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AVOIDANCE LAW IN JUDICIAL MANAGEMENT

*Neo Corp Pte. Ltd. v. Neocorp Innovations Pte. Ltd.**

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I. INTRODUCTION

The recent case of *Neo Corp Pte. Ltd. v. Neocorp Innovations Pte. Ltd.*[2] is, according to a leading insolvency practitioner, one which "all professionals who accept appointment as judicial managers (and all lawyers advising them) will have to firmly bear in mind, pending legislative reform of the judicial management regime."[3] In that case, judicial managers of a company commenced an action under section 227T of the *Companies Act*[4] against a secured creditor of the company claiming that a floating charge which the company granted to the creditor constituted an unfair preference or a transaction at an undervalue. Before the action was completed the company was wound up. The secured creditor argued that the liquidator of the company had no right to continue the action under section 227T, as the right belonged to the judicial managers only. Both Andrew Phang J.C. (as he then was) in the High Court and Chao Hick Tin J.A. (as he then was) and V. K. Rajah J. in the Court of Appeal agreed with this contention. The significance of the decision is clear. In addition, the case is interesting on a procedural point: whether a High Court judge is entitled to examine and set aside an order of another High Court judge where the issues in relation thereto were not argued before the latter. A brief introduction of the legislative scheme on avoidance provisions is in order before we proceed to the facts of the case and an analysis of the judgments.

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1 [2006] 2 S.L.R. 717 (C.A.) [*Neo Corp(CA)*]; [2006] SGCA 15 affirming *Neo Corp Pte. Ltd. v. Neocorp Innovations Pte. Ltd.* [2005] 4 S.L.R. 681 [*Neo Corp(HC)*]; [2005] SGHC 167.

2 *Ibid.*

3 Lee Eng Beng, "Insolvency Law" (2005) 6 S.A.L. Ann. Rev. 279 at para. 14.97.

4 Cap. 50, 1994 Rev. Ed. Sing. [*CA*]. Henceforth all future references will be to this Act, unless otherwise indicated.

II. Legislative Scheme

Although avoidance provisions are an integral part of corporate insolvency law, some of its most important provisions are not found in the *CA*.[5] The current scheme imports bankruptcy avoidance provisions by virtue of sections 329 and 227T into insolvent winding up and judicial management respectively. Section 329 provides that subject to modifications, any transaction of a company which, had it been done by or against an individual, would in his bankruptcy be void or voidable shall in the event of the company being wound up be "void or voidable *in like manner*".[6] The various bankruptcy avoidance provisions, such as sections 98 (transaction at an undervalue), 99 (preference) and 103 (extortionate credit transaction) of the *Bankruptcy Act* are thus imported into corporate insolvency law.[7] Section 227T is the counterpart of section 329 for judicial management, but the wording is different in several critical aspects. It provides that a transaction which if it had been incurred "by a natural person would in the event of his becoming a bankrupt be void as against the Official Assignee shall, in the event of the company being placed under judicial management, be void as against the *judicial manager* (emphasis added)."

For a liquidator or judicial manager to impugn a transaction under one of the avoidance provisions, the transaction must take place within a relevant time before the onset of winding up or judicial management. The *BA* prescribes different periods for different avoidance provisions.[8] For example, a preference given to an unconnected party which is not a transaction at undervalue is only vulnerable if it takes places within six months of the commencement of winding up or judicial management.[9] The normal minimum period for a judicial management order is six months, unless the court on application of the judicial manager discharged it earlier.[10] Most companies in judicial management end up in insolvent liquidation. This means that a preference which is given by a company as aforesaid before it enters into judicial management and then winding up will be immune to attack by the liquidator, as it would have taken place more than six months before the commencement of winding up. This was the position which the liquidators in the *Neo Corp* case found themselves in. As they could not rely on section 329, section 227T was pressed into service, but this attempt was rejected by Phang J.C. and the Court of Appeal. Both held that the words "void as against the judicial manager" meant literally what they said and the liquidators could not continue an action which they had begun earlier when they were judicial managers of the company but which they did not bring to fruition in that capacity.

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5 Some of those found in the *CA* are s. 131 (renders registrable but unregistered charges void), s. 259 (avoids dispositions after commencement of winding up by the court) and s. 330 (renders floating charge for past value invalid).

6 *Ibid.* (emphasis added).

7 *Bankruptcy Act* (Cap. 20. 2000 Rev. Ed. Sing.) [*BA*], s. 100 (relevant time for preference and transaction at an undervalue) and s. 103(2). (extortionate credit transaction).

8 *Ibid.*, s.100 (relevant time for preference and transaction at an undervalue) and s. 103(2) (extortionate credit transaction).

9 *Ibid*., s. 100(1)(c) read with s. 227T and s. 329 of the *CA*.

10 *CA*, s. 227B(8) read with s. 227Q.

This note makes four arguments. First, it argues that certain propositions of Phang J.C. on the functions of judicial management and approach on the interpretation of statutory provisions in judicial management are, with respect, based on premises that are too broad. Secondly, it argues that whilst the importation of bankruptcy avoidance provisions into corporate insolvency law is outdated and unsatisfactory and that corporate insolvency law should have its own avoidance provisions,[11] the Court of Appeal *might* have been persuaded to come to a different conclusion, that the right of action under section 227T vests in the *company*, had its attention been drawn to *Smith v. Bridgend County B.C.*,[12] a recent House of Lords decision. This argument is put forward tentatively because what is discussed here is only the proverbial tip of the iceberg. It is not an exaggeration to say that the Court of Appeal judgment raises complex and interconnected issues, such as the destination of the proceeds of recovery and litigation funding, hitherto not discussed in our courts, which if not resolved properly may well add to the difficulties to fund avoidance action litigation thus allowing transactions which infringe the avoidance provisions to remain secure in practice. Thirdly, although bankruptcy law and corporate insolvency law share many similarities, it is critical to note that whilst the assets of the bankrupt vest in the trustee in bankruptcy,[13] no such vesting takes place in corporate insolvency proceedings. It is not suggested here that the judgments are authorities for a contrary proposition. Unfortunately, as counsel's arguments seem to suggest that such vesting does take place and they are not rebutted, it is necessary to discuss this matter briefly. Fourthly, it is submitted that although the Court of Appeal upheld the decision of Phang J.C., there seems to be a difference in opinion on whether the company may avail itself of section 227T if it were to emerge from judicial management successfully as a going concern. It is submitted respectfully that the opinion of the Court of Appeal, that nothing of section 227T is preserved upon the termination of the judicial management, is to be preferred.

III. THE CASE

The facts of the case are straightforward. As mentioned earlier, the judicial managers of Neo Corp Pte. Ltd. (referred to as "NCP" in the Court of Appeal judgment) commenced an action, pursuant to section 227T against Neocorp Innovations Pte. Ltd. (referred to as "NIP" in the Court of Appeal judgment) to set aside a floating charge that the former granted to the latter on the ground that the transaction was an unfair preference or was a transaction at an undervalue. While the action was pending, on a winding-up petition presented by the judicial managers, Tay Yong Kwang J. ordered that NCP be wound up. Paragraph 8 of the winding-up order authorised the liquidators "to continue with any legal action commenced by the judicial managers". Subsequently, NIP applied, by way of summons in chambers, to have order 8 set aside on the ground that the liquidators could not be authorised to

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[11] Lee Eng Beng, "The Avoidance Provisions of the Bankruptcy Act 1995 and Their Application to Companies" [1995] Sing. J.L.S. 597 at 648.

[12] [2002] 1 A.C. 336 (H.L.); [2001] UKHL 58.

[13] *BA*, s. 76(1)(a).

continue with the action as NCP was no longer under judicial management. Phang J.C. who heard the application held that as the attention of Tay J. was not directed to the issue in question and did not have the opportunity of considering it, he was not precluded from ruling on the substantive issue.[14] His Honour went on to hold that section 227I did not allow anyone else other than the judicial managers to invoke the powers under that provision. As the judicial managers did not bring the action to fruition, the liquidators of NCP were not entitled to continue with it.[15] In reaching this conclusion, Phang J.C. emphasised the different functions of judicial management and liquidation, although acknowledging that judicial management might lead to liquidation.[16]

On appeal, counsel for the liquidators criticised Phang J.C.'s decision on both procedural and substantive grounds. It was argued that Phang J.C. had no power to set aside the order of Tay J as both judges were sitting in courts of equal jurisdiction. The Court of Appeal held that as the doctrine of *res judicata* did not apply,[17] Phang J.C. was not precluded from examining the issues raised in the summons in chambers.[18] But as both judges were sitting in courts of equal jurisdiction, Phang J.C. had no power to set aside the order of Tay J. The proper procedure would be for him to simply rule on the application before him. This would have led to there being two conflicting decisions of equal standing, and it was open to either party to take it up on appeal. The Court of Appeal held that what Phang J.C. intended to do was really to declare that his ruling was different from order 8 of Tay J. The procedural objection raised by counsel for the liquidator was thus rejected.

On the substantive front, NCP raised two main grounds to challenge Phang J.C.'s interpretation of section 227T.[19] The first was that there was no necessity for the judicial managers to bring the action to fruition in order that the rights granted by section 227T may be enforced by the liquidators. This was rejected. The court held that the right to avoid a transaction under section 227T is a right personal to the judicial manager and this right does not form part of the assets of the company "which upon its winding up will be vested in the liquidator".[20] Two reasons were given for this conclusion. First, this is evinced by the words "void as against the judicial manager" in section 227T itself. Secondly, an analogy may be drawn with *Re Oasis Merchandising Services Ltd.*,[21] a decision of the English Court of Appeal, which held that an action brought by the liquidator of a company under section 214 of the U.K. *Insolvency Act 1986*[22] against the company's directors for wrongful trading was personal to the liquidator as the power under the provision was conferred on him

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[14] *Neo Corp(HC), supra* note 1 at para. 15.
[15] *Ibid*. at para. 75.
[16] *Ibid.* at paras. 31-33, 75.
[17] NIP was not a party to the winding up proceedings nor was it served with a copy of the court documents in those proceedings. Tay J.'s attention was not drawn to the action to set aside the floating charge and the issues concerning the interpretation of s. 227T when he made order 8 in the winding-up order.
[18] *Neo Corp(CA)*, *supra* note 1 at para. 12.
[19] *Ibid.* at para. 20.
[20] *Ibid.* at para. 24.
[21] [1998] Ch. 170 (C.A.).
[22] (U.K.), 1986, c.45 [*IA 1986*]

alone.[23] As for the second ground of challenge, unfair disadvantage to the general creditors, it was argued that the critical act was the institution of the action to challenge the transaction. By doing so, the judicial manager had exercised his right. There is no reason why the action should abate or terminate merely because of supervening liquidation, the result of which would benefit the preferred creditor as against the general creditors. Having reached the conclusion that the right under section 227T is a personal right of the judicial manager, the Court had no difficulty rejecting this argument. Although a preferred creditor should not benefit in a circumstance like the present, the judicial manager is not without recourse. He can apply to court for an extension on the ground of better realising its assets. Section 227X(b), which states that certain provisions in liquidation shall apply to judicial management and gives the court discretionary power to order that other sections are to apply similarly, may be usefully resorted to in order to deal with a problem like the present case. Further, the judicial managers could have applied to court to obtain the powers of a liquidator in order to better manage the affairs of the company during the period of judicial management.

IV. Analysis

A. *Propositions of Phang J.C.*

Phang J.C. and the Court of Appeal gave substantially different reasons for holding that the right of action under section 227T vests in the judicial manager. The only common ground in their interpretation of that section is that the words "void as against the judicial manager" are clear and unambiguous and should be given effect accordingly.[24] The Court of Appeal approved *Re Oasis Merchandising Services Ltd.*,[25] and drew an analogy with that case.[26] The *Oasis* case is a leading authority on the destination of the proceeds of recovery from avoidance actions and the funding of insolvency litigation. It will be considered in detail in conjunction with the discussion on *Smith v. Bridgend County B.C.*[27] The reasoning of Phang J.C ranged broader. His Honour, considering it necessary to start from basic principles, there being no precedent that is directly applicable, observed that judicial management and winding up are two separate and distinct legal regimes.[28] The former is meant to provide a framework to rescue potentially viable business and prevent premature liquidation. Winding up is the precise reverse. This fundamental distinction means that particular statutory provisions furnishing powers must, as a starting point, be presumed to operate within that particular statutory regime alone. Therefore sections 227T and 329

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[23] *Neo Corp(CA)*, *supra* note 1 at para. 24. The wrongful trading section allowed the liquidator of a company in liquidation to bring an action against a director who failed to take the appropriate action when he knew or ought to know that there was no reasonable prospect of the company avoiding going into insolvent liquidation.

[24] *Neo Corp(CA)*, *supra* note 1 at para. 24; *Neo Corp(HC), supra* note 1 at paras 33 and 38.

[25] *Supra* note 22.

[26] *Supra* note 1 at para. 24.

[27] [2002] 1 A.C. 336 (H.L.); [2001] UKHL 58.

[28] *Supra* note 1 at paras. 30-33.

must be presumed to operate solely within judicial management and winding up respectively.

Phang J.C.'s statement that judicial management is meant to serve as a corporate rescue mechanism is certainly well supported.[29] However, as the Court of Appeal acknowledged, rehabilitation is not the only object of judicial management.[30] A judicial management order may be made for the *sole* purpose of achieving a more advantageous realisation of the company's assets than would be effected on a winding up.[31] In his magisterial work on corporate insolvency law,[32] Sir Roy Goode took great pains to emphasise that administration, which is the English equivalent of our judicial management and which still shares significant similarities with it after the amendments brought about by the U.K. *Enterprise Act 2002*, should not be equated with reorganisation or the U.S. Chapter 11.[33] It is not possible in this case note to discuss the meaning, methods and other salient features of business or corporate rescue and the role of administration in relation thereto, save to quote a statement of Goode that summarises the purpose of administration succinctly[34]:

> Though the purposes [of the new UK administration procedure] are now expressed differently, it was and remains the case that administration is not in itself a reorganisation procedure; rather it is a temporary holding mechanism to keep the business afloat under external management until a decision can be taken as to the best exit route …

In fact, many companies in judicial management ended up in insolvent winding up. In these cases, the purpose of winding up is merely to distribute the assets to the company's creditors.[35] If dividends could be paid to the creditors within judicial management, there is *usually* no need for a company to incur the time and expense of being wound up before it is dissolved.[36] Accordingly, it is respectfully submitted that Phang J.C. had overstated the differences in functions between judicial management and winding up. In particular, as judicial management is *intended* and is used in practice as an alternative to winding up to achieve a more advantageous realisation of assets than the latter, it is difficult to accept Phang J.C.'s broad proposition that statutory provisions within judicial management that confer powers must *prima facie*

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[29] During the second reading of the Bill introducing judicial management, the then Minister for Finance said that the procedure "provides a legal framework that would, in a suitable case, enable the rescue of a potentially viable business and thus prevent a premature liquidation": Sing *Parliamentary Debates.* vol. 48 at col. 40 (5 May 1986). See also T. C. Choong & V. K. Rajah, *Judicial Management in Singapore* (Singapore: Butterworths, 1990) at vii.

[30] *Neo Corp(CA)*, *supra* note 1 at para. 28.

[31] *CA,* s. 227B(1)(b)(iii).

[32] Roy Goode, *Principles of Corporate Insolvency Law*, 3rd ed. (London: Sweet & Maxwell, 2005).

[33] *Ibid.* at paras. 10-05, 10-20 – 10-30.

[34] *Ibid.* at para. 10-05.

[35] *CA*. A judicial manager, unlike a liquidator, has no general power to pay dividends to the creditors. To do so it will be necessary for the company to enter into a s. 210 scheme of arrangement with its creditors. The approval of such a scheme is one of the purposes for which a judicial management order may be made: s. 227B(1)(b)(ii).

[36] *Ibid.* As the law currently stands, certain legal consequences are unique to insolvent winding up. For e.g., s. 149 (disqualification of unfit directors), s. 339 (fraudulent trading) etc. Unless such provisions are also made applicable to judicial management where company rescue does not take place, winding up is relevant not only as a forum to pay dividends to creditors, but also as a forum to investigate and censure the conduct of errant directors.

be presumed to operate within that particular statutory regime alone. It is submitted, with respect, that the meaning of each provision, whether it is found in judicial management or winding up, must be construed by reference to its wording without there being a rebuttable presumption as the learned judge seemed to suggest. It is noteworthy that the Court of Appeal in affirming Phang J.C.'s decision did not approve this particular aspect of his Honour's judgment.

B. *"Void as Against the Judicial Manager"*

We turn now to consider the Court of Appeal's reliance on *Re Oasis Merchandising Services Ltd.*[37] in reaching its conclusion that the words "void as against the judicial manager" in section 227T should be construed literally. In the *Oasis* case, the liquidator brought proceedings against former directors of the company under the U.K. *Insolvency Act 1986*, section 214, alleging that the directors were guilty of wrongful trading thus causing loss to the creditors of the company. As there were no means to fund the litigation, the liquidator, under a litigation funding agreement, sold and assigned the *fruits* of the section 214 action to a company in return for, *inter alia*, funding to pursue the action and a share of the fruits of the action.[38] Such an assignment of *bare causes of action* raised obvious issues of maintenance and champerty.[39] It was conceded that this agreement was champertous, but counsel argued that nevertheless it was lawful as it was a sale of the *company's property*; as the liquidator was conferred power under the relevant U.K. legislation to dispose of such property,[40] Parliament must be taken to have accepted that the statutory power of sale may be validly exercised without infringing the rules of maintenance and champerty. The English Court of Appeal rejected this argument, holding that the agreement did not involve a disposal of the company's property as the right of action under section 214 did not belong to the company. It drew a distinction between assets that are property of the *company* at the commencement of the liquidation, including rights of action which arose and might be 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 (henceforth the "*Oasis* distinction").[41]

The Court of Appeal recognised that the *Oasis* case was not a direct authority on the construction of the scope of section 227T, as it held that an *analogy* may be drawn with that case.[42] In doing so, it extended the *Oasis* distinction from liquidation into judicial management. Unfortunately, the reasoning of the English Court of Appeal

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[37] *Supra* note 22.

[38] *Ibid.* An outright legal assignment of the action itself was not possible because a claim under s. 214 can only be made and pursued by the liquidator himself, a point which the court recognised.

[39] Maintenance occurs when a person who has neither an interest in litigation nor any other motive recognised as justifying interference assists or encourages a party to litigation. Champerty is a particular form of maintenance in which the maintainer of the action receives a share in the proceeds or subject matter of the action. Arrangements tainted with maintenance or champerty are void as being contrary to public policy.

[40] Under the *IA 1986*, Sch. 4, para. 6 the liquidator is conferred power to sell "any of the company's property".

[41] *Supra* note 22 at 181-182.

[42] *Neo Corp(CA), supra* note 1 at para 24.

in the *Oasis* case is controversial.[43] Space does not permit a detailed analysis of the reasons. Suffice it to say that two main reasons were influential:[44] the chronological order in which causes of action arose and the destination of the proceeds of recovery. The former is in fact not a reason at all, as it merely asserts the *Oasis* distinction itself. Be that as it may, it raises the question why the fact whether a cause of action arises before or after liquidation should be determinative of the issue of whether that cause of action constitutes an asset of the company or not. The Court did not deal with this issue directly. Instead, it gave various examples where the statutory provisions provide that the liquidator[45] may apply to court for relief, for example, the U.K. provisions for transaction at an undervalue,[46] preference[47] and wrongful trading.[48] However, it is at least arguable that these provisions do not vest the right of action in the liquidator as a matter of substantive law, but is only procedural.[49] As for the second reason, the destination of the proceeds of recovery, the Court asked the question whether the proceeds of recovery of an avoidance or wrongful trading action would be captured by a pre-existing charge over the assets of the company. It cited *Re Yagerphone Ltd.*,[50] a decision of Bennett J. in the 1930s, which gave a negative answer to a preference action. As such, it reasoned that this could only mean that the right of action was vested in the liquidator; had the action belonged to the company it would have been captured by a charge. The difficulty with this reason is that *Re Yagerphone Ltd.* and the authorities following it[51] have never given any convincing explanation why in the first place the right of action was not captured by an appropriately drafted charge.[52] Commentators have therefore argued that *Yagerphone* and its progeny are driven by the policy to ensure that unsecured creditors, who usually get nothing out of an insolvent liquidation, at least get to enjoy the fruits of the action discussed here.[53] Whether this policy is defensible raises many complex issues, such as the policies underlying the provisions, the effect on the funding of avoidance actions litigation and the consequent impact on the effectiveness of avoidance law in the real

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[43] See, for e.g., Rebecca Parry, *Transaction Avoidance in Insolvencies* (Oxford: OUP, 2001), c.28; Rebecca Parry, "The Destination of Proceeds of Insolvency Litigation" (2002) 23 Co. Lawyer 49; John Armour, "Transactions at Undervalue" in John Armour & Howard Bennett eds., *Vulnerable Transactions in Corporate Insolvency* (Oxford: Hart, 2003) at 88; Adrian Walters, "Preferences" in Armour & Bennett at 179.

[44] *Supra* note 22 at 181-183.

[45] Or the administrator, the U.K. equivalent of our judicial manager.

[46] *IA 1986*, s. 238(2)

[47] *Ibid.*, s. 239(2).

[48] *Ibid.*, s. 214(1).

[49] F. Oditah, "Wrongful Trading" [1990] L.M.C.L.Q. 205 at 217.

[50] [1935] Ch. 392.

[51] E.g. *N. W. Robbie & Co. Ltd. v. Witney Warehouse Co. Ltd.* [1963] 1 W.L.R. 1324 (C.A.) at 1338; *Re M. C. Bacon Ltd. (No. 2)* [1991] Ch. 127 at 137.

[52] On the contrary, current wording of some of the provisions suggests that the right of action vests in the company. For e.g., section 99 of the *BA*, dealing with preference (which is almost identical to the *IA 1986*, s.239(3)) provides that the court may "make such order as it thinks fit for restoring the position to what it would have been if that individual had not given that unfair preference." This suggests that preference law does not effect a substantive change in entitlements. Had the company not given the unfair preference, for e.g., by paying off a creditor, the monies or assets would still have belonged to the company and so be subject to a charge. This can only be if the right of action conferred by the provision is one that vests in the company, not the liquidator. For a contrary argument, see Armour, "Transactions at Undervalue", *supra* note 43 at 88.

[53] See for e.g., Oditah, *supra* note 49 at 217.

world, on which the commentators are divided and which are beyond the scope of this comment to delve into.

Should the issue arise directly in future, it is imperative that great care be exercised before we decide whether or not to import the *Oasis* distinction into our law of insolvent liquidation. This applies *a fortiori* to judicial management. However, although the *Oasis* case is problematic and not directly relevant, it cannot be ignored. It brings home the important message that a decision on whether an avoidance or any other action vests in the liquidator or the company has a direct impact on, *inter alia*, the destination of the proceeds of recovery. This is something we will revisit later. For the moment, we turn our attention to *Smith v. Bridgend County B.C.*,[54] which albeit more relevant did not seem to have been cited to the Court of Appeal. A company was employed by a borough council to rehabilitate land which had been disfigured by derelict coal dumps. The contract, a standard form contract issued by the Institution of Civil Engineers, granted certain rights over two coal-washing plants to the employer. The company encountered financial difficulties, abandoned the site and then went into administration (the U.K. equivalent of Singapore's judicial management). The employer used the coal washing plants to complete the contract and then disposed of them. In earlier litigation,[55] the English Court of Appeal had held that the contract created a floating charge over the plants, and as the charge was not registered, it would, under section 395(1) of the U.K. *Companies Act 1985*, be "void against the liquidator or administrator". In reliance on this, the administrator sued the employer for conversion. The latter argued that whilst the company was owner of the plants and thus the right to sue for conversion vested in it, it was not entitled to invoke section 395(1) of the U.K. Act. The reason was that the words "void against the liquidator or administrator" meant literally what they said, i.e., the charge was void as against the liquidator or administrator personally, not the company; hence only the liquidator or administrator was entitled to invoke section 395(1).

It can be seen that although the context and statutory provision concerned were different, the words under construction in *Smith v. Bridgend County B.C.*[56] and the *Neo Corp* case were identical and raised exactly the same issue of whether they should be construed literally. The House of Lords, reversing the English Court of Appeal, held that "void against the liquidator or administrator" meant void against the company in liquidation or administration.[57] Lord Hoffmann, who commanded the assent of other members of the coram, pointed out that the legislative purpose of the section is the protection of the creditors of the company which is achieved by giving persons dealing with the company the opportunity to discover, by consulting the register of charges, whether its assets were burdened by the specified charges which would reduce the amount available for unsecured creditors in a liquidation.[58] It may be that this is not a realistic form of protection; nevertheless the "plain intention of the legislature was that property subject to a registrable but unregistered charge should be available to the general body of creditors (or a secured creditor ranking after

[54] [2001] 1 A.C. 336 (H.L.); [2001] UKHL 58.
[55] *Re Cosslett (Contractors) Ltd.* [1998] Ch. 495 (CA).
[56] [2002] 1 A.C. 336 (H.L.); [2001] UKHL 58.
[57] *Ibid.* at paras. 21, 31.
[58] *Ibid.* at para. 19.

the unregistered charge) as if no such charge existed."[59] Next, his Lordship pointed out that there is no divesting of assets when a company goes into liquidation.[60] The assets continue to belong to the company but the liquidator is able to exercise the company's right to collect them for the purposes of the liquidation.[61] Therefore, his Lordship concludes that when section 395 says that the charge shall be "void against the liquidator", it means void against a company acting by its liquidator, that is to say, a company in liquidation. The same reasoning applies in the context of administration;[62] in particular, the assets of a company in administration continue to vest in the company, not the administrator. The word "administrator" was thus added to section 395 when administration was added to U.K. insolvency law.

It is pertinent to note that in adopting a purposive construction of section 395, Lord Hoffmann was influenced by policy considerations. This appears most clearly in his Lordship's rejection of the reasoning of the Court of Appeal, which was said to be "startling and unorthodox".[63] The latter gave a literal interpretation of the words "void against the administrator" and accordingly held that an administrator could only ignore a registrable but unregistered charge when he could sue in his own name and therefore be able to rely upon the fact that the charge was void against him personally. It further held that the *only* provision which confers such a right of action is that of section 234 of the U.K. *Insolvency Act 1986*. This section enables a liquidator or an administrator, *inter alia*, to recover the company's property in specie by summary proceedings in order for him to discharge his statutory functions. It can be seen that the approach of the Court of Appeal severely circumscribed the scope of section 395. Although purporting to base his reasoning on legislative intention by arguing that when the legislative predecessor to section 395 was enacted,[64] the intention was not to confine the scope of that provision to cases in which the liquidator was making a summary application under the legislative predecessor to section 234,[65] which is older than section 395, Lord Hoffmann was clearly determined that section 395 should not be construed in a manner that robbed it of its utility. "The registration provisions would have had little value if they applied only to charges in favour of the persons subject to the summary jurisdiction."[66]

It is accepted that *Smith v. Bridgend County B.C.* is not a direct authority on the interpretation of section 227T. It is not simply that a different statutory provision is involved; section 227T is a provision that imports *various* bankruptcy avoidance provisions into judicial management. Further, unlike section 329(1) which imports bankruptcy avoidance provisions into winding up by providing that the transaction of the company shall be "void or voidable in like manner", which leaves the precise effect of the avoidance provision to the particular bankruptcy avoidance provision concerned and allows its underlying objective to be taken into account, section 227T, on a literal reading, seems to dictate a uniform result for all the avoidance provisions concerned, viz, "void as against the judicial manager". At

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[59] *Ibid.*
[60] *Ibid.* at para. 20.
[61] *Ibid.*
[62] *Ibid.*
[63] *Ibid.* at para. 19.
[64] First found in the *Companies Act 1900* (U.K.), c.48.
[65] *Companies Act 1862* (U.K.), c.89, s. 100.
[66] *Smith v. Bridgend County B.C.* [2002] 1 A.C. 336 (H.L.) at para. 27; [2001] UKHL 58.

first sight, these considerations seem to render the approach of *Smith v. Bridgend County B.C.*, which requires the purpose of the avoidance provision concerned to be scrutinised, unworkable. It is however suggested that such an argument should be rejected.

First, none of the bankruptcy avoidance provisions imported by section 329 renders the impugned transaction void or voidable, notwithstanding that is the effect suggested by a literal reading of section 329.[67] In the case of transaction at an undervalue or preference, the provisions only give the court the power to "make such order as it thinks fit for restoring the position to what it would have been if that individual had not" entered into the transaction or given the preference.[68] As for an extortionate credit transaction, the court is given power to "make an order with respect to the [impugned] transaction".[69] It cannot however be seriously argued that due to the apparently different remedial consequences found in section 329 and the bankruptcy avoidance provisions, the latter are not imported into the law of insolvent liquidation. This argument applies with equal force to section 227T. Secondly, both Phang J.C. and the Court of Appeal regarded section 227T as the equivalent of section 329 in judicial management.[70] Indeed, the former remarked that the distinction in the respective legal effects of the two sections ("void" in the case of section 227T and "void or voidable" in the case of section 329) is "curious".[71] Section 227T can only perform this function, just like section 329, if a purposive interpretation is adopted, i.e. the effect of the different bankruptcy avoidance provisions it imports into judicial management depends on the individual avoidance provisions concerned. These two reasons suggest that the words "*void* as against the judicial manager" in section 227T are only a convenient but inaccurate description of the remedial consequences of the bankruptcy avoidance provisions it imports and do not preclude the courts from considering the purpose of the relevant avoidance provision under consideration; that was the approach in *Smith v. Bridgend County B.C.*[72] Consequently, subject to the issue of the destination of the proceeds of recovery and other related issues (to be discussed later), we turn to consider the rationale of preference law, which was the relevant avoidance provision in the *Neo Corp* case.

It is generally accepted that preference law is designed to protect the interests of creditors of an insolvent company.[73] The approach in *Neo Corp*, with respect, fails to give full effect to this objective. It is true that, as the Court of Appeal has suggested, the judicial manager could apply to court for an extension of the judicial management order so that a section 227T action may be brought to fruition before the company is

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[67] In *Buildspeed Construction Pte. Ltd. v. Theme Corp Pte. Ltd.* [2000] 4 S.L.R. 776. at para. 51, Lim Teong Qwee J.C. pointed out that s. 329 is curiously worded on the remedial consequences and explained the legislative history. The legislative predecessor of s.99, s.53(1) of the old *Bankruptcy Act* (Cap. 20, 1985 Rev. Ed. Sing.), declares that a preference which falls within the provision is fraudulent and void. This may account for the reference to the transaction being void or voidable in s. 329. When the current *BA*, which made substantial changes to the avoidance provisions, including the remedial consequences, was enacted, whilst reference to the specific bankruptcy avoidance provisions sought to be imported under s. 329 was updated accordingly, other parts of s. 329 were left unchanged.

[68] *BA*, s. 98(2) and s. 99(2) respectively.

[69] *Ibid.*, s. 103(2).

[70] *Neo Corp(CA), supra* note 1 at paras. 14-16; *Neo Corp(HC), supra* note 1 at paras. 18-19.

[71] [2005] 4 S.L.R. 681 at para. 33.

[72] [2002] 1 A.C. 336 (H.L.); [2001] UKHL 58.

[73] See for e.g., Adrian Walters, "Preferences" in Armour & Bennett, *supra* note 43 at 132 et. seq.

wound up.[74] This however entails unnecessary delay and cost where the continuation of the judicial management, save the prosecution of the section 227T, serves no useful purpose, and should be avoided unless section 277T compels it. Moreover, although this can only be a minor factor, the decision is a trap for the unwary. Thus, at least where the judicial manager alleges that a transaction has infringed our preference law, a strong argument may be made that the words "void as against the judicial manager" should not be interpreted literally but mean instead void as against the company in judicial management. If so, the right of action under section 227T vests in the company and continues to so vest when the company is wound up, just like any other property of the company. When the company is in judicial management, the judicial manager, as he is vested with control of the company's affairs,[75] would be entitled to pursue the action on behalf of the company. This power devolves on a liquidator when the company is wound up.[76]

The above suggestion impacts directly on, *inter alia*, the issue of the destination of the proceeds of recovery of avoidance actions. As mentioned earlier, *Re Yagerphone Ltd.*[77] and its progeny have held that the right of a preference action vests in the liquidator personally and the *Oasis* distinction has extended it to include other causes of action that only arise after the liquidation of a company and are recoverable only by the liquidator pursuant to statutory powers conferred on him. The suggestion here leads to an opposite result. Though this is not without support, it must be emphasised that a thorough consideration of all the relevant issues, which is beyond the scope of this note, must be undertaken before it can be satisfactorily decided whether on balance it is preferable to hold that "void as against the judicial manager" means void as against the company in judicial management or otherwise. As stated earlier and this bears repeating, the *Oasis* case brings home the important message that a decision on whether an avoidance or other action vests in the liquidator or the company has a direct impact on, *inter alia*, the destination of the proceeds of recovery.

In summary, the issue of whether an action under section 227T is void as against the judicial manager or the company is one on which many questions depend for answers. It has been argued above that subject to the issue of the destination of the proceeds of recovery and related issues, it is preferable to hold that "void as against the judicial manager" means void as against the company in judicial management. However, consideration of other issues relating to the destination of the proceeds of recovery may compel a different conclusion. It may be criticised that this note raises more questions than the answers it has proffered. Indeed, it seems that the complexities of this area of law and the uncertainties generated have reduced greatly the effectiveness of the avoidance provisions in the real world. It is to be hoped that a law reform body may be persuaded to look into these issues in the near future.

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[74] *Neo Corp(CA), supra* note 1 at para. 29.

[75] *CA*, s. 227G(4) read with the 11th Sch., para. (e) (judicial manager may bring or defend any action or other legal proceedings in the name and on behalf of the company).

[76] *Ibid.*, s.272(2)(a) (liquidator may bring or defend any action or other legal proceeding in the name and on behalf of the company).

[77] [1935] Ch. 392.

C. *No Vesting in Liquidation or Judicial Management*

Counsel for NCP, with respect, seemed to think that the assets of a company in liquidation vests in the liquidator. One of their arguments in the Court of Appeal was that if the judicial manager has taken "active steps" to preserve the rights of the judicial manager under section 227T, the rights will devolve "on the liquidator upon the winding up of the company".[78] This argument was rightly rejected by the Court. A very similar argument, that the right of action under section 227T "belongs to the company and that it therefore passes *automatically* to the liquidator upon the company concerned being wound up" was made in the High Court.[79] Phang J.C. rejected this argument on the ground that the right of action belonged only to the judicial managers.

Whatever one's views on the interpretation of section 227T, counsel's arguments set out above must be firmly rejected. One of the key differences between bankruptcy and corporate insolvency law is that in bankruptcy the property of the bankrupt, except exempt property, is vested in the Official Assignee or trustee in bankruptcy,[80] whereas in corporate insolvency proceedings the company's property remain vested in the company.[81] "In a winding up, there is no transfer of the company's property to the liquidator whose duty is merely to take into custody and take control of the company's property."[82] The same rule applies to judicial management.[83]

D. *Section 227T under Different Scenarios*

Phang J.C. entered into a detailed analysis of an article by Lee Eng Beng whereby the latter examined the effect of section 227T in different scenarios.[84] First, a broad dividing line is drawn between whether the company emerges from judicial management as a going concern or enters into winding up. In fact, it should be noted that this scheme of analysis assumes a seamless transition from judicial management to winding up. In principle, it is possible to have a case where a hopelessly insolvent company emerges from judicial management only because of the discharge or expiry of the judicial management order, and it is not wound up although that would be the right thing to do. There is after all, no legal duty on a judicial manager to apply for the winding up of the company. In such a case, there may be a time gap between the discharge or expiry of the judicial management order and the making of a winding up

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[78] *Neo Corp(CA), supra* note 1 at para. 25.

[79] *Neo Corp(HC), supra* note 1 at para. 33.

[80] *BA,* s.76(1)(a) read with s.78(1), (2).

[81] The authorities are legion. See e.g. *Re Oriental Inland Steam Co.* (1874) 9 Ch. App. 557 (C.A.) at 560; *Ayerst v. C&K (Construction) Ltd.* [1976] A.C. 167 (H.L.) at 177; *Low Gim Har v. Low Gim Siah* [1992] 2 S.L.R. 593 (H.C.) at 601 – 608; *Smith v. Bridgend B.C.* [2002] 1 A.C. 336 (H.L.); [2001] UKHL 58. Note that under s. 269(2) the liquidator may apply to court for an order vesting the property of the company in him. It is normally unnecessary to have a vesting order made, in view of the wide powers conferred on the liquidator to act in the company's name (s. 272).

[82] Lee Eng Beng, "Trust Funds, Ascertainability of Beneficial Interest and Insolvency Set-Off" (1996) 8 Sing.Ac.L.J. 489 at 497. This was a case note on *Good Property Land Development Pte. Ltd. v. Societe Generale* [1996] 2 S.L.R. 239 (C.A.).

[83] *CA*, s.227G read with the 11th Sch.

[84] Lee Eng Beng, *supra* note 11 at 643–644.

order against the company, if at all. In this case is the company regarded as one that has emerged from judicial management as a going concern? Presumably it should not. Next, according to Phang J.C. and Mr Lee, three different scenarios are possible within the two situations they contemplated: the vulnerable transaction is unwound, whether through legal proceedings or not; the judicial manager does not take any action; the judicial manager commences an action under section 227T but does not bring it to fruition. We will consider the effect of section 227T in these scenarios, first under the interpretation suggested here, and then under the interpretation held by the Courts.

Under the interpretation advocated here these different scenarios do not cause any difficulty, except where the company emerges from judicial management, whether as a going concern or not, and the vulnerable transaction has not been unwound. If the company were to be wound up, it is clear that the advent of winding up does not suddenly deprive the company of its right of action under section 227T, regardless of whether steps have been taken pursuant thereto.[85] It is a fundamental principle of corporate insolvency law that it recognises rights accrued under the general law prior to liquidation.[86] However, if the company were to emerge from judicial management as a going concern, it seems that it will cease to be able to invoke or continue proceedings under section 227T. The reason, it is submitted, is not so much what Sir Roy Goode has argued: that one of the necessary conditions that must be satisfied before a transaction can be upset under insolvency law is that the company must be in winding up or administration.[87] When putting forward that proposition, Goode does not have in mind the issue under consideration here, as he was concerned with answering the question why creditors should not be allowed to bring an avoidance action *before* the advent of a formal insolvency proceeding, and the reasons he gives do not really apply to the issue here.[88] The reason, it is suggested, lies in the wording of the statutory provisions. Bankruptcy avoidance provisions are rendered applicable by sections 329(1) and 227T to companies only when the companies are "being wound up" or are "being placed under judicial management" respectively. Further, applications to court under the various avoidance provisions can only be made by the Official Assignee in the case of bankruptcy,[89] and by parity of reasoning, by the liquidator or judicial manager in winding up and judicial management respectively. It is also noteworthy that in *Smith v. Bridgend B.C.*,[90] Lord Hoffmann suggested that although the right of action under the U.K. equivalent of our section 131 vests in the

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[85] Meng S. Wee, "Insolvency and the Survival of Contracts" [2005] J.Bus.L. 494 at 508 et. seq. (discussing the analogous situation of the effect of the commencement of insolvency proceedings on the subsistence of contracts).

[86] *Re Scheibler, ex. p. Holthausen* (1874) 9 Ch. App. 722 (C.A.). See generally Goode, *supra* note 32 at para. 3-02.

[87] Goode, *ibid*. at para. 11-05.

[88] *Ibid.* at para. 11-06. Briefly, they are as follows. First, when a company is a going concern there is no justification for allowing unsecured creditors to interfere in its affairs. Secondly, the creditor of a company not in winding up or administration has more direct methods of obtaining payment. Thirdly, different creditors may have different views as to avoidance provisions. A collective mechanism, which winding up and administration provides, is needed to enforce what is essentially a class right of the creditors of the company.

[89] *BA*, s. 98(1), 99(1) and s. 103(2).

[90] [2002] 1 A.C. 336 (H.L.); [2001] UKHL 58.

company, it is not an assignable property and can be claimed only by the company acting by its liquidator or administrator.[91]

We turn to consider the effect of section 227T under the Court's interpretation. Where the company enters into winding up after judicial management, there is general agreement between the Court of Appeal and Phang J.C. that the right of action vests in the judicial manager alone. If he does not bring it to fruition, the only recourse of the liquidator is to invoke section 329. Here, it does not matter whether the judicial manager takes no action at all, as in *Re An Application by J G A Tucker and Reid Murray Developments (Qld) Pty Ltd.*,[92] or commences an action but did not bring it to fruition, as what happened in the case itself. The picture is more complex where the company emerges from judicial management as a *going concern*, or where, as suggested above, it emerges from judicial management insolvent but is not wound up immediately, a possibility not canvassed by Phang J.C. or Lee. It will be convenient to set out the three different scenarios again: the vulnerable transaction is unwound, whether through legal proceedings or not; the judicial manager does not take any action; the judicial manager commences an action under section 227T but does not bring it to fruition.

The first scenario is easy. Lee had argued that the transaction cannot be resurrected notwithstanding that under section 227T the right to avoid the transaction is vested in the judicial manager personally.[93] This was approved by both the Court of Appeal and Phang J.C.[94] It is submitted that this view is logical and makes perfect sense for the reasons given by Lee. It is further submitted that on his reasoning this should also apply to the situation where the company does not emerge from judicial management as a going concern.

In principle, on the reasoning of Phang J.C. or the Court of Appeal, the second or third scenarios should yield the same outcome, and also where the company emerges from the judicial management not as a going concern. As the right of action under section 227T is vested in the judicial manager alone, it should not matter whether the judicial manager is completely passive or has taken some steps but did not bring the action to fruition. As the Court of Appeal pointed out, "unless the transaction has been unwound, and this must mean completely unwound, nothing of section 227T is preserved upon the termination of the judicial management."[95] Phang J.C. and it seems Lee thought otherwise.

Lee posited a scenario where a transaction is executory and although the judicial manager regards it as infringing the avoidance provisions, he is content not to take any action, where for example the other party to the transaction does not assert the claim or file a proof of debt, or according to Phang J.C., for whatever reason.[96] He argues that in this case it does not follow that the transaction concerned ought to remain valid and binding as between the parties in the event that the judicial management order is discharged. If the company successfully emerges from judicial

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[91] *Ibid.* at para. 24. Lord Hoffmann was commenting on *Re Ayala Holdings Ltd. (No 2)* [1996] 1 B.C.L.C. 467 where Knox J. held that the right of a company to recover property free from a charge avoided by s. 395 of the *Companies Act 1985* (U.K.), c.6 was not an assignable piece of property.

[92] [1969] Qd. R. 193.

[93] Lee Eng Beng, *supra* note 11 at 643.

[94] *Neo Corp(CA)*, *supra* note 1 at para. 25.; *Neo Corp(HC), supra* note 1 at para. 53.

[95] *Neo Corp(CA), supra* note 1 at para. 25.

[96] Lee Eng Beng, *supra* note 11 at 644; *Neo Corp(HC), supra* note 1 at para. 55.

management, it should not be saddled with a liability which could aggravate its precarious position and undo the benefits of judicial management. Phang J.C. agreed with this analysis.[97] First, his Honour opined that as the company is financially viable again, there is no reason in principle why its inchoate cause of action that existed during judicial management ought to be scotched simply by virtue of the fact that the judicial manager had initiated no proceedings. In this case, "where the judicial manager had not commenced proceedings at all pursuant to s 227T, there appear to be no time constraints where the company subsequently commences proceedings instead."[98] Secondly, Phang J.C. was at pains to explain that different consequences ensue depending on whether the company emerges from judicial management as a going concern or is wound up. Apart from pointing out that Mr Lee did not say that a company has the right to avail itself of all timeliness it would have had the action been commenced pursuant to section 227T in the situation where the company goes into liquidation,[99] his Honour said that in this case "the company must take the benefit together with the burden".[100] The liquidator would have to abide by the applicable timeliness (under section 329) should it choose to commence an action after the company has been wound up.

It can be seen that the reasons given by both Phang J.C. and Lee are policy motivated. Though one can understand the desire of wanting to give effect to the legislative objective of rescuing companies via judicial management, it is submitted, with respect, that the reasons are not persuasive. First, if the right of action under section 227T vests in the person of the judicial manager, it is difficult to see how that right can continue to subsist after he has ceased to be judicial manager. One is driven ineluctably to the conclusion that the right is lost, and this is regardless of whether the company emerges from judicial management as a going concern or otherwise or is wound up, and whether the judicial manager takes no step at all pursuant to section 227T or commences an action but fails to bring it to fruition. The position is as what the Court of Appeal has stated succinctly: "unless the transaction has been unwound, and this must mean completely unwound, nothing of s 227T is preserved upon the termination of the judicial management."[101]

Secondly, the justification given for affording different treatment depending on whether the company is wound up after judicial management or not is not convincing. As the learned judicial commissioner emphasised throughout the judgment, the issue is one of interpreting section 227T. If so, it is beside the point that if the company is wound up there is another statutory provision, section 329, which the company may in theory rely on to impugn vulnerable transactions, which is not available if the company is not wound up. It is also hard to see section 329 conferring any benefit on the company. If a transaction is susceptible to attack under either section 227T or section 329, the company will get only the remedies under one section; in short, there will be no double recovery. Indeed, on the facts, the argument is most ironic. Section 329, rather than conferring any benefit on the company, is the cause of its problems. The liquidator was not able to rely on it at least as regards the preference claim as

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[97] *Neo Corp(HC), supra* note 1 at paras. 55-58.
[98] *Ibid.* at para. 58.
[99] *Ibid.* at para. 57.
[100] *Ibid.*
[101] *Neo Corp(CA), supra* note 1 at para. 25.

it was out of time. He was compelled to rely on section 227T, but here he was told by the court that he could not do so as the presence of section 329 was considered an important reason for holding that section 227T must be confined within judicial management.

Thirdly, Phang J.C. seems to draw a distinction between scenarios two and three, carefully restricting the survival of the right of action to scenario two, i.e. where the judicial manager is completely passive. This is puzzling. The need to ensure that the company, which is now financially viable, is not burdened by a vulnerable transaction is no less in the third scenario compared to the second scenario. Further, just as in the opposite situation where the company is wound up after judicial management, there is no legal significance arising out of whether the judicial manager is completely passive or has commenced an action but did not bring it to fruition.

V. Conclusion

The *Neo Corp* case raised difficult issues beyond the simple facts of the case which unfortunately did not seem to have been argued before Phang J.C. and the Court of Appeal. It is argued here that subject to a full consideration of its impact on the destination of the proceeds of recovery and funding litigation, it is open to the courts to interpret the words "void as against the judicial manager" to mean void as against the company acting by its judicial manager or void as against the company in judicial management. Nevertheless, this writer is in full agreement with the call to reform sections 227T and 329 by cutting the apron strings to the *Bankruptcy Act*. Indeed, it is submitted that we need to compare our approach, which treats judicial management equally with winding up where the avoidance provisions are concerned, with that of the U.K., where generally the right to avoid vulnerable transactions is reserved for companies in winding up, to determine which is preferable. This is not simply because the problem which arises in *Neo Corp* would not have been a problem under U.K. law, but also because it is arguable that the rationale of some of the avoidance provisions may not sit well with the functions of judicial management. For example, it is generally agreed that the *pari passu* principle is one of the reasons for preference law. However, in *Re Wan Soon Construction Pte Ltd*,[102] it was held that the principle did not apply in the context of judicial management. It is true that this example is an oversimplification, and the case has attracted adverse comments,[103] but nevertheless it is an illustration of the need to examine the doctrinal foundation of section 227T.

[102] [2005] 3 S.L.R. 375; [2005] SGHC 102.
[103] Tracey Evans Chan, "The *Pari Passu* Principle in Judicial Management" [2006] Sing. J.L.S. 213.