Kon Yin Tong and another *v* Leow Boon Cher and others
[2011] SGHC 228

Case Number : Suit No 37 of 2009

Decision Date : 14 October 2011

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Paul Seah Zhen Wei and Vimaljit Kaur (Tan Kok Quan Partnership) for the plaintiffs; Daniel Tan Choon Huat, Angeline Tan Sze Mei (Drew & Napier LLC) for the 1st and 2nd defendants; Chiah Kok Khun and Diana Ho (Wee Swee Teow & Co) for the 3rd to 7th defendants.

Parties : Kon Yin Tong and another — Leow Boon Cher and others

Companies – Winding-up

Companies – Fraudulent Preference

14 October 2011 .

Judith Prakash J:

1 This case involves a company in liquidation and some of the various transactions that it undertook before it was wound up. The plaintiffs, who are the liquidators of the company, seek to recover what they say is the company's money from the defendants who comprise two former directors and shareholders of the company and other firms who did business with the company.

The parties

2 The company in liquidation ("the Company") is Woon Contractor Pte Ltd, a company that was set up in 1995 as a successor to a partnership, Woon Contractor, which carried on business in the construction industry. Woon Contractor was owned and run by the first defendant, Leow Boon Cher ("Mr Leow"), and his wife, Ong Chiew Ha ("Mdm Ong"), the second defendant. On the incorporation of the Company, Mr Leow and Mdm Ong became its sole directors and shareholders and ran it the same way in which they had run Woon Contractor. Mr Leow was the man in the field, getting business and supervising the Company's construction activities and its workers, whilst Mdm Ong was the back office woman, in charge of administration and accounts. From time to time I shall refer to Mr Leow and Mdm Ong jointly as "the Directors".

3 On 4 March 2005, Mr Leow made a Declaration that the Company was unable to continue business by reason of its liabilities. A winding up order was made against the Company on 20 May 2005 and the plaintiffs were then appointed its joint liquidators. The first plaintiff, Mr Kon Yin Tong ("Mr Kon"), was the lead witness for the plaintiffs in the present proceedings.

4 The third defendant, Aim Top Enterprise Pte Ltd ("Aim Top") was incorporated on 9 September 2003. Aim Top has two directors who are also its sole shareholders. First, there is Mdm Chiew Kim Lian (who holds 99.99% of Aim Top's shares). She is the mother of Mdm Ong. The other director and shareholder is Mr Chiow Yit Wah; he was an employee of the Company from its incorporation until 2003 and prior to 1995 had worked for Woon Contractor for several years.

5 The fourth and fifth defendants, Mr Ong Key Young ("OKY") and Mr Ong Eng Seng ("OES"), are the partners of a partnership firm called Antah Forwarders ("Antah") which has the same registered address as Aim Top. OKY is Mdm Ong's father while OES is Mdm Ong's brother. OES is also the sixth defendant in the action in his capacity as the sole proprietor of a business known as Western Express Resources Agency ("Wera"), another business sharing an address with Antah.

6 The seventh and last defendant is Yew San Construction Pte Ltd ("Yew San"). This company was incorporated in 1996 and carries on business as a general contractor in building construction. Its directors and shareholders are not related to the other defendants.

The dispute

7 The plaintiffs' position was that during their investigation of the affairs of the Company, they discovered that the Company, acting at the behest of the Directors, had entered into a series of fraudulent and irregular transactions in order to siphon off the money and assets of the Company and put the same out of the reach of its creditors. The allegation made was that the Directors did this because they knew that the Company was insolvent. A summary of the specific allegations in the Statement of Claim (Amendment no 3) follows.

8 The plaintiffs averred that the Company was insolvent as at 30 April 2003 as it was unable as of that date to pay its debts as and when they fell due and it continued to be insolvent after that date. Further, the plaintiffs averred that the liabilities of the Company exceeded its assets as at 31 August 2003 and the Company was therefore insolvent as at that date as well. The plaintiffs pleaded that the Directors had masterminded a scheme to defraud the Company's creditors and, in the course of the scheme, had made the Company a party to a series of irregular and fraudulent transactions which had the effect of siphoning moneys out of or removing assets from the Company. The plaintiffs sought to recover various payments made by the Company pursuant to such transactions. The particulars of these are:

(a) a number of payments totalling $537,738 from 5 May 2003 to 6 August 2004, made to Mr Leow allegedly in repayment of loans that he had made to the Company;

(b) a sum of $39,394.78 paid to Aim Top allegedly for rental of lorry, labour, driver service and rental of excavator, such payments being made between 17 February 2004 and 20 June 2004;

(c) a sum of $41,000 paid to Antah for transportation services allegedly provided by Antah;

(d) payments totalling $13,500 purportedly paid to Wera as a sub-contractor even though Wera was not in the building and construction business; and

(e) a sum of $13,111.35 paid to Yew San allegedly for excavation work done at a worksite in Bendemeer.

In addition, the plaintiffs claimed that the Directors had acted in breach of their fiduciary duties by causing the Company to sell a used excavator to a company called Ban Guan & Co ("Ban Guan") at an under value. It was also asserted that they had acted dishonestly, *mala fides* and against the interests of the Company and its creditors and, in the alternative, had given fraudulent preference to creditors of the Company who were connected to them. In relation to Mdm Ong, in the statement of claim, the plaintiffs sought to recover a sum of $6,000 paid to her on 27 August 2003 purportedly as a subsidiary for her private vehicle that was allegedly used in the course of the Company's business. In their closing submissions, however, the plaintiffs did not deal with this claim and therefore I will not

consider it.

9 In their defence, Mr Leow and Mdm Ong averred that the Company was not insolvent either as at 30 April 2003 or 31 August 2003. They asserted that they had undertaken to provide continued financial support to the Company to meet its obligations as and when they fell due and that, over the years, they had provided financial support to the Company by injecting capital amounting to $828,500 into the Company. Mr Leow and Mdm Ong also asserted that all the transactions referred to by the plaintiffs had been carried out in good faith and/or with the knowledge and/or belief that the Company was not insolvent. The other defendants have claimed that the various transactions in which they were involved were made in good faith and for good consideration and that the plaintiffs had not been able to establish fraud on the part of Mr Leow and Mdm Ong.

10 Arising from the pleadings, there are three main areas that have to be investigated and determined. The first relates to the solvency of the Company as at 30 April 2003 and/or 31 August 2003 and in relation to this situation, it is also important to establish the knowledge of the Directors regarding the Company's financial position. The second area relates to the payments made by the Company to the Directors and whether they or either of them has to account for any or all of such payments. The third area covers the various transactions between the Company and the third to seventh defendants. In this connection, each transaction and relationship has to be examined to ascertain whether the payments made were regular or were in pursuance of sham transactions and/or were fraudulent preferences. My determination as to whether the Directors acted dishonestly or with intent to defraud the Company and/or the general body of its creditors will play a part in determining their liability for a number of the claims brought. This is an issue therefore to which much attention will have to be given. I will also have to examine whether in any of the impugned dealings the Directors were acting in breach of their fiduciary duties.

The plaintiffs' narrative

11 It is important at this juncture to set out the framework of the plaintiffs' case before I go on to consider the individual allegations and transactions. This framework provides the plaintiffs' perspective on how the transactions should be viewed and keeping it in mind also prevents one from failing to see the wood because of the abundance of trees. It must, however, be remembered when the following paragraphs are read that they set out the story as the plaintiffs see it and what I have to do in this judgment is to determine whether or not the plaintiffs have mustered sufficient evidence to prove that the story is fact and not fiction.

12 The original business of Woon Contractor commenced in 1985. After its conversion into a company, the business was profitable for a few years but from 1999 onwards, losses were made every financial year (apart only from 2001) up to 2004.

13 In January 2003, a construction project referred to as the Fernvale Project was novated to the Company, as main contractor. The employer was the Housing and Development Board ("HDB") and the works to be undertaken by the Company comprised (a) major infrastructural construction works and (b) earthworks. The lump sum price for the project was about $4,678,000 of which $1,622,800 related to the earthworks. The Company promptly sub-contracted the entire earthworks portion to another contractor called Soon Li Heng Civil Engineering Pte Ltd ("Soon Li Heng") for a sum of $1,050,000. This sub-contract was on a back-to-back basis with the main contract.

14 It is the plaintiffs' case that the Company was insolvent by 30 April 2003 and that from 5 May 2003 until 6 August 2004, a series of unexplained payments were made by the Company to Mr Leow without any supporting documentation to justify the payment vouchers which Mdm Ong prepared.

Further, on 5 May 2003, the Company purportedly paid Wera $2,500 for its work as a "subcontractor". Wera, however, was not in the building and construction business and the cheque was made payable to Mdm Ong instead of to Wera.

15 By 3 July 2003, Soon Li Heng had completed the earthworks under their sub-contract for the Fernvale Project. Prior to that date, the Company had made three progress payments to Soon Li Heng totalling $368,000. On 4 July 2003, the Company received a claim for some $630,000 (less the retention sum) from Soon Li Heng and this demand made Soon Li Heng the Company's biggest creditor. The HDB subsequently certified that the Fernvale Project had been successfully completed.

16 In June and July 2003, the Company sold various pieces of construction equipment to Wera. These vehicles were purportedly leased back by the Company for various periods beginning from January 2004.

17 On 28 July 2003, the Company purportedly paid Wera another $10,000 for work as a "sub-contractor". This time the cheque was made payable to Mr Leow and was deposited into Mr Leow's bank account.

18 On 30 July 2003, Soon Li Heng's lawyers sent the Company a letter of demand in respect of its claim. The Company did not respond to this demand.

19 On 31 July 2003, Antah invoiced the Company for $35,000 in respect of services that it had supposedly performed between January 2003 and June 2003. In the view of the plaintiffs, these invoices were not supported by any credible documentation.

20 On 20 August 2003, a sum of $1,000 was purportedly paid to Wera. This time the cheque was made out in favour of Mr Leow's Maybank credit card account.

21 On 25 August 2003, Soon Li Heng commenced legal action against the Company in High Court Suit 863 of 2003 ("Suit 863") for the sum of $682,000 which it asserted was due and payable under the sub-contract. The Company responded by filing a counterclaim for the sum of $537,681.25. It also accused Soon Li Heng of not having completed the earthworks on time and asserted that it had not been able to carry out its own work on the Fernvale Project because of the actions of Soon Li Heng. In February 2005, judgment was delivered in the action. Soon Li Heng was successful in its claim as the Company's defence was found to be without merit. The Company's counterclaim was also adjudged to be without foundation and was dismissed with costs.

22 In the meantime, on or about 24 August 2003, HDB had paid the Company a sum of approximately $550,000 for work done on the Fernvale Project. As a result, the balance in the Company's bank account became $641,456.99. Two days later, a cheque for $200,000 drawn from the Company's bank account was deposited into Mr Leow's personal bank account. Mr Leow stated in court that approximately $100,000 out of this money was used to trade in the stock market. By the end of August 2003, the amount remaining in the Company's bank account was $83,103.90.

23 Aim Top was incorporated on 9 September 2003 with Mdm Ong's 63 year old mother and Mr Chiow, as its initial directors. It is the plaintiffs' belief that Aim Top is in fact owned and controlled by the Directors and was formed by them so that they could have a new umbrella under which to conduct business when the Company failed.

24 From 1 October 2003, the Company started selling construction equipment to Aim Top. This included a 10-tonne lorry which was leased back to the Company in November 2003. The lorry was

sold for $37,440 but the rentals paid by the Company to Aim Top eventually amounted to $27,200. The plaintiffs said that this meant that Aim Top had received the lorry at a heavily discounted price and that there was no commercial justification for the sale and the lease back.

25 In December 2003, the Company purportedly leased an SK-200 excavator-with-breaker from Aim Top at $7,000 per month. At about the same time, it leased to Aim Top a PC200/SK200 excavator for $5,800 per month. The plaintiffs contended that there was no commercial justification for these transactions.

26 On 8 April 2004, the Company sold a used excavator for $57,750 to Ban Guan. The plaintiffs found this sale suspicious because they had discovered evidence which indicated that Ban Guan had itself sold the same excavator to a third party at the price of $88,200 several days before purchasing the excavator from the Company.

27 On 15 June 2004, the Company paid a sum of $13,111.35 to Yew San for purported excavation work. The plaintiffs said that there was no credible evidence that this work was actually done by Yew San for the Company.

28 Under the judgment delivered in Suit 863 a total sum of $773,058 was found to be due from the Company to Soon Li Heng. On 22 February 2005, Soon Li Heng sent a statutory demand to the Company for the judgment sum. Just about two weeks later, on 5 March 2005, Mr Leow made the declaration of the Company's inability to continue business by reason of its liabilities.

The law

Insolvency

29 A company is insolvent if it is unable to pay its debts. Section 254(2) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") provides the definition of a company's inability to pay debts:

> **Definition of inability to pay debts**
>
> (2) A company shall be deemed to be unable to pay its debts if —
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $10,000 then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
>
> (b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
>
> (c) *it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company*.
>
> [emphasis added]

30 The current position the courts are inclined to adopt with regards to the definition of insolvency is enunciated in the case of *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo & Ors* [2004] 1 SLR(R) 434 ("*Chip Thye*"). In *Chip Thye*, the suit was commenced by the liquidator against the

directors of the company which was a family-owned company engaged in the building construction business. Belinda Ang J held that one ought not to look for a single appropriate test for insolvency:

> ... it is neither helpful nor necessary to lean in favour of one or the other test. There is no single test for insolvency.

31 Secondly, Ang J held that the answer to determining the solvency of a company lies in scrutinising all relevant evidence available:

> Ultimately, as the cases decided by the High Court since *Re Great Eastern Hotel* illustrate, regard is given to all of the evidence that appears relevant to the question of insolvency.

32 Thirdly, as the case is not one that concerns the determination on whether a winding-up petition should be granted, but a determination concerning transactions entered into or made before liquidation, the learned Judge held that:

> This approach is all the more applicable to a company (like the plaintiff) that has already been wound up under s 254(1)(e) of the Act and the liquidator of the company seeks to attack various transactions entered into or made before the liquidation but at the time the company was insolvent or of doubtful solvency.

33 Despite the fact that no one single test is conclusive as a measure of solvency, it is commonly accepted that the two primary indicia of a company's inability to pay debts are the cash flow test and the balance sheet test. For most purposes, it is the present inability to pay debts that is the crucial factor.

34 It is important to bear in mind, however, that the determination of whether a company is insolvent is essentially a question of fact. This can be seen from *Tong Tien See Construction Pte Ltd (in liquidation) v Tong Tien See & Ors* [2002] 3 SLR 76, where Tay Yong Kwang JC (as he then was) held:

> A company is insolvent or unable to pay its debts when it is unable to meet current demands, irrespective of whether the company is possessed of assets which, if realised, would enable it to discharge its liabilities in full. Insolvency in this commercial sense is principally a question of fact which may be established in a number of ways. However, proof that a creditor's debt has not been paid per se does not establish an inability to pay debts within the meaning of s 254(2)(c) of the Companies Act (Cap 50, 1994 Ed). A temporary lack of liquidity does [*sic*] not tantamount to insolvency.

35 Generally, the burden of proof is borne by the party making the allegation of insolvency. However, s 100(3) of the Bankruptcy Act (Cap 20, 2008 Rev Ed) ("Bankruptcy Act") provides for a presumption of insolvency in a situation where, as between the parties to the transaction, one is an associate of the other. This presumption may come into play in my consideration of the transactions that took place between the Company and the third to seventh defendants.

36 The cash flow test deems a company insolvent when it cannot meet its obligations as and when they fall due. The balance-sheet test, on the other hand, would deem a company insolvent when the current liabilities of the company exceed its assets.

37 With respect to the cash flow test, the court will look at the company's financial position taken as a whole. The relevant factors which can be taken into consideration include:

(a) all of the company's debts as at that time in order to determine when those debts were due and payable;

(b) all of the assets of the company as at that time in order to determine the extent to which those assets were liquid or were realisable within a timeframe that would allow each of the debts to be paid as and when it became payable;

(c) the company's business as at that time in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales; and

(d) arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts.

38 It should also be noted that the court adopts a commercial rather than a technical view of insolvency. Thus, while the phrase "is unable" might be thought to refer to the inability at the relevant time to pay debts which have then fallen due, its conjunction with the phrase "as they fall due" indicates a continuous succession of debts rather than a calculation of debts existing on any particular day. The essential question is whether the company's financial position is such that it can continue in business and still pay its way. The court therefore has to consider whether any liquidity problem the company may have is purely temporary and can be cured in the reasonably near future. Further, the court may also have regard to claims falling due *in the near future* and to the likely availability of funds to meet such future claims and the company's existing debts.

39 On the other hand, the balance sheet test deems a company insolvent if its assets are insufficient to meet its liabilities, including contingent and prospective liabilities. It is thus a wider test than the "cash flow" test which only takes into account debts.

40 A "contingent liability" would refer to a liability or other loss which arises out of an existing legal obligation or state of affairs, but which is dependent on the happening of an event that may or may not occur. "Prospective liability" however, has been judicially defined as "a debt which will certainly become due in the future, either on some date which has already been determined or on some date determinable by reference to future events". It thus embraces both future debts, in the sense of liquidated sums due, and non-liquidated claims.

Sham or fraudulent transactions

41 The plaintiffs' primary case concerns numerous sham transactions allegedly concocted by the Directors to fraudulently siphon moneys away from the Company so that the creditors would not be able to obtain the same. The law governing fraudulent trading is s 340 of the Act and is reproduced below:

Responsibility for fraudulent trading

340. —(1) If, in the course of the winding up of a company or in any proceedings against a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation

of liability, for all or any of the debts or other liabilities of the company as the Court directs.

42 It was said at first instance in *Tang Yoke Kheng v Lek Benedict* [2004] 4 SLR(R) 788 ("*Tang Yoke Kheng*"), at [12] that in order to succeed under this section, the plaintiff would have to prove two elements, namely:

(a) that the business of the company has been carried on with intent to defraud the creditors of the company or of any other person or for any fraudulent purpose; and

(b) that the defendants were knowingly parties to the carrying on of the business in that manner.

In addition, "defraud" and "fraudulent purpose" connote "actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame" (see *In re Patrick and Lyon, Limited* [1933] Ch 786 at 790).

43 When the case went on appeal (*Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263), the Court of Appeal held:

In the context of an allegation of fraud, the objective standard of what an honest person would have done in the circumstances could be a useful device to test the honest intention of the person concerned against all the other evidence available, including, and especially, the explanation by that person of his deviation from what an honest person would have done in his circumstances. However, to rely on the objective standard as the sole test would be exceptional as it would require the court to be convinced that the negative answer given in the factual circumstances was sufficiently indicative of fraud to warrant a finding of fraud.

The civil standard of proving on a balance of probabilities applied where fraud was the subject of a civil claim, despite the infusion of a criminal element (ie fraud). However, because of the severity and potentially serious implications attaching to a fraud, the court's expectation of proof would be higher even in a civil trial. The more serious the allegation, the more the party on whom the burden of proof fell had to do in order to establish his case on a balance of probabilities.

It is generally recognised, as enunciated above, that in order to make a finding of fraud, the court requires a greater degree of proof than it would when coming to a finding on issues of fact that do not involve fraud.

44 Additionally, in *Liquidator of Leong Seng Hin Piling Pte Ltd v Chan Ah Lek and others* [2007] 2 SLR(R) 77, it was held that the standard of honesty was not measured according to some private standard of a defendant or the objective standard of the reasonable man, although it may serve as a guide in the assessment of whether the defendant was dishonest. Rather, the subjective intention of the defendant that he had acted in good faith constituted evidence which the court evaluated and tested against the weight of other objective facts available including, if required, the objective standard of the reasonable man.

The law on unfair preference and undervalue transactions

45 It is helpful to also set out the law on unfair preference and undervalue transactions at this juncture. The relevant statutory provisions are s 329 of the Act read with ss 98 – 102 of the Bankruptcy Act. Section 329 of the Act is as follows:

Undue preference

329. —(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 (Cap. 20) (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.

46 Section 98(1) of the Bankruptcy Act provides that:

Transactions at an undervalue

98. —(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has at the relevant time (as defined in section 100) entered into a transaction with any person at an undervalue, 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 entered into that transaction.

Further, an individual enters into a transaction with a person at an undervalue if:

...

(c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.

47 Additionally, the relevant period in so far as it concerns a transaction allegedly at an undervalue, is the period of five years prior to the presentation of the winding up proceedings (s 100(1)(a) Bankruptcy Act). However, s 100(2) of the Bankruptcy Act requires that in order for the transaction to be declared void, it must be shown that the company under liquidation:

(a) was insolvent at that time; or

(b) became insolvent in consequence of the transaction.

Under s 100(3) of the Bankruptcy Act there is a presumption of such insolvency where, as between the parties to the transaction, one is an associate of the other.

48 Section 101 of the Bankruptcy Act lays down the criteria establishing when a person would be considered to be an associate of another person. More specifically, s 101(2) states that a person is an associate of an individual if he is the person's spouse or relative. Regulation 3 of the Companies (Application of Bankruptcy Act Provisions) Regulations ("CABAR") provides that ss 98 - 103 of the Bankruptcy Act shall be read subject to "such textual and other modification as may be necessary" for their application to a company being wound up. As such, when the situation relates to two companies, the reference to 'individual' in the Bankruptcy Act must be read as referring to a company as a necessary modification contemplated by reg 3 (see: *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd* [2002] 4 SLR 145).

49 It should be noted however, that where the claim is that of an undervalue transaction, the party alleging that the transaction was at an undervalue has to prove this to the court. It is settled law that he who asserts must prove and the burden of proof, on a balance of probabilities, of such undervalue rests with the liquidators who assert that the transaction was effected at an undervalue. There is no presumption provision as to undervalue as there is as to insolvency.

Unfair preference transactions

50 Similarly, s 99 of the Bankruptcy Act states the following:

> **Unfair preferences**
>
> **99**. —(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has, at the relevant time (as defined in section 100), given an unfair preference to any person, the Official Assignee may apply to the court for an order under this section.
>
> (2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not given that unfair preference.
>
> (3) For the purposes of this section and sections 100 and 102, an individual gives an unfair preference to a person if —
>
> (a) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities; and
>
> (b) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.
>
> (4) The court shall not make an order under this section in respect of an unfair preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3)(*b*).
>
> (5) An individual who has given an unfair preference to a person who, at the time the unfair preference was given, was an associate of his (otherwise than by reason only of being his employee) shall be presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (4).

51 The relevant period for an unfair preference transaction would be within two years of the presentation of the winding-up petition and it is for the associate to rebut the presumption. It was also held in [35] of *Re Tiong Polestar Engineering Pte Ltd (formerly known as Polestar Engineering (S) Pte Ltd)* [2003] 4 SLR(R) 1, that as long as there was an intention on the part of the company to prefer the associate, that would be sufficient to constitute unfair preference even if it was not the main intention of the company.

Was the Company insolvent on either or both of the specified dates?

52 The plaintiffs took the position that the evidence showed that the Company was insolvent on 30 April 2003 and continued to be thereafter.

53 First, the bank reconciliation statement prepared by the Company showed that its cash balance

as of that date was $101,654.73. The plaintiffs compiled the invoices due and payable by the Company as at 30 April 2003 and found that these totalled $314,584.84, a sum that was far in excess of the cash balance.

54 Additionally, there were other invoices amounting to $51,548.72 which were payable by the Company but which were not dated. The plaintiffs claimed that, assuming these invoices were due for payment when presented to the Company, the total amount of debt due and payable by the Company on all the invoices as at 30 April 2003 would have been $366,133.56. As such, applying the balance sheet test, the Company was clearly insolvent.

55 The plaintiffs also asserted that on 30 August 2003, the liabilities of the Company had exceeded its assets. The Company's debts as at that date amounted to $274,764.34. Other invoices issued and presented against the Company on or before 31 August 2003 for which payment terms were not stated amounted to $42,018.65. Assuming that these were due when issued and presented to the Company for payment, the total amount due and payable by it as at 31 August 2003 was $316,782.99. As against this amount, the Company's available cash on 31 August 2003 was, as shown by its financial statements for the year ended August 2003, only $176,841.00 and therefore it was not in a position to pay the liabilities.

56 Additionally, by 31 August 2003, the claim from Soon Li Heng for $629,550 had already been received (4 July 2003). Soon Li Heng was pressing for payment and a demand letter for the amount had been sent out on 30 July 2003 when the Company failed to meet the claim. Legal action was, obviously, imminent even if the writ may not have been served by 31 August 2003.

57 The Company's financial statements did not disclose Soon Li Heng's claim. It appeared from the evidence that the auditors were not informed of this claim and this was probably the reason why it was not captured as a liability or a contingent liability in the 2003 financial statements. If this claim were to be included as part of the Company's indebtedness as at 31 August 2003, then there would be no doubt as to the Company's insolvent position on that date.

58 The Directors submitted that the plaintiffs' reliance on the cash flow and balance sheet tests to establish the Company's insolvency was erroneous as these two tests are not determinative of insolvency. They relied on the evidence of their expert witness, Chee Yoh Chuang ("Mr Chee"), who was a partner of Stone Forest Corporate Advisory and had more than 20 years experience in insolvency related accounting services, to state their position on the solvency of the Company as on 30 April 2003 and 31 August 2003.

59 Mr Chee had relied on two tests for insolvency, namely a "net worth" test and a "liquidity" test. In the course of cross-examination, however, he agreed that these tests were in essence the "balance sheet" and "cash flow" tests respectively. Mr Chee also agreed that the net worth test operates by seeing "whether the book value of the company is positive or negative from its balance sheet" – identical to the balance sheet test, and that the liquidity test works by determining if the current assets are less than current liabilities - identical to the cash flow test. As such both the plaintiffs and the defendants were relying on the same tests to determine the Company's solvency. In addition, Mr Chee had relied on a third test, that of "whether the company has enough money in hand to pay the liabilities that are due".

60 However, Mr Chee had reached the conclusion that the Company was solvent on 30 April 2003 and 31 August 2003 on the basis of the same tests which the plaintiffs had used – the cash flow and balance sheet tests. As the plaintiffs submitted, however, during cross-examination, it appeared that Mr Chee's conclusions were flawed and he had to retract his position.

61 The first problem was that when Mr Chee reconstructed the Company's balance sheet as at 30 April 2003 to show that its assets exceeded its liabilities, he did not include amounts owing to hire purchase creditors among the liabilities. When cross examined, Mr Chee initially claimed that he had lifted the current liability figures from the plaintiffs' statement of claim and had assumed that this figure included the hire purchase creditors. However, when faced with contradictory evidence in his affidavit of evidence-in-chief ("AEIC"), he agreed that what he had said in his AEIC was that he believed that the Company's trade payables amounting to $366,134 were made up of costs which were incurred prior to 30 April 2003 on ongoing projects that the Company was working on. In fact, no assumption ought to have been made that the figures in the statement of claim included the hire purchase creditors. On the second day of cross-examination, having checked the audit working papers overnight, Mr Chee admitted that he had found that an amount of approximately $81,000 should have been included under the Company's current liabilities as being due to hire purchase creditors and that this meant that the Company had a negative net worth of approximately $65,000 as at 30 April 2003, instead of the positive net worth that he had reported.

62 Further, in the course of cross-examination, Mr Chee had candidly agreed that he could have done a better job of assessing the Company's financial statements:

> Q I put it to you that this was slipshod work, Mr Chee.
>
> A Well, could well be at that point in time.
>
> ...
>
> Q And that if you had done your work with proper diligence, you would have advised her Honour more carefully on what the real net worth of the company was?
>
> A Granted.

63 In addition, with regards to the liquidity test, Mr Chee had derived a positive current ratio as at 30 April 2003 by matching the Company's current assets as at 30 April 2003 against the figure for current liabilities that he had lifted from the statement of claim. Mr Chee was aware that the plaintiffs' figure for current liabilities was derived from invoices that were due and payable by the Company as of 30 April 2003, or from invoices that were on cash terms. However, he had not taken into account the fact that the current assets' figure in the Company's balance sheet might have included amounts that the Company could not immediately use to pay off its current liabilities.

64 In particular, Mr Chee had not checked the credit terms of the Company's invoices that formed the basis for the "trade receivables" figure. This could possibly have led to him comparing trade receivables that were not yet due against payments that were already due and owing by the Company as of 30 April 2003. He did not verify whether the trade receivables were indeed collectible as of that date. Further, he had neglected to take into account the fact that a performance bond of $40,000 that was only refundable to the Company after 18 June 2005 was included as a current asset under "other receivables and deposits". Mr Chee admitted that such bond deposits which could not be collected immediately could not be used to pay off debts as of 30 April 2003. This greatly affected the accuracy of Mr Chee's liquidity test results.

65 Mr Chee had also failed to take into account amounts reflected as owing by the Company to the Directors as a current liability. Mr Chee admitted that the Company would be clearly insolvent on his liquidity test if the amounts owing to the Directors were included as current liabilities as at 30 April 2003 as they had been by the Company's auditors. However, he had chosen to reflect the amount

owing to the Directors as a non-current liability instead. Mr Chee stated that he chose to treat these debts as "quasi-capital". Mr Chee justified the use of this term on the basis that the Directors could withhold demanding repayment of the amounts due to them as long as they wanted to and, therefore, advances made by them should not be treated in the same way as other indebtedness. When questioned, however, he readily admitted that "quasi-capital" was a term he had come up with himself and that he had not come across any previous situation in which this term had been used to describe amounts owing to a director and caused the same to be removed from the current liabilities.

66 Mr Chee testified that he was unaware of Mr Leow's position that the latter had borrowed large sums of money to fund the Company's needs. Mr Chee agreed that the lenders to the Directors may have imposed repayment terms for those loans and that this could mean that the Directors would not be able to withhold demanding repayment from the Company. When he was shown the Directors' testimony that they had used money repaid to them by the Company between 30 April 2003 and 31 August 2003 to repay some $120,000 worth of third party loans, Mr Chee agreed that this would mean that the amount owing to the Directors on 30 April 2003 had to be treated as a current liability. As a result, application of Mr Chee's liquidity test meant that the Company was insolvent as at 30 April 2003.

67 In addition, the application of the third test was flawed because Mr Chee had assumed that the Company could use its collections from invoices issued after 30 April 2003 to pay debts that were already due as at that date. If this assumption is applied then, as Mr Chee agreed, a company which has a cash flow could only become insolvent if its creditors demanded payment. Such a position would not comply with the well-established solvency principle that a solvent company is one that is able to pay its debts as and when they fall due. More crucially, Mr Chee failed to take into account new liabilities incurred by the Company that would become due and payable after 30 April 2003 and the impact these would have on the Company's cash flow. Therefore, Mr Chee had considered only a future in-flow of funds and ignored future out-flows. This omission skewed his analysis.

68 Crucially, Mr Chee had admitted the following during cross-examination:

> Court: As of 30th April if you use the cash flow test, would the company be technically insolvent?
>
> A: Yes, your Honour.
>
> ...
>
> Q: So on all three test[s], technically the company is insolvent?
>
> A: Technically, yes.

69 With respect to the Company's position at 31 August 2003, Mr Chee had concluded in his AEIC that the company was technically insolvent under both the net worth and liquidity tests, which suggested that the Company might not be able to settle its obligations as and when they fell due. However, Mr Chee had maintained that the Company would have a positive net-worth if the amount reflected as owing to the Directors was excluded as a current liability, and reflected as "quasi-capital". I find it difficult to accept this because, as mentioned earlier, this was an avant-garde and irregular method of accounting. Further, Mr Chee had admitted that if this had been left as a liability and not revised, and the net worth test had then been applied properly, the Company would have had a negative net worth as of 31 August 2003.

70 It also appeared that Mr Chee had not taken into account the debt owed by the Company to

Soon Li Heng. Indeed, he had admitted when questioned, that if the auditors had been notified of the Soon Li Heng claim, and a notional S$500,000 was put into the books as part of that claim, the Company would have had a huge deficit in terms of its net worth.

71 Lastly, Mr Chee had assumed that the Directors were able to fund the Company's financial needs. In making this assumption, he had relied on letters of representation signed by Mr Leow and Mdm Ong, confirming that they would continue to support and finance the Company and would provide additional funds to meet its debts as and when they fell due.

72 Upon questioning, Mr Chee admitted that the letter of representation was of limited value without a proper study of the Directors' bank accounts and other financial means and further admitted that he had not made such a study. In addition, he had erroneously calculated Mr Leow's contribution to the Company between September 2003 and August 2004 as being $255,955.23 instead of $176,564.93, thus coming to the inaccurate conclusion that the Directors had the financial ability to make good the Company's shortfall of $251,258. Further, Mr Chee admitted that it was "possible" that his assumption that the Directors could fund the Company was inaccurate because he did not take into account new liabilities in the Financial Year 2003-2004 which the funds allegedly put into the Company by the directors might have been used to pay.

73 I have concluded that because of the difficulties in Mr Chee's evidence that the Directors cannot rely on it to support their stand that the Company was financially solvent as at 30 April 2003 and 31 August 2005.

74 The Directors also submitted that the cash flow test was not, in and of itself, determinant of whether the Company was insolvent. They claimed that the balance sheet test was also not determinative of insolvency. They relied on *Chip Thye* - that all evidence must be taken into consideration in deciding whether a company was able to pay its debts as they fell due.

75 In *Chip Thye*, Belinda Ang J held that there was no single test for insolvency and that regard should be had to all of the evidence that appeared relevant to the question of insolvency. However, in determining if the company in that case was insolvent, the learned judge had regard to the balance sheet test of insolvency which showed that the company had a negative net worth during the relevant financial years. Further, she found that there were no cash flow statements provided by the defendant to prove the company's cash flow was healthy. The judge had also looked at the financial statements of the company and found that turnover or sales had declined sharply over the relevant financial years and that there was no likely financial assistance forthcoming from financial institutions, investors or shareholders. As such, she held that the evidence over all established insolvency. From this short account of the case, it appears that the defendants have glossed over the importance of the cash flow and balance sheet tests as the same were applied and were part of the reason for the conclusions arrived at in *Chip Thye*.

76 While it is certainly true that a global consideration of all relevant factors is necessary, it is equally true that the cash flow and balance sheet tests are useful and accurate means of verifying the solvency of a company. Indeed, as the plaintiffs have submitted, in *Chip Thye*, the court's first port of call was an examination of whether the Company was technically insolvent.

77 The plaintiffs also pointed out other factors which they said they had relied on in coming to the conclusion that the Company was insolvent. These included the value of the property, plant and equipment of the Company as at 30 April 2003; the quantum of trade receivables of the Company as at 30 April 2003 and 31 August 2003; and the financial support allegedly provided by the Directors. The plaintiffs submitted that these factors could not alter the conclusion that the Company was

insolvent.

78 The defendants made an argument that they had collected significant amounts from the Company's trade receivables in the period after 30 April 2003 and that these amounts were used to pay off its debts as at April 2003. The Directors asserted that the liabilities incurred by the Company after 30 April 2003 did not impact on its solvency as at 30 April 2003 but only on its solvency after 30 April 2003. This argument, however, to my mind, flies in the face of the defendants' assertions that the totality of the situation ought to be taken into account and that an overtly technical analysis should not be used. Should all relevant factors and evidence be taken into consideration, then the possibility that the Company would incur further liabilities after 30 April 2003 should impact on its solvency as of that date. Otherwise, there will be a myopic and technical analysis of the Company's financial health. Further, s 254(2) of the Act provides that both contingent *and* prospective liabilities ought to be taken into account in deciding if a company is able to pay its debts as and when they fall due.

79 In their submissions, the Directors emphasised that 100% of the Company's debts as of 30 April 2003 and 94.3% of the debts as of 31 August 2003 were eventually paid off and this meant that the Company was not insolvent because it was able to pay its debts. I do not accept this submission. The fact that all of the Company's debts as of 30 April 2003 were eventually paid off is not determinative of whether on that date the Company was able to pay its debts as and when they fell due. In *Bank of Australasia v Hall* (1907) 4 CLR 1514-1528, the court distinguished between the position of a debtor who was able to pay all his debts as and when they became due and that of a debtor who would only be able to pay debts presently due at some future time. The court stated that only the first type of debtor could be said to be solvent.

80 In the present case, the evidence of the Directors was that all the invoices due as at 30 April 2003 were fully settled only by 8 June 2004, *ie*, more than a year from the date on which these invoices were due and payable. The Directors did not give evidence as to whether the Company was in a position to pay off all the debts it incurred after 30 April 2003. The Company certainly could not pay off all of its debts as of 31 August 2003 since only 93% of these were eventually paid.

81 More importantly, the Directors claimed that they were in a position to contribute their personal funds to stave off any claims as at 30 April 2003. The Directors maintained that they had an amount of $50,425.64 in various bank accounts under their names as at 30 April 2003 which was a reserve fund that could be used to pay off any urgent claims. As the plaintiffs submitted, however, there is no evidence supporting the amount that the Directors claimed to have contributed to the Company, apart from the Company's records, in particular the Director's Account in the General Ledger and the Cash Book. Neither Mr Leow nor Mdm Ong was able to explain how or where they were able to provide the funds recorded as contributions from them in the Company's accounts nor why those accounts should reflect such amounts as owing to them.

82 In the course of cross-examination, Mr Leow repeatedly gave evidence that Mdm Ong prepared the Company's accounts, including payment vouchers and cheques, on his instructions. He also admitted that she obtained the information regarding the accounts from him. He went so far as to say that Mdm Ong would follow his instructions without question when she prepared the Company's accounts.

83 Mdm Ong's testimony corroborated her husband's evidence, as she also stated that she prepared the Company's accounts solely on Mr Leow's instructions and would not question or verify what Mr Leow had told her. Further, if Mr Leow gave her money without stating specifically that it was a payment from one of the Company's debtors, she would simply record it as a loan by Mr Leow

to the Company. In the light of evidence such as this, I have considerable doubts about the accuracy of the Company's accounting records.

84 Quite apart from the records, the oral evidence of the Directors cast doubts on the alleged loans that they had made to the Company. When questioned as to how he could have provided a $48,000.00 loan to the Company, as was recorded in the Ledger, at a time when he only had $5,000 in the bank, Mr Leow's reply was:

> A I cannot answer you. You have to check with my wife. ... Too long ago.

Further, an amount of $936.32 was received by the Company and recorded as a cheque deposit made by Mr Leow on 11 February 2003. However, there was no corresponding withdrawal of the same amount from Mr Leow's account on or around that date. Mr Leow could not explain how it was that this amount was recorded as a contribution from him or why the amount was not rounded off to the nearest dollar. His reply was that the plaintiffs should "check with [his] wife".

85 When Mdm Ong was cross-examined on these records, her only response was that she could not remember how the transactions she was questioned about had come about. She admitted further that she would not be able to help the court by explaining where the funds that the Directors had contributed to the Company had come from.

86 The Directors submitted that they had further financial resources which they could have used to support the Company and therefore it could not be considered insolvent. First, they asserted that there were significant amounts of cash on the persons of both Mr Leow and Mdm Ong and in their home. They said that the Company's bank statements showed that significant cash deposits were made into the Company's account. In order to have deposited the amounts (ranging between $9,200 and $65,000) in cash, Mr Leow would have carried them on his person or kept them at home at some point in time before he deposited them. The Directors' assertion that they had significant amounts of cash at all times was therefore not inherently incredible.

87 Whilst I accept that the Directors may have carried around substantial amounts of cash from time to time, there is no evidence that this cash belonged to them rather than to the Company. Mr Leow often collected payment in cash from the Company's debtors and he also cashed cheques from the Company's account. If the cash in his possession was taken from his own bank account, then he could have produced evidence of this. There was no evidence of any other business that the Directors carried on apart from that of the Company which could have generated the cash in hand. I therefore have to infer that any cash that did not come from the personal bank accounts came from either the Company's debtors or the Company's bank account. Further, if the Directors did have sufficient cash with them to pay the Company's debts as they fell due, the question arises as to why they did not and why it took a year before all the debts which were due as at 30 April 2003 were settled.

88 The Directors also said that they were able to support the Company because they could have borrowed sums of up to $200,000 from Mr Leow's friends. However, any loan that Mr Leow took from his friends and then on-lent to the Company to settle the Company's debts would itself have increased the Company's indebtedness. I have rejected the Directors' contention that directors' loans were to be considered as "quasi-capital" instead of as normal loans. On that basis, the fact that Mr Leow could have borrowed more and more money from his friends would not result in the Company being considered solvent.

89 On the totality of the evidence, I am satisfied that the Company was insolvent both on and

after 30 April 2003 and was also insolvent on 31 August 2003.

Did the Directors know that the Company was insolvent?

90 The plaintiffs' position is that the Directors were clearly aware of the Company's insolvency on 30 April 2003 and thereafter. The plaintiffs submitted that the Directors were aware of the Company's general financial position at all times and would have been aware by 30 April 2003 that the Company would have difficulty paying its debts as they fell due. In the alternative, the plaintiffs submitted that it must have been obvious to the Directors by 31 August 2003 that the Company could not pay its debts.

91 Before I deal with the evidence, I would like to comment on the quality of the testimony given by the Directors in relation to their dealings with the Company and its moneys. Neither Mr Leow nor Mdm Ong was a convincingly truthful witness in relation to many areas of their evidence. They were frequently evasive and avoided the questions that were being asked. Often too, their evidence was contradictory and they had a tendency to change their stories as they were pressed during the cross-examination. Some things that they said were inconsistent with other parts of their evidence. I have mentioned portions of their testimony in earlier paragraphs of this judgment which illustrate the difficulty of accepting much of the same at face value.

92 As mentioned above, Mr Leow maintained that his wife would be more familiar with the Company's finances as he did not go through the records often. When cross-examined, however, Mdm Ong's testimony on this point was inconsistent and contradictory. When questioned as to whether she would be able to tell how much money the Company owed on any particular day, Mdm Ong had given a negative reply. She explained she would only calculate all outstanding bills in the Company's "Outstanding file" once a year, when the Company's finances were due for auditing. When questioned if she had "never checked what was owing", Mdm Ong confirmed that she "never check[ed]".

93 The very next day, however, Mdm Ong testified that she prepared "purchase journals" for the Company for each year. She said that these purchase journals were prepared using Excel spreadsheets programmed with formulae which would calculate how much the Company owed to its creditors for each of its projects whenever she entered figures for invoices received or sums paid out on those invoices. When asked if, just by looking at the purchase journal, she would automatically know how much was unpaid for each project the Company was involved in, Mdm Ong replied in the affirmative. This contradicted her testimony of the previous day when she had claimed that she would not have any idea as to how much the Company owed its creditors.

94 Further, contrary to her husband's earlier evidence, Mdm Ong had testified that Mr Leow looked at the bills in the "Outstanding file" once every one or two months, and by looking at these bills "he should know" the amount of money he owed creditors. This was in stark contrast to Mr Leow's adamant insistence that he knew nothing about the accounts. As such, it appears that both Mr Leow and Mdm Ong had knowledge of the accounts of the Company, and their deliberate evasiveness was so as to conceal the fact that they had known the Company could not pay its debts as they fell due as at 30 April 2003 and 31 August 2003. To believe the Directors' assertions of ignorance would also be to believe that they were negligent and incompetent in their running of the Company's affairs and, bearing in mind that this business had been carried on by them for decades, that is a difficult belief to justify.

95 In addition, the plaintiffs submitted that the Directors did not have a legitimate reason to avoid payment of the Soon Li Heng claim nor did they have the necessary means to pay it. The Directors' response was that they held the view that they had a good case against Soon Li Heng as an

application for summary judgment had been dismissed. They maintained that the claim was disputed in good faith. The Directors therefore submitted that on 31 August 2003, it would have been premature to treat the Soon Li Heng claim as a payable. However, the Directors admitted that their expert witness, Mr Chee, had accepted that the claim ought to have been disclosed as a contingent liability at least. As noted previously, contingent liabilities are to be taken into consideration when determining a company's solvency. The Directors were also aware that Soon Li Heng had completed the work and that on 24 August 2003 the Company had received a substantial payment from the HDB for work done on the Fernvale project. Under the sub-contract, the Company had to pay Soon Li Heng within three to seven days of receipt of payment from the HDB. The Directors must have been aware from the HDB's payment that it was generally satisfied with the work done and therefore that some amount of money at least was payable to Soon Li Heng in respect of the project. The Company put a counterclaim and this was, in substance, its main defence to Soon Li Heng's claim. Given, however, that that counterclaim was subsequently found to be totally baseless, the Directors (or Mr Leow, at least, since he was aware of what went on at the site) could not have reasonably believed that the counterclaim had much chance of success.

96 The Directors made the argument that the fact that they continued to run the Company as a going concern from 30 April 2003 up to end 2004 showed that they were ignorant that the Company was insolvent from 30 April 2003 onwards. In this connection, the Directors contended that they continued to provide the Company with financial support during this period as follows:

(a) $45,000 was contributed as capital contributions;

(b) $498,856 was paid into the Company's bank account as directors' loans; and

(c) Mr Leow bore cash expenses totalling $336,197.83 on the Company's behalf.

Mr Kon agreed that according to the Company's documents the Directors had provided the above financial support to the Company during the entire period during which the impugned transactions were taking place.

97 The important question here is whether the Company's documents can be relied on as accurately reflecting the financial support given by the Directors. The records relied on are the Director's Account in the Company's General Ledger, where Mdm Ong recorded amounts allegedly owed by the Company to her husband and the Company's Cash Book, which reported cash payments made by the Company from its cash-in-hand. I have already referred to the way in which these accounts were kept by Mdm Ong (see [83] above). That evidence did not give me confidence in the accuracy of the record-keeping. I have also highlighted some of the evidence which showed the difficulty that the Directors had in explaining where the funds recorded as contributions from them in the Company's accounts actually came from. Mr Kon's position was that on the state of the documents, there was not enough documentary proof that the moneys had in fact come from the Directors. His view was that these moneys could simply have emanated from third parties or been part of the Company's trade receivables. The Plaintiffs submitted that Mr Leow could simply have told Mdm Ong that money that had been paid to the Company by third parties were loans from him and she would have recorded the same as money owing to him on Mr Leow's say-so without further checking or verification. Likewise, Mr Leow could have told her that he had made a payment on the Company's behalf and she would record this as more money owing to Mr Leow even if such payment

had nothing to do with the Company.

98 I agree that the evidence does not establish on a balance of probabilities that the Directors made the contributions to the Company that they asserted they did.

99 The Directors also relied on the fact that they had given written undertakings to support the Company financially. Two undertakings were signed by the Directors – the first was in relation to the Company's financial statements for the financial year ended 31 August 2003, while the second was in relation to the financial statements for the year ended 31 August 2004. These letters however did not really show that the Directors were prepared to support the Company because the first letter was only signed by the Directors on 25 October 2004, more than a year after the close of the 2003 financial year, whilst the letter for the year ended 31 August 2004 was only signed on 25 April 2005. In fact, the latter letter was issued after Mr Leow's statutory declaration on 4 March 2005 stating that the Company could not continue its business because of its liabilities.

100 Mr Leow's credibility was also sorely shaken when he was questioned on the topic of the letters of undertaking. In the span of five minutes, he changed his position on whether he understood the contents of the letter of undertaking no less than four times. He had first testified that he "roughly" understood the meaning of the letter, but then changed his position to say that he did not read the letter when he signed it. However, he then reverted to the stand that he "roughly" knew its meaning, and finally, when questioned by me, he affirmed that he did know the meaning of the letter. When asked to confirm his position at the start of the hearing on the next day, Mr Leow changed his testimony again, this time saying that the auditor did not explain the letters to him and that he was "not very certain" about their meaning. Overall, I cannot find that Mr Leow knew what he was signing and committing himself to. This means that the letters really are valueless as evidence that the Directors ran the Company as a going concern.

101 The third factor raised by the Directors was that the Company had continued tendering for projects from the HDB in 2003 and 2004. Unfortunately, the Company did not succeed in any of the tenders and they thus had no impact on the Company's financial position. In any event, the evidence of continuing tendering is equivocal – the Directors may have been trying to save the Company from its insolvent position. The fact that tenders were sent out did not mean that the Directors were unaware that the Company was in a parlous financial position or that they thought the Company was solvent. The same thing goes for the Company's ongoing subcontracting works for China Construction. The fact that there was such an ongoing contract did not mean that the Company was solvent. It made an overall loss in financial year 2003. Therefore whatever profits it made from its ongoing contracts that year did not, and could not, take it from an insolvent position to a solvent position. The Company was not a going concern simply because it was still doing some work.

102 On a consideration of the evidence therefore, I do not accept the Directors' contentions that they were not aware of the Company's financial difficulties or its insolvent position. In my judgment, both the Directors knew that the Company could not pay its debts as the same fell due and the actions that they took after 30 April 2003 must be considered in the light of such knowledge.

Should the Directors be made to repay moneys taken from the Company?

103 The plaintiffs' case was that during their investigations of the Company's affairs, they found that the Directors had caused the Company to make a number of payments to Mr Leow between May 2003 and August 2004. According to the plaintiffs' closing submissions, these payments totalled $537,738. The plaintiffs also made reference to the statement of claim (Amendment No 3) which included a table giving me the particulars of the impugned payments. The payments in the table

totalled $544,239.17. The difference between the two figures is the amount of $6,501.17 which was particularised in item 10 of the table as being a cash amount paid out on 31 August 2003. In court, Mr Kon confirmed that the plaintiffs were no longer claiming reimbursement of that amount.

104 The table in the statement of claim is set out below. Hereafter, I will refer to the individual items which are challenged as Payments and will identify them by the serial numbers in the table.

S/No	Date of Payment Voucher	Cheque No	Amount (S$)
1)	5 May 2003	567826	8,000.00
2)	24 June 2003	567773	30,000.00
3)	23 June 2003	567924	30,000.00
4)	25 June 2003	567963	17,540.00
5)	25 June 2003	567964	10,000.00
6)	20 August 2003	568051	80,000.00
7)	20 August 2003	568038	2,000.00
8)	25 August 2003	568088	200,000.00
9)	26 August 2003	568084	5,000.00
10)	31 August 2003	Cash	6,501.17
11)	2 September 2003	568091	13,958.00
12)	5 December 2003	568243	1,500.00
13)	5 January 2004	568261	37,000.00
14)	22 February 2004	568315	2,000.00
15)	5 March 2004	568326	10,000.00
16)	8 March 2004	568335	20,000.00
17)	9 March 2004	568327	2,500.00
18)	25 March 2004	568348	1,000.00
19)	28 March 2004	568351	9,240.00
20)	29 March 2004	568349	1,500.00
21)	30 March 2004	568350	1,000.00
22)	5 April 2004	568354	1,000.00
23)	10 April 2004	568358	2,000.00
24)	12 April 2004	568359	30,000.00
25)	12 April 2004	568366	12,000.00
26)	1 July 2004	568462	1,500.00

27)	5 July 2004	568463	1,000.00
28)	1 August 2004	568475	2,000.00
29)	6 August 2004	568479	6,000.00
		Total	S$544,239.17

105 The plaintiffs' case is that the Payments formed part of a series of irregular and fraudulent transactions which had the effect of siphoning moneys from the Company and out of the reach of its creditors. They submitted that the Directors had masterminded the scheme to defraud the Company's creditors. The Payments were documented by way of payment vouchers from the Company which were either made out in favour of Mr Leow or which were marked as "cash payments".

106 In their defence, the Directors said that the Payments were made in good faith and/or in the knowledge that the Company was not insolvent and/or in the belief that the Company was not insolvent. I have found that the Directors knew that the Company was insolvent during the period when these Payments were made and therefore the onus must lie on the Directors to explain the reason for the Payments and why it was that they were each made in good faith for the Company's business.

107 The Payments were made to Mr Leow. When he was asked in court to explain them, he maintained that he could not recall anything about any of the Payments and repeatedly stated that his wife would be able to help the court. In her AEIC, Mdm Ong attempted to explain the Payments. She did this by splitting the Payments into several overlapping categories as follows:

(a) the Directors would pay their employees' salaries in cash first and the Company would reimburse them later;

(b) the Directors may have withdrawn cash from the Company which they had then used to pay the Company's employees' salaries;

(c) Mr Leow may have borrowed money from his friends and/or other contractors and repaid them by way of cash cheques; and

(d) some of the Payments involved cheques that were not issued by Mr Leow.

108 It should be noted that not all the Payments made were explained by Mdm Ong as belonging to one or more of the categories set out above. Some Payments were not explained at all. Other Payments fell into more than one of her categories. For example, she said that Payment no 6 was meant as a repayment of a loan given by one Mr Piak Boon Seng (category (c)) and also that the cash cheque for this amount was not issued to Mr Leow (category (d)). In court, Mdm Ong was questioned extensively about the various Payments and she had quite a lot of difficulty in explaining them.

109 In their submissions, the Directors relied heavily on the assertion that Mr Leow had contributed significant funds to the Company and these contributions were recorded under the Directors' account in the Company's general ledger or in the cash book. At the end of the financial year, after netting off the cash payments to Mr Leow against the cash payments made by him to the Company, the balance on the cash book was carried back to the Directors' account under the general ledger as a pure accounting operation and treated as a partial repayment of the Directors' loans. The records showed

that the Payments were taken account of in the Directors' account in the Company's general ledger. They did not disappear off the radar and they were not off balance sheet items. The first plaintiff had conceded that all of the impugned Payments were openly recorded in the Company's documents.

110 The Directors also submitted that the plaintiffs could not prove fraud by shifting the burden to the Directors to provide explanations for the Payments. They had to prove fraud by convincing evidence. Secondly, Mr Leow was legally entitled to repay himself the Directors' loans because these loans were, on the Company's audited statements, stated to be "with no fixed terms of repayment" and were therefore repayable only on demand. In this regard, Mr Kon had agreed that the Directors could choose whether to postpone payment or to pay themselves in respect of such loans.

111 In my opinion, the fact that the Payments were recorded in the Company's records could not by itself mean that the Payments were used for the Company's purposes. There had to be supporting documents to show what the Payments were for. The problem in this case was that there were insufficient accompanying documents which established that the moneys were taken for the Company's purposes and not for other uses. This is why the explanation of the Directors as to who were the persons who handled the funds was very important. If the Directors were able to explain what had happened to the various Payments and how they were used in the Company's business, then there would be no reason to impugn these Payments. In the absence of satisfactory explanation, however, the court might have no option but to draw an adverse inference. Whilst it is always preferable to have direct evidence of fraud, sometimes fraud can be established by inference if the circumstances are strong enough.

112 Dealing with Mdm Ong's explanations, first, she said that Payments nos 8, 9, 13, 15, 25, 27 and 29 fell into two categories. They were either reimbursements to the Directors of employees' wages which they had paid in cash or they were cash withdrawals which the Directors had taken from the Company in order to pay wages. In this regard, I note that the Company was a small family run business in the contracting industry and that it is not uncommon in this industry to pay workers in cash especially as many may be daily-rated workers. There must, however, surely be some record of the wages paid and receipts for them signed by the workers. In any case, some of the sums taken seemed far too large to simply be moneys used to pay salaries.

113 Looking at the table, Payment no 8 was by way of a cash cheque for $200,000. I find it difficult to conceive that Mr Leow advanced $200,000 for salaries and had no documentation to support those payments. There is no evidence that the sum represented only one month's wage bill and it is highly unlikely that Mr Leow paid several months' wages from his own resources and only sought reimbursement when the figure reached $200,000. Mdm Ong's explanation of this payment is therefore incredible. This cheque was dated 25 August 2003. The next Payment, item no 9, was a cash cheque for $5,000 dated 26 August 2003. There was no indication of what additional salaries Mr Leow had paid between 25 and 26 August 2003 to require him to be reimbursed with a further $5,000 just after he had received $200,000.

114 Payment no 13 was a cash cheque for $37,000. This perhaps could have represented a payment for salary or overtime, but Mdm Ong did not point to her payroll to cross-reference the wages due. Payment no 15 was a cash cheque dated 5 March 2004 for $10,000. There was the same lack of evidence in relation to this as in relation to Payment no 13. The next Payment, no 25, was for $12,000 and again lacked supporting evidence. Payments no 27 (5 July 2004) for $1,000 and Payment no 29 (6 August 2004) for $6,000 were for smaller sums but were still not supported by reference to the Company's payroll. In all cases there was a lack of supporting documentation to show how Mr Leow was being reimbursed for payments he had made for the Company.

115 Thus, while I accept in principle that the Company could have advanced cash to Mr Leow to pay wages, it is not possible for me to find that these advances were made for wage payments (either as reimbursement for past wages or for current wages) because of the lack of correlation between the amounts taken and wages paid. In addition, it is entirely possible that whilst Mr Leow used some part of the funds for wages, the remainder thereof was applied for other uses which were not explained. In all these circumstances, I find that these Payments have not been substantiated as having been made *bona fide* for the Company's business and therefore Payments no 8, 9, 13, 15, 25, 27 and 29 must be repaid by Mr Leow.

116 On the next set of transactions, Payments 2, 3, 4, 5, 6, 18, 19, 21, 22 and 24, Mdm Ong's explanation was that these were repayments of loans given by third parties. She named the third parties as being Mr Tan Koon Leck, Mr Piak Boon Seng and Mr Piak Beng Teck. Mdm Ong agreed in cross-examination, however, that there was no evidence apart from Mr Leow's word that the Company had taken loans from these third parties through him. I will deal first with those Payments that were paid into third party accounts.

117 In respect of Payment no 2, a cash cheque for $30,000, the voucher stated that the payee was Mr Leow and the particulars of the payment indicated that it was "cash loan return". The cheque itself was paid into a bank account in the joint names of Piak Boon Seng and Piak Beng Teck. Mdm Ong said this cheque was for "money borrowed from them previously and now returned to them". Payment no 5 was a sum of $10,000 paid by cheque no 567964 on 25 June 2003. The voucher described the payee as "cash – Leow Boon Cher" and the particulars were simply "Cash loan return". However, the back of the cheque shows that it was paid into the same account in the names of both Piak Boon Seng and Piak Beng Teck as Payment no 2 had been.

118 In respect of Payment no 3, a cash cheque for $30,000 dated 21 June 2003, the voucher said "payee cash – Leow Boon Cher" and the particulars in the voucher stated "loan return cash". Mdm Ong said this was repayment of a loan extended by Tan Koon Leck. The account the cheque was paid into was not an account belonging to either Director.

119 Payment no 6 was a cash cheque for $80,000. The voucher stated "Payee cash" and gave no other details. According to the back of the cheque, it was cashed by Mr Piak Boon Seng on 20 August 2003. On 30 March 2004, Mr Piak Boon Seng was paid $1,000 (Payment no 21) by way of a cash cheque (no 568350) and on 5 April 2004, he received another $1,000 (Payment no 22) by way of another cash cheque (no 568354).

120 In respect of Payment no 4, a cheque was drawn in favour of Mdm Ong herself for $17,540 but the voucher said that the payee was "cash – Leow Boon Cher" and the particulars gave the same description as for Payments 2 and 3. Mdm Ong was asked to explain this Payment and her reply was "When I entered them into the account, so when I – when the money came, I'll put it under Leow Boon Cher, so when the money go out, I also take it from Leow Boon Cher". She then confirmed that this was an instance when Mr Leow had borrowed money from her to pay the Company's expenses and the payment voucher represented his payment to her. I find this explanation difficult to accept. It was open to Mdm Ong to lend money to the Company directly and documenting it properly would not have been difficult since she was in charge of the accounts. Her explanation seemed convoluted and incredible.

121 Payment no 18 was a cash cheque (no 568358) for $1,000. Under "Particulars" in the payment voucher, Mr Leow's name appeared. There is no indication at the back of the cheque where the money went so it was probably paid to him in cash.

122 There are two Payments which were alleged to be repayments of loans made by Aim Top. Payment no 24 was in the sum of $30,000 which was paid on 12 April 2004 by way of cheque no 568359. Mdm Ong testified that this sum represented a loan from Aim Top which was being repaid. However, the voucher only noted Mr Leow's name and the back of the cheque showed Mdm Ong's name and NRIC no indicating that she had cashed the cheque. When asked to explain this, she said that $1,000 out of the $30,000 was taken by her for use as petty cash on behalf of the Company and the remaining $29,000 was banked into Aim Top's account. This explanation was unbelievable because there was no reason for her to take her petty cash out of a cash cheque meant to repay Aim Top and no evidence that the money actually went to Aim Top. Nor was there any evidence of any loan taken from Aim Top notwithstanding that by April 2004, Mdm Ong was working for Aim Top herself. It would therefore have been easy for her to have prepared the necessary documentation.

123 The other Payment that was said to be repayment of a loan to Aim Top was Payment no 19 in the sum of $9,240 made on 28 March 2004. The voucher stated "Cash Leow" but the cheque itself was paid into Aim Top's account. When Mdm Ong was asked in court how she knew that this money paid to Aim Top was to repay a loan, her answer was "Based on my record". She then admitted it was a record like the one that she normally wrote down on her draft documents and she also agreed that no copy of that draft was in court. When it was put to her that since the document was not available, there was no way to know that the payment was in respect of a genuine loan, her answer was difficult to understand. She said "First, when it come in, it was entered as 'Mr Leow' and when it goes out, it's also entered as 'Mr Leow'". It was then put to her that what could have happened was that Mr Leow took payment from the Company and used it to fund Aim Top. She did not agree and insisted that it was a repayment of a loan.

124 I have considerable difficulty with these transactions involving Aim Top. I think, for reasons that are expressed below, that the Company's transactions with Aim Top were dubious and that there is no proof that there was any genuine loan that went from Aim Top to the Company. In any case, Aim Top was not an independent third party since it was partly owned by Mdm Ong's mother. I am not satisfied that Payment no 19 was a genuine loan repayment.

125 In respect of this set of Payments, I find that nos 4, 18, 19 and 24 have not been properly explained and it has not been established that they were *bona fide* payments for the use of the Company or the return of moneys borrowed from the Directors by the Company. In any case, as I mention below, there is a problem of preference in relation to repayment of loans to the Directors. These Payments must therefore be returned by the Directors.

126 As regards Payments nos 2, 3, 5, 6, 21 and 22, however, I accept that they were made to third parties. I also accept that they were repayments of loans advanced by such third parties. The Company was in financial difficulties and the Directors did not have sufficient resources to settle the Company's debts on their own. The evidence showed that the Company did, however, continue to pay its debts from time to time (albeit not all of them and not as they fell due) and in order to do so, it is probable that the Directors borrowed money from friendly third parties. Insofar as the evidence shows that moneys have been repaid to identified third parties, I am willing to give the Directors the benefit of the doubt and hold that such repayments were made for the benefit of the Company and in order to help the Directors continue to have recourse to such sources of funding from time to time.

127 The third set of Payments that I will deal with comprises those that Mdm Ong identified as being cash payments to sub-contractors. She stated that she and Mr Leow would pay cash to the sub-contractors for work and services performed or as repayment of loans which they had advanced to the Company. She elaborated that this practice of cash payment had been in effect since the days of Woon Contractor. The Payments in question are nos 11, 17, 26 and 28.

128 Payment no 11 was the sum of $13,958 paid by cash cheque 568091 on 2 September 2003. According to the back of the cheque, the money was received in cash by one Mr Ong Hoi Lian. The voucher, however, only stated "Cash Leow". In court, Mdm Ong identified Mr Ong as a sub-contractor for the Company and said that she believed his work had "something to do with earth". She was not able to explain how she knew that Mr Ong was a sub-contractor though she was quite certain that he was. She was not able to identify any invoice issued by Mr Ong.

129 Payment no 17 was the sum of $2,500 paid by cash cheque no 568327 dated 9 March 2004. Mdm Ong explained that she had taken this money because she could have paid a portion of this amount for operating expenses of the Company and was reimbursed for such payment. This explanation was too vague to provide a credible basis for holding that the money was spent for the Company's purposes.

130 Payment no 26 ($1,500 by cheque no 568462) was paid to Mdm Ong on 1 July 2004 while she received Payment no 28 in the sum of $2,000 by way of cheque no 568475 on 1 August 2004. No explanation was provided for either of these Payments.

131 I find that the Directors must repay Payments nos 17, 26 and 28. As for Payment no 11, I am willing to give them the benefit of the doubt that this was a *bona fide* payment in the course of the Company's business to one of its sub-contractors. The amount of the Payment, not being a round figure as so many others were, is some indication that it was meant to settle an actual bill for work done or goods supplied. The recipient was not alleged to be one of Mdm Ong's relatives and I accept her evidence that he was a sub-contractor, although she found it difficult to explain how she knew that. Mdm Ong is not a very articulate woman but that does not mean that in this instance she was not telling the truth.

132 In her affidavit, Mdm Ong did not offer any explanation for Payments nos 1, 7, 12, 14, 16, 20 and 23. In court, she attempted to remedy the omission. Payment no 1 (voucher dated 5 May 2003) was a cash cheque for $8,000. She stated that this amount was paid to Mr Leow and that it was entered in the Directors' account in the general ledger. That must mean that the Payment was intended as a loan or as a repayment of a previous loan made to the Company by Mr Leow.

133 Payment no 7 evidenced by a voucher dated 20 August 2003 was in the sum of $2,000 and was made out to UOB Card Centre. Mdm Ong admitted that it was paid to settle Mr Leow's credit card bill which he had incurred for his personal expenditure. This amount was therefore another loan to Mr Leow.

134 Payment no 12 was a cash cheque for $1,500 dated 5 December 2003. Mdm Ong testified that she did not know into whose account the money had gone. She was therefore not able to explain this transaction. It is noted from the voucher however, that it was made out to Mr Leow, so in all probability the cheque was cashed by him. In the case of Payment no 14, a cheque for $2,000 dated 22 February 2004 was made out in favour of Mr Leow. Mdm Ong said that she did not know what this payment was for. Mdm Ong was also unable to explain adequately Payment no 16 in the sum of $20,000 that was by way of a cheque dated 8 March 2004 in favour of Mr Leow. Whilst Mdm Ong said that it was a reimbursement for her husband's expenditure, she was unable to recall what expenditure it related to.

135 Payments no 20 and 23 were cash cheques for $1,500 and $2,000 respectively. They were paid in March and April 2004. Mdm Ong claimed that they were payments to one Mr Yeo Lai Hee, a casual worker, meant as reimbursement for certain items that he had purchased on behalf of the Company. She said that the usual procedure followed in cases like this would be for the worker to first take cash

from her, then use it to buy the items required by the Company and then he would come back to her with the cash bills issued by the vendor. With the cash bill she would issue a cash voucher and then enter the item in the cash book. In this case, however, the cash vouchers made no reference to any item purchased or any vendor's bill. Also, the payment vouchers were made out to Mr Leow and not in the name of Mr Yeo Lai Hee. I am not able to find that these transactions were *bona fide* transactions for the Company.

136 In the result, Payments nos 1, 7, 12, 14, 16, 20 and 23 must be repaid by the Directors.

137 There is an additional justification for my order that the various Payments which I have not accepted as *bona fide* must be repaid by the Directors. This is that even if the Directors had loaned money to the Company which the Company was liable to repay them, these Payments clearly constituted an unfair preference pursuant to ss 98 – 101 of the Bankruptcy Act read with s 329 of the Act. The Payments were made during the period of two years between 30 April 2003 and 26 April 2005 when the Company was insolvent. As far as the Payments that I have not accepted as genuine are concerned, they were paid either to Mdm Ong or Mr Leow (in fact the majority of them were paid to Mr Leow as Mdm Ong implicitly acknowledged). Both Directors were clearly associates of the Company pursuant to regs 2 and 4 of the CABAR. Further, as Mr Leow and his wife were the controlling and directing minds of the Company, they were in a position to, and did, influence the Company to give them an unfair preference to put them in a better position in the event of the Company being wound up subsequently. In the absence of credible evidence explaining them, the Payments were irregular and constituted an unfair preference.

Aim Top

Relationship between the Company, the Directors and Aim Top

138 There were a number of transactions between Aim Top and the Company that the plaintiffs sought to impugn. In connection with this overall intention, the plaintiffs made submissions on the relationship between Aim Top and the Company and I will consider this issue first before I go on to deal with the individual transactions.

139 The plaintiffs submitted that Aim Top was set up to be the Company's successor and to divert the Company's business and assets away from the Company and out of the reach of its creditors. The Directors and Aim Top vehemently denied this allegation and contended that since the plaintiffs had not pleaded this in the statement of claim, they should not be able to rely on any such assertion. While it is true that the plaintiffs did not plead that Aim Top was set up to be the Company's successor, I accept the plaintiffs' submission that this was not a necessary pleading as the statement of claim contained many assertions of irregularity in the dealings between the Company and Aim Top and these irregularities were the foundation of the plaintiffs' claim that the transactions between Aim Top and the Company should be set aside. The plaintiffs' allegation that Aim Top was set up by the Directors would, if proved, establish the context in which the *bona fides* of transactions between Aim Top and the Company have to be determined but does not in itself dictate how the issue of whether each such transaction was a genuine one must be resolved.

140 As stated above, Aim Top was incorporated on 9 September 2003, by which time the Company was clearly insolvent. The two persons responsible for the incorporation of Aim Top were closely connected with the Directors: to reiterate, Mdm Chiew is the mother of Mdm Ong and Mr Chiow had been the Company's loyal employee for 13 years prior to the establishment of Aim Top. Mr Chiow was the only person from Aim Top who gave evidence as to the circumstances in which his company was incorporated and the way in which it had dealt with the Directors and the Company.

141 Mr Chiow did not come across as a canny and experienced businessman. He testified that he had never incorporated any company before Aim Top and that his purpose in setting it up in September 2003 was so that he could "be a boss". Mr Chiow further claimed that Mdm Chiew had asked him to set up Aim Top with her for the benefit of her eldest son, Ong Eng Hian ("OEH"). When it was put to him that if OEH ran the company, he would not be the boss, he replied rather philosophically that he was "still half a boss". Further questioning elicited that prior to the establishment of Aim Top Mr Chiow and OEH had never met, and that they only met twice in the context of setting up the company. The evidence also showed that thereafter OEH had not worked for Aim Top at all despite apparently having been intended as the main beneficiary of that business. Mdm Ong herself testified that her brother OEH had never shown any interest in leaving his occupation as a stockbroker to enter the construction industry.

142 Mr Chiow was questioned extensively about his relationship with Mdm Chiew. At first, Mr Chiow claimed that he had "known her for many years" prior to September 2003. However, when quizzed as to how he had come to know Mdm Chiew, Mr Chiow said he did not remember. When questioned as to how often he had met Mdm Chiew prior to starting Aim Top, his answer was that he did not remember this either, but it was probably once every few months or once a year. When counsel for the plaintiffs asked Mr Chiow when he would meet her, the reply was that it would be on his "rest day". However, when pressed further as to whether he visited Mdm Chiew, he answered that he would "bump into her occasionally ... [but] won't intentionally go visit her". This evidence that he would only run into Mdm Chiew by chance was clearly contradictory to and inconsistent with previous testimony as Mr Chiow had initially given the impression that he would meet up with Mdm Chiew on his off days. In fact, Mr Chiow claimed, rather incredibly, that it was on an occasion when he accidentally bumped into Mdm Chiew and they started talking that she broached the subject of the two of them starting a company together.

143 In his affidavit, Mr Chiow had said that one of the reasons he left the Company to set up Aim Top was that on a few occasions the Company had delayed paying his salary. When questioned as to how often the payment had been delayed, his initial reply was that it might have happened two or three times but that he could not remember clearly. Later, when he was asked why he had never brought this issue up to the Directors, he replied that he was used to such delays as they happened "all the time". He then changed his testimony to say that he could not remember on how many occasions the Company had been late in paying his salary. Mr Chiow's evidence on this point was not supported by the Company's cash book which indicated that he was paid on time every month. When shown these entries, Mr Chiow claimed that the records in the cash book were not correct because the Directors had forgotten to pay him and that he was used to getting his pay one week after the due date. He also asserted that he did not dare to complain about the late payment as such delays did not happen every year and sometimes the delays would be for only a few days. There is much substance in the plaintiffs' submission that Mr Chiow's confused and constantly changing testimony about the alleged delay in payment shows that he was not telling the truth about it.

144 The plaintiffs also raised doubts about Mdm Chiew's participation in Aim Top. She was in her 60s when the company was incorporated and was a housewife. She had not had any formal education, had never been in formal employment and could only read and write simple Chinese characters. Her daughter testified that Mdm Chiew had never told her prior to September 2003 of any desire to go into the construction business or to start a company. It was odd that Mr Chiow who had never been in business for himself would want to start a new venture with someone even less experienced in business. Mr Chiow said he had got to know Mdm Chiew well when they were neighbours living in Old Tampines Road. The veracity of this evidence was thrown into doubt subsequently when OES, another son of Mdm Chiew, testified that Mr Chiow had not been their neighbour when the family lived in Old Tampines Road.

145 It is hard to understand why Mr Chiow and Mdm Chiew would go into business together in September 2003. Apart from the unlikelihood of their being good friends due to the differences in age and occupation, it is baffling that Mdm Chiew would suddenly approach her daughter's employee to start up a company for her eldest son who was a stockbroker and showed no interest in the construction business whatsoever. There was no hint that OEH had any financial or other reason to want to change his occupation and he himself did not come forward to corroborate Mr Chiew's assertions.

146 There were other difficulties in accepting Aim Top as independent of the Directors. Firstly, as discussed above, Mr Chiew was unable to give a coherent reason for leaving the Company and setting up his own business. Secondly, he had admitted that he did not know much about incorporating a company but claimed that he had found an auditor who "someone" had recommended to him. Further questioning revealed that this "someone" was Mdm Ong. I find it difficult to believe that Mdm Ong would help an employee of hers leave her employ in order to set up a company which would compete with the Company unless the Directors had something to gain from this endeavour.

147 The third difficulty is that Mr Chiow admitted that he had "not come up with a single cent" of Aim Top's paid up capital of $100,000 and that the entire sum had been paid by Mdm Chiew. The problem with this testimony is that there was no evidence that Mdm Chiew on her own had the resources to fund Aim Top to the tune of $100,000. Mdm Ong's testimony was that her mother had never worked outside the home before Aim Top was incorporated and that she had no source of income. In such a situation, any savings that Mdm Chiew had would be precious and it would be unlikely that she would spend a substantial sum on a company that was going to be run by someone like Mr Chiow who had no track record at all in the business. In any case, with a husband and another son already in business and familiar with the construction industry, it is extremely odd that she would turn to an outsider for help.

148 Fourthly, there was a very close manpower connection between Aim Top and the Company. Aim Top's first employee was one Chng Nyee Ming, who had also worked for the Company prior to joining Aim Top. When asked if he thought poaching employees from the Company would make the Directors unhappy, Mr Chiow replied that he did not care. Subsequently, Mr Chiow employed other persons who had worked for the Company including another brother of Mdm Ong. In 2006 to 2007, Aim Top formally employed Mr Leow and Mdm Ong themselves but even before then, the evidence showed that they had been working for Aim Top on a freelance basis. The plaintiffs argued that the movement of employees from the Company to Aim Top strongly supports the inference that Aim Top was set up as a successor to the Company.

149 Mdm Ong claimed that she only started formal employment with Aim Top in 2006. Mr Chiow, however, testified that Mdm Ong had applied for permits for foreign workers on Aim Top's behalf. Although he did not say so, this must have been done long before 2006 as shortly after Aim Top was formed, it was awarded a construction project and needed workers for that. Further, during cross-examination, Mdm Ong admitted that she had advised Mr Chiow on an informal basis before 2006. She said that she had helped Aim Top with "administrative work" shortly after its incorporation. She had also prepared cash vouchers for the payment of wages to Aim Top's workers during "most months". She also admitted that from the time of Aim Top's incorporation, she had prepared payment vouchers for Aim Top's payments to its sub-contractors. Whilst Mdm Ong herself denied doing the accounts for Aim Top, Mr Chiow subsequently stated that Mdm Ong had handled at least some of Aim Top's day-to-day accounts from shortly after Aim Top was incorporated. He confirmed that amongst other work, Mdm Ong would prepare Aim Top's invoices and receive a record of Aim Top's daily expenses once every two weeks.

150 There was also evidence as to certain activities that Mr Leow himself had undertaken on behalf of Aim Top after its incorporation. His initial evidence was that he was only formally employed by Aim Top as a manager between September 2007 and about July 2009. However, Mr Chiow had said in an interview in June 2006 that Mr Leow was then helping Aim Top on a freelance basis. When Mr Leow was shown the transcript of this interview, he changed his evidence and said that he had helped Mr Chiow to make submissions for payment on construction projects and also to supervise sites when Mr Chiow lacked manpower. Mr Chiow's subsequent evidence in court was that Mr Leow had been formally employed by Aim Top during two periods in 2006 and 2008 and that even before his first formal employment in 2006 he had prepared documents for Aim Top on freelance basis. The evidence therefore indicates that Mr Leow did work for Aim Top from least 2006.

151 The fifth indication that Aim Top was much more closely connected to the Company and the Directors than they wanted to admit consisted of evidence that the Company made payments to sub-contractors on Aim Top's behalf from shortly after its incorporation. In or about February 2004, the Company paid Antah to deliver equipment to a site in St Michael's Road. Both the Directors testified that the Company did not have a project there but Mr Chiow confirmed that Aim Top had received delivery of equipment from Antah at its St Michael's Road site. He explained that Mr Leow had borrowed some of this equipment for the Company's own project at Punggol and had subsequently lent it to Aim Top. There was also some indication that the Company may have paid an entity known as Yong Kiat Heng ("YKH") for transportation of earth from the St Michael's Road site. Mr Chiow admitted that YKH had carried out earth removal works for Aim Top at that site but he could not remember receiving any claim for payment from YKH. The plaintiffs suggested that this indicated that the Company had paid YKH.

152 The plaintiffs also submitted that the evidence showed that Aim Top had taken over the Company's last major sub-contract with China Construction (South Pacific) Development Co Pte Ltd ("China Construction") in relation to a site known as MUP 17 in the Bendemeer Road area. It does appear to me that the circumstances in which Aim Top became the sub-contractor for this project were suspect. The contract between Aim Top and China Construction was dated 15 April 2004 but stated that the date of commencement of the works was 25 April 2003, a date four months before Aim Top was incorporated. As an indication that the commencement date was not an error, the schedule of rates referred to in the contract was dated 15 April 2003. It is unlikely that the date would have been typed wrongly twice though this was Mr Leow's explanation for it. Mr Chiow when pressed on the document said that he had signed a "brand new contract" but was forced to admit that "work for the project had commenced earlier". The most plausible explanation for this discrepancy would be that the Company was the initial counterparty to the contract with China Construction but that Aim Top took over from the Company in name only. Mr Leow admitted in court that Aim Top had stepped into the shoes of the Company but maintained that China Construction was entitled to use its own discretion to choose whichever contractor it wanted to work with and was not restricted to the Company. In April 2004, by which time the works would have been underway for at least a year, there was no reason for the Company which desperately needed work to voluntarily step aside and give up a good contract to Aim Top. It seems to me that the plaintiffs' suspicions were well placed.

153 In view of all the evidence connecting Aim Top and the Directors, I find on a balance of probability that the Directors did set up Aim Top with a view to it taking over the business and staff of the Company when the same was no longer able to continue due to its indebtedness. This does not mean, however, that all the transactions between Aim Top and the Company must necessarily be set aside. As Aim Top's solicitors pointed out, the transfer of assets from the Company to Aim Top could still have been legitimate as long as the Company received good consideration for the transfer. I now turn to consider the individual transactions which comprise the following:

(a) the sale and lease-back of one 10-tonne lorry;

(b) the lease of excavators; and

(c) Payments totalling $4,888 made to Aim Top between 17 February 2004 and 20 June 2004.

Sale and lease-back of the 10-tonne lorry

154 The Company sold a 10-tonne lorry to Aim Top on 1 October 2003 at the price of $37,440. Thereafter, the Company leased the lorry back from Aim Top from November 2003 to April 2004. Over that period, a total sum of $27,200 was paid as rental to Aim Top. The plaintiffs claimed that the sale and subsequent lease-back of the lorry were sham transactions meant to place the lorry out of reach of the Company's creditors and to enrich Aim Top and that the rental of $27,200 should be refunded.

155 The Directors' case was that they sold the lorry in October 2003 as the Company did not require the use of the lorry then, but that they had to subsequently lease it back when business picked up.

156 It is undisputed that the Company owned only one 10-tonne lorry between April 2003 and April 2004. According to Mr Leow, this lorry was leased to China Construction between June 2003 and September 2003. However, the invoices issued by the Company to China Construction showed that the lease of the lorry to the latter continued from October 2003 to April 2004 despite its sale to Aim Top. Thus, it appears that Mdm Ong's assertion that the lorry was sold to Aim Top because the Company did not require it was not true.

157 Mr Leow's evidence during cross-examination did not serve to clarify matters. When asked to clarify the rationale for the sale of the lorry, this was what transpired:

Q Who decided to sell the lorry?

A I decided.

Q So the reason for selling the lorry must be yours, not [Mdm Ong's], correct?

A Yes.

Q So she would not know the reason unless you told her?

A It's such a long time ago, I can't remember whether I did tell her.

...

Q The only way she could state a reason for wanting to sell the lorry is for her to have heard the reason from you.

A I cannot answer your question.

Q You cannot or you do not want to?

A Because I don't know how to answer you. ... I'm unable to answer you.

158 The fact that Mr Leow could not answer a simple question honestly without wavering or being evasive, speaks volumes as to his lack of credibility as a witness. In addition, when asked as to where he obtained a lorry to lease to China Construction in October 2003, since he had sold Woon Contractor's lorry and had not leased it back then, Mr Leow replied:

Q You sold it on 1st October 03 and only leased it back for the month of November 03. But we know that you continued to lease the lorry to China Con in the month of October. Where did you get the lorry from?

A I don't only lease my lorry from Aim Top. I [also] lease it from elsewhere.

Q From who?

A Yew San, CK.

...

Q ... I can tell you that there's absolutely no evidence in the company's accounts that you rented a similar lorry from somebody else in October 03.

A I did not say it was in October that month. It was so long ago.

...

Q My question was: Who did you rent a lorry from in October 2003 in order to lease a lorry to China Construction for that month?

A I did rent from Aim Top, if my memory serves me right.

159 The circumstances of the sale and lease-back of the lorry became even more suspicious as Aim Top had also hired the lorry driver from the Company in November 2003. However, as the lorry was leased back to the Company that same month, Aim Top and the Company had a convoluted agreement under which the driver would be hired by Aim Top, but would, for all intents and purposes, be doing work for the Company. As events turned out, however, the driver was still paid by the Company until at least January 2004 despite his having been employed by Aim Top from November 2003.

160 Further, the plaintiffs claimed that Aim Top's purchase of the lorry was in essence funded by Mdm Ong. In October 2003, two large withdrawals from Mdm Ong's bank account were made, totalling $37,000, leaving only $790 in the account. It is the plaintiffs' case that this money was used to pay for the lorry. They thought it suspicious that despite such a large amount of money being withdrawn from her account, Mdm Ong claimed in court to be unable to remember what it was for.

161 In response, Aim Top and the Directors asserted that the equipment leases to Aim Top were not sham transactions and were legitimate as the Company had received good consideration for the transfer. They claimed that there was no evidence of dishonesty or misrepresentation on the part of Mr Leow or Mdm Ong. Further, there were no personal advantages to be gained by the Directors from the transactions. They also claimed that the Directors had been providing financial support to the Company in amounts that far exceeded the total amount of the impugned transactions. As such, they submitted that it was illogical to contend that the Directors would conspire to defraud the Company.

162 In addition, Aim Top argued that the sale of the 10-tonne lorry was justifiable as it improved the Company's cash flow. The Company obtained a good price from the sale of the lorry as it was sold at or above market price. Further, Aim Top claimed that by selling the lorry, the Company had raised cash to pay off its debts to other creditors and to enable it to still fulfil its contractual obligations to China Construction by renting another lorry for that purpose.

163 The difficulty with this argument, however, is that Mr Leow was unable to specify where he had obtained the additional lorry to fulfil the China Construction contract from. It did not assist matters that Mr Leow's evidence was inconsistent and wavering, as noted above. There is a coincidence between the amount of money withdrawn from Mdm Ong's account ($37,000) on 2 October 2003 and the amount which Aim Top had paid the Company for the lorry ($37,440) the very next day. There was no evidence of any withdrawals of similar amounts from the accounts of either Mr Chiow or Mdm Chiew. Mr Chiow contended that Aim Top had paid for the lorry using its paid-up capital and borrowings from his friends. He had to concede, however, that the paid-up capital was insufficient to fund all Aim Top's purchases. As regards the alleged borrowings from his friends, these were bare assertions without any supporting evidence.

164 I find it highly plausible that Mdm Ong had funded the purchase of the lorry. In view of this and of the other suspicious circumstances which I have listed above, the sale and lease-back of the 10-tonne lorry was, in all probability, not a *bona fide* transaction but a fraudulent one designed to remove the lorry from the clutches of the Company's creditors. Accordingly, the sale and lease-back must be set aside and the sum of $27,200 repaid by Aim Top.

Lease of PC200 excavator with breaker from Aim Top

165 In December 2003, the Company leased a PC200 excavator with breaker from Aim Top. Both the Company and Aim Top said that the Company required a PC200 with breaker which Aim Top owned but did not require. On the other hand, the Company possessed a PC200 excavator without a breaker, which Aim Top needed. Thus there was an exchange of the equipment, with each company paying rent to the other. However, as the rental for the PC200 with breaker was higher, the Company paid Aim Top more money than it received. The plaintiffs claim repayment of $7,280.

166 In court, however, Mr Leow could not explain coherently why he required the excavator with a breaker. He gave general answers such as that he needed to use it for "defect work" as well as for "tidying up" of the Fernvale Project. These seemed improbable as the Fernvale site was handed over to the HDB three months before the excavator with a breaker was hired. In addition, Mr Chiow's testimony on the exchange of excavators was contradictory. He had, at first, admitted that one of the pieces of equipment he had purchased from the Company was an excavator with a breaker. However, when asked if this was the same excavator with a breaker that he leased to the Company, he claimed that it was a different one which he had purchased. Shortly afterwards, Mr Chiow said that he had "rented the excavator which [he] leased to Woon from someone else". Later, Mr Chiow stated that he had only bought an excavator without a breaker from Woon Contractor. However, when confronted with the invoice from Woon Contractor that showed that Mr Chiow had purchased an excavator with a breaker for $62,400, Mr Chiow admitted that he "can't not accept" this fact and accepted it. He then stated that he had rented another excavator with a breaker from a third party, but had no use for it, and therefore he leased it to the Company. Shortly after however, Mr Chiow claimed that he had only rented a breaker, and not an excavator with a breaker.

167 The plaintiffs argued that the inability of Mr Chiow and Mr Leow to give clear evidence on the excavator issue was due to the fact that they were trying to cover up this sham transaction, and their lies could not add up. I agree. I find that the purported lease was a sham transaction which was

used to channel the Company's funds to Aim Top and that the $7,280 paid must be refunded.

168 A related transaction between the Company and Aim Top that the plaintiffs sought to impugn was the payment by the Company of $312 for an excavator operator that Aim Top had allegedly provided to the Company. This operator was provided to operate the excavator with a breaker that the Company had purported leased from Aim Top. Since I have held that the lease was a sham transaction, the provision of the operator was equally fraudulent and the sum of $312 would have to be reimbursed to the Company.

Payments totalling $4,888 made to Aim Top

169 The plaintiffs sought to impugn payments made to Aim Top for the provision of the services of one Lailin Wissanu, a labourer ($26.78), and one Tee Chin Thian, a lorry driver ($4,576). According to Aim Top's invoice, these amounts were charged for the provision of the two men's services in December 2003. The plaintiffs' case was that both these men were still paid employees of the Company as of 4 January 2004 and this was admitted by both Mr Leow and Mdm Ong. Aim Top was not justified in charging the Company for providing it with the services of the Company's own employees.

170 Neither Mr Leow nor Mdm Ong could explain why the Company had made these payments to Aim Top. It even took Mr Leow some minutes to confirm that Mr Wissanu had once been the Company's employee and had later left it to join Aim Top. Mr Leow tried to distance himself from the transactions, claiming that Mdm Ong prepared the payment vouchers. However, when confronted with the fact that the payment vouchers would only have been prepared upon his instructions as he was the person dealing with Aim Top, Mr Leow conveniently claimed that he could not recall the matter.

171 Aim Top argued that the provision of workers such as labourers, drivers and excavator operators by the Company to Aim Top was done on an *ad hoc* basis and was effected by oral agreements. The defendants argued that Mr Kon had conceded that small-scale sub-contractors were often not given to keeping and filing documents, and as such, there was nothing out of the ordinary in the informal way in which Aim Top had provided the Company with the services of its workers. In this case, however, Aim Top did not appear to be one of those companies that hardly kept any documents since it had produced a lot of documents in the course of the proceedings. These documents were all contractual documents. So I do not find much substance in Aim Top's argument seeking to excuse the lack of documentation for the transactions concerned.

172 Additionally, Aim Top alleged that the plaintiffs were wrong in asserting that Tee Chin Tian was an employee of the Company in December 2003 as it had been established by Mdm Ong's evidence that he had left the employment of the Company after October 2003. It is difficult, however, to accept Mdm Ong's word for this since her credibility as a witness was shaken numerous times during the course of the proceedings. Further, when she was questioned by the court as to why, if Tee Chin Tian was not employed by Woon Contractor in November 2003, he was being paid overtime by the Company in December 2003, Mdm Ong's reply was "I don't know". Since Mdm Ong was not able to provide a believable answer to that question, it is hard to accept as true her evidence that Tee Chin Tian's employment with the Company ceased at the end of October 2003. In any case, the reason why Tee Chin Tian's services were allegedly being provided by Aim Top to the Company was in order that he could drive the lorry the Company had allegedly sold to Aim Top. Since that sale was a sham, it is likely that no real transfer of Tee Chin Tian's employment to Aim Top took place.

173 On the whole of the evidence, I have come to the conclusion that these transactions must be impugned and the sum of $4,888 should be repaid to the Company.

174 Aim Top did make the argument that the liquidators chose not to impugn certain other transactions between the Company and Aim Top even though there were no formal documents supporting those transactions. The implication was that since the liquidators had accepted in relation to these unquestioned transactions, that the absence of formal documentation did not affect the genuine quality of the same, they should also accept that the impugned transactions were genuine. In relation to the impugned transactions, this argument is not persuasive because of the quantity of evidence casting doubt on the authenticity of the transactions.

Fraudulent preference

175 The plaintiffs also mounted an alternative claim for repayment from Aim Top on the basis that the amounts paid by the Company to Aim Top constituted an unfair preference. The material facts they relied on were that the payments were made within the period of two years prior to the commencement of the winding up proceedings and were made when the Company was insolvent. Further, Aim Top was an associate of the Company because of Mdm Ong's relationship with Mdm Chiew. As such, the plaintiffs argued, there was a presumption that the Company was influenced to give Aim Top an unfair preference to put it in a better position in the event the Company was wound up. I note that argument and must add that since I have found that the Directors set up Aim Top with the intention of transferring the business of the Company to it, there is added weight to the presumption of undue influence. The connection between the Directors and Aim Top is even stronger for that purpose than the connection between Mdm Chiew and Mdm Ong.

176 Aim Top argued that the unfair preference allegation could not stand because, *inter alia*, the payments were made in the Company's ordinary or established course of business, the Company also made payments to other creditors and in making payments to Aim Top, the Company was solely influenced by commercial considerations in giving the preference.

177 I have to deal with this allegation on the basis that I was wrong in my finding that the transactions were sham transactions. If the transactions were not sham transactions, then I must accept the evidence that the lorry, excavator and employees were being provided by Aim Top to the Company so that the Company could carry on business and meet its contractual obligations. What Aim Top wishes me to hold is that if the Company had failed to pay it the rentals and other hire charges, then Aim Top would have withdrawn the services and the Company would not have been able to carry out its work. Therefore, its argument was that the payments were not influenced by an intention to prefer Aim Top but instead, were payments made for clear commercial considerations. I think this argument must be rejected. Although Aim Top may have provided services that the Company needed for its business, the presumption that it rather than other creditors was paid because of the connection between it and the Directors cannot be so easily rebutted in the light of the ties between the two companies. In paying Aim Top, the Directors were paying a business which was a front for them and which they wanted to establish as a firm in the construction industry. It was in their own interests to employ Aim Top and to pay its bills promptly. I think, on the basis of all the evidence before me, I am entitled to hold that in fact (and not only by way of presumption) there was an intention on the part of the Directors to put Aim Top in a better position than other creditors. Therefore, the payments to Aim Top must be set aside on this ground too.

Antah

178 While Antah has the same registered address as Aim Top, it is a business that has been in existence for more than 30 years. It is a partnership firm in which the partners are Mdm Ong's father and one of her brothers. It is in the business of supplying transportation services to companies in the construction industry. In the course of proceedings, Antah produced many invoices for transportation

services provided to the Company in 2001, 2003 and 2004. It also produced invoices showing that it had carried out similar jobs for other customers. Antah did a great deal of work for the Company as reflected by the issue of 30 invoices in 2003 and eight invoices in the first quarter of 2004.

179 The plaintiffs sought to impugn payments made by the Company to Antah in 2003 and 2004. They attacked the payments in two ways. First, in respect of two of the 2003 invoices, the plaintiffs alleged that the transactions those invoices reflected were shams and had been used to siphon money away from the Company. Second, the plaintiffs asserted that even if the invoices were genuine, the payments made under them were fraudulent preferences and that the same was true for other payments totalling $3,540 between 7 March 2003 and 24 August 2003 and totalling $3,160 between May 2004 and September 2004.

180 The allegedly sham transactions were reflected in two invoices:

(a) Invoice no. 30907 for the period Jan 2003 – June 2003 (dated 31 July 2003) for $35,000; and

(b) Invoice no. 31061 for the period July – August 2003 (dated 31 August 2003) for $6,000.

The invoices stated that the amounts charged were due for the "supply [of] lorry, crane, trailer, transport for working at various site[s]". There was only one delivery order issued by Antah for the periods covered by both invoices. The plaintiffs alleged that these invoices were entirely different from Antah's regular billing practices. To distinguish these invoices from others, I will refer to them as "the lump-sum invoices".

181 The plaintiffs had two major problems with the lump-sum invoices. First, most of the invoices that Antah rendered both to the Company and to other customers were in respect of the provision of transport services for individual and distinct jobs. For example, under invoice 31180 dated 29 September 2003, Antah billed the Company $60 for supplying a lorry crane to lift "4 pcs U drain" at a site in Jalan Kayu and a further $60 to supply the lorry crane to deliver equipment from Jalan Kayu site to Blk 36 Bendemeer Road. Such job descriptions were typical. The plaintiffs alleged that Antah was not in the practice of billing its customers a lump-sum amount at the end of a work period of several months duration.

182 The Directors and OES, the fifth defendant and a partner of Antah, were asked on the stand to explain the difference between the lump-sum invoices and other invoices issued by Antah. Their response was that the difference could be explained as the invoices issued for the other jobs were for transportation from one construction site to another. The lump-sum invoices were for transportation within a site when the lorry and other equipment had been provided on a daily basis and had stood by for several hours on site in order to provide services as and when required. When Mr Leow gave this evidence, he was shown other invoices from Antah that indicated that on other occasions, charges were made on an hourly basis for transportation within a site.

183 When asked why the amounts that the other invoices were made out for were "figures of several hundred dollars at the most each time" but one of the lump-sum invoices was for $35,000, Mr Leow claimed that:

> this one is meant for Fernvale as well as Seng Kang East and West project, so it's a much larger site. So those [other] invoices ... perhaps it's only for a few days of work ... Antah may have made mistakes in respect of the claims.

The plaintiffs argued that this evidence should not be accepted as it was hard to conceive that for the same service, Antah would charge such varying fees for different companies, even if there was a difference in the size of the site. They further argued that even if the difference in the size of the work site was a factor that contributed to the increased fees, the defendants ought to have produced evidence of the breakdown of Antah's charges, including the number of hours during which Antah had provided services, and the exact sizes of the Fernvale and Seng Kang sites.

184 Mr Leow claimed that the figure of $35,000 was obtained from the time cards which were used to record the number of hours during which work was performed by Antah on the Company's sites. Mdm Ong testified that there was one time card for each month, making a total of six time cards for the six months which the Company was billed for. Mdm Ong also testified that each vehicle would have its own time card. As such, there ought to have been one time card for each of the three vehicles, over a period of six months, which would result in 18 time cards. During Mdm Ong's cross-examination, at first she confirmed that she had only checked six cards but subsequently she admitted that she had never checked any card at all. When asked why she had given a different reply earlier, her response was that she could not recall what had actually happened at that time.

185 The evidence given by OES was slightly different. He admitted that Antah's usual practice for work done within a site was to bill for each day and that the billing was on a per-hour basis. He also admitted that in such cases, Antah usually billed the customer for each day of work and did not send it a lump sum bill at the end of the month. He agreed that the practice of totalling up the number of days and charging in one lump sum was a one-off practice that was only carried out for the Company. In addition, OES's testimony as to the time cards contradicted that of Mdm Ong. Having admitted that it was easier if there was a time card for each vehicle, rather than one time card for four different vehicles, he said that it was only for this particular transaction that Antah had used time cards. Previously Antah had used delivery orders in relation to its transportation services. OES could not explain why he had used time cards in this instance, saying he was "not very sure". The plaintiffs suggested that OES had only testified that time cards existed in this case in order to corroborate his sister's evidence.

186 The second suspicious matter that the plaintiffs highlighted was that the lump-sum invoices included charges for the provision of a trailer. They considered that this was odd since Antah did not own a trailer. OES testified that it was probably hired from a sub-contractor. The plaintiffs doubted the truth of this answer because OES could not remember the amount of hire charges and this was the first time Antah had supplied a trailer. Further, no documentary evidence was produced of the lease or the payments made for the trailer.

187 On the other hand, Antah took the position that the lump-sum invoices were entirely legitimate. These were not the only transportation services which Antah had provided to the Company during the period between January 2003 and August 2003 but only some of them. These were transportation services which took place internally within sites occupied by the Company whereas the other services which had not been questioned took place at the same time but related to transportation services which involved moving material out of or into a site. The lump-sum invoices had been produced because the internal site services provided had been separated from the external trips.

188 Antah argued that what the plaintiffs were trying to do was to establish a quasi-criminal conspiracy between the Directors, OES and OKY to steal from the Company by fabricating a commercial transaction and creating bonus documentation to cover their tracks. This was a serious allegation of fraud and the court should require a high standard of proof, in fact it should demand that the plaintiffs produce direct evidence of the fabrication. In this case, since the transportation

services took place at the construction site, witnesses from the owner of the site or from one of the other sub-contractors or from the security company guarding the site could have been called to testify as to whether equipment belonging to Antah had been on site during that period or to state their recollection as to who was responsible for transportation within the site. Alternatively, the plaintiffs could have sought discovery from the owners of the site of any records they may have had of the vehicles present on the site during the material period.

189 Antah pointed out that no such evidence had been tendered by the plaintiffs. The plaintiffs had not even given positive circumstantial evidence of the alleged fabrication, such as evidence that the lorry crane was at the workshop or that the work site was closed on the day when work was alleged to have been done by Antah. Instead, the plaintiffs' case was entirely negative. It was premised on pointing out alleged inconsistencies in the defendants' explanations of the transport services and the supporting documentation. The plaintiffs appeared to believe that Antah must be regarded as guilty until it proved itself innocent.

190 Further, it was rational for Antah to have two types of billing practices to deal with the difference services it provided. Most of the bills related to specific transport jobs from a worksite to a specified external site and were charged on a trip basis. This type of service was duly reflected in the corresponding delivery order. On the other hand, the lump-sum invoices were for jobs within a site in which Antah's vehicles and drivers were simply left at the site for the day and would be at the disposal of the Company when it required to move things around the site. This service required a different system of billing. With a specified job to move something from point A to point B, billing would have to be calculated based on distance and weight whereas for a general job to provide services within site, it was not possible to measure distance or weight, so an hourly or daily rate was proposed. Antah pointed out that during their cross-examination, the plaintiffs did not challenge that it was rational to have a different system in this case.

191 Antah did not agree that the oral evidence had been evasive and incredible. First, as far as Mr Leow was concerned, it was not right to ask him to explain the differences in another company's billing practices. His evidence on this was only speculation as indicated by the words "I believe" in his answer. Therefore, inconsistencies in his evidence would not mean that the lump-sum invoices were fabricated. Secondly, OES did not admit that lump-sum billing was only done vis-a-vis the Company. He had testified that he had billed other customers in this way albeit for two or three months work only rather than for six months as in the case of the Company. OES had also explained why only one delivery order was issued for the jobs reflected in the lump-sum invoices and this was:

> Because the lorry crane, trailer and drivers were or should only be delivered or supplied once to the construction site to cover the extended period. Therefore the said lorry crane, trailer and drivers were to be stationed in the said site to perform or provide transportation services within the same site.

192 Antah also took exception to being blamed for the paucity of evidence regarding the trailer. The plaintiffs had questioned why no other invoices were produced by Antah showing the hire of a trailer. Antah explained that apart from the lump-sum invoices, the invoices produced by Antah were not related to the impugned transactions and therefore were not discoverable. They were produced voluntarily because Antah wished to prove the nature of its billing practices. They were not selected to show the range of equipment Antah owned or to prove that Antah had owned or hired a trailer. Therefore, the non-mention of the trailer in the other invoices proved nothing.

193 With regards to the plaintiffs' argument that there was no documentary evidence of the transactions in question apart from the lump-sum invoices and the delivery order, Antah asserted that

not much could be made of that. It pointed out that although the plaintiffs had controlled the Company since 20 May 2005, it had only commenced the present action in January 2009. Thus, five years and eight months had elapsed since the transportation services had been provided by Antah. Since Antah had no knowledge for such a long time that the suit was going to be commenced, it was not surprising that it had not preserved the documents relating to the transaction. As for the Directors, they had not been in control of the Company for nearly four years so they would not have the relevant documents either. The Directors were not able to search the Company's records and had to rely on the plaintiffs to find the relevant documents. As for the conflicting evidence on the time cards, Antah stated that the last time any of the witnesses had to address their minds to those documents was in August 2003, almost seven years before the case was started. Further, the issue of the time cards had not been raised during pleadings or discovery or in the affidavits of the plaintiffs' witnesses and it was only during the trial that the Directors and OES were suddenly required to remember these details. It was not reasonable for the plaintiffs to expect three separate witnesses to have such great powers of recollection that even without the assistance of written records, they would still be able to recall exactly the same details about a transaction that had taken place seven years earlier.

194 Having considered the arguments carefully, I have come to the conclusion that there is insufficient evidence to hold, on a balance of probabilities, that the lump-sum invoices were fraudulent and represented sham rather than genuine transactions. There is ample evidence that, not only during the period covered by the lump-sum invoices but thereafter as well, Antah provided transportation services to the Company in the course of Antah's own business. Also, during that same period, the Company did have construction work to carry out at various sites. So, looking at the situation objectively, it could very well have required Antah to provide transportation services within its sites and hired Antah's equipment and personnel on a daily basis for that purpose. Whilst the Directors and OES were not very satisfactory witnesses on the way in which the charges had been derived, it was a valid point that they were only required to remember such details long after the events in question. Mdm Ong's evidence on the time cards was suspect but the reason may be an innocent one – she may not have investigated the accuracy of the charges very rigorously when the lump-sum invoices were presented because she relied on the honesty of her father and brother. However, when it came to court, she may have thought she needed to justify those payments by reference to documents. In any case, it does not seem likely to me that the Directors would have involved OES and OKY in an elaborate fraud which required the fabrication of documents just so that they could lay their hands on a total of $41,000 in mid to late 2003. At that time, the Directors were able to deal freely with the funds of the Company and, as the transactions I have discussed above show, many payments were made to Mr Leow and Mdm Ong which were not supported by any documentation. There was therefore no reason for them to ask Antah to fabricate documents in order to siphon moneys away from the Company.

195 The alternative basis for the plaintiffs' claim that moneys paid to Antah in 2003 and 2004 (totalling $47,000) must be reimbursed was that these payments constituted a fraudulent preference in favour of Antah. The plaintiffs submitted that because of the relationship between Mdm Ong and OES and OKY, Antah was an associate of the Company pursuant to reg 5 of the Regulations and therefore the presumption under s 99(5) of the Bankruptcy Act applied so that the Company was presumed to have given Antah an unfair preference to put it into a better position in a winding up situation. The plaintiffs further submitted that the defendants had not rebutted this presumption because they had not provided any credible evidence to explain the payments and that the payments had no commercial justification.

196 Antah submitted that of course the payments had a commercial justification because the transportation services had been provided by it. Further, Mr Leow was not influenced by any desire to

improve Antah's position but simply wished to pay Antah for its services and that had the side effect of improving its position. It was insufficient to establish liability if Mr Leow only desired to pay Antah for its services and was aware that this might improve Antah's position. Further, the evidence was against a finding that Mr Leow desired to improve Antah's position because as late as August 2004, the Company was still paying off its creditors of which there were many. Indeed, looking at the list compiled by Mr Kon, by 8 June 2004, the Company had paid off 100% of the debts which had fallen due by 30 April 2003. This meant that Antah was simply one among many companies whose invoices were being honoured. The fact of payment was not exceptional.

197 I find it difficult to accept Antah's arguments. I have found that the Directors knew that the Company was insolvent from as early as 30 April 2003 and they were also aware that it was insolvent on 31 August 2004. It is not in the Company's favour that it took till 8 June 2004 to pay off all the debts which had fallen due by 30 April 2003. If the Company was not able to pay all those debts within a reasonable time of the due date, say 60 or 90 days at the most, then the fact that it did pay Antah for the lump-sum invoices before 8 June 2004 when the amounts payable under the lump-sum invoices only fell due on 31 July 2003 and 31 August 2003 shows a preference given to Antah. There is no indication in Mdm Ong's affidavit as to when she actually made payment of these invoices but some handwriting on the invoice for $35,000 appears to indicate that it was paid in cash and therefore there may not be a record of the payment. Mdm Ong herself stated that these lump-sum invoices were "duly paid". From that evidence, it is safe to infer that she did not wait more than a few months after their issue to settle them. The fact that the Company most probably settled the lump-sum invoices at a time when amounts which fell due on 30 April 2003 were still outstanding is to me an indication that there was an actual intention to prefer. In any case, I hold that in the circumstances, Antah has not been able to rebut the presumption.

198 As for the sum of $3,540 paid to Antah, according to Mdm Ong, this total reflected 17 invoices issued by Antah between 7 March 2003 and 20 August 2003. Again, Mdm Ong says that these invoices were "duly paid". In this connection it should also be noted that of the debts owing as at 31 August 2003, only some 94% was eventually paid off. Here again, the Company chose to pay Antah rather than other creditors with amounts due as of 31 August 2003 and I hold that Antah has not been able to rebut the presumption.

199 As for the final sum of $3,160, this represented the total amount paid in respect of 19 invoices which Antah issued to the Company between 6 September 2003 and 28 March 2004. According to Mdm Ong's affidavit, $2,320 was paid by the Company in respect of these invoices on 10 May 2004 and the remaining $840 was paid on 28 September 2004. By then, the Company was hopelessly insolvent. I hold that Antah has not been able to rebut the presumption in respect of this sum as well.

200 I therefore conclude that the total sum of $47,000 has to be reimbursed as an undue preference.

Wera

201 Wera, a sole proprietorship firm owned by OES, allegedly supplied labour to the Company in January, February, March and April 2003 for which it billed the Company a total of $13,500. Its charges were settled by way of three payments *viz* $2,500 on 5 May 2003, $10,000 on 31 July 2003 and $1,000 on 21 August 2003. The plaintiffs sought to impugn these payments and also a transaction between Wera and the Company in which Wera first purchased certain equipment from the Company and subsequently leased it back to the Company.

Claim for $13,500

202 Dealing first with the payments to Wera for services provided, the plaintiffs sought to cast doubt on the authenticity of the transactions. They alleged that Wera was not in the building and construction business. Additionally, although the payment vouchers stated that payment was being made to Wera, the cheques were put in the names of the Directors instead. The first cheque (no 567829) for $2,500 was made payable to Mdm Ong and was deposited into her bank account. The second cheque (no 567969) for $10,000 was made payable to Mr Leow and was deposited into his account, whilst the third cheque (no 568039) for $1,000 was made payable to a Maybank credit card account number belonging to Mr Leow and was paid to that account.

203 OES asserted that Wera's main business was the supply of labour. It also did some trading. Its main customers were factories which it provided with workers on a daily or monthly basis. It transpired that the Company was the only construction business that Wera had ever provided labour to. OES was not able to provide any documentary evidence in respect of the workers that he had supplied to the Company. He had no written record of how much he had paid them or when they had been paid. He said that for daily workers, he paid them $50 a day in cash and would charge his customers $55 per worker. He found this was a simple transaction and therefore usually he had not kept any records of these transactions.

204 The Directors also gave evidence on these transactions. They said that whenever the Company obtained labour from Wera, they would pay Wera's charges first and would subsequently reimburse themselves from the Company's account. Mdm Ong's original testimony was that if either she or Mr Leow made a payment on behalf of the Company, the same would be recorded in the general ledger as a loan from them or it would be recorded as cash taken from the cash book. In this case, however, the payments of $13,500 to Wera were not recorded in either the general ledger or the cash book. Mdm Ong was unable to explain the reason for the omission. She eventually admitted that there was no documentary evidence of the advances made by the Directors to Wera. The Directors maintained, however, that Wera's payment arrangements were completely legitimate since services in the construction industry were often supplied on a cash basis. Further, Wera had admitted that it had received the $13,500 from the Company for the supply of labour so there was no doubt that the funds had, in one way or another, made their way to Wera and had not been appropriated by the Directors.

205 Wera asserted that the plaintiffs were being selective in their claim because although the Company's records showed that $29,150 had been paid to Wera for labour services, the plaintiffs were only seeking to impugn $13,500. Mr Kon had stated in evidence initially that he had not impugned the other transactions as he could not find records showing that these payments were made to Wera. He was then shown the evidence in the Company's books of the other payments made. He then said that it was an oversight on his part not to have challenged the other payments as well. He also explained that he had made a distinction between transactions that took place before April 2003 and those that took place after that date because the plaintiffs had suspected fraudulent behaviour on the part of the Directors from April 2003 onwards. Wera challenged this as an artificial distinction on the basis that if the plaintiffs considered that payments amounting to $13,500 represented sham transactions, then logically all payments to Wera also were in respect of sham transactions as they were made for the same purpose and took place in similar circumstances.

206 Although there are some suspicious aspects of the payments to Wera given the lack of supporting documentation (in particular to show that the Directors had paid Wera in advance and had then collected payment from the Company), I find it difficult to hold that on a balance of probabilities the transactions were sham. First, the plaintiffs failed to impugn the entire series of payments for this purpose. I do not find their justification for this omission to be persuasive. Second, it is not far-fetched for the Company to have obtained daily workers from Wera as and when they required extra

labour. Although Wera generally supplied workers to factories, this did not mean that their workers could not carry out labourers' work on construction sites and, bearing in mind the relationship between Mdm Ong and OES, it makes sense that he would have been willing to supply workers to the Company even though he did not generally supply them to firms in the construction industry. Third, the services charged for were supplied between January and April 2003 and this was a period when the Company was still active in the construction business and was working on many sites (as shown also by the various transportation services it had to hire Antah for) and therefore could have had a need for daily workers.

207 The plaintiffs also challenged the $13,500 payment on the basis of unfair preference. Since the cheques in question were made out to the Directors in reimbursement of sums that they had advanced to Wera, there is no evidence as to when Wera was actually paid the various sums totalling $13,500. The services paid for were provided between January and April 2003 and there is no breakdown of the amount of charges incurred during each of those months. Accordingly, it could very well be the case that Wera was paid most of the $13,500 before 30 April 2003 and that therefore those payments fell outside the two-year preference period which has to be worked backward from 30 April 2005. Accordingly, I am not able to hold that vis-a-vis Wera itself the payments could have constituted fraudulent preferences. On the other hand, the cheques show that the Directors reimbursed themselves between May and August 2003 *ie* during the preference period. The Directors, having advanced moneys to the Company by paying Wera, should not have repaid themselves when the Company was insolvent. It is therefore my judgment that the Directors have to repay what they received and therefore Mr Leow has to repay $11,000 while Mdm Ong has to repay $2,500.

The sale and lease back of construction equipment

208 Around June or July 2003, the Company allegedly sold three pieces of construction equipment to Wera. These were an SK 100 excavator with breaker, an EX 30 mini-excavator and an SK04 excavator with breaker. Subsequently, in January, February, March and August 2004, the Company leased the same equipment back from Wera.

209 The plaintiffs alleged that these were sham transactions meant to put the said construction equipment out of the reach of the Company's creditors and to transfer the Company's funds to Wera. The plaintiffs claimed that Wera had no reason to purchase the construction equipment in the first place as its business was the supply of labour and some trading. OES testified that the trading that Wera did was with regards to generators, corporate gifts and grinding machinery for factories. Prior to the transactions in question, Wera had never dealt in construction equipment such as excavators.

210 Wera's case was that one of Antah's customers, Joffren Omar Company Sdn Bhd ("JOC") of Brunei, had wanted these specific pieces of equipment and had asked OES to source for the same for it. When asked why the transaction was done by Wera and not by Antah since Antah was in the construction business, OES replied that the decision was up to him as to which company he would use. In any case, Antah had never sold construction equipment previously either.

211 Subsequently, OES discovered that the Company had exactly the equipment required and, coincidentally, these items were available for sale. OES also testified that the Directors had known that he was purchasing the equipment from the Company in order to trade the items for a profit. OES said that he had not thought about passing the contact details of JOC to the Directors so that they could deal directly with the buyer. He said that he wanted to make a profit out of the transaction. In the end, however, Wera had not been able to sell the excavators to JOC, and was saddled with them.

212 When cross-examined as to how Wera had dealt with the equipment after the items were

purchased from the Company, OES appeared evasive. He initially stated that he kept them "at the site", but when pressed as to which site it was, he was unable to give a definite answer. Finally, when asked where the equipment had been parked after Wera's purchase but before the Company had leased the items, OES confirmed that the equipment had, in fact, never left the Company's possession.

213 In addition, there was doubt as to whether OES had genuinely attempted to sell the equipment to other companies when the deal with JOC fell through. OES asserted that he had tried approaching some people to buy it but when asked who these were, he could not remember. He also admitted that no potential purchaser had come to view the excavators at all. When asked why he did not think of selling them to Aim Top, he replied that he did not know the "nature" of Aim Top's business or whether they required the equipment or not. This was an incredible answer as OES knew very well that he was sharing his office premises with Aim Top and must also have known that his mother, Mdm Chiew, was a shareholder and director of Aim Top. He must have been fully aware of the nature of Aim Top's business from the beginning.

214 Further, Mr Leow's evidence on the Company's need to lease back the equipment was hard to believe. He said that at the time when the Company leased the equipment from Wera in December 2003, there were only two projects which the Company had with China Construction. These were MUP14 and MUP17 and, therefore these must have been the projects that the excavators were needed for. One would therefore expect that between June and December 2003 the Company had not been able to supply such equipment to the sites because it had sold the same to Wera. However, the evidence showed that the Company had been able to lease equipment to China Construction from, at the latest, 30 April 2003. Further, the lease between the Company and China Construction was not affected by the purported sale of the equipment to Wera in June 2003. There was no interruption in the lease from then right up till April 2004.

215 When pressed as to how he had been able to meet his obligations to China Construction when he had sold the equipment to Wera, Mr Leow at first claimed he could not recall because "it's too long ago". Subsequently, however, he asserted that he had had other mini excavators in his possession which he had been able to use to satisfy China Construction's needs. When questioned as to why he needed to lease back the excavators sold to Wera if the Company owned sufficient equipment, Mr Leow deliberately skirted the question. His final recourse was to say that China Construction wanted more machines at the construction site to "standby" in case of need. This claim did not withstand cross-examination as the evidence showed that the Company had actually charged China Construction less in total in January and February 2004, when the additional vehicles were allegedly supplied, than in December 2003. Notwithstanding the situation disclosed by the documents, Mr Leow insisted that this was his position. It is not credible that Mr Leow could remember exactly which equipment was on standby at different times, when on many occasions throughout his testimony (and even in relation to the equipment itself as shown above), he was unable to remember other details and excused himself by saying that the transactions in question had occurred long ago.

216 Additionally, the Company's last major project as a main contractor was the Fernvale Project which ended on 30 September 2003. Mr Leow admitted that he would have required many vehicles before the completion of that project, but that between June/July 2003 and 30 September 2003, he was able to survive without the equipment sold to Wera. Subsequently, Mr Leow changed his position, and claimed that he was only doing "defect work" at the Fernvale site, and thus did not require as much machinery. However, he also agreed that any defect rectification works would only have started after 30 September 2003, which was when the project was completed. Finally, Mr Leow stated that the Fernvale site only required large machinery and equipment, while the China Construction site required the smaller equipment that he had sold to Wera. When asked why he did

not give this answer at first, Mr Leow claimed that it had never been put to him. On the whole, Mr Leow's evidence on this issue was evasive and not convincing.

217 Wera claimed that the transactions were completely legitimate. It alleged that the rates at which the Company had leased the equipment to China Construction were higher than the rates at which Wera leased the same to the Company and therefore the Company had actually made a profit from this transaction. Wera had also prepared a table showing the amount of money the Company would have earned from not selling and leasing back the equipment from Wera and comparing this with the amount of money that the Company had actually earned from these transactions. It was shown that the arrangement that the Company had with Wera had given it more earnings that if it had not sold the equipment.

218 The defendants also submitted that Mr Kon had admitted in court that the lease back was not a sham transaction and that it was a genuine commercial transaction which allowed the Company to benefit monetarily. When asked about this by the court, however, Mr Kon insisted that the sale to Wera was still a sham transaction. His reasons were that the Company had no need to sell the equipment, and it did not market the same, nor advertise or compare the quotations for the equipment with other firms. In addition, in re-examination, Mr Kon stated that although the defendants' table showed that the Company had benefitted arithmetically, this benefit had not taken into account the future utility of the equipment sold to Wera. In fact, the Company had lost the ability to profit for a longer period of time from the equipment. Therefore, while the lease back on its own could be justified commercially, when it was coupled with the initial sale for which there was no commercial justification, the entire transaction appeared to him to be a sham transaction.

219 Having considered the evidence, I agree that the sale and lease back of the equipment in question was a sham and must be set aside. The plaintiffs, in the alternative, challenged the sale on the basis that the equipment was sold at an undervalue. In view of my finding as to the sham nature of the transaction, I need not deal with the submission in detail. I would only say that the plaintiffs were not able to put forward convincing evidence of the actual market value of the equipment so as to show that the prices at which the same was sold to Wera were below market levels. Their expert, Mr Robert Khan, produced a report which was lacking in details which would have substantiated his valuation of the equipment. In particular, he did not give particulars of the research carried out with machinery dealers or indicate in sufficient detail what factors he had taken into account to come up with his valuation. His attitude seemed to be that the court should take his word as to the accuracy of the valuation because he had sworn to it. This is an unsatisfactory position for any expert to take and counsel must be aware that to be of use to the court, their experts must be able to explain with supporting data how they arrived at their various conclusions.

Yew San Construction Pte Ltd

220 The Company paid the seventh defendant, Yew San Construction Pte Ltd ("Yew San") the sum of $13,111.35 on 15 June 2004 in settlement of an invoice for "Excavation works for Bendemeer" done in March 2004. The plaintiffs alleged that that was a sham transaction and should be set aside. Yew San itself urged the court to bear in mind that it was not an associate of the Company. It had been incorporated in 1996 and had been in the construction business for some time before the events complained of occurred. None of its directors or shareholders were relatives or employees of the Company. It contended that there was no apparent reason for the Company or the Directors to concoct a fraudulent transaction so that they could pay Yew San for doing nothing.

221 The plaintiffs were suspicious of the transaction because they considered that the Company had no contract to carry out excavation work at the Bendemeer site. Based on the invoices issued by

the Company to China Construction which was the main contractor at the Bendemeer MUP17 site, the services provided by the Company were the supply of dump trucks, the rental of equipment such as excavators and the removal of earth. The plaintiffs did not find a document which showed that the Company had agreed to carry out excavation works for China Construction. Further, they had not found any written contract between Yew San and the Company in respect of this work nor had they located any delivery order relating to the same. The plaintiffs did not accept Yew San's claim that the work had been done on the basis of Mr Leow's verbal instructions. Mr Leow himself had confirmed that there was an oral contract between the Company and Yew San but the plaintiffs doubted that.

222 Leo Kim San, the manager of Yew San, gave evidence on its behalf. He stated that the Company did engage Yew San to provide excavation work at a Bendemeer site. The excavation works commenced sometime in March 2004 and were completed in April 2004. Upon completion of the work, the Company was duly invoiced and payment was received by Yew San for the work done. He also stated that since about 2002 there had been an established practice between the Company and Yew San in relation to business between the two entities. Upon receipt of a verbal request from Mr Leow for Yew San's services, the work would be performed as requested. Thereafter, an invoice would be issued by Yew San and paid by the Company. There were no written contracts because the jobs done by Yew San were mainly small jobs involving the sending of a lorry, and occasionally an excavator as well, to remove earth. Yew San produced invoices for services rendered in July 2003, August 2003, October 2003 and April 2004 which had been provided without any written contract having been concluded.

223 In criticising the defences put forward by the Company and Yew San, the plaintiffs laid emphasis on the poor quality of Mr Leo's evidence. When Mr Leow was cross-examined as to why the Company had had to hire Yew San when it had been doing earth removal work at the Bendemeer all along, he claimed that there was earth at the site that was "dirty" but needed to be disposed of and that he had been unable to find a dumping ground and so needed Yew San's services. Subsequently, he clarified that 'good earth' and 'bad earth', *ie*, the dirty earth, would both be sent to the dumping ground. This contradicted his earlier assertion that it was because he could not find a dump site for the dirty earth that he had hired Yew San. The plaintiffs submitted that given that the Company had been providing earth removal services for China Construction for months prior to March and April 2004, it was highly unlikely that it would be unable to deal with the new type of dirty earth that was dug up in the same area so forcing it to hire Yew San.

224 Most damagingly, the plaintiffs said, the invoices issued by the Company showed that China Construction was not only billed for the removal of earth in March and April 2004 when Yew San had been hired but also in January and February that year. When asked how it was that the Company had been able to deal with the earth before March 2004, Mr Leow was clearly evasive. Ultimately he came up with the story that the Company had dug up the dirty earth prior to March 2004, but had stockpiled it and then hired Yew San which used its own excavator to remove this earth. However, the question remained why China Construction had accepted the Company's invoice for removal of earth when the earth had not been removed but only stockpiled. Mr Leow's explanation was that he had charged China Construction in advance of the removal of the earth.

225 Further, the plaintiffs pointed to various discrepancies between the invoices issued by Yew San to the Company and those from the Company to China Construction. Firstly, the invoice which the Company issued described the work "disposal of earth at Block 30 and Block 34, Boon Keng". However, Yew San's invoice stated that it was for "excavation works in Bendemeer".

226 Secondly, the invoices by the Company charged according to the number of loads of earth moved. Yew San's invoice in contrast simply stated a lump sum charge of $13,111.35. This was also

different from earlier invoices by Yew San to the Company for earthworks, which had also charged on a per load basis. In his affidavit, Mr Leo had explained that when a job to be done was larger in scale and the earth to be removed was conveniently piled together, Yew San had sometimes charged on a lump sum basis. In such cases, it would estimate how many loads the earth removal job would require and quote a fixed figure for the job. When asked how Yew San had arrived at a lump sum that was an odd figure ($12,487 (before GST)), Mr Leo attempted to explain the discrepancy by saying that Yew San's excavator had happened to run out of diesel and they had taken diesel from the Company and therefore had to deduct the cost of the diesel from the final invoice. I found this a very creative explanation, considering that it was given six years after the event and that there was nothing in the invoice which hinted at it.

227 More importantly, the plaintiffs said, Yew San had billed the Company a total of $24,703.35 for earth removal works in March and April 2004. On the other hand, the Company only charged China Construction $16,831.50 for the removal of earth during the same period which meant that it suffered a loss by hiring Yew San's services. However, this higher figure charged by the Company included work done in another area *viz* Boon Keng Block 28.

228 Whilst there were interesting stories and discrepancies in the stories told by the witnesses, I have to bear in mind that the events in question took place six years or more before the trial and that, especially from Yew San's point of view, the services supplied were carried out in the normal course of its business with nothing occurring at that time that would have fixed the events in the memory. In this connection, I note from the invoices produced that Yew San had charged the Company a further $26,768.72 for similar services between July 2003 and 30 April 2004 but the plaintiffs had not sought to impugn all those transactions as well. Of these bills, some $11,592 represented services rendered in April 2004 alone. The plaintiffs obviously had no difficulty accepting all those bills as representing genuine transactions. When Mr Kon was asked why these payments were not impugned, he merely said that he could not remember and that he might not have seen those invoices. This explanation does not help justify the challenge made to the invoice for $13,111.35. It is difficult to see how the transaction represented by that invoice was a sham when other such invoices were accepted as reflecting genuine transactions. At all times, the factual context in which the invoices were issued remained the same.

229 In addition, I accept Yew San's assertions that there was nothing sinister in Yew San's description of the works as "excavation works" in the invoice, as the job required the use of Yew San's lorry for the earth removal and disposal, and also the provision of an excavator for removing the piles of earth from the site and lifting it onto the lorry. Further, Yew San had also described the work that it did for the Company as "removal of earth" in a letter to the plaintiffs prior to the commencement of the suit. Yew San argued, tellingly, that an inaccuracy in the description of the work done in the invoice should not be construed as an indication that it had not been done at all.

230 I agree that the Company's careless way of hiring and making payment to sub-contractors cannot mean, *ipso facto*, that no work had been done for the Company and that a fraud had been perpetrated. Mr Leow was consistent in the main points of his testimony on this issue, which were that the Company required someone to remove and dump the "dirty" earth from his construction site and to find a field site in which to dispose of this dirty earth. Additionally, I agree with the submission by Yew San that it was not particularly suspect that the invoices did not adequately describe the work. It would be unrealistic to expect small construction companies to produce perfectly worded invoices. The invoices were sufficient to indicate the type of work done and ought to be considered sufficient evidence that the work was in fact done. This is particularly so since there was no connection, except a business one, between Yew San and the Company. There was no reason let alone a good reason suggested by the plaintiffs as to why the Directors would want to benefit Yew

San by concocting a fake transaction. Overall, therefore, I find that the plaintiffs have not been able to prove that the invoice for $13,111.35 was in respect of a sham transaction.

Sale of excavator to Ban Guan & Co ("Ban Guan")

231 On 8 April 2004, the Company sold Ban Guan a used excavator for $55,000. The plaintiffs contended that this excavator was sold at an undervalue. They said that the Directors did not take any steps to sell the excavator at its fair market price, and that shortly afterwards the same excavator was sold to one JPN Industrial Trading Pte Ltd ("JPN") for $24,200 more than the price at which it was sold to Ban Guan. In addition, the sale to JPN occurred three days before the Company had invoiced Ban Guan for the latter's purchase of the excavator and that the Directors were unable to explain this. The plaintiffs claimed that the Directors had acted in breach of their duties in procuring this transaction.

232 In order to establish this claim, the plaintiffs had to show that the price at which the excavator was sold was an undervalue. Their expert for this purpose was Robert Khan. His evidence on the valuation of the excavator sold to Ban Guan suffers from the same defects as that given in respect of the sale of the equipment to Wera. I cannot rely on this evidence. Therefore, there is no evidence before me that the price paid by JPN was the market price. I cannot assume that just because JPN paid that price at about the same time as Ban Guan paid a lower price, the sum of $88,200 was the market price. There may have been particular reasons why JPN needed that particular excavator. In any case, there was no reason for the Directors to sell the excavator at less than the best possible price they could obtain. Ban Guan was not related to them and they had no reason (and none was suggested by the plaintiffs) for giving Ban Guan a bargain when the Company itself needed money so badly. There was no lease back in this case and, and on a balance of probabilities, I find that the sale was a genuine one. The Directors may not have spent enough time looking for the best possible price for the excavator but this does not mean that they acted dishonestly in effecting its sale to Ban Guan.

Conclusion

233 For the reasons given above, the plaintiffs are entitled to succeed in relation to certain areas of their claims and against certain defendants. They are entitled to recover the following:

(a) in respect of the Payments:

(i) nos 8, 9, 13, 15, 25, 27 and 29 totalling $271,000 from Mr Leow;

(ii) no 4 in the sum of $17,540 from Mdm Ong;

(iii) no 18 in the sum of $1,000 from Mr Leow;

(iv) no 24 in the sum of $30,000 from Mdm Ong;

(v) no 19 in the sum of $9,240 from Mr Leow;

(vi) nos 17, 26 and 28 totalling $6,000 from Mdm Ong; and

(vii) nos 1, 7, 12, 14, 16, 20 and 23 totalling $37,000 from Mr Leow.

(b) in respect of the Company's dealings with Aim Top, the 10-tonne lorry registration no XB 5283 which Aim Top must surrender to the plaintiffs or, in the alternative, pay damages to be

assessed on the basis of the value of such lorry as at the date of winding-up;

(c) in respect of payments which I have found to be sham or fraudulent preferences:

(i) from Aim Top, the sum of $27,200 paid by the Company for the rental of the lorry;

(ii) from Aim Top, the sum of $7,280 paid as rental for the excavator with breaker;

(iii) from Aim Top, the sum of $4,888 paid by the Company for services rendered;

(iv) from OKY and OES the sum of $47,000 paid by the Company for services rendered by Antah;

(v) from Mr Leow the sum of $11,000 representing the repayment by the Company of sums which he had advanced to Wera; and

(vi) from Mdm Ong the sum of $2,500 representing the repayment by the Company of sums which she had advanced to Wera; and

(d) in respect of the Company's dealings with Wera, the excavator model SK 100 with breaker, mini excavator model EX 30 with breaker and excavator model SK 40 with breaker be which Wera must surrender to the plaintiffs or, in the alternative, pay damages to be assessed on the basis of the value of such equipment as at the date of winding-up.

234 There will be judgment accordingly for the plaintiffs against the various defendants except Yew San. The plaintiffs' claim against Yew San shall be dismissed with costs. The plaintiffs shall be entitled to recover their costs of action against the first and second defendants, Aim Top, OKY and OES.