DBS Bank Ltd *v* Tam Chee Chong and another (judicial managers of Jurong Hi-Tech Industries Pte Ltd (under judicial management))
[2011] SGCA 47

Case Number	: Civil Appeal No 230 of 2010
Decision Date	: 16 September 2011
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Tan Chuan Thye, Kevin Kwek and Linda Esther Foo (Stamford Law Corporation) for the appellant; Sarjit Singh Gill SC, Pradeep Pillai and Zhang Xiaowei (Shook Lin & Bok LLP) for the respondents.
Parties	: DBS Bank Ltd — Tam Chee Chong and another (judicial managers of Jurong Hi-Tech Industries Pte Ltd (under judicial management))

Insolvency Law

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 2 SLR 310.]

16 September 2011 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 This is an appeal by DBS Bank Ltd ("DBS") against the decision of the trial judge ("the Judge") in setting aside a charge ("the Charge") granted by Jurong Hi-Tech Industries Pte Ltd (under judicial management) ("JHTI") over 74,411,620 shares in MAP Technology Holdings Limited ("MAP") on the ground that the Charge was an unfair preference under s 227T of the Companies Act (Cap 50, 2006 Rev Ed) ("CA"), read with s 99 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("BA") (see *Tam Chee Chong and another v DBS Bank Ltd* [2011] 2 SLR 310 ("the GD")).

Background

2 The background facts in these proceedings are as follows. JHTI was a wholly-owned subsidiary of Jurong Technologies Industrial Corporation Ltd (under judicial management) ("JTIC"), a public company whose shares were listed on the Singapore Exchange ("SGX"). JHTI and JTIC (collectively, "the Companies") were in the business of providing electronic manufacturing services ("EMS"). Most of their EMS operations were carried out by JHTI.

3 The Companies' business operations were financed by DBS and a group of banks ("Creditor Banks"), which included ABN AMRO Bank NV ("ABN-AMRO"), Bank of Tokyo-Mitsubishi UFJ ("BTMU"), KBC Bank NV ("KBC"), Malayan Banking Berhad ("Maybank"), Oversea-Chinese Banking Corporation Ltd ("OCBC"), RHB Bank Berhad, Coöperatieve Centrale Raiffeisen-Boerenleenbank BA, trading as Rabobank International, Singapore Branch ("Rabobank") and United Overseas Bank Ltd ("UOB"). All the bank facilities were unsecured. These facilities were granted by the Creditor Banks subject to negative pledges given by the Companies and agreements that the Creditor Banks would be entitled to *pari passu* distribution of the Companies' assets in the event of the Companies' insolvent liquidation.

4 In 2006, DBS offered banking facilities to the Companies, which accepted the offer subject to the same conditions as those applicable to the facilities granted by the other Creditor Banks. On 27 December 2006, DBS agreed to provide banking facilities to the Companies jointly and severally on this basis. By February 2008, DBS had become the Companies' main banker in providing the following facilities of various types up to the limit of U$137m: [note: 1]

(a) Global Facilities of up to US$37m;

(b) Foreign Exchange Facility of up to US$20m;

(c) Interest Rate Swap Facility of up to US$50m;

(d) Term Loan Facility of up to US$20m; and

(e) Term Loan 2 Facility of up to US$10m.

5 When Ms Joyce Lin Li Fang ("Joyce" or "Ms Lin"), a founding member of JTIC and a director since 26 April 1986, and also a director of JHTI since 26 August 2003, was appointed Chairman of JTIC in March 2006, she began to be concerned with the level of the Companies' debts to the Creditor Banks. Sometime in April or May 2008, Ms Lin made a presentation to DBS of the Companies' financial position and told DBS that some of the Companies' assets could be "monetised", *ie*, sold, to reduce the Companies' loans. These assets included the Companies' EMS business, shares in MAP ("MAP shares") and shares in Min Aik Technology Co Ltd ("Min Aik shares"). From September 2008 to November 2008, the other Creditor Banks, including Sumitomo Mitsui Banking Corporation, were also informed of the possible sale of these assets.

6 By 30 June 2008, the Companies' total borrowings had reached the level of S$340m, of which about S$87m was owing to DBS, S$70m to UOB, S$60m to OCBC and the remainder to the other Creditor Banks. In July 2008, JHTI deposited with ABN-AMRO at its request 18.6m of the MAP shares which it (JHTI) held. They were subsequently released to JHTI for conversion into scripless shares. JHTI acquired more MAP shares, bringing its total investment to 74,411,620 MAP shares (slightly below 20% of the paid-up capital of MAP), *ie*, the total number of MAP shares over which the Charge was eventually granted (we will hereafter refer to the 74,411,620 MAP shares which were the subject of the Charge as "the MAP Shares"). Between August and October 2008, ABN-AMRO requested that the MAP Shares be put in a custodian account with it. The October 2008 request was made as a "non-negotiable condition" for ABN-AMRO to refrain from recalling its facilities. JHTI refused to do so for the reason that, as stated by Dr Chung Siang Joon ("Dr Chung"), JTIC's executive director of finance, "this can trigger off and become a risk factor should the other [Creditor] Banks come to learn about it" [note: 2] . He pleaded for support: "I do hope you can understand my difficulty and obligation to the other [Creditor] Banks".

7 From September 2008 onwards, the Companies encountered significant financial difficulties, due primarily to the global recession and credit crunch, which had resulted in reduced orders from their

customers. During this period, the Companies' trade creditors were chasing for payment of their debts, and so were all the Creditor Banks. The Companies could only make payments in the ordinary course of business from trade receivables or by drawing on credit lines. The Companies continued to promise the Creditor Banks that they would pay their loans and facilities from the proceeds of sale of the MAP Shares, their Min Aik shares and their EMS business. Although the Companies were defaulting in the payment of debts due to the Creditor Banks, they continued to roll over the debts. The Creditor Banks really had no choice but to wait for the Companies to sell their assets in order to pay their debts to the Creditor Banks.

8 On 14 October 2008, JTIC signed a non-binding term sheet with Global Emerging Markets ("GEM") to sell part of JTIC's EMS business ("the GEM Deal"). The announcement made by JTIC the next day on the SGX was as follows: [note: 3]

> The Board of Directors of [JTIC] wishes to announce that [JTIC] has received and signed a non-binding term sheet with [GEM] … pursuant to which GEM, together with various investors … have proposed the formation of a special purpose vehicle … to acquire a significant interest in selected electronic manufacturing services businesses and assets … for cash consideration.
>
> Shareholders should note that the Proposed Disposal will be subject to, *inter alia*, the negotiation and execution of definitive agreements and the conduct of a due diligence ...

The Creditor Banks were informed that the GEM Deal could bring in as much as US$160m. Two officers from GEM had visited Singapore in October 2008 to evaluate the deal, and KPMG was to conduct the necessary due diligence in January 2009.

9 During this period, the Companies were in default in paying certain short-term loans given by DBS (*ie*, the short-term loans mentioned at [36] below), which continuously pressed for payment by the deadline of 14 November 2008 from the proceeds of sale of the MAP Shares, as Ms Lin had promised. On 13 November 2008, at a meeting with DBS, Ms Lin had signed a security document which created the Charge. This document ("the Security Memorandum") was fully executed on 17 November 2008.

10 On 8 December 2008, JTIC made a public announcement that its audit committee had commenced an investigation into alleged irregularities in the administration of the receivables financing facilities extended by Rabobank and OCBC to the Companies. On 9 December 2008, KordaMentha Pte Ltd, JTIC's financial advisers, called a meeting of all the Creditor Banks and informed them of JTIC's outstanding debts. On 10 December 2008, DBS registered the particulars of the Charge with the Accounting and Corporate Regulatory Authority. By the end of December 2008, the Companies had received letters of demand from KBC (on 7 November 2008), Maybank (on 2 and 22 December 2008), ABN-AMRO (on 18 December 2008), OCBC (on 26 December 2008) and BTMU (on 29 December 2008). Additionally, the Companies had also received letters of demand from their trade creditors, some of whom had filed actions in court as early as 12 December 2008 to recover their debts.

11 On 20 February 2009, the Companies were placed under judicial management by the court on the application of some of the Creditor Banks.

12 On 22 June 2009, JHTI's judicial managers (the respondents in the present appeal) commenced the proceedings against DBS in the court below to set aside the Charge on the basis that it constituted an unfair preference under s 227T of the CA. In a reserved judgment delivered on 18 November 2010 (*ie*, the GD), the Judge allowed the application, holding that:

(a) the Charge was an unfair preference under s 227T of the CA, read with s 99 of the BA; and

(b) JHTI was insolvent when it granted the Charge.

The sole issue in this appeal

13 In this appeal, DBS has not appealed against the Judge's finding that JHTI was insolvent at the time it granted the Charge. Hence, the sole issue is whether the Judge's decision that the Charge was an unfair preference under s 227T of the CA, read with s 99 of the BA, is correct.

14 Before we consider the Judge's decision and the arguments of the parties in this appeal, it is convenient that we first discuss the principles of law on unfair preference applicable in Singapore.

The law on unfair preference in judicial management

15 The statutory provisions relating to unfair preferences are set out in s 227T and s 329 of the CA, which provide as follows:

> **Undue preference in case of judicial management**
>
> **227T**.—(1) Subject to this Act and such modifications as may be prescribed, a settlement, a conveyance or transfer of property, a charge on property, a payment made or an obligation incurred by a company which if it had been made or incurred by a natural person would in the event of his becoming a bankrupt be void as against the Official Assignee under section 98, 99 or 103 of the Bankruptcy Act (Cap. 20) (read with sections 100, 101 and 102 thereof) shall, in the event of the company being placed under judicial management, be void as against the judicial manager.
>
> (2) For the purposes of subsection (1), the date that corresponds with the date of the application for a bankruptcy order in the case of a natural person and the date on which a person is adjudged bankrupt is the date on which an application for a judicial management order is made.
>
> …
>
> **Undue preference**
>
> **329**.—(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 (Cap. 20) (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 making of the application for a bankruptcy order in the case of an individual shall be —
>
> (*a*) in the case of a winding up by the Court —
>
> (i) the date of the making of the winding up application; or

(ii) where before the making of the winding up application a resolution has been passed by the company for voluntary winding up, the date upon which the resolution to wind up the company voluntarily is passed,

whichever is the earlier; and

(*b*) in the case of a voluntary winding up, the date upon which the winding up is deemed by this Act to have commenced.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

16 It may be noted that s 329 of the CA makes a distinction between a "void" preference and a "voidable" preference. But, it should also be noted that s 329 makes no reference to judicial management. We highlight these points because under the former bankruptcy regime, the now-repealed Bankruptcy Act (Cap 20, 1985 Rev Ed) ("the 1985 BA") made a distinction between a void preference and a voidable preference, but the BA has abrogated such a distinction.

17 In this appeal, DBS has not raised the issue as to whether an unfair preference is a void, as distinguished from a voidable, transaction under s 227T(1) of the CA: see s 329 of the CA. We assume that this omission was a deliberate decision for the reason that the 1985 BA, which had created such a distinction, was repealed on 15 July 1995 by the new Bankruptcy Act No 15 of 1995 on the same day that the then equivalent of s 329 of the CA was amended to refer expressly to, *inter alia*, the then equivalent of s 99 of the BA. In other words, the retention of the distinction in s 329 of the CA between a void transaction and a voidable one was a drafting oversight (see the apt comments of Lim Teong Qwee JC in *Buildspeed Construction Pte Ltd (in liquidation) v Theme Corp Pte Ltd and another* [2000] 1 SLR(R) 287 at [50]–[52]).

18 We now turn to s 99 of the BA, which provides as follows:

(1) Subject to this section ... 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.

(2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not given that unfair preference.

(3) For the purposes of this section ... an individual gives an unfair preference to a person if —

(*a*) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities; and

(*b*) 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*.

(4) The court shall not make an order under this section in respect of an unfair preference given to any person *unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3) (*b*)*.

[emphasis added]

19 Section 99 of the BA is derived from s 239 of the Insolvency Act 1986 (c 45) (UK) ("the 1986 UK Insolvency Act"), which was enacted to give effect to the recommendations of the Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982) ("the *Cork Report*"). Prior to 1986, the statutory test of an unfair preference (under s 44(1) of the Bankruptcy Act 1914 (c 59) (UK) and s 53 of the 1985 BA) was that the debtor must have a *dominant* intention of preferring the creditor before the relevant transaction could be set aside : see *Sharp (Official Receiver) v Jackson and others* [1899] AC 419 at 423–425, 427 and *Lin Securities Pte v Royal Trust Bank (Asia) Ltd* [1994] 3 SLR(R) 899 at [23]. The 1986 UK Insolvency Act introduced the test of whether the debtor was influenced by a subjective desire to prefer a specific creditor or creditors to the general body of creditors.

20 The seminal and illuminating decision on the scope of s 239 of the 1986 UK Insolvency Act is *Re MC Bacon Ltd* [1990] BCLC 324 ("*MC Bacon*"), which has been cited with approval and also followed in Singapore, *eg*, in *Re Libra Industries Pte Ltd (in compulsory liquidation)* [1999] 3 SLR(R) 205, *Amrae Benchuan Trading Pte Ltd (in liquidation) v Tan Te Teck Gregory* [2006] 4 SLR(R) 969 ("*Amrae Benchuan*"), *Leun Wah Electric Co (Pte) Ltd (in liquidation) v Sigma Cable Co (Pte) Ltd* [2006] 3 SLR(R) 227 ("*Leun Wah Electric*") and *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089.

21 In *MC Bacon*, Millett J explained the new statutory test as follows (at 335E–336A):

> What the court has to do is to interpret the language of the statute and apply it. It will no longer inquire whether there was 'a dominant intention to prefer' the creditor, but whether the company's decision was 'influenced by a desire to produce the effect mentioned in sub-s (4)(*b*)'.
>
> This is a completely different test. It involves at least two radical departures from the old law. It is no longer necessary to establish a dominant intention to prefer. It is sufficient that the decision was influenced by the requisite desire. That is the first change. The second is that it is no longer sufficient to establish an intention to prefer. There must be a desire to produce the effect mentioned in the subsection.
>
> This second change is made necessary by the first, for without it it would be virtually impossible to uphold the validity of a security taken in exchange for the injection of fresh funds into a company in financial difficulties. 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 ... improve the creditor's position in the event of an insolvent liquidation. *A man is not to be taken as desiring all the necessary consequences of his actions*. *Some consequences may be of advantage to him and desired by him; others may not affect him and be matters of indifference to him; while still others may be positively disadvantageous to him and not be desired by him, but be regarded by him as the unavoidable price of obtaining the desired advantages*. It will still be possible to provide assistance to a company in financial difficulties provided that the company is actuated only by

proper commercial considerations. 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.

[emphasis in original omitted; emphasis added in italics]

22 Millett J's propositions may be summarised as follows:

(a) The test is not whether there is a dominant intention to prefer, but whether the debtor's decision was influenced by a desire to prefer the creditor.

(b) The court will look at the desire (a subjective state of mind) of the debtor to determine whether it had positively wished to improve the creditor's position in the event of its own insolvent liquidation.

(c) The requisite desire may be proved by direct evidence or its existence may be inferred from the existing circumstances of the case.

(d) It is sufficient that the desire to prefer is one of the factors which influenced the decision to enter into the transaction; it need not be the sole or decisive factor.

(e) A transaction which is actuated only by proper commercial considerations will not constitute a voidable preference. A genuine belief in the existence of a proper commercial consideration may be sufficient even if, objectively, such a belief might not be sustainable.

23 In *MC Bacon*, Millett J found as a fact that the security was given to the bank as a result of proper commercial pressure and not from a desire to produce the effect of a preference. He said (at 336F–337E):

Mr Glover and Martin both gave evidence; Mr Creal did not. I accept Martin as a reliable witness. Mr Glover was far from reliable, but I accept him as an honest witness who tried his garrulous best to help the court. His recollection was poor and much of his evidence consisted of inaccurate reconstruction. It was chiefly valuable for the insights it gave of his own and others' motives ... I am satisfied that he remained a de facto director and that he was a party to and greatly influenced all decisions of importance in relation to financial matters. In relation to the bank's debenture ... he did not take sides but gave his evidence fairly and impartially ...

I am satisfied that ... Mr Glover, Mr Creal and Martin *knew* ... (ii) that [the company's] continuing to trade was entirely dependent on the continued support of the bank; (iii) that if the debenture ... were not forthcoming the bank would withdraw its support; and (iv) that if the bank withdrew its support the company would be forced into immediate liquidation. I am also satisfied that they had decided to continue trading in a *genuine belief* that the company could be pulled around. It follows that they had no choice but to accede to the bank's request for a debenture. I accept Martin's evidence: 'It was viewed as a simple decision. Either we gave the bank a debenture or they called in the overdraft.'

That sufficiently explains the decision to grant the debenture and there is no justification for inferring any other reason. There is no evidence that either Martin or Mr Creal wanted to improve the bank's position in the event of an insolvent liquidation and there is no reason why they should. I find as a fact that in deciding to grant the debenture to the bank neither [Martin nor Mr Creal] was motivated by any desire except the desire to avoid calling in the overdraft and to

continue trading. That, however, is not the end of the matter. They were greatly influenced by Mr Glover's recommendation that the debenture should be granted, and I turn to examine his evidence to see whether he was influenced by a desire to improve the bank's position in the event of a liquidation for, if he was, then, in my judgment, the company's decision was similarly influenced, even though Mr Glover did not communicate any such desire to the others.

Mr Glover's evidence was to the same effect. He knew that if the company was to continue to trade it had no choice but to grant the debenture. He had a further reason for recommending it to the others. He *believed* that a debenture was not valid unless the company continued to trade for six months after it was given. Accordingly, he conceived the *eccentric notion* that if the bank took a debenture it would have to continue to support the company for a further six months. As he put it:

> 'A. I viewed the bank, that the bank, having got the debenture, would then have to give us credit for a further six months...
>
> Q. What was the point in giving the bank a debenture, in your mind? A. In the first and foremost, to secure an overdraft of £250,000 for a guaranteed six months.'

[emphasis added]

24 In *Re Conegrade Ltd* [2003] BPIR 358, Lloyd J succinctly explained the logical implications of the subjective statutory test (at 374):

On the one hand, it seems to me that it would be unsatisfactory that a well-intentioned but ill-founded belief that the present condition and future prospects of a company which is in fact insolvent can result in an undoubted act of preference to a director escaping the accountability imposed by s 239. On the other hand, of course, *the section does require, in conclusion, that the transaction was, subjectively, motivated by the relevant desire*. [emphasis added]

2 5 *MC Bacon* was followed in *Re Fairway Magazines Ltd; Fairbairn v Hartigan* [1993] BCLC 643, where Mummery J said (at 649G):

... [I]t does not follow that, because there was a desire to grant the debenture or to make the payment, there was a desire to prefer the creditor in the event of insolvency. If the company is influenced by 'proper commercial considerations' and not by a 'positive wish to improve the creditor's position in the event of its insolvent liquidation', then the debenture will be valid. If a desire to prefer is present, however, it is sufficient that it influences the decision. It does not have to be the sole or decisive influence on the decision.

26 In *Amrae Benchuan*, Sundaresh Menon JC expressed a similar view in stating at [51]:

… A person is taken to intend the natural consequence 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.

The "something more" referred to by Menon JC is, of course, the debtor's subjective desire to improve the creditor's position in the event of its own insolvent liquidation, which desire must be a factor that influenced the debtor's decision.

27 The burden of proof is on the Official Assignee to show that the bankrupt had the desire to improve the position of a particular creditor as compared to that of other creditors: see *Leun Wah Electric* at [12]. Evidence of such desire may be express or inferential: see *Re Sweetmart Garment Works Ltd (in liquidation)* [2008] 2 HKLRD 92 ("*Re Sweetmart*") at [17].

The findings of the Judge

28 In the present case, the Judge applied these principles to the facts as found by him. He found that there was ample evidence to show that the Charge was an unfair preference. At [43]–[47] of the GD, he said:

> 43 Turning then to the facts at hand, there is more than ample evidence that in granting the Charge, JHTI desired putting [DBS] in a better position than it would otherwise have been in and that this desire influenced the granting of the Charge. Ms Lin stated in her first affidavit, filed on 22 June 2009, that she was willing to sign the Security Memorandum to grant the Charge as [DBS] had helped the Companies by granting the Companies short term loans when no other bank was willing to do so, and [DBS] had been very supportive of the Companies. She further stated in her second affidavit, filed on 27 August 2009, that the "fact that DBS wanted to provide financing to the Companies even in November 2008 made me feel that DBS was very supportive of the Companies, and this support *contributed* to my decision to give the Charge to DBS".
>
> 44 Ms Lin also testified, on re-examination, that JHTI had granted the Charge to [DBS] as [DBS] was supportive in extending facilities to JHTI when other banks were unwilling to:
>
> > Q: My learned friend referred you to the paragraph in your affidavit, and he put it to you that therefore, when you say in paragraph 2.6.1 that 'DBS was supportive of the [C]ompanies' and that is why you gave the [C]harge, that is a false statement.
> >
> > A: I do not agree.
> >
> > Q: He says that. Can you explain to the court what you meant by supportive?
> >
> > A: Okay.
> >
> > Q: They used the word 'supportive' in the affidavit.
> >
> > A: 'Supportive' means during the – July, there was a 5 million I needed for the M&A to acquire Priver, so they give it to us, the 5 million drawdown, and then there is another in September, we supposed to have the dividend paid, it's 6 million, I think they also have drawn down.
> >
> > And then they also helped us on the SBLC, which was 1.5, later they upgrade to US$2 million SBLC, where, I think – which bank doesn't want to continue. So DBS help us where other banks doesn't [*sic*] want to continue.
>
> 45 It was difficult at time[s] to understand Ms Lin's testimony owing to her command of the English language. She also suffered from memory lapses at several junctures. Nevertheless, I was satisfied that her testimony was credible and reliable with respect to the underlying reason for the granting of the Charge: namely, that [DBS] had been very supportive of the Companies in the past.

46 Ms Lin's reason for granting the Charge was supported by others at the Companies. Dr Chung and Yeo [*ie*, Mr Yeo Pek Heng Roland, another director of the Companies] stated in their affidavits that they supported Ms Lin's decision to grant the Charge to [DBS] as they felt that [DBS] had been very supportive of the Companies in the past in granting them short term loans when no other bank was willing to do so.

47 This is supported too by the circumstantial evidence. JHTI had told its [Creditor Banks] that it would be raising funds through the sale of various assets. However, JHTI eventually chose to grant the Charge to [DBS] only. The other [Creditor] [B]anks exerted as much, if not more, pressure on the Companies ... yet the Charge was granted to [DBS]. Indeed, Ms Khua [the DBS officer who was managing the Companies' account at the material time] admitted that the pressure exerted by KBC was greater than that exerted by [DBS] as KBC had issued a formal letter of demand. Prior to 13 November 2008, there was no indication that [DBS] had approved the recall of facilities to JHTI. Furthermore, no new facilities were granted or disbursed to the Companies as a result of the granting of the Charge. Although [DBS] alleged that the Charge was granted by JHTI in exchange for a two-week extension for payment, this was not conveyed to the Companies. In any event, it is questionable that a two-week extension would have constituted a proper commercial consideration, given JHTI's dire situation ... *There were, therefore, no valid commercial reasons for JHTI to grant the Charge to [DBS]. Thus, there was clearly a desire to prefer [DBS] that influenced the granting of the Charge*.

[emphasis added]

29 In connection with his finding that KBC had exerted greater pressure on JHTI than DBS (because KBC had issued a letter of demand to recall all its facilities, whereas DBS had not done so), the Judge referred to *Re Sweetmart*, where the court set aside a payment to one of the creditors as an unfair preference. In coming to this conclusion, the court in *Re Sweetmart* held (at [29]) that the steps taken by the other banks were "more concrete, more serious, and instituted much more promptly" than those threatened by the preferred bank, and furthermore (at [30]), given the company's disastrous financial position, it could not have thought that it would be able to carry on business for any decent length of time so as to benefit from maintaining its relationship with the preferred bank.

30 The Judge concluded (at [50] of the GD) as follows:

50 Similarly, in the case at hand, the pressure exerted by [DBS] pales in comparison with that exerted by the other [Creditor] [B]anks that had already sent the Companies formal letters of demand ... As for [DBS's] attempts to justify the grant of the Charge as being based on commercial reasons, the reasoning in *Re Sweetmart* is apropos: given JHTI's overall indebtedness and the letters of demand that had been served on JHTI up to that point, JHTI could not possibly have envisaged carrying on its business for any decent length of time even if it had managed to avoid having [DBS] issue a letter of demand.

For these reasons, the Judge found that there was no proper commercial reason for JHTI to grant the Charge to DBS at the relevant time.

31 The Judge also rejected DBS's argument that JHTI had been influenced by proper commercial considerations in granting the Charge in these words (at [51]–[53] of the GD):

51 Counsel for [DBS], Mr Ashok Kumar, made several arguments. First, he argued that the Charge was granted in order to avert [DBS] recalling its facilities and allow the Companies to pursue and close the GEM Deal. (Ms Lin had testified that this deal, had it closed, would have possibly brought in US$160m for the Companies.) The GEM Deal would have been scuttled if [DBS] had issued a letter of demand; thus, [JHTI] was influenced by proper commercial considerations in granting the Charge. Furthermore, KBC, one of the two creditors that had served a letter of demand prior to the granting of the Charge, had agreed to a standstill arrangement with the Companies and not to do anything until the GEM Deal had carried through. It emerged at trial that the letter of demand from the other creditor, Rabobank, was never received by the Companies.

52 However, this contention was untenable. Realistically, it could not have been a proper commercial consideration to grant the Charge with a view to averting a declaration of default by [DBS] when the Companies were heavily indebted to many other [Creditor] [B]anks at the same time. JHTI could not possibly have expected them to wait patiently while the GEM Deal was pursued, and especially not after letters of demand had already been issued – much less after finding out about the Charge.

53 On cross-examination, Ms Khua agreed with counsel for the plaintiffs [the respondents in the present appeal] that if the other [Creditor] [B]anks had found out about the Charge, the GEM Deal could not close. It may have been the case that KBC was willing to hold off until the closing of the GEM Deal; but that did not mean that the other creditors, Rabobank included, would have been willing to do so as well. Moreover, once the other creditors discovered that [DBS] had been given the Charge, they would have applied either to wind up the company or to place it under judicial management so as to preserve their right to impugn the preference. In fact, it was only after [DBS] had lodged the Charge for registration on 10 December 2008 that the other [Creditor] [B]anks, namely, ABN AMRO, BTMU, Maybank and OCBC sent the Companies letters of demand. This is not surprising, as the [Creditor] [B]anks would have found out about the Charge upon its registration. I therefore did not agree with [DBS's] counsel that there were proper commercial considerations influencing the decision to grant the Charge.

32 To summarise the Judge's findings of fact:

(a) Ms Lin and her co-directors had executed the Charge as they felt that DBS had been very supportive of the Companies in their hour of need.

(b) The other Creditor Banks had exerted equal, if not more, pressure on the Companies to pay their debts, and, yet, DBS was given the Charge.

(c) DBS provided no proper commercial consideration for the Charge, in that:

(i) JHTI was not placed in a position where DBS would call a default (and thereby scuttle the GEM Deal) if it did not execute the Charge because DBS had not issued a letter of demand. Even if such a letter had been issued and JHTI had averted the risk of DBS calling a default by granting the Charge, the other Creditor Banks would have called a default once they found out about the Charge.

(ii) No new facilities were granted or disbursed by DBS as a result of the grant of the Charge.

(iii) DBS had not given the Companies an extension of two weeks to repay certain short-

term loans (*ie*, the short-term loans mentioned at [36] below) in return for JHTI granting the Charge, but, even if DBS had given such an extension, it would also have been a futile exercise as the other Creditor Banks would have called a default eventually (which they did).

Our decision in this appeal

33 As we have stated earlier, the sole issue before us is whether the Judge was justified in finding that the Charge was an unfair preference. Thus, this entire appeal turns on whether JHTI agreed to grant the Charge because it desired to improve DBS's position in the event of its (JHTI's) liquidation, or because it had no choice as DBS would otherwise have declared an event of default and recalled its facilities, thus scuttling the GEM Deal. In this appeal, DBS no longer relies on the ground that it had given an extension of time of two weeks to the Companies to repay the short-term loans mentioned at [36] below as consideration for the Charge.

34 DBS's case is essentially that the Judge was wrong to have accepted Ms Lin's testimony and that of her co-directors that JHTI had agreed to give the Charge because DBS had been supportive of the Companies. In our view, the Judge was correct to find, on the evidence, that DBS had been supportive of the Companies – certainly more than the other Creditor Banks. The question is whether this was a factor which had influenced JHTI to agree to give the Charge. DBS has argued that the Judge should have inferred from all the circumstances – especially the desperate financial straits of the Companies, the ongoing intention of the Companies to monetise their assets (especially the GEM Deal) and DBS's oral threats to call a default if JHTI did not agree to give the Charge – that JHTI had no choice but to give the Charge. It had no choice because the GEM Deal was critical to the Companies' survival, and, therefore, it could not afford to allow DBS to call a default and thereby scuttle the deal.

35 It is an established principle that an appellate court will not ordinarily disagree with the findings of fact of the trial judge, especially where he has heard oral testimony and has based his findings on his evaluation of the witnesses' credibility. An appellate court is entitled to reverse the findings of fact of the trial judge only when they are manifestly wrong and any advantage which the trial judge enjoyed by having seen and heard the witnesses is not sufficient to explain his conclusion: see *Watt or Thomas v Thomas* [1947] AC 484 at 487–488, cited with approval by the Privy Council in *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 (an appeal from Malaysia); see also *Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd* [1998] 2 SLR(R) 1010 at [32]. Let us now look closer at the evidence of the two main witnesses in this case, *viz*, Ms Lin and Ms Khua (the DBS officer who was managing the Companies' account at the material time) on the circumstances leading to the grant of the Charge on 13 November 2008.

36 DBS had granted three short-term or ad hoc loans to the Companies: (a) a S$5m loan made on 2 July 2008 to assist JHTI to acquire 100% of the shares in Priver Electric (BVI) Co Ltd; (b) a S$6m loan made on 26 September 2008 to enable JTIC to pay dividends to its shareholders; and (c) a S$0.5m loan made on 29 September 2008 for the Companies' working capital. These short-term loans are referred to in the pleadings as "the S$9m short-term loans", and we will use the same expression in the rest of this judgment.

37 According to Ms Khua, JHTI had agreed to deposit the MAP Shares in a custodian account with DBS Nominees Pte Ltd as a condition for DBS granting the Companies the second of the S$9m short-term loans. The custodian account was opened on 23 September 2008 and the MAP Shares were placed in that account. DBS did not ask for a charge on the MAP Shares at that time (presumably because of the negative pledges given by the Companies to the other Creditor Banks). By 29 October 2008, the Companies' debts to DBS had reached a level that was causing great concern to DBS,

probably exacerbated by its knowledge of the level of the Companies' debts to the other Creditor Banks. Ms Khua's more immediate concern was the repayment of the S$9m short-term loans, which the Companies had promised to repay from the proceeds of sale of the MAP Shares, whose market value had been falling.

38 On 29 October 2008, Ms Khua sent an e-mail (copied to Ms Lin) to Dr Chung and another director of the Companies, Mr Yeo Pek Heng Roland ("Roland" or "Mr Yeo"), which set a deadline of 14 November 2008 for payment of the S$9m short-term loans from the proceeds of sale of the MAP Shares. On 6 November 2008, Ms Khua and Mr Law Heng Huan Terry (Ms Khua's subordinate) met Ms Lin and followed up with the following e-mail: [note: 4]

> Hi Roland,
>
> Re our meeting with Joyce this morning, she agreed to sell the MAP [S]hares to repay the S$9m … short-term loan[s] due on 14 Nov 08.

On 10 November 2008, Ms Khua sent another e-mail as follows: [note: 5]

> Morning Roland
>
> Please be reminded that the S$9m … short[-]term loan[s] [are] due on Friday, **14 Nov 08** .
>
> Unless you have other sources of repayment, please authorise DBS Vickers to proceed with the sale of the MAP [S]hares.
>
> Joyce has agreed to the sale in our meeting with her last Thursday. This is the real test of integrity and will affect how we conduct the account going forward.
>
> [underlining and emphasis in bold in original]

Ms Lin's affidavits and oral evidence

39 In her affidavit dated 22 June 2009, Ms Lin deposed that on 13 November 2008, DBS requested and was given details of the Companies' debts to other creditors. On the same day, DBS sent an e-mail to Dr Chung, copied to Mr Yeo and others, asking him "to execute the sale of the MAP [S]hares to settle [overdue bills of S$6.9m and S$13m excess] immediately" [note: 6] . On the same day, Ms Lin went to DBS's premises after receiving a call from Ms Khua. When she met Ms Khua, she was told that since the MAP Shares had not been sold and since their market price kept on falling, DBS wanted a charge on the MAP Shares as security. Ms Lin agreed, and signed the Security Memorandum to create the Charge. Her understanding was that the Charge was meant to secure only the S$9m short-term loans, which she had promised JHTI would repay from the proceeds of sale of the MAP Shares. She deposed that JHTI decided to give the Charge because DBS had helped the Companies by giving them the S$9m short-term loans when no other bank was willing to do so, and because DBS had been very supportive of the Companies.

40 Ms Lin was cross-examined on this issue. Counsel for DBS put to her that JHTI had agreed to grant the Charge because it did not want DBS, the Companies' main banker, to pull the plug, *ie*, to declare a default and recall all the loans which DBS had made to the Companies. The notes of evidence show the following exchanges between Ms Lin and counsel: [note: 7]

Q ... I am going to suggest to you that the reason why you agreed to give this charge was: one, because your monetisation process was still ongoing; agree?

A Yes.

Q If the sale of the EMS business to GEM had taken place – and it looked like a real prospect – it would have brought in 160 million into the group to pay down bank borrowings.

A Yes.

…

Q I suggest to you that you gave the [C]harge to DBS because they insisted that they must have the [C]harge, otherwise they would recall the facilities. You can agree or disagree.

…

A I disagree in the way that DBS is at that time pressuring me to release all [the] MAP [S]hares to them. Because initially, I'm promising to all the banks, but I appreciated DBS for giving us the ad hoc … 9 million loans [*viz*, the S$9m short-term loans] … that I honoured to pay to DBS.

Later, when Ms Lin was re-examined by JHTI's counsel, she was asked to elaborate on this answer: [note: 8]

Q ... Why do you disagree to his suggestion that you gave the [C]harge to DBS because it insisted that they had must have the [C]harge, otherwise they would recall the facilities?

A Because there's no letter of demand. There's only a letter – e-mails coming in and out to people like Rolands [*sic*], you know, in the e-mails, and that is a normal, normal case for – because all the banks are doing it the same.

At the close of Ms Lin's cross-examination, counsel for DBS returned to the issue: [note: 9]

Q … Therefore, am I correct to say that you wouldn't have wanted the group's biggest lender to pull the plug on JHTI?

A At that time, I do not think DBS or whoever is going to pull the plug, because –

Q The question is: you wouldn't have wanted that; right?

A Yes.

...

Q Ms Lin, you knew and you have accepted that the granting of the [C]harge could be a breach of the negative pledge clauses, and that notwithstanding this, you gave the … [C]harge to DBS.

A Yes.

Q I put to you, therefore, that you had decided to give the charge, notwithstanding there were possible breaches, because you were under intense pressure to do so.

A No.

...

Q I put it to you that commercially, JHTI had [n]o choice but to give the [C]harge to DBS, because if DBS, the largest lender to the companies, had recalled their facilities, approximately S$90 million or so would be immediately payable, and this would put the companies into a situation which could derail the monetisation process ... which was a process that was still ongoing as at the date of the [C]harge.

A I think the letter of demand was only on the 14th [of January 2009] …

Q That's not the point. I'm talking about when you gave the [C]harge … not when DBS demanded. When you gave the [C]harge, you did it because commercially you had no choice but to give it because DBS was the largest lender to the [C]ompanies, and if they had recalled their facilities and asked for the immediate payment of $90 million, this would have put the [C]ompanies into a situation which could derail the monetisation process. You can agree or disagree.

A No – no. I don't agree, because I recognise the [S$9m short-term] loans, okay. That's the reason, you know. We [were] supposed to pay the [S$9m short-term] loan[s].

Ms Khua's affidavit and oral evidence

41 In her affidavit dated 13 August 2009, Ms Khua made the following statements:

(a) DBS informed the Companies on 17 and 20 October 2008 that events of default had occurred and that DBS had the right to recall all the banking facilities which it had granted them (at paras 38–39).

(b) Ms Lin agreed on 6 November 2008 to sell the MAP Shares to meet the Companies' repayment obligations punctually (at para 48).

(c) On 11 November 2008, Ms Lin sought an extension of time to sell the MAP Shares as there was a proposal to make MAP private, and she believed the price of MAP shares would go up. Ms Lin agreed that JHTI would give the Charge as consideration for the extension of time (at para 56).

(d) On 12 November 2008, Ms Lin informed DBS that JHTI's board of directors would be approving the sale of the MAP Shares to meet the Companies' payment obligations to DBS (at para 57).

(e) On 13 November 2008, DBS again impressed on the Companies the total amount due to DBS and stated that JHTI was to sell the MAP Shares immediately (at para 58).

(f) JHTI gave DBS the Charge so that DBS would not recall the entire banking facilities (at para 59).

(g) DBS insisted that the Security Memorandum be signed by 13 November 2008 as Ms Lin was going on a long business trip (at para 62).

42 Ms Khua was cross-examined on her affidavit and her oral evidence that DBS had contemplated calling an event of default. The exchanges between counsel and Ms Khua are set out below: [note: 10]

Q Ms Khua, yesterday you told the court that the bank contemplated calling an event of default. By that, I assume you meant recalling all the facilities; right?

A Yes, on 13 November.

Q On 13 November. So when exactly was this contemplation?

A It started when they went into bills default.

Q That would be 24 September; right?

A Right, but I only came to know of it on the 29th.

Q So you were contemplating already, from 29 September? Right?

A Okay, because at that time we were still waiting for the placement proceeds from Sem India to come in … So the thought was not so intense.

Q When did the thought become really "intense" – it's your evidence that you told [JHTI] ..., "Give us a charge on the [MAP] [S]hares. If not, we are going to recall the facilities". You also told the court a decision had been taken to recall all the facilities –

A No, we told the customer we have the right to recall on 17 October.

Q Yes.

A We declared that it's an event of default, and I followed up in writing.

Q Yes, I saw that email. That's different from making a decision to recall all the facilities if the [C]harge is not given. I want to know when exactly was that decision made, that if the [C]harge is not given, the bank will recall all the facilities.

A I would say on 13 November.

...

Q On the day when the [C]harge was given, you still had no approval, internal approval to grant the two weeks' extension; correct?

A Correct.

...

Q You had already taken a charge on 13 November, and in your affidavit you are basically saying that you granted them an extension of two weeks; right? An extension of two weeks, in exchange for the [C]harge. Is that correct?

A No, the [C]harge is in exchange for not recalling the facilities.

Q Look at paragraph 56 of your affidavit. Towards the end of the paragraph:

"We had decided that if we did not have the comfort that we needed, we will recall the entire banking facilities. Accordingly, for us to consider granting an extension of the Deadline for two weeks, Joyce agreed to provide a charge ..."

So it was in consideration of the granting of the two weeks that the [C]harge was given, right or wrong? Right or wrong first?

A Correct.

Q On the day when you took the [C]harge, and you purportedly granted the two weeks' extension in exchange for the [C]harge, you did not have internal approval either to grant the extension or to take the [C]harge in exchange for the extension. Is that correct? "yes" or "no"?

A Yes.

...

Q You took a charge, and you purportedly granted her an extension, but you confirm that you did not inform [JHTI] at all that we have given you an extension of two weeks?

A Yes, it's an internal approval.

Q So, where is the consideration for the [C]harge? ...

A No, the consideration for the [C]harge is for the bank not to recall, so Joyce said, "Okay, I give you the [C]harge, then you give me two weeks' time to sell the shares", and if they sell the shares, the proceeds will come and repay the bank, and then it will be a happy ending.

...

A So on the 13th, the bank was already contemplating to call on the facilities.

Q Yes.

A So we asked for the [C]harge on the [MAP] [S]hares, which they gave and they say they want us to consider a two weeks' extension.

Q Of the short-term loan [*ie*, the S$9m short-term loans]?

A Yes. So my charge on the shares is actually for everything, for all their global facilities and the [S$9m] short-term loan[s].

Q But did you have internal approval to take a charge on the shares for everything?

A The [C]harge is an all-monies charge.

Q Let's be specific. When you sought approval by way of your internal memo, you only sought approval for a charge for [the S$9m] short-term loan[s]; is that not correct?

A That's not correct.

Q That's not correct?

A Yes. An all money-charged [*sic*] to the bank is always –

Q You may have gotten JHTI to sign an all-monies charge document, we all know that –

A Yes.

Q – but you sought approval, telling your credit committee, approval for 9 million FAFY [Fixed Advance Facility] – isn't that right?

A No. If not, I would say the [C]harge is capped at a certain amount, so the [C]harge is for everything. Otherwise we will say that it's a limited charge.

Q Let's not split hairs. Let's look at your memo.

…

Q Show me where in this approval memo do you say that you are taking the [C]harge for all the facilities including the [S$9m] short-term loan[s], all the facilities? Either it's there or it's not there. Is it there?

A It's not –

Q Is it there or is it not there, in the memo?

A It's not stated in this memo.

Summary of the evidence of Ms Lin and Ms Khua

43 We have referred to the above passages relating to the affidavits of the two key witnesses in this case – Ms Lin for JHTI and Ms Khua for DBS – and have set out the material parts of their oral evidence to show why the Judge chose to accept Ms Lin's evidence as credible and Ms Khua's evidence as not credible. Ms Lin's oral testimony was consistent with what she had deposed in her affidavit, and she gave her testimony in a forthright manner and did not fudge her evidence. In contrast, Ms Khua prevaricated in her testimony and tried to make up answers to counsel's questions in order to support her assertions that JHTI gave the Charge because it had no choice in the matter. In our view, the evidence clearly shows that DBS asked for the Charge on the MAP Shares on 13 November 2008 in lieu of the Companies' promise to sell the MAP Shares to pay off the S$9m short-term loans by 14 November 2008, which the Companies could not do. Further, in asking for the Charge, DBS did not specifically tell Ms Lin that it wanted the MAP Shares to secure all its facilities. Had DBS informed Ms Lin of this, JHTI would have refused to grant the Charge because of the negative pledges given by the Companies to all the Creditor Banks. The Companies were certainly in default in repaying their loans, and had been in default for some time. But, at no time did DBS threaten to declare an event of default and recall all its banking facilities because it was not in its interest then to bring down the Companies. Ms Khua's evidence that Ms Lin had agreed that JHTI would give the Charge as consideration for an extension of time to sell the MAP Shares was found to be Ms Khua's own justification as recorded in an internal memo. Ms Lin was never made aware of this, nor was she made aware that Ms Khua intended to use the Charge to secure the Companies' total indebtedness to DBS. Ms Khua's assertion that the consideration for the Charge was the two-week extension of time to sell the MAP Shares was not consistent with her allegation that Ms Lin had succumbed to DBS's threat (or contemplation) to recall all the facilities on 13 November 2008 if JHTI refused to execute the Charge. In fact, DBS did not formally recall its facilities until 14 January 2009, when it sent a formal letter of demand after all the other Creditor Banks had done so. Ms Khua gave an inconsistent, and at times incoherent, account of the reasons why DBS had asked Ms Lin to agree to JHTI giving the Charge due to the fact that she (Ms Khua) was trying to justify using the Charge to secure all the Companies' liabilities to DBS when that was neither Ms Lin's nor Ms Khua's intention when the Charge was given.

44 Thus, on the evidence, Ms Lin consistently said that JHTI gave the Charge to secure the S$9m short-term loans to honour her promise that JHTI would pay those loans from the proceeds of sale of the MAP Shares. At the same time, she testified that JHTI gave the Charge because DBS had been very supportive of the Companies. In contrast, what we have from Ms Khua is a somewhat disjointed account of why the DBS asked for the Charge *only* on 13 November 2008, when Ms Lin was about to go overseas. It seems to us that on the evidence, there was nothing manifestly wrong with the Judge's finding. In fact, we would go so far as to say that the Judge was perfectly justified in finding that JHTI's decision to grant the Charge was influenced by a desire to give DBS what it wanted

because it had been good to the Companies.

45 There was also produced to the Judge a DBS internal memorandum dated 17 November 2008, prepared four days after Ms Lin signed the Security Memorandum and on the day the Charge was duly executed and returned to DBS (see Ms Khua's affidavit at para 63). The material portions of this memorandum (sent through Ms Khua and three other officers) read: [note: 11]

> The S$9m short-term loan[s] which we accommodated on an adhoc basis [are] to be repaid by 14 Nov 08 … JHT [*ie*, JHTI] agreed to repay the [S$9m] short-term loan[s] via proceeds from sale of the [MAP Shares].
>
> In the light of a possible privatization of MAP by private equity firm, JHT requested that the [S$9m] short[-]term loan[s] be extended. In consideration, JHT agreed to DBS'[s] charge on [the] MAP [S]hares ...
>
> …
>
> Total bank borrowings amounted to S$318m as at 30 Sep 08, all granted on a clean basis based on negative pledge and pari passu clauses. We will seek legal advice on our rights in taking the shares as security. In the meantime, the [C]harge on [the] MAP [S]hares is taken for whatever it is worth. JHT has placed [the] MAP [S]hares in our custody and we are now effecting the transfer into the collateral account to have control over the proceeds for repayment.
>
> JHT's 74.412m shares represents 19.95 % of MAP's total issued share capital … and is in breach of the 10% concentration limit under our Core Credit Policy.
>
> …
>
> CCO's approval is now sought to accept excess collateral of MAP shares of up to 20%.

46 What this memorandum shows clearly is that when Ms Khua or her colleague asked JHTI (through Ms Lin) for a charge on the MAP Shares, no internal approval had been granted to accept the MAP Shares as security for all the credit facilities extended by DBS to the Companies. It also shows that Ms Khua's testimony that JHTI had given the Charge as security because it did not want DBS to declare an event of default and that the MAP Shares were meant to secure all the liabilities of the Companies to DBS was a fairy tale. DBS's case rested entirely on Ms Khua's discredited testimony, which was inconsistent with her own internal memorandum.

47 For these reasons, we agree with the Judge's finding of fact that JHTI's decision to give the Charge to DBS was influenced by its desire to prefer DBS to the other Creditor Banks. We also agree with the Judge's finding that there was no proper commercial consideration for the Charge, and this reinforced the conclusion that JHTI had positively wished to improve DBS's position in the event of its (JHTI's) insolvency.

Our observations on the negative pledges and the *pari passu* clauses

48 Before we conclude our judgment, we would like to make some observations of the relevance in these proceedings of the negative pledges and the *pari passu* clauses which the Companies had undertaken in respect of all the Creditor Banks. We have earlier referred to DBS offering, and the Companies accepting, its banking facilities subject to these two contractual terms. The precise terms are set out in DBS's letter of offer dated 27 December 2006 as follows: [note: 12]

5.1 Negative Pledge

Except for overseas subsidiaries, you [the Companies] will not and will ensure that none of your subsidiaries will create or permit to arise or subsist any debenture, mortgage, charge (whether fixed or floating), pledge, lien or any other encumbrance whatsoever or any other agreement or arrangement having substantially the same effect on your assets or factor any of your accounts receivables.

...

5.4 Obligations to rank Pari-passu

You [the Companies] will ensure that your obligations under the facility documents are unconditional and unsubordinated and will at all times rank at least pari passu with all your other unsecured and unsubordinated obligations (except for such obligations mandatorily preferred by law).

49 It is not disputed that the material terms of the negative pledges and the *pari passu* undertakings given by the Companies to all the Creditor Banks are substantially the same in effect (see also *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International, Singapore Branch) v Jurong Technologies Industrial Corp Ltd (under judicial management)* [2011] SGCA 48, our decision in a related appeal, Civil Appeal No 5 of 2011).

50 A negative pledge is an undertaking by a borrower or debtor to a lender or creditor not to give security to any other present or future lender or creditor. It is a device usually employed by a borrower who has commercial bargaining power not to encumber any of its assets where its business or operations are financed by more than one lender so that it can deal with its assets freely in its own commercial interests. A negative pledge clause fulfils the function of contractually preventing any creditor from trying to obtain security over the assets of the debtor at any time, and particularly when the debtor is in deep financial distress and the creditor wants its overdue debts paid before the claims of other creditors. In such cases, a creditor who induces the debtor to breach the latter's negative pledges to other creditors may be liable for the tort of interfering with the contractual relations of the debtor with those creditors: see *First Wyoming Bank v Mudge* (1998) 748 P 2d 713.

51 Hence, the relevance of a negative pledge to the law of unfair preference is indirect and peripheral. It is a contractual gloss on a legislative scheme which large corporations who need to borrow large sums of money from financial institutions may find inadequate in protecting them from undue pressures at a time when they need to satisfy the demands of all their creditors, but do not have sufficient resources to do so.

52 A *pari passu* undertaking has the function of preventing a creditor from applying undue pressure on the debtor to pay its overdue debts to the former. Unlike a negative pledge, which is directed against the giving of security, a *pari passu* undertaking is directed against the payment of moneys to creditors. Further, unlike a negative pledge, a *pari passu* undertaking is a positive obligation to treat all creditors on a *pari passu* basis at all times, and it is inherent in such an undertaking that the borrower will not prefer one creditor to another creditor. Accordingly, the inducement by one creditor of a breach of the debtor's obligation under a *pari passu* undertaking will have the same effect in law as the inducement of a breach of the debtor's obligation under a negative pledge, *ie*, it will amount to an interference with contractual relations.

53 Hence, the combined operation of a negative pledge and a *pari passu* undertaking given by a

debtor to a group of creditors has the effect of creating among the contracting parties a "cessation of payments", except in the ordinary course of business. This notion of a "cessation of payments" introduced by Australian law was rejected by the *Cork Report* for the reasons given in the paragraphs reproduced below:

> 1250. In Australia, a more radical solution has been adopted, by dispensing altogether with the need to establish an intention to prefer. ... [T]he test is no longer whether the debtor made the payment *with a view to giving* a preference to the creditor, but whether the payment *had the effect of* giving a preference to the creditor.
>
> 1251. Of course, such a test could not be adopted without qualification, for every payment by an insolvent debtor ... must, in the absence of *pari passu* payment to all, have the effect of preferring the creditor who has the good fortune to receive it. Accordingly ... the Australian Act [the Bankruptcy Act 1966 (Cth)] excludes any payment to a creditor who can prove that the payment was made in good faith and in the ordinary course of business; and ... the payment should not be regarded as being made in good faith if the creditor ... knew or had reason to suspect that the debtor was unable to pay his debts as they became due from his own money, and that the effect of the payment would be to give him a preference ... over other creditors.
>
> 1252. We have given long and anxious consideration to the question whether to recommend dispensing altogether with the need to establish an intention to prefer, and adopting a test similar to that adopted in Australia. We have found this a difficult question. We have observed that, whereas the requirement of proving an intention to prefer has never formed part of the law in the United States of America, in Canada the Senate which has been examining proposals to reform and modernise the law of insolvency, proposes to retain it in the Canadian Insolvency Bill. Our own Committee has been divided. A minority would dispense with the requirement, and indeed see no reason why pressure for payment on the part of the creditor, which even before 1869 prevented the payment from being recoverable, should continue to afford the creditor a defence.
>
> …
>
> 1256. The majority of the Committee have therefore reached the conclusion that the requirement of an intention to prefer should be retained, and that genuine pressure by the creditor should continue to afford a defence. Their reasons for reaching this conclusion are as follows:
>
> > (a) The law should not lightly permit the recovery of payments made in discharge of lawful debts properly due when the payment was made, particularly since the creditor may well have used the money to pay his own creditors. Such payments should be recoverable only if really improper.
> >
> > (b) The creditor who is active to obtain payment of his own debt ought in principle to be allowed to retain the fruits of his own diligence. He ought not to be made to refund them for the benefit of others who were less diligent.
> >
> > (c) Creditors who delay taking steps to obtain payment of their own debts, whether by commencing insolvency proceedings or otherwise, take the obvious risk that the debtor will pay other creditors in the ordinary course of business or in response to commercial pressure. But there is no reason why they should expose themselves to the risk that he will put his own family and associates first, or discriminate between his creditors on any but normal commercial principles.

(d) The proposed change [*ie*, in favour of the Australian model] would introduce into the law of insolvency a notional 'cessation of payments', and would be inconsistent with our approach to the commencement of insolvency proceedings, and in particular with our proposals to abolish the concept of the act of bankruptcy.

[emphasis in original]

54 It would thus appear from the facts of this case that the Companies and their Creditor Banks, including DBS, found it commercially convenient to finance the business of the Companies on the principle (no longer a notion) that none of them should be allowed to steal a march on the others by applying pressure on the Companies to obtain security or payment of its debts to the disadvantage of the others. This kind of arrangement, if too tightly controlled, may make it difficult for a business to obtain fresh loans in case of need, but, as such an arrangement cannot be said to be contrary to public policy, there would be no reason why a court would not enforce it in an appropriate case, *eg*, where the debtor is induced to breach its negative pledge or its obligation to ensure that no creditor of it would have an advantage over the other creditors in the event that the debtor becomes insolvent.

55 In the present case, if we had found that the Charge was not an unfair preference, it might well be that DBS would have been liable for interfering with the contractual rights of the other Creditor Banks *vis-à-vis* the Companies under the negative pledges given by the latter. We cannot help but observe the irony of DBS seeking to defend the validity of the Charge, a course of action which, even if successful, might have rendered DBS liable for the tortious act of interfering with the aforesaid contractual rights of the other Creditor Banks and might have exposed it to liability to those banks. In other words, even if DBS had succeeded in this case, it might have been nothing more than an exercise in futility. For the same reason, the same observations apply to the breach of the *pari passu* undertakings by JHTI in giving the Charge.

Conclusion

56 For the above reasons, we dismiss the appeal with costs and the usual consequential orders.

[note: 1] II(A) ACB at p 86.

[note: 2] RSCB, Tab 3 at p 7.

[note: 3] II(D) ACB at p 881.

[note: 4] II(C) ACB at p 617.

[note: 5] II(C) ACB at p 627.

[note: 6] II(C) ACB at p 639.

[note: 7] II(B) ACB at pp 226–228.

[note: 8] II(B) ACB at p 302.

[note: 9] II(B) ACB at pp 293, 297–298.

[note: 10] II(B) ACB at pp 348–349, 397, 409–410, 412–414, 478–479.

[note: 11] II(C) ACB at pp 649–650.

[note: 12] II(C) ACB at pp 721–722.

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