

Reversing a Bankrupt's Transfer

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I. INTRODUCTION

Let's say you are an investor. You enter a joint investment with a friend, and lend him \$100,000. Sadly, the joint venture fails, and to make matters worse, your friend has gone bankrupt and transferred half of your money to his wife. Can you get your money back?

Unfortunately, once he is declared bankrupt, you cannot take legal action against your friend.¹ As a bankrupt, all his assets vest in a public servant called the Official Assignee ("OA").² The OA is responsible for managing bankrupt persons' assets to ensure they pay back their creditors.³

While the OA manages transfers of money both before and during bankruptcy, this article assumes that your friend transferred the money to his wife *before* he went bankrupt. In this situation, the OA can apply to court to reverse your friend's transfer under Section 361 of the *IRDA*⁴ in order to return your money back to you.⁵ This article explains the requirements the OA must fulfil to reverse such transactions, how you can assist with matters, and the steps you can take to begin this process.

II. DISCUSSION

There are four requirements to successfully reverse a bankrupt's transfer:⁶

- (a) There must be a "transaction";
- (b) The transaction must occur during a "relevant time";

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¹ Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("*IRDA*"), at s 327(1)(c).

² *IRDA*, *supra* n 1, at s 327(1)(a)(i).

³ "Who is the Official Assignee?" Ministry of Law website, accessed 17 October 2021, <https://io.mlaw.gov.sg/bankruptcy/who-is-the-official-assignee/>.

⁴ *IRDA*, *supra* n 1, at s 361(1).

⁵ "Information for Creditors", Ministry of Law website, accessed 17 October 2021, <https://io.mlaw.gov.sg/debt-repayment-scheme/information-for-creditors>, ("*Information for Creditors (Debt Repayment Scheme)*"), at [4].

⁶ *Mercator & Noordstar NV v Velstra Pte Ltd* [2003] 4 SLR(R) 667 ("*Mercator*"), at [21].

- (c) The bankrupt must be “insolvent” when the transfer was made; and
- (d) The transaction must be at an “undervalue”.

A. *There must be a “transaction”*

The word “transaction” may seem commercial, but a formal contract or agreement is not required.⁷ Indeed, a simple payment is enough to create a reversible transaction.⁸ In fact, courts have treated transfers from bankrupts to their relatives as transactions.⁹ So if your friend transferred money to his wife, this should constitute a transaction.

B. *The transaction must occur during a “relevant time”*

To fall within the relevant time, the transaction must have occurred at least *three years* before the application for bankruptcy was made.¹⁰ You can find out the date of the application [here](#).¹¹

C. *The bankrupt must be “insolvent” when he made the transfer*

Next, the bankrupt must have been “insolvent” during the transfer.¹² Generally, someone is “insolvent” when they cannot pay their debts.¹³ At law, insolvency is proven in two ways:¹⁴ (1) the cash-flow test;¹⁵ and (2) the balance-sheet test.¹⁶ Alternatively, the law can *presume* that the bankrupt was insolvent if he transacted with an “associate”.¹⁷

(1) *Cash-flow test*

Under the cash-flow test, someone is insolvent if they cannot pay their debts as they fall due.¹⁸ This is proven by showing that the bankrupt was pressed to make payments, yet he was still

⁷ *Mercator*, *supra* n 6, at [28].

⁸ *Id.*, at [28].

⁹ See *Christie, Hamish Alexander (as private trustee in bankruptcy of Tan Boon Kian) v Tan Boon Kian* [2021] 4 SLR 809; *Awyong Shi Peng v Lim Siu Lay* [2008] SGDC 280.

¹⁰ *IRDA*, *supra* n 1, at s 363(1)(a)(ii).

¹¹ “Insolvency office E-Services”, Ministry of Law Website: Insolvency Office, accessed 18 November 2021, at <https://eservices.mlaw.gov.sg/io/>.

¹² *Id.*, at s 363(2)(a).

¹³ “Insolvency”, Investopedia.com, accessed 17 October 2021, <https://www.investopedia.com/terms/i/insolvency.asp>.

¹⁴ *Christie, Hamish Alexander (as private trustee in bankruptcy of Tan Boon Kian) v Tan Boon Kian* [2021] 4 SLR 809 (“*Christie Hamish*”), at [23].

¹⁵ *IRDA*, *supra* n 1, at s 363(4)(a).

¹⁶ *Id.*, at s 363(4)(b).

¹⁷ *Id.*, at s 363(3).

¹⁸ *Christie Hamish*, *supra* n 14, at [25].

unable to pay.¹⁹ Thus, in the case of *Living the Link*, a company was deemed cash-flow insolvent²⁰ as one of its creditors repeatedly demanded for payment over the course of a year,²¹ which the company plainly could not fulfil.²²

(2) *Balance-sheet test*

Another way to demonstrate insolvency is through the balance-sheet test.²³ Here, someone is deemed insolvent if the totality of his assets (his properties, cash, etc) is *lesser* in value than his liabilities (the debts he owes others).²⁴ Liabilities here include both “contingent” and “prospective” liabilities.²⁵

Contingent liabilities are debts that are dependent on an uncertain event in the future.²⁶ For them to count, there must be a “real prospect” that the contingency event will occur.²⁷ *Christie Hamish* is a useful example. There, one Mr. Tan transferred substantial sums of money to his relatives before he went bankrupt.²⁸ Previously, Mr. Tan had promised a bank to pay for a resort’s debts in the event the resort could not pay for them.²⁹

The court found that the resort’s debts constituted contingent liabilities for Mr. Tan.³⁰ This was because the resort was doing badly and, in all likelihood, would have been unable to pay for its debts.³¹ So, although the resort had yet to default on its debts, there was a real prospect that it would have,³² and the debts thus constituted contingent liabilities for Mr. Tan.³³

¹⁹ *Living the Link Pte Ltd v Tan Lay Tin Tina* [2016] 3 SLR 621 (“*Living the Link*”), at [27].

²⁰ *Living the Link*, *supra* n 19, at [30].

²¹ *Id.*, at [28].

²² *Id.*, at [28] & [30].

²³ *Christie Hamish*, *supra* n 14, [33].

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ “Contingent Liability”, Investopedia.com, accessed 17 October 2021, <<https://www.investopedia.com/terms/c/contingentliability.asp>>.

²⁷ *Christie Hamish*, *supra* n 14, at [60].

²⁸ *Id.*, at [2].

²⁹ *Id.*, at [53](a).

³⁰ *Id.*, at [57].

³¹ *Ibid.*

³² *Id.*, at [61].

³³ *Id.*, at [57].

On the other hand, prospective liabilities are debts that are certain to become due in the future.³⁴ In *Christie Hamish*, for example, the same Mr. Tan sold a property in Melbourne.³⁵ To show that Mr. Tan was solvent, Mr. Tan's relatives (who wanted to keep the money he passed to them) argued that he would have made A\$500,000 from the sale.³⁶

The court disagreed with his relatives,³⁷ and found that he would have only earned around S\$300,000.³⁸ This was because he would have had to discharge a capital gains tax upon selling the property.³⁹ This tax payment was a liability that Mr. Tan was certain to incur and was thus a prospective liability that needed to be factored in.⁴⁰ Ultimately, the tax payment reduced the value of Mr. Tan's assets considerably.⁴¹

Overall, the OA only needs to satisfy *one* of these tests, and not both.⁴² On this requirement, if you happen to know any details regarding your friend's financial state at the time he made the transfer, you can assist matters by providing the OA such information.

(3) *Associate presumption*

Problems arise: what if the OA has no proof that your friend was pressed by his creditors (cash-flow test), or documents evincing his assets and liabilities (balance-sheet test)? How do we then prove insolvency?

The law acknowledges this problem, and *presumes* the bankrupt was insolvent⁴³ if he transacted with an "associate".⁴⁴ Associates include the bankrupt's siblings⁴⁵ or their spouses.⁴⁶ This effectively flips the burden onto your friend to show that he was solvent under the cash-flow *and* balance-sheet test.⁴⁷

³⁴ *Christie Hamish*, *supra* n 14, at [46].

³⁵ *Id.*, at [49].

³⁶ *Ibid.*

³⁷ *Id.*, at [50].

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Id.*, at [50].

⁴² *Living the Link*, *supra* n 19, at [26].

⁴³ *IRDA*, *supra* n 1, at s 363(4).

⁴⁴ *Christie Hamish*, *supra* n 14, at [17].

⁴⁵ *IRDA*, *supra* n 1, at s 364.

⁴⁶ *Id.*, at s 364(2)(a).

⁴⁷ *Awyong Shi Peng v Lim Siu Lay* [2008] SGDC 280 ("Awyong"), at [19].

Fortunately for you, since your friend transferred money to his wife (who's an associate), this makes it a lot easier for the OA to establish this requirement.⁴⁸

D. *The transaction must be at an “undervalue”*

A transaction is at an undervalue in two scenarios:⁴⁹ (1) gifts or transactions where the bankrupt receives nothing in return;⁵⁰ and (2) transactions where the bankrupt receives something of significantly less value than what he provides.⁵¹

(1) Gifts or transactions where the bankrupt receives nothing in return

Giving a gift is an undervalue transaction.⁵² In *Awyong*, for example, a father, before going bankrupt, transferred his two sons \$200,000 for their overseas university education.⁵³ The father had no obligation to do so and effectively gave the money for free.⁵⁴ It was clear he intended the money as a gift for his sons,⁵⁵ and thus, the transfer was deemed at an undervalue.⁵⁶

Alternatively, if there was a formal agreement, a transaction can still be at an undervalue if the bankrupt receives nothing in return.⁵⁷ *Parakou Shipping* illustrates this. There, a company named Parakou had been paying the salaries of some personnel for some time.⁵⁸ However, it transpired that these people were not employed by Parakou at all – they were employed by another company altogether.⁵⁹ Parakou was therefore paying the salaries of people who Parakou did not employ, all while receiving nothing in return.⁶⁰ Accordingly, these payments were at an undervalue.⁶¹

⁴⁸ *Mercator*, *supra* n 6, at [14].

⁴⁹ *Christie Hamish*, *supra* n 14, at [18].

⁵⁰ *IRDA*, *supra* n 1, at s 361(3)(a).

⁵¹ *Id.*, at s 361(3)(c).

⁵² *Awyong*, *supra* n 47, at [11].

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Parakou Shipping Pte Ltd v Liu Cheng Chan* [2017] SGHC 15 (“*Parakou Shipping*”), at [94].

⁵⁸ *Id.*, at [18].

⁵⁹ *Id.*, at [105].

⁶⁰ *Ibid.*

⁶¹ *Id.*, at [106].

(2) *Transactions where the bankrupt receives something of significantly less value*

Lastly, a transaction is at an undervalue where the bankrupt receives something of significantly less value than whatever he provides.⁶² In *Rothstar* for example, a man named Mr. Ng signed a mortgage worth \$4,500,000 over a property before he went bankrupt.⁶³ The court ruled the mortgage to be an undervalue transaction, holding that Mr. Ng received something of significantly less value than what he provided.⁶⁴ This was because he signed the mortgage for the benefit of a company, not himself.⁶⁵ Additionally, he stood to gain little (to no) benefit from the mortgage.⁶⁶ Overall, whatever benefit he received from the transaction, it was clearly significantly lower than the massive \$4,500,000 he signed away.⁶⁷

Overall, the OA will need to conduct some background checks to see if your friend's wife gave him anything in return when he transferred the money. As such, if you possess any information on whether your friend's wife gave him anything in return, you can help matters by letting the OA know.

III. STEPS TO TAKE

So far, we have explained how the OA may reverse transactions made by bankrupts. This section will explain how you can kickstart this entire process. For starters, you should immediately notify the OA of your dispute.⁶⁸ You do this by submitting a "Proof of Debt" form to him.⁶⁹ This step is important, as the OA is only allowed to return money to creditors who have proven their debts to him.⁷⁰

⁶² *Rothstar Group Ltd v Chee Yoh Chuang* [2021] SGHC 176, at [56].

⁶³ *Id.*, at [12].

⁶⁴ *Id.*, at [65].

⁶⁵ *Id.*, at [60].

⁶⁶ *Id.*, at [62].

⁶⁷ *Id.*, at [65].

⁶⁸ "Information for Creditors", Ministry of Law website, accessed 17 October 2021, <https://io.mlaw.gov.sg/bankruptcy/information-for-stakeholders/information-for-creditors/>, (*"Information for Creditors (Stakeholders)"*), at [3]. Take note that you will have to furnish your particulars and further information on the money you lent your friend. You can also submit your Proof of Debt form [here](#).

⁶⁹ *Id.*, at [5].

⁷⁰ *Information for Creditors (Debt Repayment Scheme)*, *supra* n 5, at [4].

Assuming all goes well, the OA will return your money to you once the bankrupt has sufficient funds to pay back his creditors.⁷¹ Be prepared, as this may take a while: dividends are returned on a half-yearly basis,⁷² and chances are that you are not the only person your friend owes money.⁷³

IV. CONCLUSION

Getting money back from a bankrupt is going to be challenging, and the OA's job is to help creditors get their money back from bankrupts. That said, this does not mean you have to sit idle helplessly – as discussed, you can always assist matters by providing the OA any relevant information you may have on your dispute.⁷⁴

⁷¹ *Information for Creditors (Stakeholders)*, *supra* n 68, at [11].

⁷² *Information for Creditors (Debt Repayment Scheme)*, *supra* n 5, at [4].

⁷³ You can find out the total amount of claims made against a bankrupt to get a rough guess how long it will take [here](#): *Information for Creditors (Stakeholders)*, *supra* n 68, at [7].

⁷⁴ For steps on how to can contact the OA, see *Information for Creditors (Stakeholders)*, *supra* n 68, at [12].