Amrae Benchuan Trading Pte Ltd (in liquidation) v Tan Te Teck Gregory [2006] SGHC 181

Case Number : Suit 832/2005

Decision Date : 13 October 2006

Tribunal/Court : High Court

Coram : Sundaresh Menon JC

Counsel Name(s) : Narayanan Vijay Kumar (Vijay & Co) for the plaintiff; The defendant in person

Parties : Amrae Benchuan Trading Pte Ltd (in liquidation) — Tan Te Teck Gregory

Companies – Winding up – Payments made by company to defendant two years before winding up – Defendant ex-employee of company and married to niece of company director – Whether defendant "associate" of company at time payments made – Whether payments constituting undue preference recoverable by company liquidators upon winding-up of company – Sections 98, 99, 100 Bankruptcy Act (Cap 20, 2000 Rev Ed), s 329(1) Companies Act (Cap 50, 1994 Rev Ed)

13 October 2006 *Judgment reserved.*

Sundaresh Menon JC:

Background

1 The plaintiff is a company in liquidation. It brought this claim against the defendant, Gregory Tan Te Teck, who had been its employee. The action was brought with a view to recovering payments that had been made to the defendant by the plaintiff. Just under two years after these payments had been made, insolvency proceedings were commenced against the plaintiff. The plaintiff alleges in this action that these payments constitute an undue preference and hence are liable to be recovered by the liquidator. The principal question raised is one that concerns the circumstances in which a liquidator may properly challenge transactions that were entered into prior to the onset of a company's insolvency. However, it also presents an occasion to re-examine the appropriate role and approach of liquidators to the initiation and prosecution of litigation in the name of the company.

2 It is significant to note at the outset that this was the latest in a series of lawsuits that have their genesis in a business relationship involving some or all of the plaintiff, its former directors, the defendant and another entity known as Niklex Supply Co ("Niklex") in relation to commercial arrangements for the sale and supply of crystal ware. I refer here to the decisions of:

(a) Lai Kew Chai J in *Tang Yoke Kheng v Lek Benedict* [2004] 3 SLR 12;

(b) Andrew Ang JC (as he then was) in *Tang Yoke Kheng v Lek Benedict (No 2)* [2004] 4 SLR 788 ("*Lek Benedict (No 2)*");

(c) The Court of Appeal in the appeal from the decision of Ang JC in *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR 263 ("*Lek Benedict (No 2)(CA)*");

(d) Tan Lee Meng J in *Re Tang Yoke Kheng* [2006] 1 SLR 351; and most recently,

(e) Lai Siu Chiu J in *Amrae Benchuan Trading Pte Ltd v Lek Benedict* [2006] 3 SLR 141 ("*Amrae Benchuan*").

3 Benedict Lek and Joseph Lim Wee Chuan (collectively "Lek and Lim") were shareholders and directors of the plaintiff. The defendant was an employee of the plaintiff from 1994 until December 2001. At the material time, the defendant was employed as a sales executive and was paid a monthly salary of $2,400.

4 On 22 August 2003, Niklex presented a petition to wind up the company. The company was wound up some weeks later on 19 September 2003. The Official Receiver was originally appointed as the liquidator but subsequently by an order of court dated 25 May 2005, Mr Don Ho Mun Tuke was appointed as the liquidator and I refer to him as such.

5 The company had been carrying on business as a distributor of Bohemian crystal, supplying its wares to a number of leading retailers in Singapore. At some point, the company started to obtain supplies from Niklex. Lai Siu Chiu J in *Amrae Benchuan* found that Niklex was a sole proprietorship registered in the name of Mdm Tang Yoke Kheng but that in fact she was a front for her husband Mr David Chan Choo Tuck ("Mr Chan"). The learned judge in that case also noted that the litigation in question, although brought in the name of the company, was being funded by Mr Chan. The background to the relationship between Mr Chan and Niklex on the one hand, and the plaintiff, Lek and Lim and the defendant on the other, is set out in some detail in the judgment of Lai J in *Amrae Benchuan* at [1] to [24] and it is not necessary for me to repeat those matters here.

Liquidators and litigation

6 However, the history of the proceedings before Lai J in *Amrae Benchuan*, and indeed in *Lek Benedict (No 2)* ([2(b)] *supra*) heard before Andrew Ang JC, is of more than passing interest to the present proceedings.

7 *Lek Benedict (No 2)* was an action brought against Lek and Lim and the defendant in the present proceedings. Mdm Tang Yoke Kheng, trading as Niklex, was the plaintiff and she sought to make the defendants in that action liable for fraudulent trading under s 340 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act"). The plaintiff was unsuccessful but in dismissing the claim, Ang JC made the following observations at [23] and [27]:

> The Company could have used the money to keep instalment payments to the plaintiff but did not. I am not persuaded by the first and second defendants' reasons for stopping the instalment payments. In my view, at the time these repayments of loans were made, the Company was already insolvent, the plaintiff's demand of 31 January 2001 not having been met. A case could well be made out for saying that in making these and other payments (such as the payment of directors' fees accrued from previous years) the company was unfairly preferring the defendants over the plaintiff. In many instances, as shown in the defendants' document marked "DD-3", moneys paid by the Company to the defendants were channelled (by way of loan or otherwise) into Axum [a related company] which then paid the moneys the same day, or shortly thereafter, over to the Company to run down the outstandings owed by Axum to the Company. The moneys simply went one full circle. However strongly suggestive of unfair preference they may be, the facts are insufficient, in my view, to warrant a finding that the defendants are liable for fraudulent trading under s 340(1). …
>
> Accordingly, *albeit* with some regret, I dismiss the plaintiff's claim. It is still open to the plaintiff to request the Official Receiver (or any other liquidator appointed in his stead) to consider instituting proceedings against any creditors who may have been unfairly preferred for the recovery of moneys paid by the Company. I am unable to say more as the question whether or not there had been unfair preference was not before me.

[emphasis in original]

8 When the matter went to the Court of Appeal, that court in *Lek Benedict (No 2) (CA)* ([2(c)] *supra*) dismissed the appeal but made certain other observations at [15] suggesting that there were some unanswered questions. I note in passing that these unanswered questions appear to have been considered and disposed of by Lai Siu Chiu J (see for example at [67] to [68] of *Amrae Benchuan* ([2(e)] *supra*)). In any event, driven by the observations of Ang JC in *Lek Benedict (No 2)*, an action was brought by the liquidator of the plaintiff company against its two directors, Lek and Lim, in *Amrae Benchuan* seeking, *inter alia*, the avoidance of certain transactions under s 329 of the Act on the basis that these were undue preferences.

9 I think it is fair to say that Lai Siu Chiu J formed an adverse impression of Mr Chan (see [74]–[77] of *Amrae Benchuan*). The learned judge said as follows at [78]:

> It is no secret that the Liquidator's costs in these proceedings are to be borne by David [*ie*, Mr Chan]. That being the case, I cannot accept the Liquidator's assertion that Tang's various actions against the defendants or that David's conduct (according to counsel's submission) is irrelevant to the Company's claim herein or has no impact. On the contrary, Tang and David have everything to do with this suit. David used his wife's sole proprietorship, Niklex, to sell crystal ware to the defendants. He then used Niklex to sue the defendants and through Niklex, he is funding this litigation to recover moneys the defendants transferred out of the Company. The Liquidator may well be duty-bound at law to recover money which belonged to the Company but the motive of the party behind[,] and funding, this litigation is highly questionable and his conduct reprehensible.

10 Although this is not directly relevant to the decision I have reached, I make reference to this only because I think a liquidator has a special responsibility to retain a measure of detachment in the course of discharging his functions even if, as in this case, he is being funded by the single creditor of the company. The point has been considered and commented upon in two judgments of V K Rajah JC (as he then was) and those passages bear reiteration so that those engaged in the conduct of liquidations may be reminded of the special favour with which the court tends to view them and hence the special responsibility that is imposed upon them. In *Korea Asset Management Corp v Daewoo Singapore Pte Ltd* [2004] 1 SLR 671, Rajah JC made the following observation at [70]:

> Liquidators should always view matters through objective lenses. … They must be seen to be properly wearing the mantle of objective neutrality untarnished by any special interests, including their own fee considerations.

11 Although that was articulated in the context of a challenge against the liquidators on an issue involving a potential conflict of interest, the principle stated is of general application in so far as the conduct of liquidators is concerned. The reason for this is spelt out in another judgment of the same judge in *Liquidator of W&P Piling Pte Ltd v Chew Yin What* [2004] 3 SLR 164. At [20] of that judgment, Rajah JC noted as follows:

> Court-appointed liquidators are officers of the court and enjoy a unique standing in the insolvency process as they are perceived as not only serving private interests but also as concurrently discharging a public function. Deference to the office of liquidator should not, however, be equated with the unquestioning acceptance of his views or opinions. He is in many ways discharging responsibilities, not unlike those of an advocate, and as such, owes a higher duty to the court than to his clients – a duty that is on occasion overlooked.

12 Then at [29(a)] of the same judgment, the learned judge made the following further observations:

> There is an inclination to lean in favour of the views of the liquidator. He is presumed to be neutral, independent minded and acting in the best interests of the company: see Megarry J in *In re Rolls Razor Ltd (No 2)* [1970] Ch 576 at 592; and Sir Nicolas Browne-Wilkinson VC in *Cloverbay Ltd v Bank of Credit and Commerce International SA* [1991] Ch 90 at 104. Having a predisposition is not tantamount to accepting the assertions or opinions of the liquidator if it is incongruent with the discharge of his statutory functions. The court will be cognisant that, from time to time, liquidators overstep the mark in their zeal to discharge their duties, or they could be influenced by extraneous factors or collateral motives that might not dovetail with the company's interests.

13 I regard each of these pronouncements as having general application to liquidators in the conduct of their duties. In the context of the present case, I think the liquidator ought perhaps to have had these considerations at the forefront of his mind when responding to certain questions I asked him and which I refer to a little later at [43]–[44] below. It is also pertinent to note that although the litigation in *Amrae Benchuan* and in these proceedings was driven by the observations of Ang JC in *Lek Benedict (No 2)* which I have referred to, it would have been appropriate for the liquidator to reassess the position following the decision of the court in *Amrae Benchuan* where the very issues raised in *Lek Benedict (No 2)* were fully ventilated. This is especially so given the strong terms in which Lai J had expressed herself.

Procedural history

14 In any event, the action came on for hearing before me on 26, 27 and 28 July 2006. The claim initially included reliefs seeking the avoidance of unspecified transactions, which the defendant had contracted with the plaintiff, on the basis that these had been concluded at an undervalue. At the start of the case, I made three observations to counsel for the liquidator, Mr Narayanan Vijay Kumar. I noted first that the transactions said to have been contracted at an undervalue had not been particularised at all in the pleadings. I further noted that no expert evidence had been adduced as to what the true market value was in relation to those transactions. Thirdly, I noted that there was no agreed bundle of documents and that the principal evidence was being given by the liquidator himself. I drew the attention of counsel for the liquidator to the decision of the Court of Appeal in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769 and invited him to consider and make submissions on whether the pronouncements of the Court of Appeal in that case, on the implications of not having an agreed bundle, would present him with any difficulty.

15 After considering these matters, the liquidator, on the advice of counsel, decided not to proceed with the bulk of his claims. Instead, he opted to proceed only with a claim in respect of two payments made by the plaintiff to the defendant on 7 and 18 September 2001. These were for a sum of $50,000 and $30,000 respectively and had been made by way of repayment of certain debts due to the defendant from the plaintiff. The liquidator and the defendant (who was in person) then agreed upon a statement of facts. On the basis of the facts set out there the only issues for my decision were the following:

(a) whether these payments were undue preferences within the meaning of s 329(1) of the Act read with ss 98 to 100 of the Bankruptcy Act (Cap 20, 2000 Rev Ed); and

(b) whether the defendant was an "associate" of the plaintiff at the time of these payments so that the period for invalidating the payments under s 100(1)(*b*) of the Bankruptcy Act should be extended to two years.

16 Oral and written submissions were presented on behalf of the liquidator, and at Mr Kumar's request, time was allowed after the hearing dates reserved for this matter for further written submissions to be filed dealing with the issue of whether the defendant was an "associate" of the plaintiff. The defendant for his part principally relied upon the opening statement filed on his behalf by his solicitors just before the commencement of the trial, by which time they had been discharged.

17 In addition, the liquidator gave oral evidence. So too did Mr Chan although this was purely to prove certain documents.

The issues

Was the defendant an associate of the plaintiff?

18 I consider the second issue first, namely, whether the defendant was an associate of the company. This is potentially relevant for two reasons. If he were an associate (otherwise than by reason only of his being an employee of the plaintiff), then:

(a) under s 99(5) of the Bankruptcy Act a rebuttable presumption arises that the payment was influenced by the desire to prefer him; and

(b) under s 100(1)(*b*) of the Bankruptcy Act the relevant period for invalidating the transaction as an unfair preference is extended from six months to two years prior to the commencement of insolvency proceedings.

19 The provisions of the Bankruptcy Act are made relevant by virtue of s 329(1) of the Companies Act which provides that if a transaction may be avoided under the Bankruptcy Act had it been by or against an individual in the event of his bankruptcy, it shall be voidable if done by or against a company in its liquidation. The unsatisfactory nature of this arrangement for importing provisions from the personal insolvency regime into that for corporate insolvency was noted by the Court of Appeal in *Show Theatres Pte Ltd v Shaw Theatres Pte Ltd* [2002] 4 SLR 145 at [17]. In the article "The Avoidance Provisions of the Bankruptcy Act 1995 and Their Application to Companies" [1995] Sing JLS 597, Mr Lee Eng Beng makes the following concluding observations at 647–648:

> The introduction of the avoidance provisions into the bankruptcy legislation is timely and will no doubt herald a system of more comprehensive and effective protection for a bankrupt's creditors. With the exception of the few instances highlighted above, it is likely that the avoidance provisions will achieve their intended purposes satisfactorily.
>
> The same cannot be said of the application of the avoidance provisions to companies in winding up and judicial management. It is probably fair to say that the position is confused and convoluted. This is not due to any objection to the rationale of the avoidance provisions, but rather with the mechanics of rendering those provisions applicable to the corporate context. … In this connection, the need for urgent legislative reform, and relatively uncomplicated reform at that, cannot be over-emphasised.

20 Having examined this issue, I sympathise with those sentiments.

21 There is no dispute that the defendant was an employee of the plaintiff at the relevant time. However, under both s 99(5) as well as s 101(1)(*b*) of the Bankruptcy Act there is an exception in that those provisions do not apply to a person who is an associate of the insolvent party by reason only of his position as an employee. The question then is whether the defendant was an associate of

the plaintiff otherwise than by reason of his employment. Section 101 of the Bankruptcy Act provides that any question whether a person is an associate of another person *shall* be determined in accordance with the provisions of that section.

22 Where this is applied in the context of companies, it becomes necessary to examine the Companies (Application of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Rev Ed) ("the Regulations"). Regulation 2 provides that an "associate" means an associate of a person or company as determined in accordance with s 101 of the Bankruptcy Act as modified by reg 5 of the Regulations. Further, reg 2 introduces the term "person connected with a company" which is defined to mean a person who is a director or shadow director of the company, or who is an associate of such a director or shadow director, or who is an associate of the company.

23 Regulation 4 then provides that any reference to an associate of a person or an individual who has been adjudged bankrupt (except any such reference within s 101 itself of the Bankruptcy Act) shall be read as a reference to a person connected with the company that has been placed under judicial management or that has been wound up.

24 Finally (for present purposes), reg 5 provides that in addition to s 101 of the Bankruptcy Act, a company shall be regarded as an associate of another company in certain circumstances.

25 It is thus apparent that the provisions of s 101 of the Bankruptcy Act are to be applied with some modifications in the corporate context. In particular, if it could be shown that the defendant was an associate of either of the directors of the plaintiff, then he would be a person connected with the company.

26 Mr Kumar submitted several grounds upon which the defendant should be considered an associate of, or a person connected with, the company otherwise than by virtue of his position as an employee and I consider each of these.

27 The first provision of relevance which was relied on by Mr Kumar is s 101(6) which provides that a company is an associate of an individual who controls it on his own or with his associates. Section 101(8) provides that an individual shall be taken to have control of a company if he is entitled to exercise at least one-third of the voting rights or if the directors are accustomed to act in accordance with his instructions. On the evidence before me, the defendant was not a shareholder of the plaintiff at all and there was no evidence whatsoever upon which I could make a finding that Lek and Lim (who were the directors of the plaintiff at the material time) were accustomed to acting in accordance with the directions or instructions of the defendant. Therefore, this does not avail the plaintiff.

28 Reference was then made to reg 5 of the Regulations. However, reg 5 has no direct application to the facts before me because it is concerned with defining when one company may be regarded as an associate of another company. The issue at hand is whether the defendant as an individual is an associate of the plaintiff company either directly or by virtue of being an associate of one of its directors.

29 Mr Kumar then submitted that the provision excepting an employee from being an associate in the relevant sense for the purposes of s 99(5) and s 100(1)(*b*) of the Bankruptcy Act should be read as only applicable to the extent that the transaction being challenged related to the payment of such of the employee's debts as had been incurred *qua* employee. Put another way, Mr Kumar's submission was that the words "otherwise than by reason only of being an employee" found in s 99(5) and s 100(1)(*b*) should be construed to mean that the payment was made in respect of a claim on the

part of the payee arising "only by reason of being an employee". Thus, he submitted that a payment made in respect of a claim for wages for instance could come within the excepting provision. He submitted that if I were to hold otherwise, there would be a dissonance between these provisions and s 328 of the Act which recognises certain priorities for employee claims. In my view, this submission is plainly wrong. Firstly, this is not borne out by the express language of the two provisions in question. Further, s 328 is concerned with priority among creditors seeking to be paid out of the insolvent estate. An employee coming within that section is entitled to be paid his wages (to the extent provided there) ahead of the general pool of creditors in the event of a company's insolvency. That has nothing to do with an undue preference which may be set aside. The latter concerns payments made by the company before the insolvency regime has kicked in and which may in certain circumstances be set aside. There is thus no need for there to be an equivalence between these provisions because they relate to quite different things.

30 Mr Kumar submitted that this would mean an employee could circumvent the provision on priorities by "taking out" even more than he could claim a priority for under s 328 of the Act. This, with respect, is misconceived. An employee cannot "take out" money from a company at any time. If he is not an associate of the company or is an associate solely by virtue of being an employee and is paid a sum within six months of the onset of insolvency and that has the effect of preferring him over other creditors, then it can be attacked as an undue preference. If the payment is made more than six months before the onset of insolvency and he is not otherwise an associate, it cannot be impugned on this ground. That is a different matter from what he may claim a priority for under s 328 of the Act.

31 Mr Kumar also relied on s 101(3) of the Bankruptcy Act which provides that a person is an associate of an individual with whom he is in partnership. Mr Kumar submitted that I should accord this a broad interpretation and hold that the defendant was in partnership with, and therefore an associate of, Lek and Lim because they had shared interests in other companies. I disagree with this premise. The reach of the relevant statutory provisions is already very broad. The legislation is designed to cover a wide range of people with direct or indirect connections to the insolvent. This has been achieved through a number of express provisions and I see no need to further extend this by giving these provisions an unduly expansive construction.

32 Partnership as contemplated in s 101(3) of the Bankruptcy Act, in my view bears the meaning it has as a legal term and there is good reason for that. Partners are jointly as well as severally liable for the partnership debts and that shared exposure provides a sufficient explanation for the treatment of such persons as associates. In my view, persons who all happen to be shareholders in corporate entities would not *ipso facto* be associates. The only evidence in the agreed statement of facts was that the defendant and Lek and Lim were shareholders and directors of three other companies but in my view, this does not make them partners and hence, they are not associates within the meaning of s 101(3) of the Bankruptcy Act.

33 Mr Kumar's next submission was that the defendant is to be treated as a relative of Mr Lim who was a director of the plaintiff company at all material times, and that on this basis he is to be treated as a person connected with the plaintiff. The basis for this submission is found in s 101(2) read with s 101(7) and in s 101(8) of the Bankruptcy Act which sections provide as follows:

> (2) A person is an associate of an individual if that person is the individual's spouse, or is a relative, or the spouse of a relative of the individual or his spouse.
>
> (7) For the purpose of this section, a person is a relative of an individual if he is that individual's brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendent,

treating —

(*a*) any relationship of the half blood as a relationship of the whole blood and the step-child or adopted child of any person as his child; and

(*b*) an illegitimate child as the legitimate child of his mother and reputed father.

(8) References in this section to a spouse shall include a former spouse.

34 The combined effect of these provisions is as follows:

(a) Under s 101(2) a person will be an associate of another person, *inter alia*, if he is that person's spouse, or relative or relative's spouse.

(b) Under s 101(7) a "relative" is as defined there and under s 101(8) references to a spouse would include a former spouse.

35 Mr Kumar's submission rested on certain agreed facts, in particular, that for some years, the defendant had been married to Mr Lim's niece, one Ms Regina Sim Poh Choo. On the basis of those agreed facts, I find that:

(a) Ms Sim is a relative of Mr Lim by virtue of s 101(7) of the Bankruptcy Act;

(b) the defendant was Ms Sim's spouse by virtue of s 101(8) of the Bankruptcy Act since a reference to a spouse includes a former spouse; and

(c) the defendant was therefore the spouse of Mr Lim's relative.

36 It would follow from this that by virtue of s 101(2) of the Bankruptcy Act, the defendant was an associate of Mr Lim and by virtue of the Regulations, he was a person connected with the plaintiff. This is distinct from his status as an associate by virtue of his being an employee of the plaintiff. The effect of this therefore is to extend the period, within which transactions entered into by the plaintiff with the defendant may be invalidated, to two years from the onset of insolvency. As the two payments in question are within this extended period, they are liable to be invalidated if it can be shown under s 99(4) of the Bankruptcy Act that the payments were influenced by the desire to prefer the defendant. As to this, s 99(5) of the Bankruptcy Act applies to raise a rebuttable presumption that this is so where the payment is made to an associate.

Were the payments in question undue preferences?

37 I therefore turn to this issue now. I think it is pertinent at the outset to note a couple of points that emerged from the liquidator's evidence as well as from the findings and observations contained in the earlier decisions to which I have referred.

38 I have already quoted at [7] above the relevant extract from the judgment of Ang JC in *Lek Benedict (No 2)* ([2(a)] *supra*). What may be noted is the following:

(a) Ang JC spoke of money being paid by the company (*ie*, the plaintiff before me) to Lek and Lim and the defendant who then paid it to a company they owned, known as Axum Marketing Pte Ltd ("Axum"), which then paid it to the plaintiff to reduce the outstandings Axum owed to the plaintiff;

(b) In that context, Ang JC noted that the money went full circle and thought it might be suggestive of an undue preference; and

(c) Ang JC himself noted that he was making no finding on this as that issue was not before him.

39 The issue was then raised before Lai J in *Amrae Benchuan* ([2(e)] *supra*) in connection with a suit brought against Lek and Lim but not including the present defendant. Lai J found that where Lek and Lim had transferred stock worth $419,435.93 from the plaintiff to Axum without payment, they had no basis for doing so. The learned judge was satisfied that this was an undue preference and avoided it under the Act.

40 However, in relation to cash payments paid by the company to Lek and Lim, Lai J came to a different conclusion. There were two classes of such payments. The first was a series of payments amounting to $24,000 and $6,000 which were repayments of loans extended by Lek and Lim respectively to the plaintiff company. Lai J found that these repayments were *not* undue preferences because they had been made for the purpose of enabling these two persons to lend the money back to Axum and for Axum to pay the plaintiff for the supply of crystal. This was the series of transactions described by Ang JC as circular. This was how Lai J expressed her conclusion on these payments at [79] and [90] of her judgment:

> I then ask a pertinent question. Why did the defendants take moneys owed to them out of the Company? It was to lend to Axum so that Axum could pay the Company for the supply of crystal and for the Company in turn to pay Niklex. This was the finding in the third suit by Ang JC, who found that the money simply went one full circle (see [21]). It is clear therefore that the defendants did not benefit personally from their actions; they did not pocket the money from the Company.
>
> As for the withdrawals of $24,000 and $6,000 by the first and second defendants [Lek and Lim] respectively from the Company's funds, these were originally loans they extended to the Company. The defendants made the withdrawals in order to lend the money in turn to Axum. … I do not find that these withdrawals were done with a desire to improve the defendants' position as creditors in the event of an insolvent liquidation of the Company.

41 The key point is this: Lai J found that Lek and Lim had caused the plaintiff to repay them not out of a desire to improve their position as creditors in the event of an insolvent liquidation but because they wanted Axum to be able to pay the plaintiff for crystal that it supplied (see [79], [83]–[84] and [90] of *Amrae Benchuan*).

42 The second series of loan repayments that Lai J dealt with in *Amrae Benchuan* were moneys that Lek and Lim claimed they had to repay to others from whom they had earlier borrowed in order to assist the plaintiff. In other words, these were not channelled back to the plaintiff through Axum. Lai J did not accept the contentions of Lek and Lim in respect of these payments (see *Amrae Benchuan* at [91]).

43 When the liquidator took the stand before me, I asked him to explain why the case of the defendant in the present case was not the same as that of Lek and Lim in relation to the money that they had paid to Axum, which in turn had then paid the money back to the plaintiff. These were the payments that Lai J had found were not undue preferences. In that light and given her observations in that case, I wanted to understand whether and, if so, how the liquidator had reassessed the position. The liquidator testified that he thought the case of the defendant before me was materially

different, in that in the case before Lai J, she had found that the money had not gone into the pockets of Lek and Lim whereas, he suggested that in the present case, the money was repaid to the defendant.[note: 1]

44 I was then disturbed when the defendant himself cross-examined the liquidator and quickly established that the defendant, in common with Lek and Lim, had paid the money that had been repaid to him by the plaintiff, over to Axum, which then went back to the plaintiff *and* that the liquidator in fact knew this was so.[note: 2] It was plain therefore that the defendant's case was on all fours with that part of the case against Lek and Lim in respect of which the liquidator had failed before Lai J in *Amrae Benchuan*. Although that does not bind me, I think the outcome there should at the very least have caused the liquidator to assess its implications on the present case. Of greater concern were the liquidator's untenable responses to the questions I had asked him. In the light of the points I have already registered at [9] to [13] above, this left me with a sense of disquiet as to whether he had sufficiently considered what should properly drive the conduct of the liquidation.

45 Against that background, I turn to the law. I begin with a passage from the judgment of Kan Ting Chiu J in *Re Libra Industries Pte Ltd* [2000] 1 SLR 84 ("*Re Libra*"). The facts of the case are not material for present purposes but in considering the application of s 329 of the Act to the avoidance of undue preferences, Kan J followed the decision of Millett J in the English case of *Re MC Bacon Ltd* [1990] BCLC 324. Kan J noted as follows at [36] to [37]:

> Section 99 which was enacted in 1995 is similar to s 239 of the Insolvency Act 1986 of the United Kingdom. The provisions introduced changes to the insolvency law of both territories. The changes were discussed in *Re MC Bacon Ltd* [1990] BCLC 324 by Millett J with admirable clarity.
>
> He identified two significant departures from the old law. The first is that '(i)t is no longer necessary to establish a *dominant* intention to prefer. It is sufficient that the decision was *influenced* by the requisite desire.' The second departure is that 'it is no longer sufficient to establish an *intention* to prefer. There must be a *desire* to produce the effect.'

46 Kan J then cited the following passage from *Re MC Bacon Ltd* (at 335–336):

> A man is taken to intend the necessary consequences of his actions, so that an intention to grant a security to a creditor necessarily involves an intention to prefer that creditor in the event of insolvency. The need to establish that such intention was dominant was essential under the old law to prevent perfectly proper transactions from being struck down. With the abolition of that requirement intention could not remain the relevant test. Desire has been substituted. That is a very different matter. Intention is objective, desire is subjective. A man can choose the lesser of two evils without desiring either.
>
> It is not, however, sufficient to establish a desire to make the payment or grant the security which it is sought to avoid. There must have been a desire to produce the effect mentioned in the subsection, that is to say, to improve the creditor's position in the event of an insolvent liquidation. … Under the new regime a transaction will not be set aside as a voidable preference unless the company positively wished to improve the creditor's position in the event of its own insolvent liquidation.
>
> There is, of course, no need for there to be direct evidence of the requisite desire. Its existence may be inferred from the circumstances of the case just as the dominant intention could be inferred under the old law. But the mere presence of the requisite desire will not be sufficient by itself. It must have influenced the decision to enter into the transaction.

47 Both these decisions were followed by Lai J in *Amrae Benchuan* (see at [81] of her judgment).

48 There is a further aspect to be considered: When dealing with payments to associates, which give rise to a rebuttable presumption that the payment was influenced by the relevant desire, what is the approach to be taken in determining whether that presumption has been rebutted? On this, I have found assistance in two earlier decisions of this court. Firstly, Kan J in *Re Libra*, which I have already referred to, did touch on this. Kan J followed the decision of Lloyd J in *Wills v Corfe Joinery Ltd* [1998] 2 BCLC 75 ("*Wills*") and held at [42] to [45] and [50] to [51] of his judgment that:

> (a) the burden fell on the recipient of the payment to rebut the presumption that the payment was influenced by the relevant desire; and
>
> (b) in this regard, the court should look at all the relevant circumstances in order to determine whether there was sufficient evidence to conclude on a balance of probabilities that the payment was influenced by the relevant desire.

49 On the facts before him, Kan J noted as follows at [48] to [50]:

> In the light of the explanation and the payments, I accept that there was an established practice for Libra Industries to make payments into the account with Libra Holding without reference to specific invoices, and that the payments listed in the table were made in accordance with that practice. The reason for payment absent in *Wills'* case is present here.
>
> There is another distinguishing feature from that case. Libra Holdings was not repaid in full while other creditors were neglected. Over the period January 1995 to February 1997, Libra Industries paid $3,970,538 to Libra Holdings and $5,691,874 to 310 other creditors. After those payments were made, $153,421 was owing to Libra Holdings and $2,061,435 was owing to the other creditors.
>
> I took all these matters into consideration. Evidently, not every creditor was treated with perfect equality by Libra Industries. A company in its normal course of business may not treat all creditors equally for various reasons, eg the degree of goodwill with the creditor, the size of the debt, the need to continue trading with the creditor. This will hold true even when the company is in financial difficulty. In determining whether a payment is voidable for being preferential, Millett J's observations on the difference between desire and intention are instructive, and the former must be present.

50 A very similar approach was taken by Choo Han Teck JC (as he then was) in *Soh Gim Chuan v Koh Hai Keong* [2002] 4 SLR 212 where he noted as follows at [9]–[10], again in the context of a case where the presumption had been raised:

> In determining whether there was unfair preference the direct object of the court is to ascertain whether the bankrupt had been influenced by a desire to put the payee in a better position than he would have been, in the event of the bankrupt becoming a bankrupt. This exercise naturally involves a finding of fact to a large extent and thus would vary from case to case. For instance, the case cited before me, *Re Libra Industries (in compulsory liquidation)* [2001] 1 SLR 84 turned on its own facts, so different that I need not elaborate here. See also *Re MC Bacon* [1990] BCLC 324 in which [Millett J] emphasised that it is not sufficient merely to 'establish a desire to make payment or grant the security which it sought to avoid'. Otherwise, every payment in itself, other than perhaps, a payment under mistake, becomes an unfair preference.

> The act or the payment within the two years or six months prior to the bankruptcy by itself is of little significance otherwise every payment even to the bankrupt's grocer will, by the receipt of payment alone, be counted as an unfair preference. I now revert to the appellant's main point, that the respondents had not rebutted the presumption. ... From the evidence of the two respondents I accept that the payments were genuine payments of legal fees. There is nothing to indicate otherwise. Although counsel examining Mr Gwee did not challenge the size of the bills, I am of the view that on a broad scan, based on the nature of the suit in the High Court, the legal fees did not appear in any way excessive such that the intention of the payor to pay his solicitors in the ordinary course of business, can reasonably be doubted. From the evidence available on record, it would not be wrong for the assistant registrar to accept the payments as having being made in the ordinary course of business. As I have stated, every case turns on its own facts. In this case, I am of the view that by the nature of the payments in question, the evidence on record was sufficient to rebut the presumption of unfair preference.

51 In my judgment, in the light of the authorities, the following propositions may be advanced when considering whether a transaction may be successfully challenged as an undue preference:

(a) A person is taken to intend the natural consequences of his action. As every payment or grant of security potentially has the effect of preferring the payee or the grantee in the event of the paying company's subsequent insolvency, something more has to be shown. Otherwise, the question of preference would be determined in every case simply by undertaking an objective inquiry into whether in effect there had been a preference.

(b) The legislation in its previous form provided that what had to be shown was that the achievement of the preference was the predominant intention. That is no longer the case. What needs to be shown under the law as it now stands is that the payment was influenced by the desire to improve the creditor's position in the event of an insolvent liquidation.

(c) The analysis is to be undertaken by reference to the time of the impugned transaction: see *Wills* ([49] *supra*).

(d) Where the challenged transaction involves an associate, there is a rebuttable presumption that the company entered into that transaction under the influence of the relevant desire. In such a case, the court will examine all the facts, and determine whether on a balance of probabilities the presumption had been rebutted.

52 A transaction will therefore not be set aside unless the court is satisfied that at the time of the transaction the company was influenced by the desire to improve the creditor's position in the event of its own insolvent liquidation.

53 I turn to consider the evidence in the case before me in the light of the foregoing principles. When the liquidator took the stand, I did seek his assistance on why he believed that such indeed was the operative desire of the company and his evidence came down to this: Because the payments made to the defendant had the effect of preferring him when the company later went into liquidation, I should infer that the payments were made under the influence of the desire to prefer the defendant over the other creditors of the company.

54 But for the statutory presumption, I am satisfied this would have been a non-starter. Otherwise, as I have already noted, the inquiry in each case would be directed at the simple objective question: Did the transaction have the effect of preferring the payee? Yet the authorities establish that this is simply not sufficient. Instead, the inquiry is directed at whether the transaction

was influenced by a particular desire.

55 Mr Kumar submitted that I should also have regard to the following facts:

(a) the defendant, together with Lek and Lim, was carrying on a competing business through Axum and some other companies;

(b) they had stopped paying Niklex in July 2001 and so at the time the payment was made to the defendant some two months later in September 2001, they must have expected that Niklex would take steps to liquidate the plaintiff in the light of the large amount that it was owed; and

(c) therefore they had already decided to pull the plug on the plaintiff.

56 I think it is important first to reiterate that in assessing the probabilities, whatever inferences are drawn must be drawn from the perspective of the facts known at the time of the transaction. It would be wrong to undertake a hindsight evaluation. At the time of the transaction in September 2001, I do not see how I can find that Lek and Lim (and the defendant for that matter) knew or expected that the company would inevitably be wound up imminently. As I pointed out to Mr Kumar in the course of arguments, it was just a little less than two years before a petition for the winding up of the plaintiff was in fact presented. This points away from the probability that those making the payment were doing so with the relevant desire.

57 More importantly, the fact that Lek and Lim in common with the defendant pumped substantial sums of money into Axum, and then back to the plaintiff, suggests they were operating under the opposite assumption. I say this because if at that time they believed the plaintiff was heading for insolvency imminently, it would not have made sense for them, once they had been repaid by the plaintiff, to then have pumped the money first to Axum and then back to the plaintiff. This again points away from the probability that the payments were made under the relevant desire.

58 Further, as was the case in *Re Libra* ([45] *supra*), it is not the position here that other creditors were being ignored. The payments that were challenged here are to be seen in the context of the fact that a sum of $720,000 was apparently paid by the plaintiff to Niklex until July 2001, as was accepted by the liquidator when he took the stand.

59 Finally, I note that in the identical context in relation to Lek and Lim, Lai J in *Amrae Benchuan* ([2(e)] *supra*), having heard the evidence of the very people who caused the company to make these payments to themselves and to the defendant, and who also were persons connected with the plaintiff company, was satisfied that the payments to them were not made under the influence of the relevant desire. That finding binds the liquidator who was party to that suit, in so far as those payments to Lek and Lim are concerned. That does not bind me in so far as the present defendant is concerned, but it would be perverse, in the light of that finding which was not appealed against by the liquidator, to come to a different conclusion, given that:

(a) the payments to the defendant were more or less contemporaneous with like payments to Lek and Lim;

(b) the circumstances of the payments to the defendant were identical to those of the payments to Lek and Lim and all of these payments were channelled back to the plaintiff;

(c) no other evidence was tendered before me that suggested any difference between

these payments;

(d) given Mr Kumar's submission at [55] above, the logical inference appeared to be that there was no basis to conclude that the payments to the defendant should be viewed differently from the corresponding ones to Lek and Lim; and

(e) the sole basis for the liquidator's submission that I should come to a different conclusion was the fact that the payment in question had the effect of preferring the defendant, but this takes him no further than the presumption which also applied in the case of Lek and Lim but was found to have been rebutted.

60 In my judgment, looking at the totality of the facts and circumstances, the presumption has been adequately rebutted and I therefore find that the plaintiff has failed to discharge the burden of showing that the payments constitute an unfair preference.

61 I accordingly dismiss the action with costs. I should explain that I considered it appropriate to make an order for costs in favour of the defendant, even though he appeared before me in person, because he had been represented by solicitors through most of the litigation until just prior to the commencement of the trial.

[note: 1] See Transcript Day 2 p 25 line 8–9 and p 26 line 6–8).

[note: 2] See Transcript Day 2 p 29 line 30 – p 30 line 2).