McPherson's Law of Company Liquidation BY ANDREW R. KEAY [London: Sweet & Maxwell, 2001. cxxii + 924 pp. Hardcover: £106]

This text is the English edition of the widely acclaimed Australian text, *The Law of Company Liquidation*, first published in 1968 and written by Dr. B.H. McPherson, now McPherson J. of the Queensland Court of Appeal. Like the Australian text, it is written primarily for lawyers and insolvency practitioners, and to a lesser extent, academics and students. It is an invaluable addition to the increasing literature on liquidation and insolvency law. So far as Singapore is concerned, one particular attraction of the text is that it

contains not only a masterly exposition of English law, but no doubt reflecting the book's Australian roots and the author's early career as an Australian lawyer and academic, also widespread references to Commonwealth case law and literature, especially from Australia. The result is that the reader is not only presented with the English position, but also possible points of departure in the laws of other Commonwealth jurisdictions. Although Singapore's law of company liquidation is primarily based on English law, a succinct discussion on the laws of other jurisdictions is certainly beneficial to anyone that needs not only a quick update on the current status of English law but also that of other Commonwealth jurisdictions. The breadth of its coverage also raises its potential as a starting point for comparative research.

The value of this text extends beyond functioning as a reference point for practitioners. In addition to setting out the rules of liquidation (except cross-border issues), it contains a healthy discussion of theoretical issues that impact on the practical application of the rules. This is brought out most clearly in Chapter 11, which discusses the avoidance provisions of insolvency law, including transactions at an undervalue, preferences and the avoidance of floating charges for past value. The author's attempt to place the notoriously complex provisions within a sound theoretical framework is to be applauded. Not only does it give the law in this area some semblance of structure, it brings out very sharply the inadequacies and inconsistencies of the current state of law. At a more general level, the book's critique of the unsatisfactory aspects of the law of liquidation and suggestions for law reform deserves careful attention, especially from those involved with law reform in Singapore. The Government has accepted the Company Legislation and Regulatory Framework Committee's recommendation (recommendation 4.1) to introduce an omnibus Insolvency Act, to be modelled on the Insolvency Act 1986 (U.K.), that is to be applicable to companies and individuals and which would set out and update all core areas of insolvency law, including company liquidation. This would be an opportune time to reflect on the comments and suggestions for law reform in this text.

Generally, the author has discussed issues of substantial significance that have emerged recently, such as the destination of recoveries of avoidance provisions, the funding of litigation (at paras. 9.50 *et. seq.*) and what constitutes the expenses of liquidation (at paras. 13.21 *et. seq.*). These issues overlap and have become extremely complex due to decisions such as *Re M.C. Bacon Ltd.* [1997] Ch. 127; *Re Oasis Merchandising Services Ltd.* [1998] Ch. 170 (C.A.) and *Re Floor Fourteen Ltd., Lewis v. I.R.C.* [2001] 3 All E.R. 499. It is unfortunate that the crucial House of Lords case of *Re Toshoku Finance U.K. Plc.* [2002] U.K.H.L. 6, [2002] 1 W.L.R. 671 came to late to be included in the book. In view of the practical importance of the issues raised, and the difficult terrain they occupy, it is also regrettable that

the author could perhaps did not devote more space to a sustained discussion of the issues, and express some views on the possible development of the law. The current state of the law has been demonstrated to be unsatisfactory by Rebecca Parry's cogent critique in Chapters 26 and 28 of *Transaction Avoidance in Insolvencies* (2001), especially paras. 28.28 *et. seq.* It is rather disappointing that very little was said about the distinction drawn in the *Oasis* case between assets that are the property of the company at the commencement of the liquidation, including rights of action which arose and might have been pursued by the company prior to liquidation, and assets which only arise after the liquidation of the company and are recoverable only by the liquidator pursuant to statutory powers conferred on him, which occupies a central role in this area of law.

The law of company liquidation is unique within corporate insolvency law in that its reach extends beyond corporate insolvency *per se*. Liquidation is also the procedure by which a perfectly solvent company has to resort in order to wind up its affairs and distribute the surplus to its members. Notwithstanding certain procedural similarities between solvent and insolvent liquidation, the differences between the two could not be greater. An insolvent liquidation is concerned with the realisation of the assets of the company to pay off its creditors, whereas a solvent liquidation is a process to return investments to the company's members. The debate surrounding the objective(s) of corporate insolvency law (see *e.g.* Chapter 2 of Vanessa Finch's *Corporate Insolvency Law: Perspectives and Principles* (2002)) has direct relevance on the principles of insolvent liquidation law, but is totally irrelevant to solvent liquidation. A text on insolvency law, such as Professor Ian Fletcher's *The Law of Insolvency* (3rd ed., 2002) will thus have an internal coherence of its own. It is much more difficult to find a general theme in a text describing the law of liquidation. This should not be taken as a criticism of the utility of such a book, but rather as a reminder of the need to keep the discussion of solvent liquidation distinct from insolvent liquidation, or at the very least of the need to highlight the differences between these two forms of liquidation. The emergence of corporate insolvency law as a specialist field and the increasing complexity may mean that the structure adopted in the text, which arranges the topic for the most part by the chronological order of events in a winding up, may require reconsideration.

This critique should not be regarded as a theoretical point without practical significance. In his discussion of the transaction avoidance provisions, the author omitted to discuss the provision which renders registrable but unregistered charges void (s. 131 of the Companies Act (Cap. 50, 1994 Rev. Ed., Sing.), which is similar to s. 395 of the Companies Act 1985 (U.K.)). The reason given was that "the rules requiring registration are really concerned with events occurring before liquidation and so fall outside the scope of this work" (at para. 11.93). This is hardly convincing. The

same could be said with regard to transactions at undervalue and preferences, but these are analysed in great detail in the book. If the text were concerned solely with solvent liquidation, it would not be necessary to discuss any of the avoidance provisions. But since it aims to discuss the whole corpus of liquidation law (except cross-border issues), it should discuss all things that are relevant to liquidation, including all the avoidance provisions, as they are of direct relevance to insolvent liquidations.

Lastly, in view of the recent developments in corporate insolvency law, and the shift towards a "corporate rescue" culture, some discussion of the relationship of insolvent liquidation with other forms of insolvency proceedings would be apposite. It appears that this was touched upon only in the first chapter of the book cursorily. The level of the discussion is also not in keeping with the generally high standard of the book. It is doubtful whether the oft-repeated statement that liquidation is mandatory extends so far as this proposition (at para. 1.02) that liquidation, in the sense of the realisation of assets and distribution of proceeds to creditors of an insolvent company, "can take place only pursuant to, and in accordance with, the terms of the relevant statute". With respect, the proposition, without suitable qualifications, is too broad and is not supported by authority. As a matter of principle, it contradicts the move away from insolvent liquidation towards other forms of insolvency procedure that would yield a better outcome than insolvent liquidation. Furthermore, the cases cited in support of the proposition are mainly first instance judgments with minimal reasoning, and their outcomes are justifiable on the facts and/or with reference to other rules of law.

For example, in *Re Tillers Pty. Ltd.* [1970] 3 N.S.W.R. 202, Street J. refused to order a meeting of creditors of an insolvent company to consider a scheme of arrangement under a provision similar to s. 210 of the Companies Act (Cap. 50, 1994 Rev. Ed., Sing.). His Lordship gave two reasons. First, the provision should not fill the place of proceedings for which specific provision is made elsewhere in company legislation. Secondly, the reason for wanting to institute a scheme of arrangement—that it would obtain a better price than winding up—did not apply, as the undertaking of the company had already been sold. It is submitted that the case should be regarded as being decided on the second reason, although this is not free of difficulty as the sale did not appear to have been completed, and the agreement of sale was conditional on the conclusion of a scheme of arrangement. The first reason, with respect, is open to serious objection. No authority was cited. It may be that the proposition is sound with regard to the extent to which a provision like s. 210 may be used to achieve a take-over without having to comply with the takeover provisions in the Securities and Futures Act (Cap. 289, 2002 Rev. Ed., Sing.) and s. 215 of the Companies Act (Cap. 50, 1994 Rev. Ed., Sing.) (see *e.g. Re Hellenic and General Trust*

Ltd. [1976] 1 W.L.R. 123, but *cf. Re National Bank Ltd.* [1966] 1 W.L.R. 819). It is however not at all clear that the proposition should apply similarly where the provision is used to effect a corporate rescue, or to achieve a more advantageous realization of a company's assets compared to liquidation.

Notwithstanding the above critiques, the text provides an excellent discourse on the law of company liquidation. It deserves to be the first port of call for any judge, practitioner or academic who needs an authoritative statement in this area of law. It is also a good reference for any law student who finds this area of law interesting and is not satisfied with a brief treatment in a standard company law text.

WEE MENG SENG