Neo Corp Pte Ltd (in liquidation) v Neocorp Innovations Pte Ltd
[2006] SGCA 15

Case Number : CA 68/2005

Decision Date : 07 April 2006

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; V K Rajah J

Counsel Name(s) : Edmund Kronenburg and Leong Kit Wan (Tan Peng Chin LLC) for the appellant; Chan Kia Pheng and Shaun Koh Kang Ming (KhattarWong) for the respondent

Parties : Neo Corp Pte Ltd (in liquidation) — Neocorp Innovations Pte Ltd

Companies – Winding up – Company under judicial management subsequently wound up – Whether proceedings commenced by judicial manager challenging company transaction on ground of unfair preference or undervalue under s 227T Companies Act may be continued by liquidator – Section 227T Companies Act (Cap 50, 1994 Rev Ed)

Courts and Jurisdiction – Judges – Power – Whether judge hearing summons in chambers proceedings in High Court having power to set aside order of judge hearing winding-up proceedings also in High Court

7 April 2006 *Judgment reserved.*

Chao Hick Tin JA (delivering the judgment of the court):

1 This appeal raises a point on insolvency law which is of considerable importance to the general creditors of an insolvent company. The specific question that arose for consideration is whether an action instituted by the judicial managers of a company to challenge a transaction entered into by the company with a third party on the ground of unfair preference, or being at an undervalue, may be continued by the liquidators when judicial management of the company is followed by a winding up order before the action is adjudicated upon.

The facts

2 On 5 May 2004, Neo Corp Pte Ltd ("NCP") was placed under judicial management. On 26 November 2004, pursuant to s 227T of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act"), the judicial managers applied by way of Originating Summons No 1535 of 2004 ("OS 1535") to have a floating charge created by NCP in favour of Neocorp Innovations Pte Ltd ("NIP") set aside on the ground that the transaction was an unfair preference or was at an undervalue.

3 Pursuant to a petition filed in Companies Winding Up No 2 of 2005 ("CWU 2/05") by the judicial managers, on 18 February 2005, Tay Yong Kwang J ("Tay J") made an order winding up NCP. In para 8 of the same order ("order 8") Tay J also authorised the liquidators "to continue with any legal action commenced by the judicial managers". Subsequently, NIP applied, by way of Summons in Chambers No 1741of 2005 ("SIC 1741"), to have order 8 set aside on the ground that the liquidators could not be authorised to continue with OS 1535 as NCP was no longer under judicial management and, consequently, also asked that OS 1535 be struck out.

4 Thus, the issue raised in SIC 1741 concerned the interpretation of s 227T of the Act. Andrew Phang Boon Leong JC (as he then was) ("the Judge"), having carefully analysed the provision as well as comparing it with the equivalent statutory provisions in other jurisdictions, and having regard to

the fact that the regime of judicial management is distinct from that of liquidation, came to the conclusion that s 227T did not allow anyone else other than the judicial managers to invoke the powers under that provision. As the judicial managers did not bring OS 1535 to fruition, the liquidators of NCP were not entitled to continue with it. He ordered order 8 be set aside in so far as it authorised the liquidators to continue with OS 1535.

The appeal

5 This is the appeal of the liquidators of NCP against the decision of the Judge. They have argued that the Judge was wrong to rule that they could not continue OS 1535 which was initiated by the judicial managers. They submitted that the construction given by the Judge to s 227T would greatly disadvantage the general creditors of NCP and, in turn, unjustifiably benefit NIP. The section does not say that the action must be brought to fruition.

6 The liquidators also raised a procedural point. This is that as Tay J had in the CWU 2/05 ordered that the liquidators be allowed to continue with OS 1535, the Judge, sitting in a court of equal jurisdiction, had no power to set aside or override the order of Tay J.

Procedural point

7 We will first deal with the procedural objection. The point made by NCP is that the decision of the Judge amounted to setting aside the order of Tay J, which the Judge did not have the jurisdiction or power to do, relying in this regard on *In re Barrell Enterprises* [1973] 1 WLR 19 ("*Barrell Enterprises*"). NCP, moreover, pointed out that as early as 26 November 2004, the judicial managers had in a letter of that date informed all creditors, including NIP, of the intended winding up proceedings against NCP. The relevant portions of the letter read:

> [M]ost of the plant and equipment of the Company comprise a formwork system and scaffolding material with a nett book value of S$1,751,456.75. Based on the records of the Company, the formwork system and scaffolding material were subject to a floating charge given on 24 November 2003 to secure the amount of S$1,291,780.61 owing to [NIP].
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> Based on legal advice obtained, the Judicial Managers have commenced legal action to set aside the aforesaid floating charge on the grounds of preference, given that the Company was insolvent when the charge was created.
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> …
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> [T]he Judicial Managers take the view that it is just and equitable for the Company to be wound up. In this regard, and having obtained the approval of the [Informal Creditors' Committee], the Judicial Managers will be filing a winding up petition to the Court shortly, to place the Company under liquidation.

8 The Judge was conscious that, in dealing with SIC 1741, he was being asked to review the decision of Tay J. The Judge noted that Tay J's attention was not drawn to OS 1535 and the issues concerning the interpretation of s 227T when Tay J made order 8 authorising the liquidators to continue with any legal proceedings commenced by the judicial managers. He further noted that NIP was not a party to the winding up proceedings nor was NIP served with a copy of the court documents in those proceedings. The fact of the matter was that Tay J did not have the opportunity to consider the issues which the Judge was asked to determine in SIC 1741 as they were not raised before Tay J. In the premises, the Judge did not think that he was precluded from examining the

issues raised in SIC 1741 and giving his decision thereon. He also did not think that in the circumstances here, the doctrine of *res judicata* could arise. On this, we agree.

9 Another argument raised by NCP is that as the winding-up order was served on NIP on 15 March 2005, and if NIP was not happy with it, it still had time to lodge a notice of appeal to the Court of Appeal. NIP did not do that. Thus NIP should not be permitted to question order 8 by way of SIC 1741.

10 It seems to us that as NIP was not a party to CWU 2/05, it would be out of the question for NIP to file any appeal against the decision of Tay J. The next question is whether, in view of the fact that NIP was allegedly notified by the letter of 26 November 2004 of the proposal to authorise the liquidators to continue with the action commenced by the judicial managers to challenge the validity of the floating charge, NIP should have intervened in CWU 2/05, and not having done so, it is precluded from raising the issue now. First, we would observe that the letter of 26 November 2004 was not tendered in evidence in relation to the present proceedings and thus did not form a part of the record of appeal. It should not be taken into account. Second, no papers relating to CWU 2/05 were in fact served on NIP. Third, the papers relating to OS 1535 were not served on NIP until 15 March 2005, almost one month after NCP was wound up on 18 February 2005.

11 In our opinion, it is clear that order 8 is a general order, with no specific reference to OS 1535 or any other proceedings which the liquidators were to continue. While NIP could be deemed to have constructive notice of the winding up proceedings by virtue of the advertisements in the media, there was nothing in the advertisement which indicated that, other than the usual orders, something like order 8 was being prayed for. As NIP was never served with the papers in CWU 2/05, there would have been no reason for NIP to intervene in the winding-up proceedings as such.

12 As the issue raised in SIC 1741 was never brought before Tay J for consideration, we do not think, in the circumstances here, NIP should be precluded from filing SIC 1741 to have the issue determined. Justice would favour giving NIP the opportunity to canvass the issue: *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 at 425. However, as the judge hearing SIC 1741 is of equal standing as Tay J who heard the winding-up proceedings, it is our opinion that the Judge was not empowered to set aside the order of another High Court judge. In this regard, NIP relies upon O 13 r 8 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("ROC") as an analogy to argue that the Judge was permitted to set aside order 8 as NIP was not a party to CWU 2/05. Quite apart from the fact that the ROC do not apply to proceedings relating to the winding up of companies (see O 1 r 2(4) and *Tohru Motobayashi v OR* [2000] 4 SLR 529), O 13 r 8 relates to the setting aside of a default judgment in default of appearance. Such a judgment could be set aside on the application of the defaulting party. However, there can only be a judgment in default of appearance in the case of a writ which is endorsed with a claim against a defendant and that defendant, after being served, fails to enter appearance. Of course, setting aside an order is possible in other circumstances, *eg*, in the case of an *ex parte* injunction. It does not seem to us that setting aside the order is the proper procedure here. The proper approach would have been for the Judge, having considered and commented on order 8, to simply rule on the application before him without purporting to set aside order 8. There will thus be two conflicting decisions of equal standing, and it is open to either party to take it up on appeal. It seems to us that what the Judge intended to do was really to declare that his ruling was different from order 8 of Tay J.

13 While the facts in *Barrell Enterprises* ([7] *supra*) were different, the case is of relevance. There, the appellant was committed to prison for contempt for failing to comply with an order of court. Her appeal to the Court of Appeal was dismissed. Thereafter, she commenced serving her prison term. A few months later the appellant applied to another judge to set aside the committal

order on the ground of fresh evidence, which application was refused. The appellant appealed. We should add that by this time the first order of the Court of Appeal had still not been extracted. The Court of Appeal refused to reopen the first appeal. It also ruled that the High Court had no jurisdiction to review its own decision or set it aside on the ground that fresh evidence had come to light. In such circumstances, the application for rehearing should be made to the Court of Appeal. While the situation here is quite different from that in *Barrell Enterprises* in the sense that NIP was not present before the court when Tay J made order 8, the ruling in *Barrell Enterprises* that the High Court cannot review or set aside its own order still holds good.

Scope of section 227T of the Act

14 We now turn to consider the substantive issue of this appeal. Section 227T provides that certain transactions of a company which is placed under judicial management may be challenged by the judicial manager. It reads:

> (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.

15 A similar provision in the Act which empowers the liquidator of a company to challenge some transactions of the company is s 329:

> (1) Subject to this Act and such modifications as may be prescribed, any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable under section 98, 99 or 103 of the Bankruptcy Act 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 —
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> (*a*) in the case of a winding up by the Court —
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> (i) the date of the presentation of the petition; or
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> (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,
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> 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.

16 We note that there is considerable similarity in wording between ss 227T(1) and 329(1), although the catalogue of transactions that are void or voidable are not the same. However, it is clear that some transactions may be challenged by both the judicial manager and the liquidator. What the present case brings to focus is the question whether proceedings commenced by the judicial manager under s 227T may be continued by the liquidator. To void a transaction which constituted unfair preference, proceedings must be commenced within the prescribed timelines. Unless proceedings commenced by the judicial manager, and which have yet to be adjudicated upon, may be continued by the liquidator, the liquidator may find himself to be out of time as far as the preferred transaction is concerned.

17 In the court below, NIP raised basically two main arguments to contend that the right of action of the judicial manager under s 227T cannot inure for the benefit of the liquidator. The first was based on the last several words in s 227T(1), namely, "be void as against the judicial manager". The second was based on a comparative analysis of legislation elsewhere. For example, in England, their equivalent to our s 329 expressly allows an action commenced by the liquidator to relate back to the time when the company concerned was placed under administration, the equivalent of our judicial management. There is no similar provision for relation back in our s 329.

The decision below

18 In coming to his conclusion, the Judge highlighted the clear difference in objective between judicial management and liquidation: the former was to rescue a potentially viable business whereas the latter was just the reverse, to bring the business to an absolute end. That being the case, in the absence of express contrary indication, the provisions which relate to one regime should not be construed to apply to the other regime. This position is reinforced by a comparison of the wording between ss 227T and 329. Whereas s 227T(1) provides that the transaction under challenge would be void "as against the judicial manager", s 329(1) merely provides that the transaction would be "void or voidable in like manner".

19 The Judge also emphasised the fact that the powers in s 227T are unique to Singapore. A similar power was not accorded to the judicial manager in other jurisdictions such as in England and Australia (the present position). He said in his judgment (reported at [2005] 4 SLR 681) at [38]:

> 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.

Accordingly, he held that the liquidators of NCP could not continue OS 1535, which was never brought to fruition by the judicial managers; instead the liquidators had to commence fresh proceedings pursuant to s 329 and could only challenge those transactions which fell within the timelines set out in s 329, read with s 100 of the Bankruptcy Act (Cap 20, 2000 Rev Ed).

Grounds of the appellant

20 The grounds which NCP has advanced before us to challenge the decision of the judge below on the interpretation of s 227T may conveniently be grouped under the following two main heads:

(a) There was no necessity for the judicial managers to bring OS 1535 to fruition in order that the rights granted by s 227T may be enforced by the liquidators.

(b) If the liquidators are not permitted to pursue OS 1535, the general creditors of NCP would be unfairly disadvantaged.

These were much the same grounds which were canvassed before the Judge and were dealt with by him.

Were the judicial managers required to pursue the action to fruition?

21 The Judge, in finding that an action commenced by a judicial manager to avoid a transaction under s 227T would abate or terminate upon the discharge of the judicial management order unless the action was brought to fruition, had found support for his position in an article by an academic writer, Mr Lee Eng Beng, entitled "The Avoidance Provisions of the Bankruptcy Act 1995 and Their Application to Companies" [1995] Sing JLS 597 ("the article"). The relevant portion of the article (at 643) reads:

> A peculiar feature of section 227T(1) is that it provides that a transaction which would be caught by the avoidance provisions if it had taken place in bankruptcy 'shall, in the event of the company being placed in judicial management, be void as against the judicial manager'. A literal interpretation suggests that the transaction is not void as against the company. …
>
> If the relevant transaction is wholly or partially executed and the judicial manager has taken active steps to avoid it by invoking the avoidance provisions, it is clear that the transaction cannot be resurrected on the discharge of the judicial management order. The transaction must be treated as unwound once and for all. 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.
>
> However, the position is not that clear where the relevant transaction is one which is executory and the judicial manager does not declare it to be void under the avoidance provisions.

22 Counsel for NCP submitted that the article does not state that the judicial manager must bring a pending action under s 227T to fruition. All that the author says is that the judicial manager must "take active steps" to avoid the transaction. This, the judicial managers here had done: they had taken a firm position by instituting OS 1535. NCP emphasised that the critical portion of the article is the following (at 643):

> If … the judicial manager has taken active steps to avoid it by invoking the avoidance provisions, it is clear that the transaction cannot be resurrected on the discharge of the judicial management order.

23 It is true that the author of the article does not say that the judicial manager must, or should, initiate proceedings and/or obtain a judgment or order of court. He only says that if the judicial manager has taken steps to avoid them, "the transactions cannot be resurrected on the discharge of the judicial management order. The transaction must be treated as unwound once and for all." It seems to us clear that implicit in these remarks is the assumption that whatever transaction that is being impugned by the judicial manager, it has already been set aside or repayment made, in other words unwound, otherwise there would have been no question of resurrecting the transaction. Thus, the words "taken active steps to avoid" the transaction must be read in their proper context. The article rightly does not refer to legal proceedings because it does not necessarily follow that to unwind a transaction, institution of legal proceedings is needed in every

case. If the preferred creditor agreed to what the judicial manager claims and refunds the payment, or reconveys the property, there would be nothing more to be done. The impugned transaction would have been reversed.

24 It is also true that the author does not in the article specifically address the question as to what is to be the legal position if an action instituted by the judicial manager to void a transaction has not yet been adjudicated upon by the court, as in the present case. It seems to us that the institution of an action is no more than the formal lodging of a claim. It does not determine the rights of the parties. Under s 227T it is clear that the right to void a transaction tainted with unfair preference is personal to the judicial manager. This is evinced by the words "be void as against the judicial manager". A case which is germane to this very point is *In re Oasis Merchandising Services Ltd* [1998] Ch 170 which decided that an action brought by the liquidator of a company under s 214 of the English Insolvency Act 1986 (c 45) against the company's directors for wrongful trading was personal to the liquidator as the power under the provision was conferred on him alone. Section 214 allowed the liquidator of a company in the course of winding up to bring proceedings against a present or former director (including a shadow director) who knew or ought to have known when he entered into a transaction on behalf of the company that there was no reasonable prospect that the company would avoid going into insolvent liquidation. In the course of his judgment, Peter Gibson LJ, delivering the judgment of the Court of Appeal, said (at 181) that money recovered by the liquidators from fraudulently preferred creditors did not become part of the general assets of the company. Thus, by analogy, the right of action conferred upon the judicial manager under s 227T is a right personal to the judicial manager and this right does not form part of the assets of the company which upon its winding up will be vested in the liquidator.

25 The appellant argued that so long as the judicial manager has taken a decision on the matter and has conveyed the decision to the preferred creditor, that would have constituted sufficient "active steps" to preserve the rights of the judicial manager, which rights can be devolved on the liquidator upon the winding up of the company. In our opinion, this submission is without any foundation. It presupposes that the right of action to void the transaction has thereby become a general asset of the company which will or can automatically vest in the liquidator upon winding up. As mentioned above, this right to void the transaction under s 227T is personal to the judicial manager. Indeed, unless the transaction has been unwound, and this must mean completely unwound, nothing of s 227T is preserved upon the termination of the judicial management.

26 Reverting to the article, it is of interest to note that the author in another part (at 644) made the following comments:

> 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 an 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.

What the author clearly means is that unless the impugned transaction is unwound during the currency of the judicial management, then upon winding up of the company, the liquidator will not be

stepping into the shoes of the judicial manager. The liquidator could challenge the transaction but the six-month period will be reckoned backwards not from the time of the appointment of the judicial manager but from the commencement of liquidation. In view of the delay, an impugned transaction which falls within the six-month period as of the making of the judicial management order could well fall outside the six-month period as of the commencement of liquidation.

Unfair disadvantage to the general creditors

27 NCP next argued that the critical act is the institution of the action to challenge the transaction. By instituting the action, OS 1535, the judicial manager has exercised his rights to challenge the allegedly preferential transaction. There is no reason why the action should abate or terminate simply because liquidation has set in before the action could be adjudicated upon and the transaction unwound. If the judicial management is followed immediately by liquidation, there is no good reason why the preferred creditor should benefit as against the general creditors.

28 It cannot be disputed that the objects of judicial management are not the same as those of liquidation, although there is at least one common ground upon which a petition for either judicial management or winding up can be made, *ie*, when the company is unable to pay its debt. A company can be wound up for a variety of reasons. We accept that when a company is wound up, other than for its inability to pay its debts, the creditors in general are not likely to be concerned and the question of unfair preference will probably not arise. It is only where a company is wound up for its inability to pay its debts that questions relating to unfair preference or transactions at an undervalue will arise. On the other hand, in every application for judicial management, the creditors will be concerned. This is because when such an application is made the company will already be, or is likely to be, in financial difficulties. While rehabilitation is a clear aim of a judicial management order, it is not the only object: see *Re An Application by J G A Tucker and Reid Murray Developments (Qld) Pty Ltd* [1969] Qd R 193 ("*Re Tucker*"), *per* Lucas J at 210. It could also be for the better realisation of the assets of the company. In fact, those were the dual aims of the petitioner in obtaining the judicial management order in the present case in respect of NCP.

29 While we acknowledge the force of the argument to the effect that why the preferred creditor should not benefit in a circumstance like the present, we must also point out that it is not as if there is no other recourse available to the judicial manager. The judicial manager, upon realising that the object of rehabilitation is no longer possible, can apply to court to ask for an extension of the judicial management order just for the purpose of the better realisation of the assets of the company. In this regard, s 227X(*b*) of the Act could be useful. It reads:

> At any time when a judicial management order is in force in relation to a company under judicial management —
>
> > (*b*) sections 337, 340, 341 and 342 shall apply as if the company under judicial management were a company being wound up and the judicial manager were the liquidator, but this shall be without prejudice to the *power of the Court to order that any other section in Part X shall apply to a company under judicial management as if it applied in a winding up by the Court and any reference to the liquidator shall be taken as a reference to the judicial manager* and any reference to a contributory as a reference to a member of the company.
>
> [emphasis added]

30 It would be seen that s 227X(*b*) is a wide-ranging provision which could usefully be resorted to in order to deal with a problem like the present case where it is necessary to maintain a judicial

management order to better realise the assets of the company, *ie*, to unwind the preferred transaction which was the subject of OS 1535. There will thus be no justification for this court to disregard the clear wording of s 227T and give it an interpretation which is at variance with its explicit terms.

31 In this regard, NCP reminded this court of s 227Q(1) of the Act which reads:

> The judicial manager of a company shall apply to the Court for the judicial management order to be discharged if it appears to him that the purpose or each of the purposes specified in the order either has been achieved or is incapable of achievement.

Counsel for NCP submitted that if the approach of the Judge were correct it would mean that the judicial manager had to "choose between breaching his duty under s 227Q … [or] … losing the ability to challenge various transactions if he does not wait for the avoidance proceedings to bear fruit". In the light of what we have stated in [29] and [30] above, there is hardly any force in this argument. The judicial managers of NCP could have applied to court to obtain the powers of a liquidator in order to better manage the affairs of the company during the period of judicial management.

32 We have earlier referred to the statutory position in England (which is also the current position in Australia), where the administrator is not given an equivalent right of action as that conferred on the judicial manager by our s 227T. However, the English statutory equivalent to our s 329 allows an action to void a preferred transaction commenced by a liquidator to relate back to the time during which the company concerned was under administration. Clearly, the scheme applicable in England is different from ours as far as this aspect is concerned. We do not think any useful point can really be made out of the difference in treatment.

The only precedent

33 We now turn to examine the only known case in the Commonwealth which related to a similar Australian provision and which was construed by the Judge as supporting the stance he had taken. This is the case of *Re Tucker* ([28] *supra*) which was a decision of the Full Court of Queensland, Australia, pursuant to a special case stated by a judge of the Supreme Court of Queensland. The facts of the case were in many respects similar to the present except for one very material aspect. There, certain payments were made by the company to a creditor which were alleged to be preferences and were therefore void or voidable pursuant to s 206(1) of the Companies Acts 1961–1964 ("the Queensland Act") (this provision had since been repealed). Unlike our case here, *no step was taken* by the official manager during the currency of the official management order to set aside or void the payments. A little more than three months later, the company was ordered to be wound up on a petition filed on 30 May 1963, by which date none of those alleged voidable payments fell within the voidable six-month period. The liquidator applied by a summons, pursuant to s 206, to have those payments declared preferential and to require the creditor to repay those amounts to the company. Section 206(1) of the Queensland Act read:

> 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.

34 We should perhaps at this point also quote s 293(1) of the Queensland Act which was the equivalent of our s 329(1). It read:

> 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 wound up be void or voidable in like manner.

35 The majority of the Queensland Full Court, Lucas and Douglas JJ, came to the conclusion that the liquidator could not commence proceedings under s 206 to have the payments avoided. First, they noted that the object of official management was different from winding up and that companies placed under official management were not necessarily to be wound up. The object of official management was to grant to the insolvent company a moratorium for the purposes of seeing whether the official manager could get it off its difficulties. Lucas J, delivering the majority judgment, said at 211:

> The section 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 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.

36 Hart J, who gave the dissenting judgment, did not think that it would be correct to regard Part IX of the Queensland Act, which related to official management, as a "statutory island". He could not accept the following comments made in G Wallace & J Young, *Australian Company Law and Practice* (The Law Book Company Limited, 1965) at p 601:

> … At all events if the official manager (or his successor) does not during the *period of official management* avoid the disposition the following results flow:
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> (a) In the event of a subsequent winding up the right to avoid would not enure for the benefit of the liquidator who would have to rely on the provisions of s 293.
>
> (b) After termination of the official management (whether by effluxion of time or payment) the right to avoid would cease and there is no power in this part for an extension of time.
>
> (c) If a second period of management were duly resolved upon, the operation of the section would commence *de novo.*
>
> [emphasis in original]

He felt that s 221(1) of the Queensland Act which gave the official manager power to present a winding-up petition to be very significant. Unlike the majority, he thought that s 206 was a section "which [was] directed rather to the winding up of companies than to their continued trading" although he recognised that "if a creditor has got a preference, then it might assist the company to trade its way to solvency if he is made to disgorge" (at 200). He emphasised that the aim of the law in voiding unfair preferences in bankruptcy had always been equality amongst creditors of insolvent persons. He said (at 203):

> Preference provisions belong to the insolvency law and in the *Bankruptcy Act* are designed to do equity amongst creditors. The words "in like manner" and "with such adaptations as are necessary" suggest that this is the purpose of s. 206 and that any other effect is incidental.
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> …
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> The words "with such adaptations as are necessary" do not occur in s. 293. This suggests that more adaptations are required in s. 206, than in s. 293 and that there should not be a too literal application of the decisions on that section.

37 Quite clearly, the decision of the majority in *Re Tucker* does lend support to the approach taken by the Judge on our s 227T. Moreover, the wording of our s 227T is even more explicit than that in s 206 of the Queensland Act. Our s 227T says the impugned transaction is "void as against the judicial manager" whereas s 206 states that where a company is placed under official management the impugned transaction shall "be void or voidable in like manner" as in the case of an individual in bankruptcy. While no mention was made in *Re Tucker* whether the Queensland Act then contained a similar provision as our s 227X(*b*), the majority opinion was definite in holding that the right in s 206 was not available to anyone other than the official manager. While it is true that in *Re Tucker*, the official manager had not instituted any action, unlike in the present case, it seems to us that, conceptually, if a right is available only to the judicial manager, we cannot see how anybody else could step into the shoes of the non-existent judicial manager and pursue the action. The action must abate or terminate following the lapsing of the judicial management order. The concern raised by counsel for NCP about the interest of the general creditors loses much of its force when it is borne in mind that that aspect is not something which could not be taken care of as alluded to above.

38 In passing we would like to mention that counsel for the creditor in *Re Tucker* seemed to have drawn a distinction between the situation where proceedings to avoid a preferred transaction had already been instituted by the official manager but not yet adjudicated upon and the situation where no proceedings had yet been instituted by the official manager. Counsel for the creditor appeared to have conceded that in the former situation the liquidator could continue with the proceedings already instituted by the official manager (see *Re Tucker* at 204). Obviously, this is only the view of a counsel. As far as the position here is concerned, we think that only the judicial manager can institute *and pursue* an action invoking s 227T.

39 Accordingly, we would agree with the decision of the court below. In our judgment, this appeal should be dismissed with costs to the respondent.

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