Re Lehman Brothers Finance Asia Pte Ltd (in creditors' voluntary liquidation) [2012] SGHC 190

Case Number : Originating Summons No 149 of 2012

Decision Date : 14 September 2012

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : Patrick Ang Peng Koon and Chua Beng Chye (Rajah & Tann LLP) for the Applicant; Andrew Chan Chee Yin and Goh Zhuo Neng (Allen & Gledhill LLP) for Fullerton (Private) Limited.

Parties : Re Lehman Brothers Finance Asia Pte Ltd (in creditors' voluntary liquidation)

Insolvency Law – Winding Up – Liquidator

14 September 2012 Judgment reserved.

Quentin Loh J:

1 This is an application by the Liquidators of Lehman Brothers Finance Asia Pte Ltd ("the Company") pursuant to s 310(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") to determine the relevant date for the conversion of foreign currency debts to Singapore Dollars under Rule 181 of the Bankruptcy Rules (Cap 20, Rg 1, 2006 Rev Ed) ("Rule 181") for a Creditor's Voluntary Liquidation.

2 The question in the Originating Summons is framed thus:

(1) Whether debts of the Company in a currency other than Singapore Dollars which are admitted in proof by the Liquidators, for the purposes of dividends in respect of such debts in the Creditors' Voluntary Liquidation of the Company, are to be converted into Singapore Dollars at the exchange rate prevailing:-

(a) on the date on which the Statutory Declaration was lodged with ACRA and the Official Receiver (*i.e.* 23 September 2008) being the date of commencement of the Creditors' Voluntary Liquidation of the Company as provided for by section 291(6)(a) of the Companies Act; or

(b) on the date of the resolutions of the Company and the creditors of the Company passed during the meetings of the Company and its creditors for the Creditors' Voluntary Liquidation of the Company (*i.e*. 17 October 2008)?

3 There is no Singapore case which decides this issue. However I am told that confusion arises from the decision of the Court of Appeal of Sarawak, North Borneo and Brunei in *Attorney General v Creditors of Tenganipah Estate* [1956] SCR 90 ("*Tenganipah*") which establishes a different date for conversion of foreign currency debts from the date for proof of debts in bankruptcy. If *Tenganipah* is binding, this would introduce an inconsistency between local and foreign creditors when calculating provable debts. This Application, *inter alia*, challenges the decision in *Tenganipah* as unsound in principle and inapplicable to the Singapore context in light of Rule 181.

Factual Background

4 The Company was an investment holding company wholly owned by Lehman Brothers Investments Pte Ltd (In Creditors' Voluntary Liquidation) and incorporated in Singapore on 24 August 2007.

5 On 23 September 2008, the Board of Directors ("the Board") of the Company decided to place the Company into Creditors' Voluntary Liquidation and to appoint Messrs Peter Chay Fook Yuen, Bob Yap Cheng Ghee and Roger Tay Puay Cheng as provisional liquidators. The Board lodged a statutory declaration on the same day with the Accounting and Corporate Regulatory Authority of Singapore ("ACRA") and the Official Receiver which stated, *inter alia*, that the Company could not continue its business due to its liabilities and that meetings of the Company and its creditors had been called.

6 The resolution placing the Company in Creditors' Voluntary Liquidation was passed on 17 October 2008, appointing the three provisional liquidators stated in the Statutory Declaration as the Liquidators of the Company ("the Liquidators"). Notice of Appointment of the Liquidators was lodged with ACRA and the Official Receiver.

7 The Liquidators received claims from the unsecured creditors for the following sums in the respective foreign currencies:

(a) USD 164,177,290.40;

(b) JPY 455,941.00;

(c) AUD 1,948.65; and

(d) GBP 11.00.

8 The Liquidators were subsequently able to realise a substantial part of the Company's assets, bringing the total cash or cash equivalent to approximately SGD 213,000,000. As a result, the Liquidators decided to declare an interim dividend in respect of unsecured debts owed by the Company, and gave notice to all known unsecured creditors of this intention on 22 August 2011. The Liquidators examined the proof of debts submitted by the unsecured creditors and informed them of the admission or rejection, in whole or in part, of the proofs on 19 September 2011.

9 The distribution of these interim dividends has been postponed beyond the prescribed limit of two months to permit determination of this question: whether the relevant date for the conversion of foreign currency debts to Singapore Dollars under Rule 181 should be 23 September 2008, the date of lodgement of the Statutory Declaration, or 17 October 2008, the date of the passing of the resolution for voluntary winding up (see [23] below).

My Decision

Application of Bankruptcy Rules to Corporations

10 The rights of creditors and issues relating to debts provable in the liquidation of an insolvent company follow the same rules relating to the bankruptcy of individuals: s 327(2) CA. Section 327(2) CA imports the relevant provisions of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("BA") and the Bankruptcy Rules (Cap 20, Rg 1, 2006 Rev Ed) ("BR") in the winding up of an insolvent company. The relevant rule for conversion of foreign currency debts is contained in Rule 181, which reads:

Debt in foreign currency

181.—(1) For the purpose of proving a debt incurred or payable in a currency other than Singapore dollars, the amount of the debt shall be converted into Singapore dollars at the rate prevailing on the date of the bankruptcy order as derived under paragraph (2) or (3).

...

11 As the term "date of the bankruptcy order" in Rule 181 is not apt in the case of a company, the question then arises: what is the "date of the bankruptcy order" in the context of insolvent companies? Under s 255 CA, the commencement date of the winding up is the date the application is filed or the date the resolution for voluntary winding up is passed:

Commencement of winding up

255.—(1) Where before the making of a winding up application a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and, unless the Court on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case the winding up shall be deemed to have commenced at the time of the making of the application for the winding up.

12 In a voluntary liquidation, the commencement date of the winding up is either the date the statutory declaration is lodged with the Registrar if a provisional liquidator has been appointed, or the date the resolution for voluntary winding up is passed. Section 291(6) CA provides:

Commencement of voluntary winding up

(6) A voluntary winding up shall commence —

(a) where a provisional liquidator has been appointed before the resolution for voluntary winding up was passed, at the time when the declaration referred to in subsection (1) was lodged with the Registrar; and

(b) in any other case, at the time of the passing of the resolution for voluntary winding up.

13 The real issue therefore boils down to this: what is the relevant date when applying Rule 181 in a creditors' voluntary liquidation where provisional liquidators have been appointed? The CA, BA and BR offer no express indication as to what the equivalent of "the date of the bankruptcy order" in a creditors' voluntary liquidation is and there is no decided case on this issue.

14 Woo Bih Li J identified this problem in *Panorama Development Pte Ltd v Fitzroy Investment Pte Ltd* [2003] 1 SLR(R) 93 ("*Panorama Development*") at [21]:

Also, in the context of companies, a determination may sometimes have to be made as to which date is the equivalent of the date of the bankruptcy order made under the applicable Bankruptcy Act (Cap 20, 1996 Rev Ed), i.e. the date of the filing of the winding up petition or the date of the winding up order.

However, since it was not necessary for him to decide the point on the facts of the case before him, he declined to do so.

15 The learned author in *Walter Woon on Company Law* (Sweet & Maxwell, 2009, Revised 3rd Ed), at [17.203] summarises this quandary as follows:

> In the context of liquidation, the question is at what date is the conversion into Singapore dollars to be undertaken. In a world where foreign exchange rates roller-coaster up and down from day to day, the exact date of conversion can mean the loss (of gain) of substantial sums. Unfortunately, there is again a difference of opinion in other jurisdictions and no Singapore case to decide the point. In *Attorney General v Creditors of Tenganipah Estate*, Rogers and Lascalles JJ sitting in the Court of Appeal of Sarawak, North Borneo and Brunei held that foreign currency claims are to be valued at the exchange rate prevailing on the date that the winding up application was made. However, in *Re Dynamics Corporation of Maerica*, Oliver J held that the appropriate date of conversion is the date on which the winding up order is made. In the case of a voluntary winding up, such claims are valued as of the date of the resolution to wind up. There is some authority to the effect that a decision of the Court of Appeal of Sarawak, North Borneo and Brunei is binding in Singapore. If correct, this would oblige the High Court to follow the *Tenganipah* case and order conversion as of the date of the making of the winding up application. However, such a rule would mean that foreign currency debts are valued at a different date from local debts, an anomalous and inequitable position.

16 This suggestion that *Tenganipah* is binding on the High Court in Singapore emanates from the fact that it is a Court of Appeal decision from the Supreme Court of Sarawak, North Borneo and Brunei and thus constitutes a binding precedent (under the doctrine of *stare decisis*) pursuant to s 88(3) of the Malaysia Act 1963 (Act 26 of 1963) (Malaya) and s 13 of the Republic of Singapore Independence Act 1965 (1985 Rev Ed) as interpreted by the High Court decision of *Mah Kah Yew v Public Prosecutor* [1968–1970] SLR(R) 851 ("*Mah Kah Yew*").

17 The court in *Tenganipah* was called upon to decide when to apply the rate of conversion from Japanese Yen into Sterling. The trial judge had applied the conversion rate on 31 December 1940, the date when the relevant company had ceased operations. In the Court of Appeal, Rogers J (with whom Bodley and Lascelles JJ concurred) disagreed and decided that the appropriate date for calculating the conversion rate was the date of presentation of the winding up petition which was 29 June 1953. The *Tenganipah* court applied *Re Russian Commercial and Industrial Bank* [1955] 1 All ER 76 ("*RCIB*") where Wynn-Parry J considered that the date for the conversion into sterling of a foreign currency debt should be the date when the debt became due.

18 In *RCIB*, a Russian bank with a branch in England had been dissolved under Russian law in December 1917. However, its English branch continued to operate until 3 February 1922, when the winding up petition was presented for compulsory winding up of the English branch. A creditor had a current account with the bank's English branch, and proved a debt of 36,430 roubles due to him as at 1 July 1921. The question arose as to what date the conversion should be effected. Wynn-Parry J clarified that the general principle which should be applied was to first ask when the debt became due. He found (at 80) that the bank continued to operate out of its English branch for a considerable time after its dissolution in Russia and transactions in the normal course of banking were entered into "as if the dissolution had not occurred". In addition, there was authority to the effect that a dissolution should not be recognised for the purposes of winding up and the distribution of its assets amongst creditors. As a result, Wynn-Parry J ruled that there was "no other logical conclusion" but to ignore the dissolution of the bank. He opined (at 80–81; in a passage which was quoted in *Tenganipah* at 95):

> A customer of the bank to whom money is owing on current account at the date of dissolution can only obtain payment (either in whole or in part) by proving in the winding-up; but if he

> proves in the winding-up he must accept that the dissolution which, looked at outside the winding-up, was effective to determine the relation of banker and customer, is to be treated by the liquidator, who examines his claim, and the court which may have to pronounce on it, as not having taken place. In other words he can rely on the dissolution as having terminated the relation of banker and customer, if he stays outside the winding-up, in which case he will be without remedy; or on the other hand *he can prove in the liquidation, in which case he must accept the non-recognition by the liquidator and the court of the event which in fact caused the termination of the relationship between banker and customer between the bank and himself*. In the liquidation, therefore, the relationship must be deemed to have continued. On this basis, the commencement of the liquidation is *the earliest date when the relationship came to an end; and that is the date when the debt became due*.
>
> [emphasis added]

19 It is noteworthy that the comparison in *RCIB* was between the date of effective dissolution in Russia and the date of winding up of the English branch. Similarly, in *Tenganipah*, the comparison was between the date of cessation of operations and the date of winding up. Neither of these cases considered the situation as to when the winding up became effective for the purposes of proof of debt. Much of the decision in *RCIB* focused on the special position of proof of debt in a winding up situation and why it should be an *exception* to the rule that dissolution terminated the relationship between creditor and debtor such that the debt became immediately due. In other words, the *Tenganipah* court was restating the position in *RCIB* that the relationship between the parties must be treated as continuing where a debt had yet to be proved in a winding up. The principle in *RCIB* was used in *Tenganipah* to reject the claim that a debt became due once operations of a company had ceased. Once this had been decided, the court *assumed* that the date of the presentation of the petition was the date of winding up. In *Tenganipah*, Rogers J had concluded (at 95):

> In the case now before the Court, there has not been any previous dissolution to complicate the issues and the date when these debts became due can without any difficulty be fixed as the date of the presentation of the petition.

20 The question that the *Tenganipah* court had been called upon to decide was therefore a related but tangential question. The court never considered, much less decided, what the date of the bankruptcy order was or whether the date of the order for winding up should apply. As the Applicant points out, the *Tenganipah* court never considered the impact of Rule 181. I find that this is not only because Rule 181 was not in existence in Borneo at that time, but more importantly because the question of when the equivalent date of a bankruptcy order was in the context of a company's liquidation was never before that Court.

21 Accordingly I find that the *ratio* in *Tenganipah* is inapplicable to the facts of this case. In the event that I am wrong and the *ratio* is read more broadly, *Tenganipah* is distinguishable on its facts.

22 As a side note, I should add that I also entertain reservations whether the Singapore High Court should continue to be bound by the decisions of the previous Court of Appeal of Sarawak, North Borneo and Brunei. Professor Walter Woon, in his article "Review of Judicial and Legal Reforms in Singapore between 1990 and 1994" in *The Doctrine of Binding Precedent: Cutting the Gordian Knot* (Butterworths, 1996) (at p 170) opines that the rule of *stare decisis* is complicated by our political history because at one time or another we have been part of a Presidency in India, a separate Crown Colony (initially within the Straits Settlements and later on our own), a constituent of the state of Malaysia, and finally an independent republic. Consequently there are about a dozen other courts that have some claim to being predecessors of the present Court of Appeal. The learned author states at

(pp 179–180):

> There is, in my submission, no justification for treating decisions of other appellate courts – *viz* the Court of Appeal of the Federated Malay States, the Court of Appeal of the Malayan Union, the Court of Appeal of the Federation of Malaya, the Court of Appeal of Sarawak, North Borneo and Brunei – as binding on the High Court. None of these courts have ever exercised jurisdiction in Singapore. They were treated as foreign courts, whose decisions might be accorded respect but which were never considered binding. It would be ironic indeed if decisions of these courts were not binding on the judges of colonial Singapore but are now binding on the judges of independent Singapore, a generation or more after the said courts have ceased to exist.

I agree with those sentiments and have my reservations about the continued carriage of unnecessary baggage from our chequered political history, particularly when we have developed our own jurisprudence over almost half a century since our independence. I should also point out that strictly speaking, although the decision in *Mah Kah Yew* (see [16] above) was by a court of three Judges, it was a Magistrate's Appeal which Wee Chong Jin CJ reserved to a court of three Judges pursuant to s 295(3) of the Criminal Procedure Code (cap 132, 1955 Rev. Ed). It therefore remained a decision of the High Court, a fact which was emphasized by Wee Chong Jin CJ at [1].

Choice between Statutory Declaration or Passing of Resolution

23 There are two possible interpretations when applying "the date of the bankruptcy order" to a creditors' voluntary liquidation where provisional liquidators have been appointed:

(a) the date on which the creditors' voluntary liquidation commences, *ie*, the date of the Statutory Declaration, 23 September 2008 ("the Commencement Date"); or

(b) the date on which the Company passes the Resolution to put the Company in creditors' voluntary liquidation, 17 October 2008 ("the Resolution Date").

24 The choice of the Commencement Date as the equivalent of the "date of the bankruptcy order" finds some support in the following:

(a) First, s 75 BA provides that the date on which "the bankruptcy order is made" is also the date on which the bankruptcy commences; and

(b) Second, s 291(6) CA provides that the creditors' voluntary liquidation where a provisional liquidator is appointed commences on the date on which the statutory declaration is lodged under s 291(1) CA.

On this approach, since the date of the bankruptcy order is the date of commencement of bankruptcy, its equivalent in the context of a creditors' voluntary liquidation where a provisional liquidator is appointed must also be the Commencement Date.

25 By contrast, the use of the Resolution Date is based on an approach which considers the substantive effect on the legal status of a company under a creditors' voluntary liquidation as a bankruptcy order does on the legal status of an individual. As the statutory declaration, which begins on the Commencement Date, merely appoints liquidators on a provisional and not a conclusive or more permanent basis, a company is not conclusively placed in creditors' voluntary liquidation until a valid resolution to place itself in creditors' voluntary liquidation is passed.

26 In my view, the Resolution Date is the correct basis for the conversion for the reasons set out below, the chief of which must be the substantive effect on the legal status of the legal entity and the avoidance of anomalies.

27 An examination of the language used in the BR and its equivalent provisions in the Companies (Winding Up) Rules (Cap 50, Rg 1, 2006 Rev Ed) ("CWR"), shows that the words "bankruptcy order" and "winding up order or resolution" are used in the same context to mean the same thing. For example, Rule 182 of the BR and Rule 86 of the CWR are substantively the same in the treatment of periodic payments. Rule 182 of the BR reads:

> **Periodical payments**
>
> **182**. When any rent or other payment falls due at stated periods, and the *bankruptcy order* is made at any other time other than one of those periods, the person entitled to rent or payment may prove for a proportionate part thereof up to the *date of the order*, as if the rent or payment grew due from day to day.
>
> [emphasis added]

Rule 86 of the CWR reads:

> **Periodical payments**
>
> **86**. When any rent or other payment falls due at stated periods, and the *winding up order or resolution to wind up* is made at any other time other than one of those periods, the person entitled to rent or payment may prove for a proportionate part thereof up to the *date of the winding up order or resolution*, as if the rent or payment grew due from day to day…
>
> [emphasis added]

The only difference between these rules is the substitution of "winding up order or resolution to wind up" for "bankruptcy order".

28 The position is similar in respect of proof of debts payable at a future time. Rule 186 of the BR reads:

> **Debt payable at a future time**
>
> **186.** A creditor may prove for a debt not payable at the *date of the commencement of the bankruptcy* as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of 8% per annum from the date of declaration of a dividend to the date when the debt would have become payable according to the terms on which it was contracted.
>
> [emphasis added]

Rule 88 of the CWR reads:

> **Proof of debt payable at a future time**
>
> **88.** A creditor may prove for a debt not payable at the *date of the winding up order or resolution*

as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of 6% per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

[emphasis added]

The only differences between the two rules are the percentage rebate of interest, a slight phraseology change, and the substitution of "date of the winding up order or resolution" for "date of the commencement of bankruptcy". Both dates are treated as interchangeable and pointing to the same event: that of a debt becoming payable or due.

29 Again, as to claims for interest, there is similar treatment although the juxtaposition is less obvious. Rule 184 of the BR reads:

Claim for interest where not previously agreed

184. In the following circumstances, the creditor's claim may include interest at a rate not exceeding the rate of interest as provided for in the Rules of Court (Cap. 322, R 5) for the time being in force on the debt for periods before the bankruptcy order, although not previously reserved or agreed:

(a) if the debt is due by virtue of a written instrument and payable at a certain time, interest may be claimed for the period from that time to the *date of the bankruptcy order*; or

(b) if the debt is due otherwise, interest may only be claimed if, before the filing of the bankruptcy application, a demand for payment was made in writing by or on behalf of the creditor, and notice given that interest would be payable from the date of the demand to the date of payment, in which case interest may be claimed under this rule for the period from the date of the demand to that of *the bankruptcy order*.

[emphasis added]

Rule 87 of the CWR reads:

Interest

87. On any debt or sum, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the *date of the winding up order or resolution*, the creditor may prove for interest at a rate not exceeding 6% per annum to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time payment.

[emphasis added]

The time at which the interest is payable is calculated from the date of bankruptcy order *or* the date of the winding up order or resolution. In Rule 184 of the BR, a further distinction is made in Rule 184(b) between "the bankruptcy application" and the date of "the bankruptcy order", making it clear that the calculation of interest on the debt happens *subsequent to* the bankruptcy application and

only when an order is made. Interest may only be calculated on a debt when it becomes due, and not before. If interest only starts accruing at the point of the bankruptcy order or date of winding up order or resolution, this points to the fact that the debt only becomes due at the Resolution Date and not before. In fact, Rule 87 of the CWR suggests that a debt may become due at an even later date, *viz*, when a demand is made for that debt.

30 This comparison shows a consistent intention for the bankruptcy order to correspond to the winding up order and the resolution for winding up in the BR and the CWR.

31 In the context of filing proofs of debt in winding up proceedings, the Singapore courts have determined that the equivalent of a bankruptcy order is not the commencement of winding up but the winding up order. In *Re City Securities Pte* [1995] 2 SLR(R) 746 ("*City Securities*"), Chao Hick Tin J (as he then was) applied s 40(3) of the Bankruptcy Act (Cap 20, 1985 Rev Ed) ("the 1985 BA") and held that the cut-off date up to which proofs of debt could be calculated was the date of the order and not the date of presentation of the winding up petition. Section 40(3) of the 1985 BA is materially similar to the current s 87(3) BA. This corresponds, in the present case, to the Resolution Date, and is perfectly consistent with the examination of the BR and CWR at [27]–[30] above.

The English and Australian Position

32 In England, no uncertainty arises because there is specific legislation which adopted the common law position. Rule 4.91 of the English Insolvency Rules 1986 expressly provides:

> **4.91** – (1) For the purpose of proving a debt incurred or payable in a currency other than sterling, the amount of the debt shall be converted into sterling at the official exchange rate prevailing *on the date when the company went into liquidation*.
>
> [emphasis added]

Section 247(2) of the English Insolvency Act 1986 defines "goes into liquidation" as:

> **247 'Insolvency' and 'go into liquidation'**
>
> (2) For the purpose of any provision in this Group of Parts, *a company goes into liquidation if it passes a resolution for voluntary winding up* or an order for its winding up is made by the court at a time when it has not already gone into liquidation by passing such a resolution.
>
> [emphasis added]

33 In *In re Dynamics Corporation of America* [1976] 2 All ER 669 ("*Re Dynamics*"), a creditor of a New York company which had carried on business in the USA and England presented a petition in England for the compulsory winding up of the company as an unregistered company. The rate of exchange of the US Dollar to Sterling differed between the date when the petition was presented and the date of the winding up order. The English liquidator applied to the English Court to determine which exchange rate to apply to convert the debts in US Dollar to Sterling. Oliver J held that the conversion of a US Dollar debt to Sterling was to be based on the exchange rate prevailing at the date of the making of the winding-up order. Oliver J explained (at 774G– 775E):

> What the court is seeking to do in a winding up is to ascertain the liabilities of the company at a particular date and to distribute the available assets as at that date pro rata according to the amounts of those liabilities. In practice the process cannot be immediate, but notionally I think it

is, and, it seems to me, it has to be treated as if it were, although subsequent events can be taken into account in quantifying what the liabilities were at the relevant date. In the context of a liquidation, therefore, the relevant date for the ascertainment of the amount of liability is the notional date of discharge of that liability and, ...that date must, in my judgment, be the same for all creditors and it must be 'the date of payment' for the purposes of any judgment which has been entered for the sterling equivalent at the date of payment of a sum expressed in a foreign currency.

Two candidates have been suggested as appropriate in the case of a compulsory winding up, the *date of the winding up order* and the *date of the commencement of the winding up* – that is the *date of the presentation of the petition. The latter has been suggested because it is said that this would be consistent with the set off cases, but I do not think that is right.* It is, of course, perfectly true that the question of the availability of set off has to be ascertained at the commencement of the winding up, but that date does not, as I see it, govern the valuation of the set off. ... *In my judgment the [date of the winding up order] is the date at which such conversion should be made, and I will declare accordingly*.

[emphasis added]

The reason given by Oliver J for deciding that the relevant date was the date of the winding up order can be found at 764E–F:

It is only in this way that a rateable or pari passu distribution of available property can be achieved, and it is, as I see it, axiomatic that the claims of creditors amongst whom the division is to be effected must all be crystallized at the same date ..., for otherwise one is not comparing like with like.

34 Although *Re Dynamics* concerned compulsory winding up of a company, it was also approved by the English Court of Appeal in *In re Lines Bros Ltd (In Liquidation)* [1983] Ch 1 ("*Re Lines Bros*") which concerned a creditors' voluntary liquidation. In *Re Lines Bros*, the liquidators in a creditors voluntary liquidation converted foreign currency debts of the company into Sterling at the rate of exchange prevailing at the date of the resolution to wind up, *ie*, the Resolution Date in the present case. As a result of the depreciation of Sterling against the Swiss Franc, the creditor bank, on converting their Sterling dividends into Swiss Francs, received only 58.7% of the 18.5 million Swiss Francs owed to them by the company. The bank sought to recover the loss from the surplus after paying all the provable debts. The liquidators applied to the English court for directions. The Court of Appeal upheld the judge's decision that the bank's foreign currency debt was properly converted at the date the resolution was passed to wind up the company and they were not entitled to further participate in the assets of the company.

35 Brightman LJ stated (at 1019A) that "there can be no reason for any distinction between a voluntary liquidation and a compulsory liquidation" and (at 1020C–E) that this was because there remained the need "to value foreign debt once and for all at an appropriate date, and to keep to that rate of conversion throughout the liquidation until all the debts have been paid in full" so that "all the creditors will be treated alike". Brightman LJ also observed (at 1022G):

As I have quoted at length from authorities on a proposition which is accepted as axiomatic, in order to underline the point that the winding up date is *the date of valuation* of liabilities. An account can only be struck in a single currency, it must follow that the scheme of company liquidation requires that a foreign debt shall be converted into [the currency of the liquidation]… as at the date of liquidation and at no other date.

[emphasis original]

and (at1023H):

> ...The liquidation of an insolvent company is a process of collective enforcement of debts for the benefit of the general body of creditors. Although it is not a process of execution, because it is not for the benefit of a particular creditor, it is nevertheless akin to execution because its purpose is to enforce, on a pari passu basis, the payment of the admitted or proved debts of the company. When, therefore, a company goes into liquidation a process is initiated which, for all creditors, is similar to the process which is initiated, for one creditor, by execution. *If the commencement of the process of execution is the correct date for the conversion of a foreign debt in the case of a defendant whose affairs are under his control, it seems to me entirely consistent that the date of liquidation should be the due date for conversion in the case of a company whose affairs are committed to a liquidator*.
>
> [emphasis added]

36 Lawton LJ opined (at 1018D):

> Ever since *In re Humber Ironworks and Shipbuilding Co., L.R. 4 Ch.App. 643* it has been the practice to value the fund as at the date of liquidation. *I can see no reason why a different date should be fixed merely because one or more of the liabilities is stated in a foreign currency. It follows that such a foreign liability has to be valued at the rate of exchange when the valuation is made.* Since the application of the fund in satisfaction of all the liabilities is a form of enforcement, in my judgment, payments out of it by way of dividend should be in sterling just as judgment debts in foreign currencies are paid in sterling at the rate appropriate when leave to enforce is given.
>
> [emphasis added]

In so holding, the Court of Appeal approved the decision and reasoning of *Re Dynamics* (see 1024 of *Re Lines Bros*).

37 *Re Dynamics* has been applied in Australia in *Re Gresham Corporation Pty Ltd (in liq.)* [1990] 1 Qd R 306. Dowsett J held (at 307–308):

> In *In Re Dynamics Corporation of America (in liq.)* [1976] 1 WLR 1 WLR 757, Oliver J (as he then was)..., after careful consideration of the history of the realisation of assets in bankruptcy and company liquidations and of the current English legislation, came to the conclusion that the appropriate date was the date of the winding-up order. I must say that I find his Lordship's reasoning persuasive, and although our legislation tends to diverge more and more from the current English legislation, I think that the considerations which led his Lordship to that conclusion may well be persuasive here.
>
> ...
>
> … the fact that the line of authority commencing with *In re Dynamics Corporation* has not been contradicted leads me to believe that such decision has been accepted as a fair basis for the resolution of questions concerning the distribution of assets in a winding-up. It appears to me to be theoretically and practically sound, if I may say so with respect, and it is the course that should be followed here.

> In the circumstances I would direct that the amounts of proofs in foreign currency be converted into Australian dollars at the rate appropriate on the date upon which the company was placed in liquidation.

38 *Re Lines Bros* has been approved by the Singapore High Court in *Re Mohamed Yunus Valibhoy, ex parte Bank of Credit and Commerce Hong Kong Ltd* [1994] 3 SLR(R) 504 although that case was in the context of the 1985 BA and before the introduction of Rule 181. It is interesting to note that counsel for the banks, Mr V K Rajah (before his elevation to the Bench), submitted (at [35]):

> It was/is the practice of the [Official Assignee] to relate the exchange rate to the date of the adjudication and receiving orders were granted or as at the date of the winding up in the case of a company (see *Re Lines Bros Ltd (in liquidation)* [1983] Ch 1). As for the bankrupt's argument that the bank should be paid in US currency that being the currency of its claim and no more, *Miliangos v George Frank Textiles* [1976] AC 443 supported the [Official Assignee's] decision that the bank should be paid the equivalent in local currency as at the date the adjudication and receiving orders were made. In the case if a winding up, *creditors are entitled to their claim for subsequent interest if there are surplus funds available* ***after payment of what was due for principal and interest at the date of the winding up*** (*In re Humber Ironworks & Shipbuilding Co* (1869) LR 4 Ch App 643) and the same applied for bankruptcies where there are surplus funds as the estate has in this case. It is *clear and settled law* and the [Official Assignee] agrees that the English practice applies to Singapore for liquidations ***and*** bankruptcies.
>
> [emphasis added in italics and bold italics]

This argument was supported by the Official Assignee (see [38]) and was not challenged by counsel for the bankrupt. This submission and the underlying reasoning of *Re Lines Bros* (which, as noted above, rules that the relevant date for conversion of foreign currency debts was the date of the resolution or date of winding up) was accepted by Lai Siu Chiu J (see [56]–[59]). The learned judge also quoted with approval (at [56]) the judgment of Lawton LJ in *Re Lines Bros* set out above at [36]. Lai Siu Chiu J concluded (at [59]):

> *Clearly*, on the foregoing authorities, it was *right and proper* for the [Official Assignee] to make payment to the bank on the proof in the S$ equivalent of the US$ at the exchange rate prevailing on the date the adjudication and receiving orders were made and let the loss incurred in the process lie where it falls, namely, on the bankrupt. Indeed *it would be inequitable otherwise* in view of the long and tortuous history behind the application all of which was the making of the bankrupt.
>
> [emphasis added]

39 The reasons advanced by these decisions in England and Australia, *viz*, achieving equality of treatment of the creditors regardless of whether their claims are in local or foreign currency, and avoiding two different dates, one for claims in foreign currency and another for local currency, apply with equal force in Singapore. Ian F Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 2009, 4th Ed) ("*Fletcher*") explains (at [23-010]) that the rationale behind these rules is to "ensure equality of treatment between all creditors" by fixing liabilities on the same day.

Possible Conflict with Relevant Date for Insolvency Set-off

40 In *Good Property Land Development Pte Ltd (in liquidation) v Societe-Generale* [1996] 1 SLR(R) 884 ("*Good Property*"), the Court of Appeal held that insolvency set-off occurs at the date of

commencement of the compulsory winding up of a company as opposed to the date of the winding up order. The Court of Appeal relied on s 255 CA and held (at [14]):

> For our purposes [of set-off] here, we thought we should highlight the point that under the retroactivity principle, the relevant date is the date of presentation of the petition for winding up as opposed to the date of the winding-up order under the English position.

There is an apparent anomaly in that insolvency set-off occurs automatically on the commencement of the winding up (corresponding to the Commencement Date in the present case) but the date of conversion of the foreign currency debt is the date of the winding up order or resolution (the Resolution Date in the present case).

41 Before I deal with the apparent anomaly, I should point out that *Good Property* has its detractors. In his article, *Trust Funds, Ascertainability of Beneficial Interest and Insolvency Set-Off* (1996) SAcLJ 489, Mr Lee Eng Beng offers the view that although *Good Property* is supported by some English cases, it is in disagreement with the more recent and authoritative English decisions as well as the Australian position, and that the Court of Appeal's reliance on s 255 CA as rendering the local position different from that in England is not incontrovertible. While this is not the appropriate place to discuss consistency of the date of set-off with the dates of conversion and proof, I find Mr Lee Eng Beng's criticism in (1996) SAcLJ 489 at p 494 to be quite compelling:

> For set-off to be effected, it is necessary to determine whether the claim sought to be set off by a creditor is a provable debt, since only provable debts may be set off and, if so, the value of the claim must also be quantified. But these questions cannot be resolved until the date of the winding up order. It is therefore odd that set-off should be effected at an earlier date.

It does seem to be putting the cart before the horse to decide on the value of set-off *before* the debt could be proved in liquidation. Woo Bih Li J in *Panorama Development* (see [14] above) had his reservations on the Court of Appeal's reliance (at [40]) on *Arab Banking Corp v United Overseas Bank Ltd* [1991] 1 SLR(R) 560 and cited Mr Lee Eng Beng's article with approval (see [55]–[57]). The incongruity of the insolvency set-off date and the relevant date for the conversion of foreign currency was recognised by Oliver J in *Re Dynamics* but that did not change his view (see 775B-E).

42 The apparent anomaly created by *Good Property* can be avoided for present purposes by treating it as a case which dealt with set-off and s 88 BA, unlike the present case which concerns proofs of debt under s 87 BA. As set out above, both case law and the statutory scheme relating to proofs of debt provide that the equivalent of the bankruptcy order in creditors' voluntary liquidation is the passing of the resolution for winding up. Also, the established position prior to the introduction of Rule 181 was that the date for currency conversion should, by extension, be the date of the winding up resolution. There is no reason to suggest that the law relating to proofs of debts has changed because a different position has been taken in relation to the law on set-offs. I also see, as stated by Oliver J in *Re Dynamics* (at 775D), that "[t]here is nothing in the set-off cases which compels a quantification of the amount of the set off as at the commencement of the winding up".

43 Further, the retroactivity concept the Court of Appeal considered in reaching its decision in *Good Property* to favour the date of commencement has been abolished through s 75 BA which provides that the bankruptcy commences on the day when the bankruptcy order is made and continues until the bankrupt is discharged. Our s 75 BA is based on s 278 of the English Insolvency Act 1986, in respect of which *Fletcher* states (at [8-005]):

> ... section 278(a), is the technical date of commencement of the bankruptcy. This represents a

change from the provisions in force prior to the enactment of the Insolvency Act 1986, and is attributable to the abolition of the concept of "acts of bankruptcy" as part of the recasting of the insolvency law. Under the former law a rule known as the "relation back" doctrine was applied so as to fix the date of commencement of the bankruptcy as at the date of the commission of the act of bankruptcy on which the order of adjudication was made. This doctrine, which could operate so as to place the commencement of the bankruptcy as a time several months before the date of the order, has ceased to be part of the law and the new rule expressed in section 278(a) has the decided merits of clarity and certainty with regard to its application.

44 *Good Property* also relied on the concept of "relation back" to distinguish *MS Fashion Ltd & Ors v Bank of Credit and Commerce International SA (in liq) & Ors (No.2)* [1993] 1 Ch 425 which held that in the context of a winding up, the relevant date for assessing the mutuality of credits and debts in insolvency set-off is the date of the winding up order.

45 The position on proof of debts in Singapore is set out in s 87(3) BA:

Description of debts provable in bankruptcy

87.—(3) Subject to this section and section 90, any debt or liability to which the bankrupt —

(a) is subject at the date of the bankruptcy order; or

(b) may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy order,

and any interest on such debt or liability which is payable by the bankrupt in respect of any period before the commencement of his bankruptcy shall be provable in bankruptcy.

In *City Securities* (see [31] above), Chao J (as he then was) interpreted the predecessor of s 87(3) BA (at [7] and [10]) as follows:

The combined effect of the foregoing provisions [Section 40(3) of the 1985 BA, now section 87(3) of the BA] seems to be that the cut-off date up to which proof of debt could be calculated would be the date of the order and not the date of the presentation. Moreover, the authorities would appear to support this view…

By r 87 [of the BR], a creditor without contractual right to interest could prove for interest at 6% up to the date of winding-up order. I cannot see any reason why we should deny a creditor, who by the terms of his contract with the debtor company is entitled to charge interest, the right to do precisely that; it would be completely illogical.

The learned judge also distinguished *Amalgamated Investment & Property Co Ltd* [1985] 1 Ch 349 as it ran counter to the provisions of s 327(2) CA, read with what is now s 87(3) BA. The approach in *City Securities* clearly accords with the provisions already referred to above and in particular, Rule 87 CWR.

Conclusion

46 I find that the need to ensure consistency and equality between all creditors in the event of voluntary liquidation, and especially fixing liabilities on the same day, is a compelling one. I therefore answer the question in this application as follows: the debts of the Company in foreign currency

which are admitted in proof by the Liquidators are, for the purposes of dividends in respect of such debts, to be converted into Singapore Dollars at the exchange rate prevailing as at the Resolution Date, *viz*, 17 October 2008.

47 Costs of the Application are to be paid out of the assets of the Company. There will also be liberty to apply.

48 It remains for me to record with gratitude the very able assistance I have derived from the clear and cogent submissions of counsel for the Liquidators, Mr Patrick Ang Peng Koon, and counsel for a creditor, Fullerton (Private) Ltd, Mr Andrew Chan Chee Yin.