IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 77

Originating Summons (Bankruptcy) 4 of 2018
Registrar's Appeal No 18 of 2018
Summons No 889 of 2018
Summons No 954 of 2018
Summons No 2149 of 2018

In the matter of the Bankruptcy Act (Cap 20)

And

In the matter of Part V of the Bankruptcy Act (Cap 20)

And

In the matter of DOMINIC ANDRLA

DOMINIC ANDRLA

… Applicant

Bankruptcy No 824 of 2017
Registrar's Appeal No 19 of 2018
Summons No 840 of 2018
Summons No 2150 of 2018

In the matter of the Bankruptcy Act (Cap 20)

And

In the matter of DOMINIC ANDRLA

Between

AMERICAN EXPRESS INTERNATIONAL INC
… Plaintiff

And

DOMINIC ANDRLA
… Defendant

GROUNDS OF DECISION

[Insolvency Law] — [Bankruptcy] — [Interim Order]

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[2019] SGHC 77

High Court — Originating Summons (Bankruptcy) No 4 of 2018 (Registrar's Appeal No 18 of 2018, Summons No 889, 954 and 2149 of 2018, Bankruptcy No 824 of 2017 (Registrar's Appeal No 19 of 2018, Summons No 840 and 2150 of 2018)
Lee Seiu Kin J
17, 31 May; 25 June 2018

19 March 2019

Lee Seiu Kin J:

Introduction

1 In registrar's appeal no 18 of 2018, the appellant appealed against the decision of assistant registrar Scott Tan ("AR Tan") on 23 January 2018 dismissing his application in Originating Summons (Bankruptcy) No 4 of 2018 for an interim order under s 45(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed)("the Act"). In registrar's appeal no 19 of 2019, the appellant appealed against the decision of assistant registrar Bryan Fang ("AR Fang") on 25 January 2018 in making a bankruptcy order against him in bankruptcy no 824 of 2017.

2 After hearing arguments, I dismissed both appeals. The appellant filed a notice of appeal on 20 December 2018 and I now give my written grounds of decision.

Facts

3 The appellant is a British Citizen, and has been a Permanent Resident of Singapore for the last 19 years.[1] To date, he has accumulated debts of almost $8m of which the three top creditors are Nair (in the sum of about $3.1m), Hartnoll (about $2.2m) and Guy Neville ("Neville") (about $1.3m).[2] The remaining sum of about $1.4m is owed to various financial institutions and miscellaneous entities. The appellant also disclosed that there were two claims in the District Courts against him totalling about $400,000.

4 A bankruptcy petition was filed by one of the creditors, American Express International Inc ("AMEX") on 20 April 2017.[3] AMEX's bankruptcy application against the appellant was granted by AR Fang on 25 January 2018.[4]

5 On 11 January 2018, the appellant filed an application for an interim order under s 45(1) of the Act.[5] Under his initial proposal, the appellant would be given between six to nine months to sell his 33 Lotus Avenue Property ("the Singapore Property") and repay all debts out of the proceeds of its sale.[6] His proposed nominee was a lawyer.[7] The application was subsequently dismissed by AR Tan on 23 January 2018.[8] The appellant later sought to have the bankruptcy application dismissed on 25 January 2018 before AR Fang.

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[1] Appellant's Affidavit in HC/OSB 4/2018 dated 15 February 2018, para 5.

[2] Annex B, Appellant's Written Submissions for Hearing on 17 May 2018.

[3] Originating Summons in HC/B 824/2017.

[4] Minute dated 25 January 2018.

[5] Appellant's affidavit dated 11 January 2018.

[6] Appellant's Affidavit in HC/OSB 4/2018 dated 11 January 2018, para 37(b).

[7] Appellant's Affidavit in HC/OSB 4/2018 dated 11 January 2018, para 36.

[8] Minute dated 23 January 2018.

Decision below

6 Two creditors, AMEX and Neville objected to the appellant's application for an interim order. In their view, there was no point sanctioning a voluntary arrangement when it was "doomed to fail".[9] Secondly, they argued that the proposal put forth by the appellant was not a serious and viable one, as required by law.

7 The appellant argued that the court should not pre-judge the matter until it had seen the nominee's report, and added that the proposal was a serious one.

8 AR Tan agreed substantially with the creditors and accordingly dismissed the application for the interim order. He was of the view that, taking into account that Neville would object to whatever proposal put forward by the appellant, there was "no chance" that the scheme would be approved.[10]

9 In the application before AR Fang, the appellant sought to dismiss the ongoing bankruptcy application against him by arguing that he had made fresh offers to his creditors and that they had been "unreasonably refused", pursuant to s 65(2)(*d*) of the Act.[11]

10 The main thrust of the "offer" made to the creditors involved the Singapore Property. Another aspect of his offer was the proposed assignment of loans from the appellant to the creditors. AR Fang took the view that the offer was not "unreasonably refused" as there was no "certainty" around the proposed sale of the Singapore Property, and the creditors had already extended a degree of time and indulgence to the appellant. Accordingly, AR Fang determined that

[9] Minute dated 23 January 2018.

[10] Minute dated 23 January 2018.

[11] Minute dated 25 January 2018.

s 65(2)(*d*) of the Act was not satisfied and made the bankruptcy order.

Registrar's Appeal

11 Being dissatisfied with the decisions of the two assistant registrars, the appellant appealed. These formed the subject of registrar's appeal no 18 of 2018 and registrar's appeal no 19 of 2018.

12 The proceedings were heard over the course of three days: 17 May, 31 May, and 25 June 2018.

Issues to be determined

13 Before me, the appellant argued that:[12]

(a) It would be appropriate for the court to make an interim order for the purpose of facilitating the consideration and implementation of the debtor's proposal.

(b) The bankruptcy order on 25 January 2018 ought not to have been made as there were other "sufficient cause[s]" not to make such an order.

14 I shall address each issue in turn.

Would it be appropriate for the court to make an interim order?

15 Pursuant to s 45(1) of the Act, an insolvent debtor who intends to make a proposal to his creditors for a voluntary arrangement may apply to the court for an interim order. The effect of an interim order would be that, during the period in which it is in force, no bankruptcy application may be made or proceeded against the debtor; and no other proceedings may be commenced or

[12] Appellant's Written Submissions for Hearing on 17 May 2018.

continued against the debtor without the leave of court: s 45(3)(*a*)(*i*) and s 45(3)(*a*)(*ii*) of the Act.

16 The court may make an interim order if it thinks that it would be "appropriate to do so for the purpose of facilitating the consideration and implementation of the debtor's proposal" as stipulated by s 48(2) of the Act.

17 In *Re Lim Wee Beng Eddie* [2001] SGHC 103 at [56], reproducing *Muir Hunter on Personal Insolvency (1987)* at pp 3018 – 3019, the court shed some light as to what constitutes "appropriateness":

> In determining the "appropriateness" or otherwise of making an interim order, the court will consider whether the debtor's proposal for voluntary arrangement is *serious and viable*. "If, in a particular case, the judge before whom the application for an interim order concludes that the proposal is not one which can be described as *serious and viable*, it would be expected that as a matter of discretion, the judge would refuse to make an interim order. Judges must, I think, be careful not to allow applications for interim orders simply to become a means of postponing the making of bankruptcy orders, in circumstances where there is no apparent likelihood of benefit to the creditors from such a postponement": see *Hook v Jewson* [1997] 1 SLR B.C.L.C 664, Scott, V-C, following *Re A Debtor* (*Cooper v Fearnley*) (1 of 1994) [1997] B.P.I.R. 20 Aldous J.
>
> [Emphasis Added]

18 The appellant's proposal rests on two pillars:

(a) Sale of the Singapore Property;[13] and

(b) Loan repayments from Straits Advisors Group Limited ("SAGL").

19 I will address each aspect of the appellant's proposal, considered against the sums owed by the appellant to his creditors.

[13] Appellant's Written Submissions for Hearing on 17 May 2018, para 96.

20 The appellant's main asset is the Singapore Property. The estimated value of the Singapore Property is $11m.[14] The outstanding mortgage and CPF charge on the Singapore property is $7,786,884. I note that the mortgagee, OCBC, had at the time of the proceedings, already issued a notice for the appellant to vacate the Singapore property.[15] The possibility of a forced sale could therefore not be discounted. The forced sale value of the Singapore property is $9.35m.[16] After deducting the outstanding mortgage on the property, the appellant would be left with $3.2m, or $1.55m if it is a forced sale.

21 The second aspect of the appellant's proposal hinges on repayments by SAGL of a debt owed to him. The appellant is the managing director of SAGL, a company he formed in 1998 to provide financial consultancy services.[17] In 1999, SAGL entered into a sub-contracting arrangement with Straits Advisors Private Limited ("SAPL").[18] SAPL had a client that defaulted on payments of approximately US$2m in shares and fees in 2010. SAPL then attempted to recover the debt by way of court litigation but was unsuccessful. However, that attempt had cost SAPL about $1m in legal fees and other costs. SAPL was also unable to pay third party costs awarded against it and was wound up in 2015. The appellant explained that SAPL was funded by SAGL and this in turn was funded by him personally.[19] The total debt owed to him by SAGL is thus about $5.2m. [20] The appellant stated that SAGL had, since 2015, started to make a profit and had made repayments of the loan to him.[21] The appellant stated that

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[14] Annex A, Appellant's Written Submissions for Hearing on 17 May 2018.

[15] Appellant's Affidavit dated 08 May 2018, para 55.

[16] Appellant's Affidavit dated 15 February 2018, para 7(a).

[17] Appellant's Affidavit dated 9 January 2018, para 8.

[18] Appellant's Affidavit dated 9 January 2018, para 16.

[19] Appellant's Affidavit dated 9 January 2018, para 16.

[20] Annex A, Appellant's Written Submissions for Hearing on 17 May 2018.

SAGL had generated a profit of about $790,000 in 2017 and had repaid that sum to him[22] which reduced the loan from $6m to $5.2m.

22 The appellant also claimed that he has other assets although he did not include them in his proposal. Upon an examination of those assets, it is clear why he did not do so. The first is a property in the United Kingdom which he had tried to sell but had "withdrawn from the market in light of a lack of interest".[23] The appellant stated that the likelihood of a sale remained low. In any event, even if he could sell it at what he felt was the market value, the net proceeds after repayment of the mortgage amounted to only GBP12,000.[24] The second is a pair of villas in Batam, Indonesia over which he had purchased lease agreements. After payment of some $839,000 out of a total of $1.217m, the Lessor terminated the lease.[25] The appellant said that he had filed a claim for the equivalent of $1.34m in the Indonesian courts in 2017. However, he noted that he was unfamiliar with Indonesian law and unsure of the prospects of success in this matter.[26]

23 Therefore, in numerical terms the appellant's proposal in relation to the $8m debt appears to be the following:

(a) $3.2m to be realised from the sale of the Singapore property (or $1.55m if it is a forced sale); and

(b) Repayments from SAGL of $5.2m.

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[21] Appellant's Affidavit dated 9 January 2018, para 17.

[22] Appellant's Affidavit dated 9 January 2018, para 20.

[23] Appellant's Affidavit dated 9 January 2018, para 23(b).

[24] Appellant's Affidavit dated 9 January 2018, para 23(b).

[25] Appellant's Affidavit dated 9 January 2018, para 24(d).

[26] Appellant's Affidavit dated 9 January 2018, para 24(g).

24 In relation to the sale of the Singapore property, even if time was given to him to sell it under the best of circumstances, he would have at most $3.2m, leaving a balance of $4.8m. The appellant claimed that this can be repaid from the debt owed to him by SAGL. However, the appellant was vague in his affidavit as to how SAGL could repay him this sum. The appellant said that since 2015, SAGL "has started making a profit"[27] and had repaid him the sum of some $780,000. He also said that if he were "unable to continue working with SAGL … there is every possibility that SAGL will be unable to repay the remainder of the Loan".[28] This suggests that if he were able to work in SAGL unhindered by a bankruptcy order, he would be able to effect repayment of the $5.2m loan. But he did not state this explicitly. More importantly, he did not state the time frame within which he anticipated that SAGL would be able to repay the loan. The appellant exhibited the statement of income of SAGL for 2014, 2015, 2016 and 2017 which showed net profits of $257, $10,111, $91,894 and $788,139 respectively.[29] However, the appellant did not state whether he expected the dramatic improvement in profit in 2017 to be a continuing feature, much less the reason for such a big jump. Even at the rate of $800,000 per year, it would take at least six years to clear the balance $4.8m owed. This is assuming the best case scenario for the sale of the Singapore property. If the sale were a forced sale, and the bank is not prevented from doing so by any interim order, there would be a further shortfall of $1.65m, requiring a total of eight years to clear the balance debt on the premise of SAGL being able to repay him at the rate of $800,000 per year.

25 In my view, in order to persuade the court that the proposal is, to cite *Re Lim Wee Beng Eddie*, "serious and viable", the appellant must put up a plan that

[27] Appellant's Affidavit dated 9 January 2018, para 17.

[28] Appellant's Affidavit dated 9 January 2018, para 20.

[29] Appellant's Affidavit dated 9 January 2018, Tab 3.

contains sufficient information on how he is able to raise the funds set out in the proposal. He cannot rely on hints and innuendo. The appellant cited the debt of $5.2m owed to him by SAGL and the fact that there was a payment of $780,000 paid in 2017 which reduced the debt to that amount from $6m. But he left unsaid in his affidavit how the balance $5.2m was going to be repaid. Even in his written submissions, all he said was that "given his role in [SAGL], [he] is able to make a concrete proposal that has a real prospect".[30] At best, this meant that he will be in a better position to turn SAGL around if he is not made a bankrupt. It does not tell the court how he can achieve it. This was the crucial plank of his proposal, yet what was needed to be said was left unsaid. In so doing, he has not shown that it is a serious proposal and has said nothing on how this would be viable. Furthermore, the analysis above had not taken into account the interest that would continue to accrue on the debts at substantial rates.

26 I gave leave to the appellant to make further arguments after he secured a commitment from the two largest debtors to agree to take a reduction of 45% of their debts on the basis that they would forgive the interest components (which was 13.125% and 12.5%). However, this required the other debtors to take a similar haircut even though the interest owed on their debts was substantially lower. I did not consider it likely that the other creditors would agree to a reduction of 45% of their debt, but even on the basis of such a reduction, the $8m would be reduced to $4.4m, and with a forced sale value of $1.55m, there would still be $2.85m payable. At the optimistic rate of $800,000 per year, this would still take him more than three years to repay. Even at the further arguments stage, the appellant did not take the opportunity given to him to provide more details as to how he could ensure that SAGL would repay its

[30] Appellant's Written Submissions for Hearing on 17 May 2018.

loan each year at a level that he can satisfactorily repay his creditors within a reasonable time.

27 A bankruptcy order is a serious matter as it concerns debts owed to creditors that are unpaid when due. In the same vein, an application for an interim order is a serious matter because, if granted, it means that creditors who are entitled to resort to a bankruptcy order to enforce their rights to payment will have that right stayed. On the other hand, a debtor who has a serious proposal to make that could satisfy his creditors and thereby avert a bankruptcy order should be given an opportunity to do so. The court has to balance the interests of both sides. The requirement in law is that such a proposal must be serious and viable. In order to enable the court to decide whether a proposal is viable, sufficient details must be given at the outset in order to prevent abuse. The appellant had not explicitly stated in his affidavits how he would be able to procure the repayment by SAGL of its debt of $5.2m and despite a number of hearings in which he would have the opportunity to do so. In fact, he had taken the opportunity in those hearings to disclose undertakings by other creditors to agree to a reduction of debt. Yet in the crucial area of the repayment by SAGL, there was nothing said on affidavit for the court to examine the viability of his proposal. It is incumbent on this court to ensure that applications for interim orders not be used to delay bankruptcy proceedings by requiring such applications to be accompanied by proposals that are serious and viable. If such a proposal is not provided at the outset, a court should dismiss the application. In the present case I have in fact given the opportunity to the appellant to make further arguments regarding his proposal and still did not find it viable.

28 For the reasons given above, I dismissed the appellant's application for an interim order.

Are there grounds to dismiss the creditor's bankruptcy application under s 65(2)(*e*) of the Act?

29 Before the registrar, the appellant argued that the bankruptcy application should have been dismissed on the basis of s 65(2)(*d*) of the Act.[31]

30 On appeal, the appellant chose to rely on s 65(2)(*e*) of the Act.[32] Under s 65(2)(*e*), the court may dismiss a bankruptcy application if it is "satisfied that for other sufficient cause no order ought to be made". The appellant cited an example in the Registrar's decision in *Tang Yong Kiat Rickie v Sinesinga Sdn Bhd* [2014] SGHC 6 ("Rickie Tang") at [13b], where a court exercised the discretion to dismiss a bankruptcy order where it was made on the basis of evidence which turned out to be untrue: *Re Bright, ex p Wingfield and Blew* [1903] 1 KB 735.

31 The appellant contended that it is "untrue" that the Neville's debt comprised such a proportion of the total debt that he (Neville) had the power to veto any proposal put forward by the appellant.[33] This argument however turned on the appellant being able to obtain an interim order. As I have determined that such order was not justified, it followed that there was no "sufficient reason" to dismiss the creditor's bankruptcy application.[34]

Conclusion

32 For the above reasons, I dismissed the registrar's appeals. I could not accept the appellant's proposal in relation to the interim order as a serious and viable one. I also saw no reason to dismiss the creditor's bankruptcy application

[31] Minute dated 25 January 2018.

[32] Appellant's Written Submissions for Hearing on 17 May 2018.

[33] Appellant's Written Submissions for Hearing on 17 May 2018, para 122.

[34] Appellant's Written Submissions for Hearing on 17 May 2018, para 124.

under s 65(2) of the Act.

Lee Seiu Kin
Judge

Melissa Peh (Yeo-Leong & Peh LLC) for the plaintiff;
Nandwani Manoj Prakash (Gabriel Law Corporation) for the defendant.
