IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1994] SGCA 130

CA 58/1994

Between

Lin Securities Pte (in liquidation)

… *Appellant*

And

Royal Trust Bank (Asia) Ltd

… *Respondent*

GROUNDS OF DECISION

Insolvency Law — Avoidance of transactions — Unfair preferences

Version No 1: 29 Oct 2026 (23:45 hrs)

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Lin Securities Pte (in liquidation) and Others v Royal Trust Bank (Asia) Ltd

[1994] SGCA 130

CA 58/1994
Karthigesu JA; L P Thean JA; Yong Pung How CJ
22 November 1994

1 Cur Adv Vult

2 ***The background***

3 The first appellants, Lin Securities Pte (Lin), are a stockbroking company in liquidation, and the second, third and fourth appellants are the liquidators. The respondents are a merchant bank. In June 1982, the respondents extended to Lin a short term revolving facility to the extent of $4m, secured by: (i) a charge over a portfolio of quoted shares, and (ii) joint and several guarantees of all the directors of Lin. To constitute the charge, an instrument called `letter of hypothecation` dated 3 August 1982 was executed by Lin, and the instrument was registered with the Registry of Companies. Under the terms of the letter of hypothecation, the respondents had, inter alia, the right to call for the physical deposit of the shares charged to them and take possession of them, and in the event of a breach of a term thereof or a default in payment of any money due, the respondents had the right to dispose of such shares and apply the net proceeds in or towards payment of the entire amount due and owing to them.

4 On 4 August 1982, Lin began to utilize the facility granted by the respondents. Since then and until 21 January 1986, as required by the respondents, Lin had without fail submitted to the respondents weekly `certificates of hypothecation` stating the quantity, counter, unit price and value of the shares held in their possession and charged to the respondents; but the numbers of the certificates in which the shares were comprised were not stated. Lin retained at all times possession of all the shares which were charged to the respondents. As it transpired, Lin had similar arrangements with 20 other banks which had also granted facilities to Lin. In favour of all these banks similar letters of hypothecation were executed, and all these instruments contained substantially the same or similar terms. Each asserted that certain shares described in daily or weekly certificates (as the case may be) to be furnished by Lin were in the physical custody of Lin and were charged to the bank in question. All the banks appeared to be contented with this form of security and they did not interfere with Lin`s practice of retaining the shares and freely trading in them. Under each letter of hypothecation, Lin delivered to the bank concerned daily or weekly certificates, as the case may require, of the shares in their custody which were said to be charged or `hypothecated` to the bank. Like the certificates submitted to the respondents, these certificates stated only the quantity, counter, unit price and value of the shares as of the dates of the certificates, and did not state the numbers of the certificates in which the shares were comprised. Furthermore, all the shares held in Lin`s possession and charged to the banks (including the respondents) under the letters of hypothecation were not set aside separately and demarcated for each of the banks respectively. All the shares so charged formed a common pool. Lin had, in fact, charged the same shares to various banks simultaneously.

Version No 1: 29 Oct 2026 (23:45 hrs)

5 In November 1985 or thereabout, there was a dramatic downturn in the stock markets of Singapore and Malaysia. On 2 December 1985, trading on The Stock Exchange of Singapore Ltd (SES) was suspended for a few days owing to the collapse of the company called Pan Electric Industries Ltd. When trading on the SES resumed, the values of most of the shares plummeted to an unprecedented level. As a result, the value of Lin`s assets, as represented by the shares in their possession, was severely and adversely affected. To compound the situation, Lin had a great number of shares in companies connected or associated with Pan Electric Industries Ltd and the values of these shares fell even more sharply than others in the wake of the collapse of the latter. At this time, Lin were heavily involved in `forward contracts` on these shares. Many `forward contract` parties defaulted and failed to make payment to and take delivery of the shares from Lin. Saddled with these huge irrecoverable debts, Lin were not able to honour their obligations to the sellers under the `forward contracts`. In consequence, Lin became insolvent and were clearly so from December 1985 onwards.

6 Thenceforward until about mid-February 1986, the creditor banks of Lin, one after another, demanded immediate delivery of the shares charged to them. The first bank to do so was The Development Bank of Singapore Ltd. By a letter dated 2 December 1985 they demanded from Lin immediate delivery of the shares charged to them. Lin resisted the demand, and there followed a further exchange of letters between them. In their letter of 27 January 1986, Lin audaciously offered to pay off the outstanding amount owing to the bank by 30 April 1986 which the bank accepted. At about this time, several other banks also made similar demands. The Industrial & Commercial Bank Ltd by a letter dated 22 January 1986 also demanded immediate delivery of the shares charged to them. Lin similarly refused to do so and subsequently also reached agreement

Version No 1: 29 Oct 2026 (23:45 hrs)

with that bank to pay off the outstanding amount by 30 April 1986. Arrangements were also made by Lin with Banque Paribas and Dresdner Bank Aktiengesellschaft, who had similarly demanded for the shares, to settle the amount owing to them respectively by or about late February 1986.

7 At about that time, the Monetary Authority of Singapore (MAS) and the SES were actively arranging for a $180m standby credit facility (the credit fund) to be made available to various stockbrokers who required assistance to meet their liabilities. It was expected that Lin would be able to have recourse to this credit fund. It would appear that it was because of the moves to establish the credit fund that these four banks and other banks, during this period, slightly relaxed their demands for immediate delivery of the shares charged to them. Of the 21 banks that held letters of hypothecation executed by Lin, only two banks, namely, the respondents and United Malayan Banking Corp Ltd (UMBC), succeeded in obtaining physical delivery of the shares charged to them respectively.

8 As we have related, prior to 21 January 1986, the respondents had been accepting the weekly certificates submitted by Lin, which stated the quantity, counter, unit price and value of the shares held in the latter`s possession and charged to the respondents. Periodic inspections of those shares were conducted by the respondents; the last inspection took place on 10 January 1986. On the Friday, 17 January 1986, Mrs Laura Hwang and Mr Wong Chin Kheng, the managing director and the executive director respectively of the respondents, called at the office of Lin and had a meeting with Mr Lin Tah Hwa, the managing director of Lin. At that meeting, Mr Lin was informed that the respondents` principals in London were concerned about the security furnished under the letter of hypothecation. Mrs Hwang and Mr Wong requested Mr Lin

Version No 1: 29 Oct 2026 (23:45 hrs)

to arrange for the shares charged to the respondents to be handed to the respondents each afternoon at or about 4.30pm and to be kept in their custody until 9am the following morning when the shares would be returned to Lin to enable them to carry on their business. Mr Lin agreed to the request. As regards this arrangement, Mr Wong in his affidavit filed on 8 February 1993 said:

> *Lin Tah Hwa agreed to our request. I believe that he did so because the arrangement proposed by us enabled Lin to carry on trading or dealing with the shares hypothecated to the defendant bank [ie the respondents]. In any event, if he had not agreed to our request, the defendant bank would have considered his refusal a breach of the terms of the LOH and called on Lin`s loan facility immediately. I believe that Lin Tah Hwa was aware of this.*

9 On the following Monday, the respondents confirmed in writing the arrangement made with Lin, and the arrangement was duly carried out. At the same time, Lin continued with the practice of submitting weekly certificates of hypothecation to the respondents.

10 As regards UMBC, they wrote to Lin on 14 February 1986, demanding immediate delivery of the shares charged to them. As with their responses to other banks, Lin declined to give in to the demand but assured them that every bank would rank pari passu. However, UMBC was adamant and gave Lin an ultimatum to the effect that, unless the demand was satisfied within three days, the credit facility granted would be withdrawn. Some discussion then took place between Mr Lin and one Mr Robert King of UMBC, and they came to a compromise. In exchange for the continuation of the credit facility granted to Lin up to $5m, the latter gave UMBC the custody of the shares charged as shown in the latest daily certificate.

Version No 1: 29 Oct 2026 (23:45 hrs)

11 Between 21 January 1986 and 21 February 1986, Lin and the respondents acted on the arrangement agreed to on 17 January 1986. By 21 February 1986, Lin`s effort to redeem themselves from their huge indebtedness came to an impasse, and rumours were rife that Lin was hopelessly beyond salvation. At a meeting with the officials of the MAS on 20 February 1986, the banks were informed that they were `at liberty to make their own commercial decisions` in relation to their securities. In the event, shortly after the shares were delivered to the respondents by Lin in the late afternoon of the Friday, 21 February 1986 (in accordance with the arrangement agreed), the respondents decided to exercise their rights under the terms of the letter of hypothecation to retain possession of the shares. Accordingly, on the morning of the following Monday, 24 February 1986, when a representative of Lin came, as usual, to retake delivery of the shares, the respondents refused to release the shares to Lin.

12 In the meanwhile, on 22 February 1986, Lin, probably overwhelmed by pressures mounted by the creditor banks, wrote to all of them unilaterally declaring the discontinuance of the `practice` of hypothecating shares. The letter stated as follows:

> *Dear Sirs*
>
> *We like to inform you that our letter herein supersedes our certificate of hypothecation to you dated _____ [date varies from bank to bank].*

13 With effect from the date hereof, we wish to inform you that we have decided to discontinue the practice of hypothecating shares to you.

14 The reason for this development is that arising from the case of , certain of our bankers have seen it fit to threaten us with an application to court to seize

possession of the shares hypothecated to them. As you know, all our bankers rank pari passu and we are sure you would not like to be put in a position inferior to them should they decide to act. At the same time, if we were to give all the shares to all the bankers on a physical deposit basis, frankly we would find it administratively impossible to carry out our business as stockbrokers.

15 We therefore intend to discuss with you how we can continue our relationship with you on another basis. Should our discussions result in no agreement between us then we intend to settle our account with you in full before 30 April 1986, which is the deadline we have agreed with several of our bankers.

16 We hope to hear from you in due course.

17 With best regards,

Yours faithfully
Lin Securities (Pte)
- Sgd -
Lin Tah Hwa
Managing director

18 This letter was received by all the banks including the respondents on 24 February 1986.

19 On 28 February 1986, the respondents, through their solicitors, wrote to Lin in the following terms:

> *We are instructed that a meeting of creditors of Lin Securities (Pte) has been convened on 28 February 1986. This is an event of default under the terms of the facility granted by our clients to*

> *you. Accordingly, we are instructed and do, on our clients` behalf, hereby declare that:*
>
> *(1) The loan is in default*
>
> (2) The principal ... with interest ... are immediately due and payable.
>
> *Take notice that unless ... paid in full within 48 hours hereof, ... , our clients will be compelled to take whatever action they may be advised.*

20 Between 24 February and 27 February, triggered no doubt by the contents of Lin`s letter of 22 February, 18 banks commenced legal proceedings against Lin seeking delivery of the shares charged to the banks. In these proceedings, although the respective plaintiffs obtained almost immediately ex parte interim injunctions for delivery of the shares, they were not able to obtain physical possession of any shares, as none were then available. One reason for this was that on 25 February 1986, officers of the Commercial Affairs Department raided the premises of Lin and seized all the share certificates held by Lin. On 28 February 1986, three of the creditor banks presented a winding-up petition, and the second, third and fourth appellants were on that day appointed provisional liquidators. On 18 July 1986, an order was made for the winding-up of Lin and the three appellants were appointed the liquidators for the purpose of such winding-up.

21 The shares held by the respondents were eventually sold by them sometime in March and April 1986 and a total sum of $4,034,604.22 was realized. After satisfying the amount owing to them under the letter of hypothecation, the respondents paid the surplus of the proceeds of sales amounting to $1,045.48 to the liquidators of Lin on 29 May 1986.

Version No 1: 29 Oct 2026 (23:45 hrs)

22 By an originating summons dated 20 January 1992, the liquidators sought a declaration that the delivery of the shares by Lin to the respondents was a fraudulent preference and was therefore void as against the liquidators; they also asked for the necessary consequential orders. At the hearing of the originating summons, the only issue for determination was whether the delivery of the shares by Lin to the respondents on 21 February 1986 was a fraudulent preference. In a reserved judgment delivered on 4 March 1994, the learned judge held that the liquidators had failed to establish that Lin in delivering the shares to the respondents intended to prefer the respondents over the other creditors of Lin, and accordingly, he dismissed the originating summons with costs. [See [1994] 2 HKC 168.]

23 **Appeal**

24 Against his decision, this appeal has been brought. Before us, the same issue has been raised as was raised before the learned judge, namely: whether the delivery of the shares to the respondents on 21 February 1986 was a fraudulent preference and was therefore void as against the liquidators. It is convenient at this stage to set out the relevant law governing the issue of fraudulent preference. Section 329 of the Companies Act (Cap 50, 1994 Ed), in so far as relevant, provides as follows:

> *(1) 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 under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner.*
>
> *(2) For the purposes of this section, the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be -*
>
> (a) in the case of a winding up by the Court -

> (i) the date of the presentation of the petition; or
>
> (ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up, the date upon which the resolution to wind up the company voluntarily is passed,
>
> whichever is the earlier; …

25 This section rides on the law of bankruptcy, and the relevant provision in the Bankruptcy Act (Cap 20) is s 53, which, so far as relevant, is as follows:

> *(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor or any person in trust for any creditor, with a view to giving the creditor or any surety or guarantor for the debt due to the creditor a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within 3 months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the Official Assignee.*

26 In the present case, there is no dispute that Lin was insolvent at the time when the shares were handed over to the respondents. Nor is it disputed that the handing over of the shares to the respondents took place within three months of the presentation of the winding-up petition against Lin. The only issue is whether Lin gave possession of the shares to the respondents with a view to giving the latter a preference over the other creditors, and the onus lay on the appellants.

27 The learned judge in coming to his decision considered two English cases, namely, ***Re M Kushler Ltd*** case1 and ***Re Cutts (a bankrupt)*** , . These are clearly relevant cases pertaining to the issue. In ***Re M Kushler Ltd*** , K and his wife were the sole directors and shareholders of a company which had an overdraft facility with a bank which was secured by K`s personal guarantee and

Version No 1: 29 Oct 2026 (23:45 hrs)

life insurance policy. On 12 May 1941, they were advised that the company had become insolvent and should therefore be wound up. Between then and 21 May 1941, sums were paid into the overdraft account as a result of which the overdraft was extinguished, and K was thus relieved from liability under his personal guarantee. There was no evidence that there was any form of pressure exerted on the company by the bank. It was held that the payment was a fraudulent preference. Commenting on the interpretation of the then equivalent provision dealing with fraudulent preference, which was in pari materia with s 53 of our Bankruptcy Act, Lord Greene MR said, at pp 251-252:

> *In some cases the circumstances may be insufficient to justify an inference of an intent to prefer, but at the other end of the scale comes the type of case, which is extremely familiar nowadays, where the person (such as a director) who makes the payment on behalf of the debtor is himself going to obtain by means of it a direct and immediate benefit. These cases of guarantees of overdraft and securities deposited to cover overdrafts are very common, and where directors have given guarantees the circumstance of a strong element of private advantage resulting from payment of the debt may justify the court in attaching to the other facts much greater weight than would have been attached to similar facts in a case where that element did not exist.*

28 Taking the whole situation in the present case, the proper inference to be drawn, in my opinion, is that the payments after May 10 were made with a view of giving to the bank a preference over the other creditors and so discharging the guarantee, ... The statute is directing the court to ascertain the state of mind of the payer in relation to a particular transaction. A state of mind is as much a fact as a state of digestion and the method of ascertaining it is by evidence and inference, and I can see nothing in the language of the section which justifies the view that the problem which the legislature sets the court is to be dealt with on any principles different from those commonly employed in drawing inferences of fact. It must, however, be remembered that the inference to be drawn is of something which has about it, at the least, a taint of dishonesty,

Version No 1: 29 Oct 2026 (23:45 hrs)

and, in extreme cases, much more than a mere taint of dishonesty. The court is not in the habit of drawing inferences which involve dishonesty or something approaching dishonesty unless there are solid grounds for drawing them.

29 Goddard LJ said, at p 255:

> *The authorities establish that the mere fact that a preference is shown is not sufficient to enable the court to draw the inference that that preference was fraudulent. Before that inference can be drawn the court must be satisfied that the dominant motive of the debtor was to prefer the particular creditor. It would be dangerous to attempt to lay down any particular circumstance or set of circumstances from which the court was or was not justified in drawing that inference, except to say that the mere fact that a preference is shown is not sufficient.*

30 We now turn to the next case, ***Re Cutts*** , which was a case of personal insolvency. The bankrupt was a director of a building society. He was also a solicitor and transacted all the conveyancing business of the building society. At the beginning of 1953 the bankrupt sold a house which belonged to him but was mortgaged to the building society. He conveyed it to the purchaser free of the mortgage, handing over on completion a discharge executed by the building society against the payment of the mortgage money. The bankrupt received the money and applied it for his own purposes. On 12 March 1954 the bankrupt, who was then unable to pay his debts as they became due, paid to the building society the mortgage money with interest. On 6 September 1954, which was within the six-month period laid down in the statute, he was adjudged bankrupt on his own petition. It was held that the payment to the building society was void on the ground that it was made by the bankrupt with a view to preferring the building society over the other creditors. Commenting on s 44(1) of the Bankruptcy Act 1914 of the United Kingdom, which was in pari materia with s 53 of our Bankruptcy Act, Lord Evershed MR said, at p 541:

> *I shall not attempt for myself any exhaustive exposition of the requirements of the subsection: but, so far as those requirements are in issue in the present appeal it may, I think, now be safely stated: (i) The onus is on the person alleging a `fraudulent preference` to prove to the satisfaction of the court that the payment impugned was made by the creditor `with a view of` preferring the payee over his other creditors; in other words, the onus is on the person alleging a fraudulent preference (normally, as here, the trustee in bankruptcy) to prove the fact of the debtor`s requisite state of mind, that is, his intention. (ii) It is competent for the court to draw the inference of intention to prefer from all the facts of the case, particularly when there is no direct evidence of intention before it; but the inference should not be drawn, having regard to the situation of the onus of proof, unless the inference is the true and proper inference from the facts proved. Thus, it will not be drawn if the inference from the facts is equivocal, and, in particular, it will not be drawn from the mere circumstance that the creditor paid was in fact `preferred` in the sense that he was paid when other creditors were not paid and could not be paid. ... (iii) The words used in the section are `with a view of`. I have used the word `intention` as synonymous with the word `view`; and other words - eg `object` - have also been used as synonyms in the cases. Whether the word used be `intention` or some other word, since it is notorious that human beings are by no means always single-minded, the intention to prefer which must be proved is the principal or dominant intention. There may also be a valid distinction for present purposes between an intention to prefer and the reason for forming and executing that intention.*

31 His Lordship then went on to illustrate the distinction between the intention whether or not to prefer and the reason that led to the formation and carrying out of that intention. He said, at pp 541-542:

> *If a debtor, knowing himself to be insolvent and knowing, also, that bankruptcy is imminent, deliberately elects to pay his oldest friend or his closest relative, and to leave his other creditors unpaid or with little chance of being paid, it would appear to me to be irrelevant that he made the selection because of the love he bore for his friend or relative or because of his hopes for general but unspecified favours from them in the future. I am, therefore, not prepared to accept the submission of counsel for the Society that a deliberate choice in the present case by the debtor of the Society for payment because the Society was the most important of his clients could not for that reason constitute a fraudulent preference. For if a debtor deliberately selects for payment A in*

> *preference to all his creditors, it cannot to my mind matter, in the absence of other relevant circumstances, whether A is the debtor`s oldest friend, closest relative or best client. On the other hand, where a debtor, owing money in all directions, has also robbed his employer`s till, he may, knowing himself to be insolvent, elect to reimburse the till in order that, when the crash comes, the damaging fact of his robbery may not be discovered. Or a debtor may elect to make a particular payment under pressure of some threat, or to obtain for himself some immediate and material benefit or to fulfil some particular obligation. In these cases the reason for payment affects, essentially, the intention in making it. In the instances given, the intention, that is the real and dominant intention, will no longer be to `prefer` (ie to pay, as it were, out of turn) but will be to avoid the detection of a criminal act; to relieve the threat; to get the benefit and postpone the evil day; or to satisfy the particular obligation. Though the question of pressure in some form or another has, in the reported cases, often been the crux of the matter, it is plain that an inference of intention to prefer may be displaced in many other ways than by showing that the debtor acted under pressure. Examples are indeed legion.*

32 The decision in ***Re Cutts*** was followed by the High Court in Singapore in . At p 88, the court summarized the position as follows:

> *From the judgment of Lord Evershed it is clear that, first, the onus is upon the person who seeks to avoid the payment to prove that the payment was made with a view to preferring the recipient over the other creditors; secondly, the word `view` was construed as synonymous with `intention` or `object`; thirdly, where there is no direct evidence, it is open to the court to infer such intention from the facts, but such inference should only be drawn if it is the true and proper inference, and it will not be drawn from the mere fact that the creditor was paid when others were not, and, lastly, the intention to prefer must be the dominant or principal intention.*

33 Counsel for the appellants advanced a number of arguments in support of the contention that Lin acted `with a view` to preferring the respondents over the other creditors. First, Lin allowed the respondents to have possession of the shares, notwithstanding that the latter had not exerted any pressure. Second, Lin`s inconsistent responses to the respondents` and other banks` requests for

custody of the shares showed that Lin acted `with a view` to preferring the respondents. Third, Lin`s surreptitious conduct in giving the respondents overnight custody whilst at the same time representing to the other banks that all of them would rank pari passu showed all the more that Lin`s conduct was a deliberate choice. Fourth, once the deliberate act of a preferred payment made to a creditor in a situation of insolvency is proven, the only inference is that the payment was `with a view` to preferring that creditor. In this respect, counsel relied on the case of . In that case, the company with M and his wife as the only shareholders and directors had an overdraft facility with a bank which was secured by guarantees executed by him and his wife. It ran into financial difficulties and stopped trading. The next day M paid into the bank account two cheques, as a result of which the overdrawn account was cleared, and the directors gave notice terminating the guarantee. The company then went into liquidation within the three-month period. The liquidator took out a summons seeking a declaration that the payments made to the bank were a fraudulent preference under the statutory provisions which were in pari materia with s 329 of the Companies Act and s 53 of the Bankruptcy Act. At first instance, the judge dismissed the summons but his decision was reversed on appeal. Several findings of fact were made by the judge at first instance. First, M in paying the cheques to the bank account intended to pay off the bank ahead of other creditors. Second, the company was insolvent and M knew of the insolvency. And third, there was no pressure by the bank for payment to them. The Court of Appeal held that on these findings the clear inference to be drawn was that the payment was made with a view to giving the bank a preference over the other creditors. It should also be noted that M in fact had selfish interests to serve in making the payments. He and his wife as directors were the guarantors of the overdraft facility granted by the bank and the payment made to the bank extinguished their liability under the guarantees, and it appeared obvious that

he preferred the bank over the creditors to whom they had not given any guarantee. The facts in that case were reminiscent of ***Re M Kushler Ltd*** . They were, however, quite different from those of the case at hand.

34 In our judgment, the question, at the end of the day, is whether in all the circumstances Lin had acted `with a view` to preferring the respondents over all the other creditors. As Lord Evershed MR said in ***Re Cutts (a bankrupt)*** , the mere fact of a preference is not, without more, tantamount to proof that the debtor has acted `with a view` to prefer.

35 It is necessary to look at the circumstances in which Lin on 17 January 1986 came to the arrangement with the respondents, whereby the latter had overnight possession of the shares charged. It is not correct to say, as contended on behalf of the appellants, that no pressure had been exerted on Lin in coming to this arrangement. First, the arrangement was not made at the instance of Lin or on their own volition. As we have related, the managing director of the respondents, Mrs Laura Hwang, and the executive director, Mr Wong, together personally called on Mr Lin, the managing director of Lin. That was certainly not a social or a courtesy call; they did not go there for a cup of tea or coffee to exchange pleasantries with Mr Lin. To adopt the learned judge`s words, their joint attendance on Mr Lin spoke volumes of the concerns of the respondents and their determination to put the security arrangement on a firmer and more secured basis. Secondly, Mr Lin would not have acceded to `the request` made by Mrs Hwang and Mr Wong, if he could avoid or resist it; this was amply demonstrated by Mr Lin`s brash stand he boldly adopted in staving off the demands of other banks for immediate delivery of the shares. Thirdly, it is also clear that had the respondents made `the request` in the form of a letter in lieu of the personal call by Mrs Hwang and Mr Wong, Lin would not have acceded

Version No 1: 29 Oct 2026 (23:45 hrs)

to such request. The learned judge assessed the significance of the meeting in his judgment as follows:

> *Counsel for the plaintiffs made much of the fact that the defendant bank only `requested` Lin for the shares and did not demand for the shares or threaten legal action against Lin if he failed to deliver. Unlike the other banks, Laura Hwang, as managing director of the defendant bank, instead of writing letters of demand or issuing threats of legal action, appears to have taken the initiative, at a relatively early stage, to go to Lin`s office, explain the defendants` position, listen to his problems in handing over possession of the shares and as a solution to Lin`s trading difficulties offered to let Lin have the shares back during trading hours. She had no need to issue threats and demands. Her very visit at that stage to Lin`s premises with the executive director of the defendants would have spoken volumes of the defendants` sense of urgency and determination to sort matters out.*

36 The learned judge was justified in attaching such considerable significance to the personal call made by Mrs Hwang and Mr Wong on Mr Lin. We are disposed to take the view that there was a threat conveyed to Mr Lin.

37 Mr Wong in his affidavit said that Mr Lin was aware that if he (Mr Lin) did not agree to `the request`, the respondents would immediately terminate the facility and call for the payment of the amount owing. Looking at the circumstances realistically, we can see no reason for disbelieving what Mr Wong had said in his affidavit. A clear message of a threat had been effectively conveyed to Mr Lin in a businesslike manner without uttering any harsh language in the form of a threat or demand. It is only a matter of truism that pressure can be exerted in more ways or forms than one.

38 It is also significant that there was no evidence that the other banks had made any serious efforts to discuss with Lin the possibility of their holding the shares only during non-trading hours. To allow any bank to have full and

Version No 1: 29 Oct 2026 (23:45 hrs)

continued custody would mean in effect a cessation of Lin`s business. As Lin at that time expected that help from the $180m MAS fund was in the pipeline, Lin did what they could in the circumstances to avoid the knell of their imminent collapse. As such, the arrangement with the respondents allowed Lin to carry on trading without any effectual interruption, and at the same time enabled Lin to have the benefit of the facility from the respondents. On this, the learned judge said:

> *It appears to me that Lin agreed to the defendants` request for overnight custody of the shares, not because Lin intended to prefer the defendants over the other creditor banks, but because the arrangement enabled Lin to maintain good relations with the defendants so that its credit facilities would not be withdrawn and because it enabled Lin to carry on trading and dealing with the hypothecated shares.*

39 The case of is directly in point. There, the company in question contracted to purchase a plot of land. It obtained an overdraft from its bank which was secured by a deposit of the title deeds of the land. The bank, however, failed to register the equitable charge under the relevant provisions in the Companies Act 1948 of the United Kingdom. The company later ran into financial difficulty and was insolvent throughout the month of September 1965. On 29 September 1965, the bank requested for a legal charge over the land to be created in its favour. The company complied willingly and without any pressure from the bank. It was found as a fact that the person who had de facto control of the company genuinely thought that the bank had a first charge over the land by virtue of the deposit of the title deeds. In holding that the execution of the legal charge was not a fraudulent preference, Pennycuick J said, at pp 1419-1420:

> *The circumstances as they stood at 29 September were these: The company was insolvent and notice had been served by Mr Boyes of his intention to file a petition. But Mr Brown had not*

Version No 1: 29 Oct 2026 (23:45 hrs)

> *given up the struggle. He was hoping for funds on 1 January and he was playing for time. On 29 September Mr Brown believed that the bank already had a first charge on the Filey property, so by giving a legal charge the company was getting nothing, but equally it was giving nothing. There was no pressure and no consideration but, on the other hand, there was no detriment to the company. ... Taking into account all those circumstances and the evidence of Mr Brown himself, I think that the dominant attention in the mind of Mr Brown was to keep on good terms with the bank in the hope that the bank would or might be willing to give some sort of banking facilities to the company in the future. It is worth bearing in mind that the company had entered into arrangements with Ward [* ***our note****: Ward is another creditor] to pay by instalments, so that banking facilities would be needed for that purpose.*

40 Like FLE Holdings, Lin had nothing to lose by agreeing to let the respondents have overnight possession of the shares. It did not impede or disrupt their trading. Mr Lin at that time `had not given up the struggle`. It was necessary for him to keep on good terms with Mrs Hwang and Mr Wong so that Lin could continue to have the facility from the respondent. He was then also hoping or probably expecting a lifeline from the MAS credit fund which unfortunately did not materialize for Lin.

41 Reverting to the actual handing over of the shares to the respondents at 4.30pm or thereabout on 21 February 1986, we think that Lin did not expect the respondents to exercise their right to retain the shares when trading resumed on the morning of Monday, 24 February 1986. On that morning, a representative of Lin, as usual, went to the respondents` premises and requested for the shares. Only then were Lin informed that the respondents refused to part with the shares. The exercise of their right was not with the consent or acquiescence of Lin. Again, it is clear that if Lin knew or in any way suspected that the respondents would exercise their right and retain the shares, they would not have handed them to the respondents for the overnight possession on the afternoon

Version No 1: 29 Oct 2026 (23:45 hrs)

of 21 February. In our opinion, in delivering the shares to the respondents, Lin did not intend that those shares should be kept by the respondents to satisfy the latter`s debts. There was no intention on their part to prefer the respondents over the other creditors.

42 In the result, this appeal fails and is dismissed with costs. The security deposit in court is to be paid to the respondents to account of their costs.

43 ***Appeal dismissed.***

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Eben W Hamilton QC, Randolph Khoo and Thio Shen Yi (Drew & Napier) for the appellants
George Lim and Roslina Baba (Wee Tay & Lim) for the respondents

Version No 1: 29 Oct 2026 (23:45 hrs)