IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 231

Originating Summons No 18 of 2016

Between

(1) CCM Industrial Pte Ltd (in liquidation)

… *Plaintiff*

And

(1) Chan Pui Yee

… *Defendant*

GROUNDS OF DECISION

[Insolvency Law] — [Avoidance of transactions] — [Unfair preferences]

CCM Industrial Pte Ltd (in liquidation)
v
Chan Pui Yee

[2016] SGHC 231

High Court — Originating Summons No 18 of 2016
Chua Lee Ming JC
15 July 2016

18 October 2016

Chua Lee Ming JC:

Introduction

1 This was a claim by the liquidators of the plaintiff, CCM Industrial Pte Ltd ("the Company"), for the recovery of payments amounting to $766,799.45 which were made to the defendant, Mdm Chan Pui Yee, in the lead up to the Company's liquidation.

2 I agreed with the liquidators that the payments constituted unfair preferences to the defendant under s 329 of the Companies Act (Cap 50, 2006 Rev Ed) ("the CA") read with s 99(5) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the BA"). Consequently, I ordered the defendant to repay the sum of $766,799.45 to the Company. The defendant has appealed against my decision.

The facts

3 The Company was a family business founded by the defendant's husband, Liew Sen Keong ("Liew"), and some of his business friends in 2001. It operated in the construction industry in Singapore, leasing equipment such as gondolas and mast climbing work platforms.[1] The defendant and her brother, Lawrence Chan Tien Chih ("Lawrence"), joined the Company in 2002.[2] Liew was the managing director of the Company from its inception. Lawrence and the defendant were subsequently appointed executive directors in 2004 and 2006, respectively.[3]

4 In 2009, plans were made for an initial public offering to expand the business. A new company, CCM Group Ltd ("CCMG"), was incorporated as the corporate vehicle for the public listing. CCMG was listed and started trading on 5 June 2010.[4] The Company was restructured as a wholly owned subsidiary of CCMG. The defendant, Liew, and Lawrence were all directors of CCMG, with Liew as the chairman of the board of directors.

5 Subsequently in 2013, the Company's business deteriorated and it faced cost overruns for many of its construction projects.[5] The Company's audited financial statements for the financial year ended 31 December 2013 ("FY2013") showed that the Company suffered a net loss of approximately

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1 Defendant's affidavit filed on 11 April 2016, para 5.

2 Lawrence's affidavit filed on 11 April 2016, para 4.

3 Lawrence's affidavit, para 6.

4 Defendant's affidavit, paras 11–13.

5 Mark Sims Chadwick's first affidavit, para 42; Mark Sims Chadwick's second affidavit, exhibit "MSC-29", paras 10 and 11.

$21.1m and had a negative net asset position of approximately $7.7m at the end of that financial year.[6]

6 It was undisputed that as at 31 December 2013, the Company owed the defendant the sum of $766,799.45 which comprised a loan of $500,000 given by the defendant in April 2013 and various payments amounting to $266,799.45 made by the defendant on behalf of the Company from 2010 to December 2013.[7]

7 The defendant resigned as a director of both the Company and CCMG with effect from 1 February 2014. Lawrence resigned as a director of the Company with effect from 28 April 2014[8] and as a director of CCMG with effect from 1 February 2014.[9]

8 On 14 February 2014, the Company made the following payments in discharge of the debt of $766,799.45 owing to the defendant ("the Payments"):

(a) two cheques in the amounts of $300,000 and $266,799.45 drawn in favour of the defendant; and

(b) a cheque in the amount of $200,000 drawn in favour of Liew.[10] Although this cheque was drawn in favour of Liew, it was common ground that it was issued in repayment of the debt owed by the Company to the defendant.[11]

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6 Mark Sims Chadwick's second affidavit, exhibit "MSC-23".

7 Defendant's affidavit, paras 26, 30 and 31.

8 Mark Sims Chadwick's first affidavit, para 13.

9 Lawrence's affidavit, para 12.

10 Defendant's affidavit, para 34.

All three cheques were dated 14 February 2014. They were presented for payment and cleared on 20 March 2014.[12]

9 On 16 April 2014, one of the Company's creditors, Guan Chuan Engineering Pte Ltd ("Guan Chuan"), applied for a winding up order against the Company.[13] This application was based on an unpaid progress claim for the amount of $238,450.69 issued by Guan Chuan to the Company on 14 January 2014, and a statutory letter of demand by Guan Chuan for the same claim dated 21 March 2014.[14]

10 On 16 May 2014, CCMG entered into a sale and purchase agreement to sell all the shares in the Company to Raymond Brother Builder Pte Ltd ("RBB") for $1.[15] The sale to RBB was completed on 21 May 2014 after which the Company ceased to be a subsidiary of CCMG. On the same day, the Company filed an application for judicial management.[16] The application was subsequently dismissed.

11 On 4 August 2014, Guan Chuan's winding up application was granted and the Company was placed in liquidation.[17]

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11 Defendant's affidavit, para 34.

12 Mark Sims Chadwick's first affidavit, para 18.

13 Mark Sims Chadwick's first affidavit, para 5.

14 Mark Sims Chadwick's second affidavit, exhibits "MSC-27" and "MSC-28".

15 Defendant's affidavit, paras 61 and 62; Mark Sims Chadwick's second affidavit, para 34.

16 Originating Summons No 467 of 2014.

17 Mark Sims Chadwick's first affidavit, para 1.

What the liquidators had to prove

12 Section 329 of the CA makes ss 98–103 of the BA applicable to the winding up of companies. Where an unfair preference has been given, s 99(2) of the BA gives the court the power to make such order as it thinks fit for restoring the position to what it would have been if the unfair preference had not been given. For purposes of the present action to recover the Payments as undue preferences, the liquidators had to prove that:

(a) the Payments were made within the claw-back period of six months (or two years, if the defendant was an associate of the Company when the Payments were made) prior to the winding up order against the Company: s 329(2) of the CA read with s 100(1) of the BA;

(b) the Company was insolvent at the time of the Payments, or became insolvent in consequence of the Payments: s 100(2) of the BA;

(c) each of the Payments gave a preference to the defendant in that the defendant's position, upon the winding up of the Company, was improved: s 99(3) of the BA; and

(d) in making the Payments, the Company was influenced by a desire to improve the defendant's position in the event the Company was wound up: s 99(4) of the BA.

Whether the Payments were made within the claw-back period

13 There was no dispute that the Payments were made within six months before the Company was wound up. Whether or not the defendant was an associate was therefore irrelevant for this purpose.

Whether the Company was insolvent when the Payments were made

14 Section 100(4) of the BA provides as follows:

> **Section 100.**
>
> …
>
> (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
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> (b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities.

15 These two tests are also known respectively as the "cash flow (or liquidity) test" and the "balance sheet test". It is established law that both tests are to be read disjunctively: *Jurong Technologies Industrial Corp Ltd (under judicial management) v Coöperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International, Singapore Branch)* [2011] 2 SLR 413 (HC) at [57]; *Tam Chee Chong and another v DBS Bank Ltd* [2011] 2 SLR 310 at [57].

16 The defendant submitted that there is no single test for insolvency and regard must be had to all evidence that appears relevant to the question of insolvency: *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo and others* [2004] 1 SLR(R) 434 ("*Chip Thye*") at [20]; *Kon Yin Tong and another v Leow Boon Cher and others* [2011] SGHC 228 ("*Kon Yin Tong*") at [30].

17 I disagreed with the defendant's submission. As pointed out in *Living the Link Pte Ltd (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others* [2016] 3 SLR 621 ("*Living the Link*") at [30], the *dicta* in *Chip Thye* arose in a different context and was "based on authorities dealing

with the court's discretion to wind up a company under s 254(1)*(e)* read with sub-s (2)*(c)* of the Companies Act". *Chip Thye* did not deal with the specific application of s 100(4) of the BA. Neither did *Kon Yin Tong*.

18 The issue of solvency may arise in different contexts. In the context of a winding up by the court, s 254(2)*(e)* of the CA provides a general definition of insolvency. However, in the context of avoidance of transactions giving unfair preferences, it is s 100(4) of the BA that applies. The language in s 100(4) is clear. It introduces two specific tests of insolvency and upon either of the tests being satisfied, the company is deemed insolvent: *Velstra Pte Ltd (in compulsory winding up) v Azero Investments SA* [2004] SGHC 251 at [89]; *Living the Link* at [26].

19 The question in the present case then was whether the Company was cash flow insolvent or balance sheet insolvent at the time the Payments were made.

20 The liquidators submitted that the Company was both cash flow insolvent and balance sheet at the material time.

21 The liquidators submitted that the Company was cash flow insolvent based on the following facts:

(a) The Company's financial statements for FY2013 showed that as at 31 December 2013, the Company had:

(i) incurred a net loss of $21,404,557;[18]

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[18] Mark Sims Chadwick's second affidavit, p 27.

(ii) a negative net cash flow of $1,678,679 from its operations;[19] and

(iii) a negative position of $2,426,192 in respect of cash and cash equivalents.[20]

(b) If the Company had paid all of its creditors as and when the debts fell due, it would have faced a cash shortage of $3.3m.[21] In addition, the Company would have exceeded its overdraft facilities as at 31 December 2013 and for each month of the next financial year ended 31 December 2014 ("FY2014").[22]

(c) Cash flow from the Company's operations was insufficient to fund the Company's operations and pay trade creditors. In particular, of the Company's four main projects (which accounted for 88% of the Company's total revenue in FY2013), only one ("the Eon Shenton Project") was operating within budget and at a positive gross margin.[23] However, the Company received a termination warning letter for the Eon Shenton Project on 5 February 2014 and the Company's contract was terminated on 17 March 2014.[24]

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19 Mark Sims Chadwick's second affidavit, p 30.

20 Mark Sims Chadwick's second affidavit, p 30.

21 Mark Sims Chadwick's first affidavit, p 63.

22 Mark Sims Chadwick's first affidavit, p 64.

23 Mark Sims Chadwick's first affidavit, para 25(h).

24 Mark Sims Chadwick's first affidavit, paras 43 and 45.

(d) Based on the proofs of debt filed in the liquidation to date, as at 31 December 2013, the Company had at least $6.3m of payables outstanding dating as far back as November 2010.[25]

(e) The Company was unable to pay Guan Chuan's progress claim of $238,450.69 when it was issued on 14 January 2014. Guan Chuan issued a statutory letter of demand on 21 March 2014; the Company did not pay. The Company's failure to make payment led to the winding up application on 16 April 2016 and the eventual liquidation of the Company.

(f) In his affidavit filed in support of the Company's application for judicial management, Liew admitted that the Company was unable to pay its debts as and when they fell due.[26] Although this referred to the Company's position as at 21 May 2014 (the date of Liew's affidavit), there was nothing to suggest that the Company's position was any better in February 2014.

(g) The sale of the Company to RBB for $1 also pointed towards the lack of value in the Company.[27]

22 As for balance sheet insolvency, the liquidators relied on the following facts:

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25 Mark Sims Chadwick's first affidavit, para 25(j).

26 Mark Sims Chadwick's second affidavit, exhibit "MSC-29", paras 9 and 34.

27 Mark Sims Chadwick's second affidavit, para 34.

(a) The Company's financial statements for FY2013 showed that the Company had a negative net asset position of about $7.7m as at 31 December 2013.[28]

(b) The Company's unaudited balance sheet showed that it had a negative net asset position of more than $16.8m as at 30 April 2014, *ie*, more than double what it was as at 31 December 2013.[29]

23 At the hearing before me, the defendant did not challenge the above facts relied on by the plaintiff. However, the defendant submitted that the Company was nevertheless solvent at the material time because CCMG and another related company, Singapore Construction Pte Ltd ("SCPL"), were providing financial support to the Company during the relevant period and stopped doing so only on 21 May 2014 when the Company was sold to RBB. In support of this assertion, the defendant relied on the following:

(a) As of 31 December 2013, CCMG owed the Company $6.8m. By 30 April 2014, the position was reversed and CCMG became a creditor of the Company to the tune of $1.36m. According to the defendant, CCMG had therefore extended financial support of $8.16m to the Company between 31 December 2013 and 20 April 2014.[30]

(b) Debit notes indicating that CCMG and SCPL continued making transfers to the Company until May 2014;[31]

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28 Mark Sims Chadwick's second affidavit, p 28.

29 Mark Sims Chadwick's second affidavit, p 169.

30 Defendant's affidavit, para 48.

31 Defendant's affidavit, pp 152, 157 and 158.

(c) A statement in the CCMG's unaudited financial statements for FY2013 indicating that the borrowings of the Company were secured by, *inter alia*, corporate guarantees of CCMG;[32]

(d) A letter of continuing financial support from CCMG dated 7 February 2014 to Ernst & Young LLP ("Ernst & Young"), the auditors of the Company for FY2013, representing that CCMG "intends and has the capability to provide adequate funds to [the Company] to enable it to continue operations through one year period from the date of this letter".[33]

(e) Announcements by CCMG on the Singapore Exchange ("SGX") in April 2014 stating that CCMG had reallocated funds to, *inter alia*, fulfil its obligations under an indemnity it had given for one of the Company's projects[34] and that it intended to use the proceeds from a future funding exercise to support "the Singapore construction business" (*ie*, the Company).[35]

24 I disagreed with the defendant's submission that the Company was solvent because of the financial support from CCMG and SCPL at the material time. Financial support is irrelevant unless there was an obligation to provide this support: *Living the Link* (at [30]). Financial support which may or may not be given by the provider, at its sole discretion, is meaningless in this context. I would add that it seems to me that the effect of financial support on the

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32 Mark Sims Chadwick's first affidavit, p 82.

33 Mark Sims Chadwick's second affidavit, exhibit "MSC-25".

34 Defendant's affidavit, pp 162–164.

35 Defendant's affidavit, pp 148–150.

company's solvency status would also depend on whether the support was given by way of an equity injection or a loan. However, this point was not argued before me and I would leave its determination for some future case.

25 In the present case, there was no evidence that CCMG and SCPL were legally bound to provide financial support to the Company. Any financial support that CCMG and SCPL had provided in the past was provided at their sole discretion.

26 The defendant argued that the guarantees given by CCMG showed that CCMG itself recognised a binding obligation to extend financial support to the Company.[36] I disagreed. The argument involved an untenable leap in logic. Giving a guarantee to third parties was one way that CCMG provided financial support to the Company. However the fact that CCMG guaranteed specific indebtedness owed by the Company to third parties could not mean that there was therefore a binding obligation on the part of CCMG to provide financial support to the Company.

27 The defendant next argued that the letter dated 7 February 2014 from CCMG to Ernst & Young (see [23(d)] above) showed CCMG's commitment to extend financial support to the Company. I disagreed. The letter was given to the Company's auditors to deal with the question of the Company's ability to continue as a going concern. Although the auditors were prepared to regard the letter as an "undertaking to provide continuing financial support",[37] it did not create any binding obligation on the part of CCMG.

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36 Defendant's Written Submissions, paras 22.4 and 23.2.

37 Mark Sims Chadwick's second affidavit, p 31, note 2.

28 CCMG – now known as Singapore eDevelopment Limited ("SEL") after a change in management[38] – has also confirmed *via* a letter to the liquidators dated 28 June 2016 that it had not given any undertaking to meet all of the Company's liabilities which accrued and fell due from 1 January 2013 to 21 May 2014.[39] SEL has also stated that:

> SEL's position is that all moneys extended by SEL to the Company were on the basis that (a) SEL was itself directly liable under certain corporate guarantees for obligations of [the Company], primarily performance bonds and bank guarantees; and (b) where possible, purely to forestall further calls on performance bonds, and therefore incur even greater liabilities, SEL had advanced moneys (including through SCPL) to continue projects and pay staff.

29 The letter from SEL unequivocally stated that "[t]here was never any intention to provide financial support to [the Company] to ensure that it could be sustained on a going concern basis".

30 In my judgment, that there was clearly no legally binding obligation on the part of CCMG and/or SCPL to provide financial support to the Company.

31 I concluded that on the evidence, the Company was clearly insolvent in February 2014 when the Payments were made on both the cash flow and balance sheet tests.

Whether the Payments gave a preference to the defendant

32 There was no dispute that, leaving aside the defendant's *Quistclose* trust defence (see [47]–[50] below), the Payments did improve the defendant's

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38 Defendant's affidavit, para 29.

39 Mark Sims Chadwick's third affidavit, exhibit "MSC-32".

position in the Company's liquidation relative to its other unsecured creditors and therefore gave her a preference.

Whether the Payments were influenced by a desire to prefer

33 Generally, the test is whether the debtor's decision to give the preference was influenced by a desire (a subjective state of mind) to prefer the creditor; it is sufficient that this desire is one of the factors which influenced the decision: *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International, Singapore Branch)* v *Jurong Technologies Industrial Corp Ltd (under judicial management)* [2011] 4 SLR 977 (CA) ("*Rabobank International (CA)*") at [24].

34 However, under s 99(5) of the BA, the Company would be presumed, unless the contrary is shown, to have been influenced by the desire to give the defendant an unfair preference if the defendant was an associate of the Company at the time the preference was given.

35 It was not disputed that in this case, for purposes of s 99(5) of the BA, an "associate" of the Company includes the spouse or a relative of a director of the Company: regs 2 and 4 of the Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Rev Ed) ("the Regulations") read with s 101(2) of the BA. It was also not disputed that the defendant was an associate of the Company either because she was Liew's spouse or because she was Lawrence's sister, both Liew and Lawrence being directors of the Company at the time the Payments were made. Therefore, the statutory presumption under s 99(5) of the BA applied in this case. The burden was on the defendant to rebut the presumption. To rebut the presumption, the defendant had to show that the Payments were not *influenced at all* by any

desire on the Company's part to place her in a preferential position: *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 at [36].

36 The defendant first submitted that the Company's directors honestly believed in February 2014 that the Company could continue as a going concern. It was not necessary to establish that the directors of the Company knew or believed that it was insolvent in order to prove unfair preference (*Rabobank International (CA)* at [30] and [31]). However, the defendant submitted that the fact that it was never on the directors' minds that the Company was insolvent was a strong indication that there was no desire to prefer her as a creditor.

37 The defendant referred to Lee Eng Beng, "The Avoidance Provisions of the Bankruptcy Act 1995 and Their Application to Companies" [1995] Sing JLS 597 where the learned author made the following observation (at p 616):

> Admittedly, it is improbably that one would have a desire to prefer if he is ignorant of his own impoverished condition. On the other hand, it is very possible that a person will have a desire to prefer even if he is not absolutely sure that he is insolvent; it is totally plausible that he may entertain such a desire where he suspects or has reason to believe that his own insolvency is a real possibility.

38 The defendant relied on the following as evidence of the directors' belief in the Company's solvency.

(a) Liew's statement during an interview which was published on 27 January 2014 that "CCM has no problems continuing as a going-concern".[40]

(b) Confirmation by the directors of CCMG to CCMG's auditors that they believed CCMG and the Group (*ie*, CCMG's subsidiaries including the Company) will be able to continue as going concerns, as reflected in CCMG's auditors' report for FY2013 (dated 3 April 2014) and CCMG's press release dated 8 April 2014.[41]

(c) Liew's loan of $3m given to the Company in January 2014 ("the $3m Loan").[42] According to the defendant, Liew would not have given this loan if he believed that the Company was insolvent or would be wound up in the near future.

39 I disagreed with the defendant's claim that the directors believed the Company was solvent. First, Liew's statement published on 27 January 2014 was in relation to CCMG and not the Company. In addition, the statement was made in response to rumours of CCMG going down. In my view, the statement could not be given much weight in the circumstances. Second, the $3m Loan was not given to the Company. Instead, it was given to CCMG.[43] The fact that the funds were deposited into the Company's account could only mean that it was a loan by CCMG to the Company. Indeed, the fact that the loan was made to CCMG rather than the Company (although it appeared that it was intended to fund the Company) was more consistent with Liew's *lack of belief* in the Company's solvency.

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40 Defendant's affidavit, p 151.

41 Defendant's affidavit, p 147.

42 Defendant's affidavit, para 32.

43 Mark Sims Chadwick's second affidavit, p 18.

40 In my view, it was implausible that the directors were unaware of the Company's perilous financial position when the Payments were made in February 2014. The Company was clearly balance sheet as well as cash flow insolvent and there was no binding obligation on CCMG to provide financial support to the Company to ensure that all of the Company's debts would be paid. Even Guan Chuan's progress claim of $238,450.69 issued in January 2014 went unpaid.

41 The defendant next submitted that there was no intention to prefer because there was a genuine commercial reason for the Payments. The defendant claimed that the sole purpose for making the Payments was to consolidate the amounts owing to her under Liew's name since she had resigned from the Company.[44] The defendant further claimed that of the $3m Loan, $1m was set aside to settle the amounts owing to her.

42 I rejected the defendant's claims. The evidence did not support her case. First, there was no evidence that the debts owing to the defendant were "consolidated" under Liew's name. The Payments were recorded as repayments of amounts "owing to director" in the Company's ledgers.[45] No corresponding debt owed to Liew was recorded. In addition, Liew did not file any proof of debt in relation to the sum of $766,799.45.

43 Second, the bank statements of the Company's UOB account ("the UOB Account") flatly contradicted the defendant's contention that $1m from the $3m Loan had been specifically set aside for the sole purpose of settling the outstanding amounts owed to defendant. The bank statements ("the UOB

44 Defendant's affidavit, para 32.

45 Mark Sims Chadwick's first affidavit, exhibit "MSC-8".

Statements") were tendered by the liquidators' counsel belatedly at the hearing of this application. However, the defendant's counsel did not object to the admission of these bank statements or dispute their authenticity.

44 The UOB Statements corroborated the defendant's evidence that the $3m Loan was deposited into the Company's UOB Account in two tranches.[46] The first tranche of $2m was deposited on 24 January 2014 when the UOB Account was already overdrawn by more than $1.3m.[47] Multiple withdrawals were made on the very same day, leaving a balance of $624,792.63.[48] The second tranche of $1m was deposited on 27 January 2014. Again, numerous withdrawals were made by the Company soon after. As a result, the UOB Account was back to being overdrawn by the end of the next day, 28 January 2014. [49] It was patently clear that no part of the $3m Loan was segregated for the specific purpose of repaying the defendant. In fact, the full amount of $3m had been withdrawn from the UOB Account well before the three cheques were issued to the defendant on 14 February 2014.

45 Third, I found the defendant's explanation for the Payments (*ie*, to consolidate the debts under Liew's name) hard to believe given the circumstances of the case. There was no compelling reason to consolidate the debts owed to her under Liew's name just because she had resigned.

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46 Defendant's affidavit, para 33.

47 January bank 2014 statements for UOB account no 934-342-340-0 ("January 2014 bank statements for the UOB account"), p 6.

48 January 2014 bank statements for the UOB account, p 7.

49 January 2014 bank statements for the UOB account, p 10.

46 For completeness, I would add that the defendant also asserted that the Company had issued two earlier cheques in June or July 2013 to her for the total amount of $500,000. Her evidence was that she had overlooked these earlier cheques before they expired and the two cheques issued to her in February 2014 for the total amount of $500,000 (see [8] above) were replacements for the cheques originally issued in 2013.[50] In my view, this point was neither here nor there. Even if it was true, this explanation did not constitute a commercial justification for the Company to prefer the defendant ahead of its other unsecured creditors by making the Payments in February 2014. The defendant was not even pressing the Company for payment.

Whether the funds used to make the Payments were held under a *Quistclose* trust?

47 Finally, the defendant submitted that as Liew had informed the Company that of the $3m Loan, $1m was to be set aside to be used to pay the defendant, the $1m was subject to an express *Quistclose* trust. Accordingly, the Payments were not made using the general assets of the Company and could not be recovered by the liquidators.

48 A *Quistclose* trust may take the form of either an express or resulting trust. In either case, the certainties of subject matter and objects must be present (*Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [113] ("*AHPETC*")). For an express *Quistclose* trust, such as that alleged by the defendant,[51] it must also be sufficiently certain that the settlor-donor intended to constitute the recipient as a trustee, and conferred

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50 Defendant's affidavit, paras 28 and 34.

51 Defendant's written submissions dated 8 July 2016, para 76.

a power or duty on the recipient-trustee to apply the money exclusively in accordance with the stated purpose (*AHPETC* at [114(c)]).

49 In my judgment, this defence was an afterthought and a non-starter. First, the evidence as to how the $3m Loan was dealt with proved that no trust could have been created (see [44] above). There was no certainty of subject matter as the $1m was mixed with the Company's other funds in the UOB Account, without any segregation. Further, the whole of the $3m Loan was fully withdrawn by the end of 28 January 2014 when the UOB Account went into overdraft. Hence, there was no connection between the $3m Loan and the actual monies disbursed to the defendant after the three cheques issued to her were cleared for payment on 20 March 2014.

50 Second, CCMG's public announcement issued on 22 January 2014 contradicted Liew's alleged intention to subject $1m to a trust. In that announcement, CCMG clearly stated that the $3m Loan was an interest-free loan to CCMG and that the loan "will be used for general working capital of the Company's construction business".[52]

Conclusion

51 For the above reasons, I concluded that:

(a) the Company was insolvent when the Payments were made;

(b) the Payments improved the defendant's position in the event of the Company's liquidation; and

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52 Mark Sims Chadwick's second affidavit, exhibit "MSC-23".

(c) the defendant failed to rebut the presumption that in making the Payments, the Company was influenced by the desire to improve the defendant's position in the event of the Company's liquidation.

52 As the Payments were made well within the relevant claw-back period under s 100(1) of the BA, they constituted undue preferences and were recoverable by the liquidators. I therefore ordered the defendant to repay the sum of $766,799.45 to the Company, with costs fixed at $15,000 plus disbursements.

Chua Lee Ming
Judicial Commissioner

Justin Yip Yung Keong and Aw Chee Yao (Morgan Lewis Stamford LLC) for the plaintiff;
Cheong Jun Ming Mervyn and Jerrie Tan (Eugene Thuraisingam LLP) for the defendant.