IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 67

Suit No 544 of 2012

Between

(1) Living the Link Pte Ltd (in creditors' voluntary liquidation)
(2) Chia Soo Hien
(3) Leow Quek Shiong

… *Plaintiffs*

And

(1) Tan Lay Tin Tina
(2) Alldressedup International Pte Ltd
(3) Link Boutique Pte Ltd

… *Defendants*

JUDGMENT

[Insolvency Law] — [Avoidance of transactions] — [Unfair preferences]
[Companies] — [Directors] — [Duties]

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Living the Link Pte Ltd (in creditors' voluntary liquidation) and others
v
Tan Lay Tin Tina and others

[2016] SGHC 67

High Court — Suit No 544 of 2012
Steven Chong J
26–29 January 2016; 2 February 2016; 10 March 2016

21 April 2016 Judgment reserved.

Steven Chong J:

Introduction

1 On 13 May 2010, the first plaintiff, Living the Link Pte Ltd ("Living") was placed in creditors' voluntary liquidation.[1] Living was part of the Link Group of companies who were pioneers in the high end retail fashion business in Singapore. Prior to the voluntary liquidation, the remaining inventory and certain shares held by Living were transferred to its associate companies, Link Boutique Pte Ltd ("Link") and Alldressedup International Pte Ltd ("Alldressedup") (together "the associate companies"). Substantial inter-company cash transfers were also recorded between the companies,

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[1] Affidavit of evidence-in-chief of Leow Quek Shiong dated 7 October 2015 ("LQS affidavit"), para 3.

particularly between Living and Link, in the two years preceding the liquidation.

2 The bulk of Living's unsecured debts are owing to Link and Alldressedup who had provided financial support to Living from its inception for its operation and the acquisition of inventory. The only substantial creditor not related to Living is its former landlord, Cheong's Company Pte Ltd ("Cheong") who has a claim for rental arrears and damages arising from the premature termination of the tenancy agreements between Cheong and Living.[2] The present liquidators replaced the initial liquidators appointed by the defendants. This replacement was pursuant to an application by Cheong[3] who is also funding the present claim against the defendants, namely Living's director and sole shareholder, Tina Tan Lay Yin ("Tina Tan"), and the associate companies. In this judgment, the plaintiffs are referred to as the liquidators.

3 As the impugned transfers of inventory and the majority of the cash payments were made to associate companies within the two years preceding the creditors' voluntary liquidation ("the relevant period"), the liquidators are relying on the statutory presumption that these transactions were undue preferences under s 329 of the Companies Act (Cap 50, 2006 Rev Ed) read with ss 99 and s 100(1)(b) of the Bankruptcy Act (Cap 20, 2009 Rev Ed). The liquidators also assert that Tina Tan breached her duties as Living's director by, *inter alia*, procuring these transactions.

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2 Affidavit of evidence-in-chief of Sim Guan Seng dated 6 July 2015, Exhibit SGS-1 (Expert Report of Sim Guan Seng dated 6 July 2015) ("SGS Report"), paras 6.2.12 to 6.2.21.

3 LQS affidavit, para 4; Agreed Bundle ("AB"), volume 12, p 8290.

4 The liquidators seek a reversal of all the impugned transactions, the total amount of which far exceeds the claims of the unsecured creditors not related to Living, particularly Cheong. This gives rise to a real risk of the remedy being disproportionate to the claim, with the associate companies paying monies over to Living only for a substantial portion to become repayable to them after their Proofs of Debt are assessed. The question arising from this state of affairs is whether the court is entitled to order a partial reversal of the impugned transactions *only* to the extent sufficient to meet the claims of Cheong and any other unrelated creditors even if all or most of the transactions constituted undue preferences. Initially, counsel for the liquidators indicated that this would be a sensible approach. However, after considering an issue which I had flagged to the parties when giving directions for the closing submissions, the liquidators changed their position and submitted that the court does not have the power to order a partial reversal because such an order would have the effect of approving and paying some of the debts owing to Link and Alldressedup even before they are adjudicated by the liquidators.

5 Additionally, the liquidators have sued Tina Tan in her capacity as director and seek against her, *inter alia*, an order that she pays a sum equal in value to the undue preference transactions. Although it has been observed that a director might be in breach of his or her fiduciary duties in procuring undue preferences, to-date there is no reported decision by our courts on whether this alone is sufficient to warrant such a finding against the director and if so, what orders can or should be made against the director as a defendant in such proceedings. This case thus raises several interesting issues on the law governing undue preferences which this judgment will examine.

Facts

Background to the dispute

6 Link was first founded by Tina Tan as a retailer of ladies' apparel and high fashion merchandise in 1982.[4] Subsequently, in early 2005, she began to design and produce fashion wear under Link's own label "alldressedup". Alldressedup was incorporated the same year to carry on the production and sale of this label.[5] At this point, the Link Group was mainly operating out of its flagship store located in the Mandarin Hotel.[6]

7 In the third quarter of 2006, the Link Group had to relocate its flagship store after being given notice to vacate due to plans to renovate the building.[7] A suitable location was available at 1 Nassim Road ("One Nassim"), just off the fashion boulevard of Orchard Road. In order to maximise this new space, Tina Tan conceptualised the launch of a fashion and lifestyle concept store which was to combine the retail of high fashion brands with food and beverage outlets.[8] This business was to be known as "Living the Link" and Living was incorporated on 9 January 2007 to carry on this new enterprise.[9] Living then entered into a tenancy agreement for One Nassim with Cheong on 11 June 2007 for three years which was extended on 6 May 2008 till 31 March 2011.[10]

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4 Affidavit of evidence-in-chief of Tan Lay Tin Tina dated 9 October 2015 ("TT affidavit"), para 7.

5 TT affidavit, paras 11 and 12.

6 TT affidavit, para 8.

7 TT affidavit, para 19.

8 TT affidavit, paras 20 and 21.

9 TT affidavit, para 23.

10 LQS affidavit, Exhibit LQS-28.

8 The store at One Nassim opened for business sometime in the second half of 2007, but it never really took off.[11] The launch of this new enterprise unfortunately coincided with the onset of the global financial crisis in 2008. Living faced cash-flow difficulties throughout 2008, and eventually closed the business and terminated the lease on 31 July 2009.[12] This gave rise to a dispute with Cheong as to whether Living could validly terminate the lease on the basis that Cheong had failed to provide adequate power supply for the operation of a lifestyle café/bar in the premises.[13] This was the subject matter of litigation between the two parties in Suit No 941 of 2009 which was subsequently discontinued after Living was placed in creditors' voluntary liquidation on 13 May 2010 pursuant to a resolution passed at the creditors' meeting held the same day.[14] Cheong has since filed a Proof of Debt in the sum of $1,297,135.75 against Living comprising:[15]

(a) arrears in rental (from 1 February 2009 to 12 August 2009) and damages for lost rental (from 13 August 2009 to 10 May 2010) amounting to $1,685,167.77 (with interest);

(b) damages arising from the reduced rental derived as a result of the termination of the tenancy agreement by Living amounting to $404,198.90;

(c) reinstatement costs, legal costs and agents' fees totalling $120,116.47; and

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11 TT affidavit, para 33.

12 TT affidavit, paras 66–69 and Exhibit TT-16.

13 TT affidavit, para 35.

14 SGS Report, paras 6.2.16–6.2.21; LQS affidavit, paras 13–15.

15 AB, volume 12, p 7996.

(d) *less* part payments of $362,346.89, replacement tenant rental of $349,440.60 and deposit set-off of $200,559.90.

9 At all material times, Tina Tan was a director and the sole shareholder of Living and the associate companies, Link and Alldressedup, through their parent company Fashionation International Pte Ltd.[16]

Impugned transactions

10 In the period leading up to Living's liquidation, the following transactions took place which, according to the liquidators, were wrongful:[17]

(a) transfers of inventory amounting to approximately $1.29m in book value from Living to Link;

(b) transfers of inventory amounting to approximately $1.34m in book value from Living to Alldressedup;

(c) net cash payments of approximately $3.86m from Living to Link over the course of 2008, comprising:

(i) $980,000 from 2 January 2008 to 12 May 2008 (*ie*, outside the relevant period), and

(ii) $2,885,174.35 from 13 May 2008 to 31 December 2008 (see [45] below);

(d) on 1 April 2009, a transfer of 120,000 ordinary shares that Living held in Graha Lifestyle Pte Ltd ("Graha") at the book value of $120,000 to Link; and

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16 TT affidavit, para 16.

17 Plaintiff's Closing Submissions, para 6.

(e) between 1 May 2008 and 15 July 2009, payment by Living of the personal expenses of Tina Tan and her husband Lionel Leo, who was the CEO of the Link Group at all material times,[18] to the amount of $41,738.80.

11 There is no dispute that these transactions occurred. The liquidators accept that for all of these transactions, save for the payment of the personal expenses, there was value given by Link and Alldressedup in the form of a corresponding reduction in the debts owed by Living to the two associate companies. The defendants in turn acknowledge that all of the impugned transactions, except the cash payments made by Living to Link outside of the relevant period and the payment of the personal expenses, fall within the statutory presumption and are *prima facie* undue preferences.

12 For the inventory, the parties disagree as to whether the transfers took place on 31 December 2008, as reflected, *inter alia*, in Living's accounts, or sometime later around April 2009. The impact of this disputed issue, if any, will be explored below.

Issues before the Court

13 There have been multiple shifts in the positions of the parties since the commencement of these proceedings. The defendants' case, in particular, has morphed incessantly, with a total of seven amendments to their Defence and Counterclaim, including one which was made, with my leave, the week before the trial.[19] At that stage, it was asserted, *inter alia*, that at least some of the

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18 Affidavit of evidence-in-chief of Leo Lionel dated 12 October 2015 ("LL affidavit"), para 1.

19 Summons Nos. 205 of 2016 and 318 of 2016.

transferred inventory and the Graha shares were held by Living on constructive or resulting trust for Link and Alldressedup and/or the secured lenders who financed the purchase of the inventory. The constructive trust argument was, however, dropped on the first day of the trial, and the resulting trust defence was abandoned just before the close of the defendants' case. Hence, the defendants now accept that the transferred inventory and the Graha shares were owned by Living before their transfers to Link and Alldressedup.

14 The liquidators' case has also somewhat narrowed. Initially, it was argued that the transfers of inventory and the Graha shares were not just undue preferences, but also undervalue transactions as these assets were worth more than the amounts which were credited to Living upon their transfers. This is no longer pursued. Similarly, certain transfers of fixed assets by Living to Link were initially the subject of dispute but the liquidators have since confirmed at the close of the defendants' case that they were no longer pursuing this claim. Finally, the claim for personal expenses was broader before the parties agreed to limit the quantum of the claim to the amount stated above.

15 Following the culling of these arguments, the remaining issues for determination, broadly stated, are:

Undue preference

(a) whether Living was insolvent when the impugned transactions were made during the relevant period, or became insolvent in consequence thereof;

(b) whether the statutory presumption that these transactions were influenced by a desire to prefer the defendants is rebutted;

(c) if not, what is the appropriate remedy and does the court have the power to partially reverse any undue preferences to an amount sufficient to meet the claims of Cheong and any other unsecured creditors;

Breach of directors' duty arising from undue preference

(d) whether Tina Tan is *per se* in breach of her duties as director if any of the impugned transactions are found to be undue preferences, and if so what orders, if any, should be made against her;

Breach of directors' duties arising from other claims

(e) whether Tina Tan breached her fiduciary duties by procuring the remaining impugned transactions, namely the cash payments made outside of the relevant period and the payment of the personal expenses, and if so what orders, if any, should be made against her.

Undue preference

Statutory framework

16 The relevant statutory provisions under the Companies Act and the Bankruptcy Act are as follows:

> **Companies Act**
>
> **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.

(2) For the purposes of this section, the date which corresponds with the date of making of the application for a bankruptcy order in the case of an individual shall be —

(a) …

(b) in the case of a voluntary winding up, the date upon which the winding up is deemed by this Act to have commenced.

Bankruptcy Act

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).

Relevant time under sections 98 and 99

100.—(1) Subject to this section, the time at which an individual enters into a transaction at an undervalue or gives an unfair preference shall be a relevant time if the transaction is entered into or the preference given —

(a) …

(b) in the case of an unfair preference which is not a transaction at an undervalue and which is given to a person who is an associate of the individual (otherwise than by reason only of being his employee) —

(i) …

(ii) in any other case, within the period of 2 years ending on the day of the making of the bankruptcy application on which the individual is adjudged bankrupt; or

(c) …

(2) Where an individual enters into a transaction at an undervalue or gives an unfair preference at a time mentioned in subsection (1)(a), (b) or (c), that time is not a relevant time for the purposes of sections 98 and 99 unless the individual —

(a) is insolvent at that time; or

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

(3) Where a transaction is entered into at an undervalue by an individual with a person who is an associate of his (otherwise than by reason only of being his employee), the requirements under subsection (2) shall be presumed to be satisfied unless the contrary is shown.

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

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

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

17 Of the requirements for an undue preference laid down in s 99 of the Bankruptcy Act, there is no dispute that the impugned transactions took place during the relevant period, and had the factual effect of preferring the defendants as creditors, as respectively defined in ss 100 and 99(3) of the same Act.

18 The parties also accept that Link and Alldressedup were associates of Living for the purposes of ss 99 and 100 of the Bankruptcy Act (see *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd and another* [2002] 2 SLR(R) 1143; reg 5 of Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Rev Ed)). Hence, under s 99(5) of the Bankruptcy Act, there is a presumption that Living was influenced by a desire to prefer the associate companies when the transactions were entered into.

19 The defendants seek to challenge the presumption on various grounds. The overarching argument which cuts across all the claims is that Living was not insolvent at the time of the impugned transactions. Independently, the defendants raise a number of specific arguments to rebut the presumption. First, in respect of the inventory and shares, Tina Tan claims she had the genuine belief that Living had no substantial creditors at the time of their transfers apart from Link and Alldressedup. In particular, she says she genuinely believed at the time that Cheong neither was nor would be a creditor of Living since Living was entitled to terminate the tenancy agreements prematurely and had paid all its rental arrears as of the date of termination. Hence, it is claimed that the transfers were not motivated by the requisite

desire to prefer Link and Alldressedup over Cheong or any other unsecured creditor. Second, Tina Tan relies on the continued payments made by Link and Alldressedup to Living after the transfers of the inventory and shares as evidence that she had no desire to prefer the associate companies in the first place. Finally, in respect of the cash payments made by Living to Link during the relevant period in 2008, she asserts that they were part of a series of legitimate mutual dealings under a running account between the companies.

Was Living insolvent at the time of the impugned transactions?

Was the inventory transferred in December 2008 or April 2009?

20 Before examining whether Living was insolvent at the time of the impugned transactions, there is an anterior question which has to be addressed in relation to the date of the transfers of the inventory. The parties are *no longer* in agreement as to the date of the transfers. I say *no longer* because until 21 January 2016, when the Defence and Counterclaim was amended for the seventh time on the eve of the trial, it was not in dispute that the transfers had occurred on 31 December 2008.[20] With the latest amendment, the defendants now assert that the transfers were instead effected on 27 April 2009.

21 The purpose for this late amendment was initially not clear. But it became apparent in the defendants' closing submissions that the date of the transfers has several ramifications to the defence. For a start, Living's solvency has to be examined with reference to the date of the transfers. More importantly, the defendants accept that Living had effectively ceased business following the inventory transfers. So the date has a material impact on various

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[20] Defence and Counterclaim (Amendment No. 7) dated 21 January 2016, para 9.

other arguments which the defendants have put forward. It is the defendants' case that Living continued operating until April 2009 with the financial support of the associate companies. This continued financial support, the defendants argue, indicates that the cash payments made by Living to Link for the whole of 2008 were legitimately made with a view to obtaining fresh financial support from the associate companies. However if it is found that the inventory transfers took place on 31 December 2008, with Living ceasing business thereafter, then questions arise as to the veracity of this continued financial support, which is an issue which will be further examined below. It is also then difficult to explain why Living continued to reimburse the personal expenses of its directors from January to April 2009.

22 In support of their amended position that the transfers occurred on 27 April 2009, the defendants relied on the fact that the total value of the transferred inventory, as recorded in Living's books on 31 December 2008[21] was exactly the same as the value of the inventory recorded in Living's inventory list dated 27 April 2009 ("the 27 April list").[22] On this premise, the defendants' expert witness, Mr Sim Guan Seng ("Mr Sim") concluded that Living must have used the 27 April list to record the transfers as if they were made at the end of December 2008.[23] In other words, the decision to transfer the inventory was made on 27 April 2009 but the transfers were backdated to 31 December 2008. Mr Sim though was unable to provide any information as to provenance of the 27 April list – by whom, when and why it was prepared and whether there are similar inventory lists for January to March 2009 to verify that the amounts stated in the 27 April list were not simply a

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21 LQS affidavit, Exhibit LQS-12.

22 LQS affidavit, Exhibit LQS-10.

23 Notes of Evidence ("NOE") for 27 January 2016, pp 34:14–38:8.

reproduction of amounts earlier recorded on 31 December 2008. In addition, the defendants drew the court's attention to a $2m credit facility which Living obtained from the Bank of East Asia ("BEA") on 25 November 2008. They claim that it is unlikely that a decision to wind down Living would have been taken so soon after this event. I disagree. First, it is clear that this credit facility was not obtained by Living solely to finance its own business. As acknowledged by the defendants, it was merely a transfer of Link's credit facility with BEA to Living,[24] and the terms of the facility specifically provided that any borrowings were to be disbursed to pay off the outstanding sums owing by Link and Alldressedup to BEA before any undrawn portion was available for Living's use.[25] Second, and significantly, the testimony of Lionel Leo was that the transfer was arranged at the behest of BEA.[26] Thus the transfer of the facility would likely have taken place regardless of when the decision to wind down Living was made.

23 In my view, the preponderance of the evidence before the court is contrary to the defendants' case. First, the audited accounts of Living reflect that it had no inventory as at 31 December 2008.[27] This is entirely in line with the corresponding debit notes dated 31 December 2008 issued by Living reflecting the transfers of the inventory to Link and Alldressedup in the amounts of $1,289,858.90 and $1,337,926.50 respectively.[28] Second, the monthly balance sheets of Living record that Living had no inventory on its books from January to April 2009.[29] Third, it was admitted as much by

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24 NOE for 28 January 2016, pp 120:16–122:15.

25 TT affidavit, Exhibit TLYT-11.

26 NOE for 29 January 2016, pp 40:25–41:6.

27 SGS Report, Appendix 4, BA 1816.

28 LQS Affidavit, Exhibits LQS-13 and LQS-14.

Ms Yeoh Swee Leng of Living in an email dated 9 June 2009 to the liquidators,[30] as well as by Tina Tan in her examination by the liquidators under s 285 of the Companies Act in OS No. 997 of 2011 ("s 285 Examination").[31] At the hearing before me, Tina Tan could not provide an adequate explanation for the change in her evidence on this issue, and was unable to point to any correspondence or records showing that the decision to transfer the inventory was indeed made in April 2009.[32] Fourth, although the liquidators are no longer pursuing the claim for the transfer of the fixed assets, it is relevant that the transfer of these assets from Living to Link was also recorded on 31 December 2008.[33] This is an unequivocal indication of Living's intention to cease its retail business on that date. Consistent with this decision, the inventory was likewise transferred to the associate companies on 31 December 2008. As Tina Tan accepted in cross examination, it would not make any business sense to transfer Living's fixed assets to Link if it intended to carry on its retail business.[34]

24 Finally, although there are records of continued sales by Living in 2009, the defendants' subpoenaed witness, Ms Yong Buck Noi ("Ms Yong"), Living's former chief financial controller, confirmed in her oral testimony that these sales were effected *on behalf of Link* to which the necessary expenses were charged.[35] In other words, Link rather than Living was the *de facto*

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29 SGS Report, Appendix 12.

30 LQS Affidavit, Exhibit LQS-30.

31 LQS affidavit, Exhibit LQS-2, Transcript for 17 January 2012, p 30.

32 NOE for 28 January 2016, pp 52:21–59:8.

33 LQS affidavit, Exhibit LQS-16.

34 NOE for 28 January 2016, pp 42:17–43:7.

35 NOE for 2 February 2016, pp 19:20–20:23.

company operating at One Nassim in 2009, and the transfers of the inventory at the end of 2008 precipitated a transfer of the Link Group's retail business from Living to Link following the decision that Living was not going to proceed as a going concern. Indeed, this was how Tina Tan herself characterised the purpose of the inventory transfers although she insisted that the transfers took place in April 2009.[36] Her assertion however is inconsistent with the totality of the evidence that the transfers of the inventory from Living to the associate companies must have taken place on 31 December 2008 as stated in the audited accounts.

25 In light of this finding, I move on to consider whether Living was insolvent when the impugned transactions took place.

When did Living become insolvent?

26 The two generally accepted tests – the "cash flow" and "balance sheet" tests – to determine the insolvency of a company are embodied in s 100(4) of the Bankruptcy Act:

> **Section 100.**
>
> …
>
> (4) For the purposes of subsection (2), an individual shall be insolvent if —
>
> (a) he is unable to pay his debts as they fall due; or
>
> (b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities.

It is not disputed that the two tests are to be read disjunctively, so that a company is deemed to be insolvent as long as one of the two tests is satisfied

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[36] NOE for 28 January 2016, pp 45:17—46:18.

(see *Velstra Pte Ltd (in compulsory winding up) v Azero Investments SA* [2004] SGHC 251 at [89]).

(1) Cash flow test

27 Starting with the "cash flow" or "liquidity" test, this will be satisfied if the company is "pressed for payments at the material time… and had not been able to pay" (see *Leun Wah Electric Co (Pte) Ltd (in liquidation) v Sigma Cable Co (Pte) Ltd* [2006] 3 SLR(R) 227 ("*Leun Wah*") at [8]). In *Tam Chee Chong and another v DBS Bank Ltd* [2011] 2 SLR 310 ("*Tam Chee Chong*"), Andrew Ang J approved the following extract by Prof Ian F Fletcher in *The Law of Insolvency* (Sweet & Maxwell, 3rd Ed, 2002) at [59]:

> As proof of the debtor company's state of illiquidity, it will suffice to exhibit to the court some evidence – conveniently, often, in the form of correspondence – showing an unequivocal request for payment made by the creditor, and an absence of any bona fide dispute as to indebtedness on the part of the debtor.

28 Hence no matter how asset rich the company might be, it will still fail the cash flow test and be held to be insolvent under s 100(4) of the Bankruptcy Act if it is proved that the company was unable to pay its debts as they fell due. For this reason, it was held in *Tam Chee Chong*, after finding that the company was unable to service its debts, that "it is unnecessary to go into the balance sheet test" (at [62]). While it is not disputed that "a temporary lack of liquidity does not tantamount to insolvency" (see *Tong Tien See Construction Pte Ltd (in liquidation) v Tong Tien See and others* [2001] 3 SLR (R) 887 at [55]), the evidence shows that Living was persistently unable to pay its debts to Cheong as they fell due. Demands for outstanding rental were made from as early as 10 January 2008[37] and Living remained in arrears throughout 2008.

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[37] Supplementary affidavit of evidence-in-chief of Leow Quek Shiong ("LQS

Both Tina Tan and Ms Yong admitted as much under cross-examination.[38] Ms Yong, in particular, was forthright when questioned by the liquidators' counsel on Living's financial predicament in 2008:[39]

> Q. Right. So right from the start business is no good, couldn't pay the rent on time, couldn't pay the bank dues also, on time, correct?
>
> A. Yes, yes.
>
> Q. So from January of 2008, Living the Link really could not pay its debts as they fell due, correct?
>
> A. Fell due, yes, but we tried to work on it.
>
> Q. I understand. And that position didn't improve during the course of 2008. For the whole of 2008, Living the Link could not pay its debts as it fell due, correct?
>
> A. Yes.

29 This was unsurprising as apart from the BEA credit facility which was transferred from Link to Living a month before it ceased business (see [22] above), Living never had its own independent source of finance. It was always dependent for its cash flow on Link and Alldressedup as determined by Tina Tan. When and whether Living was able to pay its debts as they fell due was therefore entirely dependent on the cash flow made available by Tina Tan to Living. The defendants argue that this support from the associate companies should be taken into account in the assessment of whether Living was cash flow solvent. In aid of this submission, they rely on the following passage from Belinda Ang J's judgment in *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo and others* [2004] 1 SLR(R) 434 ("*Chip Thye Enterprises*") at [17]:

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supplementary affidavit"), Exhibit LQS-1, p 6.

38 NOE for 28 January 2016, pp 13:6–27:6; NOE for 2 February 2016, pp 55:21–57:1.

39 NOE for 2 February 2016, pp 56:15–57:1.

> There is support in the cases for the view that the test for putting a company into liquidation under s 254(1)(e) read with sub-s (2)(c) of the Companies Act (Cap 50, 1994 Rev Ed) is one of fact to be decided in the light of all the circumstances of the case: *Re Sanpete Builders (S) Pte Ltd* [1989] 1 SLR(R) 5. Insolvency is established as a fact in a number of ways: *Societe Generale v Statoil Asia Pacific Pte Ltd* [2000] SGHC 64, decision of Rajendran J (unreported). The court would look, for instance, at the accumulated losses to see if it were in excess of its capital; nature of the assets of company or were they book debts; current liabilities over current assets; *prospect of fresh capital or financial support from shareholders and incoming payments from any source to discharge the debts including credit resources*. See Chao JC (as he then was) in *Re Sanpete Builders (S) Pte Ltd*.
>
> [emphasis added]

30 The above dicta, however, is based on authorities dealing with the court's discretion to wind up a company under s 254(1)(e) read with sub-s (2)(c) of the Companies Act. That is a different context in which all the relevant circumstances of the case should rightly be taken into account. Here, I am concerned with the specific application of the cash flow test in s 100(4)(a) of the Bankruptcy Act. In applying this test, I am of the view that the past financial support extended by the associate companies should not be relied upon to prove that Living was able to pay its debts as it fell due, especially as the shareholders and directors of the associate companies, in particular Tina Tan, were never obliged to provide this support. In any case, even with the financial support of the associate companies, the fact remains that Living encountered difficulties from January 2008 in paying its rental as it fell due despite being pressed for payments by Cheong. Hence, applying the cash flow test, I find that Living was insolvent from January 2008, and certainly throughout the relevant period starting 13 May 2008.

(2) Balance sheet test

31 Given my finding that Living was unable to pay its debts as they fell due, it is strictly unnecessary to deal with the balance sheet test. Nonetheless, for completeness, I will examine the issue. The balance sheet test is simply whether the value of the company's assets as at the balance sheet date was less than the amount of its liabilities, taking into account its contingent and prospective liabilities (*Tam Chee Chong* at [65]). This test is distinct from what has been called the "quick assets" test in which the companies' current assets, which can be readily converted into cash, are compared to its current liabilities (see *Chip Thye Enterprises* at [19]). The focus of the balance sheet test by contrast is on a comparison between the *net* assets of the company and its *net* liabilities (see *Leun Wah* at [8]).

32 The defendant's expert Mr Sim opined that based on its balance sheets for 2008, Living was solvent at the time of the impugned transactions because its net assets exceeded its net liabilities throughout the year:[40]

Month in 2008	**Total assets ($)**	**Total liabilities ($)**	**Net assets / (Net liabilities)**
January	5,205,441.39	(4,454,413.78)	751,027.61
February	5,914,463.78	(5,281,268.88)	633,194.90
March	6,411,022.82	(5,864,458.58)	546,564.24
April	7,316,413.57	(6,861,735.89)	454,677.68
May	8,019,836.93	(7,164,322.72)	855,514.21
June	7,767,520.96	(6,982,235.96)	785,285.00

[40] SGS Report, Appendix 12.

July	7,894,788.26	(7,149,499.03)	745,289.23
August	5,350,387.34	(4,628,678.65)	721,708.69
September	5,162,005.44	(4,586,610.61)	575,394.83
October	5,835,809.17	(5,169,169.49)	666,639.68
November	5,829,136.37	(5,201,207.25)	627,929.12
December	1,797,353.03	(1,764,605.85)	32,747.18

33 I accept that up till December 2008, Living was balance sheet solvent as it had a substantial net surplus of assets from January to November 2008. But I do not agree with the defendants' submission that Living was balance sheet solvent as at 31 December 2008 when the transfers of the inventory took place. Section 100(4)(b) of the Bankruptcy Act expressly provides that prospective liabilities must be placed into the equation when applying the balance sheet test. As observed in *Leun Wah* (at [8]):

> Section 100(4) of the Bankruptcy Act defines the term "insolvent" in two possible ways. The first, known as the "liquidity" test, simply requires proof that the person concerned be "unable to pay his debts as they fall due". The second, known as the "balance sheet" test, requires that "*the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities*". The liquidators do not deny that the management accounts of the plaintiff showed that its net assets exceeded its net liabilities. However, they pointed out that Ernst & Young, the plaintiff's auditors, had recommended that adjustments be made in respect of debts relating to two companies, known as Econ and Neo Corp respectively, and that had such adjustments been done, the plaintiff would have been insolvent under the "balance sheet" test. … I would, on the balance of probabilities in this instance, accept the auditors' report and recommendation. In the present case, I was not persuaded by Ms Gan's arguments to find that the plaintiff's balance sheets ought not to make the provisions recommended by the auditors.
>
> [emphasis added]

34 At the end of December 2008, Living had a net asset surplus of $32,747.18 after taking into account the inventory transfers. However once Living's prospective liability for the balance rental under the lease which was then $71,533.03 per month[41] is factored in, it is undeniable that Living, on the balance of probabilities, had insufficient assets to be able to meet all its liabilities as at 31 December 2008 (see *BNY Corporate Trustee Services Limited and others v Neuberger Berman Europe Ltd (on behalf of Sealink Funding Ltd) and others* [2013] UKSC 28 at [48]). In fact, Tina Tan, in response to a question about Living's ongoing obligation to pay rent, conceded in her s 285 Examination that "the business was so bad that [Living] could not pay the future rental; it was insolvent and losing a lot of money".[42] Hence, as at 31 December 2008, Living was both cash flow and balance sheet insolvent. I should also add that Mr Sim also rightly accepted that the balance sheet test does not assist in the objective determination of whether Living was able to pay its debts as they fell due.[43]

Were the transactions influenced by a desire to prefer the defendants?

Subjective desire to prefer

35 The general principles on the requirement that an undue preference must have been motivated by a subjective desire to prefer the relevant creditor are well established, and were succinctly summarised by the Singapore Court of Appeal in *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International, Singapore Branch) v Jurong Technologies Industrial Corp Ltd (under judicial management)* [2011] 4 SLR 977 (at [24]):

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41 LQS affidavit, Exhibit LQS-28.

42 LQS affidavit, Exhibit LQS-2, Transcript for 17 January 2012, p 29:10.

43 NOE for 27 January 2016, p 46:10.

> … These principles restate the law as enunciated by Millett J in *Re MC Bacon Ltd* [1990] BCLC 324 ("*MC Bacon*"), a judgment which has been approved and followed in a number of decisions of the Singapore courts. They are as follows:
>
> > (a) The test is not whether there is a dominant intention to prefer, but whether the debtor's decision was influenced by a desire to prefer the creditor.
> >
> > (b) The court will look at the desire (a subjective state of mind) of the debtor to determine whether it had positively wished to improve the creditor's position in the event of its own solvent liquidation.
> >
> > (c) The requisite desire may be proved by direct evidence or its existence may be inferred from the existing circumstances of the case.
> >
> > (d) It is sufficient that the desire to prefer is one of the factors which influenced the decision to enter into the transaction; it need not be the sole or decisive factor.
> >
> > (e) A transaction which is actuated by proper commercial considerations may not constitute a voidable preference. A genuine belief in the existence of a proper commercial consideration may be sufficient even if, objectively, such a belief might not be sustainable.

36 Within the context of undue preferences given to associates, the leading authority in Singapore is *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 ("*Progen*"). The case will be further examined below, but the Court of Appeal's succinct exposition of the general principles on rebutting the statutory presumptions (at [36]) is worth setting out:

> To rebut the statutory presumption, the burden is on the respondent to show, on a balance of probabilities, that the transactions had not been influenced by PEPL's desire to place the respondent in a better position in the event of PEPL's insolvent liquidation. Simply put, the respondent must show that the transactions were *not influenced at all* by any desire on PEPL's part to place the respondent in a preferential position. It is never sufficient, where there is objective evidence of a preferential payment to benefit a related party in the event of an insolvent liquidation, for the directors to

> simply deny the existence of such a desire. The facts have to be explained in detail.
>
> [emphasis in original]

37 So in practical terms the defendants have to satisfy the court on a balance of probabilities that Living was acting *solely* with reference to proper commercial considerations in effecting the transactions, and that a desire (*ie*, a subjective wish) to better the position of the associate companies in the event of an insolvent liquidation did not operate on the directing mind of Living, *ie,* Tina Tan, at all (see *Wilson and another v Masters International Ltd and another* [2009] EWHC 1753 (Ch) ("*Wilson v Masters International*") at [76]).

Transfers of the inventory and Graha shares

38 The transfer of the Graha shares was effected on 1 April 2009 at a time when Living was undoubtedly insolvent.[44] It is relevant to highlight that *unlike* the transferred inventory, Living's audited accounts for the year ending 31 December 2008 still reflected the Graha shares as an asset.[45] I make this observation because the defendants have relied on the date of the Graha shares transfer to support the amended April 2009 date for the transfers of the inventory: the reasoning being that the defendants must have intended all the transfers to take place at the same time. This comparison is, however, misconceived since the inventory and the shares have been treated differently in Living's books.

39 As stated above, the defendants seek to uphold the transfers of the inventory and shares on two grounds. First, they say that Tina Tan genuinely believed that Cheong would not be a creditor following the premature

44 LQS Affidavit, para 44.

45 SGS Report, Appendix 4, BA 1832.

termination of the lease. Thus the transfers were not motivated by a desire to prefer the associate companies over Cheong, which was Living's only other substantial creditor at the time apart from Link and Alldressedup. Next, the defendants rely on continued payments made by the associate companies to Living after the transfers of the inventory and shares as evidence that there was no desire to prefer the associate companies in the first place. I find both these grounds are without merit.

(1) Did Tina Tan genuinely believe that there were no other substantial creditors at the time of the transfers?

40 First, as the lease was *prematurely* terminated, it seems obvious that Cheong would bring a claim for damages for the remaining term of the lease. Tina Tan however sought to persuade the court that she genuinely believed that Cheong would not be a creditor because Living was entitled to validly terminate the lease owing to a repudiatory breach and/or misrepresentation by Cheong in failing to provide, *inter alia*, a 3-phase 350 Amp power supply to Living for the operation of a lifestyle café as required under the terms of the lease.[46] There are many insuperable difficulties with this argument. First, while the lease did stipulate that Living was permitted to establish "a lifestyle café/bar" to complement the retail business,[47] there is no express contractual requirement that Cheong was obliged to provide the specific type of power supply sought by Living. If this was indeed Living's technical requirement for the operation of its contemplated lifestyle café, then it was incumbent on Living to specify this requirement to Cheong *and* for Cheong to expressly agree to provide it in the lease. This was not done. Evidently the power supply provided by Cheong was adequate to operate a café at One Nassim as a

46 TT affidavit, Exhibit TLYT-15, BA 1624—BA 1625.

47 LQS affidavit, Exhibit LQS-28, cl 2(17.2).

previous establishment, the Jackie Chan café, was in operation there until May 2009.[48] Second, the alleged failure to provide the power supply was raised belatedly on 14 May 2009 almost two years after the commencement of the lease.[49] This inevitably leads to the inference that this defence was an afterthought raised by Tina Tan in her attempt to justify the premature termination. It is telling that Living wrote to Cheong's property agent on 24 October 2008 to request for a waiver of two months of rental and a reduction of rental because it had not been "able to generate the same amount of sales as [at the] previous location in Mandarin hotel" and to assure that, if Cheong was agreeable, it would "endeavour" to pay the monthly rental till the end of the lease.[50] There was no hint whatsoever in the letter that Cheong had misrepresented or were in repudiatory breach of the lease. Third, Cheong was listed as a creditor of Living in its Statement of Affairs dated 31 March 2010[51] and was likewise included as a creditor in its notice of meeting for Living's voluntary winding up.[52] Lastly, Tina Tan's belief that Cheong was in *repudiatory breach* of the lease was simply incompatible with Living's offer on 29 July 2009 to "settle the July rental if [Cheong] accept[s] a *mutual termination* of the [Tenancy] Agreement" [emphasis added].[53] Given these clear objective facts, it is simply untenable that Tina Tan genuinely believed that Cheong would not be a creditor following the premature termination of the lease.

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48 TT affidavit, para 63.

49 NOE for 28 January 2016, pp 79:1—82:23.

50 AB, volume 1, p 33.

51 AB, volume 1, p 64.

52 SGS Report, Appendix 13.

53 AB, volume 1, p 51.

(2) Was there continued financial support provided by the associate companies to Living in 2009?

41 As noted above, my finding that the transfers of the inventory took place on 31 December 2008 leads to the inevitable conclusion that Living had ceased its business thereafter. Despite this state of affairs, the defendants adduced evidence that there were bank transfers totalling $903,000 and $125,500 from Link and Alldressedup respectively to Living from January to August 2009[54] to prove that the associate companies continued to financially support Living after the transfers of the inventory and shares had taken place. This continued support, the defendants' submit, is inconsistent with the liquidators' case that the inventory and share transfers were effected in order to "clean out" Living and with a desire to prefer the associate companies as creditors. However, as there was no logical reason for Link and Alldressedup to continue providing such support to Living in 2009 after it had ceased business, the underlying purpose for these bank transfers must be carefully scrutinised.

42 In their closing submissions, the defendants submit that the bank transfers "were applied to the payment of (a) rental and (b) wages/staff costs".[55] On whose behalf were these payments made? According to Living's books, all the rental and wages/staff costs for 2009 were debited to Link.[56] This was acknowledged by Ms Yong in her testimony, and she explained that this was done because by then "the stocks all belong[ed] to Link Boutique already".[57] This is entirely consistent with my earlier finding that the transfers of the

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54 Defendants' Closing Submissions ("DCS"), paras 32—35.

55 DCS, para 37.

56 SGS Report, Appendix 16.

57 NOE for 2 February 2016, pp 19:22—20:3.

inventory had taken place on 31 December 2008 in order for Link to take over the Link Group's retail business (see [24] above). The entries for the rental and wages/staff costs in Living's books indicate that these expenses also pertained to the other entities of the Link Group such as Link Wedding, Link Home and Alldressedup Distribution.[58] In other words, the rental and wage/staff costs recorded were not those of Living. It follows that the funds were transferred to Living in 2009 to enable it to pay these expenses *on behalf of the associate companies*. Accordingly, these monies could not conceivably have constituted financial support for Living. In fact, this alleged financial support appears to have been used by Living to cover expenses which had been booked against it even though these were unrelated to Living's business and ought not to have been borne by it in the first place.

43 In the premises, the presumption in respect of the inventory and share transfers remains unrebutted. At the time these transfers were made, on 31 December 2008 and 1 April 2009 respectively, the decision had already been made that Living was not going to proceed as a going concern and Tina Tan was aware that there were other unsecured creditors, particularly Cheong, with substantial claims against the company. Given this context, it is implausible that a desire to better the position of the associate companies did not operate on Tina Tan's mind at all when she procured these transfers to the family owned associate companies to the exclusion of Living's other creditors.

Cash transfers in 2008 and the running account principle

44 The liquidators initially claimed that the entire *net* cash payments of approximately $3.86m by Living to Link over the course of 2008 were tainted

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[58] SGS Report, Appendix 16.

by undue preference. However s 329 of the Companies Act read with ss 99 and 100(1)(b) of the Bankruptcy Act only extends to payments made within the period of two years ending on the date of the commencement of the winding up. It is common ground that in this case the relevant date is 13 May 2008 when the resolution for the creditors voluntary winding up was passed: s 329(2)(b) read with s 291(6) of the Companies Act. The liquidators therefore can only challenge the cash transfers as undue preferences for the period from 13 May 2008 to 31 December 2008. This was acknowledged by the liquidators' counsel in his oral closing submissions.

45 From 13 May 2008 to 31 December 2008, there were a total of 159 cash transfers from Living to Link totalling $3,354,174.35 as recorded in Living's bank statements with United Overseas Bank.[59] Over the same period, Link transferred $469,000 to Living. The liquidators are seeking a reversal of the *net* cash transfer of $2,885,174.35 from Living to Link over this period as set out in the table below.

Month in 2008	**Link Boutique to Living ($)**	**Living to Link Boutique ($)**	**Net cash transfer ($)**
13 to 31 May	84,000.00	254,000.00	170,000.00
June	–	425,000.00	425,000.00
July	–	837,500.00	837,500.00
August	–	352,924.35	352,924.35
September	112,000.00	594,500.00	482,500.00
October	132,000.00	229,700.00	97,700.00

[59] LQS affidavit, Exhibit LQS-17.

November	100,000.00	299,500.00	199,500.00
December	41,000.00	361,050.00	320,050.00
Total	**469,000.00**	**3,354,174.35**	**2,885,174.35**

46 The defendants' defence is that these payments were a part of a legitimate series of mutual dealings under a running account between the two companies. In particular, they rely on the "running account principle" which determines when a transaction, which on its face is an undue preference, can be upheld on the basis that it was made under a mutually beneficial running account.

(1) Running account principle

47 Within the common law, the running account principle can be traced to a series of Australian authorities starting with *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110 and culminating in the decision of the High Court of Australia in *Airservices Australia v Ferrier and another* (1996) 185 CLR 483 ("*Airservices Australia*").

48 In *Airservices Australia*, there were nine payments made by Compass Airlines to the Australian Civil Aviation Authority ("CAA"), for airport and air navigation services, in the lead up to the airlines' insolvency. In considering whether the payments were undue preferences, the majority of Dawson, Gaudron and McHugh JJ (Brennan CJ and Toohey J dissenting) elaborated on the definition of a running account and its relevance to preference law (at 504–505):

> … A running account between traders is merely another name for an active account running from day to day, as opposed to an account where further debits are not contemplated. *The essential feature of a running account is that it predicates a*

> *continuing relationship of debtor and creditor with an expectation that further debits and credits will be recorded. Ordinarily, a payment, although often matching an earlier debit, is credited against the balance owing in the account. Thus, a running account is contrasted with an account where the expectation is that the next entry will be a credit entry that will close the account by recording the payment of the debt or by transferring the debt to the bad or doubtful debt a/c.*
>
> If the record of the dealings of the parties fits the description of a "running account", that record will usually provide a solid ground for concluding that they conducted their dealings on the basis that they had a continuing business relationship and that goods or services would be provided and paid for on the credit terms ordinarily applicable in the creditor's business. When that is so, a court will usually be able to conclude that the parties mutually assumed that from a business point of view each particular payment was connected with the subsequent provision of goods or services in that account. Sometimes, however, the transactions recorded in the account may be so sporadic that a court cannot conclude that there was the requisite connection between a payment and the future supply of goods even though the account was kept "in the ordinary form of a running account in which debits and credits are recorded chronologically and in which payments are not shown as attributable to any particular deliveries but are brought generally into credit". *Thus, it is not the label "running account" but the conclusion that the payments in the account were connected with the future supply of goods or services that is relevant, because it is that connection which indicates a continuing relationship of debtor and creditor. It is this conclusion which makes it necessary to consider the ultimate and not the immediate effect of individual payments.*
>
> [emphasis added]

49 On the facts, the majority found that there was a running account between Compass Airlines and the CAA. Critically, the facts recorded in the running account indicated that the parties had a continuing relationship which contemplated further debits and credits; the individual payments were intended to continue and not determine the relationship, and their purpose was to acquire goods and services equal to or of greater value than the payment. Hence, except for the last payment made the day before Compass Airlines

went into provisional liquidation, the rest were upheld as legitimate. The last payment was judged to have been made in response to a demand by the CAA for partial payment of an old debt rather than for the provision of continuing services, and was thus found to be an undue preference.

50 In Singapore, the running account principle was first considered, in the context of undue preferences given to associates, by the Court of Appeal in *Progen*. That case concerned a number of payments made by the insolvent company, PEPL, to its holding company, the respondent. These included, *inter alia*, the repayment and discharge of loans owed by PEPL to the respondent, and payments for the salaries and expenses of the respondent's employees. The directors of PEPL sought to rebut the statutory presumption that there was a desire to prefer the respondent by demonstrating that the payments were part of PEPL's "settled practice" and in line with its past practice of acting as a "payment centre" for the other related companies within its group. PEPL's specific defence was rejected. Evidence that the payments were in line with a course of dealing established when the company was *solvent* was held to be insufficient – it must be proved that the payments made when the company was *insolvent* were made with *the intention of obtaining new value to keep the business going*. V K Rajah JA elucidated as follows (at [57]):

> … The existence of an established course of dealings, or "past practice" so to speak, is only *relevant* if those past practices show that the creditor has been *providing new value* by granting new credit to the company to purchase supplies and items (for example) to keep its business going. Where that is the case, payment is made not with the desire to prefer the creditor, but with the motivation to obtain fresh financing to sustain the company's business in earnest. As observed by Prof Roy Goode in *Principles of Corporate Insolvency Law* (Thomson Sweet & Maxwell, 3rd Ed, 2005) at p 465:
>
> > [The] fact that there is a series of mutual dealings, with debits and credits on both sides, will usually suffice to negate an intention to prefer, for it suggests either that

> a payment into the account was made in the expectation that further drawings would be allowed or that the bank allowed a further drawing on the understanding that it would be covered by a further payment into the account. In either case there is no intention to prefer, or indeed, a true preference at all. Indeed, it has been said that the real question is … the intention that payments into the account will generate future supplies of goods, services or credit. *Accordingly … even payments made to discharge specific debit items will qualify for the application of the principle if the intention is that they should form part of a continuing relationship involving the extension of further credit.*
>
> [emphasis in original]

51 On the facts of *Progen*, there was no evidence that the contested payments were made in the expectation that the respondent would provide new credit to the company to finance its business. The payments constituted "one way traffic" as the respondent did not provide new value nor extended new credit throughout the history of the contested payments (*Progen* at [62]). Hence, they could not be upheld as part of a series of mutual dealings on a running account between the parties.

52 The Court of Appeal also discussed, with approval, *Re Libra Industries Pte Ltd (in compulsory liquidation)* [1999] 3 SLR(R) 205 ("*Re Libra*"), the facts of which are analogous to the present matter. In *Re Libra*, just as in this case, there were a series of payments made by the company to a related creditor, Libra Holdings, over the course of a year. The liquidator challenged these payments on the basis that they were largely unaccounted with no details or particulars to explain them. The liquidator relied on the case of *Wills and another v Corfe Joinery Ltd (in liquidation)* [1998] 2 BCLC 75 (*"Wills*") in which repayments to the insolvent company's directors were found to be undue preferences as "there was no explanation given for making the repayments to the directors" (*Re Libra* at [45]).

53 Kan Ting Chiu J distinguished *Wills* on the basis that there was a valid commercial basis for the transfers. The records showed that the company had been making such payments to Libra Holdings over a substantial period in return for financial support or assistance which Libra Holding provided to the company. This support took the form of various payments of the company's staff salaries as well as the purchase of raw materials required by the company. The court also accepted that the company would not have been able to carry out its business operation without the financial support of Libra Holdings (at [46]). Finally, the court took into account the fact that Libra Holdings was not repaid in full while other creditors were neglected (at [49]). Considering all these matters, Kan J found that the company had rebutted the statutory presumption on a balance of probabilities.

54 While Kan J did not expressly refer to the running account principle, *Re Libra* was analysed and reconciled in *Progen* with reference to this doctrine. In the Court of Appeal's view, it was crucial that there was something more than a *mere* established past practice in *Re Libra*: the payments made to Libra Holdings had been made so that the company could obtain *new value*, and that the practice of repayment of loans had *continued with the extension of new credit* (*Progen* at [60]).

55 So in summary, the fact that an impugned payment was made pursuant to a running account is *by itself* insufficient to negate an intention to prefer – it must have been made with *the intention of obtaining new value to keep the business going*. The running account principle, so understood, is not strictly an independent defence, but goes to proving that the insolvent company was acting solely by reference to proper commercial considerations in making the payment and was not influenced at all by a desire to prefer the creditor.

(2) Application to the present case

56 In the present case, were there mutual dealings with debits and credits on both sides made as "part of a continuing relationship involving the extension of further credit"? I note that the liquidators are only claiming to reverse the *net* cash transfers of $2,885,174.35. By mounting the claim in this manner, the liquidators are in effect acknowledging the existence of a running account between Living and Link. If it were otherwise, I would have expected the liquidators to seek a reversal of *all* the cash transfers from Living to Link over the relevant period instead.

57 The liquidators claim that the cash transfers could not have been for the purpose of securing further financial support from Link because there was a net outflow of cash from Living to Link in the relevant period. However, in examining this issue, it would be incomplete to examine only the cash transfers between the parties. It is common ground that Living's retail business was entirely dependent on the financial support of its associate companies and Tina Tan. Although there was a net cash transfer of $2,885,174.35 from Living to Link, the debit notes issued by Link to Living over this same period indicate that Link supplied Living with inventory of approximately $2.9m in value and paid about $1.3m of Living's operating expenses as follows:[60]

Month in 2008	Inventory ($)	Operating expenses ($)
January	488,355.94	456,663.89
February	180,131.22	68,283.89
March	135,398.91	37,168.85

[60] SGS Report, para 6.4.7, Table 9.

April	270,436.66	278,406.97
May	320,962.87	36,180.83
June	195,111.87	51,301.92
July	678,012.94	53,684.95
August	99,809.56	65,520.25
September	118,029.48	51,108.10
October	295,553.03	46,392.35
November	117,152.20	49,330.94
December	9,794.69	84,951.24
Total	**2,908,749.37**	**1,278,994.18**

58 Tina Tan's evidence that these cash transfers by Living were necessary to ensure a constant supply of inventories and the payment of Living's operating expenses by Link accords with the commercial reality of the financial arrangement between the companies. Link used its banking facilities to purchase inventory on behalf of Living.[61] Clearly the repayments to the banks had to be made by the borrower – Link and not Living. Thus it is naïve for the liquidators to assert that the defence has not been established because no evidence was adduced to prove that Link would have ceased supporting Living's retail business if Living had not made the cash transfers. In essence, the liquidators appear to suggest that Link was expected to fund the acquisition of inventory for Living without getting any repayments in return. Such a structure is not only plainly contrary to the manner in which Living operated its retail business and was funded; it is also financially unworkable.

[61] TT affidavit, para 29.

The sale of the inventories was effected by Living as the retail outlet of the group. So in order for Link to supply Living with fresh inventories and pay the latter's operating expenses, the transfer of funds from the sale proceeds by Living to Link on a regular basis would be expected in the ordinary course of business and as a matter of proper cash-flow management.

59 Thus I am satisfied that the evidence does establish the existence of a running account between Living and Link, as there was in *Re Libra*, without which Living would not have been able to operate as a going concern in 2008. In making the cash payments, Living was acting solely by reference to proper commercial considerations rather than a desire to prefer Link as a creditor.

60 In the circumstances, does it follow that Living has successfully rebutted the presumption in respect of *all* the cash transfers over the relevant period? As it must be recalled, I made an earlier finding that Living ceased its business following the transfers of the inventory to Link and Alldressedup at the end of 2008. That being the case, the decision to wind down Living's business would have been made shortly before the end of the year. The evidence is inconclusive as to when exactly the decision was made. But this can be inferred by examining the payments which were made over the relevant period. I observe that there was no unusual spike in the payment amounts towards the end of 2008. The payments were fairly regular and were mostly supported by debit notes. Unlike *Progen*, this was not a case where there had been a "one way traffic".

61 I turn to the evidence of the cash payments and debit notes between Living and Link in the second half of 2008. As the table above (at [57]) shows, Link was still supplying Living with substantial inventory of over $100,000 per month up to November 2008. There was then a drastic drop in

the amount of inventory supplied in December 2008, to $9,794.69, which indicates that the decision to wind down Living was, on balance, made sometime in December, after the last debit note dated 30 November 2008 was issued by Link to Living.[62]

62 In December 2008, there were a total of 23 cash payments made by Living to Link, totalling $361,050, and one payment of $41,000 in the other direction by Link to Living on 26 December 2008.[63] Neither party has adduced evidence as to why these specific payments were made, nor do the relevant bank statements and debit notes provide much assistance.[64] In the bank statements and debit notes, the payments are briefly described as "FOR EXPENSES", "FOR REPYMT OF LOAN", and so on. Eleven transactions, including the sole payment by Link to Living, do not have any description at all. So there is simply insufficient evidence before this court for me to make a finding as to when in December 2008 the directors of Living made the decision to wind down the company. Thus there is no basis for me to hold that any of the December 2008 payments were made with the intention of obtaining new value, and the defendants have failed to rebut the presumption that these 23 payments were motivated by a desire to prefer Link as a creditor. Given this finding, the order should be to reverse *all* the December 2008 payments from Living to Link *ie,* $361,050 and not just the *net* payments.

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62 Bundle of Affidavits ("BA"), volume 4, p 3070.

63 LQS affidavit, Exhibit LQS-17.

64 LQS affidavit, Exhibit LQS-17, BA 765—BA 807; BA, volume 4, p 3073—3078.

Summary of findings on undue preference

63 In summary, the defendants have failed to rebut the statutory presumption in respect of the following transactions which are therefore set aside:

(a) Transfer of Graha shares to Link on 1 April 2009

(b) Inventory transfers to Link and Alldressedup on 31 December 2008

(c) Cash transfers to Link amounting to $361,050 for the month of December 2008

Appropriate remedy and court's powers

Reversal of undue preferences

64 While the values to be reversed in respect of the Graha shares, $120,000, and the December 2008 cash transfers, $361,050, are self-evident, the parties could not agree on the value to be reversed for the inventory transfers.

65 Although the book value of the transferred inventory was reported at an aggregate amount of $2,627,785.40, it is not in dispute that most of the inventory has since been sold by Link. Link produced a report on the status of the transferred inventory as at April 2011 showing sale proceeds of $2,035,595 out of which a sum of $90,114.76 represented the profits.[65] The report also showed that there was unsold stock as at that date with a book value of $682,335.12 and obsolete stock amounting to $318,226.59. When

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[65] AB, volume 13, p 8605.

queried as to the current status of the unsold stock, the defendants were unable to provide a satisfactory explanation. The defendants submitted that the starting point for the amount to be reversed should be the sale proceeds of $2,035,595. The liquidators, on the other hand, urged me to use the aggregate book value of the inventory instead. As the defendants have not been able to account for the unsold inventory and the records indicate that the inventory which was actually sold did generate a profit over and above the book value, in my view, it would be fair to use the total book value of $2,627,785.40 as the base figure.

66 Both parties are in agreement that deductions should be made from this amount to reflect the expenses, namely the rental and wage/staff costs, which Living would have incurred in retailing the inventory if the transfers had not taken place. The liquidators accept that, in such a case, only the net sale proceeds following such deductions would have been available for distribution to the unsecured creditors. As the lease was terminated in July 2009, rental and wage/staff costs for the period from January to July 2009 should be deducted against the book value of the inventory. These expenses are as follows.

(a) Living's net monthly rental for this period was $41,840.53, which is derived by deducting the sub-tenant rental of $29,692.50[66] from the rental of $71,533.03[67] which was payable by Living to Cheong. So the total net rental which would have been paid by Living from January to July 2009 is $292,883.71.

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66 TT affidavit, Exhibit TLTY-12.

67 LQS affidavit, Exhibit LQS-28.

(b) The wage/staff costs which were charged to Link for the period from January 2009 to July 2009 amounted to $762,073.38.[68] This amount would have been incurred by Living if the inventory had not been transferred as well.

(c) Hence the total amount of the expenses to be deducted from the aggregate book value of the transferred inventory is $1,054,957.09.

67 The amount to be repaid by the associate companies to reverse the wrongful inventory transfers, with the total rental and wages/staff costs deducted in proportion to the value of inventory received by Link and Alldressedup respectively, is therefore as follows:

	Book value of inventory transferred ($)	**Expenses to be deducted ($)**	**Net amount to be repaid to Living ($)**
Link	1,289,858.90	517,829.88	**772,029.02**
Alldressedup	1,337,926.50	537,127.21	**800,799.29**
Total	2,627,785.40	1,054,957.09	**1,572,828.31**

68 The total amounts to be repaid by the associate companies to reverse all the transactions tainted by undue preference is therefore as follows:

	Transfers of inventory ($)	**Transfer of Graha shares ($)**	**Cash payment in December 2008**	**Total amount to be repaid to Living ($)**
Link	772,029.02	120,000	361,050	**1,253,079.02**

[68] SGS Report, Appendix 16.

Alldressedup	800,799.29	–	–	**800,799.29**
Total	1,572,828.31	120,000	361,050	**2,053,878.31**

69 Since my order for reversal is not for the entire amount claimed by the liquidators, the issue I had raised earlier of the remedy being disproportionate to the claim is no longer as apparent in this case. So, subject to my comments below (see [76] below), there is no need for the court to order a partial reversal of the transactions found to be undue preferences. However, since both parties have made submissions on whether the court has the power to make such an order, I shall make some observations for future reference on this issue.

Does the court have the power to order a partial reversal of the undue preferences?

70 The court's remedial powers in the context of undue preferences are governed by s 99(2) of the Bankruptcy Act which provides:

> **Unfair preferences**
>
> **99.**
>
> ....
>
> (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.
>
> [emphasis added]

71 Section 102(1) of the Bankruptcy Act provides for the specific remedial powers of the court, without prejudice to the generality of s 99(2):

> **Orders under sections 98 and 99**
>
> **102**.—(1) Without prejudice to the generality of sections 98(2) and 99(2), an order under either of those sections with respect to a transaction or preference entered into or given by an

> individual who is subsequently adjudged bankrupt may, subject to this section —
>
> > (a) require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the Official Assignee;
> >
> > (b) require any property to be so vested if it represents in any person's hands the application of the proceeds of sale of property so transferred or of money so transferred;
> >
> > (c) release or discharge (in whole or in part) any security given by the individual;
> >
> > (d) require any person to pay, in respect of benefits received by him from the individual, such sums to the Official Assignee as the court may direct;
> >
> > (e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction or by the giving of the preference to be under such new or revived obligations to that person as the court thinks appropriate;
> >
> > (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for the security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction or by the giving of the unfair preference; and
> >
> > (g) provide for the extent to which any person whose property is vested by the order in the Official Assignee, or on whom obligations are imposed by the order, is to be able to prove in the bankruptcy for debts or other liabilities which arose from, or were released or discharged (in whole or in part) under or by, the transaction or the giving of the unfair preference.

72 Despite the use of the word "shall" in s 99(2) of the Bankruptcy Act, the expression "as it thinks fit" has been construed as granting the court a wide discretion within the context of s 239(3) of the UK Insolvency Act 1986 which is *in pari materia* with s 99(2). For example in *In Re Paramount Airways Ltd (in Administration)* [1993] 1 Ch 223, the English Court of Appeal held at 239

that, despite the use of the verb "shall" in the provision, the court has an overall discretion which is wide enough to enable the court to make *no order at all* "if justice so requires".

73 The following dicta, also by the English Court of Appeal, in *Ramlort Ltd v Michael James Meston Reid* [2004] EWCA Civ 800 (at [125]) is instructive as well:

> … [A]s a matter of general approach, in deciding what is the appropriate remedy where there has been transaction at an undervalue the Court does not start with the presumption in favour of monetary compensation as opposed to setting the transaction aside and reinvesting the asset transferred. *Indeed, in my judgement, in considering what is the appropriate remedy on the facts of any particular case the Court should not start from any priori position. Each case will turn on its particular facts, and the task of the Court in every case is to fashion the most appropriate remedy with a view to restoring, so far as it is practicable and just to do so, the position as it "would have been if [the debtor] had not entered into the transaction".* In some cases that remedy may take the form of reversing the transaction; in others it may not. In some cases it may take the form of an order for monetary compensation; in others it may not.
>
> [emphasis added]

74 Hence on its face there is no indication that the court's general powers under s 99(2) preclude me from ordering that a specific sum be transferred to Living sufficient to meet the claims of the non-related creditors, particularly Cheong. Such an order would avoid the potential harshness and unnecessary transactions costs resulting from the associate companies having to pay monies over to Living only for a substantial portion to become repayable to them after their Proofs of Debts are assessed.

75 An analogy can perhaps be made with the cases on transactions at undervalue. The court's remedial powers in dealing with undervalue

transactions, under s 98(2) of the Bankruptcy Act, are exactly the same as those provided under s 99(2) for undue preferences. In this context, it is accepted that the court may, in appropriate cases, allow the defendant to retain the asset in return for a payment of the difference between the full value of the asset and the value which was in fact received by the company (see R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) ("*Goode*") at para 13-46; *Pena v Coyne and another (No 2)* [2004] 2 BCLC 730 (*"Pena*"). The liquidators point out that such an order is distinguishable as it results in the company obtaining the *full* value of the asset, unlike the partial reversal proposed by the defendants in this case. Nevertheless, I find the analogy apposite as both orders involve the court necessarily sanctioning a wrongful transaction which ought not to have taken place, and look to the practical impact of the remedial order on the parties before the court. In a case where the court makes a partial reversal of a preferential transaction on the basis that the preferred creditor will *ultimately* be entitled to the remaining sums in any case, the company is *in reality* restored to the position it would be in if a full reversal is ordered. In such circumstances, it is hard to see how the other unsecured creditors will be prejudiced.

76 The difficulty with this analysis, however, is that the court in making such an order will invariably have to undertake a projected calculation of the various claims and take into account imponderables such as the liquidators' overall expenses. Crucially, in deciding on the partial amount to be reversed, the court will have to notionally adjudicate the competing Proofs of Debts of the company's creditors which is properly the role of the liquidators. While this consideration did give me pause, I am of the view that this is a factor which goes towards the exercise of the court's broad discretion under s 99(2) of the Bankruptcy Act and does not rule out the possibility that, in an

appropriate case, the court may order a partial reversal of transactions found to be undue preferences if justice so requires. Such an order may be justified, for example, in clear cases where the parties' claims are uncontroversial, or where there is an agreement between the preferred creditor and the liquidators as to the amount which ought to be set aside for the claims of the other unsecured parties (see *Pena* at [28]). In this case, the parties were not at *ad idem* as to the amount to be partially reversed should the court arrive at the view that it has the power to do so. Both parties' calculations were premised on different base figures, and significantly did not provide for the liquidators' costs and expenses. As it is quite clear that Cheong will not in any event achieve full recovery of its claim of $1,297,135.75 (see [8] above), a reversal in the sum of $2,053,878.31 may appear extravagant. Given the court's determination of the precise sums to be reversed, and its consequential impact on the claims of the associate companies, the parties are thus invited to agree on a lesser sum to be reversed. In the absence of such an agreement, my order to reverse the full sum of $2,053,878.31 stands.

Breach of directors' duties

Breach arising from undue preference

77 The law on the duties of a director in the eve of a company's insolvency was authoritatively set out by VK Rajah JA in *Progen* (at [48]):

> It is trite that directors have a duty to act in the best interest of the company as a whole. When a company is solvent, the company's directors owe no duty to creditors. (See *Federal Express Pacific Inc v Meglis Airfreight Pte Ltd (formerly known as Thong Soon Airfreight Pte Ltd)* [1998] SGHC 417 ("*Federal Express*") at [17] where it was held that such a duty to consider creditors' interests only arises during insolvency or in a state of near insolvency; and *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, applied in *Lexi Holdings plc (In Administration) v Luqman* [2007] EWHC 2652 (Ch); also see

> the observations in Kala Anandarajah, *Corporate Governance, Practice and Issues* (Academy Publishing, 2010) at p 275.) However, *it is now also settled law that when a company is insolvent, or even in a parlous financial position, directors have a fiduciary duty to take into account the interests of the company's creditors when making decisions for the company. This fiduciary duty requires directors to ensure that the company's assets are not dissipated or exploited for their own benefit to the prejudice of creditors' interests. In this regard, the purpose of this duty mirrors that of the avoidance provisions in seeking to preserve the company's assets for distribution to the company's creditors through the mechanism of insolvency. …*
>
> [emphasis added]

78 In the present case, my finding that the transfers of the inventory and shares, as well as the cash payments to Link in December 2008 were undue preferences *ipso facto* leads to the conclusion that Tina Tan had breached her fiduciary duty to ensure that the company's assets are not misapplied to the prejudice of creditors' interests. The fact that the purpose of this duty mirrors that of the statutory avoidance provisions makes this inference practically inevitable in every case although I accept that there may be exceptional circumstances where a director may be found to have acted *bona fide* in the best interests of the company even though he or she might have procured an undue preference (see, for example, *Wilson v Masters International* at [91]–[95]). Here, however, as I have found that these transactions were procured by Tina Tan without a genuine belief that there were no other substantial creditors at the time, and that she was influenced by a desire to prefer the associate companies, it necessarily follows that she is in breach of her duties as Living's director.

79 The defendants submit that Tina Tan should nonetheless be excused under s 391 of the Companies Act. The provision empowers the court to grant relief if it is found that the defaulting director "has acted honestly and reasonably and that, having regard to all the circumstances of the case

including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach". In support of this submission, they rely on factors such as the eventual payment of the rental to Cheong up to June 2009, the fact that Tina Tan ensured that Living's other creditors were paid, and the personal losses which she has suffered as a result of Living's failure as well as the adverse publicity following the commencement of the present proceedings.[69] None of these factors, however, go towards showing that she had acted honestly and reasonably in procuring the transactions which I have found to be undue preferences. The payment of the rental to Cheong was late, incomplete and in any case, unrelated to the wrongful transfers. Similarly, the fact that Tina Tan ensured that the claims of Living's other creditors were satisfied is also immaterial, particularly as these were mostly secured creditors who have recourse against Tina Tan, her husband and her mother under their personal guarantees and were only paid after exercising their security rights under the respective credit facilities.[70] Finally, it is difficult to see how the personal losses suffered by Tina Tan indicate that her actions were honest and reasonable, especially as I have found that the transactions were influenced by a desire to prefer the associate companies of which she is a director and the sole shareholder.

80 I also accept the liquidators' case that Tina Tan, in procuring the undue preferences, was influenced by a desire to better her own position as a personal guarantor of the associate companies' credit facilities with their banks as well. At the hearing, Tina Tan conceded that Link and Alldressedup were hard pressed by the banks in 2008 to settle their outstanding loans amounting to over $1.5m.[71] It is also common ground that the cash payments

69 DCS, para 77.

70 DCS, para 77(b).

to Link and the proceeds from the transferred inventory were used mainly to settle these debts.[72] Thus the conclusion that a desire to better her own position as a guarantor of these loans must have operated on Tina Tan's mind in some form when she procured the undue preferences is irresistible.

81 Hence I am not satisfied that this is a case where relief under s 391 of the Companies Act ought to be granted.

What order, if any, should be made against Tina Tan?

82 The more vexing question is what order, if any, should be made against Tina Tan in her capacity as director for procuring the undue preferences. In *Progen*, while the Court of Appeal found that the company's directors had committed clear and manifest breaches of their duties (at [53]), no orders were made against them personally, apart from an adverse costs order against one of the directors who was found to have made egregious misrepresentations to the court (at [70]). This however can be explained by the fact that the directors in *Progen* were not parties to the proceedings unlike Tina Tan who is a defendant in this matter. As noted in my introduction, to-date there is no reported decision by our courts on what orders can or should be made against the director as a defendant in such proceedings.

83 The liquidators seek an order that Tina Tan be required to pay a sum equal in value to the undue preference transactions to Living. They rely on the English Court of Appeal's decision in *Liquidator of West Mercia Safetywear Ltd v Dodd and another* (1988) BCC 30 ("*West Mercia*") which is the authority most often cited for the proposition that a director may be made

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71 NOE for 28 January 2016, pp 60:1 – 61:14.

72 TT affidavit, paras 44 and 56; NOE for 28 January 2016, pp 72:13 – 73:1.

personally liable for procuring an undue preference (see *Goode* at para 14-14; A Walters, "Preferences" in J Armour and H Bennett, *Vulnerable Transactions in Corporate Insolvency* (Hart Publishing, 2003) ch 4 ("*Walters*") at para 4.104).

84 In *West Mercia*, the director of the company, Mr Dodd, authorised a repayment of a debt of £4,000 owed to its parent company so as to reduce his own personal liability under a guarantee. The liquidators, instead of bringing an action for undue preference, brought direct proceedings against Mr Dodd for misfeasance and breach of fiduciary duty. At first instance, the liquidators' claim failed on the basis that no assets of the company had been misapplied since the monies had been used merely to repay a debt of the company. The English Court of Appeal rejected this analysis and held that Mr Dodd was guilty of a breach of duty by causing the repayment to be made in disregard of the interests of the general creditors of the insolvent company. The question then arose as to the order to be made against him. It was held that "[*p*]*rima facie* the relief to be granted where money of the company has been misapplied by a director for his own ends is an order that he repay that money with interest" (at 33). The following order was consequently made on the facts:

(a) Mr Dodd was to repay the £4,000 to the company with interest;

(b) the debt due from the company to the parent company was to be taken as notionally increased by the same amount to restore the position to what it would have been if there had not been an undue preference; and

(c) any dividend attributable to the extra monies thus added back to the debt of the parent company was to be recouped to Mr Dodd rather than being paid to the parent company.

85 This order was seen as "a rough and ready way of achieving justice on both sides" as it ensured that the unsecured creditors did not receive a larger dividend than they would have otherwise obtained. Specifically, the order that the parent company's dividend attributable to the repaid monies was to be paid to Mr Dodd instead ensured that the parent company, which was not itself ordered to make any repayment, would not be enriched at the expense of Mr Dodd.

86 The liquidators also rely on the English High Court's decision in *Kevin Hellard, Devdutt Patel (in their capacity as the Joint Liquidators of HLC Environment Projects Ltd) v Horacio Luis De Brito Carvalho* [2013] EWHC 2876 (Ch) ("*Hellard*") which applied *West Mercia*. In that case, the directors once again argued that where a payment has gone to reduce a genuine liability of a company, it has *ex hypothesi* not suffered a loss. They sought to distinguish *West Mercia* on the basis that the payment in *West Mercia* was made to repay a debt which Mr Dodd had personally guaranteed and was "for his own end". This was also the same argument raised by the defendants in their attempt to distinguish *West Mercia*. This argument was emphatically rejected, in my view rightly so, by John Randall QC (sitting as a Deputy High Court Judge). He held that *West Mercia* highlighted the width of the remedial powers the court has under s 212 of the UK Insolvency Act 1986 (formerly s 333 of the UK Companies Act 1948) and that there was no need for facts akin to a personal receipt by the director. The fact that the director may not have personally benefitted from the undue preference does not render it any less a breach. In any event, the evidence in this case indicates that Tina Tan

did personally benefit from the undue preferences given to the associate companies as they were used to discharge bank loans secured by her personal guarantee. The court in *Hellard* also found that proof of loss to the company is not strictly required as a claim against a director in such circumstances is analogous to a claim against a trustee to restore a fund that he had misapplied (at [139]–[145]). Orders similar in terms to those made by the Court of Appeal in *West Mercia* were held to be *prima facie* appropriate (at [148]–[151]).

87 I find the reasoning adopted by the English courts in *West Mercia* and *Hellard* compelling. Holding a director who procures an undue preference directly responsible for restoring the company to the position it would otherwise have been in is not only just, but also in line with the clear direction of the Singapore Court of Appeal in *Progen* that a director has a fiduciary duty to take into account the interests of the company's creditors when a company is insolvent, or near insolvency, and that the purpose of this duty mirrors that of the statutory avoidance provisions. Finding otherwise would empty this duty of substance.

88 Admittedly in both *West Mercia* and *Hellard* the only claims were those against the directors as the plaintiffs did not rely on the statutory provisions governing undue preferences. But I see no reason why a company should not be able to bring concurrent claims for both undue preference and breach of fiduciary duty as the liquidators have done in this case (see *Walters* at para 4.104). Although they concern the same subject matter, the two claims are clearly premised on distinct causes of action. This however is subject to the caveat, which I will return to below, that the courts must be slow in allowing the liquidator to employ the claim against the director as a means of circumventing the strict statutory criteria for an undue preference laid down by Parliament in the Bankruptcy Act (see *Knight v Frost and others* [1999]

1 BCLC 364 ("*Knight*") at 381–382; *Re Continental Assurance Co of London plc (in liquidation) (No 4); Singer and another v Beckett and others* [2007] 2 BCLC 287 at [420]).

89 Next, does it make any difference that the orders in *West Mercia* and *Hellard* were made under the UK statutory equivalent to s 341 of our Companies Act – a provision which the liquidators have neither pleaded nor relied upon in this case? In my view, it does not. Section 341 is derived from s 333 of the UK Companies Act 1948 (now s 212 of the UK Insolvency Act 1986) and allows the liquidator to bring misfeasance proceedings against delinquent officers of the company summarily and without trial. As has been held, the section does not create any new rights but only provides a summary mode of enforcing rights which apart from the section would have to be enforced by an ordinary action in the courts (see *Re Kie Hock Shipping (1971) Pte Ltd* [1983–1984] SLR(R) 796 at [39]; *Law and Practice of Corporate Insolvency* (A Chan gen ed) (LexisNexis, 2014) at p 457). Thus the principles laid down in *West Mercia* and *Hellard* are equally applicable to this case.

90 Accordingly I find that Tina Tan is liable to repay the sum of $2,053,878.31 to Living representing the total value of the undue preferences as calculated earlier (see [68] above). This liability is joint and several with the liability of the associate companies to repay this sum. Applying *West Mercia*, I also order that to the extent any repayments are made by Tina Tan personally rather than Link or Alldressedup, the dividend attributable to these monies added back to the debt of the associate companies are to be recouped to Tina Tan rather than paid to the associate companies. There is no need for me to order that the sum due to the associate companies be notionally increased to what it would have been had there been no undue preference as this necessarily follows from my setting aside of these transactions.

Breach arising from other claims

Cash transfers outside the relevant period

91 Outside the relevant period, from 2 January 2008 to 12 May 2008, there was a net cash transfer of $980,000 from Living to Link. The liquidators submit that these payments were made in breach of Tina Tan's fiduciary duties, essentially for the same reasons they claim the remaining payments made in 2008 were undue preferences. As I have found that the payments made throughout 2008, apart from those made in December 2008 prior to Living ceasing business, were a part of a legitimate series of mutual dealings under a running account between the two companies, it follows *a fortiori* that these earlier payments were legitimate as well. Hence, I find that Tina Tan did not breach her duties as a director in procuring these payments.

92 Additionally, *even if* the evidence suggested that Living had been insolvent when these payments had been made and that Tina Tan had been influenced by a desire to prefer the associate companies in procuring them, it is likely that I still would not have found that she had breached her duties as a director in effecting these earlier payments. As I noted above, the courts must be slow in allowing the liquidator to circumvent the strict statutory criteria for an undue preference laid down in ss 99 and 100 of the Bankruptcy Act by bringing a claim directly against the director. In *West Mercia*, the payment in question was an undue preference made within the relevant statutory period prior to the commencement of a winding up. So the case is not authority for the proposition that a director who causes the company to prefer one of its creditors over another *outside* the statutory period is liable to replace the money at the suit of the company (see *Knight* at 382).

Personal expenses

93 The liquidators' final claim concerns the personal expenses of Tina Tan and Lionel Leo, amounting to $41,738.80, which were reimbursed by Living between 1 May 2008 and 15 July 2009. It is submitted that these were not for the benefit of Living's business and that Tina Tan breached her fiduciary duties in procuring them.

94 The defendants' defence that these expenses were incurred for the purpose of generating more business for Living and maintaining business relationships necessary for the conduct of its business in the fashion industry is untenable following my finding that Living had ceased operating on 31 December 2008 and that its retail business was transferred over to Living on that date (see [24] above). It follows that even if these reimbursements, which included payments for Tina Tan and Lionel Leo's country club bills, hair salon charges and miscellaneous credit card bills, constituted legitimate business expenses, they would not have been for the benefit of Living. I also note that Living was insolvent both on a cash flow and balance sheet basis throughout this period. Hence, I find that Tina Tan did breach her fiduciary duties to Living in procuring the reimbursement of these personal expenses.

95 Again, there is no basis for me to find that Tina Tan had acted honestly and reasonably in effecting these payments which were made after the decision to wind down Living was reached in December 2008. Thus relief under s 391 of the Companies Act is equally inappropriate for this claim.

96 As these reimbursements were not for the benefit of Living, this was a misapplication of the company's assets which Tina Tan is liable to restore. She is thus to repay the sum of $41,738.80 to Living.

Conclusion

97 In summary, these are my findings and orders in this case:

(a) The cash payments made by Living to Link from 2 January 2008 to 30 November 2008 were part of a series of legitimate dealings under a mutually beneficial running account between the companies.

(b) The transfers of the inventory to Link and Alldressedup on 31 December 2008, the transfer of the Graha shares to Link on 1 April 2009, and the cash payments of $361,050 made to Link in December 2008 are set aside as undue preferences. To reverse these transactions, Link and Alldressedup are to repay to Living the sums of $1,253,079.02 and $800,799.29 respectively.

(c) Tina Tan did breach her fiduciary duties as a director of Living in procuring the above transactions and is liable to repay the total sum of $2,053,878.31 to Living. This liability is joint and several with the liability of the associate companies to repay the sums stated above, and to the extent any payments are made by Tina Tan personally rather than Link or Alldressedup, the dividend attributable to these monies added back to the debt of the associate companies are to be recouped to Tina Tan rather than paid to the associate companies.

(d) Tina Tan also breached her fiduciary duties by effecting the reimbursement of the personal expenses of herself and Lionel Leo in 2009. She is thus to repay the value of these reimbursements totalling $41,738.80 to Living.

98 Costs should follow the event. The trial, including oral submissions, was heard over five and a half days, with two rounds of written submissions

exchanged. Seven amendments were made to the Defence and Counterclaim and, as noted at [13] above, several defences were abandoned in the course of the trial.

99 Taking into account these factors, and the fact that the liquidators did not succeed in reversing all the impugned transactions, I order the defendants to pay the liquidators' costs which I fix at $180,000, plus reasonable disbursements to be agreed if not taxed. For the avoidance of doubt, the defendants are jointly and severally liable for the costs so ordered.

Steven Chong
Judge

Suresh Sukumaran Nair and Tan Tse Hsien, Bryan (Advocatus Law LLP) for the plaintiffs;
Tan Kheng Ann Alvin and Lo Ying Xi, John (Wong Thomas & Leong) for the defendants.