Jeyaretnam Joshua Benjamin v Indra Krishnan
[2007] SGCA 30

Case Number : CA 142/2006

Decision Date : 01 June 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : The appellant in person; Sarjit Singh and Chan Wang Ho (Insolvency & Public Trustee's Office) for the Official Assignee; Ashok Kumar and Foo Hsiang Ming (Allen & Gledhill) for the first and 11th creditors; Hri Kumar (Drew & Napier LLC) for the Second to tenth creditors

Parties : Jeyaretnam Joshua Benjamin — Indra Krishnan

Insolvency Law – Bankruptcy – Bankruptcy effects – Garnishment by creditors prior to bankruptcy order being made but after bankruptcy petition filed – Whether sums garnished null and void – Sections 77, 105 and 106 Bankruptcy Act (Cap 20, 2000 Rev Ed)

Insolvency Law – Bankruptcy – Bankruptcy rules – Creditors and Official Assignee opposing bankrupt's application for discharge from bankruptcy – Bankrupt and creditors unable to agree on amount of composition – Whether bankrupt's application for discharge misconceived – Whether bankrupt ought to be discharged conditionally – Section 124 Bankruptcy Act (Cap 20, 2000 Rev Ed)

1 June 2007

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 The appellant, Joshua Benjamin Jeyaretnam, filed Summons No 600358 of 2006 ("SUM 600358/2006") on 28 August 2006 seeking a discharge of his bankruptcy under s 124(1) of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("BA"). The application failed before the assistant registrar ("the AR") and on appeal to the judge in chambers ("the Judge below"). Consequently, the appellant filed this appeal. On 23 April 2007, we delivered our oral judgment in which we allowed the appellant's appeal in part by granting the appellant a conditional discharge upon payment to the Official Assignee ("the OA") the sum of $233,255.78 within three weeks of 23 April 2007. Because the appellant was successful in part, we made no order as to the costs of this appeal.

2 We now set out the grounds of our decision in detail.

The background facts

3 The background leading to this appeal was not in dispute. The application filed by the appellant in SUM 600358/2006 represented the latest in a string of unsuccessful attempts by the appellant since he was adjudged a bankrupt on 19 January 2001 either to discharge himself from bankruptcy or to have the bankruptcy annulled. The following table sets out the list of creditors that filed proofs of debt against the appellant pursuant to the bankruptcy order.

Creditors	Judgment Debt	Amount paid/garnished before the bankruptcy order	Proved Debt
S Jayakumar and four other ("the First Creditor")	$121,857.35	$66,666.66	$55,190.68
Goh Chok Tong ("the 11th Creditor")	$36,274.76	–	$36,274.76
Niruman Pillay, V Krishnasamy, Indra Krishnan, Pakir Maideen and four others (collectively, "the Second to Tenth Creditors")	$546,550.09	$57,066.00	$489,484.09
Comptroller of Income Tax	$225.21	–	$225.21
DBS	$5,237.63	–	$5,237.63
UDMC	$2,860.93	–	$2,860.93
Zosing International	$3,000.00	–	$3,000.00
William Bennett	$11,325.00	–	$11,325.00

4 In January 2004, the appellant informed the OA that he wished to be discharged and for this purpose, he offered his creditors 20% of the proved debts. The OA told him that he would not support the appellant's application because the appellant's assets had not been fully realised. The appellant went ahead with the application to court and failed, but not before raising his offer of composition to 25% of the proved debts on appeal to the High Court: see *Re Jeyaretnam Joshua Benjamin, ex parte Indra Krishnan* [2004] 3 SLR 133. The Court of Appeal eventually dismissed the appellant's appeal: see *Jeyaretnam Joshua Benjamin v Indra Krishnan* [2005] 1 SLR 395.

5 A second application to the court seeking discharge in May 2005 was also dismissed by the assistant registrar and affirmed by Andrew Ang J.

6 Then, in January 2006, the appellant applied for an annulment of the bankruptcy. However, this application was pre-empted by the appellant's creditors who filed an application for a stay until the appellant had paid all outstanding costs due to them. The assistant registrar ordered the appellant to pay the outstanding costs and the costs of the application to stay the annulment proceedings by 24 March 2006, failing which the annulment application would be dismissed. The appellant failed to make the payment on time. He was then given more time to pay the costs by Judith Prakash J, who ordered that payment be made by 3 July 2006. Again, no payment was made by the end of the extended deadline, and the application for annulment was accordingly dismissed.

7 The application in SUM 600358/2006 was therefore the appellant's third application for a discharge of his bankruptcy. For the purposes of this application, the appellant wrote to counsel for

the Second to Tenth Creditors, Drew & Napier LLC, on 4 July 2006 offering "forty-five [per cent] (45%) of the debts for which your clients have filed proofs of debt". On 12 July 2006, Drew & Napier LLC replied asking whether the same terms had been extended to all the other creditors who had filed proofs of debt. Two days later, the appellant wrote back to say that he had not made the same offer to the other creditors and requested an answer as to whether the Second to Tenth Creditors would accept the offer regardless of what the other debtors might do. On 31 July 2006, Drew & Napier LLC replied in the following terms:

> We are instructed that our clients agree to accept your offer of payment of 45% of the sum owed to our clients in settlement of your debt to our clients, subject to the following conditions:
>
> (a) you shall pay the sum of $222,517.84, being 45% of the principal sum reflected in our clients' proofs of debt;
>
> (b) you shall make full payment of the sum referred to at paragraph (a) above to us by way of cashier order made in favour of M/s Drew & Napier LLC by **[5pm on 31 August 2006]**, failing which this agreement shall be deemed terminated immediately without notice;
>
> (c) in the event the agreement is terminated, our clients shall be entitled to treat all sums received (if any) as part payment of amount owed to them, and shall be entitled to claim the balance of the debt as reflected in their proofs of debt: …
>
> [emphasis in bold in original]

8 On 3 August 2006, the appellant responded as follows:

> I am glad your clients have finally agreed on what they would be prepared to accept.
>
> I shall be making an application to the court for my discharge before the month is out and the application will be served on you.
>
> Needless to say, I shall be offering 45% to all creditors.

The decisions of the courts below

9 Before the AR, the appellant argued that based on the agreement reached between the parties, he needed only to pay $124,937.62. The AR rejected the appellant's contention and dismissed the application with the following explanation:

> Under the Bankruptcy Act, the grant of a discharge is within the discretion of the court, and there are a number of relevant factors for the court to consider, including the bankrupt's age, the fact that he has been adjudicated a bankrupt since 19 January 2001 and his offer to pay 45% of all his debts. However, as I have earlier found, the B's computation of 45% is inaccurate and his offer in fact represents a substantially lower percentage than 45%.
>
> The creditors have indicated that they are willing to accept 45% of the amounts owing to them, and have even in some cases discounted the interest element of the judgment debt. Notwithstanding their offers, Mr Jeyaretnam has insisted that he will only pay $124,937.62 and no more. He does not go so far as to say that he cannot pay the sums the creditors have requested for, which amount to 45% of the remaining debts due and owing to them. Simply that he refuses to pay them.

In these circumstances, the JB property becomes very relevant as it could potentially contribute $380,000 to the bankrupt's estate. The OA has commenced proceedings to have the Malaysian estate vested in the OA, but Mr Jeyaretnam has filed an affidavit to *oppose* that application. [Mr Jeyaretnam] has also persisted in his refusal to arrange for his share of monies from his late sister's estate to be handed over to the OA, despite the fact that his Malaysian solicitors have collected the sum since 2001. I reiterate the Court of Appeal's words to [Mr Jeyaretnam] here: [Mr Jeyaretnam] must help himself in order that others, including the court, can help him.

[Mr Jeyaretnam's] age and the length of time in bankruptcy are certainly very relevant considerations for this court, they have to be balanced against the conduct of the [bankrupt] here. The creditors have made a reasonable offer, but he has refused to accept it. Contrary to Mr Jeyaretnam's arguments, there is no material change of circumstances since the last time [he] applied for a discharge last year. [Mr Jeyaretnam's] offer of $124,937.62 amounts to far less than the 45% he has claimed.

10 The appellant lodged an appeal against the AR's decision, but he refused to attend the hearing of his appeal before the Judge below. He sent a messenger, one Mr Ng Teck Siong, who was not an advocate and solicitor, to inform the court that he would not be attending the appeal and to hand over his written submissions. The Judge below could have dismissed his appeal without considering the written submissions since he had failed to appear to argue his case, but the Judge below chose not to do so. After deliberation, the Judge below dismissed the appeal on, *inter alia*, the following grounds:

(a) The appellant's computation of what constituted 45% of the debt owed was not only different from his creditors' calculation, but also the OA's. There being no agreement between the parties, other grounds for discharge had to be considered.

(b) While the appellant was 80 years old, this was only one factor to be taken into account in determining whether he should be discharged from bankruptcy.

(c) The appellant's age had to be balanced against the interests of the creditors, the amount owed, the period of bankruptcy, the appellant's own conduct with respect to his bankruptcy and the fact that the considerations that persuaded the Court of Appeal in late 2004 (see [4] above) that he should not be discharged from his bankruptcy at the material time continued to apply with equal force to his present application to be discharged from bankruptcy.

(d) The administration of the appellant's assets had still not been completed. While this did not automatically mean that a bankrupt could not be discharged, it could not be ignored that the appellant had claimed to be the owner of a property in Johor Baru valued at some RM750,000 ("the JB property"), a significant amount that can be utilised for the payment of his debts. It was not true that the OA had been dilatory in acting on the said property; rather, it was the appellant's lawyers who had opposed the OA's application to have the property vested in the OA.

(e) The appellant had also failed to hand over moneys that he was entitled to from his late sister's estate.

(f) The appellant's conduct also weighed against granting a discharge. He had not disclosed the source of his funds to pay his debts and the history of the discharge proceedings was that each time he had failed in his application, he would increase his offer of composition.

(g) The appellant's debts had not been incurred as a consequence of an unfortunate

business failure; but because of his publishing defamatory statements that were aggravated.

(h) Even a conditional discharge was not appropriate because there was no evidence that the appellant would in good faith fulfil the condition imposed.

The appellant's contentions on appeal

11 The appellant's central argument on appeal was directed not at the lower courts' assessment of the factors to be taken into account in deciding whether to grant a discharge. Rather, his primary contention was that both the AR and the Judge below had erred in failing to determine the precise amount that remained to be paid to each creditor based on their purported acceptance of his composition offer. However, the appellant did not dispute every debt – only those relating to the First to Tenth Creditors.

12 In relation to the judgment debt due to the First Creditor amounting to $121,857.35, the appellant submitted that the said creditor should not be entitled to any further amount under the appellant's composition offer. Rather, he should refund the sum of $11,830.20 to the appellant's bankruptcy estate for the following reasons:

(a) A sum of $66,666.66 that had been garnished on 11 January 2001 was null and void as being in violation of s 77(1) of the BA, which sum should be deemed to be held by the First Creditor on behalf of the appellant's bankruptcy estate.

(b) As 45% of the total judgment debt ($121,857.35) amounted only to $54,835.80, the First Creditor was under a duty to refund the difference between the latter sum and the garnished sum to the OA. That difference was $11,830.20.

(c) If, instead, the First Creditor received 45% of the balance of the judgment debt after deducting the garnished sum (*ie*, 45% of $55,190.68, the latter sum being the judgment debt of $121,857.35 less $66,666.67), the First Creditor would be recovering some 70% of the total judgment debt while other creditors would only recover 45% of the judgment debt owed to them. This would be in violation of the *pari passu* rule in bankruptcy.

13 In relation to the debt owed to the Second to Tenth Creditors represented by Drew & Napier LLC, the appellant submitted as follows:

(a) It was undisputed that prior to the bankruptcy order, the said creditors had received $52,066.00 from the appellant.

(b) Under the said creditors' acceptance of the appellant's composition offer, the sum received should be deducted from what the appellant would have to pay *after* calculating 45% of the judgment debt.

(c) If instead, as the said creditors argued, the appellant had to pay 45% of the *balance* of the judgment debt after deducting the sum received from the judgment debt, the said creditors would obtain more than their legitimate share of the judgment debt *vis-à-vis* other creditors.

(d) There was another sum in the amount of $23,266.00 that should be discounted from what the appellant should pay. This sum represented one-tenth of the appellant's costs in respect of Suit No 2308 of 1995 that one Mr M Loganathan was ordered to pay by the trial judge.

The creditors'/OA's objections

14 The creditors and the OA objected to the discharge on the grounds that:

(a) there was no agreement in respect of the appellant's composition offer of 45% of the debts for which proofs of debt had been filed;

(b) in any event, their calculation of the appellant's composition offer was accurate; and

(c) in the absence of an agreement between the parties as to a composition offer, there were no new factors, since the time of the previous discharge applications in January 2004 and May 2005, which would persuade the court to discharge the appellant from his bankruptcy.

Issues on appeal

15 The issues on appeal may be summarised as follows:

(a) whether the Judge below fell into error by failing to decide between the computations offered by the appellant and his creditors;

(b) whether, in any event, the appellant ought to be unconditionally discharged; and

(c) if the appellant should not be unconditionally discharged, whether a conditional discharge was appropriate; and if so, on what terms.

Whether the Judge below fell into error by failing to decide between the computations offered by the appellant and his creditors

16 As noted above, the main submission of the appellant on appeal was that the lower courts had failed to appreciate the thrust of his case, which was that having reached an agreement with his creditors that they would accept 45% of the proved debts, the only question that remained for the court to determine was the precise amount that he (*ie*, the appellant) would have to pay to his creditors under this composition offer. In our view, there was no error on the part of the lower courts in not answering the issue posed by the appellant for two reasons. First, it was clear from the structure of the bankruptcy framework under the BA that the appellant had made the wrong application and posed the wrong question to the court for determination. Secondly, the facts did not even support the appellant's argument that he had reached an agreement with the creditors on the terms he had contemplated.

The structure of the bankruptcy framework under the BA

17 Before we set out our reasons for our conclusions on the facts and the law in relation to the issues referred to in [15] above, it would be useful to examine the legislative framework under the BA pertaining to the discharge of bankrupts from bankruptcy. Under the BA, there are a number of ways in which a bankrupt may be released from bankruptcy:

(a) The bankrupt may offer a satisfactory composition offer. If the offer is accepted, the OA will then issue a certificate *annulling* the bankruptcy: see ss 95, 95A and 96 of the BA.

(b) A court may also *annul* a bankruptcy order if any of the grounds enumerated under s 122(1) of the BA are satisfied.

(c) The OA, pursuant to s 123A of the BA, may also *annul* a bankruptcy once all of the bankrupt's debts are cleared.

(d) The court may also *discharge* a bankrupt on the application of any person having an interest in the matter: s 124 of the BA.

(e) After a period of three years and if the bankrupt's debt does not exceed $500,000, the OA is also at liberty, subject to certain limitations, to issue a certificate *discharging* the bankrupt: s 125 of the BA.

Each of these mechanisms is subject to its own rules and provides independent and separate avenues for a bankrupt to get himself released from the disability of bankruptcy. It should be noted, however, that the court retains a residual supervisory power over the decisions of the OA pursuant to ss 30 and 31 of the BA.

18 In an application to the *court* for *discharge*, which was the subject matter of this appeal, the court has jurisdiction only to the extent that it may order an unconditional discharge or a discharge subject to conditions, or it may simply refuse to discharge the bankrupt. This is specifically provided for in s 124(3) of the BA. The court's only duty in a discharge application is to consider all the relevant facts (see [25] to [36] below) and determine whether the bankrupt is deserving of a discharge. While the court may certainly take into account the fact that an agreement has been reached among the creditors and the OA in deciding whether to discharge a bankrupt, the BA does not give the court the power to determine what the creditors should accept as a satisfactory *settlement* of their debt. Furthermore, while the court does have discretion as to the terms that it may impose if it orders a conditional discharge – and this obviously includes ordering the bankrupt to pay whatever amount it deems fit to the creditors as a condition of his discharge – this is different from suggesting that the court has the jurisdiction or the power to settle disputes relating to an ongoing settlement or composition between a bankrupt and his creditors.

19 Indeed, any proposed settlement is purely a matter for the bankrupt and the creditors (with the assistance of the OA) and should be pursued in accordance with the procedure laid down in s 95(1) of the BA, which provides as follows:

> Where a bankruptcy order has been made, the creditors who have proved their debts may, if they think fit —
>
> (*a*) at a general meeting of creditors; or
>
> (*b*) in writing,
>
> by special resolution, resolve to accept a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs.

The court's sanction is not required for any settlement pursuant to s 95 of the BA, which envisages such settlements to be purely a matter between the bankrupt and his creditors. Accordingly, the question presented by the appellant both in the courts below and on appeal (*viz*, the outstanding amount he should pay pursuant to his composition offer) was one that ought to have been pursued in accordance with s 95 of the BA and not via an application to the court for discharge.

20 In addition, it was apparent to us that the appellant's submission in relation to whether certain sums received by the creditors prior to the bankruptcy order ought to be counted as part of

the proved debts (based on which the appellant had made his offer of 45%) was a question that is generally entrusted to the OA. The correct procedure for seeking adjudication of proofs of debt filed against a bankrupt is found in s 89 of the BA read with r 197 of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) ("the Rules"). Section 89 of the BA states:

> With respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs and any other matters, the prescribed rules shall be observed.

In turn, r 197(1) of the Rules provides:

> The Official Assignee or the trustee, as the case may be, shall examine every proof and the grounds of the debt, and in writing admit or reject it in whole or in part or require further evidence in support of it.

However, a bankrupt is not without any rights in contesting any such proofs. He may apply to the court to expunge or reduce the amount claimed by his creditors but there is a specific procedure for that laid down in r 201(1)(*b*) of the Rules.

21 In this regard, the appellant did not follow this procedure. It was pertinent to note that the appellant was invited to attend at the OA's office to have the various proofs of debt adjudicated on 21 and 25 April 2006. On both occasions, the appellant did not attend the adjudication process to protect his rights. It therefore followed that in so far as this aspect of the appellant's case was concerned, neither the AR nor the Judge below was in error in declining to compute the precise amount of the debts of which proofs had been filed, even assuming that there was a binding agreement between the appellant and the creditors on the 45% offer of composition.

Was there a binding agreement on the 45% offer?

22 There was another reason why the AR and the Judge below did not fall into error in declining to determine whether the appellant's computation of the amounts he considered payable to the creditors pursuant to his 45% offer of composition was correct. The appellant's basic argument on this question was that there was a binding agreement between him and the creditors and that the only question for the court to decide was whether his computation was correct or those of the creditors were correct. For that reason, he contended that the Judge below fell into error in not deciding this issue. As the appellant stated in his written submissions:

> The appellant has said earlier that the appeal arises because of the failure by [the Judge below] to examine which of the conflicting computations is correct and to decide between them. [The Judge below] had failed to grasp, like [the AR] before him, what were the issues that stood in the way of the appellant's discharge.

23 In our view, the evidence showed that there was no acceptance by the creditors of the substance of the appellant's 45% offer as contemplated by him. For example, the Second to Tenth Creditors agreed to accept the 45% offer on the basis that it represented $222,517.84 (their 45% being based on their *proofs of debt* which already took into account the sum of $57,066.00 received before the bankruptcy order) (see [7] and [8] above), whereas the appellant's notion of 45% was 45% of the *judgment debt less the $57,066.00 received.* To put it in mathematical terms, if X represents the judgment debt, and Y the moneys received prior to the bankruptcy order, the appellant's submission was that he should pay (45% of X) minus Y. On the other hand, the said creditors' submission was that they should receive, under the composition offer, 45% of (X minus Y). Similarly, the First Creditor also made it clear that his acceptance of the 45% offer meant that he

would receive a settlement sum of approximately $24,508.24, rather than having to disgorge the sum of $11,830.20 as submitted by the appellant. Moreover, it was clear from the letter of 31 July 2006 from the solicitors for the Second to Tenth Creditors that any agreement between the parties was conditional upon the appellant paying the stipulated amount within a month (see [7] above). The appellant had failed to do so.

24 Indeed, looking at the correspondence in their totality and giving an objective interpretation to their effect, it was not beyond argument that the *appellant* had agreed to the amounts specified by the creditors. First, the creditors certainly had the impression that the appellant had agreed to the amounts stipulated by them. But the appellant, after receiving the creditors' letters setting out the precise amounts they had expected under the composition offer, did nothing to disabuse them of their misunderstanding, if such was the case. Instead, he wrote back expressing gratitude that the creditors "had finally agreed on what they would be prepared to accept". In our view, the best case the appellant could have made out from the exchange of correspondence was that he had misunderstood the meaning of the creditors' agreement rather than the reverse. Secondly, the appellant's own offer of composition dated 4 July 2006 stated that he was willing to pay "forty-five [per cent] (45%) of the debts *for which your clients have filed proofs of debt*" [emphasis added]. In this connection, there could be no dispute that the relevant creditors had filed proofs of debt *after* having given credit for the moneys received prior to the bankruptcy order (see the table at [3] above). As such, the creditors' interpretation of the appellant's composition offer, *ie*, 45% of (X minus Y), was not without basis. Thirdly, in respect of the appellant's allegation, that the creditors' interpretation of the composition offer had violated the *pari passu* rule in the distribution of a bankrupt's assets among the creditors, it was clear from the new legislative framework enacted in 1994, and especially s 105(1) of the BA, that the law is not generally concerned with how much a creditor would recover from his debtor prior to the making of the bankruptcy order. Accordingly, the original *pari passu* rule in bankruptcy under the BA was modified to the extent that it ceased to apply to the proceeds of execution completed before the making of the bankruptcy order; in other words, it no longer applied to debts that were provable and have been proved in bankruptcy. Since, in the present case, all the relevant creditors were seeking the same proportion of their proved debts, *ie*, 45% of (X minus Y), the *pari passu* rule in bankruptcy as modified was not violated.

Whether, in the absence of any composition agreement between the parties, the appellant ought to be unconditionally discharged

25 In the circumstances, given that there was no concluded agreement between the parties (see [22] and [23] above), we proceeded to consider whether the appellant ought to be discharged from his bankruptcy in all the circumstances of the case.

26 The BA itself does not dictate the factors a court may take into account when deciding whether to discharge a bankrupt. In *Law and Practice of Bankruptcy in Singapore and Malaysia* (Butterworths Asia, 1999), the learned authors, at pp 417–422, have set out a list of common-sense factors, including:

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

(b) the public interest and commercial morality;

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

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

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

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

(g) any objections to the application;

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

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

27 This list is not exhaustive and the court has wide discretion in taking these and other factors into account as well as the manner in which the various factors are weighed against each other. For this reason, an appellate court will seldom interfere in a lower court's decision: see Ian F Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 3rd Ed, 2002) at para 110-010, citing *In re Sultzberger* (1887) 4 Morr 82.

28 The overriding principle in any discharge application has been stated by Warren L H Khoo J in *Re Siah Ooi Choe, ex p Hongkong and Shanghai Banking Corp* [1998] 1 SLR 903 ("*Re Siah Ooi Choe*") at [9]:

> A proper approach to an application to discharge from bankruptcy involves a consideration of the object and purpose of these new provisions of the Bankruptcy Act (Cap 20, 1996 Ed) (the Act). The Act was designed to meet two major conflicting concerns. One stemmed from the recognition that many an individual businessman becomes insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle. It would be in the interest of society that people who had become bankrupt in such circumstances, and generally, should be given a second chance in life, so that the social cost of waste of entrepreneurial resources could be reduced. The other concern was that, without proper safeguards, people who had used dishonest or fraudulent methods in conducting their business affairs to the detriment of their creditors might get an undeserved advantage from their own wrongdoings. The fear of people taking advantage of their own frauds is probably as old as the institution of bankruptcy itself, and it was natural that such fears were highlighted when an easier regime for discharge from bankruptcy was being proposed. The new legislation sought to strike a balance between these two major concerns.

29 Similarly, in *The Law of Insolvency* ([27] *supra*), it has been observed (at para 11-012):

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

30 Following from these principles, it was our judgment that the refusal of the lower courts to grant the appellant an unconditional discharge could not be faulted based on the following factors, which were decidedly unfavourable to the appellant.

No change in relevant factors

31 An examination of the factors that the Judge below had taken into account in dismissing the appellant's appeal in the present case showed that the factors were substantially the same as those this court took into account in dismissing the appellant's first appeal to this court in 2004 (see [4] above). In other words, there was no substantial change in the position of the appellant that warranted an unconditional discharge from bankruptcy. It would be useful to recall some of the material factors.

The appellant's assets

3 2 The appellant still had two substantial assets that had yet to be realised. The first was the JB property, and the second was the moneys that he became entitled to from his late sister's estate. A discharge at this stage would have been unfair to the creditors as these were property that they could and should reasonably expect would be applied to the debts owed to them. It was also relevant, as pointed out by the OA, that the discharge of the appellant would have prejudiced the OA's ability to realise the JB property.

The appellant's conduct

3 3 The appellant's conduct had also shown a lack of good faith in his attempts to repay his debts, as evidenced by, *inter alia,* the following instances:

(a) the appellant's continued opposition to the vesting in the OA of the JB property;

(b) his exploitation of the bankruptcy provisions to launch repeated and fruitless challenges against his bankruptcy – the present application being the fourth such challenge within two years –notwithstanding that he had not done all he could to repay his creditors;

(c) his tactic in raising his composition offers each time he failed in his application to discharge himself (starting from 20% in the first application to 45% in this latest one), thus bringing into question his sincerity in his desire to pay his debts;

(d) his failure to attend the OA's adjudication of the proofs of debt on 21 and 25 April 2006;

(e) his insistence on bringing this application to the court rather than utilising the proper settlement procedure set out in s 89 and/or s 95 of the BA; and

(f) his failure to make any contribution towards the creditors since the bankruptcy order was made on 19 January 2001.

The outstanding debt

34 The outstanding debt was also pertinent. In this respect, it might be thought that the parallel discharge scheme under s 125(2)(*b*) of the BA could provide a reference point in the present case. Under that provision, the OA has the power to discharge a bankrupt if, *inter alia*, the outstanding debt is less than $500,000. This provision was intended to apply only where the bankrupt became

subject to such disability as a result of business or business-related failures or other similar reasons. The policy objective of "encouraging entrepreneurship" reflected in s 125(2)(*b*) (see *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at cols 401–402), would not apply to the appellant's case, and in any case his outstanding debt was in excess of $618,205.51 and would therefore fall outside this statutory scheme. However, in a proper case which falls outside this scheme, and in consequence of which the bankrupt may only apply to the court for a discharge under s 124 of the BA, the court would be free to give due consideration to the cause or causes of his disability in determining whether or not the bankrupt should be discharged. For example, in *Re Siah Ooi Choe* ([28] *supra*), Khoo J discharged a bankrupt owing over $100m, observing at [23] that:

> As far as the amount of debt is concerned, it is undoubtedly a very big one. But, then, there is no upper limit set by the Act beyond which discharge is barred. The huge amount of debt here merely reflects the fact that a big business, when it fails, tends to fail in a big way. I am sure that it is in recognition of this fact that no maximum amount is stipulated in the Act.

Except for such types of cases where the bankruptcies are the result of business or business-related failures, the original policy objectives under the general bankruptcy regime (see [28] and [29] above) have not changed. Therefore a court should generally be slow in discharging a bankrupt whose debt exceeds $500,000 without good reasons. For these reasons, it was our view that, absent persuasive countervailing factors, the Judge below was not wrong in refusing to discharge the appellant as a bankrupt on the arguments he had presented.

Length of bankruptcy

35 While it was true that the appellant had been a bankrupt for about six years, this alone was insufficient to outweigh the other factors that militate against granting a discharge. In *Re Siah Ooi Choe*, the court discharged a bankrupt only after ten years, and even then, this was because the bankrupt had "conducted himself exemplarily … [and] co-operated fully with the Official Assignee throughout": at [24]. In contrast, the court in *Re Loo Teng Soy* [1997] SGHC 249 refused to discharge the bankrupt even though 11 years had passed since the bankruptcy order, primarily because the bankrupt had evaded the bankruptcy proceedings against him.

Assessment

36 Having regard to all the factors discussed above, we were of the view that both the AR and the Judge below were justified in refusing to grant an unconditional discharge to the appellant.

Whether a conditional discharge should be ordered

37 In *Jeyaretnam Joshua Benjamin v Indra Krishnan* ([4] *supra*), this court refused to grant the appellant a conditional discharge on the ground that the appellant had not conducted himself in a manner that demonstrated that he would act in good faith to fulfil the conditions imposed on him. Given our analysis of the appellant's conduct thus far in the present appeal, we would have been inclined to the same view. However, notwithstanding the creditors' objection to the grant of an unconditional discharge of the appellant from his bankruptcy, counsel for the creditors informed the court that their clients were still willing to accept 45% of the judgment debt *that remained outstanding.* Similarly, all the other corporate creditors had also accepted the offer and the OA had no objection to the settlement, other than that the appellant must pay the administration costs in the bankruptcy. The creditors and the OA had no serious concerns that the appellant might not be able to pay the composition amounts found by this court. Indeed, the appellant had himself initiated the offer of a 45% composition and, before us, the appellant himself gave the impression that he

would be able to raise the computed amount if given time as he was most anxious to get himself discharged from bankruptcy. As he admitted to us, what was uppermost in his mind was certainty in the amount he had to pay and finality in the discharge proceedings. Given (a) that the creditors and the OA did not object to a conditional discharge (and had, in fact, indicated that this would be the appropriate order to make); (b) the appellant's willingness to offer a 45% composition (notwithstanding his objection to the precise computation); and (c) the fact that the appellant is 80 years old and that he had been in bankruptcy for more than six years, we were of the view that it would be just and fair in the circumstances that we grant him a conditional discharge, subject to his paying the amounts computed by the creditors (based on 45% of the outstanding debt owing to them) and approved by us within three weeks from the date of the order.

38 We wish to make one observation in relation to our decision. It did not imply nor was it intended to imply that this court was *bound* by any agreement between the parties, or indeed the willingness of the creditors to accept any particular terms or conditions. This would have been contrary to the express terms of s 124(3)(*c*) of the BA which vests in the court the widest of discretion to "make [any] order discharging [a bankrupt] subject to such conditions as *it* thinks fit to impose" [emphasis added]. Nevertheless, because the parties did not object to a conditional discharge (subject to our decision on the final computation of what the appellant should pay); and given the assent of the OA (who was representing the appellant's estate, and by implication all the other creditors who had a claim to its assets) to a conditional discharge, this was akin to an agreement that could have been sanctioned under s 95 of the BA. These factors were compelling reasons for us to grant the conditional discharge.

39 Returning to the present appeal, we tabulate below the precise amount payable by the appellant in order to avoid any doubt.

Creditors	**45% of the outstanding debt owing to the creditors (having deducted any moneys received prior to the bankruptcy order)**
The Second to Tenth Creditors	$220,267.84
The First and 11th Creditors	$38,804.88
Comptroller of Income Tax	$4,127.28 (100%)
DBS	$2,039.23
UDMC	$1,576.65
Zosing International	$1,547.65
William Bennett	$4,348.80

TOTAL	**$272,712.33**

40 After deducting the balance in the appellant's bankruptcy estate (as of 23 April 2007), the total amount due from the appellant under this particular arrangement would be $233,255.78.

Effect of garnishee orders under the BA

41 The appellant had raised certain issues of law relating to the status of garnishee orders that had been completed and the moneys paid to the execution creditor before the appellant was made a bankrupt but after bankruptcy proceedings had begun. It may be recalled that the First Creditor had received $66,666.66 under a garnishee order prior to the appellant's bankruptcy which the appellant had argued should be taken into account in computing what was due from the First Creditor under the 45% composition offer. We rejected his arguments and indicated that we would give our reasons for doing so.

42 The appellant's argument was that the bankruptcy regime rendered any disposition of a bankrupt's property void once bankruptcy proceedings had commenced. In support of this argument, he had referred to s 77(1) of the BA, which reads:

> Where a person is adjudged bankrupt, any disposition of property made by him during the period beginning with the day of the making of the bankruptcy application and ending with the making of the bankruptcy order shall be void except to the extent that such disposition has been made with the consent of, or been subsequently ratified by, the court.

43 The appellant also referred to s 106(1) of the BA, which reads:

> Where any property of a debtor is taken in execution, then, if before the completion of the execution notice is given to the Sheriff that a bankruptcy order has been made against the debtor, the Sheriff shall deliver the property or the possession thereof and any such moneys to the Official Assignee.

His submission was that the expression used in s 106(1) – "taken in execution" – must mean "taken in execution *before the commencement of bankruptcy proceedings, which are marked by the date of the filing of the bankruptcy petition*" when read with s 77(1) of the BA.

44 We rejected this argument. In our view, these two provisions did not support the appellant's argument. Plainly, s 77(1) of the BA applies only to the disposition of the bankrupt's property by the bankrupt himself. Obviously, the law cannot allow him to dispose of his assets once a bankruptcy petition is presented against him, whether by a creditor or by himself. As for s 106(1) of the BA, the appellant's interpretation of the words "taken in execution" would require us to read into the statute not only words, but also a rationale, that were conspicuously absent. It is patently clear that under s 106(1) a Sheriff who has seized the assets of a bankrupt is only required to hand over these assets to the OA if the execution is completed *after* the making of the *bankruptcy order*. He is under no statutory duty to hand over the seized assets if he has completed the execution *before* the making of the *bankruptcy order*. The meaning of s 106(1) is made absolutely clear by the words of s 105(1) of the BA as follows:

> Where the creditor of a bankrupt has issued execution against the goods or lands of the bankrupt or has attached any debt due or property belonging to him, the creditor shall not be entitled to retain the benefit of the execution or attachment against the Official Assignee *unless he has*

completed the execution or attachment before the date of the bankruptcy order … [emphasis added]

45 We should point out that ss 77, 105 and 106 of the BA were amended by Parliament in 1994 when it repealed the previous enactment of the Bankruptcy Act (Cap 20, 1985 Rev Ed) to provide for two separate regimes – one governing the disposition of a bankrupt's assets by the bankrupt himself and the other governing the execution of debts against the would-be bankrupt by his creditors.

46 In the present case, the garnishee order was made absolute on 3 January and was completed on 11 January 2001, about a week prior to the bankruptcy order, which was made on 19 January 2001. Therefore, the garnishment was legally valid and the First Creditor was entitled to retain the benefit of the execution. It was true, as pointed out by the appellant, that an appeal was filed on 4 January 2001 against the garnishee order. However, it is established law that an appeal does not automatically stay or suspend the execution of an order unless otherwise ordered. The appellant was at liberty to make such an application to stay the execution of the garnishee order pursuant to s 74 of the BA but did not. In any event, since the bankruptcy order was made on 19 January 2001, the bankrupt was not competent to maintain any action thereafter without the sanction of the OA under s 131 of the BA. No such sanction was ever sought or obtained to pursue the appeal and thus the appeal ultimately lapsed.

Other miscellaneous arguments raised by the appellant

47 The appellant also raised three other miscellaneous points. The first was that in respect of the creditors apart from the First to 11th Creditors, there was no reason why this court should, as we did, include interest in our calculation of what the appellant has to pay (see [39] above). This was a non-starter. As the OA correctly pointed out, the reason for our doing so was because those creditors had not yet indicated whether they were willing to discount the interest earned on the outstanding amount. In our view, the creditors were assuredly entitled to interest and unless they specifically waived this, we were not inclined to discount it. Moreover, as the OA assured this court, if and when the relevant creditors decide to waive their claim to the interest, the OA will refund the interest to the appellant.

48 Secondly, the appellant suggested that the OA had inflated his calculation of the disbursements he was entitled to and which would have to be deducted from the appellant's bankruptcy estate. However, no evidential basis on which we could question the OA's calculation was adduced. If anything, the OA provided a detailed breakdown of its costs (which totalled up to a modest $6,040.12), and they did not appear to us to be inflated.

49 Finally, the appellant argued that the sum of $23,266.00 should be discounted from the total amount that he was ordered to pay his creditors. It will be recalled that the appellant had claimed that this sum represented one set of costs that Mr Loganathan was ordered to pay the appellant but had not. The appellant submitted that the OA had been dilatory in obtaining this sum from Mr Loganathan. This submission was, however, misconceived for two reasons. First, it was clear from the OA's submissions that while Mr Loganathan was ordered to pay $23,266.00, it was to be paid equally to three persons – the bankrupt and two other defendants in Suit No 2308 of 1995. Therefore, Mr Loganathan was liable to the appellant for only $7,755.40. Second, according to the OA, $3,556.25 of the latter sum had since been paid to the OA, and the balance was due as a book debt. The OA stated, and we had no reason to doubt his statement, that he had made efforts to obtain payment of the outstanding balance from Mr Loganathan, but had not been successful. Accordingly, it could not be seriously contended that the OA had been negligent in its duty to recover debts owing to the appellant in order to reduce the appellant's debt to his creditors. Indeed, the appellant himself

had admitted that there was an outstanding garnishee order against Mr Loganathan for the sum that he was liable to pay the appellant and the two defendants. This admission contradicted his own argument that nothing had been done to collect the outstanding debt from Mr Loganathan.

Conclusion

50 For the reasons we have given above, we ordered that the appellant be granted a discharge conditional upon his paying to the OA the sum of $233,255.78 within three weeks from 23 April 2007. Each party was to bear its own costs in the appeal, and the orders of costs in the court below were to stand.

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