Re Tiong Polestar Engineering (formerly known as Polestar Engineering (S) Pte Ltd [2003] SGHC 8

Case Number : CWU 60/2000; SIC 600915/2002

Decision Date : 22 January 2003

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Mahendra Segeram (Segeram & Co) for the Applicant; Cheong Yuen Hee and Sum Chong Mun (C M Sum & Co) for the Respondent

Parties : —

Companies – Winding up – Creditor garnishing money in bank account – Bank causing delay in payment – Creditor receiving proceeds after commencement of winding up – Whether court to set aside rights of liquidator -Companies Act (Cap 50, 1994 Rev Ed) s 334(1)(c)

Companies – Winding up – Unfair preference – Application to void transaction – Whether liquidator has locus standi – Whether application made by originating summons or summons-in-chambers – Companies (Winding Up) Rules (Cap 50, R 1, 1990 Rev Ed) r 7(2)

Companies – Winding up – Unfair preference – Insolvent company paying arrears to associate company within two years of winding up – Whether associate company rebutting presumption of unfair preference

Words and Phrases – Definition of "prescribed" in Companies Act (Cap 50, 1994 Rev Ed) – Whether Companies(Application of Bankruptcy Act Provisions) Regulations (Cap 50, R 3, 1995 Ed) validly prescribed – Whether legislation must be made under Bankruptcy Act (Cap 20, 2000 Rev Ed)

1 Tiong Polestar Engineering Pte Ltd ('the Company') was a joint venture between a local company Tiong Asia Marine Pte Ltd ('TAM') and Polestar Marine Engineering Co Ltd ('Polestar Japan'), a company incorporated under the laws of Japan. The Company was formerly known as Polestar Engineering (S) Pte Ltd. It was wound up by order of court dated 24 March 2000 and Mr Jamshid Keki Medora was appointed as the liquidator ('the Liquidator'). The winding-up petition on which the winding up order was made was presented on 24 February 2000.

2 In the matter before me, the Liquidator applies for various reliefs. I set out below the primary reliefs sought, using the same paragraph numbering as in his application:

(1)(a) a declaration that sums amounting to $1,247,190.03 or such other amounts paid by the Company to TAM between 23 February 1998 to 24 February 2000, constitute an unfair preference to TAM and are voidable accordingly;

(b) an order that TAM do pay the Company the sum of $1,247,190.03 or such other sum as may be determined by the Court.

(2)(a) a declaration that the purported rental increase by TAM on 1 December 1996 and 1 December 1997 in respect of the Company's premises at No. 29 Tuas Basin Link Singapore constitutes a transaction at an undervalue within the meaning of Section 329 of the Companies

Act ('CA') (read with Section 98 of the Bankruptcy Act (meaning the Bankruptcy Act 1995 which I will refer to as 'BA 1995') or alternatively, a declaration that these increases in rent constitute an unfair preference to TAM and therefore voidable accordingly;

(b) an order that TAM do repay the increased rental amounts to the Company from 1 December 1996 to the end of the Liquidator's possession of the premises.

(3)(a) a declaration that TAM is not entitled to retain the benefit of the execution or attachment pursuant to garnishee proceedings and amounting to $330,333.94 in view of Section 260 CA read with section 334 CA; and

(b) an order that TAM do pay $330,333.94 to the Company.

3 In submissions before me, Mr Mahendra Segeram, Counsel for the Liquidator, proceeded first with the challenge in respect of the monies received by TAM pursuant to the garnishee proceedings (i.e prayers 3(a) and (b)) and then the challenge in respect of monies received by TAM for rent and utilities within two years of the date of presentation of the petition of winding up (i.e prayers 1(a) and (b) but the two year period should be 25 February 1998 to 24 February 2000). He did not proceed with the challenge pertaining to the increase in rent under prayers 2(a) and (b).

$330,333.94 Paid to Tam pursuant to Garnishee

4 The $330,333.94 was paid by UOB to TAM by way of a cashier's order ('CO') and a cover letter dated 24 February 2000 from UOB to TAM's solicitors C M Sum & Co. It is undisputed that the CO was not received until 25 February 2000 and that the Winding-up petition against the Company was presented on 24 February 2000 i.e one day earlier.

5 Although the challenge of the Liquidator was made under s 260 read with s 334 CA, Mr Segeram's submission focussed on s 334 CA.

6 Under s 334(1) and (2)(b) CA, a creditor is not entitled to retain the benefit of any attachment of any debt as against the liquidator unless it has received the debt before the date of commencement of winding up.

7 It was also not disputed that the payment made by UOB was pursuant to a Garnishee Order Absolute obtained by TAM in an action (i.e Suit No 600055 of 2000) and that such a garnishee order is an attachment by TAM of a debt due to the Company.

8 However, Mr Cheong Yuen Hee, Counsel for TAM, submitted that the CO might constitute a loan from UOB to the Company and hence was the property of UOB and not that of the Company.

9 I am of the view that the CO should not be considered in isolation and the circumstances which led to the issue of the CO were important. Although there was no direct evidence from UOB, there is documentary evidence that its payment was made pursuant to the Garnishee Order Absolute. In such circumstances, it would be illogical for UOB to make a loan to the Company. In the absence of any other evidence, the only logical inference I can draw is that the Company's account with UOB was debited by this amount to pay TAM in compliance with the Garnishee Order Absolute.

10 Mr Cheong also submitted that under s 334(1)(c) CA, the rights conferred on the Liquidator may be set aside by me in favour of TAM to such an extent and on such terms as I thought fit. He submitted that I should do so because the delay in receiving payment was caused by UOB, whose cover letter was dated 24 February 2000, when TAM's solicitors' letter requiring payment, pursuant to the Garnishee Order Absolute, was dated 18 February 2000. However, I am of the view that this is not a sufficient reason to set aside the rights conferred on the Liquidator under s 334(1) read with s 334(2) CA. It is incumbent on a creditor to try and get payment as soon as possible and if receipt of payment is delayed by the act of another party, whether it be, for example, a bank or the Bailiff, then the interests of the general creditors will have to prevail

11 In the circumstances, I am of the view that TAM is not entitled to retain the $330,333.94 as against the Liquidator.

Payments made by the company to Tam by way of rent and utilities within two years of the date of presentation of the winding-up petition - unfair preference

12 Prior to the presentation of the winding-up petition, the Company had made payments of rent and utilities to TAM for occupying space in premises purchased by TAM.

13 The background to such payments was that the Company had initially wanted to purchase premises. As this was too expensive, TAM agreed to purchase the premises (at 29 Tuas Basin Link) and let out some space therein to the Company.

14 On or about 1 July 1994, TAM leased some space in premises to the Company for two years from 1 July 1994 to 30 June 1996 at a monthly rent of $13,330.13 less 10%. The area of the space was supposed to be 8,333.97 square feet. TAM was also occupying part of the premises at all material times. The Company was also to pay $100 to TAM for clearing and disposal of rubbish and to pay TAM for utilities.

15 On or about 1 December 1996 (after the expiration of the initial term of two years), TAM increased the rent for the alleged reason that the Company was using additional space of 2,238.05 square feet. The rent was therefore increased to $17,000 per month.

16 On or about 1 December 1997, the rate of the rent i.e the rent per square foot, was increased for the alleged reason that the previous rate was a concessionary rate. The rent was increased to $20,000 per month.

17 As I have said, Mr Segeram did not proceed with the Liquidator's application for a declaration that each increase constituted a transaction at an undervalue or an unfair preference (prayers 2(a) and (b)).

18 Indeed, it seems to me that each increase was the opposite i.e TAM was overcharging the Company and not that the Company had disposed of its property to TAM at an undervalue. The question of overcharging would be a different matter which was not the subject of the Liquidator's application.

19 As for the question whether each increase constituted an unfair preference, Mr Segeram did not seek to argue that, in itself, it constituted an unfair preference but rather that the increase supported his submission of unfair preference in respect of the payments of rent and utilities by the Company to TAM within two years of the date of commencement of winding up, i.e 25 February 1998 to 24 February 2000.

20 As for the sum of $1,247,190.03, Mr Segeram reduced the Liquidator's claim to $604,447.61 comprising:

(a) rental - $434,984.59

(b) utilities - $169,463.02

_____

$604,447.61

_____

21 Mr Segeram relied on s 329 CA read with ss 99 and 100(1)(b) of BA 1995. Section 100(1)(b) applies where the unfair preference is given to a person who is an associate of the debtor within two years of the date of presentation of the winding-up petition (see s 329(a)(i) CA also).

22 Mr Segeram pointed out that there were three directors of the Company. Two of the directors were brothers i.e Tan Sen Tiong and Tan Sen Kong. Sen Tiong was at all material times also a director of TAM. Mr Segeram relied on the authority of the Court of Appeal's decision in *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd & Anor* [2002] 4 SLR 145, for the proposition that TAM was connected to the Company and hence an associate of the Company.

23 Mr Cheong did not dispute that in view of that case, TAM would be an associate of the Company for the purpose of s 100(1)(b) BA 1995. However he submitted that the definition of an 'associate' in the context of a company was found not under s 101 BA 1995 but under regulations made by the Minister for Finance under s 411 CA i.e The Companies (Application of Bankruptcy Act Provisions) Regulations 1995 ('the 1995 Regulations').

Are the 1995 Regulations ultra vives?

24 Mr Cheong submitted that the 1995 Regulations are ultra vives because they should have been made under s 410, instead of s 411 CA, in view of s 329(1) CA and the definition of 'prescribed' in s 2 CA.

25 Section 329(1) CA provides:

'329. Undue preference

(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.'

[Emphasis added.]

26 Under s 2 CA, 'prescribed' means 'prescribed under this Act or by the rules'. There is no specific mention in that definition of regulations. Although there is no definition of 'the rules', there is a definition (also in s 2) of 'Rules' (with a capital 'R') and the Rules (with the capital 'R') are defined to mean Rules of Court. Mr Cheong then pointed out that s 410 CA refers to rules prescribed by the Rules Committee whereas s 411 CA refers to regulations to be made by the Minister (for Finance). Accordingly, in his submission, the definition of 'prescribed' means that the modifications to be made under s 329 CA, to apply the bankruptcy provisions to companies, should have been made by the Rules Committee and not the Minister. Mr Cheong submitted that if the 1995 Regulations are ultra vives, then the definition of 'associate' thereunder would not apply and even if there was any unfair preference, it would apply only for the six months, and not two years, before the presentation of the winding-up petition. In other words, s 100(1)(c) BA 1995, and not s 100(1)(b), would apply.

27 I digress briefly to say that although the heading of s 329 states 'Undue preference', the heading of s 99 BA 1995 is 'Unfair preferences' and the provisions in s 99 BA 1995 adopt the words 'unfair preference' and not 'undue preference'. As the intention under s 329 CA is to apply certain bankruptcy provisions, including s 99 BA 1995, to companies, 'unfair preference' should be used instead of 'undue preference'.

28 In my view, Mr Cheong's submission about ultra vives is not valid for the simple reason that the definition of 'prescribed' includes 'prescribed under this Act' (emphasis added) and 'Act' is defined (also under s 2 CA) as including 'any regulations'. Therefore, although 'regulations' is not mentioned in the definition of 'prescribed', it is mentioned in the definition of 'Act'. In summary, 'prescribed' would mean prescribed under the CA or the regulations (made under s 411 CA) or the rules (made under s 410 CA).

Must the 1995 Regulations be passed under BA 1995?

29 Mr Cheong then submitted that the 1995 Regulations were made on 5 July 1995 to apply the provisions in BA 1995 with modifications to companies but BA 1995 itself did not come into operation until 15 July 1995, ten days later. He submitted that while anticipatory subsidiary legislation could be passed under s 22 of the Interpretation Act, the 1995 Regulations could only be made under BA 1995 and not under the CA.

30 It seems to me that Mr Cheong has combined two arguments into one. The question whether the 1995 Regulations must be made under BA 1995 is separate from the question whether anticipatory subsidiary legislation can be passed before the primary legislation comes into operation.

31 On the latter question, Mr Cheong had conceded that subsidiary legislation can be passed before the primary legislation comes into operation under s 22 of the Interpretation Act.

32 As regards the former question, I see no reason why the 1995 Regulations cannot be made under the CA in view of s 329, s 2 and s 411 thereof. Indeed, it seems to me that they are correctly made under the CA because they are intended to apply certain bankruptcy provisions to companies.

33 I also add that the 1995 Regulations were made on 5 July 1995 and came into operation on 15 July 1995. BA 1995 was passed earlier and by notification dated 19 June 1995, it came into operation also on 15 July 1995.

Was there unfair preference?

34 As TAM is an associate of the Company, there is a presumption that the payments made by the Company to it within two years of the presentation of the winding-up petition is an unfair preference and it is for TAM to rebut the presumption (see s 99(3) to (5) BA 1995 and [21] of the judgment of Chao Hick Tin JA in *Show Theatres*).

35 On this point, Mr Cheong accepted that so long as there was an intention on the part of the Company to prefer TAM, that would be sufficient to constitute unfair preference even if that was not the main intention of the Company.

36 Mr Cheong submitted that the increases in rent were done openly in that the accounts of the Company had been sent from time to time to Polestar Japan and the amounts paid for rent were disclosed therein. Polestar Japan did not object.

37 As for payments of rent and utility over the two years in question, Mr Cheong did not dispute that

the Company was insolvent at the material time or that there was evidence that between 31 January 1998 and 31 January 2000 the amount owing by the Company to TAM, aside from TAM's loan to the Company, had been reduced substantially from $515,280.19 to $100,929 whereas the amount owing to trade creditors and to hire purchase ('H/P') creditors had increased. The amount of the loan from TAM to the Company remained about the same. To be fair, there appears to be some payments to trade and H/P creditors during these two years with the balance owing fluctuating from time to time. However the balance owing to these creditors as at 31 January 2000 was more than as at 31 January 1998.

38 There was also evidence to show that while the Company made regular monthly payments of rent to TAM of less than $2,000 a month during the two years prior to the presentation of the winding-up petition, the Company also made substantial lump sum payments during that period to TAM to cover some arrears of rent.

39 However, Mr Tan Sen Kong deposed that there were many verbal and incessant threats made by TAM to evict the Company because of the arrears of rent which culminated in a Notice to Quit dated 31 December 1999 being issued by TAM to terminate the tenancy agreement by two months' notice. He said that the consequences of eviction would be disastrous and even at a directors' meeting of 3 November 1999, it was agreed that the loans from the joint venture partners would be repaid after the arrears in rent had been settled. He claimed to be merely carrying out the instructions of this meeting in effecting payment to TAM.

40 Mr Cheong also pointed out that as late as 22 February 2000, two days before the winding-up petition was filed, Polestar Japan had written to say that the Company was in a good condition. Mr Cheong submitted that this militated against the argument of unfair preference.

41 Mr Cheong added that Mr Tan Sen Kong did not use the sum in the Company's UOB account (which was subsequently garnished) to repay TAM's loan which could have been easily done if the intention was to prefer TAM.

42 As for payment of utilities, there was no payment by the Company from 2 April 1998 to 12 April 1999. Then, from 13 April 1999 to 2 February 2000, substantial sums were paid for utilities totalling $169,463.02. There was no explanation for this and the only submission made by Mr Cheong in respect of the utilities was that TAM was not being paid as creditor but as agent of the Company because TAM had to pay first for the utilities and then claim reimbursement from the Company.

43 On the other hand, Mr Segeram relied on various evidence besides the presumption of preference. As I have mentioned, there was evidence to show that the amounts owing to TAM, aside from its loan, had been reduced substantially between 31 January 1998 and 31 January 2000 while the amounts owing to trade and H/P creditors had increased in the same period. There was also evidence to show payments of substantial lump sums to cover some arrears of rent and utilities for the two years from 25 February 1998 to 24 February 2000.

44 Mr Segeram also pointed out that the Liquidator had found no written evidence of threats from TAM to evict the Company. Also, according to the Liquidator, an increase in the rate of the rent took place during a period when the Company had the option to renew the tenancy (without any such increase).

45 As for the directors' meeting of 3 November 1999, the Liquidator pointed out that the minutes did not say that arrears of rent must be paid in priority to other creditors but only that the loans from the joint venture partners would be paid after the arrears in rent were paid.

46 Mr Segeram further submitted that even if Polestar Japan had agreed to the arrears in rent being paid first, this was not binding on the Liquidator.

47 As regards the argument that Mr Tan Sen Kong could have used the monies in the UOB account to repay TAM's loan if he wanted to prefer TAM, Mr Segeram countered that this was done indirectly by the omission of the Company to contest TAM's claim at all which facilitated TAM's obtaining judgment and the eventual Garnishee Order Absolute.

48 I do not accept the allegation that payments of substantial sums were made to TAM because of threats from TAM to evict the Company. Mr Tan Sen Tiong was a director of TAM and the Company. TAM was also a shareholder of the Company. In my view, it was unlikely that TAM would evict the Company so long as it wanted the Company to carry on business. It was not in TAM's interest for the Company to try and look for alternative premises because the costs of operations would increase as the Company would be at a different location from TAM. Also, TAM would lose a source of revenue, even though the Company was often in arrears. There would also be relocation costs incurred by the Company which again would not be in TAM's interest as a joint venture partner.

49 Secondly, substantial payments amounting to more than $110,000 were made by the Company to TAM between 3 January 2000 to 2 February 2000, after the Notice to Quit dated 31 December 1999 was given. Although Tan Sen Kong said the consequences of eviction would be disastrous, the Notice to Quit was not withdrawn even after these payments were made.

50 Thirdly, the amounts owing to trade or H/P creditors as at 31 January 2000 was more than as at 31 January 1998 whereas during the same period, the amount owing to TAM as at 31 January 2000, aside from its loan to the Company, had been substantially reduced.

51 As regards the directors' meeting of 3 November 1999, I am of the view that even if all the directors of the Company had agreed to pay the arrears of rent first, notwithstanding that substantial amounts (totalling about $900,000) were owing to other creditors, this would in itself suggest a preference to TAM.

52 In addition, many of the payments of substantial sums to TAM were made before the directors' meeting of 3 November 1999, so it does not lie in Tan Sen Kong's mouth to say that he was merely carrying out the instructions given at this meeting. These payments were also made before the Notice to Quit and in the absence of any written threat to evict.

53 As for the letter dated 22 February 2000 from Polestar Japan stating that the Company was in a good condition, I am of the view that that statement must be read in the context in which the letter was sent. Besides mentioning that the Company was in a good condition, the letter also stated that it was closing down. As is evident from that letter, there were disputes between the joint venture partners and Polestar Japan wanted to be bought out by TAM. It was therefore trying to persuade TAM to buy it out. It is undisputed that as at 22 February 2000, the Company was still insolvent although, perhaps, its prospects had improved. Indeed, two days later, it was Polestar Japan who filed the winding-up petition based on its unpaid loan to the Company and also on the basis that the Tan brothers had acted in their own interests. One of the complaints was that monies owing to TAM had been reduced and the Tan brothers had allowed TAM to obtain judgment in default in its claim against the Company (which eventually led to the Garnishee Order Absolute I have mentioned). Another complaint was in respect of the increases in rent payable to TAM. Even though not all the complaints by Polestar Japan are necessarily valid, the fact of the matter is that the Company was insolvent at all material times.

54 As for the argument that Mr Tan Sen Kong did not use the rest of the Company's money in the UOB account to pay TAM's loan (or the remaining arrears of rent) when he could have done so, I am of the view that he did not do so probably because he (and Sen Tiong) thought it better to get the

monies through garnishee proceedings. I am not suggesting that the Company must dispute a bona fide claim but I am of the view that the omission to have direct self-help to the rest of the money in the UOB account is not sufficient to rebut the presumption of preference and the other evidence against TAM.

55 As regards the argument that the payment of utilities to TAM was made to it as the Company's agent, I am of the view that this argument is neither here nor there. TAM still stood as a creditor of the Company for the utilities and it received the payment as such.

56 In the circumstance, I find that there was an unfair preference but, in my view, this finding does not apply to all the payments of rent. I am of the view that the regular payments of less than $2,000 a month to TAM were fair, bearing in mind that other creditors have received some payments in the two years before the presentation of the winding-up petition. Based on p 100 and 101 of the Liquidator's first affidavit, these regular payments amount to $23,143.57. As the total payment of rent and utilities during the two years is $604,447.61, the amount to be paid by TAM for unfair preference is:

$604,447.61

- $ 23,143.57

_____

$581,304.04

Two other arguments of Mr Cheong

57 I now come to two other arguments raised by Mr Cheong.

58 First, he submitted that there was some doubt that the Liquidator was the right person to make the application before me. For this point, Mr Cheong relied on an article 'The Avoidance Provisions of The Bankruptcy Act 1995 And Their Application to Companies' by Lee Eng Beng in (1995) SLJS 597. In that article, Mr Lee suggests that there is some ground for saying that a liquidator has no locus standi to make such an application and it should be the Official Receiver to do so.

59 On the other hand, Mr Segeram pointed out that in *Show Theatres*, it was the liquidator who made the application and Mr Lee himself was the Counsel acting for the liquidator there. Likewise, in

Re Libra Industries Pte Ltd (in compulsory liquidation) [2000] 1 SLR 84, it was also the liquidator who made the application. Be that as it may, the point does not appear to have been taken in these two cases, and so I come to Mr Lee's reasons for suggesting that a liquidator (who is not the Official Receiver) may not have locus standi to make the application.

60 Mr Lee pointed out that in bankruptcy, it is the Official Assignee who makes the application and the trustee in Bankruptcy (who is usually from private practice) is expressly conferred the powers of the Official Assignee. Mr Lee concluded that for companies, as the equivalent of the Official Assignee is the Official Receiver, it is the Official Receiver who should have the locus standi to make the application. This is supported by s 4(1) CA which defines the Official Receiver to mean the Official Assignee. Moreover, there is no provision in the CA conferring on a liquidator the general powers of the Official Receiver and the powers of the liquidator are all expressly provided in the CA eg s 273, 288, 305 and 306 CA. In view of this, Mr Lee made the suggestion that there is some ground for saying that a liquidator (who is not the Official Receiver) has no locus standi to make the application.

61 In my view, the intention of the CA is to give a liquidator (who is not the Official Receiver) as much powers as possible as would allow and assist the liquidator to carry out his duties. To that end, various provisions were enacted to give him such powers but there is nothing in the CA expressly saying that he has such powers only and no others.

62 Using judicial management as a comparison, Mr Lee also pointed out (in p 640 of his article) that the Official Receiver is not involved in judicial management and he has no control over the judicial manager. Accordingly in judicial management, it should be the judicial manager and not the Official Receiver to make a similar application under s 227T(1) CA. However, I note that s 227T(1) CA expressly states that the transaction in question would be void 'as against the judicial manager'. Therefore, judicial management did not assist me in my deliberation regarding liquidation on this point.

63 The problem is that s 329 CA does not expressly state that the transaction in question would be void as against the liquidator unlike, for example, s 334(1) CA which states that the creditor shall not be entitled to retain the benefit of the execution or attachment 'against the liquidator'. As Chao Hick Tin JA observed in *Show Theatres* (at [17]), the difficulty arises because provisions meant to be applicable to the bankruptcy regime are made to apply to winding up.

64 I also note that Mr Lee himself suggested in his article (p 641) that 'practical sense would prevail and the likely stand that the court will take is that a liquidator [who is not the Official Receiver] does possess the necessary locus standi' to make such an application. Mr Lee also suggested that regulation 3(b) of the 1995 Regulations may be used in aid of this conclusion. Regulation 3(b) states:

'3. For the purposes of sections 227T and 329 of the Act, sections 98, 99, 100, 101, 102 and 103 of the Bankruptcy Act 1995 shall be read subject to -

(a) the modifications set out in regulations 4 to 9; and

(b) such textual and other modifications as may be necessary for their application to a company being placed under judicial management or being wound up, as the case may be.'

65 Unfortunately, regulation 3(b) only refers to such modifications as may be necessary only and it does not refer to modifications that may be appropriate. One may be hard-put to argue that it is necessary for the liquidator (and not the Official Receiver) to make the application.

66 Be that as it may, I am of the view that it is the person appointed as liquidator who should make the application and this would be the private liquidator or the Official Receiver, as the case may be. In the context of companies a private liquidator is often appointed as liquidator instead of the Official Receiver. If the Official Receiver's name must be used for a challenge based on unfair preference, it would mean that he would have to seek an indemnity for costs and perhaps be consulted as well when he really has nothing to do with the dispute.

67 The second other argument by Mr Cheong is that the application should have been made by way of Originating Summons under s 272(a) CA and not a summons-in-chambers filed presumably under s 273(3) CA which is the provision for directions. On this point, Mr Cheong relied on:

(a) McPherson, 'The Law of Company Liquidation (4th Ed) p 487 to 491,

(b) *Editions Tom Thompson Pty Ltd v Pilley* [1997] 24 ACSR 617, and

(c) Australian Corporation Law, Vol 2, (Buttherworths 1991) para 5.4.0605.

68 Mr Cheong further submitted that an application under s 273(3) CA is not suitable where substantive issues are involved and the court is asked to make binding orders on TAM. Moreover, where there are substantive issues of fact, these issues would be more suitably disposed of after a trial. However, Mr Cheong accepted that this last point should have been taken earlier and was not.

69 Indeed, in one of the hearings prior to the main hearing, I had asked Counsel for each party to

consider whether there was a need for cross-examination of the deponents. Subsequently, Mr Sum Chong Mun (who is instructing Mr Cheong) applied to cross-examine the Liquidator only on one point. The application was resisted by Mr Segeram because the Liquidator had no personal knowledge of the point in question and was only drawing an inference from facts. In the circumstances, I did not allow Mr Sum's application and there was no appeal against that decision. Accordingly, I am of the view that it was too late for Mr Cheong to argue that there should have been a trial.

70 As regards the argument that s 273(3) CA should not be used to determine substantive issues and make binding orders, I note that the application before me did not specifically state that it was made under s 273(3) CA. Indeed, the application as regards unfair preference was made under s 329 CA and, as regards the garnished monies, was made under s 334 CA.

71. As regards the question whether the application should have been made by way of Originating Summons or summons-in-chambers, Mr Segeram submitted that whatever the position may be in Australia, that may have been because of the provisions in Australia. He then referred to Rules 5(1) and (2) and 7(1) and (2) of the Singapore Companies (Winding Up Rules) which state:

> '5(1) The following matters and applications in Court shall be heard before the Judge in open Court:
>
> (a) petitions;
>
> (b) appeals to Court;
>
> (c) applications under section 343 of the Act;
>
> (d) applications for the committal of any person to prison for contempt;
>
> (e) applications to rectify the Register; and
>
> (f) such matters and applications as the Judge may from time to time by any general or special orders direct to be heard before him in open Court.
>
> (2) Every other matter or application to the Court under the Act to which these Rules apply may be heard and determined in Chambers.
>
> 7(1) Every application in Court other than a petition, shall be made by motion and shall be served on the party affected thereby not less than 8 days before the day named in the notice for hearing of the motion. An application for leave to serve short notice of motion shall be made ex parte.
>
> (2) Every application in Chambers shall be in the Form 1 set out in the First Schedule, which, unless otherwise ordered, shall be served on every person against whom an order is sought, and shall require that person or persons to whom the summons is addressed to attend at the time and place named in the summons; and such summons shall be served not less than 8 days before the day named in the summons, unless in any case it shall be otherwise ordered.'

Mr Segeram said that he had used Form 1 in the First Schedule as directed by Rule 7(2).

72 Mr Segeram also drew my attention to *Show Theatres* and *Re Libra* in which the applications also appeared to have been made by way of summons-in-chambers. However, again, the point does not appear to have been argued in either of the two cases.

73 Although Form 1 is not entirely clear whether it is an Originating Summons or Summons-in-Chambers, I am of the view that 'summons' in Rule 7(2) means a summons-in-chambers and not an Originating Summons because the latter should be expressly stated if that were so. I find support for my view (that Rule 7(2) refers to a Summons-In-Chambers) from Rule 8(1) and (2) which states:

> '8(1) Every proceeding in a winding up matter should be dated and shall, with any necessary additions, be intituled as follows:
>
> "IN THE HIGH COURT OF SINGAPORE
>
> COMPANIES WINDING UP NO. OF
>
> In the matter of the Companies Act
>
> (Chapter 50)
>
> and
>
> In the matter of ……".
>
> (2) The first proceeding in every winding up matter shall have a distinctive number assigned to it in the office of the Registrar, and all proceedings in any matter subsequent to the first proceeding shall bear the same number as the first proceeding.'
>
> [Emphasis added.]

74 I would add that although O 88 r 2(1) of the Rules of Court provides for applications under the Companies Act to be made by way of Originating Summons, unless other provided by the CA, O 1 r 2(4) states that the Rules of Court shall not have effect in relation to proceedings relating to the winding up of companies.

Reliefs granted

75. In the circumstances:

> (a) I declare that TAM is not entitled to retain the benefit of the Garnishee Order Absolute in Suit No 600055 of 2000. I order TAM to pay the Liquidator $330,333.94.
>
> (b) I declare that $581,304.04 was paid by the Company to TAM as an unfair preference and I order TAM to pay the Liquidator the $581,304.04.
>
> (c) TAM is to pay the costs of this application to the Liquidator to be agreed or taxed.