

Cheo Sharon Andriesz v Official Assignee of the estate of Andriesz Paul Matthew, a bankrupt
[2012] SGHC 140

Case Number : Originating Summons No 133 of 2012
Decision Date : 03 July 2012
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Lim Seng Siew and Susan Tay (Ong Tay & Partners) for the plaintiff; Lee Eng Beng SC, Chua Beng Chye and Raelene Su-Lin Pereira (Rajah & Tann LLP) for the defendant; Ng Yeow Khoon (KhattarWong) for other party.
Parties : Cheo Sharon Andriesz — Official Assignee of the estate of Andriesz Paul Matthew, a bankrupt

Insolvency Law – Bankruptcy

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 49 of 2012 was dismissed by the Court of Appeal on 27 November 2012. See [\[2013\] SGCA 8.](#)]

3 July 2012

Tan Lee Meng J:

1 The plaintiff, Mdm Sharon Andriesz Cheo (“Mdm Cheo”) commenced divorce proceedings against her husband, Mr Paul Matthew Andriesz (“the bankrupt”) two weeks after she knew that the latter had been served a statutory demand by Bangkok Bank Public Company Limited (“the bank”) to pay around US\$8.67m. One month after the bank commenced a bankruptcy application against the bankrupt, Mdm Cheo and the bankrupt consented to an interim consent judgment, which required the bankrupt to transfer his interest in two properties, namely, No 35 Kew Drive, Singapore 466104 and No 33A East Tower, Georgetown, Penang, Malaysia (“the properties”), to her without any consideration for the transfer.

2 As the bankrupt disposed of his interest in the properties to Mdm Cheo between the date of the bank’s bankruptcy application and the date of the bankruptcy order, the disposition was void by virtue of s 77(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) (“the Act”) unless it is ratified by the court. Mdm Cheo’s application for, *inter alia*, the ratification by the court of the disposition of the properties by the bankrupt was opposed by the Official Assignee of the Estate of Paul Matthew Andriesz (the “Official Assignee”), who contended that the divorce proceedings were sham proceedings intended to put the properties out of the reach of the bankrupt’s creditors. I dismissed Mdm Cheo’s application and now give the reasons for my decision.

Background

3 On 10 August 2010, the bank issued a statutory demand against the bankrupt for the sum of US\$8,671,681.56. This amount was owed to the bank under a continuing joint and several guarantee furnished by the bankrupt to secure banking facilities granted to a company known as Amana Foods Private Limited. The statutory demand was served by way of substituted service by posting on the front gate of the matrimonial property on 14 August 2010.

4 One month later, the bankrupt applied in OSB 28/2010 to set aside the statutory demand on 14 September 2010.

5 On 22 October 2010, Mdm Cheo filed an affidavit in support of the bankrupt's application to set aside the statutory demand. In it, she acknowledged that she was present at the time substituted service of the statutory demand was effected on the bankrupt. In fact, she said that she opened the envelope containing the statutory demand and called the bankrupt to let him know about the document.

6 Less than two weeks later, on 4 November 2010, Mdm Cheo commenced divorce proceedings against the bankrupt in Divorce Suit No 5600 of 2010/S.

7 On 22 December 2010, the bankrupt's application in OSB 28 to set aside the bank's statutory demand was dismissed by the Assistant Registrar.

8 A week later, on 29 December 2010, the bank filed a bankruptcy application against the bankrupt in Bankruptcy OS No 2193 of 2010/X. The application was served personally on the bankrupt on 30 December 2010.

9 The hearing of the bank's bankruptcy application was scheduled for 20 January 2011. However, the hearing was adjourned as the bankrupt filed a Notice of Appeal on 3 January 2011 against the Assistant Registrar's dismissal of his application to set aside the bank's statutory demand.

10 On 27 January 2011, the bankrupt's appeal against the decision of the Assistant Registrar in OSB 28/2010 was dismissed.

11 Four days after the dismissal of the bankrupt's appeal, on 1 February 2011, Mdm Cheo and the bankrupt agreed to a consent judgment, which included the following terms:

3 (c) Subject to the bank's approval, [the bankrupt] shall transfer all his right, title and interest in [the matrimonial property] to [Mdm Cheo] within 4 weeks of this Order without consideration and without [her] refunding to [the bankrupt's] Central Provident Fund account.

(d) The [bankrupt] shall also transfer all his right, title and interest in [the Penang property] to [Mdm Cheo] within 4 weeks from the date of this Order *without consideration*.

[emphasis added]

12 On 5 May 2011, a bankruptcy order was made against the bankrupt.

13 On 9 May 2011, the Official Assignee sent a notice to the bankrupt to attend at its office to submit his Statement of Affairs. On 16 May 2011, the bankrupt made no reference to his interest in the properties when he filed and affirmed his Statement of Affairs.

14 On 2 December 2011, Mdm Cheo filed an application to enforce the terms of the interim consent judgment. This application was adjourned pending the outcome of Mdm Cheo's application for ratification of the disposition of the bankrupt's interest in the properties.

The court's decision

15 Section 77(1) of the Act, which imposes restrictions on the disposition of property by a

bankrupt after a bankruptcy application has been filed against him or her, provides as follows:

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.

[emphasis added]

16 Note must also be taken of s 77(3), which protects transferees of the bankrupt's property who act in good faith and gave value for the transfer. It provides as follows:

Nothing in this section shall give a remedy against any person in respect of —

- (a) any property or payment which he received from the bankrupt before the commencement of the bankruptcy in good faith, for value and without notice that the bankruptcy application had been made; or
- (b) any interest in property which derives from an interest in respect of which there is, by virtue of this subsection, no remedy.

17 The transfer of an interest in property by a debtor to his or her spouse pursuant to an order of court is a "disposition of property". This is evident from *Re Flint* [1993] 2 WLR 537, where s 284 of the English Insolvency Act, which corresponds to s 77 of the Act, was considered.

18 As the bank filed its bankruptcy application against the bankrupt on 29 December 2010 and the bankrupt attempted to give away his share of the properties to Mdm Cheo by way of the consent judgment more than a month later on 1 February 2011, the disposition is void unless it is ratified by the court.

Whether the disposition of the properties should be ratified

19 It is for Mdm Cheo to persuade the Court that the disposition of property by the bankrupt on 1 February 2011 should be ratified.

20 Mdm Cheo's counsel, Mr Lim Seng Siew, relied on a number of English cases, including *Hill v Haines* [2008] 2 WLR 1250, which accepted that there should be a fair balance between the systems of insolvency law and ancillary relief law which protects creditors against collusive orders in ancillary relief proceedings as well as orders justly made at arm's length for the protection of the bankrupt's spouse and children. This approach cannot be faulted but it must be pointed out that the English cases in question are distinguishable as did not concern transactions rendered void by statute. Instead, they concerned applications to set aside transfers of property by bankrupts to their spouses at an undervalue during divorce proceedings before the commencement of the transferor's bankruptcy.

21 In *Hill v Haines*, the parties separated in March 2003 and ancillary relief proceedings were commenced in May 2003. On 22 December 2004, the court ordered the husband to transfer his interest in a farm to the wife. Two years after their separation and almost a year after the wife commenced ancillary relief proceedings, a bankruptcy order was made against the bankrupt on his own petition on 31 March 2005. The application of the trustees in bankruptcy to have the disposition of the farm to the wife set aside as a transaction entered into at an undervalue was dismissed. As

the right to impugn a transaction on the ground that it was entered into at an undervalue concerns transactions entered into within five years before the day on which the relevant bankruptcy application is made, and ancillary relief may have been granted long ago, it was not surprising that Rix LJ opined (at [82]) in that it “would be unfortunate in the extreme if a court-approved or even (an *a fortiori* case), a court-determined property adjustment order would be liable, in practice to be undone for up to five years because the husband goes bankrupt within that period”.

22 In so far as the burden of proof is concerned, there is a clear difference between an application to set aside a transfer of property from one spouse to another on the ground that it was entered into at an undervalue, and an application to ratify a void disposition of property from one spouse to another after a bankruptcy petition has already been filed. In the case of a transaction that was allegedly entered into at an undervalue, the liquidator has the burden of proving the allegation. However, where, as in this case, a disposition of property by the bankrupt is void by virtue of s 77 of the Act, the spouse who benefited from the disposition of property has the burden of persuading the court that the disposition should be ratified.

23 In her affidavit filed in support of the application before this court, Mdm Cheo stated at paras 30 and 31 as follows:

30 Because of his bankruptcy, I now have the sole burden of maintaining myself; our three young children and his daughter from his previous marriage.... His promises, as reflected in the interim judgment to transfer the properties (and to pay the maintenance) do not mean anything if they are not ratified by this court.

31 *Our children and I are innocent bystanders prejudiced by [the bankruptcy]. To prevent this injustice, I pray that this court ... ratify the Transfer Orders.*

[emphasis added]

24 The spouse and children of a bankrupt are often innocent bystanders who are prejudiced by bankruptcy proceedings against the bankrupt and it is understandable that a bankrupt would want to provide for his or her spouse and their children. However, any attempt by a bankrupt to transfer his assets to his spouse *after* the presentation of a bankruptcy petition against him in order to put the said assets out of the reach of his creditors must be closely scrutinised. In *Denney v John Hudson & Co* [1992] BCLC 901, at 904 (“*Denny*”), Fox LJ explained that that in considering whether or not to make a validating order, the court “must always do its best to ensure that the interests of the unsecured creditors will not be prejudiced”.

25 In *Re Flint*, some three weeks after a bankruptcy petition was presented against the husband, a consent order was made in the county court in divorce proceedings requiring the husband to transfer his interest in the matrimonial home to the wife. A week later, the husband was made a bankrupt. It was held that the consent order involved a “disposition” of property and that as the court refused to ratify the disposition, it was void against the husband’s trustee in bankruptcy.

26 The Official Assignee submitted that there are no good grounds for the court to ratify the transfer by the bankrupt of his property to Mdm Cheo to the detriment of all the other creditors of the bankrupt. To begin with, the transfer by the bankrupt of his interest in the properties to Mdm Cheo was made without any consideration being offered to the former. Although Mdm Cheo claimed to have given consideration, the interim consent judgment specifically stated that the transfer by the bankrupt of the properties in question to Mdm Cheo was to be made “without consideration”.

27 Secondly, the Official Assignee pointed out that Mdm Cheo did not act in good faith and without knowledge of the bankruptcy proceedings in question. In her affidavit dated 10 February 2012, which was filed in support of her present application, she claimed that she was not aware of the bankruptcy proceedings against the bankrupt when the interim judgement was entered. She stated as follows (at paras 16 and 20):

16 Other than the fact that [the bankrupt] is a bankrupt, I have no personal knowledge of what took place in the course of his bankruptcy proceedings. Most of the details set out in paragraphs below are from an affidavit that the Official Assignee filed on 20 Dec 2011 in the Divorce Proceedings.

....

20 While I am aware that the [bankrupt's] business faced some cash-flow problems, I did not think that he was facing any bankruptcy proceedings, especially when he informed me that his business had new investors.

21 As such, I did not know about his bankruptcy proceedings when the interim judgment was entered.

28 The Official Assignee pointed out that Mdm Cheo knew or ought to have known that the bankrupt was facing bankruptcy proceedings when she and the bankrupt consented to the interim judgment on 1 February 2011. After all, it was obvious from her affidavit filed on 22 October 2010 in support of the bankrupt's application to set aside the statutory demand from the bank that she knew that the bankrupt had, in her own words, been served a "bankruptcy document" by the service clerk of the bank's solicitors, M/s KhattarWong, on 14 August 2010. She stated at paras 12 and 17 of the said affidavit as follows:

12 I asked who he was and he told me that he was from "Khattar Wong (sic), serving a *bankruptcy document*" on "Mr Andreisz". I told him that "Mr Andriesz" was not in town.

17 I then went upstairs, *opened the envelope and noticed that it was a bankruptcy document*. I then called [the bankrupt] in Vietnam to inform him that I had received this document.

[emphasis added]

29 The statutory demand that Mdm Cheo found in the envelope made it plain that the demand was made pursuant to s 62 of the Act and that a bankruptcy application was on the cards if the amount claimed was not paid on time. It was in the following terms:

STATUTORY DEMAND UNDER

SECTION 62 OF THE BANKRUPTCY ACT

The creditors claim that you owe them the sum of **US\$8,671,681.56** as of the date of the demand, full particulars of which are set out in PART A of this demand, and that it is payable immediately and, to the extent of the sum demanded, is unsecured.

The creditors demand that you pay the above debt or secure or compound for it to the creditors'

satisfaction within 21 days from the service of this statutory demand on you. *If you fail to do so, the creditors may file a bankruptcy application against you.*

[emphasis added]

30 It is also worth noting that the bank's bankruptcy application against the bankrupt was served personally on him at his matrimonial property on 30 December 2010. At that time, Mdm Cheo was residing there.

31 Knowing that the bank had demanded that the bankrupt pay up more than US\$8.67m or face bankruptcy proceedings, Mdm Cheo must have been concerned about the future of her family. I thus do not believe that she did not keep herself abreast of the situation and had, as she claimed, assumed that the matter had been resolved because the bankrupt told her that there were going to be new investors.

32 It is pertinent to note that when Mdm Cheo filed for divorce, she did not claim that the bankrupt should transfer his entire interest in the properties to her. Instead, she stated in para 7(d) of her Statement of Claim filed on 4 November 2010 that the matrimonial assets were to be dealt with as follows:

- (a) [She and the bankrupt] shall continue to hold the matrimonial home .. in joint tenancy.
- (b) [The bankrupt] shall continue to service the outstanding mortgage loan and pay property tax on the matrimonial home solely.
- (c) [She] and the children of the marriage shall be allowed to stay at the matrimonial home, rent-free, until such time as the Plaintiff deems fit.

....

- (d) Division of the matrimonial assets (aside from the matrimonial home):

Just and equitable division of the other matrimonial assets.

33 Conveniently, after the bankruptcy petition was filed against the bankrupt on 29 December 2010 and served on him personally on 30 December 2010, he decided around one month later to give her all his interest in the properties on 1 February 2011.

34 The Official Assignee also pointed out that Mdm Cheo had given the court scant details of the reasons for the divorce. Although she complained of the bankrupt's adultery in these proceedings, she sought a divorce from him on the ground of his unreasonable behaviour although the bankrupt's alleged adultery was mentioned in the Statement of Particulars. The only documents evidencing the bankrupt's alleged infidelity in Vietnam that were furnished to the court were two entries in his credit card statements showing that he had bought some jewellery and accessories from a ladies' store amounting to S\$2,500, which, according to Mdm Cheo, had not been presented to her by the bankrupt.

35 Apart from agreeing to give up his interest in the properties to Mdm Cheo without receiving any consideration in return, the bankrupt also agreed in the interim consent judgment to pay Mdm Cheo and their children S\$21,000 per month as maintenance. This was a ridiculous amount for the bankrupt to offer as maintenance because his monthly salary was stated to be less than US\$5,000 per month.

By inflating the monthly maintenance to Mdm Cheo and his children to such an unrealistic extent, he showed just how much he wanted to put his funds out of the reach of his creditors.

36 Finally, the Official Assignee pointed out that after the commencement of the divorce proceedings on 4 November 2010, the bankrupt continued to reside at the matrimonial home with Mdm Cheo until March 2011, one month after the interim consent judgment. While the bankrupt may have had his reasons for continuing to stay at the matrimonial home after Mdm Cheo had commenced divorce proceedings against him, I find that, after taking all circumstances into account, Mdm Cheo did not act in good faith when she consented to the interim judgment.

37 To sum up, the circumstances in Mdm Cheo's case were not such as to persuade the court to ratify the disposition by the bankrupt of his interest in the properties by way of the interim consent judgment on 1 February 2011. Much more was required of her to persuade the court to ratify what appears, without more, to have been an attempt to keep the bankrupt's interest in the properties out of the reach of his creditors. For the reasons stated, Mdm Cheo's application was dismissed with costs.