Wong Ser Wan v Ng Bok Eng Holdings Pte Ltd and Another (No 2)
[2004] SGHC 197

Case Number : Suit 310/2003, SIC 2069/2004

Decision Date : 06 September 2004

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : K Shanmugam SC, Ang Cheng Hock, Leona Yuen (Allen and Gledhill) for plaintiff; Leslie Chew SC, Chan Kia Pheng, Shaun Koh (Khattar Wong and Partners) for defendants

Parties : Wong Ser Wan — Ng Bok Eng Holdings Pte Ltd; Bian Bee Company Pte Ltd

Land – Conveyance – Whether individual creditor entitled to commence action to annul sale and transfer of assets notwithstanding bankruptcy of debtor who executed alleged fraudulent conveyance – Factors to consider – Section 73B Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed)

6 September 2004 Judgment reserved.

Judith Prakash J:

1 This suit was started on 1 April 2003 by the plaintiff, Mdm Wong Ser Wan, for the purpose of annulling the sale and transfer to the defendants of assets formerly owned by her ex-husband, Mr Ng Cheong Ling. It was brought under the provisions of s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("the Act"). The full facts of the case are set out in the judgment that I delivered in [2004] SGHC 181 on 19 August 2004. This judgment deals with an application made by the defendants that came up for hearing on the first day of the trial. After hearing the arguments, I indicated that I would give my decision after the trial had ended.

2 By a Summons for Further Directions filed on 16 April 2004, the defendants applied for the following orders to be made:

(a) pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), a determination of the issue that, as a matter of law, Mdm Wong is not the correct plaintiff in respect of her claim against the first and second defendants made pursuant to s 73B of the Act and that the correct party to make such a claim as plaintiff is the Official Assignee;

(b) this action, so far as it is made pursuant to s 73B of the Act, or alternatively, the entire action if this court deems fit, be stayed for 14 days pending the Official Assignee being named as the plaintiff in place of Mdm Wong in respect of the claim; and

(c) in default of the above, Mdm Wong's claim made pursuant to s 73B of the Act be struck out or dismissed without more, and the costs of this claim thrown away be paid by Mdm Wong to the first and second defendants.

3 It is significant that the application was made more than a year after the action had started and after the parties had prepared and exchanged their Affidavits of Evidence-in-Chief, and were almost ready for the trial which had been fixed to take place between 12 May and 18 May 2004. The

application first came up for hearing on 28 April 2004 but in view of the imminent start of the trial, the hearing was adjourned to be determined by the trial judge.

Relevant facts

4 The facts relevant to this application are set out in the affidavits filed by the defendants' solicitor Mr Chan Kia Pheng and by Mdm Wong herself. No challenge has been mounted as to the accuracy of the facts asserted by Mdm Wong.

5 The assets which were the subject matter of the action comprised the land and premises known as 764 Mountbatten Road, Singapore ("the Mountbatten property") and 60,000 ordinary shares in the capital of Ng Bok Eng Holdings Pte Ltd, the first defendant ("the shares"). Mr Ng was previously the legal owner of both assets. On 27 June 1998, he transferred the Mountbatten property to the first defendant. On 26 September 1998, he transferred the shares to the second defendant, Bian Bee Company Pte Ltd.

6 Mr Ng was made a bankrupt on 11 October 2002. By an Order of Court dated 14 October 2002, one Mr Loke Poh Keun was appointed the trustee in bankruptcy of Mr Ng's estate. Having asked the creditors to file their proofs of debt, Mr Loke proceeded to convene a creditors' meeting. The creditors included Aromate Pte Ltd, the petitioning creditor, represented by Mdm Wong. Mdm Wong was also a creditor in her own right. She had filed a proof of debt of $1,402,072.71. Other creditors who had filed proofs of debt and were entitled to attend the meeting included Mr Ng Bok Beng, the bankrupt's father and a director of the first defendant; the bankrupt's brother, Mr Ng Cheong Bian, who was a director of the second defendant; the first defendant itself; Ms Ng Chai Loan, the bankrupt's sister; and three companies from China and Hong Kong that were started and run by the bankrupt.

7 The first creditors' meeting was held on 19 December 2002. At the meeting, a creditors' committee of three members was elected. Those elected were Mr Ng Bok Beng, the first defendant and Goodray Limited, a Chinese company in which the bankrupt was, practically, the only shareholder. The first creditors' committee meeting was held on 23 January 2003. Two days later, there was a pre-trial conference in respect of the on-going dispute between Mdm Wong and the bankrupt over the division of their matrimonial assets. Mr Loke appeared and informed the court that the creditors' committee was in favour of commencing legal proceedings to recover assets disposed of by the bankrupt in the five years preceding the bankruptcy order and that these assets included the Mountbatten property and the shares. He also stated that the creditors' committee needed time to seek legal advice for starting such proceedings. As a result, the pre-trial conference was adjourned to 22 February 2003 to allow Mr Loke time to commence legal action.

8 Having held a second creditors' committee meeting on 4 February 2003, Mr Loke was able to obtain legal advice on the issue from Messrs Rajah & Tann. At the next pre-trial conference, Mr Loke informed the court that he needed time to consider this advice before deciding whether to proceed. He did not, however, disclose what the advice had been. Having heard this, the district judge observed that if the intended proceedings to set aside the transactions relating to the transfer of the assets had not been commenced by the next pre-trial conference, she intended to proceed with the hearing of the ancillary matters. The next pre-trial conference was then fixed for 5 April 2003.

9 On 3 March 2003, Mr Loke issued a notice for a second creditors' meeting to be held on 12 March. One item on the agenda was the consideration of whether the trustee in bankruptcy should proceed with court action to set aside the transactions relating to the Mountbatten property and the shares. Two days later, Mr Loke informed Mdm Wong that he had resigned as trustee in bankruptcy

and that his resignation was due to take effect on 5 April 2003. When the creditors' meeting took place as scheduled, the creditors were informed by Mr Loke that he would be referring the matter set out in the agenda to the Official Assignee who would be taking over as the trustee of Mr Ng's estate.

10 By 1 April 2003, no action had been taken on behalf of Mr Ng's estate to recover the Mountbatten property and the shares. Mdm Wong considered that the trustee in bankruptcy had had more than sufficient time to file such an action but had not done so. Further, the district judge had decided that if no such action was started by 5 April 2003, she would proceed with the hearing of the ancillary matters. Mdm Wong considered that it was not reasonable to expect the trustee in bankruptcy to take action to recover the assets since the creditors and the creditors' committee were effectively controlled by the first defendant and Mr Ng Bok Beng. She considered that through the first defendant and Mr Ng Bok Beng, the creditors were simply buying time and wanted to prevent or delay any action relating to the assets. She therefore decided to commence the present suit.

11 The next pre-trial conference proceeded as scheduled on 5 April. The Official Assignee attended the conference. Mdm Wong's solicitors informed the court of the commencement of this suit. The district judge then vacated the trial dates fixed for hearing of the ancillary matters and indicated that she would have no objection if that matter was transferred to the High Court to be heard together with the present suit. Three days later, the Official Assignee wrote to Mdm Wong's solicitors asking for details of the action which Mdm Wong had taken. Copies of the Writ and Statement of Claim were subsequently furnished to the Official Assignee. No objections to this action were received from the Official Assignee then or at any time thereafter.

The arguments

12 For the purposes of this application, only sub-s (1) of s 73B of the Act is relevant. This reads:

> Except as provided in this section, every conveyance of property, made whether before or after 12th November 1993, with intent to defraud creditors, shall be voidable, *at the instance of any person thereby prejudiced.* [emphasis added]

This sub-section is the only part of s 73B that indicates who has *locus standi* to bring an action based on the section. The wording indicates that standing to bring the action is vested in a person who has been prejudiced by the fraudulent transfer. There is nothing in the wording that implies that the situation would be different if the debtor who made the fraudulent transfer had been adjudicated a bankrupt.

13 As the defendants submitted, however, there is authority for the proposition that once a debtor is made bankrupt, any challenge mounted against any disposition of property by such debtor must be taken by the trustee in bankruptcy, whether the basis for the challenge lies in the provisions of the Bankruptcy Act (Cap 20, 2000 Rev Ed) or in other legislation like the Act. They cited the passage at pp 342–343 of *The Law and Practice in Bankruptcy* by Williams and Muir Hunter (19th Ed, 1979) which reads:

> An application to set aside or avoid any settlement, conveyance, transfer, security or payment … must be made in court (B.R. 8) and must be made by and in the name of the trustee, and not of an individual creditor.

This passage was based on the authority of *Re Crossley* [1954] 3 All ER 296 and the defendants drew my attention to the following portion of the judgment of Upjohn J (at 298):

> It is clear that in this court any application to set aside these conveyances and transfers must be made in the name of the Official Receiver, the trustee of the property of the debtor. Therefore, the court would have before it the trustee, as applicant, and the transferee of the various properties, as respondent, but the petitioning creditor would not be before the court in her own name. …

The significance of *Re Crossley* is that it was the only case cited to me that was decided after the enactment of the English Law of Property Act 1925 ("the English Act"), s 172 of which is *in pari materia* with our s 73B. On a closer examination of *Re Crossley* however, it is plain that the remarks in question did not follow a detailed consideration of s 172 or the phrase "at the instance of any person thereby prejudiced".

14 In *Re Crossley*, the debtor of that name was made a bankrupt on a petition filed in the County Court. On investigation of his affairs, it was thought that certain conveyances made by the debtor might be set aside under s 172 of the English Act, but the trustee in bankruptcy was unwilling to bring proceedings because of an insufficiency of funds. The petitioning creditor therefore wanted to bring the proceedings and, having obtained a civil aid certificate, she then applied for the bankruptcy proceedings to be transferred to the High Court because under the relevant legislation, legal aid was only given to parties to High Court proceedings. The question before the court was therefore whether the transfer should be allowed. The application was rejected on two grounds:

> (a) as the County Court was the natural and proper forum for the proceedings to set aside the conveyances, it was not correct to transfer the bankruptcy proceedings to the High Court merely to enable the petitioning creditor to obtain legal aid which was not available in the County Court; and
>
> (b) the transfer to the High Court should be refused also because the proposed subsequent proceedings would have to be brought in the name of the Official Receiver who would not be entitled to a grant of legal aid.

15 It was in relation to the second ground that Upjohn J made the observations that I have cited above (see [13] *supra*). The passage in question (at 298) began as follows:

> The other point depends on the form of the civil aid certificate. It is, so far as is relevant, in this form. It is a certificate that the petitioning creditor
>
> > is entitled, in accordance with the Legal Aid and Advice Act … to legal aid as applicant in connection with the following proceedings: (i) to take proceedings in the High Court of Justice, Bankruptcy Court, for (a) application to the court for leave to bring proceedings in the name of the trustee in bankruptcy of [the debtor] to avoid settlements made by [the debtor] and (b) to take such proceedings against [the debtor], and to enforce any order for costs.

Having set the scene, Upjohn J went on:

> Suppose that the proceedings are transferred. It is clear that in this court any application to set aside these conveyances and transfers must be made in the name of the Official Receiver, the trustee of the property of the debtor. Therefore, the court would have before it the trustee, as applicant, and the transferee of the various properties, as respondent, but the petitioning creditor would not be before the court in her own name. In that state of affairs, when the court comes to consider the question of taxation of costs it is quite clear that, if the Official Receiver

> loses, there will be an unconditional order against him to pay the respondent's costs. It may be that the petitioning creditor can give satisfactory security against that liability, but when the Official Receiver asks for his costs to be taxed under the Legal Aid and Advice Act, 1949, it will at once become apparent that the civil aid certificate is not for the benefit of the Official Receiver, but for the petitioning creditor, who is not a party to the application, and on that form of certificate it would be quite impossible, in my opinion, to order taxation of the Official Receiver's costs for the purposes of the Act of 1949.

When the relevant portion of the judgment is looked at as a whole therefore, it is apparent that the judge considered the petitioning creditor bound to bring the proceedings in the name of the Official Receiver because that was the condition on which the civil aid certificate had been granted. The petitioning creditor had not asked for leave to bring the proceedings in her own name and there was no discussion of whether, in view of the wording of s 172 of the English Act, she was entitled to bring such proceedings in her own name notwithstanding the fact that the debtor had been made a bankrupt. In my view, therefore, the cited passage is not particularly strong authority for the proposition that once the debtor concerned has been made a bankrupt, proceedings under s 73B can only be initiated by the trustee in bankruptcy.

16 The other authority that was cited to me in support of the proposition put forward by the defendants was an extract from *Halsbury's Laws of England,* vol 18 (4th Ed, 1977). The general rule as to who is entitled to bring such proceedings is stated at para 377 of *Halsbury's* as being any person prejudiced which would include any creditor but not the debtor himself or any person claiming through him. The position in bankruptcy is dealt with at para 383 of the same volume where *Halsbury's* states that "[i]f the debtor has become bankrupt, his trustee in bankruptcy is the proper person to institute the proceedings". Three old English cases are put forward as the basis of this assertion. On examination, they do not state the rule in such emphatic terms. It should be noted also that they were decided under the regime of the legislation that preceded the English Act namely the Statute of 13 Eliz 1571 (c 5), usually called "the Elizabethan Statute". Whilst the Elizabethan Statute declared that fraudulent conveyances should be "clearly and utterly void, frustrate and of none effect" it did not contain any language expressly stating who had the *locus standi* to obtain a declaration to that effect in respect of any particular conveyance.

17 The first of the old cases is *Doe d. Grimsby v Ball* (1843) II M&W 531; 152 ER 916. The issue in this case was whether the assignee of an insolvent debtor could take action to recover land that had been fraudulently conveyed by the debtor. It was argued that he could not because he stepped into the shoes of the debtor and took only those interests that the debtor himself was entitled to. As the debtor himself could not set aside the conveyance on the ground that it was fraudulent, the assignee should not be able to either. This argument was rejected by a bench of four. The ground of the rejection as expressed by Parke B was that the assignee of an insolvent debtor represented the creditors for all purposes and that if any fraud existed in a transaction to which the insolvent was a party, the assignee could take advantage of it to avoid the transaction. He said that a deed that was void against creditors was also void against those who represented the creditors. The case therefore did not state that once there was a bankruptcy, an individual creditor could no longer take such action.

18 The next case cited by *Halsbury's, Ex parte Butters. In re Harrison* (1880) 14 Ch D 265, basically concerned the question whether the Court of Bankruptcy had the jurisdiction to entertain a question arising under the Elizabethan Statute or whether this jurisdiction could only be exercised by the Court of Assizes. It was held that the Court of Bankruptcy had the necessary jurisdiction. In the course of his judgment, James LJ expressed the opinion at 267 that:

> The bankruptcy law puts the trustee in the position of the representative of all the creditors of the bankrupt, and under the statute of Elizabeth creditors have a right to impeach transactions which the bankrupt himself could not impeach. The trustee, therefore, in seeking to set aside the transaction as fraudulent under the statute of Elizabeth is claiming by a higher title than the bankrupt himself, for the bankrupt is not party to the fraud.

Although this statement was obiter, it sets out the rationale of the rule that once the debtor had been made bankrupt, only his trustee could take action under the Elizabethan Statute, *ie*, that the trustee represented all the creditors and action by him would benefit all creditors equally. I point out again that there was no statement in terms in the case that an individual creditor was prohibited from commencing proceedings.

19 The final case quoted is *Ex parte Russell. In re Butterworth* (1882) 19 Ch D 588. The issue in that case was whether a settlement made three years before the debtor in question voluntarily filed a liquidation petition could be set aside under the Elizabethan Statute. It was held that the settlement was void as against the trustee in bankruptcy. The action had been started by the trustee and no question of the right of any individual creditor to bring the action arose. The case therefore has no bearing on the proposition one way or another.

20 From this review, it appears to me that the authorities cited were concerned to establish that under the Elizabethan Statute, the trustee in bankruptcy had as much right as any individual creditor to avoid fraudulent conveyances. Whilst these cases did not go so far as to state that an individual creditor had no right whatsoever to take such action, it certainly does appear from cases like *Ex parte Kearsley. In Re Genese* (1886) 17 QBD 1 that in the late 19th century, individual creditors who wanted to take recovery action had to apply to court for leave to commence action in the name of the trustee. In the *Genese* case Cave J stated at 3:

> Now the proper course for creditors, if the trustee refuses to act, or to allow his name to be used, is for them to come to the Court and apply for leave to use the name of the trustee on giving him an indemnity against costs. On such an application the Court will consider the nature of the proposed proceedings, and, if satisfied that there are prima facie grounds for allowing the creditors to proceed, will grant the application. But it is monstrous that any creditor, however small the amount of his debt, who is dissatisfied with the conduct of the trustee, should be at liberty to launch a motion like this.

The action that drew the ire of Cave J was an application by minority creditors in their own names for a declaration that a settlement made by the bankrupt was void as against the trustee in bankruptcy.

21 It is also, however, clear from the *Genese* case that if a trustee was not willing to act to recover property under the Elizabethan Statute, the creditors had the recourse of applying to the court for leave to start the necessary proceedings in his name. In fact, *Halsbury's* (at para 383) uses that case as authority for the statement that a creditor may institute proceedings if the trustee in bankruptcy refuses to act.

22 The cases discussed above are all cases that arose from the application of the Elizabethan Statute. We now have different legislation and thus the position is not necessarily the same now as it was previously. As I have said, the Elizabethan Statute does not state who is entitled to institute proceedings under it. Section 73B of our Act (echoing s 172 of the English Act) is, however, explicit on the issue. Anyone who has been prejudiced by a fraudulent conveyance can institute proceedings to avoid it. The drafters of the section must have been aware that the English courts had limited the rights of individual creditors to invoke the Elizabethan Statute once the debtor became a bankrupt.

Yet, when they enunciated in s 73B who was able to invoke the statutory protection, they did not differentiate between the situation of a bankrupt debtor and the situation of a non-bankrupt debtor. On the face of the statute, the rights of the creditor to avoid a fraudulent transfer are not affected by the status of the debtor. There is no ambiguity in the language. There is no provision in any other statute, including the Bankruptcy Act, that vests the power to avoid a fraudulent conveyance solely in the trustee in bankruptcy. I do not see any good reason why the courts should write a limitation into the statute which is not specifically provided for. There would, in my view, be no danger to the general body of creditors from allowing one of the creditors to take such action because, if the action succeeds, the property that is recovered or its proceeds must go to the estate of the bankrupt to be distributed by the trustee in bankruptcy and cannot be retained by the creditor who started the action.

23 I am therefore of the view that as long as an individual creditor does not seek to keep the fruits of his action for himself alone, he is entitled to commence action under s 73B notwithstanding that the debtor who executed the alleged fraudulent conveyance has since been made a bankrupt. It is my view therefore that Mdm Wong was entitled to bring this action in her own name.

24 In any event, I grant Mdm Wong leave to bring the action in her own name. It is clear from the recital of the facts that this is an appropriate case to make such an order. The creditors' committee was and is run by persons who had an interest that was adverse to the contemplated proceedings. The former trustee in bankruptcy did nothing to commence such proceedings and resigned on short notice. The Official Assignee, who succeeded Mr Loke as trustee in bankruptcy, was kept fully informed of the status and contents of the action and raised no objection thereto. The defendants did not raise the objection to Mdm Wong's *locus standi* until shortly before the trial and this would seem to be an attempt to delay proceedings. Finally, I note from *Overseas Union Bank v Lew Keh Lam* [1999] 3 SLR 393, the court can make orders that have retrospective effect. This order must have retrospective effect so as to prevent injustice and delay.

Conclusion

25 The defendants' application is therefore dismissed with costs. To the extent necessary, I grant Mdm Wong leave to bring these proceedings against the defendants.