IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 52

Originating Summons (Bankruptcy) No 3 of 2024

In the Matter of Section 328 of the Insolvency, Restructuring and Dissolution Act 2018

Eng Lee Ling

… *Applicant*

Originating Summons (Bankruptcy) No 20 of 2024

In the Matter of Section 328 of the Insolvency, Restructuring and Dissolution Act 2018

Dong Yu

… *Applicant*

JUDGMENT

[Insolvency Law — Bankruptcy]
[Insolvency Law — Avoidance of transactions — Dispositions of property after commencement of insolvency proceedings]

TABLE OF CONTENTS

Re Eng Lee Ling and another matter

[2024] SGHC 52

General Division of the High Court — Originating Summons (Bankruptcy) No 3 of 2024 and Originating Summons (Bankruptcy) No 20 of 2024
Aedit Abdullah J
22 February 2024

26 February 2024 Judgment reserved.

Aedit Abdullah J:

1 HC/OSB 3/2024 ("OSB 3") and HC/OSB 20/2024 ("OSB 20") are applications by a husband-and-wife duo, both of whom have had bankruptcy applications taken out against them, and which remain on foot at the time of these applications. In these applications, the applicants seek the consent of the court to proceed with the intended sale of a property that is jointly owned by them ("the Property"), so that the proceeds may be applied to the discharge of the debts owed to the creditors who have petitioned for their bankruptcies.

2 This decision is published to record that the court has confirmed that it has the jurisdiction under s 328 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") to consent to a proposed disposition of property by a debtor prior to the making of a bankruptcy order against him/her, as well as to provide general guidance on what the court expects in applications for such orders for prospective validation of proposed dispositions.

3 This judgment may be supplemented by full grounds if need be.

Background to these applications

4 The applicant in OSB 3 is Mdm Eng Lee Ling ("Mdm Eng"). A bankruptcy application[1] was filed against Mdm Eng by Maybank Singapore Limited ("Maybank"), on 22 May 2023.[2] Subsequently, Mdm Eng commenced negotiations with Maybank, where she proposed that she sell off the Property and for the proceeds of sale to be applied to the discharge of her debt to Maybank after paying off the mortgage over the Property that is held by Orix Leasing Singapore Limited ("Orix Leasing").[3] Maybank declined this proposal. At present, Maybank's bankruptcy application against Mdm Eng has been adjourned for the Official Assignee to assess Mdm Eng's suitability to be placed on the Debt Repayment Scheme.[4]

5 Shortly before the hearing of OSB 3 and OSB 20 on 22 February 2024, a second bankruptcy application[5] was filed on 19 February 2024 against Mdm Eng by another creditor, DBS Bank Ltd ("DBS"). DBS's bankruptcy application against Mdm Eng has yet to be heard.

6 The applicant in OSB 20 is Mr Dong Yu ("Mr Dong"). A bankruptcy application[6] was filed against Mr Dong by DBS on 29 January 2024. At present, DBS's bankruptcy application against Mr Dong has also not yet been heard.

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1 HC/B 1456/2023.

2 Affidavit of Eng Lee Ling dated 15 January 2024 ("Eng's Affidavit") at para 5.

3 Eng's Affidavit at paras 6–7.

4 Eng's Affidavit at paras 9; Affidavit of Dong Yu dated 8 February 2024 ("Dong's Affidavit") at para 7.

5 HC/B 630/2024.

6 HC/B 369/2024.

7 In the intervening period between Maybank's bankruptcy application against Mdm Eng and the subsequent bankruptcy applications by DBS against Mdm Eng and Mr Dong, Mdm Eng and Mr Dong entered into an agreement with a third-party purchaser for the sale of the Property to the latter. However, a few days before the initial scheduled completion date, the purchaser indicated a refusal to complete the sale due to his concern that he could not obtain good title to the Property because of Maybank's pending bankruptcy application against Mdm Eng at that time.[7]

8 To assuage the purchaser's concerns, Mdm Eng and Mr Dong have brought OSB 3 and OSB 20 in which they seek the court's consent to proceed with the proposed sale.[8] DBS, as a creditor of both Mdm Eng and Mr Dong, has filed objections to both OSB 3 and OSB 20. On the other hand, neither Maybank nor the Official Assignee have taken a position on these applications, although the papers have apparently been served on them.

Issues to be determined

9 The parties are agreed that two issues arise in these applications for the court's determination:

(a) First, as a preliminary question, whether the applications are premature. This turns on whether the court has the jurisdiction to grant its consent to a proposed disposition of property by a debtor prior to the making of a bankruptcy order.

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7 Eng's Affidavit at paras 11–12; Dong's Affidavit at para 11.

8 Eng's Affidavit at para 14; Dong's Affidavit at para 12.

(b) Second, if the applications are not premature, whether the court should grant the orders sought by Mdm Eng and Mr Dong on the facts of their respective applications.

My decision

Whether the applications are premature

10 The first issue is whether the applications are premature given that no bankruptcy orders have yet been made against either Mdm Eng or Mr Dong. As mentioned above, this is a question of the court's jurisdiction. This is an issue that was raised by counsel for the applicants, Mr Tris Xavier ("Mr Xavier"), in his written submissions. Although counsel for DBS, Ms Cherie Tan ("Ms Tan"), confirmed at the hearing that DBS did not take the position that the applications were premature or that the court did not have the jurisdiction to grant the orders sought, I consider it useful to engage with the issue given that there does not currently appear to be a reported decision in respect of the applicable provision, s 328 of the IRDA.

11 Section 328 of the IRDA reads:

> **Restrictions on dispositions of property by bankrupt**
>
> 328.—(1) Where a person is adjudged bankrupt, any disposition of property made by the bankrupt during the period beginning on the day of the making of the bankruptcy application and ending on the day of the making of the bankruptcy order is void except to the extent that such disposition has been made with the consent of, or been subsequently ratified by, the Court.
>
> (2) For the purpose of this section, a disposition of property includes any payment (whether in cash or otherwise) made to any person by the bankrupt and accordingly, where any payment is void by virtue of this section, the person to whom the payment was made holds the sum paid for the bankrupt as part of the bankrupt's estate.

> (3) Nothing in this section gives a remedy against any person in respect of —
>
> (a) any property or payment which the person 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.
>
> …
>
> (5) A disposition of property is void under this section even if the property is not or, as the case may be, would not be comprised in the bankrupt's estate, but nothing in this section affects any disposition made by a person of property held by that person on trust for any other person.

12 Mr Xavier focuses on the use of "consent" in s 328(1), which is used in contradistinction to the phrase "or been subsequently ratified by", to submit that the legislation contemplates that the court can grant *ex ante* approval to a proposed disposition of property rather than being limited to *ex post* ratification of a completed disposition.[9] He also submits, in respect of the context of s 328, that because s 327(1)(*a*) vests the property of an adjudicated bankrupt in the Official Assignee upon the making of a bankruptcy order, a reading of s 328(1) that only allows the court to ratify a disposition after a bankruptcy order has been made would render s 328(1) otiose.[10]

13 In my judgment, it is clear from the wording of s 328 of the IRDA and its context, as well as the legislative purpose of the provision, that the court can prospectively validate a proposed disposition of property before a bankruptcy order is made.

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9 Applicant's Written Submissions in OSB 3/2024 dated 8 February 2024 ("AWS") at paras 10 and 12.

10 AWS at para 11.

14 First, on the plain wording, I agree with the contrast drawn by Mr Xavier between the word "consent" and the phrase "or subsequently ratified by" in s 328(1). The ordinary meaning of "consent" refers to *ex ante* authorisation. On the other hand, the ordinary meaning of ratification – which the statute itself makes clear through the adverb "subsequently" – refers to *ex post* authorisation (see, *eg*, *Alternative Advisors Investments Pte Ltd v Asidokona Mining Resources Pte Ltd* [2024] SGCA 3 at [2], in respect of ratification of an agent's authority).

15 Second, I see nothing in the objective, purpose or context of s 328 that would militate against the court having the jurisdiction to grant prospective validation orders before a bankruptcy order is made.

16 Although the cases on the predecessor to s 328 of the IRDA – *ie*, s 77 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("BA") – and the parallel provisions in the context of corporate insolvency – previously s 259(1) of the Companies Act (Cap 50, 2006 Rev Ed), and now s 130(1) of the IRDA – are generally concerned with ratification rather than consent, Steven Chong J in *Centaurea International Pte Ltd (in liquidation) v Citus Trading Pte Ltd* [2017] 3 SLR 513 ("*Centaurea*") did recognise the possibility of seeking the court's consent for a proposed disposition after a winding-up petition had been filed against a company (and presumably before a winding-up order had been made) (at [26]):

> A third party who, despite having knowledge that the winding up petition has been filed, is asked to enter into a transaction with a company after the commencement of winding up can always decline to do so until he or the company has obtained a *prospective* validating order. If he chooses to go ahead without first obtaining the validating order, then he obviously takes the risk of the court subsequently refusing to make the order. However, it is not always feasible to obtain such an order in advance because the third party may be unaware of the winding

> up application. Here we are concerned with such a situation; hence, the necessity for the *retrospective* validation order.
>
> [emphasis in original]

It is clear from this excerpt that seeking consent in the form of a prospective validation order does serve a tangible purpose, namely, to give counterparties to transactions with financially distressed individuals and companies peace of mind prior to entering into what would otherwise be an avoidable transaction in the individual or company's subsequent bankruptcy or insolvency.

17 If there were no jurisdiction for the prospective validation of dispositions prior to the making of a bankruptcy order, transaction counterparties would be forced to inevitably run the risk of subsequent nullity if a bankruptcy order were to be made later down the line. That would be a wholly uncommercial result and therefore an absurd construction that should be eschewed (see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [38]).

18 For these reasons, I hold that s 328(1) of the IRDA empowers the court to grant its consent, in the form of a prospective validation order, to a proposed disposition of property during the intervening period between the making of a bankruptcy application and the making of a bankruptcy order.

Whether consent should be granted

The applicable principles

19 The authorities in respect of the predecessor provision in s 77(1) of the BA are clear that the primary consideration when the court exercises its discretion to validate a disposition is that the disposition should promote an "orderly and rateable distribution to the general body of creditors" (see *Sutherland, Hugh David Brodie v Official Assignee and another* [2021] 4 SLR

752 ("*Sutherland*") at [28]). Some implications of this are that the disposition that is sought to be validated should be proper and fair, consistent with the principle of *pari passu* distribution, and not amount to a preference of any creditor. I do not wish to foresee all possible situations, but the guiding light should be whether the disposition is (a) fair and (b) to the benefit of the general body of unsecured creditors.

20 In an application for prospective validation, the fact that the disposition has yet to go through, and its effects yet to be felt, means that the court is faced with the difficult task of fortune-telling. Insofar as the question is whether the proposed transaction or disposition is fair or *pari passu*-compliant, such an inquiry may be less speculative. For example, where a debtor intends to apply his limited assets to repay a particular creditor in priority to other similarly situated creditors, the court does not need a crystal ball to see that the intended payee will obtain an advantage. However, insofar as the question is whether the proposed disposition or transaction is likely to benefit the general body of unsecured creditors, that inherently requires an element of projection. Ultimately, the burden of proof lies on the applicant seeking the court's blessing to convince the court that, on the balance of probabilities, the proposed disposition is likely to benefit the general run of creditors.

21 In contrast, in an application for ratification of a disposition that has been rendered void by operation of s 328(1), the inquiry would appear to be less speculative (see *Sutherland* at [38]); although I note that, in *Centaurea*, Chong J held (in the context of the predecessor provision to s 130(1) of the IRDA) that the relevant time for the inquiry even in ratification applications should be the time of the disposition, and that the question should remain framed in terms of likelihood of benefit to the creditors (at [48]).

The parties' arguments

22 Mr Xavier agrees that the court should primarily consider whether the proposed disposition would benefit the general pool of creditors. He submits also that the court should consider other factors such as whether the applicant debtor has acted in good faith, although he accepts that good faith *per se* would not be sufficient.[11]

23 In this regard, Mr Xavier submits that the general pool of creditors stand to benefit from the proposed disposition of the Property because the sale price, he says, is at fair market value and likely to exceed anything which could be obtained in what he describes as a "fire sale" by the mortgagee who holds a mortgage over the Property.[12] If the proposed disposition goes through, Maybank (who has petitioned for Mdm Eng's bankruptcy) would be paid in full. In contrast, if the proposed disposition does not go through, Maybank would then fall into the general pool, resulting in lower recoveries for the other unsecured creditors.[13] Mr Xavier also submits that it is in the interests of the creditors generally for Maybank to withdraw its bankruptcy application; it would allow Mdm Eng to continue with her business, benefitting her creditors as a whole.[14]

24 On Mdm Eng's good faith, Mr Xavier submits that Mdm Eng has always been candid, and has not hidden her financial affairs from Maybank and the need to sell the Property to pay off her debt to it. The fact that she has taken the

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11 AWS at para 23.

12 AWS at paras 24–25.

13 AWS at para 26.

14 AWS at para 27.

initiative to take out OSB 3 further underlines her good faith, showing her desire to comply with the law.[15]

25 Although Mr Xavier did not tender written submissions in OSB 20, he seemed to take the position in his oral submissions during the hearing that the points above were also made on behalf of Mr Dong's application.

26 The objecting creditor, DBS, argues that the applications by both Mdm Eng and Mr Dong are hastily done and in an unsatisfactory state.[16] In this connection, Ms Tan points to a litany of lapses and omissions committed in both applications:

(a) First, there is nothing to support the applicants' assertion that the agreed sale price for the Property is at fair value.[17]

(b) Second, no list of creditors has been produced before the court, and in fact, Mdm Eng did not disclose DBS as a creditor of hers in her supporting affidavit.[18]

(c) Third, nothing has been said about the disclosure of the applications in OSB 3 and OSB 20 to other creditors.[19]

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15 AWS at para 30–31.

16 DBS Bank Ltd's Skeletal Submissions dated 22 February 2024 ("DBSWS") at para 24.

17 DBSWS at para 25.

18 DBSWS at para 26.

19 DBSWS at para 27.

(d) Fourth, although Mdm Eng and Mr Dong have disclosed that a deposit has been paid by the purchaser for proposed sale of the Property, nothing has been said about what has become of this deposit.[20]

(e) Fifth, the applications were served on DBS only at the eleventh hour.[21]

27 Ms Tan submits that the manner in which Mdm Eng and Mr Dong intend to apply the sale proceeds from the proposed disposition of the Property does not benefit their creditors. To pay Maybank – an unsecured creditor – in full from the proceeds of sale flies in the face of the *pari passu* principle, and does not serve s 328(1)'s purpose of promoting an orderly and rateable distribution.[22] Further, Mdm Eng and Mr Dong intend to pay themselves from the sale proceeds rather than their creditors, as is apparent from the Completion Statement[23] that Mdm Eng has tendered in evidence.[24] There is thus no benefit that is likely to accrue to the general body of their unsecured creditors if the court consents to the proposed sale of the Property.

28 On the issue of good faith, Ms Tan submits that Mdm Eng and Mr Dong have deliberately attempted to conceal the sale of the Property, and the proposed preferential treatment given to Maybank, from DBS.[25] Mdm Eng has conducted herself as if DBS is not one of her creditors, by neither disclosing to DBS the

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20 DBSWS at para 28.

21 DBSWS at para 29.

22 DBSWS at paras 30–32.

23 Eng's Affidavit, Exhibit ELL-1, Tab 8.

24 DBSWS at para 33.

25 DBSWS at para 37.

proposed sale of the Property or her application in OSB 3.[26] On the other hand, Mr Dong failed to disclose the proposed sale of the Property in his negotiations with DBS,[27] and only served OSB 20 onto DBS at the last minute.[28] In these circumstances, it is argued that Mdm Eng and Mr Dong's conduct has been "plainly dishonourable".[29]

The applications are dismissed

29 Given that the crucial inquiry is the impact that the proposed disposition would have on the general body of creditors, one would expect that, in most cases, there would be an indication of some sort of planned distribution benefitting all – or at least, most – creditors, as well as a list – not necessarily exhaustive, but as best as can be obtained in the circumstances – of the debtor's creditors. Here, what has been produced before the court has clearly fallen short. Tellingly, there is no list of creditors. Save perhaps for the odd case where a debtor is almost entirely indebted to a single creditor, it is difficult to see how the court can be expected to project the effects of a proposed disposition on the debtor's creditors without knowing who the debtor is indebted to, and for how much.

30 The applicants' focus appears to be to stave off the creditor that is currently knocking on the door (Maybank), and thereafter operate on a wing and a prayer to keep their business going. This, if ever, will rarely be enough; still less when it is clear that other creditors such as DBS will be coming up the path

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26 DBSWS at paras 38–39.

27 DBSWS at para 40.

28 DBSWS at paras 41–42.

29 DBSWS at para 44.

as well. It is simply not enough to kick the can down the road and hope for the best. Financial difficulty is rarely remedied by Micawberism.

31 The professed intention to pay off Maybank in full clearly amounts to a preference that is injurious of other unsecured creditors, including DBS. It is not enough to say that Maybank's debt is cleared from the pool of unsecured debt: that happens with every preference. The other creditors are harmed because they get much less than Maybank when they should all be sharing *pari passu*. Conceptually, the payment of a preference unjustly enriches the preferred creditor at the expense of the remaining unsecured creditors (see, *eg*, *Stanford International Bank (in liquidation) v HSBC Bank plc* [2023] AC 761 at [48]).

32 It follows that it would rarely be in the interests of the unsecured creditors for one of their number to be accorded preferential treatment. There will of course be exceptions: one can conceive of a case where it may be beneficial to the creditors as a whole for an unsecured creditor who is a major supplier of the debtor to be paid, so that the debtor can continue in business and trade its way out of difficulty. But the court would need some convincing, and the applicants have not adduced any evidence that displaces the general starting point that a preference would injure, rather than benefit, their unsecured creditors.

33 It might well be that the sale price in the proposed sale of the Property is, or will be, a better price than in a "fire sale" conducted by Orix Leasing in the event that it enforces its power of sale *qua* mortgagee of the Property. But in the absence of any valuation report, or any evidence of proper marketing by the applicant, the court cannot conclude that this is a likely benefit and will therefore not validate a proposed sale even if it means that the sale will be lost (see *Re Rescupine Ltd* [2003] EWHC 216 (Ch)).

34 Candour and proactivity on the part of the debtors will be strong indicators of good faith. In this case, I am satisfied that Mdm Eng and Mr Dong have not exhibited the degree of candour or proactivity that the court will normally associate with good faith and a genuine intention to act in the interests of their creditors. Apart from failing to lead important pieces of evidence to allow the court to properly assess the merits of their applications, one would have expected them to engage with all their creditors rather than seeking to satisfy one at the potential expense of the others. In this connection, their glaring failure to notify DBS – a common creditor of both of them – of the proposed sale as well as these applications until the eleventh hour (one day before the original hearing date)[30] falls short of the requisite good faith.

Conclusion

35 For all the reasons discussed above, OSB 3 and OSB 20 are dismissed.

36 In closing, I record my gratitude for the clear, succinct and able advocacy from both sides: Mr Xavier and Ms Tan presented their cases very well, both orally and in writing, and I look forward to seeing more of their work in the future.

Aedit Abdullah J
Judge of the High Court

[30] Affidavit of Mok Pei Fong dated 21 February 2024 at para 29.

Tris Xavier (Yuen Law LLC) for the applicants;
Chua Beng Chye, Cherie Tan and Foung Han Peow (Rajah & Tann Singapore LLP) for the non-party.
