

Soh Gim Chuan (private trustee of the estate of Goh Poh Choo in bankruptcy) v Koh Hai
Keong and Another
[2002] SGHC 130

Case Number : B 1487/2000, RA 600050/2002

Decision Date : 25 June 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Soh Gim Chuan (Soh Wong & Yap) for the appellant/applicant; Gwee Boon Kim (Koh & Partners) for the respondents; Gn Chiang Soon (Gn & Co) for the judgment creditor

Parties : Soh Gim Chuan (private trustee of the estate of Goh Poh Choo in bankruptcy) —
Koh Hai Keong; Another

Insolvency Law – Bankruptcy – Unfair preference – Whether payment of legal fees to solicitor constitutes unfair preference – Whether payments made within the 'relevant time' – Whether solicitor an 'associate' – Considerations in determining existence of unfair preference – Whether presumption relating to associates rebutted – ss 99(5), 100(1) & 101(5) Bankruptcy Act (Cap 20, 2000 Ed)

... Judgment Creditor

Between

SOH GIM CHUAN

private trustee of the Estate of Goh Poh Choo in bankruptcy

... Applicant

And

1. **KOH HAI KEONG**

2. **GWEE BOON KIM (practising as Koh & Partners)**

...

Respondents

Citation: Bankruptcy No 1487 of 2000; RA No 600050 of 2002.

Jurisdiction: Singapore

Date: 2002:06:25
2002:06:24; 2002:06:20

Court: High Court

Coram: Choo Han Teck, JC

Counsel:

Soh Gim Chuan (*Soh Wong & Yap*) for the Appellant/Applicant

Gwee Boon Kim (*Koh & Partners*) for Respondents

Gn Chiang Soon (*Gn & Company*) for Judgment Creditor

HEADNOTES

Bankruptcy

– Unfair Preference – Whether payment of legal fees to solicitor constituted unfair preference – Whether solicitor considered an associate – Whether presumption relating to associates rebutted – Bankruptcy Act (Cap 20), s 99(5)

Facts

The appellant was the private trustee of the estate of Goh Poh Choo in bankruptcy ('Goh'). Goh was adjudicated bankrupt on 21 July 2000. Prior to that, she had paid \$101,500 to the respondents who were partners of the law firm which acted for her in respect of a suit brought against her by a judgment creditor. The judgment creditor's claim was dismissed by the High Court, but was reversed by the Court of Appeal on 13 April 2000. In the meantime, the said sum of money had been paid by Goh to the respondents in two tranches: \$56,500 was paid on 25 June 1999 and \$45,000 on 4 April 2000 (nine days before the Court of Appeal's decision). The appellant made an application for the sum to be repaid to the bankrupt's estate on account of unfair preference under the Bankruptcy Act (Cap 20) ('the Act'). The assistant registrar dismissed the application and the appellant appealed.

Held,

dismissing the appeal

(1) The sum of money was held by the respondent solicitors as trustees for the client, and they were therefore "associates" of the bankrupt by virtue of s 101(5) of the Act (see 6 – 7).

(2) In determining whether there was unfair preference, the court has to ascertain whether the bankrupt had been influenced by a desire to put the payee in a better position than he would have been, in the event of the bankrupt becoming a bankrupt. The legal fees did not appear in any way excessive such that the intention of the payor to pay his solicitors in the ordinary course of business can reasonably be doubted. The evidence on record was sufficient to rebut the presumption of unfair preference. The fact that \$45,000 of the total fees were paid about nine days before the Court of Appeal decision was not sufficient to indicate unfair preference on the part of the bankrupt (see 10 – 11).

Case(s) referred to

Re Libra Industries Pte Ltd (in compulsory liquidation)

[2000] 1 SLR 84 (refd)

Re MC Bacon

(1990) BCLC 324 (refd)

Legislation referred to

Bankruptcy Act (Cap 20), ss 36, 99, 100 and 101

Judgment

GROUND OF DECISION

1. This was an appeal by Mr. Soh Gim Chuan (the appellant) the private trustee of the estate of Goh Poh Choo in bankruptcy. The appellant applied before the assistant registrar for an order that the respondents pay a sum of \$101,500 to the bankrupt's estate. This sum of money was previously paid by the bankrupt (before her bankruptcy) to the respondents as legal fees. The respondents were at all material times partners of the law firm that had acted for her in respect of a suit brought by the judgment creditor against her in the High Court. The judgment creditor's claim was dismissed by the trial judge on 30 August 1999. The judgment creditor appealed and the appeal was heard on 22 February 2000. The Court of Appeal handed down its verdict on 13 April 2000 in favour of the judgment creditor. Goh Poh Choo was adjudicated a bankrupt on 21 July 2000. In the meantime, the said sum of \$101,500 was paid to the respondents as legal fees in two tranches. The first, \$56,500 was paid on 25 June 1999 and the second, \$45,000 on 4 April 2000 (nine days before the Court of Appeal's decision). The appellant's application was based on unfair preference under the Bankruptcy Act, Ch 20. His application was dismissed by the assistant registrar and he appealed to this court against that decision.

2. Mr. Gwee, one of the two respondents appeared on behalf of the respondents. He raised a preliminary objection on the ground that the appellant had no standing to make this application because he is a private trustee of the bankrupt's estate. Mr. Gwee's argument was that only the Official Assignee is empowered to make this application. Counsel relied on s 36 which provides as follows:

"36. - (1) Subject
to subsection (3)
and section 39, a
trustee shall -

(a)
have
all
the
functions
and
duties
of
the
Official
Assignee
in
relation
to
the
conduct
of
a
bankrupt
and
the
administration
of

his
estate
as
provided
in
this
Act;
and

(b)
exercise
all
the
powers
of
the
Official
Assignee."

3. Mr. Gwee says that in order for the private trustee to be endowed with all the power of the Official Assignee he must first administer the estate of the bankrupt under as provided under s 36(1) (a). I have no difficulty ruling against Mr. Gwee on this point as it seems clear to me that s 36(1)(a) and (b) complement each other and are not subject to either in the way argued by Mr. Gwee, nor are they mutually exclusive. I do not need to dwell further in an argument borne out of desperation as this appears to be.

4. The salient facts that I have set out above are not disputed by any party. There are, therefore, only two points in contention that are relevant to the appeal. First, in order to determine whether the payments of the \$90,000 are subject to recovery as being payments made as "unfair preferences", the relevant time must be ascertained.

5. The act provides for three time periods. These are set out in s 100(1) (a) to (c) as follows:

"100. – (1) Subject to this section, the time at which an individual enters into a transaction at an undervalue or gives an unfair preference shall be a relevant time if the transaction is entered into or the preference given –

(a)
in
the
case
of
a
transaction
at
an
undervalue,
within
the
period

of
5
years
ending
with
the
day
of
the
presentation
of
the
bankruptcy
petition
on
which
the
individual
is
adjudged
bankrupt;

(b)
in
the
case
of
an
unfair
preference
which
is
not
a
transaction
at
an
undervalue
and
is
given
to
a
person
who
is
an
associate
of
the
individual

(otherwise
than
by
reason
only
of
being
his
employee),
within
the
period
of
2
years
ending
with
that
day;
and

(c)
in
any
other
case
of
an
unfair
preference
which
is
not
a
transaction
at
an
undervalue,
within
the
period
of
6
months
ending
with
that
day."

6. Only (b) and (c) are relevant for our purposes since the earlier of the two payments (that is the \$56,500 payment) was made within two years. This depends on whether the respondents are

"associates" of the bankrupt as defined in s 101(5) which provide as follows:

"101. – (5) A person in his capacity as trustee of a trust is an associate of an individual if the beneficiaries of the trust include, or the terms of the trust confer a power that may be exercised for the benefit of, that individual or an associate of that individual."

7. Mr. Gwee argued that the firm of Koh & Partners, in whose client account the money of the bankrupt was deposited, are not trustees within the meaning of s 101(5). I do not accept this argument because the words of s 101(5) are simple and straightforward, and are sufficiently broad to include a solicitor who holds his money in his account. The account is in the name of the solicitor or his firm, but the money belongs to the client. The money is therefore held by the solicitor in no other capacity than that of a trustee.

8. The second and more crucial aspect of the appeal is in respect of the question whether the two payments by the bankrupt amount to "unfair preference". The relevant provision in the Bankruptcy Act is s 99 which provides as follows:

99. – (1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has, at the relevant time (as defined in section 100), given an unfair preference to any person, the Official Assignee may apply to the court for an order under this section.

(2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not given that unfair preference.

(3) For the purposes 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.

(4) The court shall not make an order under this section in respect of an unfair preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3)(b).

(5) An individual who has given an unfair preference to a person who, at the time the unfair preference was given, was an associate of his (otherwise than by reason only of being his employee) shall be presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (4).

(6) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of an unfair preference."

The appellant submitted that the assistant registrar was in error because he did not take into account subsection (5) which, by the presumption raised against the respondents as trustees, shifted the burden to them. He submitted that the respondents have not made any point in their affidavit that goes towards rebutting the presumption.

9. In determining whether there was unfair preference the direct object of the court is to ascertain whether the bankrupt had been influenced by a desire to put the payee in a better position than he would have been, in the event of the bankrupt becoming a bankrupt. This exercise naturally involves a finding of fact to a large extent and thus would vary from case to case. For instance, the case cited before me, *Re Libra Industries Pte Ltd (in compulsory liquidation)* [2000] 1 SLR 84 turned on its own facts, so different that I need not elaborate here. See also *Re MC Bacon* (1990) BCLC 324 in which Millet J emphasized that it is not sufficient merely to "establish a desire to make payment or grant the security which it sought to avoid". Otherwise, every payment in itself, other than perhaps, a payment under mistake, becomes an unfair preference.

10. The act or the payment within the two years or six months prior to the bankruptcy by itself is of little significance otherwise every payment even to the bankrupt's grocer will, by the receipt of payment alone, be counted as an unfair preference. I now revert to the appellant's main point, that the respondents had not rebutted the presumption. In this case, in addition to the public examination of Mr. Gwee Boon Kim (one of the respondents), Mr. Koh Hai Keong (the other respondent) had filed an affidavit on 15 April 2002. From the evidence of the two respondents I accept that the payments were genuine payments of legal fees. There is nothing to indicate otherwise. Although counsel examining Mr. Gwee did not challenge the size of the bills, I am of the view that on a broad scan,

based on the nature of the suit in the High Court, the legal fees did not appear in any way excessive such that the intention of the payor to pay his solicitors in the ordinary course of business, can reasonably be doubted. From the evidence available on record, it would not be wrong for the assistant registrar to accept the payments as having being made in the ordinary course of business. As I have stated, every case turns on its own facts. In this case, I am of the view that by the nature of the payments in question, the evidence on record were sufficient to rebut the presumption of unfair preference.

11. Although \$45,000 of the total fees were paid about nine days before the Court of Appeal decision, this fact alone would not be sufficient to indicate unfair preference on the part of the bankrupt. Payments are made by clients to their lawyers only upon his solicitor rendering a bill of costs. In this case, if the respondents (as opposed to the bankrupt) had woken up to the fact that if the judgment of the High Court was reversed, they (the respondents) may not be paid, and thus promptly render their bill of costs on the eve of the Court of Appeal decision, would that indicate unfair preference on the part of the bankrupt? I think not. The intention to create an unfair preference is the intention of the bankrupt. To contemplate otherwise without more is to put all solicitors at risk of having to refund their fees should their clients become bankrupt with two years of payment.

12. It is thus the misfortune of the judgment creditor in this case that money she had paid out under a judgment of court could not be recovered having herself subsequently succeeding on appeal. But such are the risks inherent in every case. Risks that cannot fully be measured. That is why parties, in the hope of minimising these risks, ask for a stay of execution pending appeal. Sometimes they are successful and sometimes not.

13. For the reasons above the appeal was dismissed.

Sgd:

Choo Han Teck

Judicial Commissioner

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