issues were raised on appeal. First, whether the court *could* grant an unconditional discharge from bankruptcy where there existed special facts under s 124(5) of the Act. Second, if the court did have the power to grant an unconditional discharge, whether the Judge *should* have done so. A third issue raised by the appellant was whether the OA's Reports were adequate. We will deal with the adequacy of the OA's Reports together with the second issue of whether the Judge erred in the exercise of her discretion.

The power to grant an unconditional discharge from bankruptcy

17 It was clear that the first issue was the main plank of the Appellant's case. For present purposes, s 124, and in particular s 124(4)(*c*),of the present version of the Bankruptcy Act (*ie*, the Act), is pertinent. Section 124 has remained unchanged since the enactment of the Bankruptcy Act in 1995 (*ie*, Act 15 of 1995 ("the Act of 1995")). The Act of 1995 had brought about significant changes in the law for the discharge of bankruptcy. For convenience, s 124 of the Act will be set out in its entirety as follows:

> **Discharge by court**
>
> **124.**—(1) The Official Assignee, the bankrupt or any other person having an interest in the matter may, at any time after the making of a bankruptcy order, apply to the court for an order of discharge.
>
> (2) Every such application shall be served on each creditor who has filed a proof of debt and on the Official Assignee if he is not the applicant, and the court shall hear the Official Assignee and any creditor before making an order of discharge.
>
> (3) Subject to subsection (4) on an application under this section, the court may —
>
> (*a*) refuse to discharge the bankrupt from bankruptcy;
>
> (*b*) make an order discharging him absolutely; or
>
> (*c*) make an order discharging him subject to such conditions as it thinks fit to impose, including conditions with respect to —
>
> (i) any income which may be subsequently due to him; or
>
> (ii) any property devolving upon him, or acquired by him, after his discharge,
>
> as may be specified in the order.
>
> (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), the court shall —
>
> (*a*) refuse to discharge the bankrupt from bankruptcy;
>
> (*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.

(5) The facts referred to in subsection (4) are —

(*a*) that the bankrupt has omitted to keep such books of accounts as would sufficiently disclose his business transactions and financial position within the 3 years immediately preceding his bankruptcy, or within such shorter period immediately preceding that event as the court may consider reasonable in the circumstances;

(*b*) that the bankrupt has continued to trade after knowing or having reason to believe himself to be insolvent;

(*c*) that the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable ground of expectation (proof whereof shall lie on him) of being able to pay it;

(*d*) that the bankrupt has brought on or contributed to his bankruptcy by rash speculations or extravagance in living, or by recklessness, or want of reasonable care and attention to his business and affairs;

(*e*) that the bankrupt has delayed or put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action or other legal proceedings properly brought or instituted against him;

(*f*) that the bankrupt has within 3 months preceding the date of the bankruptcy order, when unable to pay his debts as they became due, given an undue preference to any of his creditors;

(*g*) that the bankrupt has, in Singapore or elsewhere on any previous occasion, been adjudged bankrupt or made a composition or arrangement with his creditors;

(*h*) that the bankrupt has been guilty of any fraud or fraudulent breach of trust;

(*i*) that the bankrupt has, within 3 months immediately preceding the date of the bankruptcy order, sent goods out of Singapore under circumstances which afford reasonable grounds for believing that the transaction was not a bona fide commercial transaction;

(*j*) that the bankrupt's assets are not of a value equal to 20% of the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value to 20% of his unsecured liabilities has arisen from circumstances for or in respect of which he cannot firstly be held blamable;

(*k*) that the bankrupt has entered into a transaction with any person at an undervalue within the meaning of section 98;

(*l*) that the bankrupt has given an unfair preference to any person within the meaning of

section 99;

(*m*) that the bankrupt has made a general assignment to another person of his book debts within the meaning of section 104.

(6) The court may, at any time before an order of discharge takes effect, rescind or vary the order.

The background to the enactment of s 124(4)

18 It will be seen from the provisions above that the discharge regime are in two distinct tracks – the first under s 124(3) where there are no special facts under s 124(5) of the Act, and the second under s 124(4) where there are such special facts. It should be noted that there is a possible third track pursuant to s 125, *viz*, discharge upon certification by the OA, which does not involve the court (although the court still has the final say under s 126(6) of the Act). The present case did not concern s 125.

19 In order to better appreciate the purpose of s 124(4)(*c*) of the Act, we would point out that this provision was not in the original Bankruptcy Bill (*ie*, Bill 16 of 1994) presented to Parliament, which included only *two* options in cl 124 (which was to be s 124) for the court should it find that a special fact existed – it could either refuse to discharge the bankruptcy (*per* cl 124(4)(*a*)) or grant a discharge subject to a substantive condition that the bankrupt make payment of a 25% dividend or future income or assets (*per* cl 124(4)(*b*)). The inclusion of cl 124(4)(*c*) was the result of the deliberations of the Select Committee on the Bankruptcy Bill, whose findings were contained in the *Report of the Select Committee on the Bankruptcy Bill (Bill No 16/94)* (Parl 1 of 1995, 7 March 1995) (the "Select Committee Report"). The Select Committee Report stated the following (at paras 6.16–6.19):

6.16 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.

6.17 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*).

6.18 Many representors have expressed the concern that bankrupts who do not satisfy the conditions specified in clause 125 (2) for discharge by the [OA] 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.

6.19 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*.

[emphasis added]

20 The traditional analysis *vis-à-vis* an application for the discharge of a bankruptcy order involved the court balancing the interests of the bankrupt, the creditor, and also the interests of the public and of commercial morality (see, generally, *In re Gaskell* [1904] 2 KB 478). The dynamics of this

balancing exercise was notably tweaked by the Act of 1995. One of the first cases to consider the then newly enacted discharge regime was *Siah Ooi Chee* ([14] *supra*) where Khoo J said (at [9]):

> The [Bankruptcy Act) was designed to meet two major conflicting concerns. One stemmed from the recognition that many an individual businessman becomes insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle. It would be in the interest of society that people who had become bankrupt in such circumstances, and generally, should be given a second chance in life, so that the social cost of waste of entrepreneurial resources could be reduced. The other concern was that, without proper safeguards, people who had used dishonest or fraudulent methods in conducting their business affairs to the detriment of their creditors might get an undeserved advantage from their own wrongdoings. The fear of people taking advantage of their own frauds is probably as old as the institution of bankruptcy itself, and it was natural that such fears were highlighted when an easier regime for discharge from bankruptcy was being proposed. The new legislation sought to strike a balance between these two major concerns.

21 These policy considerations were reaffirmed by this court in *JBJ* ([14] *supra*), where it was stated that (at [10]):

> On the one hand, businessmen who became insolvent through being caught at the wrong turning of the economic cycle should be given a second chance in life. On the other hand, the provisions should not be allowed to be used by dishonest individuals who would get an undeserved advantage, to the detriment of their creditors, from their own wrongdoings.

22 Khoo J in *Siah Ooi Choe* ([14] *supra*) went on further to state that s 124(4) gave *no* discretion to grant an unconditional discharge (at [14]–[15]):

> 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 post discharge 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.
>
> 15 The facts that make a case a special case falling under sub-s (4) are as follows:
>
> (a) offences under the Act[;]
>
> (b) offences under section 421 to 424 of the Penal Code; and
>
> (c) the facts set out in sub-section 5.
>
> *This reflects the concern for the need to guard against frauds, improper and irresponsible conduct*. These three classes of facts together make a very long, if not exhaustive, list. The

sub-s (5) facts I set out earlier are only some of them, but they give a flavour of the sort of facts which the legislature thought relevant to a consideration of such applications.

[emphasis added]

23 This position was confirmed by this court in *JBJ* ([14]) *supra*), where it was stated that "[w]here the factors mentioned in subsections (4) and (5) come into play, the court is prevented from granting an absolute discharge" (at [9]). However, Kala Anandarajah *et al*, *Law and Practice of Bankruptcy in Singapore and Malaysia* (Butterworths Asia, 1999) ("*Law and Practice of Bankruptcy*") observes that s 124(4)(*c*) of the Act is unclear because it seems to replicate s 124(4)(*b*). One possible construction of s 124(4)(*c*) suggests that the court must "direct its mind on imposing one or more of the specific conditions mentioned in section 124(4)(b) [*sic*]" before going on to exercise its general powers under s 124(4)(*c*) (*id* at p 416). This interpretation was approved by the Judge. Still, this approach does not answer the question of whether the court's powers included the power to grant an unconditional discharge.

Analysis

24 The literal reading of s 124(4)(*c*) would be that the court has a great degree of discretion in imposing conditions for a discharge. The phrase "subject to such conditions as the court may think fit to impose" would conceivably include the possibility of not imposing any conditions if there were no appropriate conditions in the court's mind. What appears to stand in the way of such a reading of the provision would be the views expressed by the High Court in *Siah Ooi Choe* ([14] *supra*) and the Court of Appeal in *JBJ* ([14] *supra*) where it was stated that there was no possibility of an unconditional discharge where a case comes within s 124(4). The Judge found that the comments in both *Siah Ooi Choe* and *JBJ* were *obiter dicta* because "neither case dealt with a situation in which the special facts within s 124(5) were proved" (Judgment at [16]).

25 In *JBJ*, the main issue considered was whether the bankrupt should be discharged in light of an offer to repay one third of his debts. Although the broad framework of s 124 was considered, the Court of Appeal did not delve into the issue of s 124(4) in particular, beyond approving the opinion of Khoo J on the provision as expressed in *Siah Ooi Choe*. Therefore, the Judge was correct in characterising the Court of Appeal's comments in *JBJ* as *obiter dicta*.

26 The facts were more complex in *Siah Ooi Choe* ([14] *supra*). The bankrupt in that case had been previously convicted for offences under s 406(*a*) of the Companies Act (Act 42 of 1967) for inducing four banks to extend credit facilities to one of his companies just before he was made bankrupt (see *Siah Ooi Choe v PP* [1988] SLR 402). He repaid three of the banks in full although the fourth bank was only partly repaid because provisional liquidators had already been appointed by that time. It was submitted that such circumstances (*ie*, the offences) could constitute the special fact of fraud under s 124(5)(*h*).

27 Furthermore, the bankrupt was also accused of bringing about a situation where his assets had fallen far below 20% of his unsecured liability, a special fact under s 124(5)(*j*). However, Khoo J took note of the findings of L P Thean J in the criminal proceedings in *Siah Ooi Choe v PP* that the bankrupt's offences were "of the lowest levels of culpability; that the circumstances were highly exceptional and there were very strong extenuating factors in [the bankrupt's] favour" (*Siah Ooi Choe* at [18]). Discharge was granted but with the condition that the bankrupt was to sell off his HDB (*ie*, Housing Development Board) flat. Khoo J did not specify if he was making the order pursuant to s 124(3)(*c*) or s 124(4)(*c*).

28 The most plausible reading of *Siah Ooi Choe* would be that Khoo J had applied s 124(4)(*c*), since he did not expressly reject the assertion that the bankrupt was fraudulent. In fact, he accepted that the offences committed should be taken into account, although the circumstances still weighed in the bankrupt's favour. In this regard, he stated (*id* at [20]):

> On these two matters, *it seems to me that the offences under the Companies Act of which [the bankrupt] was convicted, may legitimately be taken into consideration as they took place so near the date of his bankruptcy*. However, the *circumstances in which they were committed, as mentioned by LP Thean J, must weigh in [the bankrupt's] favour*. *Frauds come in all shapes and sizes*. There is, obviously, a scale ranging from cases where no loss is caused to creditors and no gain accrues to the bankrupt to cases where a person in control of a company sets about defrauding the company or its creditors and allowing the company to be wound up leaving the creditors high and dry. In considering such cases, the court must have regard to where on the scale the particular case falls. [emphasis added]

While Khoo J would appear to suggest that the bankrupt's fraudulent conduct might have been of the lowest degree of culpability, he did not go on further to conclude that the bankrupt's conduct was outside of the special facts in s 124(5) before imposing a conditional discharge. Accordingly, we think it would be reasonable to infer that Khoo J gave a conditional discharge pursuant to s 124(4)(*c*).

29 Be that as it may, it was clear that Khoo J regarded that, in the circumstances of that case, an appropriate condition – the selling of the bankrupt's HDB flat – should be imposed before granting a discharge. He did not specifically examine if the scope of s 124(4)(*c*) allowed for an unconditional discharge since there was no issue of what would happen in the event that there was no such appropriate condition, which was the issue in the present appeal. Thus, *Siah Ooi Choe* ([14] *supra*) had *not* decided the same question confronting the Judge in the present case.

Parliamentary intention

30 As noted earlier (at [19] above), the Select Committee Report indicated that s 124(4)(*c*) was included to broaden the scope of the court's powers in granting a discharge where special facts existed. In addition to the original provisions which allowed a discharge on the conditions laid out in s 124(4)(*b*), the court could now, if it thought fit, make an order discharging the bankrupt subject to such conditions as it deemed fit to impose. Although s 124(3) expressly includes the power to grant an unconditional discharge under s 124(3)(*b*), the same power is not included in s 124(4). Arguably, if the intention of Parliament behind the introduction of s 124(4)(*c*) was really to give the court unfettered discretion in granting a discharge from bankruptcy, then the powers conferred upon the court under s 124(4) would have been worded in a similar fashion as those set out in s 124(3).

31 The reason for a dual track regime for ordinary and special cases would seem to be that the existence of the special facts enumerated in s 124(5) are indicative of some level of culpability on the part of the bankrupt that calls for harsher treatment, as discussed at [14] of *Siah Ooi Choe*. In the second reading of the Bankruptcy Bill, Prof S Jayakumar quoted the Addendum to the President's Address to Parliament in January that year, where he (*ie*, Prof Jayakumar) had remarked that the new legislation would allow for "speedier discharges of bankrupts" in Singapore (see *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 64 at col 399). Notwithstanding this general liberalisation of discharging people from bankruptcy, there is still a balance to be maintained between the financial rehabilitation of the bankrupt (to give, in Khoo J's words in *Siah Ooi Choe* at [9], the bankrupt a second chance in life) on one hand, and the protection of creditors and society at large from fraudulent or irresponsible debtors on the other.

32 Conceivably, the true parliamentary intention behind s 124(4)(*c*) could have been deterrence – to mandate the imposition of a condition, any condition, even if the court determined none to be appropriate, for the sake of deterring fraudulent or irresponsible conduct in society at large. Construing s 124(4)(*c*) such that the court has no power to grant an unconditional discharge would be, in other words, representative of the balance that Parliament has struck between individual financial rehabilitation and the broader public interest.

33 This interpretation dovetails with the structure of the Act, since the powers granted to the court under s 124(3) and s 124(4) are so obviously different. Functionally, it might be argued that should the court have the power to grant an unconditional discharge, then to all intents and purposes s 124(4) is in fact indistinguishable from s 124(3), save for the formality of considering the imposition of one of the conditions prescribed in s 124(4)(*b*). This might *not* reflect the balance between the different competing interests that Khoo J talked about in *Siah Ooi Choe* ([14] *supra*), where in relation to s 124, he said (at [16]):

> It can be assumed that all the conflicting interests, including the concerns I refer to, were taken into consideration in the formulation of all these provisions, as evidenced by this rather exhaustive listing [of special facts to be proved].

34 On the other hand, there are other provisions in the Act which show that the aforementioned arguments have their limits. It will be recalled that s 125 contains the innovative measure of allowing the OA to certify that a bankrupt is discharged from bankruptcy, if, *inter alia*, the outstanding sum is less than $500,000. Section 126 allows creditors to apply to court if they object to the OA's certification, and the court could then dismiss the application or make other orders as it thought just. Thus, the ultimate control is still with the court.

35 If HLB's contention was correct in that s 124(4)(*c*) does not allow the court to grant an unconditional discharge, then an anomaly would arise. The court would be able to approve an unconditional discharge by the OA under s 126(*a*) even where any of the special facts enumerated in s 124(5) existed in the case; but conversely the court would not have the power to grant an unconditional discharge under s 124(4)(*c*). We will illustrate the anomaly by an example. Let us take a case where a special fact, say unfair preference, had been established, but the matter is within the OA's s 125 jurisdiction because the outstanding sum is less than $500,000. In that case, the OA is effectively free to grant an unconditional discharge. Even if creditors were to apply to court to overturn the OA's decision under s 126, the court in that case has the power to dismiss the creditors' application entirely under s 126(*a*). However, if the bankrupt had chosen to apply to court directly under s 124, then the court conversely would not have the power to grant an unconditional discharge if the appellant's reading of s 124(4)(*c*) was adopted.

36 Parliament could not have intended this inconsistency. Of course, we recognise that the problem only arises for bankrupts with debts less than $500,000 and s 124(4) may not be utilised for such cases. But there is nothing in s 124 which suggests that it has no application where the bankrupt's debt is less than $500,000. If there was supposed to be a difference in the court's powers under s 124 where the debt is less than $500,000, this difference is not apparent from a reading of the section or the Act as a whole. Neither is such an intention apparent from the parliamentary debates.

37 What conditions should appropriately be imposed must depend on the circumstances of each case, bearing in mind the degree of a bankrupt's culpability and the deterrent value of each condition. Thus, in *Siah Ooi Choe* ([14] *supra*), the court appears to have taken into account the bankrupt's blameworthiness when making the decision to discharge him from bankruptcy with a condition. The

aim of ss 124(4) and 124(5) could be construed as being to guard against frauds, improper and irresponsible conduct (*id* at [15]) and to demonstrate that a bankrupt who has been guilty of such conduct is expected to do more before he could be discharged.

38 There would not be any value in precluding the court from granting an unconditional discharge if whatever conditions to be imposed in a case would be of little or nominal deterrence value. Conversely, no harm would be suffered by interpreting s 124(4)(*c*) broadly to give the court such powers because the court could be relied upon to ensure that fraudsters or reckless traders do not take advantage of the new discharge regime by imposing, if need be, severely punitive conditions commensurate with the degree of culpability of the bankrupt.

39 In this regard, we would think that there is much to be said in favour of construing s 124(4) in a way, which while protecting creditors and commercial morality, does not discourage entrepreneurship. As Prof David Milman, in "Personal Insolvency Law and the Challenges of a Dynamic, Enterprise-Driven Economy" (2008) 20 SAcLJ 438, noted, there is "no doubt that having an effective bankruptcy law model can aid enterprise; in general terms, this is because fear of the consequences of bankruptcy can deter risk taking" (at 439). The impossibility of an unconditional discharge would certainly be such a fear for an entrepreneur who may be compelled by market forces into financially unwise situations.

The rule of statutory construction against absurd results

40 Finally, counsel for Soh also pointed to the rule of statutory construction, as stated in F A R Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th Ed, 2008) ("*Bennion*") at Part XXI, *viz*, that Parliament is presumed not to have intended an absurd result – which could mean an unworkable or impracticable result, an inconvenient result, an anomalous or illogical result, a futile or pointless result, an artificial result or a disproportionate counter-mischief (at p 969). The courts have given a wide meaning to the phrase "absurd results" that goes beyond the plain English meaning of being silly or ridiculous. The extent to which the presumption applies depends "on the degree to which a particular construction produces an unreasonable result [and the] more unreasonable a result, the less likely it is that Parliament intended it" (*per* Lord Millett in *R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209 at 238). This was an argument which struck a cord with the Judge (see Judgment at [18]).

41 What would amount to imposing a condition which would lead to a futile or pointless result? This is not something which is amenable to definition. Much would depend on the fact situation of the case at hand. What can be said is that the presumption against a futile result has been expressed in several ways. One formulation is that Parliament does nothing in vain (*Bennion* at p 1000), while in *Barrett Bros (Taxis) Ltd v Davies Lickiss and Milestone Motor Policies at Lloyd's, Third Parties* [1966] 1 WLR 1334, Lord Denning MR said that "[t]he law never compels a person to do that which is useless and unnecessary" (at 1339). This maxim has been applied to avoid unnecessary legal proceedings, disability or duplication of a legal duty. In *Aziz v Knightsbridge Gaming and Catering Services and Supplies Ltd* [1982] TLR 364, a gaming licensee was required to deliver any cheque received for gaming to a bank within two days for payment or collection. The cheque in this instance was drawn on a non-existent bank. The court there found it was pointless for the licensee to go through the motions of presenting the cheque to a bank when there was no such bank.

42 The view taken by the Judge, which we thought persuasive, was this: if s 124(4)(*c*) was interpreted to mean that the court had no power to grant an unconditional discharge, then the court would have to "impose a nominal condition simply for the sake of doing so" even though none might be appropriate (Judgment at [18]). In this particular situation, she found that the enormity of the

debt dwarfed any contribution that could be ordered from Soh, rendering meaningful repayment impossible (*id* at [21]).

43 Here, we could foresee a possible counter-argument, *viz*, s 124(4)(*c*) should be read to mean that only a *substantive* condition, *ie*, not merely a nominal condition, should be imposed so as to avoid an absurd result. Again, taking into consideration the $40,000 debt settlement proposal, there was no condition that could be realistically imposed on Soh that would better the creditors' position. Imposing, perhaps, a condition that Soh continue to make payment of $250 per month would still mean that more than 13 years would have to elapse before Soh could match the proposed payment of $40,000 by the third party which was to be made now. Moreover, even if the court should order that Soh increase his monthly repayment to $300 per month, that would still require some eleven years before $40,000 could be recovered. Therefore, there was no meaningful substantive condition that could be imposed. In any event, in our view, this approach seemed to go against the plain wording of the provision which allows for the imposition of any condition the court thinks fit, and accordingly, it should be rejected.

Conclusion on the power to grant an unconditional discharge

44 Drawing the threads of the analysis together, taking a purposive interpretation of the Act and for the reasons set out above, we agreed with the Judge that it was permissible under s 124(4)(*c*) to grant an unconditional discharge where no harm would thereby be caused to creditors and the broader public interest of deterrence would not be undermined.

The exercise of the discretion to grant an unconditional discharge

45 An appellate court may only interfere in the exercise of a discretion by a judge below on one of three bases, namely, where: (a) the trial judge was misguided with regard to the principles under which his or her discretion was to be exercised; (b) the trial judge took into account matters which he or she ought not to have or failed to take into account matters which he or she ought to have; or (c) the trial judge's decision was plainly wrong (see *The Vishva Apurva* [1992] 2 SLR 175 at 181, [16] and *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 at [51]). In the present case, HLB's arguments related, in the main, to the first two bases.

46 At this juncture, we should mention that in its submission, HLB had pointed out that in this case more than one special fact under s 124(5) existed. In our opinion, the existence of multiple special facts in itself does not bar the court from granting a discharge, whether conditional or unconditional. But the presence of multiple special facts might show that there is greater blameworthiness on the bankrupt's part and this would be germane to the question of the appropriate conditions to be imposed for the discharge.

Principles governing the discharge from bankruptcy

47 The Act does not prescribe the factors that should be taken into consideration by the court when it decides whether to discharge a bankrupt. This court approved a list of "common-sense" factors (set out below) in *Jeyaretnam Joshua Benjamin v Indra Krishnan* [2007] 3 SLR 433 ("*JBJ 2*") at [26]; however, it was emphasised that the list was not meant to be exhaustive and that the court retains a wide discretion in deciding which factors, if any, to take into account (*id* at [27]). This court also stated that an appellate court would seldom interfere in a lower court's decision in this respect (*ibid*). That said, the list of factors were as follows (*ibid*):

(a) the interests of the bankrupt and the creditors;

(b) the public interest and commercial morality;

(c) the bankrupt's conduct prior to and during his bankruptcy;

(d) whether the bankrupt has committed any offence under the [Act] or under ss 421–424 of the Penal Code (Cap 224, 1985 Rev Ed);

(e) the cause of the bankrupt's insolvency and his culpability in incurring his debts;

(f) the magnitude of the deficiency in the bankrupt's estate;

(g) any objections to the application;

(h) the bankrupt's domestic, social and financial circumstances, including the bankrupt's employment status and whether the bankruptcy is affecting his chances of obtaining gainful employment; and

(i) the contributions made by the bankrupt, for the benefit of the creditors.

48 Additionally, this court also approved (*JBJ 2* at [29]) of a passage from Ian F Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 3rd Ed, 2002) at para 11-012:

> [I]t may be logically inferred from the overall purposes attaching to the bankruptcy law that the court should be mindful of such questions as to the debtor's suitability to recommence trading; whether the creditors have been enabled to recover all that might reasonably be made forthcoming to them through the bankruptcy; and the essential consideration of the proper protection of the public. Against such considerations must be balanced the need to avoid placing such a lingering burden upon the debtor as to destroy all motive for future exertion on his part, for it is a fundamental policy of the bankruptcy law that, in return for giving up his property, the debtor shall be made a free man again. Likewise it would be regarded as unfair to accompany a refusal of discharge with a formulation of conditions as to the future payment of money to so great an amount that there is no reasonable chance that the bankrupt will ever qualify for his discharge.

The adequacy of the OA's Reports

The object of OA's Reports

49 It had to be foremost borne in mind that the OA's Reports were to assist and enable the court to come to a fair and just decision on the discharge application. Under s 21 of the Act and rule 48 of the Bankruptcy Rules (Cap 20, R1, 2006 Rev Ed) any statement in a report filed by the OA in relation to an application to discharge a bankruptcy order is only *prima facie* evidence. Other evidence may be admitted to contradict that. If there are matters which are not in the report that the court considers important for it to have, it is entitled to ask for further investigations to be done. Having said that, whether a matter ought to be addressed in the report must necessarily depend on the issues raised by any objecting creditor. Supplementary report(s) could be furnished by the OA to address specific concerns. Information required could also be furnished directly by the bankrupt to the court by way of an affidavit.

50 As far as this appeal was concerned, any inadequacy in OA's Reports could not have materially affected the Judge's decision, as the information that was alleged to be missing was in fact provided

in Soh's affidavits and by his counsel. In any event, the Judge found that the OA's Reports were adequate (Judgment at [6]). While she was conscious that a lack of information could hinder the court from making a just decision, she had rightly ruled that the OA did not have to include every nuance of its investigation in its report. We would hasten to add that a judge is certainly not bound to accept the recommendation of the OA, but is entitled to make his or her decision in the light of all the available evidence placed before him or her.

Case law

51 HLB had sought to rely on the Australian case of *Re Harding* [1981] 57 FLR 320 and the Malaysian cases of *Re Kelvin Lee See Fooi; ex p BSN Commercial Bank Malaysia Bhd* [2006] 3 MLJ 683 ("*Re Kelvin Lee*") and *Re Lau Kah Lay & Anor; ex p Cold Storage (M) Bhd* [2001] 6 MLJ 311 ("*Re Lau Kah Lay*") for the proposition that the inadequacy of the OA's Reports would bar or at least be a significant factor against the court granting the discharge of a bankrupt.

52 The Australian Federal Court in *Re Harding* took an approach similar to *JBJ 2*. There, while the official trustee (whose role would be similar to that of the OA) furnished a report stating that the conduct of the bankrupt was satisfactory, he opposed the bankrupt's application for a discharge on the ground that the bankrupt had a deficiency in excess of $100,000 – a technical point which bore no part in the court's decision. However, some of the bankrupt's creditors objected to his discharge, alleging that the bankrupt had transferred his assets to his wife and that he received benefits and allowances substantially in excess of his stated salary and allowances. Lockhart J dismissed the allegations that the bankrupt's wife held property on trust for him for a lack of evidence, but accepted that the bankrupt was substantially better off financially than he appeared to be. The application for a discharge was refused. In that case, the official trustee's report, though not adequate, was not the cause why the court did not grant a discharge. It was simply one piece of evidence that was given relatively little weight in light of the other evidence. Indeed, the bankrupt was even orally cross-examined as to his true financial position. There was evidence that the bankrupt had substantial benefits aside from his stated salary and the fact that there were some other matters which required further inquiry persuaded the court not to order a discharge. Lockhart J was certainly less that happy with the bankrupt's conduct post bankruptcy as can be seen from these remarks of his (*id* at 337):

> But the bankrupt's conduct, in particular since his bankruptcy, has been such that before he can obtain a discharge he must show that he is worthy of it. He must make amends by doing what he can to help his creditors. He has the capacity to do so. Doubtless this will mean that he should conduct his affairs in the future so as to make available some of his real income to his creditors.

53 The holding in *Re Lau Kah Lay* ([51] *supra*) was substantially similar to *Re Harding*. In that case, the court refused to grant a discharge because not all of the relevant information was before it. There was a reasonable suspicion that the assets of the two bankrupts might have gone to their wives, and the OA in his report merely stated that he was powerless to investigate the wives of the bankrupts. The judge did not think that the OA had done enough to get to the bottom of things. He also suggested that the bankrupts could help themselves by asking their wives to lay the facts before the court by way of affidavits.

54 As for *Re Kelvin Lee* ([51] *supra*), the court in that case did base its findings substantially on the inadequacy of the OA's report; but this must be considered in light of s 33(3) of the Malaysian Bankruptcy Act 1967, which provides:

> On the hearing of [any application for discharge from bankruptcy], the court *shall* take into

consideration a report of the Official Assignee as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy …. [emphasis added]

55 The situation is different in Singapore. As stated in *JBJ 2* ([47] *supra*), the Act does not mandate which factors should be take into account, giving the court a wide discretion in deciding whether to discharge a person from bankruptcy (at [26]–[27]). Having said that, the court could, at any time, order further investigations, or require the bankrupt to furnish more information if it thinks that such information is necessary to enable it to come to a fair and just decision.

56 The three cases discussed (*ie*, *Re Harding* ([51] *supra*), *Re Lau Kah Lay* ([51] *supra*), and *Re Kelvin Lee* ([51] *supra*)) do not stand for the proposition that the adequacy of the OA's reports alone would prompt the court to allow or refuse a discharge from bankruptcy. What the first two cases (*ie*, *Re Harding* and *Re Lau Kah Lay*) show is that where the OA's reports do not provide sufficient evidence, the court could turn to other sources of evidence in order to obtain a fuller picture of the bankrupt's true financial position. In the present case, as will be elaborated on below (see [57]–[58]), all the queries that were raised were answered by either the OA or Soh. The Judge felt that she had the information to come to a decision and there was no basis for us to disagree with her in this regard.

Soh's financial situation

57 Broadly, HLB argued that the OA's Reports were inadequate in that they did not disclose (a) the extent and nature of the financial assistance Soh had obtained from a third party while unemployed and still a bankrupt; and (b) Soh's latest income and monthly expenses. These would appear to fall within two factors (see [47] above), *viz*, the bankrupt's conduct during and prior to bankruptcy (*ie*, factor (c)) and the bankrupt's financial situation including his employment and other forms of remuneration (*ie*, factor (h)).

58 In reality, this information had already been disclosed. Soh's second affidavit contained in greater detail Soh's financial circumstances during bankruptcy, including the fact that he had received financial assistance from one Tan Keaw Chong while unemployed. Soh's solicitors made oral submissions disclosing Soh's latest income of $7,000 a month at the hearing below on 22 August 2008. No evidence of any other circumstances militated against Soh's discharge from bankruptcy. Thus, it appeared that the missing information which HLB alleged was in fact available to the Judge below. We sensed that HLB seemed to be insinuating that there were gaps in the record that *could* be due to improper conduct. However, there was no evidence adduced to support this suggestion either before the court below or before us.

Other factors taken into consideration

59 It is apparent from the Judgment that the Judge had found Soh to have given unfair preference to WSCPL (Judgment at [12]). However, the Judge did not view this incident as being a case of unfair preference *simpliciter* because WSCPL was not merely Soh's creditor – she also found WSCPL to be a debtor of HLFB; thus Soh's payments to WSCPL would help to keep the company afloat so that "it could eventually repay [its] debts to HLB" (*id* at [20]). Therefore, viewed in this light, this giving of a preference to WSCPL was not wholly blameworthy.

60 However, we would hasten to add that the Judge would seem to have made a mistake when she found that WSCPL was a debtor of HLFB and in turn of HLB (see Judgment at [20]). From the facts provided in the affidavit evidence and the OA's Reports, it was not evident that WSCPL was

HLB's debtor. What was equally significant was that HLB itself denied that WSCPL owed it any money. Soh also acknowledged that HLFB only lent money to Soh's four Malaysian companies and *not* WSCPL. Soh maintained nonetheless that his actions were to salvage WSCPL and were not evidence of reckless or irresponsible behaviour. In a sense, one could say that that was irrelevant because what was in issue below was whether Soh had unfairly preferred one creditor, his own company WSCPL, over others, including HLB. Soh could still be said to be blameworthy of unfair preference. However, a broader perspective might well be that the various companies under Soh's control were interrelated and shared the same destiny. It should not really matter which company borrowed money from whom as the health of one would affect the health of the others. But there was not much evidence led on this point.

61 That said, Soh's second affidavit explained that he injected funds into WSCPL because WSCPL "still had $50 million worth of contracts" (at para 11), which presumably meant that the contracts if performed would have tided Soh and his other companies over the Asian financial crisis. Further, Soh also explained that his defaults on his loans and guarantees were a result of a "chain reaction" sparked off by one of his creditor banks, OCBC (*ibid*). This would imply that there was some sort of mutual interdependence between the various Singapore companies owned by Soh and the Malaysian companies which eventually defaulted on its loans to HLB. The Act was not designed to punish *bona fide* business activities (see *Siah Ooi Choe* at [9]). Soh's actions made business sense. From the admittedly scant facts, Soh's injection of funds into WSCPL would have plausibly allowed him to protect or salvage his other companies, including the four Malaysian companies. Given that the primary cause of Soh's financial collapse was the Asian financial crisis and that there was a strong possibility that the health of the various companies under Soh's control was interrelated to each other, Soh's actions could be regarded as not entirely blameworthy.

62 Other factors which seemed to have a bearing on the Judge's eventual decision related to Soh's personal circumstances. These included Soh's medical problems, the seven years he spent in bankruptcy, his age (*viz*, 48 years), the moderate salary he was drawing from employment in China, his lack of substantial assets aside from his HDB flat, and the fact that Soh was *not* living lavishly but working hard at providing for his family. In regard to the latter, there was an assertion that, based on Soh's monthly family expenses of $4,000 to $6,000, Soh was living well or in luxury. This claim stemmed from Soh's first affidavit where he stated that his monthly family expenses ranged from $4,000 to $5,000 while he was unemployed, although it increased to $6,000 when he began working in China (at para 7.1). We had no doubt that the OA would have examined the expenses required by his family in Singapore and by his living and working in China. But the OA had not found such expenses to be extravagant.

63 The Judge also took into account the fact that there was no benefit in ordering Soh to continue making payments because the enormity of his debt rendered any condition as to repayment "ludicrous" (Judgment at [21]). In contrast, granting a discharge would mean accepting the third party's proposal to repay Soh's creditors a dividend of at least $40,000. The Judge was certainly not wrong in holding that the debt settlement proposal of $40,000 now was far better than any repayment scheme that could be imposed on Soh. Furthermore, as HLB stood to gain the most as it was a substantial creditor, we could hardly fault the Judge for taking the debt settlement proposal into account in granting an unconditional discharge.

64 Finally, Soh did not misbehave himself during the period of his bankruptcy, a factor which the Judge was entitled to take into reckoning (see Judgment at [20]). For completeness, however, we considered some of the other complaints which HLB maintained before us. These included Soh's frequent travelling, his alleged consultation with specialists in private hospitals for his medical problems, his failure to contribute more than $250 per month despite drawing his current salary, the

enormity of his debt, and the brevity of the period of his bankruptcy (seven years). But there was really nothing in these complaints.

65 First, the OA had confirmed that Soh had not travelled without authorisation. Second, Soh's second affidavit stated that for most occasions he consulted his family general practitioner for his medical problems and was only once referred to a specialist (for his back problem, *not*, as HLB asserted, his liver) (at para 18). Third, although Soh drew a salary of $7,000, his expenses, which the OA had knowledge of but did not object to, came up to $6,000. Bearing in mind Soh's responsibility to his family, his amount of contribution was not unreasonable. Lastly, based on [24] of *Siah Ooi Choe* ([14] *supra*), HLB submitted that a period of ten years at least should pass before a discharge should be allowed. We did not think that this was what the court in *Siah Ooi Choe* intended to suggest. Moreover, the court also stated explicitly that the minimum waiting time for s 124 cases was to be similar to s 125 cases, *ie*, three years, and it need not be in proportion measured by the amount of the indebtedness (*id* at [17]). The fact of the matter is that the Act does not prescribe any minimum waiting period for an application under s 124. Views expressed by the court in specific cases as to a minimum waiting time are at best suggestions. Much would depend on the merits of each case. Here, although only a period of seven years had passed, we could not see why the Judge should be faulted for granting a discharge.

Conclusion on the Judge's exercise of discretion

66 Having regard to the relevant factors and circumstances, we were of the view that the Judge did not err in her exercise of discretion to grant Soh an unconditional discharge from bankruptcy.

Conclusion

67 In the light of the foregoing, we affirmed the Judge's decision to grant to Soh an unconditional discharge from bankruptcy with costs and with the usual consequential orders.