IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 264

Originating Summons No 637 of 2016

In the matter of Section 259 of the Companies Act (Cap 50, 2006 Rev Ed)

And

In the matter of Centaurea International Pte Ltd (in liquidation)

Between

Centaurea International Pte Ltd (in liquidation)

… *Plaintiff*

And

Citus Trading Pte Ltd

… *Defendant*

JUDGMENT

[Insolvency Law] — [Avoidance of transactions] — [Dispositions of property after commencement of insolvency proceedings]

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Centaurea International Pte Ltd (in liquidation)
v
Citus Trading Pte Ltd

[2016] SGHC 264

High Court — Originating Summons No 637 of 2016
Steven Chong J
1 November 2016

1 December 2016 Judgment reserved.

Steven Chong J:

Introduction

1 It is not uncommon for a company to continue operating after the commencement of winding up. This could be due to a variety of reasons including the company making legitimate efforts to keep itself afloat. It is equally not uncommon for third parties to continue doing business with such a company oblivious of the winding up application. However, such business transactions may well give rise to unanticipated legal implications and complications.

2 The case before me concerns a series of transactions between the parties and the corresponding payments made by the plaintiff in the period between the commencement of the winding up and the eventual winding up order. The liquidators of the plaintiff seek to recover the payments which were made after the

commencement of the winding up while the defendant seeks to validate those payments.

3 After the commencement of the winding up, s 259 of the Companies Act (Cap 50, 2006 Rev Ed) ("s 259") provides that any disposition of the property of the company shall be void "*unless the Court otherwise orders*". While there are local cases dealing with the transfer of shares after the commencement of winding up under s 259, I was informed by the parties that the issue of validating payments under s 259 has not been the subject matter of any reported decision of our courts. Both parties referred me to decisions in other jurisdictions which have considered provisions similar to s 259. In general, there appears to some consensus that in order to validate the payments, the court must be satisfied that such payments would be, *inter alia,* for the benefit of the company and consequently the general body of creditors. This judgment will examine the circumstances under which this criterion would be satisfied. It will also analyse the time at which this criterion is to be assessed – should it be assessed as at the time the payment was made *or* as at the time the payment is sought to be validated with the benefit of hindsight? Finally, should a distinction be made between *prospective* validation and *retrospective* validation? This case concerns the latter.

The facts

4 The essential facts are largely not in dispute. The plaintiff was wound up on 23 August 2013. Pursuant to the winding up order, Mr Chee Yoh Chuang and Mr Abuthahir Abdul Gafoor of Stone Forest Corporate Advisory Pte Ltd ("the liquidators") were appointed as the joint and several liquidators for the plaintiff.[1]

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[1] 1st Affidavit of Chee Yoh Chuang, dated 8 June 2016, at para 7

5 Prior to its winding up, the plaintiff was engaged in the business of supplying bunkers to vessels. The defendant is an international trader dealing in commodities including crude oil, petroleum distillates and petrochemicals.[2] The plaintiff would purchase the bunkers from oil traders including the defendant in order to supply them to vessels.

6 The parties started their business dealings in May 2013. The sale of the bunkers by the defendant to the plaintiff was on credit terms, the details of which will be examined below. At the outset of the business relations, two forms of security were provided to the defendant to secure the plaintiff's liabilities: (a) a personal guarantee dated 22 May 2013 by the plaintiff's director, Lim Tiong Ling ("Lim"); and (b) a mortgage dated 27 May 2013 over *MT Sirima 1*, a vessel owned by the plaintiff's affiliate company, Centaurea International Ltd ("Centaurea Ltd").[3] It is important to bear in mind that these two securities were provided by third parties and *not* by the plaintiff itself. At all times, the parties dealt with each other through an intermediary, G Ocean Trading Pte Ltd ("the broker"). It was the broker who introduced the plaintiff to the defendant.[4]

7 On 1 July 2013, another creditor, Navig8 Pool Inc ("Navig8"), commenced winding up proceedings against the plaintiff.[5] This was advertised in the Gazette, The Straits Times and the Lianhe Zaobao on 3 July 2013.[6]

8 After the commencement of the winding up, the plaintiff made five payments totalling US$1,526,803.53 to the defendant between 5 to 31 July 2013

2 1st Affidavit of Nadar Ajlani, dated 11 August 2016, at para 7

3 2nd Affidavit of Nadar Ajlani, dated 3 October 2016, at paras 7–8

4 1st Affidavit of Nadar Ajlani at para 8

5 1st Affidavit of Chee Yoh Chuang at p 9

6 1st Affidavit of Chee Yoh Chuang at p 11

in settlement of various *pre-liquidation* invoices. The liquidators requested the defendant to return the payments in November 2013.[7] This was denied by the defendant and the liquidators eventually filed Originating Summons 637 of 2016 ("the application") seeking a declaration that these payments are void under s 259 which provides as follows:

> **Avoidance of dispositions of property, etc.**
>
> **259**. Any disposition of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

The liquidators have disclosed the fact that this application is funded by Navig8.[8]

9 As the impugned payments were made *after* the commencement of the winding up, the liquidators submit that they are *prima facie* void. As it is common ground that the winding up commenced on 1 July 2013, the defendant does not dispute that the payments are caught by s 259 and hence *prima facie* void but relies on the court's discretion under s 259 to validate the payments.

Transaction history between the parties

10 A review of the transactions between the parties is essential to a proper understanding of their respective competing positions. Their entire transaction history spanned a very short period between May and August 2013. All the relevant transactions were for the sale of bunkers by the defendant to the plaintiff.

11 The defendant's position is that the sale of bunkers to the plaintiff was subject to a credit limit of US$1.2m and a typical credit period of 30 days.

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7 1st Affidavit of Chee Yoh Chuang at p 13

8 1st Affidavit of Chee Yoh Chuang at para 4

12 The first trade between the parties took place on or about 21 May 2013.[9] By 24 June 2013, the parties had entered into four transactions as evidenced by the following invoices:[10]

(a) CIT 230057 dated 21 May 2013 for the sum of US$309,560, due for payment on 20 June 2013.

(b) CIT 230058 dated 30 May 2013 for the sum of US$206,482.56, due for payment on 29 June 2013.

(c) CIT 230059 dated 30 May 2013 for the sum of US$722,688.96, due for payment on 29 June 2013.

(d) CIT 230068 dated 24 June 2013 for the sum of US$309,563, due for payment on 24 July 2013.

13 It appears from the evidence that the May invoices were not paid on their respective due dates. However there is no dispute that as of 1 July 2013, the May invoices had been paid by the plaintiff though the precise dates were not stated in the affidavits.[11]

14 The next transaction was evidenced by invoice number CIT 230071 dated 26 June 2013 for the sum of US$597,800.[12] Notably, the credit period for this invoice was reduced from the usual 30 days to five days. The defendant explained that the credit period was reduced because payments due under invoice numbers CIT 230058, 230059 and 230068 had remained outstanding as at 26 June 2013.[13]

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9 1st Affidavit of Nadar Ajlani at para 13

10 1st Affidavit of Nadar Ajlani at pp 55–58

11 1st Affidavit of Nadar Ajlani at para 17

12 1st Affidavit of Nadar Ajlani at p 59

It can therefore be inferred that these three invoices were eventually paid sometime *after* 26 June but *prior* to 1 July 2013. Nothing turns on the exact dates for these payments.

15 Thereafter, the parties entered into a further transaction in June 2013 – CIT 230074 dated 27 June 2013 for the sum of US$928,689.[14] The credit period for this invoice was restored to the usual 30 days.

16 The subject matter of this application concerns five payments by the plaintiff to the defendant in settlement of the two June invoices:

(a) Cheque payment of US$200,000 on 5 July 2013.

(b) Cheque payment of US$300,000 on 11 July 2013.

(c) Cheque payment of US$97,800 on 11 July 2013.

Sub-total – US$597,800 in payment of CIT 230071

(d) Cash payment of US$479,003.53 on 30 July 2013.

(e) Cheque payment of US$450,000 on 31 July 2013.

Sub-total – US$929,003.53 in payment of CIT 230074

17 Following receipt of the first three payments totalling US$597,800 in payment of CIT 230071 by 11 July 2013, the defendant entered into two further transactions with the plaintiff on the usual credit terms – as evidenced by invoices CIT 230092 dated 23 July 2013 for the sum of US$309,946 and CIT 230096 dated 30 July 2013 for the sum of US$412,650.[15] The final transaction, CIT

[13] 1st Affidavit of Nadar Ajlani at para 19

[14] 1st Affidavit of Nadar Ajlani at p 60

[15] 1st Affidavit of Nadar Ajlani at pp 81–82

230100 dated 6 August 2013 for the sum of US$32,709.39,[16] was entered into after receiving the balance two payments totalling US$929,003.63 for CIT 230074. The plaintiff had not directly made any payment for the last three transactions totalling US$755,305.39 at the time when it was wound up.

18 During the hearing, it occurred to me when the payments were matched against the respective invoices, one invoice, *ie*, CIT 230068 dated 24 June 2013 for the sum of US$309,563, was not accounted for. There was no mention of the status of this invoice in the affidavits. In response to the court's query, counsel for the defendant, Mr Jude Benny, informed the court that this invoice had been paid by Lim directly in cash. For that reason, the defendant did not pursue this invoice against Lim in the bankruptcy proceedings. Neither does it feature in the proof of debt against the plaintiff. Similarly, the liquidators have not challenged this payment because there is no record in the plaintiff's books that this payment was made with the plaintiff's funds. Nonetheless, for good order, I directed the defendant to file an affidavit to explain the circumstances for this cash payment. A director of the defendant, Mr Nadar Ajlani, duly filed the affidavit as directed on 2 November 2016 to explain that this cash payment was made by Lim on 24 July 2013.[17] The liquidators have not taken issue with this disclosure by the defendant which arose directly from the court's question.

Relevant post-liquidation events

19 On 26 August 2013, the defendant learned from the broker that Lim had "absconded".[18] A search conducted by the broker with Accounting and Corporate

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16 1st Affidavit of Nadar Ajlani at p 83

17 3rd Affidavit of Nadar Ajlani, dated 2 November 2016, at para 4

18 1st Affidavit of Nadar Ajlani at para 38

Regulatory Authority on 27 August 2013 revealed that the liquidators had been appointed to wind up the plaintiff.[19]

20 On 30 August 2013, the defendant issued a statutory notice against Lim under the personal guarantee in respect of the liabilities due and owing by the plaintiff.[20] Lim did not respond to the statutory notice and the defendant thereafter commenced bankruptcy proceedings against Lim on or about 17 October 2013. Lim was adjudged a bankrupt on 21 November 2013.[21] The defendant has filed a proof of debt against the plaintiff for the sum of US$755,305.39 being the total amount outstanding under the last three invoices – numbers CIT 230092, 230096 and 230100.

21 The defendant then exercised its rights under the mortgage to take possession of the *Sirima 1*. By 29 August 2013, the defendant, acting under the mortgage, transferred the ownership of the *Sirima 1* to itself.[22] The vessel was subsequently sold by the defendant for about US$350,000. Mr Benny informed the court during the hearing that the sale of the *Sirima 1* took place after the filing of the proof of debt and that the defendant would file an amended proof of debt to reflect the amount recovered from the sale of the vessel.

22 The plaintiff is relying on the personal guarantee and the vessel mortgage to demonstrate that the defendant continued to supply the bunkers to the plaintiff under the last three unpaid invoices on the strength of the two securities and not

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19 1st Affidavit of Nadar Ajlani at para 39

20 2nd Affidavit of Chee Yoh Chuang, dated 8 September 2016, at p 31

21 1st Affidavit of Nadar Ajlani at p 71

22 3rd Affidavit of Chee Yoh Chuang, dated 20 October 2016, at para 19

on account of the five impugned payments made by the plaintiff. The significance of this point will become clear when the law is examined below.

Applicable legal principles

23 As I observed earlier, there is no local reported decision dealing with the validation of payments made by a company under s 259 after the commencement of the winding up. In this regard, it is relevant to note that s 259 is *in pari materia* with s 127 of the UK Insolvency Act 1986 (c 45) ("the UK Insolvency Act") and substantially similar to the various equivalent legislations in Australia. It is therefore instructive to examine English and Australian authorities on this issue.

24 The underlying rationale of s 259 is to prevent the dissipation of the assets of the company so as to "procure so far as practicable the rateable payments of the unsecured creditors' claims" (*per* Buckley LJ in *In re Gray's Inn Construction Co Ltd* [1980] 1 WLR 711 ("*Gray's Inn Construction*") at 718). Hence,

> … the court should not validate any transaction or series of transactions which might result in one or more pre-liquidation creditors being paid in full at the expense of other creditors, who will only receive a dividend, *in the absence of special circumstances making such a course desirable in the interest of the unsecured creditors as a body*.
>
> [emphasis added]

25 Consistently with the underlying rationale, it has also been said that s 259 is intended to ensure that there are no preferential payments to pre-liquidation creditors which would infringe the *pari passu* rule.

26 A third party who, despite having knowledge that the winding up petition has been filed, is asked to enter into a transaction with a company after the commencement of winding up can always decline to do so until he or the company has obtained a *prospective* validating order. If he chooses to go ahead

without first obtaining the validating order, then he obviously takes the risk of the court subsequently refusing to make the order. However, it is not always feasible to obtain such an order in advance because the third party may be unaware of the winding up application. Here we are concerned with such a situation; hence, the necessity for the *retrospective* validation order.

27 Mr Benny submits that payments made (a) in good faith; (b) in the ordinary course of business; and (c) without notice of the winding up application "would usually be validated by the court unless there are grounds for thinking that the transaction may involve an attempt to prefer the disponee", as Buckley LJ held in *Gray's Inn Construction* at 718.

28 I do not think Buckley LJ meant, in *Gray's Inn Construction*, to lay down any general rule or presumption. In fact, this was very recently clarified in *Express Electrical Distributors Ltd v Beavis and ors* [2016] EWCA Civ 765 ("*Beavis*") where Sales LJ described it at [36] as a "bald proposition". He went on to observe:

> Validation on that basis could well prejudice the interest of the body of unsecured creditors, unless the making of such a validation order depends upon a more searching inquiry whether it is in the circumstances in the overall interest that the transaction in question should be validated.

29 Further on in the judgment, Sales LJ opined "that the time has come to recognise that the statement by Buckley LJ … cannot be taken at face value and as a rule in itself" (at [56]).

30 In my view, showing that the impugned payments to pre-liquidation creditors were made in good faith in the ordinary course of business without notice of the winding up petition would not be sufficient to validate the payments. The statement that such transactions would "usually" be validated is only a

descriptive statement and does not explain why the court would permit a departure from the *pari passu* rule in making a validation order. The departure is permitted when there is a benefit to the company and hence its creditors.

31 That is not to say that these requirements are not relevant considerations. Obviously, if the payments were not made *bona fide* in the ordinary course of business, the "*searching inquiry*" as to validation of the payments would, in many cases, stop there without further examination simply because such payments would *ex hypothesi* not be for legitimate purposes, and may have been attempts to prefer the disponee.

32 But, to borrow the words of Fox LJ in *Denny v John Hudson & Co Ltd* [1992] BCLC 901 ("*John Hudson*") at 905, "while good faith is, in my view, established, I do not think that good faith is enough by itself to justify validation". In support of this view, Fox LJ relied on the following passage from *Re J Leslie Engineers Co Ltd* [1976] 2 All ER 85 ("*Leslie*") at 95:

> Whilst obviously *the absence of any actual knowledge in the recipient of a payment that a petition is in being is a factor – indeed a very powerful factor – to be considered in relation to the exercise of discretion, I do not think that, by itself, it can be conclusive* and, indeed, counsel for the respondents does not so contend. I think that in exercising discretion the court must keep in view the evident purpose of the section which, as Chitty J said in *Re Civil Service and General Store Ltd* (1887) LJ Ch 119, is to ensure that the creditors are paid *pari passu*. Obviously there are circumstances where this cannot in fairness be the sole criterion in cases where, for instance, the creditor concerned has since the presentation of the petition helped to keep the company afloat, or has otherwise swollen the company's assets, salvage cases and that sort of thing.
>
> [emphasis added]

33 Further, if the third party decides to enter into transactions with the company despite *actual knowledge* of the commencement of winding up, the third party would be deemed to have taken the risk that the court may not issue the

validating order *ex post facto* and that it might eventually only receive a dividend upon liquidation of the company. In such a case, it would be prudent for the third party to first seek *prospective validation* prior to entering into the transaction. But the fact that the third party is aware of the winding up petition is not necessarily fatal. As mentioned in *Jardio Holdings Pty Ltd v Dorcon Construction Pty Ltd* (1984) 2 ACLC 574 ("*Jardio Holdings*") at 581*,* "knowledge of the company's financial embarrassment, or even its insolvency, is not necessarily fatal" to an application for validation. Also, as elaborated in [43] below, *Gray's Inn Construction* itself dealt with a situation where the third party bank permitted the company to continue using its current account for its trades *notwithstanding* the bank's actual notice of the winding up petition.

34 In short, while the fact that the payments were *bona fide* in the ordinary course of business without notice are strong factors in favour of validation, the crucial requirement remains whether there are "*special circumstances making such a course desirable in the interest of the unsecured creditors as a body*". That is the main dispute which divides the parties in this case as to whether the five impugned payments should be validated.

35 It is at least common ground between the parties that the "special circumstances" would be satisfied if the defendant was able to prove that the payments were for the benefit of the general pool of unsecured creditors. This is the pivotal issue which will be examined below with reference to the parties' submissions. However, what further divides the parties is the relevant time to determine whether there was "benefit" to the general body of unsecured creditors – is it the time of the payment or the time when the payment is sought to be validated?

Relevant time of the inquiry

36 The case before me concerns *retrospective validation*, *ie*, validation after the disposition in question has occurred. Mr Benny submits that it is sufficient for the defendant to demonstrate that, looking at the payments at the time they were made, it was *likely* that they would benefit the company.[23] Counsel for the plaintiff, Mr Edgar Chin, submits that the defendant must demonstrate with cogent evidence that, looking at the payments with the benefit of hindsight, they in fact turned out to be for the benefit of the general body of creditors.[24]

37 The difference in the two approaches is likely to be material to the eventual exercise of my discretion under s 259 because the plaintiff submits that, looking at the evidence with the benefit of hindsight, the plaintiff and consequently the unsecured creditors did not *actually* benefit from the supplies of bunkers delivered by the defendant following the payments by the plaintiff which are now impugned.

38 I agree with Mr Benny's submission as to the proper time for the inquiry. It is both grounded on relevant case law and preferable as a matter of principle.

39 The preponderance of authorities supports the defendant's position. The following dicta by the Federal Court of Australia in *Jardio Holdings* at 581, in the context of s 227 of the Companies Act (NT) (which is substantially similar to s 259), is particularly instructive:

> Logically, *the merits of the application should be tested as at the date of entry into the transaction sought to be validated.* Subsequent events may be capable of throwing light on the position at an earlier point of time, but that is a different matter.

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23 Defendant's Submissions at paras 33 and 37

24 Plaintiff's Submissions at para 37

> If an applicant can make out a case for validation of a transaction upon the footing that, looked at as at the time of entry into the transaction, it was in the interests of the general body of creditors that the disposition of the company's property concerned should take place, *sanction should not be denied because subsequent events prove wrong a judgment reasonably formed at the time that the transaction offered advantages or potential advantages to the general body of creditors.*
>
> [emphasis added]

The court also observed at 579 that a transaction entered into in good faith which offers actual or *prospective* advantage to the company or its general body of creditors would ordinarily be sanctioned by the court.

40 In *John Hudson* at 906, Fox LJ approached the inquiry by posing the question whether the relevant transactions were "*likely*" to be for the benefit of creditors generally. Staughton LJ observed, similarly, that a judge would be entitled to find that a transaction "was *apt* to benefit the creditors, even if it is not shown that it did in fact do so" [emphasis in original] (at 908).

41 In similar vein, in *Tellsa Furniture Pty Ltd v Glendave Nominees Pty Ltd* (1987) 12 ACLR 64 ("*Tellsa*") at 66, the Court of Appeal of New South Wales observed that in exercising the power of validation, the court's inquiry is whether the transaction is "*apt*" to benefit the creditors generally. These cases support the defendant's position that the court should assess whether, at the time of the payment, the impugned transaction was *likely* to benefit the creditors.

42 Mr Chin relies on *Beavis* at [56] for the proposition that in respect of *retrospective* validation, the court should inquire whether the payment "*has been*" for the benefit of the general body of unsecured creditors such that it is appropriate to disapply the usual *pari passu* principle. Although the court in *Beavis* preferred the hindsight test, Sales LJ had observed at [26], "I do not think that it matters in this case which of these two approaches is adopted". I should

also mention that the court also found on the facts that: (a) there was no evidence that the further supplies were made for the benefit of the general body of the creditors whether as at the time of the payment *or* with the benefit of hindsight (at [31]); and (b) that the payment was, in any event, not made in the ordinary course of business (at [57]). Hence it was neither critical nor necessary for the court to decide that the appropriate inquiry should be as at the time when the validation is sought.

43 Mr Chin also relies on *Gray's Inn Construction* where Buckley LJ held at 720 that the judge below was bound to deal with the inquiry "in the light of all the facts then known to him including the fact, according to his finding, that the company had traded at a loss". This statement seemingly suggests that the inquiry should be carried out with the benefit of hindsight. However, the hindsight test was applied in *Gray's Inn Construction* to disallow part of the validating order made by the judge below because the bank allowed the company to continue using its current account *even after having actual knowledge* of the winding up petition. Buckley LJ held (at 724) that the proper course for the bank to adopt was to have applied for a prospective validating order at which time the court might have granted the order subject to certain precautions. The bank made no such application and instead "took the risk of going on without an order". In such a case, it is not unfair to require the third party to prove that the further transactions *in fact* benefited the company since, in continuing to transact with the company despite having notice of the winding up application, the third party has accepted the risk that the further transactions may not turn out to be beneficial to the company. The result in *Gray's Inn Construction* was that the court only validated the credits to the company's bank account *before* the bank knew of the winding up petition, but not those credits after it did (at 721).

44 I should not be taken as saying that the hindsight test will invariably be applied once it is shown the third party had knowledge of the winding up petition. *Jardio Holdings* seems to suggest otherwise. The third party in that case – a mortgagee – knew of the company's "perilous financial condition" when taking a mortgage from the company (at 581). The court disagreed with the lower court's application of the hindsight test. It went on to apply the test of prospective benefit, asking whether the mortgage "could, at the time, reasonably be perceived as offering some advantage or at least some potential advantage" to the company (at 582). In the end, it found that there had been no such prospective benefit (at 583). The present case does not involve a third party with notice of the winding up petition (or insolvency of the company) and there is hence no need for this court to take a firm view of whether the hindsight test should apply in the context where the third party had notice. In any event, neither *Beavis* nor *Gray's Inn Construction* is clear authority that the court should apply the hindsight test in such a situation.

45 Furthermore, examining an impugned transaction with the benefit of hindsight would work unfairness to parties dealing in good faith with "insolvent" companies without notice. This is for a number of reasons. First, as pointed out by Staughton LJ in *John Hudson* at 908:

> … it would be a substantial task to prove by detailed evidence that the creditors' position was better after those further supplies were made than it had been before, and that it was profitable for the company to pay the disputed amounts in order to obtain them.

Such difficulties of proof are compounded by the fact that the burden of doing so lies on the defendant seeking to validate the transaction, whereas it is the company which would be best placed to say whether the transactions were eventually profitable or for the benefit of the creditors.

46 Second, whether or not the payments did in fact benefit the company, and hence the creditors, may be determined by extraneous circumstances beyond the control of the parties. *Advanced EPI Technology Corporation v Vitelic (Hong Kong) Ltd and others* [2007] HKCFI 896 ("*Vitelic*") is a case in point. It dealt with s 182 of the Companies Ordinance (Cap 32) which is similar to s 259. The insolvent company's solicitors sought to validate the payment of fees they received between the date of the winding up petition and the date of the winding up order for work they had done before the company was wound up. The work done was in assisting with the transfer of a lease held by the company to a transferee who was prepared to pay a fair price for it. The transfer of the lease was not only *likely* to produce a substantial surplus for the company but was prospectively validated by the court after the winding up petition. However, the transfer did not take place because the lessor withheld its consent. Nonetheless, Barma J found that the services rendered by the solicitors were, when viewed objectively, for the benefit of the company and its creditors (at [14]). In my view, the result Barma J arrived at was correct. He found (at [16]) that the lease not having been transferred did not detract from his conclusion:

> It is true that the transaction ultimately fell through and that it therefore did not actually produce a benefit for the company or its creditors at the end of the day. However, it seems to me that to take this into account would be to view the matter with the benefit of hindsight.

47 The present case is another illustration of this point. The transactions concern the sale and purchase of bunkers to the plaintiff for onward sales to end users. What price the plaintiff would eventually realise from the onward sales would invariably depend on market conditions. Consider a scenario where two traders in similar positions to the defendant both sold bunkers to the plaintiff on the same day and at the same price, but the plaintiff resold them on different days, generating a profit on one day but incurring a loss on the other. It would not be

right, as a matter of principle, that the payment would be validated in the former case but not in the latter case. Both traders would be identically situated, yet the outcome would be different on account of matters completely outside the control of the parties.

48 All things considered, I do not think the suitability of retrospective validation should depend on such extraneous accidents. The proper and, in my view, just approach is to focus the inquiry at the time of the payment whether the disposition is *likely* to benefit the creditors.

The exercise of discretion under section 259

Were the payments made in good faith in the ordinary course of business without notice?

49 It is not seriously disputed by the liquidators that the impugned payments were made and received in good faith in the ordinary course of business. It is clear from the transaction history that the payments were for arms-length transactions between the parties.

50 However, the liquidators take issue with the question of notice. Mr Chin submits that the advertisement of the winding up petition is "notice to all the world of its presentation" (see *Leslie* at 304, *Rose v AIB Group (UK) plc and anor* [2003] EWHC 1737 (Ch) at [45]) and that the defendant must be taken to have known of the winding up petition at the time of the payments since the winding up advertisements had been published before any of the payments were made.[25]

51 On the strength of this proposition, Mr Chin submits that it is immaterial whether the defendant in fact knew of the winding up at the time when the

[25] Plaintiff's Submissions at para 23

payments were made.[26] This statement is not incorrect but it serves only to make the point that the lack of actual knowledge of the winding up proceedings does not take the payment outside the ambit of s 259. The case law shows, however, that the absence of actual knowledge *is* a factor in favour of validation (see [32] above). This is precisely what the defendant is relying on the lack of actual knowledge for.

52 I think the evidence is clear that the defendant did not have actual notice of the winding up each time the payments were made. There is no suggestion by the liquidators that the defendant in fact had *actual notice* of the winding up at the time when the payments were received. The defendant's lack of actual notice is also borne out by the objective evidence. From the transaction history, the defendant made three deliveries to the plaintiff *on the usual credit terms* in July and August 2013 *after* the commencement of the winding up (see [17] above). Such a course would have been commercially inexplicable had the defendant been aware of the winding up, and hence aware of the risks that (securities notwithstanding) it would not be fully paid for those deliveries. There is also no suggestion by the liquidators that the deliveries were made by the defendant *in spite of actual notice* of the winding up proceedings.

53 I now turn to examine the critical issue: were the payments for the benefit of the company and the general body of creditors? The defendant's case is that the trades with the plaintiff "were guided by a credit exposure limit" and that as long as the trades were cumulatively within the exposure limit, it would continue to trade with the plaintiff. Once the exposure limit was exceeded, the defendant would not continue to trade "until some payment was made".[27] The defendant

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[26] Plaintiff's Submissions at para 18

[27] 1st Affidavit of Nadar Ajlani at para 20

asserts that without the five impugned payments by the plaintiff, the defendant would not have supplied the three deliveries in July and August 2013 ("the additional supplies"). The liquidators dispute the defendant's case on several fronts. They deny that the additional supplies were made solely on account of the impugned payments. In support, they deny that there was any operative credit limit and that the additional supplies were made in reliance of the personal guarantee and the mortgage instead. I will address each of these arguments in turn.

The significance of the credit limit and the credit period

54 The question whether the transactions with the plaintiff were subject to a credit limit has an important bearing on this application. The defendant's case is that owing to the credit limit which had been exceeded at the relevant time, the additional supplies would not have been made to the plaintiff without first receiving payment for the outstanding invoices. The liquidators dispute that there was any such credit limit.

55 From the objective and *contemporaneous* evidence before the court, it is clear that there was in fact a credit limit of US$1.2m for the plaintiff's trades.

(a) First, on the face of the vessel mortgage, the mortgage was provided "as partial collateral for the purpose of a business loan/open credit".[28] Although the amount of the "business loan/open credit" was not stipulated in the mortgage, the liquidators accept that the amount intended to be secured was US$1.2m. This mirrors the credit limit. This is also supported by an email dated 20 May 2013 which was sent by the broker to the agent preparing the vessel mortgage that the "[a]mount borrowed is USD 1.2 Million".[29]

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28 2nd Affidavit of Goh Seng Wee at p 11

(b) Second, in an email dated 28 May 2013, the broker informed the defendant that the plaintiff "was chasing … for the balance USD 1.2 m - USD 300k first sales = USD 900k balance sales".[30] As at 28 May 2013, the plaintiff had entered into one transaction with the defendant – CIT 230057 for approximately US$300,000. It is evident from the email that the plaintiff was keen to utilise the balance credit of US$900,000.

(c) Third, in a WhatsApp message dated 5 August 2013, the broker informed Lim that if the plaintiff could address the defendant's concern of prompt payment, the defendant would be minded to "possibly get even more than 1.2 mil for u. U can grow too".[31] In the context of the parties' business relationship, this message must have been referring to an *existing* limit of US$1.2m which could increase with prompt payments.

56 The liquidators deny that there is any evidence to support the alleged credit limit. Principally, they rely on the fact that as at 23 July 2013, the total credit exposure was US$1,548,198.[32] If the point made is that the defendant has not consistently *observed or adhered* to the credit exposure limit, then I agree. However, occasional departures from a credit limit do not negate its existence. Such deviations are not unexpected in business dealings. When the credit limit is permitted to be exceeded, *ie*, not strictly adhered to, all it indicates is a temporary increase in the risk appetite of the defendant. This is entirely a business call. The mere fact that the credit limit was allowed to be exceeded does not undermine the objective evidence which points to the existence of a credit limit of US$1.2m.

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29 2nd Affidavit of Goh Seng Wee at p 17

30 2nd Affidavit of Goh Seng Wee at p 19

31 1st Affidavit of Goh Seng Wee at p 66

32 2nd Affidavit of Chee Yoh Chuang at para 12

The impact of the personal guarantee and the vessel mortgage

57 As mentioned at [6] and [20]–[22] above, the defendant did obtain a personal guarantee and a vessel mortgage from Lim and Centaurea Ltd respectively to secure the plaintiff's liabilities and it has since taken steps to enforce the two securities.

58 The liquidators brought to my attention the fact that in the bankruptcy proceedings against Lim, the defendant, through the affidavit of Mr Nadar Ajlani, had stated that the additional supplies were made "[i]n reliance on the Personal Guarantee".[33] Furthermore, the liquidators also asserted that the defendant had omitted to mention that it had taken possession of the *Sirima 1* and had obtained some recovery from the sale of the vessel. The defendant does not dispute either of these two points.

59 During the hearing before me, I asked Mr Chin what was the precise significance of these two points to the liquidators' case. He clarified that their significance lay in the liquidators' submission that the additional supplies by the defendant to the plaintiff in July and August 2013 were made on the strength of these two securities and not because of the impugned payments by the plaintiff. In short, the liquidators claim that there was no causal link between the additional supplies and the impugned payments. As observed at [53] above, this position of the liquidators is in line with its denial that there was any credit limit of US$1.2m for the plaintiff's trades, a point on which I have found against them.

60 I do not think either of these two points assists the liquidators' case. It cannot be denied that the personal guarantee was provided by Lim to secure the plaintiff's liabilities to the defendant. Obviously, to enforce the personal

[33] 2nd Affidavit of Chee Yoh Chuang at p 28

guarantee, it would be necessary for the defendant to state, as it has done, that the further supplies were made "in reliance on the Personal Guarantee". That is strictly correct. It does not follow that – as appears to be the liquidators' position – the defendant would have continued to supply further deliveries of bunkers without the plaintiff first settling the outstanding invoices. Rather, it appears to me that the defendant's willingness to continue the deliveries on credit terms was predicated on *both* the payment of the earlier invoices *and* the fact that the personal guarantee had been given. This is particularly likely given that the outstanding amounts had crossed the credit limit. It is also of significance that the enforcement of the personal guarantee only took place *after* the defendant learned that Lim had absconded. This suggests that the defendant viewed the personal guarantee as a last resort, and is consistent with the defendant having *also* relied on the earlier invoices being paid so as to reduce the likelihood that the personal guarantee would have to be called on.

61 Further, I am unable to accept the liquidators' argument as regards the significance of the two securities. In the first place, it is pertinent to note that these two securities were provided from the *outset* of the relationship. If the defendant was always intending to rely solely on these two securities for payment of *all* outstanding sums, then there would be no reason for the broker to send frequent reminders to the plaintiff to pay up on the overdue invoices – text messages were sent on various occasions on 1, 22, 23, 29 July 2013 and 22 and 26 August 2013 in addition to phone calls being made to Lim.[34] Furthermore, it should be recalled that when the May invoices remained unpaid, the defendant drastically reduced the credit period from 30 days to five days. These contemporary measures show that the defendant was always mindful of its credit exposure to the plaintiff and had always insisted on payments of outstanding invoices *before* supplying further

[34] 1st Affidavit of Goh Seng Wee at pp 56, 60, 62, 81, 83

deliveries of bunkers. This reflects the commercial realities of the parties' business dealings especially where the outstanding sums had crossed the credit limit and exceeded the credit period.

Were the payments for the benefit of the general body of creditors?

62 This is the decisive factor for the exercise of discretion under s 259. The liquidators have devoted much effort to demonstrating that the additional supplies by the defendant following the impugned payments did not *in fact* benefit the plaintiff or the creditors. For this reason, the liquidators have stated, in their various affidavits, that there is nothing to suggest that the payments "benefited" the plaintiff in any way or that the additional supplies "resulted" in projects that benefited or "materially improved" the plaintiff's financial position. Proceeding on this basis, the liquidators attempted to demonstrate that the additional supplies were probably sold by the plaintiff at a loss. There are several difficulties in this assertion. First, the liquidators assumed that the additional supplies "must necessarily be sold by the Plaintiff *only or after* the physical delivery date" of the additional supplies [emphasis added].[35] In other words, the sub-sales could not have been sold forward, *ie*, by way of short selling. The defendant asserts that short selling is not uncommon in the oil trade.[36] However, the possibility of forward sales was acknowledged by the liquidators in a subsequent affidavit: "it is possible for the Defendant to have concluded contracts on dates other than the invoice date".[37] Furthermore, the liquidators claim that they are unable to identify the plaintiff's invoices for the sub-sales of the additional supplies. In other words, the liquidators are not able to state affirmatively what happened to the additional

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35 2nd Affidavit of Chee Yoh Chuang at para 23

36 2nd Affidavit of Nadar Ajlani at para 20

37 3rd Affidavit of Chee Yoh Chuang at para 25

supplies delivered by the defendant. Therefore the submission that the sub-sales were sold at a loss is speculative at best. It further illustrates the difficulties of the liquidators, in spite of their full access to the plaintiff's records, in making good the point that the additional supplies did not *in fact* benefit the plaintiff. How then would a third party like the defendant, without similar access, be expected to discharge the burden that the additional supplies *actually benefited* the plaintiff? This demonstrates the difficulty of proof alluded to by Staughton LJ in *John Hudson* – see [45] above.

63 Nonetheless, this inquiry only assumes relevance if I accept Mr Chin's submission that the question of benefit in the context of retrospective validation is to be examined with the benefit of hindsight. As elaborated at [36] to [48] above, the relevant time for the inquiry is the time of the payment, contrary to Mr Chin's submission. Once the inquiry is settled as at the time of payment, the focus necessarily shifts to the *prospective* (anticipated) advantage to the plaintiff and the general body of creditors. It becomes unnecessary to examine whether the payments in fact benefited the plaintiff.

64 I have already found at [55] above that there was a credit limit of US$1.2m for the plaintiff's trades which had been exceeded at the relevant time and that the defendant would not have agreed to sell the additional supplies to the plaintiff on credit terms *but for* the impugned payments (see [61] above).

65 Against these findings, the crucial question is whether the payments of the overdue invoices in order to obtain the additional supplies from the defendant were "likely" or "apt" to benefit the plaintiff and the general body of creditors. This question must be examined with particular reference to the purpose of the additional supplies for the plaintiff's business. The plaintiff is in the business of supplying bunkers to vessels. Its business is entirely dependent on sourcing for

favourable bunker prices from oil traders such as the defendant. The plaintiff's primary business model is to earn a margin from the onward sales to vessels. It stands to reason that in order for the business to continue, the plaintiff must be able to secure supplies *on credit terms* from traders like the defendant. The payments by the plaintiff would have the effect of refreshing the credit limit. The defendant's continuing supply is therefore the source of the plaintiff's business without which the plaintiff would not be able to stay afloat. It follows that making payments to pre-liquidation creditors like the defendant in order to stay afloat must at least carry a potential or prospective benefit to the plaintiff and hence the general body of creditors.

66 This approach was in fact adopted in *John Hudson* to validate payments made in order to obtain further supplies in circumstances similar to the present case. In that case, the company carried on business as hauliers. The respondent carried on business as suppliers of fuel oil to customers including the company. Owing to the company's less than sterling payment record, the supply was on terms that the previous deliveries had to be paid for before new deliveries could be made. After the petition for compulsory winding up of the company had been presented, the company paid various pre-liquidation invoices in order to obtain new deliveries of fuel oil. The liquidator challenged the payments under s 127 of the UK Insolvency Act. In validating the payments, the court held that the continued supply of fuel oil was of value to the company's business as hauliers because "[w]ithout the diesel they could not continue in business" (at 906). Although the payments were challenged on the premise that there was no evidence that the supplies had been used profitably, the court went on to observe (at 907) that while that might have been true "the supplies would enable the business to be carried on, and to earn revenue". Equally, the court attached significance to the fact that the company received *quid pro quo* from the payments

– the ability to order a further supply of fuel oil while deferring payment (at 906). If the impugned payments had merely been to pay the pre-liquidation invoices and no more, then such payments would clearly infringe the *pari passu* principle.

67 In *Tellsa*, the Court of Appeal of New South Wales, in examining a provision substantially similar to s 259, held (at 70) that such transactions would ordinarily be validated

> so long as they "related to the need to continue business, and earn income, or save loss, during the pendency of the petition" … as distinct from on the other hand payments which even though made honestly are no more than reductions of a pre-existing debt without arguable countervailing benefit to the company.

68 In *Prospect Electricity v Advanced Glass Technologies of Australia P/L* (1996) 22 ACSR 6, also a decision of the Court of Appeal of New South Wales, the court validated the payment of pre-liquidation electricity bills in order for the company to continue receiving electricity supply to stay in business. The court noted (at 13) that one important consideration was that the payments "contributed towards the *continued existence of the company* as a going concern with *actual and possible benefit* to relevant parties" [emphasis added]. The court fittingly added (also at 13) that "the situation of actual and possible benefit could not have been reached if there had not been payment of the amount outstanding".

69 It may not always be the case that there is benefit to the company simply by allowing it to continue trading. It would not, for instance, be in the interests of the creditors to retrospectively validate a transaction which was "part of a course of trading by the company at a loss" (see *Beavis* at [36]). In the same way, a prospective validation order to allow a company to continue trading has been refused because there were serious doubts as to the company's solvency and because it had not been trading profitably (see *Re a Company (No 007523 of 1986)* [1987] BCLC 200 at 203 and 205). There is no evidence that the plaintiff,

here, was trading at a loss. I would also venture to suggest that the benefit to a company may in some cases be remote. In *Fuji Photo Film Co Ltd v Jazz Photo (Hong Kong) Ltd* [2004] HKCFI 19, for example, the court declined to prospectively validate expenses for business trips to meet clients and attend camera and photography exhibitions. The court observed that this was hardly sufficient to show that the trip would bring benefits to the company (at [26]).

70 Here, the plaintiff did receive *quid pro quo* from the payments through the defendant's additional supplies on credit terms. This is the crucial difference. Providing the additional supplies as stock on credit terms allowed the plaintiff to continue in its business. That would not have been possible without the plaintiff first making the impugned payments. The payments in order to secure the additional supplies, in my view, were at the material time, "likely" or "apt" to be for the benefit of the plaintiff and the general body of creditors. It may well be that with the benefit of hindsight, the additional supplies did not in fact benefit the plaintiff but that, in my judgment, is the incorrect test in deciding whether the discretion under s 259 should be exercised to retrospectively validate the payments in a case where the defendant was unaware of the winding up application.

Conclusion

71 In the circumstances, the payments to the defendants are hereby validated and as a consequence, the liquidators' application is dismissed with costs fixed at $10,000 inclusive of disbursements.

Steven Chong
Judge

Edgar Chin Ren Howe, Jonathan Thio and Samantha Ch'ng (Incisive Law LLC) for the plaintiff;
Jude Benny and Mary-Anne Chua (Joseph Tan Jude Benny LLP) for the defendant.
