Buildspeed Construction Pte Ltd (in liquidation) v Theme Corp Pte Ltd and Another [2000] SGHC 26

Case Number : OS 877/1999

Decision Date : 24 February 2000

Tribunal/Court : High Court

Coram : Lim Teong Qwee JC

Counsel Name(s) : N Sreenivasan and Joseph Liow (Derrick Ravi & Partners) for the plaintiffs; Sumitri M Menon and Raymond Lam (Jansen Menon & Lee) for the first defendants; Latiff Ibrahim, Hariprasad Ratnagopal and Ivan Tan Chee Hui (Khattar Wong & Partners) for the second defendants

Parties : Buildspeed Construction Pte Ltd (in liquidation) — Theme Corp Pte Ltd; Another

Companies – Winding up – Transaction at undervalue – Building company entering novation agreement with other company to take over building contract – Whether transaction in novation agreement was transaction at undervalue – s 329 Companies Act (Cap 50, 1994 Ed) – s 98 Bankruptcy Act (Cap 20, 1996 Ed)

Words and Phrases – 'Void or voidable' – s 329 Companies Act (Cap 50, 1994 Ed)

: By this originating summons issued on 7 June 1999 the plaintiff (`Buildspeed Construction`) claims a declaration and other reliefs in respect of a novation agreement dated 18 March 1998 which it entered into with the defendants. At the conclusion of the hearing on 12 November 1999 I made an order for a declaration that the transaction between Buildspeed Construction and the first defendant (`Theme Corp`) contained in the novation agreement was void as a transaction at an undervalue. I adjourned the matter to a date to be fixed for directions for an account to be taken. Theme Corp has given notice of appeal and these are my written grounds.

Buildspeed Construction was incorporated on 8 May 1986. According to the report of its directors dated 30 April 1998 its principal activities for the year ended 31 March 1997 were those of general contractors in the building and construction industry, property development and investment holding. Note 24 to the accompanying statutory financial statements for that year stated:

> *Subsequent to the balance sheet date, the company intends to cease its operations.*

The balance sheet date referred to was 31 March 1997.

Buildspeed Construction did cease its operations after 31 March 1997. On 29 April 1998 its directors passed a resolution for the appointment of provisional liquidators. On 29 May 1998 the present liquidators who bring these proceedings were appointed liquidators at a creditors` meeting in place of the provisional liquidators. The directors would have made and lodged with the Registrar of Companies a statutory declaration that complies with s 291(1) of the Companies Act and in accordance with s 291(6)(a) the winding up would have commenced when the statutory declaration was lodged. A resolution of the company for voluntary winding up would also have been passed on 28 or 29 May 1998 before the present liquidators were appointed at the creditors` meeting (see s 296) and alternatively in accordance with s 291(6)(b) the winding up would have commenced when the resolution for winding up was passed. Quite surprisingly the directors` report I have referred to was dated 30 April 1998 and presented to the shareholders after the appointment of provisional

liquidators.

Buildspeed Construction was until 18 March 1998 the main contractor employed by the second defendant under a building contract dated 10 December 1996 for the construction, completion and maintenance of a substantial development at Sims Ave/Geylang East Ave 2. The contract sum was $103,850,000 and by February 1998 the architect had certified that works to the value of $70,289,962. 23 had been carried out as at 5 February 1998.

The novation agreement dated 18 March 1998 recited that Buildspeed Construction desired to be released and discharged from the building contract and that the second defendant as the employer agreed to release and discharge Buildspeed Construction `upon the terms, inter alia, of [Theme Corp] undertaking to perform the [building contract] in lieu of [Buildspeed Construction] and to be bound by the terms and conditions of the [building contract], in accordance with the terms and conditions set out in [the novation agreement]`.

Section 329 of the Companies Act (Cap 50, 1994 Ed)provides:

> *(1) Subject to this Act and such modifications as may be prescribed, any transfer ... or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable under section 98, 99 or 103 of the Bankruptcy Act 1995 (read with sections 100, 101 and 102 thereof) shall in the event of the company being wound up be void or voidable in like manner.*
>
> *(2) For the purposes of this section, the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be -*
>
> *...*
>
> *(b) in the case of a voluntary winding up, the date upon which the winding up is deemed by this Act to have commenced.*

Section 98 of the Bankruptcy Act (Cap 20, 1996 Ed) provides:

> *(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has at the relevant time (as defined in section 100) entered into a transaction with any person at an undervalue, the Official Assignee may apply to the court for an order under this section.*
>
> *...*
>
> *(3) For the purposes of this section and sections 100 and 102, an individual enters into a transaction with a person at an undervalue if -*
>
> *...*
>
> *(c) he enters into a transaction with that person for a consideration the value of which, in money or money`s worth, is significantly less than the value, in money or money`s worth, of the consideration provided by the individual.*

Section 100 of the Bankruptcy Act provides:

> *(1) Subject to this section, the time at which an individual enters into a transaction at an undervalue ... shall be a relevant time if the transaction is entered into ... -*
>
> *(a) in the case of a transaction at an undervalue, within the period of 5 years ending with the day of the presentation of the bankruptcy petition on which the individual is adjudged bankrupt;*
>
> *...*
>
> *(2) Where an individual enters into a transaction at an undervalue ... at a time mentioned in subsection (1)(a) ... that time is not a relevant time for the purposes of sections 98 and 99 unless the individual -*
>
> *(a) is insolvent at that time; or*
>
> *(b) becomes insolvent in consequence of the transaction...*
>
> *(4) For the purposes of subsection (2), an individual shall be insolvent if -*
>
> *(a) he is unable to pay his debts as they fall due; or*
>
> *(b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities.*

Relevant time

The date which corresponds with the date of presentation of the bunkruptcy petition is the date upon which the winding up is deemed by the Companies Act (Cap 50, 1994 Ed) to have commenced. No evidence has been given of the date of lodging the statutory declaration under s 291(1). The alternative date is the date when the resolution for winding up was passed. That evidence also has not been given. However it is not in dispute that on 29 April 1998 provisional liquidators were appointed and on 29 May 1998 the present liquidators were appointed in their place at a creditors` meeting. It is clear that Buildspeed Construction is being wound up voluntarily and that such winding up commenced some time between 29 April 1998 and 29 May 1998 and I find accordingly.

The novation agreement was entered into on 18 March 1998. This was well within the period of five years whether ending on 29 April 1998 or 29 May 1998 and the requirements of s 100(1)(a) of the Bankruptcy Act (Cap 20, 1996 Ed) are clearly satisfied. It remains to be proved that at the time at which the novation agreement was entered into Buildspeed Construction was either insolvent or became insolvent in consequence of the novation agreement.

Mr Chee Yoh Chuang is one of the two liquidators in the winding up. He is a certified public accountant. He said in his affidavit filed on 8 June 1999 that at or about 18 March 1998 Buildspeed

Construction was insolvent within the meaning of s 329 of the Companies Act (Cap 50, 1994 Ed) and s 100(4) of the Bankruptcy Act (Cap 20, 1996 Ed) . He referred to the company`s management accounts as at 5 May 1998 and the audited accounts for the years ended 31 March 1996 and 31 March 1997. He also referred to the large number of actions in the High Court and the Subordinate Courts against Buildspeed Construction.

The management accounts show that the current liabilities (including a secured loan of $3. 35m) exceeded the current assets by more than $12m and the company had a negative working capital of about $4. 081m. The liabilities exceeded the value of the assets, both current and non-current, by about $4. 081m. Mr Chee said that in his opinion a negative working capital is indicative that a company is unable to pay its debts as they fall due. If no further capital was brought in then I would agree that a company with a negative working capital is likely to be unable to pay its debts as they fall due.

At 5 May 1998 Buildspeed Construction had ceased to carry on business. Its directors had stated in their report that the company intended to cease its operations subsequent to 31 March 1997. It had proceeded to a creditors` voluntary winding up and provisional liquidators were appointed on 29 April 1998. No further capital had been brought in. I think Buildspeed Construction was insolvent at 5 May 1998. It was clearly unable to pay its debts as they fell due. The value of its assets was also less than the amount of its liabilities. The shortfall was more than $4m.

Mr Chee also said that Buildspeed Construction`s audited financial statements indicated that the company had a negative working at 31 March 1996 and 31 March 1997. I think he was mistaken. The current liabilities exceeded the current assets by more than $3. 964m and $7. 868m at those dates but the financial statements show that the original paid-up capital of $5m had not been completely lost. The company suffered losses in those two years. At 31 March 1996 the capital was a little less than $4. 28m but at 31 March 1997 it had been reduced to less than $168,000.

The auditors` report on the financial statements for the year ended 31 March 1997 included this statement:

> *The accounts have been prepared on a going concern basis. This basis may not be appropriate because on 31 March 1997 the company`s current liabilities exceeded its current assets by $7,868,975. The company is currently relying on the support of its creditors, bankers and financiers and if this support is withdrawn and alternative finance is not made available it is unlikely that the company will be able to continue trading.*

There is no evidence of any continuing support of the creditors, bankers and financiers.

Buildspeed Construction`s capital had been reduced from about $4. 28m to about $168,000 in one year and in about 13 months to a negative amount of about $4. 081m. It had suffered losses in the two years to 31 March 1997 and unless there were exceptional circumstances there would have been losses suffered in the period down to 5 May 1998 as well. Other than the transaction contained in the novation agreement no evidence has been given of any such circumstances. Mr Koh Swee Hua, a director of Theme Corp and one of the senior managers formerly employed by Buildspeed Construction, said that the company was `thriving during 1996 and 1997` but this is not borne out by the financial statements and the circumstances I have referred to.

I pause here to observe that the novation agreement is not even referred to in the financial

statements or the notes to those statements or in the auditors` report or the directors` report notwithstanding that it was made within the financial year following that to which the financial statements were made out and those reports were both dated after the date of the novation agreement. The auditors` report in addition to the statement quoted above also stated:

> *Should the company be unable to continue trading, adjustments would have to be made to reduce the value of assets to their recoverable amount to provide for any further liabilities which might arise and to reclassify fixed assets and long term liabilities as current assets and current liabilities.*

At the date of this report provisional liquidators had been appointed and yet the directors presented an `uneventful` report.

I return now to the question of insolvency. On the evidence before me I see no reason to doubt that Buildspeed Construction was at 18 March 1998 unable to pay its debts as they fell due and I find accordingly. At 31 March 1997 its capital had been reduced to less than $168,000 and by 5 May 1998 it had become more than $4,081m negative. I would have thought that if at 18 March 1998 the value of the assets exceeded the liabilities then some evidence of extraordinary events would have been given. There was no such evidence except that the company went into a creditors` voluntary winding up shortly after. In all the circumstances I think that at 18 March 1998 Buildspeed Construction was unable to pay its debts as they fell due and also the liabilities exceeded the value of the assets and I find accordingly. Buildspeed Construction was insolvent at that date and accordingly had at the relevant time as defined in s 100 of the Bankruptcy Act (Cap 20. 1996 Ed) entered into the transaction contained in the novation agreement with Theme Corp.

Consideration for the transaction

Clause 1. 2 of the novation agreement provides:

> *the [second defendant] releases and discharges [Buildspeed Construction] from performance of the [building contract] and from all obligations and liabilities in respect of the [building contract] ... and except as provided in cl 2. 1 and 2. 2 of this novation agreement the [second defendant] releases and discharges and agrees that they shall not make any claims against [Buildspeed Construction] in respect of any of [Buildspeed Construction`s] obligations and liabilities in respect of the [building contract] whether arising before, on or after the date this novation agreement is made;*

Clauses 2. 1 and 2. 2 provide:

> *2.1 the [second defendant] shall not be entitled to recover or claim from [Theme Corp] the liquidated damages calculated from 24 November 1997 to the date this novation agreement is made, which the [second defendant] is entitled to recover or claim against [Buildspeed Construction] pursuant to the delay certificate dated 26 November 1997 which was issued by the architect under Condition 24(2) of the [building contract], and [Theme Corp] shall therefore not be liable for the said liquidated damages;*
>
> *2.2 [Buildspeed Construction] shall remain liable to the [second defendant] on*

the claim for liquidated dmages referred to in cl 2. 1 above;`

On 26 November 1997 the architect certified that the date of completion under the building contract was 24 November 1997 and that Buildspeed Construction was and had been in default in not having completed the works by that date. On 18 March 1998 the works had still not been completed. The building contract provided for liquidated damages for delay calculated at $30,000 per day. Under the novation agreement Buildspeed Construction remained liable for liquidated damages down to 18 March 1998 but was released from liability for any continuing delay. The release was part of the consideration.

Finally Buildspeed Construction is released and discharged from all obligations and liabilities in respect of the building contract and as Mr Sreenivasan quite properly concedes such release and discharge extends to defects in the execution of the works down to 18 March 1998. Theme Corp has made no attempt to give amonetary value to this although Mr Koh referred to the report prepared by Mr Martin Anthony Riddett, a surveyor retained by Buildspeed Construction. I shall consider this report later in these grounds.

In summary the consideration for the transaction comprised (1) release from further performance under the building contract, (2) release from liability for delay after 18 March 1998 and (3) release from liability for defects and other obligations under the building contract in the execution of the works down to 18 March 1998.

Consideration provided by Buildspeed Construction

On 18 March 1998 the same day that the novation agreement was entered into the quantity surveyor under the building contract issued a certificate of valuation in respect of work done and materials on site as at 10 March 1998 and the following day 19 March 1998 the architect issued interim certificate 26 for payment of $2,253,482. 99. This included $589,325. 93 due to nominated sub-contractors and suppliers. In accordance with the terms of the building contract Buildspeed Construction was entitled to be paid the amount certified within 21 days of the receipt of the architect`s certificate by the second defendant. If the second defendant had received the certificate on 20 March 1998 then Buildspeed Construction was entitled to be paid by 10 April 1998.

Clause 10 of the novation agreement provides:

> *[Buildspeed Construction] acknowledges and agrees that the [second defendant] shall be entitled to pay to [Theme Corp], the amount certified due and payable to [Buildspeed Construction] under the architect`s Interim Certificate No 26 issued or to be issued under the [building contract]. Such payment shall be deemed to have been fully authorised by [Buildspeed Construction] and shall constitute a valid and proper satisfaction and discharge of the [second defendant`s] obligation and liability to make such payment to [Buildspeed Construction]. [Theme Corp] shall upon receipt of the aforesaid interim payment pay to any:*
>
> *1 Designated or Nominated Sub-Contractors of [Buildspeed Construction] the amounts certified due to them under the said interim certificate; and*
>
> *2 other sub-contractors of [Buildspeed Construction] for the Works,*

and shall be entitled to retain the balance (if any) of such interim payment after making the aforesaid payments.

The effect of this provision was to give preference to the nominated sub-contractors and suppliers and other sub-contractors and to benefit Theme Corp.

Eastern Concrete Pte Ltd, Eastern Pretech Pte Ltd and Burwill Trading Pte Ltd were three of the creditors of Buildspeed Construction but they were not among the nominated sub-contractors or suppliers named in the quantity surveyor`s valuation certificate of 18 March 1998. They commenced proceedings and orders of court were made on 27 March 1998 and 28 March 1998 in the proceedings. Those orders are not before me but Mr Yong Kam Yuen a director of the second defendant said in his affidavit that:

... a number of judgment creditors of [Buildspeed Construction] obtained:

1 Mareva injunctions against [Buildspeed Construction] to prevent [Buildspeed Construction] from unlawfully dissipating its assets; and

2 garnishee orders against this interim payment. `

and that [Buildspeed Construction] did not appear in those proceedings.

On 24 April 1998 orders were made in the three creditors` actions to permit the second defendant `to deduct and/or set-off part of the sum of $3,390,000 due from [Buildspeed Construction] to the applicant as liquidated damages, pursuant to the architect`s delay certificate dated 26 November 1997 from the sum of $2,253,482. 99 due under interim payment No 26 notwithstanding the Interim Injunction herein ...`The effect of these orders if carried into effect is that the second defendant appropriated to itself the amount payable under interim certificate 26 in part satisfaction of the liquidated damages for delay. However Mr Yong said that from the sum of $2,253,482. 99 which was set off the second defendant paid Theme Corp $1,966,411. 16 and the balance to certain creditors. His evidence appears to be that the second defendant voluntarily gave away more than $2. 25m of its own money. He was not cross-examined.

This part of Theme Corp`s case appears to be that the novation agreement was varied as between itself and the second defendant. That may well be so but Buildspeed Construction was not a party to the variation. Mr Koh admitted the payment of $1,966,411. 16 to Theme Corp and in accordance with the novation agreement this constituted a satisfaction and discharge of the second defendant`s liability to Buildspeed Construction for the amount paid in respect of interim certificate 26. He said that the whole amount was distributed to `the project`s sub-contractors` but he was not prepared to reveal details of the payment unless ordered by this court. Mr Sreenivasan did not ask for such an order and I could see no reason for making one.

The sub-contractors who were paid might have been Buildspeed Construction`s creditors or they might not. There is no evidence before me. Mr Koh admitted under cross-examination that all the money received from the second defendant under interim certificate 26 was paid only to those sub-contractors Theme Corp needed to continue the works. This was clearly a benefit to Theme Corp. It

is equally clear that whether or not any of the `project`s sub-contractors` was a creditor of Buildspeed Construction the money that was paid to them was in reality part of the price for their work or materials which Theme Corp required in its execution of the works under the novation agreement.

Under the building contract the sums stated as due under interim certificates are calculated at the rate of 90% of the value of work done and 80% of materials on site from which are deducted sums previously certified. The percentages not certified constitute the retention monies but the amount of the retention monies is limited to $5,192,500. Upon completion of the works and the issue of the completion certificate the contractor is entitled to have one half of the amount of the retention monies certified as due to it less only the cost of any outstanding works at the date of the completion certificate. Upon expiry of the maintenance period the contractor is entitled to the balance of the retention monies less any deduction for defects which are not required to be made good. The maintenance period is 12 months from the issue of the completion certificate.

Clause 2. 4 of the novation agreement provides:

> *the [second defendant] shall release and pay to [Theme Corp] the sum of S$1,500,000. 00 out of the retention monies of $5,192,500. 00 which are presently being held by the [second defendant], within fourteen (14) days from the complete and full satisfaction and compliance of the conditions precedent referred to in cl 5 of this novation agreement ... and that thereafter only the sum of $1,096,250. 00 will be due for certification for release in accordance with Condition 31(7).*

Condition 31(7) under the building contract provides for the first release of half of the retention moneys. At the date of the novation agreement the limit of the amount of the retention moneys had been reached. The conditions precedent relate to the furnishing of the performance guarantee of Theme Corp and the consent of the bank to whom the building contract had been assigned by Buildspeed Construction as security for banking facilities.

On 25 February 1998 Buildspeed Construction submitted an interim claim for $6,566,995. 95 in respect of which the architect issued interim certificate 26 for $2,253,482. 99. In these proceedings Buildspeed Construction claims that the difference amounting to $4,313,512. 96 represented the value of work done and materials on site which had not been certified at the date of the novation agreement. There is no basis for this claim. The evidence before me is that the work done and materials on site were valued on 10 March 1998 and interim certificate 26 was issued on the basis of the valuation.

On 9 April 1998 interim certificate 27 for $1,623,701. 29 was issued for work done and materials on site valued on 2 April 1998. Mr Koh said in his affidavit:

> *A portion of interim certificate 27 may therefore be said to be referrable to work done between the period following that covered by certificate 26 and the novation date, ie 18 March 1998. However the fact is work had all but stopped during this period. No separate valuation has been done.*

Some part of the work done and materials on site covered by interim certificate 27 may have been attributable to the period between 10 March 1998 when the previous valuation was done and 18

March 1998 but as Mr Koh said `work had all but stopped during this period`. I think the value would not have been significant and I would disregard it.

By entering into the novation agreement what Buildspeed Construction gave up was the uncompleted part of the building contract. It would have been entitled to be paid under interim certificate 26 shortly after 18 March 1998 but not the retention moneys. It was only entitled to one half of those moneys upon the issue of the completion certificate and the balance 12 months after. To obtain the benefit of the retention moneys the building contract had to be fully performed. Costs would have to be incurred. Liquidated damages for delay would have to be taken into account and they are liable to be deducted from any moneys due to Buildspeed Construction under the building contract at any time up to and including the final certificate. Buildspeed Construction would be entitled to be paid for the balance of the contract works.

Barton Associates Pte Ltd was appointed by Buildspeed Construction on 27 September 1999 to prepare a report in respect of the completion of the works. It was specifically asked to give (1) an opinion on the likely profitability of the balance of the works, (2) an opinion on the value of the liability to carry out rectification of defects and (3) an opinion on the normal range of profit margin expected by a contractor for a project of this nature. Its report containing the opinions was produced. It was prepared by Mr Riddett. The opinions were those given by him.

As to the likely profitability of the balance of the works the report stated:

> *Given the arrangements under which Theme Corp took over the completion of the Project and the reduction in costs which had occurred since the original contractor tendered for the project, we are of the opinion that the balance work was likely to be profitable for Theme Corp.*

The report also stated:

> *The novation took place in a time of recession in the construction industry and it is a fact that prices of construction had fallen at that time. [Theme Corp] took over the contract at the original contract rates, yet was able to carry out the remainder of the works at reduced costs.*
>
> *Assuming that the rates to price the contract originally contained an allowance for profit (which must be assumed) it is clear that [Theme Corp] would have been able to increase that profit on the part of the works that they executed.*

As to the value of the liability to carry out rectification of defects the report stated:

> *Given the extremely vague and general descriptions set out in the architect`s list of defects, it is impossible to place a price on carrying out this work.*
>
> *We have therefore based our opinion on our experience of industry practice, and we have estimated the maximum possible financial liability of making good defects as being 1% of the contract sum.*

The architect`s list is the schedule of rectification works issued by the architect on 7 January 1999. That was the date also of the architect`s completion certificate issued for apparent completion achieved on 2 November 1998. One per cent of the contract sum would be $1,038,500.

As to the normal range of profit margin expected the report stated:

> *Contractor`s profit margins are not easy to establish due to the wide range of accounting techniques, methods of paying directors and other factors. It is not necessarily reasonable to rely upon any published figures.*
>
> *Our own experience leads us to predict profit margins of 2-5% for contracts of this size.*

Under cross-examination Mr Riddett explained that profit margins for contracts of this size would be 2-5% of the contract sum and in the case of Theme Corp carrying out the balance of the works it would be 2-5% of the balance of the contract sum. Mr Riddett said in the report that the value of the balance of the works to be executed by Theme Corp was $20,038,348. 15 after deducting nominated sub-contractors` works. I understand his evidence to be that the range of profit margin expected in the case of Theme Corp was 2-5% of the value of the balance of the works or about $400,767 to $1,001,917.

Comparison of consideration for which transaction entered into and consideration provided

The consideration provided by Buildspeed Construction was the uncompleted part of the building contract. The value in money or money`s worth was the price payable by the second defendant for the balance works. In addition Buildspeed Construction gave up the amount payable under interim certificate 26. Finally Buildspeed Construction gave up the retention moneys amounting to $5,192,500. These items have to be valued as at 18 March 1998. They have to be seen in the light of the circumstances then prevailing. At the same time events may occur which may have an effect on the values. If there is at the relevant date (which in this case is 18 March 1998) a real likelihood of such events occurring then I think the values to be arrived at must reflect the chances of such events occurring. I propose to adopt this approach.

Mr Riddett`s evidence is that the balance work was likely to be profitable for Theme Corp. He estimated that the range of profit margin for Theme Corp would be $400,767 to $1,001,917. He would have put thecost at $19,036,431 to $19,637,581. This would have taken into account the cost of executing the works including the cost of insurance and of providing the performance guarantee. It would also have included the cost of maintenance works. It would not have taken account of liquidated damages for delay which I will consider later. Mr Riddett also said that when the novation agreement was entered into prices had fallen so that Theme Corp would have been able to increase that profit. I find that the value of the balance works after allowing for the costs I have referred to was not less than $400,767 to $1,001,917.

The amount payable under interim certificate 26 was $2,253,482. 99. This certificate was issued the day after the date of the novation agreement but the work done and materials on site had been valued by the quantity surveyor on 10 March 1998 and his certificate had been issued on 18 March 1998. The certificate included $589,325. 93 due to nominated sub-contractors and suppliers. The architect had not issued any certificate of non-payment in respect of any sub-contractor or supplier under the building contract that was outstanding as at 18 March 1998 (or even when interim

certificate 26 was issued). There is no evidence of any such certificate having been issued. If and when a certificate of non-payment is issued the second defendant would be entitled to deduct the amount certified as unpaid from any money due to Buildspeed Construction at any time. The second defendant would also be entitled to deduct liquidated damages for delay which I shall consider later.

I think there is every likelihood of certificates of non-payment being issued if the nominated sub-contractors and suppliers are not paid and the chances of such deductions being made must be very good. If the $589,325. 93 due to nominated sub-contractors and suppliers is not paid it would be deducted from money subsequently due to Buildspeed Construction. I think the value of interim certificate 26 at the time the novation agreement was entered into was the amount certified less the amount due to nominated sub-contractors and suppliers, ie $1,664,157. 06. The second defendant subsequently made a deduction purportedly on account of liquidated damages for delay (which it was entitled to) but in fact to pay certain creditors who were not nominated sub-contractors or suppliers (which it was not entitled to). As at 18 March 1998 there was no real likelihood of such a deduction other than for delay. Furthermore if any part of the money payable under interim certificate 26 had been applied in payment of creditors the total liabilities would have been correspondingly reduced without any effect on the net assets position of Buildspeed Construction. I have accordingly disregarded the deduction in fact made by the second defendant.

The retention moneys totalling $5,192,500 were always at risk. As at 18 March 1998 the liquidated damages for delay amounted to $3,390,000 but this liability was not affected by the novation agreement. The balance works were yet to be executed and the novation agreement provided for completion by 31 August 1998. Liquidated damages were payable by Theme Corp for delay beyond 31 August 1998 at the same rate of $30,000 per day. It was a substantial risk assumed by Theme Corp. The value of the balance works less sums due to nominated sub-contractors and suppliers was only some $20m.

Theme Corp has four shareholders all of whom are also directors. All four are former employees of Buildspeed Construction. Mr Koh is one of them. He was one of its senior managers. Two of the others were also senior managers. The fourth director was its project manager. Mr Koh said in his affidavit:

> *If [Buildspeed Construction] ceased work on their projects it followed that we would be jobless. We were thus very concerned. Following discussions amongst us, we decided that we should try to seize what we saw as a possible business opportunity for us. We thought that the second defendants and other employers would regard us favourably if we proposed to take over the Simsville and other projects as we were already familiar with and working on the sites and if we could get the nominated and domestic sub-contractors to continue working. `*

`Simsville` is a reference to the project under construction by Buildspeed Construction for the second defendant.

The concern of the directors of Theme Corp was financial. They might be jobless but there was no reason for them to `take over` if they would suffer a loss and be in a worse position. $30,000 a day is a very substantial sum and it must have been taken into account. But they were as Mr Koh said `already familiar with and working on the sites`. They would have been in a good position to know what construction time was required. They were trying to `seize what [they] saw as a possible business opportunity`. In all the circumstances I think the period of 166 days from 19 March 1998 to 31 August 1998 under the novation agreement was a fair estimate of the required time to carry out

the balance works under the building contract.

As at 18 March 1998 I would say that there was a real likelihood of a delay of 166 days to complete the works in addition to the delay already occasioned. In the event of such further delay there would be a liability of an additional $4,980,000 for damages. I think the whole of this has to be provided for. In that event it is almost certain that the second defendant will deduct this from sums payable to Buildspeed Construction under the building contract. Taking this from the retention moneys will leave $212,500. In fact completion was only achieved 63 days later on 2 November 1998 but there is no evidence as to the cause of the delay except that Ms Menon said that `[Theme Corp was] of the view that the delay was not entirely their fault`. I think the value of the retention moneys as at 18 March 1998 was $212,500.

During the period between 10 March 1998 when the work done and materials on site were valued for the architect`s interim certificate 26 and 18 March 1998 `work had all but stopped`. Mr Koh and the other three directors of Theme Corp were very concerned that they would be jobless if Buildspeed Construction ceased work on its projects. They must have seen that as a real likelihood. Buildspeed Construction was as I have found insolvent and it had no intention to carry on business. In the construction industry as in any other business there may be commercial reasons for an enterprise to give up a potentially profitable contract and suffer a loss. There can hardly be any such reasons in this case. Buildspeed Construction ceased business. It appointed provisional liquidators on 29 April 1998. On the evidence before me I find that the transaction entered into on 18 March 1998 was not for the purpose of carrying on its business. Paragraph 6 of the Companies (Application of Bankruptcy Act Provisions) Regulations does not apply to preclude the making of an order referred to in s 98 of the Bankruptcy Act.

As I have found the value of the consideration for the transaction with Theme Corp contained in the novation agreement entered into by Buildspeed Construction was less than the value of the consideration provided by Buildspeed Construction. The shortfall was not less than $400,767 to $1,001,917 (for the net value of the balance works), $1,664,157. 06 (for the net value of interim certificate 26) and $212,500 (for the net value of the retention moneys). In total it was in the range of $2,277,424 to $2,878,574. The consideration for the transaction was significantly less than the consideration it provided and I so find. If Buildspeed Construction were an individual then I would say that it has entered into a transaction with Theme Corp at an undervalue for the purpose of s 98 of the Bankruptcy Act.

Void or voidable

If the transaction entered into at an undervalue had been entered into by an individual and in his bankruptcy such transaction would be `void or voidable under section 98, 99 or 103 of the Bankruptcy Act 1995` then it shall in the event of the company being wound up be `void or voidable in like manner`. See s 329 of the Companies Act. The Bankruptcy Act does not provide that any such transaction is void or voidable. What s 98 provides is that the Official Assignee may apply to the court for an order under this section and s 98(2) provides:

> *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 entered into that transaction.*

In **Re Libra Industries Pte Ltd** [2000] 1 SLR 84 which was decided shortly before this originating

summons came up for hearing the company which was in compulsory liquidation claimed a declaration that certain lease agreements entered into by the company as tenant constituted a transaction at an undervalue and it also claimed a number of other reliefs. Kan Ting Chiu J said at [para] 52:

> *I find that a sum of $490,810 paid by Libra Industries to Libra Holdings as rent is voidable for being an unfair preference and that $462,000 thereof is also voidable for having been made at an undervalue.*

He made an order for the repayment of $490,810. I think he must have held that the transaction was voidable under s 329 of the Companies Act because it would have been voidable under the Bankruptcy Act had it been entered into by an individual. **Re MC Bacon Ltd** [1991] Ch 127[1990] BCLC 324 was referred to.

Re MC Bacon Ltd was decided under s 238 (transaction at an undervalue) and s 239 (preference) of the English Insolvency Act 1986. Both those sections contain provisions enabling an application to be made for an order for restoring the position to what it would have been if the company had not entered into the transaction or had not given the preference. They make no reference to the transaction or preference being void or voidable and the question does not arise.

Section 329 of the Companies Act is curiously worded in its reference to a transaction being void or voidable under s 98 (or other provisions) of the Bankruptcy Act. Prior to 15 July 1995 it referred to a transaction being `under the law of bankruptcy ... void or voidable`. The Bankruptcy Act in force prior to 15 July 1995 did provide for certain transactions to be void or voidable but that Act has since been repealed by the Bankruptcy Act now in force. It was repealed on 15 July 1995 and on the same day s 329 of the Companies Act was amended to refer expressly to s 98 and other sections of the Bankruptcy Act.

I think it is clear that the purpose of s 329 of the Companies Act is to provide for uniformity in the treatment of transactions which are impugned whether the insolvent person be a natural person (or `individual`) or a company. The specific reference to s 98 and other sections of the Bankruptcy Act points to the consequences under those provisions. Under the Bankruptcy Act the court shall make such order as it thinks fit for restoring the position to what it would have been if the impugned transaction had not been entered into. In this sense the impugned transaction is `voidable` so that where the court would make such order under the Bankruptcy Act had the insolvent person been an individual it shall under s 329 of the Companies Act make a similar order where the insolvent person is a company. Such a construction will promote the purpose of s 329 of the Companies Act.

When I heard this originating summons the balance works had been completed and the maintenance period had just ended. Final accounts had not been and could not be prepared yet. The order to be made under s 329(1) of the Companies Act read with s 98(2) of the Bankruptcy Act is of a restorative nature and I accordingly made an order for the declaration and adjourned the originating summons for directions for an account.

Outcome:

Declaration granted.