Chee Yoh Chuang and Another (as Liquidators of Progen Engineering Pte Ltd (In Liquidation)) *v* Progen Holdings Ltd
[2010] SGCA 31

Case Number	: Civil Appeal No 165 of 2009
Decision Date	: 31 August 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Lee Eng Beng SC, Nigel Pereira and Jonathan Lee (Rajah & Tann LLP) for the appellants; Philip Fong and Shazana Anuar (Harry Elias Partnership LLP) for the respondent.
Parties	: Chee Yoh Chuang and Another (as Liquidators of Progen Engineering Pte Ltd (In Liquidation)) — Progen Holdings Ltd

Insolvency Law – Avoidance of transactions – unfair preferences

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2009] SGHC 286.]

31 August 2010 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 Progen Holdings Ltd ("the respondent"), a company listed on the Singapore Stock Exchange, is the sole shareholder and holding company of Progen Engineering Pte Ltd ("PEPL"). A winding-up application was filed against PEPL on 22 January 2007 by a creditor, Chua Aik Kia trading as Uni-Sanitary Electrical Construction ("Uni-Sanitary"). As a result, an order to wind up PEPL was made on 16 February 2007. Chee Yoh Chuang and Lim Lee Meng were then appointed as liquidators of PEPL ("the liquidators").

2 On 6 November 2008, the liquidators made an application to court to order the respondent to repay substantial amounts of monies paid by PEPL to it. These monies were alleged to be unfair preferences under s 99(2) of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ('the Bankruptcy Act') read with s 329(1) of the Companies Act (Cap 50, 2006 Rev Ed) ('the Companies Act'). A High Court judge ("the Judge") dismissed this application and the liquidators now appeal against this decision.

3 This appeal raises interesting issues about how the law ought to balance the rights of creditors with the company directors' desire to keep a company afloat when the company has financial difficulties. Difficulties often arise when an insolvent company seeks to make payments to certain creditors at the expense of others. Ordinarily, commercially sensible transactions made with the objective of creating or extending a lifeline to a company suffering financial difficulty should not be questioned. A court ought not to be too astute in taking directors to task when they appear to have been attempting in good faith to facilitate the preservation or rehabilitation of a company, and where they had reasonable commercial grounds for believing that the transaction would benefit the company. With that said, we must caution that where it appears that ***related parties*** have benefitted from priority payments, the law would usually view these transactions with a good measure of scepticism. This is particularly so if the interests of unrelated creditors, with claims standing on the

same footing, are left in the cold. In respect of these kinds of transactions, the burden of proof would be placed on the related party for it to show that there had been no undue preference. Having sketched these broad parameters bounding the law on undue preferences, we now set out the salient facts before analysing the Judge's grounds and giving our decision.

Factual Background

4 The Progen Group ("the Group") comprises the respondent and a stable of ten subsidiaries, including PEPL and Progen Pte Ltd ("PPL"). The Group is in the business of supplying, installing, trading, maintaining and servicing air-conditioning and ventilation systems. Mr Lee Ee @ Lee Eng ("Lee Ee") is the chairman and founder of the Group [note: 1], and is the managing director of the respondent. In addition, Lee Ee and his wife, Koh Moi Huang, ("Koh") together owned the largest block of shares in the respondent [note: 2] amounting to 29.24% of the issued shares during the material period [note: 3]. Lee Ee and Koh [note: 4] were, it ought to be noted, directors of PEPL at the material time. It also bears mention that there were three common directors of PEPL and the respondent at the relevant time, namely, Lee Ee, Tan Eng Liang and Ch'ng Jit Koon. Undoubtedly, Lee Ee is the key figure in the Group. Besides his family's substantial shareholdings in the respondent, it is noteworthy that he was the only director of either company to affirm affidavits in these proceedings and in an earlier application for court sanction for the capital reduction of the respondent see below at [16].

5 In all, after the liquidators completed their investigations into PEPL's affairs, it was alleged that ten transactions between PEPL and the respondent were unfair preferences. These transactions can be summarised (in chronological order) as follows:

	Date	Amount(S$)	Type of Transaction
1st Transaction	31.01.2005	92,994.50	Salaries, etc
2nd Transaction	21.02.2005	50,000.00	Purchases of iron ore
3rd Transaction	04.02.2005	10,987,960.85	Capital distribution and Special Dividend to Respondent's shareholders
4th Transaction	28.02.2005	57,837.00	Salaries, etc
5th Transaction	04.03.2005	55,000.00	Purchases of iron ore
6th Transaction	31.03.2005	48,956.75	Salaries, etc
7th Transaction	30.04.2005	48,607.00	Salaries, etc
8th Transaction	31.05.2005	48,617.62	Salaries, etc
9th Transaction	30.06.2005	50,131.29	Salaries, etc
10th Transaction	30.06.2005	7,538,243.15	Set-off
Total amount transacted	-	**18,978,348.16**	-

6 The 3rd transaction involved the largest sum and obviously requires the greatest scrutiny. This particular transaction also gives an acute insight as to how the common directors typically handled inter-company transactions. We will therefore examine the 3rd transaction before the other transactions ("the other transactions"). In addition to the ten transactions above, PEPL made several payments amounting to $3,528,040 to other *related* companies within the Group between 23 February 2005 and 22 January 2007. [note: 5] These, however, are not being questioned in these proceedings.

The 3rd transaction

7 The 3rd transaction involved the transfer of $10,987,960.85 from PEPL to the respondent on 4 February 2005. The respondent maintains in this appeal that the 3rd transaction involved the repayment of an ordinary loan given by the respondent to PEPL. It asserts that these monies came from the sale of a property at 12 Woodlands Loop ("Progen Building") on 29 July 2004 for a sum of $24.9m. [note: 6] Progen Building, however, was consistently reported as a fixed asset in PPL's audited financial statements for the financial years. [note: 7] There is absolutely no documentary evidence of Progen Building ever being declared as an asset of the respondent. Despite this dearth of evidence, the respondent adamantly maintained during the trial proceedings that Progen Building was always held on trust by PPL for it, and the subsequent sale proceeds were trust monies belonging to it. This untenable contention, however, was not canvassed on appeal.

8 The sale proceeds of the Progen Building were eventually placed in PPL's fixed deposit account with United Overseas Bank Limited ("UOB") on a monthly basis until 4 December 2004. Before each renewal, PPL withdrew a small part of the funds. The aggregate sum in the account on final maturity was $23,342,695.12. [note: 8] Immediately after maturity, a sum of $19m was transferred from PPL's UOB fixed deposit account to PEPL's fixed deposit account with Malayan Banking Berhad ("MBB") for two months. [note: 9] Initially, to persuade the Judge that the respondent had no intention of making a loan to PEPL, the respondent claimed that this transfer was merely an interim commercial decision to secure higher interest returns. However, we note that no satisfactory evidence to substantiate this was ever adduced.

9 The Group had at this point of time two available internal sources of funds:

(a) a sum of $19m from the sale proceeds of Progen Building kept in PPL's UOB fixed deposit account; and

(b) a sum of $300,000 from the sale of the respondent's shares in Wee Poh Holdings. [note: 10]

10 From this, $19.3m was *transferred to PEPL* by way of two cheques on 4 December 2004:

(a) a cheque drawn by PPL from its UOB account for $19m; and

(b) a cheque drawn by the respondent from its UOB account for $300,000.

11 The purported reasons for the transfer of this sum of $19.3m (captured in two contemporaneous debit notes dated 31 December 2004 and issued by PEPL) were briefly recorded as follows:

(a) a sum of $300,000 recorded as a "transfer of funds to PEPL MBB fixed deposit account" and a sum of $15,750,000 recorded as an " ***ADVANCE*** FROM [THE RESPONDENT] TO PEPL", both were recorded on the same Debit Note: PHL/DN/167 [note: 11] [emphasis in bold italics added]; and

(b) a sum of $3.25m that was recorded as an advance by PPL to PEPL in Debit Note PPL/DN/863. [note: 12] (This sum was in fact a repayment by PPL to PEPL of monies previously advanced to PPL. This is not the subject of the present appeal.)

12 Having briefly set out the genesis of the "loan" given by the respondent to PEPL, we now examine the reasons given by the respondent to justify the 3rd transaction, that is, the repayment of the "loan".

Alleged commercial reasons for the 3rd transaction

13 The respondent claims that the transaction was motivated by proper commercial considerations. Specifically, the transfer of $10,987,960.85 from PEPL to the respondent on 4 February 2005 was meant to pay for the respondent's Capital Distribution and Special Dividend payout. In support of this, the respondent referred to an earlier SGX MASNET announcement dated 26 August 2004 where it had stated that there would be a special dividend payment of $4m and capital distribution of $11m to the respondent's shareholders. [note: 13] Shareholders' approval for this was obtained on 24 November 2004 at an Extraordinary General Meeting and Court approval was obtained on 10 January 2005.

14 However, in justifying the payment of the Capital Distribution and Special Dividend, the respondent has inadvertently drawn attention to several discrepancies in the processes it employed to secure sanction from the court. It appears from the relevant court minutes and affidavits on record that the respondent did not inform the Court about PEPL's dire financial position (PEPL's Balance sheet as at 31 December 2004 showed that it was insolvent). On the contrary, the respondent apparently misstated the position to the Court by not fully disclosing the material facts below.

15 On 26 November 2004, Winter Engineering (S) Pte Ltd ("Winter Engineering") obtained an award against PEPL in the sum of $3.6m inclusive of costs ("the arbitration award"). This award adversely affected PEPL's financial position by adding to its ever increasing pile of unsatisfied debts. In addition to Winter Engineering's arbitration award, PEPL then already had a significant pre-existing inter-company debt owing to the respondent; PEPL's General Transactions Listing dated 30 November 2004 stated that PEPL owed a sum of $2,787,999.95 to the respondent. [note: 14] As mentioned above, on 4 December 2004, $19m was transferred from PPL's fixed deposit account to PEPL's MBB bank account. However, none of these monies were used to settle the debt due to Winter Engineering. Instead, it appears that PEPL ignored this debt and subsequently attempted to reopen the arbitration award in an attempt to delay payment. On 6 April 2005, PEPL unsuccessfully applied for leave to appeal against this arbitration award. A High Court Judge, in dismissing PEPL's application for leave to appeal against the arbitration award, observed that PEPL was improperly attempting to evade its legal obligations (*see Progen Engineering Pte Ltd v Winter Engineering (S) Pte Ltd* [2006] SGHC 224 at [17]):

> It is evident that the plaintiff was quite content not to prosecute this matter diligently as it had incurred a liability to pay a substantial sum to the defendant pursuant to the First Award. *In its attempt to challenge the First Award it sought to raise several unmeritorious issues*, *ie*, the remaining issues. I can only infer from the plaintiff's conduct that it has, since the issuance of

the Second Award, *employed every legal strategy available either by omission and/or commission to deprive the defendant of the fruits of litigation. This should no longer be tolerated or permitted*. [emphasis added]

16 On 30 November 2004, merely four days after the arbitration award had been made against PEPL, Lee Ee applied on behalf of the respondent for court approval of the Capital Distribution and Special Dividend payment. Regrettably, the existence of the arbitration award was not drawn to the Court's attention in Lee Ee's supporting affidavit. Instead, Lee Ee made several unqualified assertions about the Group's strong financial position, For instance, in para 24 of his affidavit [note: 15] :

> These aforesaid audited accounts show that the [respondent] and the Group are in sound financial health.

17 It cannot be disputed by the respondent that this reference to the Group embraced PEPL since it was expressly referred to as one of Progen Holdings' subsidiaries in the affidavit. This representation was clearly not correct. As will be shown below, PEPL's balance sheet as at 31 December 2004 clearly showed that it not just financially anaemic–it was insolvent and had substantial unsatisfied debts.

18 Lee Ee also unequivocally represented to the Court that even after the Capital Distribution exercise had been implemented, the companies in the Group would have more than sufficient assets to meet their then outstanding liabilities. At para 27 of his affidavit he boldly asserted:

> After the proposed capital reduction and capital distribution of the [respondent], it is intended for the [respondent] and the Group to retain substantial cash and cash equivalents, *which will be more than sufficient to meet the existing liabilities in the accounts and to continue its operations*. [emphasis added]

19 Strikingly, the following assertions were also made at paras 11 and 12 of the same affidavit:

> *... taking into account the reserves available to the Group in the form of the Available Funds, the working and other capital requirements of the Group, the Group's present credit facilities as well as funds required for any business and expansion opportunities, the current available working capital of the Group is more than its present requirements...*
>
> The level of cash distribution pursuant to the capital reduction and capital distribution exercise has been determined to allow the Group to maintain sufficient Available Funds and capital and revenue reserves to support and focus on the Group's businesses as well as to take advantage of appropriate new business opportunities that may arise from time to time in the future ...

20 We can safely assume that it was only because of all these unqualified statements about the Group's robust financial position that the Court approved the Capital Distribution and Special Dividend payment on 10 January 2005. Unfortunately, this pattern of misstatement did not stop here. It will be seen below that the respondent continued to give further questionable assurances (of a different kind) even after the 3rd transaction was effected on 4 February 2005.

Material misstatements in PEPL's Financial Statements and Director's Statement

21 Before dealing with the further misstatements, it would be appropriate to review the financial situation of PEPL at the material time. In PEPL's balance sheet as of 31 December 2004, a sum of $18,514,288 was recorded as an " ***Amount due to [the respondent]*** " [note: 16] (emphasis in bold italics added). This sum comprises of (a) $16.05m transferred by the respondent to PEPL, and (b) the

pre-existing debt of $2,787,999.95 owed by PEPL to the respondent. Plainly, the balance sheet as at 31 December 2004 indicated that PEPL was already insolvent at that time with unsatisfied debts of $2,246,584.

22 PEPL's balance sheet and Financial Statements dated 31 December 2004 were jointly issued by Lee Ee, Koh, Tan Eng Liang, and Ch'ng Jit Koon on 23 February 2005. The first alleged misstatement is in Note 13 of PEPL's Financial Statements dated 31 December 2004 [note: 17] ("Note 13"), where it was stated that:

> The amount [due to the respondent which is the sum of $18,514,288 recorded in PEPL's balance sheet] is non-trade related, unsecured, interest-free and is *not expected to be repaid within the next twelve months*. [emphasis added]

23 This assurance, as we have pointed out above, was not observed as the respondent and the directors of PEPL allowed this amount to be utilised, even before it was given, on 4 February 2005 to "repay" the amount for the purpose of making the dividend payments.

24 The second alleged misstatement was contained in the Statement made by two of PEPL's Directors ("Director's Statement"), namely Lee Ee and Tan Eng Liang. [note: 18] The Director's Statement was dated 23 February 2005 and was issued together with PEPL's balance sheet as at 31 December 2004 and PEPL's Financial Statements dated 31 December 2004. Paragraph (b) of the Director's Statement represented that:

> ... at the date of this statement there are reasonable grounds to believe that [PEPL] *will be able to pay its debts as and when they fall due as its holding company has agreed to provide adequate funds for [PEPL] to meet its liabilities* as and when they fall due and to *subordinate the amount owing to it and its related companies for the prior payment of other liabilities*. [emphasis added]

25 This statement was referred to by the Judge as a "Subordination Statement" (see the Judge's Grounds of Decision, *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2009] SGHC 286 ("GD") at [22]) and we will adopt the same terminology here. Contrary to the representations made in the Subordination Statement and Note 13, PEPL in fact had already paid the sum of $10,987,960.85, out of the sum of S$19.3m kept in the MBB fixed deposit account, to the respondent on 4 February 2005. We consider it significant that even after this payment was made on 4 February 2005, the directors of PEPL had more than ample opportunity to amend its Director's Statement (inclusive of the Subordination Statement) and its Financial Statements (inclusive of Note 13), as these documents were all dated and issued much later, on 23 February 2005.

The other transactions

PEPL's payment of salaries and expenses of the respondent's employees

26 Lee Pui Hoon, the respondent's finance manager, testified that PEPL had operated as a "payment centre" since 2001. [note: 19] PEPL would make payments for and on behalf of the respondent and other subsidiaries. The payments include salaries, CPF payments and petty cash reimbursements for the employees in the Group. [note: 20] This arrangement does not seem, however, to have been properly captured in the Group's financial statements.

27 During the material period, PEPL made payment to the respondent on six separate occasions,

allegedly as payment for the salaries and expenses of the respondent's employees. These payments came to $347,144.16 in all. The six occasions were: 31 January 2005, 28 February 2005, 31 March 2005, 30 April 2005, 31 May 2005 and 30 June 2005 (see above at [5]). These were all alleged to be unfair preferences. The respondent maintains that these payments were made in accordance with PEPL's settled practices. [note: 21]

PEPL's payment to the respondent for reimbursement of iron ore purchases

28 PEPL also made payment to the respondent on two other occasions, allegedly as reimbursement for iron ore purchases. These payments amounted to $105,000.00. The two occasions were 21 February 2005 and 4 March 2005. These were alleged to be unfair preferences. The respondent again claims that these payments followed PEPL's settled practices. [note: 22]

Set-off on 30 June 2005

29 On 30 June 2005, a debt of $7,538,243.15 owed by PEPL to the respondent was discharged by setting it off against the sum of $9,027,964.19 owed by PPL to PEPL. The discharge of the debt owed to the respondent is also alleged to be an unfair preference. The respondent contends that this transaction was an 'inter-company adjustment', and that such adjustments were a "normal practice" of the Group. Companies within the Group would make payments on behalf of each other and inter–company balances then adjusted periodically. [note: 23]

The Judge's decision

30 The Judge found that the evidence did not support the respondent's contention that the sum of $16.05m was held on trust for the respondent. The Judge nevertheless held that that the statutory presumption under s 99(5) of the Bankruptcy Act had been rebutted in all ten transactions: see GD at [71]–[82]. The Judge accepted that the sum of $10,987,960.85 was meant all along to be used for the respondent's Capital Distribution; the money had only been temporarily placed in PEPL's MBB fixed deposit account to take advantage of higher interest rates pending court approval. The Judge also determined that even though the undertaking given in Note 13 and the Subordination Statement had been disregarded, this did not necessarily mean that there had been an unfair preference (see GD at [68]). *Nonetheless, the Judge acknowledged that even if there was no fraud involved, there had been negligence and recklessness on the part of Lee Ee and PEPL's directors*. In addition, the Judge noted that there was no hint that steps would be taken by the respondent to "put its house in order" (GD at [86]). Noting that the respondent is a listed company, he intimated that the liquidators ought to draw the breaches of the various undertakings to the attention of PEPL's auditors and the Singapore Stock Exchange. His observations at [85]–[88] of the GD merit repetition here:

> 85 There is, however, one other observation I wish to make. *It seemed to me that the directors of [PEPL], or at least Mr Lee Ee, did not bother to ensure that the Subordination Statement and Note 13 were accurate. There seemed to be some negligence or recklessness even if there was no fraud*. Furthermore, although Mr Lee Ee said he would take full responsibility for the Subordination Statement, and presumably for Note 13 as well, there seemed to be an absence of genuine remorse. These two statements were not the only "errors" which had occurred. To recapitulate some other examples:
>
> (a) the effective dates of transactions were at times incorrectly entered in accounting documents of [PEPL]; and

(b) the payment of $3,250,000 by PPL to [PEPL] was actually a re-payment of an amount to [PEPL] but not recorded correctly.

86 There was no hint that steps would be taken by [the respondent] to put its house in order. *[the respondent] appeared to treat the present claim as more of a nuisance rather than an overdue alarm*.

87 *I am concerned about the [the respondent] mindset bearing in mind especially that it is a listed company*.

88 *I hope the liquidators will bring this unsatisfactory state of affairs to the attention of the auditors of [PEPL] who, I was informed, are also the auditors of the [the respondent] if not to the Singapore Stock Exchange as well*.

[emphasis added]

31 With regard to the other transactions, the Judge was satisfied that they were "part of the Company's practice" to treat PEPL as a "payment centre" to pay the salaries and cash expenses of companies in the Group. Similarly, regarding the 10th transaction (the set-off involving the sum of 7,538,243.15), the Judge found that it was not the first time that set-offs had been carried out by PEPL (although the Judge did acknowledge that "it was *not normal* for a set-off of this *extent* to be done" (GD at [77])).

Our decision

Relevant statutory provisions

32 The relevant statutory provisions dealing with unfair preferences are s 329 of the Companies Act read with ss 99 and 100 of the Bankruptcy Act. The relevant parts of s 329 of the Companies Act read as follows:

329. —(1) Subject to this Act and such modifications as may be prescribed, any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable under section 98, 99 or 103 of the Bankruptcy Act (Cap. 20) (read with sections 100, 101 and 102 thereof) shall in the event of the company being wound up be void or voidable in like manner.

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

(*a*) in the case of a winding up by the Court —

(i) the date of the making of the winding up application …

33 The pertinent portions of ss 99 and 100 of the Bankruptcy Act state:

Unfair preferences

99. —(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has, at the relevant time (as defined in section 100), given an unfair preference

to any person, the Official Assignee may apply to the court for an order under this section.

(2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not given that unfair preference.

(3) For the purposes of this section and sections 100 and 102, an individual gives an unfair preference to a person if —

(*a*) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities; and

(*b*) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.

(4) The court shall not make an order under this section in respect of an unfair preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3) (*b*).

(5) An individual who has given an unfair preference to a person who, at the time the unfair preference was given, was an associate of his (otherwise than by reason only of being his employee) shall be presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (4).

(6) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of an unfair preference.

Relevant time under sections 98 and 99

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

(*a*) …

(*b*) in the case of an unfair preference which is not a transaction at an undervalue and is given to a person who is an associate of the individual (otherwise than by reason only of being his employee), within the period of 2 years ending with that day; and

(*c*) …

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

(*a*) is insolvent at that time; or

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

(3) …

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

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

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

[emphasis in bold in original, emphasis in bold italics added]

34 It is common ground that the ten transactions questioned by the liquidators were entered into while PEPL was insolvent. In addition, they were made within a period of two years preceding the date of the commencement of winding up of PEPL, that is to say, when the winding up application was filed on 22 January 2007.

35 It is also undisputed that PEPL was "connected" with the respondent, through the common directors, for the purposes of triggering the statutory presumption under s 99(5) of the Bankruptcy Act read with s 329 of the Companies Act (we shall refer to this presumption hereafter as the "statutory presumption"). On this point, it has been unequivocally decided by this court in *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd & another* [2002] 2 SLR(R) 1143 ("*Show Theatres*") that where two companies have a common director or common directors, they will be considered to be "connected with" each other. A payment to a connected party within the two years prior to liquidation is presumed to be an unfair preference and it is for the "connected" company to rebut that presumption, see *Show Theatres* at [21]. *Prima facie*, the ten transactions being questioned are presumed to have been influenced by PEPL's desire to place the respondent in a better position in the event of PEPL's insolvent liquidation than if the transactions had not been entered into (see ss 99(4) and (3)(*b*) of the Bankruptcy Act).

36 As such, the issue that takes centre stage in this appeal is whether the statutory presumption has been rebutted. To rebut the statutory presumption, the burden is on the respondent to show, on a balance of probabilities, that the transactions had not been influenced by PEPL's desire to place the respondent in a better position in the event of PEPL's insolvent liquidation. Simply put, the respondent must show that the transactions were *not influenced at all* by any desire on PEPL's part to place the respondent in a preferential position. It is never sufficient, where there is objective evidence of a preferential payment to benefit a related party in the event of an insolvent liquidation, for the directors to simply deny the existence of such a desire. The facts have to be explained in detail. We deal with the 3rd transaction in Part 1 below. The other transactions will be dealt with in Part 2 (at [56]–[68]) below.

Part 1 – Analysis of the 3rd transaction

Preliminary considerations

37 As mentioned above, the Judge had decided that the sum of $16.05m transferred to PEPL was an ordinary advance. He, quite rightly, emphatically rejected the contention that the subject monies advanced by the respondent to PEPL were trust monies that had belonged, all along, to it. As mentioned above, as there is no cross-appeal by the respondent against this finding we will not revisit this issue. It suffices for us to say that the objective facts clearly show the following. First, PEPL's audited Financial Statements for the year ended 31 December 2004 confirm that the sum of $18,514,288 (which includes the sum of $16.05m transferred from the respondent to PEPL) was

recorded as a "**[n]on-current liability**" [emphasis in bold in original] and as "Amounts due" to the respondent. [note: 24] In addition, Note 13 of the Financial Statements emphatically stated that the amount due to the respondent (the sum of $18,514,288) as "unsecured" and "interest free" that is "not expected to be repaid within the next 12 months". [note: 25]

38 Second, the debit note dated 31 December 2004 recorded the transfer of the sum of $15,750,000.00 on 4 December 2004 as an "ADVANCE" from the Respondent to PEPL even though the monies came from the sale proceeds of an asset owned by PPL. [note: 26] The balance sum of $300,000 (the sum that the respondent obtained from having realised its shares in Wee Poh Holdings) had been recorded as a "TRANSFER OF FUNDS TO PEPL MBB FIXED DEPOSIT".

39 Third, Lee Ee and Tan Eng Liang, in their capacity as directors of PEPL, unequivocally represented in the Subordination Statement that PEPL would be able to pay its debts when due *as the Respondent had agreed to provide adequate funds for PEPL to meet its liabilities as and when they fell due* and crucially, to subordinate the amount owing to it and its related companies to ensure the prior payment of other liabilities. [note: 27]

Presumption for 3rd transaction is not rebutted

40 The existence of a subjective desire to prefer a creditor in the event of an insolvent liquidation may be inferred from all the circumstances of the transaction. The statutory presumption can therefore be reinforced or rebutted on the basis of direct evidence and/or on inferences drawn from the circumstances. If it can be established by the related party that the transaction was underpinned by proper commercial considerations and not by a positive desire to prefer it in the event of an insolvent liquidation, the transaction will not be impugned. On the established facts, in so far as the 3rd transaction is concerned, we determine that the statutory presumption for the 3rd transaction has not been rebutted for the following reasons:

(a) The failure to adhere to the above series of *assurances* given by the directors of the respondent and PEPL was highly *irregular* – indeed, they were made for an improper reason. Quite clearly, they were made to allow PEPL to continue operating as a going concern despite its parlous financial situation. Given the proximity with which they were made to the date of the adverse arbitration award against PEPL and the emphatic assurance not to pay related companies in preference to unrelated creditors in the Subordination Statement and in Note 13, we think that there was more than compelling evidence of a desire by PEPL to prefer the respondent.

(b) In situations where there is clear evidence of the directors' failure to appropriately consider the interests of the company's creditors, the Court should carefully sift through the evidence to determine if there were any transactions that undermine the collective procedure of insolvent liquidation. Here, the interests of PEPL's unrelated creditors were *obviously disregarded*. The 3rd transaction was undoubtedly orchestrated by PEPL's principal director to benefit the respondent's principal shareholder, who was essentially one and the same person: Lee Ee (and his wife, Koh). As such, the established facts in the present case fortify the statutory presumption.

(c) The purported commercial reason for making the advance (even if present), in and of itself, is insufficient to rebut the statutory presumption.

41 We now elaborate on each of these reasons.

False assurances given by the directors of PEPL

42 It is plain to us that assurances given in the Subordination Statement and Note 13 have been shown to be false. We should point out at the outset, that since PEPL is statutorily required [note: 28] to lodge an annual return attached with the company's balance sheet, Directors' report and Financial Statements; any assurances found in these statements would be made to the auditors, the public at large, as well its shareholders and, of particular concern in the present case, PEPL's creditors. For its *unrelated* creditors, these publicly filed statements were likely to be their main source of financial information on PEPL and could have influenced their decisions on when and how to recover their outstandings. Note 13 represented that the amounts due to the respondent (referenced as the sum of $18,514,288 in the Financial Statements) were not intended to be repaid *within the next twelve months*. Note 13 was part of PEPL's Financial Statements dated 31 December 2004 and it was issued together with the Directors' Report for the year ended 31 December 2004, signed on 23 February 2005. *This assurance was given to ensure that PEPL could continue operating as a going concern as it was then technically insolvent. In fact, the sum of $10,987,960.85 from the sum of $18,514,288 had already been repaid to the respondent on 4 February 2005 – well before this assurance was even given*.

43 The assurances given by PEPL's directors in the Subordination Statement that PEPL would subordinate the amounts owed to the respondent and its related companies "for the prior payment of other liabilities" (see [24] above) were also disregarded. Counsel for the respondent argued that the Subordination Statement correctly represented PEPL's financial situation as of 31 December 2004 as the payment out was only made subsequently. We cannot agree with this. The Director's Statement (inclusive of the Subordination Statement) dated 23 February 2005, was released as an integral part of PEPL's Directors' Report for the year ended 31 December 2004 and annexed to PEPL's audited balance sheet and Financial Statements ending 31 December 2004. This assurance that other liabilities would be paid in priority to related debts given *inter alia* to the auditors of the Group did not end on 31 December 2004. It was meant to unambiguously create an expectation that all debts owed to unrelated creditors would be paid in priority to related debts. Despite this solemn assurance, the sum of $10,987,960.85 was paid to the respondent on 4 February 2005.

44 The Judge appeared to have vaguely hinted that the misrepresentations might have been fraudulent but was ultimately content to find that there was negligence and recklessness on the part of Lee Ee and PEPL's directors. It appears to us clear that when the Subordination Statement and Note 13 were issued on 23 February 2005, the relevant directors ought to have been aware that $10,987,960.85 had already been paid to the respondent on 4 February 2005; they were after all directors of both PEPL and the respondent (with the exception of Koh who was the director of PEPL only). Lee Ee has now begrudgingly acknowledged that he might have known that PEPL was "technically insolvent" by the end of the financial year 2004, a few months before the amount was paid on 4 February 2005. [note: 29] This is not the whole truth. It is surprising that even after these payments were made on 4 February 2005, the directors of PEPL (despite the ample time available to them to amend its Financial Statements (inclusive of Note 13) and the Director's Statement (inclusive of the Subordination Statement) before these were issued on 23 February 2005), took no steps to correct them. In its written submissions, the respondent claims that Note 13 "was intended as a standard form statement and not meant to be legally binding" [note: 30] though it is conceded that "[t]hese statements were made in order to confirm PEPL as a going concern at the end of the financial year". [note: 31] These are astonishing submissions as they suggest that the directors were guilty of reckless conduct, at the very least. As these statements were made to secure PELP's status as a going concern all the directors must take collective responsibility for their contents and the glaring failure to adhere to the commitments given therein. This limp attempt to minimise responsibility for a public commitment in a statutory document must be strongly deprecated. Directors have to understand that they must take full responsibility for the accuracy and implementation of all such

statements. There is no point in saying that these were pro forma statements. A failure to appreciate the consequences of not adhering to such statements can be perilous.

45 In our view, the legal significance of the assurances made in the Subordination Statement and Note 13 were not fully appreciated by the Judge. We find that the patent breaches of these assurances fortify the statutory presumption and are, in the final analysis, compelling evidence of the *desire of the common directors to prefer a related entity*. When these assurances were given, Winter Engineering had already secured an arbitration award (awarded on 26 November 2006) of $3.6m against PEPL. When this liability of $3.6m was factored in, PEPL was insolvent with a deficit of more than $2m as shown in its Balance Sheet as at 31 December 2004. As Winter Engineering was immediately entitled to enforce its award the risk of PEPL being placed in liquidation was very real. *It was only because of those assurances that PEPL could continue trading as a going concern*. Subsequent events made it plain that the directors of PEPL and the respondent never had any intention of settling the outstanding due to its unrelated creditors. The evidence is telling. Between the time PEPL's Financial Statements and Director's Statement were released on 23 February 2005, and when insolvency proceedings commenced on 22 January 2007, a total sum of $18,978,348.16 was transferred from PEPL *to the respondent*, and a total sum of $3,528,040 was transferred from PEPL *to related companies in the Group.* [note: 32] Yet PEPL's two largest external creditors, Winter Engineering and Uni-Sanitary were not paid even a cent. In addition, PEPL owed a total sum of $527,336.28 to other *unrelated* creditors (apart from Winter Engineering and Uni-Sanitary) as at 16 February 2007, the date of the winding up order. [note: 33]

46 The irresistible conclusion is that these false assurances were given to buy more time for the respondent to transfer PEPL's monies to itself and to related creditors, including the respondent –*away from the reach of PEPL's unrelated creditors*. These facts also suggest the directors of PEPL had been carrying on PEPL's business when it was technically insolvent to the detriment of PEPL's unrelated creditors. This can perhaps be best characterised as a case of transparent subterfuge. It raises problematic issues under s 340(1) of the Companies Act in relation to the directors' collective responsibility for this sorry state of affairs. As this particular point is not an issue immediately before us, we will say no more.

Breach of director's duties

47 In addition to the false assurances made by PEPL's directors, there are additional facts to fortify the statutory presumption. As will be seen below at [53], the evidence here presents an obvious situation where the directors (Lee Ee and Koh in particular) have breached their directors' duties to consider the interests of PEPL's creditors. Indeed, we think that whenever it is plainly established that the directors have disregarded their duties the Court should view with even greater scepticism transactions that appear to undermine the collective procedure of insolvent liquidation, such as unfair preferences or undervalue transactions. This is because the avoidance rules serve the same broad policy objectives as the directors' duties to consider the interests of creditors when a company's financial position severely deteriorates. Both are aimed at protecting the general body of creditors against a diminution of the assets available for distribution to creditors in the collective insolvency regime. In certain instances, the breach of the director's duty goes hand in hand with an unfair preference transaction and may even be a basis for independent recovery from the directors if the preferred creditor is unable to repay the amount adjudged to be an undue preference. To appreciate this, a proper understanding of the duty is required.

48 It is trite that directors have a duty to act in the best interest of the company as a whole. When a company is solvent, the company's directors owe no duty to creditors. (See *Federal Express*

Pacific Inc. v Meglis Airfreight Pte Ltd (formerly known as Thong Soon Airfreight Pte Ltd) and Others [1998] SGHC 417 ("*Federal Express*") at [17] where it was held that such a duty to consider creditors' interests only arises during insolvency or in a state of near insolvency; and *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, applied in *Lexi Holdings plc (In Administration) v Luqman and others* [2007] EWHC 2652 (Ch); also see the observations in Kala Anandarajah, *Corporate Governance, Practice and Issues* (Academy Publishing, 2010) at p 275.) However, it is now also settled law that when a company is insolvent, or even in a parlous financial position, directors have a fiduciary duty to take into account the interests of the company's creditors when making decisions for the company. This fiduciary duty requires directors to ensure that the company's assets are not dissipated or exploited for their own benefit to the prejudice of creditors' interests. In this regard, the purpose of this duty mirrors that of the avoidance provisions in seeking to preserve the company's assets for distribution to the company's creditors through the mechanism of insolvency. The House of Lords in *Winkworth v Edward Baron Development Co Ltd and others* [1987] 1 All ER 114 (*per* Lord Templeman) declared at 118:

> [A] company owes a duty to its creditors, present and future. The company is not bound to pay off every debt as soon as it is incurred, and the company is not obliged to avoid all ventures which involve an element of risk, but the *company owes a duty to its creditors to keep its property inviolate and available for the repayment of its debts*. *The conscience of the company, as well as its management, is confided to its directors. A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors*. Both Mr and Mrs Wing committed a breach of their duty to the company and its creditors when £115,000 was withdrawn from the company to pay for their shares and when the company's overdraft was incurred and increased at least partly for their benefit. When Mr and Mrs Wing paid £8,600.91 to the company, their liability to the company and its creditors far exceeded that sum. These breaches of duty would not have mattered if Mr and Mrs Wing had been able to maintain the solvency of the company and to see that all its creditors were paid in full. [emphasis added]

49 The English Court of appeal decision of *West Mercia Safetywear Ltd (in liq) v Dodd and another* [1988] BCLC 250 ("*West Mercia*") is particularly instructive for present purposes. In that case the plaintiff company owed its parent company more than £30,000. Mr Dodd was a director of both companies, which were both insolvent. The parent company had debts which were guaranteed by Mr Dodd. At the time when, to Mr Dodd's knowledge, the plaintiff company was already insolvent, Mr Dodd authorised the transfer of £4,000 from the plaintiff company to the parent company so as to reduce his own personal liability under his guarantees for the parent company. The Court of Appeal found (at [33]) that by doing so, Mr Dodd had been "*in fraud* of the creditors of the company"; he had disregarded the interests of the creditors of the plaintiff company and had made the transfer for his sole and personal benefit. Dillon LJ cited with approval the observations of Street CJ in the New South Wales Court of Appeal decision of *Kinsela and another v Russell Kinsela Pty Ltd (In Liq)* [1986] 4 NSWLR 722, at p 730 ("*Kinsela*"):

> In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But *where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets*. It is *in a practical sense their assets and not the shareholders' assets that, through the medium of the company*, are under the management of the directors pending either liquidation, return to

solvency, or the imposition of some alternative administration. [emphasis added]

50 In Australia, the decision of *Walker v Wimborne and others* [1975–1976] 137 CLR 1 ("*Walker*") underscores how such breaches of fiduciary duties can occur where there are common directors in companies that belong to the same group. *Walker* was a case that involved several companies with common directors. The directors of the plaintiff company ("Asiatic") formulated a general policy for moving funds between the companies in the group to meet exigencies as they arose. The directors transferred $10,000 from Asiatic to Australian Sound, a company in the group, as the latter was in financial difficulties ("the transaction"). However, Asiatic did not receive any advantage or benefit from this so-called loan, since there was no security nor any promise to pay interest obtained from Australian Sound. Furthermore, Asiatic was itself insolvent when the common directors directed the sum of $10,000 to be transferred to Australian Sound. As such, to finance the transaction, Asiatic had to borrow $10,000 from another company in the group, Estoril. This loan was fully secured by an equitable charge granted by Asiatic to Estoril. This meant that Asiatic's unsecured creditors had been deprived of $10,000 which would have been available for distribution but for the transaction. The Court emphasised that each company in a group is a separate legal entity, and that the directors of each company had to discharge their duties with regard to the interests of the creditors of that company, without allowing such interests to be prejudiced by movement of monies between companies in a group (at 6–7):

> … each of the companies [in a group of companies] was a separate and independent legal entity, and that it was the duty of the directors of Asiatic [the plaintiff company] to consult its interests and its interests alone in deciding whether payments should be made to other companies. In this respect it should be emphasized that the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and its creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them. The creditor of a company, whether it be a member of a "group" of companies in the accepted sense of that term or not, must look to that company for payment. His interests may be prejudiced by the movement of funds between companies in the event that the companies become insolvent.

51 The English and Australian approach to these issues has also been adopted by the Singapore courts. In the decision of *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo and others* [2004] 1 SLR(R) 434, the High Court correctly endorsed the basic proposition that "[w]hen a company is insolvent, the interests of creditors become the dominant factor in what constitutes 'the benefit of the company as a whole'" (at [13]; also see *Federal Express* at [17]).

52 It can be seen (at [49] above) from the observations by Street CJ in *Kinsela* (cited with approval in *West Mercia*) that the rationale for such a duty is that, when a company is insolvent, the creditors' interests come to the fore as the company is effectively trading and running the company's business with the creditors' money. Because of the limited liability principle, the risks (of trading when the company is insolvent) on shareholders would be minimal as they would at worst lose only what they have already invested in the company in their capacity as shareholders. Unsecured or partially secured creditors on the other hand may never recover any monies due to them. Unlike shareholders who have the most to gain from risky ventures, unsecured creditors, in particular, have everything to lose when illegitimate risks are taken. As such, it is only right that directors ought to be accountable to creditors for the decisions they make when the company is, or perilously close to being, insolvent. We add, parenthetically, that this fiduciary duty is strictly speaking owed *to the company*; there is *no duty owed directly to creditors*. In other words, individual creditors cannot, without the assistance of liquidators, directly recover from the directors for such breaches of duty (see *Yukong Line Ltd. of Korea v Rendsburg Investments Corporation of Liberia and Others (No. 2)* [1998]

1 WLR 294; and more recently, *Re Pantone 485 Ltd, Miller v Bain and others* [2002] 1 BCLC 266). If creditors were allowed to recover directly, it would contravene the collective procedure of insolvency and open a back door for some of them to work around the *pari passu* rule. Allowing creditors *and* the company to directly recover from directors might also lead to double recovery; see *D D Prentice*, "*Creditor's Interests and Director's Duties*" (1990) 10 Oxford Journal of Legal Studies 265 at 275.

53 In the present case, we find that the statutory presumption, far from being rebutted, had in fact been reinforced by PEPL's directors' manifest breaches of their personal directors' duties. The transfer of $10,987,960.85 on 4 February 2005, made in direct contravention of the representations found in the Subordination Statement and Note 13, had been for the purposes of the Capital Distribution and Special Dividend payout to the respondent's shareholders. [note: 34] It is not an unimportant consideration that Lee Ee and his wife, Koh together own 29.24% of the shareholding in the respondent. [note: 35] As such, the 3rd transaction had the effect of conferring a direct benefit to Lee Ee and Koh *personally* in their capacity as substantial shareholders of the respondent. In light of the fact that they were: (a) the ultimate beneficiaries of a substantial portion of $10,987,960.85; (b) directors of PEPL and (c) one of them (Lee Ee) was also a director of the respondent, there are grounds for a compelling inference that Lee Ee and Koh were the *directing minds* behind the payment of $10,987,960.85 on 4 February 2005 to the respondent. This is irrefutable evidence of the requisite desire to prefer, even without having to rely upon the statutory presumption of the desire to prefer. In essence, the directors of PEPL, especially Lee Ee and Koh, had brazenly disregarded their very own assurances (*qua* directors) not to prefer (as manifested in the Subordination Statement and Note 13) or benefit themselves to the prejudice of the interests of PEPL's unrelated creditors.

Commercial reason for making the advance is in and of itself insufficient to rebut the statutory presumption

54 We have emphasised that the directors' breaches of their own assurances constitute compelling evidence of the desire of PEPL to prefer the respondent. In this regard, the 3rd transaction ought to be set aside as an unfair preference with or without the aid of the statutory presumption. Even if we did not take into consideration the broken assurances and the breaches of director's duties on Lee Ee's part, the respondent has, in our view, failed to discharge its burden of proof to rebut the statutory presumption.

55 The respondent stated that the advance of $16.05m to PEPL was made to take advantage of higher interest rates in PEPL's MBB fixed deposit accounts. The respondent's commercial reasons given to justify the advance of the loan are not apparent to us (see above at [8]). The fact that $16.05m had been advanced by the respondent to PEPL on 4 December 2004 purportedly to take advantage of higher interest rates in PEPL's MBB fixed deposit account does not explain why the repayment of $10,987,960.85 by PEPL to the respondent *would not be* an unfair preference. This is because there is nothing exceptional in a creditor lending money to take advantage of the possibility of higher returns upon repayment of the money lent. In other words, the commercial reason for making the advance (to take advantage of higher interest rates), without more, does not explain away the presumption that the *repayment* of the advance was influenced by a desire to prefer the creditor. More importantly, the monies loaned were unsecured loans which could not thereafter be repaid in priority relative to other outstanding liabilities of PEPL *when the company itself was insolvent*. In any case, we are satisfied that the crucial consideration in the decision by the respondent to loan the money to PEPL was to enable PEPL's accounts to be finalised on a going concern basis. In our view, sanction for the capital reduction of the respondent and the payment of the dividends would not have been given if the court had been apprised of the true facts.

Part 2 - The presumption in relation to PEPL's other payments to the respondent and the set-

off effected on 30 June 2005 has not been rebutted

56 The other payments made by PEPL to the respondent alleged to be unfair preferences were:

(a) Payments allegedly made for the salaries and expenses of the respondent's employees on six occasions: 31 January 2005, 28 February 2005, 31 March 2005, 30 April 2005, 31 May 2005 and 30 June 2005. These payments amounted to $347,144.16 (see above at [27]);

(b) Payments allegedly made as reimbursement to the respondent for iron ore purchases on 21 February 2005 and 4 March 2005. These payments amounted to $105,000.00, (see above at [28]).

In addition, there was a set-off transaction which was alleged to be an unfair preference:

(c) The set-off was effected on 30 June 2005; as a consequence a debt of $7,538,243.15 owed by PEPL to the respondent has been discharged, as this sum was set off against the sum of $9,027,964.19 owed by PPL to PEPL (see above at [29]).

57 The respondent's position is that transactions [56](a)–(c) are not unfair preferences as there was evidence that they were part of PEPL's settled practice. PEPL had been acting as the "payment centre" to make payments to other related companies within the Group. This, in our view, is not a valid legal reason for the payments. Just because a transaction has been earlier carried out while a company is solvent, it does not necessarily follow that the presumption that such transactions have been influenced by the requisite desire to prefer will be rebutted. There is no formulaic magic to a transaction being part of a past practice; a creditor cannot simply evade the statutory presumption by merely labelling a transaction as "past practice". The key issue in rebutting the statutory presumption is to show that the particular transactions have not been influenced by the requisite desire to prefer the respondent. The existence of an established course of dealings, or "past practice" so to speak, is only *relevant* if those past practices show that the creditor has been *providing new value* by granting new credit to the company to purchase supplies and items (for example) to keep its business going. Where that is the case, payment is made not with the desire to prefer the creditor, but with the motivation to obtain fresh financing to sustain the company's business in earnest. As observed by Professor Roy Goode in *Principles of Corporate Insolvency Law*, (Thomson Sweet & Maxwell, 3rd Ed, 2005) at p 465:

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

58 Here, we note that the Judge mistakenly assumed that the presumption for these transactions was "automatically" rebutted as they were part of a "past practice", see GD at [76]–[78]:

> 76 ... I noted that [PEPL] did in the past apply some inter-company set-offs …

77 While it is not normal for a set-off of this extent to be done, the liquidators did not dispute that there were times when some set-offs were done.

78 As for the payments to CPF and for bonuses and reimbursements of petty cash, I was satisfied that these were part of [PEPL] practice. Likewise, for [PEPL] reimbursement to the [respondent] for the [respondent] earlier payment for the [PEPL'S] iron ore purchases.

59 The Judge, *without elaboration*, had earlier approvingly referred to the decision of *Re Libra Industries Pte Ltd* [1999] 3 SLR(R) 205 at [49] ('*Re Libra*') at [70] of the GD:

I accept that there was an *established* practice for Libra Industries to make payments into the account with Libra Holding without reference to specific invoices, and that the payments listed in the table were made in accordance with that practice. [emphasis added]

60 We note that the Court in *ERC Land Pte Ltd (in liquidation) v Ho Wing On Christopher and others* [2004] 1 SLR(R) 105 at [48] has similarly referred to the decision of *Re Libra, without elaboration* for the same proposition that "an established past practice of payments would indicate that there was no desire" to prefer the creditor. As mentioned earlier (in [57]), the existence of an established past practice of a particular type of transaction does not mean that the statutory presumption will *ipso facto* be rebutted. Indeed, there was something more than a *mere* established past practice in *Re Libra*: the court in *Re Libra* found an established course of dealing where Libra Holdings (the creditor) extended credit to Libra Industries (the company) by paying first the salaries of the employees of Libra Industries and by financing Libra Industries' purchase of raw materials from third party suppliers. Libra Industries would in turn *repay sums owed* to Libra Holdings so that the latter could *provide new value*, by extending further credit to Libra Industries. The practice of repayment of loans had *continued with the extension of new credit*; see the succinct summary of facts by Kan Tin Chiu J in *Re Libra* at [46]:

[T]hey were payments for moneys owing by Libra Industries to Libra Holdings for, inter alia, sale of the raw materials by Libra Holdings to Libra Industries which raw materials were purchased from third party suppliers pursuant to Libra Industries' request for salaries paid by Libra Holdings to Libra Industries' staff. In short, Libra Holdings and Libra Industries maintained a running account whereby payments or purchases on behalf of Libra Industries would be recorded as a debit entry against Libra Industries whilst payments received from or goods purchased from Libra Industries would be credited to Libra Industries …

Since 1995, Libra Holdings had been providing Libra Industries with financial support or assistance in that it would provide Libra Industries credit or make various payments of Libra Industries' staff salaries and CPF contributions and purchased the raw materials required by Libra Industries.

61 The reasoning in *Re Libra* is entirely consistent with Goode's view in [57] that where the company made repayments of loans with the *intention* of obtaining new credit to supply its own business operations, these repayments would not be considered as preferential payments.

62 The present case is very different from the scenarios described above. This is not a case where PEPL repaid loans to the respondent, in the expectation that the respondent would provide new credit to PEPL to finance the running of PEPL's business. If that were the case, it could be argued that PEPL made the payments to the respondent not with the desire to prefer the respondent, but with the genuine intention to obtain new credit required for the running of its business. Here, the respondent's employees' salaries were paid by PEPL. This payment of monies was made after technical insolvency had set in. The payments constituted "one way traffic", in some senses: the respondent did not

provide new value nor did they extend new credit throughout the history of PEPL's payments. As for the respondent's claim that PEPL's payments to the respondent on 21 February 2005 and 4 March 2005 were based on the past practice of *reimbursements* to the respondent for iron ore purchases paid by the respondent for and on behalf of PEPL, the respondent's best case would be that PEPL made the payments not with the desire to prefer, but with the intention to obtain fresh financing for iron ore purchases. However, the respondent did not substantiate this claim with documentary evidence. It could have easily adduced invoices of iron ore purchases that it claimed to have paid for on behalf of PEPL, but failed to do so.

63 As regards the set-off transaction (transaction (c) at [56] above), it clearly constitutes an unfair preference even without the aid of the statutory presumption. The set-off placed the respondent in a better position in the event of the company's insolvent liquidation than if the transaction had not been done; the debts that had been set off on 30 June 2005 could not have been set off in PEPL's insolvent liquidation because of the lack of mutuality. The set-off transaction employed an asset (PEPL's *chose in action* against PPL) that could have been distributed to PEPL's unsecured creditors (PEPL's claim against PPL for the debt owed) to discharge PEPL's debt owed to the respondent, thus giving PPL an advantage over the other creditors and at the same time depriving those same creditors of an asset that could have been used for distribution in PEPL's insolvent liquidation. The only inference to be drawn from the discharge of the debt owed to the respondent, *without any extension of new credit to PEPL*, would be that PEPL intended to prefer the respondent and PPL.

64 Furthermore, there is no evidence that the respondent had extended new credit to PEPL subsequent to this discharge of PEPL's indebtedness. It would have been different if *the respondent had granted new credit to PEPL subsequent* to the discharge of PEPL's indebtedness so that PEPL could use the new credit to finance its business operations. If that was the position, it could be argued that the discharge was made with the intention to sustain PEPL's business. In the absence of any evidence to the contrary, the presumption remains unrebutted.

65 In any case, there is no satisfactory objective evidence of an established past practice of similar payments. Although the respondent adduced several debits notes which shows the recorded transactions of payments made by PEPL to the respondent [note: 36], these were simple internal documents that could be prepared by simply making repetitive adjustments on a standard template on a computer. The respondent ought to have adduced records of invoices from the *respondent* itself - this it failed to do. With regard to the set-off transaction effected on 30 June 2005, the respondent adduced the "Schedule of Inter-Company Contra Involving 3 Companies" [note: 37] which showed tripartite set-off arrangements made between related companies of the Group for December 2002; June, September and December 2003; and June and December 2004. However, no documents adduced were for the transaction that really mattered, that is, for June 2005. In any event, we have examined the Schedules of those adduced (from 2002 to 2004) and it is pertinent to note that there is no evidence of any tripartite set-offs between PEPL, PPL, and the respondent evidenced in these Schedules.

66 We should also point out that as at 25 May 2005, when Uni-Sanitary obtained its arbitration award of $628,791.75, PEPL'S directors, despite having two substantial unsatisfied arbitration awards, had no reservations about discharging the remaining "debt" of more than $7.5m to the respondent soon after (see above at [3]). The debt of $18,514,288 due to the respondent as at 31 December 2004 (see above at [21]) was completely discharged by the end of June 2005. PEPL, however, did not pay its debts to its largest unrelated creditors. When it was eventually wound up its total debts amounted to $5,861,218.91. Of this, slightly over $1m was due to the respondent. The remaining

amount was due to seven unrelated creditors (including Winter Engineering and Uni-Sanitary).

67 There is one final argument that we should deal with. The respondent, relying on an observation by the Judge (made without the benefit of hearing arguments), maintained that the set-off effected on 30 June 2005 should not be set aside because PPL was not a party to the action. In our view, there is *no requirement* for PPL to be made a party to these proceedings. As stated clearly in s 99(3)(*a*) of the Bankruptcy Act, the claim for unfair preferences applies only against *creditors*:

> For the purposes of this section and sections 100 and 102, an individual gives an unfair preference to a person if —
>
> (*a*) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities ...

68 PPL was in the position of a *debtor* who owed PEPL the sum of $9,027,964.19. There is no claim of unfair preference against PPL. It was for the respondents to make PPL a party if they desired to be indemnified by it.

Conclusion

69 For the reasons given above, we allow the appeal. The payment of $10,987,960.85 made on 4 February 2005 is set aside. In addition, transactions [56](a) and (b) above which involved the sums of $347,144.16 and $105,000.00 respectively are set aside. Transaction [56](c) is declared void such that the debt of $7,538,243.15 owed by PEPL to the respondent continues to subsist. The full amount involved for the 3rd transaction and the other transactions is $18,987,348.16. However, since the amount of debt owed by PEPL to respondent is the sum of $18,514,287.97, the liquidator's claim for undue preference of a debt is necessarily limited to that amount only [note: 38] (this was also reflected in the claim stipulated in Originating Summons No 1433 of 2008 [note: 39]). Accordingly, the respondent is ordered to repay to the liquidators all monies required to settle debts to unrelated creditors (as well as professional fees) up to the sum of $18,514,287.97.

70 The liquidators are entitled to the costs of this appeal and the hearing below on an indemnity basis. In view of the egregious misrepresentations made by Lee Ee to the court to obtain its approval for the capital reduction of the respondent, and the flagrant breaches of the assurances given in the Financial Statements and the Director's Statement (for which he must take primary responsibility), we order him to personally bear the costs of the proceedings here and below. While we have not made any costs orders against the other directors of the respondent and PEPL, we are constrained to observe that they have clearly not properly discharged their obligations of care and oversight as directors in relying on the actions and decisions of Lee Ee. The troubling sequence of improper fund transfers to related entities and the payment of the dividends (procured through false assurances of solvency) at the expense of legitimate external creditors reflected the lack of proper corporate governance within the Progen Group.

[note: 1] ROA Vol3(C) at p 1300

[note: 2] 2005 Annual Report of PEPL, ROA Vol 3(A) at p 171.

[note: 3] ROA Vol 3(A) at p85

[note: 4] *Ibid*

[note: 5] See Appellant's Case at p 56 and ROA Vol 3(A) p 203 to 247.

[note: 6] 3rd Affidavit of Lee Ee filed on 10 Nov 09, ROA Vol 3(C) at p 1450 para 15a.

[note: 7] 3rd Affidavit of Chee Yoh Chuang filed on 8 May 09, ROA Vol 3(C) at p 1225 para 6(a).

[note: 8] RC at p 7.

[note: 9] ACB Tab 5 ROA Vol 3(A)

[note: 10] ROA Vol 3(A) p 265 and 266

[note: 11] ROA Vol 3(A) at p 77.

[note: 12] ROA Vol 3(A) at p 81

[note: 13] RSCB ROA Vol 3(B) at p 725.

[note: 14] ACB Vol 2 at p 61 and 62.

[note: 15] Lee Ee's affidavit dated 30 November 2004 filed in support of application for Court Approval of Special Dividend and Capital Distribution.

[note: 16] ACB Vol 2 at p 39.

[note: 17] ACB Vol 2 at p51.

[note: 18] ACB Vol 2 at p 37.

[note: 19] 2nd Affidavit of Lee Pui Hoon filed on 31 March 2009, ROA Vol 3(B) at p 994 para 20..

[note: 20] *Ibid*.

[note: 21] RC at p 14.

[note: 22] RC at p 15.

[note: 23] RC at p 16.

[note: 24] ACB Vol II at p 39

[note: 25] ACB Vol II at p 51

[note: 26] ACB Vol II at p 58

[note: 27] ACB Vol II at p 37.

[note: 28] Every company (having a share capital) must lodge an annual return under Section 197(1) of the Companies Act with particulars in the Eight Schedule, which includes the company's balance sheet, director's report and financial statements.

[note: 29] 3rd Affidavit of Lee Ee filed on 10 November 2009, ROA Vol 3(C) at p 1448 para 9.

[note: 30] Respondent's Case at [71(i)]

[note: 31] Respondet's Case at [71(ii)]

[note: 32] See Appellant's Case at p 56 and ROA Vol 3(A) p 203 to 247.

[note: 33] See GD at para [80].

[note: 34] RC at p 15.

[note: 35] 2005 Annual Report of PEPL, ROA Vol 3(A) at p 171.

[note: 36] ROA Vol 3(A) pg 1013 to 1210.

[note: 37] ROA Vol 3(C) pg 1555 to 1563

[note: 38] See clarification made by Appellant's counsel in N/E of 1 October 2009 found in ROA 3(D) at p 1729.

[note: 39] See ROA Vol 3 at p 44.

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