Re Fan Kow Hin
[2018] SGHC 257

Case Number : Originating Summons (Bankruptcy) No 479 of 2017, (Summons No 2898 of 2018)

Decision Date : 16 November 2018

Tribunal/Court : High Court

Coram : Aedit Abdullah J

Counsel Name(s) : Andrew Chan, Alexander Yeo, Chew Jing Wei (Allen & Gledhill LLP) for the applicant; David Chan, Cai Chengying, Shirin Swah (Shook Lin & Bok LLP) for the non-parties.

Parties : Fan Kow Hin

Insolvency Law – Bankruptcy – Third-party litigation funding

16 November 2018 Judgment reserved.

Aedit Abdullah J:

Introduction

1 By Summons No 2898 of 2018, the trustees in bankruptcy seek the court's sanction of a funding arrangement in respect of litigation commenced on behalf of the estate ("the funding application"). The funding application is opposed by the defendants to that litigation. The determination of the application turns on a consideration of the provisions of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("Bankruptcy Act"), the English decision in *In re Oasis Merchandising Services Ltd* [1998] Ch 170 ("*Oasis*") (which was followed by the Singapore Court of Appeal in *Neo Corp Pte Ltd (in liquidation) v Neocorp Innovations Pte Ltd* [2006] 2 SLR(R) 717 ("*Neocorp*")), and the effect of the 2017 amendments to the Civil Law Act (Cap 43, 1999 Rev Ed) ("Civil Law Act"), which permits third-party litigation funding in respect of international arbitration, amongst other forms of dispute resolution.

Background

2 The trustees of the bankruptcy estate of Fan Kow Hin ("the Trustees") are proceeding with a suit, High Court Suit No 1078 of 2017, against various defendants, seeking, amongst other things, the avoidance of transactions at an undervalue and unfair preferences under the relevant provisions of the Bankruptcy Act (referred to generally and specifically as "the clawback claims"). The applicant Trustees now seek the Court's approval of an agreement assigning and selling a proportion of the benefits or proceeds of the clawback claims. The defendants to the clawback claims were present at the hearing of the funding application as non-parties ("the Non-Parties"). By consent, they were allowed to make submissions albeit only on the specific questions of whether the fruits of insolvency clawback claims may be assigned and whether such an assignment would be champertous or an abuse of process. The merits of the funding application are to be heard separately, without the involvement of the Non-Parties.

Trustees' case

3 The Trustees argued that the assignment of the fruits of an insolvency clawback claim is

permitted by law. First, the Trustees submit that the English decision of *Oasis* should not have been followed, as unlike the statutory regime prevailing in England at the time *Oasis* was decided, s 102(4) of our Bankruptcy Act expressly provides that the proceeds of clawback claims under ss 98 or 99 shall be comprised in the bankrupt's estate. These proceeds can be alienated. Second, the courts in Singapore should adopt the position in Australia, which permits the assignment of the proceeds of statutory claims. Third, the assignment proposed in the present case is not champertous or an abuse of process. Fourth, the proceeds are capable of assignment at law.

Non-Parties' case

4 As the 2017 amendments to the Civil Law Act only permit third-party funding for international arbitration and related court and mediation proceedings, other forms of third-party funding remained subject to the rule against maintenance and champerty. *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 ("*Vanguard*"), in which it was held that maintenance and champerty did not apply to a liquidator's exercise of the power of sale under s 272(2)(*c*) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"), had been superseded by the 2017 amendments to the Civil Law Act, which allows third-party funding only in respect of international arbitration and related court and mediation proceedings. Second, the clawback claims arose out of rights personal to the Trustees – rights personal to liquidators are not covered by the exception in *Vanguard* as they are not the property of the company and cannot be assigned. Third, any development in the law on assignment of the proceeds of litigation should be left to Parliament. Last, should the court be minded to permit the assignment, the criteria laid down in *Vanguard* should be applied in determining whether such an assignment would be champertous.

The decision

5 The application is allowed. Under the Bankruptcy Act, the fruits of the litigation are property of the estate, and may be assigned by the trustees: see s 102(4) of the Bankruptcy Act. Even if it were not, such an assignment is not contrary to public policy as being champertous or in maintenance as it is aimed at providing access to justice in the context of an insolvency, in which no other option for litigation funding would be viable.

Analysis

Whether the proceeds of clawback claims constitute property of the bankrupt's estate under the Bankruptcy Act

6 The question of whether the proceeds of clawback claims under the Bankruptcy Act form part of the bankrupt's estate turns on the interpretation of the statutory framework governing such claims under the Bankruptcy Act. On a proper construction of those provisions, I am satisfied that such proceeds are indeed property of the estate.

7 The parties' submissions centre on ss 78(1)(*a*) and 102(4) of the Bankruptcy Act, both of which deal with the composition of the bankruptcy estate:

> **Description of bankrupt's property divisible among creditors**
>
> **78.**—(1) The property of the bankrupt divisible among his creditors (referred to in this Act as the bankrupt's estate) shall comprise —
>
> (*a*) all such property as belongs to or is vested in the bankrupt at the commencement of

his bankruptcy *or is acquired by or devolves on him before his discharge*…

…

Orders under sections 98 and 99

102.—(1) Without prejudice to the generality of sections 98(2) and 99(2), an order under either of those sections with respect to a transaction or preference entered into or given by an individual who is subsequently adjudged bankrupt may, subject to this section —

(*a*) require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the Official Assignee;

…

(4) *Any sums required to be paid to the Official Assignee in accordance with an order under section 98 or 99 shall be comprised in the bankrupt's estate.*

[emphasis added]

8 The Trustees' argument is that the proceeds of clawback claims are property of the bankrupt which may be alienated under the Bankruptcy Act by law; as such, no question of champerty or maintenance arises. The proceeds of claims for undue preferences and undervalue transactions under ss 98 and 99 comprise part of the bankrupt's estate under s 102(4) of the Bankruptcy Act, and are thus available for division amongst the creditors under s 78(1)(*a*) of that same Act (which in fact expressly provides that after-acquired property also forms part of the bankrupt's estate). The Non-Parties referred to the decision of the High Court in *Manharlal Trikamdas Mody and another v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 ("*Sumikin*"), where it was held that the right to enforce statutory moratoria was personal to the Official Assignee and therefore incapable of assignment at law (at [32], [54]–[55]). That case can be distinguished as it was concerned only with the assignment of rights to enforce moratoria *under ss 76 and 105 of the Bankruptcy Act*, and not the assignment of the proceeds of clawback claims. A further distinction between *Sumikin* and the present case is that what is sought to be assigned is not the *right* to sue under ss 98 and 99, but only the *proceeds* of any successful suit thereunder. Such proceeds cannot be said to be *rights* personal to the trustees in bankruptcy. Rather, they are assets forming part of the bankruptcy estate. Likewise, *Neocorp*, the Trustees say, is also distinguishable because it did not concern the assignment of the *fruits* of litigation, but rather the *right* to avoid transactions tainted with unfair preference; and in any case involved a corporate insolvency under the Companies Act which, unlike the Bankruptcy Act, does not expressly define sums recovered under ss 98 and 99 as part of the bankruptcy estate. Also, *Neocorp* itself appeared to suggest that the proceeds from a transaction unwound under ss 98 or 99 would be a general asset of the company (at [25]).

9 The Non-Parties contend that nothing in the Bankruptcy Act permits the assignment of the fruits of litigation as the Trustees' claims arise out of rights personal to the Trustees which could not be said to form part of the bankruptcy estate. They further argue that the statutory provisions relied upon by the Trustees do not assist, as s 102(4) is predicated on orders under ss 98 or 99 first having been made, whereas no such orders were made here.

10 Section 98 governs transactions at an undervalue; s 98(2) allows the court, upon application by the Official Assignee, to make an order restoring parties to the *status quo ante*; *ie*, the position that would have been had the bankrupt not entered into the transactions at an undervalue. Section

99 provides that similar orders may be made in respect of unfair preferences given. Section 102, which is referred to in ss 98 and 99, is concerned with the orders that are made under ss 98 and 99. It is against that context that s 102(4) then provides that "[a]ny sums required to be paid to the Official Assignee in accordance with an order under section 98 or 99 shall be comprised in the bankrupt's estate".

11 In my view, the plain words of s 102(4) of the Bankruptcy Act clearly contemplate that the proceeds from clawback claims under ss 98 and 99 would be part of the estate, which, as s 78(1) provides, is property that may be divided among the creditors. The fact that no order has been made under ss 98 or 99 is immaterial. I accept that the insolvency clawback proceeds contemplated by s 102(4) would only obtain after an order is made pursuant to ss 98 or 99. However, that does not detract from the Trustees' point that *if and when* such orders are made, the proceeds obtained therefrom would form part of the bankruptcy estate under s 102(4) of the Bankruptcy Act. I thus do not accept the arguments of the non-parties that it is necessary for an order under ss 98 and 99 to first have been made. What is material is that ss 78(1)(*a*) and 102(4) make it clear that even property acquired post-bankruptcy can be property of the estate.

***The English decision in* Oasis**

12 The primary obstacle in the way of the Trustees' proposed course of action is the English case of *Oasis*. That case is authority for the proposition that fruits of a cause of action arising after insolvency are property recoverable only by the liquidator under statutorily-conferred powers, and therefore does not form part of the company's property in the liquidation. Thus the alienation of such proceeds of litigation as a means of funding that same litigation would be champertous and an abuse of process.

13 The Trustees argue that *Oasis* should not be followed as the distinction drawn under English law between property acquired pre- and post-bankruptcy is not recognised in Singapore law, and in any case, was doubted and impliedly overruled by the House of Lords in *Buchler and another v Talbot and others* [2004] 2 AC 298 ("*Buchler*"), and is therefore no longer good law. They further argue that *Oasis* only purported to apply to corporate insolvencies. The Trustees argues that instead, Australian authorities departing from *Oasis* should be followed.

14 The Non-Parties point out that *Oasis* was followed by the Singapore Court of Appeal in *Neocorp* and the High Court in *Sumikin*. In respect of the Australian cases relied upon by the Trustees, these can be distinguished as the Australian corporations law provisions allow the recovery losses or damages resulting from insolvency as a "debt due to the company". While the Small Business, Enterprise and Employment Act 2015 (c 26) (UK) now expressly provides for the assignment of causes of action or rights personal to the liquidator, the Non-Parties argue that *Oasis* still applies in respect of bankruptcy.

15 I accept that *Oasis* does not stand for the proposition that proceeds assignable under the Bankruptcy Act would not run afoul of the rules against maintenance and champerty. Rather, *Oasis* concerned the question of whether the agreement was champertous. In that case, the agreement – to assign the fruits of an action commenced pursuant to a statutory power conferred on the liquidator personally to sue in respect of alleged wrongful trading by the directors – was made under a purported exercise of the liquidators' statutory power to sell "the company's property". In my view, the legal principles to be extracted from *Oasis* are as follows:

(a) An assignment of the fruits of litigation operates in equity and if there is consideration will be valid, and will not offend the rule against maintenance or champerty, if the assignee has no

right to influence the course of proceedings (at 177, 186).

(b) There is a distinction between property of the company as at the time of the commencement of the liquidation; and those that arise after the liquidation and recoverable by the liquidator under statutory powers. The latter is not part of the company's property (at 180–181).

(c) The English statutory provisions did not permit the liquidator to enter into a champertous agreement (at 187).

16 In the present case, *Oasis* is invoked as authority both for the argument that the proposed agreement here offends the policy against champertous agreements, as well as for the argument that the Trustees have no statutory power (which would protect the transaction against all allegations of being champertous) to sell the fruits of the litigation, as those proceeds were not an asset of the estate but a right vested in the Trustees personally.

17 It is clear that *Oasis* is authority for the distinction between property of the company accrued *before* the liquidation and property subsequently obtained *after* the commencement of the liquidation by the exercise of rights vested in the liquidator. While there is criticism of this distinction, it is not open to me to go behind the Singapore Court of Appeal's endorsement of *Oasis* in *Neocorp* (at [24]). In the context of bankruptcy, *Oasis* was followed by the Singapore High Court in *Sumikin*, which came to the conclusion that the rights under s 76(1) (relating to the statutory moratorium on actions against the person or property of the bankrupt commenced by creditors in respect of a debt), and s 105 (relating to the restriction of the rights of a creditor against the Official Assignee under execution or attachment) are personal to the Official Assignee and not capable of being assigned (*Sumikin* at [54]). On the facts of that case, the purported assignment of a cause of action was held to be ineffective.

18 A point of difference from the present case was that *Sumikin* was not concerned at all with third-party funding insolvency litigation; rather, it looked at the question of who should pursue an action. Thus, the similar but separate question of whether the fruits of the litigation could be considered the property of the bankruptcy estate was not directly engaged. Section 102(4) of the Bankruptcy Act was not examined. In any event, in light of my interpretation of the Bankruptcy Act, I come to the conclusion that *Oasis* does not apply to Singapore bankruptcies, and, to the extent that *Sumikin* says otherwise, would respectfully decline to follow *Sumikin* in this regard. The distinction drawn in *Oasis* between property acquired pre- and post-insolvency cannot apply to bankruptcies in light of the express provision to the contrary in s 102(4) of the Bankruptcy Act. I did not see anything in *Neocorp* which would militate against the conclusion that the distinction in *Oasis* does not apply to bankruptcies. *Neocorp* was not concerned with the position of an individual bankrupt's estate under the Bankruptcy Act at all.

19 That said, I do not think that the Trustees' arguments that *Buchler* has impliedly overruled *Oasis* takes them very far. *Buchler* did not concern third-party funding of insolvency litigation, but rather the funding of the liquidation itself. In *Buchler*, the liquidators claimed that their remuneration should be paid out of the assets of the company in priority to the claims of creditors under a debenture secured by a floating charge. The House of Lords observed that when a company was both in administrative receivership and liquidation, its former assets are comprised in two separate funds: those subject to the floating charge belonged to the debenture holders, and those that were not subject to the floating charge belonged to the unsecured creditors. The Trustees relied on academic commentary surmising that office-holder recoveries (*ie* funds recovered by liquidators and bankruptcy trustees) might be understood as falling within the separate liquidators' fund (*ie*, the fund available to

the unsecured creditors), in which case *Buchler* would have impliedly overruled *Oasis* to the extent that such office-holder recoveries may be considered "property of the company" within the power of sale . It may be that this was what the House of Lords may have had at the back of their Lordships' minds, but it was not so expressed in *Buchler* itself. In my view, the commentary was at best a speculation on the possible implications of the ruling in *Buchler*, and it would go too far to say that *Oasis* had thereby been overruled.

20 Additionally, the Trustees referred to Australian case law which took a contrary line even in corporate insolvency cases. In a number of cases including *Movitor Pty Ltd (Receiver and manager appointed) (In liquidation) v Anthony Milton Sims* [1996] FCA 1320 ("*Movitor*"), *Elfic Limited and others v Macks and others* [2001] QCA 219 and *Cook (Liquidator), in the matter of Italiano Family Fruit Company Pty Ltd (in liq) v Italiano Family Fruit Company Pty Ltd (in liq)* [2010] FCA 1355, the proceeds of an action by an insolvent company were regarded as part of the general assets of the company, and *Oasis* was not followed. I do not consider it open to me to adopt these given the endorsement of *Oasis* by the Singapore Court of Appeal in *Neocorp*. I do note that in *Vanguard* there was consideration of both *Oasis* and *Movitor* but this was only in the context of the question whether the exercise of the statutory power of sale under s 272(2)(*c*) of the Companies Act would attract the application of the rules against maintenance and champerty.

The Proposed assignment did not amount to maintenance or champerty

21 The Trustees argue that the proposed agreement is not champertous as there would be no surrender of control over the legal proceedings to the assignees. They argue that *Vanguard* is authority for the proposition that the policy of promoting access to justice calls for such agreements to be given effect.

22 In my view, the proposed agreement is not champertous so long as the assignee has no control over the conduct of proceedings. *Vanguard* recognised as early as in 2015 that the ends of justice would be served by allowing third-party litigation funding, and laid down a number of criteria under which the assignment of a bare cause of action or the fruits of such actions would not offend the rules against champerty and maintenance (at [43]).

23 The torts of champerty and maintenance (as well as their respective common law offences) were abolished through the Criminal Law Act 1967 (c 58) (UK), though as noted above, their legal significance as an aspect of public policy still lives on as exemplified by *Oasis*. The position in Singapore is now similar, with the abolishment in 2017 of liability in tort for maintenance or champerty via s 5A of the Civil Law Act, save that the abolition did not affect any rule of law as to when a contract is treated as being contrary to public policy or illegal.

24 Even before the amendments, the Court of Appeal in *Lim Lie Hoa and another v Ong Jane Rebecca* [1997] 1 SLR(R) 775 ("*Lim Lie Hoa*"), had already held that an assignment of a cause of action may not be champertous if it is ancillary to a transfer of property or there is genuine interest in the assignment. Relying on, *inter alia*, *Lim Lie Hoa*, English cases such as *R (Factortame Ltd) v Secretary of State for Transport (No 8)* [2003] QB 381, as well as cases from other jurisdictions such as New South Wales and Hong Kong, the High Court in *Vanguard* held that the doctrine of maintenance and champerty has no application to the exercise of the statutory power of sale under s 272(2)(*c*) of the Companies Act, which permitted the sale of a cause of action as well as the proceeds from a successful claim upon that cause of action. In sum, an assignment of a cause of action or its fruits would be held valid if it was incidental to the transfer of property; or the assignee has a legitimate interest in the outcome of the litigation; or there is no realistic possibility that the administration of justice may suffer as a result of the assignment (*Lim Lie Hoa* at [32], [37] and

[47]).

25 It is thus apparent that *Vanguard* took a broad approach in considering whether a contract offended public policy for being champertous or in maintenance. In my view, a similar approach applies in respect of bankruptcy proceedings, given my conclusions on the provisions of the Bankruptcy Act above. So long as the criteria laid down in *Vanguard* are met, an assignment or sale of the proceeds of litigation by the Trustees would not run afoul of public policy.

The 2017 amendments to the Civil Law Act do not preclude common law developments

26 The Non-Parties argue that the amendments to the Civil Law Act allowing for third-party funding in respect of certain prescribed types of proceedings circumscribes the permissibility of third-party funding for other non-prescribed types of proceedings. In sum, the 2017 amendments to the Civil Law Act restrict the ambit of maintenance and champerty, permitting third-party funding in respect of international arbitrations. Section 5A, as noted above, abolished maintenance and champerty as torts, while preserving these doctrines as grounds for vitiation as being contrary to public policy or illegality:

> **Abolition of tort of maintenance and champerty**
>
> **5A.**—(1) It is declared that no person is, under the law of Singapore, liable in tort for any conduct on account of its being maintenance or champerty as known to the common law.
>
> (2) Subject to section 5B, the abolition of civil liability under the law of Singapore for maintenance and champerty does not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

27 Section 5B prescribes a regime for third-party funding, applicable only to the prescribed dispute resolution proceedings:

> **Validity of certain contracts for funding of claims**
>
> **5B.**—(1) This section applies only in relation to prescribed dispute resolution proceedings.
>
> (2) A contract under which a qualifying Third-Party Funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings is not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty.
>
> …

Under the Civil Law (Third-Party Funding) Regulations 2017 (No S 68/2017), s 5B applies only in respect of international arbitration proceedings, or related court or mediation proceedings.

28 The Non-Parties argue that development of third-party funding should be left to Parliament, citing in support the *Report of the Law Reform Committee on Litigation Funding in Insolvency Cases* (February 2014) (Chairman: Ashok Kumar) ("the Report"), in which it was said that codification is recommended, and removes uncertainties that would arise from case law development of provisions not intended to govern litigation funding (at paras 63–66).

29 That Report is not determinative of the issue: it is certainly not binding, and it preceded the High Court's seminal decision in *Vanguard*. As the Non-Parties themselves acknowledged, the Report

has not in fact been adopted by Parliament. It is thus of little assistance.

30 The Non-Parties also refer to statements made by the Senior Minister of State for Law in the Second Reading speech explaining the 2017 amendments which introduced third-party litigation financing for international arbitration, indicating that third-party funding for such cases would be proceeded with as a test case, with a view to extension to other types of proceedings in the future (*Singapore Parliamentary Debates, Official Report* (10 January 2017) vol 94). The Non-Parties then point to the absence of any similar legislative provision in respect of third-party funding for insolvency litigation, and argue that the development of the law – specifically, whether and when third-party funding should be extended to insolvency litigation – should be left to Parliament.

31 In my view, the absence of express parliamentary provision does not *ipso facto* preclude the courts from developing the law as needed; the flexible and responsive development of the law is one of the great merits of the common law system. The absence of any legislation could be the product of many factors, including competing legislative priorities and the (non-)availability of parliamentary time. It does not mean that development in a particular area by the courts is to be closed off. In my view, what can be discerned from the parliamentary debates on the 2017 amendments was that Parliament had left the issue of the extent to which the rule against maintenance and champerty continued to operate to the courts.

32 Had the legislature so wished, it could and would have statutorily overruled *Vanguard*. The parliamentary debates clearly show that the legislature was aware of *Vanguard*; that decision was referred to by one of the Members of Parliament in a question posed to the Senior Minister of State. The Senior Minister of State for Law said the following in reply:

> As mentioned, we are first proceeding with third-party funding in the context of international arbitration and related proceedings. This is because we want to have the framework tested in a limited sphere, where those involved are typically well-advised, commercially sophisticated and better able to bear the reduction in damages. If the framework works well, as and when appropriate, the prescribed categories of proceedings may be expanded.

The Non-Parties argue since Parliament was clearly aware of the decision in *Vanguard*, and yet decided to extend third-party litigation funding only to international arbitration, this indicated that such funding in insolvency would still be in maintenance and champertous, and that *Vanguard* was rendered obsolete. According to the Non-Parties, the parliamentary debates reflect Parliament's intent for a very limited expansion of third-party funding, such that the proposed assignment, not falling within the ambit of that limited extension, would still be tainted by the doctrine of maintenance and champerty.

33 It is not appropriate to refer to a judgment as being "obsolete"; a judgment stands unless it is overruled, whether by an appellate court or by legislation. *Vanguard* has not been so overruled, and remains good law. While it may be that there was some reference in the debate to *Vanguard* or at least its effect, nothing in the passage of the bill or the explanatory statement points to a statutory overruling of that case, even impliedly. Implied overruling only arises when a particular decision is incompatible with the statutory provision. That is not the case here, as s 5A leaves the scope of the doctrine of maintenance and champerty to be determined by the courts in the development of the common law.

34 As it stands, the doctrine of maintenance and champerty may vitiate contracts as a matter of public policy so as to prevent litigation from being driven not by the objective of resolving a genuine dispute between the parties, but by a desire to profit from the process itself. Of course, third-party

funders are not in it for purely altruistic reasons, and a profit motive is to be expected. In my view, that profit motive is not objectionable *per se*. What cannot be countenanced is the *sole* focus on such profit to the detriment of the administration of justice. That public interest is safeguarded by the criteria identified in *Vanguard*, which go towards ensuring that is the third-party has a sufficient interest before such funding would be allowed.

35 I am reinforced in this approach by the decision in *Re Trikomsel Pte Ltd (In compulsory liqudation) and another*, High Court Originating Summons No 989 of 2018, in which the court made a declaration that a funding agreement did not offend the doctrine of maintenance and champerty. No written decision has to date been issued for that case.

Conclusion

36 In the circumstances, therefore, I allow the Trustees' application. I will hear the Trustees on the merits of the funding application itself, without the involvement of the Non-Parties. Further directions will be given for this hearing, as well as for arguments on costs orders. Time for any appeal application relating to the present case is extended until two weeks after costs are determined or other order of court.