EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2023/0177

BETWEEN:

[1] LUKE ALMOND
[2] SO KIT YEE ANITA
(As Joint Liquidators of Tsinghua Unigroup International Co., Ltd)

Applicants

and

LINXENS HOLDING SAS

Respondent

Appearances:

Mr. Richard Fisher, KC, with Ms. Sarah Latham for the Applicants

Mr. David Alexander, KC, with him Ms. Eleanor Morgan and Ms. Sophie Christodoulou for the Respondent

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2025: September 30; October 1, 2;
2026: April 16.

JUDGMENT

[1] **WALLBANK J (Ag.)**: This is the judgment of the Court in respect of an application filed by the Applicants, the joint liquidators ('the Liquidators') of Tsinghua Unigroup International Co., Ltd. (for ease of reference here only, 'TUI'), for an order against the Respondent, Linxens Holding SAS ('Linxens'), under sections 245 and 249 of

the **Insolvency Act 2003**[1] ('IA 2003'), in respect of an alleged unfair preference, requiring Linxens to pay to them the sum of US$125.9 million ('the Application').

[2] For the reasons developed below, the Application succeeds.

1. Background

[3] TUI was incorporated in this jurisdiction (the 'BVI') on 15th December 2011.

[4] TUI is an indirectly wholly owned subsidiary of Tsinghua Unigroup Co Ltd ('TUC'), a company incorporated in the People's Republic of China ('the PRC').

[5] On 6th August 2015, Unigroup International Holdings Ltd ('UIH') was incorporated in the BVI. UIH is a wholly owned subsidiary of TUI.

[6] TUI, TUC and UIH and other entities formed part of the Tsinghua Unigroup conglomerate of companies ('the Group'). The Group was made up of over 200 companies. It is ultimately owned by a PRC State owned enterprise. TUI was one of the finance companies for the Group. It was established to raise debt and make investments in the PRC as directed by the Group. The business of TUI, therefore, included to take loans, repay loans, make loans and receive repayment of loans.

[7] Linxens is a company incorporated under the laws of France. The Court was informed that Linxens is a leading technology company providing component-based solutions for security and identification and that it is a world-class specialist in the design and manufacture of microconnectors for smartcards and RFID antennae and inlays. Linxens is said to have been a market leader in its field for more than 30 years.

[8] Linxens is indirectly controlled by TUC, having been acquired by TUC in July 2018.

[9] Linxens and TUI are, accordingly, and uncontroversially, 'connected persons' within the meaning of section 5 of IA 2003.

[1] No. 5 of 2003.

[10] In December 2015, UIH issued US$350 million 6.0 per cent bonds scheduled to mature on 10th December 2020 ('the December 2015 Bonds').

[11] In April 2016, UIH issued a further US$100 million 6.0 per cent bonds scheduled to mature on the same date, 10th December 2020 ('the April 2016 Bonds'). The December 2015 Bonds and the April 2016 Bonds are, together, referred to as 'the Bonds'.

[12] TUI provided a guarantee in respect of UIH's obligations under the Bonds. The guarantee provided, among other things, as follows at Clause 5:

> "The Guarantor unconditionally and irrevocably guarantees that if the Issuer does not pay any sum expressed to be payable by it under this Trust Deed or the Bonds by the time and on the date specified for such payment (whether on the normal due date, on acceleration or otherwise), the Guarantor will pay that sum to or to the order of the Trustee, for itself and on behalf of each bondholder, in the manner provided by Clause 2.2 forthwith on demand."

[13] By the time the Application came on for trial, or, perhaps more accurately stated, at the trial, it was no longer seriously contested that TUI bore primary liability to meet the Bond obligations if UIH failed to do so.

[14] On 9th December 2020, i.e. the day before the Bonds were to mature, it was announced to the Stock Exchange of Hong Kong ('HKSE') that neither UIH nor the Guarantor TUI would be able to make the final payment of interest and principal (of around US$463 million) due the following day.

[15] UIH and TUI have not paid anything to the bondholders.

[16] Yet, two days prior to the HKSE announcement, on 7th December 2020, TUI paid cash of US$125.9 million to Linxens ('the Payment') in partial repayment of an outstanding loan of around US$180 million that was not due for repayment until 9th September 2021, some nine months later, nor demanded, or even requested, by Linxens.

[17] Contemporaneous emails show that Linxens' own employees understood, albeit informally, that the US$125.9 million payment was being made to it because the

Group was 'pushing back all the cash to the operating units to ensure that there is as little impact as possible of likely December 10 default on those bonds'.

[18] The Liquidators' case, put shortly, is that the Payment was (and obviously was) an unfair preference within the meaning of section 245 of IA 2003, in favour of a related company within the Group, to the detriment of the bondholders, who received none of the money due to them under the Bonds.

[19] Linxens' case at the trial, put equally shortly, is that the Payment does not fall to be treated by the Court under IA 2003 as an unfair preference nor as a prohibited payment, because (a) TUI was not cash-flow insolvent when the Payment was made on 7th December 2020; and (b) the Payment was made in the ordinary course of TUI's business.

2. **Procedural history**

[20] At the risk of repetition later in the context of Linxens' submissions, some procedural history here may serve as helpful background.

[21] On 3rd November 2021, a Statutory Demand was served on TUI by Citicorp International Ltd ('Citicorp') as Trustee for the bondholders in respect of the sum of US$486 million. On 23rd December 2021, Citicorp filed an originating application seeking the appointment of joint liquidators in respect of TUI ('the Originating Application'). On 25th April 2022, on the application of TUI, Ms. So, Mr. Tsui Chi Chiu and Mr. Roy Bailey were appointed by this Court as joint provisional liquidators of TUI. On 16th November 2022, the Originating Application was heard by the Court and Ms. So and Mr. Bailey were appointed as joint liquidators ('the Original Liquidators') of TUI. On 5th December 2022, Linxens submitted a R184 Claim Form in TUI's liquidation for debts of US$ 1,174,306 and EUR 49,044,394.

[22] On 27th September 2023, the Original Liquidators issued the Application seeking to set aside the Payment as an unfair preference within the meaning of section 245 of IA 2003.

[23] By an Order dated 30th May 2024, Mr. Almond replaced Mr. Bailey as one of the Liquidators with effect from 28th June 2024. By an Order dated 4th July 2024, Mr. Almond was substituted as the First Applicant on the Application.

[24] The trial of this Application was originally scheduled for February 2025. At the trial, Linxens applied for an adjournment to have more time to seek additional evidence from its indirect parent, TUC. This additional evidence would include evidence demonstrating that TUC had received payment of US$523 million between 7th and 11th December 2020 in cash, and that this 'payment' had not simply been effected by book entries. As learned Kings Counsel for Linxens, Mr. Alexander, KC, then explained:

> "…we are going to have to go to TUC and say you've got to provide us with the assistance or alternatively, and this is your choice, we are going to be in a position where we can't deal with this".

[25] Linxens was granted the adjournment. Only one material document, a loan agreement, was produced. There is a dispute whether the totality of the evidence now before the Court suffices to demonstrate whether the US$523 million had been paid in cash. We will return to this.

3. **Statutory provisions**

[26] The Application falls to be determined against the backdrop of the following statutory provisions.

[27] Section 245(1) of IA 2003 provides that:

> "Subject to subsection (2), a transaction entered into by a company is an unfair preference given by the company to a creditor if the transaction –
>
> (a) is an insolvency transaction;
>
> (b) is entered into within the vulnerability period; and
>
> (c) has the effect of putting the creditor into a position which, in the event of the company going into insolvent liquidation, will be better than the position he or she would have been in if the transaction had not been entered into."

[28] Section 245(2) of IA 2003 provides that:

> "A transaction is not an unfair preference if the transaction took place in the ordinary course of business."

[29] Section 244(2) of IA 2003 provides that:

> "A transaction is an insolvency transaction if- (a) it is entered into at a time when the company is insolvent; or (b) it causes the company to become insolvent".

[30] Section 244(3) of IA 2003 provides that:

> "For the purposes of subsection (2), insolvent has the meaning specified in section 8(1) with the deletion of paragraph (c)(i)".

[31] With the deletion of paragraph (c)(i) (which relates to balance sheet insolvency), section 8(1) of IA 2003 provides that:

> "A company …is insolvent if: …(c) … (ii) the company is unable to pay its debts as they fall due."

[32] Section 244(1) provides that 'vulnerability period' means:

> "in the case of a … preference given to a connected person, the period commencing 2 years prior to the onset of insolvency and ending on the appointment … , if the company is in liquidation, the liquidator".

[33] Section 244(1) provides that 'onset of insolvency' means:

> "the date on which the application for the appointment of a liquidator was filed, where a company is in liquidation and the liquidator was appointed by the court…".

[34] Section 245(4) of IA 2003 provides that:

> "Where a transaction entered into by a company within the vulnerability period has the effect specified in subsection (1)(c) in respect of a creditor who is a connected person, unless the contrary is proved, it is presumed that the transaction was an insolvency transaction and that it did not take place in the ordinary course of business".

[35] It is this latter provision which encapsulates statutory presumptions that the Payment in this case was an 'insolvency transaction' and did not take place 'in the ordinary course of business'.

[36] The Liquidators of TUI thus argue that the burden is on Linxens to prove to the satisfaction of the Court that, despite TUI's failure to pay (i) the guaranteed sum of

US$463 million in respect of the UIH bonds on 10th December 2020; (ii) the UIH Debt (as defined below) in the sum of around US$450 million (plus any interest); and (iii) a further US$1.05 billion (plus any interest) in respect of a different set of offshore bonds, which became due on 31st January 2021:

(1) TUI's financial position as at 7th December 2020 (two days before it made a stock exchange announcement that it was cashflow insolvent) was in fact that it was cashflow solvent when it paid the US$125.9 million to Linxens, and following the making of that payment; or

(2) Despite the contemporaneous communications demonstrating that the purpose of the Payment (and any other payments made around that time to connected parties) was to move all cash and valuable assets out of the entities liable for the offshore bond payments to other operating units, so as to minimise the impact of the impending defaults, the Payment should be treated as being in the ordinary course of business.

[37] The Liquidators contend that this is a hopeless task for Linxens, given the presumptions, the law, and the admissible evidence concerning the facts.

[38] Linxens argues that that is not so.

[39] Helpfully, and to Linxens' credit as a litigant, Linxens did not contest at the trial that the three limbs of section 245(1) were satisfied in this case. That said, the facts in evidence gave them no real choice but to do so.

[40] In the final reckoning, only two substantive issues remain:

(1) Whether TUI was cashflow insolvent when it made the Payment to Linxens; and

(2) Whether the Payment was made in TUI's ordinary course of business.

4. **Evidential constraints**

[41] Before summarizing Linxen's main lines of argument, it warrants observation that both sides presently before the Court, that is to say, TUI's Liquidators and Linxens,

have been disabled from developing their respective cases on account of a lack of documentary evidence from the Group. Those who must have been in the know concerning the affairs of TUI, UIH, TUC and other Group companies have not been forthcoming with documents and assistance. TUI's Liquidators lack important documents and records. Linxens have not been able to obtain them either. Both have tried. Both have engaged eminent accounting experts, who have likewise been hampered by lack of documents, information and assistance from elsewhere in the Group. TUI's Liquidators appointed Mr. Borrelli, the Managing Director of Kroll's Global Restructuring. Linxens appointed Mr. Pomeroy, a Director at Grant Thornton (British Virgin Islands) Ltd.

[42] Mr. Borrelli's evidence was that TUI was insolvent on a balance sheet basis and on a cash flow basis as at 8th December 2020. In relation to balance sheet solvency, Mr. Borrelli says that, after adjustment, TUI had a net deficiency as at 8th December 2020 of just over US$1 billion, and on cash flow insolvency, Mr. Borrelli says that on 8th December 2020 TUI did not have sufficient funds to make a payment of US$463 million on 10th December 2020.

[43] Mr. Pomeroy's evidence was that TUI was not cash flow insolvent at the time when it made the Payment to Linxens and that Payment did not cause TUI to become insolvent, because the evidence supports the conclusion that TUI had sufficient liquidity after it made the Payment to meet its obligations. He says that it was TUI's choice to lend US$523 million to TUC after it made the Payment, that ultimately led to TUI's insolvency when the Statutory Demand was served on TUI (nearly a year after the Payment was made).

[44] In the context of the cash flow solvency of TUI, Mr. Pomeroy said that:

(1) TUI had at least US$648.9 million of cash or cash equivalents available to it on or around 7th December 2020. Prior to the trial, Linxens' Counsel, in their Skeleton, urged the Court to consider, 'for context', paragraphs 33 to 35 of the judgment of the High Court of the Hong Kong Special Administrative Region, dated 15th June 2023, in Action No. 1269 of 2021, **Citicorp International Limited v Tsinghua Unigroup Co., Ltd,** by Hon.

Harris J ('**the Citicorp Judgment**') referred to at paragraphs 3.1.10 to 3.1.19 of the Third Pomeroy Report and especially at paragraph 3.1.18;

(2) The payment of US$523 million on 8th, 9th and 11th December 2020 by TUI to TUC was made by way of three separate and distinct payments of unequal amounts via bank transfers from TUI's PRC bank accounts to TUC's bank accounts, rather than merely being made by way of a series of accounting entries (i.e. cash did flow from TUI to TUC);

(3) From the documentation which Mr. Pomeroy had seen, and on the understanding that TUC's senior management could not unilaterally demand or compel TUI to make a loan to TUC, there was no contractual obligation on the part of TUI to make these three payments totaling US$523 million to TUC. Instead, the documentation indicates that such payments were made in the exercise of TUI's own discretion; and

(4) A loan of US$1.05 billion from Tsinghua Unic Limited ('Unic') to TUI ('the UNIC Loan') did not fall due to be repaid by TUI on 31st January 2021, nor did it fall due for payment by TUI within the reasonably near future of 7th December 2020. The loan contract in respect of the UNIC Loan provided that it was a demand loan for which Mr. Pomeroy (and the Liquidators) have seen no evidence of a demand in the documents. The UNIC Loan did not, therefore, impact the cash flow solvency of TUI.

[45] Mr. Pomeroy's evidence required adjusting during the trial. To his credit as an expert witness, he accepted this evidential necessity. The thrust of this adjustment was that instead of TUI's balance sheet as at 8th December 2020 showing TUI to have been solvent, it was, rather, balance sheet insolvent in the amount of some US$472 million.

[46] This case has presented the somewhat bizarre situation wherein Linxens is tasked with rebutting the statutory presumption that a different company over which it has very limited, indeed almost no, visibility, TUI, was cashflow insolvent when TUI made the Payment. Linxens did not make the Payment and did not demand that it should be made. Understandably, it does not want to have to give the money back

to TUI, but Linxens has the task of defending the acts and/or omissions of another, albeit connected, entity, over which Linxens had limited visibility and no control.

5. **Linxen's arguments**

[47] The following, in sum, are Linxens' arguments.

[48] Linxens is indirectly controlled by TUC, having been acquired by TUC in July 2018. Linxens and the Company are, accordingly, 'connected persons' within the meaning of section 5 of IA 2003.

[49] As of 30th June 2018, TUI's Consolidated Financial Statements recorded that TUI had assets of US$4.1 billion, liabilities of US$4 billion, net assets of US$83 million and a cash balance of US$1.2 billion.

[50] As of 31st December 2018, TUI's audited Financial Statements recorded that TUI had assets of US$3.4 billion, liabilities of US$3.3 billion, net assets of US$134 million and a closing balance of cash and cash equivalents of US$398 million.

[51] As of 30th June 2019, TUI's financial statements recorded that TUI had assets of US$3.4 billion, liabilities of US$3.3 billion, net assets of US$168 million and balance of cash at bank and on hand of US$918 million.

[52] As of 31st December 2019, TUI's audited Financial Statements ('the December 2019 Financial Statements') recorded that TUI had assets of US$2.6 billion, liabilities of US$2.5 billion, net assets of US$126 million and a closing balance of cash and equivalents of US$98 million.

[53] As of 30th June 2020, TUI's Financial Statements recorded that TUI had assets of US$2.6 billion, liabilities of US$2.5 billion, net assets of US$51 million and cash at bank and on hand of US$220 million.

[54] By August 2020, at TUC's request, TUC and Linxens had discussed the possibility of Linxens making loans to TUI so that cash was available (so Linxens says) to purchase bonds trading at a highly discounted rate. In that context:

(1) By an email dated 3rd August 2020 from Mr. Duong, the then Chief Financial Officer of Linxens, to Ms. Amy Yang Zhou ('Ms Zhou'), acting on behalf of TUI, Mr. Duong asked Ms. Zhou whether the proposed loans to TUI were going to be relatively short-term loans; and

(2) By an email dated 3rd August 2020, Ms. Zhou told Mr. Duong that repayment would be made 'whenever [TUI] has sufficient funds', although she also said that at that moment in time she could not guarantee that repayment would be made within 12 months.

[55] Pausing here, Ms. Zhou did not give evidence at the trial. For Linxens, Mr. Duong did, together with Mr. Arnaud Lay, Linxens' General Counsel and Chief Compliance Officer.

[56] On 9th September 2020, a loan agreement ('the Loan Agreement'), under which Linxens would lend TUI US$95 million and Euros 70 million, was signed on behalf of TUI by Mr. Weiguo Zhao, one of TUI's two directors.

[57] On 10th September 2020, the Loan Agreement was entered into between Linxens and TUI (having been signed on behalf of Linxens by Linxens' then Chief Executive Officer).

[58] The sums of US$95 million and Euros 70 million were then lent by Linxens to TUI. Pursuant to Clause 3.1 of the Loan Agreement, the loans were said, formally, to be due for repayment by 9th September 2021, although the agreement (says Linxens) actually was that they would be repaid 'whenever [TUI] ha[d] sufficient funds' to repay them. Accordingly, in Clause 3.2, provision was made for the loans to be repaid earlier than 9th September 2021.

[59] On or prior to 4th December 2020, in accordance with the agreement that TUI would repay Linxens 'whenever [TUI] ha[d] sufficient funds', TUI gave instructions to its bank to pay the sum of US$125.9 million to Linxens in partial repayment of the sums loaned by Linxens to TUI.

[60] On 7th December 2020, US$125.9 million was transferred to Linxens by TUI's bank in partial repayment of the sums loaned by Linxens to TUI.

[61] On 7th December 2020, Linxens contends, TUI received the sum of US$523 million.

[62] On or about 7th December 2020, TUI agreed to loan the sum of US$523 million to TUC. That sum was paid (contends Linxens) by TUI to TUC on 8th, 9th and 11th December 2020 in three unequal tranches, as follows:

(1) RMB 64,705.00 on 8th December 2020;
(2) RMB 3,181,715,395.00 on 9th December 2020;
(3) RMB 199,533,991.95 on 11th December 2020.

[63] On 10th December 2020, UIH was obliged to make a payment of US$462,676,000 (for convenience, US$463 million) in respect of the Bonds to or to the order of the Trustee, Citicorp. UIH did not make that payment to Citicorp.

[64] On 8th September 2021, Linxens and TUI amended the Loan Agreement in respect of the outstanding balance (then Euros 43.35 million) owed by TUI to Linxens.

[65] On 3rd November 2021, a Statutory Demand was served on TUI by Citicorp in respect of the sum of US$486 million.

[66] On 23rd December 2021, Citicorp filed the Originating Application seeking the appointment of joint liquidators in respect of TUI.

[67] As at 31st December 2021, TUI's Consolidated Balance Sheet ('the December 2021 Balance Sheet') showed that TUI had assets of US$2.2 billion, liabilities of US$2.3 billion and a net deficiency of US$35 million.

[68] Linxens accepts that:

(1) It is a connected person in relation to TUI on account of the fact that Linxens and TUI are both subsidiaries of TUC;
(2) Because Linxens is a connected person, the Payment was made within the vulnerability period. The payment was made on 7th December 2020. The vulnerability period covers the two-year period ending on 23rd December 2021, that being the date on which the application for the appointment of liquidators was filed; and
(3) The Payment had the effect specified in section 245(1)(c) of IA 2003.

[69] Linxens also accepts that, because it is a connected person, there is a presumption that the transaction was an insolvency transaction and that it did not take place in the ordinary course of business. However, Linxens contends that the contrary is in fact the correct position in both cases. Linxens accordingly contends that the Payment cannot be set aside under section 245 of IA 2003.

5.1. **Linxens' submissions on Cash-Flow Insolvency: The Law**

[70] Linxens submits that in the context of section 245 of IA 2003, so unfair preferences, the relevant insolvency test is the so-called cash flow insolvency test (otherwise called the 'commercial insolvency test'): section 244(3) and section 8(1) of IA 2003. The so-called balance sheet test is expressly disapplied by section 244(3) of IA 2003.

[71] The cash-flow test has been the subject of a number of decisions of English courts including, in particular, **Re Cheyne Finance plc**,[2] **BNY Corporate Trustee Services Ltd v Eurosail UK**[3] and **Bucci v Carman (Liquidator of Casa Estates (UK) Ltd)**.[4]

[72] Linxens submitted that the following principles emerge from these English cases:

(1) Cash flow solvency or insolvency is not to be ascertained by a blinkered focus on debts due at the relevant date: **Eurosail** [51]; **Casa Estates** [28(i)].

(2) Adopting a focus on debts due at the relevant date will in some cases fail to see that a momentary inability to pay is only the result of temporary illiquidity. In other cases, it will fail to see that an endemic shortage of working capital means that the company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks or even months: **Cheyne Finance** [51]; **Casa Estates** [28(i)].

[2] [2008] 1 BCLC 741, [2007] EWHC 2402 (Ch) (Briggs J).
[3] [2013] UKSC28.
[4] [2014] EWCA Civ 383, 2014] BCC 269, CA.

(3) The cash-flow test, accordingly, looks not only to a company's presently due debt but also to debts falling due from time to time in the future: **Eurosail** [25] and [37]; **Casa Estates** [27].

(4) The future in question is the 'reasonably near future': **Eurosail** [37]; **Casa Estates** [27]. What is the 'reasonably near future' will depend on all the circumstances of the case, especially the nature of the company's business: **Eurosail** [37]; **Casa Estates** [27]. The test is flexible and fact-sensitive: **Cheyne Finance** [56]; **Eurosail** [34]; **Casa Estates** [27]. However, once the court has to move beyond the 'reasonably near future', any attempt to employ the cash flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) - i.e. the balance sheet test - becomes the only sensible test: **Eurosail** [37].

[73] **Eurosail** has been referred to by the courts of the BVI on at least two occasions:

(1) in **Donna Union Foundation v Koshigi Limited**;[5] and

(2) in **PT Ventures, SGPS, S.A. v Vidatel Limited**.[6]

[74] In addition to the principles which derive from **Cheyne Finance**, **Eurosail** and **Casa Estates**, Linxens submitted that further assistance can be obtained from principles set out in passages in two Australian cases, which passages were not referred to in **Cheyne**, **Eurosail** or **Casa Estates**:

(1) Whilst the cash flow test requires looking to the future, that usually involves looking only to the 'reasonably immediate future' at [44]: **New Cap Reinsurance Corporation Ltd (in liq) v AE Grant**;[7] and

(2) An inquiry into whether an insolvency existed at a particular time is generally assisted by searching for what have been described as 'the usual indicia of insolvency' namely (1) a history of dishonoured cheques, (2)

[5] BVIHC (COM) 231 of 2018, unreported, delivered 14th May 2019 (Adderley J.).
[6] BVIHCM2021/0039, unreported, delivered 30th September 2021 (Wallbank J.).
[7] [2008] NSWSC 1015.

suppliers insisting on cash on delivery terms, (3) the issuing of post-dated cheques, (4) the issuing of rounded cheques (suggesting part payment of debts), (5) special arrangements with creditors, (6) inability to produce timely audited accounts, (7) non-payment of workers' compensation premiums, VAT, pension payments and group tax, (8) demands from bankers to reduce the amount owing on an overdraft, (9) receipt of letters of demand and (10) receipt of court processes for debt: **Austin Australia Pty Ltd v De Martin & Gasparini Pty Ltd**.[8]

5.2. **Linxens submissions on the Ordinary Course of Business: The Law**

[75] Linxens submitted that pursuant to section 245(2) of IA 2003, a transaction will not be an unfair preference if it took place in 'the ordinary course of business'.

[76] The leading case on the meaning of ordinary course of business is the decision of the Privy Council in **Countrywide Banking Corporation Ltd v Dean**[9] on an appeal from the New Zealand Court of Appeal. In **Countrywide** the liquidator of a New Zealand company served a notice that he wished to have a transaction set aside as a preference. The applicant applied to the High Court in New Zealand for an order that the transaction (the payment by the company to a creditor of the sum of NZ$30,914.90) should not be set aside as a preference under section 266 of the Zealand Companies Act 1993 ('the 1993 Act'). The High Court in New Zealand dismissed the application. The New Zealand Court of Appeal dismissed the appeal. The Privy Council then dismissed the appeal to it as well. In dismissing the appeal, the Privy Council (Lords Browne-Wilkinson, Slynn, Hoffmann and Hutton and Gault J):

(1) Said that the test of whether something was in the ordinary course of business was essentially one of fact (349A-B);

(2) Declined to adopt any particular formulation as to what ordinary course of business meant (349A-B);

[8] [2007] NSWSC 1238, NSW S Ct at [9]-[10] and [22].
[9] [1997] AC 338.

(3) Stated that it was not necessary to make any comprehensive statement, suitable for all cases, of the criteria for determining when a transaction is to be held to have taken place in the ordinary course of business for the purposes of section 266 of the 1993 Act (349B);

(4) Declined to accept that, as submitted by the applicant, the test is general in the sense that it would be satisfied so long as it can be said that the transaction is one which might reasonably take place in some business setting (349B-C);

(5) Said that to abstract the particular business setting and inquire (in effect) merely whether it is possible to envisage a setting in which the transaction would be an ordinary one is not what the statute requires (349C);

(6) Stated that plainly the transaction must be examined in the actual setting in which it took place and that the actual setting defined the circumstances in which it is to be determined whether a transaction was in the ordinary course of business (349C-D);

(7) Indicated that the determination is to be made objectively by reference to the standard of what amounts to the ordinary course of business (349D-E);

(8) Said that the transaction must be such that it would be viewed by an objective observer as having taken place in the ordinary course of business (349E);

(9) Stated that, while there is to be reference to business practices in the commercial world in general, the focus must still be the ordinary operational activities of businesses as going concerns, not response to 'abnormal activities';

(10) Agreed with what the Judge in **Countrywide** had said (349F-H), namely:

> "Whether a payment should be regarded as commercially routine at a day to day trading and operating level will turn at least in part upon a comparison with the practices of the commercial community in general. But equally the way the particular company has acted in the past, and its dealings with the particular creditor, would seem pertinent. That the payment was simply the repetition of past behaviour would make it more difficult to argue that it represented special assistance to an insider or the result of special enforcement measures or a situation which the subject creditor ought to have

> investigated before extending credit. So at a policy level there is something to be said for the view that relevant considerations should extend to the prior practices of the particular company."

(11) Said that section 266 of the 1993 Act therefore required examination of the actual transaction in its factual setting, excluding the intent and purpose of the company save as required by s.266(4) of the 1993 Act (349H);

(12) Stated that, because the examination is undertaken objectively by reference to the standard of the ordinary course of business, there may be circumstances where a transaction, exceptional to a particular trader, will nonetheless be in the ordinary course of business as for example its first transaction of a particular type (350A);

(13) Said that it may be that transactions undertaken in the past will, because of changed circumstances, no longer be considered as in the ordinary course of business (350A);

(14) Stated that the payment of some accrued indebtedness may be within the ordinary course of business as may the payment of moneys owing under a lease to secure a lessor's consent to an assignment of the lessee's interest (350A-B); and

(15) Concluded by saying that the particular circumstances will require assessment in each case (350B).

[77] **Countrywide** is not the only case where the question of the ordinary course of business has been considered in England. In the English Chancery Division case of **Ashborder BV v Green Gas Power Ltd**,[10] Etherton J (as he then was; he subsequently became Master of the Rolls in England and is now Lord Etherton) had to consider a near identical phrase in the context of debentures containing floating charges allowing a company to dispose of any of its assets if such disposal was 'in the ordinary course of its business'.

[78] In **Ashborder**, the claimants contended that a transaction was only in the course of the company's business if it was part of the common flow of business done by the

[10] [2004] EWHC 1517 (Ch), [2005] BCC 634.

company, forming part of the ordinary course of business which it carried on, calling for no remark and arising out of no special or particular situation (at [194]). In contrast the defendants contended that a transaction was carried out in the ordinary course of business if the transaction was not fraudulent, was within the memorandum of association and was not calculated to bring the business of the company to an end. Etherton J concluded that the opening position of both sides was too extreme.

[79] Etherton J then said, among other things, as follows:

(1) The proper starting point is that the words in the expression 'ordinary course of its … business' are ordinary words of the English language which must be given the meaning which ordinary business people in the position of the parties to the facilities agreement and the debentures would be expected to give them against the factual and commercial background in which those documents were made (at [202]);

(2) On the other hand, such businessmen would not be likely to take so narrow a view of 'ordinary course of business' that it would not embrace a transaction for the preservation and continuance of a company's business, merely because it was not a transaction that had ever been carried out before (at [203]);

(3) The **Borax Company**[11] litigation is English Court of Appeal authority for the proposition that a transaction may be in the ordinary course of business even if it is exceptional or unprecedented (at [206]);

(4) The question whether a particular transaction is within the ordinary course of a company's business in the context of a floating charge is a mixed question of fact and law (at (227]);

(5) It is convenient to approach the matter in two stages. First, to ascertain, as a matter of fact, whether an objective observer, with knowledge of the company, its memorandum of association and its business, would view the transaction as having taken place in the ordinary course of its business and,

[11] In re Borax Company; Foster v Borax Company [1901] 1 Ch 326.

second, to consider whether, on the proper interpretation of the document creating the floating charge, applying standard techniques of interpretation, the parties did not intend that the transaction should be regarded as being in the ordinary course of business for the purposes of the charge (at [227]);

(6) Subject to any such special considerations resulting from the proper interpretation of the charge document, there is no reason why an unprecedented or exceptional transaction cannot, in appropriate circumstances, be regarded as in the ordinary course of a company's business (at [227]); and

(7) Transactions which are intended to bring to an end, or have the effect of bringing to an end, the company's business are not transactions in the ordinary course of business (at [227]).

[80] In **SWM Limited v Jersey Financial Service Commission**,[12] a regulated financial services company sought a declaration that certain payments it wished to make were 'in the ordinary course of business'. The Royal Court of Jersey referred to **Ashborder** and said that, although **Ashborder** related to the interpretation of the words 'ordinary course of its business' within security documentation, it seemed to the Royal Court that **Ashborder** provided useful guidance as to the correct approach (at [24]). The Royal Court then went on to make some observations which applied to interpreting the expression 'ordinary course of business' (at [25]). They were that:

(1) The expression should be given its ordinary English meaning;

(2) The expression does not preclude a single one-off exceptional act which the company might never have done before nor never do again;

(3) Actions which were likely to preserve or protect a company's business against a threat to it may well be in the ordinary course of business; and

[12] [2016] JRC 014.

(4) The question of whether or not an action is in the ordinary course of business may be fact specific and cannot be isolated from the context in which the company conducts its business.

[81] The phrase ordinary course of business also appears in the context of injunctions (because despite a freezing injunction being imposed on a company, that company is still entitled to effect transactions that are carried out in the ordinary and proper course of its business). The leading case in this field appears to be the decision of the English Court of Appeal in **Michael Wilson & Partners, Ltd v Emmott**[13] where, among other things, the following was said:

(1) What is in the ordinary course of business is a highly fact-sensitive question (at [19] and [35]);

(2) What is in the ordinary course of business depends on what the defendant's business is and on how it is carried on (at [19]);

(3) A payment which might be made in the ordinary course of one business may not satisfy that description in a different business (at [19]);

(4) It is the course of business which has to be ordinary as opposed to the particular transaction (at [21]);

(5) It is not helpful to substitute for the phrase 'ordinary course of business' synonyms (or approximate synonyms) like 'routine' or 'recurring' (at [22]);

(6) A transaction which is neither routine nor recurring may properly be regarded as being in the ordinary course of business: (at [22]); and

(7) To restrict the scope of the ordinary course of business exception to the payment of trade creditors is as unhelpful as any other paraphrase (at [28]).

[82] In **Emmott**, the Court of Appeal found that the repayment of part of a loan balance and rental arrears to associated companies fell within the meaning of ordinary course of business. However, Gloster LJ said that the fact that the Court of Appeal had concluded that such was the case in **Emmott** did not mean that, in all circumstances, the repayment of indebtedness to associated companies would be

[13] [2015] EWCA Civ 1028.

regarded as falling within the expression 'ordinary course of business' (**Emmott** at [35]).

[83] Given the matters set out above, Linxens submits as follows in relation to ordinary course of business as that phrase is used in section 245(2) of IA 2003:

(1) The expression ordinary course of business should be given its ordinary English meaning;

(2) Whether something is in the ordinary course of business is essentially a question of fact. It is a highly fact-sensitive question.

(3) The transaction must be examined in the actual setting in which it took place. That setting defines the circumstances which determine whether the transaction was in the ordinary course of business.

(4) A crucial factor in determining whether a transaction is in the ordinary course of business is what the business of the company is. It is impossible to form any view about whether something is in the ordinary course of business of a company without knowing what that company's business was.

(5) It is the course of business which has to be ordinary as opposed to the particular transaction.

(6) The determination of whether a transaction is in the ordinary course of business is to be made objectively. The transaction must be such that it would be viewed by an objective observer, with knowledge of the company, its memorandum of association and its business, as having taken place in the ordinary course of business.

(7) A transaction may be in the ordinary course of business even if it is exceptional or a one-off or an unprecedented transaction and/or a transaction which the company may never have done before and may never do again.

(8) The payment of accrued indebtedness plainly can be within the ordinary course of business.

5.3 **Ordinary Course of Business: Linxens' Case**

[84] Linxens' case is that the core, and indeed the only, business of TUI was as a finance company. It existed for the very purpose of taking out loans and lending money. Part of that business also involved repaying money which it had borrowed and being repaid money which it had lent. In 2019 and 2020, TUI lent very substantial sums of US dollars. It also borrowed very substantial sums of US dollars. During that time, it also repaid very substantial sums of US dollars. Likewise, it was repaid very substantial sums of US dollars in those years.

[85] In view of the above, the taking of a short-term loan and its repayment by TUI is, therefore, always likely to be in the ordinary course of business in relation to TUI when it is remembered what TUI's business actually was. The course of business in question is ordinary. That is particularly so when the size of the loans and the repayment are, in relative terms to what had previously happened in 2019 and 2020, at the lower end of the scale. Even more so when the Memorandum of TUI is considered and the authorities have indicated that the payment of indebtedness can well be regarded as being within the ordinary course of business: see e.g. **Emmott**. In such circumstances, Linxens submitted that an objective observer with knowledge of TUI's Memorandum and its business could conclude that the Payment was made in the ordinary course of business.

[86] The detailed facts point in that direction as well. In August 2020, TUC wished for a very short-term bridging facility loan from Linxens to repurchase bonds that were trading at a discount. Linxens and TUI agreed that this very short-term loan would be repaid 'whenever [TUI] ha[d] sufficient funds' to do so. Early repayment was therefore expressly written into the Loan Agreement. Linxens then lent TUI US$95 million and Euros 70 million. In or about early December 2020, so three-months after the making of the loans, TUI decided to repay part of them. It did that on 7th December 2020. That was consistent with TUI having agreed to repay as soon as it had sufficient funds.

[87] Given the above, the Payment fell fairly and squarely into the definition of having been made in the ordinary course of the business of TUI. What is more, it was made at a time when TUI had at least US$648.9 million immediately available to it in cash.

The amount of the Payment also represented a very small percentage of the loans which it is currently known that TUI repaid in 2019 and 2020 – only 6.3%. That the repayment was made in the ordinary course of business is all the more so because TUI was solvent at the time of the Payment. Thus submitted Linxens.

6. **Rebuttal of presumptions.**

[88] Another area of legal submissions before the Court concerned the burden to be discharged by a party who has the task of rebutting presumptions.

[89] Linxens urged that in the present civil (i.e. non-criminal) law circumstances, Linxens has the burden of proving to the ordinary civil standard, of a balance of probabilities, that the Payment was not an 'insolvency transaction' and took place 'in the ordinary course of business' (see section 245(4) of IA 2003).

[90] Thus, urged Linxens, the application of the ordinary civil standard means that Linxens does not have a high burden to discharge: it does so if it can satisfy the Court that in all the known and admissible circumstances of the case (a) TUI was cashflow solvent on 7th December 2020 when it made the Payment to Linxens; and (b) TUI did so in the ordinary course of business.

[91] The Liquidators accepted that the ordinary civil balance and standard of proof applies, but with two slight but significant glosses.

[92] The Liquidators contended as follows.

[93] The existence of the statutory presumption in favour of the Liquidators which Linxens must displace has at least two important practical consequences, as demonstrated by the conclusions of Lewison LJ in the English Court of Appeal case of **Bucci v Carman (Re Casa Estates)**[14] at [37] and [43] when addressing the similar presumption which exists in English law:

(1) First, the only finding that the Court needs to make is that Linxens has not rebutted the presumption that TUI was cashflow insolvent at the time that

[14] [2014]EWCACiv383.

the relevant payment was made. It is not necessary to make a finding as to exactly what the solvency position of TUI was, simply that Linxens has not persuaded the Court that TUI was cashflow solvent. Per Lewison LJ at [37]:

> "[37] Warren J was in my judgment entitled to find that Mrs Bucci had not rebutted the presumption that Casa UK was cash-flow insolvent at the time that it made the payments to her. He did not need to go any further."

(2) Second, the Court is entitled to conclude that the presumption is not displaced if it cannot make a finding as to solvency with sufficient certainty, or that it cannot be satisfied as to any necessary steps or 'building blocks' in the defendant's analysis of cashflow insolvency. Per Lewison LJ at [43]:

> "[43] Finally, Mr Randall criticised Warren J for having said that he was not in a position to make findings of fact on some of the matters debated before him. But this overlooks the statutory presumption that the company was insolvent when the payments were made. A presumption is a provisional conclusion that must be displaced by contrary evidence. It is not the same as a trial at which the court starts, so to speak, with a blank sheet of paper. If the judge is not in a position to make a finding of solvency, the presumption prevails. Equally, if he is not in a position to make one or more findings about the building blocks in the case that the company was solvent, then the presumption is not displaced. I do not, therefore, consider that this criticism undermines Warren J's overall conclusion."

7. **Discussion**

[94] It is convenient to start by observing that I accept as correct Lewison LJ's explanation in **Bucci v Carman (Re Casa Estates)** of what it takes for a presumption to be rebutted. I do so because it accords, in my view, with sound reasoning. The principle he enunciates would seem to apply both to criminal and civil matters. In criminal matters, where the standard of proof is to the higher standard of beyond reasonable doubt, it is easy to see that unless the prosecution demonstrates beyond a reasonable doubt that the accused satisfies all the necessary elements for commission of the offence in question, then the presumption, or provisional conclusion, prevails that the accused is not guilty.

Similarly, in a civil law context, unless a claimant or applicant can assemble all the necessary elements to establish a factual position that would displace the provisional conclusion, that provisional conclusion remains in place. In a civil law context, what the 'necessary elements' are would be case specific, as opposed to statutory elements found in criminal law. It therefore makes sense to refer to these elements as 'the building blocks'. It is true that in a civil case, where the standard of proof is a balance of probabilities, the Court is not strait-jacketed into conducting a box-ticking exercise for the presence or absence of 'building blocks', but can be swayed more vaguely to a conclusion in view of 'all the circumstances of the case' and the Judge's assessment of the quality and nature of the witness and documentary evidence. Nonetheless, if the Court sees that apparently necessary 'building blocks' are missing, the Court would generally not be wrong in concluding that the provisional conclusion has not been displaced.

[95] This begs the question as to what necessary 'building blocks' are in this case, for Linxens to rebut the statutory presumptions.

[96] The Liquidators submitted that given the connected status of Linxens, it is for Linxens to prove to the Court's satisfaction (including any 'building block' steps in the analysis) that TUI was, contrary to the statutory presumption, cashflow solvent at the time of the making of the Payment to Linxens, and remained cashflow solvent having made that payment. The Liquidators say that Linxens cannot do so for a variety of reasons, not least that their own expert Mr. Pomeroy suggests that there is insufficient evidence to reach a clear view on the cashflow position of TUI as at 7th December 2020. Given this, say the Liquidators, the prospect of Linxens rebutting the statutory presumption is hopeless on this basis alone. But even if this is not treated as fatal to Linxens' case, Linxens cannot satisfy the Court that TUI was cashflow solvent in the required sense as at 7th December 2020 or after making the payment to it.

[97] First, say the Liquidators, the Court must proceed on the basis that TUI would become subject to an immediately and currently due and payable liability under the guarantee and indemnity to pay the Trustee US$463 million on 10th December 2020.

The liability did not remain contingent until the Statutory Demand was made in November 2021. So much was, to my mind, incontrovertible at the trial.

[98] In terms of allegedly missing necessary 'building blocks' for Linxens' case that TUI was cashflow or commercially solvent, the Liquidators specifically identify two which became controversial at the trial.

[99] The first of these was that Linxens needs to satisfy the Court that (i) TUI received US$523 million in cash or cash equivalents (ii) before TUI made the Payment to Linxens on 7th December 2020.

[100] The second was that the US$523 million in cash or cash equivalents would have been freely available to TUI for TUI to pay its debts as they fell due. If the US$523 million had been paid to TUI only on condition that the money would be used by way of payment under the loan to TUC, then the money was not freely available to TUI for the purpose of the cashflow analysis and TUI was therefore cashflow insolvent.

[101] The Liquidators urged that Linxens had failed to adduce any evidence that (i) TUI had received or paid TUC US$523 million in cash or cash equivalents, nor indeed (ii) that TUI had received such money before TUI made the payment to Linxens.

[102] Linxens could not point to any documentary evidence for the timing of receipt by TUI of US$523 million. That 'building block' was completely absent.

[103] In terms of documentary evidence, Linxens could however point to an apparent cash-flow statement or summary for TUI that their expert, Mr. Pomeroy, had identified amongst the limited material papers, showing that TUI made payments, in three unequal tranches, to TUC in a total amount of about US$523 million, on 8th, 9th and 11th December 2020. This indicated, so said Linxens, that TUI must have had at least US$523 million together with the amount of the Payment to Linxens, available to it in cash on or about 7th December 2020. Linxens urged that this cash-flow statement was irrefutable proof of the availability to TUI of those amounts of cash as at 7th December 2020.

[104] The Liquidators contested this. Whilst Mr. Bailey, one of the Original Liquidators, accepted that he had presumed the cash-flow statement or summary indeed referred to payment of cash, one of the subsequent office holders, Mr. Luke Almond, observed that this cashflow statement or summary does not necessarily refer to cash or cash equivalents passing, even if, as it did, it referred to 'cash received'; the same accounting effect could be achieved internally by way of bookkeeping entries. Mr. Almond also observed that cash flow summaries of that nature, as an internal management account, are 'not prepared typically on the basis of any accounting standards' and that he did not know what accounting standard might have been used. In these matters, Mr. Almond's view was supported by the Liquidators' expert, Mr. Borrelli.

[105] Linxens' learned Counsel urged that the amounts and dates of the unequal tranches strongly suggested that what passed was cash, not merely book entries.

[106] The Liquidators urged, in response, that Linxens and, by extension, TUI and other Group entities, had been accorded the benefit of the adjournment of the February trial to come up with evidence for the receipt of the US$523 million in cash, which Linxens had said they needed in order to rebut the presumption of insolvency, but no such evidence had been forthcoming. No bank statements were produced, which would be the obvious record for cash payment. The Liquidators submitted that that indicated that no such payment of cash to TUI, or from TUI to TUC occurred. The only material document produced was a form of an alleged loan agreement between TUI and TUC, apparently produced on 7th December 2020, but that did not evidence the payment of cash either. The thrust of the Liquidators' submissions was that clearly TUC had decided not to make available to its subsidiary, Linxens, documentary evidence for the alleged payment of cash, if it had such evidence at all, and that such a choice has the consequence of leaving Linxens without this necessary 'building block' for its case of TUI's alleged cashflow solvency.

[107] There is only limited mileage that can be extracted from an internal, apparently unaudited, so-called cashflow statement, unsupported by contemporaneous

documentary evidence such as bank statements, remittance instructions and such like. Whilst I agree with Linxens that the cashflow statement is indicative of cash payments being made, in terms of the amounts and dates recorded, and references to 'cash received' and 'cashflow', the pointed lack of documentary supporting evidence, despite the very ample opportunity afforded to Linxens and its Group connected entities to come up with better, direct, evidence, suggests to me that there was in fact no such actual payments from TUI to TUC. There may, possibly, have been payment of cash or cash equivalents from a different entity to TUC, or to a yet different entity, with the payment and receipt being ascribed to TUI and TUC respectively for accounting purposes. But there is no documentary evidence for this either. The cash payment 'building block' is suggested, but not supported, nor evidenced.

[108] There is, here, another aspect, which I should allude to, although it ultimately became of no great importance.

[109] The Liquidators, on the one hand, and Linxens' accounting expert on the other, had read the **Citicorp Judgment**. That decision arose out of largely the same factual matrix and circumstances as presently before this Court. The parties were different and so were the issues in dispute.

[110] Harris J there referred to payment of the US$523 million. He also narrated the facts in such a way that was commensurate with a natural understanding that cash or cash equivalents passed between TUI and TUC, i.e., there was an actual payment and not a series of book entries, although he did not in terms specify this.

[111] Linxens was initially (understandably) keen that I should read that judgment 'for context', since it supported their case that the US$523 million was indeed 'paid' in cash. The Liquidators, through Mr. Fisher, KC, objected, on the basis that Linxens' reliance upon that judgment 'falls foul of the rule in **Hollington v Hewthorn**.[15] …

[15] [1943] 1 KB 587 (as described in the ECCA decision in Floreat Real Estate Limited v XYZ et al., BVIHCMAP 2023/0017, unreported, delivered 3rd May 2024 at [226]-[243] (Farara JA (Ag.)).

that factual findings made by an earlier tribunal in other proceedings are inadmissible in a subsequent trial, certainly between different parties'.

[112] Linxens' suggestion that I should read that judgment 'for context' clearly sought to skirt around the rule in **Hollington v Hewthorn**, of which its Counsel was patently aware. Not to put too fine a point on it, what Linxen's Counsel appeared to be doing, in my view, was to pay lip-service to the rule but hope that the colours of that judgment would run into my mind to influence me into accepting that the US$523 million was paid in cash.

[113] At the trial, however, Linxens' learned Counsel performed a *volte-face*. Mr. Alexander, KC, for Linxens, postulated that neither the 'Liquidators nor Linxens can rely on anything in the judgment of Honourable Justice Harris'.

[114] What was behind this change in tack, as learned Counsel for the Liquidators, Mr. Fisher, KC, submitted, was that the judgment also contained material that indicated that the US$523 million was not available to be used freely as TUI might desire, but could contractually only be used for a specific purpose.

[115] Now it was Mr. Fisher, KC's turn to adjust his course. He submitted that the rule in **Hollington v Hewthorn** applies only to factual findings of the other tribunal in other proceedings; the rule does not prevent another litigant pointing out that evidence has been led about a factual state of affairs in those other proceedings.

[116] In the present case, it was ultimately not necessary for the Liquidators to rely upon evidence led in the Hong Kong proceedings that the US$523 million transfer was conditional upon it being used for a specific purpose. I will therefore refrain from weighing into the debate (in a necessarily *obiter* way) as to how much, if anything, a different party can rely upon the contents of the decision of another tribunal. It is enough that the **Citicorp Judgment** merely reminds us of the trite fact that sometimes money is paid conditionally upon being used for a particular purpose and may then not be free to be used by the recipient for other purposes. It is enough that the judgment raised the issue whether or not the funds in question (if they were

indeed cash) were or were not available to be used freely by TUI. This Court does not, and indeed should not, look to that judgment for the answer to that question.

[117] The issue whether funds are to be freely available is primal and needs to be asked anyway. The free use of money for meeting debts as they fall due is a fundamental building block for Linxens' case that TUI was cashflow or commercially solvent.

[118] Thus, whether the US$523 million were freely available funds is not just a basic but also an important question for the present trial.

[119] The Liquidators do not have to show that the US$523 million was not freely available for TUI: the burden is on Linxens to demonstrate that TUI could use the US$523 million freely to meet its debts as they fell due. Linxens adduced no evidence at all that this was so. That necessary 'building block' is completely missing.

[120] Now, it may be said that a structure need not collapse if some building blocks happen to be absent. The Court could, it might be said, despite their absence, form an overall view of all the facts and circumstances, and conclude on a balance of probabilities that TUI did have sufficient cash to pay its debts as they fell due at the moment when it made the payment to Linxens. There would, in that case, need to be some sufficient reason why the absence of the building blocks identified above is not fatal. But I am unaware of any such reason in this case.

7.1 **Liquidators' contentions regarding TUI's insolvency**

[121] The Liquidators compellingly present the following view.

[122] The question of whether the presumption of cashflow insolvency has been rebutted is ultimately a factual matter for the Court. The parties have adduced a very significant amount of accounting evidence (although it is far from complete).

[123] Mr. Borrelli, the Liquidators' accounting expert, says that TUI was cashflow insolvent (and obviously so) on 7th December 2020. Linxens made no inroads into his expert evidence in cross-examination.

[124] Linxens' accounting expert, Mr. Pomeroy disagrees with Mr. Borrelli. Unfortunately, Mr. Pomeroy's expert evidence and the weight to be given to his opinion has to be

considered through the lens of the very significant corrections he had to make to his initial analysis at trial. Ultimately, Mr. Pomeroy's opinion of TUI's solvency swung from TUI being balance sheet solvent to balance sheet insolvent in the amount of some US$472 million.

[125] In relation to cashflow insolvency, the Liquidators criticize Mr. Pomeroy for maintaining his view that TUI was cashflow solvent, accusing him of making a number of unreal assumptions.

[126] In relation to the factual analysis, the Liquidators submit that it is helpful to stand back (in accordance with the 'commercial reality' approach advocated in the case law) and consider the two critical pieces of contemporaneous evidence:

(1) The HKSE announcement of 9th December 2020. TUI's own directors announced to a stock exchange, only two days after the date on which the Court is required to consider the issue of cashflow insolvency, that TUI was cashflow insolvent – i.e. it was already not expected to pay a debt that would fall due the following day. Mr. Pomeroy accepted that in his evidence.

(2) The fact that the Payment to Linxens was made at all. Linxens contemporaneously understood that the reason for making the payment was that the Group was 'pushing back all the cash to the operating units to ensure that there is as little impact as possible of likely December 10 default on those bonds'. That is because the Group knew, and the directors of TUI knew, that TUI was insolvent. The Linxens' Payment makes no sense unless TUI was cashflow insolvent – indeed, that was the whole reason for making the Payment in the first place.

[127] The Liquidators submit that it is hard to think of more compelling evidence than this – and indeed the Liquidators are unable to identify a case in which a court has been assisted by such clear evidence as to a company's cashflow insolvency. Linxens has no answer to these points – it still cannot advance a sensible argument as to why the Court should disregard these central pieces of contemporaneous evidence.

[128] The compelling contemporaneous evidence is bolstered by the fact that Mr. Duong (the CFO and then, from 4th December 2020, the CEO of Linxens) accepted in cross-examination that his view at the time was that TUI was cashflow insolvent – i.e. would not be able to pay its debts in full as they fell due. This is what he said about the position of TUI in early November 2020 (i.e. one month before Linxens was paid):

> "Q. So I suggest to you that there was no basis at this stage for you to be confident in any way that the TUI loan to Linxens would be repaid.
>
> A. So what happens when you default? You negotiate, and when you negotiate, the banks receive a portion, the other lenders receive a portion, and as I mentioned, I didn't think, you know, I didn't think we would get everything back intact, but at the same time I didn't truly believe that all of it would just disappear either.
>
> Q. So by this stage, then, I think what you are saying is you thought it was likely that the loan would be impaired to some degree but you didn't know what you might get in due course.
>
> A. Right."

[129] The Liquidators place particular significance on the evidential record that the Group was 'pushing back all the cash' to the operating companies, both from an insolvency point of view as well as whether the Payment had been made in the ordinary course of business.

[130] They record that on 26th November 2020, Mr. Duong emailed Mr. Lay explaining that Ms. Zhou (who was working on Group financing matters ahead of the imminent bond defaults and who Mr. Duong confirmed was Linxens' point of contact for TUC) had told him why she thought the payment was being made:

> "Amy and Gary don't have a direct read on this, but Amy thinks that they are pushing back all the cash to the operating units to ensure that there is as little impact as possible of likely December 10 default on those bonds. So, if TU are going to default, better to have the operating units with cash to continue to work rather than having cash stuck at TU group levels and operating units also running out of cash. Not an official position or communication, but just personal interpretations."

[131] They point out that it is extremely rare to have contemporaneous evidence of the motivation of a debtor in making a preference payment. However, this is one of

those rare cases. The payment was made to prefer Linxens, a Group company, over the external creditors. Mr. Duong accepted this in cross-examination and also accepted that Linxens was aware of the same.

[132] Indeed, this would be the obvious inferential conclusion even in the absence of the 26th November 2020 email. At the time the payment was made to Linxens, there was no obligation on TUI to repay the loan or any part of it (it was not due to mature until September 2021, some nine months later) and Linxens had made no demand. The Liquidators ask rhetorically, what other possible reason could there have been for transferring all the available cash to Linxens immediately before the default on the UIH Bonds? The Liquidators urged that Linxens has not offered any.

[133] I pause here to note that the Liquidators are not entirely correct here. Linxens' case concept is that TUI had agreed to repay the loan from Linxens whenever it had the money; on 7th December 2020 TUI had the money, and simply did what it had agreed to do, which was to pay it back. I will come back to point out the flaw(s) in this case concept when considering the ordinary course of business aspect.

[134] The Liquidators approach the issue of insolvency as follows.

[135] The issue for the Court at this trial is to consider whether Linxens has rebutted the statutory presumption that TUI was cashflow insolvent as at 7th December 2020, immediately after the payment was made to Linxens. In doing so, the Court is invited to put itself into the position of a hypothetical judge hearing a hypothetical winding up petition on that day. What would the evidence look like to that judge?

[136] The hypothetical judge would know the following at the hypothetical hearing on 7th December 2020.

[137] First, TUI was balance sheet insolvent to a very significant degree. It simply did not have the assets, let alone the reasonably available assets, to meet its obligations to its creditors.

[138] Second, TUI was either already liable or would, only three days later, become liable in respect of the UIH Bonds in two ways:

(1) On 10th December 2020, as was well known, TUI would become directly liable to Citicorp, the trustee of the UIH Bonds, under the guarantee for the sum of US$463 million.

(2) TUI was also directly liable to UIH for the UIH Debt in the sum of at least US$449 million. No loan agreement has been identified by Linxens and accordingly the position is as set out in **Chitty on Contracts** (35th edn., Sweet & Maxwell, 2023) at [42-280]: '[w]here money is lent without any stipulation as to the time of repayment, a present debt is created which is generally repayable at once without any previous demand'. The UIH Debt was therefore due in circumstances where the obvious commercial purpose was that TUI would put UIH in funds in order to pay the bondholders on or around 10th December 2020.

[139] Third, TUI was likely (at the very least) to become liable to Unic for US$1.05 billion in very short order. The evidence demonstrates the following:

(1) A significant proportion of the proceeds of the bonds issued by Unic ('the Unic Bonds') was paid to TUI. Accordingly, by 7th December 2020, TUI owed Unic over US$1.7 billion ('the Unic Debt').

(2) The first tranche of the Unic Bonds (US$1.05 billion) matured on 31st January 2021, less than two months later. Unic's most, or indeed only, valuable asset capable of paying the Unic Bonds was the Unic Debt, i.e. the loan it had made to TUI with the proceeds of the Unic Bonds. The commercial intention was for TUI to repay US$1.05 billion to Unic; and for Unic to use that money to pay the bondholders. This is obviously correct as Mr. Pomeroy accepted (albeit as a 'reasonable assumption').

(3) Linxens' case appears to be that the Unic Debt should be ignored because it was on demand. This is wholly unreal:

a. The loan was not on demand. It was repayable 'no later than the date required' by Unic: clause 2.3. Unic required US$1.05 billion of the Unic Debt to be repaid by 31st January 2021 in order to pay its bondholders. That should be the start and end of the position.

Given the burden on Linxens and the absence of evidence regarding the admissible background, the commercial structure of the arrangement makes it obvious that Unic, which only had one asset capable of providing it with the funds required to repay the bondholders (the debt due to it by TUI) required payment by the time it was required to pay the bondholders. That is the position that its liquidators are taking. Linxens cannot credibly satisfy the Court that the loan agreement does not have such an effect. This 'building block' is simply missing.

b. In any event, it is irrelevant whether the loan was repayable on demand. If it was payable on demand, the hypothetical judge considering the matter on 7th December 2020 would have asked: what are the prospects of Unic demanding payment of its main asset, which it needs to realise in order to pay its own debts that fall due on 31st January 2021? The answer would obviously be: Unic will make a demand because: (i) that is commercial common sense i.e. it is consistent with the commercial structure of the arrangements; (ii) failure to make a demand would be a breach of the duties owed by its directors to its creditors; and (iii) if Unic's directors do not cause Unic to make a demand, then it will enter an insolvency process and its officeholders will make a demand. Indeed, Mr. Pomeroy accepted this in his third report when he noted that 'it would appear reasonable to assume that TUI would have or should have been called on to repay the UNIC Loan': paragraph 14 3.3.30. As he also said in cross-examination:

> "Q. Right. Well, let's - - I think that's a slightly different point, but I think the point I was just putting to you is looking at the position in a commercially realistic manner, 7 or 8 December, given the limited assets available to Unic, surely, your language, it would be reasonable to assume that Unic would demand payment from TUI in order to pay its own liabilities falling due at the end of January?
>
> A. Yes. That would be reasonable."

c. The very best that Linxens can say on this point is that a demand would not be made because TUI could not pay it and/or Unic's directors would have acted in breach of duty by failing to take steps to realise the one asset capable of paying Unic's bondholder creditors. The first point is entirely circular in its logic; and the second requires the court to assume that, with no evidential basis, a hypothetical judge hearing a winding up petition would have concluded that TUI was cashflow solvent because the directors of an insolvent major creditor would act contrary to the interests of its creditors and fail to make a demand (and that, for some reason, subsequently appointed officeholders over the insolvent major creditor would also fail to make a demand). Both points should be rejected.

(4) Fourth: despite having partially repaid Linxens, TUI still owed approximately US$55 million to Linxens, which was a debt falling due, at the latest, in nine months (or earlier if Linxens was to make a demand). Mr. Duong appeared to accept that the reason why Linxens was only repaid in part (rather than in full) was precisely because TUI did not have enough cash to do so:

> "Q. Did you ever ask why only part of the debt was being repaid at this time, Mr Duong?
> A. I did, and I don't think I got a really clear explanation for it.
> Q. I mean, logically, isn't it right that it must be because that was all the cash that TUI had available to it?
> A. Initially they were paying back 150.
> Q. And then they paid less?
> A. Yes."

But as Mr. Duong further accepted, even Linxens (a connected company that was being preferred over the external creditors) did not consider that it would recover the loan in full.

(5) Fifth, TUI had no prospect of paying any of these debts. As is common ground, the Group was in serious financial distress. On 16th November 2020, there had been a default in respect of bonds issued by TUC. The

Group had been downgraded. A default on the UIH Bonds on 10th December 2020 was inevitable (as everybody within the Group knew). A default on the Unic Bonds on 31st January 2021 was also inevitable (as everybody within the Group also knew).

(6) As Mr. Zhang said in January 2022, TUI was 'a holding company with no material operations of its own'. The only assets TUI had were receivables due from other Group companies – but those assets were not realisable (and certainly not readily realisable) to enable TUI to pay its debts in light of the Group's serious financial distress. Sensibly, Linxens does not contend otherwise. As Mr. Pomeroy accepted, there is 'no evidence that any entity in the group had sufficient assets to enable the bonds which were falling due in December and January to be paid'.

(7) In short, it was not the case that TUI could not pay ***some*** of its debts when due. In fact, it could not pay ***any*** of its debts when due. The Liquidators submitted that there could not be a clearer case of cashflow insolvency.

[140] The Liquidators submit that the burden lies on Linxens to rebut the presumption of TUI's insolvency but Mr. Pomeroy was apparently unable to reach any concluded views on the issue – or at least any view he could be confident in. Mr. Pomeroy stated in Section 6.3 of his first report that the 'financial statements do not provide sufficient detail to calculate TUI's Cash Flow Solvency as at the date of the Subject Payment …', that 'the financial statements and certain intra-group communications submitted into evidence provide fragmented, fixed point-in-time information about cash balances and debts owed and are not suitable for the purpose of calculating TUI's Cash Flow solvency when it made the Subject Payment' and 'Based on the available evidence, it is not possible to conduct a comprehensive Cash Flow Solvency analysis for the date of the Subject Payment or for any period leading up to the service of the Statutory Demand.' In cross-examination, he said, on more than one occasion, that a 'definitive' cashflow analysis was not possible: 'I would say that a comprehensive cashflow analysis has been done, I would say that a definitive cashflow analysis can't be done because we don't have all the information.'

[141] This is not a particularly hopeful start for a litigant that wishes to rely on its expert to support its contention that it has rebutted a statutory presumption.

[142] Further concessions made by Mr. Pomeroy in cross-examination included:

(1) As mentioned above, his reconstructed balance sheet contained two major errors:

a. Despite increasing the cash and cash equivalents as if the payment to Linxens had not been made, the full liability of US$180 million due to Linxens had not been included;

b. Despite increasing the cash and cash equivalents to reflect an alleged receipt by TUI of US$523 million from Spreadtrum Hong Kong Ltd ('Spreadtrum HK'), the receivables figure had not been adjusted down to decrease the amount of assets by the amount of money credited to the cash account.

As a consequence of the above errors, TUI was not balance sheet solvent on 7th December 2020. In fact, using Mr. Pomeroy's own assumptions (which were favourable to TUI), TUI was balance sheet insolvent in the sum of US$472 million as at 7th December 2020.

(2) When the cashflow test is applied on 7th or 8th December 2020, the relevant liabilities to be taken into account include not just those due on that date, but those which are likely to fall due in the reasonably near future. However, although the look-forward period is an important part of the analysis, Mr. Pomeroy was unable to opine on a specific period save as to say that three months or six months might be 'reasonable'.

(3) The announcement to the HKSE on 9th December 2020 by TUI's directors was that TUI was cashflow insolvent.

(4) As to the UIH Debt and the guarantee obligation to the UIH Bonds trustee:

a. Contrary to his disagreement with Mr. Borrelli ahead of the adjourned trial, Mr. Borrelli was right that it was appropriate to include on the balance sheet as a liability TUI's guarantee of the UIH Bonds in addition to the UIH Debt;

b. If a demand was needed in respect of the UIH Debt, it would be reasonable to assume that it was likely a demand would be made against TUI as at 7th or 8th December 2020, and that 10th December 2020 would be within any reasonably near future period.

(5) As to the Unic Debt:

a. On the assumption the Unic Debt is to be taken into account, TUI was cashflow insolvent;

b. Assuming a demand was required, it was reasonable to assume that Unic would have called on TUI to pay the Unic Debt because Unic had no other source of asset from which the Unic Bonds could be repaid.

(6) There is no proof that TUI received (or paid TUC) US$523 million and Mr. Pomeroy had drawn his conclusions based on the information he had seen, but not on the information he would have expected to see but had not seen.

(7) If the US$523 million had been paid to TUI only on condition that the money be used by way of payment under the loan to TUC, Mr. Pomeroy would accept that the money was not freely available to TUI for the purpose of the cashflow analysis and was therefore cashflow insolvent.

[143] Nevertheless, Linxens still advances a single argument based on a theory of Mr. Pomeroy's, which is itself based on the sum of US$523 million said to have been paid to TUC shortly after the payment to Linxens. Mr. Pomeroy's theory runs like this. (1) TUI received US$523 million from Spreadtrum HK at some unspecified time and therefore (apparently) must have had US$523 million when it paid Linxens on 7th December 2020. (2) The Court should, when considering cashflow insolvency,

entirely ignore the Unic Debt and the balance of the Linxens debt. (3) The Court should also ignore the sums due in respect of the UIH Bonds (i.e. the sums due under the guarantee and the UIH Debt). However, if that liability is to be taken into account, it is only US$463 million. (4) US$523 million is greater than US$463 million so the Company was not cashflow insolvent. (5) TUI then became cashflow insolvent shortly after (but at an unspecified time prior to 9th December 2020) when it paid US$523 million to TUC.

[144] The Liquidators submit that this theory is totally unreal and many steps removed from commercial reality:

(1) First, as a starting point, the theory requires the Court to ignore the US$1.05 billion Unic Debt that was payable on or shortly before 31st January 2021. There was no prospect of the Unic Debt being paid. Mr. Pomeroy accepted that, if the Unic Debt is to be taken into account (as it plainly ought to be) then his solvency theory does not get off the ground.

(2) Second, there is no clear and credible evidence that there was any cash payment from TUI to TUC (whether as at 7th December 2020 or any other date for that matter). In seeking an adjournment of the first trial, Linxens made the following submission:

> "MR ALEXANDER:…Plainly we are now going to have to approach TUC, so the indirect Parent above us, which is one of the companies which is the Company which received the 523 million, and we're going to have to get a piece of evidence that demonstrates that TUC actually received the 523 million on the 7th of December, the 8th, 9th and 11th of December."

(3) Remarkably, despite the trial being adjourned for this primary purpose, TUC has refused to provide Linxens (its own subsidiary) with bank statements showing receipt of any funds from TUI. First, evidence from Linxens' Mr. Lay:

> "Q. And so TUC would presumably be motivated to assist Linxens because if you have to repay US$125 million, that will affect the value of its asset. Is that right?

A. As I was saying, I have been (Inaudible) they acknowledge my request, they told me they will communicate this request to TUC people, and despite several attempts on my side I didn't get information or documents."

…

"Q. Did you ask them to provide bank statements or documents evidencing –

A. I did. I never received anything about bank statements.

Q. So you did ask but you never received them?

A. Correct."

Secondly, evidence from Mr. Pomeroy:

"A. From my background and experience I would have expected to see, like I say, emails, notes, statements themselves, so it is a major gap in information and something I couldn't explain."

…

"Q. But I think we would agree that the only way in which an accountant, a reasonable accountant typically would be satisfied as to what would happen would be the availability of bank statements.

A. Absolutely. That would be proof. Unfortunately, we don't have proof, so I was forced to rely on the evidence that is in submission.

Q. And so I think I'm right in saying that what you sought to do is infer as best you can based on the information what could have happened.

A. I have drawn my conclusion based on what I have seen.

Q. Right, but not what you haven't seen.

A. No. I guess so, yes."

The Liquidators invited the Court to infer that the reason for the failure to provide bank statements is that the bank statements do not assist Linxens' case (and by extension, do not assist TUC as the party that would benefit if the Liquidators' claim were to fail). Ultimately, the failure to do so means that Linxens cannot rebut the presumption based on this particular case theory.

(4) Third, even if TUI paid cash to TUC at some point in December 2020, there is absolutely no evidence whatsoever that TUI had the US$523 million before it made the Linxens payment on 7th December 2020, or that payment to TUC was made after the Linxens payment.

(5) Fourth, even if TUI had the US$523 million in cash when it paid Linxens on 7th December 2020, it was plainly not at the free disposal of TUI. The US$523 million theory comes from Mr. Pomeroy. Mr. Pomeroy's theory is based on what he has read in the Citicorp Judgment of Harris J. Mr. Pomeroy explained in paragraph 5.6.19 of his first report that (based on the Harris judgment) the alleged US$523 million came from Spreadtrum HK and was then paid on to TUC. That these funds (if they were funds) were not at the free disposal of TUI is consistent with the terms of the loan agreement itself – see clause 1.1. ("The purpose of this Loan is to repay the security deposit of the domestic affiliate Spreadtrum Communications (Shanghai) Co., Ltd"). Mr. Pomeroy accepted (in addition to the various other points above) that this, if established, was fatal to his solvency theory.

(6) Fifth, and in any event, even if Linxens could somehow get over these hurdles (which the Liquidators submitted it cannot), the attempt to isolate the US$125.9 million payment to Linxens from the US$523 million payment to TUC is unsustainable. It is readily apparent that, assuming the US$523 million payment was made, the purpose of both payments was to strip cash out of TUI in favour of Group companies and at the expense of the bondholders. A preference 'transaction' includes not just the direct preference payment but all linked/associated transactions including with third parties: **Phillips v Brewin Dolphin Bell Lawrie Ltd**[16] and **Goode on Principles of Corporate Insolvency Law** (5th edn., Sweet & Maxwell, 2018).[17] When taking a commercially realistic view of cashflow/commercial

[16] [2001] 1 W.L.R. 143.
[17] at 13.18.

insolvency it is entirely artificial to separate the payments in the way Linxens seeks to do.

[145] Put shortly, TUI was plainly hopelessly cashflow insolvent as at 7th December 2020. Linxens cannot come close to discharging the burden of proof.

[146] I agree with the Liquidators' analysis. It is clear to me that key elements, or 'building blocks', are missing for a case that TUI was cashflow or commercially solvent when it made the Payment to Linxens. That suffices for the Court to find, as I do, that Linxens has failed to rebut the presumption of TUI's insolvency.

[147] That is sufficient to dispose of Linxens' case. I would go further, to say that it is improbable on a balance of probabilities that TUI, whilst heavily balance sheet insolvent, and clearly cashflow or commercially insolvent for an extended period, and part of a financially distressed Group that was undergoing a liquidity crisis, should have experienced a window of cashflow solvency just on the day, or in the few days either side, of 7th December 2020 when it made the Payment. If, extraordinarily, that had been the case, it could have been demonstrated by primary documentation such as bank statements and correspondence, with, if necessary, appropriate commentary by way of oral evidence, but no such evidence was adduced by Linxens. Linxens, unfortunately for it, was not provided with any such evidence from TUC or from elsewhere in the Group despite having asked for this assistance.

7.2 **Ordinary course of business**

[148] Linxens' summary of the law in relation to what constitutes the 'ordinary course of business' inquiry is one which I entirely agree with, so far as it goes. It looks to transaction types, company types, possibly new or one-off transactions by companies, and a host of considerations. One is tempted to summarise the inquiry to be undertaken by the Court, in considering whether a transaction was done 'in the ordinary course of business' with the blanket, entirely correct, but utterly unenlightening remark that it depends upon all of the circumstances of a particular case.

[149] Consideration whether a transaction has been done in a company's 'ordinary course of business' cannot be divorced from the insolvency context in which that inquiry is to take place. In the context of insolvency, a transaction is either in the ordinary course of business, ***or it confers an unlawful preference***. The old-fashioned, unpolished, but instantly understandable term was a 'fraudulent preference'. The Court does not look merely at whether the company in question could do and did transactions of the type in question in the ordinary course of its business. If that were the end of the inquiry, the fact that an impugned transaction is of exactly the same kind that the company usually does would mean that no such transaction could ever amount to an unlawful preference. That cannot be right. The Court however goes further and asks whether, in the circumstances before it, the **design behind** the transaction was to confer an unfair (or fraudulent, or undue, or whatever other epithet denoting unlawfulness) preference to someone.

[150] I fully accept Linxens' submission that the loan it made to TUI, and TUI's repayment of it, fell squarely within the type of business ordinarily conducted by TUI. But this does not address the fundamental question whether the Payment to Linxens was in fact an unfair preference. The question to ask is not so much, 'was the payment made in the ordinary course of the payor's business' but 'was the effect of the payment to confer a preference, and if so, was that unfair'. As the authorities make clear, the answer comes down to the ***design*** behind the transaction, whether actual or to be imputed. I use the word 'design', because that is the term used in the seminal authority, and because a 'design' is not necessarily the same as a dishonest intention.

[151] The Liquidators adverted to the following line of authorities which support this analysis. They submitted as follows.

[152] The 'ordinary course of business' defence has its roots in old English authorities concerning preferences and the distinction between: (i) transactions that seek to subvert the equal participation of creditors in an insolvent debtor's estate; and (ii) transactions that are in the ordinary course of business. See, for example, the

transaction described by Lord Mansfield in **Rust v Cooper**[18] as 'a secret clandestine contrivance, with no other view or intention than to give a preference, and to defeat the consequences of a certain bankruptcy, though it purports to be a *bonâ fide* sale'. Lord Mansfield went on to say:

> "There is a fundamental distinction between an act like this, and one done in the common course of business….If, in a fair course of business, a man pays a creditor who comes to be paid, notwithstanding the debtor's knowledge of his own affairs, or his intention to break; yet, being a fair transaction in the course of business, **the payment is good; for the preference is there got consequentially, not by design: it is not the object**; but the preference is obtained, in consequence of the payment being made at that time." (Emphasis added.)

[153] The Liquidators point out that this distinction is supported by a whole series of authorities making essentially the same point: **Tomkins v Saffery**[19] at 235 to 236, **Taylor v White**[20] at [6] (Dixon CJ), [7], [11] (Taylor J) and [13] (Menzies J), **Countrywide Banking Corporation Limited v Dean**[21] (payments that were 'responses to abnormal financial difficulties' or which 'represented special assistance to an insider or the result of special enforcement measures' did not fall within the 'ordinary course of business' defence).

[154] The Liquidators include in this line of authorities our Court of Appeal judgment in **Mark Byers & Ors v Chen Ninging**,[22] which concerned the repayment of an unsecured loan shortly before liquidation. The Court of Appeal distinguished between payments made to creditors with a view to the continuation of trade, and payments made in response to the company's insolvency: see [102]-[105].

[155] Thus, Linxens' focus on what TUI's ordinary course of business is misses the point: it overlooks what TUI's 'design' was in making the Payment.

7.3 Evidence in relation to 'ordinary course of business

[18] (1777) 98 E.R. 1277, 2 Cowp. 629.
[19] (1877) 3 App. Cas. 213.
[20] [1964] HCA 11.
[21] [1998] A.C. 338.
[22] BVIHCVAP 2015/0011, unreported, delivered 12th June 2018.

[156] Linxens' case concept would suggest that Linxens is indeed not overlooking what TUI's 'design' was in making the Payment. Linxens contends that TUI was a finance vehicle that made and received repayment of loans; it borrowed money from Linxens in order to buy bonds that were trading at a discount, and, in accordance with an agreement or understanding between Linxens and TUI that TUI would repay the loan whenever it had sufficient money to do so, it did. Thus, TUI's 'design' in making the Payment was merely to continue to fulfill TUI's contractual obligations at a point in time when it had enough money to do so.

[157] This analysis is attractive, but it is superficial, and, as I will explain, incomplete and not one I have been able to bring myself to believe. It ignores important contemporaneous evidence.

[158] The explanation that the loan from Linxens to TUI had as its purpose the purchase of bonds at a discounted price is not reflected in the contemporaneous correspondence. So, for example, on 3rd August 2020, Mr. Duong emailed other employees of Linxens in the following terms:

> "Dear all, As you have heard, TU [i.e. Tsinghua Unigroup] will be opening up its capital to Chongqing and in doing so will receive substantial cash injection. The only problem is that this substantial capital injection is not expected to happen before the end of H1'21 and TU has 1.5 B$ in bonds maturing in Dec'20 and Jan'21 [i.e. the UIH Bonds and the Unic Bonds]. **TU have therefore requested our help to upstream cash to help them repay these bonds.** Based on the June reporting, we do not have quite enough cash in France to be able to freely upstream the requested 150 M€. …" (Emphasis added.)

[159] The purpose of the loan was described by Linxens' Mr. Duong as being to supply cash to TUI for it to fulfill its obligations to pay the bondholders, not to purchase bonds at a discount.

[160] Further correspondence involving Mr. Duong shows that he became fairly intimately involved in Group efforts to help find cash within the Group for repayment of the Bonds – not to purchase bonds trading at a discount.

[161] Then, on 1st March 2021, Mr. Duong sent draft slides to Mr. Lay for his review. Mr. Lay replied the same day, saying he had no comment, and that the slides were

'clear and comprehensive'. These slides were prepared for a meeting of Linxens' shareholders, who were also employees of Linxens, on 3rd March 2021. Amongst the 'clear and comprehensive' matters communicated, was the following:

> "TU Financial Situation
>
> - Since December 2020, TU has suffered from liquidity situation which does not allow them to meet their interest and principal repayments on their maturing debt
>
> -TU requested Linxens' assistance in the form of a ~150 M€ loan to TU requested Linxens' assistance in the form of a ~150 M€ loan to TU **to help pay the interest, but soon realized that the total amount TU to help pay the interest, but soon realized that the total amount raised was not enough, so TU reimbursed Linxens ~110 M€ of this loan**. …" (Emphasis added.)

Again, there was no mention of the purchase of bonds trading at a discount.

[162] In terms of Linxens' understanding of the purpose behind the Payment, before the Payment was made, on 26th November 2020, Mr. Duong explained to his colleagues, including Mr. Lay, TUI's desire to make a repayment to Linxens. Mr. Duong wrote this:

> "Just had Amy on WeChat. Decision made by committee which is managing TU situation. Transfer needs to be done in next 48 hours (Jerome, fast, please).
>
> Amy and Gary don't have a direct read on this, but Amy thinks that **they are pushing back all the cash to the operating units to ensure that there is as little impact as possible of likely December 10 default on those bonds. So, if TU are going to default, better to have the operating units with cash to continue to work rather than having cash stuck at TU group levels and operating units also running out of cash**. Not an official position or communication, but just personal interpretations.
>
> So there you go.
>
> Let's get that cash back as fast as possible.
>
> This will have ~5-7 M€ negative impact on 2021 budget for the interest income…
>
> Rgds. CD" (Emphasis added.)

[163] Whilst it is correct that the explanation does not come from TUI itself, and is the personal interpretation of intermediaries, and thus may be incorrect or incomplete,

this is a direct, unaffected and unschooled account. It is strong evidence of what Linxens' understanding of the transaction was. That understanding was that the Payment was designed to confer a preference upon Linxens, to the detriment of the bondholders and other creditors.

[164] So, before, and for at least several months after the loan from Linxens and the Payment, Linxens' Mr. Duong and Mr. Lay were recorded as proceeding on the understanding that the loan and its repayment had everything to do with assisting TUI to meet its Bond obligations and nothing to do with buying bonds trading at a discount, nor repayment whenever TUI should have available funds.

[165] There is another aspect of the contemporaneous documentary record that is important. This is the haste TUI had in making the Payment. Linxens' case concept is that TUI had agreed to repay the loan from Linxens whenever TUI had sufficient funds to do so. There is no evidence that Linxens had an urgent desire for cash. Equally, it is uncontroversial that Linxens had made no demand for repayment of its loan to TUI. Upon the terms of the written contract, repayment would not be due for several months. Linxens appears to have been content with this (and indeed, Mr. Duong, in the email of 26th November 2020 I have just quoted, lamented the loss of interest that Linxens would earn if the loan was repaid early).

[166] But, as Mr. Duong's email of 26th November 2020 records, the 'committee which is managing TU situation' had decided that 'Transfer needs to be done in next 48 hours'. The 'TU situation' appears, clearly, to have been its impending default upon the Bonds unless it could find the cash to meet its Bond obligations. Mr. Duong obviously understood that TUI required the Payment to be made in haste. He instructed his colleague Mr. Jerome Frou: '(Jerome, fast, please)'.

[167] TUI's urgency was also reflected in an email copied to Mr. Duong from the Group's Mr. Gary Miao on 26th November 2020. The primary addressees were a Group company CFO, Mr. Randy Shen, and Linxens' Mr. Jerome Frou. Also copied was Ms. Zhou. Its subject line was 'TU loan repayment'. The email forwarded a request for Linxens' Euro and US dollar bank account details. Mr. Miao's email was brief:

"Hi CD [i.e. Mr. Duong], this is urgent, pls provide asap. Gary"

[168] Mr. Duong's contemporary reaction is also recorded. On the same day, 26th November 2020, Mr. Duong sent an email to Mr. Lay and another Linxens colleague, Mr. Christophe Duverne. The subject line read 'FW: TU loan repayment' and the 'importance' was marked 'High'. Mr. Duong stated this:

> "Weird. I had Gary on Tuesday and Amy today and neither one mentioned this… very strange."

[169] The aspect that was 'weird' and 'very strange' was the fact that neither of Ms. Zhou, nor Mr. Gary Miao, who were, so to speak, external to Linxens and on TUI's side of the transaction, had mentioned the making of the Payment when they had spoken with Mr. Duong earlier that day, as Mr. Duong must have got used to expecting from the ordinary course of Group companies' business with Linxens. This suggests that the idea of making the Payment, and the speed with which it had to be made, were a reaction to a time-sensitive situation on the side of TUI. The only such situation for which there is evidence is the maturing of the Bonds, and the likely default on them.

[170] Mr. Duong's (entirely correct and understandable) sense of unease was also shared by his colleague at Linxens, Mr. Christophe Duverne. The latter sent an email to Mr. Duong the same day, 26th November 2020:

> "CD, noted but I really can't make sense of this. And it might not be the end of it. It almost begs for us to try and freeze at least some of our cash for safety sake. Happy to discuss further. "

[171] The way I read this, it indicates that Mr. Duverne sensed that the Payment might be liable to be set aside as somehow improper, hence it might be prudent for Linxens to lock down its own cash to preserve it from restitution to TUI.

[172] To me, this correspondence indicates that Linxens' Mr. Duong and Mr. Duverne both sensed that the Payment was not being made in the ordinary course of TUI's business.

[173] The only explanations to be found in the contemporaneous record for the reason(s) behind the Payment and its urgency are:

(1) The Group's management was 'pushing back all the cash to the operating units to ensure that there is as little impact as possible of likely December 10 default on those bonds';

(2) Linxens had loaned cash to TUI 'to help pay the interest [on the Bonds], but [TUI] soon realized that the total amount raised was not enough, so TU[I] reimbursed Linxens'.

[174] Nowhere is it trailed or reflected in the contemporaneous documents that the purpose behind the loan from Linxens to TUI was to enable TUI to purchase bonds trading at a discount, and that TUI was simply making the Payment to Linxens because it had the money available to do so and had agreed that it would repay the loan whenever it had that money.

[175] Indeed, had that been the case, it would not explain TUI's rush to make the Payment. In circumstances where Linxens had not demanded repayment, and the loan was not set to mature on its written terms for another several months, repayment was not time-sensitive **from Linxens' point of view**. But it was clearly time-sensitive **from TUI's point of view**. The only upcoming event reflected on the evidential record that could make repayment time-sensitive from TUI's perspective was the upcoming maturing of the Bond payment obligations. Scrupulosity on TUI's part to honour its contractual obligations, even ahead of time, does not explain TUI's rush – TUI clearly had no such scruples about leaving external creditors unpaid.

[176] TUI's vaunted (by Linxens) purpose in repaying the Linxens' loan whenever it had available funds also does not explain the 'weird' and 'very strange' failure on TUI's part to mention its intention to make the Payment during Mr. Duong's discussions by WeChat earlier that day with Ms. Zhou and Mr. Gary Miao.

[177] There is, moreover, another aspect. The narrative that the purpose of the Linxens' loan had been for TUI to purchase bonds trading at a discount, was first mentioned by Mr. Lay in these proceedings in his First Affidavit at paragraph 19, made on 6th December 2023. He appears to have received this narrative from Mr. Duong. Mr. Duong continued and slightly elaborated on it. In his Witness Statement made on 11th October 2024, Mr. Duong stated the following:

> "15. On 31 July 2020, Amy asked me if we could schedule a call. We scheduled an MS Teams call for 3 August 2020. **During the call, Amy explained that TUC had bonds trading at a discount, and they wanted to repurchase some of the bonds to take advantage of that discount, but they needed cash in order to do so**. Amy asked for Linxens to provide a loan for the purposes of purchasing the bonds.
>
> 16. Immediately following my call with Amy on 3 August 2020, I sent an email to members of Linxens' team, stating that 'TU' (by this I meant TUC, Linxens' shareholder) had "requested our help to upstream cash to help them repay… bonds." By this I did not mean pay back principal or interest due under bonds since the loan amount would not be nearly sufficient for that, but to buy bonds back." (Emphasis added.)

[178] While organization of the call is reflected in contemporaneous correspondence, the explanation attributed to Ms. Zhou is not. This is somewhat odd, if it had been true. There is no reason why that purpose should or could not have been stated in correspondence in the weeks and months that followed, but a different story stated and maintained on the record thereafter. If this supposed reason was true, it makes Mr. Duong's explanation, months later in March 2021, to Linxens' employee shareholders, approved by Mr. Lay, a falsehood. So, I am bound to ask myself: which of these two explanations was true, because they both cannot be? I am more inclined to believe the unaffected, unschooled contemporaneous record, than the mere say-so of one who single-handedly, unforcedly, denies the truth of what he has stated.

[179] One of the tell-tale signs for an artificially constructed narrative is typically an account of an allegedly remembered oral conversation, of which no record, conveniently, exists in writing. Another is that, when pressed for more details in cross-examination, the witness cannot remember. That was also the case here. Counsel for the Liquidators was prepared to go along with the Linxens' narrative that the purpose of the loan was to fund purchase of bonds trading at a discount. I am prepared to do the same, because that part of the overall account does not matter. Whatever was the purpose for the loan from Linxens, that purpose ***does not explain TUI's haste in repaying Linxens, and in part at that, nor TUI's 'weird' and 'very strange' failure to discuss beforehand with Linxens TUI's***

intention to rush through the very substantial but incomplete payment in Euros and US dollars within 48 hours.

[180] I have come to the conclusion that I do not believe Linxens' case that TUI was simply discharging its contractual obligation to Linxens to repay the loan whenever it had the funds available to do so. The contemporaneous documentary record demonstrates, on a balance of probabilities, that the preference Linxens gained by the Payment was not merely a consequence of continuing trading by TUI, but by TUI's design. The only contemporaneous record reflects Mr. Duong's entirely reasonable understanding that TUI was caused to 'push back' cash to operating entities within the Group, including Linxens, so the cash could continue to be used there, instead of falling to be divided between TUI's creditors upon its liquidation which was foreseeable once it defaulted on its Bond obligations.

[181] There is no other credible explanation advanced. In other words, I am driven to the view, on the evidence and a balance of probabilities, that the Payment deliberately caused a Group creditor, Linxens, to receive cash in preference to the external creditors. This was not the case of a preference being conferred as a mere consequence of timing in continuation of TUI's ordinary course of business. This Payment, in my assessment, on a balance of probabilities, intentionally and by design, conferred a preference upon Linxens as a Group company. It was positively intended to frustrate other, external, creditors' rights in the likely imminent event of TUI's insolvency following default upon its Bond obligations. This case is as far from an 'ordinary course of business' case as can be imagined.

[182] At the very least, in the way it was recorded in the correspondence, and in the March 2021 shareholder meeting slides, the Payment was a response to abnormal financial difficulties on the part of TUI, and as such was not a payment made in the ordinary course of business – see **Countrywide Banking Corporation Limited v Dean.**[23]

[23] [1998] A.C. 338 at 349 E - F.

[183] The Liquidators submitted that the Payment to Linxens was obviously not made in the ordinary course of business - ordinary business does not include the urgent partial repayment of a loan to a connected company made in order to prefer that connected company over other creditors. They submitted that in circumstances where there exists a presumption that Linxens is required to rebut, Linxens' case on this point is hopeless, and Linxens thus fails to rebut the presumption. I agree.

Disposition

[184] For the reasons given, I am driven to conclude that the Liquidators' application succeeds.

[185] I take this opportunity to thank both sides' learned Counsel for their assistance.

Gerhard Wallbank
High Court Judge

By the Court

Registrar