

Re Tang Yoke Kheng (ex parte Lek Benedict and another)
[2005] SGHC 214

Case Number : Bankruptcy P No 797/2005, RA 155/2005
Decision Date : 14 November 2005
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Lim Fung Peen (Lim Ang John and Tan LLC) for the petitioning creditors; Roderick Martin (Martin and Partners) and Trinel Chakraborty (T C Siva and Partners) for the debtor
Parties : —

Insolvency Law – Bankruptcy – Petition – Petitioning creditors both directors and shareholders of company – Debtor funding action by liquidator of company against petitioning creditors – Debtor also creditor of company – Whether exceptional circumstances warranting stay of bankruptcy proceedings existing

14 November 2005

Tan Lee Meng J:

1 The petitioning creditors, Mr Lek Benedict (“Lek”) and Mr Lim Wee Chuan (“Lim”), appealed against the decision of the assistant registrar, Mr Vincent Leow, to stay their bankruptcy proceedings against Mdm Tang Yoke Kheng (“Mdm Tang”) on condition that the money owed by Mdm Tang to Lek and Lim is paid into court.

Background

2 Mdm Tang and her husband, Mr Chan Chon Tuck, were ordered to pay costs when Suit No 864 of 2003, which they instituted against Lek and Lim for conducting a business with intent to defraud creditors, was dismissed in September 2004 by Andrew Ang JC (as he then was), whose decision (see *Tang Yoke Kheng v Lek Benedict (No 2)* [2004] 4 SLR 788) was affirmed by the Court of Appeal. The bankruptcy proceedings initiated by Lek and Lim against Mdm Tang relate to the non-payment of the costs of the dismissed action.

3 For a better understanding of the assistant registrar’s decision to stay the bankruptcy proceedings on terms, the background of the dismissed action and of an earlier suit, Suit No 21 of 2002, must be considered. Mdm Tang traded in Bohemian crystal goods under the name of her company, “Niklex Supply Company”. She was the principal supplier of such goods to Amrae Benchuan Trading Pte Ltd (“Amrae”), of which Lek and Lim are shareholders and directors.

4 Amrae, which paid Mdm Tang more than \$5m for Bohemian crystal goods, made its last purchase from Mdm Tang in December 1999. The goods that were ordered were delivered in February and April 2000. From about that time, Amrae, which still owed Mdm Tang a substantial amount of money for unpaid goods, obtained its supplies from other sources. Lek said that he and Lim feared that Mdm Tang would wind up Amrae. As such, in June 2001, they bought a shelf company, called Axum. Lim said that a new company was required to obtain goods from new suppliers at cheaper prices so as to earn better profits to pay off Amrae’s debts.

5 Between July 2001 and June 2002, Amrae sold to Axum \$1,268,983.02 worth of Bohemian crystal goods. Although Axum paid Amrae \$713,831.38 for the goods, not a single cent was paid to Mdm Tang. Instead, the money was utilised by Lek and Lim to pay themselves, *inter alia*, backdated

directors' fees under circumstances where a question as to unfair preference by an insolvent company arose.

6 Mdm Tang instituted Suit No 21 of 2002 to recover around \$1.5m from Amrae. On 21 August 2002, she obtained judgment for \$245,226.02 for part of her claim and on 5 September 2002, a consent judgment was entered against Amrae for the sum of \$821,000.00. The total sum awarded to Mdm Tang in Suit No 21 of 2002 was thus \$1,066,226.02.

7 Mdm Tang only managed to recover \$59,710.46 from Amrae by way of a Sheriff's sale. This left more than \$1m of the judgment debt unsatisfied. On 19 September 2003, Mdm Tang obtained a winding-up order against Amrae.

8 Mdm Tang's next move to recover the money still owed to her by Amrae proved to be a costly mistake. On 25 September 2003, she commenced Suit No 864 of 2003 against Amrae's directors, Lek and Lim. Numerous allegations of fraud were made, including a claim that Lek and Lim caused Amrae to continue trading with her even though they knew that their company was insolvent and that they caused the dissipation of Amrae's assets by, *inter alia*, paying salaries and bonuses to themselves in 2000 and 2001 when the company was already insolvent.

9 As far as the allegation of undue preference is concerned, the trial judge, Andrew Ang JC, who noted that Amrae did not use any part of the \$713,831.38 it received from Axum to pay Mdm Tang, observed in [23] of his judgment as follows:

[Amrae] could have used the money to keep up instalment payments to the plaintiff but did not. I am not persuaded by the first and second defendants' reasons for stopping the instalment payments. In my view, at the time these repayments of loans were made, [Amrae] was already insolvent, the plaintiff's demand of 31 January 2001 not having been met. ... *A case could well be made out for saying that in making these and other payments (such as the payment of directors' fees accrued from previous years) [Amrae] was unfairly preferring the defendants over the plaintiff.* [emphasis added]

10 Ang JC also noted that in many instances, money paid by Amrae to Lek and Lim was channelled by way of loan or otherwise to Axum, which then paid back the money to Amrae on the very same day or shortly thereafter to reduce the outstanding amount owed by Axum to Amrae. In other words, the money "simply went one full circle". All the same, the trial judge held that however "strongly suggestive of unfair preference they may be", the facts were insufficient to warrant a finding that Lek and Lim were liable for fraudulent trading under s 340(1) of the Companies Act (Cap 50, 1994 Rev Ed). Mdm Tang's appeal to the Court of Appeal was dismissed: see *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR 263.

11 The taxed costs for Mdm Tang's failed action against Lek and Lim were adjusted to \$181,698.98 on 3 February 2005. M/s Lim Ang John & Tan LLC, solicitors for Lek and Lim, served a statutory demand on Mdm Tang on 7 February 2005. A Bankruptcy Petition was filed on 10 March 2005 and served on 16 March 2005. At a bankruptcy hearing on 27 May 2005, Mdm Tang paid \$26,000 and sought an adjournment. The balance due to Lek and Lim remains unpaid.

12 It is pertinent to note at this juncture that on 9 June 2005, Amrae's liquidator commenced Suit No 424 of 2005 against Lek, Lim and Axum for the recovery of preferential payments to them. As Mdm Tang is Amrae's main creditor, she stands to gain if the liquidator succeeds in his action against Lek, Lim and Axum.

The assistant registrar's decision

13 Before the assistant registrar, Mdm Tang, who applied for a stay of the bankruptcy proceedings, with or without terms, contended that in deciding whether to allow the bankruptcy proceedings to continue, the unusual circumstances of her case ought to be taken into account. In paras 30 and 31 of her affidavit filed on 8 June 2005, she stated:

I understand from the Liquidator [of Amrae] that in his preliminary findings, ... there is clearly a sum of \$419,435.93 and \$280,229.00 which was paid up to the Directors when the company was clearly insolvent, evidencing preferential payments. There is also a sum of \$400,000 which is due from Axum to [Amrae] ...

I verily believe that when the Liquidator finishes his investigations, the amount to be [collected] back from [Lek and Lim] will be much higher.

14 Mdm Tang pointed out that she is Amrae's main creditor and that the only two other creditors of that company are Lek and Lim, whose claims have to be studied very closely by the company's liquidator. As such, she was effectively the main beneficiary of any amount that Amrae's liquidator recovers from Lek, Lim and Axum. She also pointed out that she is the person financing the liquidator's action against Lek, Lim and Axum and if she is made a bankrupt, Lek and Lim, who claim to be Amrae's creditors, are not going to finance an action by the liquidator against themselves. She accused Lek and Lim of trying to bankrupt her so as to ensure that Amrae's liquidator is left with no funds to continue his suit against them.

15 The assistant registrar stayed the bankruptcy proceedings pending the outcome of the liquidator's claim against Lek and Lim but on condition that the money owed by Mdm Tang to Lek and Lim be paid into court. In his notes, he explained the basis for his decision as follows:

The position is that the petitioning creditor here may potentially owe substantial sums to [Amrae] and that the debtors here are substantial creditors of [Amrae] ... [Mdm Tang and Chan] plead that if they are made bankrupt, then the liquidator of Amrae will not be able to proceed against the petitioning creditors because they being the main creditors of [Amrae] are the ones funding the liquidator. Hence, they contend that this is an abuse of process ...

16 It was agreed by the parties that \$200,000.00 was due to Lek and Lim and this sum has since been paid into court. Dissatisfied with the outcome of the hearing, Lek and Lim appealed against the assistant registrar's decision.

The appeal

17 Lek and Lim asserted that there is no reason why Mdm Tang should be allowed to avoid paying taxed costs at this juncture. They referred to the following passage from MPH Rubin J's judgment in *Sia Leng Yuen v Ko Chun Shun Johnson (No 2)* [2003] 4 SLR 128 at [18]:

Costs, as defined in *Black's Law Dictionary* (6th Ed), refer to "pecuniary allowance, made to the successful party (and recoverable from the losing party), for his expenses in prosecuting or defending an action or a distinct proceeding within an action". It was no more than just a reimbursement of expenses incurred and resources laid out. In my view, exceptional circumstances should be shown to the court to delay or postpone such an element of reimbursement.

18 Section 64(1) of the Bankruptcy Act (Cap 20, 2000 Rev Ed), which gives the court the power to stay or dismiss proceedings in bankruptcy proceedings, provides as follows:

The court may at any time, for sufficient reason, make an order staying the proceedings on a bankruptcy petition, either altogether or for a limited time, on such terms and conditions as the court may think just.

19 The question before the court is whether or not there is sufficient reason for the bankruptcy proceedings to be stayed on the terms imposed by the assistant registrar. In *Re E E Manasseh* [1938] MLJ 225, the Straits Settlements Court of Appeal stayed bankruptcy proceedings on terms. In this case, the judgment creditor, who successfully defended himself in an action by the plaintiff, instituted bankruptcy proceedings against the latter when he was not paid the costs of the action, which amounted to \$6,724.95. In the meantime, the plaintiff lodged an appeal against the dismissal of his action. McElwaine CJ, who delivered the judgment of the Court of Appeal, ordered a stay of the bankruptcy proceedings on condition that the plaintiff deposited in court security for the costs of the appeal, which were estimated at \$3,500.

20 Admittedly, in the present case, the costs that are due to Lek and Lim relate to an action that has already had the consideration of the Court of Appeal and Mdm Tang is not a party to the action instituted by Amrae's liquidator against Lek and Lim. All the same, in the rather unusual circumstances of this case, Amrae's liquidator's action ought not to be ignored. Mdm Tang rightly pointed out that the reality of the situation is that if the liquidator of Amrae succeeds in his action against Lek and Lim, the two of them will have to pay to her a very much larger sum than the \$200,000 that she owes them for the costs of her failed action against them. She reiterated that she is, as Amrae's main creditor, financing the liquidator's claim against Lek and Lim and that Lek and Lim were using the present bankruptcy proceedings to bankrupt her so that Amrae's liquidator would be without funds to continue the action against them to recover the amount they paid themselves at a time when the company was already insolvent.

21 In Suit No 864 of 2003, Ang JC rightly pointed out that Lek and Lim could have ensured that money paid to Amrae by Axum be paid to Mdm Tang but they did not do so as much of it went into their own pockets. In seeking to persuade the court to lift the stay on the bankruptcy proceedings, Lek and Lim asserted that Amrae's liquidator's claim against them has no realistic prospect of success. This contention is a self-serving one. Both the trial judge and the Court of Appeal commented on the propriety of many of the payments by Amrae to Lek and Lim. Indeed, at [27] of his judgment, Ang JC, who made it clear that he was dismissing Mdm Tang's claim against Lim and Lek "with some regret", went so far as to add:

It is still open to the plaintiff to request the Official Receiver (or any other liquidator appointed in his stead) to consider instituting proceedings against any creditors who may have been unfairly preferred for the recovery of moneys paid by the Company. I am unable to say more as the question whether or not there had been unfair preference was not before me. [emphasis added]

22 It is also worth noting that when commenting on the decision of Ang JC, Choo Han Teck J, who delivered the judgement of the Court of Appeal, said at [5] as follows:

The trial judge accepted that the money received by [Amrae] was used to pay directors' fees accrued over the years rather than to pay the appellant. On these facts, the trial judge could infer that the Company indulged in fraudulent trading, or that it had merely exercised undue preference to one creditor over another. The trial judge inferred that it was the latter.

23 In the present case, there are exceptional circumstances to warrant a stay of the bankruptcy petition against Mdm Tang even though this may result in a delay in her payment of costs to Lek and Lim. Pending the decision of the High Court on the claim against Lek and Lim by Amrae's liquidator, their position is safeguarded as Mdm Tang has already paid \$200,000 into court. The appeal against the assistant registrar's decision was thus dismissed with costs.

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