IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 50

Originating Summons
No 1118 of 2014

In the matter of
Encus International Pte Ltd
(In compulsory liquidation)

and

In the matter of
Section 329(1) of the Companies Act (Cap 50)
read with Sections 98 and 99 of the
Bankruptcy Act (Cap 20) and the
Companies (Application of Bankruptcy Act Provisions) Regulations
(Cap 50, Reg 3, 1995 Ed)

Between

ENCUS INTERNATIONAL
PTE LTD
(in compulsory liquidation)

… *Plaintiff*

And

(1) TENACIOUS INVESTMENT
PTE LTD
(2) KOH BOON HWEE
(3) LIM KIM BOCK
(4) SIM BENG CHYE
(5) PI HOLDINGS LTD
(6) GCL HOLDINGS (BVI) LTD

… *Defendants*

JUDGMENT

[Contract] – [Contractual terms] – [Entire agreement clauses]

[Contract] – [Contractual terms] – [Implied terms]

[Insolvency law] – [Avoidance of transactions] – [Transactions at an undervalue]

[Insolvency law] – [Avoidance of transactions] – [Unfair preferences]

[Insolvency law] – [Avoidance of transactions] – [Transactions contrary to anti-deprivation principle]

[Credit and security] – [Equitable mortgage]

Encus International Pte Ltd (in compulsory liquidation) v Tenacious Investment Pte Ltd and others

[2016] SGHC 50

High Court — Originating Summons No 1118 of 2014
Judith Prakash, J
12, 13 October 2015; 18 January 2016

31 March 2016 Judgment reserved.

Judith Prakash J:

Introduction

1 The plaintiff, Encus International Pte Ltd ("the Company"), is a company in liquidation. By this application, it seeks to recover a valuable asset, namely, shares in another company. The Company seeks a declaration that the transfer of these shares to the first defendant has to be annulled as an unfair preference or as a transaction at an undervalue or because it was carried out in breach of the anti-deprivation principle.

2 In May 2013, the Company transferred 1,772,728 ordinary shares in a company called DKE Precision Pte Ltd ("DKE") to the first defendant, Tenacious Investment Pte Ltd, as nominee for the second to sixth defendants. I shall henceforth refer to the shares as the "DKE Shares" and to the second to sixth defendants and one Mr Tan Piak Khiang ("Mr Tan") as the "Investors". The transfer was purportedly effected pursuant to a Conditional Share Transfer Agreement ("CSTA") dated 26 January 2012 and made between the Company and the Investors.

3 On 5 June 2013, the Company was placed under judicial management and on 25 October 2013 a winding-up application was filed. The Company was placed in liquidation on 14 November 2013. Mr Wong Joo Wan ("the Liquidator") was appointed liquidator of the Company.

Background

4 The Company and its subsidiaries carried on the businesses of sheet metal fabrication, sub-assembly, product design and engineering. At some point, the Company entered into a 50:50 joint venture with another party which resulted in the formation of DKE. The value of the Company's 50% shareholding in DKE lay in a profitable subsidiary in China.

5 At all material times, Mr Tan was the executive director of the Company. Sometime in January 2011, Mr Tan approached the third and fourth defendants seeking an injection of funds as the Company was experiencing financial difficulties. The third and fourth defendants later brought the second, fifth and sixth defendants into the negotiations with Mr Tan in relation to a possible investment in the Company. In the transactions that ensued, Mr Tan

was part of the investing group and a party to the CSTA. He, however, is not challenging the Liquidator's efforts to recover the DKE shares and, therefore, is not one of the defendants herein.

6 On or about 12 April 2011, the parties agreed to terms stated in an Investment Term Sheet ("the Term Sheet") which the third defendant circulated by e-mail. The Company and the Investors were, at this time, represented by the same solicitors, M/s Drew & Napier LLC ("D&N"). The Term Sheet stated, *inter alia*, that the Investors would invest $8.8m ("the Investment") in the Company and would receive some form of security which would be surrendered ("the Share Transfer") if the Company failed to meet certain profitability targets in 2013 ("the Performance Standard").

7 Subsequently, on 28 April 2011, the Investors and the Company entered into a convertible loan agreement ("the CLA") under which the $8.8m would be disbursed as a loan that would be convertible into shares in the Company at a fixed rate of $0.25 per share ("the Encus Shares"). It was contemplated that the CLA would be accompanied by a charge over the DKE Shares ("the Share Charge"). The CLA provided that conversion of the loan into the Encus Shares would be mandatory upon completion of a whitewash procedure aimed at ensuring that the giving of security would comply with s 76 of the Companies Act (Cap 50, 2006 Rev Ed). The CLA contained an entire agreement clause.

8 At the time the CLA was signed, some of the Investors, including Mr Tan, had already lent the Company $2,216,680.98. Between 29 April 2011 and 16 May 2011, the Investors lent the Company further sums totalling

$6.1m. On 5 September 2011, the Investors lent the Company $483,319.02 (thus bringing the total loan amount up to $8.8m).

9 After the CLA was signed, the parties had further negotiations for the purpose of completing and executing the Share Charge. Although a number of whitewash procedures were successfully carried out in order to allow execution of the Share Charge, in the end it was not concluded, as the Investors no longer wanted it.

10 Instead, the Investors – now represented by RHTLaw Taylor Wessing LLP – insisted that the security be given in the form of the CSTA, which included new conditions under which the Investors would be allowed to insist on the Share Transfer ("Transfer Events"). The third defendant explained in his affidavit filed in the proceedings that the scope of the Transfer Events in the CSTA had to be expanded beyond the non-achievement of the Performance Target to include the possibility of insolvency situations of the Company and Encus Shanghai. This was because in December 2011 the Investors had noted that the Company's financial performance was still poor despite the Investment and that insolvency was therefore a distinct possibility.

11 The Term Sheet provided for a single Transfer Event which was the failure to meet the Performance Standard. In contrast, there were seven possible Transfer Events in the CSTA. Five of these new events related to insolvency. The CSTA thus effected a significant broadening of the rights of the Investors, departing materially from the original terms of the Investment.

12 The CSTA was executed as a deed on 26 January 2012, immediately after the loan was converted into Encus Shares.

13 On 3 February 2013, relying on the Company's insolvency, the Investors invoked their right to have the Share Transfer performed. The Share Transfer was effected on 3 May 2013 and the first defendant became the registered owner of 1,772,728 DKE Shares. As stated, the Company now seeks to unwind this transfer and recover the DKE Shares for the benefit of its creditors.

Plaintiff's case

14 The plaintiff's case is that the Term Sheet was superseded by the CLA, the Share Transfer was performed pursuant to the CSTA alone, and that the Company received no consideration under the CSTA. The plaintiff further argues that the Company's entering into the CSTA was motivated by a desire to place the Investors, as creditors, in a better position in the event of the Company's going into liquidation. Consequently, the plaintiff argues that the Share Transfer should be unwound:

> (i) as an undervalue transaction under s 98 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) read with s 329(1) of the Companies Act; or
>
> (ii) as an unfair preference under s 99 of the Bankruptcy Act read with s 329(1) of the Companies Act; or
>
> (iii) as a contravention of the common law anti-deprivation rule.

Defendants' case

15 Although the defendants' case includes a number of alternatives, their primary case rests on an assertion that all the dealings between the parties were governed by a master agreement which subsumed and supplemented the

CLA and CSTA. At an earlier stage in the proceedings, the defendants' position was that the alleged master agreement was partly oral and partly written, but their final position was that the master agreement is fully embodied in the Term Sheet. Thus, since the provisions of the Term Sheet and of the (purported) master agreement are one and the same, there is no need to refer to any separate master agreement.

16 The defendants' main argument regarding s 98 of the Bankruptcy Act is that the Term Sheet relates the Investment to the Company's entry into the CSTA and that the Investment was adequate consideration for the CSTA. Regarding s 99 of the Bankruptcy Act, the defendants essentially contest every element of the section.

17 Regarding the anti-deprivation rule, the defendants argue that the alleged deprivation occurred before the commencement of winding-up, and is therefore not caught by the rule.

The issues

18 The three main issues to be decided are:

(a) Whether the CSTA was a transaction at an undervalue;

(b) Whether the Share Transfer was an unfair preference; and/or

(c) Whether the Share Transfer and/or the CSTA breached the anti-deprivation rule.

19 There is also a preliminary issue of whether the Term Sheet was superseded by the CLA.

Did the Term Sheet continue in force after the CLA?

20 Since many of the issues in dispute relate to the effect of the Term Sheet, it is worth addressing at the outset whether, on the basis that the Term Sheet was in itself a valid contract, it retained this status until the CSTA was signed. The plaintiff argues that the entire Term Sheet was "superseded" by the CLA, while the defendants contend that the Term Sheet continued in force and "[t]he CLA and the CSTA merely set out the mechanics for putting the Term Sheet into effect". The plaintiff's argument is based on the effect of the entire agreement clause contained in the CLA.

21 Clause 12 of the CLA provides that:

> This Agreement constitutes the whole agreement between the Parties and *supersedes any previous agreements or arrangements between them relating to the subject matter of this Agreement* and it is expressly declared that no variations of this Agreement shall be effective unless made in writing and executed by the Parties. [emphasis added]

22 The leading case on the effect of entire agreement clauses on prior agreements is *Lee Chee Wei v Tan Hor Peow Victor and another appeal* [2007] 3 SLR(R) 537. In that case, the Court of Appeal held, at [35], that "an appropriately worded provision would be acknowledged and upheld *if it clearly purports to deprive any pre-contractual or collateral agreement of legal effect* [emphasis added]".

23 *Cherie Hearts Group International Pte Ltd v G8 Education Ltd* [2012] SGHC 70 is another case which considered the effect of an entire agreement clause. The plaintiff in that case, a company which ran a chain of childcare centres, sought to rely on an alleged "Overarching Agreement" which

provided for the acquisition of childcare centres which were not part of the plaintiff's group as well as for certain bonus payments to be made to the plaintiff's founders. However, the parties subsequently entered into various agreements containing entire agreement clauses. Those later agreements made no mention of the acquisition of the said childcare centres or of the bonus payments. The plaintiff nonetheless argued that the "Overarching Agreement" continued in force in respect of the terms not found in the later agreements.

24 After considering the agreements in question, I stated, at [107], that:

> … the "entire agreement" clauses in the M&A Deed and the New Bonus Deed … state that any previous understanding or agreement relating to the subject matter of the M&A Deed/New Bonus Deed has been replaced by the M&A Deed/New Bonus Deed and has no further effect. *If an overarching agreement did exist which contained a term relating to the acquisition of other childcare centres or to the payment of bonus, then that agreement would have ceased to have any effect when, respectively, the M&A Deed and the New Bonus Deed were concluded.* [emphasis added]

25 The parallels with the present case are obvious. The wording of cl 12 clearly purports to deprive any previous agreement of legal effect. Thus, the Term Sheet would have survived the CLA only if it did not concern the same subject matter as the CLA.

26 The subject matter of the CLA was the extension and conversion of the loan. It provided for a loan of $8.8m which would be converted into Encus Shares at $0.25 per share. This equates to conversion into a total of 35,200,000 shares. Notably, the CLA did not give the Investors a right to refuse the conversion once the Whitewash Exercise was completed and notice of the conversion served. Thus, although it was a loan in form, the substance of the CLA was an investment.

27 The Term Sheet's subject matter is stated in the Investment Term, which reads:

> The investors will invest S$8.8 million (some of which has already been extended as loans) for 35,200,000 ordinary shares of Encus at an issue price of 25 cents per share.

This clearly relates to the same subject matter as the CLA, down to the quantum of the loan or investment and the number and price of the Encus Shares. Further, the terms which followed all had to do with matters surrounding the Investment. It should be noted that of those terms, the terms headed "Conditions of Closing" and "Payment" were in substance replicated in the CLA as cll 4.1 and 5.1 respectively.

28 Given these clear similarities, it cannot plausibly be denied that the Term Sheet was an agreement which "relat[ed] to the same subject matter" as the CLA. Thus, in my judgment, upon the execution of the CLA, the Term Sheet was superseded and deprived of all legal effect.

29 The defendants also argue that cl 12 of the CLA notwithstanding, an important term of the Term Sheet survived. This term, bearing the rubric "Security for Investment" reads:

> The shares of DKE owned by Encus will serve as security for the investment and will be surrendered to the investors if the consolidated net profit before tax of Encus Singapore and Encus Shanghai (excluding DKE) is negative in 2013.

Calling this term the "Security Term", the defendants argue that it was preserved by the "Whitewash Procedure" in cl 7.1 of the CLA. I am not able to accept this argument for three reasons.

30 First, the argument effectively asserts that the Security Term is severable from the Term Sheet such that it can survive even when the Term Sheet as a whole has been deprived of all legal effect. This cannot be right given that the Security Term is parasitic on the Investment Term, which was certainly superseded by the CLA.

31 Secondly, if the parties truly intended to keep any part of the Term Sheet alive, it is difficult to see why they would have included cl 12, which expressly invalidates prior agreements. The defendants' counsel, Mr Eugene Quah, was not able to explain this inconsistency. He could only state that "that's something to take up with [the defendants'] lawyers".

32 Thirdly, the link between the term "Whitewash Procedure" and the Security Term is tenuous. The Security Term does not mention the Whitewash Procedure. The CLA likewise does not connect the Whitewash Procedure with the Security Term; Schedule 1 of the CLA defines it simply as "the whitewash procedure pursuant to s 76(1) of the Companies Act to be carried out by the Borrower". There is nothing to show that the term "Whitewash Procedure" referred specifically to actions relating to the Security Term.

33 The plaintiff's case is that "Whitewash Procedure" referred instead to actions which were to be taken in preparation for the Share Charge, which the parties were purportedly obliged to enter into pursuant to a collateral agreement. Given the specific references to the Share Charge and its terms in e-mails pre-dating the CLA (indeed, pre-dating the Term Sheet), as well as the Directors' Resolution passed on the same day as the CLA, this appears to be the more likely explanation.

34 Finally, a brief mention should be made of a curious alternative argument which the defendants made in their written submissions:

> In the alternative, if the Court finds that the CLA made no reference to the Security Term, the Defendants submit that *the effect of [the] Entire Agreement Clause was to confine the CLA to the subject-matter of the Loan and its conversion.* The CLA did not supersede the Master Agreement. The Master Agreement remained alive … [emphasis added]

This seems unsatisfactory as a matter of logic. The *raison d'être* of an entire agreement clause is to keep extraneous terms and agreements *out* of the contract containing the clause, not to "confine" the effects of that contract *within* that contract. Since the defendants have not provided any authority for their novel argument – which is really a bare assertion – that argument can only be rejected.

Should the CSTA be unwound as a transaction at an undervalue?

Did the CSTA create an equitable mortgage or other security and, if so, can it qualify in principle as a transaction at an undervalue?

35 Before addressing the requirements of a transaction at an undervalue, it is convenient to deal with the defendants' argument that the CSTA created an equitable mortgage and thus falls outside the scope of s 98 of the Bankruptcy Act. The plaintiff in response argues only that the grant of security is no less capable of being an undervalued transaction than are other kinds of transactions.

36 The question of law which the parties have raised is not settled. The defendants cite the holding of Millet J (as he then was) in *Re MC Bacon Ltd* [1990] BCC 78 ("*MC Bacon*"), at 92, that:

> The mere creation of a security over a company's assets does not deplete them and does not come within the paragraph [relating to undervalued transactions]. By charging its assets the company appropriates them to meet the liabilities due to the secured creditor and adversely affects the rights of other creditors in the event of insolvency. But it does not deplete its assets or diminish their value.

On this reasoning, securitising an existing debt or other obligation can never be a transaction at an undervalue.

37 The plaintiff points out that the English Court of Appeal in *Hill v Spread Trustee Co Ltd and another* [2007] WLR 2404 ("*Hill*") re-characterised, if not implicitly overruled, *MC Bacon*. According to Arden LJ (with whom Sir Martin Nourse and Waller LJ agreed, except on one unrelated issue), at [93]:

> … It does not follow from this [Millet J's holding] that a transaction involving the grant of security can never amount to a transaction for no consideration. *In my judgment, it is no different from any other transaction in that respect.* … [emphasis added]

Her Ladyship went on to opine that Millet J had relied on the fact that fresh consideration had been given in *MC Bacon*. She then found that the giving of the security in *Hill*, for which there was no fresh consideration, did amount to an undervalued transaction.

38 What the plaintiff did not point out, but which the defendants did, was that a differently constituted English Court of Appeal in *Feakins v Department for Environment Food and Rural Affairs* [2007] BCC 54 ("*Feakins*") subsequently chose (at [72]) to apply *MC Bacon*, making no mention of Arden LJ's *dictum* in *Hill*. Further, *MC Bacon* continues to be cited as the leading case in L Sealy and S Worthington, *Cases and Materials in Company Law*

(Oxford UP, 10th Ed, 2013) at 766–768, and was strongly endorsed by Prof Roy Goode in *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) ("*Corporate Insolvency Law*") at para 13-38.

39 Speaking for myself, I prefer the approach in *Hill*. While no doubt rare, it is possible that a situation will arise in which security is given without fresh consideration. The present case does not, however, require me to decide which position is correct, or preferable, under Singapore law. This is because, on the facts, the CSTA could not have created an equitable mortgage or other security.

40 The defendants cite a number of authorities, including the Court of Appeal case of *Pacrim Investments Pte Ltd v Tan Mui Keow Claire* [2008] 2 SLR(R) 898 (at [15]), for the well-established proposition that an equitable mortgage can be created by the deposit of shares together with a blank transfer form. However, the crucial element that is missing here is that the fundamental purpose of a mortgage, like other securities, is to secure a debt or other obligation: EF Cousins and I Clarke, *Cousins on The Law of Mortgages* (Sweet & Maxwell, 3rd Ed, 2010) at para 1-05, citing *Santley v Wilde* [1899] 2 Ch 474.

41 The CSTA did not serve that function. First, it did not create a debt. Secondly, the Company was under no *obligation* – whether under the CSTA, the CLA, or the Term Sheet – to avoid insolvency or to be profitable. Insolvency and unprofitability were simply events which would trigger the Share Transfer. There having been no debt or other obligation for the CSTA to secure, it cannot have created an equitable mortgage or other security, even though the mechanism for creating an equitable mortgage was used. Instead,

the CSTA was no more than a contract for a conditional transfer of property, as its name suggests.

42 Consequently, the CSTA is susceptible in principle to avoidance under s 98 of the Bankruptcy Act.

What was the relevant transaction?

43 Under s 98 of the Bankruptcy Act, the question is not whether the Share Transfer *per se* was at an undervalue but whether the entire *transaction* – properly defined – was at an undervalue. The Share Transfer was done in accordance with the CSTA. It follows that the transaction to be scrutinised must be the CSTA and not the Share Transfer in isolation.

44 A further question is whether the CSTA forms part of a larger agreement, such that it is that larger agreement which should be scrutinised as the relevant transaction under s 98 of the Bankruptcy Act. The answer to this question is crucial because it determines whether the Investment, which was agreed in the Term Sheet and disbursed long before the execution of the CSTA, can stand as consideration for the CSTA.

45 The defendants argue that the CSTA and the Term Sheet formed a single transaction and that that single transaction is what must be scrutinised under s 98 of the Bankruptcy Act. I have held above that the Term Sheet was entirely superseded and deprived of all legal effect by the CLA. On that basis, the defendants' argument obviously fails: at the time the CSTA was entered into, there was no legally effective Term Sheet for the CSTA to form a single transaction with.

46 Even if I am wrong in so concluding, I am nonetheless satisfied that the terms of the Term Sheet and the CSTA are so radically different (as discussed at [10]–[11] above) as to be irreconcilable. Consequently, the CSTA and the Term Sheet could not form a single agreement even if the Term Sheet continued in force.

Can an implied term be found in the Term Sheet which would entitle the defendants to take the DKE Shares in the event of the Company's insolvency, thus allowing the Term Sheet and the CSTA to be reconciled?

47 The defendants argue, in addition, that the court should imply a term in fact into the Term Sheet which would allow the DKE Shares to be taken in the event of the Company's insolvency. If such a term could be implied, there might then be enough commonality between the CSTA and the Term Sheet for them to form a single transaction, assuming (contrary to my finding above) that the Term Sheet continued in force. In his oral submissions, Mr Quah went as far as to concede that the implication of this term was crucial to the defendants' case. The concession was rightly made.

48 In my view, the term sought by the defendants cannot be implied. In order for the court to imply a term in fact, there must first be an appropriate gap in the contract for the implied term to fill. As the Court of Appeal held in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another appeal* [2013] 4 SLR 193 ("*Sembcorp*") at [94]–[95], *per* Sundaresh Menon CJ:

> 94 … not all gaps in a contract are "true" gaps in the sense that they can be remedied by the implication of a term. There are at least three ways in which a gap could arise:
>
> > (a) *the parties did not contemplate the issue at all and so left a gap;*

> (b) the parties contemplated the issue but chose not to provide a term for it because they mistakenly thought that the express terms of the contract had adequately addressed it; and
>
> (c) the parties contemplated the issue but chose not to provide any term for it because they could not agree on a solution.
>
> 95 *In our view, scenario (a) is the only instance where it would be appropriate for the court to even consider if it will imply a term into the parties' contract …*
>
> [emphasis added]

49 The term sought to be implied by the defendants does not fall within scenario (a) in *Sembcorp*. On a plain reading of the Term Sheet, it cannot be said that the parties failed to contemplate what events should count as Transfer Events. They did contemplate that question, as evidenced by the express wording of the Security Term which set out the sole Transfer Event agreed on at the time.

50 Further evidence for this, although not strictly necessary, can be found in the email dated 14 April 2011 sent by D&N, the parties' lawyers at the time. The relevant portion of the e-mail stated:

> 10. … Pursuant to the Term Sheet, the DKE Shares will serve as security for the investment by way of a Share Charge in favour of the New Investors [*ie*, the Investors]. The New Investors may enforce the share charge and the DKE Shares will be transferred to the New Investors *in the event that the consolidated net profit before tax of the Company and Encus International Shanghai Co., Ltd (Encus Shanghai) (excluding DKE) is negative in 2013.I …* [emphasis added]

This e-mail was sent in the week before the Term Sheet was circulated and confirms that the parties had directed their minds toward what the Transfer Event(s) should include. The defendants have not adduced any evidence to suggest that the Investors disagreed with the understanding of the Security Term conveyed in D&N's e-mail before agreeing to the Term Sheet as circulated on 20 April 2011.

51 When all the evidence is considered, it is clear that not only does the present case fall outside the (a)-type scenario in *Sembcorp*, it is not even a (b)- or (c)-type situation. The parties did not neglect to provide a term addressing the issue or fail to reach agreement on the said term. Rather, they contemplated the question of what events should count as Transfer Events and reached an agreement contrary to what the defendants are now advocating. There can be absolutely no room for the implication of a term in fact in such circumstances. Consequently, it is not necessary to consider whether the term sought to be implied would satisfy the officious bystander and business efficacy tests. However, based on the evidence analysed above, it is apparent that the officious bystander test, at least, would not be satisfied: if anything, the parties' answer (or, at any rate, the Company's answer) to the officious bystander, when asked whether the term should apply, would have been "Surely not."

52 For the above reasons, the CSTA alone is the relevant transaction to be scrutinised under s 98 of the Bankruptcy Act.

Was the Company insolvent at the relevant time?

53 The relevant time for assessing the Company's solvency is the time the CSTA was entered into. Solvency is determined according to whether the corporate entity concerned fails at least one of two tests: the balance sheet test or the cash flow test. However, both may be relevant depending on the

circumstances of the case: *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo* [2004] 1 SLR(R) 434 at [20]. The defendants argue that at the time the CSTA was entered into, the Company was solvent under both these tests. It appears to me, on the evidence, that the Company was insolvent by either standard.

54 Regarding the balance sheet test, there is no disagreement between the parties that the crucial question is whether the $5,406,000 owed to the Company by its subsidiary, Encus Shanghai – and which the Company subsequently waived – should be subtracted from the Company's assets at the relevant time. If it should be subtracted, the Company was insolvent under the balance sheet test; otherwise, the Company was solvent under the balance sheet test.

55 The defendants are right to point out that hindsight should be used with caution, as noted in *Corporate Insolvency Law* at para 4-33. However, it is unnecessary to apply hindsight (specifically, knowledge of the subsequent waiver of the $5,406,000) in order to conclude that the debt should be disregarded when calculating the Company's assets at the relevant time. The plaintiff has highlighted several other strong factors, known to the parties at the relevant time, which support that conclusion. Most significantly, the debt owed by Encus Shanghai dated back to 2008, and had only increased between 2008 and 2011. Further, according to the defendants' own evidence – specifically, the third defendant's e-mail dated 12 December 2011 – Encus Shanghai was "on the verge of insolvency" and had incurred a year-to-date loss of approximately $654,000 as at September 2011. It was therefore obvious, even at the time the CSTA was entered into, that the prospect of

Encus Shanghai ever repaying its debt to the Company was a remote one. The sum owed by Encus Shanghai should be disregarded, and this leads to the conclusion that the Company was balance sheet insolvent.

56 Turning to the cash flow test, it is equally clear that the Company was unable to pay its debts out of the liquid resources available to it, which is the relevant test: *Re Great Eastern Hotel (Pte) Ltd* [1988] 2 SLR(R) 276 at [71]. Although the Company did have overdraft facilities, in January 2012 the available balance of the same was always insufficient to settle the Company's liabilities as they fell due. Further, as at 26 January 2012, when the CSTA was entered into, the Company had received demands from at least three suppliers and been served with one writ of summons by another supplier, in respect of debts which had already fallen due, some of which had been owing for many months. None of these debts had been paid and the total amount owed to these four suppliers was some $177,327.59. Further, even a debt as small as the $3,119 owed to One Legal LLC as at 10 January 2012 was not fully paid, there being only $2,000 available at the time. The contemporaneous correspondence of the Company's financial officers made the Company's parlous financial position quite plain.

57 These debts are well-documented and were not disputed by the defendants. Instead, the defendants argue, citing *Corporate Insolvency Law* at paras 4-16 and 4-20, that the appropriate test is whether the Company could have raised the necessary funds by borrowing or by disposing of its liquid assets. The defendants further argue that the Company could have paid off its debts had it been able to obtain the trade receivables owing to it and drawn from its remaining overdraft facility.

58 With respect, the defendants have misinterpreted Prof Goode's comments at para 4-16. There, Prof Goode quoted, with approval, a passage from the Federal Court of Australia in *Quick v Stoland Pty Ltd* (1998) 29 ACSR 130 at 138, which stated that the court would consider, *inter alia*:

> All of the assets of the company as at that time in order to determine the extent to which those assets were liquid or were realisable *within a timeframe that would allow each of the debts to be paid as and when it became payable.* [emphasis added]

Prof Goode then observed that "[t]he essential question is whether the company's financial position is such that it can continue in business and still pay its way".

59 Applying both the Federal Court of Australia's and Prof Goode's statements to the present case, it is clear that that even if the Company had been able to raise the required funds immediately, it would still not have been able to pay its debts *as and when they became payable*, because those debts had *already fallen due* and had been owing for some time. Further, the inability of the Company to fully discharge even low four-figure debts shows that the Company was practically unable to continue in business and pay its way.

60 Consequently, the Company was insolvent on both applicable tests at the time the CSTA was entered into, which was the relevant time.

Was the CSTA a transaction at an undervalue?

61 The only question here is whether the CSTA itself provided consideration for the Share Transfer.

62 Clause 2.2 of the CSTA stated that the Share Transfer would be done "free of payment and … in consideration of the Investors converting the Convertible Loan into shares of the Transferor". This would appear to be good consideration on the surface, although the value of that consideration would remain to be calculated.

63 However, as discussed above at [26], it is clear from cl 7.2 of the CLA that the Investors in fact had no right to object to the conversion of the loan once the Whitewash Procedure was completed and notice served. Consequently, the Investors were agreeing to do that which they were already obliged to do, and the consideration given by the Investors under the CSTA was wholly illusory. It is to the defendants' credit that they have never argued otherwise. Indeed, Mr Quah in the final round of oral submissions candidly stated that if the CSTA was a standalone transaction, the defendants' case would fail on the undervalue point. This must be right.

Can the Defendants rely on the good faith defence?

64 Under Reg 6 of the Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Reg 3, 1996 Rev Ed), the court will not make an order under s 98 of the Bankruptcy Act if the transaction at an undervalue was entered into in good faith for the purpose of allowing the Company to carry on its business and the Company entered into the transaction with reasonable grounds for believing that the transaction would benefit it.

65 As earlier discussed, it was obvious that the CSTA conferred no benefit at all on the Company. Because of this, the Company had no

reasonable grounds for believing that the CSTA would benefit it. The second requirement not being satisfied, the Defendants cannot rely on the defence.

Should the Share Transfer be unwound as an unfair preference?

66 It should be noted that under s 99 of the Bankruptcy Act, the focus is on the actual transfer of value as opposed to the agreement under which the Company undertook a legal burden. This was established by the English High Court in *Re Ledingham-Smith* [1993] BCLC 635 ("*Re Ledingham-Smith*"). Morritt J held, at 640g–h, that:

> … The relevant things done by the Ledingham-Smiths were the agreement of 21 January 1990 and the three payments of £4,000. *The agreement could not of itself produce a preference in fact though its performance might. Thus the relevant things done must be the actual payments on 30 January, 5 February and 12 February.* … [emphasis added]

The rule accords with logic and common sense: before a transfer is actually performed, it cannot be said that a promise to prefer puts a creditor in a better position in the event of winding up. Unless the agreement to transfer amounts to the creation of a security, the creditor remains in the same position of having to prove the debt in insolvency.

67 Consequently, the question here is whether the Share Transfer itself, and not the CSTA, was an unfair preference. This leads to an unusual interaction between the undervalued transaction and unfair preference provisions. Ordinarily, either s 98 or s 99 of the Bankruptcy Act will apply, but not both. As stated in *Corporate Insolvency Law* at para 13-107:

> … payment of a debt which does not exceed the amount due is not a transaction at an undervalue, as the net asset position is unchanged, whilst to the extent that the payment exceeds

> what is due to the creditor, he does not receive it *qua* creditor and his liability, if any, arises under [the undervalue transaction provisions], not [the unfair preference provisions].

68 Here, however, the entering into of the CSTA caused the Company to incur an obligation for no consideration, reducing the Company's net assets, while the performance of the CSTA when the obligation to transfer was triggered gave an advantage to the Investors *qua* creditors. Thus, the two parts of the transaction – entry into the CSTA and performance of the CSTA – can be impugned under ss 98 and 99 independently. Of course, it suffices, practically speaking, that either provision is made out, as the same remedy (the return of the DKE Shares) is sought under each provision.

Were the defendants creditors at the relevant time?

69 The plaintiff argues that the Share Transfer should be assessed as at the date the CSTA was entered into, whereas the defendants argue that the Share Transfer should be assessed as at the date the Term Sheet was entered into. The defendants further argue that at that date, they were not creditors of the Company, and the unfair preference provisions therefore cannot apply.

70 On the first point, both the plaintiff and the defendants are mistaken. As stated above at [67], the focus of the inquiry is the Share Transfer itself. Thus, the correct time for assessing the Share Transfer is neither the date of entering into the Term Sheet nor the date of entering into the CSTA. It is the date of the actual transfer of the DKE Shares, which was 3 May 2013. There can be no doubt that the defendants were creditors on 3 May 2013: if nothing else, they were owed obligations under the CSTA, in fulfilment of which the DKE Shares were transferred. The definition of "creditor" for this purpose is not limited to a person who is owed a monetary sum. Although the CSTA was

liable to be set aside – and should be set aside – at the application of the liquidator, being a deed it remained enforceable until and unless it was set aside. The CSTA therefore created obligations which were valid at the material time, and this sufficed to make the defendants creditors.

71 For the sake of completeness, it should be noted that even if the defendants were right that the time for assessment was the time of entry into the Term Sheet, that would not mean that none of the Investors was a creditor at the relevant time. On the defendants' own evidence, some of the Investors (specifically, the third and fourth defendants and Mr Tan) had already loaned the Company more than $2.2m before the Term Sheet was entered into in April 2011. These defendants and Mr Tan, at least, would have been subject to s 99 of the Bankruptcy Act to the extent of the loans already disbursed at the time. This situation would involve a more complicated inquiry; thankfully, it need not be pursued any further.

Were the remaining requirements for an unfair preference made out?

72 The remaining requirements for an unfair preference are an intention to prefer and a transfer falling within the applicable claw-back period. Both requirements are easily made out because the Investors were associates of the Company at the relevant time.

73 Section 101(6) of the Bankruptcy Act provides that a person shall be an associate of a company if he – either alone or with his associates – has control over the company. Section 101(9)(*b*) of the Bankruptcy Act provides that such control will be present when a person is entitled to exercise or control the exercise of one-third or more of the voting power at the general

meeting of the company. At the time of the Share Transfer, the Investors together held 88% of the shares in the Company, and thus are deemed to have had control over the Company under s 101(6) read with s 101(9)(*b*) of the Bankruptcy Act. They were therefore associates of the Company at the relevant time.

74 Consequently, the plaintiff can rely on both the presumption that the Company had an intention to prefer and the extended claw-back window of two years dating back from the commencement of winding up.

75 Regarding the presumption of an intention to prefer, the plaintiff has correctly pointed out that the defendants have not adduced any evidence at all to show that the Share Transfer was not motivated by an intention to prefer. Instead, the defendants have only submitted that entry into the Term Sheet – which is not the relevant transaction for the purposes of s 99 of the Bankruptcy Act – was not motivated by an intention to prefer. It follows that the defendants have failed to rebut the presumption of an intention to prefer. I note too that once the Company's desperate state became clear to them in December 2011, if not earlier, the Investors were eager to protect their position by expanding the Transfer Events in the CSTA. Their explanation that the CSTA was needed because the Share Charge under the CLA would have been difficult to enforce rings rather hollow in the circumstances.

76 Given that the relevant date is 3 May 2013, the Share Transfer did fall within the two-year claw-back window measured backwards from the commencement of winding up on 25 October 2013.

77 For these reasons, the Share Transfer was an unfair preference under s 99 of the Bankruptcy Act and can be unwound on that basis.

Were the Share Transfer and/or the CSTA in breach of the anti-deprivation rule?

78 The anti-deprivation rule is an English common law rule which prohibits any attempt to withdraw an asset on bankruptcy, liquidation or administration, in order to prevent a reduction in the value of the insolvent estate to the detriment of creditors. The rule was expressed in this way in the recent English case of *Belmont Park Investments Pty Ltd and others v BNY Corporate Trustee Services Ltd and another* [2012] 1 AC 383. The rule is founded on the general principle that such a deprivation is contrary to public policy as a fraud on the insolvency statutes.

79 The anti-deprivation rule has not been applied in any Singapore judgment so far as I am aware, although its cousin, the *pari passu* principle, has. The plaintiff's position is that as the anti-deprivation rule was well established in English law prior to 12 November 1993, it was received into Singapore law pursuant to s 31 of the Application of English Law Act (Cap 7A) (1994 Rev Ed).

80 As I have already decided the plaintiff's application in its favour on the basis of the statutory regime, there is no need for me to consider the applicability of the anti-deprivation rule, its extent, or the defences available when it is raised.

Conclusion

81 I therefore decide this application in favour of the plaintiff and make the following orders:

(a) There shall be a declaration that the CSTA is null and void and of no effect as a transaction at an undervalue within the meaning of s 98 of the Bankruptcy Act (Cap 20) read with s 329(1) of the Companies Act (Cap 50).

(b) There shall be a declaration that the transfer of 1,772,728 shares in DKE pursuant to the CSTA is an unfair preference within the meaning of s 99 of the Bankruptcy Act (Cap 20) read with s 329(1) of the Companies Act (Cap 50).

(c) The first defendant shall transfer 1,772,728 shares in DKE to the plaintiff forthwith and, so far as is necessary, the second to sixth defendants shall take all steps required to procure such transfer.

(d) The defendants shall pay the plaintiff's costs of this application as taxed or agreed.

Judith Prakash
Judge

Smitha Menon, Daniel Tan Shi Min and Yu Kanghao
(WongPartnership LLP) for the plaintiff;

Eugene Quah, Abigail Cheng and Lydia Ni
(RHTLaw Taylor Wessing LLP) for the defendants.