Amrae Benchuan Trading Pte Ltd (in liquidation) v Lek Benedict and Others [2006] SGHC 75

Case Number : Suit 424/2005

Decision Date : 05 May 2006

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Vijay Kumar (Vijay & Co) for the plaintiff; The first and second defendants in person

Parties : Amrae Benchuan Trading Pte Ltd (in liquidation) — Lek Benedict; Lim Wee Chuan; Axum Marketing Pte Ltd

Insolvency Law – Avoidance of transactions – Liquidator of company claiming certain company transactions amounting to unfair preference and breach of directors' duties – Whether directors breaching fiduciary duties to company and s 99 read with ss 100 to 102 of Bankruptcy Act by transferring stock of company to another company which they were directors and shareholders of and by paying themselves directors' fees when company insolvent – Whether directors acting bona fide in interest of company – Sections 99, 100, 101, 102 Bankruptcy Act (Cap 20, 2000 Rev Ed)

5 May 2006 *Judgment reserved.*

Lai Siu Chiu J:

The facts

1 The plaintiff, Amrae Benchuan Trading Pte Ltd ("the Company"), was wound up by an order of court on 19 September 2003 in Companies Winding Up No 216 of 2003 ("the Winding-up Petition") and the Official Receiver was appointed the liquidator. By an order of court dated 25 May 2005, Don Ho Mun-Tuke ("the Liquidator") replaced the Official Receiver as the liquidator. The Company was incorporated on 30 May 1990 and prior to its winding up, its business was distributing Bohemia crystal ware and gifts.

2 Benedict Lek and Joseph Lim Wee Chuan ("the first and second defendants" respectively and collectively the "defendants") were shareholders and directors of the Company at the material time. The defendants were also shareholders and directors of the third defendant, Axum Marketing Pte Ltd ("Axum"), together with one Gregory Tan Te Teck ("Gregory"), who was Axum's employee. Axum was incorporated on 28 April 2001 under its former name, Memco Pte Ltd. The name change to Axum was effected on 4 June 2001. The Company started supplying goods to Axum on 15 August 2001 or thereabouts.

3 Gregory is also the sole proprietor of Concept Gifts which business was registered on 29 September 1994. A company by the name Concept Gifts Pte Ltd was incorporated on 8 August 2002 with Gregory as a director and shareholder. The defendants have no shares in either Concept Gifts or the limited company.

4 The first defendant used to work for a company called Tri Sindo International Pte Ltd ("Tri Sindo") between 1982 and late 1988. During that period, Tri Sindo purchased crystal ware from Zlin Co, a Czechoslovakian trade representative in Singapore. The sales manager of Zlin Co was one David Chan Chon Tuck ('David").

5 After resigning from Tri Sindo, the first defendant established Benchuan Trading ("Benchuan")

with the second defendant. Benchuan dealt in crystal ware, buying from a wholesaler and supplying to departmental stores such as Robinsons, Daimaru and some shops.

6 After the Company was incorporated, the defendants starting sourcing crystal ware from Czech factories to supply to Robinsons, CK Tang and Takashimaya department stores. Eventually, the Company became the exclusive supplier to Robinsons and Takashimaya. From 1994 onwards, the Company also obtained supplies of crystal ware from David. The Company was invoiced for its orders of crystal ware not by David but by Niklex Supply Company ("Niklex") a sole proprietorship of David's wife, Tang Yoke Kheng ("Tang"). Although David is described as the manager of Niklex, there is little doubt he is using his wife to front his business. The defendants have never met Tang, which statement in para 17 of the first defendant's affidavit of evidence-in-chief has never been challenged by the Liquidator or his counsel. Neither Tang nor David appeared at this trial.

7 In 1994, the defendants started attending European trade fairs. They would meet buyers from Robinsons, CK Tang and Takashimaya to discuss the purchase of new crystal items and concepts. Their success did not escape David's notice. After their return from Europe in 1994, David approached the defendants and proposed that he be given a 50% stake in the Company. By then, the Company was owing Niklex almost $1m for the supply of crystal ware, due in large part to the fact that some invoices from Niklex were rendered as late as two years after the crystal ware was supplied. Thinking they had no choice in the matter, the defendants agreed but on condition that David became a registered shareholder. David refused as he was then still working for Zlin Co and was also supplying crystal ware to other companies on the side. After becoming a shareholder, David had access to the Company's books of accounts as well as to its *modus operandi*.

8 By 1997, the Company's business had grown steadily and had been profitable over the years. However, because the defendants did not take directors' fees due and owing to them, the accounts of the Company under the item "Amount owing to directors' account" reflected an amount in excess of $500,000. David now wanted 60% share in of the Company. The defendants reluctantly agreed.

9 In 1998, Niklex started supplying crystal figurines known as Preciosa Bohemia ("Preciosa figurines") to the Company. When Swaroski Crystal withdrew its product lines from Robinsons and Takashimaya, the two stores approached the defendants for a substitute. The defendants supplied them with Preciosa figurines. However, by 1999, Niklex demanded the return of the Preciosa figurines. Subsequently, Niklex took over the business of supplying Preciosa figurines to the Company's customers.

10 In 1999, David wanted 70% of the Company as well as a salary but again without registering himself as a shareholder. Whilst the defendants acceded to his request for an increase in his shareholding (in order to stop his meddling into their operations, they said), they rejected his request for a salary. By 1999–2000, the defendants had obtained alternative sources of Bohemia crystal ware from other suppliers at prices that were 30% lower than what David/Niklex charged them. They asked David to match the pricing they obtained, but he refused. Consequently, they decided to and did, terminate the Company's relationship with Niklex.

11 The defendants agreed with David that 1 April 2000 would be the cut-off date when the Company would stop buying crystal from Niklex; David would be free to compete with the Company in the market.

12 As the Company still owed Niklex in excess of $1m, the defendants proposed to David that the Company settle the debt by monthly instalments of $50,000 each spread over three years. Although David neither agreed nor disagreed, Niklex nonetheless accepted the Company's 14

instalment payments totalling $720,000 between April 2000 and July 2001.

13 After the Company ceased buying from Niklex, David approached the Company's customers in the hope that they would buy from Niklex. When the defendants learnt of David's moves, they assured their customers that they would continue to supply the customers from better and more reliable sources than Niklex. It was then (according to the defendants) that David demanded that the Company pay its debt to Niklex in full.

14 While the Company was paying the monthly instalments of $50,000 to Niklex, it needed funds for its purchase of stocks and operations. The defendants resorted to making personal loans to the Company for this purpose. The first defendant lent the Company $24,000 while the second defendant lent it $6,000.

15 After April 2000, the first defendant devoted his energies to running the Malaysian branch of the company, namely, Amrae Benchuan Sdn Bhd ("the Malaysian company"), leaving the second defendant to run the Company and Axum with Gregory (after June 2001).

16 As Axum also needed funds, the first defendant consented (at the request of the second defendant and Gregory) to the withdrawal of his loan of $24,000 from the Company to tide over Axum.

17 On 7 January 2002, Tang, as the sole proprietor of Niklex, sued the Company in Suit No 21 of 2002 ("the suit"). In her statement of claim filed on 17 January 2002, Tang claimed $1,544,214.02 for the balance of goods sold and delivered to the Company totalling $4,704,627.53. By the date of commencement of the suit, it is noteworthy that the oldest invoice was almost five years old (dated 14 April 1997), lending credence to the first defendant's complaint that Niklex was tardy in rendering its invoices to the Company.

18 On 21 August 2002, Niklex obtained judgment in the suit by way of Registrar's Appeal No 190 of 2002 in the sum of $245,226.02, when it successfully appealed against the decision of the assistant registrar granting the Company unconditional leave to defend its claim. This was followed by consent judgment against the Company in the sum of $821,000 on 5 September 2002 at the trial before Tan Lee Meng J. After levying execution by other means (writ of seizure and sale, examination of the defendants and Gregory as the judgment debtors) which yielded a paltry sum of $59,710.46, Niklex presented the Winding-up Petition against the Company on 22 August 2003, based on its outstanding judgement of $1,010,289.54. By then, Gregory had resigned as a director (on 31 July 2002) and as a shareholder (on 14 August 2002) of Axum.

19 Besides the suit, Tang as the sole proprietor of Niklex sued the defendants and Gregory in two other actions, *viz*, Suit No 415 of 2003 ("the second suit") and Suit No 864 of 2003 ("the third suit").

20 In the second suit, Tang sued the defendants and Gregory for dissipation of assets of the Company, accusing them, *inter alia*, of drawing huge sums as directors' fees and salaries. Tang prayed for a declaration that the defendants and Gregory be made liable for all the debts of the Company amounting to $1,010,289.54, which sum she also claimed. On 4 July 2003, the second suit was struck out at a pre-trial conference before the Registrar when counsel for Tang applied to withdraw the action against all three defendants.

21 In the third suit, Tang's action was based on s 340 of the Companies Act (Cap 50, 1994 Rev Ed). The action was essentially a repeat of the allegations she had made in the second suit. It was

Tang's case that the defendants had aided and abetted in the transfer of $1,268,983.02 worth of crystal ware from the Company to Axum, a shelf company. After an eight days' trial, the third suit was dismissed by Andrew Ang JC (as he then was) on 30 September 2004 (see *Tang Yoke Kheng v Lek Benedict* [2004] 4 SLR 788).

22 Tang appealed to the Court of Appeal in Civil Appeal No 100 of 2004 ("the appeal") against the dismissal of the third suit and by Notice of Motion No 12 of 2005 ("the notice of motion") for a stay of execution. On 23 March 2005, the Court of Appeal dismissed the appeal as well as the notice of motion (see *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR 263). Tang also failed in her appeal (in Civil Appeal No 4 of 2004) against Lai Kew Chai J's decision in setting aside the *ex parte* injunctions and mandatory orders (preventing the disposal of or otherwise dealing with the goods and assets of the Company) she had obtained against the defendants and Gregory (see *Tang Yoke Kheng v Lek Benedict* [2004] 3 SLR 12).

23 Other proceedings taken out by David and his wife against the defendants were in Originating Summons Bankruptcy Nos 30 and 31 of 2005 respectively. Tang had failed to pay the costs and damages awarded to the defendants in the third suit as which result the defendants issued statutory demands followed by the filing of bankruptcy petitions, against David and Tang in Bankruptcy Nos 785 and 797 of 2005 respectively. On 6 April 2005, David and Tang obtained stay orders on the judgment in the third suit as well as an extension of time for the setting aside of the statutory demands. The defendants appealed against the assistant registrar's decision. Both appeals were dismissed by Tan Lee Meng J on 25 July 2005 (see *Re Tang Yoke Kheng* [2006] 1 SLR 351).

24 The defendants alleged that David and Tang were prompted to institute this suit by a passage in the judgment of Andrew Ang JC in the third suit when he held that fraud had not been proven. This was not disputed by the couple. Indeed, in his affidavit of evidence-in-chief, the Liquidator referred to [27] of the judgment where Andrew Ang JC opined:

> It is still open to the plaintiff to request the Official Receiver (or any other liquidator appointed in his stead) to consider instituting proceedings against any creditors who may have been unfairly preferred for recovery of moneys paid by the Company. I am unable to say more as the question whether or not there has been undue preference was not before me.

The pleadings

25 The Company's statement of claim essentially repeated the allegations pleaded by Tang/Niklex in the second and third suits, *viz*:

(a) The defendants owed fiduciary duties as directors of the Company including a duty to act *bona fide* in the best interests of the Company. They also owed a duty to employ their powers and the Company's assets for a proper purpose in the best interests of the Company.

(b) The defendants had a duty to ensure that the Company complied with company and insolvency laws.

(c) As directors, the defendants had a duty not to place themselves in a position of conflict with their own personal interests particularly in dealings with Axum.

26 The Company alleged that the defendants breached their fiduciary duties as directors when they stopped paying Niklex from July 2001 onwards for the supply of crystal ware. Further, between July 2001 and June 2002, the Company had other assets worth $1.2m which it failed to utilise to pay

Niklex.

27 Further, in or around July 2001, the defendants started trading in Bohemia crystals through Axum by transferring to Axum some $1,268,983.02 of the Company's assets, *viz*, the crystal stock by a purported sale to Axum on credit terms for which there was no justification. The defendants also breached their duties as directors of the Company in not setting fixed terms for repayment and in not charging Axum interest.

28 Relying on evidence adduced in the third suit, the Company alleged that apart from credit notes of $114,246.73 for the purported return of goods and the purported payment of $713,831.31 by Axum, there was a balance owed to the company of $419,435.93 ("the outstanding sum") which remained unpaid. The Company averred that the defendants failed to take steps to recover the outstanding sum. It was alleged that the defendants were in further breach of their duties in not using the payments received from Axum to pay Niklex, the Company's creditor.

29 The Company alleged that on or about 31 January 2001, Niklex had demanded repayment of the outstanding sum. Consequently, by that date, the defendants knew that the Company was insolvent. Hence, in dealing with the Company's assets, the defendants breached their duty to deal with its assets without unfair preference to creditors.

30 It was alleged that the defendants breached ss 99 to 102 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("the Act") in repaying themselves loans and directors' fees.

31 In the case of the first defendant, the sum was $24,000 as earlier referred to in [16]. The sum was withdrawn from the Company on 28 September 2001 and lent to Axum. In the second defendant's case, the sums he allegedly withdrew from the Company totalled $121,000 as can be seen from the following breakdown:

Date	Cheques	Amount
10.09.01	DBS No 500614	$5,000.00
10.09.01	DBS No 500617	$100.000.00
15.09.01	DBS No 500624	$ 10,000.00
28.09.01	DBS No 500643	$ 6,000.00
		$121,000.00

32 The second defendant was also alleged to have made accounting entries to reflect a repayment of a debt of $125,000 owed to him which was then treated as a credit of Concept Gifts for reduction of a debt owed to the Company.

33 A sum of $10,299.11 was represented by the defendants as interest paid by the Company on behalf of Axum which sum was offset against money due from the second defendant.

34 The Company alleged the transfer of funds from the Company to the defendants was void or voidable against the Company. The Company, *inter alia*, demanded the sums of $24,000 and $131,299.11 from the first and second defendants respectively, the sum of $125,000 from the defendants as well as the sum of $419,435.93 from all three defendants.

35 The first and second defendants filed a common defence. They denied they had breached ss 99 to 100 of the Act or their fiduciary duties as directors. They asserted that they had acted *bona fide* in the best interests of the Company and that they properly exercised their powers as directors.

36 The defendants alleged that although Tang was the sole proprietor of Niklex, David was the *alter ego* of Niklex. They further alleged that at a meeting they had with David in February 2000, they had informed him that the Company would no longer purchase crystal ware from Niklex but would source for cheaper supplies elsewhere. The defendants had then offered to cancel the Company's last order made in December 1999 and return unsold stocks to Niklex but David refused and insisted that the Company take delivery. Had David agreed, stock worth $1m would have been returned to Niklex thereby reducing the Company's debts. David as the *de facto* majority shareholder of the Company, acted against the Company's best interests. His conduct prevented the defendants from substantially reducingthe debt owed by the Company to Niklex. The Company's last sale was made in June 2002.

37 The defendants alleged that the Company did not pay any salaries to the first defendant after March 2001 and to the second defendant after September 2001. Further, even though the Company declared directors' fees from 1993 to 1997 totalling $289,147.65 and $209,578.88 to the first and second defendants respectively, the first defendant did not receive any of the fees whilst the second defendant was paid $100,000 on his entitlement (for the first time) on 10 September 2001.

38 The defendants contended that the Company's sales to Axum were *bona fide* transactions done in the best interests of the Company, bearing in mind David's refusal of their offer to return stock to Niklex and that they had difficulty selling the same. The trading terms with Axum were fair and reasonable to the Company.

39 The defendants averred that for the 12 months (July 2001 to June 2002) Axum was in operation, it bought $1,186,805.72 worth of crystal ware on credit from the Company, for which it paid $713,831.38 and received credit notes for $114,246.38. Under the running account that it maintained with the Company, Axum owed a balance of $358,727.96.

40 Due to the judgment obtained and execution proceedings levied against the Company by David and/or Niklex in the suit, the operations of the Company and Axum effectively ceased. Knowing full well the financial state of the Company, the action of Niklex and/or David caused the Company to become insolvent. The defendants caused payments received from Axum for the Company to be lent to Axum to enable Axum to trade profitably in order to pay the Company's and ultimately Niklex's debts.

41 The defendants asserted that David's dominant purpose was to remove the Company, the defendants and/or Axum as middlemen in the supply of crystal ware and porcelain figurines to Robinsons, Takashimaya and CK Tang. David achieved his purpose as Robinsons and Takashimaya bought crystal ware directly from him and/or Niklex after the Company and Axum ceased operations.

42 The defendants referred to the second and third suits in their defence. They contended that the Liquidator's claim herein was essentially a repeat of some of the claims made by Niklex in the third suit. They pleaded that Niklex was estopped from re-litigating claims which it made in the third unsuccessful suit.

The evidence

The company's case

43 The Liquidator was the only witness for the plaintiff's case while the defendants were the only witnesses for the three defendants. Despite the pivotal role he played in these and earlier proceedings, David was not a witness, even though (as deposed to by the Liquidator in his affidavit of evidence-in-chief) David underwrote the cost of this litigation in case there were insufficient funds from the winding up to cover the Liquidator's expenses.

44 The Liquidator understandably had no personal knowledge of events that took place before his appointment. In addition, his knowledge was limited to his investigation of the Company's books of accounts and what he was told by David. Even so, the Liquidator arrived at his finding (in para 19 of his affidavit) that there was a strong case of unfair preference, breach of fiduciary and other duties as directors on the part of the defendants that caused the Company loss and damage but benefited Axum.

45 The Liquidator deposed in his affidavit that the Company was insolvent from at least 31 March 2001 because its audited accounts showed a loss of $31,437.00 as at that date. For 2001, the losses were $25,136.00. The Company's accounts as at 31 March 2002 showed that its current liabilities exceeded its current assets by $669,440.00. In addition, the Company owed Niklex about $1.2m in 2001.

46 The Liquidator pointed out that as an employee of the Company and a sole proprietor of Concept Gifts, Gregory was in a conflict situation in selling the Company's products to Concept Gifts.

47 The Liquidator had conducted searches in Malaysia and discovered therefrom that the defendants and Gregory were shareholders in the Malaysian company, which was incorporated on 8 January 1998. On the date of its winding up, the Company was owed $169,947.51 by the Malaysian company. Another Malaysian company with which the defendants traded was Edge Point (M) Sdn Bhd ("Edge Point"). The Liquidator alleged that in the third suit, the defendants had admitted that Edge Point was an associate company. (This is incorrect as the defendants have no interest in Edge Point, neither does the Company).

48 According to the balance sheet of the Company as at 31 March 2002, the Company owed the first and second defendants $289,147.65 and $219,877.99 respectively by way of directors' fees. However, in the course of trial of the third suit, the first defendant had apparently admitted that his loans were actually profits of the Company. The first defendant had then revealed that he and the second defendant decided to save the Company tax money by converting its profits into directors' fees.

49 The Liquidator alleged that the defendants withdrew moneys (totalling $270,000) from the Company to pay themselves when the Company was insolvent (see [45]), although the Company had other creditors including Niklex, to whom it owed about $1.2m. The withdrawals were made in September 2001. On 31 March 2002, when $125,000 was received by the Company from Concept Gifts, the payment was transferred to the second defendant and treated as repayment of a director's loan thereby giving the second defendant priority over other creditors.

50 At the trial of the third suit, the defendants had testified that the Company's goods (worth $419,435.93) were transferred to Axum at a price which was at least 10% more than their purchase price from Niklex. The Liquidator expressed surprise as the defendants had complained that Niklex's prices were high. Further (according to what David told him) the Company's profit margin was usually 20%. Why should the Company sell to Axum at half that margin? In addition, the defendants made no serious attempts to recover the $419,435.93 debt from Axum since 31 December 2002.

51 The Liquidator testified that OCBC Bank charged the plaintiff $10,299.11 (denied by the defendants) for interest incurred by Axum. The interest formed part of the Liquidator's claim.

The defendants' case

52 The first and second defendants conducted their own defence, apparently due to lack of funds to engage a solicitor. Axum was also not represented. Only the first defendant cross-examined the Liquidator. The defendants' previous solicitor along with the solicitor for Axum, ceased acting for them just before the trial. The defendants contended that their inability to pay their former solicitor and thereby suffering the disadvantage of no legal representation, was a direct consequence of Tang's and/or David's refusal to pay their taxed costs for the third suit. The Liquidator on the other hand was told that the defendants attempted to bankrupt Tang and David so that Tang as the Company's judgment creditor could not present a winding-up petition against the Company. As far as the Liquidator was concerned, Tang and/or Niklex had nothing to do with the Company's claim in this suit.

53 In the course of the cross-examination, the first defendant disclosed that although David refused to accept instalment payments, nevertheless, the periodic instalments of $50,000 from the Company were accepted by Niklex without protest. Niklex did not extend credit terms to the Company despite which it rendered invoices as late as two years after crystal ware was delivered to the Company. When David demanded payment of the total outstanding sum of $1.6m owed to Niklex and rejected the defendants' request for instalment payments, he also rejected the defendants' alternative proposal for Niklex to take back its stock from the Company in order to reduce the outstanding debt. Had he agreed, the defendants would likely have cleared the total debt owed to Niklex.

54 Questioned why the defendants did not dispose of the stock themselves to raise cash, the first defendant explained that such a move would have destroyed the market as the defendants would have been forced to lower their selling prices.

55 While he agreed that the Company was insolvent by 31 January 2001, the first defendant disagreed that he and the second defendant had withdrawn $270,000 from the Company after it was insolvent. He pointed out that $125,000 was withdrawn to repay loans to the Company from Gregory and/or Concept Gifts extended between 31 August 2000 and 17 March 2001. The defendants had also lent money to the Company and they repaid themselves by transferring moneys to Axum to fund its operations.

56 The first defendant testified that he sincerely believed that by injecting funds into Axum, he and the second defendant would eventually be able to make enough money to pay all the Company's debtors. That was why neither of them was afraid to become directors of Axum. The defendants were under pressure from their suppliers and customers to set up another company. This was because some of the Company's Czech suppliers were aware of the defendants' troubles with Niklex and the suppliers wanted a fresh start with the defendants. The first defendant denied the purpose of setting up Axum was to destroy the Company; the Company would have been destroyed by Niklex in any event. The purpose was to ensure they had a long-term supply of and better prices for, crystal ware.

57 The first defendant had a falling out with the second defendant in 2000 with the result that the two went their separate ways. The defendants split responsibilities with the first defendant taking charge of the Malaysian company and developing the export market while the second defendant took charge of operations at Axum and the Company. Consequently, the first defendant was unaware of what took place in the Company after 1999. The first defendant obtained supplies of crystal ware for

the Malaysian company from the Company, not from Axum.

58 I turn next to the testimony of the second defendant, who was in charge of sales and purchases for the Company at the material time. The second defendant had allowed staff of the Company to help out with the operations of Axum when the latter first started trading. Axum also used the telephone numbers of the Company in the initial stages but for its use of the Company's premises, Axum paid rent.

59 Although he did not deny counsel's suggestion that Axum used the Company's letterhead to write to suppliers with the intention of transferring the Company's business to Axum, the second defendant explained that the defendants had no other choice. The purpose was not to kill the business of the Company which, in any case, was dying a natural death. The Company's Czech suppliers of crystal who were a closely-linked community were aware of the third suit. The suppliers would have been reluctant to grant agencies to the defendants or to support the defendants with credit terms if the defendants had carried on doing business in the name of the Company. As the bulk of the Company's sales to department stores were on consignment basis, credit terms from their suppliers were essential to the defendants' survival.

60 The second defendant revealed that in August 2001 Axum secured the agency for Preciosa figurines from the biggest crystal manufacturer in the Czech Republic, with credit terms of 120 days, even though its commercial director was aware of the third suit. This was because of the defendants' strong reputation in the market. Prior thereto, Niklex was the manufacturer's agent.

61 The second defendant testified that the sole (and honest) reason for setting up Axum was to try and help the Company sell off its stock in order to keep it alive from the profits to be made thereon. The defendants also hoped that Axum would be profitable so that they could pay off the debts owed to Niklex. Unfortunately, because of the 9/11 incidents in 2001, the market for crystal ware crashed and the defendants could not pay Niklex, not that they did not want to pay.

62 The second defendant testified that it was always the defendants' intention to settle in full the Company's indebtedness to Niklex. That was why the defendants proposed to pay the judgment sum in the suit by monthly instalments of $18,000 for five years. However, David and his lawyers demanded that the defendants furnish personal guarantees. This condition was rejected by Tan Lee Meng J for the reason that the debt owed to Niklex was a corporate debt.

63 The defendants accused David of having a hidden agenda. They alleged that David's sole and/or main intention was not to recover the debts owed to Niklex but to remove the defendants from the crystal ware market altogether so that David could monopolise the industry. That was why David refused the return of stock worth $300,000 from the Company, even though it would have considerably reduced the Company's debt. That was also the reason David demanded the return of the Preciosa figurines after the defendants succeeded in securing customers for the line from departmental stores. In fact, it was David who requested the Company to market the product for him. Yet, once the defendants succeeded, David demanded the stock back and supplied Preciosa figurines through Niklex to the Company's customers. Apparently at one meeting the second defendant had with David, the latter told the second defendant in no uncertain terms that he (David) would not show mercy once the parties went their separate ways. The defendants remained fearful of him to-date.

64 The second defendant testified that it was only recently that the defendants understood the meaning of the word "insolvency". The defendants had no idea that what they did (withdrawing cash from the Company and transferring stock to Axum) amounted to breaches under the Companies Act.

Although the Company made small losses in 1999–2000, it was profitable in the other years.

65 Apart from the two sums referred to earlier in [14], the second defendant revealed that the defendants and Gregory borrowed money from relatives on the Company's behalf. These short term loans had to be repaid so that the defendants could approach the lenders again for fresh loans if the need arose. To-date, the Company and Axum remained indebted to the second defendant. The second defendant agreed that the defendants failed to pay Niklex on the outstanding debt even though Axum paid the Company in excess of $500,000 between August and December 2001. That was because the Company had other creditors and/or suppliers who had to be paid to ensure the business continued. Further, David had made it clear that he was not interested in instalment payments even though that was all that the Company could afford. Neither did the defendants pay Niklex after it commenced the suit against the Company in January 2002 – because David's stand on instalment payments remained unchanged.

66 One aspect of the defendants' testimony that has a bearing on my findings concerned the identification of the stock that the Company obtained from Niklex. Apparently, crystal ware items bore common catalogue numbers regardless of the source of supply. For example, if a vase supplied by Niklex bore the number 1234, the same item obtained from another supplier would also bear the number 1234.

67 There was therefore a fallacy in the submissions of the counsel for the Liquidator (paras 66 to70) when he pointed out that it made no sense for the defendants to buy from Niklex at higher prices and sell to Axum at lower prices. That is incorrect. The defendants could not have been so foolish. They had obtained from other sources stock similar to or identical with what Niklex supplied the Company, but at prices which were 30–40% lower than what Niklex charged. Consequently, the defendants could sell to Axum for 10% gross profit margin. The second defendant explained that he had given strict instructions to his staff that the Company's sale price to Axum must always be pegged to the purchase price of the former. However the cost of an item could vary from shipment to shipment.

68 I found no evidence that contradicted the defendants' testimony on this aspect, contrary to the submissions tendered on the plaintiff's behalf. It bears mentioning that Niklex supplied the Company with about 50% of its stock. The defendants sourced the remaining 50% from other suppliers. The second defendant testified that besides Bomaco (who started supplying the Company from about 2000 onwards), the Company obtained their supplies from five or six Czech factories in or about 1997–1998 onwards. By then the dispute with David had started.

The issue

69 The only issue for determination is whether the defendants had breached their fiduciary duties to the Company and ss 98 to 99 of the Act by paying themselves directors' fees and by transferring the stock of the Company to Axum when the Company was insolvent.

The law

70 I shall first refer to the relevant law before I set out my findings. The applicable sections of the Act are the following:

> **Unfair preferences**
>
> **99.** — (1) Subject to this section and sections 100 to 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.

Relevant time under sections 98 and 99

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.

(2) Where an individual enters into a transaction at an undervalue or gives an unfair preference at a time mentioned in subsection (1)(a), (*b*) or (*c*), that time is not a relevant time

for the purposes of sections 98 and 99 unless the individual —

(*a*) is insolvent at that time; or

(*b*) becomes insolvent in consequence of the transaction or preference.

(3) …

(4) For the purposes of subsection (2), an individual shall be insolvent if —

(*a*) he is unable to pay his debts as they fall due; or

(*b*) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities.

71 An "associate" is defined in s 101(4) of the Act 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.

72 Section 329 of the Companies Act also applies; it states:

(1) 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.

(2) For the purposes of this section, the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be —

(*a*) in the case of a winding up by the court —

(i) the date of presentation of the petition; or

…

The findings

73 The Company was wound up on 19 September 2003. Consequently, the 24-month period under s 100(1)© of the Act would cover the defendants' withdrawal of funds from the Company in September and October of 2001 (see [31]). It is common ground that the Company was insolvent from as early as 31 March 2001.

74 At this juncture I need to digress by reverting to the earlier suits taken out by Tang or more accurately, taken out against the defendants by David in Tang's name.

75 First, there was the suit before Tan Lee Meng J that resulted in a judgment against the Company in the total sum of $1,066,226.02. The suit was followed by the winding-up proceedings. The defendants were then subjected to the second and third suits in which Tang failed in her claims.

Undeterred, Tang appealed to the Court of Appeal (in Civil Appeals Nos 4 and 100 of 2004 respectively) where again she failed. Still undaunted, Tang or rather, her husband, David, took out this suit. Tang and David also instituted proceedings against the defendants to prevent them from making the couple bankrupt for failing to pay the taxed costs awarded to the defendants in the third suit.

76 I am referring again to the previous legal proceedings to show the extent of David's personal vendetta against the defendants. That is the only appropriate word to describe the relentless hounding of the defendants by David over the past three years. It seemed that David will not rest until he has eliminated the defendants completely from the crystal ware market and destroyed them financially. I have never known a man to be more vindictive. The defendants' claim that David had a hidden agenda was not a baseless accusation. They had reasons to fear him. He set out to destroy them in order to monopolise the crystal supply market; he has achieved his purpose. As David chose not to testify, the allegations made against him by the defendants and which were not challenged in cross-examination stood as evidence under the principle in *Browne v Dunn* (1894) 6 R 67 (HL).

77 David granted the defendants credit and deliberately delayed rendering the invoices of Niklex to the Company until the outstanding sum had accumulated in excess of $1m. With no defined credit terms extended to the Company, it was a case of payable when able according to the defendants. I see no evidence that contradicts this finding. David then demanded to be given 50% share in the Company, once the defendants were at his mercy due to the huge debt accumulated by the Company. His shareholding enabled David to gain access to the books of accounts of the Company and thereby its profitability. David then demanded 70% share (which the defendants acceded to albeit reluctantly) when the Company was unable to repay its total debt to Niklex.

78 It is no secret that the Liquidator's costs in these proceedings are to be borne by David. That being the case, I cannot accept the Liquidator's assertion that Tang's various actions against the defendants or that David's conduct (according to counsel's submission) is irrelevant to the Company's claim herein or has no impact. On the contrary, Tang and David have everything to do with this suit. David used his wife's sole proprietorship, Niklex, to sell crystal ware to the defendants. He then used Niklex to sue the defendants and through Niklex, he is funding this litigation to recover moneys the defendants transferred out of the Company. The Liquidator may well be duty-bound at law to recover money which belonged to the Company but the motive of the party behind and funding, this litigation is highly questionable and his conduct reprehensible.

79 I then ask a pertinent question. Why did the defendants take moneys owed to them out of the Company? It was to lend to Axum so that Axum could pay the Company for the supply of crystal and for the Company in turn to pay Niklex. This was the finding in the third suit by Ang JC, who found that the money simply went one full circle (see [21]). It is clear therefore that the defendants did not benefit personally from their actions; they did not pocket the money from the Company.

80 This finding then leads to the next consideration. Did the defendants' well-intended motives which caused the money to go full circle back to the Company come within the ambit of s 99(4) of the Act? (See [70].)

81 I can do no better at this stage than to cite a case relied on by counsel for the Liquidator. In *Re MC Bacon Ltd (No 1)* [1990] BCLC 324, Millett J had to determine whether a transaction was a voidable preference within s 239 of the UK Insolvency Act 1986 (c 45) ("the UK Act"), which provision is similar to s 99 of our Act. Millett J, in setting out the requirements of s 239 of the UK Act, said (at 335–336):

> ***It is not, however, sufficient to establish a desire to make the payment or grant the security which it is sought to avoid. There must have been a desire to produce the effect mentioned in the subsection, that is to say, to improve the creditor's position in the event of an insolvent liquidation.*** A man is not to be taken as *desiring* all the necessary consequences of his actions. Some consequences may be of advantage to him and be desired by him; others may not affect him and be matters of indifference to him; while still others may be positively disadvantageous to him and not be desired by him, but be regarded by him as the unavoidable price of obtaining the desired advantages. It will still be possible to provide assistance to a company in financial difficulties provided that the company is actuated only by proper commercial considerations. Under the new regime a transaction will not be set aside as a voidable preference unless the company positively wished to improve the creditor's position in the event of its own insolvent liquidation. [emphasis added in bold italics]

Millett J's *dicta* as emphasised above was adopted by Kan Ting Chiu J in *Re Libra Industries Pte Ltd* [2000] 1 SLR 84.

82 As for counsel's other submission (in his para 110) that the writ of seizure and sale by David or Niklex had no relevance whatsoever to the proceedings herein, I totally disagree. It would be apt at this juncture to refer to a passage from the judgment of Lai Kew Chai J in *Tang Yoke Kheng v Lek Benedict* ([22] *supra*) where he said (at [44]):

> When the plaintiff seized the goods of Amrae Benchuan, the plaintiff ended up seizing the goods of Axum too! To the shock of everybody, the goods were sold for a song. Both parties suffered huge losses. Axum could have interpleaded but the exercise was pointless since it still had a debt of $474,804.43 for some of the crystals to Amrae Benchuan.

Selling the Company's goods for a song only worsened the defendants' financial situation. In the light of my earlier comments on his conduct (see [76]), this consequence would have been known to David beforehand.

83 The defendants did not strike me as being either dishonest or untruthful, as was contended by Mr Kumar for the Liquidator. They came across not as savvy businessmen but babes in the woods. They were no match for David. The defendants readily admitted that they started Axum because they were afraid David would wind up the Company (which he eventually did). They needed Axum to begin a fresh start for their crystal ware business, in the hope that it would become profitable in due course. I do not believe it crossed their minds that the law would view their actions differently and that their well-meaning intentions for Axum could constitute a breach of the fiduciary duties they owed to the Company. In the case of the second defendant, naïveté was coupled with ignorance and/or lack of understanding of accounts. It is on record in the judgement of Tan Lee Meng J (see [23]) that the defendants paid on the Company's behalf to Niklex in excess of $5m for crystal supplied. Such conduct is not consistent with that of debtors who do not intend to pay their creditor. The defendants' willingness to return the Company's stock and cancel its last three orders to Niklex reinforces my observation that they were not dishonest.

85 Mr Kumar also contended that the second defendant's testimony was concocted when the latter said that the $125,000 was repayment of a debt owed to Concept Gifts. In this regard, the second defendant had testified (see notes of evidence on 29 November 2005 at pp 158–160) that it was an incorrect entry in the general ledger books for 2002 stating the amount was due to him as director which was set off from a payment received from Concept Gifts. The second defendant referred to his affidavit of evidence-in-chief (pp 144 and 150) where the sum was reflected in the accounts as the accumulation of loans from Concept Gifts. I accept the second defendant's

explanation that the $125,000 was wrongly classified in the general ledgers of the Company.

86 The defendants had paid out from the Company $82,641 between 19 June 2001 and 6 August 2001 for goods. This was before Axum placed its first order with the Company on 15 August 2001. Counsel criticised as untrue the second defendant's explanation that the sums represented prepayment for goods. Mr Kumar pointed out that before he cross-examined the second defendant on the figures which made up $82,641, the latter had confirmed that in dealings with Axum, there were no prepayments. I am unable to say whether this sum represented an unfair preference to third parties as the evidence is inconclusive.

87 In the course of trial, the court was referred to a letter dated 16 February 2001 (see AB7) written on the Company's behalf by the first defendant to David as Niklex's manager. The first defendant informed David that he had stopped payment on the Company's DBS cheque No 160731 dated 10 January 2001 for $50,000 as Niklex had not presented it for payment. The first defendant then enclosed a replacement cheque for the January instalment of $50,000. In his submissions, Mr Kumar questioned the defendants' need to replace the cheque No 1670731 bearing in mind a cheque is valid for six months. He surmised the letter was a delaying tactic and that the purported cheque was never sent to Niklex in the first place. Based on my assessment of the defendants' credibility, I disagree with counsel's submission.

88 I accept that the defendants should not have transferred stock worth $419,435.93 from the Company to Axum without payment, notwithstanding their explanation that there was a running account between the two companies. However, I do not accept the Liquidator's contention (and his pleaded case) that the defendants breached their fiduciary duties in granting credit terms to Axum for crystal supplied by the Company. Credit terms are part and parcel of transactions for the sale of goods. Why was it wrong for the defendants to grant credit without fixed terms to Axum when this was exactly what David did for Niklex?

89 I now turn to the other sums claimed by the Liquidator. I start with the interest sum claimed of $10,299.11 which sum (according to the Liquidator) was paid by the Company to OCBC Bank on Axum's behalf. When the Liquidator was cross-examined by the first defendant, he was told that the interest was in fact charged to the lenders of the Company, including the first defendant's sister (who is the wife of the second defendant). As the Liquidator was unable to produce documents to support his claim, I cannot make a finding that the sum had been wrongfully debited to the Company.

90 As for the withdrawals of $24,000 and $6,000 by the first and second defendants respectively from the Company's funds, these were originally loans they extended to the Company. The defendants made the withdrawals in order to lend the money in turn to Axum. To paraphrase the words of Millett J (see [81]), I do not find that these withdrawals were done with a desire to improve the defendants' position as creditors in the event of an insolvent liquidation of the Company.

91 Next, the payments made by the second defendant to himself totalling $121,000 (see [31]). It was the second defendant's case that that the repayments were to people from whom he borrowed on the Company's behalf. Repayment to the lenders was necessary in order to borrow from them again. The second defendant had also testified that despite these repayments, the Company still owed him money. The second defendant unfortunately had no documentation to support the loans he took from third parties. As I consider his withdrawal of $6,000 excusable, the second defendant is only accountable for the difference of $115,000 ($121,000 – $6,000).

92 The Liquidator and Mr Kumar repeatedly referred to the defendants' testimony in the suit and third suit to say the latter had admitted that they converted the Company's profits into directors'

loans to themselves. The defendants' case was that they did this as a tax-saving measure for the Company, at the material time. The alternative would have been to declare the Company's profits by way of dividends which would still have been paid to the defendants as their entitlement at law, being the Company's shareholders. I do not accept there was wrongdoing in what the defendants did.

93 The defendants were also said to have admitted that Edge Point, Hong Kwang Enterprise Pte Ltd, Concept Gifts and Concept Gifts Pte Ltd were "associates" of the Company and themselves. It seemed to me highly unlikely that the defendants' understanding of the word "associate" was as defined under s 101(4) of the Act (see [71]). No doubt Concept Gifts (because its sole proprietor, Gregory, is an employee of the Company) is an "associate" of the Company but it would be straining the definition under s 101(4) to describe Edge Point and Hong Kwang Enterprise Pte Ltd as "associates" when they have no connection with the Company. The defendants obviously used the word "associates" to mean friends who operated these two companies.

Conclusion

94 I find that the defendants have given undue preference to Axum in relation to the sum of $419,435.93 and that the second defendant unduly preferred himself in relation to the sum of $115,000. Consequently, I award judgment to the plaintiff in the sum of $419,435.93 against the defendants and judgment against the second defendant in the sum of $115,000, with costs. I award judgment against the third defendant in the sum of $419,435.93. The plaintiff is however not entitled to damages and no account or inquiry is necessary.

95 Due to the factual matrix of this case, it would be highly inequitable and unfair to the defendants if I were to ignore the involvement of David and/or Niklex in this litigation. The court should not lend its aid to someone who is on a personal vendetta against litigants whom I have found to be honest and the victims of circumstances. As David Chan is funding this litigation, he and Niklex should not be unjustly enriched by this judgment without taking into account the costs he and Tang (as sole proprietor of Niklex) owe the defendants for the third suit and for the appeals therefrom. The judgment sums and costs herein are therefore to be set off against the costs awarded to the defendants; the defendants are only liable for the net sum owing after the set-off.

Copyright © Government of Singapore.