IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 58

OS 45/1992

Between

Lin Securities Pte (in liquidation)

… Plaintiff

And

Royal Trust Bank (Asia) Ltd

… Defendant

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] SGHC 58

OS 45/1992
S Rajendran J
04 March 1994

1 The plaintiffs seek a declaration that the delivery of certain shares to the defendant by Lin Securities (Pte) (`Lin`) on 21 February 1986 was void because:

> (a) it is a fraudulent preference under s 329 of the Companies Act, and/or
>
> (b) the memorandum of deposit dated 21 January 1986 pursuant to the terms of which the shares were allegedly handed over, is void and/or invalid and unenforceable.

2 At the hearing of the summons Mr George Lim, counsel for the defendant, indicated that the defendant would not be relying on the terms of the memorandum of deposit but would be relying solely on its rights under a letter of hypothecation dated 3 August 1982 executed by Lin. No arguments were therefore advanced in respect of the validity or otherwise of the memorandum of deposit.

3 **Background**

4 By a letter dated 29 June 1982, the defendant extended to Lin a short term revolving facility of $4m to be secured by:

> (a) a hypothecation over a portfolio of quoted shares acceptable to the lender (`security shares`), such shares to be held by the borrower in trust for the lender;
>
> (b) joint and several guarantees of Mr Lin Tah Hwa, Mrs Kathryn Tan nee Lin Shun Ching, Miss Lin Ai Ling, Mr Lin Cheang Hwa, Mr Ho Weng Meng and Mr Lin Jo Yan.

5 As required by the facility letter, the defendant, on 3 August 1982, executed a letter of hypothecation and from 4 August 1982, began to utilize the facility. The relevant provisions of the letter of hypothecation were:

> *3 Charge*
>
> (3) .1 As a continuing security for our performance of our obligations under the facility letter and the payment of the secured amounts, we hereby charge, transfer and assign to the bank all our rights, title and interest in and to the security shares and the additional security (whether such security shares are beneficially owned by us or charged or mortgaged to us by the owner thereof).
>
> *5 Undertakings*
>
> We hereby undertake to the bank that we will:
>
> …
>
> (b) transfer, assign, charge or in any other way deal with the security shares and the additional security only in such manner as the bank may from time to time direct or approve in writing.
>
> …
>
> (f) allow the bank or its representatives to inspect and (if the bank so requires) to take possession of all certificates and other documents of title to the security shares as and when the bank shall deem fit and necessary, and for that purpose to enter upon any premises where any of such certificates and documents may be;
>
> (g) on demand and at our cost and expense, deliver or cause to be delivered to the bank or as the bank may direct the

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> certificates relating to the security shares and all transfers and documents relating thereto and do all such acts and things as the bank may require to perfect or to protect the security hereby created.

6 Clauses 7.1 and 8.1 of the letters of hypothecation empowered the bank to sell, or otherwise dispose of, the shares for breach of any of the terms of the facility letter and to apply the proceeds towards the discharge of sums due to the defendant from Lin. From 4 August 1982 Lin utilized the facility.

7 Up to 21 January 1986, Lin, as required by the defendant, submitted to the defendant a weekly certificate of hypothecation stating the quantity, counter, unit price and value of the shares held in its possession and hypothecated to the defendant. From the outset Lin was allowed by the defendant to retain possession of the shares and to deal with the shares.

8 The letter of hypothecation was a device relied upon not only by the defendant but by 21 other banks which had extended facilities to Lin. The letters of hypothecation with all these banks were broadly in similar terms. Each asserted that shares which were in the physical custody of Lin, were `hypothecated` to that bank. The banks did not interfere with Lin`s practice of retaining the shares and freely trading in the shares so said to be hypothecated. Indeed, it eventually came to light that Lin had even `hypothecated` the shares given as security to one bank, to various banks simultaneously.

9 Towards the end of 1985, as a consequence of a dramatic downturn in the stock markets of Singapore and Malaysia, Lin found itself in an extremely precarious financial position. On 2 December 1985, trading on the Stock Exchange of Singapore (`SES`) was suspended owing to the Pan Electric crisis. The value of shares at this time fell sharply. As a result, the value of Lin`s assets,

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as represented by the shares in its possession, was adversely affected. In particular, Lin had a great number of Pan Electric, GIH, Supreme Corporation and Sigma Metal shares whose values fell sharply in the wake of the Pan Electric crisis. At this time, Lin was heavily involved in `forward contracts` involving these shares. Many `forward contract` parties defaulted and failed to make payment and take delivery of the shares. As a result, Lin was not able to honour its obligation to the sellers under the `forward contracts`. Lin became saddled with immense debts. As a result Lin became insolvent and was so from December 1985 onwards. This was not in dispute.

10 From December 1985 to late February 1986, the creditor banks, one after another, began to demand immediate delivery of the hypothecated shares. Of the 21 banks that had letters of hypothecation with Lin, only two banks, namely, the defendant herein and United Malayan Banking Corporation (`UMBC`), obtained physical delivery of the hypothecated shares.

11 By a letter dated 22 February 1986 which appears to have been sent to the banks on 24 February 1986, Lin unilaterally discontinued the practice of hypothecating shares. In the letter Lin stated:

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

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

13 The reason for this sudden development is that arising from the case of ***Standard Chartered v City Securities*** , 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 so 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.

14 We therefore intend now 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 upon with several of our bankers.

15 We hope to hear from you in due course.

16 Between 24 February 1986 and 27 February 1986, triggered no doubt by the contents of this letter, 18 banks commenced proceedings against Lin seeking the delivery of the shares hypothecated to the banks. In each of these proceedings, although the respective plaintiffs obtained almost immediately ex parte interim injunctions for the delivery of the shares, they were not able to obtain physical possession of the shares.

17 On 25 February 1986, officers of the Commercial Affairs Division raided the premises of Lin and seized all share certificates found. On 28 February 1986, three of the creditor banks presented a winding-up petition and M/s Peter Chi, Bobby Chin and Michael Ng were, on that day, appointed provisional liquidators. Lin was subsequently wound up on 18 July 1986 by an order of court made in Companies Winding Up No 183 of 1986.

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18 In the case of ***Re Lin Securities (Pte); Peter Chi Man Kwong & Ors v Asia Commercial Bank & Ors,*** the liquidators of Lin sought the determination by the court of the legal effect of each of the letters of hypothecation and the priorities as between the various banks. On 21 March 1988, Chao Hick Tin J held that the letters of hypothecation were floating charges and hence valid securities.

19 **The arrangements with the defendant**

20 The circumstances under which Lin agreed to give physical custody of the shares under hypothecation to the defendant were enumerated in an affidavit filed by the defendant. On Friday, 17 January 1986, Laura Hwang (the then managing director of the defendant) and Wong Chin Kheng, the executive director, met with Lin Tah Hwa of Lin at Lin`s office. At this meeting they informed Lin Tah Hwa that the bank`s principals in London were concerned about the securities furnished by Lin and they requested Lin Tah Hwa to arrange for the shares hypothecated to the defendant to be kept in the custody of the defendant each afternoon, from 4.30pm to the next morning, 9am. Lin Tah Hwa agreed to this request. On Monday, 20 January 1986, the defendant confirmed this arrangement in writing. An `additional safeguard` requested Lin to execute a memorandum of deposit and charge but as noted earlier, no arguments were raised on the validity or otherwise of this memorandum of deposit and charge.

21 Between 21 January 1986 and 21 February 1986, Lin and the defendant acted on the arrangements agreed to on 17 January 1986. However, by 21 February 1986, rumours were rife that Lin was in a difficult financial position. Also, at a meeting on 20 February 1986, the Monetary Authority of Singapore (`MAS`) had indicated that banks were at liberty to make their own commercial

decisions regarding securities held by them. In the event, shortly after the shares were deposited with the defendant by Lin on the evening of Friday, 21 February 1986, the defendant decided to exercise its rights under cll 5(b) and (f) of the letter of hypothecation to retain possession of the shares. Accordingly, on the morning of Monday, 24 February 1986, when a representative of Lin came, as usual, to take possession of the shares, the defendant refused to release the shares to Lin. Subsequent to the refusal, the defendant received from Lin the letter dated 22 February 1986 referred to above.

22 **Arrangements with other banks**

23 DBS

24 By a letter dated 2 December 1985, the day the stock market was suspended, the Development Bank of Singapore Ltd (`DBS`) demanded from Lin the immediate delivery of the shares hypothecated to it. Lin did not comply. DBS made a second demand for delivery by letter dated 23 January 1986. In its reply dated 23 January 1986, Lin stated:

> *We are clearly surprised you have taken the decision to vary the terms of your lending to us.*

25 You may not probably be aware that we have given an undertaking to all our bankers that everyone of them ranks pari passu, ie no one bank is put on a more preferential basis than the other. Our borrowings from all banks are against letters of hypothecation and personal guarantees. We therefore cannot accede to your request for deposit of shares.

26 We have had a mutually profitable relationship since our account was first set up in 1979. If you wish us to continue this relationship, please do not put forward a request which we would find very difficult to comply with.

27 To this letter, DBS, in its reply dated 24 January 1986, denied having varied the terms and referred to its rights under the letter of hypothecation. The letter also contained the following paragraph:

> *We cannot understand why you should find it very difficult to comply with our request. It only involves a transfer of the pledged shares which are in your possession to the bank. The operational procedures relating to the deposit of the said shares and the redemption therefore can surely be worked out between ourselves.*

28 In Lin`s reply of 27 January 1986, rejecting the demand, Lin did not address the offer by DBS to work out the `operational procedures relating to the deposit`. Lin however counter-offered to pay off the outstanding loan at the latest before 30 April 1986 and said in the letter:

> *When we entered into our banking relationship with you, it was the intention of both parties that shares were to be hypothecated to you and not deposited with you. Otherwise you would have secured the banking line with a memorandum of deposit of shares and would not have asked us to execute a letter of hypothecation instead.*

29 On 31 January 1986, DBS `without prejudice to our rights and remedies under the terms of our offer and the letter of hypothecation` accepted Lin`s proposal to pay off the loan.

30 Banque Paribas

31 On 29 January 1986, Banque Paribas wrote to Lin demanding delivery of the shares hypothecated to it. On 30 January 1986, Lin informed Banque

Paribas that it could not accede to the request because of an undertaking given to all its banks not to put any one bank on a more preferential basis than the others. The letter concluded with the words:

> *We have had a mutually profitable relationship since our account was first set up in November 1984. If you wish us to continue this relationship, please do not put forward a request which we would find very difficult to comply with.*

32 A meeting took place with Lin and Banque Paribas on 30 January 1986 in which Lin promised to settle its outstandings of US$1.5m with Banque Paribas by 28 February 1986.

33 At about that time, the MAS and the SES were actively arranging for a S$180m standby credit facility (`the credit fund`) to be made available to stockbrokers who might require 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 these moves to establish the credit fund that Banque Paribas (and no doubt DBS and other banks which, during that period, went easy on their demands for immediate possession of the shares) accepted the offer to repay and relented on its demand for immediate custody of the shares.

34 On 24 February 1986, Lin told Banque Paribas that due to unexpected changes in the credit fund, Lin would not be able to make the expected drawings and hence would not be able to meet the 28 February deadline. At this meeting Lin handed to Banque Paribas the letter dated 22 February 1986 referred to earlier.

35 Dresdner Bank

36 On 5 February 1986, Dresdner Bank Aktiengesellschaft (`Dresdner Bank`) demanded delivery from Lin of the shares hypothecated to it. In its reply dated 6 February 1986, Lin informed Dresdner Bank that it would not be delivering the shares demanded by Dresdner Bank on the grounds that an undertaking had been given to all banks that everyone of them would rank pari passu. The contents of this letter were similar to the contents of the letter to DBS dated 23 January 1986 referred to earlier. Lin however proposed to repay its debt of S$3m to Dresdner Bank in three equal monthly instalments of S$1m, commencing end of February 1986. This offer was accepted by Dresdner Bank on 12 February 1986. On 24 February 1986, Dresdner Bank received Lin`s letter dated 22 February 1986.

37 By a telex dated 21 February 1986 and a letter dated 22 February 1986, Overseas Union Bank Ltd (`OUB`) demanded the delivery of the shares hypothecated to it. Lin failed to do so and instead handed to OUB the letter of 22 February 1986 referred to above.

38 ICB

39 By a letter dated 22 January 1986, the Industrial and Commercial Bank (`ICB`) wrote to Lin demanding immediate delivery of the shares hypothecated to it. Lin`s reply, by letter dated 23 January 1986, was similar to the reply given to DBS on the same day which has been referred to above. ICB responded the same day by pointing out that by the letter of hypothecation, Lin was obliged to deliver the shares on demand. On 31 January 1986, ICB gave notice that unless the shares were delivered within five days, it would recall the facilities extended. On 3 February 1986, Lin counter-offered to pay off the outstanding loan at the latest before 30 April 1986. The counter-offer contained a paragraph

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identical to the paragraph in Lin`s letter to DBS dated 27 January 1986, referred to above, protesting that when they entered into the banking relationship, it was the intention of both parties that shares were to be hypothecated and not to be deposited with the bank.

40 ICB, by its letter of 6 February 1986, informed Lin that while it was willing to accept Lin`s suggestion to settle its outstandings by 30 April 1986, it insisted on Lin adhering to its undertaking in the letter of hypothecation to deliver the shares. When Lin failed to deliver the shares, ICB, by a letter dated 17 February 1986, recalled its credit facilities and gave Lin till the end of February to settle its outstandings of $2,986,019.88. Lin, in its reply to ICB dated 18 February 1986, stated that it would ignore ICB`s demand and would only settle its outstandings by 30 April 1986. On 24 February 1986, ICB received Lin`s letter of 22 February 1986.

41 UMBC

42 On 14 February 1986, UMBC demanded immediate delivery of the shares hypothecated to it. By its letter dated 17 February 1986, Lin, in declining to deliver the shares to UMBC, stated:

> *We find it difficult to accede to your request for deposit of shares. As highlighted to your Mr Lee Seow Gek, all our borrowings from our bankers have hitherto been secured against letters of hypothecation and personal guarantees. And we have always stood by our firm undertaking that every banker ranks pari passu, ie no one bank is put on a more preferential basis than the other.*

43 On the same day, UMBC replied to Lin and intimated that it would withdraw all overdraft facilities unless it received delivery of the shares hypothecated to it within three days. On 17 February 1986, Lin forwarded $3m

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worth of shares to UMBC `in exchange for your continuation of the credit facility given to us of up to $5m`. There was no evidence before me of the liquidators having challenged this delivery of shares to UMBC.

44 **Fraudulent preference**

45 On the basis of the above facts, counsel for the plaintiffs submitted that not only had the defendant procured the shares it wanted, but that it had procured them without applying any coercion or pressure against Lin. The defendant, it was submitted, was able to steal a march over the rest of the creditor banks of Lin, and counsel submitted that in the circumstances, the court should draw the conclusion that the defendant had obtained the shares in question through a fraudulent preference.

46 By virtue of s 329 of the Companies Act read with s 53 of the Bankruptcy Act, the transfer of property by a company to any creditor when the company is unable to pay its debts as they become due, ***with a view***

47 to giving the creditor a preference over the other creditors, if made within three months of the presentation of the petition on which the company is wound up, is deemed ***fraudulent and void*** as against the liquidator. It was not in dispute that at the time the delivery of the shares to the defendant took place, Lin was insolvent and1934 the delivery of the shares took place within three months of the presentation of the winding-up petition. The only issue before me was whether Lin, in delivering the shares to the defendants, did so `with a view` to giving the defendant a preference over other creditors.

48 The statutory provisions in England on fraudulent preference are in pari materia with our s 329 of the Companies Act and s 53 of the Bankruptcy Act.

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A reference to the English authorities would be useful. In ***Re Cutts (a bankrupt), ex p Bognor Mutual Building Society v Trustee in Bankruptcy,*** Lord Evershed summarized the law relating to fraudulent preference as follows:

> (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 debtor `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. What I have stated in this paragraph appears to be the effect of the three cases of ***Re Cohen, ex p Trustee*** [1924] 2 Ch 515; ***Sir William Henry Peat v Gresham Trust Ltd*** [1934] AC 252 and ***Re Kushler Ltd*** [1943] 2 All ER 22 .
>
> (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.

49 In ***Re Kushler Ltd,*** the directors of the company made payments into its overdrawn bank account after they had been advised that the company was insolvent and ought to be wound up. The bank had not been pressing for settlement but other creditors had been doing so. The bank account was guaranteed by the directors but when questioned at a creditors` meeting, the director had failed to mention this and had falsely claimed that two other persons

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were the guarantors. At first instance, Bennett J held that after the company had been advised that it was insolvent, it might be said that the company stopped payments to creditors in order not to prefer any of them and paid the money received by the company into the bank without contemplating the consequences as regards the overdraft. He held that that being a possible explanation, it was not open to him, in view of Lord Tomlin`s judgment in ***Peat v Gresham Trust Ltd*** and of the absence of direct evidence of intention to prefer, to hold that the liquidators had proved a fraudulent preference. Lord Greene MR, in allowing the appeal brought by the liquidators, said:

> *The weight of evidence of conduct in these cases may vary very much according to the type of case with which the court is concerned. 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.*

50 ...

51 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, 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.

52 ...

53 I do not think Lord Tomlin could have meant that, in every case where there is no direct evidence of intention to prefer, the court is bound to say that the onus of proof is not discharged, if any view of the facts not involving an intention to prefer can possibly be taken.

54 In the present case, there was no suggestion that Lin Tah Hwa or any of the directors of Lin stood to gain personally by agreeing to hand the shares to the defendant. Although Lin Tah Hwa and other directors of Lin had given personal guarantees to the defendant, they had similarly given personal guarantees to all the other banks. Counsel for the liquidators submitted that the following factors showed that Lin`s dominant motive in handing the shares to the defendant, when Lin was insolvent, was to prefer the defendant:

> (a) The shares were handed to the defendant whilst similar demands by other banks, including clear threats of legal action and the withdrawal of facilities, were ignored.
>
> (b) There was virtually no evidence of Lin agreeing to hand over the shares under any form of pressure exerted by the defendant.
>
> (c) For one entire month from 21 January 1986 to 21 February 1986, Lin had been duly providing physical custody of shares to the defendant whilst:
>
> (i) the similar advantage demanded by other banks were being rejected or placated by offers to pay off all debts at certain specified future dates;

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> (ii) Lin took the position with the other banks that it would not deliver up shares to them as it wished to treat all its banks pari passu.
>
> (d) Lin did not disclose to other banks that it was in fact delivering shares to the defendant on a regular basis, contrary to its public posture that it was treating all banks pari passu. This was blatantly dishonest. To surreptitiously treat the defendant on a wholly separate footing was to act in fraud of the other creditors` interests.

55 The liquidators had also raised an argument based on the better security provided to the defendant by way of the memorandum of deposit signed by Lin, but as indicated earlier, this argument was not pursued.

56 Whether it can be said that the dominant intention of Lin in agreeing to and handing the shares to the defendant at the close of every trading day, and collecting them before trading commenced the next day was to prefer the defendant, is a question of fact. As there is no direct evidence as to Lin`s intention, the court can only gather what the intention was by way of inferences from the surrounding facts.

57 Looking at all the facts, one feature seems to stand out. Whilst it is true that some of the banks did, whilst demanding custody of the shares, suggest that some administrative procedures could be worked out to enable trading to continue, it was only the defendant, who from the very outset, appears to have appreciated this problem and in effect limited its request for possession to possession only during those times when the market was closed. Such an arrangement would not hamper Lin in its trading activities, and Lin Tah Hwa at the meeting on 17 January 1986, could not obviously use his trading difficulties as a reason for not acceding to the request.

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58 Counsel for the plaintiffs made much of the fact that the defendant 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, 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 defendant`s 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 defendant, would have spoken volumes of the defendant`s sense of urgency and determination to sort matters out. I can therefore see little or no merit in the submission that Lin had, without being under any pressure from the defendant, agreed to the defendant having possession of the shares.

59 There is no evidence before me that the other banks made any serious efforts to discuss with Lin the possibility of their holding the shares only during non-trading hours. DBS was the first bank that made a demand for custody of the shares. It did so as early as 2 December 1985. When Lin did not comply with the demand, DBS issued a second demand on 23 January 1986. In reply to this second demand, Lin told DBS: `... please do not put forward a request which we would find very difficult to comply with`. DBS, unlike the defendant, did not thereupon offer to let Lin have possession of the shares during trading hours. Its response: `... the operational procedures relating to the deposit of the said shares and the redemption thereof can surely be worked out between ourselves` was relatively vague. Lin appears to have considered the demand by DBS for custody of the shares to be a breach of faith. This is evident from the paragraph of Lin`s reply dated 27 January 1986, where he says: `When we entered into our

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banking relationship with you it was the intention of both parties that shares were to be hypothecated to you and not deposited with you.` At about that time, DBS, as well as some other banks, appears to have relaxed the pressure for delivery of shares and instead entered into negotiations with Lin, and agreed to give Lin time to pay off the outstanding loan. This relaxation of pressure at that stage is clearly attributable to the expectation that at that time, the $180m revolving credit fund would be established under the aegis of the MAS and the SES and that Lin would be able to utilize this credit to settle outstanding loans.

60 I now come to the submission that Lin was being dishonest in leading the banks to believe that it would treat all of them pari passu while surreptitiously delivering shares to the defendant every evening. There was no evidence before me as to when this undertaking to treat all the banks pari passu was given. The first reference to the undertaking is in Lin`s letters to DBS and ICB both dated 23 January 1986. But in these letters and in all such letters to other banks where there is a reference to this undertaking, the standard phraseology used by Lin is: `You may not probably be aware that we have given an undertaking ...`. If each of these banks was not aware of the undertaking, the question must arise when and to whom this undertaking was given. There is no evidence before me that this undertaking was communicated to any of the creditor banks at a date earlier than that. If 23 January 1986 was the first time any bank had heard of this undertaking, then it is difficult to say that when Lin agreed with the defendant on 17 January 1986 to deliver the shares to them on a daily basis, he was being surreptitious or dishonest vis-a-vis the other banks.

61 The plaintiffs have not satisfied me that in agreeing to hand possession of the shares to the defendant at the close of each trading day, and in carrying out this agreement, Lin was doing so with a view of preferring the defendant

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over other creditors. It appears to me that Lin agreed to the defendant`s request for overnight custody of the shares, not because Lin intended to prefer the defendant over the other creditor banks, but because the arrangement enabled Lin to maintain good relations with the defendant so that its credit facilities would not be withdrawn, and because it enabled Lin to carry on trading and dealing with the hypothecated shares. Perhaps when Lin told the other banks that he would treat all the banks pari passu, Lin should have informed them of the arrangements with the defendant, but this failure cannot, in my view, be said to be surreptitious.

62 There is no doubt that as a result of the agreement reached between the defendant and Lin on 17 January 1986 and in the events that happened, the defendant has in fact been `preferred` in the sense that the defendant had possession of the shares whilst the others did not. But, following the decision in ***Re Cutts*** referred to above, the inference of intention to prefer will not be drawn merely from that fact. I also note that like the other banks, the defendant received Lin`s letter dated 22 February 1986. When the defendant received the letter, it had already made up its mind not to return the shares to Lin, and Lin had been so informed. Had the defendant released the shares to Lin on the morning of 24 February 1986, then in view of the contents of the letter, there can be little doubt that that evening Lin would not have returned the shares to the defendant. The issue of that letter to the defendant indicates to me that Lin had no intention of giving any preference to the defendant.

63 The burden of proving, that in handing overnight custody of the shares to the defendant, Lin was intending to prefer the defendant over the other creditor banks lies with the plaintiffs. On the evidence adduced, I am not

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satisfied that the plaintiffs have discharged this burden. I therefore dismiss the plaintiff`s claims with costs.

64 Plaintiffs` claim dismissed.

S Rajendran J

Raj Singam, Mohan Pillay and Randolph Khoo (Drew & Napier) for the plaintiffs
George Lim (Wee Tay & Lim) for the defendant

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