Singapore Journal of Legal Studies
[1996] 600 – 607

DISCHARGE UNDER THE NEW BANKRUPTCY REGIME

Re Ng Lai Wat[1]

ONE of the important reforms introduced by the new Bankruptcy Act[2] ('the Act') is that the Official Assignee has the power to issue a certificate discharging a bankrupt from bankruptcy in certain circumstances.[3] A creditor of the bankrupt may object to this and, if his objection is rejected by the Official Assignee, he may make an application to the Court.[4] The Court is given wide powers to deal with such an application. One of the orders it may make is to permit the issue of the certificate but subject to such conditions as it thinks fit, including conditions with respect to any income which may be subsequently due to the bankrupt after his discharge or any property devolving upon the bankrupt or acquired by him after his discharge.[5]

In *Re Ng Lai Wat*, the Singapore High Court had to deal with such an application by a bankrupt's creditor for the first time and, incidentally, on a rather interesting set of facts. Ng had been bankrupt for more than 6 years,[6] his main debt being a judgment debt owed to the Housing Development Board ('HDB'). Ng also had a share in an HDB flat, the value of which had appreciated from the original purchase price of $35,000 to $135,000. The Official Assignee decided to discharge Ng unconditionally and HDB applied to the Court objecting to this. The Deputy Registrar decided that the certificate of discharge should be made subject to the condition that,

1 [1996] 3 SLR 106.

2 Cap 20, 1996 Ed. The Act came into force on 15 July 1995.

3 See s 125 of the Act. A period of 5 years must have lapsed since the commencement of bankruptcy (*ie*, the date of the bankruptcy order: see s 75 of the Act) and the provable debts of the bankrupt must not exceed $100,000.

4 See s 126 of the Act.

5 S 126(6)(c) of the Act. The Court may also dismiss the application or order that no certificate of discharge be granted by the Official Assignee for a period not exceeding two years: s 126(6)(a), (b).

6 He was made bankrupt under the repealed Bankruptcy Act but, pursuant to the transitional provisions in s 167(3) and para 1(1) of the First Schedule, the present Act applied to him as if he had become a bankrupt thereunder.

upon sale or transfer of the flat, Ng must use his share of the sale proceeds to satisfy the debt owed to HDB. Lai Siu Chiu J allowed the Official Assignee's appeal and allowed the grant of an unconditional certificate of discharge.

The General Approach

The Official Assignee made the somewhat bold submission that he had an absolute and unfettered discretion to issue a certificate of discharge and that the Court ought not to intervene in the exercise of such discretion except for very good reasons. This was apparently rejected by the learned Judge who pointed out that section 126 of the Act 'does not contain qualifying words to the effect that the Court can interfere with the OA's decision only if the decision is reasonable'.[7]

The position taken by the learned Judge was clearly correct. It is true that if a bankrupt or any of his creditors apply to the Court against an act, omission or decision of the Official Assignee in relation to the administration of the bankrupt's estate,[8] the Court will not intervene unless there was bad faith or absurdity,[9] or if the Official Assignee did not address the correct question or made errors of law or failed to take into account relevant matters or took into account irrelevant matters.[10] For if the Official Assignee has to answer at every step for the exercise of his discretion, administration of the bankruptcy would be impossible.[11] However, the context is entirely different when the Official Assignee is considering whether to grant a discharge. It is the exercise of a power which is determinative of the creditors' substantive rights and is probably more akin in nature to a quasi-judicial act, such as a decision to reject a proof of debt, than an administrative decision as to the conduct of the bankruptcy. In examining the validity of a proof,[12] the Official Assignee acts in a quasi-judicial capacity in accordance with standards no less than the standards of a Court or Judge.[13]

7 *Supra*, note 1, at 119C.

8 S 31(1) of the Act.

9 *Re Peters, ex parte Lloyd* (1882) 47 LT 64 at 65; *Re a Debtor* [1949] Ch 236 at 241; *Re Hall* (1957) 20 ABC 21 at 29; *Re Carson* (1960) 19 ABC 108 at 121; *Stone* v *Angus* [1994] 2 NZLR 202 at 204-5.

10 See, in the context of applications against an act, omission or decision of a liquidator under the materially similar provision in s 315 of the Companies Act (Cap 50, 1994 Ed), *Re Equity Funds Of Australia* (1976) 2 ACLR 238.

11 See *Re a Debtor*, *supra*, note 9, at 241; *Re Carson*, *supra*, note 9, at 121; *Re Valibhoy* [1995] 1 SLR 601 at 614.

12 See r 197(1) of the Bankruptcy Rules.

13 See, in the context of a liquidator's duty in examining a proof under the similar r 92 of the Companies (Winding Up) Rules, *Tanning Research Laboratories Inc* v *O'Brien* (1990) 169 CLR 332 at 338-9; *Re Magic Aust Pty Ltd* (1992) 7 ACSR 742 at 745.

Consequently, an appeal to the Court against the Official Assignee's decision to reject a proof[14] probably takes the form of a *de novo* hearing.[15] It is therefore suggested that the Court, in hearing an application against the Official Assignee's decision to issue a certificate of discharge, may similarly consider all the circumstances in coming to a decision. Of course, at the same time the Court should have due regard to the views of the Official Assignee in relation to aspects such as the conduct and attitude of the bankrupt during the bankruptcy and his suitability to recommence trading.

Factors Relevant to Grant of a Discharge

The learned Judge very helpfully set out some pertinent factors which the Court may consider in balancing the interests of the bankrupt with those of his creditors to determine whether the bankrupt should be discharged and, if so, whether conditionally or unconditionally. These were the cause of the bankruptcy, the bankrupt's conduct relevant to his bankruptcy as well as after his bankruptcy, the interests of the public and commercial morality.[16] While this list of factors was probably not intended to be exhaustive, it is noteworthy that none of the listed concerns had any direct bearing on the interests of the bankrupt's creditors. This commentator would respectfully suggest that considerations such as the extent to which the bankrupt's creditors have been paid off and the total amount of debt still outstanding would have deserved a place on the list. It may be inferred from the overall purposes attaching to the bankruptcy law that the Court should be mindful of the question whether the creditors have been enabled to recover all that might reasonably be made forthcoming to them through the bankruptcy.[17] In this connection, it may be useful to note that, in the case of a discharge by the Court, the Court is less likely to make an order of discharge if it is shown that the bankrupt's assets are worth less than 20% of the amount of his unsecured liabilities, unless this deficiency arises from circumstances for which he cannot be held blamable.[18] After 6 years

[14] R 198(1) of the Bankruptcy Rules.

[15] See, in the context of liquidation, *Re Kentwood Constructions Ltd* [1960] 1 WLR 646; *Re Trepca Mines Ltd* [1960] 1 WLR 1273; *Tanning Research Laboratories Inc* v *O'Brien*, *supra*, note 13, at 340-1. See also *Watta Battery Industries Sdn Bhd* v *Uni-Batt Manufacturing Sdn Bhd* [1993] 1 MLJ 149 at 159. The right of appeal in liquidation is given by r 93 of the Companies (Winding Up) Rules which is substantially similar to r 198(1) of the Bankruptcy Rules.

[16] *Supra*, note 1, at 118H.

[17] Fletcher, *The Law of Insolvency* (Second Ed, 1996) at 313.

[18] S 124(4) read with s 124(5)(j) of the Act.

of bankruptcy Ng had paid only $5,800 of HDB's judgment debt of $75,818.88; on average this worked out to a monthly payment of approximately $80. Surely this fact warranted at least an express reference by the Court in exercising its discretion though, of course, it would still have been perfectly entitled, after consideration of all the circumstances of the case, to conclude that Ng ought to be discharged.

An argument was made by HDB that the fact that Ng's bankruptcy was due to business failure rather than fraudulent or criminal acts was relevant. This contention was rightly rejected by Lai Siu Chiu J, as it is difficult to see in what way it assisted HDB's case against an unconditional discharge. However, the Court's rejection of the argument may have been couched in overly extensive terms; the learned Judge held that the fact that the cause of bankruptcy was business failure and not fraudulent or criminal acts should not make any difference to the way the Official Assignee ought to exercise his discretion in issuing a certificate of discharge.[19] Surely, whether the bankrupt has engaged in fraudulent or criminal acts leading to his bankruptcy has at least some measure of relevance to the factors for discharge, in particular, his suitability to recommence business[20] and the protection of the public and commercial morality. More importantly, section 124(4) and (5) of the Act explicitly places a higher burden on a bankrupt seeking a discharge from the Court where, *inter alia*, he has committed an offence under the Act or under sections 421, 422, 423 or 424 of the Penal Code,[21] or where he has been guilty of any fraud or fraudulent breach of trust.[22] While these provisions relate to the case of a discharge by the Court, they should apply equally to the exercise of the Official Assignee's discretion in respect of a certificate of discharge.

The Main Issue

The issue which preoccupied the Court was the condition on the certificate of discharge. It was not disputed that conditions should not be imposed on a certificate of discharge such that the bankrupt could not improve his position in life or make a fresh start.[23] What was in dispute was the specific issue of whether, in the light of section 51 of the Housing and Development

19 *Supra*, note 1, at 116F-G.

20 See *Re Cook* (1889) 6 Morr 224 at 233; *Morgan* v *White* (1912) 15 CLR 1 at 15-6. See also *Re Kolomy* (1982) 56 FLR 157 and the authorities discussed therein.

21 Cap 224. These sections deal with dishonest or fraudulent acts committed for the purpose of putting one's assets beyond the reach of creditors.

22 See s 124(4) and s 124(5)(h) of the Act.

23 On this, see also *Re James* (1891) 8 Morr 19.

Board Act[24] ('HDB Act'), a condition could be imposed that, in the event that Ng's HDB flat is sold or transferred, the proceeds should be made available to his creditors. The relevant part of section 51 provides that an HDB flat shall not vest in the Official Assignee on the bankruptcy of the owner and shall not be attached in execution of a decree of a Court.

Lai Siu Chiu J gave two reasons for her view that the condition could not be sustained.[25] Firstly, since Ng's flat was protected from attachment in execution of a decree of a Court, the condition was tantamount to HDB circumventing the HDB Act and attempting to obtain indirectly what it could not obtain directly. Secondly, section 78(2)(d) of the Act provides that a bankrupt's property which is excluded under any written law shall not comprise property which is divisible among the bankrupt's creditors. Read with section 51 of the HDB Act, this established a 'hands-off' principle on creditors in respect of a debtor's HDB flat, whether the debtor was in bankruptcy or being discharged from bankruptcy.

Neither of these reasons are without difficulty. The premise upon which both reasons were founded was that the proceeds resulting from a sale or transfer of Ng's flat were not to be distinguished from the flat itself. This is doubtful. On a reading of the relevant statutory provisions, it is not apparent that the privilege of immunity from attachment in respect of an HDB flat extends to the proceeds upon its sale or transfer. Indeed, it may plausibly be argued that the basis for the immunity is that, since HDB flats are publicly-subsidised and meet a most basic social need,[26] it would be unfair to society as a whole and harsh to the flat-owner if an HDB flat were to be made available to satisfy his creditors' claims. If so, there is no justification for extending the immunity to the proceeds received upon the sale or transfer of an HDB flat. Further, what if a bankrupt sells his HDB flat while he is still bankrupt? Upon the learned Judge's analysis, the result would be that the bankrupt will be fully entitled to use the proceeds as he wishes, and what appears to be a most unlikely and ill-advised thing for a bankrupt to do takes on a wholly different flavour. This hardly seems equitable; surely the proceeds of such a sale should be divisible among his creditors. The case should fall squarely within the terms of section 78(1)(a) of the Act which provides that the property of a bankrupt which

[24] Cap 129.

[25] See *supra*, note 1, at 119H-120A.

[26] Similarly, the Central Provident Fund fulfils a fundamental social necessity and an employee's Central Provident Fund moneys and contributions are rendered immune from attachment and vesting in the Official Assignee upon bankruptcy: see s 25, Central Provident Fund Act (Cap 36, 1991 Ed). See also s 31 of the Post Office Saving Bank of Singapore Act (Cap 237).

is divisible among his creditors includes all property which is acquired by him before his discharge.

On the other hand, when one considers the possibility of compulsory acquisition, with which the learned Judge was understandably concerned, her Honour's approach has its merits. If Ng's flat was subsequently compulsorily acquired by the government for which he receives compensation, it would be repugnant if he had to surrender the compensation moneys to his creditors pursuant to the condition on the certificate of discharge.[27] Though such a contingency could have been adequately met, on the facts of Ng's case, by an appropriate variation of the terms of the condition, a more problematic issue arises if an HDB flat is compulsorily acquired while the flat-owner is in bankruptcy. The effect of the relevant statutory provisions, as argued above, would be that the compensation moneys paid to the bankrupt would become divisible among his creditors. This would be seriously prejudicial to the bankrupt since he would have been forcibly deprived of his statutory immunity against attachment of his HDB flat. Although this point was not discussed by the learned Judge, her Honour may well have been influenced by this consideration in concluding that the proceeds upon the sale or transfer of an HDB flat could not be divided among the flat-owner's creditors. However, on balance, it is submitted with respect that it would been more logical and more faithful to the statutory provisions to hold to the contrary. The problems connected with the compulsory acquisition of a bankrupt's HDB flat should be left to be addressed by legislative remedial action.

A further point may be made with reference to her Honour's reliance on the statutory immunity of an HDB flat from attachment in execution of a decree of a Court pursuant to section 51 of the HDB Act and her view that the condition on the certificate of discharge constituted an outflanking of such immunity. It is unfortunate that the recent decision of the Court of Appeal in *Central Provident Fund Board* v *Lau Eng Mui*[28] was not highlighted in connection therewith. In *Lau Eng Mui* the Court of Appeal considered section 25(1) of the Central Provident Fund Act[29] ('CPF Act'), the material part of which provides that moneys in a CPF account shall not be 'liable to be attached, sequestered or levied upon for in respect of any debt or claim whatsoever'. The question was whether

[27] *Supra*, note 1, at 116C-F. Her Honour also felt that the same point may be made, to a lesser degree, with respect to the possibility of en-bloc upgrading of Ng's flat: he should not be 'penalised' for the increase in the value of the flat resulting therefrom when he sells. With the greatest respect, this writer does not see the injustice.

[28] [1995] 3 SLR 109.

[29] Cap 36, 1991 Ed.

the Court, in exercising its power under section 106 of the Women's Charter[30] to order the division of matrimonial assets when granting a decree of divorce, judicial separation or nullity of marriage, could order that the wife's share of the matrimonial assets be satisfied from a portion of the husband's CPF moneys. It was held that such a 'proprietary order' could be made despite section 25(1) of the CPF Act as, *inter alia*, such an order did not amount to an attachment, sequestration or levy on CPF moneys. Moreover, a 'proprietary order' could be made notwithstanding that it imposed a charge on the CPF moneys; the embargo against enforcement did not prohibit the creation of such a charge. The Court of Appeal also expressly followed the decision in *Re Sandrasagram*[31] that the vesting of a bankrupt's property in the Official Assignee upon bankruptcy was not an attachment, sequestration or levy within the meaning of a materially identical provision in respect of the Singapore Municipal Provident Fund.

Applying the reasoning of these cases, it would seem that the provision in section 51(3) of the HDB Act that an HDB flat shall not be attached in execution of a decree of a Court does not prevent it from vesting in the Official Assignee upon the flat-owner's bankruptcy. This is probably why an express provision to the latter effect is found in section 51(2).[32] *A fortiori*, section 51(3) should not have any bearing on the type of conditions which are permissible to be imposed on a certificate of discharge; it is thus not easy to see how the condition on the certificate of discharge in Ng's case operated to circumvent the operation of section 51(3). Certainly, following *Lau Eng Mui*, the fact that the condition amounted to a charge on Ng's flat[33] does not result in a contravention of section 51(3) either in wording or spirit. Further, the claim of a creditor against his bankrupt debtor clearly cannot be given any less precedence than the claim, as in *Lau Eng Mui*, of one spouse against another in matrimonial proceedings.

Concluding Note

The ultimate question is, where did the justice of Ng's case lie? Hopefully, it has been demonstrated that there is no convincing legal or policy ground for completely insulating the proceeds of sale of Ng's HDB flat, if and when he sells it, from the reaches of his creditor. As a matter of fairness, it is difficult to see why Ng should reap the rewards of the appreciation

[30] Cap 353.

[31] [1935] MLJ 247. See also *Re Hendricks* [1936] MLJ 89 and *Re Monteiro* [1949] MLJ 185.

[32] S 25(4) of the CPF Act is a similar express provision prohibiting the vesting of CPF moneys in the Official Assignee upon the bankruptcy of a CPF member.

[33] Lai Siu Chiu J appeared to lay some emphasis on this fact: see s*upra*, note 1, at 116C.

in value of his HDB flat while his creditor remains unpaid. The HDB Act guarantees an HDB flat-owner that he will never be forcibly evicted from his home by his creditors; it should not assure him that he can realise and enjoy the incidental capital gains without having to account for his debts.

On the other hand, the condition imposed by the Deputy Registrar was oppressive to Ng in one respect: no time limit had been imposed with respect to the operation of the condition. If Ng had not been made bankrupt, the Limitation Act[34] would have barred the enforcement of the HDB's judgment debt after 12 years;[35] Ng would have been at liberty to sell his HDB flat after this period had elapsed without fear of being compelled to surrender the proceeds to satisfy the judgment debt. Surely, he cannot be put in a worse position in his bankruptcy. The operation of the condition should have been limited in time to a period of 12 years from the date of the judgment, discounting the period of the bankruptcy itself.[36] This course, it is respectfully suggested, would have achieved the proper balance between the respective interests of the parties.

LEE ENG BENG*

34 Cap 163.

35 S 6(3) of the Limitation Act.

36 Since time under the Limitation Act stops running upon the making of the bankruptcy order in respect of a claim which is recoverable in the bankruptcy : see *Re Westby* (1879) 10 ChD 776 at 784; *Re Crosley* (1887) ChD 266; *Re Benzon* [1914] 2 Ch 68 at 75; *Cotterell* v *Price* [1960] 3 All ER 315.

* LLB (Hons)(NUS); BCL (Oxon); Lecturer, Faculty of Law, National University of Singapore. I thank my colleague Mr Daniel Seng for his valuable comments on earlier drafts. I remain solely responsible for the views expressed in this note.