Neo Corp Pte Ltd (under judicial management) v Neocorp Innovations Pte Ltd and Another Application
[2005] SGHC 167

Case Number : OS 1535/2004, SIC 1761/2005, CWU 2/2005, SIC 1741/2005

Decision Date : 08 September 2005

Tribunal/Court : High Court

Coram : Andrew Phang Boon Leong JC

Counsel Name(s) : Edmund Kronenburg and Leong Kit Wan (Tan Peng Chin LLC) for the company; Chan Kia Pheng and Shaun Koh Kang Ming (Khattar Wong) for the creditor

Parties : Neo Corp Pte Ltd (under judicial management) — Neocorp Innovations Pte Ltd

Companies – Winding up – Company under judicial management subsequently wound up – Whether right of action residing in judicial manager to challenge transaction on ground of unfair preference or undervalue continues to reside in liquidator once company wound up – Sections 227T, 329 Companies Act (Cap 50, 1994 Rev Ed)

8 September 2005

Andrew Phang Boon Leong JC:

Introduction

1 The present case raises questions with respect to the legal relationship between two different regimes under the Companies Act (Cap 50, 1994 Rev Ed), albeit in a quite specific context. The two regimes pertain to judicial management and winding up, respectively. The focal question that is raised is this: Does a right of action residing in a *judicial manager* to challenge a transaction under s 227T of the Companies Act whilst the company concerned is under a judicial management order *continue* to reside in a *liquidator* if the same company is subsequently wound up?

2 To set the present proceedings in their context, it is best to describe the various hearings as well as decisions concerned.

3 The company concerned had in fact been under judicial management, the order for judicial management being made on 5 May 2004. Whilst under the judicial management regime, the then judicial managers of the company had applied under s 227T of the Companies Act by way of Originating Summons No 1535 of 2004 ("OS 1535/2004") (on 26 November 2004) to set aside a floating charge created by the company in favour of the creditor on 24 November 2003, who is in fact the applicant in the present proceedings. More specifically, the judicial managers alleged (pursuant to s 227T) that the floating charge was both a transaction at an undervalue as well as an unfair preference.

4 Subsequently, however, a petition was presented to wind up the company (pursuant to Companies Winding Up No 2 of 2005 ("CWU 2/2005")). It is pertinent to note that the judicial managers had not, however, seen their application under s 227T brought to fruition.

5 The petition for winding up was granted. One of the orders in the winding-up order dated 18 February 2005 authorised the liquidators to continue the application that had been commenced by the judicial managers under s 227T. It is pertinent to note, however, that no issues relating to this order were either raised or argued before the learned judge who granted the petition, Tay Yong Kwang J. I shall return to the significance of this point later.

6 Pursuant to the order mentioned in the preceding paragraph, the liquidators of the company then continued with the original application under s 227T to set aside the said floating charge by way of OS 1535/2004.

7 The events briefly described above constitute the backdrop against which the present proceedings were initiated by the creditor in whose favour the floating charge was created. The creditor, it should be noted, was not a party to or represented in the earlier winding-up proceedings.

8 The creditor in fact brought two related proceedings that are the subject matter of the present appeal.

9 The first (Summons in Chambers No 1741 of 2005 ("SIC 1741/2005")) was for a declaration that the liquidators of the company could not be authorised to continue its action under OS 1535/2004 (see [6] above) and that the order in the winding-up petition be set aside to the extent that it authorised the liquidators of the company to continue the action just mentioned.

10 The second (Originating Summons No 1761 of 2005 ("OS 1761/2005")) followed from the first in as much as the creditor applied for OS 1535/2004 (see [6] above) to be struck out.

11 I held in favour of the creditor in both the abovementioned proceedings. In effect, therefore, I had answered the key question set out at the outset of this judgment (in [1] above, in fact) in the negative. The company was dissatisfied with my decision and has appealed against it. I now deliver the detailed grounds for my decision.

The procedural objections

12 However, before proceeding further, I pause to consider the procedural objections raised by counsel for the company to both the applications by the creditor.

13 One objection was that both applications by the creditor did not state any grounds or basis and that, on this basis alone, the applications ought to be dismissed. Counsel for the company did not, however, pursue this point vigorously and, in my view, rightly so. Looking at both applications, it appeared to me that the grounds stated therein were clear, although counsel for the creditor would have to elaborate upon those grounds at the actual hearing before me – which is what they did.

14 Another objection raised by counsel for the company, particularly in so far as SIC 1741/2005 was concerned, was that the one particular order (authorising the liquidators to continue the application commenced by the judicial managers under s 227T (see [3] above)) could not be "attacked on its own" and that the entire order to wind up the company had to be looked at "as a whole". Once again, counsel for the company did not pursue this particular objection vigorously. Be that as it may, in so far as this particular objection is concerned, a vital point ought to be noted at the outset. And it is this: The issues concerned are by no means easy ones and do require consideration. This will become amply clear in the paragraphs that follow.

15 Another no less vital point follows from this, although this was (again) not canvassed as such by counsel for the company. The various difficulties were, most unfortunately, not drawn to Tay J's attention during the presentation of the petition for the winding up of the company. Indeed, the *issues themselves had not been raised at all*. They concerned, in fact, very specific issues which (in turn) raised, as we shall see, a not uncontroversial point of law that directly concerned the creditor in the present proceedings. As (if not more) importantly, *the creditor itself* was not a party to the winding-up proceedings (see also [7] above) and there was no evidence before me to show that the

application to preserve the action was served on it. There is therefore no issue of *res judicata*. To all intents and purposes, the winding-up proceedings constituted a routine application by the then judicial managers (and, as a result of the petition, liquidators). Not surprisingly, the issues raised in the present proceedings had slipped under the proverbial "radar screen", not least because they had not been "launched" in the first instance. Hence, Tay J did not in fact have the opportunity to consider the issues in the first place. This bears not only repeating but, in my view, ought to be underscored. The correct question, in my view, is whether or not Tay J would have granted the order in question had he been addressed by *the relevant parties* on the salient legal issues that were proffered in the instant proceedings that were commenced precisely for the purpose of raising what are difficult and significant legal issues. And it is to those issues that my attention must now turn as it is my duty to declare what the law is in so far as these issues are concerned. It bears repeating that what is raised, in the present proceedings, by the creditor's/applicant's attack on the specific order concerned is *a discrete point of law that was not canvassed by the relevant parties in the actual proceedings to wind up the company and which it would be in the interest of justice to rule on in this particular case*.

16 In the circumstances, I did not find any merit in the procedural objections raised by counsel for the company. I therefore proceed to consider the substantive issues raised by the parties. These centre, in the main, on two specific provisions of the Companies Act and it would therefore be apposite to set out the text of those provisions first.

The relevant statutory provisions

17 The relevant statutory provisions with respect to judicial management and winding up, respectively, give us more than a clue as to why the appellant is so concerned with the precise legal issue in these proceedings. The provisions themselves are, respectively, ss 227T and 329 of the Companies Act.

18 Section 227T, which as alluded to above deals with the right of the judicial manager to challenge a charge given to a creditor as an unfair preference, reads as follows:

> (1) Subject to this Act and such modifications as may be prescribed, a settlement, a conveyance or transfer of property, a charge on property, a payment made or an obligation incurred by a company which if it had been made or incurred by a natural person would in the event of his becoming a bankrupt be void as against the Official Assignee under section 98, 99 or 103 of the Bankruptcy Act 1995 (read with sections 100, 101 and 102 thereof) shall, in the event of the company being placed under judicial management, be void as against the judicial manager.
>
> (2) For the purposes of subsection (1), the date that corresponds with the date of the petition in bankruptcy in the case of a natural person and the date on which a person is adjudged bankrupt is the date on which a petition for a judicial management order is made.

19 On the other hand, s 329 deals with the same legal right of challenge in the liquidator in the context of winding up. Not surprisingly, the rationale and even language utilised in s 329 is very similar to that to be found in s 227T, and reads as follows:

> (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 1995 (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 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; and

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

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

Counsel's arguments on the substantive issues of law

In general

20 Counsel for the creditor's arguments, put in a nutshell, were as follows. The company concerned was originally under judicial management. The judicial managers asserted the rights of the company pursuant to s 227T of the Companies Act (reproduced above at [18]). However, they did not bring those rights to fruition, as it were, under the judicial management regime. The company was put into liquidation. It now fell upon the liquidators to commence a similar action pursuant to s 329 instead (reproduced above at [19]). This last-mentioned course of action would ordinarily have posed no difficulties. However, counsel for the company has argued that to recommence proceedings under s 329 would start time running against the company all over again. Indeed, the company would be out of time in so far as its argument with regard to an alleged undue preference is concerned (see s 329 read with ss 99 and 100 of the Bankruptcy Act (Cap 20, 2000 Rev Ed)). He conceded, however, that only one string to his client's legal bow would have thereby been lost. There was, nevertheless, a remaining string. The company is obviously dissatisfied that it had lost the former string owing to my decision and has therefore appealed against my decision.

21 To return, however, to counsel for the creditor's arguments, there were two basic (and closely related) reasons given as to why the right of the judicial managers under s 227T cannot now inure for the benefit of the liquidators who must therefore recommence a similar action under s 329 instead.

The language and purpose of s 227T

22 First, the language of s 227T is clear. If the provision applies, the charge in question is "void as against the *judicial manager*" [emphasis added]. The provision is therefore self-contained and limited in ambit to proceedings brought to fruition whilst the company is under the judicial management regime. The company concerned is no longer under judicial management and, hence, the appropriate course of action for the (now) liquidators to adopt lies under s 329 instead.

23 Counsel for the company had no real response to this particular argument by counsel for the creditor. He basically asked the court to look, instead, at the fairness of the case. If, so his argument went, the liquidators had to recommence a similar action under s 329, the company would, as already alluded to above, be out of time. This was not fair. He argued that, as a result, it must surely be the case that the Singapore Legislature must have intended the cause of action under s 227T to *continue* in favour of the company *even though it was no longer under judicial management but had been put under liquidation instead*.

24 In response to counsel for the company's arguments from fairness briefly set out in the preceding paragraph, counsel for the creditor argued that the judicial manager ought to have ensured that the proceedings begun under s 227T ought to have been brought to fruition, even if it involved a request for an extension of the judicial management order (as to which see s 227B(8)). Counsel for the company, however, argued that the company could not be kept waiting if it was preferable to put it under liquidation instead (which, in the present situation, has happened).

25 Counsel for the company did, however, argue that the cause of action resided with the company and that this was supported indirectly by the Singapore High Court decision of *Cendekia Candranegara Tjiang v Yin Kum Choy* [2002] 4 SLR 48 ("the *Cendekia* case").

Comparative analysis of legislation in other jurisdictions

26 I turn, now, to outline counsel for the creditor's *second* argument. It was based on a *comparative analysis with legislation elsewhere* and was intended to buttress his first argument briefly stated above. In particular, he argued that legislation in England (and, now, Australia) never provided for an equivalent right of action to that which exists under s 227T of our Companies Act for the administrator (the equivalent of a judicial manager in the Singapore context). *Instead*, what was provided for was the allowing of an action commenced by a *liquidator* under the equivalent of s 329 of our Companies Act to *relate back* to the time during which the company concerned was under administration (the equivalent of judicial management in the Singapore context). Looked at in this light, the judicial manager in the Singapore context had, unlike his English counterpart, *already been equipped* with a remedy on behalf of the company pursuant to *s 227T*. This, so he argued, was why the *Singapore* legislation, *unlike* the English (and now Australian) legislation, did *not* provide, in its provisions under the *winding-up regime* (here, s 329 of the Companies Act), for a *relation back to the time of judicial management* (or administration under the English and Australian legislation) that the *liquidator* could utilise. Indeed, a close perusal of the provisions with regard to winding up under the Singapore Companies Act confirms that *no* provision for *relation back* in the manner just described exists. Hence, counsel for the creditor argued, *having* the authority and power under *s 227T*, the judicial manager in the Singapore context ought to have brought the proceedings to fruition under that particular provision instead of asking the court to "carry forward" or continue or vest the rights *under s 227T* in a liquidator if the company passes, as it were, from a judicial management regime to one of winding up, as was the situation in the present case.

27 Counsel for the company did not really address this argument, preferring to rely, instead, on the argument from fairness which he had utilised in response to counsel for the creditor's first argument.

28 I turn, now, to consider each of these two main arguments by counsel for the creditor *seriatim*.

Counsel's arguments considered

The language and purpose of s 227T

29 In the apparent absence of any precedent directly applicable to the context in the present case, it is prudent to commence with basic principles grounded in logic and common sense.

30 It is important, in this regard, to note that judicial management on the one hand and winding up on the other are two quite separate and distinct legal regimes. The former is intended, in the words of the authors of the leading local work, "to minimize the depletion of economic resources and to offer the unsecured creditor a platform to make his view heard" (see T C Choong & V K Rajah, *Judicial Management in Singapore* (Butterworths, 1990) at p vii). The learned authors proceed to observe thus (see *ibid*): "Unlike liquidation and receivership, judicial management approximates legal hospitalization." Herein lies the fundamental difference between the two aforementioned legal regimes: Judicial management, in the words of the then Minister for Finance, Dr Hu Tsu Tau, during the Second Reading of the Bill introducing the scheme of judicial management itself, "provides a legal framework that would, in a suitable case, *enable the rescue of a potentially viable business and thus prevent a premature liquidation*" [emphasis added] (see *Singapore Parliamentary Debates, Official Report* (5 May 1986), vol 48 at col 40). The latter regime (*viz*, winding up) is the precise converse of judicial management – it entails, literally, the entire process leading to the ultimate interment of the company itself. Unlike the process of judicial management, that involved in liquidation or winding up is not to attempt to revive and resuscitate but, rather, to pull the plug on any lifelines attached to the company concerned.

31 The fundamental distinction between judicial management on the one hand and winding up or liquidation on the other, briefly outlined in the preceding paragraph, is of fundamental importance. More specifically, particular statutory provisions furnishing powers must, as a starting-point, be presumed to operate within that particular statutory regime – and that regime alone. It would, in other words, require clear statutory language (buttressed by any relevant legislative background and/or materials) for the court to find otherwise. In the absence of such a contrary intention, the assumption must be that the provision concerned loses all application and applicability outside the four corners of the regime as delineated by the language concerned.

32 Looked at in this light, both ss 227T and 329 of the Companies Act, situated as they are within the judicial management and winding up regimes respectively *and* dealing with similar situations (albeit in altogether different contexts), must be presumed (as I have just argued) to operate within their respective regimes only.

33 The approach just proffered is in fact supported by the language of the respective provisions themselves. Section 227T(1), for example, refers to the transaction concerned being "void as against *the judicial manager*" [emphasis added]. The corresponding concept, as embodied within s 329(1), is slightly different. In particular, no mention is made of the transaction concerned being void as against the liquidator. Indeed, the precise language utilised is that the transaction in question "shall in the event of the company being wound up be *void or voidable* in like manner" as that which obtains under the Bankruptcy Act [emphasis added]. Leaving aside the somewhat curious distinction in the respective legal effects for the moment ("void" in the case of judicial management but "void or voidable" in the case of winding up), it is noteworthy to reiterate that, in so far as this latter provision (*viz*, s 329) is concerned, the reference is to *the company, and not to the liquidator*. This is an important point in the light of counsel for the company's argument to the effect that the right of recourse given to the judicial manager under s 227T belongs to the company and that it therefore passes *automatically* to the liquidator upon the company concerned being wound up. It seems to me that the position is the *exact opposite*: The difference in language, coupled (more importantly) with the quite different underlying philosophies with respect to judicial management and winding up

respectively, strongly points to the right of recourse under s 227T being *limited to the judicial manager only – and no other*. In other words, the right of action is vested in the judicial manager and it is its duty – and its duty and right alone – to ensure that the transaction concerned is avoided. This construction of s 227T is in fact supported by the relevant background materials, which I now consider.

34 I turn, first, to the Explanatory Note in the Companies (Amendment) Bill (Bill No 9 of 1986). The relevant part (which refers to s 227S [the present s 227T]) reads as follows:

> New section 227S deals with undue preference in the case of *a judicial manager*. Any transfer of property or charge on property or payment made by a company shall in the circumstances stated in the section *be void as against the judicial manager*. [emphasis added]

35 The learned authors of a book already cited appear to adopt a similar view (see Choong & Rajah ([30] *supra*) at p 107), as follows:

> A framework is provided for examining and avoiding transaction which reduce the pool of assets available for creditor distribution. It is interesting to note that the law relating to fraudulent preference also applies to judicial management. Section 227T provides that a transaction preferring a creditor, if entered within three months from the date of presentation of a petition for a judicial management order, shall be void as against the judicial manager.

36 And, in Walter Woon & Andrew Hicks, *The Companies Act of Singapore – An Annotation* (LexisNexis, Looseleaf Edition, 2004, vol 2), the learned authors observe (at para 1209) thus:

> Section 227T *exceptionally* is taken from Aus 1981 s 348(1) and (4). It enables the judicial manager to avoid undue preferences, fraudulent settlements, etc. *See UK Insolvency Act 1986 ss238-240 for similar provisions*.
>
> Section 227T is *equivalent to s 329 in winding up, though* the catalogue of transactions that are avoided (ie "a settlement, a conveyance or transfer of property", etc) are different in the two sections.
>
> [emphasis added]

37 Counsel for the company did argue, *inter alia*, that it might not be possible for the judicial manager to bring an action under s 227T to fruition. In this regard, I accept counsel for the creditor's argument (referred to above) to the effect that the judicial manager could have applied for an extension of time to bring the entire process to fruition. I also accept, as reasonable and practical, his further argument that this was not a complicated action that would lead to unwarranted delays. This last-mentioned point is particularly important in the light of counsel for the company's argument that a situation might arise where it would be desirable to wind up the company as soon as it is convenient. In any event, such an argument from convenience must always be undergirded by a legal basis. If, as I understand it, his argument was simply that the liquidators ought to be allowed to continue the action under s 227T because it would not hamper the decision as to whether or not to wind up the company, this argument would, with respect, be wholly one-sided in nature. Not surprisingly, counsel for the company was asserting what was fair in so far as his client and the company were concerned. He was asserting their alleged legal rights. However, and this is unfortunately missed or glossed over by many counsel, there are also arguments from fairness that can be made in favour of the other party – here, the creditor. The issue is not simply one of convenience to one party or the other without more. The issue is, rather, the statutory intention (as

embodied within the language and context of the provision concerned). Thus far, it appeared quite clear that both the language as well as context strongly supported the creditor's construction of s 227T. Indeed, there is yet another related reason why such a construction ought to prevail.

38 The right of action accorded to the judicial manager under s 227T is a special statutory right. As we shall see, a similar power does not appear to have been accorded to the judicial manager (or its equivalent) in other jurisdictions. Where such a right is specially conferred by statute, it must be exercised in accordance with the strict language of the provision itself. As I have already pointed out above, the language of s 227T is clear: The right of action is vested in *the judicial manager – and no other*. A special (especially statutory) right is a privilege and should not be extended beyond its legitimate boundaries. And the obvious boundaries are set by the statutory language itself. In my view, counsel for the company is proposing to extend the scope of s 227T beyond what has been clearly laid down by the Legislature. Section 227T, being a special power and right conferred on the judicial manager, was not, in my view, intended to extend into liquidation. Indeed, in so far as the winding up context is concerned, s 329 furnishes the liquidator with similar powers to that which are accorded to the judicial manager under s 227T.

39 I have already alluded to the real reason why counsel for the company in these proceedings is dissatisfied with this particular construction of s 227T: If the liquidators were now to mount an action pursuant to s 329, the company would be out of time in so far as the argument with respect to an alleged undue preference is concerned (see also [20] above). However, such an argument is neither here nor there. I have already stated that mere convenience to one party cannot be a good legal reason to prejudice the other party (here, the creditor). If the judicial manager ought to have seen the action commenced under s 227T to fruition in the first instance, it cannot now be argued that that had not been done and that the action ought to be "carried forward" and vested in the liquidators. There must be a legal basis if such an argument is to succeed. Unfortunately, there is none that I can ascertain. Indeed, even if I were to accept the argument from convenience, it would be a double-edged one. Would not the creditor be prejudiced if the company's arguments in the present proceedings are accepted inasmuch as it would have to deal with a further cause of action that ought to have been dealt with earlier (by the judicial manager) but was not? I do not think that general – and subjective – arguments from fairness take us anywhere. This is because what is required is a clear legal compass, which can then provide all the parties with unshakeable guidance that is both objective and universal. Subjective arguments of fairness are the very antithesis of this ideal. This brings us back full circle, as it were. The issue is, in the final analysis, a legal one: Put in the simplest terms, what is the proper construction of s 227T?

40 It is true, however, that, on my construction of s 227T, there is an all-or-nothing result. Nevertheless, it bears repeating that if counsel for the company's arguments were accepted, an all-or-nothing result would equally ensue – albeit in the opposite direction. In this regard, it seems to me that a more nuanced approach might be appropriate. However, this must necessarily be effected via legislative amendment. What does appear clear, however, is that both ss 227T and 329 are by no means felicitously phrased. In the words of a leading commentator (see Lee Eng Beng, "The Avoidance Provisions of the Bankruptcy Act 1995 and Their Application to Companies" [1995] Sing JLS 597 at 648):

> It is probably fair to say that the position is confused and convoluted. This is not due to any objection to the rationale of the avoidance provisions, but rather with the mechanics of rendering those provisions applicable to the corporate context. The deficiencies of the present mode of importing the avoidance provisions by means of sections 227T(1) and 329(1) CA [Companies Act] would appear to be sufficiently serious to erase much of the attendant advantage of rendering those provisions applicable to companies. In this connection, the need for urgent legislative

reform, and relatively uncomplicated reform at that, cannot be over-emphasised.

41 There is much merit in the observations just quoted, especially with regard to the specific issue that constituted the core of the present proceedings (*cf* also Woon & Hicks ([36] *supra*) at para 1209). It is suggested, in particular, that one possible way forward is *for the Legislature to provide the court with a discretion, where it is just and equitable in the circumstances to do so, to allow an action commenced by the liquidator under s 329 to relate back to the time of the actual transaction, even if this had taken place prior to liquidation (for example, as in the present situation, during judicial management).* This would be consistent with the approach adopted in some other jurisdictions, as we shall see below.

42 There is another possible alternative: The Legislature could provide the court with a discretion to allow actions commenced by a judicial manager pursuant to s 227T to vest in the liquidator upon the company being wound up if it was just and equitable in the circumstances to do so.

43 It is true that the conferment of such discretion would entail some subjectivity on the part of the court. However, courts exercise discretion daily in a myriad of contexts, of which this would be one. What is important is that the discretion must be properly conferred (here, by the Legislature). In the absence of the legitimate conferment of legal discretion, the court's hands are (as in the present proceedings) tied. Nevertheless, the issue of reform is clearly outside the purview of the present proceedings. A decision can only be made premised on the statutory language in its present form and, in this regard, the company's arguments must necessarily fail.

44 I turn now to two specific arguments raised by counsel for the company, one of which has already been referred to briefly earlier in this judgment (see [25] above).

45 The first is counsel for the company's reliance on the *Cendekia* case ([25] *supra*) for the proposition that the liquidators of a company are the persons empowered to control any action that has been commenced by the judicial managers of the company. A perusal of the *Cendekia* case itself reveals that no such proposition can be drawn from the case – not even indirectly. The case itself concerned the bringing of an action by a prospective investor of the company against the judicial manager for the recovery of earnest money that had been paid to the judicial manager after the entry by the parties into a memorandum of understanding in relation to the purchase of the company's assets by the plaintiff. More significantly, for the purposes of the present proceedings, it also concerned the bringing of a counterclaim by the judicial manager. Shortly after the said counterclaim was mounted on behalf of the company by the judicial manager, the company was wound up. The judicial manager's appointment was terminated as three other people were appointed liquidators by the court. However, the (former) judicial manager continued to act on behalf of the company in the proceedings in spite of an unambiguous statement from the solicitors for the liquidators that he had no authority to do so. The court allowed the plaintiff's claim and dismissed the counterclaim. What is germane for our present purposes are the following observations by MPH Rubin J (at [55]):

> Under s 272(2) of the Companies Act (Cap 50, 1994 Ed) only the liquidator of the company may 'bring or defend any action or other legal proceeding in the name and on behalf of the company.' In the case at hand, the first defendant, having commenced the counterclaim for and on behalf of the company, had no further authority to continue with his action once his appointment had been revoked and the liquidators had been appointed. The court was told that the first defendant was continuing with this action because of his perception that he might be held liable for possible negligence during his tenure of office. In my view, such a perception as regards a contingency was not a valid ground to continue with his claim, especially in the light of clear instructions from

the solicitors of the present liquidators.

46 In the event, Rubin J found that the conclusion arrived at above was sufficient to dispose of the counterclaim "for want of authority and legal standing" on the part of the judicial manager (at [56]). However, the learned judge did proceed to hold that, in any event, the counterclaim failed on its merits.

47 It will be seen that the *Cendekia* case does not support the proposition tendered by counsel for the company. What the case *does* decide is that a judicial manager has neither the authority nor legal standing to continue an action on behalf of the company after its appointment has been terminated. It does *not* decide that the liquidator – or any other person for that matter – can continue the action on behalf of the company. It did not, in particular, decide, on the facts of the case itself, that had the counterclaim been valid or at least viable, the liquidators could then have continued the action that had been instituted by the judicial manager. Indeed, this decision affirms *only* the proposition that the *locus standi* to *bring* an action on behalf of the company belongs (pursuant to s 272(2) of the Companies Act) to the liquidator. Indeed, counsel for the company in the present proceedings referred to this particular provision – in particular, to para (*a*) thereof. It should also be noted that, in any event, whether or not the liquidator can in fact continue an action begun by the judicial manager would depend very much on the precise nature of the cause of action concerned and this would (in the context of the present proceedings) depend very much on a construction of (especially) s 227T of the Companies Act. This last-mentioned point applies equally with regard to the next point (relating to s 272(2)(*a*) of the Companies Act).

48 As just mentioned, counsel for the company also referred to s 272(2)(*a*) of the Companies Act, which reads as follows:

> (2) The liquidator may –
>
> (*a*) *bring* or defend any action or other legal proceeding in the name and on behalf of the company;
>
> [emphasis added]

49 I have already referred to the distinction drawn between judicial management on the one hand and winding up on the other. The provision just quoted refers to the fact that the liquidator may "*bring*" an action in the name and on behalf of the company. It does *not* refer to the *continuation* of an action previously brought by, say, the judicial manager of the company as such.

50 In any event, the liquidator's action must have a *legal basis* – which, *inter alia*, depends on the precise language of the statutory provision it is seeking to rely upon to found the cause of action on behalf of the company (here, s 227T; and see [18] above). This brings us back full circle to the construction of s 227T, which I have examined in some detail above, the analysis of which will therefore not be repeated here again.

51 I turn now to counsel for the company's reliance on an article referred to earlier (see Lee ([40] *supra*)). In particular, he referred to pp 643 and 644 of that particular article in support of his arguments in the present proceedings.

52 I read the article and, in particular, the specific pages cited in the preceding paragraph closely. Unfortunately, I could find no support for counsel's arguments. Let me elaborate.

53 There were a number of propositions proffered by the learned author. First, Mr Lee was of the view that if the judicial manager had successfully taken active steps pursuant to s 227T to avoid the transaction concerned, that transaction "must be treated as unwound once and for all" *in the event that the judicial management order against the company is discharged* (see Lee ([40] *supra*) at 643). In other words, it could not be argued that just because s 227T utilises the words "void as against the judicial manager", the impugned transaction must then be "revived" against the company after the judicial manager's appointment comes to an end once the judicial management order is discharged. This view is logical, sensible and just. The underlying rationale of s 227T would be subverted or undermined by any interpretation to the contrary. But it should be noted that, in such a situation, the judicial manager has *in fact brought the action on behalf of the company pursuant to s 227T to fruition*. This is *obviously quite different* from the situation in the *present* proceedings. It is also interesting to note that the learned author also observed thus (*ibid*):

> Ludicrous and unworkable consequences would clearly ensue if *the efforts of the judicial manager* may be reversed by the other party to the transaction once the judicial management order is discharged, not to mention that such a chaotic state of affairs could not have been contemplated by the statute. [emphasis added]

54 There is, here, more than a strong hint that an action under s 227T is in fact within the province of *the judicial manager* – an approach that is wholly consistent with the approach I have adopted in the present proceedings.

55 The learned author then deals with a second situation. This occurs where the transaction concerned is executory *and* the judicial manager (for whatever reason) chooses *not* to initiate any action pursuant to s 227T. It should be noted, at the outset, that this, once again, is *not* the situation in the *present* proceedings. The judicial manager here *did* initiate proceedings pursuant to s 227T, *but did not bring them to fruition*; hence, the order sought to *continue* the proceedings in *liquidation*. Mr Lee's view is that, where the judicial manager in fact chooses *not* to initiate proceedings pursuant to s 227T, it does *not* follow that the transaction concerned ought to remain valid and binding as between the parties and is therefore enforceable against the company in the event that the judicial management order is *discharged* (see Lee ([40] *supra*) at 644); the learned author proceeds to observe thus (see *ibid*):

> Such a result should not be permitted. A company which successfully *emerges from* judicial management as a going concern should not be suddenly and immediately saddled with a liability which could aggravate its precarious position and undo the benefits of the judicial management. *It may be true that, in the alternative scenario where a company goes into liquidation immediately or shortly after the discharge of the judicial management order, the liquidator will probably challenge the transaction in any event. However, in mounting such a challenge, the period of the judicial management would have to be taken into account in determining whether the transaction took place at the relevant time and this may substantially prejudice the chances of the transaction having taken place at the relevant time. It should be noted that the normal minimum period for judicial management is 6 months, a period which is not insubstantial*. Indeed, the relevant time for a unfair preference which is not a transaction at an undervalue is any time within 6 months ending with the date of the presentation of the winding up petition. *In cases involving this type of transaction, therefore, the interposition of the judicial management period would effectively mean that the transaction would not have taken place at the relevant time.* [emphasis added]

56 It would appear that the learned author's views with regard to this second situation might lend some support to counsel for the company in so far as they suggest that an existing, *but*

inchoate, action under s 227T *continues* to subsist *even after the judicial management order has been discharged*. *However*, it should be noted, first, that the learned author *acknowledges at the outset that there is, notwithstanding his own preferred view, a diametrically opposed view. More importantly*, it should be noted that this particular situation is not only literally but also legally different in the following way. The company is, *ex hypothesi*, financially viable once again, having emerged from judicial management. There is, therefore, no reason in principle why its inchoate cause of action that existed during judicial management ought to be scotched simply by virtue of the fact that the judicial manager had initiated no proceedings pursuant to s 227T. *However, the situation is quite different from that which obtains where the company proceeds from judicial management to liquidation – which is precisely the situation in the present case. In this regard, it is very important to note that the learned author nowhere states that, if the company were to be wound up, the liquidator would be able to avail itself of the timelines in the manner in which counsel for the company in the present proceedings is arguing for.* Indeed, there is no legal impediment whatsoever in the liquidators in the *present* proceedings initiating similar proceedings, albeit under *s 329*. As I have already pointed out (at [20] and [39] above), the liquidators in the present case would be out of time if it recommenced proceedings *qua* liquidator under s 329 in so far as the potential cause of action with regard to an alleged undue preference is concerned. It would, as I have also observed, be able to recommence proceedings (again, under s 329) with regard to an alleged sale at an undervalue. However, it would then possess only one legal string to its bow, instead of two.

5 7 *Therefore, the key issue,* in my view, is whether or not the author of the article cited *supports the further proposition* to the effect that, *in addition* to retaining its right to challenge a transaction *upon emerging out of judicial management*, the company *also has the legal right to avail itself of all timelines it would have had had the action been commenced pursuant to s 227T in the quite different situation where the company goes into liquidation instead*. At this juncture, a close perusal of the passage in the article which was quoted at length in the preceding paragraph reveals, in my view, that the learned author appears to be expressing a *quite different* view. This is especially evident in the italicised words quoted above, which suggest that the company must take the benefit together with the burden, so to speak, *in precisely the situation we are presently faced with, viz*, a situation where the company has in fact gone *into* liquidation. In other words, the liquidator will have to abide by the applicable timelines should it choose to commence an action after the company concerned has been wound up (presumably, under s 329). This is, indeed, the plain meaning of the passage quoted above, especially in so far as the italicised words are concerned (at [55]). To put it simply, the article cited by counsel for the company *supports*, in point of fact, *the approach taken by this court.*

58 I should add, for the sake of completeness, that in the situation which was the focus of the passage quoted (at [55] above), *viz*, one where the judicial manager had not commenced proceedings at all pursuant to s 227T, there appear to be no time constraints where the company subsequently commences proceedings instead. *However*, as I have been at pains to point out (because this is such a fundamental point in the present proceedings), this is *not* the situation here. In the first instance, the judicial manager had in fact *commenced* proceedings pursuant to s 227T, although they were not brought to fruition prior to the company being wound up. More importantly, the company has been wound up and, in this regard, therefore, any proceedings in a similar vein will be governed by *s 329*. This is, as I have also been at pains to emphasise, *quite different* from a situation where the company has emerged *from* judicial management.

59 I should add that my approach is supported by what is apparently the only Commonwealth precedent that is closest in factual context as well as legal relevance to the present proceedings. Indeed, as we shall see, this particular decision goes *further* in so far as it is authority that militates against even the views expressed in the article just considered with regard to a situation where *no*

action whatsoever has been taken by the judicial manager under the equivalent of s 227T of our Act, for the simple reason that the factual context of this case was precisely one of inaction on the part of the judicial manager during the period of judicial management itself (and see [61] below). In the decision of the Full Court in the Queensland decision of *Re An Application by J G A Tucker and Reid Murray Developments (Qld) Pty Ltd* [1969] Qd R 193 ("*Tucker*"), the main issue centred around the construction of a predecessor provision of s 348 of the Australian Companies Act 1981 (Cth), which was (in turn) a provision from which our own s 227T was derived. This was s 206 of the Companies Acts 1961–1964, which read as follows:

> (1) Every disposition of its property, which if made by an individual would in the event of his bankruptcy be void or voidable, shall, if made by a company placed under official management and unable to pay all its debts, be void or voidable in like manner and the provisions of the law relating to the estates of bankrupt persons shall with such adaptations as are necessary apply to such a disposition.
>
> (2) For the purposes of this section the date of the passing of the resolution by the creditors appointing the official manager shall be deemed to be the date which corresponds with the date of the presentation of the bankruptcy petition in the case of an individual.

60 It is important to note, in my view, that there was (in that same Act) also an equivalent to s 329 of our Act. This was s 293 of the Companies Acts 1961–1964, the first two subsections of which read 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 be void or voidable shall in the event of the company being would 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; and
>
> (b) in the case of a voluntary winding up the date upon which the resolution to wind up the company voluntarily is passed.

61 It was held, by a majority, that if there were undue preferences which were alleged to have been effected within the meaning of s 206 of the Companies Acts 1961–1964 *and* the *official manager* (the equivalent of a judicial manager under our Act) *takes no step* to set aside and recover the payments concerned, it was *not* competent for the court to make a declaration to the effect that, *on a winding-up order being made* against the company, the *liquidator* could *continue* with proceedings *qua liquidator*.

62 It is true that the facts of *Tucker* were different from those in the present proceedings inasmuch as the judicial manager in the present case had in fact taken initial steps to set aside the

transaction under s 227T. However, as we have seen, these steps were not, in any event, brought to fruition. More importantly, in both *Tucker* and the present case, the company was ultimately wound up. In essence, therefore, the situations are, in substance, similar. Indeed, in *Tucker*, the creditors of the company had passed a resolution that the company should, for a period of two years commencing on 9 April 1963, be under the official management of Mr Tucker. Mr Tucker was in fact appointed the official manager on 25 March 1963. As already mentioned, he did not take any steps evidencing an intention to avoid any of the impugned payments which were made between 25 September 1962 and 28 November 1962. On 30 May 1963, however, a winding-up petition was presented to the court by Mr Tucker and a winding-up order was made pursuant to this petition on 11 July 1963. Mr Tucker in fact became the liquidator of the company. A special case was stated by Hanger J at the request and with the consent of the parties for the opinion of the Full Court which, *inter alia*, centred on the issue as to whether or not Mr Tucker could now, as *liquidator*, take steps to set aside transactions, which steps were *not* taken (pursuant to s 206) whilst he was the *official manager*. As we have seen, the majority of the Full Court decided that this was *not* possible.

63 Lucas J, with whom Douglas J agreed, was of the view, first (at [59] *supra* 207), that s 206 (reproduced at [59] above) was "capable of application to all companies which are in a position to be placed under official management"; more to the point, the learned judge was of the view (see *ibid*) "that the section includes in its scope companies which are 'only a little bit insolvent'".

64 Secondly, Lucas J was of the view (see *ibid*) that the issue in the case "depended upon the true construction of s. 206" and proceeded forthwith to observe that "this is so in my opinion because s. 293 can have no application to the matter" (see *ibid*). The Singapore equivalent of s 293 is of course s 329 of our Act. And this view is therefore consistent with the view already expressed above to the effect that s 227T and s 329 of our Act, albeit parallel in function, serve *different* legal regimes altogether (see also H A J Ford, *Principles of Company Law* (Butterworths, 5th Ed, 1990) at para 1243). This point is, in my view, similarly expressed in a later part of Lucas J's judgment ([59] *supra* at 209).

65 Thirdly, Lucas J expressed the following views (at 209–210):

> The provisions of Part IX deal only, it is true, with insolvent companies. But it is not contemplated by the legislation that companies which are placed under official management are necessarily later going to be wound up. Unfortunately, that is what seems to happen to most of them in the end, but it is, I think, clear enough that the intention of the legislature, expressed in general terms, was to grant insolvent companies a moratorium for the purpose of seeing whether they could get out of their difficulties.

66 The observations just quoted are important because the dissenting judge, Hart J, laid great store by the argument that s 206, although applying in the context of official management, "is directed chiefly to the cases in which winding up ensues" (at 202). Indeed earlier on in his judgment, the learned judge observed, in a similar vein (at 200), that s 206 "is a section which is directed rather to the winding up of companies than to their continued trading". Whilst this may be practically true, winding up is, as is evident from the word "chiefly" itself, not inevitable. Indeed, as has already been pointed out, the *raison d'être* with respect to judicial management and winding up, respectively, are quite different (see [30] above). As Lucas J himself put it, in similar vein, in *Tucker* after outlining the essential elements of official management, "[n]othing could be more different from a liquidation" (see at 210; see also J O'Donovan, *The Law of Company Liquidation* (The Law Book Company Limited, 3rd Ed, 1987); dealing with the relevant statutory provisions at p 9). I wholly agree and, with respect, disagree with the views of the dissenting judge, Hart J, who was of the view that ([59] *supra* at 199) that "it could be a mistake to regard part IX [dealing with official management] as a

'statutory island'".

67 Fourthly, Lucas J observed thus (*id* at 211):

> The section [s 206] does not on its face say that it may be used by a liquidator, in a supervening winding up of the company, for the purpose of recovering preferences which were given more than six months before the presentation of the winding up petition. *I can find no words in s. 206 which would give it this meaning. On the contrary, it seems to me that the use of the words "in like manner" indicates that, since this is a section dealing with official management, which comes between two sections which deal specifically with the official manager's powers and duties, the intention is that the dispositions of property to which the section applies are to be voidable as against the official manager, just as s. 95 [of the Bankruptcy Act] provides expressly that preferences are void as against the trustee. It does not seem to me that the section gives to anybody else the right to avoid such dispositions.* [emphasis added]

68 Indeed, comparing the text of s 206 (reproduced at [59] above) with our own s 227T (reproduced above at [18]), in particular the express reference in s 227T itself to "the judicial manager", the reasoning above applies, *a fortiori*, in the Singapore context.

69 I now turn to consider briefly the dissenting judgment of Hart J. In addition to emphasising the fact that the official management regime was directed primarily at winding up (see [66] above), the learned judge was particularly concerned with the (related) point that "the aim of the law as to preferences in bankruptcy has always been equality amongst creditors, of insolvent persons" (see [59] *supra* at 200; see also at 201, 203 and 205). This argument is, in my view, more than amply answered by Lucas J in the same case, where the learned judge observed (at 211–212) thus:

> *First*, I do not think that there is any real violation of the principle [of equality of treatment of creditors]. One of the objects of Part IX seems to me the *postponement* of payment of the debts of the company's pre-existing creditors. The construction which I propose ensures equality of treatment of such creditors by compelling those of them who have received preferences to bring the money so received into the common fund. *But secondly, if the principle is indeed violated, so be it. It is a matter of finding out what the section means; if what it means does violence to an established principle, that is a matter for the legislature and not for the Court.* [emphasis added]

70 As I have argued in some detail above, the language as well as *raison d'être* of s 227T appear to me to be more than clear. Indeed, as I have already pointed out, the construction I have adopted is based on even clearer language than that found in the provision considered by the court in *Tucker*, which court in fact adopted the same approach as that which I have suggested in the present proceedings.

Legislation in other jurisdictions

71 I turn now to the argument from comparative legislation. Counsel for the creditor referred, in particular, to s 240(3) of the UK Insolvency Act 1986 (c 45). Section 240 itself reads as follows:

> **"Relevant time" under ss. 238, 239.**
>
> **240** —(1) Subject to the next subsection, the time at which a company enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into, or the preference given —

(*a*) in the case of a transaction at an undervalue or of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of insolvency (which expression is defined below),

(*b*) in the case of a preference which is not such a transaction and is not so given, at a time in the period of 6 months ending with the onset of insolvency, and

(*c*) in either case, at a time between the presentation of a petition for the making of an administration order in relation to the company and the making of such an order on that petition.

(2) Where a company enters into a transaction at an undervalue or gives a preference at a time mentioned in subsection (1)*(a)* or *(b)*, that time is not a relevant time for the purposes of section 238 or 239 unless the company —

(*a*) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or

(*b*) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference;

but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company.

(3) For the purposes of subsection (1), the onset of insolvency is —

(a) *in a case where section 238 or 239 applies by reason of the making of an administration order or of a company going into liquidation immediately upon the discharge of an administration order, the date of the presentation of the petition on which the administration order was made, and*

(b) in a case where the section applies by reason of a company going into liquidation at any other time, the date of the commencement of winding up.

[emphasis added]

72 As counsel for the creditor, correctly in my view, argued, the "relation back" afforded to the liquidator of a company in the UK context was necessary because the administrator had not been accorded any specific powers similar to those accorded to its legal analogue in the Singapore context (*viz*, the judicial manager) pursuant to s 227T of the Singapore Companies Act.

73 Finally, although s 227T was derived, in part at least, from s 348 of the Australian Companies Act 1981(Cth) (see [36] above; s 348 was later re-enacted as s 449 of the Australian Corporations Act 1989 (Cth)), the present position in Australia appears to be similar to that which obtains in the UK. In this regard, ss 565 and 588FA (read with s 588FE) of the Australian Corporations Act 2001 (Cth) might be usefully noted (both sets of provisions dealing with the positions prior to, and after, 23 June 1993, respectively).

Conclusion

74 It is clear that both a literal as well as purposive reading of s 227T leads to the conclusion that where proceedings have been commenced by the judicial manager pursuant to s 227T, it is necessary that they be brought to fruition by the judicial manager if they are to have any legal effect. If, as was the case here, they have not, then the liquidator cannot, in my view, continue the action initiated by the judicial manager, but must commence separate proceedings pursuant to s 329.

75 Although it is impractical to restate the detailed reasoning set out above, it might be useful to summarise the major reasons for my decision in the present proceedings:

(a) The language of s 227T is both clear and unambiguous. It does not allow anyone else other than the judicial manager to invoke the powers provided under the provision itself.

(b) The legal regimes for judicial management and for winding up are, respectively, different inasmuch as they serve different functions. That judicial management might in fact lead to winding up is not, in and of itself, a reason for equating the two regimes. Indeed, in so far as the situation of *winding up* is concerned, similar powers are provided for the *liquidator* under *s 329* instead.

(c) Following from (b) above, it is clear that the judicial manager has been given a specific statutory right that has to be exercised by the judicial manager and no one else. Such a right was not intended to extend into the context of winding up or liquidation for which, as already mentioned in the preceding paragraph, s 329 would be the appropriate provision to invoke.

(d) The approach adopted towards s 227T in the present proceedings is buttressed by the decision in *Tucker* ([59] above). On the other hand, the *Cendekia* case ([25] above) does not support the contrary approach suggested by counsel for the company.

(e) The overall situation in general and that relating to s 227T in particular could be made clearer and/or more nuanced, but this can only be effected by legislative amendment (see [41] and [42] above).

Creditor's applications granted.

Copyright © Government of Singapore.