# Re Ho Kok Cheong
# [2000] SGHC 89

**Case Number** : B 1235/1987

**Decision Date** : 22 May 2000

**Tribunal/Court** : High Court

**Coram** : Judith Prakash J

**Counsel Name(s)** : K Shanmugam SC and Suresh Nair (Allen & Gledhill) for the appellant; inston Chew for the official assignee

**Parties** : —

*Credit and Security – Guarantees and indemnities – Guarantor – Secured creditor of liquidated companies having bankrupt as personal guarantor of loans to those companies – Whether creditor considered secured creditor vis-a-vis bankrupt guarantor*

*Insolvency Law – Bankruptcy – Proof of debt – Secured creditor of liquidated companies having bankrupt as personal guarantor of loans to those companies – Whether creditor considered secured creditor vis-a-vis bankrupt guarantor*

*Insolvency Law – Bankruptcy – Contractual rate of interest – Whether proceeds of sale of securities may be applied to contractual rate of interest*

*Insolvency Law – Bankruptcy – Calculation of interest – Date from which interest to be calculated – Whether interest to be calculated from date of notice of demand to guarantor or from date of disbursement of loans*

: The appellant in this matter is Hong Leong Finance Ltd and it lodged this appeal in order to obtain admission of the proof of debt for $9,502,613. 71 which it had filed against the bankrupt`s estate on 9 November 1999.

***The background***

The bankrupt, Mr Ho Kok Cheong, was a well-known property developer in Singapore some 20 years ago. He was interested in several companies including Dragon Court Pte Ltd (`Dragon Court`) and Rochester Co Pte Ltd (`Rochester`). In November 1982, the appellant extended a term loan to Dragon Court on the security of mortgages over several units in a building called Katong Shopping Centre as well as a joint and several guarantee from the bankrupt and three others. Under this guarantee, the guarantors undertook to pay the appellant all moneys due and to become due under the aforesaid mortgages. The guarantee also provided that it would be security to the appellant for the payment of any ultimate balance that might remain due to the appellant from Dragon Court.

In November 1981, the appellant had extended banking facilities to Rochester. These were secured by an assignment dated 23 November 1981 and a mortgage in escrow (eventually dated August 1984) executed by Rochester over three units in the building known as Orchard Plaza, Singapore. Additionally, the appellant held a personal guarantee dated 23 November 1981 from the bankrupt and three others who jointly and severally undertook to pay all moneys due and to become due under the said assignment and mortgage. This guarantee also provided that it would be a security to the appellant for the payment of any ultimate balance that might remain due to it from Rochester.

In 1986, both companies were in financial difficulties. As a result, the court wound them both up that same year. As Dragon Court had defaulted on its repayment responsibilities to the appellant, the appellant proceeded to exercise its right as mortgagee to enter into possession of the mortgaged

units and sell them. Eventually the units were sold on various dates between September and November 1993. In the meantime, Rochester had defaulted on its obligations to the appellant who had consequently exercised its rights as mortgagee and entered into possession of the three units at Orchard Plaza. It sold one unit in 1984 and the remaining two in 1990. The amounts recovered by the appellant from the sales were not sufficient to fully satisfy either the mortgage debts of Dragon Court or those of Rochester.

Meanwhile, to be specific on 6 November 1987, a receiving and adjudication order had been made against the bankrupt on the petition of another creditor.

***The proofs of debt***

On 10 November 1997, the appellant lodged a proof of debt against the bankrupt`s estate for the sum of $13,313,279. 86 which sum comprised both principal and interest. Following discussions amongst the appellant, its solicitors and the Official Assignee, the appellant revised its claim to a sum of $10,842,877. 14 that it said did not include interest. The Official Assignee then served a notice of partial rejection of proof of debt on the appellant whereby it agreed to admit a debt of $1,652,713 only.

On 3 May 1999, the appellant filed an application to reverse the partial rejection of its proof of debt. At the hearing of the application, the Official Assignee withdrew his partial rejection and the appellant withdrew its application for a reversal.

On 9 November 1999, the appellant filed an amended proof of debt against the bankrupt for the sum of $9,502,613. 73. The reason for the amendment was to ensure that all elements of interest were totally excluded from the appellant`s claim and that the proof only referred to the outstanding principal due from each of Rochester and Dragon Court for which the bankrupt was liable under the two guarantees he had signed. The principal due from Rochester was calculated as being $8m while that due from Dragon Court was calculated as being $1,502,613. 73.

On 29 November 1999, the Official Assignee`s office issued a notice of rejection of proof of debt to the extent of $9,297,691. 82. At that stage, the Official Assignee was only prepared to admit a sum of $204,921. 91. The reasons for the rejection as stated in the notice were:

> *(a) interest after the date of receiving and adjudication orders was not provable; and*
>
> *(b) interest after the date of demand notice to the date of receiving and adjudication orders was computed at the rate of 8% on the debt owed at the date of the demand notice and as reduced by proceeds of sale of securities and other payments, for the purpose of distribution of dividend.*

It should be noted that Dragon Court had agreed to pay interest on the loan from the appellant at the rate of 14. 5% per annum and default interest at 1. 5% per month whilst the interest payable by Rochester was to accrue at 17% per annum with default interest at 1. 5% per month.

In December 1999, the appellant took out an application for an order that the notice of rejection of proof of debt dated 29 November 1999 be reversed. In an affidavit filed on behalf of the Official

Assignee by Mr Low Cher Khoon in January 2000, the Official Assignee modified his position on the proof of debt slightly and admitted a sum of $212,009. 26, an increase of about $8,000.

The appellant proceeded with its application for the reversal of the rejection nevertheless. The application was heard and dismissed by the assistant registrar on 21 March 2000. The appellant appealed. I allowed the appeal and the Official Assignee has now appealed against my decision. [The appeal has been withdrawn - Ed. ]

***The Official Assignee`s explanation of its computation***

In the affidavit filed by Mr Low Cher Khoon, the Accountant to the Official Assignee, the reasons for the Official Assignee`s rejection of the appellant`s proof were further elucidated. He pointed out that the Official Assignee had initially admitted $1,652,713 as being the sum due to the appellant. The basis for the admission of this sum which related to an earlier proof of debt for the sum of $13,313,279. 86, was incorrect as it failed to take into account the date when the liability of the guarantor arose pursuant to the guarantees. In his view, the effective date for liability of the guarantor would be the date of service of the creditor`s demand for payment.

The appellant had demanded payment from the guarantor on 7 June 1984 in respect of Rochester`s indebtedness and on 25 April 1985 in respect of Dragon Court`s indebtedness. Based on these dates, the Official Assignee recomputed the claim of the appellant and reduced the amount that it would admit to $204,291. 91. The Official Assignee had arrived at this figure by applying the proceeds of sale of the mortgaged units first in reduction of the principal amounts due and secondly in reduction of the interest. He had also recomputed the interest charged by the appellant at 8% per annum in accordance with the Bankruptcy Rules on the basis that interest commenced to accrue on the date of service of the notice of demand on the bankrupt. He had then added the outstanding interest to the expenses incurred and the appellant`s legal costs to arrive at the total amount of the claim to be admitted.

The Official Assignee took issue with the way the appellant had calculated the interest due to it. In para 6 of his affidavit, Mr Low stated that as a result of the appellant`s method of calculating interest based on its contractual interest rate and its method of applying the proceeds of sale first towards payment of interest and penalties before application towards principal, the appellant had recovered a total sum of $2. 8m plus in respect of the original $2m loan disbursed to Dragon Court and a total sum of $15. 5m plus in respect of the $10m loan disbursed to Rochester. The appellant had therefore recovered the full sum of $12m disbursed to the two companies and had made a profit of $6. 4m plus in respect of its interest and other charges. If the court admitted the proof of debt in the sum of $9. 5m, then taking this sum plus the $6. 4m of profit already recovered, the appellant would have collected a total of $15. 9m in addition to the original principal amount disbursed.

As regards the interest, based on the accounts submitted by them, the appellant was claiming a sum of some $11. 94m as pre-bankruptcy interest and some $8. 68m as post-bankruptcy interest. Based on the Official Assignee`s adjudication, the latter sum of $8. 68m had to be totally excluded. As for the first sum of $11. 94m, it had been calculated on the basis of the contractual rates imposed by the appellant on the two borrowing companies. The appellant was, however, only entitled to claim $335,617. 36 as interest calculated at 8% per annum in respect of Dragon Court and $2,384,993. 79 as interest calculated at 8% per annum in respect of Rochester.

Finally, the Official Assignee stated that its approach and method of adjudication had been applied also to the 16 other creditors who had filed proofs of debt against the bankrupt. After adjudication of

these claims, 14 had been admitted to proof and two had been rejected. None of the other claimants had objected to or challenged the Official Assignee`s adjudication.

***The Official Assignee`s submissions***

The Official Assignee`s contention was that once the receiving and adjudication orders were made against the bankrupt in November 1987 the provability of the appellant`s claims was governed by the provisions of the Bankruptcy Act (Cap 20) (`the Act`) and the Bankruptcy Rules (`the Rules`) made thereunder. The governing provision in respect of the adjudication of debts, s 94(1) of the Act read with r 185 of the Rules, made it clear that only the prescribed rate of interest of 8% per annum could be proved for by a creditor against a bankrupt`s estate. The appellant, however, had calculated its claim on the basis of the contractual interest rate set out in the contract of guarantee and on the basis of their method of deducting interest charges and other expenses from the principal sums owed. Interest was charged not only at the contractual rate but capitalised and incorporated as part of the principal. This was not provided for in the Act. Further, post bankruptcy interest is not chargeable unless the bankrupt`s estate has a surplus after all the debts proved in the bankruptcy had been paid in full.

The Official Assignee recognised that the appellant was not strictly a `secured creditor` of the bankrupt within the definition set out in s 2 of the Act. He contended, however, that the appellant was in a position similar to that of a secured creditor who is obliged to give credit for the value of his security and prove only for the balance of its debt. He argued that the appellant must do this notwithstanding that the securities it held belonged to the two companies, the principal debtors, rather than to the bankrupt itself. No authority was, however, cited for the proposition that even though the Act did not categorise the appellant as a `secured debtor` it had nevertheless to be treated as one for the purposes of its claim against the bankrupt.

The appellant had realised its security and chosen to prove for the balance still due. In such a situation, the Official Assignee contended, the appellant could not be treated any differently from other unsecured creditors who had lodged a proof against the bankrupt`s estate. Thus, in accordance with the Rules governing the claims of unsecured creditors, the appellant would only be entitled to prove for pre-bankruptcy interest and not for post bankruptcy interest unless there is a surplus. It would also be barred from attempting to use the proceeds of the security to discharge its claim for post-bankruptcy interest and then prove in the bankruptcy for pre-bankruptcy interest.

The next argument made by the Official Assignee was that the proceeds of the realisation of the securities had to be applied by the appellant in the payment of principal and interest in that order up to the date of the bankruptcy order and that the appellant could only prove for the balance of the debt which would exclude any interest accruing subsequent to the bankruptcy order. His point was whether a secured creditor may apply his security to satisfy the creditor`s claim for post bankruptcy interest depended whether he chose to prove in the bankruptcy or to stand apart and rely on his security. If he chose the latter course, he would be able to enforce his full contractual entitlement to interest accruing after the date of the bankruptcy and right up to the date of payment. The security could then be applied in discharge of any liability of the bankrupt that the creditor might think fit.

In this instance, the appellant had chosen to take the course of proving for the balance due to it and by doing so it was bound by the same rules and principles to which the other unsecured creditors were subject. There was no basis in law or fact to treat the appellant differently or to subject it to an independent regime. Doing so would not only be unjustified in law but it would upset the entire legal basis on which the Official Assignee had adjudicated claims previously.

The appellant`s first proofs of debt against the bankrupt`s estate were filed in August and December 1992 for the sums of approximately $12. 65m and $2. 29m based on the respective outstanding balances owed on the mortgage loans for which the bankrupt acted as guarantor. These two proofs were filed more than three years after the adjudication of bankruptcy and presumably were not filed earlier as the mortgaged properties were not completely disposed of until 1992. The Official Assignee submitted that the appellant could not through its conduct in waiting for the securities to be fully realised before filing a claim prejudice the position of the bankrupt by allowing his liability under the guarantees to run after the date of his bankruptcy.

***The basis of the decision***

The reasons why I allowed the appeal are neatly summarised at the end of the appellant`s submissions. These are:

(i) the debts of Dragon Court and Rochester cannot be confused with the debts of the bankrupt;

(ii) the debts of Dragon Court and Rochester were secured debts. The appellant was entitled to recover contractual interest out of the proceeds of the sales of the securities up to the dates of realisation;

(iii) the appellant was entitled to apply those proceeds to whichever parts of the debts it saw fit to do so;

(iv) the appellant was entitled to prove for the remaining principal against the bankrupt`s estate;

(v) the securities provided by Dragon Court and Rochester did not enure for the benefit of the bankrupt and the proceeds of their realisation could not be deducted from the sum that was due from the bankrupt.

The legal principles supporting the above conclusions are discussed below.

The main points underpinning the Official Assignee`s argument were that the appellant had to be treated as a secured creditor of the bankrupt who elected to prove for an unpaid balance after realisation of security and that interest on the indebtedness owing to the appellant had to be calculated in accordance with the bankruptcy regime rather than on the basis of the contractual documents signed by the principal debtors and guaranteed by the bankrupt.

Taking the interest point first, the Official Assignee did not dispute the appellant`s computation of contractual interest in relation to its recovery of the principal debt against both companies. The appellant was entitled to recover this contractual interest vis-Ã -vis the companies because it was a secured creditor of the companies. When it came to proving the remainder against the bankrupt, however, the Official Assignee`s case was that the appellant was only entitled to such aggregate sum that did not exceed what it would have received had interest been calculated on the basis of the rate allowable in bankruptcy ie 8% and even that, only up to the date of the bankruptcy order. The implication of this argument was that because the appellant obtained the additional security of the bankrupt`s guarantee, it lost its entitlement, effectively, to the contractual interest. This was not an argument that I could accept. The bankrupt had agreed to guarantee all amounts payable but not paid by the companies under the mortgage loans and under those loans, the lender was entitled to charge its contractual interest up to the date of disposal of the mortgaged properties notwithstanding

the intervening liquidation of the borrowers. The amount payable by the bankrupt as guarantor could only be ascertained after the realisation of the security and would then encompass whatever was outstanding at that date whether it was principal or interest.

Accepting the Official Assignee`s argument would mean that I would have to re-write the whole debt owed by the companies as though they were debts of the bankrupt, ie debts which accrued interest at 8% per annum (rather than the contractual rate) up the date of the bankruptcy order (rather than up to the date of realisation of the security). It would also mean that I accepted that the proceeds from the sale of security would then be deducted from the re-calculated debt leaving the remaining sum as the sum provable in bankruptcy. This was the natural consequence of the Official Assignee`s argument that the appellant`s position was equivalent to that of a secured creditor under the Act which argument implied that the appellant`s claim should be treated in exactly the same way as if the securities had been provided by the bankrupt`s estate, rather than by the two companies.

There is nothing in the Act to support the Official Assignee`s argument. The appellant did not take any security from the bankrupt. The security that it took was from the companies, the principal debtors. The bankrupt`s liability to the appellant was that of a guarantor and fell to be determined by the wording of the guarantee concerned. The companies` debts must be viewed separately from the bankrupt`s debt, because their legal incidents are different. As against the companies the appellant was entitled to contractual interest (and not limited to 8%) and to be treated as a secured creditor. As against the bankrupt, the appellant was subject to the bankruptcy regime as an unsecured creditor. The fact that the appellant was a secured creditor vis-Ã -vis the companies did not automatically make it a secured creditor vis-Ã -vis the bankrupt.

It is not in doubt that a secured creditor is entitled to contractual interest up to the date of liquidation of his security. See **Re Securitibank Ltd** [1980] 2 NZLR 714. Secondly, the creditor is not obliged to dispose of his security at any particular time. As I stated in **United Malayan Banking Corp Bhd v Lim Kang Seng** [1994] 2 SLR 787 , if the guarantor thinks that the sale of the securities should take place more quickly then he is free to request the creditor to sell and, if the creditor remains idle, to pay off the debt, take over the benefit of the securities and sell them himself. Once the security has been sold, the creditor would be entitled to apply the proceeds in discharge of whatever liability of the debtor as he may think fit. See **Re William Hall (Contractors) Ltd** [1967] 2 All ER 1150.

The right to apply security as the creditor sees fit extends to post-liquidation contractual interest. In the case of **Re Fox & Jacobs, ex p Discount Banking Co of England and Wales** [1894] 1 QB 438, the court held that s 23 of the English Bankruptcy Act 1890 (the equivalent of our present s 94 read with r 185), which provides that where a debt has been proved upon a debtor`s estate with interest, such interest shall for the purposes of dividend be calculated at a rate not exceeding five per cent per annum, does not prevent a secured creditor, who has realised or assessed the value of his security from allocating such value in discharge of the interest, even although such interest is at a rate higher than five per cent per annum, and proving for the principal or balance of principal due to him. Thus, the appellant on realising its securities was entitled to apply the proceeds first to bank charges, then to interest calculated at the contractual rate, and finally, to principal. It did not have to apply the proceeds only to interest calculated on the basis of the bankruptcy rate of 8% per annum.

In a situation where the principal debtor who has given security for his debt is made a bankrupt or liquidated and the guarantor for the debt is also bankrupted, each of the principal debtor and the guarantor will be considered to be a separate estate in bankruptcy. This means that the creditor will only be treated as a secured creditor vis-Ã -vis the principal debtor. He will not be treated as a

secured creditor vis-Ã -vis the guarantor and the security that he holds will not enure to the benefit of the separate estate of the guarantor. The proceeds from the sale of the security are applied to the secured debt of the principal debtor and only after that will you be able to ascertain the amount of the unsecured debt of the guarantor.

In **Re Dutton, Massey & Co, ex p Manchester and Liverpool District Banking Co, Ltd** [1924] 2 Ch 199, a partnership obtained credit facilities from a bank on the strength of certain securities pledged by two of the three partners. Later, the same two partners provided personal guarantees to secure the same facilities. Even later, a deed of assignment was entered into for the benefit of the partners` creditors under which, after getting in of the partnership assets and deducting costs, the remaining assets were to be applied in payment of the debts according to the rules of bankruptcy. The bank realised its securities and sought to prove against the partners personally for the remaining sum. It was argued on behalf of the partners that they should not be liable to the full extent of their guarantees, because regard ought to have been given to the fact that the bank was as against the firm, placed in an advantageous position by reason of the securities it held.

The partners` arguments were rejected. Pollock MR stated at p 210:

> *... a `secured creditor` after all, under the rules of bankruptcies is a person who, by the interpretation clauses (s 167) of the Bankruptcy Act 1914, holds a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor [this is in pari materia with the definition of secured creditor in the Bankruptcy Act 1995]. In the present case, therefore, the secured creditor is one against whom two characteristics must be established; first, that he holds a security on the property of the debtor, and secondly, that the security is in respect of a debt due to him from the debtor. Having regard to that definition, and to the rule laid down by Sir George Jessel, it appears to me that there is a confusion of thought in suggesting that there is not the absolute right on the right on the part of the bank to prove against the separate estates of the debtors in respect of the liabilities created under the guarantees which were given by those debtors respectively. That liability is not to be confounded with what has been done with regard to that which belongs to the estate of the partnership: the partners and the firm are to be treated as entirely separate entities, and the suggestion now made is one to which effect cannot be given, by reason of the fact that there is no method by which a security which is appropriated, or belongs to, quite a different bankruptcy, can be brought in so that it may enure to the benefit of a different bankruptcy from that in which the particular proof is made.*

The appellant submitted that what the Official Assignee was attempting to do was to cause securities that belonged to the liquidation of Rochester and Dragon Court to enure to the bankruptcy of Ho Kok Cheong. I agreed that to deny the appellant its full rights of recovery against the bankrupt would be unjust. As a prudent lender, the appellant took separate securities, the personal guarantees, so that sums that could not be recovered by realising the mortgaged properties would nonetheless be recoverable from the guarantors. Accepting the Official Assignee`s position would have meant agreeing that the appellant did not improve its position one iota by taking the additional security and its aggregate recovery was limited to what would have been recoverable had the appellant taken the guarantee alone as security. Legally, this could not be the position.

That the bankrupt cannot benefit from the securities provided by a third party was clear as long ago as **Re Turner, ex p West Riding Union Banking Co** [1881-82] 19 Ch D 105 where Jessel MR observed:

> *The principles of bankruptcy law are plain enough. A man is not allowed to prove against a bankrupt`s estate and to retain a security which, if given up, would augment the estate against which he proves. That is the principle of the whole thing. The only question is whether, if the security were given up, it would augment the estate?Of course, if the security was given up by a stranger and you were to cancel it, you would not augment the bankrupt`s estate to the extent of one farthing, and consequently such a security need not be given up.*

Since the securities provided by Rochester and Dragon Court stood outside the bankrupt`s estate and could not enure to for his benefit, and at the same time the secured debt carried contractual interest until payment, the appellant was entitled to prove as it did against the bankrupt`s estate.

One further point relating to the calculation of interest payable by the bankrupt. In calculating the amount provable, the Official Assignee only imputed interest which arose on the indebtedness of the companies from the date the notice of demand was issued against the bankrupt. This was not correct. By each guarantee, the bankrupt undertook to pay the appellant `all moneys due and to become due under [the loan documentation] or on any judgment which may be recovered thereunder and ... [the bankrupt] shall be considered and be liable ... as principal debtors but for all moneys owing by the Borrower to you ...`. Accordingly, even though the bankrupt was not liable to make payment until the borrower defaulted, once that happened, he became obliged to pay the entire amount of the debt of the relevant company. That debt clearly included principal and interest accrued up to the date of the issuance of the appellant`s notice of demand. Thus, for the purposes of assessing the bankrupt`s liability, interest had to be calculated from the respective dates of disbursement of the loans.

**Outcome:**

Appeal allowed.