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

[2021] SGHC 65

Originating Summons No 1006 of 2020

Between

Sutherland Hugh David Brodie

… *Applicant*

And

(1) Official Assignee
(2) Oversea-Chinese Banking Corporation Limited

… *Respondents*

JUDGMENT

[Choses In Action] — [Assignment]
[Equity] — [Estoppel] — [Proprietary estoppel]
[Insolvency Law] — [Bankruptcy]
[Trusts] — [Constructive trusts]

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v
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19 March 2021 Judgment reserved.

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Introduction

1 No good deed goes unpunished, or so the proverb goes.

2 From March to September 2018 Mr Sutherland Hugh David Brodie ("Mr Sutherland"), the applicant in these proceedings, did one such good deed for his friends, Mr Balbeer Singh Mangat ("Mr Mangat") and his wife, Mdm Sirjit Gill (collectively, the "Debtors"). At their request, he made payments totalling $414,000 to the second respondent, Oversea-Chinese Banking Corporation ("OCBC"), to repay instalments owing under OCBC's mortgage over the Debtors' home at Cable Road (the "Property"). The idea was that if OCBC was persuaded to hold off on enforcing their rights, the Debtors could sell the Property on the open market and obtain a better price than in a mortgagee sale. A higher price would benefit the unsecured creditors, though it

would not completely satisfy the Debtors' very considerable debts. From the start of his involvement, in mid-March 2018, Mr Sutherland expected to be repaid from the surplus sale proceeds. This would be after OCBC was paid, but it would be ahead of the unsecured creditors. All he wanted was to be repaid exactly what he himself paid. He did not ask for a single cent of interest.

3 This arrangement was later recorded in an assignment agreement, titled "Assignment of Sales Proceeds" and dated 18 September 2018 (the "Assignment Agreement").[1]

4 Unfortunately, the Debtors were made bankrupt on 25 October 2018. This was before they could sell the Property. There was then a mortgagee sale, which was completed on 21 October 2020. It did indeed generate a surplus of about $1 million over what was owed to OCBC.[2] These proceeds of sale are the Debtors' main asset.

5 The Official Assignee, who is the first respondent in these proceedings, took the position that Mr Sutherland could not rely on the Assignment Agreement because it was entered into only after the bankruptcy application against the Debtors had been filed on 11 May 2018. The Official Assignee considered that the Assignment Agreement was therefore void under s 77(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) (the "BA"). Mr Sutherland was thus only an unsecured creditor and would only rank rateably with the other unsecured creditors. Instead of getting back what he had paid in full, he would receive a small fraction of it.

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1 Affidavit of Applicant dated 9 October 2020 ("SHDB-1"), pp 259–273.

2 Affidavit of Allen Lye Xin Ren dated 15 December 2020, [34].

6 Mr Sutherland did not agree. He brought these proceedings seeking ratification of the Assignment Agreement under s 77(1) of the BA. This provision now appears as s 328(1) of the Insolvency, Restructuring and Dissolution Act 2018 (No 40 of 2018) (the "IRDA"). In the alternative, he relied on what transpired in March 2018, shortly before his first advance to OCBC on the Debtors' behalf (which was before the bankruptcy application was filed), as giving rise to a common intention constructive trust or a proprietary estoppel in respect of the Property. At the hearing, he also argued as an alternative that there was an equitable assignment of the balance sale proceeds (*ie*, what remained after OCBC had been repaid) at that earlier time.

7 The questions for the court are as follows: (a) whether the Assignment Agreement should be ratified; and (b) whether what was discussed between Mr Sutherland and Mr Mangat on 16 March 2018 (the "16 March 2018 meeting") and recorded in a letter from the Debtors to Mr Sutherland dated 17 March 2018 effected an equitable assignment, or gave rise to a common intention constructive trust or a proprietary estoppel.

Outline of facts

8 By late 2017, the Debtors were beset by claims from creditors under guarantees they had given in respect of loans extended to a company called FTMS Holdings (S) Pte Ltd. The Debtors made a proposal for a joint voluntary arrangement on 10 November 2017.[3] Apart from seeking to avoid bankruptcy, they hoped to achieve a higher recovery for their creditors than under a bankruptcy scenario, prevent a scramble for assets and maintain Mr Mangat's chartered accountant licence. A key part of the proposal was to sell the Property

[3] SHDB-1, pp 25–55.

by 31 December 2018. They anticipated a sale price of $25 million that would allow for a surplus of about $8 million for the unsecured creditors.[4]

9 OCBC was naturally looking to its security in the Property. By a letter dated 13 March 2018, OCBC notified the Debtors that it would proceed with a writ of possession unless the Debtors adhered to the repayment schedule.[5] The repayment schedule had been set out in a letter dated 1 February 2018.[6]

10 Against this background, a creditors' meeting was held on 15 March 2018.[7] The chairman of the meeting (the "Chairman") was a professional insolvency practitioner who was the nominee for the intended voluntary arrangement. Towards the end of the meeting, he raised a new point. He informed the creditors at the meeting that a third party was prepared to pay the monthly instalments of $100,000 to OCBC. The aim was to obtain OCBC's indulgence for the Property to be sold by the end of 2018. The unnamed third party was Mr Sutherland. The Chairman noted that under this arrangement, the third party would be paid in priority to the unsecured creditors from the sale proceeds. The Chairman took the view that this would benefit the unsecured creditors, provided that the third party did not charge interest. Interest was already accruing on the outstanding mortgage repayments in accordance with the terms of the OCBC mortgage.

11 By this stage of the creditors' meeting, some of the creditors had already left. It was too late to modify the joint proposal to include this newly suggested arrangement. So, no vote was taken on it. However, one creditor is noted as

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4 SHDB-1, p 52.

5 SHDB-1, p 23.

6 SHDB-1, pp 75–76.

7 SHDB-1, pp 56–66.

objecting. He thought that it might amount to an undue preference. The Chairman disagreed with him. The relevant paragraph in the minutes reads:[8]

> Whilst the voting was ongoing, the Chairman informed the meeting that he had just been advised by [Mr Balbeer Singh Mangat] that in respect of the OCBC mortgage loan, a third party was prepared to pay the monthly instalments of S$100,000 on behalf of the Debtors so as to obtain the indulgence from OCBC for the Property to be sold by the end of 2018, instead of a fire sale. Under this arrangement, the third party would like the loan to be ranked in the same position as OCBC and be paid in priority ahead of the unsecured creditors from the sale proceeds. The Chairman was of the view that such an arrangement would be beneficial to the creditors, provided that the third party did not charge interest, as opposed to OCBC where interest would continue to accrue. Mr Kuppanchetti added that this could result in an undue preference. The Chairman informed that he was of the view there should not be an issue of undue preference and that such an arrangement would entail modification to the Joint Proposal. At this juncture, however, as some of the creditors have left after casting their vote, it was not possible to modify the Joint Proposal and the Chairman would record this comment in the minutes of the creditors' meeting.

12 The next day, Mr Sutherland and his business advisor met Mr Mangat. Mr Sutherland described what happened in the following terms:[9]

> We then discussed that in return for my assistance, all monies loaned to Mr Mangat and Mdm Gill will eventually be repaid to me from the sale proceeds of the Property after all outstanding payments to [OCBC] have been made. We also agreed that an assignment agreement will follow in due course. …

13 The Debtors gave the applicant a letter dated 17 March 2018. It read in part:[10]

> As discussed yesterday , [*sic*] we appreciate your assistance on helping us on the March 2018 OCBC instalment as required by the attached letter dated 13 March 2018 from OCBC.

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8 SHDB-1, p 64.

9 SHDB-1, [13].

10 SHDB-1, p 78.

> Please transfer $100,000 into our OCBC account … This transfer will [be] repaid from the proceeds of sale … after OCBC payments as agreed by the VA creditors meeting on 15 March 2018.

14 The letter did not mention that an assignment agreement would follow. On a separate note, it was not accurate to say that the arrangement had been "agreed by the VA creditors meeting", given that no vote had been taken.

15 Mr Sutherland then proceeded to make payments toward the mortgage, the last one being made on 23 October 2018.[11]

16 The Assignment Agreement was only executed on 18 September 2018.[12] Its recital acknowledged the payments made by Mr Sutherland, in respect of the Debtors' OCBC mortgage, prior to that date as well as prospective payments.[13] In relation to all such advances, both past and prospective, Clause 4 set out an assignment of any sale proceeds of the Property that remained after repaying OCBC, up to the amount payable to Mr Sutherland by the Debtors.

17 Clause 4 reads:[14]

> **4.1 Assignment of Sale Agreement**
>
> The Assignors as beneficial owners, and as a continuing security for the payment and discharge of the Liabilities and for the observance and performance by the Assignors of its obligations for the Advances, hereby assigns and agrees to assign absolutely to the Assignee, free from all liens, charges and other encumbrances, all its present and future rights to the proceeds of any payments (up to the sum of equivalent to the Outstanding Amount after deducting the amount payable to the relevant Mortgagee for the redemption in full of the relevant

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11 SHDB-1, [17] and [22].

12 SHDB-1, p 259.

13 SHDB-1, p 260.

14 SHDB-1, pp 263–264.

> Mortgage and (if applicable) any amount payable to the Central Provident Fund Board for the redemption in full of the CPF charge over the Property) which may at any time be received by or payable to it under or in connection with the Sale Agreement, whether on account of any claims, awards and judgments made or given under or in connection with the Sale Agreement or otherwise howsoever.
>
> **4.2 Discharge and Reassignment**
>
> On or after the Final Discharge Date, the Assignee shall, at the request and expense of the Assignors, reassign to the Assignors all the Property, or otherwise discharge the security interest hereby created.

18 "Sale Agreement" was specifically defined to mean "the agreement which is or at any time may be entered into by or on behalf of the Assignors for the sale or disposal of the whole or any part of the Property".[15]

19 Shortly after Mr Sutherland's last payment on 23 October 2018, the bankruptcy order was made against the Debtors on 25 October 2018. The bankruptcy application had been filed on 11 May 2018. The Debtors then voluntarily gave up possession of the Property on 31 December 2018, and it was sold.

Ratification

S 77 of the BA: its scope, its exception and the court's discretion to ratify

20 S 77(1) of the BA provides as follows:

> Where a person is adjudged bankrupt, any disposition of property made by him during the period beginning with the day of the making of the bankruptcy application and ending with the making of the bankruptcy order shall be void except to the extent that such disposition has been made with the consent of, or been subsequently ratified by, the court.

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15 SHDB-1, p 261.

21 The purpose of this provision, which has been retained as s 328(1) of the IRDA, is to preserve the bankrupt's assets for orderly and rateable distribution to the general body of creditors.

22 The Official Assignee took the position that as the Assignment Agreement was only executed after the date on which the bankruptcy application was filed, it was void under s 77 of the BA. The applicant sought the court's ratification of the Assignment Agreement. This was opposed by the Official Assignee.

23 The Official Assignee did however accept that, if ratified, the Assignment Agreement would be binding, and the applicant would be entitled to be paid out of the sale proceeds in priority to the unsecured creditors. The Official Assignee did not address the legal basis for this position, but it is helpful to sketch out the binding effect of the Assignment Agreement in equity, as well as its interaction with s 77(1) of the BA, before considering the application for ratification further.

24 At the time of the Assignment Agreement, the Property had not been sold, and no sale agreement had been executed. The right to claim an interest in sale proceeds arising under a contract not yet in existence is a future chose in action. As the chose in action was not yet in existence, it could not be assigned in law. Equity, however, enforces a promise to assign a future chose in action, so long as the promise is supported by consideration and thus specifically enforceable (Marcus Smith and Nico Leslie, *The Law of Assignment* (Oxford University Press, 3rd Ed, 2018) ("*The Law of Assignment*") at para 2.108). The assignment is completed the moment the property comes into the hands of the assignor. However, the assignment in equity is treated as taking place at the time of the agreement to assign (*Snell's Equity* (John McGhee QC gen ed) (Sweet &

Maxwell, 34th Ed, 2020) at para 3-030; Hugh Beale, *Chitty on Contracts* (Sweet & Maxwell, 32nd Ed, 2015) at [19-033]). This commercially useful outcome rests on the principle that equity treats as done that which ought to be done. In this way, an agreement to assign binds a trustee in bankruptcy if it was formed prior to the making of the bankruptcy application or, if formed post-bankruptcy application, it is ratified under s 77(1) of the BA. The agreement to assign is not just a matter of contract but has acquired the character of an equity. There is, however, one important exception. Some future choses in action will only be earned in the future, meaning that steps will have to be taken to earn them. Where those steps have not been taken prior to bankruptcy, the trustee may choose to disclaim the contracts under which those steps would be taken and so would not be bound by the assignment of the receivables that would be payable under such contracts (*The Law of Assignment* at paras 30.27–30.37). For this reason, the assignment of unearned book debts does not bind a trustee in bankruptcy. But this case is different. The assignor owned the property at the time of the assignment. Even though no sale contract had yet been made, the right to receive sale proceeds from any future sale of that property was already earned, and so any valid agreement to assign would bind the trustee in bankruptcy in equity and would not merely give rise to an unsecured debt.

25 As the Assignment Agreement was formed after the bankruptcy application was made, the operation of equity is, accordingly, subject to the restrictions on the disposition of property under the BA. A future chose in action falls within the definition of property in s 2(1) of the BA. An assignment of that future chose in action would be a disposition within the meaning of s 77(1). Therefore, unless ratified by the court, the Assignment Agreement is void.

26 What then is the test for ratification of a disposition? The first observation to make is that ratification is only necessary if the disposition does

not fall within the exception set out in s 77(3) of the BA (now s 328(3) of the IRDA). That exception, essentially in favour of a good faith purchaser for value without notice of the bankruptcy application, is as follows:

> Nothing in this section shall give a remedy against any person in respect of —
>
> > (*a*) any property or payment which he received from the bankrupt before the commencement of the bankruptcy in good faith, for value and without notice that the bankruptcy application had been made; or
> >
> > (*b*) any interest in property which derives from an interest in respect of which there is, by virtue of this subsection, no remedy.

27 That the possibility of ratification is provided for separately from and in addition to the exception contained in s 77(3) necessarily means that ratification is not limited to transactions that fall within that exception. There may be occasions when ratification is appropriate even though the conditions of the exception are not met. Good faith, notice and value will be relevant when considering ratification, but how important or necessary they are will have to be considered as part of the overall exercise of discretion. Considerations of good faith and notice will figure differently. Transactions may be ratified even though the third party had notice of the bankruptcy application, if it is otherwise fair and just to do so. On the other hand, the absence of good faith would almost certainly rule out a successful application for ratification. The presence of good faith would not in itself be sufficient.

28 Returning to the test for ratification, the starting point is the objective of s 77 of the BA. It is to preserve the bankrupt's assets for orderly and rateable distribution to the general body of creditors. For this reason, the first consideration must be whether ratification promotes this objective or undermines it. A disposition that was, at the time it was made, in the interests of the general pool of creditors fits with the objective of the provision. Such a

disposition may be ratified, if it is otherwise fair and just to do so. In determining what was in the interests of the general pool of creditors, the court should ask whether at the time of the disposition it was likely to benefit the general pool of creditors.

29 The foregoing statement of principle fits with the recognised position concerning validation under the former s 259 of the Companies Act (Cap 50, 2006 Rev Ed) of dispositions made by a company after commencement of winding up. Both parties referred to *Centaurea International Pte Ltd (in liquidation) v Citus Trading Pte Ltd* [2016] SGHC 264. Steven Chong J (as he then was), at [48] of that decision, opined that "[t]he proper and … just approach is to focus the inquiry at the time of the payment whether the disposition is *likely* to benefit the creditors" [emphasis in original].

Parties' arguments on ratification

30 The applicant and the Official Assignee took contrary positions on the purpose and likely benefit of the Assignment Agreement.

31 The applicant stressed that the Assignment Agreement followed and formalised what had been happening since March 2018. He made the mortgage instalments to help the Debtors avoid a fire sale of the Property. He expected to be repaid from the eventual proceeds of sale ahead of the unsecured creditors. He helped the Debtors openly. The bankrupts' nominee informed the unsecured creditors of this course of action at the creditors' meeting on 15 March 2018. The applicant's case for ratification was summarised by him as follows:[16]

> In any case, I wish to state that my intentions in rendering financial assistance to Mr Mangat and Mdm Gill have always been honourable. I emphasize that I had so readily offered my

[16] Affidavit of Applicant dated 15 January 2021, [39].

> help to prevent a fire sale of the Property in order to safeguard the Property for the benefit of the creditors as a whole out of good faith and not due to any self-interest. I verily believe that my actions had the following positive effect: -
>
> (a) The Property was not sold by [OCBC] in a fire sale;
>
> (b) The Property was eventually sold for a higher value;
>
> (c) The amount which Mr Mangat and Mdm Gill owed to [OCBC] under the Mortgage of the Property was reduced, thus reducing the amount of interest accrued; and
>
> (d) After staving off the fire sale, Mr Mangat was able to engage in further negotiations with [OCBC], which resulted in [OCBC's] waiver of the amount of $450,000.00 in penalties. This amount was therefore preserved for the benefit of the creditors as a whole, and had a positive effect on Mr Mangat and Mdm Gill's bankruptcy estates.

32 The Official Assignee by contrast sought to distance and disconnect the Assignment Agreement from the earlier payments that the applicant had made. According to the Official Assignee, if there was any benefit to the general body of creditors, it came from the earlier payment of the mortgage instalments. Further, the Assignment Agreement was entered into "only at a very late stage".[17] Moreover, any such benefit was speculative, as it was only an assumption that there would have been a "fire sale" or that an earlier sale would have resulted in a lower price.[18]

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17 Official Assignee's written submissions, [60].

18 Official Assignee's written submissions, [61].

Discussion on ratification

33 Given that $361,000 of the $414,000 advanced by the applicant was provided by him prior to the Assignment Agreement,[19] it is important to deal first with whether it is appropriate to have regard to events prior to the disposition. In my view, there is no blanket rule that excludes prior events from consideration. Whether they should factor into the exercise of the discretion depends on how they relate to the later disposition. The applicant stresses that even before the first advance was made, there was discussion that an assignment agreement would follow.[20] An assignment agreement was, on this submission, a formality that was already in contemplation when the first advance was made. The Official Assignee by contrast suggests that there was no intention back then to execute any assignment: if that had indeed been the intention then the Assignment Agreement would have been signed much earlier. Instead, the Official Assignee suggests that the original intention was simply to make unsecured loans such that the entry into the Assignment Agreement was "probably a belated attempt… to obtain a form of security".[21]

34 I am of the view that prior events that were in contemplation of the later disposition would be relevant to whether the disposition should be ratified. I accept that the applicant only made the first and subsequent advances because he expected that an assignment agreement would follow so that he would be repaid from the sale proceeds of the Property ahead of the unsecured creditors (the "expectation"). First of all, this is what the applicant himself says in describing what was said at the 16 March 2018 meeting he had with Mr

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19 SHDB-1, [17].

20 SHDB-1, [13].

21 Official Assignee's written submissions, [57].

Mangat.[22] Secondly, the applicant's expectation is corroborated by the evidence of his business adviser.[23] Thirdly, the expectation fits the contemporaneous documents. It is supported by what the bankrupts' nominee had said the day before, as reflected in the minutes of the creditors' meeting (see [11] above).[24] The minutes spell out that the arrangement would entail the applicant being repaid from the sale proceeds in priority to the unsecured creditors. It is also consistent with the letter of 17 March 2018 (see [13] above). Fourthly, it is consistent with common sense, in that anyone in the applicant's shoes would seek to put in place some protection for himself. It is true that the applicant was helping Mr Mangat as an old friend. It is also true that he was not seeking to earn any interest or make any profit. But that does not mean the applicant would have acted without regard to being repaid at all. It would have been foolish to make the advances without any priority to repayment, knowing that the Debtors were on the verge of insolvency and so at best he would only receive a fraction of repayments due to him. That the applicant brought his business adviser with him to the 16 March 2018 meeting shows that while he wanted to help, he was also seeking to protect himself. For these reasons, the Assignment Agreement must be considered in the light of the intentions, as well as the likely benefit to the general pool of creditors, of the earlier advances covered by the Assignment Agreement.

35 For completeness, I add that I also find that the earlier intention was for the applicant to have a security interest in the sale proceeds, in priority to the secured creditors. He was not intended to be only an unsecured creditor. I also accept that he acted in good faith throughout.

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22 SHDB-1, [12]–[15].

23 Affidavit of Rodger Stuart Johnston dated 9 October 2020, [6] and [7].

24 SHDB-1, p 64 at para 4.5.

36 Turning to the question of likely benefit, at the creditors' meeting described at [10] and [11] above, the Debtors' nominee (who was the Chairman) noted that this arrangement would benefit the creditors. He noted two ways in which it would do so. One was that it would fend off a fire sale by OCBC. The other was the saving of interest payable to OCBC. I accept that these were indeed likely benefits of the Assignment Agreement.

37 As noted at [31] above, a third benefit was put forward by the applicant. It lay in providing Mr Mangat the opportunity to further negotiate with OCBC, leading to a waiver of penalties which would otherwise have reduced the pool of assets available to unsecured creditors. This was not clearly evidenced, whether as an identified likely benefit or as one that eventuated, and I have not had regard to it in the exercise of my discretion.

38 My principal focus has been on whether there was likely benefit to the general pool of creditors, rather than whether ultimately there was benefit. Nonetheless, where benefit has in fact occurred, it must be a relevant factor in favour of ratification. It would be unfair if the general pool of creditors receives and retains a benefit as a consequence of a transaction, but that transaction is void. In this case, benefit to the creditors did in fact eventuate. While no evidence was tendered that the Property ultimately realised a higher price because of the additional time obtained from OCBC, nor that the applicant's payments led to OCBC's waiver of penalties, it is clear that the unsecured creditors have benefited from not having to deduct from the sale proceeds the amount of interest payable to OCBC on the $414,000 advanced by the applicant. It would not be fair or just for the unsecured creditors to take the benefit of this saving – and in addition share rateably in the $414,000 advanced by the applicant – when that interest would have been deducted from the sale proceeds in favour of OCBC if the applicant had not advanced his payments.

39 I therefore consider that this is an appropriate case for ratification of the Assignment Agreement.

Alternative contentions of an earlier equitable assignment, a common intention constructive trust or a proprietary estoppel

40 Given that I have decided in the applicant's favour on the question of ratification, it is not necessary for me to consider whether there was an equitable assignment as of 16 or 17 March 2018, nor whether a common intention constructive trust or a proprietary estoppel arose at any time. However, I will make some brief observations.

41 In relation to the equitable assignment of a chose in action such as that in question here, the first point is that the equitable assignment does not have to be in writing. The requirements of an equitable assignment are threefold, namely: (a) an intention to assign; (b) clear identification of the chose in action being assigned; and (c) some act by the assignor showing that he is passing the chose in action to the alleged assignee (see *Tsu Soo Sin v Oei Tjiong Bin and another* [2009] 1 SLR(R) 529 at [16]). These requirements are satisfied by what took place at the 16 March 2018 meeting. Mr Mangat told the applicant that his advances would be repaid from the sale proceeds of the Property, once it was sold, in priority to the unsecured creditors. He said a formal assignment agreement would follow. The applicant acted on what he was told when he made the first advance on 17 March 2018.[25] While Mr Mangat did not use the word "assign", this is not a pre-requisite and the court looks to the substance of what was said. The reference to an assignment agreement being entered into invoked the concept of assignment. Together with the mention of priority over unsecured creditors, it is clear that a security interest was being created in favour of the

[25] SHDB-1, [14] and [17].

applicant over the sale proceeds. Value was given by the applicant through the making of the advances. I would therefore have held that there was an equitable assignment at that earlier point in time, if it had been necessary to consider this alternative.

42 Turning to the contentions of a common intention constructive trust and proprietary estoppel, I would have rejected them both. Little purpose will be served by setting out the principles underlying these doctrines, as the applicant would fail in relation to both of them for one simple reason. The possibility that he would have an interest in the Property itself was never discussed. There is no evidence that it was ever intended he would. Moreover, while this point was not taken before me, the creation of an immediate beneficial interest in the Property in favour of the applicant would be a dealing in the mortgaged property that might well have required OCBC's consent. This could explain why it was not discussed.

Conclusion

43 I ratify the Assignment Agreement under s 77(1) of the BA. Mr Sutherland's good deed for his friends escapes the proverbial punishment.

44 I will hear the parties on the costs of this originating summons.

Philip Jeyaretnam
Judicial Commissioner

Subir Singh Grewal (Aequitas Law LLP) for the applicant;
Goh Yin Dee and Allen Lye Xin Ren (Insolvency & Public Trustee's Office) for the first respondent;
Fah Serena (Advent Law Corporation) for the second respondent.
