Velstra Pte Ltd (in compulsory winding up) v Azero Investments SA [2004] SGHC 251

Case Number : Suit 445/2003

Decision Date : 09 November 2004

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Vinodh Coomaraswamy, David Chan and Stanley Tok (Shook Lin and Bok) for plaintiff; Conrad Campos and Ramesh Tiwari (Robert Wang and Woo LLC) for defendant

Parties : Velstra Pte Ltd (in compulsory winding up) — Azero Investments SA

Companies – Directors – Duties – Whether director of company actively assisted creditor in collecting debt from company to the prejudice of other creditors – Whether director was a "person connected with" or "associate" of defendant – Regs 2, 4, 5 Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1995 Ed) – Section 101 Bankruptcy Act (Cap 20, 2000 Rev Ed)

Insolvency Law – Avoidance of transactions – Unfair preferences – Whether plaintiff's director allowed defendant creditor to garnish the plaintiff's money to the prejudice of the plaintiffÂ's other creditors – Whether defendant held garnished money as constructive trustee for plaintiff – Whether unfair preference given at "relevant time" – Sections 99, 100(1)(b), (c) Bankruptcy Act (Cap 20, 2000 Rev Ed) – Section 329(2)(a)(i) Companies Act (Cap 50, 1994 Rev Ed)

9 November 2004 *Judgment reserved.*

Lai Siu Chiu J:

The facts

1 Velstra Pte Ltd ("the plaintiff") is a local company incorporated on 19 June 1999 with a paid-up capital of $2.00. Its directors were a Belgian national, Tony F E Snauwaert ("Snauwaert"), and a Singaporean, Tan Lee Chin ("Tan"). Tan was also the plaintiff's company secretary. Although the plaintiff's objects stated that its principal activities, *inter alia*, related to information technology in speech and artificial intelligence, in reality the plaintiff's sole activity was to act as an investment holding company.

2 The plaintiff is a fully-owned subsidiary of a Belgian company called Language Development Fund ("LDF"). LDF was incorporated on 31 March 1999. As at 31 August 2000, the plaintiff itself had nine subsidiaries of which six were incorporated in Belgium and the remaining three in Singapore. The Singapore subsidiaries were/are The French CALC Pte Ltd, The German CALC Pte Ltd and The Italian CALC Pte Ltd (collectively "the Singapore subsidiaries"). The six Belgian subsidiaries all bear the initials "LDC NV" in their names, *eg* The Slavic LDC NV (hereinafter they will all be referred to collectively as "the LDCs"). Neither the plaintiff nor its Singapore subsidiaries carried out any real business activity in Singapore. Similarly, its foreign subsidiaries did not carry out any business activities either. The common registered address of the plaintiff and its Singapore subsidiaries is at UIC Building #12-05 which address is that of a local law firm.

3 The plaintiff was placed into compulsory liquidation by an order of court dated 12 April 2002 made in Companies Winding Up No 600096 of 2002 ("the winding-up petition"). The petitioner was one Harout Khatchadourian ("Khatchadourian"), a Lebanese-American businessman who had extended an

unsecured loan of US$36m to the plaintiff on or about 24 December 1999. The winding-up petition was based on a default judgment which Khatchadourian had obtained on the unpaid loan, after it became due on 27 December 2001. William Caven Hutchinson ("Hutchinson"), Kon Yin Tong and Wong Kian Kok (collectively "the liquidators") from the accounting firm of M/s Foo, Kon, Tan and Grant Thornton were appointed joint and several liquidators. The liquidators instituted these proceedings on the plaintiff's behalf. One of the liquidators, *viz* Hutchinson, was the plaintiff's only witness.

4 According to subsequent investigations conducted by the liquidators, the plaintiff and its subsidiaries were essentially established by individuals who were closely associated with Lernout & Hauspie Speech Products NV ("L&H"), a speech technology and voice synthesis software company incorporated in Belgium. At the material time, L&H was the world's largest provider of speech recognition software competing against computer giants like IBM and Philips Electronics. The founders and managers of L&H were Jo Lernout ("Lernout"), Pol Hauspie ("Hauspie") and Nico Willaert ("Willaert"). The plaintiff and its subsidiaries were established for the sole purpose of acquiring licences from L&H for its software.

5 Azero Investments SA ("the defendant") was incorporated under the laws of Luxembourg on 23 November 1999 and has its registered office at 106, Route d'Arlon L-8210, Mamer. Since its incorporation to date, the directors of the defendant are three Luxembourg entities, *viz* F van Lanschot Management SA, F van Lanschot Corporate Services SA and Harbour Trust and Management SA.

6 The shareholders of the defendant are Rozea Lux Holding SA ("Rozea") and FVL Management, holding 9,999 shares and one share respectively. Its parent company, Rozea, was incorporated on 9 June 1999 under its former name Azero Investments SA. Rozea changed to its present name on 16 November 1999 just before the defendant was incorporated. The three directors of the defendant were also the original shareholders and directors of Rozea.

7 On its day of incorporation (9 June 1999), the aforementioned three shareholders of Rozea transferred their shares to APJ Veltmeijer, Robert AF Veltmeijer and JHMJF Philippen. APJ Veltmeijer and Robert AF Veltmeijer ("Veltmeijer") are brothers while JHMJF Philippen is their brother-in-law.

8 On 17 August 1996, a company which came to be known as NV Language Investment Company ("LIC") was incorporated. Its managing director was Willem Hardeman.

9 On 11 February 1999, Snauwaert incorporated a company in Ghent, Belgium, called BVBA Language Development Service ("LDS") with himself as the sole director. This was followed by the incorporation of LDF ([2] *supra*) on 31 March 1999. The directors of LDF were Snauwaert, LDS and LIC. Upon incorporation, the capital of LDF was 2.5m Belgian Francs ("BEF") divided into 2,500 shares of 1,000 BEF each. The shareholders were LDS (2,499 shares) and LIC (one share). On the same day of its incorporation, an extraordinary general meeting was held wherein LDF's capital was increased from 2.5m BEF to 77.76m BEF by the issuance of 75,260 new shares of 1,000 BEF each to a company called Mercator & Noordstar NV ("M&N") whose chief executive officer ("CEO") is Ronald Everaert. M&N is an insurance company listed on the Belgian stock exchange.

10 In January 1999, whilst he was on a skiing holiday, Veltmeijer met one Thomas Denys ("Denys") who introduced himself as a financial adviser of L&H. In actual fact, Denys was the general counsel and senior vice president of L&H. At that time, L&H was highly regarded in Belgium as a leader in speech technology. L&H was listed on the Belgian stock-exchange and had a secondary listing on NASDAQ in the United States. It was at one time the darling of the stock market and documents produced in court showed that broking houses gave a "buy" recommendation on the stock. Computer

giants such as Microsoft and Intel were amongst its investors. The company was constantly in the news; at its height its share price rose to US$80 with a projected increase of another US$40. However by 9 November 2002 when trading in its stock was suspended, its price had nose-dived to US$6.22 (according to Internet business reports). After L&H collapsed, its share price dropped further to a few cents (according to Veltmeijer). During its heyday, a large section of Belgian society (including the royal family) invested in L&H in one way or another.

11 Veltmeijer was told by Denys that L&H invested in the development of speech technology for various languages and that this was normally done through joint ventures with other parties. Veltmeijer then had a Hungarian business partner who was keen on developing software to translate the Hungarian language into English. As Veltmeijer thought his business partner would be interested in the business of L&H, he stayed in touch with Denys.

12 On 14 September 1999, Veltmeijer and his Hungarian partner visited the offices of L&H in Leper. They met Denys who introduced them to Snauwaert and Hauspie. In the course of conversation, Veltmeijer and his partner were told that L&H was looking for investors. They were given a demonstration of speech technology products, which greatly impressed them.

13 Veltmeijer was surprised, albeit flattered, to be invited by the three founders of L&H to the opening ceremony of its Leper office on 11 November 1999. His bank manager was most impressed. Guests at the opening ceremony included the Crown Prince of Belgium. At Leper, Veltmeijer was introduced to L&H's managing director, Willaert, who Veltmeijer thought was the actual decision-maker for the company as, whenever they held discussions, Snauwaert would say he had to speak to Willaert before reverting to Veltmeijer.

14 However it was Snauwaert who proposed that Veltmeijer invest in a language development company in Singapore. Veltmeijer said he was only comfortable with investing in a Belgian company. Snauwaert then suggested that Veltmeijer's investment be by way of a loan to a Belgian company, *viz* LDS. After further discussions, it was agreed that Veltmeijer would make the loan and that the same would be secured by personal guarantees from Willaert, Lernout and Hauspie (hereinafter referred to as "the three sureties"). On 26 November 1999, a loan agreement ("the loan agreement") for the sum of €2m ("the loan") was signed between LDS and the defendant; the loan was disbursed that day. A separate surety agreement ("the guarantee") was also signed that day by the three sureties. The loan was to expire on 31 May 2001. Unbeknownst to Veltmeijer, LDS and the plaintiff subsequently entered into a separate loan agreement dated 3 December 1999 ("the sub-loan agreement") whereby LDS agreed to advance to the plaintiff 75% of the loan, repayable by 25 May 2001. Snauwaert signed the sub-loan agreement as legal representative for both LDS and the plaintiff.

15 Before proceeding further, it is necessary to give a brief background of the Veltmeijer family. According to Veltmeijer, his father started a chain of amusement parks in various parts of Europe. In January 1999, a large part of that business was sold off. He, his brother and brother-in-law owned (usually in equal shares), and operated between themselves, about 20 to 25 companies. When he referred to the family or the Veltmeijer group of companies, Veltmeijer said he meant those 20 to 25 companies. The family's diverse investments included real estate and rental businesses. As a result of the sale of the group's majority stake in amusement parks, the Veltmeijer family was cash-rich and was looking for fresh investment opportunities when the proposal from Snauwaert came along. Veltmeijer revealed that the loan extended by the defendant to LDS was one of several investments which his family made at that point in time through their various companies.

16 In mid-2000, press reports started to appear in Belgium questioning the licensing fees which L&H was supposed to receive from four companies in the LDS group. Veltmeijer became increasingly

concerned by what he read. Consequently, he instructed the defendant's directors to write to LDS in November 2000 about the disquieting state of L&H's finances, to inquire about the precise relationship between LDS and L&H and what further security the three sureties proposed to furnish for the loan. The defendant's directors also requested for the audited accounts of LDS.

17 The letter from the defendant's directors dated 10 November 2000 drew a reply from Snauwaert dated 14 November 2000 in which he stated that LDS and L&H had no relationship whatsoever, that the balance sheet of LDS was not ready as the financial year had not ended and, (for the first time) explained how the loan had been utilised. Snauwaert revealed that €1.5m therefrom had gone into the plaintiff with the balance €0.5m being channelled to another company called Four One-One.Com Pte Ltd ("the dot com company"). Veltmeijer discovered subsequently that the €1.5m invested in the plaintiff was further invested in three LDCs. In his letter, Snauwaert proposed that the loan be converted into equity participation by Veltmeijer in the respective companies. The defendant did not respond but in court, Veltmeijer said he was not keen on equity participation having learnt where the loan had gone.

18 According to an Internet article produced to the court by the plaintiff,[1] L&H filed for Chapter 11 bankruptcy in the United States on 30 November 2000, after failing to persuade its main lending banks to restructure its massive loans of US$451m. Similarly, L&H went into bankruptcy in Belgium in November 2001.

19 Veltmeijer was not satisified with Snauwaert's explanation. He requested a meeting with Snauwaert. After encountering some difficulty in tracking Snauwaert down, Veltmeijer eventually met him in February 2001. At the meeting, Snauwaert handed Veltmeijer a report which he said was prepared by L&H and which identified the various LDCs as well as the stages of development of the various speech technology products. Snauwaert assisted Veltmeijer to draw up a corporate structure of the companies related to LDS based on L&H's report. When Veltmeijer inquired how the corporate structure of LDS was linked to L&H (in which Veltmeijer thought his family had invested by granting the loan), Snauwaert explained that legally there was no relationship between L&H and LDS. This was on the advice of accountants KPMG, for the purpose of off-balance sheet accounting. Licensing and consultancy fees paid by LDS were booked as revenue into L&H. It was then that Veltmeijer realised that LDS, the various LDCs and the plaintiff were mere "letter-box" companies whose only real assets were the licences they had obtained from L&H.

20 In later searches conducted on the defendant's behalf in the Singapore Registry of Companies, Veltmeijer learnt that the dot com company (registered on 19 June 1999), like the plaintiff, had a paid-up capital of $2.00 and its two directors were also Snauwaert and Tan. The two shareholders of the dot com company were Tan Siew Lee and Lee Li Ching.

21 Snauwaert, however, was still convinced that there was value in the plaintiff and in the LDCs, based on the report of L&H. He agreed to put up a proposal to Veltmeijer on restructuring LDF. Subsequently, Veltmeijer did receive the restructuring proposal from Snauwaert, which proposal included restructuring the various LDCs as well as the subsidiaries of LDS.

22 Around end-March or early April 2001, Veltmeijer started thinking seriously of investing in and taking control of LDF. To that intent and purpose, he held several discussions with the accounting firm of Deloitte & Touche ("D&T") and retained the services of a Belgian law firm, Advocatenassociatie Gilkens Panis Vandersanden ("AGPV"), and Mr Leo Panis ("Panis") in particular. Veltmeijer himself contacted M&N, the shareholder of LDF holding 97% of its shares. He met the CEO Ronald Everaert in April 2001 on the possibility of acquiring LDF. Between April and June 2001, Veltmeijer and his advisers had numerous discussions with M&N and their advisers. M&N made an offer of its shares to Veltmeijer

who made a counter-offer.

23 Separately, Veltmeijer had acquired 499 shares in LDF from LDS on 28 May 2001. He did this so that as a shareholder he would be entitled to minutes of general meetings and would have access to the financial statements of LDF. Veltmeijer also attended an extraordinary general meeting of LDF on 30 May 2001 ("the EOGM") where he questioned M&N on its withdrawal of funds to the LDF group in order to repay M&N's loans (totalling US$5.08m), thereby jeopardising the cash flow of the LDF group. Veltmeijer had also requested for a proper valuation of the LDCs without which he said he could not properly formulate his takeover offer. The demonstration he saw at L&H's office at Leper had convinced Veltmeijer that LDF had definite speech technology capability and hence value. He wanted to secure that technology.

24 Shortly after the EOGM, Veltmeijer requested Snauwaert for a statement of the assets of the LDCs. Through his lawyers, M/s Mattjis, Van Roy, Voet & Co ("Voet & Co"), Snauwaert sent a letter dated 13 June 2001 ("the 13 June letter") which contained a schedule of the bank balances of the various LDCs. The schedule showed that the plaintiff, the dot com company and its subsidiaries had substantial cash balances in their bank accounts maintained with KBC Bank NV Singapore branch ("KBC") as well as in the account the plaintiff maintained with the Development Bank of Singapore ("DBS"). All the accounts were US dollar-denominated.

25 As the loan expired on 31 May 2001, Panis wrote on the defendant's behalf to Snauwaert on 1 June 2001, inquiring what steps LDS proposed to take to recover the loan from the plaintiff and the dot com company. Voet & Co replied on 11 June 2001 to say that although the loan was due in turn from the plaintiff and the dot com company on 25 May 2001, neither company was in a position to pay LDS to enable LDS in turn to pay the defendant. Voet & Co proposed that LDS assign to the defendant its sub-loan to the plaintiff and the dot com company, in order to discharge the loan.

26 Based on the schedule attached to the 13 June letter, Veltmeijer realised that the defendant could recover some of the loan moneys from the bank balances of the plaintiff and its subsidiaries if he accepted Snauwaert's assignment proposal. When he testified, Veltmeijer explained that the defendant had no other option. By June 2001, the guarantees given by the three sureties were valueless. The three sureties had been taken away in handcuffs for questioning on or about 27 April 2001 and had been detained, pending investigations and/or the filing of criminal charges against them. L&H had collapsed (see [18] *supra*) and it was the subject of separate investigations in Belgium and of class actions in the United States. Every newspaper and television station in Belgium talked about L&H's spectacular fall and everything the company owned was seized. Veltmeijer testified he was advised by his lawyers that if the defendant sued, it would be 200th creditor in the queue. In any case, because of the pending criminal investigations, Belgian law prohibited the commencement of civil proceedings until the criminal proceedings were completed. When Veltmeijer told Panis that the defendant would not accept the assignment if he had to give up the defendant's rights against the three sureties, the latter reportedly said, "Then they won't do it".

27 By an agreement dated 14 June 2001 ("the Assignment"), LDS assigned to the defendant its debt of €1.5m due from the plaintiff and its debt of €0.5m due from the dot com company. Snauwaert signed the Assignment on behalf of LDS while one M A Verhaagen was authorised to sign on the defendant's behalf. Notice of the Assignment was given to the plaintiff on 22 June 2001 by M A Verhaagen and acknowledged by the plaintiff on 25 June 2001. In the Notice of Assignment, the defendant also demanded payment from the plaintiff of the sum owed to LDS.

28 According to Veltmeijer, pursuant to a request from Voet & Co dated 19 June 2001, he had agreed that the defendant would not exercise its rights as assignee, in such a manner as to leave the

plaintiff and the dot com company without sufficient funds to carry out their daily administrative functions.

29 On 3 July 2001, pursuant to the Assignment, the defendant commenced proceedings against the dot com company and the plaintiff in Suit Nos 824 and 825 of 2001 respectively. The defendant's claim against the dot com company was for US$558,499 (equivalent to €0.5m) whilst the claim against the plaintiff was for US$1,872,240 (equivalent to €1.5m).

30 Neither company entered an appearance to the two writs of summonses. Consequently, on 12 July 2001, the defendant obtained judgment in default of appearance against the dot com company and the plaintiff in the principal sums of US$558,499 and US$1,872,240 respectively (not including contractual interest at 16% per annum and costs). Demands for the judgment debts were made by the defendant's solicitors but there was no response from either the dot com company or the plaintiff.

31 Accordingly, based on the information contained in the schedule to the 13 June letter, the defendant's solicitors commenced separate garnishee proceedings against KBC and DBS on the judgments obtained against the plaintiff. The garnishee orders *nisi* were made absolute against KBC and DBS on 8 August 2001 in the sums of US$204,543.98 and US$91,546.48 respectively. On 10 August 2001, KBC paid Panis' firm, AGPV, the sum of S$308,931.47 (equivalent to US$204,543.98). A sum of US$5,000 was left in the KBC account in accordance with the agreement reached between Snauwaert and the defendant (see [28] *supra*). DBS paid the sum of US$91,347.04, also to AGPV, on 21 August 2001, leaving a balance of US$113.58 in the plaintiff's account.

32 Thereafter, various sums of moneys were deposited into the DBS account of the plaintiff by three LDCs, *viz* The Taiwanese LDC Pte Ltd, The Vietnamese LDC Pte Ltd, The Malay LDC Pte Ltd, as well as the dot com company. This was apparently done on the instructions of Snauwaert as the managing director of all four companies. I should add that the plaintiff's account with KBC was closed on 19 September 2001 and the credit balance in the account was transferred to the DBS account.

33 On 11 October 2001, Snauwaert tendered his resignation as director and managing director of the plaintiff as well as his directorships of the plaintiff's subsidiaries and the dot com company. Under Singapore law, Snauwaert's resignations would not have been effective as no substitutes were appointed to replace him. According to searches produced in court by counsel for the defendant, the six Belgian subsidiaries of the plaintiff as well as other LDCs were put into liquidation on various dates in 2002 to 2003.

34 On 9 November 2001, the defendant's solicitors applied to garnish the DBS account again. By then the credit balance in the account was US$250,346.98. On 26 November 2001, the garnishee order *nisi* was made absolute against DBS in the sum of US$250,346.98. On 18 December 2001, DBS discharged the garnishee order absolute by remitting to AGPV the sum of US$250,145.08 (less a deduction of S$140 for the costs of DBS).

35 The defendant filed a proof of debt for (the balance of) its claim with the liquidators. The defendant's proof of debt and those of other creditors of the plaintiff have not been adjudicated upon as the plaintiff has no assets and there is nothing to distribute. Tan as director had submitted on the plaintiff's behalf a list of creditors to the liquidators, which list included LDS.

The claim

36 The liquidators filed this suit on 6 May 2003. In the Re-Amended Statement of Claim, it was

alleged that Snauwaert had breached his fiduciary duties as a director of the plaintiff in actively assisting the defendant to recover US$546,152 from the plaintiff to the prejudice of the plaintiff's other creditors. As the sole person authorised to operate the plaintiff's KBC and DBS bank accounts, Snauwaert's conduct had caused the plaintiff to unfairly prefer the defendant in the plaintiff's insolvency over its other creditors, within the meaning of s 99(1)(b) of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("the Bankruptcy Act") read with s 329 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Companies Act"). It was alleged that the plaintiff had failed to take steps to ensure that its only assets at the relevant time, *viz* the funds in its bank accounts which were the subject matter of the three garnishee proceedings, were preserved and distributed *pari passu* amongst all its creditors rather than made only available to a single creditor.

37 In the alternative, it was pleaded that the defendant was at all material times "a person connected" with the plaintiff's sole shareholder, LDF, within the meaning of reg 2 of the Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Ed) ("the Companies Regulations") and/or was "an associate" of the plaintiff's sole shareholder, LDF, within the meaning of s 101 of the Bankruptcy Act read with regs 4 and 5 of the Companies Regulations and s 329(1) of the Companies Act.

38 The liquidators alleged that the plaintiff was influenced by a desire to put the defendant into a position which, in the event of the plaintiff's insolvency, would be better than the position the defendant would otherwise have been in if those acts had not been done or had not been suffered to be done.

39 It was further alleged that the unfair preferences given to the defendant took place within the period of two years ending with 22 March 2002, *viz* the date of presentation of the winding-up petition. Consequently, the time at which each of the unfair preferences was given was a "relevant time" within the meaning of s 100(1)(b) of the Bankruptcy Act read with s 329(2)(a)(i) of the Companies Act.

40 The plaintiff alleged that the defendant knew or ought to have known that Snauwaert was a director of the plaintiff and owed fiduciary duties to the plaintiff, that the plaintiff was insolvent at the material time, that Snauwaert allowed the defendant to garnish the plaintiff's moneys to the prejudice of the plaintiff's other creditors and that Snauwaert's personal interest in LDS conflicted with the duties he owed to the plaintiff. As such, the liquidators alleged that the defendant held and continues to hold the moneys it had garnished as constructive trustee for, and is liable to account for the same to, the plaintiff.

41 In its Re-Amended Defence, the defendant denied that Snauwaert was a director of the defendant or was a person in accordance with whose directions or instructions the directors of the defendant were accustomed to act. The defendant pleaded that Snauwaert was not a "person connected with" or an "associate" of the defendant within the meanings defined in the Companies Regulations and Bankruptcy Act respectively.

42 The defendant contended that the controlling mind and will of the defendant at all material times remained with Rozea, its parent company, none of which shareholders (the two Veltmeijers and their brother-in-law) exercised any control whatsoever over LDF, the plaintiff's parent company. Control over LDF was exercised by its board of directors and/or by M&N, its main shareholder.

43 The defendant denied that the execution of the Assignment was a breach of the fiduciary duties Snauwaert owed to the plaintiff. The defendant, *inter alia*, averred that LDS, the LDCs, the plaintiff and its subsidiaries were vehicles set up by nominees or associates of the senior management

of L&H as part of a fraudulent design to inflate revenues and profits of L&H, thereby artificially boosting its stock to benefit L&H and/or its senior management. The defendant alleged that Snauwaert was a nominee of the senior management of L&H and acted on the latter's instructions. It was further alleged that Khatchadourian was a nominee or associate of Snauwaert and/or of L&H who knew or ought to know of the fraudulent design. The defendant questioned the veracity of Khatchadourian's loan of US$36m to the plaintiff which was alleged to appear on a one-page document made in Beirut and did not state the purpose nor require any collateral.

44 The defendant contended that the Assignment did not change the plaintiff's legal or financial position and denied that the plaintiff owed any duty to its creditors to take any steps to preserve any of its assets for the benefit of other creditors against the lawful action of one creditor. It was contended that if the plaintiff was insolvent at the material time, it was due to the alleged loan of US$36m (and the interest accruing thereunder) of Khatchadourian. If indeed the plaintiff was insolvent at the material time (which was denied), the defendant pleaded that the fiduciary duties owed by Snauwaert as a director did not extend to taking steps to preserve the plaintiff's assets against the lawful action of a creditor enforcing its legal rights.

45 The defendant also contended that Suit No 825 of 2001 was an incontestable action to which the plaintiff had no defence and there were no grounds for staying enforcement of the judgment in the suit.

46 As for the garnishee proceedings, the defendant averred that they were three separate and independent transactions so that only the last garnished payment received on 18 December 2001 fell within the period of six months ending with 22 March 2002.

47 It was further pleaded that Snauwaert, in his capacity as director of LDF and with the authority of its shareholders, had furnished the schedule of assets attached to the 13 June letter for the purpose of enabling Veltmeijer to evaluate what assets LDF and its subsidiaries had. (The Defence did not elaborate on the purpose of Veltmeijer's evaluation.)

The evidence

The plaintiff's case

48 Hutchinson was the only witness for the plaintiff. At the outset, I had inquired of counsel for the plaintiff and was told that Snauwaert would not testify as he was outside the jurisdiction of our courts and was unwilling to be a witness. Further, although she was within jurisdiction, Tan was not called to testify either, as Hutchinson formed his opinion (after interviewing her) that she was only a nominee director who simply followed Snauwaert's instructions. This was apparently confirmed by Snauwaert whom Hutchinson had interviewed outside jurisdiction, in the presence of a lawyer from Voet & Co. Hutchinson had in his affidavit evidence repeated what he had learnt from Snauwaert, that the latter had acted on the instructions of the senior management of L&H on all the significant transactions of the plaintiff and its subsidiaries. This fact was common ground between the parties. I should point out that in press reports which appeared after the collapse of L&H, Snauwaert was described as "the front man" of L&H.

49 In the course of his cross-examination, Hutchinson revealed that Khatchadourian, who was/is the plaintiff's largest creditor, was funding this litigation. The defendant and their counsel viewed this fact as sinister and the real motive for mounting this suit. It was suggested in the Defence and in Veltmeijer's testimony, that Khatchadourian's loan and default judgment of US$36m were highly suspect. I can only say that by the same token, the same criticism can be levelled against the

defendant's default judgments obtained in Suit Nos 824 and 825 of 2001. This suit is not the proper forum for the defendant to raise its doubts on the *bona fides* of the motives of Khatchadourian and/or his loan since the winding-up proceedings were based on the judgment that Khatchadourian had obtained pursuant to his loan; it is far too late. The circumstances surrounding Khatchadourian's loan are not relevant for my purpose. In his testimony, Hutchinson had distinguished Khatchadourian's personal loan as straightforward as compared with the convoluted manner (see [51] *infra*) in which loans to and from the plaintiff were channelled by Snauwaert.

50 In his testimony, Hutchinson said the plaintiff was clearly insolvent at the time of the garnishee proceedings, based on its accounting and financial records. The plaintiff's balance sheet as at 31 August 2000 showed that its liabilities totalled $4,440,153 whilst its profit and loss accounts as at that date showed it suffered a loss of $4,439,255. It was also noted that the plaintiff was unable to repay the loan on its due date of 31 May 2001.

51 Hutchinson had, in the course of his investigations, uncovered a large number of transactions which tied the plaintiff to L&H. He had seen in the plaintiff's cash books a number of loans which were described as from "a consortium of Belgian investors". He noted that funds were usually channelled through companies controlled by Snauwaert or through Snauwaert's own bank accounts. The funds were ultimately traced back to the three sureties. Indeed, the case pending against the three sureties was that they had borrowed money and channelled the funds through a number of their offshore companies, including the plaintiff and its nine subsidiaries.

52 Based on the transactions that he had seen, Hutchinson's view was that there was a connection between the plaintiff, Snauwaert and the defendant. The level of co-operation between Snauwaert and the defendant in enabling the latter to recover money from the plaintiff was not an ordinary third party relationship. It did not make commercial sense for the defendant to accept an assignment from LDS of the plaintiff's debt when the plaintiff was already in default on its loan from LDS, particularly when the loan was guaranteed by the three sureties. He noted that no attempt was made to call on the guarantee before the taking of the Assignment. It was even more noteworthy that the Assignment released LDS without recourse to the three sureties. The transaction made no sense other than to allow access to cash that was available through the plaintiff. As the lender, the defendant was in a far stronger position to dictate terms to the borrower, LDS, than *vice versa*. The defendant could have gone against LDS and put it into liquidation. In that event, there would have been no need to release the three sureties, who were all very wealthy individuals in the past and could be expected to have assets. The release of the three sureties was even less comprehensible viewed in the light of Veltmeijer's testimony that it was on the comfort of their guarantee that the defendant had granted the loan.

53 The plaintiff had asserted[2] that Snauwaert was the controlling mind of the defendant on whose directions or instructions the directors of the defendant were accustomed to act. Cross-examined on whether he disputed that the controlling mind of the defendant and its parent company, Rozea, was in fact the Veltmeijer brothers and their brother-in-law, Hutchinson candidly admitted that he had no way of knowing who was in fact the controlling mind of the defendant. Again, Snauwaert would have been a crucial witness in this regard and his absence from court was most unfortunate.

54 On the omission to defend Suit Nos 824 and 825 of 2001, Hutchinson explained that Snauwaert and Tan should have taken legal advice on what steps to take, knowing the plaintiff was insolvent. One such step would have been to file for voluntary liquidation of the plaintiff and let the provisional liquidator evaluate the merits of the two claims.

55 On the schedule to the 13 June letter, Hutchinson opined that if indeed Veltmeijer was

serious about investing in LDF, Veltmeijer would have requested for more information on the company than a list of its bank accounts. An investor would have wanted to know the company's assets and liabilities. Further, as D&T were his appointed financial advisers for the proposed takeover of the company, why did Veltmeijer have to do his own evaluation of LDF's assets? Hutchinson pointed out that at the EOGM which Veltmeijer attended, he had already received a set of the company's accounts. (Indeed, Veltmeijer received two sets of accounts, one set for LDF as a going concern and the other in the event of its liquidation.) If he already had the bank account information then, Hutchinson questioned why Veltmeijer was asking for it again in the following month. (In its closing submissions, the defendant offered an explanation – Veltmeijer knew what the liabilities of LDF and its subsidiaries were from the status report handed to him by Snauwaert, but not its assets. As it was a known fact by then that all the companies were mere letter boxes, Veltmeijer knew they would only incur administrative, not operational, expenses; the companies' liabilities for administrative expenses would also be only nominal.)

56 The greater part of Hutchinson's testimony was based on conclusions that he had reached after reviewing all the relevant documents and transactions and from the interviews that he had conducted overseas, including Belgian authorities involved in the ongoing investigations on L&H and the three sureties. Very little of Hutchinson's evidence was based on contemporaneous events. Whilst I can appreciate the difficulties Hutchinson must have encountered in discharging his duties as liquidator, the lack of primary evidence and Snauwaert's absence from court hampered the plaintiff's case.

The defendant's case

57 The defendant first called to the stand JO Van Crugten ("Crugten") who was/is a common director of the three Luxembourg entities identified earlier in [5] as the defendant's directors. Besides himself, the individuals who made up the board of directors of the three director companies were Mrs CAM Peuteman and Mr Hermes and Mr Faber. Crugten deposed that there had been no changes in the directorship of the defendant's parent company, Rozea, from its inception.

58 Essentially, Crugten confirmed what has been set out in [5] to [7]. He further confirmed that Snauwaert was not and has never been a director of the defendant or of the director companies of the defendant. However, he had met Sanuwaert on 26 November 1999 at the signing of the loan agreement. Neither Crugten nor any of the other individual directors from the three director companies of the defendant had taken instructions at any time from Snauwaert. Crugten deposed that the directors took their instructions from the defendant's shareholders, *viz* the Veltmeijer brothers and their brother-in-law.

59 Crugten also confirmed the loan, the subsequent events which led to the Assignment, the proceedings in Suit Nos 824 and 825 of 2001 as well as the garnishee proceedings, concluding with the defendant's receipt of US$545,935.10 through their Belgian solicitors. He was also the author of the defendant's letter dated 10 November 2000 to LDS ([17] *supra*) written on Veltmeijer's instructions. These facts, together with Crugten's information on the corporate structures of the defendant and Rozea, were all well documented and could not be disputed by the plaintiff. Hence, Crugten's cross-examination was minimal.

60 Veltmeijer was the principal witness for the defendant and he was cross-examined *in extenso*. He revealed that when he was first approached to invest in a language development company, he expressed less interest as he preferred to invest in L&H. He was then told he would get a 20% return on his investment. That figure was revised subsequently to 15% along with changes in the investment proposal, culminating in the loan agreement with LDS. Because of the guarantee from

the three founders of L&H, Veltmeijer said he felt the loan was a low risk investment. He was so impressed by L&H's opening ceremony at Leper that he and his brother decided not to question Snauwaert or L&H further, for fear of losing the investment opportunity presented to them.

61 Questioned why the defendant had released the three sureties from the guarantee, Veltmeijer explained that at the time the loan was extended, it was represented to him that the defendant was the only lender who was given a guarantee. He subsequently discovered from newspaper reports that the representation was untrue as the three sureties gave many more guarantees for even bigger amounts than the loan. In his mind, the guarantee was "absolutely worthless" and it served no purpose to discuss with Panis further action on the guarantee. Veltmeijer was unclear whether Panis had or had not advised him that the defendant would have to obtain a fresh guarantee from the three sureties together with the Assignment, in order to preserve the defendant's rights. Counsel for the plaintiff made much of this vague recollection by Veltmeijer. As Panis was not called to testify, it served little purpose to pursue this line of questioning as it would only be pure speculation.

62 Counsel for the plaintiff questioned Veltmeijer as to why his family, and the defendant in particular, was prepared to lend to LDS, when Veltmeijer had been told that LDS was a language development company which was developing software based on the technology of L&H. Veltmeijer explained that it was not relevant whether he was making the loan to a language development company or a language service company as in his mind, he was lending to L&H. He believed he must have asked Snauwaert about LDS and had received the assurance the company was part of the L&H group. He was so trusting of Snauwaert that Veltmeijer did not even conduct a search on LDS in public records. Had he known he was lending to a letter-box company and there was no relationship between L&H and LDS, Veltmeijer said he would have refused to grant the loan. Although he conceded that the loan turned out to be a bad deal, Veltmeijer denied that LDS, Snauwaert and the defendant did not deal with one another at arm's length.

63 Having seen the demonstration on speech technology in September 1999, Veltmeijer said he was convinced that L&H was capable of doing what it touted and that the company had real value. When he met Snauwaert in February 2001, Veltemeijer formed the impression that Snauwaert was equally surprised as he was by the disquieting newspaper articles on L&H. That was why Snauwaert gave him the report prepared by L&H. Snauwaert tried to explain to Veltmeijer that press reports stating L&H had inflated its revenue (using licence fees from the LDCs) were untrue. At that same meeting, Snauwaert revealed to Veltmeijer that M&N actually owned LDF and had increased its share capital. Veltmeijer recalled Snauwaert saying something to the effect that as long as L&H survived, the loan would be repaid. Payment was also contingent on the fate of the LDCs. However, Snauwaert did not promise that LDS would repay the loan. Veltmeijer also suggested that LDS lacked the funds to institute proceedings against the plaintiff and the dot com company, for repayment of their respective loans.

64 Although the defendant could have sued LDS upon receipt of Voet & Co's letter dated 11 June 2001 (see [25] *supra*) stating its inability to repay the loan, Veltmeijer explained that he did not take legal action because doing so would have "disturbed" the relationship and it was not in his nature to sue so easily. By then, his attention was focused on purchasing LDF and/or the LDCs. It emerged in the course of his re-examination, that like many Belgian and other foreign investors, Veltmeijer could not believe that a conglomerate like L&H could collapse so suddenly almost overnight. He harboured hopes (like many others) that the company could still be saved by a new management team and in that eventuality, the guarantee would be good against the three sureties.

65 Just before he completed his acquisition of 499 shares in LDF from LDS, Panis' firm (AGPV)

had written on behalf of the defendant and the Veltmeijer group to M&N's lawyer on 25 May 2001. In his letter, Panis, *inter alia*, gave notice of the loan, informed M&N that Veltmeijer would be present at the EOGM and voiced his clients' sentiments that it would be a manifest abuse of M&N's majority position if it were to force through a decision at the EOGM to put LDF into bankruptcy, which decision the Veltmeijer group would strongly resist.

66 When he saw the accounts of LDF as at 31 December 2000 at the EOGM, Veltmeijer disagreed with the company's total write-off of its shares in the LDC. He felt there was value in the LDCs and in their shares. Although M&N had intended to liquidate LDF, Veltmeijer testified that M&N's management seemed to change its mind after his earlier letter dated 9 May 2001 to the CEO Ronald Everaert to say he wanted to take over LDF as a going concern. (I note however that in that same letter, Veltmeijer withdrew his counter-offer to M&N's offer (see [22] *supra*), after complaining that M&N had not reverted to him as promised with the information he had requested.) It may well be that M&N too decided to reconsider liquidating LDF after receipt of the letter dated 25 May 2001 from AGPV.

67 Veltmeijer revealed that after the three sureties were detained, there was a new management team in place at L&H. He met Denys in April 2001 at the office of L&H, as well as Philippe Bodson, the new CEO who was brought in to save L&H. The two were very receptive to Veltmeijer's statement that he intended to purchase the LDF group. Denys indicated he would give his full co-operation, declared that everything was negotiable and that L&H had to cut costs in order to survive. Eventually however, Veltmeijer gave up the idea of taking over LDF and the LDCs. Pressed by counsel for a date, Veltemeijer testified this would have been some time in November 2001, after the completion of the first round of garnishee proceedings but before the second round of garnishee proceedings against the DBS account. (LDF went into bankruptcy/liquidation on or about 28 November 2001.) Veltmeijer denied counsel's suggestion that he opposed the liquidation of LDF because of the defendant's Singapore proceedings.

68 Veltmeijer further denied that the minutes of meetings of LDF which he and Snauwaert attended made no mention of the Singapore proceedings because both of them deliberately wanted to suppress the information from M&N. Veltmeijer pointed out that a lot of discussions at meetings of LDF were not minuted. Such suggestion by counsel for the plaintiff was incorrect. In AGPV's letter to the Veltmeijer group dated 12 July 2001, Panis had stated that at the annual general meeting of LDF on 2 July 2001 ("AGM"), an announcement was made that the defendant had instituted proceedings in Singapore to recover its debt.

69 Counsel made much of the fact that it was the plaintiff, not the defendant, who produced the minutes of the meeting of LDF held on 21 November 2001 at Ghent. In the plaintiff's closing submissions, it was said that Veltmeijer deliberately withheld those minutes because it showed that he had voted against putting the company into liquidation. I do not accept that submission. Veltmeijer had said he could not recall having attended that AGM. However, his poor recollection of that and other events did not mean he was not truthful. I certainly did not form the impression that Veltmeijer was evasive in his answers under cross-examination. He had appointed legal and/or financial advisers for the loan, for his (aborted) takeover of LDF as well as for the Assignment. He was entitled to rely on such professional advisers to act in his best interests, including attending to correspondence and meetings on his behalf. I do not believe that Veltmeijer engaged in an elaborate (and expensive) charade when he appointed D&T and AGPV to assist him in his takeover of LDF; his intention was *bona fide* even though it did not come to fruition eventually. Neither do I accept the plaintiff's suggestion that Veltmeijer's motive in delaying the liquidation of LDF was to buy time for the Singapore proceedings, in order to recover the loan.

70 A considerable amount of time was also spent in cross-examining Veltmeijer on newspaper and Internet articles on L&H. Some articles were exhibited in Veltmeijer's affidavit of evidence-in-chief whilst others were included in the plaintiff's bundle of documents. As there is always a risk of misreporting by newspaper reporters and writers of articles, I was not prepared to accept the contents of the articles as the gospel truth. In any event, I did not see their relevance to the plaintiff's case or to the defence. All that the articles did was to confirm that the people behind L&H had by means of creative accounting engaged in an elaborate scheme to deceive investors and shareholders which succeeded, before *The Wall Street Journal* (in August 2000) questioned the veracity of the company's sales figures to its Korean customers as they showed a 60,000% rise in profit from US$97,000 in the first quarter of 1999 to nearly US$59m in the first quarter of 2000. An article in *The Wall Street Journal* of 9 April 2001[3] reported that an audit by PriceWaterhouseCoopers commissioned by the new management under Philippe Bodson had found that 70% of the nearly US$160m in sales booked by the Korean unit of L&H between September 1999 and June 2000 were fictitious.

The law

71 I turn now to the legislation relied on by the plaintiff in its pleadings. I start with s 99(1) of the Bankruptcy Act, which states:

> Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has, at the relevant time (as defined in section 100), given an unfair preference to any person, the Official Assignee may apply to the court for an order under this section.

72 Unfair preference is explained in s 99(3)(b) as:

> [A]n individual gives an unfair preference to a person if the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.

73 Section 100(1)(b) of the Bankruptcy Act states:

> Subject to this section, the time at which an individual enters into a transaction at an undervalue or gives an unfair preference shall be a relevant time if the transaction is entered into or the preference given in the case of an unfair preference which is not a transaction at an undervalue and is given to a person who is an associate of the individual (otherwise than by reason only of being his employee), within the period of 2 years ending with that day; …

whilst s 101 explains the meaning of "associate". For our purpose the following subsections therefrom are relevant:

> (1) For the purposes of sections 99 and 100, any question whether a person is an associate of another person shall be determined in accordance with this section.
>
> (4) A person is an associate of an individual whom he employs or by whom he is employed and for this purpose, any director or other officer of a company shall be treated as employed by that company.
>
> (6) 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.

74 The relevant provision in s 329 of the Companies Act states:

> (1) Subject to this Act and such modifications as may be prescribed, any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable under section 98, 99 or 103 of the Bankruptcy Act 1995 (read with sections 100, 101 and 102 thereof) shall in the event of the company being wound up be void or voidable in like manner.
>
> (2) For the purposes of this section, the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be —
>
> > (a) in the case of a winding up by the Court —
> >
> > > (i) the date of the presentation of the petition; …

75 "Person connected with a company" is defined in reg 2 of the Companies Regulations as:

> (a) a director or shadow director of the company or an associate of such a director or shadow director; or
>
> (b) an associate of the company.

76 Regulation 5 of the Companies Regulations states:

> In addition to the provisions of section 101 of the Bankruptcy Act by which the question whether a person is an associate of another person is to be determined, a company shall be regarded as an associate of another company if —
>
> > (a) the same person has control of both companies, or a person has control of one company and persons who are his associates, or he and persons who are his associates, have control of the other company; or
> >
> > (b) a group of 2 or more persons has control of each company, and such groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate.

The findings

77 In practical terms, it would have made little difference to the defendant's remedies even if a fresh guarantee had been extracted from the three sureties at the time of the Assignment. Whether the defendant's rights against the three sureties under the guarantee were preserved, or a fresh guarantee was obtained from them, does not detract from the fact that the three sureties were incarcerated at the material time. Civil proceedings against them (if allowed to be commenced under Belgian law) would be protracted. Chances of recovering the loan were slim if the defendant was only one in a long line of creditors who had secured similar guarantees from the three sureties not to mention that other creditors had far larger claims against the three sureties. Pursuing LDS and/or the three sureties to recover the loan may well have been an exercise in futility and/or ended in a paper judgment, not to mention the time and expense involved.

78 In the course of cross-examination, Veltmeijer's attention was drawn to Art 11 of the loan agreement, which gave the defendant the right to accelerate payment of the loan when certain default events spelt out thereunder occurred. Such events included the filing for bankruptcy by LDS and the company's failure to meet its obligations arising under the loan agreement. Veltmeijer's testimony was that when he met his lawyer on 22 January 2001 before his February meeting with Snauwaert, he had asked and was advised that no action could be taken on the guarantee until the loan was due and LDS had failed to pay. Veltmeijer was further told that none of the default events (save possibly for provision (j)) in Art 11 had occurred so as to enable the defendant to demand earlier repayment of the loan.

79 I am of the view that Art 11 would not have assisted the defendant at all by the time news broke out on the true financial position of L&H. It would have been too late for the defendant to call upon LDS for immediate payment of the loan. I do not believe the financial position of LDS would have been any better in mid-2000 (when disquieting press reports on L&H first appeared) than on 1 June 2001 when the loan became due. In mid-2000, the plaintiff and the dot com company would still not have been able to pay LDS and LDS in turn would not have been able to pay the defendant. It bears remembering that six months before the loan became due, the defendant had written to LDS on 10 November 2000 to inquire on the relationship between L&H and LDS. Snauwaert's reply ([17] *supra*) had categorically stated that the two companies were not related. No safeguard provisions could have helped the defendant to recover the loan then as the defendant did not know (until much later) that contrary to Snauwaert's reply, the fate and fortunes of LDS were inextricably linked to that of L&H.

80 As a shareholder of the defendant's parent company, Veltmeijer's main concern, not unnaturally, was how to get back his family's money; the Assignment represented the best or only prospect of doing so. What was surprising was the extent Snauwaert assisted the defendant in this regard.

81 One is left to speculate on Snauwaert's motives. Why did he go out of his way to ensure the Assignment effectively enabled the defendant to recover the loan in part? His assistance extended to crediting the DBS account with moneys that came from the various LDCs and the dot com company. I very much doubt that Snauwaert's motives were altruistic or that he was prompted by his conscience. For reasons best known to Snauwaert, he felt beholden to the three sureties who were the founders of L&H. He was not at risk personally as he was not a guarantor although the Assignment saved his company, LDS, from being sued as the original borrower of the loan. Snauwaert made sure the three sureties were unconditionally released from the guarantee in exchange for the Assignment. In consideration thereof, the defendant was assured of recovering the loan because Snauwaert took steps to put substantial funds into the plaintiff's two bank accounts of which he was the sole signatory.

82 In the absence of Snauwaert as a witness, the plaintiff could not challenge nor rebut the testimony of the defendant's first witness that Snauwaert was not, and had never been, a director of the defendant or of the three director companies of the defendant. Neither Crugten nor the individual directors from the three director companies had ever taken instructions from Snauwaert either; they took their instructions from the defendant's main shareholder, Rozea, *viz* Veltmeijer, his brother and his brother-in-law. Consequently, Snauwaert does not come within the definition of "associate" as defined in s 101 of the Bankruptcy Act or reg 5 of the Companies Regulations. Neither can he be said to be a "person connected with [the defendant] company" under reg 2.

83 In its closing submissions,[4] the plaintiff sought to argue that Snauwaert could be considered a "director" of the defendant within the extended meaning under s 4 of the Companies

Act, *viz* "a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act". The plaintiff submitted that the defendant was taking instructions from Snauwaert in connection with the garnishee proceedings, firstly on the Assignment and secondly in pointing out the assets available for seizure. It was argued that Snauwaert was a director of the plaintiff and a shadow director of the defendant thereby rendering the defendant an associate of the plaintiff.

84 In the alternative, the plaintiff submitted that by reason of Veltmeijer being a shareholder of and his intention to acquire LDF, the defendant was an "associate" of the plaintiff's sole shareholder, LDF, within the meaning of s 101 of the Bankruptcy Act.

85 It has to be borne in mind that M&N controlled LDF, not the defendant. Whilst Snauwaert was a director of and did indeed control LDS, the plaintiff and its subsidiaries, and was also a director of LDF, he did not control LDF nor did the directors of LDF act on his directions. Snauwaert had no control over the defendant either and it would be straining the language of reg 2 of the Companies Regulations to say he was/is "a person connected with" the defendant merely because he agreed to execute on behalf of LDS the Assignment in the defendant's favour, for reasons only known to himself. Equally, Snauwaert cannot conceivably come within the definition of an "associate" of the defendant under s 101 of the Bankruptcy Act merely because of his common directorship in LDS and the plaintiff's parent company, LDF.

86 Conversely, the fact that LDF's minority shareholder was Veltmeijer who happened also to be a shareholder of the defendant's parent company, Rozea, does not make the defendant an "associate" of the plaintiff within s 101 of the Bankruptcy Act or reg 2 or 5 of the Companies Regulations either. Neither does it render Veltmeijer a person who (a) could exercise sufficient control over LDF when the garnishee proceedings were ongoing and (b) who could prevent LDF from going into liquidation.

87 In para 9B of the Re-Amended Statement of Claim, the plaintiff alleged that the defendant alone or with Snauwaert had, at all material times and by reason of the defendant's rights arising from the default of LDS on the loan, the right to control LDS and was therefore an "associate" of the plaintiff within the meaning s 101 of the Bankruptcy Act. I accept the submission of the defendant that this plea should be rejected as it was a bare assertion which was not proved. The defendant had also pointed out an inconsistency in the plaintiff's case. If the Assignment was effective (which undoubtedly it was because of this suit), the defendant would not in any event have had control of LDS, as the Assignment released LDS from its obligations under the loan agreement.

88 It should be borne in mind that Veltmeijer asked for a statement of the assets of the LDCs and Snauwaert supplied, in response thereto, the bank balances of the LDCs; Veltmeijer did not specifically request for the information. Curiously enough, Voet & Co (again on Snauwaert's instruction) had voluntarily supplied to the plaintiff's Singapore solicitors, on 10 August 2001, information on the bank balances of *all* the LDCs in the hope that "the information might be useful".[5] By that date, I note that the orders *nisi* against the KBC and DBS accounts had been made absolute in the first round of garnishee proceedings. Was the information meant to assist the defendant in further execution proceedings?

Was the plaintiff insolvent when the garnished sums were paid to the defendant?

89 The plaintiff's case that the company was insolvent was based on s 100(4) of the Bankruptcy Act which states:

For the purpose of subsection (2), an individual shall be insolvent if —

(a) he is unable to pay his debts as they fall due; or

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

I accept the plaintiff's submission that the above subsection is to be read disjunctively on its wording.

90 Based on the extended meaning of "liability" in s 2(1) of the Bankruptcy Act, the plaintiff's liabilities would include present, future, certain or contingent liabilities. That meant the US$36m loan of Khatchadourian due on 27 December 2001 was a contingent liability that had to be taken into account to determine if the plaintiff was insolvent at the material time. The plaintiff's last audited accounts were for the financial period 19 June to 31 August 2000.[6] As at 31 August 2000, the plaintiff's balance sheet showed accumulated losses of $4,440,153. The US$36m loan (equivalent to S$61.2m) of Khatchadourian was classified as a term loan and/or long term liability against net total assets of $25,736,319. The plaintiff's profit and loss account showed a net trading loss of $4,439,255. The company's paid-up share capital was only $2. Were it not for Khatchadourian's loan, the plaintiff's net current assets would have exceeded its current liabilities by $25,736,329. (According to the notes to the accounts, Khatchadourian's loan was utilised as working capital by the plaintiff and bore an interest rate of 9.41% per annum.) Based on the definition in s 100(4)(b) of the Bankruptcy Act, the contingent liability of US$36m (repayable more than two years after 31 August 2000) rendered the plaintiff insolvent.

91 As the parties in my view were neither "associates" nor "connected persons", the "relevant time" for determination of unfair preference would not be the two years under subsection (1)(b) of s 100 of the Bankruptcy Act [73]. Instead, the "relevant time" is to be found in subsection (c) which states:

in any other case of an unfair preference which is not a transaction at an undervalue, within the period of 6 months ending with that day.

92 The winding-up proceedings were commenced on 22 March 2002. Therefore, if indeed there was undue preference, the relevant time under s 100(1)(c) of the Bankruptcy Act would commence from 22 or 23 September 2001. Using 22 September 2001 as the cut-off date, the only payment that would be caught would be the third garnished sum, *viz* US$250,346.98, paid by DBS on 18 December 2001 pursuant to the second round of garnishee proceedings which were commenced on 9 November 2001. As the first round of garnishee proceedings was concluded by August 2001, the defendant is entitled to retain the two sums obtained therefrom totalling US$296,090.46. In this connection, I reject the plaintiff's alternative plea[7] that the acts complained of were so closely connected as to form one transaction.

93 The next question to address is, was undue preference given by Snauwaert on the plaintiff's behalf to the defendant within the meaning of s 99(1)(b) of the Bankruptcy Act in relation to the sum of US$250,346.98? Did Snauwaert put the defendant in a better position by the Assignment than it would have been in otherwise?

94 The plaintiff had pleaded[8] that Snauwaert owed and breached his fiduciary duties as a director. This was not denied by the defendant and hence is not in issue. What the defendant asserted[9] was that Snauwaert's duties as a director of an insolvent company *did not extend to taking steps* to preserve the plaintiff's assets against the lawful actions of a creditor enforcing its

legal rights. The defendant, however, agreed that directors of an insolvent company have a duty to consider the interests of its creditors (see *Federal Express Pacific Inc v Meglis Airfreight Pte Ltd* [1998] SGHC 417) but submitted the duty only extended to not acting to the prejudice of the creditors. It was submitted that the Assignment was not an act of the plaintiff. As such, it caused no prejudice to the plaintiff's creditors and did not affect the legal and financial nature of the plaintiff.

95 Pausing here for a moment, it cannot be disputed that were it not for the Assignment, the defendant would have had to sue the original debtor, LDS, under Belgian law when the loan remained unpaid after 31 May 2001. It would not have sued LDS in Singapore. Had the defendant obtained judgment in Belgium against LDS, it could not have garnished the plaintiff's debt to LDS under Singapore law. Different jurisdictions would be involved and the defendant would not have been a judgment creditor under Singapore law. Snauwaert's act, in his capacity as a common director of LDS and the plaintiff, in giving the Assignment undoubtedly overcame the defendant's legal difficulties and I reject the defendant's arguments to the contrary.

96 Based on the scenario in [95], it is my view that Snauwaert's conduct fell squarely within s 99(1)(b) of the Bankruptcy Act. I had observed earlier at [81] that Snauwaert went out of his way to make the Assignment an effective instrument for the defendant to recover the loan (in part). In its closing submissions,[10] the defendant argued that as the execution of the Assignment by Snauwaert on behalf of LDS was in discharge of his duties owed to the defendant as a creditor, it was not influenced by a desire to put the defendant in a better position than other creditors. I disagree. The fiduciary duty owed by Snauwaert to act in the plaintiff's best interests took precedence over any duty he owed to third party creditors, let alone to a particular creditor.

97 As the defendant's closing submissions[11] conceded that the moneys in the KBC and DBS accounts totalling US$546,152 constituted trust property, the only question that needs to be determined is whether the defendant is liable to account for the last sum garnished, as constructive trustee of the plaintiff.

98 Both sides agreed that the following requirements founded a constructive trust, *viz*:

(a) a particular property was subject to a trust;

(b) there was a transfer of that property by a fiduciary;

(c) the transfer was in breach of the fiduciary's duties;

(d) the defendant received the property or its traceable proceeds;

(e) the receipt was for the defendant's benefit;

(f) the defendant received the property with knowledge that it was trust property and that it had been transferred in breach of trust.

In this case, items (a) to (e) are clearly satisfied; the only issue is item (f). Did Veltmeijer know in relation to the sum of US$250,346.98 that the defendant was receiving trust property and that it had been transferred in breach of trust?

99 To answer that question, it is necessary to go back to the time of the Assignment. Whatever may have been the motives of Snauwaert in revealing the bank balances of the various LDCs by the 13 June letter, there is no doubt in my mind that Veltmeijer was persuaded by the healthy balances of

the LDCs to accept the Assignment on the following day, as a viable alternative for the defendant to recover the loan. Consequently, he knew or must have known that Snauwaert's act of assigning the debt of the plaintiff was instrumental in the defendant's obtaining US$546,152, at a time when Veltmeijer had been told personally that LDS could not repay the loan due to the plaintiff's default on the loan. Moneys to repay the loan had to come from other sources of the plaintiff, which sources were revealed to Veltmeijer in the 13 June letter. It is not an insignificant fact that Veltmeijer and Snauwaert even agreed that the defendant would not garnish *all* the moneys in the KBC account but would leave US$5,000 for the plaintiff's operating expenses. The action to recover the loan by way of the Assignment was pre-planned. Accordingly, I answer the question posed in [98] above in the affirmative.

100 I find that the plaintiff has succeeded on its claim in relation to the third sum garnished of US$250,346.98. Consequently, there shall be judgment for the plaintiff against the defendant for US$250,346.98 with interest at 8% from 18 December 2001 (date of receipt of the sum by AGPV) and costs.

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[1]See PB15

[2]In para 7 of the Statement of Claim

[3]See PB15-22

[4]Para 5.6.3

[5]See 1AB 114

[6]See 2AB586-593

[7]In para 33A of the Statement of Claim

[8]In para 5A of the Statement of Claim

[9]In para 16A of the Defence

[10]Para 16

[11]Para 17