# Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd and another application [2002] SGHC 61

**Case Number** : CWU 319/2000, SIC 601418/2001, 601420/2001

**Decision Date** : 28 March 2002

**Tribunal/Court** : High Court

**Coram** : Tan Lee Meng J

**Counsel Name(s)** : Lee Eng Beng and Lynette Lee (Rajah & Tann) for the Applicants; Tan Kok Quan SC, Tang Khin Wai and Dawn Chew (Tan Kok Quan Partnership) for the Respondents.

**Parties** : Show Theatres Pte Ltd (in liquidation) — Shaw Theatres Pte Ltd

*Insolvency Law – Avoidance of transactions – Transactions at an undervalue – Purchase of shares by company from shareholder – Liquidator claiming transaction at undervalue – Whether transaction falls within stipulated five -year period for impugning transactions at undervalue – s 329(1) Whether transaction at undervalue – Companies Act (Cap 50, 1994 Ed) – ss 98(3) & 100 Bankruptcy Act (Cap 20, 2000 Ed) – reg 6 Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Ed)*

*Insolvency Law – Avoidance of transactions – Unfair preferences – Repayment by company of shareholders' loans – Liquidator claiming unfair preference – Whether loans for special designated purpose thereby creating Quistclose trust – Whether Companies (Application of Bankruptcy Act Provisions) Regulations ultra vires Bankruptcy Act – Whether transaction falls within relevant period for impugning transactions on basis of unfair preference – Whether relevant time two years or six months – Whether shareholders associates of company – ss 329(1) & 411(g) Companies Act (Cap 50, 1994 Ed) – ss 99(3), 100 & 101(4) Bankruptcy Act (Cap 20, 2000 Ed) – regs 2Â–5 Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Ed)*

*Words and Phrases – 'Associate' – s 101(4) Bankruptcy Act (Cap 20, 2000 Ed) – regs 2, 4 & 5 Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Ed)*

## Judgment

## GROUNDS OF DECISION

1. In SIC No 601418 of 2001 and SIC No 601420 of 2001, which were heard together, the liquidator of Show Theatres Pte Ltd ("ST") sought to reverse the effect of three transactions entered into by the company with its two shareholders, Shaw Theatres Pte Ltd ("Shaw") and Eng Wah Investments Pte Ltd ("Eng Wah"), prior to the presentation of the winding-up petition. In SIC No 601418 of 2001, the liquidator asserted that the purchase by ST of 500,000 Chinatown Point shares from Shaw was a transaction at an undervalue. In SIC No 601420 of 2001, the liquidator contended that the question of an unfair preference arose with respect to the repayment by ST of shareholders' loans to Shaw and Eng Wah in 1999.

### A. BACKGROUND

2. ST, whose principal business was the owning, leasing and management of cinemas, was incorporated on 13 December 1993. Shaw and Eng Wah were its only shareholders. Shaw held 375,000 shares and Eng Wah held 125,000 shares. Two directors of ST, Mr Shaw Vee Chung Harold and Mr Shaw Vee King, are directors of Shaw while ST's other director, Mr Goh Keng Beng, is a director of Eng Wah.

3. ST was wound up on 17 November 2000 as it was unable to pay its debts, which amounted to

more than $8.6m. After perusing ST's records and accounts, the liquidator questioned the propriety of a number of transactions between ST and its two shareholders on the ground that they fell within the scope of sections 98 and 99 of the Bankruptcy Act, read with section 329(1) of the Companies Act (Chapter 50), which provides as follows:

> Subject to this Act and such modifications as may be prescribed, any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable under section 98, 99 or 103 of the Bankruptcy Act 1995 (read with sections 100, 101 and 102 thereof) shall in the event of the company being wound up be void or voidable in like manner.

## B. THE CHINATOWN POINT SHARES

4. SIC No 601418 of 2001, which concerns ST's purchase from Shaw of 500,000 Chinatown Point shares will first be considered. ST paid Shaw $1.20 for each share and $600,000 for the 500,000 shares. The liquidator asserted that the shares were worth $480,000 or $0.96 each at the material time and sought to recover the sum of $120,000 from Shaw on the ground that the transaction was at an undervalue.

5. For the liquidator to succeed in his claim, the following must be established:

> (a) ST was insolvent when it bought the Chinatown Point shares.
>
> (b) The purchase of the said shares was made within the period of 5 years before the presentation of the winding-up petition against ST (see section 100 of the Bankruptcy Act).
>
> (c) The value of the shares was significantly less than the $600,000 paid by ST (see section 98(3) of the Bankruptcy Act).

6. It is common ground that ST was insolvent at the material time. However, there was disagreement as to when the shares were bought by ST and what was their value at the material time.

*When was the agreement concluded*

*?*

7. Shaw claimed that the agreement for the purchase and sale of the Chinatown Point shares was concluded in July 1995, more than 5 years before the petition to wind up ST was presented on 24 October 2000. If this is so, the transaction falls outside the 5-year period stipulated in section 100 of the Bankruptcy Act for impugning transactions at an undervalue. However, the liquidator submitted that the shares were purchased by ST in 1997 and that the transaction falls within the 5-year period stipulated in section 100 of the Bankruptcy Act.

8. Mr Goh Keng Beng, who negotiated the transaction on ST's behalf, had no doubt that the agreement for the sale and purchase of the Chinatown Point shares was concluded in July 1995. In para 12 of his affidavit dated 28 August 2001, he stated as follows:

> 12. Thereafter, the formal agreement was only entered into in December 1996 as parties had to obtain the necessary approval from the other shareholder of Chinatown Point, City Centrepoint Pte Ltd ("City Centrepoint") and several condition precedents had to be satisfied….
>
> 13. The negotiations on the draft Sale and Purchase Agreement began in July 1995….. At that time, the condition precedents which had to be satisfied were stated as "conditions subsequent" because the lease agreement with City Centrepoint had not yet expired and thus not due for renewal.
>
> 14. Between July 1995 and the execution of the Sale and Purchase Agreement in December 1996, several drafts of the Sale and Purchase Agreement were negotiated upon and amendments were made. Due to the time lapse between the agreement and the execution of the Sale and Purchase Agreement, these "conditions subsequent" became [conditions precedent] as the lease agreement expired in November 1996. However, the terminology used in the executed Sale and Purchase Agreement remained as "conditions subsequent" and was never amended.

9. The liquidator, who did not agree with Mr Goh, pointed out that the agreement for the sale and purchase of the Chinatown Point shares, which was dated 12 March 1997, expressly provided that "the parties have executed this agreement the day and year first above written". Where a document is dated, the date is prima facie evidence of the date on which it was executed (see, for instance, *Andersen v Weston* (1840) 6 Bing NC 296). While the prima facie presumption may be rebutted, no convincing explanation was furnished to rebut the presumption. Discussions for the sale of the Chinatown Point may have started in 1995. However, any assertion that the contract was concluded in 1995 is untenable, if only because the terms of the draft sale and purchase contract prepared in July 1995 were very different from the agreement executed by the parties on 12 March 1997. In fact, in the original draft, Chinatown Point Theatres Pte Ltd was a party to the contract but it was not a party to the executed agreement. It should also be noted that the directors' resolution to purchase the shares was passed in January 1997 and the funds required for the purchase were provided by Shaw and Eng Wah in March 1997.

10. If all the circumstances are taken into account, there can be no doubt that the agreement for the sale and purchase of the Chinatown Point shares was concluded in March 1997. As such, the transaction in question was concluded within the 5-year period referred to in section 100 of the Bankruptcy Act.

*Whether the transaction was at an undervalue*

11. Whether or not the transaction was at an undervalue will next be considered. The liquidator noted that no valuation report had been produced to justify the price paid by ST for the shares and that in Chinatown Point's audited balance sheet as at 31 March 1997, the Book Net Tangible Assets showed that the shares in question were worth only around $0.96 per share. Furthermore, the investment in the Chinatown Point shares was totally written off in ST's financial statements as at 31 March 1998.

12. In *McDonald and Anor v Hanselmann* [1998] 28 ACSR 49, 53, where transactions at an undervalue were considered by the Supreme Court of New South Wales, Young J rightly said that value is not a matter to be decided in a vacuum and that the relevant question is "whether there was

a bargain of such magnitude that it could not be explained by normal commercial practice". It is also pertinent to note that regulation 6 of the Companies (Application of Bankruptcy Act Provisions) Regulations 1995 provides that the court shall not make an order referred to in section 98 of the Bankruptcy Act in respect of a transaction at an undervalue if it is satisfied that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business; and that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

13. Shaw contended that the price of $1.20 per share was fair, reasonable and commercially justifiable because of the benefits which ST expected to derive from the purchase of Chinatown Point shares. Shaw's counsel, Mr Tan Kok Quan SC, pointed out that Shaw, which owned 65% of ST, had to provide ST with much of the funds required for the purchase of the shares. More importantly, it must be noted that it was Eng Wah's nominee director on the ST Board, Mr Goh Keng Beng, and not Shaw's nominee directors on the ST Board, who negotiated the purchase of the Chinatown Point shares from Shaw. Eng Wah must have considered it in ST's interest to purchase the Chinatown shares from Shaw. In his affidavit dated 25 July 2001, Mr Goh, who confirmed that the shares were purchased after he had discussions with the management of Eng Wah, added as follows:

> 5. …. I was appointed by [ST] to negotiate on behalf of the Company.
>
> 6. [I]t was agreed that it was in the best interest of the Company to purchase 500,000 shares of Chinatown Point at S$1.20 per share from the Respondents….
>
> 8. In arriving at the conclusion that the price of S$1.20 was fair and reasonable, I had taken into account the commercial benefits that could be obtained by the Company at that time….
>
> 12. As [ST] wanted to have the benefit of participating in the operation of Choa Chu Kang Cineplex, it was necessary for the company to become a shareholder of Chinatown Point….
>
> 14. …. It was a pure commercial decision on the part of [ST] with a view to future benefits. The purchase was approved by the Directors of the Company.

14. After taking all circumstances into account, including the fact that Eng Wah viewed the transaction at arm's length as it had to provide part of the funds required by ST for the purchase of the 500,000 Chinatown Point shares from Shaw, I hold that the transaction was not at an undervalue. ST entered into the transaction in good faith and for the purpose of carrying on its business and at the time it did so, there were reasonable grounds for believing that the transaction would benefit the company. As such, the liquidator's claim with respect to the Chinatown Point shares is dismissed with costs.

## C. REPAYMENT OF SHAREHOLDERS' LOANS

15. SIC No 601420 of 2001, which concerns the repayment by ST of shareholders' loans to Shaw and Eng Wah will next be considered. It is common ground that ST borrowed money from Shaw and Eng Wah and that it paid Shaw $375,000 on 6 August 1999 and Eng Wah $125,000 on 28 September 1999. It was not disputed that ST was insolvent when these shareholders' loans were repaid.

16. The liquidator contended that the question of an unfair preference arises because the money

borrowed by ST from Shaw and Eng Wah should not have been paid ahead of the sums claimed by the company's other creditors. As for what is an "unfair preference", section 99(3) of the Bankruptcy Act provide as follows:

> For the purpose of this section and sections 100 and 102, an individual gives an unfair preference to a person if –
>
> (a) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities; and
>
> (b) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.

17. Shaw and Eng Wah contended that they were not obliged to return to ST the amounts repaid to them in 1999 for three reasons. First, the repayment of the loans fell within the ambit of *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567. Secondly, the Companies (Application of Bankruptcy Act Provisions) Regulations 1995, on which the liquidator relied for questioning the validity of the repayment of the shareholders' loans, are ultra vires the Bankruptcy Act. Thirdly, the loans were repaid outside the relevant time referred to in section 100 of the Bankruptcy Act for impugning transactions on the basis of an undue preference.

*The Quistclose case*

18. In *Quistclose Investments Ltd v Rolls Razor Ltd*, R Ltd, a company facing financial problems, negotiated with a financier for a loan of 1m. It was suggested that the loan might be made on condition that R Ltd found a sum of around 209,719 to pay an ordinary share dividend that had already been declared. Quistclose agreed to lend R Ltd this sum on condition that it was to be used to pay the dividend in question. Quistclose's cheque was paid into a separate account opened specifically for the agreed purpose of the loan. Before the dividend was paid, R Ltd went into voluntary liquidation. Quistclose claimed that it was entitled to a refund of the amount loaned on the ground that it was loaned for the sole purpose of enabling R Ltd to pay the dividend in question. It was evident that the mutual intention of the parties and the essence of the bargain was that the money loaned should not become part of the assets of the company, but should be used exclusively for payment of a particular class of creditors. It was held that Quistclose was entitled to the money loaned to R Ltd.

19. A modern formulation of the *Quistclose* principle may be found in *Re Goldcorp Exchange Ltd* [1975] 1 AC 74, 100, where Lord Mustill said:

> [I]t is necessary to show either a mutual intention that the moneys should not fall within the general fund of the company's assets but should be applied for a special designated purpose, or that having originally been paid over without restriction the recipient has later constituted himself a trustee of the money….

20. Shaw and Eng Wah asserted that their position is similar to that in the *Quistclose* case. In May 1997, ST's Board of Directors was informed that it was necessary for the company to call on its shareholders to provide $2.6m for various purposes, one of which was to enable ST to provide a loan of $500,000 to Chinatown Point. On 29 May 1997, a resolution was passed asking the shareholders to

provide an unsecured interest-free loan in proportion to their shareholdings. For the loan to Chinatown Point, Shaw gave ST $375,000 while Eng Wah, which owned the rest of the shares, gave ST $125,000. Shaw and Eng Wah said that after the loan of the $500,000 was made to ST, Chinatown Point ceased to exist. As such, ST did not loan the money to Chinatown Point. They contended that the sum did not form part of ST's general funds and that it ought to be returned to them as the agreed purpose of the loan was not carried out.

21. The liquidator, who took a different view, argued that there was no mutual intention on the part of ST and its shareholders that the money loaned to ST should be used for a designated purpose, failing which it should be returned. Admittedly, Mr Yap Bock Seng, ST's secretary and chief accountant, noted in his paper to the directors that there were a number of items in respect of which funding was required from ST's shareholders. One of the items listed was a "provision for loan to Chinatown" totalling $500,000. Counsel for the liquidator, Mr Lee, rightly argued that if the $500,000 referred to in Mr Yap's paper falls within the ambit of a trust such as that upheld in the *Quistclose* case, Shaw and Eng Wah can argue that all the sums mentioned in Mr Yap's paper are also within the ambit of the *Quistclose* type of trust. This cannot be the case. He also noted that the alleged purpose of the $500,000 loan was not mentioned in the director's resolution dated 29 May 1997, which merely referred to a lump sum of $2.6m required as a loan from the shareholders.

22. Mr Lee pointed out that there was no evidence that the $500,000 loaned by Shaw and Eng Wah to ST had been placed in a fixed deposit that was separate from ST's other funds pending its release to Chinatown Point. He also said that if the $500,000 had been intended as a loan from ST to Chinatown Point, it should have been returned to Shaw and Eng Wah as soon as it was evident that its purpose could not be achieved. However, Shaw and Eng Wah did not demand that the $500,000 be refunded to them until two years later. By that time, ST was insolvent. Mr Lee contended that in the circumstances of the case, no *Quistclose* trust had been created. I agree and hold that the $500,000 is a normal loan made by Shaw and Eng Wah to ST. As such, it should not have been repaid to Shaw and Eng Wah in priority to the other unsecured loans and liabilities of ST. The first defence of Shaw and Eng Wah thus fails.

*Whether the Companies (Application of Bankruptcy Act Provisions) Regulations 1995 are invalid*

23. The assertion by Shaw and Eng Wah that the Companies (Application of Bankruptcy Act Provisions) Regulations 1995 ("CABAR") are ultra vires the Bankruptcy Act will next be considered. The CABAR were made by the Minister for Finance pursuant to section 411 of the Companies Act. Counsel for Shaw and Eng Wah, Mr Tan, asserted as follows in his written submissions:

> [T]he Bankruptcy Act does not come within the portfolio of the Minister for Finance. If the meaning of the word "associate" as determined by the Bankruptcy Act is sought to be modified or amended, it must be done by the Minister for Law pursuant to an enabling section in the Bankruptcy Act, if any….
>
> [T]he Prime Minister … had directed that … the Minister for Law [be] responsible for … the Official Assignee and Public Trustee's Office ….
>
> As such, it is submitted that … the Minister for Finance had no authority to make regulations pursuant to section 411(g) of the Companies Act to *amend the provisions of the Bankruptcy Act*.

24. Mr Tan's argument raises a number of issues which need not be considered as the question of

ultra vires does not arise in this case. Section 329(1) of the Companies Act incorporates some provisions of the Bankruptcy Act, which concerns the insolvency of individuals, as part of the law relating to companies in liquidation. In doing so, it does not amend the Bankruptcy Act. Evidently, some Regulations are needed to give effect to section 329(1) of the Companies Act and the CABAR serve this purpose. Regulation 3 of the CABAR provides that *for the purpose of section 329 of the Companies Act*, sections 98, 99, 100, 102 and 103 of the Bankruptcy Act shall be read subject to the modifications set out in regulations 4 to 9 and such textual and other modifications as may be necessary for their application to a company which is being wound up. By introducing the CABAR, the Minister of Finance enabled section 329(1) of the Companies Act to operate properly in the context of companies in liquidation. As such, he acted within the scope of section 411(g) of the Companies Act, which provides that the Minister may "make regulations for or with respect to all matters or things which by this Act are required or permitted to be prescribed otherwise than by rules or which are necessary or expedient to be prescribed for giving effect to this Act". In view of the aforesaid, the second defence advanced by Shaw and Eng Wah was rejected.

*Relevant time*

25. Whether the shareholders' loans were repaid before the relevant time referred to in section 100 of the Bankruptcy Act will next be considered. In the case of an unfair preference given by ST to an associate, the relevant time is two years before the presentation of the winding-up petition. In any other case, the relevant time is six months. As the shareholders' loans were repaid in August and September 1999, more than six months before the winding-up petition was presented in October 2000, the liquidator's claim against Shaw and Eng Wah will fail if they are not ST's associates.

26. To determine whether or not a company is an associate of another company, the provisions of the Bankruptcy Act and the CABAR must be considered. Shaw and Eng Wah contended that attention should be focussed on regulation 5 of the CABAR, which provides as follows:

> In addition to the provisions of section 101 of the Bankruptcy Act by which the question whether a person is an associate of another person is to be determined, a company shall be regarded as an associate of another company if –
>
> (a) the same person has control of both companies, or a person has control of one company and persons who are his associates, or he and persons who are his associates, have control of the other company; or
>
> (b) a group of 2 or more persons has control of each company, and such groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate.

27. Mr Tan submitted that as the liquidator did not furnish any evidence of the requisite control referred to in regulation 5 of the CABAR, Shaw and Eng Wah cannot be regarded as ST's associates.

28. In contrast, the liquidator's counsel, Mr Lee, relied on regulation 4 of the CABAR, which provides as follows:

> Any reference to an associate of a person or an individual who has been adjudged bankrupt (except any such reference to section 101 of the Bankruptcy Act) shall be read as a reference to *a person connected with a company* …

against which a winding-up order has been made….
(emphasis added)

29. Mr Lee next relied on regulation 2 of the CABAR, which provides that a "person connected with a company" means, inter alia, a person who is a director of the company or *"an associate of such a director"*. In his written submissions, he put his clients' position as follows:

> Pursuant to section 101(4) of the Bankruptcy Act, a person is an associate of an individual whom he employs or by whom he is employed and, for this purpose, any director of a company shall be treated as employed by that company. Since the directors of [ST] are also directors of either Shaw Theatres (in the case of Shaw Vee Chung, Harold and Shaw Vee King) and Eng Wah (in the case of Goh Keng Beng), Shaw Theatres and Eng Wah would be 'associates' of at least a director of the company. Applying the definition in regulation 2 of the [CABAR], Shaw Theatres and Eng Wah would then be persons connected with [ST] and accordingly, 'associates of [ST]" for the purpose of section 100(b) of the Bankruptcy Act.

30. While a person who is connected with a company includes an associate of a director of that company, note must be taken of regulation 2 of the CABAR which provides that the word "associate" as used in the Regulations, unless the context requires otherwise, means "an associate of a person or company as determined in accordance with section 101 of the Bankruptcy Act as modified by regulation 5". In his informative article on *The Avoidance Provisions of the Bankruptcy Act 1995 and their Application to Companies* [1995] SJLS 597, 636, Mr Lee explained the ambit of section 101 and its application to companies in liquidation in the following succinct terms:

> The scheme of section 101 of the Bankruptcy Act is that it lists certain situations in which a *person* or a *company* is an associate of an *individual.* It is clear that the word 'individual' here, as in the other relevant provisions, refers to the debtor who is subsequently adjudged a bankrupt. Presumably, then, when it is sought to apply the section to companies, the word 'individual' must be taken to mean a reference to the company which is being wound up or under judicial management, as the case may be.

31. Section 101(4) of the Bankruptcy Act provides as follows:

> A person is an associate of an individual whom he employs or by whom he is employed and for this purpose, any director or other officer of a company shall be treated as employed by that company.

32. If the word "individual" is replaced by the word "company", section 101(4) provides as follows:

> A person is an associate of [a company …] he employs or by whom he is employed and *for this purpose*, any director or other officer of a company shall be treated as employed by *that* company.
> (emphasis added)

33. As Mr Lee rightly pointed out in his article on *The Avoidance Provisions of the Bankruptcy Act 1995 and their Application to Companies*, the word "company", when used in place of "individual" in section 101(4) of the Bankruptcy Act, refers to the "company which is being wound up". The words "*for this purpose*" and "*that"* company make it clear that section 101(4), when read in the context of

companies in liquidation, merely provides that a director of a company that is being wound up is an associate of *that* company. Whether this is the result intended when the provisions of the United Kingdom Insolvency Act, on which section 104 of the Bankruptcy Act and the CABAR are modelled, were incorporated into the Bankruptcy Act and the CABAR is an interesting question. Whatever may be the UK position, I cannot, in the face of the clear words of section 101(4) of the Bankruptcy Act, accept the liquidator's argument that that this statutory provision results in Shaw and Eng Wah being associates of ST. The words of section 101(4) will be gravely distorted if they are to have the added effect of making a company that is being wound up an associate of another company solely on the ground that they have one common director.

*Conclusion*

34. As Shaw and Eng Wah cannot be regarded as associates of ST on the basis of section 101(4) of the Bankruptcy Act, the relevant time under section 100 of the Bankruptcy Act with respect to the repayment of the shareholders' loans is six months. Since the ST's repayment of the shareholders' loans to Shaw and Eng Wah was made more than six months before the presentation of the petition to wind up ST, the liquidator's claim in SIC 601420 of 2001 is dismissed with costs.

Sgd:

TAN LEE MENG
Judge