Mercator & Noordstar NV v Velstra Pte Ltd (in liquidation)
[2003] SGCA 37

Case Number : CA 24/2003, 25/2003

Decision Date : 23 September 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Koh Kok Wah and Dinesh Dhillon (Wong & Leow LLC) for the appellant; Vinodh Coomaraswamy and David Chan (Shook Lin & Bok) for the respondent

Parties : Mercator & Noordstar NV — Velstra Pte Ltd (in liquidation)

Civil Procedure – Originating processes – Whether court should convert originating summons to writ action – Whether trial would serve any purpose

Companies – Winding up – Whether transaction at an undervalue for purposes of s 98 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) – Whether court should look to subsequent developments in determining whether transaction at an undervalue – Whether burden of proving undervalue lay with the liquidator challenging the payment or company receiving payment

Companies – Winding up – Whether two companies associated companies for purposes of s 101 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) even if one company did not know it owned majority shareholding in other and did not control other

Companies – Winding up – Whether unilateral payment amounted to a "transaction" for the purposes of s 98 of the Bankruptcy Act (Cap 20, 2000 Rev Ed)

Words and Phrases – "Entered into a transaction" – Whether phrase in s 98 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) suggests there should be element of mutuality

Delivered by Chao Hick Tin JA

1 There are two appeals before us. The substantive appeal relates to the question whether a payment made by the respondent, Velstra Pte Ltd (Velstra), to the appellant, Mercator & Noordstar NV (Mercator), should be declared null and void on the ground that it constituted a transaction at an undervalue within the meaning of s 98 of the Bankruptcy Act, read with s 329 of the Companies Act. The other appeal is of a procedural nature and is against the refusal of the court below to convert the present proceeding, which was commenced by originating summons (OS) into a writ action.

The background

2 The appellant, Mercator, is a Belgium insurance company. In early 1999, it was interested in investing in another Belgium company called Lernout & Hanspie Speech Products ("L&H") which specialised in the development of speech recognition, dictation and translation software. The shares of L&H were listed on the US and European stock markets and at the height of its success, which was in March/April 2000, it had a market capitalisation of some US$9 billion when its shares were traded at US$60 each.

3 Earlier, in March 1999, Mercator met up with the directors of L&H indicating its interest. The directors suggested that Mercator invest in a proposed new company called NV Language Development Fund ("LDF"). Mercator decided to invest US$2 million in LDF and also to extend to it a loan of US$10 million. Following this understanding, on 31 March 1999, LDF was incorporated in Belgium, with Mr Tony Snauwaert ("Snauwaert") as one of the directors. On the same day, LDF's capital was increased from 2.5 million BF to 77.76 million BF.

4 With the investment of US$2 million, Mercator acquired all the new shares in LDF which constituted 97% of the shares in LDF. Mercator alleged that the directors of L&H had represented to Mercator that its shareholding in LDF would not exceed 4%. Also on the same day, Mercator entered into an agreement with LDF extending to the latter a loan of US$10 million, with 30 September 1999 as the deadline for repayment.

5 However, notwithstanding that Mercator owned 97% of the shares in LDF, it did not seek to have its own nominee on the board of directors. LDF continued to be managed by Snauwaert. Apparently, Mercator did not know that by its investment it had become the largest single shareholder.

6 On 24 June 1999, LDF incorporated a wholly owned subsidiary in Singapore called Velstra Pte Ltd ("Velstra"). Snauwaert was also a director of Velstra. In turn, Velstra incorporated nine new subsidiaries, three of which were in Singapore. All nine were apparently shell companies and did not carry out any business.

7 In late 1999, a Lebanese of Armenian descent by the name of Khatchadourian showed interest in investing in L&H, in particular in the development of speech and language software on the Armenian language. At a meeting he had with the directors of L&H, they indicated the need for US$30 million to finance L&H's expansion in the Middle East and Asia. Eventually, it was agreed that Khatchadourian would give a loan of US$30 million to L&H and, in addition, a further loan of US$6 million specifically for the development of the software for the Armenian language.

8 On 24 December 1999, a loan agreement for US$36 million was executed between Katchadourian and Velstra (signed by Snauwaert) instead of L&H, and under the terms of this agreement the loan was to be repaid by 27 December 2001, with interest at 8%. However, the agreement did not specifically state that US$6 million of that loan was for the development of software for the Armenian language.

9 On 5 January 2000, Khatchadourian transferred the sum of US$36 million into Velstra's account in Singapore. As soon as the sum was received, Snauwaert instructed the bank to pay out the entire sum to four parties, one of whom was Mercator for the sum of US$5.08 million. This is the sum which the liquidators of Velstra now seek to recover from Mercator, following the collapse of L&H, with charges of fraud being brought by the Belgium authorities against the directors of L&H, including Snauwaert.

10 In accordance with the loan agreement, Velstra was to repay Khatchadourian the total debt of US$36 million by 27 December 2001. Velstra could not do so. In the meantime, neither was there any effort made by L&H or Velstra to develop the software for the Armenian language. Following default of appearance, Khatchadourian obtained judgment in the High Court against Velstra for the sum owing. This judgment, not having been satisfied, eventually led to the winding up of Velstra on 12 April 2002.

Relevant statutory provisions

11 In seeking to recover the sum of US$ 5.08 million, the liquidators of Velstra relied upon s 329 of the Companies Act which incorporated by reference the provisions of s 98 of the Bankruptcy Act. The relevant portion of s 329(1) reads:-

> "Subject to this Act and such modifications as may be prescribed, any … payment … which, had it been made … by … an individual, would in his bankruptcy be void or voidable under s 98 … of the Bankruptcy Act 1995 … shall in the event of the company being wound up be void or voidable

in like manner."

12 Section 98(1) of the Bankruptcy Act provides that, subject to this section and ss 100 and 102 of the same Act –

> "where an individual is adjudged bankrupt and he has at the relevant time (as defined in s 100) entered into a transaction with any person at an undervalue,"

the Official Assignee may apply to court for an order to restore the respective parties' position as if the transaction had not been entered into.

13 For this purpose, the term "relevant period", in so far as it concerns a transaction allegedly at an undervalue, is the period of five years prior to the presentation of the winding up proceedings (see s 100(1)(a) of the Bankruptcy Act). But in order that the transaction could be so declared void, s 100(2) requires that it must be shown that the company under liquidation,

> "(a) is insolvent at that time; or
>
> (b) becomes insolvent in consequence of the
>
> transaction …"

14 Ordinarily the burden of proving such insolvency rests with the party who makes that allegation. However, s 100(3) provides for a presumption of such insolvency in a situation where, as between the parties to the transaction, one is an associate of the other.

Associated companies

15 Counsel for the appellant argued that Mercator and Velstra were not associated companies because –

> (i) there was no common person in control of both companies; and
>
> (ii) LDF did not, in fact, control Velstra as Snauwaert, the director of Velstra, acted on the instructions of L&H. Counsel also pointed out that Mercator did not even know the existence of Velstra.

16 Section 101 of the Bankruptcy Act lays down the criteria upon which a person would be considered to be an associate of another person. Furthermore, regulation 3 of the Companies (Application of Bankruptcy Act Provisions) Regulations ("CABAR") provides that ss 98-103 of the Bankruptcy Act shall be read subject to, inter alia, "such textual and other modification as may be necessary" for their application to a company being wound up.

17 Section 101(6) provides that -

> "A company is an associate of an individual if that individual has control of it or if that individual and persons who are his associates together have control of it."

18 Section 101(9)(b) provides that for the purposes of the section, an individual shall be taken to have control of a company if –

> "he is entitled to exercise, or control the exercise of, one-third or more of the voting power at

any general meeting of the company or of another company which has control of it". (Emphasis added).

19 It seems clear to us that, where it is in relation to two companies, the reference to "individual" in s 101(6) & (9) must be read to refer to "company". This is a necessary modification contemplated by regulation 3: see *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd & Anor* [2002] 4 SLR 145. Reading subs (6) with subs (9)(b) it is also clear that Mercator had control of Velstra because Mercator owned 97% of the shares of LDF, which in turn owned Velstra wholly. The fact that Mercator did not know it owned 97% of the shares of LDF is beside the point. Neither is it material that LDF had always acted in accordance with the instructions of L&H. The fact of the matter is that Mercator did own 97% of the shares of LDF and could have exercised control. The fact that it did not know that it owned 97% of the shares is not really relevant. That is not the test. Neither is it relevant that Mercator left everything to the directors of LDF. The critical fact is that it owned 97% of the shares in LDF and this factor is decisive.

20 As regards Mercator's argument that there must be a common person in charge of both Mercator and Velstra before the two companies could be regarded as associated, relying in relation thereto on *Show Theatres Pte Ltd*, we must point out that that case merely illustrates a situation where two companies were considered to be associated. But it does not mean that another two companies which do not have a common person in charge may not be regarded as associated provided that they satisfy the other criteria set out in s 101, read with the regulations in CABAR. For the reasons above, we hold that Mercator and Velstra were associated companies and the presumption that Velstra was insolvent would apply.

Essential elements of s 98

21 Thus, to bring a case within s 98, the following elements must be satisfied. First, there must have been a transaction. Second, the transaction must have taken place within the relevant period. Third, it must be shown that the transaction was at an undervalue. Fourth, that the company under liquidation was insolvent at the time of the transaction. But in a case where the two companies are associated, like the present, there is a presumption of insolvency and the burden shifts to the other company to show that the company under liquidation was at the relevant time not insolvent. In this case, the burden of disproving insolvency of Velstra rests with Mercator.

Transaction

22 What then is the correct interpretation of the word "transaction"? Does it include a straightforward payment? On this, Mercator relied upon the English case of *Re Taylor Sinclair (Capital) Ltd (in liquidation); Knights v Seymour Pierce Ellis Ltd & Anor* [2001] 2 BCLC 176 where the brief facts are these. There, a third party, Ellis & Partners ("Ellis"), a stockbroking firm, received £100,000 from the company in liquidation, Taylor Sinclair. This money was used to discharge a loan made by Ellis to one S who owned a company called Powerhouse. S procured Powerhouse to transfer the money to Taylor Sinclair. The money was then paid over by Taylor Sinclair to Ellis to discharge S's debt with Ellis. There was no other dealing or communication between Ellis and Taylor Sinclair. Robert Englehart QC, sitting as a Deputy Judge, said (at ¶20):-

> "It is right to say that the word 'transaction' as a matter of ordinary language embraces a potentially wide range of possibilities. Furthermore, the inclusive definition of s 436 of the 1986 Act is of broad ambit. It reads:
>
> > 'transaction' includes a gift, agreement or arrangement, and references to entering into a

transaction shall be construed accordingly.'

Doubtless, one should be wary of circumscribing the width of the statutory language of s 238 lest the evident policy of the section be undermined. Nevertheless, as I read the section it does envisage that, apart perhaps from the case of a mere gift which is expressly included within ss 238 and 436, a transaction will be something which involves at least some element of dealing between the parties to the transaction. Not only is this implicit in the word 'transaction' itself, but it is reinforced by the references in s 238 to (a) the 'entry into' a transaction (b) 'with a person' and (c) 'on terms that provide'. Whilst plainly an actual contract is not required in order for there to be a transaction, the language of the section is redolent of contract and mutual dealing..

.

In the present case there was no element at all of any sort of dealing between the company and Ellis & Partners. All that happened as between them was the transmission and receipt of the cheques for L100,000. I therefore conclude that there was in the particular circumstances of this case no 'transaction' within the scope of s 238 as between the company and Ellis & Partners."

23 As Englehart QC quite rightly pointed out, the ordinary meaning of the word "transaction" encompasses a wide range of possibilities. Ordinarily it means a "dealing". But it could also mean anything that passes between the parties. He seemed to think that there could only be a transaction if there was something like a contract or mutual dealing. In his mind, a unilateral act like a payment simpliciter could not be a "transaction".

24 We have some reservations on these views of Englehart QC. They seem somewhat narrow having regard to the fact that in the definition section of the *English Insolvency Act 1986*, as well as in our Bankruptcy Act, the term "transaction" is defined to include a gift. If a gift, which is an unilateral act, and which need not be made with the knowledge or consent of the donee, comes within the meaning of "transaction", we fail to understand why a simple payment, without more, could not be a "transaction". A simple payment, without more, is at least *prima facie* indicative of a gift and it should surely fall within the meaning of "transaction".

25 In any event, in holding that there was in the fact-situation there no "transaction", Englehart QC had in mind "the particular circumstances" of the case, i.e., the insolvent company was not in commercial reality parting with its own money.

26 The result obtained in *Re Taylor Sinclair* could similarly be reached by a different route even if the payment there were to be considered a "transaction". As the judge there pertinently observed, that was not a case in which one could fairly say the company received no consideration:-

"The fact here was that the company received money from Powerhouse for which it was obliged to account to Powerhouse. In making the onward payments to Ellis & Partners on the instructions of Mr Stone, purportedly acting as the chairman of Powerhouse, the company was not in commercial reality parting with its own money at all. For the company, the consideration which it was to receive from making the payments was the performance of its obligation to account to Powerhouse. Mr Stone had with Powerhouse's apparent approval arranged for Powerhouse's funds to come to the company; it is difficult to see why he would not have had at least ostensible authority vis-à-vis the company to act on behalf of Powerhouse in arranging the onward transmission of those funds. Furthermore, the company did in fact itself receive benefit

> for what it did, although it must be acknowledged that the company's transaction with Ellis & Partners (assuming it was such) cannot readily be described as having been 'entered into on terms that provided for the company to receive' this consideration."

27 Another argument advanced by Mercator is that the word "entered" in the phrase "entered into a transaction" in s 98(1) suggests that there must be mutuality. Interestingly, in the definition of "transaction" (in both the English and our Acts) it is also provided that "… any reference to entering into a transaction shall be construed accordingly." Bearing in mind that the definition on "transaction" also includes "gift", and gift is invariably an unilateral act, it could not have been intended that the word "entering" must necessarily suggest that there should be mutuality. It seems to us that the word "enter" or "entering" in s 98(3) should not be confined to situations involving mutuality. In the context, it is broad enough to include "make" or "effect". Such an interpretation would also be in line with the policy object behind s 98 which is to protect the interest of the general body of creditors against a dimunition of assets brought about by a transaction which confers an unfair or improper advantage on a particular creditor of the company. Indeed, the aim of the provision would be seriously undermined if a simple payment were construed not to be a "transaction".

28 Accordingly, we are unable to agree with Mercator on this point. In our opinion, a payment simpliciter would come within the meaning of "transaction" in s 98.

The question of consideration

29 On the facts of this case, there is no doubt that the transaction took place during the "relevant time". We will therefore turn to the question of undervalue, and the critical issue here is who has the burden of proving such undervalue. It is not entirely clear from his Grounds of Judgment whether the judge below thought that the burden is on the liquidators of Velstra or on Mercator. Mercator relied upon the fact that in Velstra's telegraphic transfer form it was stated that the payment of US$5.08 million to Mercator was made "on behalf of LDF" and in the audited accounts of Velstra this sum was noted to be due from LDF.

30 It is useful if we first look at the approach taken by the Judge on this issue. He said:-

> "First, the money was paid out from a sum of US$36 million paid into the plaintiffs' account and, without any evidence otherwise, must be regarded as money belonging to the plaintiffs. Secondly, although the plaintiffs recorded the payment to the defendants as payment on behalf of LDF, there is no doubt that LDF was insolvent at the material time and the plaintiffs cannot be unaware of that. It is also a fact readily admitted by the defendants through William Hutchison's first affidavit. Thirdly, in such circumstances, it behoves the defendants in resisting the present claim to show that it has some credible claim against LDF for reimbursement or indemnity in respect of the US$5.08 million. There was none whatsoever. Even the plaintiffs' audited accounts were qualified. In such circumstances no indemnity from LDF to the plaintiffs can be inferred."

31 There is a need for us to make some clarifications on the above statement. First, the judge seemed to have thought that Mercator admitted that, at the time of the transaction, LDF was insolvent and that the admission was made through Hutchison's first affidavit. There was no such admission. Hutchison is one of the liquidators. What Hutchison believed or determined could not constitute an admission by Mercator. The judge was mistaken to think that Mercator had admitted. Second, the judge seemed to place no significance on the audited accounts of Velstra as they were qualified by the auditors. But the qualification did not relate to the payment of US$5.08 million to Mercator or the entry made against that item. It related to an entirely unconnected aspect. There

is no reason why the other parts of the accounts not so qualified should not be relied upon. After all the liquidators relied upon the accounts to institute the present proceeding. The liquidators could have called upon the auditors to explain the qualification and yet did not do so.

32 The judge then went on to state that Mercator could not dispute the liquidators' findings unless they had evidence to challenge it. He said (at ¶15):-

> "The evidential burden had clearly shifted to the defendants and it is of no assistance to them to say that they require discovery to show proof. They are no strangers to either the plaintiffs or LDF. It may appear at first glance that a remittance of money recorded as being made on behalf of a third party (in this case, LDF) cannot be regarded as a gift. But in the present case, there was no record or explanation as to why the remittance of US$5.08 million was made on LDF's behalf, or any explanation that might suggest that the payment would be recoverable from LDF as a loan by the plaintiffs, or that it was given in circumstances that one can infer that an indemnity was thereby created. Evidence leading to either of these conclusions might perhaps be found in the communication between the plaintiffs and LDF, or from evidence of a release of debt from LDF to the defendants to the equivalent amount. But no such evidence was adduced. The remittance of money in the present circumstances may therefore reasonably be deemed as a gift by the payer to the payee. Even if it was not a gift, it was at least a transaction for no consideration, and, in any event certainly, a transaction at an undervalue."

33 It is settled law that he who asserts must prove: see s 103 of the Evidence Act. Here, it is the liquidators who assert that the transaction was effected at an undervalue. The burden of proof on a balance of probabilities of such undervalue therefore rests with them. On this issue, the position is unlike that on the question of insolvency where if the transaction is between associated companies there is a presumption of insolvency. There is no similar presumptive provision on undervalue. It has to be proved.

34 The main point raised by the liquidator on the question of undervalue is that while the audited accounts of Velstra as at 30 August 2000 recorded that the amount was "due by holding company (LDF)", there was no evidence of an assignment of the debt from Mercator to Velstra.

35 It seems to us that this argument fails to give sufficient regard to the fact that in the explanatory statement to the accounts for that entry, it was stated that "the amount due by holding company is unsecured, interest-free and has no fixed terms of repayment." It is not a requirement of law that a transaction in the nature of an assignment can only be effected through a formal document evidencing the same. Such an arrangement can be made orally. It is not in dispute that the payment to Mercator was reflected in Velstra's records as a payment made "on behalf of LDF". It is also common ground that upon receipt of the sum of US$5.08 million from Velstra, Mercator had discharged a corresponding portion of the US$10 million loan owing to it by LDF. In such circumstances, we are unable to see how it could be contended that Velstra had discharged its burden of proving that the transaction was effected at an undervalue or for no consideration.

36 It does not carry the liquidators far to contend that they are unable to accept the audited accounts because the latter were not prepared by them when the accounts carried the statement of the directors that they had made reasonable efforts to ensure that all assets had been properly assessed to be the true value. The audited accounts of a company are the records of the company and may be tendered in evidence. Indeed the audited accounts of Velstra were placed before the court by the liquidators. We recognise that the audited accounts were qualified by the auditors, but, as stated earlier, the reason for their qualifying the accounts had nothing to do with the debt owing from the holding company (LDF) to Velstra. That qualification pertained to Velstra's investments in its

subsidiaries.

37 A further argument advanced by Velstra is that in the absence of an express indemnity or promise to repay on the part of LDF, Velstra would have no right to seek indemnity/payment from LDF. It also contended that as there is no evidence that the payment was made pursuant to a request from LDF, the law should not find that Velstra had a right to indemnity. In all the circumstances the payment to Mercator was purely voluntary. In this regard reliance is placed on the case of *Owen v Tate* [1976] QB 402. But we do not think that case assists Velstra.

38 In *Owen* the fact situation was materially different. There, the plaintiff made payment and gave a guarantee to the bank to secure the loan which the latter gave to the defendants, in order to release one L of her obligation to the bank. L was a former employee of the plaintiff. When the defendants heard of this proposed move by the plaintiff, they protested. Later, the plaintiff brought an action against the defendant to recover what he paid to the bank. At the County Court, the claim of the plaintiff was dismissed. The Court of Appeal affirmed the decision of the court below on the ground that as the plaintiff had assumed the obligation without the knowledge or consent of the defendants and even against their wishes, he was not entitled, as a volunteer, to be indemnified. The court, however, made one qualification to this proposition and this was stated by Scarman LJ in these terms (at 411-2):-

> "If without an antecedent request a person assumes an obligation or makes a payment for the benefit of another, the law will, as a general rule, refuse him a right of indemnity. But if he can show that in the particular circumstances of the case there was some necessity for the obligation to be assumed, then the law will grant him a right of reimbursement if in all the circumstances it is just and reasonable to do so."

39 It would be seen that the position in our present case is completely different. Snauwaert was in charge of both LDF and Velstra. There was nothing to suggest that the payment by Velstra to Mercator was made without the knowledge of or objected to by LDF. Indeed, it is reasonable in the circumstances to infer that LDF had had such knowledge and was agreeable. The audited accounts of Velstra recorded the payment to Mercator as a loan and there is no basis to think that the benefit received by LDF, by the discharge of the equivalent sum owing to Mercator, would not be correspondingly reflected in the books of LDF. It is of interest to note that the liquidators had interviewed Snauwaert and nothing more is placed before the court as to what was unearthed from that interview. In any case, the burden of proof is on the liquidators and if there is anything in the books of LDF which would suggest otherwise it is for the liquidators to bring forth the same. They have not done so.

40 Another contention advanced by the liquidators is that even if there was some consideration provided for the payment, in the sense of an indemnity by LDF, that indemnity was either "worthless" or at the very highest, worth significantly less than the US$5.08 million paid to Mercator. For this purpose, the liquidators argued that account could be taken of developments which occurred after the date of payment, i.e., the fact that LDF went into liquidation. It is true that in *Phillips v Brewin Dolphin Bell* [2001] 1 All ER 673, Lord Scott of Foscote said that *ex post facto* events could be taken into account. But the context in which that pronouncement was made should not be lost sight of. There, what was in issue was the value of a sublease covenant and quite clearly the court did not think that at the time the sublease covenant was made it was of any value as evidenced by this passage (at p. 683):-

> "… if, following the signing of the sublease, AJB had taken the sublease to a bank or finance house and had tried to raise money on the security of the covenant, I do not believe that the

> bank or finance house, with knowledge about the circumstances surrounding the sublease, would have attributed any value at all to the sublease covenant.
>
> Where the value of the consideration for which a company enters into a s 238 transaction is as speculative as is the case here, it is, in my judgment, for the party who relies on that consideration to establish its value. PCG and Brewin Dolphin are, in the present case, unable to do so."

The reference to subsequent assessment was really to affirm the initial determination.

41 We think it would be wrong, in relation to such an issue, to hold that reference to subsequent events may generally be made to determine the value of the consideration. It would gravely undermine bona fide business arrangements entered into between parties. It would mean that a party in receipt of monies from the other party to the transaction in consideration of the discharge of a debt due to the first party from a third party would have to anticipate future events that could happen to the other party making the payment before he could safely act on the arrangements made. We do not think that that could be intended by s 98. To so construe could seriously undermine the efficacy of business. However, we are not saying that there could not be a case where the circumstances are such that reference to subsequent events may be appropriate in helping to determine the value of the consideration. We will not speculate what those special circumstances are, but such cases must be rare, and this is certainly not such a case.

42 Reverting to the facts of our instant case, at the time when the payment was made to Mercator, the L&H group was in excellent shape. The value of L&H shares had even improved thereafter and reached a height of US$60 per share in March/April 2000, with a total capitalisation of US$9 billion. There is hardly anything to suggest that at the time of the transaction, a promise by LDF to Velstra to repay the sum of US$5.08 million was not worth its full value.

Should OS be converted to a writ

43 We now turn to the other appeal on the matter of procedure. In the light of our views above, the claim of the liquidators must fail because they have not proven that the transaction was at an undervalue. It is true that Mercator thought the proceeding should have proceeded by way of a Writ. The other appeal which is before us is on that point. But Velstra had resisted the application to convert the OS into a Writ. The liquidators of Velstra would have done their homework before instituting the OS. If what is now presented before the court is all they could uncover, a trial, which was not what they wanted, would not have served any purpose. Moreover, it would be like giving the liquidators a second bite at the cherry.

Judgment

44 In the premises, we would allow the appeal of Mercator relating to the substantive issue and declare that the plaintiff has not proven that the payment of US$5,080,000 made by Velstra to Mercator on 5 January 2000 constitutes a transaction at an undervalue within the meaning of s 98 of the Bankruptcy Act read with s 329 of the Companies Act. However, as the appellant has not succeeded on the issue of "transaction", it shall only be entitled to 60% of the costs, here and below.

45 As regards Mercator's appeal on the procedural matter, as that is rendered redundant on account of our decision on the substantive appeal, we would, as a matter of form, dismiss the appeal. As regards the question of costs of the appeal, we think the fairest order in the circumstances would be

that each party shall bear its own costs, both here and below.

46 We order both sets of security for costs, together with any accrued interest, be returned to the appellant’s solicitors.

Copyright © Government of Singapore.