Ng Bok Eng Holdings Pte Ltd and Another v Wong Ser Wan
[2005] SGCA 23

Case Number : CA 87/2004

Decision Date : 28 April 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Choo Han Teck J; Yong Pung How CJ

Counsel Name(s) : Leslie Chew SC, Chan Kia Pheng and Shaun Koh (Khattar Wong and Partners) for the appellants; K Shanmugam SC, Ang Cheng Hock and Tan Xeauwei (Allen and Gledhill) for the respondent

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

Civil Procedure – Appeals – Leave – Whether leave required to raise new argument not raised at trial – Whether appellant allowed to canvass new point on appeal – Whether respondent deprived of opportunity to put before trial court all evidence relevant to new point raised by appellant

Equity – Remedies – Account – Transfer of assets annulled on ground transfers amounting to fraudulent conveyances under s 73B Conveyancing and Law of Property Act – Whether account of rental and profits just and necessary – Whether court having power to grant account of rental and profits – Section 73B Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed)

Land – Conveyance – Husband-respondent defaulting on maintenance payments to wife-appellant after divorce – Wife seeking to annul transfers of assets by husband on ground transfers amounting to fraudulent conveyances under s 73B Conveyancing and Law of Property Act – Whether wife entitled to pursue action as creditor – Whether conveyance made with intent to defraud creditors – Section 73B Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed)

28 April 2005 *Judgment reserved.*

Chao Hick Tin JA (delivering the judgment of the court):

1 This action was instituted by the respondent, a wife who has obtained a decree *nisi* for divorce, to annul, pursuant to s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("the CLPA"), the sale and transfer by the husband of a certain property at 764 Mountbatten Road ("the Mountbatten property") and some 60,000 shares in a family company to two related companies owned by members of his family. These two companies are the appellants herein. In the court below, Judith Prakash J granted the relief prayed for, including an order for account of rental and profits (see [2004] 4 SLR 365). We heard the appeal on 21 and 24 February 2005 and reserved judgment.

The background

2 The respondent, Mdm Wong Ser Wan ("Mdm Wong"), married Mr Ng Cheong Ling ("Mr Ng") in January 1976. Mr Ng is one of the sons of Mr Ng Bok Beng ("NBB"), the founder of Ng Bok Eng Holdings Pte Ltd ("NBEH"), the first appellant herein. NBEH was set up by NBB more than 30 years ago. At the time, the shareholders of NBEH were Mr Ng and his parents and siblings. Its directors were NBB, Mr Ng and his older brother, Ng Cheong Bian ("NCB"). By the time of the trial, Mr Ng no longer held any shares in NBEH, having on 26 September 1998 transferred his entire shareholding therein, which stood at 60,000, to the second appellant, Bian Bee Company Pte Ltd ("BBC"). The shareholders of BBC were NBB and NCB.

3 Mr Ng and Mdm Wong have three children. By the first half of the 1990s, their marriage was considerably strained. In 1995, Mdm Wong applied for a summons in the Subordinate Courts against Mr Ng claiming for maintenance for herself and the children. In March 1996, upon Mr Ng promising to give her a monthly allowance of $12,000, Mdm Wong withdrew the summons. However, Mr Ng failed to keep to his promise. As a result, Mdm Wong took out a fresh maintenance summons in July 1996 which was heard in August 1996 and, by consent, a monthly maintenance of $15,000 was ordered.

4 In October 1996, Mdm Wong filed a petition for divorce on the ground of Mr Ng's unreasonable behaviour involving an improper association with a named woman. Mr Ng cross-petitioned for divorce on the ground of unreasonable behaviour on the part of Mdm Wong.

5 In 1997, attempts were made to save the marriage and/or to reach a settlement. By December 1997, an agreement was reached and signed between the parties on financial matters ("the Financial Agreement") under which Mr Ng agreed to:

(a) give certain immovable properties to Mdm Wong, including a property in Singapore;

(b) pay Mdm Wong two sums, one for $2.5m and the other for US$320,000. The US$320,000 was to be paid within seven banking days of the Agreement and $500,000 of the $2.5m within three months thereafter. As for the remainder of the $2.5m, $1m was to be paid by November 1998 and the last $1m by November 1999;

(c) continue to pay the consent maintenance of $15,000 per month;

(d) transfer certain shares to Mdm Wong by 15 February 1998.

Both parties also agreed to withdraw the various divorce proceedings taken by them in court, with Mr Ng to pay Mdm Wong her legal costs.

6 However, Mr Ng failed to fulfil the promises he made in the Financial Agreement as they fell due. Instead, on 12 June 1998, Mr Ng entered into an agreement to sell the Mountbatten property (estimated to be worth $8m) to NBEH for US$2m and this transaction was completed on 27 June 1998. In the meantime, on 25 June 1998, Mr Ng entered into another agreement to sell his 60,000 NBEH shares to BBC for US$1m and this sale was completed in September 1998. Hereinafter, the Mountbatten property and the 60,000 NBEH shares will be referred to collectively as "the two assets".

7 There was disagreement as to the value of the Mountbatten property, with Mr Ng's valuer putting it at $5,420,000, with a forced sale value of $3,795,000. Mdm Wong's valuer estimated it at $8.2m. However, Mr Ng's valuer's valuation could not be accepted by the trial judge because the valuer had made an error in categorising the Mountbatten property as a conservation property when it was not. Moreover, even on Mr Ng's valuer's assessment, the market price was $5,420,000, well in excess of the US$2m (equivalent to $3.5m) paid by NBEH. As regards the price of US$1m for the 60,000 NBEH shares, the judge found it difficult to determine whether that price was substantially less than the market price as NBEH is a private company.

8 On the evidence, it is clear that there are different methods of valuation, *eg*, the dividend payment method and the asset value method. However, none of these are exact. More importantly, at the time the transfers were agreed to and effected, neither Mr Ng nor the appellants had any regard to the real values of the two assets. All Mr Ng wanted was to make the transfers look good and real.

9 In the first half of 1999, following Mr Ng's failure to fulfil his promises under the Financial Agreement, further negotiations between the parties took place through their solicitors, culminating in the execution of a deed of separation on 8 July 1999. The deed of separation affirmed Mr Ng's obligations under the Financial Agreement. Accordingly, on 9 July 1999, Mdm Wong withdrew her divorce petition filed in 1996.

10 In September and October 1999, Mdm Wong, being anxious to ascertain what Mr Ng was up to, took steps to secretly record some of Mr Ng's conversations with a number of people. From these conversations, it was clear that Mr Ng had planned to put his assets out of her reach. On 9 October 1999, Mdm Wong filed a fresh divorce petition and in March 2000 obtained a Mareva injunction to restrain Mr Ng from dissipating his assets. Mdm Wong obtained a decree *nisi* for divorce on 1 August 2002. The decree *nisi* has yet to be made absolute.

11 In the meantime in a separate action, in Suit No 1396 of 2001, Mdm Wong also commenced a derivative action on behalf of Aromate Pte Ltd ("Aromate") against Mr Ng for his breach of fiduciary duty as a director of Aromate and obtained judgment against him for $3.8m and costs. On Aromate's petition, a bankruptcy order was made against Mr Ng on 11 October 2002. More will be said about Aromate later.

The decision below

12 Section 73B of the CLPA reads as follows:

> **73B.**—(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.

13 Prakash J held at [5] of her judgment that for a person to establish his claim for relief under the section, he must prove the following ingredients:

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

(b) that the conveyance was made with the intent of defrauding creditors; and

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

14 However, the trial judge also said that the transferee of a property would be able to resist the relief claimed by the plaintiff under s 73B if he could establish that he:

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

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

15 Prakash J next held that there was no evidence to substantiate Mr Ng's assertion that the

Mountbatten property was a gift to him from his father, NBB. She further held that by virtue of the terms of the Financial Agreement, Mdm Wong was a creditor of Mr Ng who had acted dishonestly when he effected the transfers of the Mountbatten property and the 60,000 NBEH shares to the appellants, the object of which was to reduce the matrimonial assets to which Mdm Wong would be entitled. The judge noted that while the appellants, NBEH and BBC, did pay for the assets transferred, namely, US$2m and US$1m for the property and the shares respectively, no attempts were made to determine their real values. As Mr Ng was the controlling mind of both the appellants, the latter were affixed with the knowledge of Mr Ng's intention to defraud Mdm Wong. Accordingly, the judge held that the appellants did not obtain the two assets in good faith.

Meaning and scope of section 73B of the CLPA

16 In *Quah Kay Tee v Ong & Co Pte Ltd* [1997] 1 SLR 390 ("*Quah Kay Tee*") at [8] and [9], this court stated that s 73B of the CLPA was derived from s 172 of the English Law of Property Act 1925 (c 20), which in turn was based substantially on the Statute of Elizabeth 1571 (c 5) ("the Elizabethan Statute"), an Act against fraudulent deeds, gifts, alienations, *etc*. The court in *Quak Kay Tee* stated at [26] that the one great object of the Elizabethan Statute was to "prevent debtors from dealing with their property in any way to the prejudice of their creditors". If the transfer was without any, or with only nominal, consideration, there would be a presumption of an intent to defraud on the part of the transferor.

17 In the nature of things, unless there is an admission, proof of an intent to defraud on the part of the transferor will invariably have to be inferred from all the circumstances. The position will be the same with regard to the question as to whether or not the transferee of the assets who has given valuable or good consideration has received the assets in good faith, without notice of the intent to defraud creditors on the part of the transferor. We agree with what Prakash J said as to the elements that need to be proved to set aside a transaction or to bring a transaction outside the ambit of s 73B (see [13] and [14] above).

18 In *Quah Kay Tee*, a voluntary transfer of shares in a private company from a debtor to another private company was held to fall foul of the Elizabethan Statute, which was the statute in force in Singapore prior to the enactment of s 73B, because of constructive fraud.

19 In contrast, in *Soh Lai Chan v Kuah Peng Hock* [2003] SGHC 144 ("*Soh Lai Chan*"), a decision of the High Court which was affirmed by this court on appeal, a challenge by a former wife to her former husband's disposal of his assets made pursuant to some family arrangements failed. There, the former wife, while still a wife, together with members of the husband's family, had knowingly and willingly participated in a family arrangement, at the direction of the family patriarch, whereby all members of the family had transferred their assets among themselves on the same day. This family arrangement was effected about two years before there was any contemplation of divorce proceedings between the couple. There was no intent to defraud on the part of the husband. We would add that the situation in *Soh Lai Chan* was quite different from that of the present case. Here the scheme for the transfers of the two assets was hatched by Mr Ng.

Issues on appeal

20 In this appeal, three main issues are canvassed. First, the appellants argue that when Mr Ng transferred the assets to them, there was no intention on his part to defraud his creditors. Second, they argue that even if the answer to the first issue is in the affirmative, the appellants had no notice of Mr Ng's intent to defraud. Third, the appellants contend that the judge was wrong to have made an order to account.

Was there intent to defraud?

21 The contention of the appellants was that Mr Ng entered into the agreement of 12 June 1998 to sell the Mountbatten property to NBEH and the agreement of 25 June 1998 to sell the 60,000 NBEH shares to BBC solely for the purpose of obtaining funds urgently needed to help two companies of his, namely, Aromate and Fustar Chemicals Ltd ("Fustar"), to settle their debts owing to Standard Chartered Bank ("Stanchart") and United Overseas Bank ("UOB") Hong Kong respectively. The appellants claimed that Mr Ng was obliged to do that because he stood as guarantor for the debts of those two companies and thus the burden fell on him. Mr Ng alleged that he had to obtain the funds very quickly. In effecting the transfer of the property and the shares to the appellants, the appellants averred that Mr Ng had obtained valuable consideration. The appellants also claimed that as Mr Ng was desperate for money, he had to agree with his father's terms, *ie*, the prices set by the father.

22 While the Mountbatten property was bought in 1980 in Mr Ng's name for $988,404 with a mortgage loan of $600,000 from the UOB, Mr Ng said that it was his father who paid the upfront money and serviced the mortgage loan. The mortgage was repaid in 1986. Except for a short period when NBB lived there, the property was rented out. As for the 60,000 NBEH shares, it was also his father who provided the cash for the shares at $1 each in 1970. Therefore, the appellants said that NBB was entitled to ask Mr Ng for the return of the two assets, claiming that the whole thing was a family arrangement.

23 Mr Ng explained that in June 1998, he had substantial shareholdings in the two companies, Aromate (owning 62%) and Fustar (owning 50%). He claimed that of the consideration of US$2m received from NBEH, half went into Fustar's account at the Bank of America in New York and the other half to Aromate's account with Stanchart. Of the US$1m received for the 60,000 shares, Mr Ng claimed that US$600,000 went into Fustar's account with UOB Hong Kong and US$400,000 into Aromate's account with Stanchart.

24 The trial judge noted that while Mr Ng claimed that NBB had paid for the Mountbatten property, not a piece of document was produced to show that NBB had paid either the cash upfront or the instalments. She found as a fact that NBB did not pay for the property and did not give it to Mr Ng as a gift.

25 Moreover, there is one other factor which is inconsistent with the appellants' claim that NBB had paid for the Mountbatten property. Besides the loan of $600,000 obtained from UOB, Mr Ng admitted in cross-examination that he had taken another loan of $325,792.00 from his cousin, Tjoa Him Tjaij, and there is a handwritten note by him indicating that it was for the purchase of the property. This would obviously have gone towards paying for the upfront money which was the shortfall between the purchase price and the UOB loan. The judge also noted that it was probably to fund the purchase of the property.

26 In this context the appellants relied on the fact that UOB required a guarantee from NBB as indicating that Mr Ng was incapable of paying for the property and it was NBB who paid for it. We do not see how that follows. Moreover, the guarantee given by NBB was only for the short interim period between the granting of the loan and the registration of the mortgage over the property.

27 As regards the 60,000 NBEH shares, while Mdm Wong accepted that Mr Ng's initial shareholding in NBEH came from his father in 1970, over the years Mr Ng's shareholding in NBEH varied between 60,000 and 120,000. The trial judge held that it could hardly be said that the 60,000 shares in 1998 were the original 60,000 given to him by his father in 1970. In any event, as the 60,000 shares were given to him, they were his and there was nothing to suggest that Mr Ng held them in

trust for his father.

28 The trial judge accepted Mdm Wong's assertion that, at the time of the transfer of the two assets, Mr Ng had failed to pay Mdm Wong the maintenance under the consent order of 1996 and had failed to fulfil his obligations under the Financial Agreement. Mr Ng had failed to transfer certain shares to Mdm Wong by 15 February 1998 and had also failed to pay her the promised sum of $500,000 by 4 March 1998. The judge found (at [37]) that by the transfers, Mr Ng had "effectively reduced the realisable pool of assets from which [Mdm Wong] could satisfy her rights". Those assets were Mr Ng's only assets in Singapore. She found that Mr Ng had acted dishonestly in effecting the transfers and that his intention was to put them out of Mdm Wong's reach. She said (at [38]):

> [Mr Ng] arranged for [the assets] 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.

29 This was a finding of fact based on the testimonies of Mr Ng and Mdm Wong, which an appellate court should be slow to overturn unless it can be shown to be plainly wrong or against the weight of the evidence. There are four observations which we would make here. First, the entire basis of Mr Ng's assertion that he needed to dispose of the two assets quickly was due to the creditor banks of Aromate and Fustar breathing down his neck. However, there was no letter of demand from the banks to him or, at least, none was produced. Neither was there any letter of demand from Stanchart to Aromate. There was also no evidence to show that Aromate and Fustar had used the sale proceeds to repay Stanchart and UOB Hong Kong. Second, the evidence of Mr Ng's then solicitor, Mr Tan Kok Keong ("Mr Tan"), of Mr Ng wanting to borrow money urgently from NBB, did not prove anything. The evidence of Mr Tan also confirmed that Mr Ng had been telling him how he planned to reduce the assets available for division with Mdm Wong. Third, having regard to the completely incoherent evidence of NBB in court, the judge was quite correct to have disregarded his affidavit of evidence-in-chief. Borrowing money from his father was a part of Mr Ng's plot. Fourth, in any event, the transcripts of telephone conversations (though taking place after the events) between Mr Ng and third persons, particularly those with NCB on 27 to 28 October 1999, provided the confirmation that Mr Ng had the clear intention to make himself look poor and be in debt so that Mdm Wong would not be able to get anything much out of him. The conversation with NCB clearly showed that Mr Ng realised that he was giving the Mountbatten property to his father for a low price when he used the term "pawning". It is clear to us that Mr Ng had the intention to reduce his net asset position. Accordingly, we agree with the trial judge that the transfers of the two assets by Mr Ng were made with fraudulent intent.

30 The appellants sought to downplay the significance of the transcripts of the telephone conversations on the ground that those conversations did not take place contemporaneously with the sale of the Mountbatten property and the 60,000 NBEH shares. They occurred more than a year later and even then only in one conversation was express reference made to the two assets. We have perused the transcripts and they no doubt confirm that Mr Ng had planned it all: to make himself look poor so that Mdm Wong would not be able to get at the two assets. He was very conscious of the financial implications which would follow from a divorce.

31 The appellants next argued that it was wrong for the trial judge to have inferred dishonest

intent from the surrounding circumstances. Obviously, if there was direct evidence of such intent that would be the best proof. In our opinion, the transcripts of the telephone conversations provide the direct proof. Even assuming that the telephone conversations could not amount to an admission, it does not follow that such intent may not be inferred from all the circumstances. As Pennycuick VC so poignantly put it in *Lloyds Bank Ltd v Marcan* [1973] 2 All ER 359 at 367:

> The word 'intent' denotes a state of mind. A man's intention is a question of fact. Actual intent may unquestionably be proved by direct evidence *or may be inferred from surrounding circumstances*. [emphasis added]

32 This court had also in *Yogambikai Nagarajah v Indian Overseas Bank* [1997] 1 SLR 258 held that fraud could be inferred from the surrounding circumstances although such an inference should not be lightly made. In *Re M Kushler, Ltd* [1943] 2 All ER 22, the English Court of Appeal held that an intent to defraud could be inferred from all the circumstances. In the circumstances of the present case we do not see how the trial judge could be faulted for making the inference.

Was Mdm Wong a creditor and was she prejudiced?

33 A related argument raised by the appellants is that Mdm Wong was not prejudiced when the agreements for the transfers of the assets were made. Reliance was placed on the fact that in her proof of debt filed in Mr Ng's bankruptcy, the debts stated to be owing by Mr Ng arose in April 1999 and they were not in respect of any obligation due under the Financial Agreement but under the consent maintenance order of 14 August 1996. Thus, the appellants claimed that Mdm Wong was not a creditor in 1998.

34 We should, at this juncture, add that before us, the appellants further submitted that, in any event, by the time Mdm Wong instituted the present action, she was no longer a creditor under the Financial Agreement. Reliance was placed on the case of *Cadogan v Cadogan* [1977] 3 All ER 831 ("*Cadogan*") where the view was expressed by Goff LJ (at 839) that once a claim brought by a plaintiff under s 172 of the English Law of Property Act 1925 had abated or collapsed, then such a claim could not stand or be sustained.

35 On this further submission, the respondent has objected that this was a new point which was not raised in the court below, relying in this regard on O 57 r 9A(4)(b) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). Neither have the appellants sought leave to raise this new point. The respondent also contended that in now raising this point for the first time the appellants have deprived the respondent of the opportunity to specifically put before the trial court all evidence relevant to the issue of her status as Mr Ng's creditor at the time the present action was instituted. For this reason, the respondent averred that this court should not allow this point to be canvassed. We agree.

36 In any event, we would like to make this comment on *Cadogan*. There, the wife had appealed against an interlocutory ruling striking out her claim to set aside the conveyance of her husband's property pursuant to s 172 of the English Law of Property Act 1925. The basis of her claim was that the conveyance by her husband had deprived her of her potential rights for financial provision under the Matrimonial Causes Act 1973 (c 18). However, the husband died, resulting in her right to financial relief under the said 1973 Act being abated. The judge at first instance ordered that the claim be struck out on the ground that it disclosed no reasonable cause of action. The English Court of Appeal unanimously allowed the wife's appeal which meant that her claim under s 172 would proceed to trial. While Goff LJ did make the remark referred to at [34] above, it could not be intended to be the final word. More importantly, in our case here, the factual position is quite different. We do not see how Mdm Wong's rights under the Financial Agreement could be considered to have been abated. Rights

acquired before discharge of an agreement are not affected by the discharge.

37 The appellants alleged that the main purpose of the present action by Mdm Wong was to ensure that the two assets would be available for division between Mdm Wong and Mr Ng. In this regard, the appellants relied on this part of the judgment of Prakash J at [1]:

> [This case] 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.

They submitted that the proper remedy for Mdm Wong was under s 132 of the Women's Charter (Cap 353, 1997 Rev Ed) and not s 73B of CLPA.

38 It is clear to us that on the date the two assets were transferred to the appellants, Mr Ng had outstanding maintenance due to Mdm Wong under the 1996 consent order. In addition, he had not paid the instalment of $500,000 due in March 1998 under the Financial Agreement. After the transfers, further instalments due under the Financial Agreement were outstanding. Similarly, there were outstanding subsequent maintenance payments due to Mdm Wong. The fact is that Mr Ng was constantly in default in paying maintenance to Mdm Wong. It was clear that at all material times, Mdm Wong was a creditor of Mr Ng.

39 Under s 73B, any person who is a creditor and is prejudiced by the transfer of an asset is entitled to apply to court to set it aside. Mdm Wong is such a person. As Mr Ng is now a bankrupt the assets upon restoration pursuant to the judgment below will have to be dealt with by the Official Assignee in accordance with the law of insolvency.

Notice of intent to defraud

40 The appellants next challenged the finding of the trial judge that the appellants had notice of Mr Ng's intent to defraud creditors. They averred that the judge was wrong to have found that Mr Ng was the controlling mind of both the appellants. The appellants claimed that the true controlling mind was NBB. They emphasised the fact that the first appellant was an investment holding company under the sole control of NBB. As for the second appellant, Mr Ng had ceased to be a director thereof from 1993 and the appellants claimed that Mr Ng played no part in the transfer of the Mountbatten property to NBEH and of the 60,000 NBEH shares to BBC.

41 The appellants submitted that for notice of the fraudulent intent of the transferor to be imputed to the transferee, the latter must have actual knowledge, not just constructive knowledge. The appellants submitted that the trial judge seemed to have wrongly applied the concept of constructive knowledge when considering the question of good faith.

42 However, we do not think there was any misconception on the part of the trial judge as to the test to be applied in determining knowledge. She recognised that in a case where the transferee, in fact, provided valuable consideration, it must be shown that the transferee had actual knowledge of the intent to defraud on the part of the transferor. This was her observation at [8], when commenting on what was decided by this court in *Quah Kay Tee*:

> 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.

43 Here, the trial judge found that both the appellants had knowledge of Mr Ng's scheme in relation to the transfer because he was managing NBEH and, although in relation to BBC, Mr Ng was not a director, he was, on the evidence of NCB, *de facto* running it. He was the controlling mind of the appellants. Although Mr Ng would report to his father, NBB, it was often after things had been executed. In any event, the burden of disproving knowledge rests with the transferee. Again this is a finding of fact which we are not disposed to disturb. Thus, knowledge of the devious scheme of Mr Ng would be imputed to the appellants.

44 We should add that the trial judge also found that the other director of the appellants, NCB, was aware that the "transfers" were really to keep the assets out of the reach of Mdm Wong. Two of the taped conversations were between Mr Ng and NCB. They seemed to show that NCB was aware of Mr Ng's motive in effecting the "transfers". NCB was at all material times a substantial shareholder of the second appellant, BBC. He also signed the directors' resolutions of the appellants to acquire the two assets from Mr Ng.

45 As Denning LJ said in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 at 172:

> [D]irectors and managers … represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

46 In determining who the directing mind and will of a company is, the court in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 held that it would take into account who, in fact, had management and control of the company in relation to the act or omission in question.

47 The appellants also challenged the judge's finding that the appellants lacked good faith on the ground that the judge had applied the wrong test and that this error was apparent from [58] of her judgment:

> 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.

48 In substantiation of this submission, the appellants relied upon the following passage from *Kerr on the Law of Fraud and Mistake* (Sweet & Maxwell, 7th Ed, 1986) at p 337:

> A *bona fide* purchaser, without notice of any fraud on creditors, is more entitled to be protected than the creditors themselves, whose only claim is on the general estate; for he has paid his money for the particular estate which he claims, and is expressly exempted from the operation of the statute, by this section. And even though there be some suspicious circumstances as regards the purchaser's part in the matter, which may be ground for rigid inquiry, the purchase will nevertheless be held good, unless it is shown that it was a contrivance to defeat creditors, and that the purchaser was privy to it.

49 As we see it, the difference between what the judge said and what the author stated is more apparent than real, bearing particularly in mind the qualification made by *Kerr on the Law of Fraud and Mistake*, namely, "unless it is shown that [the purchase] was a contrivance to defeat creditors" and the statement of the trial judge at [58] of her judgment that "[in] this context, the transferee's acting in good faith must also involve his not having knowledge about the fraudulent intent of the

transferor". What must be borne in mind is that in the subsequent paragraphs of her judgment, the judge proceeded to find that the appellants had actual knowledge of the fraudulent intent of Mr Ng. In short, she found that the appellants were privy to the scheme of Mr Ng. How could it be said that the appellants had gone into the transactions in good faith when they knew of the sinister scheme of Mr Ng? We need not go further into the question of whether "blind-eye" knowledge would constitute knowledge.

Taking of accounts

50 We now turn to the third issue raised by the appellants. In granting relief to Mdm Wong, the trial judge also made orders on the taking of accounts in relating to the transfer of the two assets to the appellants, namely:

> (a) There shall be an account (rental or otherwise) received by the first [appellant] from its purported ownership of the Mountbatten property.
>
> (b) There shall be an account of and an inquiry into the profits, if any, made by the second [appellant] arising from the transfers of the [60,000] shares.

51 The appellants contended that the judge was wrong to have made these consequential orders and in this regard cited the following passage from *Halsbury's Laws of England* vol 18 (Butterworths, 4th Ed, 1977) at para 386:

> Creditors are not entitled to an account of the rents and profits of the property received by the transferee before the conveyance is set aside.

52 The above passage of *Halsbury's* is based on the ancient case of *Higgins v York Buildings Co* (1740) 2 Atk 107; 26 ER 467 ("*Higgins*") where Lord Hardwicke did not offer any reason why an account for rental and profits should not be made. This view would appear to have been endorsed (in *obiter*) by Lord Romilly MR in *Reese River Silver Mining Company v Atwell* (1869) LR 7 Eq 347 and also by the Upper Canada Court of Error and Appeal in *Bank of Upper Canada v Thomas* (1864) 2 E & AR 502. However, in the later Canadian case of *Smith v Drew* (1877) 25 Grant 188, the Court of Chancery of Ontario, while recognising the statement of Lord Hardwicke in *Higgins*, left open the question whether the court should have granted an order for an account if asked to do so.

53 However, counsel for Mdm Wong quoted the case of *In re Mouat* [1899] 1 Ch 831, a decision on the Elizabethan Statute, where the English court had not only avoided the fraudulent conveyance but also granted an injunction restraining the transferee from dealing with the traced moneys received under the fraudulently assigned policy.

54 Under para 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed), it is expressly provided that the High Court has the "[p]ower to grant all reliefs and remedies at law and in equity". Of course, this only sets out the general power of the High Court. It would be for the court in each case to decide whether a particular relief ought to be granted in the circumstances there prevailing. As we have noted above, Lord Hardwicke in *Higgins* did not give any reason as to why the relief by way of account should not be ordered in addition to the relief of having the property, which was conveyed in breach of the Elizabethan Statute, restored. While it is true that an account of profits is the traditional remedy for breaches of equitable obligations, it did not mean that that remedy may not be granted by the court in other situations. No rule should remain immutable in the eyes of equity. Ultimately, it is the justice of the case which will dictate what relief will be appropriate.

55 In this regard, the following observations of Sir George Jessel MR in *In re Hallett's Estate* (1880) 13 Ch D 696 at 710 are germane:

> I intentionally say modern rules, because it must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time – altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented.

56 It is significant to note that while ordinarily a breach of contract will only give rise to an award of damages, the House of Lords had in *Attorney General v Blake* [2001] 1 AC 268 ("*Blake*") held that in an exceptional case, where the normal remedies of damages, specific performance and injunction were inadequate compensation for a breach of contract, the court could, if justice demanded it, grant the discretionary remedy of requiring the defendant to account to the plaintiff for the benefits received from the breach of contract. In *Blake*, the breach related to an undertaking as to confidentiality and the court had noted that that sort of a breach was akin to a breach of fiduciary obligations. The following rationalisation, given by Lord Nicholls of Birkenhead as to the necessity in certain circumstances to give an account in a contractual setting, is persuasive (at 284–285):

> [T]here seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression "restitutionary damages". Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.

57 Lord Nicholls then went on to clarify that no rigid tests could be laid down as to what would constitute an exceptional case. He said (at 285):

> The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.
>
> It would be difficult, and unwise, to attempt to be more specific.

58 Reverting to the position in the present case, the question to ask is whether avoiding the fraudulent transfers alone would be an adequate remedy to deal with the mischief which s 73B of the CLPA is intended to address. It seems to us that the answer cannot be given in the abstract. It must depend on the particular fact situation of each case. Neither does it follow that an account should be ordered in every case where a conveyance is annulled under s 73B. What is objectionable is the transfer of the property to defraud creditors. Section 73B does not seek to control the manner in which the owner of a property may use his asset or the income he derives therefrom. The owner would otherwise be free, had he not effected the transfer of the property, to allow whom he pleased

to occupy the property with or without rental and deal with the rental received in any way he pleased. In the present case, there is no evidence that Mr Ng was insolvent at the time the two assets were transferred, although he tried to make himself look impoverished so that there would be less for Mdm Wong to look to for division. As Prakash J noted in her second judgment in the present case reported at [2004] 4 SLR 464, s 73B does not differentiate between the situation of a bankrupt debtor and the situation of a non-bankrupt debtor. She opined that the rights of the creditor to avoid a fraudulent transfer were not affected by the status of the debtor. We agree with this view. Thus, we do not think it would be necessary or just that an account should be ordered as from the dates of the transfers. In the present case, if an account should be ordered, it should only be from the date Mr Ng was made a bankrupt. This is because as from that date, his creditors would have had an interest in his estate, and thus his assets. From that point onwards, Mr Ng would have no longer been free to determine how his assets should be dealt with. An order for account as from that date would be warranted and just. Accordingly, we would vary to that extent only the order to account made by the judge below.

Set-off

59 During the course of arguments before us, counsel for the parties were requested to submit in writing on whether, if the order of the court below that there be an account of rental and profits was maintained, it would be possible for the appellants to set that off against the two sums which the appellants had paid to Mr Ng for the two assets and only prove the balances against the bankruptcy estate of Mr Ng. Counsel for the appellants, upon further research, quite rightly, conceded that such a set-off was not permissible.

60 The governing provision on this question is s 88(1) of the Bankruptcy Act (Cap 20, 2000 Rev Ed) which provides:

> **88.**—(1) Where there have been any mutual credits, mutual debts or other mutual dealings between a bankrupt and any creditor, the debts and liabilities to which each party is or may become subject as a result of such mutual credits, debts or dealings shall be set-off against each other and only the balance shall be a debt provable in bankruptcy.
>
> (2) There shall be excluded from any set-off under subsection (1) any debt or liability of the bankrupt which —
>
> (*a*) is not a debt provable in bankruptcy; or
>
> (*b*) arises by reason of an obligation incurred at a time when the creditor had notice that a bankruptcy petition relating to the bankrupt was pending.

61 Clearly, there are a number of reasons why a set-off is not permissible in the present situation, the main reason being that there is no mutuality of parties and of debts. The rental and profits which the appellants are required to account to the trustees of the estate of Mr Ng would be for the benefit of his creditors in general. However, the US$3m was paid by the appellants to Mr Ng and now that Mr Ng is a bankrupt, the appellants would have to join the ranks of the unsecured creditors and file their proofs of debt: see *Lister v Hooson* [1908] 1 KB 174. The following passage from Rory Derham, *The Law of Set-Off* (Oxford University Press, 3rd Ed, 2003) at para 13.07, while it relates to voidable transactions (at an undervalue or unfair preference) under the insolvency regime, is equally applicable to cases under s 73B:

> A creditor who is liable to return a preferential payment is not entitled to set off against that

liability the debt for which the payment was intended to be satisfaction, or indeed any other liability of the bankrupt to him. The trustee's right to the return of the preference accrues in his own right as trustee, and is not derived from an obligation incurred by the creditor to the bankrupt. The creditor's liability and the creditor's claim against the bankrupt accordingly are not mutual. In any event, public policy would dictate that a transaction which Parliament has said should be avoided as a preference should not be able to ground a set-off, because otherwise the efficacy of the preference provision would be severely limited.

Judgment

62 In the result, the appeal is allowed only to the limited extent that we vary the order to require the appellants to account for rental and profits as from the date on which Mr Ng was made a bankrupt. As the appellants have substantially failed, we would order that they pay 85% of the costs of this appeal. The security of costs, together with any accrued interest, shall be released to the respondent to account of the respondent's costs.

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