Wong Ser Wan v Ng Bok Eng Holdings Pte Ltd and Another
[2004] SGHC 181

Case Number : Suit 310/2003

Decision Date : 19 August 2004

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : K Shanmugam SC, Ang Cheng Hock and Leona Yuen (Allen and Gledhill) for plaintiff; Leslie Chew SC, Chan Kia Pheng and Shaun Koh (Khattar Wong and Partners) for defendants

Parties : Wong Ser Wan — Ng Bok Eng Holdings Pte Ltd; Bian Bee Company Pte Ltd

Land – Conveyance – Consideration for property transferred to defendants fixed arbitrarily – Transferor controlling mind of defendants – Transferor intending to defraud plaintiff – Whether defendants acquired property for valuable or good consideration and in good faith – Whether defendants had notice of transferor's intention to defraud plaintiff – Section 73B Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed)

Land – Conveyance – Elements to be established by plaintiff to found cause of action – Defences available to defendant – Section 73B Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed)

Land – Conveyance – Transferor failing to honour financial agreement with plaintiff – Whether plaintiff a creditor – Whether plaintiff prejudiced by conveyance of property – Section 73B Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed)

Land – Conveyance – Transferor intending to reduce plaintiff's share of matrimonial assets upon divorce by transfer of property – Whether conveyance made with intention of defrauding creditors – Section 73B Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed)

Land – Conveyance – Transferor transferring property to defendants purportedly as return of gift – Whether amounting to conveyance of property – Section 73B Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed)

19 August 2004 Judgment reserved.

Judith Prakash J:

Introduction

1 The title of this action is somewhat misleading. This case is just one facet of a long-running and on-going matrimonial dispute between the plaintiff, Mdm Wong Ser Wan ("Mdm Wong"), and her ex-husband, Mr Ng Cheong Ling ("Mr Ng"). It is Mdm Wong's attempt to annul the sale and transfer by Mr Ng of certain assets so that these assets may be considered for division between her and Mr Ng when the ancillary matters attendant on the divorce proceedings are heard.

2 On 27 June 1998, Mr Ng transferred the land and premises located at 764 Mountbatten Road, Singapore ("the Mountbatten property") to the first defendant, Ng Bok Eng Holdings Pte Ltd ("NBEH") for a consideration of US$2m (then equivalent to $3,535,972). NBEH is a private limited company that was founded by Mr Ng's father, Mr Ng Bok Beng ("BB Ng"). Its shareholders are Mr Ng's parents and siblings. The directors of the company were BB Ng, Mr Ng himself and his older brother, Ng Cheong Bian ("CB Ng").

3 Mr Ng is no longer a shareholder in NBEH although he held varying numbers of shares in it for

nearly 30 years because, on 26 September 1998, he transferred his then entire shareholding of 60,000 shares ("the NBEH shares") to the second defendant, Bian Bee Company Pte Ltd ("BBC"), for a consideration of US$1m (then equivalent to $1,760,000). At that time, the shareholders in BBC were BB Ng (18%) and his elder son, CB Ng (82%). They were also the directors of the company. Thus, at all material times, both NBEH and BBC were owned and controlled by the Ng family.

Cause of action

4 Mdm Wong's claim in the suit for the transfers of both the Mountbatten property and the NBEH shares to be declared voidable, is based on s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("the Act"). As explained in *Quah Kay Tee v Ong & Co Pte Ltd* [1997] 1 SLR 390, the wording of this section is derived from s 172 of the English Law of Property Act 1925 ("the 1925 Act"). Section 172 was itself re-enacted from para 31 of Pt II of Schedule 3 to the Law of Property (Amendment) Act 1924 which was a reformulation, in a rather summarised form, of the provisions of ss 2 and 6 of the Statute of 13 Eliz 1571 (c 5) intituled An Act Against Fraudulent Deeds, Gifts, Alienations, Etc ("the Elizabethan Statute") a piece of legislation that was intended to protect creditors against action taken by debtors to salt away their assets. The Elizabethan Statute applied in Singapore until November 1993 when the governing legislation in such situations became s 73B of the Act.

5 Section 73B states:

> (1) Except as provided in this section, every conveyance of property, made whether before or after 12th November 1993, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.
>
> (2) This section does not affect the law relating to bankruptcy for the time being in force.
>
> (3) This section does not extend to any estate or interest in property disposed of for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the disposition, notice of the intent to defraud creditors.

Thus, the section confers a cause of action on a person who is able to establish the following matters:

(a) That there has been a conveyance of property.

(b) That this conveyance was made with the intent of defrauding creditors.

(c) That he is a person who was prejudiced by the foregoing conveyance of property.

The plaintiff has the burden of proof in respect of the aforesaid matters. However, the defendant, who is generally the recipient of the property conveyed, will be able to defeat the plaintiff's action and retain the property if he can establish:

(a) That he acquired the property for valuable consideration and in good faith or for good consideration and in good faith; and

(b) he did not have notice of the debtor's intent to defraud his creditors.

6 There has been discussion in case law of what is meant by the phrase "intent to defraud creditors" in s 73B(1). *Lloyds Bank Ltd v Marcan* [1973] 2 All ER 359 (Ch D) and subsequently [1973]

3 All ER 754 (Court of Appeal), was a case involving s 172(1) of the 1925 Act. Pennycuick V-C, who heard the case at first instance, held that the word "defraud" in the expression "with intent to defraud" in that section was designed to reproduce the expression "hinder, delay or defraud" in the Elizabethan statute and was not intended to be confined to cases of fraud in the ordinary modern sense of that word, *ie*, as involving actual deceit or dishonesty. The word "defraud" in this context carried the meaning of depriving creditors of timely recourse to property that would otherwise be applicable for their benefit. In the Court of Appeal, Russell LJ agreed (*supra* at 759) that an intent to deprive a creditor of timely recourse to the property concerned by granting a lease of it so that the mortgagee bank would not be able to obtain vacant possession "was, in the context of the relationship of debtor and creditor, less than honest: it was sharp practice, and not the less so because he was advised that he had power to grant the lease". Cairns LJ, however, disagreed with Pennycuick V-C that the word "defraud" was not intended to confine the application of the section to cases involving actual deceit or dishonesty. In his view, whilst deceit was not a necessary element, dishonest intention was, at any rate, when the conveyance was for consideration (at 760). The upshot of the Court of Appeal judgment is that the plaintiff must establish some degree of dishonesty on the part of the transferor in order to succeed.

7 The *Quah Kay Tee* case stands for the principle that where a transfer has been made without any or with nominal consideration, it is only necessary to show that the transferor had an intent to defraud creditors. It is not relevant what the intention of the transferee was since such a donee would not fall within the exception of a *bona fide* purchaser for value without notice. In such a situation, the intent of the transferor can be inferred from the circumstances surrounding the transfer (see *per* Lai Kew Chai J at [23]):

> The mere fact of a man, thus indebted [*ie* deeply indebted], giving part of his estate is, by presumption and construction of law, a fraudulent act.

8 Where, however, the transfer was made for valuable consideration, to set it aside it must be shown that the transferor acted with the actual intent to defraud creditors and that the transferee had notice of the transferor's fraudulent intention. The intent of the transferor will not be inferred simply from his disposal of the asset concerned since he is disposing of it for value.

9 With those principles in mind, I turn to consider the facts of this case in more detail.

The parties and the marriage

10 Mdm Wong and Mr Ng were married in January 1976. They subsequently had three children. In the 1990s, marital relations became strained. In December 1995, Mdm Wong filed a maintenance summons against her husband for maintenance for herself and the children. This summons was withdrawn in March 1996 after Mr Ng promised to give her a monthly allowance of $12,000. Asserting this promise had not been kept, Mdm Wong filed a further maintenance summons in July 1996. This summons was heard in August 1996 and a consent order providing for monthly maintenance of $15,000 was entered. In October 1996, Mdm Wong filed a petition for divorce on the ground of her husband's alleged adultery. Mr Ng then filed a cross-petition on the ground of unreasonable behaviour.

11 In 1997, there was a great deal of correspondence between the parties' respective solicitors which was initiated by a letter from Mr Ng's solicitors stating that their client desired to save the marriage and to reach a settlement, and wanted legal matters to be put on hold. In July 1997, the respective solicitors negotiated the terms of a financial agreement and the parties finally signed this on 1 December 1997. The agreement provided, *inter alia*, for Mr Ng to give certain immovable properties to Mdm Wong; to pay her a sum of $2.5m and a sum of US$320,000; to continue to pay

her monthly maintenance in accordance with the consent order of court; and to transfer certain shares to her name. He was also to withdraw his answer to petition and cross-petition and pay Mdm Wong's legal costs. Mdm Wong agreed to withdraw her divorce petition.

12 The financial agreement provided for the shares to be transferred to Mdm Wong by 15 February 1998. This was not done. In March 1998, a payment that fell due under the financial agreement was not made but, a few weeks later, Mr Ng gave Mdm Wong certain other shares in lieu of such payment. In June 1998, Mdm Wong complained that Mr Ng had only paid her $5,000 as maintenance instead of the full amount of $15,000.

13 On 12 June 1998, unbeknownst to Mdm Wong, Mr Ng entered into an agreement to sell the Mountbatten property to NBEH for US$2m. Later that month, on 25 June to be exact, he entered into an agreement to sell the NBEH shares to BBC for US$1m. The transfer of the Mountbatten property took place on 27 June 1998 and the transfer of the NBEH shares to BBC took place on 26 September 1998.

14 According to the financial agreement, Mr Ng had to place $1m out of the $2.5m in Mdm Wong's bank account not later than 30 November 1998. He did not meet this obligation.

15 On 8 July 1999, following negotiations conducted through their solicitors, the parties signed a deed of separation that, among other things, affirmed Mr Ng's obligations under the financial agreement. The next day, Mdm Wong withdrew her divorce petition.

16 Unfortunately, the parties' relationship did not improve thereafter. Mdm Wong suspected Mr Ng of carrying on another affair and therefore recorded some of his telephone conversations. After listening to these conversations, she believed that he was carrying out a scheme to dissipate his assets in order to deprive her of access to them. She was so upset that she filed a fresh divorce petition on 8 October 1999. She then instructed her solicitors to apply for a mareva injunction preventing Mr Ng from dissipating his assets. In this application she relied on the transcripts of the telephone conversations in order to substantiate her case that her husband was planning to dissipate his assets both inside and outside Singapore. In March 2000, Mdm Wong's application was heard and was successful. As at the date of this hearing, the mareva order so granted remained in force against Mr Ng.

17 The second divorce petition came up for hearing and a decree *nisi* was granted to Mdm Wong on 1 August 2000. The decree absolute has not yet been issued as the ancillary matters remain to be settled.

18 Another suit filed in the High Court is also relevant. This is Suit No 1396 of 2001 in which the plaintiff was Aromate Pte Ltd ("Aromate") and the defendant was Mr Ng. This action was commenced by Mdm Wong as a derivative action on behalf of Aromate and the cause of action was the alleged breach of fiduciary duty by Mr Ng as a director of Aromate. On the morning of the first day of the trial, Mr Ng withdrew his defence and submitted to judgment. He was ordered to pay Aromate a sum of $3.8m and costs. As no payment was made after judgment was delivered, Mdm Wong filed a bankruptcy petition on behalf of Aromate. A bankruptcy order was made against Mr Ng on 11 October 2002. To date, Mr Ng remains an undischarged bankrupt.

The Mountbatten property and the NBEH shares – Mr Ng's account

19 Mr Ng's evidence-in-chief in relation to the Mountbatten property was as follows. The property was purchased in October 1980 for a sum of $988,404. The purchase price was financed

partly by an upfront cash payment and partly by a loan from United Overseas Bank Ltd ("UOB") on the security of a mortgage over the property. Whilst the property was held in Mr Ng's name, it was his father who had bought the Mountbatten property as a gift for him. The funds for the upfront cash payment were provided by BB Ng who also paid the monthly instalments under the UOB mortgage loan. The Mountbatten property was renovated in the early 1980s at BB Ng's expense.

20 The mortgage was discharged in 1986, when BB Ng had fully paid up the mortgage. Mr Ng said he himself had no money to pay for this property as he had completed national service in 1976, had married that year, and had had children in 1977 and 1979. He also had to pay for his car and the apartment in which the family lived. After the Mountbatten property was acquired, it was leased out to various tenants. BB Ng lived there for about a year while his own home was under renovation. Neither Mr Ng nor any member of his family had lived in the Mountbatten property whilst it was owned by Mr Ng.

21 As regards the NBEH shares, Mr Ng said that these were allotted to him on 23 March 1970 for a cash consideration of $1 each. This cash consideration was provided by his father as, at that time, Mr Ng himself was still an undergraduate who was fully supported by his father.

22 Mr Ng also gave an account of the events leading up to the sale of these two assets. He stated that in 1998 he had a 62% shareholding in Aromate and a 50% shareholding in a Hong Kong company, Fustar Chemicals Ltd ("Fustar"). These companies were part of the group of companies in the family business and he had gained his shares in them as a result of a restructuring exercise carried out by his father in the early 1990s. Fustar had banking facilities from UOB Hong Kong whilst Aromate had obtained banking facilities from Standard Chartered Bank, Singapore ("Stanchart"). Mr Ng had guaranteed both sets of facilities.

23 In 1998, Aromate and Fustar experienced financial difficulties and began defaulting on their respective payments to their respective banks. This resulted in numerous phone calls from officers of the banks asking for payment of overdue amounts. UOB Hong Kong had also sent Fustar a letter dated 5 May 1998 to ask for repayment of outstanding sums under the banking facility. As a director of Aromate and shareholder of both companies, as well as a guarantor, Mr Ng was worried that if the companies continued to default, the banks would look to him for repayment of the outstanding sums, totalling about US$3m. Mr Ng was in no financial position to meet his obligations on the guarantee and was desperate for financial aid. He asked Mdm Wong for help but she said no. Eventually, he felt that his father was the only person who could help him and he approached his father through a family friend, one Mr Tan Kok Kiong.

24 Mr Tan's approaches were not successful so, finally, Mr Ng went to see BB Ng himself to plead with him for help. Mr Ng told his father that he needed US$3m urgently to repay bank debts owing by Aromate and Fustar. Initially, BB Ng was not helpful. After several begging visits by Mr Ng, BB Ng relented and agreed to help his son with those debts. He was not prepared, however, just to lend US$3m to Mr Ng. Instead BB Ng proposed that the Mountbatten property be transferred to NBEH for US$2m and the NBEH shares be transferred to BBC for US$1m. Being desperate for financial aid, Mr Ng agreed to this proposal. He believed that no one would buy the Mountbatten property due to the Asian financial crisis and the glut of properties on the market at that time. It would take him months to find a buyer and even then he would probably be offered a ridiculously low sum. As for the NBEH shares, they were shares in a closely held private company with little or no liquidity.

25 When the transfer of the Mountbatten property was completed, the sum of US$1m was sent to Fustar's account at the Bank of America in New York and a further US$1m was sent to Aromate's account with Stanchart. Of the funds received from the sale of NBEH shares, US$400,000 went to

Aromate's account with Stanchart and US$600,000 went to Fustar's account with UOB Hong Kong. Mr Ng maintained that he never had any intention of defrauding any creditors by entering into the transactions in respect of the Mountbatten property and the NBEH shares.

The defendants' case

26 In their closing submissions, the defendants contended that the facts had established that this was a case of a family arrangement in the context of a father helping his son. The two transactions in question could not be looked at as purely commercial transactions where parties were dealing at arm's length to get the best possible prices they could. Instead, this was a situation where the father was seeking to help his son financially but only on condition that his son returned assets that, to the father, were his to ask for at any time since they were gifts from him to his son. The defendants further contended that the only two issues that I have to decide are:

(a) At the time when the Mountbatten property was transferred and at the time when the shares were transferred, was there any intention on the part of Mr Ng to defraud Mdm Wong as a creditor within the meaning of that term as used in s 73B(1) of the Act?

(b) If there was an intent to so defraud Mdm Wong, did NBEH and BBC nevertheless enter into the transactions "for valuable consideration and in good faith or upon good consideration and in good faith" without "notice of the intent to defraud creditors"?

27 I agree that the above are the basic issues to be addressed in this judgment but they do contain certain other issues within them that will also need to be dealt with. I also note that, as pointed out in [5] above, Mdm Wong has the onus of establishing the following:

(a) that there has been a conveyance of property;

(b) that in making such conveyance, it was Mr Ng's intention to defraud his creditors; and

(c) that she is a person who has been prejudiced by such conveyance.

If I find that Mdm Wong has discharged that onus, then the burden would shift to each defendant to show in respect of the asset transferred to it that:

(a) it acquired that asset for valuable or good consideration and in good faith; and

(b) at the time of the acquisition, it had no notice of Mr Ng's intention to defraud his creditors.

The elements to be established by Mdm Wong

Conveyance of property

28 The defendants submitted that there was no conveyance of property because both assets were gifts from BB Ng to his son and, in so far as he and his son were concerned, BB Ng was entitled to demand that they be returned to him whenever it suited him. Thus, the two transactions in 1998 effected a return of the Mountbatten property and the NBEH shares to BB Ng's companies (*ie* NBEH and BBC) in exchange for US$3m. This was a family arrangement and did not reflect any true conveyance of either asset.

29 Dealing with the Mountbatten property first, this was purchased in Mr Ng's name. The sale

and purchase agreement for the property was made between him and the vendor. At about the same, time he applied to UOB for a credit facility of $600,000 and this was granted. The indenture of conveyance dated 6 October 1980 stated that Mr Ng was the purchaser of the property. On the same date, a sum of $600,000 was debited by UOB from Mr Ng's account. In cross-examination, Mr Ng admitted that this sum had been used to pay for the purchase of the Mountbatten property. There was also some evidence of a friendly loan taken by Mr Ng at the time, probably to fund the purchase.

30 Since the property was registered in Mr Ng's name and all documentation relating to its purchase showed that he himself had made arrangements to finance its acquisition, the defendants had to establish that notwithstanding such documents, the property had been paid for by BB Ng. Yet, there was not a single document showing even one payment made by him towards either the upfront cash portion of the purchase price or the settlement of the monthly instalments of the mortgage loan, nor was there any document showing that at the time the mortgage was discharged in March 1986, BB Ng had made any payment to UOB for that purpose. If such documents exist, they would be in the custody of BB Ng and could well have been produced for the purpose of this trial. As none were, I can only infer that no such documents exist. Whilst the UOB letter of offer did require that BB Ng give a personal guarantee for $600,000 in respect of the facility taken by Mr Ng, the letter also stated that such guarantee would be cancelled automatically upon the completion and registration of the mortgage over the property. Any assistance that BB Ng gave towards the purchase of the property would seem to have been short lived and more in the nature of comfort to the bank than actual outlay by BB Ng. There was no evidence before me to substantiate Mr Ng's bald assertion that the Mountbatten property was a gift to him from his father. I find that this property was acquired by Mr Ng himself. Accordingly, the transfer of the Mountbatten property to NBEH constituted a conveyance of that property within the meaning of s 73B of the Act.

31 Turning to the NBEH shares, the defendants' submission was that these were allotted to Mr Ng in 1970, six years prior to his marriage to Mdm Wong. Since he was a student then, BB Ng was clearly the one who provided the subscription moneys for the shares. Mdm Wong did not deny that her husband's original shareholding in NBEH had been a gift from his father. She pointed out that the corporate documents indicated that his shareholding in NBEH had varied over the years. In 1979, he owned 100,000 shares; in 1980, 120,000 shares; in 1983, this holding was reduced to 60,000 shares; in 1988, it went up to 120,000 shares again; and in 1993, his shareholding dropped back to 60,000 shares. Her submission was that in view of these changes, it could not be said that the NBEH shares which Mr Ng sold in 1998 were the same 60,000 shares that were allotted to him in 1970.

32 On the other hand, Mdm Wong herself, when she was cross-examined, agreed with the defendants' counsel that the variations in shareholdings within the Ng family were determined by BB Ng, the patriarch of the family. In this connection, the defendants pointed out that in 1970, apart from Mr Ng, his siblings had also been allotted 60,000 NBEH shares each. As far as the Ng family was concerned, BB Ng was the one who provided all the funds for the allotment and he was able to move the shares around between the various family members as he saw fit. Mr Ng's testimony on this point was that all changes in his shareholding had been determined by his father and whether NBEH shares were transferred away from him or to him, there were no financial implications as he himself did not "come out even a dollar or receive a dollar".

33 On this evidence, it seems clear that the original 60,000 shares were indeed a gift from BB Ng to his son. No share certificates were produced, however, so I cannot determine whether the 60,000 shares that Mr Ng held in 1998 were the original 60,000 shares or were transferred to him in 1988 when his shareholding increased from 60,000 shares to 120,000 shares. No corporate documents were produced to show the circumstances in which his shareholding increased or the circumstances in which it decreased, and whether when he lost half his shareholding in 1993, that was a result of a

transfer to a sibling or to BB Ng, or to a general reduction in capital.

34 From 1970 right up to 1998, Mr Ng held a minimum of 60,000 shares in NBEH. In my view, even if the 1998 shares were the same shares allotted to him in 1970, these shares were his property and there was no evidence that he held them on trust for his father or anyone else. Not a jot of evidence was produced to substantiate his assertion that shares were transferred to him and away from him simply because his father decided to change the proportions in which the various siblings held shares in the company. No testimony was given by any person who received part of Mr Ng's shareholding that he or she had not given value for those shares. This might have been the case but more evidence was needed to establish it, and that evidence surely would have been available to the defendants who were the persons trying to prove that the NBEH shares did not belong to Mr Ng beneficially. In any case, the transfer to BBC was not a transfer which fit the pattern that Mr Ng testified existed, *ie*, that when BB Ng wanted one sibling to have more shares he would just tell another sibling to give some up. Accordingly, in my judgment, it has been established that the transfer of the NBEH shares to BBC was a conveyance falling within s 73B of the Act.

Mr Ng's intentions in making the transfers

35 I agree that in order to find that in making the transfers Mr Ng intended to defraud his creditors, I would have to find that the evidence showed an element of dishonesty on his part. Whilst it would not be enough that his actions resulted in delayed payment to his creditors, an intention on his part to delay such payment by taking the actions that he did would, in my judgment, amount to the necessary element of dishonesty or sharp practice.

36 The defendants' case was that the two assets were transferred because Mr Ng was desperate for money to settle the Stanchart and UOB Hong Kong debts of Aromate and Fustar respectively. In this situation, he had no choice but to ask his father for money and agree to his father's terms about transferring the assets and the amounts he would receive for them. It was not his intention to place the assets beyond the reach of his creditors, or to delay payment to them. He did what he did because he wanted to pay his creditors, *ie*, the banks.

37 The submission made on behalf of Mdm Wong was quite the opposite. It was that Mr Ng's acts amounted to far more than dishonesty or sharp practice. Instead, he had embarked on a deliberate and systematic scheme to dispose of his assets so that there would be no assets from which Mdm Wong could have satisfied her claims. By this scheme, he had succeeded in depriving Mdm Wong of her rights for more than five years. In support of this submission, Mdm Wong relied on the following facts:

(a) Mr Ng was bound under the consent maintenance order made in August 1996 to pay her monthly maintenance. He was regularly in default of this order. He defaulted in October 1996, March 1998, June 1998 (when he paid her only $5,000 instead of $15,000), May 1999, and from November 2000, he was continuously in default right up to the date of the hearing. As a result of his default, Mdm Wong had had to take out numerous maintenance summonses in order to enforce the consent maintenance order.

(b) At the time when the transfers of the Mountbatten property and the NBEH shares took place, the divorce petition filed by Mdm Wong was still pending.

(c) In January 1997, Mr Ng had proposed that the parties reach a private settlement and, as a consequence, negotiations took place over the period of a year culminating in the signing of the financial agreement in December 1997. Mr Ng did not comply with his obligations under that

agreement because he failed to transfer certain shares to Mdm Wong by 15 February 1998; he failed to pay her $500,000 by 4 March 1998; and he failed to pay her $1m by 30 November 1998. The transfers of the assets took place while he was in breach of these obligations.

(d) The telephone conversations that took place in September and October 1999 between Mr Ng and various parties disclosed his plans to dissipate assets in order to cause Mdm Wong to receive a smaller share of the matrimonial assets in the event of the divorce.

(e) In March 2000, Mr Ng filed an originating summons in which he asked for the financial agreement to be set aside on the grounds that it was in breach of the Women's Charter (Cap 353, 1997 Rev Ed); that it was against public policy; that it was procured by duress on the part of Mdm Wong; and that it failed for want of consideration. Subsequently, he amended his claims and alleged that it had been procured by undue influence and misrepresentation on the part of Mdm Wong. The summons was converted into a writ action and was tried in the district court. On 19 December 2001, District Judge Koh Juat Jong dismissed all of Mr Ng's claims.

(f) Mr Ng filed a notice of appeal against this decision but withdrew the appeal after the district judge's grounds of decision were released. As a result of his intention to appeal, the hearing of the ancillary matters in the matrimonial proceedings was adjourned.

(g) In 2000, Mdm Wong and Mr Ng were engaged in protracted litigation in relation to the claim by Aromate that he had breached his fiduciary duty to that company. Having vigorously defended this action for a year, on the first day of trial, Mr Ng withdrew his defence and allowed judgment to be entered against him on 6 August 2002. About two months later, he allowed himself to be adjudged a bankrupt notwithstanding that, at that stage, he owned valuable shares in private companies.

It was submitted for Mdm Wong that the above facts showed the extent to which her husband had been successful in preventing her from satisfying her rights against him. He had effectively reduced the realisable pool of assets from which she could satisfy her rights. The only assets in Singapore were the Mountbatten property and the NBEH shares which had been transferred by Mr Ng to the defendants, companies that were owned and controlled entirely by Mr Ng's family and/or Mr Ng himself.

38 Having considered the evidence as summarised above, and also considered the testimony of Mr Ng in cross-examination, I am satisfied that Mr Ng did intend to put the Mountbatten property and the NBEH shares beyond the reach of Mdm Wong by transferring them to the defendants. He arranged for them to be transferred at values that were not determined by their market values at the time, and without any investigation of such market values. He came up with the scheme of borrowing money from his father so that it would look like he had no assets which could help pay his debts. Whilst Aromate and Fustar may have been experiencing financial difficulties at that time, I am satisfied that settling those debts was not the dominant reason for the disputed property transfers. Mr Ng was more concerned with what he would have to pay Mdm Wong in the event that the divorce went through and he wanted to reduce her share of the matrimonial assets as much as he could. In my judgment, he acted dishonestly with the intention of altering circumstances to the detriment of Mdm Wong.

39 Quite apart from the suspicious coincidence between the timing of the transfers and Mr Ng's difficulties with Mdm Wong, the telephone conversations provided independent evidence of his intentions. The first telephone conversation took place on 4 September 1999 and was between Mr Ng and a lady in Taiwan named Echo Chan. In that conversation, he specifically stated that since he had

"come to such a state with her", he was thinking that he should quickly sell various assets. In cross-examination, he admitted that these statements were made in the context of him having come to such a state with his wife. He also admitted that most of the conversation was about holding some prayers for Mr Ng to succeed in his case against Mdm Wong.

40 The second conversation took place on 29 September 1999 and was between Mr Ng and Mr Tan Kok Kiong. In that conversation, Mr Ng made it plain that he intended to borrow money from his father in order to increase his liabilities so that the court would give less money to his wife. During cross-examination, he admitted that the only way in which taking loans from his father would increase his liability would be if he "hid" the money he received from the loans. He also mentioned that he had previously borrowed money from a friend named Jackie, and had deliberately not repaid Jackie so that he would be in debt. When he was questioned on this in court, Mr Ng admitted that the Jackie referred to controlled a company called Golders Green Holdings Pte Ltd. That was a company which filed a proof of debt for the sum of $952,500 against Mr Ng's estate in bankruptcy.

41 Mr Ng further said to Mr Tan, "I borrowed money to put it back into the bank and I didn't touch" and "… but I cannot do everything. If it is too obvious, it'll be very dangerous". In court Mr Ng admitted that these statements were in reference to him doing things with his assets in the context of divorce proceedings pending between him and Mdm Wong. He further admitted that the "danger" to him would be that Mdm Wong would find out about what he had done with his assets and would take legal action against him. Such an admission must mean that his plan was to dissipate his assets as such a course would have given Mdm Wong cause to take legal action against him if she were to find out what he had done.

42 Mr Tan Kok Kiong also gave evidence. He was the lawyer who witnessed the sale and purchase agreement for the Mountbatten property and the NBEH shares in June 1998, and the instrument of transfer of the Mountbatten property from Mr Ng to NBEH in September 1998. Mr Tan agreed that his conversation with Mr Ng had taken place in a situation in which divorce proceedings were taking place between Mr Ng and Mdm Wong. He agreed that Mr Ng had been telling him how he planned to reduce the assets available for division with Mdm Wong. He also agreed that Mr Ng had said that the way he would reduce the assets available would be to borrow from his father and therefore show increased liability and that would reduce his net asset position. Mr Tan agreed with counsel's suggestion that the only way in which Mr Ng could reduce his net asset position would be if he borrowed money and then siphoned it away because if he borrowed it to reduce his other liabilities, then his net asset position would remain unchanged. Mr Tan also agreed, now that he was paying careful attention to what Mr Ng had said as recorded in the transcript, that the intended course of conduct was unacceptable.

43 The third telephone conversation took place on 4 October 1999 and it was also between Mr Ng and Mr Tan. During the course of it, Mr Ng said he had become very poor and would "portray a half-truth/ half-false situation". When Mr Tan asked him whether he was really without money, his reply was "half-truth/half-false". He said he still planned to borrow from his father and to be heavily indebted to him and "those assets in Canada have a valuation, I can't lie about it. I can't lie that I don't have assets … she knows that those assets are under my name". An objective reading of the foregoing would indicate that the only reason why Mr Ng could not lie about the assets he had in Canada was that Mdm Wong was aware of those assets and was aware of how they had been valued. In cross-examination, Mr Ng stated that while what he had said in the telephone conversation was "I cannot lie to her" what he had meant was "I do not want to lie to her". I do not find this alternative explanation of his statements convincing.

44 There were two other conversations. Both of these were between Mr Ng and his brother,

CB Ng. I do not need to refer to them at this stage. There is more than sufficient evidence in the record to establish that Mr Ng's intent in transferring the Mountbatten property and the NBEH shares to the two family companies was dishonest in that he wanted to put these assets beyond the reach of Mdm Wong to whom he not only had various financial obligations under the financial agreement and the consent maintenance order, but who would also be entitled to a share in the matrimonial assets in the event that the divorce went through. I should say here that I have totally disregarded the affidavit evidence of BB Ng filed to support Mr Ng's story that the assets belonged to BB Ng and he had insisted on them being returned before agreeing to help Mr Ng deal with his financial problems. When BB Ng took the stand, it quickly became clear that because of his advanced age (he is in his mid-80s), neither his memory nor his intellect was what it used to be. He was not able to assist me as he could not even remember having made the affidavit.

Has Mdm Wong been prejudiced?

45 The submission made by the defendants was that Mdm Wong could not claim to have been prejudiced by the transfers because she had failed to show that she was a creditor of Mr Ng at the time the same were effected. The submission was that the proof of debt that she had filed against Mr Ng's estate on 19 December 2002 only disclosed debts accruing in and after April 1999. In her statement of claim in this action, she had also stated that Mr Ng "began to be in arrears of his obligations under the consent maintenance order from April 1999". Mdm Wong had pleaded that she was a creditor of Mr Ng because of the financial agreement. The defendants submitted that the issue of enforceability of the financial agreement had yet to be decided at the time this action was commenced on 1 April 2003. This issue remained undecided as of the date of the closing submissions. Mdm Wong could not therefore be considered a creditor of Mr Ng.

46 I do not accept the above submission. The proof of debt filed in December 2002 is not conclusive evidence as to the existence of indebtedness in 1998. One must look at the contemporary evidence of that debt. First, the consent maintenance order imposed a continuing obligation on Mr Ng to pay the sum of $15,000 per month to Mdm Wong. In June 1998, he short-paid this maintenance sum. Second, from December 1997 onwards, Mr Ng had had financial obligations to Mdm Wong under the financial agreement. He had agreed to pay her $2.5m in instalments: the first instalment of $500,000 was to be made within approximately three months of 1 December 1997, the second instalment of $1m was to be paid no later than 30 November 1998, and the final instalment of $1m was to be paid no later than 30 November 1999. He also undertook to pay all existing mortgage repayments on the property at no 3 Cluny Hill which he was giving to Mdm Wong, and to discharge all indebtedness to any financial institutions in respect of that property by 30 November 2000. Obviously, if the financial agreement was a valid document, throughout 1998 Mdm Wong was a creditor to Mr Ng in respect of his obligations under that document.

47 In 1998, there was no question of the validity of the financial agreement. It was only in March 2000 that Mr Ng commenced his action to have that agreement set aside. In the event, he failed in that attempt. District Judge Koh ruled that the financial agreement had not been discharged due to any breach on the part of Mdm Wong. She further held that Mr Ng had been in breach of that agreement and that Mdm Wong had accepted the repudiation of the agreement by Mr Ng. It thus followed that the agreement had terminated. The district judge did not decide whether Mdm Wong was thereafter still entitled to enforce the terms of the agreement that were yet to be performed as this issue was not before her. As for myself, I see no reason why Mdm Wong should not have attempted to enforce the terms of the financial agreement should she have wished to do so. That document contained legal obligations on the part of Mr Ng which he entered into voluntarily. As he was in breach of those obligations, Mdm Wong as the innocent party had the choice that all persons in her position would have, *ie*, whether or not to take legal action to enforce performance. This option

was open to her up to the time that Mr Ng was made a bankrupt, and she then had to decide whether or not to put in a proof of debt in respect of his obligations under the agreement. She did so and I think that, legally, she was entitled to do so.

48 In the circumstances, I see no merit in the submission that Mdm Wong was not a creditor of Mr Ng at the time the transfers took place. There is no doubt that she has been prejudiced by those transfers. If those properties still belonged to him, they would form part of his estate in bankruptcy and the proceeds of their sale would be available for distribution to his creditors including Mdm Wong.

49 I therefore find that Mdm Wong has discharged the onus upon her to establish the three elements of a fraudulent conveyance. In these circumstances, for the defendants to resist the relief Mdm Wong seeks, they must be able to prove the matters stated in the latter sub-paras (a) and (b) of [27] above.

The elements to be established by the defendants: valuable/good consideration, good faith and without notice

50 Both sides gave evidence on the values to be attributed in 1998 to the Mountbatten property and the NBEH shares. Mdm Wong sought to show that these assets had been sold at an undervalue whilst the defendants contended that the sale prices were fair and reasonable in the circumstances of the case.

51 The Mountbatten property was sold for US$2m ($3,535,972). The defendants' valuer, Mr Robert Khan Yeow Wai, opined that as of 18 June 1998, the open market value with vacant possession of the Mountbatten property was $5,420,000 whilst its forced sale value was $3,795,000. His opinion was based on the sales comparison method of valuation and on the premise that the property was within the conservation area for bungalows at Mountbatten Road. The valuer called by Mdm Wong, Mr Tan Keng Chiam, valued the Mountbatten property as a redevelopment site for residential use and on that basis, considered that in June 1998, its value was $8.2m. Mr Tan was able to value the property as a redevelopment site as, he said, it was not within the conservation area and therefore the building on the land could be pulled down and the site sub-divided for redevelopment. Mr Khan, during cross-examination, conceded that he had made a mistake in categorising the property as conservation property and agreed that because of this mistake, his valuation was flawed.

52 As regards the NBEH shares, the defendants' expert, Mr Kaka Singh, used the dividend yield method to value the company. On this basis, he concluded that the value of NBEH was $7,701,000 and the value of the 60,000 NBEH shares was $1.1m. Mr Singh considered that the sale price of US$1m ($1.73m) was reasonable. During cross-examination Mr Singh agreed that historically, NBEH had declared low dividends and in fact had transferred a large percentage of its profits to its capital reserves. He also agreed that there would be nothing a buyer could do if the directors of the company decided not to declare dividends for the next few years. The buyer would be at the mercy of the whims of the directors.

53 Mr Chan Ket Teck who valued NBEH for Mdm Wong, applied the net tangible asset method. On this basis he found the fair value of the NBEH shares owned by Mr Ng to be $3,527,400 as at September 1998. The defendants criticised this valuation as having been based on far too many assumptions, in particular, assumptions Mr Chan had made as to the value of the property and whether it should be included as an asset of NBEH as, at the time Mr Ng agreed to sell the NBEH shares to BBC, the Mountbatten property did not belong to NBEH. They said that Mr Singh's method was the more appropriate one. As BB Ng had the last say on anything that was done by NBEH, there

could really be no true market value for the shares. What Mr Singh had was the closest anyone could come to an estimated valuation of the shares.

54 I note the points made by the parties. In relation to the Mountbatten property, since Mr Khan's valuation was flawed, it cannot be relied upon by the defendants as providing a reasonable estimation of the value of the Mountbatten property at the material time. The defendants did make various criticisms of Mr Tan's valuation including the suggestion that it did not provide an accurate reflection of the financial climate in June 1998 and was not based on sufficient comparables. Valuation is not an exact science and no one knows now what could have been obtained for the Mountbatten property had it been properly marketed in June 1998. I think it is possible to infer that if Mr Khan had valued the Mountbatten property on a redevelopment basis, he would have come up with a far higher amount than the US$2m it was sold for since, even regarding it as a conservation property, he thought its open market value was more than $5m.

55 As far as the NBEH shares were concerned, since NBEH is a private company tightly controlled by the family, there really is no possibility of shares in the company being sold to any third party and to that extent, there was and is no market value for the shares. The dividend method appears inappropriate to me as the company had no regular policy of paying dividends and everything depended on the whim of BB Ng or whoever was controlling the company at the time. The more appropriate method of valuing the NBEH shares was that adopted by Mr Chan, though the accuracy of that valuation depended on the accuracy of the values given to the assets of the company. In his valuation, Mr Chan included the Mountbatten property as an asset of NBEH and took the value of the Mountbatten property as being $8.2m. If he had valued it at US$2m (the amount paid for the property and thus the amount of cash that I assume the company must have had before it bought the Mountbatten property) then he would have come up with a lower figure as being the net tangible asset value of NBEH.

56 Having weighed the evidence, it appears to me more probable than not that US$2m was considerably less than the Mountbatten property was worth in 1998. As regards the value of the NBEH shares, however, the position is less clear. Whilst I am not disposed to accept the figure given by Mr Singh as being the value of the NBEH shares, Mr Chan's figure is also subject to some doubt. I am not able to find that the price of US$1m was substantially less than the true value of the NBEH shares.

57 Notwithstanding all of the above, however, it appears to me that the valuations carried out by the defendants were *ex post facto* attempts to justify the sale prices ascribed to the property. There was no consideration of the actual values of the assets before the prices of US$2m and US$1m were fixed. No effort was made by Mr Ng or anyone in either of the defendant companies to discover what the actual value of either asset was. The sums paid for each of these assets were fixed entirely arbitrarily and based on what Mr Ng said he needed. He was given what he needed without regard to the value of his assets and the split of the US$3m between the two assets was also an *ad hoc* affair. The way he told it was that his father fixed the prices and he simply did as his father requested. I am satisfied that even if the price of the NBEH shares was, in fact, more or less equal to their actual value, that was due to coincidence rather than intent.

58 The next point is whether the defendants entered into the respective transactions in good faith. The defendants submitted that in this context, the term "good faith" meant "good faith on the transferee's part, in the sense of a belief that all is regularly and properly done" (see *Halsbury's Laws of England*, vol 18 (4th Ed, 1977) at para 375). *Halsbury's* also says in the same passage that "[a] possible alternative view of the requirement for good faith in this context is that it simply means that the transaction must be a genuine transaction and not a sham". In my view, good faith on the

transferee's part must involve more than a belief that all the steps have been regularly and properly done; the transferee must have no reason to believe that there is anything dubious about the transaction. In this context, the transferee's acting in good faith must also involve his not having knowledge about the fraudulent intent of the transferor. I will therefore consider good faith and knowledge together.

59 First of all, it is worth repeating that at all material times Mr Ng was a director of NBEH. It was also the evidence of his brother, CB Ng, that although he himself owned a substantial share of BBC, all the time from 1970 onwards, it was Mr Ng who ran BBC and Aromate and other companies in the family group. He also testified that Mr Ng managed the family businesses independently of his father and made decisions without consulting BB Ng. The following passage from the evidence in cross-examination of CB Ng is significant:

> Q: Once divided, you and your brother could do what you wanted with these companies – that is what [Mr Ng] says. Is that a true statement? The first sentence of paragraph 51: "Once divided we could do what we wanted with these companies." He says that and I just want a "yes" or "no" answer. Is he telling the truth?
>
> A: Well, not exactly.
>
> …
>
> Q: Then please explain.
>
> A: Well everybody know my father being the patriarch of the company, whatever we do, we always reported to him. But my brother from time to time …, he do things secretly without letting him know. And after the event then tell him it has already happened, what you want to do –
>
> Q: "Letting him know" meaning letting your father know?
>
> A: That's right. It has already happened. What do you want to do? It is like this. So in other words –
>
> Q: Stop there, please. So your brother really did what he liked?
>
> A: That is what he say we could do what we want.
>
> Q: Thank you.
>
> A: That is exactly what he mean.

On the basis that Mr Ng ran both BBC and NBEH as he liked and only told his father what was going on after the fact, Mr Ng would clearly be the controlling mind of both the defendants and both companies would have the same knowledge that he had. They would therefore have been fully aware in June 1998 that the Mountbatten property and the NBEH shares were being transferred to them because Mr Ng wanted to place these assets beyond Mdm Wong's reach.

60 The evidence, however, is even stronger than that and I do not have to rely only on a finding that Mr Ng was a *de facto alter ego* of the defendants. Two of the telephone conversations that I have referred to earlier took place between Mr Ng and CB Ng. Those conversations revealed that CB Ng was aware of the impending divorce between Mdm Wong and Mr Ng and knew that it was in

that context that the transfer of the Mountbatten property was taking place. In one of them, the two men were in effect discussing the manner in which Mr Ng would justify the sale of the Mountbatten property to the court that determined that division of the matrimonial assets. In that conversation, no mention was made of Mr Ng's need for money to pay off debts owed by Aromate and Fustar. CB Ng also admitted in cross-examination that the issue in that conversation that he had with his brother on 27 or 28 October 1999 was ensuring that Mdm Wong would not be able to succeed in any claim in respect of the Mountbatten property.

61 In June 1998, the defendants were aware that there were divorce proceedings between Mdm Wong and Mr Ng. NBEH was aware through at least two of its directors, *ie*, Mr Ng and CB Ng, of the reasons why Mr Ng wanted to transfer the Mountbatten property to it. BBC was aware through its director, CB Ng, and through the person who actually ran its operation, Mr Ng himself, of the reasons for the transfer of the NBEH shares to it. I find that both companies knew of Mr Ng's intent to defraud Mdm Wong. As stated in *Ford and Austin's Principles of Corporations Law* (7th Ed, 1995) at [16.180] to [16.210], a company is fixed with the knowledge of its director, who with the acquiescence of its board has assumed control of the company and who treated the company's affairs and transactions as its own. Further, in ascertaining who was the mind of the company at the material time, the court takes into account who had management and control of the company in relation to the act or omission in point. This was established by the case of *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 where the defendant company was held to be liable as a constructive trustee of funds it had received on the basis that it knew that the funds were transferred out of the plaintiff's investment account by an investment manager who acted in breach of his duty. In the case of these assets, I am satisfied that Mr Ng was the controlling mind of both companies and even if he were not the controlling mind of BBC, CB Ng's knowledge would have to be imputed to BBC.

Conclusion

62 Mdm Wong has been able to establish her case but the defendants have not been able to establish the elements of good faith and ignorance of the nefarious intention of Mr Ng, the transferor. The consideration for the Mountbatten property was clearly inadequate and whilst the NBEH shares may not have been transferred at an undervalue, the evidence is clear that no attempt was made to ascertain their correct value for the purposes of the transfer and the amount of the consideration for them was an arbitrary figure chosen without any regard to value at all. Mdm Wong must succeed in her claim.

63 For the foregoing reasons I make the following orders.

(a) I declare that the transfer of the Mountbatten property by Mr Ng to the first defendant is void.

(b) There shall be an account of and an inquiry into the income (rental or otherwise) received by the first defendant from its purported ownership of the Mountbatten property.

(c) I declare that the transfer of the NBEH shares by Mr Ng to the second defendant is void.

(d) There shall be an account of and an inquiry into the profits, if any, made by the second defendant arising from the transfer of the shares.

(e) The defendants shall pay Mdm Wong's costs of this action.

64 In the statement of claim, Mdm Wong asked for interest pursuant to s 12 of the Civil Law Act

(Cap 43, 1999 Rev Ed). I do not think that she is entitled to interest and, even if she was, on what sum should such interest be calculated? There is nothing in the submissions directly related to this prayer. Therefore no order as to interest is made.

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