

Tan Teck Guan v Mapletree Trustee Pte Ltd (trustee of Mapletree Industrial Trust)
[2011] SGHC 99

Case Number : Bankruptcy No 1318 of 2010 (Registrar's Appeal No 72 of 2011)
Decision Date : 26 April 2011
Tribunal/Court : High Court
Coram : Chan Seng Onn J
Counsel Name(s) : Vijai Parwani (Parwani & Co) for the appellant; Wu Xiaowen (Lexton Law Corporation) for the respondent.
Parties : Tan Teck Guan — Mapletree Trustee Pte Ltd (trustee of Mapletree Industrial Trust)

Insolvency Law

26 April 2011

Judgment Reserved.

Chan Seng Onn J:

1 This is an appeal against the bankruptcy order made by an Assistant Registrar ("AR") on 27 January 2011 in Bankruptcy No 1318 of 2010 ("the Bankruptcy Order").

Factual background

2 Mapletree Trustee Pte Ltd ("the respondent") obtained judgment against Tan Teck Guan ("the appellant") on 9 December 2009. The appellant made part-payment of the judgment sum, but due to cash flow problems, could not make payment of the balance sum. The respondent therefore commenced bankruptcy proceedings by issuing and serving a Statutory Demand on the appellant on 17 April 2010.

3 The respondent filed an application for bankruptcy on 5 August 2010 ("bankruptcy application"). In the affidavit filed by one Tam Mei Fong on behalf of the respondent in support of the application ("the Creditor's Affidavit"), it was asserted that the appellant was not eligible to be considered for the Debt Repayment Scheme ("DRS") as he had two previous bankruptcy orders made against him in the 5 years preceding the date of the respondent's bankruptcy application.

(a) First, pursuant to Bankruptcy No 2614 of 2007 by the petitioning creditor Oversea-Chinese Banking Corporation Limited ("OCBC"), the appellant was adjudged bankrupt and a bankruptcy order was made against the appellant on 23 April 2009, with a stay granted till 11 May 2009. The appellant made payment to OCBC on 12 May 2009. Although this was one day after the stay had expired, OCBC was itself under the impression that the due date of payment was 12 May 2009, and in fact wrote to the court stating that payment was made within the stay period. Accordingly, OCBC's solicitors filed Summons 3050 of 2009 for the bankruptcy order of 23 April 2009 to be annulled.

(b) Second, pursuant to Bankruptcy No 2401 of 2007 by the petitioning creditor Singa Triumph, the appellant was adjudged a bankrupt and a bankruptcy order was made against the appellant on 29 November 2007, with a stay granted till 13 December 2007. Following the appellant's payment by the abovementioned date of the stay, Singa Triumph filed Summons 5680

of 2007 on 27 December 2007 for the bankruptcy order of 29 November 2007 to be annulled.

4 In reliance on the Creditor's Affidavit, the AR did not refer the matter to the Official Assignee for assessment of the appellant's suitability for DRS ("DRS suitability assessment"). Instead, the appellant was adjudged a bankrupt pursuant to the Bankruptcy Order of 27 January 2011.

5 It is undisputed that the two bankruptcy orders abovementioned had been made against the appellant. However, the appellant emphasised that both orders had already been annulled because full payment had been made in both cases. Although the annulments were disclosed to the court in the bankruptcy application, the effect of the annulled bankruptcy orders on the appellant's eligibility for the DRS had not been canvassed before the AR, possibly because the appellant was not represented by legal counsel at the hearings on 2 September 2010 and 27 January 2011.

6 The appellant therefore filed an application via Summons 776 of 2011, arguing that the Bankruptcy Order should not have been made, and that instead, the appellant should have been referred to the Official Assignee for DRS suitability assessment. The court hearing Summons 776 of 2011 took the view that the appellant's application should be by way of an appeal against the AR's decision not to refer the appellant for DRS. The appellant accordingly filed the present appeal.

Issue before the court

7 The sole issue before this court is: whether the existence of a bankruptcy order, which was made and subsequently annulled within the period of 5 years immediately preceding the date of the bankruptcy application, *per se* disqualifies the debtor from being referred to the Official Assignee for DRS suitability assessment. In addressing this issue, this court must decide on whether the annulment of a bankruptcy order operates *retrospectively* or *prospectively* in the specific situation where the debtor's eligibility for the DRS is being considered.

The law

The effect of annulment of a bankruptcy order

8 The effect of annulment of a bankruptcy order is not provided for in our legislation. There is also no Singapore case law authority on this point. Accordingly, I turn to consider Commonwealth jurisprudence on the effect of such annulment. In so doing, I emphasise that Commonwealth jurisprudence is persuasive given the similarities in the provisions relating to annulment of bankruptcy orders. A comparison of Singapore's Bankruptcy Act (Cap 20, 2009 Rev Ed) ("Bankruptcy Act") with the bankruptcy legislation in Malaysia, Hong Kong and Australia suffices to illustrate this point. Section 123(3) of the Bankruptcy Act provides:

Where a court annuls a bankruptcy order under this section, any sale or other disposition of property, payment made or other things duly done by or under the authority of the Official Assignee or by the court shall be valid except that the property of the bankrupt shall vest in such person as the court may appoint or, in default of any such appointment, revert to the bankrupt on such terms as the court may direct.

Section 105(2) of the Malaysia Bankruptcy Act 1967 provides:

Where an adjudication is annulled under this section, all sales and dispositions of property, and payments duly made, and all acts theretofor done by the Director General of Insolvency, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor

who was adjudged bankrupt shall vest in such person as the court appoints, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court declares by order.

Section 33(4) of the Hong Kong Bankruptcy Ordinance provides:

Where the court annuls a bankruptcy order under this section or section 20I, any sale or other disposition of property, payment made or other thing duly done by or under the authority of the Official Receiver, a nominee or a trustee or by the court is valid, but if any of the bankrupt's estate is then vested in such a trustee, it shall vest in such person as the court may appoint or, in default of any such appointment, revert to the bankrupt on such terms (if any) as the court may direct, and the court may include in its order such supplemental provisions as may be authorized by the rules.

Section 74(6) of the Australian Bankruptcy Act 1966 provides:

Where a bankruptcy is annulled under this section, all sales and dispositions of property and payments duly made, and all acts done, by the trustee or any person acting under the authority of the trustee or the Court before the annulment shall be deemed to have been validly made or done but, subject to subsection (7), the property of the bankrupt still vested in the trustee vests in such person as the Court appoints or, in default of such an appointment, reverts to the bankrupt for all his or her estate or interest in it, on such terms and subject to such conditions (if any) as the Court orders.

There is evidently substantial similarity in the bankruptcy legislation of Singapore, Malaysia, Hong Kong and Australia. This is unsurprising, given that the legislative provisions in these jurisdictions were based on the bankruptcy legislation in England.

9 The weight of Commonwealth case law authority indicates that, as a general proposition, the effect of an annulment of a bankruptcy order is *retrospective*. In the old English case of *Re Keet ex p Official Receiver* [1905] 2 KB 666 at 676 ("*Re Keet*"), the court noted, albeit in *obiter*, that the effect of an annulment was to "wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication".

10 This position was also taken by the Queensland Court of Appeal in the Australian case of *Theissbacher v MacGregor Garrick and Co* [1993] 2 Qd R 223 ("*Theissbacher*"), where the majority (Pincus JA and White J) held that a former bankrupt would, upon annulment, be treated in general as never having been made a bankrupt. The same position was reiterated in the cases of *Re Wong; ex parte Wong v Donnelly and Others* (1995) 131 ALR 180 (Federal Court of Australia) ("*Re Wong*"), *Roberts v Wayne Roberts Concrete Constructions Pty Ltd* (2004) 208 ALR 532 (Supreme Court of New South Wales) ("*Roberts*") and *Battenberg v Union Club* (2005) 215 ALR 696 (Supreme Court of New South Wales) ("*Battenberg*").

11 Both *Re Keet* and *Theissbacher* were cited with approval in the recent Malaysian case of *Sardar Mohd v Perwira Affin* [2010] 4 MLJ 285 at [37] ("*Sardar*"). As recently as August 2010, the Hong Kong Court of First Instance in *Tan Kah Eng v Tan Eng Khiam* [2010] 4 HKLRD 526 at [23] ("*Tan Kah Eng*") expressed the view that the effect of annulment under Singapore law is that the bankrupt is put in the same position as if there had been no bankruptcy order made against him.

12 I note that in Kala Anandarajah *et al*, *Law and Practice of Bankruptcy in Singapore and Malaysia* (Butterworths Asia, 1999) at p 408, the learned authors cite *Re Keet* for the proposition that in

Singapore and Malaysia:

[a]nnulment of a bankruptcy order liberates a bankrupt from the status of bankruptcy as well as the disqualifications of a bankrupt. It wipes out the bankruptcy altogether and puts the bankrupt in the same position as if there had been no bankruptcy order made against him.

(Footnote omitted)

13 I further note that this is also the view espoused by the Singapore Insolvency and Public Trustee's Office ("IPTO") in its public circular issued on 31 March 2010 ("the IPTO Circular"). Para 5 of the IPTO Circular states that:

With immediate effect from 1st April 2010, IPTO will remove the records of all cases where the bankruptcy order has been annulled from its online information search service This is to recognise that the *annulment of a bankruptcy order has the effect in law that the bankruptcy order was never made against the person*; and hence there is no issue of public interest in disclosing such information.

(Emphasis added)

14 While none of the above authorities are binding on me, I see no reason to disagree with them, especially in view of similarities in legislation as noted in [\[8\]](#) above. Accordingly, I hold that under Singapore law, annulment of a bankruptcy order has the effect of wiping out the bankruptcy altogether and putting the bankrupt in the same position as if there had been no bankruptcy order made against him.

15 This does not, however, mean that annulment has retrospective effect for *all* intents and purposes. In *Theissbacher*, Pincus JA and White J held that the former bankrupt is "in general" treated as never having been made a bankrupt, such words clearly qualifying their observation that annulment has retrospective effect. More explicitly, in *Re Wong*, the court cited *Theissbacher* for the proposition that "an annulment does not avoid the bankruptcy for *all* purposes" (emphasis added). Similarly, in *Roberts* at [46], the court held that "the effect of annulment does not cause *all* matters to be viewed after the event as if the bankruptcy had never occurred". Again, in *Battenberg* at [70], the court noted that the general proposition was "[s]ubject to *exceptions* which the Bankruptcy Act creates, and *exceptions* which arise as a matter of the general law" (emphasis added).

16 In *Sardar*, the Malaysian Federal Court emphasised the words "*in general*" used by the *Theissbacher* court (*Sardar* at [27]), and also took pains to qualify its finding, *viz* that the effect of the annulment was retrospective, as being applicable to the facts of the specific case before the court ("[f]or this case before me": see *Sardar* at [39]).

17 The view that the general proposition does not apply for *all* intents and purposes is supported by the legislative scheme in Singapore. For instance, pursuant to s 123(3) of the Bankruptcy Act, any sale or disposition of property or payment made under the authority of the Official Assignee *prior* to the annulment remains valid. Similarly, pursuant to s 147(3) of the Bankruptcy Act, the fact that the bankruptcy order has been annulled does not exempt the bankrupt from being prosecuted for an offence under the Bankruptcy Act committed by the bankrupt during his bankruptcy. Again, pursuant to s 130 of the Bankruptcy Act, where a bankrupt is disqualified from being appointed or acting as a trustee or personal representative in respect of any trust, estate or settlement, the disqualification ceases *when the bankruptcy order is annulled, viz, only after* the time of annulment. In this regard, I note that in *Tan Kah Eng*, the court appeared to have considered some of these statutory provisions,

and concluded that “annulment operates retrospectively *subject to these reservations*” (*Tan Kah Eng* at [17], emphasis added).

18 I therefore turn to consider whether a former bankrupt’s eligibility for DRS is an “exception” to the general proposition that annulment is retrospective in nature. This goes towards addressing the issue (at [7] above): if annulment is retrospective for the purposes of ascertaining eligibility for DRS, an annulled bankruptcy order would not disqualify the debtor from being referred for DRS suitability assessment; conversely, if annulment is prospective, the debtor would be so disqualified.

Does an annulled bankruptcy order disqualify a debtor from being referred for DRS suitability assessment?

19 The DRS was instituted as a pre-bankruptcy scheme to assist debtors who have debts less than \$100,000 by devising a debt repayment plan to pay their debts over a fixed period of time. Pursuant to s 65(7) of the Bankruptcy Act, if certain qualifying requirements are satisfied, the court “*shall*” (emphasis added) refer the matter to the Official Assignee for the purpose of enabling the Official Assignee to determine whether the debtor is suitable for the DRS.

20 Before a court will refer a debtor to the Official Assignee for DRS suitability assessment, the qualifying criteria in s 65(7) of the Bankruptcy Act must be satisfied. Section 65(7) provides:

(7) If a bankruptcy order may be made on the bankruptcy application, the court shall, instead of making the order, adjourn the bankruptcy application for a period of 6 months or such other period as the court may direct and refer the matter to the Official Assignee for the purpose of enabling the Official Assignee to determine whether the debtor is suitable for a debt repayment scheme under Part VA, if the following qualifying criteria are satisfied:

(a) the debt or the aggregate of the debts in respect of which the bankruptcy application is made does not exceed \$100,000 or such other amount as the Minister may, by order published in the *Gazette*, specify;

(b) the debtor is not an undischarged bankrupt, and *has not been a bankrupt* at any time within the period of 5 years immediately preceding the date on which the bankruptcy application is made, under this Act;

(c) a voluntary arrangement under Part V in respect of the debtor is not in effect, and was not in effect at any time within the period of 5 years immediately preceding the date on which the bankruptcy application is made;

(d) the debtor is not subject to any debt repayment scheme under Part VA, and has not been subject to any such debt repayment scheme at any time within the period of 5 years immediately preceding the date on which the bankruptcy application is made; and

(e) the debtor is not a sole proprietor, a partner of a firm within the meaning of the Partnership Act (Cap. 391) or a partner in a limited liability partnership.

(Emphasis added)

21 Of particular interest to the present case is s 65(7)(b) (“the s 65(7)(b) requirement”), which stipulates that a debtor would not be referred for DRS suitability assessment if, *inter alia*, he has been a bankrupt at any time within the period of 5 years immediately preceding the date on which the

bankruptcy application is made ("the 5-year period"). The issue before this court is whether a bankruptcy order which has been annulled within the 5-year period ("an annulled bankruptcy order") disqualifies a debtor from being referred for DRS suitability assessment. No precedent decision on the effect of an annulled bankruptcy order on a debtor's eligibility for the DRS was cited to me. I will therefore proceed to analyse the position at law through statutory interpretation and first principles.

22 The respondent contended that eligibility for DRS is an exception to the general proposition that annulment is retrospective in nature. In other words, a debtor who was the subject of a bankruptcy order subsisting within the 5-year period is disqualified from being referred for DRS notwithstanding that the previous bankruptcy order was subsequently annulled before the present bankruptcy application. To support this contention, the respondent referred to Form 3 of the Bankruptcy Rules, *ie* the "Affidavit in Support of Creditor's Bankruptcy Application". Form 3 requires the creditor to declare to the best of his knowledge and belief that the DRS does not apply to the debtor *inter alia* because the debtor (Form 3, para 7(c)):

has been *adjudged* a bankrupt in the 5 years preceding the date of this application

(Emphasis added)

According to the respondent, the use of the word "adjudged" suggests that the material consideration is whether or not the debtor has previously been *adjudged* a bankrupt; *viz*, any bankruptcy order subsisting within the 5-year period, regardless of whether it has subsequently been annulled, disqualifies the debtor from being referred for DRS suitability assessment.

23 However, having regard to the legislative scheme as outlined in the Bankruptcy Act, as well as the legislative purposes motivating the DRS, I do not think that eligibility for the DRS is an exception to the general proposition.

24 First, the phrase "has not been a bankrupt" in s 65(7)(b) is equivocal as to whether or not eligibility for the DRS is an exception to the general proposition. This should be contrasted with the unequivocal language of the other "exceptions" contained in ss 123(3), 130 and 147(3) of the Bankruptcy Act (see [\[17\]](#) above).

25 Second, given the ambiguity of s 65(7)(b), it is necessary to examine legislative intention to discern whether annulled orders are to be considered *vis-à-vis* eligibility for the DRS. Perusal of the Hansard reveals that the s 65(7)(b) requirement exists because the DRS is not intended to be a scheme that debtors can use repeatedly to avoid paying their debts in full: see *Singapore Parliamentary Debates, Official Report* (19 January 2009) vol 85 (Associate Professor Ho Peng Kee, Senior Minister of State for Law). I accordingly turn to consider the characteristics of an annulled bankruptcy order, so as to determine whether disqualifying *all* debtors who had bankruptcy orders annulled within the 5-year period would be in line with the professed legislative intention behind the s 65(7)(b) requirement.

26 The court's power to annul a bankruptcy order is set out in s 123(1) of the Bankruptcy Act. The four grounds on which a bankruptcy order may be annulled are set out in sub-sections (a)-(d) of s 123(1), as follows:

Court's power to annul bankruptcy order

123. —(1) The court may annul a bankruptcy order if it appears to the court that —

(a) on any ground existing at the time the order was made, the order ought not to have been made;

(b) to the extent required by the rules, both the debts and the expenses of the bankruptcy have all, since the making of the order, either been paid or secured for to the satisfaction of the court;

(c) proceedings are pending in Malaysia for the distribution of the bankrupt's estate and effects amongst the creditors under the bankruptcy law of Malaysia and that the distribution ought to take place there; or

(d) a majority of the creditors in number and value are resident in Malaysia, and that from the situation of the property of the bankrupt or for other causes his estate and effects ought to be distributed among the creditors under the bankruptcy law of Malaysia.

Simply put, a bankruptcy order may be annulled if (1) the order ought not to have been made in the first place (s 123(1)(a)); or (2) the former bankrupt had paid or secured all the debts and expenses of his bankruptcy (s 123(1)(b)); or (3) proceedings are pending in Malaysia for distribution of the bankrupt's assets (s 123(1)(c)); or (4) a majority of the creditors are resident in Malaysia and distribution ought to be under the bankruptcy law of Malaysia (s 123(1)(d)).

27 It is evident from the four grounds set out above that annulment of a bankruptcy order neither casts any aspersions nor provides any indication *vis-à-vis* the conduct of the person subject to the bankruptcy order. Accordingly, I conclude that the fact that a debtor had previously been subject to an annulled bankruptcy order should not *per se* disqualify him from being referred to the Official Assignee for DRS suitability assessment. I do not see any reason in principle why a debtor whose previous bankruptcy order has been annulled should, *for this reason alone*, be denied an opportunity for his case to be referred to the Official Assignee.

28 Practical considerations also support such a conclusion. On or after 1 April 2010, an online IPTO bankruptcy search would not reveal any annulled bankruptcy orders. For practical purposes, therefore, information regarding a debtor's previous bankruptcy orders (which were subsequently annulled) would *not* be available to a creditor for the purposes of filing the Creditor's Petition. Indeed, it bears noting that in the present case, the respondent had been able to obtain information on the appellant's annulled bankruptcy orders only because it had conducted IPTO bankruptcy searches in November 2009. Such information was relied upon by the respondent in its Creditor's Affidavit, which was filed in August 2010. Had the respondent conducted fresh bankruptcy searches on or after 1 April 2010 (*ie* after the IPTO Circular), there would have been no details regarding the appellant's annulled bankruptcy orders.

29 Despite my holding that annulment has retrospective effect and that an annulled bankruptcy order should not be an impediment to a debtor's eligibility for DRS suitability assessment, I emphasise that this does *not* mean that the Official Assignee is therefore precluded from considering previous annulled bankruptcy orders in assessing the debtor's suitability for DRS. It is clear from s 56B(2) of the Bankruptcy Act that, in assessing the debtor's suitability for DRS, the Official Assignee is not limited to considering the requirements in s 65(7). For instance, pursuant to s 56B(2)(e), the Official Assignee is empowered to find a debtor unsuitable for the DRS "for any other reason". I further note that the removal of information as indicated in the IPTO Circular is limited to removal from the *online* information search service; there is no similar removal from the Official Assignee's own records. Therefore, even though at law the annulment of a bankruptcy order is retrospective for the purposes of determining a debtor's eligibility to be referred for DRS suitability assessment, the Official Assignee

may still consider its own records in determining a debtor's suitability for DRS. In my tentative view, there may well be cases where, *inter alia*, a debtor's pattern of being adjudged bankrupt and subsequently obtaining annulment of the bankruptcy order indicates to the Official Assignee that the debtor is unsuitable for the DRS. However, as this issue is not before me, it is not necessary for me to state any conclusion on this matter.

Application to the facts

30 In the present case, the respondent declared in the Creditor's Affidavit that the appellant had previously been subject to bankruptcy orders. Print outs of the online searches annexed to the Creditor's Affidavit revealed that the bankruptcy orders were subsequently annulled. Respondent's counsel also apprised the AR of the same at the 2 September 2010 hearing. However, the legal point that an annulled bankruptcy order had retrospective effect was not canvassed before the AR, leading the AR to make the Bankruptcy Order of 27 January 2011.

31 I therefore set aside the Bankruptcy Order of 27 January 2011 and adjourn the bankruptcy application for a further six months from the date of this judgment. I further order that the present matter be referred to the Official Assignee, for the purpose of enabling the Official Assignee to determine whether the appellant is suitable for the DRS. Unless the parties wish to be heard on costs, I would award costs to the appellant to be taxed if not agreed.

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