IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 302

Originating Claim No 565 of 2024 (Summons No 2102 of 2024)

Between

(1) Group Lease Holdings Pte Ltd
(in liquidation)
(2) Cosimo Borrelli

… *Claimants*

And

Group Lease Public Company Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Injunctions — Interim injunctions — Principles — Distinction between prohibitory and mandatory injunctions]
[Civil Procedure — Injunctions — Interim Injunctions — Ancillary disclosure orders — Whether ancillary disclosure orders may be made in respect of prohibitory injunctions]
[Insolvency Law — Avoidance of transactions — Unfair preferences — Principles — Whether grant of security and assignment of receivables to parent company constituted unfair preferences — Section 225 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)]
[Insolvency Law — Administration of insolvent estates — Statutory injunctions — Section 270 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)]
[Credit and Security — Charges — Non-registration of charges — Charge over shares of subsidiary alleged to be void against liquidator — Whether

created security constituted registrable charge — Whether unregistered charge void against provisional liquidator — Whether enforcement of charge rendered charge spent prior to appointment of liquidator — Sections 131(1) and 131(3) Companies Act 1967 (2020 Rev Ed)]
[Contract — Illegality and public policy — Whether alleged breach of *Mareva* injunction capable of rendering contract void and unenforceable]

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v
Group Lease Public Co Ltd

[2024] SGHC 302

General Division of the High Court — Originating Claim No 565 of 2024
(Summons No 2102 of 2024)
Goh Yihan J
7 October 2024

28 November 2024

Goh Yihan J:

1 In this application, HC/SUM 2102/2024, the claimants, Group Lease Holdings Pte Ltd (in liquidation) ("GLH") and its liquidator, Mr Cosimo Borrelli ("Mr Borrelli"), sought an interim injunction and other related reliefs against the defendant, Group Lease Public Company Ltd ("GL Thailand"). More specifically, the claimants sought to restrain GL Thailand from exercising its rights under certain security and receivables assignment agreements, pending the determination of the claimants' allegations in HC/OC 565/2024 ("OC 565") that these agreements are improper on, *inter alia*, the ground that they constitute unfair preference transactions.

2 After hearing the parties on 7 October 2024, I granted most of the reliefs sought by the claimants with brief oral reasons. As this application touched upon several interesting points of law and practice on topics such as injunctions, non-

registration of charges, and unfair preferences, I now expand on my reasons, and consider these points in greater depth, in these written grounds of decision.

Background facts

The parties

3 The first and second claimants are, respectively, GLH, a Singapore-incorporated company undergoing insolvent liquidation, and Mr Borrelli, its liquidator.

4 GLH was first placed into provisional liquidation, and Mr Borrelli appointed as its provisional liquidator, by an order of Lee Seiu Kin J (as he then was) on 6 September 2023.[1] GLH was subsequently wound up, and Mr Borrelli appointed as its liquidator, by the court on 4 March 2024[2] on a creditor's winding-up application by JTrust Asia Pte Ltd ("JTA").[3] GLH was found by Vinodh Coomaraswamy J to be unable to pay its debts under s 125(1)(*e*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") based on GLH's default on a judgment debt owed to JTA following long-drawn litigation between them (see the General Division of the High Court decision of *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd (Group Lease Public Co Ltd and another, non-parties)* [2024] SGHC 195). JTA's winding-up application was (unsuccessfully) opposed by GLH and GL Thailand. Although GL Thailand subsequently filed an appeal against Coomaraswamy J's decision

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1 HC/ORC 4227/2023 dated 6 September 2023 (1st Affidavit of Cosimo Borrelli dated 5 September 2024 ("CB-1") at pp 52–53).

2 HC/ORC 1226/2024 dated 4 March 2024 (CB-1 at pp 57–58).

3 HC/CWU 67/2023 (CB-1 at pp 55–56).

in CA/CA 20/2024, the appeal was later withdrawn.[4] Thus, at the time of the present application, GLH was well and truly in insolvent liquidation.

5 GLH is the holding company for subsidiaries of the Group Lease group of companies operating in various Southeast Asian countries.[5] The shares that GLH holds in these subsidiaries are among the subject-matter of the present dispute.

6 The defendant, GL Thailand, is a Thailand-incorporated company publicly listed on the Stock Exchange of Thailand. It is the sole shareholder of GLH.[6]

The Loan Agreements between GL Thailand and GLH

7 The genesis of the parties' dispute is a series of 35 loan agreements between GL Thailand and GLH, that was entered into between 16 July 2015 and 7 July 2021 (collectively, the "Loan Agreements"), whereunder GL Thailand extended inter-company loans to GLH.[7]

8 I observe that, although the claimants have questioned (or at least have not admitted) the validity of the Loan Agreements in these proceedings,[8] a Singapore court has previously granted judgment to GL Thailand on the loans arising from the Loan Agreements (see [24] below). As the issue of the veracity

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4 GL Thailand's Letter to Court dated 23 August 2024; Notice of Deemed Withdrawal of Appeal dated 26 August 2024.

5 Defendant's Written Submissions dated 2 October 2024 ("DWS") at para 3.

6 DWS at para 2.

7 CB-1 at para 39.

8 CB-1 at paras 43 and 46.

of the Loan Agreements was not directly before me, I proceeded on the basis that the Loan Agreements were valid.

9 The loans pursuant to the 1st to 28th Loan Agreements were entered into between 16 July 2015 to 21 March 2017. According to GL Thailand, they were made to provide working capital to GLH.[9]

10 The loans pursuant to the 29th to 35th Loan Agreements were entered into between 20 April 2021 and 7 July 2021. In contrast to the earlier loans, they were made to enable GLH to satisfy a judgment debt pursuant to the Court of Appeal's decision in CA/CA 21/2020 (see *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] 2 SLR 1256 ("*JTA (1)*")).[10] To understand how this judgment debt came about, it is necessary to briefly explain the protracted litigation between JTA and GLH.

The litigation between JTA and GLH

11 JTA commenced an action in HC/S 1212/2017 against various parties including GLH on 26 December 2017. In that action, JTA brought various claims in deceit and conspiracy in respect of losses it incurred under three investment agreements with GL Thailand between March 2015 and September 2017 (respectively, the "1st IA", "2nd IA" and "3rd IA").[11]

12 On 6 October 2020, the Court of Appeal held in *JTA (1)* that GLH was liable for losses amounting to US$70.01m that JTA had suffered under the 1st

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9 1st Affidavit of Tatsuya Konoshita dated 9 September 2024 ("TK-1") at para 8.

10 TK-1 at para 8; DWS at para 5.

11 CB-1 at paras 19–20.

and 3rd IAs (see *JTA (1)* at [257]).[12] However, the Court of Appeal also held that JTA was only entitled to repayment of the principal sums due under the 2nd IA upon its maturity on 1 August 2021, and JTA thus suffered no loss in respect of the 2nd IA at the time of *JTA (1)* (see *JTA (1)* at [244]).[13] I shall refer to the judgment debt arising from *JTA (1)* as the "1st Judgment Debt". The 1st Judgment Debt has been paid in full (see [16] below).

13 Following the maturity of the 2nd IA on 1 August 2021, GL Thailand did not pay JTA the principal sum due. Thus, on 3 August 2021, JTA commenced HC/OS 780/2021 against various parties including GLH, seeking damages in conspiracy and deceit for losses it suffered from being induced to enter into the 2nd IA.[14] This ultimately led to the Appellate Division of the High Court ("Appellate Division") decision in *Group Lease Holdings Pte Ltd and another v JTrust Asia Pte Ltd* [2023] SGHC(A) 37 ("*JTA (2)*") on 22 November 2023. The Appellate Division found that JTA "suffered actual loss as a result of GL Thailand's failure to redeem the [2nd IA] upon the convertible debentures maturing in August 2021" (see *JTA (2)* at [19]). GLH was therefore ordered to pay damages to JTA in the sum of US$124,474,854 (see *JTA (2)* at [20]). I shall refer to the judgment debt arising from *JTA (2)* as the "2nd Judgment Debt". Unlike the 1st Judgment Debt, the 2nd Judgment Debt remains outstanding and unpaid, and formed the basis of JTA's successful winding-up application against GLH (see [4] above).

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12 CB-1 at para 23.

13 CB-1 at para 24.

14 CB-1 at paras 25 and 35.

The Mareva *injunctions obtained by JTA in JTA (1) and JTA (2)*

14 JTA obtained *Mareva* injunctions against GLH in the course of the proceedings in both *JTA (1)* and *JTA (2)*.[15]

15 During the pendency of *JTA (1)*, the Court of Appeal found that there was a real risk that GLH's assets would be dissipated pending the determination of *JTA (1)*, and granted a worldwide *Mareva* injunction (the "1st *Mareva* Injunction") restraining GLH from disposing of its assets other than in the ordinary course of business (see *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159; *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] 2 SLR 490).[16] After the Court of Appeal handed down its decision in *JTA (1)*, it extended the *Mareva* injunction to be in force until full satisfaction of the 1st Judgment Debt (see *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2021] 1 SLR 1298).[17]

16 GLH paid the 1st Judgment Debt in full on 19 July 2021, having received assistance from GL Thailand in the form of the 29th to 35th Loan Agreements (see [10] above). This caused the 1st *Mareva* Injunction to lapse (on the same day) given the satisfaction of the condition imposed by the Court of Appeal.[18]

17 However, slightly over two weeks later, following its commencement of the proceedings in *JTA (2)*, JTA applied for and obtained a fresh *Mareva*

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15 CB-1 at para 27.

16 CB-1 at paras 28–31.

17 CB-1 at para 32.

18 CB-1 at para 34.

injunction from the High Court on 4 August 2021 (the "2nd *Mareva* Injunction").[19] The 2nd *Mareva* Injunction remains in force after it was extended by the Court on 3 July 2023 until such time as the 2nd Judgment Debt is paid in full.[20]

GL Thailand's attempts to recover the sums due under the Loan Agreements

18 The gravamen of the claimants' complaint in OC 565 is that GL Thailand engaged in the asset-stripping of GLH. Specifically, beginning from shortly before the lapse of the 1st *Mareva* Injunction on 19 July 2021 until the issue of the 2nd *Mareva* Injunction on 4 August 2021, GL Thailand and GLH entered into various arrangements (which I shall refer to as the "Security Documents" and "Receivables Agreements") that had the effect of granting security over, or assigning, substantially all of GLH's assets to GL Thailand. These were done to secure or reduce the outstanding sums due to GL Thailand under the 35 Loan Agreements and had the effect of unfairly improving GL Thailand's position in GLH's liquidation.

19 Indeed, prior to the discharge of the 1st *Mareva* Injunction, GL Thailand had already begun taking steps during the ongoing litigation between JTA and GLH to recover sums due under the Loan Agreements. On 20 October 2020, GL Thailand issued a statutory demand to GLH in respect of the 1st to 28th loans.[21]

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19 CB-1 at para 36.

20 CB-1 at para 38; CB-1 at pp 1068–1069.

21 TK-1 at para 9; CB-1 at p 948.

20 Between 14 July 2021 (five days before the lapse of the 1st *Mareva* Injunction) and 30 July 2021, GL Thailand and GLH entered into the Security Documents under which GLH granted security to GL Thailand for its repayment obligations under the Loan Agreements.[22]

21 Between 1 July 2020 and 30 July 2021, GL Thailand and GLH also entered into various Receivables Agreements by which GLH agreed to transfer receivables from its subsidiary and associate companies to GL Thailand in satisfaction of its liabilities under the Loan Agreements.[23]

22 It is noteworthy that, apart from the first of the Receivables Agreements (which was executed on 1 July 2020), all of the Security Documents and the Receivables Agreements were executed between 14 and 30 July 2021. This was about two weeks before the maturity of the 2nd IA on 1 August 2021 and the subsequent grant of the 2nd *Mareva* Injunction on 4 August 2021 after proceedings in *JTA (2)* were commenced on 3 August 2021.

23 GL Thailand issued further statutory demands to GLH on 10 and 11 August 2021.[24] When GLH was unable to repay the sums due under the Loan Agreements, GL Thailand commenced HC/S 23/2022 against GLH on 13 January 2022 to recover US$147.5m from GLH, being the total sum due under the 35 Loan Agreements. In its defence, GLH accepted that it had entered into the 35 Loan Agreements and that it had received the sums that GL Thailand claimed to have lent out. However, GLH pleaded a defence only in respect of

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22 TK-1 at para 10; CB-1 at para 51.

23 TK-1 at para 12; CB-1 at paras 47–50.

24 CB-1 at pp 949–950.

the first 28 Loan Agreements and not the remaining seven that were entered into in 2021.

24 GL Thailand then applied to enter summary judgment against GLH on 14 March 2022. On 12 April 2022, GL Thailand obtained summary judgment against GLH for US$147,484,923 plus interest.[25]

The winding-up proceedings against GLH and other developments

25 On 12 April 2023, winding-up proceedings were commenced against GLH. Mr Borrelli was appointed as GLH's provisional liquidator on 6 September 2023. In the order placing GLH into provisional liquidation, Mr Borrelli was directed, *inter alia*, to perform three duties:[26]

(a) First, to take into possession all of GLH's books of accounts, general records, and real and personal estate.

(b) Second, to take all necessary steps to preserve GLH's assets (including all of GLH's books of accounts, general records and real and personal estate).

(c) Third, to review and, where appropriate, investigate historical transactions entered into by GLH.

26 However, according to Mr Borrelli, he had difficulties then, as provisional liquidator, in obtaining financial information from the management of GLH and its subsidiaries. He therefore applied in HC/SUM 3568/2023 and

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25 TK-1 at para 14.

26 HC/ORC 4227/2023 dated 3 September 2023 (CB-1 at pp 52–53).

obtained an order on 18 December 2023[27] from the High Court to appoint himself and/or a nominee as a director of GLH's subsidiaries to overcome these difficulties (the "Authorisation Order").[28]

27 Subsequently, on 10 January 2024, Mr Borrelli received a letter from AMMK Investment Holdings, a minority shareholder of GL-AMMK Company Limited ("GL-AMMK") (one of GLH's subsidiaries), informing him that GL Thailand had exercised its rights under one of the Security Documents and that all of GLH's rights and obligations in GL-AMMK will be managed by GL Thailand.[29] GL Thailand had issued its notice to exercise such rights on 21 December 2023, which was three days after the Authorisation Order.[30]

28 Following this development, Mr Borrelli, still as provisional liquidator, received further letters on 18 January 2024 similarly informing him that GL Thailand had become the shareholder of GL Leasing (Lao) Company Ltd ("GL Laos"), BG Microfinance Myanmar Co Ltd ("BGM"), and GL-AMMK after exercising its purported rights under the Security Documents. GL Finance PLC ("GL Cambodia") also wrote to Mr Borrelli on the same day informing him that GL Thailand held security and had placed a provision attachment on GL Cambodia shares held by GLH.[31] GL Laos, BGM, GL-AMMK, and GL Cambodia are all subsidiaries of GLH whose shares were the subject of the Security Documents.

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27 HC/ORC 6009/2023 dated 18 December 2023 (CB-1 at pp 958–959).

28 CB-1 at paras 66–68.

29 CB-1 at pp 1004–1005.

30 CB-1 at pp 1009–1010.

31 CB-1 at para 75; CB-1 at pp 1020–1023.

29 Mr Borrelli's solicitors then sought clarification from GL Thailand's solicitors on these developments, particularly since, in Mr Borrelli's view, the shares concerned fell within the scope of the 2nd *Mareva* Injunction.[32] GL Thailand's solicitors replied to state, among other things, that GL Thailand had no intention to dispose of or assign the shares over which it had exercised its security interests.[33] In a further letter, GL Thailand's solicitors explained that GL Thailand took the view that the Security Documents were valid and binding and that it was entitled to act upon its rights to realise those securities.[34] However, as the claimants pointed out, this is inconsistent with GL Thailand's earlier position in its (unsuccessful) application in HC/SUM 3287/2023 ("SUM 3287") made on 23 October 2023. In SUM 3287, GL Thailand had sought a variation of the 2nd *Mareva* Injunction so that it could enforce its security interests under the Security Documents. According to the claimants, the fact that GL Thailand took out SUM 3287 indicates clearly that GL Thailand appreciated that the 2nd *Mareva* Injunction prohibited its exercise of any security interests it may have had over GLH's assets.[35]

30 Indeed, GL Thailand's director, Mr Riki Ishigami ("Mr Ishigami"), had said on affidavit in support of SUM 3287 that:[36]

> GLH is a subsidiary of GL Thailand, who is the owner of, has proprietary rights in, and/or has security interests in assets that are subject to the Mareva Injunction ("Affected Assets") … *GL Thailand is unable to exercise its proprietary rights and interests in the Affected Assets* and is severely prejudiced in this regard.

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32 CB-1 at para 76; CB-1 at pp 1007–1008.

33 CB-1 at para 77; CB-1 at pp 1033–1034.

34 CB-1 at para 80; CB-1 at pp 1039–1040.

35 CB-1 at paras 64, 73 and 81.

36 CB-1 at para 63.

[emphasis added]

I would point out at this juncture that Mr Luis Inaki Duhart Gonzalez ("Mr Duhart"), who appeared for GL Thailand before me, candidly acknowledged that his client was put in a difficult position in the present application due to this affidavit. However, Mr Duhart explained that he and his team have advised GL Thailand that Mr Ishigami's position is wrong, and that GL Thailand has since revised its position on the ambit of the 2nd *Mareva* Injunction.[37] I would only observe that Mr Duhart and his team were *also* the solicitors on record in respect of SUM 3287 and when Mr Ishigami's said affidavit was filed on 24 October 2023. Thus, it appears that Mr Ishigami was advised by the *same* team of solicitors in respect of his former (supposedly wrong) position and current (supposedly correct) position.

31 GLH was eventually wound up on 4 March 2024. Thereafter, on 26 July 2024, the claimants filed the underlying action to this application, *viz*, OC 565, against GL Thailand, in which the claimants have sought various reliefs which centre on the Security Documents and the Receivables Agreements being unfair preference transactions.

The present application

32 In advance of the determination of OC 565, the claimants brought the present application for interim injunctions and other reliefs against GL Thailand. In particular, the claimants sought the following:

(a) pending the final determination of OC 565, an interim injunction restraining GL Thailand (whether by itself, directors, officers,

[37] Notes of Argument (7 October 2024) at pp 4:28–5:5.

employees or agents) from enforcing or exercising rights under the Security Documents set out at Annex A to the claimants' summons in HC/SUM 2102/2024 ("SUM 2102");

(b) in the event that GL Thailand has received assets which are the subject of the Security Documents (including any dividends or distributions), such assets are to be transferred to Mr Borrelli to be held in an escrow account (to be nominated by Mr Borrelli) or in the Companies Liquidation Account maintained with the Official Receiver until the determination of OC 565;

(c) any sums received (whether past, present or future) by the defendant under the Receivables Agreements set out in Annex B to the claimants' summons in SUM 2102 ought to be paid into an escrow account (to be nominated by Mr Borrelli) or the Companies Liquidation Account maintained with the Official Receiver;

(d) further and/or alternatively, an interim injunction restraining GL Thailand (whether by itself, directors, officers, employees or agents) from disposing or dealing with any (i) moneys or proceeds referred to in the Receivables Agreements; and (ii) assets (including any proceeds of sale, dividends or distribution) referred to in the Security Documents;

(e) GL Thailand is to file an affidavit within seven days of the making of an order herein, disclosing information and details of the matters set out in Annex C to the claimants' summons in SUM 2102; and

(f) that the *Mareva* injunction dated 3 July 2023 in HC/ORC 3189/2023 (*ie*, the 2nd *Mareva* Injunction) be varied or

discharged such that Mr Borrelli may carry out his duties as GLH's liquidator.

33 Before me, the claimants confirmed that they were not proceeding with prayer (f) because Mr Borrelli wanted to seek the views of JTA and GL Thailand before filing the appropriate application in OS 780.[38]

The applicable legal framework on injunctions

34 It is useful to begin with an overview of the applicable legal framework on injunctions relevant to the present application. There were two strands underlying the injunctions sought by the claimants in this application. The first was the court's general jurisdiction to grant injunctions under s 18(2) read with paras 5 and 14 of the First Schedule to the Supreme Court of Judicature Act 1969 (2020 Rev Ed), as well as s 4(10) of the Civil Law Act 1909 (2020 Rev Ed) ("CLA") (see the General Division of the High Court decisions of *Leong Quee Ching Karen v Lim Soon Huat and others* [2024] 4 SLR 862 ("*Karen Leong*") at [16] and *Farooq Ahmad Mann (in his capacity as the private trustee in bankruptcy of Li Hua) v Xia Zheng* [2024] SGHC 182 ("*Farooq Ahmad Mann*") at [18]). The second was the specific jurisdiction granted by s 270 of the IRDA.

35 Although my decision to grant the injunctions sought by the claimants was strictly based on the former, I take the opportunity to discuss s 270 of the IRDA given the apparent absence of any local authority addressing its operation, and the fact that I did receive some submissions on it from the parties (see [176]–[192] below).

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[38] Notes of Argument (7 October 2024) at p 2:9–16.

36 I start with the principles on interim injunctions under the court's general injunctive jurisdiction. An interim injunction is an injunction that is granted pending the outcome of a trial or the substantive determination of a matter (see *Karen Leong* at [15], citing the Court of Appeal decision of *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (trading as Sin Kwang Wah)* [2000] 1 SLR(R) 786 at [46]). Interim injunctions can be further categorised into interim prohibitory injunctions and interim mandatory injunctions: the former forbids the commission or continuation of an act, whereas the latter compels the defendant to do a positive act to repair an omission or restore the *status quo* by undoing some act (see *Karen Leong* at [19], citing the Court of Appeal decision of *RGA Holdings International Inc v Loh Choon Phing Robin and another* [2017] 2 SLR 997 ("*RGA Holdings*") at [29]). It has been said in a leading treatise that a functional test for distinguishing between the two categories of injunction is "whether the injunction can be complied with by the defendant doing nothing … based on the form of the order" (see Steven Gee, *Commercial Injunctions* (Sweet & Maxwell, 7th Ed, 2020) at para 2-041).

37 This distinction was of some relevance to the present case. As GL Thailand (rightly) pointed out, the claimants were seeking not only interim prohibitory injunctions, but interim mandatory injunctions, as prayers (b) and (c) required GL Thailand to take *the positive step* of paying or transferring assets received by GL Thailand under the Security Documents or Receivable Agreements into either an escrow account or the Companies Liquidation Account maintained with the Official Receiver (see [32] above). GL Thailand submitted that an interim mandatory injunction was a "very exceptional remedy" that was only granted in "special circumstances", which required GLH

to meet a "much higher threshold" of justification.[39] The rationale for this caution was that a mandatory injunction was more invasive than a prohibitory injunction.[40]

38 At this point, I shall first outline the principles governing interim prohibitory injunctions, before turning to a brief consideration of the distinction between prohibitory and mandatory injunctions contended for by GL Thailand.

The law on interim prohibitory injunctions

39 The law on interim prohibitory injunctions is relatively well-established, having been the subject of an authoritative restatement in the modern *locus classicus* that is the House of Lords decision in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 ("*American Cyanamid*"). The general rule is that a court will grant an interim prohibitory injunction if (a) there is a serious issue to be tried; and (b) the balance of convenience lies in favour of granting the injunction (see *RGA Holdings* at [28]). These requirements encapsulate the overarching principle that, when called upon to give interim relief based on a preliminary view of the parties' cases and pending the final determination of the parties' rights and obligations, the court should chart the path of least injustice if it turns out to be wrong in its preliminary assessment, in the sense of having granted an injunction when it otherwise should not have, or having refused an injunction when it ought to have been granted (see the Court of Appeal decisions of *Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [53] and *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] 2 SLR(R) 1 ("*Chuan Hong*") at [88]).

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39 DWS at paras 17–18.

40 DWS at para 19.

40 The merits threshold of a serious issue to be tried is not a high one. In *American Cyanamid*, Lord Diplock deprecated the previous practice of the court investigating if there was a "*prima facie* case" or a "strong *prima facie* case" as inapposite to the context of interim relief. This was because the court's function at this stage of the proceedings was not to attempt to resolve conflicts of evidence or questions of law which called for detailed argument and mature consideration. Rather, all that was required was for a claimant to demonstrate that its claim is not frivolous or vexatious (at 407). More recently, this was reiterated by the English Court of Appeal in *Planon Ltd v Gilligan* [2022] EWCA Civ 642, where Nugee LJ said that the "serious issue to be tried" standard was "not a demanding test, and it really only serves to exclude the case where the claim is frivolous or vexatious, or otherwise *demonstrably bad*" [emphasis added] (at [102]).

41 I would make two observations at this juncture. First, the "serious issue to be tried" test goes towards enlivening the court's *jurisdiction* to grant an interim injunction. In other words, the court cannot ordinarily grant an interim injunction if that standard has not been met. But it does not follow that the *strength* of the merits of the parties' cases is an altogether irrelevant consideration once the court is satisfied that there is a serious issue to be tried (see David Bean, Isabel Parry & Andrew Burns, *Injunctions* (Sweet & Maxwell, 14th Ed, 2021) at para 3-17). The extent of Lord Diplock's criticism of tests premised on the relative strengths of the parties' cases at the stage of interim relief was that it should not be *necessary* for the court to *always* consider if an applicant's chance of ultimate success was more than 50 per cent (at 406). Lord Diplock did not say that this was an altogether irrelevant or impermissible consideration when the court decides whether to exercise its *discretion* once it was satisfied that the baseline requirements for an injunction

were met. Indeed, Lord Diplock himself observed that, in the event that the balance of convenience appeared relatively even (at 409):

> … it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.

Thus, subject to the qualifier that the court should not be engaging in a mini-trial at the interlocutory stage, a judge is not constrained from factoring in the prospects of success into the analysis.

42 Indeed, there are situations where the court must assess the merits of the parties' cases. A notable exception, which Lord Diplock revisited in the House of Lords decision of *NWL Ltd v Woods* [1979] 1 WLR 1294, is where the grant or refusal of the interim injunction would, in effect, dispose of the action finally in favour of whichever party is successful in the application (at 1306). In such a scenario, the conventional approach to the balance of convenience is somewhat inapposite as it is premised "on the proposition that there will be a proper trial at a later stage when the rights of the parties will be determined" (see the English Court of Appeal decision of *Cayne and another v Global Natural Resources plc* [1984] 1 All ER 225 at 238). Put differently, because the complexion of the matter is such that the court is, in substance, being called on to give final rather than interim relief, the path of least injustice legitimately requires the court to consider the more likely substantive outcome on the merits of the parties' cases.

43 The second point, which is related to the first, is that the proposition that the court should not undertake an examination of the merits of the parties' cases has much greater force *vis-à-vis* disputes of fact rather than disputes of law. It is a not uncommon refrain, when pressed by the court, for parties to profess that the court should adjourn consideration of a difficult point of law to the trial. The following observations by George Wei J in the High Court decision of *AYW v AYX* [2016] 1 SLR 1183 are a regular refuge for a party making such a submission (at [35]):

> It is clear that the authorities support the view that novel questions of law *should not be resolved* at the striking out stage and should generally be litigated in full at trial. This is so even if the novel questions are pure questions of law which a court at the interlocutory stages of the trial may be in as good a position to resolve as a trial court who has heard all the evidence.
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> [emphasis in original]

44 I respectfully disagree with the extent to which this paragraph has been relied upon as a crutch by parties with tenuous cases to hobble to the next stop in the proceedings. In this regard, I respectfully prefer the observations of Mohamed Faizal JC in the recent decision of the General Division of the High Court in *Ng Chee Tian and another v Ng Chee Pong and others* [2024] SGHC 226 at [81]–[85]. Similar to the learned judge, I see no reason why discrete issues of law that do not implicate any factual dispute between the parties cannot be well-ventilated before a court at an interlocutory stage. Indeed, one of the grounds for striking out a claim in the interests of justice under O 9 r 16(1)(*c*) of the Rules of Court 2021 ("ROC 2021") is that the claim is legally unsustainable (see the Court of Appeal decision of *Iskandar bin Rahmat and others v Attorney-General and another* [2022] 2 SLR 1018 at [19]). The test of legal unsustainability itself calls on the court to assess whether a claimant

would be entitled to the remedies sought if he or she succeeds in proving all facts he or she asserts or offers to prove (see the Court of Appeal decision of *The "Bunga Melati 5"* [2012] 4 SLR 546 at [39(a)]). If this is answered in the negative, "a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible" (see the House of Lords decision of *Three Rivers District Council and others v Governor and Company of the Bank of England* [2003] 2 AC 1 at [95]).

45 The practical experience also reveals that the courts have not shied away from determining novel points of law at an interlocutory stage. For example, in the recent decision of the General Division of the High Court in *Farooq Ahmad Mann*, in the context of an application for a *Mareva* injunction, Aidan Xu J undertook a detailed analysis of the difficult issue of whether a disposition of property through an interim judgment of the Family Court could be reversed using the provisions for the avoidance of transactions in the insolvency legislation. It seems to me that this type of flexibility in approach commends itself to the Ideals set out in O 3 r 1 of the ROC 2021. More generally, it accords with common sense, as Laddie J observed in the English High Court decision of *Series 5 Software Ltd v Clarke and others* [1996] 1 All ER 853 (at 866):

> … one of the great values of interlocutory proceedings [is] an early, though non-binding, view of the merits from a judge. Before *American Cyanamid* a decision at the interlocutory stage would be a major ingredient leading to the parties resolving their differences without the need for a trial. There is nothing inherently unsatisfactory in this. Most clients ask for and receive advice on prospects from their lawyers well before there has been cross-examination. In most cases the lawyers have little difficulty giving such advice. … There is nothing inherently unfair in a court here expressing at least a preliminary view based on written evidence. After all, it is what the courts managed to do for a century and a half.

Laddie J's observations were not confined to pure questions of law. Indeed, I do not doubt that a court should not attempt to *resolve* thorny disputes of fact at an interlocutory stage. However, I consider that one would be hard-pressed to deny that an opinion highlighting a major factual gap and, *a fortiori*, legal defect in the parties' cases, would either facilitate amicable settlement or, at the very least, assist the parties in focussing on the *true* issues if the case subsequently proceeds to trial.

46 Turning to the balance of convenience, the analysis consists of two broad questions: (a) first, a threshold question of the adequacy of damages to either party arising from the grant or refusal of the injunction; and (b) second, the assessment of the balance of convenience proper if damages would be an inadequate remedy to both parties or the court is in doubt on this point (see *American Cyanamid* at 408). It may be useful to break up the inquiry in sequential fashion, consisting of the following three-stage analytical framework:

(a) First, if the injunction were to be refused, and that decision turns out to be wrong as the claimant is ultimately successful at trial, would damages be an adequate remedy for the claimant's loss arising out of the defendant not having been enjoined from engaging in the conduct that has now been deemed to be wrongful?

(i) If damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the claimant's claim appears to be at the interim stage.

(ii) If, on the other hand, damages would not be an adequate remedy or the court has doubt on the adequacy of damages and/or the defendant's ability to pay them, the court should move on to consider (b).

(b) Second, assuming the opposite vantage point of the defendant, if the injunction were to be granted and that decision turns out to be wrong at trial, would the defendant be adequately compensated in damages for its losses from being (wrongly) restrained from engaging in what has now been determined to be lawful conduct?

(i) If damages would be an adequate remedy and the claimant in a position to pay them, the court should grant the injunction.

(ii) If, on the other hand, damages would not be an adequate remedy or the court has doubt on the adequacy of damages and/or the claimant's ability to pay them, the court should move on to consider (c).

(c) Third, if damages would not be an adequate remedy for both parties, or the court is in doubt on the adequacy of damages as a remedy to either party, the question as to the balance of convenience properly arises. In this regard, factors which the court may consider include:

(i) any difference in the extent as to the inadequacy of damages to the parties;

(ii) the relative strengths of the parties' cases (see [41] above); and

(iii) as a last resort, where all other factors appear balanced, the course of action that entails preserving the *status quo*.

The distinction between prohibitory and mandatory injunctions

47 Having set out the principles on prohibitory injunctions, I come to consider GL Thailand's submission on the ostensibly higher threshold guarding the court's jurisdiction to grant mandatory injunctions.

48 At the outset, I accept that, as a general matter, a court would require more justification for the issue of a mandatory injunction than a prohibitory injunction. That proposition derives support from the Court of Appeal's remarks in *RGA Holdings* (at [31]). But, in my view, the authorities also counsel that this can be an oversimplification.

49 In my judgment, the suggestion that a mandatory injunction is a "very exceptional discretionary remedy" and that there exists a "much higher threshold to be met" is less a firm principle of law than a *heuristic tool*. In a similar vein to the "unusually convincing" standard in criminal law (see, *eg*, the Court of Appeal decision of *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 at [91]), it serves as a cautionary tool that reminds the decision-maker that the generally more invasive nature of the mandatory injunction means that it can cause greater prejudice than its less invasive prohibitory variant if it turns out to be wrongly granted. However, there is no difference in the underlying principle: the court is ultimately tasked to take the course which involves the least risk of injustice if it turns out to be wrong. See Kee Oon JAD, writing extrajudicially in a learned monograph, has observed that (see See Kee Oon, *Fact-Finding and Reality: A Judicial Decision-Making Primer* (Academy Publishing, 2022) at pp 11–12):

> Heuristics can be likened to mental short-cuts or quick rules of thumb which we adopt in reasoning and decision-making. …
>
> …
>
> Heuristics are often useful tools for thinking but they can give rise to cognitive biases and hardened mindsets if we adopt and apply them unthinkingly. These biases can colour our opinions and skew our decisions, leading us to reason and decide less objectively than we might desire.

50 Coming back to the principles at hand, a good starting point is the decision of the English High Court in *Shepherd Homes Ltd v Sandham* [1971] Ch 340 ("*Shepherd Homes*"), which is often cited as authority supporting a higher standard for the grant of a mandatory injunction. In that case, Megarry J said that (at 351):

> … the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a *high degree of assurance* that at the trial it will appear that the injunction was rightly granted; and this is *a higher standard than is required for a prohibitory injunction*. …
>
> [emphasis added]

51 Megarry J's reference to a "high degree of assurance" could have led to the impression that a different set of rules underpinned the grant of mandatory injunctions. But subsequent cases of the English courts, with Lord Hoffmann leading the charge, have pulled back from this view. In the English High Court decision of *Films Rover International Ltd and others v Cannon Film Sales Ltd* [1987] 1 WLR 670 ("*Films Rover*"), Hoffmann J (as he then was) commented that (at 680–681):

> … there is no inconsistency between the passage from Megarry J [in *Shepherd Homes*] and what was said in the *Cyanamid* case. But I think ***it is important in this area to distinguish between fundamental principles and what are sometimes described as "guidelines", i.e. useful generalisations about the way to deal with the normal run***

> ***of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision***, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. *A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described.* ***The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle***.
>
> The passage quoted from Megarry J in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 451, qualified as it was by the words "in a normal case", was ***plainly intended as a guideline rather than an independent principle***. *It is another way of saying that the features which justify describing an injunction as "mandatory" will usually also have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the interlocutory stage unless the court feels a "high degree of assurance" that the plaintiff would be able to establish his right at a trial.* I have taken the liberty of reformulating the proposition in this way in order to bring out two points. *The first is to show that semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren.* ***The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction***. The second point is that in cases in which there can be no dispute about the use of the term "mandatory" to describe the injunction, the same question of substance will determine whether the case is "normal" and therefore within the guideline of "exceptional" and therefore requiring special treatment. ***If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a "high degree of assurance" about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction***.
>
> [emphasis added in italics and bold italics]

52 Locally, the Court of Appeal had occasion to consider what to make of the decisions in *Shepherd Homes* and *Films Rover* in *Chuan Hong*.

Warren L H Khoo J, delivering the decision of the court that also included Yong Pung How CJ and Chan Sek Keong J (as he then was), preferred the view espoused by Hoffmann J in *Films Rover* (see *Chuan Hong* at [88]–[89]):

> 88 We respectfully agree with Hoffmann J that *it is important to distinguish between fundamental principle and what are sometimes described as "guidelines", ie useful generalisations about the way to deal with the normal run of cases falling within a particular category*. We agree with him that a fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong at trial in the sense of granting relief to a party who fails to establish his rights at the trial, or of failing to grant relief to a party who succeeds at the trial. We agree with Hoffmann J that *the guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle*.
>
> 89 ***The "high assurance" test mentioned by counsel is no more than a generalisation, albeit a useful one, of what courts normally do. It is not a principle in the sense of being capable of application in all cases or capable of explaining what courts do in all cases.*** It is a factor, no doubt often a strong factor, which the court will take into consideration when granting a mandatory injunction. The stronger the case appears at this stage, the lesser the risk of being proved wrong at the trial. However, the court, of necessity, has to consider other relevant factors, such as the conduct of the parties and whether damages instead of an injunction are an adequate remedy. *The strength of a party's case (reaching a "high assurance" or "clear case" standard) is neither a necessary, nor is it a sufficient, condition for the grant of a mandatory injunction.*
>
> [emphasis added in italics and bold italics]

The Court of Appeal was thus unequivocal that the so-called higher standard suggested by Megarry J in *Shepherd Homes* was "no more than a generalisation" or, as I have suggested above, a heuristic tool. *Chuan Hong* was subsequently cited with approval and followed in multiple decisions of the Singapore courts, including the Court of Appeal's own decisions in *Singapore Press Holdings Ltd v Brown Noel Trading Pte Ltd and others*

[1994] 3 SLR(R) 114 ("*SPH Ltd*") (at [18]–[22]) and *Projector SA v Marubeni International Petroleum (S) Pte Ltd* [2005] 2 SLR(R) 144 at ([34]–[37]). In the former case, in particular, M Karthigesu JA expressly confirmed that while "what was said by this court in *Chuan Hong v Shell* … may be *obiter dicta*, we respectfully adopt it as a correct statement of principle governing the granting of interim mandatory injunctions" (see *SPH Ltd* at [22]).

53 However, the law apparently did an about-turn in the Court of Appeal decision in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 ("*NCC International*"). GL Thailand placed particular reliance on the court's statements under the header of "[t]he exceptional nature of an interim mandatory injunction" which, admittedly, appear more aligned with Megarry J's view in *Shepherd Homes* (see *NCC International* at [75]):

> In any event, an interim mandatory injunction is a *very exceptional discretionary remedy*. There is a *much higher threshold to be met in order to persuade the court to grant such an injunction as compared to an ordinary prohibitive injunction*. Case law has established that the courts will only grant an interim mandatory injunction in *clear cases where special circumstances exist* (see *Chin Bay Ching v Merchant Ventures Pte Ltd* [2005] 3 SLR(R) 142 at [37] and *Locabail International Finance Ltd v Agroexport* [1986] 1 WLR 657 at 663–664).
>
> [emphasis added]

54 I make three observations on *NCC International*. The first is that it may fairly be said that the issue of the differences in approach to mandatory and prohibitory injunctions was not squarely considered in this case in the same way as it was in *Chuan Hong*. The second is that neither *Chuan Hong* nor (as the High Court subsequently observed in *Rikvin Consultancy Pte Ltd v Pardeep Singh Boparai and another* [2010] SGHC 191 at [12]) the opposing view in *Films Rover* appears to have been cited to the Court of Appeal in *NCC International*. The third is that the decision cited – the Court of Appeal

decision of *Chin Bay Ching v Merchant Ventures Pte Ltd* [2005] 3 SLR(R) 142 ("*Chin Bay Ching*") – had in fact cited the earlier decisions of *Chuan Hong* and *SPH Ltd* without adverse comment but considered that the principles had to be "modified" in "their application to the special situation of a defamation action" (see *Chin Bay Ching* at [31]). Indeed, that *Chin Bay Ching* should not be taken as authority stating principles governing the grant of mandatory injunctions *generally* is apparent from how, in the paragraph (*ie*, *Chin Bay Ching* at [37]) cited by the court in *NCC International*, the court had *expressly* stated that it was making special provision for the defamation context by *departing from American Cyanamid* in relation to *both* prohibitory and mandatory injunctions.

55 For these reasons, with great respect, I do not read *NCC International* to be strong authority indicating that the Court of Appeal intended to walk back on the comments it had made in *Chuan Hong* and affirmed in subsequent cases such as *SPH Ltd*. In particular, it is reasonably arguable that the especial context in *Chin Bay Ching* was not taken into account.

56 Not too long after the Court of Appeal decided *NCC International*, Lord Hoffmann had the opportunity to revisit the views he had expressed more than two decades earlier in the decision of the Judicial Committee of the Privy Council in *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] 1 WLR 1405 ("*Olint Corpn*"). His position on the matter was resolutely unchanged. He reiterated that "arguments over whether the injunction should be classified as prohibitive or mandatory are barren", as "[w]hat matters is what the practical consequences of the actual injunction are likely to be" (at [20]). In his view, the courts below had erred in their approach (at [20]–[21]):

> 20 … It seems to me that both Jones J and the Court of Appeal proceeded by first deciding how the injunction should be classified and then applying a rule that if it was mandatory,

> a "high degree of assurance" was required, while if it was prohibitory, all that was needed was a "serious issue to be tried". Jones J thought it was mandatory and refused the injunction while the Court of Appeal thought it was prohibitory and granted it.
>
> 21 Their Lordships consider that *this type of box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction.* Factors which the court might have taken into account in this case if there had been a triable issue were, first, that the injunction required the bank to continue against its will to provide confidential services for the plaintiffs; secondly, that the injunction would require the bank to continue to incur reputational risks and possible exposure to legal action; thirdly, that it was by no means clear that the plaintiffs would be able to satisfy a claim under the cross-undertaking in damages; fourthly, that the plaintiffs' case was, even if not (as their Lordships think) hopeless, certainly very weak; and fifthly, that the plaintiffs could no doubt have obtained alternative banking services from any bank whom they could persuade that they were not running a fraudulent scheme. It is unnecessary to say what should have been the outcome of a weighing of these factors because that was a matter for the discretion of the judge but they suggest that, even if there had been a serious issue to be tried, it is by no means obvious that Jones J was wrong to refuse an injunction.
>
> [emphasis added]

57 The position under English law is thus clear. As Teare J cautioned in the English High Court decision of *SDI Retail Services Ltd v The Rangers Football Club Ltd* [2018] EWHC 2772 (Comm), "one must be careful not to place too much weight on the formal distinction between mandatory and prohibitory injunctions" (at [50]). More recently, the received wisdom was the subject of a clear restatement by Henshaw J in *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd (The "Miracle Hope")* [2021] 1 Lloyd's Rep 533, who said that (at [30]):

> … There is *no absolute or determinative requirement* that the court must consider an applicant has a high degree of assurance of succeeding on its case (on the balance of probabilities) at trial. That concept can form part of the court's

> assessment of the balance of convenience, but *the risk of injustice in not granting the injunction is the final metric against which the application should be judged …*
>
> [emphasis added]

58 The latest word on the matter in Singapore appears to be the Court of Appeal decision in *RGA Holdings*. Although the court did cite expressions used in *NCC International*, it also referred to *Chuan Hong* in the same breath. Indeed, I would venture to suggest that, on a close reading, the Court of Appeal's thinking in *RGA Holdings* was more aligned with the view in *Chuan Hong* that there was no perceptible difference *of principle* between mandatory and prohibitory injunctions. This emerges from Chao Hick Tin JA's observations that (see *RGA Holdings* at [31]):

> … Various phrases have been used to express the need for caution in granting an interim mandatory injunction. It has thus been said that such an injunction should only be granted if there are "special circumstances" (*NCC International* at [75]), in a "clear case" or if there is a "high degree of assurance" that it will appear at trial to have been rightly granted (see *Chuan Hong* at [85]–[86]). ***The need for caution arises from the recognition that an interim mandatory injunction is a more invasive remedy and, as such, may lead to irreversible prejudice to a defendant.*** *A court must therefore be sure, in accordance with the fundamental principle described above, that the grant of the interim mandatory injunction is indeed the course of action which carries the lower risk of injustice – in other words, that the prejudice to the applicant from not granting the interim mandatory injunction outweighs that to the defendant from granting it.* This will not be an easy hurdle to surmount.
>
> [emphasis added in italics and bold italics]

59 Based on the survey of authority above, I consider that the position is most accurately stated in the Court of Appeal decision in *Chuan Hong*. There is no warrant for saying that a different set of rules apply to the grant of mandatory injunctions since, as Chao JA made clear in *RGA Holdings*, the "fundamental

principle" of the path of least injustice underlies an interim mandatory injunction just as much as it does for interim prohibitory injunctions. It appears to me that harping too much on vague notions of mandatory injunctions being "more exceptional" obfuscates the underlying principle; there is a tendency to fall into the pitfall identified by See JAD of allowing a heuristic to "colour our opinion and skew our decisions" (see [49] above).

60 I note that this is also the general consensus reached amongst other common law jurisdictions. The Malaysian Court of Appeal held in *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422 that although it was once thought to be the case that the grant of a mandatory injunction was governed by principles different from those applicable to prohibitory injunctions, this was "[n]o longer so" (at [27]). The Court of Appeal decision in *SPH Ltd* was cited as authority (at [29]). Similarly, in Australia, the Court of Appeal of the Supreme Court of Western Australia undertook a comprehensive survey of the authorities in *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2016] WASCA 105 and concluded that "both principle and the weight of recent authority lead to the conclusion that no different standard applies in respect of an application for a mandatory injunction" (at [76]–[85]). The position in New Zealand is no different (see the New Zealand Court of Appeal decision of *Fidelity Life Assurance Co Ltd v Pilkington* [2010] NZCA 424 at [26], and more recently, the New Zealand High Court decision of *Clode v Oliphant and others* [2018] NZHC 1442 at [21]–[22]).

61 Interestingly, the Canadian courts have opted for a different approach. In *R v Canadian Broadcasting Corp* [2018] 1 SCR 196, Brown J, delivering the unanimous judgment of the Supreme Court of Canada, held that the appropriate criterion for assessing the strength of an applicant's case in an application for

an interim mandatory injunction was "*not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case" [emphasis in original] (at [15]). This was justified on the ground that "[t]he potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction … further demand [an] 'extensive review of the merits' at the interlocutory stage" (at [15]). As to what amounted to a "strong *prima facie* case", the learned judge said the following (at [17]):

> This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.
>
> [emphasis in original]

62 The Canadian approach provides some food for thought. But it is clear that it is a significant outlier from the views expressed in other jurisdictions (see [60] above). In any event, it is premised on reasoning and the drawing of a bright line between mandatory and prohibitory injunctions that the Court of Appeal has expressly disavowed in authorities that are binding on me. Moreover, I note that at least one scholar on the Canadian law of remedies has recently cast doubt on the utility of this development that has introduced "an additional contested element" of the proper characterisation of an injunction as prohibitory or mandatory, and thus "add[ed] to the cost and complexity of litigation" (see Jeff Berryman, "Unintended Consequences: The New Test for Interlocutory

Mandatory Injunctions" (2024) 89 *Brooklyn Law Review* 885 at 892 and 896). I respectfully agree that a revival of old heresies that places undue focus on the form and phraseology of the injunction would be a retrograde step, for the reasons persuasively stated by Lord Hoffmann in *Films Rover* and *Olint Corpn*, as received into our law by the Court of Appeal in *Chuan Hong*.

63 Indeed, that the Canadian courts are boldly swimming against the current is evident from how a recent English Court of Appeal decision has authoritatively eschewed the application of a higher standard than a "serious issue to be tried" even in the context of the grant of *Mareva* injunctions, which have traditionally been referred to as one of the law's "nuclear weapons" in order to underscore their invasiveness on the defendant (see *Isabel Dos Santos v Unitel SA* [2024] EWCA Civ 1109 ("*Unitel*") at [96] *per* Flaux C and [122] *per* Popplewell LJ). Although how drastic a form of interim relief is a concern that should be factored into the analysis, there is no reason why this has to take the form of a higher merits threshold as opposed to a proper calibration of the other requirements, given the inherent perils of instituting a protracted analysis of the merits at an interlocutory stage as a jurisdictional requirement (as opposed to as a discretionary consideration) that Lord Diplock identified in *American Cyanamid* (see *Unitel* at [100] *per* Flaux C and [130] *per* Popplewell LJ).

64 This is not to say, of course, that the distinction between mandatory and prohibitory injunctions is completely redundant. To that extent I might not go so far as Lord Hoffmann and refer to the distinction as a "barren" one. In my view, two related points that are worth bearing in mind are as follows:

(a) First, before applying to the court, parties and their counsel should consider the *necessity* of seeking a mandatory injunction. If the

protection sought can be appropriately or sufficiently achieved through a properly framed prohibitory injunction, the latter option should be pursued.

(b) Second, if a party persists in seeking a mandatory injunction, the court may be interested to hear why a prohibitory injunction does not suffice to fulfil its purposes. The party should be prepared to explain its thought process with some particularity. This is especially so, as in the present case, where a party seeks *both* types of injunction – he or she should be prepared for the court's inquiry as to why such a sweeping array of relief is *necessary* at this juncture.

It seems to me that these two questions flow naturally from the fundamental principle of charting the path of least injustice, which counsels a minimally invasive approach to interim relief. An element of proportionality between the relief sought and the underlying interest that is sought to be protected is necessary to ensure that the court does not sanction overkill. As Hoffmann J said in *Films Rover*, there is a need to consider a "due process" question: the court must be wary to not allow the defendant's interests to be trodden over before he or she has had the protection of a full hearing at trial (at 681).

The parties' cases

65 I now summarise the parties' cases in broad strokes.

The claimants' arguments

66 The claimants submitted that the requirements for the grant of the injunctions had been met.

67 First, there was a serious issue to be tried, as well as a high degree of assurance, that the Security Documents and Receivables Agreements were unfair preferences under s 225 of the IRDA. The transactions took place within two years of the commencement of GLH's winding up (*ie*, 12 April 2023), and GLH was insolvent at the time of the transactions;[41] GL Thailand was placed in a better position in GLH's liquidation as it was elevated to the position of a secured creditor as a result of the Security Documents and Receivables Agreements;[42] and GLH was presumed to have been influenced by a desire to prefer GL Thailand as GL Thailand was a related company to GLH.[43]

68 Further and/or alternatively, a number of the Security Documents were void against GLH as a company in insolvent liquidation as they constituted unregistered charges under s 131 of the Companies Act 1967 (2020 Rev Ed) (the "CA").[44] As for the first of the Receivables Agreements that was entered into on 1 July 2020 (and thereby fell outside the scope of the unfair preference provisions), this agreement was an unenforceable contract that was tainted by illegality as it was entered into in breach of the 1st *Mareva* Injunction that had been in force at the time.[45]

69 The balance of convenience lay in favour of granting the injunctions sought. GL Thailand's unwillingness to hold the ring pending the determination of the validity of the Security Documents was apparent from how it had (a) already taken steps to enforce its disputed security interests pursuant to the

41 CWS at paras 53–55.

42 CWS at paras 56–59.

43 CWS at paras 60–63.

44 CWS at paras 64–66.

45 CWS at paras 67–71.

Security Documents even after GLH had gone into provisional liquidation;[46] and (b) acted obstructively towards Mr Borrelli's efforts to carry out his duties.[47]

70 Damages would not be an adequate remedy for GLH if no injunctions were to be issued, as GL Thailand would be given free rein to enforce its remaining security interests, take control of GLH's subsidiaries, and dissipate the subsidiaries' assets. Even if the claimants turned out to be successful upon the final resolution of OC 565, their success could be rendered nugatory if the subsidiaries had by then already been reduced to shell companies of no value.[48] At this juncture, I highlight that, given that a shareholder has no direct interest in the assets of the company by virtue of the cardinal principle of separate legal personality (see the House of Lords decision of *Macaura v Northern Assurance Company, Limited and others* [1925] AC 619 at 626–627, affirmed by the High Court in *Jhaveri Darsan Jitendra and others v Salgaocar Anil Vassudeva and others* [2018] 5 SLR 689 at [34] and the Court of Appeal in *Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management) and another* [2022] 1 SLR 884 at [115]), there was a missing step in the claimants' submission between the dissipation of the assets of GLH's subsidiaries and GLH suffering loss. I therefore understood the substance of the argument to be that the dissipation of the assets of GLH's subsidiaries would hurt the value of the shares in the subsidiaries, so as to render futile a restoration of those shares to GLH in the event that the Security Documents were successfully set aside in OC 565.

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46 CWS at para 73.

47 CWS at para 75.

48 CWS at para 76.

71 The prejudice that would be suffered by GL Thailand in the event that the injunctions were wrongly granted was less than the prejudice that would be suffered by the claimants in the event that the injunctions were wrongly not granted. As Mr Borrelli *qua* liquidator was an officer of the court, there was no risk that he would act adversely towards GL Thailand and harm the value of its security interests in the event that they were adjudicated to be valid.[49] Further, as no distribution of GLH's assets would take place prior to the determination of OC 565, the assets that were the subject of GL Thailand's claimed security would remain intact.[50] Finally, the claimants were willing to give the usual undertaking as to damages.[51]

The defendant's arguments

72 GL Thailand contended that the injunctions should not be issued.

73 There was neither a serious issue to be tried nor a high degree of assurance as to the success of the claimants' claim in OC 565. The Security Documents and Receivables Agreements fell outside the scope of the unfair preference regime as GLH had not been insolvent when these transactions were executed.[52] GLH had not been influenced by a desire to prefer GL Thailand when executing these transactions as it (GLH) was responding to legitimate commercial pressure exerted on it by GL Thailand.[53]

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49 CWS at para 81.

50 CWS at para 82.

51 CB-1 at para 111.

52 DWS at paras 50–52.

53 DWS at para 53.

74 GL Thailand had provided consideration for the Security Documents and Receivables Agreements in the form of its forbearance from enforcing the Loan Agreements despite GLH's obligations to repay having fallen due.[54] GL Thailand had also extended further loans to GLH pursuant to some of the Loan Agreements in exchange for some of the Security Documents and Receivables Agreements.[55] The grant of security from GLH to GL Thailand had post-dated these further loans as GLH had been subject to the 1st *Mareva* Injunction, and had to wait until the lapse of the 1st *Mareva* Injunction to grant security to GL Thailand.[56]

75 GL Thailand's prior exercise of its rights under a number of the Security Documents was not in breach of the 2nd *Mareva* Injunction as GL Thailand was not subject to the 2nd *Mareva* Injunction.[57]

76 The Security Documents alleged by the claimants to be void as unregistered charges under s 131 of the CA were not so because GL Thailand had exercised its rights prior to the commencement of GLH's winding up and Mr Borrelli's appointment as provisional liquidator. The exercise of its rights caused the charges to be spent, and the charges could not be rendered retrospectively void by GLH subsequently going into insolvent liquidation.[58]

77 Further, the balance of convenience lay in favour of not granting the injunctions sought. In the first place, the claimants would be adequately

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54 DWS at para 55(a).

55 DWS at paras 55(b)–55(d).

56 DWS at para 56.

57 DWS at paras 58–59.

58 DWS at paras 60–62.

compensated in damages in the event of their success in OC 565. The claimants' claims in OC 565 were merely personal claims as opposed to proprietary claims to any assets or securities.[59] GL Thailand could simply be required to pay a sum of money that restored the value of the securities and/or receivables under the Security Documents and Receivables Agreements to GLH's estate for distribution to its unsecured creditors.[60]

78 In any event, greater prejudice would be occasioned to GL Thailand from the injunctions being wrongly granted as opposed to the claimants being wrongly deprived of injunctions in the event of their success in OC 565.[61] The injunctions sought by the claimants would prevent GL Thailand from exercising its securities under the Security Documents. If the value of these securities fell in the meantime, GL Thailand would be prejudiced as its exposure as an unsecured creditor would increase.[62] Further, as GLH was already insolvent, there was a real risk that GLH would not be able to compensate GL Thailand for any loss in the value of its security; there was also doubt as to whether Mr Borrelli was providing an undertaking as to damages in his personal capacity.[63]

My decision: the application was granted in part

79 For the reasons below, I decided that the interim prohibitory injunctions in prayers (a) and (d) ought to be granted (see [32] above). I also ordered

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59 DWS at para 30.

60 DWS at paras 28–29.

61 DWS at para 36.

62 DWS at para 37.

63 DWS at para 38.

GL Thailand to make the disclosures set out in prayer (e). However, I declined to grant the interim mandatory injunctions in prayers (b) and (c).

The interim mandatory injunctions were not granted

80 I can first briefly dispose of the interim mandatory injunctions sought by the claimants in prayers (b) and (c). As I reflected to counsel for the claimants, Mr Suresh Nair Sukumaran ("Mr Nair"), at the hearing, the net effect of prayers (a) and (d) appeared to be identical to prayers (b) and (c) in so far as both sets of prayers were purposed towards preserving the assets that were the subject of the parties' dispute in OC 565. Mr Nair fairly acknowledged this, and stated that prayers (b) and (c) had been included due to "concerns with the limits of the prohibitory injunction".[64]

81 Against this backdrop, I declined to grant the interim mandatory injunctions. As I explained at [64] above, if an applicant's interests can be adequately protected by appropriately framed prohibitory injunctions, there would generally be no reason for the issue of more invasive mandatory injunctions. Further, although Mr Nair did gesture to "concerns with the limits of the prohibitory injunction", the claimants did not explain or particularise what these "concerns" or "limits" were in their written and oral submissions. Indeed, my impression was that having ascertained that the interim prohibitory injunctions in prayers (a) and (d) achieved the purpose they needed, the claimants did not consider it necessary to push for the interim mandatory injunctions in prayers (b) and (c).

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64 Notes of Argument (7 October 2024) at p 2:3–7.

The interim prohibitory injunctions were granted

There was a serious question to be tried

82 Turning now to the interim prohibitory injunctions, I was satisfied that there was a serious question to be tried on the merits of GLH's claim.

(1) Whether the Security Documents and Receivables Agreements were unfair preferences

83 The principal claim made by the claimants in OC 565 is that the Security Documents and Receivables Agreements were unfair preferences. Given that there does not appear to have been a local decision that has clearly set out the applicable legal principles on the avoidance of unfair preference transactions, I consider it apposite to attempt to provide an overview below.

(A) THE APPLICABLE LAW ON UNFAIR PREFERENCE

84 I begin with the statutory scheme on unfair preference. The main provision, s 225 of the IRDA, provides as follows:

> **Unfair preferences**
>
> **225.**—(1) Subject to this section and sections 226 and 227, where a company is in judicial management or being wound up, and the company has at the relevant time (as defined in section 226), given an unfair preference to any person, the judicial manager or liquidator (as the case may be) may apply to the Court for an order under this section.
>
> (2) The Court may, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that unfair preference.
>
> (3) For the purposes of this section and sections 226 and 227, a company gives an unfair preference to a person if —
>
> > (*a*) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities; and

> (*b*) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company's winding up, will be better than the position that person would have been in if that thing had not been done.
>
> (4) The Court must not make an order under this section in respect of an unfair preference given to any person unless the company which gave the preference was influenced in deciding to give the unfair preference by a desire to produce in relation to that person the effect mentioned in subsection (3)(*b*).
>
> (5) A company which has given an unfair preference to a person who, at the time the unfair preference was given, was connected with the company (otherwise than by reason only of being the company's employee) is presumed, unless the contrary is shown, to have been influenced in deciding to give the unfair preference by such a desire as is mentioned in subsection (4).

85 In turn, s 226 of the IRDA, which defines the "relevant time" referred to in s 225(1) of the IRDA, provides (in so far as relevant to unfair preference) as follows:

> **Relevant time under sections 224 and 225**
>
> **226.**—(1) Subject to this section, the time at which a company … gives an unfair preference is a relevant time if … the preference given —
>
> [Section 226(1)(*a*) omitted]
>
> (*b*) in the case of an unfair preference which is not a transaction at an undervalue and which is given to a person who is connected with the company (otherwise than by reason only of being the company's employee) — within the period starting 2 years before the commencement of the judicial management or winding up (as the case may be) and ending on the date of the commencement of the judicial management or winding up, as the case may be; and
>
> (*c*) in any other case of an unfair preference — within the period starting one year before the commencement of the judicial management or winding up (as the case may be) and ending on the date of the commencement of the judicial management or winding up, as the case may be.

> (2) Where a company … gives an unfair preference at a time mentioned in subsection (1)(*a*), (*b*) or (*c*), that time is not a relevant time for the purposes of sections 224 and 225 unless the company —
>
> (*a*) is unable to pay its debts at that time within the meaning of section 125(2); or
>
> (*b*) becomes unable to pay its debts within the meaning of section 125(2) in consequence of the transaction or preference.
>
> …

86 Section 227 of the IRDA then sets out *examples* of orders that the court may make to reverse an unfair preference; this is not an exhaustive list but merely illustrative, as the opening phrase "[w]ithout affecting the generality of sections 224(2) or 225(2)" make clear. The guiding principle of the court's remedial powers remains that the court should "make such order as it thinks fit for restoring the position to what it would have been if the company had not given the unfair preference" (see s 225(2) of the IRDA).

87 It may be useful to briefly return to first principles: what is the object of the unfair preference regime? A common answer is that the rationale of the law of unfair preference is to uphold the integrity of the *pari passu* principle of distribution that is "the default rule in insolvent liquidation", and which is statutorily enshrined in s 172 of the IRDA (see the General Division of the High Court decision in *Park Hotel CQ Pte Ltd (in liquidation) and others v Law Ching Hung and another suit* [2024] 5 SLR 138 at [49] and [51]). In this regard, the unfair preference regime reverses transactions that have the effect of improving the position of certain creditors in relation to those who would otherwise have been equally situated creditors in the liquidation. Normatively, the preferred creditor is viewed as having been unjustly enriched at the expense of the other unsecured creditors of the company (see the General Division of the

High Court decision in *Re Eng Lee Ling and another matter* [2024] 4 SLR 929 at [31]), and the "unjust factor" that supplies the reason for – and indeed demands – restitution from the preferred creditor is thus insolvency law's focus on equality amongst creditors (see Chua Rui Yuan, "The Aftermath of a Ponzi Scheme" [2023] LMCLQ 218 at 223; and Simone Degeling, "Restitution for Vulnerable Transactions" in *Vulnerable Transactions in Corporate Insolvency* (John Armour & Howard Bennett eds) (Hart Publishing, 2003) at paras 9.49–9.50). The following straightforward example illustrates this point (see Adrian Walters, "Preferences" in *Vulnerable Transactions in Corporate Insolvency* (John Armour & Howard Bennett eds) (Hart Publishing, 2003) ("*Preferences*") at para 4.1):

> To take an example, let us say that A Ltd has total assets of £100 and two unsecured creditors, X and Y, each owed £100. In A Ltd's liquidation, the £100 worth of assets would be distributed *pari passu* between X and Y, with the result that each would receive £50, representing a dividend on their claims of 50 pence in the pound. If, however, on the eve of liquidation A Ltd pays X £100, exhausting its remaining assets, the payment to X is a factual preference because it improves X's position relative to Y. X is repaid in full, rather than being left to rank alongside Y for dividend in the liquidation, while Y receives nothing.

88 However, as some commentators have pointed out, this is an inaccurate (or, at any rate, incomplete) rationalisation of the unfair preference regime under Singapore (and English) law (see Rebecca Parry, James Ayliffe QC & Sharif Shivji, *Transaction Avoidance in Insolvencies* (Oxford University Press, 3rd Ed, 2018) ("*Transaction Avoidance in Insolvencies*") at paras 2.41–2.46). If the view above were to be taken to its logical conclusion, the unfair preference regime would bite solely upon a transaction having a preferential effect. But that is not the local position, as s 225(4) of the IRDA institutes a mental element of the company having been influenced by a desire to prefer the preferred

creditor. By contrast, a purely effects-based regime can be found in Australian law, as s 588FA of the Australian Corporations Act 2001 (Cth) ("Australian CA") does *not* contain a similar mental element:

> **588FA Meaning of unfair preference**
>
> (1) A transaction is an unfair preference given by a company to a creditor of the company if, and only if:
>
> (a) the company and the creditor are parties to the transaction (even if someone else is also a party); and
>
> (b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;
>
> even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

89 This is not merely a theoretical difference. The difference in legislative design and purpose can have practical consequences which should be borne in mind. Indeed, to take the present case (and OC 565) as an example, one of the defences that GL Thailand has raised is that the Security Documents and Receivables Agreements were extracted by GL Thailand from GLH based on legitimate commercial pressure; the implication of this argument is that GLH did not have the requisite mental element of a desire to prefer GL Thailand because its entry into the Security Documents and Receivables Agreements was a response to such pressure (see [73] above). This would be a valid argument in the unfair preference regime under Singapore (and English) law, but not so under effects-based regimes such as that under Australian law (see *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) at paras 1255–1256). In the present application, GLH was content to rest its case on the mental element mostly on the statutory presumption under s 225(5) of

the IRDA where the recipient of the preference is (as GL Thailand is) a connected person to the company. I was satisfied that this was sufficient to raise a serious issue to be tried in so far as that requirement was concerned, but it should not be assumed that this would always suffice, still less when it comes to the full determination of OC 565.

90 With the statutory scheme and a brief understanding of the rationale underpinning the unfair preference regime in mind, I turn to the constituent elements of an unfair preference. In my view, a transaction would constitute an unfair preference if the following conditions are met:

(a) First, there must be a *pre-existing relationship of debtor and creditor* (or debtor and guarantor/surety) between the company and the transaction counterparty.

(b) Second, the transaction that is alleged to be a preference must be *referable to an antecedent debt* between the company and the transaction counterparty.

(c) Third, the company must have given a *factual preference* to the transaction counterparty. There are two facets to this:

(i) one, the company must have done (or suffered to have been done) something that had the effect of *putting the counterparty in a better position in the company's liquidation* than it would otherwise have been if that thing had not been done; and

(ii) two, the advantage to the counterparty must have come *at the expense of the company's other unsecured creditors*.

(d) Fourth, the company must have been *influenced by a desire to prefer* the transaction counterparty. This can either be proven through evidence or with the aid of the statutory presumption if the counterparty is a connected person to the company.

(e) Fifth, the transaction must have taken place at a *relevant time* prior to the commencement of the winding up. There are two facets to this:

(i) one, the transaction must have taken place either within one year before the commencement of the winding up or, where the counterparty is a connected person to the company, two years before the commencement of the winding up; and

(ii) two, the transaction must either have taken place when the company was insolvent or the company became insolvent as a result of the transaction. The relevant test of insolvency is the test of inability to pay debts under s 125(2) of the IRDA.

91 I explain each of the elements below.

(I) PRE-EXISTING RELATIONSHIP OF DEBTOR AND CREDITOR

92 First, the necessity of a pre-existing relationship of debtor and creditor (or debtor and guarantor/surety) between the company and the recipient of the preference is made explicit by s 225(3)(*a*) of the IRDA. The logic is also commonsensical: it is inherent in the very concept of a preference, that is concerned with inter-creditor fairness, that the recipient of the preference is an existing creditor. As the General Division of the High Court explained in *Envy Asset Management Pte Ltd (in liquidation) and others v CH Biovest Pte Ltd*

[2024] SGHC 46, the giving of a preference has no effect on the debtor's net asset position; there is no change in net asset position because the diminution in the debtor's assets is matched by a corresponding decrease in its liabilities when the debtor pays off a debt or liability (at [72(a)]). Contrariwise, a transaction that does adversely affect the debtor's net asset position would not fall to be caught by the preference regime but would instead be redressed by the provisions on undervalue transactions (at [72(b)]).

(II) THE TRANSACTION MUST BE REFERABLE TO AN ANTECEDENT DEBT

93 The second requirement is a refinement of the first. It is not the case that, once a creditor-debtor relationship comes into being, all subsequent transactions between the parties would amount to a preference. Instead, a creditor can only be said to have been preferred (relative to other existing creditors) if it gains an advantage in respect of a pre-existing, or antecedent, debt owed to it by the company (see *Preferences* at para 4.25). As the leading textbook *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten ed) (Sweet & Maxwell, 5th Ed, 2018) ("*Goode on Insolvency*") puts it, "[t]he payment, transfer or other act under attack must relate to a past indebtedness, for to the extent that the creditor gives new value, he gains no advantage" (at para 13-79). The reason for this was explained by Dixon J (as he then was) in the High Court of Australia decision of *Robertson v Grigg* (1932) 47 CLR 257 (at 271):

> … The relationship of debtor and creditor was for long the very foundation of the provisions of the bankruptcy law affecting preference, and, although exceptions have been introduced, the old rule otherwise remains and nothing can amount to a preference unless the person preferred is a creditor. … In making each separate advance on the faith of the agreement and thereby obtaining a charge in respect of the advance, the respondent did not obtain any benefit or advantage in relation to the past indebtedness. *He did not deal with the debtor in his*

> *capacity of creditor. No-pre-existing debt was better secured or otherwise affected by reason of any subsequent advance. There was, therefore, no preference to him as a creditor.*
>
> [emphasis added]

94 In order to better visualise this point, the following illustrations may be of assistance (see *Preferences* at para 4.26):

(a) If Company *X* grants a charge over its assets to secure a repayment of a *contemporaneous* advance of moneys from Company *Y*, the creation of that charge does *not* amount to a preference even if there are existing debts owing from Company *X* to Company *Y*. The transaction is not referable to any past indebtedness of Company *X*.

(b) If, on the other hand, Company *X* grants a charge over its assets to secure an *existing* debt owed to Company *Y*, the creation of that charge *would* amount to a preference as Company *Y* is now in a better position in the event of Company *X*'s insolvent liquidation than it otherwise would have been but for the grant of the charge.

(c) If Company *X* grants a charge over its assets to secure *both existing indebtedness and a contemporaneous advance*, the creation of that charge would be a partial preference *to the extent that it relates to the existing indebtedness*. But for the grant of the charge, Company *Y* would have been in a worse position in Company *X*'s insolvent liquidation in so far as the existing debt(s) are concerned.

(III) THE CREDITOR MUST HAVE RECEIVED A FACTUAL PREFERENCE

95 The third requirement of a factual preference is, self-evidently, the crux of the unfair preference regime. The relevant inquiry is whether the effect of the

transaction is to place the creditor in a better position in the company's insolvency than he would otherwise have been in a counterfactual insolvency where the transaction had not occurred (see *Preferences* at para 4.28).

96 It is notable that s 225 of the IRDA is silent on the time when the preferential effect (or otherwise) of the transaction should be assessed. In practice, I suspect that whether the time chosen is the time of the transaction or the time of the company's actual liquidation would not make a difference. Nonetheless, there is English authority supporting the view that the court should assess the preferential effect of the transaction by comparing the creditor's position in a hypothetical liquidation right before the transaction and a hypothetical liquidation right after the transaction (see the English High Court decision of *Re Hawkes Hill Publishing Co Ltd (in liquidation)* [2007] BPIR 1305 ("*Hawkes Hill*") at [31]). This is also the view that the High Court of Australia adopted in *Airservices Australia v Ferrier and another* (1996) 185 CLR 483 (at 501). I consider this to be correct in principle; in particular, the phrase "*in the event of* the company's winding up" [emphasis added] in s 225(3)(*b*) of the IRDA suggests that the court should look to an immediate hypothetical liquidation rather than the actual liquidation (see *Transaction Avoidance in Insolvencies* at para 5.56).

97 An additional requirement that is not apparent from the language of s 225(3) and has seldom been addressed in case law, but which has been the subject of an impressive consensus amongst commentators, is that the advantage gained by the creditor must come at the expense of the other creditors (see *Goode on Insolvency* at para 13-89; *Preferences* at para 4.54; *Transaction Avoidance in Insolvencies* at para 5.51). In most cases, this would not pose much difficulty. But it can sometimes make a difference, as illustrated by the

English case of *Hawkes Hill*. It was argued there that guarantors of a secured loan to a company had received a preference by being released from their liabilities as guarantors after the loan was paid off using the proceeds of sale of the company's assets. Lewison J (as he then was) held that this did not amount to a preference, as even if the repayment had not occurred prior to the company going into liquidation, the secured creditor would nonetheless have been entitled to rely on its security over the company's assets to discharge the debt and, in doing so, release the guarantors from liability (at [31]). The mere fact that the guarantors did benefit from being released from liability did not suffice as this benefit did not come at the expense of the company's other creditors; the value of the assets used to pay off the loan would not, in the event, have fallen into the company's estate for distribution to its creditors.

98 By contrast, in the English Court of Appeal decision of *Re Sonatacus Ltd* [2007] 2 BCLC 627, CIL had lent money to S, a director of a company. S instructed CIL to pay the money directly into the company's bank account, and subsequently, S procured the company to repay the sum (plus interest) directly to CIL shortly before the company's entry into insolvent liquidation. The English Court of Appeal held that this constituted the giving of a preference to S by the company. Sir Martin Nourse reasoned that: (a) S had become a debtor of CIL by taking out a loan in his personal capacity; (b) by CIL paying the loan moneys directly to the company, the company had become a debtor of S; and (c) by repaying CIL the loan, the company had given a preference to S (at [17]). In this case, the advantage to S came at the expense of the company's other creditors, because had the company not repaid CIL, S would have been liable to repay the loan to CIL on his own, and would only have recouped a dividend on his loan to the company as opposed to having it repaid in full (albeit directly to CIL). Put differently, if the company had not repaid CIL, the other creditors of

the company would have enjoyed a better return from S ranking with them in the liquidation as opposed to being repaid in priority to them.

(IV) THE COMPANY MUST HAVE BEEN INFLUENCED BY A DESIRE TO PREFER THE CREDITOR

99 The fourth requirement is the mental element that I have briefly alluded at [88] above. This requires the liquidator to establish that the company was *influenced by a desire to prefer* the creditor when giving the preference (see s 225(4) of the IRDA). In *DBS Bank Ltd v Tam Chee Chong and another (judicial managers of Jurong Hi-Tech Industries Pte Ltd (under judicial management))* [2011] 4 SLR 948 ("*DBS Bank*"), the Court of Appeal endorsed (at [22]) the following propositions derived from the English High Court decision of *Re MC Bacon (No 2)* [1990] Ch 327:

> (a) The test is not whether there is a dominant intention to prefer, but whether the debtor's decision was influenced by a desire to prefer the creditor.
>
> (b) The court will look at the desire (a subjective state of mind) of the debtor to determine whether it had positively wished to improve the creditor's position in the event of its own insolvent liquidation.
>
> (c) The requisite desire may be proved by direct evidence or its existence may be inferred from the existing circumstances of the case.
>
> (d) It is sufficient that the desire to prefer is one of the factors which influenced the decision to enter into the transaction; it need not be the sole or decisive factor.
>
> (e) A transaction which is actuated only by proper commercial considerations will not constitute a voidable preference. A genuine belief in the existence of a proper commercial consideration may be sufficient even if, objectively, such a belief might not be sustainable.

100 In general, the burden of proof would be on the liquidator to establish that the company had the requisite desire to improve the position of the preferred

creditor (see *DBS Bank* at [27]). But, in a case where the recipient of the preference is a connected person to the company (as defined in s 217 of the IRDA), s 225(5) of the IRDA emplaces a statutory presumption of the company having been influenced by a desire to prefer the connected person. The burden would lie on the connected person to establish that the company was *not influenced at all* by any desire to place the connected person in a preferential position; a bare denial would not suffice (see the Court of Appeal decision of *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 at [36] and the High Court decision of *Living the Link Pte Ltd (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others* [2016] 3 SLR 621 at [36]–[37]).

(V) THE TRANSACTION MUST HAVE TAKEN PLACE IN THE RELEVANT TIME

101 The final requirement is that the transaction must have taken place within the "relevant time" as defined in s 226 of the IRDA. As set out above (at [90(e)]), there are two elements to the "relevant time": (a) first, an insolvency requirement (*ie*, the company must either have been insolvent at the time of the transaction or became insolvent in consequence of it); and (b) second, a temporal requirement (either one year, or in the case of connected persons, two years, from the commencement of the winding up).

(B) THERE WAS A SERIOUS QUESTION TO BE TRIED AS TO WHETHER THE SECURITY DOCUMENTS AND RECEIVABLES AGREEMENTS WERE UNFAIR PREFERENCES

102 Applying the principles that I have set out above, I was satisfied that there was a serious issue to be tried as to whether the Security Documents and Receivables Agreements constituted unfair preferences.

(I) THE TRANSACTIONS WERE WITHIN THE RELEVANT TIME

103 First, beginning with the "relevant time" requirement, the time of the commencement of GLH's winding up was the date of the winding-up application against it (*viz*, 12 April 2023) (see s 217(1) of the IRDA). It was also clear that, as the sole shareholder and parent company of GLH, GL Thailand was a connected person to GLH under s 226(1)(*b*) of the IRDA such that the extended look-back period of two years from the commencement of winding up applied. In this connection, I had regard to the definition of a "person connected with a company" under s 217 of the IRDA. In particular, s 217(2)(*b*) defines a "person connected with a company" as including "an associate of the company" and, in turn, s 217(8) provides that a corporation is an associate of another corporation if, *inter alia*, "a group of 2 or more persons has control of each corporation, and the groups either consist of the same persons or could be regarded as consisting of the same persons …". Given, among other factors, that there are four common directors between GLH and GL Thailand, it could not be seriously disputed that GL Thailand was a connected person to GLH.

104 In this regard, save for the first of the Receivables Agreements (which was executed on 1 July 2020), all of the Security Documents and Receivables Agreements were executed within the period of 14 to 30 July 2021 (see [22] above). They were thus transactions entered into within two years of the commencement of GLH's winding up.

105 I was also satisfied that the insolvency element of "relevant time" had been met. Section 226(2) of the IRDA defines insolvency by reference to the test of inability to pay debts under s 125(2) of the IRDA. Two factors cited by the claimants in support of the inference that GLH was insolvent at the time that

the Security Documents and Receivables Agreements were executed were particularly telling:

(a) The first was the Independent Auditor's Report for GLH's financial statements for the year ending 31 December 2020. In that report, GLH's auditors had raised a material uncertainty as to GLH's ability to continue as a going concern, and also reported that GLH was cash flow insolvent as of 31 December 2020, as its "current liabilities exceeded its current assets by US$61,116,178".[65] This would have satisfied the test of cash flow insolvency under s 125(2)(*c*) of the IRDA as defined by the Court of Appeal in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 at [65]–[69].

(b) The second was GLH's repeated failure to comply with statutory demands issued by GL Thailand for repayment of the loans under Loan Agreements on 20 October 2020, 10 August 2021 and 11 August 2021.[66] These defaults would have triggered the statutory presumption of insolvency under s 125(2)(*a*) of the IRDA (see, *eg*, the recent decision of the General Division of the High Court in *Chia Vui Khen Jason v HR Easily Pte Ltd* [2024] 5 SLR 399).

106 Although GL Thailand submitted that there was no question about GLH's solvency by pointing to GLH's ability to repay the 1st Judgment Debt on 19 July 2021,[67] I considered there to be little substance in this argument. On

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65 CWS at para 53.

66 CWS at para 54.

67 DWS at paras 51–52; TK-1 at para 28.

GL Thailand's own account of events, GLH was able to repay the 1st Judgment Debt due to it receiving financial assistance from GL Thailand in the form of the 29th to 35th Loan Agreements.[68] GL Thailand was therefore relying on a verisimilitude of GLH's solvency and ability to meet debt obligations that *it had itself manufactured*. Indeed, as the claimants pointed out, the appearance of GLH's financial stability that GL Thailand asserted was undermined by GLH's failure to comply with the statutory demands dated 10 and 11 August 2021 issued by GL Thailand *less than a month* after the repayment of the 1st Judgment Debt. Finally, the logic in the argument was flawed: GL Thailand providing financing to GLH to repay the 1st Judgment Debt would not have materially affected GLH's solvency after the repayment of the 1st Judgment Debt, since the net effect was that GL Thailand was substituted in place of JTA as a creditor of GLH for roughly the same amount. For all these reasons, there was no merit in GL Thailand's reliance on GLH's repayment of the 1st Judgment Debt to displace the other indicators of GLH's insolvency at the material time. It was plainly impossible to conclude that there was no arguable case that GLH had been insolvent at the time of the Security Documents and Receivables Agreements.

(II) THERE WAS A PRE-EXISTING DEBTOR-CREDITOR RELATIONSHIP BETWEEN GLH AND GL THAILAND

107 Second, it was not disputed that there was a pre-existing debtor-creditor relationship between GLH and GL Thailand at the time that the Security Documents and Receivables Agreements (except for the first Receivables Agreement) were entered into. Indeed, save for the first Receivables Agreement, *all* of the Security Documents and Receivables Agreements were executed *after*

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68 TK-1 at para 17.

all 35 of the Loan Agreements (the last of which was entered into on 7 July 2021).

(III) THE TRANSACTIONS GAVE GL THAILAND A FACTUAL PREFERENCE RELATING TO AN ANTECEDENT DEBT

108 Third, the Security Documents and Receivables Agreements clearly constituted factual preferences relating to antecedent debts owed by GLH to GL Thailand, *viz*, the debts under the Loan Agreements. It was not disputed that the Security Documents and Receivables Agreements related to GLH's obligations under the Loan Agreements, as opposed to fresh and/or contemporaneous advances from GL Thailand to GLH.

109 I considered GL Thailand's arguments on why it had provided consideration to GLH for the Security Documents and Receivables Agreements to be misconceived.

110 One, although it is well-established that forbearance can constitute good consideration in the contract law (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ("*The Law of Contract in Singapore*") at para 04.034), it was not clear to me that a transaction is not rendered a preference by reason of the creditor providing consideration as understood under contract law. Instead, as noted at [93] above, the rule appears to be that a transaction is saved from being a preference to the extent that the creditor has provided new value. It was not obvious how mere forbearance to sue constitutes new value; indeed, it would be somewhat surprising if it did, as it would mean that the archetypal case of a debtor securing its past indebtedness in exchange for the creditor staying its hand would not constitute a preference, when this is, in fact, the *paradigm* example of a

preference. Moreover, no evidence other than a bare assertion as to forbearance on affidavit was adduced before me.[69]

111 Two, GL Thailand alternatively framed its submission along the line that the Security Documents and Receivables Agreements had been entered into in exchange for the extension of financing to GLH under the 29th to 35th Loan Agreements to enable GLH to pay off the 1st Judgment Debt, and that the Security Documents and Receivables Agreements had only post-dated the 29th to 35th Loan Agreements because GLH had been unable to enter into them prior to the lifting of the 1st *Mareva* Injunction.[70] According to the affidavit evidence of GL Thailand's representative, Mr Tatsuya Konoshita ("Mr Konoshita"), "[i]t was understood, at the time [the 29th to 35th] loans were made, that GLH would provide security for the same once the [1st] *Mareva* Injunction was lifted",[71] and but for the promise to enter into the Security Documents and Receivables Agreements, GL Thailand would not have disbursed the 29th to 35th loans.[72]

112 I was willing to assume that this was a *plausible* argument. But bearing in mind that it was sufficient for GLH to establish a serious issue to be tried, I did not think that a plausible argument such as this sufficed to render GLH's case in OC 565 doomed to fail. In particular, the existence of such a mutual understanding between GLH and GL Thailand was a bare assertion on affidavit by Mr Konoshita, and there was no contemporaneous evidence to support his assertion in his affidavit. At any rate, the veracity of such an allegation was

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69 TK-1 at para 21.

70 DWS at paras 55–56; TK-1 at para 17.

71 TK-1 at para 18.

72 TK-1 at para 19.

clearly better suited to be tested at trial, as opposed to being accepted outright at this juncture to render GLH's claim unsustainable *in limine*.

(IV) GLH WAS INFLUENCED BY A DESIRE TO PREFER GL THAILAND

113 Fourth, I was satisfied that GLH had been influenced by a desire to prefer GL Thailand. As GL Thailand was a connected company to GLH, the presumption that GLH had been influenced by a desire to prefer GL Thailand under s 225(5) of the IRDA was engaged. The burden thus lay on GL Thailand to demonstrate that it was plainly unarguable (given the threshold of a serious issue to be tried) that GLH had not been influenced *at all* by a desire to prefer GL Thailand.

114 GL Thailand failed to do so. As alluded to above, GL Thailand's case on denying the mental element was premised on its assertion that GLH had merely been responding to legitimate commercial pressure that GL Thailand had exerted on GLH in respect of GLH's outstanding liabilities to GL Thailand under the Loan Agreements. Although it is a plausible argument as a matter of law, I make the following observations.

115 One, there seemed to me some tension between GL Thailand's suggestion that the Security Documents and Receivables Agreements had been extracted by GL Thailand by exerting pressure on GLH, and its assertion that the Security Documents and Receivables Agreements were the product of an agreement between GL Thailand and GLH for the former to extend financing to the latter to pay off the 1st Judgment Debt. I suppose that it is conceivable that an agreement was arrived at following the application of pressure, but there was no evidence as to either of those things other than Mr Konoshita's bare assertion on affidavit.

116 Two, the case that GL Thailand had to meet to succeed in closing off the existence of even a serious issue to be tried as to the mental element was pegged at a considerably high threshold. Given the operation of the statutory presumption under s 225(5) of the IRDA, it bears emphasising that GL Thailand had to prove that a desire to prefer *completely did not operate on GLH's mind*. That would, in the ordinary course, already be a tall order based on the totality of the evidence adduced at trial, still less based solely on affidavit evidence in an interlocutory proceeding such as the present application.

117 In this connection, the Court of Appeal decision in *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International, Singapore Branch) v Jurong Technologies Industrial Corp Ltd (under judicial management)* [2011] 4 SLR 977 is instructive. In that case, although the Court of Appeal affirmed that legitimate commercial pressure could *negate* the requisite mental element of a desire to prefer, it stressed that (at [44]):

> … so long as there is some evidence that a debtor had the requisite desire to prefer, even though it was under some or great pressure from a creditor to pay its debts, the influence of such desire is sufficient to support a claim of unfair preference under [s 225 of the IRDA]. If the preferred creditor is unable to show that its commercial pressure was overwhelming or that the commercial pressure was "proper", in the sense that it had some value to the debtor (or that the debtor believed that it had some value to it), then such pressure cannot negate the requisite desire, even though the desire may, relatively speaking, be weaker than the pressure.

In my view, this statement underscored the high threshold that GL Thailand had to meet.

118 Three, Mr Konoshita's evidence tended to *support*, rather than dispel, the inference that GLH had been influenced by a desire to prefer GL Thailand. According to Mr Konoshita, given that GL Thailand had disbursed considerable

– if anything, an understatement – sums of money to GLH under the Loan Agreements, "some of which had been outstanding since 2015[,] GL Thailand was compelled to take immediate steps to secure GLH's substantial indebtedness".[73] It was significant, in my view, that Mr Konoshita was a director of *both* GLH and GL Thailand.[74] It was thus not lost on him – in fact, it was operating on his mind – that GL Thailand's position stood to be improved by entering into the Security Documents and Receivables Agreements which had the effect of reducing GL Thailand's exposure as an unsecured creditor of GLH. There was an air of unreality surrounding any suggestion by GL Thailand that it did not know that GLH was having financial troubles at the time, given that the latter required the former's assistance to pay off the 1st Judgment Debt. Moreover, the timing and sheer speed with which all of the Security Documents and Receivables Agreements were entered into – in the two-week interlude between the lapse of the 1st *Mareva* Injunction and the coming into force of the 2nd *Mareva* Injunction – also lent to the inference that there was an element of desperation in GLH's and GL Thailand's efforts to improve GL Thailand's position.

(V) Conclusion

119 For the reasons explained above, I concluded that the claimants had established a serious issue to be tried as to whether the Security Documents and Receivables Agreements executed from 14 July 2021 to 30 July 2021 were unfair preferences and liable to be set aside as such. This would encompass *all* of the Security Documents and Receivables Agreements, except for the first

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73 TK-1 at para 29.

74 CWS at para 63.

Receivables Agreement which was entered into on 1 July 2020, which I address at [131]–[142] below.

(2) Whether the Security Documents constituted unregistered charges under s 131 of the CA

120 Given that my conclusion on unfair preference covered *all* of the Security Documents, it was not strictly necessary for me to consider in detail the claimants' alternative submission that some of the securities created by the Security Documents over shares in GLH's subsidiaries amounted to unregistered charges that were void against the claimants pursuant to s 131(1) of the CA. However, I shall make some observations on it here, as although there was a reasonable argument (which GL Thailand did make) that s 131(1) did not operate in respect of securities which GL Thailand had enforced prior to the winding-up order against GLH, the position was far from as simple as it might have appeared at first sight.

(A) THE SECURITY DOCUMENTS WERE REGISTRABLE CHARGES UNDER S 131(3) OF THE CA

121 As a preliminary point, it did not appear to be disputed by GL Thailand that the securities created by the Security Documents were, in principle, registrable charges under s 131 of the CA. Indeed, the point did appear quite clear. The categories of registrable charge are set out in s 131(3) of the CA, and the list there includes, *inter alia*, "a charge on shares of a subsidiary of a company which are owned by the company". In turn, a "charge" is defined under s 4(1) of the CA as "includ[ing] a mortgage and any agreement to give or execute a charge or mortgage whether upon demand or otherwise". In this case, the relevant Security Documents alleged to constitute unregistered charges

created either equitable mortgages or charges despite being (infelicitously) called "share pledges".

122 All of the relevant Security Documents contemplated creation of the relevant security by way of deposit of the share certificates by GLH to GL Thailand.[75] There is a legion of authority establishing that the created security in these circumstances is one of equitable mortgage (or charge), as opposed to a true pledge (see the High Court decisions of *Pacrim Investments Pte Ltd v Tan Mui Keow Claire and another* [2005] 1 SLR(R) 141 at [14]–[19], *Kong Swee Eng v Rolles Rudolf Jurgen August* [2011] 1 SLR 873 at [27], and *State Bank of India Singapore v Rainforest Trading Ltd and another* [2011] 4 SLR 699 at [78]–[85]). Although these authorities have generally referred to a deposit of the share certificates along with a blank share transfer form, and not all of the Security Documents in question contained this added condition (*ie*, a blank share transfer form), I did not consider this material. In particular, this condition was not a feature of the facts of the oft-cited *locus classicus*, the English High Court decision of *Harrold v Plenty* [1901] 2 Ch 314, where a deposit of share certificates by way of security *simpliciter* was held to be an equitable mortgage (at 315–316).

123 Indeed, in a series of two High Court decisions, Chao Hick Tin JC (as he then was) considered it doubtful that a pledge over shares was conceptually possible (see *Re Lin Securities (Pte) Ltd; Chi Man Kwong Peter and others v Asia Commercial Bank and others* [1988] 1 SLR(R) 220 at [36] and *Re City Securities Pte* [1990] 1 SLR(R) 413 at [14]). This is also the clear consensus

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75 Clause 2 of the 1st Share Pledge (CB-1 at pp 64–65); Clause 1 of the 3rd Share Pledge (CB-1 at pp 85–86); Clause 3 of the 4th Share Pledge (CB-1 at p 91); Clause 2 of the 5th Share Pledge (CB-1 at pp 96–97).

view among academics and commentators, on the basis that a pledge cannot be taken over intangibles other than negotiable documentary intangibles, of which share certificates are not (see Joanna Benjamin, *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (Oxford University Press, 2000) at para 5.05; *Goode and Gullifer on Legal Problems of Credit and Security* (Louise Gullifer ed) (Sweet & Maxwell, 7th Ed, 2022) at para 1-48; Michael Bridge, Louise Gullifer & Eva Lomnicka, *The Law of Security and Title-Based Financing* (Oxford University Press, 4th Ed, 2024) at para 5.64). Chao J subsequently had occasion to revisit this point whilst sitting in the Court of Appeal in *Chase Manhattan Bank NA v Wong Tui Sun and others* [1992] 3 SLR(R) 436. Although he declined then to definitively decide if a mere pledge of a share certificate was possible, he provided the instructive guidance that, where the creditor "[was] not looking at the pieces of paper as their security but the rights attached to the shares or the choses of action", this would go "beyond the scope of what would ordinarily be the rights of a pledgee" (at [28]). In the instant case, it was clear, if not explicit, on the face of the Security Documents that GL Thailand's intention was not to take security over merely the share certificates as pieces of paper, but to take security over the shares of GLH's subsidiaries and the rights attached to the shares. Given the sheer weight of authority above, it was correct that GL Thailand did not contend otherwise *vis-à-vis* the Security Documents.

(B) THE SECURITY DOCUMENTS WERE ARGUABLY NOT VOID UNDER S 131(1) OF THE CA

124 Turning to the question of whether s 131(1) of the CA operated to invalidate the Security Documents, it is, of course, correct that the enforcement of a charge prior to the time when s 131(1) operates means that the charge is spent, and s 131(1) does not operate retrospectively to reverse the effects of

enforcement of a charge which, but for the enforcement, would have amounted to an unregistered charge as defined in s 131(3) (see Howard N Bennett, "Registration of Company Charges" in *Vulnerable Transactions in Corporate Insolvency* (John Armour & Howard Bennett eds) (Hart Publishing, 2003) at para 6.155). The Court of Appeal has, on two prior occasions, recognised that in so far as the limb of s 131(1) relied upon is that the charge is "void against the liquidator" (as opposed to "void against … any creditor of the company"), s 131(1) only operates upon the appointment of the liquidator, and does not reach back into the past to undo any prior enforcement of an unregistered charge (see *Ng Wei Teck Michael and others v Oversea-Chinese Banking Corp Ltd* [1998] 1 SLR(R) 778 ("*Michael Ng*") at [19]; *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 ("*MDA v Sculptor Finance*") at [40]). In the latter (and more recent) decision, Judith Prakash J (as she then was) cited commentary from W J Gough, *Company Charges* (Butterworths, 2nd Ed, 1996), which includes the following passage (at para 30.13):

> … Where the security of a charge is spent through enforcement and recovery prior to the liquidation, the invalidation provision cannot apply because it has nothing to bite on. In these circumstances, the chargee no longer needs to rely on the security conferred by the charge. Once the chargee has received satisfaction of his debt through enforcement of his security against the charged property, that property ceases to be property of the chargor. The charge is no longer in effect. There is nothing left of the charge to bring it within the condition of the invalidation provision that at the time of invalidation there is a charge to be avoided 'so far as any security on the company's property or undertaking is conferred thereby'. The charge has ceased to exist before the event defined in the invalidation provision as the relevant priority point has occurred. Any question of priority over the property of the chargor has been determined and ceased to be relevant before the right of the liquidator under the invalidation provision has arisen to affect the validity of the charge.

125 A potential legal complication arises from the fact that, in the present case, GLH had been placed into provisional liquidation some time before (*viz*, 6 September 2023) it went into liquidation proper upon the making of the winding-up order against it by Coomaraswamy J on 4 March 2024.[76]

126 At this juncture, it is necessary that I pause to highlight an ambiguity as to the time when GL Thailand supposedly exercised its rights under the Security Documents which it has enforced. In its written submissions resisting this application, GL Thailand had contended that it had "exercised its rights under the 1st, 3rd and 5th Share Pledges prior to the appointment of Mr Borrelli as provisional liquidator of [GLH] (i.e., 6 September 2023)".[77] But in Mr Konoshita's affidavit, although it was stated that these three Security Documents (along with one other) had been enforced, there was no mention of the specific *date* on which such enforcement action had taken place.[78] Yet, in Mr Konoshita's subsequent affidavit (filed under cover of a solicitor's affidavit) that has since been filed in response to the ancillary disclosure order I made in this application, the listed times for when the Security Documents were enforced (in respect of those that GL Thailand has taken enforcement action) are all *after* 6 September 2023.[79] I note also that these dates (*ie*, after 6 September 2023) have since been confirmed once more by GL Thailand in a response to a request for further and better particulars from the claimants.[80] I would only observe that this seems to be *another* example of GL Thailand

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76 CWS at paras 2–3.

77 DWS at para 62.

78 TK-1 at para 10.

79 Draft 2nd Affidavit of Tatsuya Konoshita at para 8 (1st Affidavit of Lee Shi Han Ignatius dated 16 October 2024 at pp 8–10).

80 Further and Better Particulars Provided Pursuant to Request dated 27 September 2024.

changing its position in a material respect (see [30] above), despite being advised by the same firm of solicitors in the present application and the disclosure affidavit filed in compliance with an order I made here.

127 Returning to the substantive point at hand, the significance of GLH having first gone into provisional liquidation is that it raises a potential question as to whether the reference to a "liquidator" in s 131(1) of the CA includes a *provisional* liquidator. If this is answered in the affirmative, it would mean that the Security Documents would have been void against Mr Borrelli from the time of his appointment as provisional liquidator (*ie*, 6 September 2023), and any subsequent attempt(s) at enforcement by GL Thailand would have been legally invalid. But, if this is answered in the negative, and "liquidator" in s 131(1) only includes a liquidator appointed upon the making of a winding-up order, enforcement action taken by GL Thailand prior to the winding-up order on 4 March 2024 would come within the safe harbour based on the aforementioned principle recognised by the Court of Appeal in *Michael Ng* and *MDA v Sculptor Finance*.

128 In this connection, there is English authority supporting the view that the reference to "liquidator" in the equivalent to s 131 of the CA in English companies legislation does not include a provisional liquidator. In the English High Court decision of *Re Namco UK Ltd* [2003] 2 BCLC 78, Blackburne J noted that whilst the position was "not … entirely clear", his "own view" was that the English equivalent to s 131(1) of the CA "[did] not avoid an unregistered registrable charge as against provisional liquidators" (at [16]). He appears to have rationalised this on the foundational principle that "[t]he usual purpose underlying the appointment of provisional liquidators is to collect and protect assets of the company in question pending the making of a winding-up

order and the appointment of liquidators" (at [13]). Although not strictly addressing a provision for the avoidance of unregistered charges, the New Zealand High Court in *Re Chateau Hotels Ltd* [1977] 1 NZLR 381 made a similar observation, when dismissing a provisional liquidator's application to challenge the validity of a debenture, that "it would be inconsistent with the provisional liquidator's duty to maintain the status quo to permit him to challenge the validity of the debenture at this stage" (at 383–384).

129 Approaching the matter on principle, I consider that there is force in the approach taken in these authorities. Apart from a provisional liquidator's principal duty being the maintenance of the *status quo*, I would suggest that the answer emerges from the very nature of the provisional liquidator's appointment as being *provisional*; since a company going into provisional liquidation is inconclusive as to whether the company would ultimately go into winding up, it is sensible that something as drastic as the invalidation of a creditor's security should not occur until there is a measure of finality. In my view, this is aligned with the Court of Appeal's conclusion in *MDA v Sculptor Finance* – overruling *Michael Ng* on this point – that the statutory trust over the company's assets arises only upon the making of a winding-up order (at [43], citing, *inter alia*, the House of Lords decision of *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167 at 179–180). As it is only at the time of the winding-up order that the assets comprising the company's estate are determined and impressed with the statutory trust, it is congruous that the invalidation of an unregistered charge – which has the consequential effect of unencumbering the charged asset(s) such that it constitutes the *company's*, and not the creditor's, asset(s) (see *Michael Ng* at [31]) – takes place at that time. Indeed, to return to the point above about the difficulty with allowing invalidation to occur where the company's liquidation is merely "provisional",

one of the reasons cited by the Court of Appeal for holding that the statutory trust only arises upon the winding-up order (and not upon the mere presentation of a winding-up petition) was that (see *MDA v Sculptor Finance* at [50]):

> … To treat the presentation of a winding-up application as having the same effect as the passing of a winding-up resolution, with a statutory trust being impressed on the company's assets as at that date, could *give rise to "intolerable uncertainty and arbitrariness" to those who are irreversibly affected by the consequences of a winding-up application that is eventually dismissed* …
>
> [emphasis added]

Given that a winding-up application can be dismissed even after the appointment of a provisional liquidator, it is clear to my mind that, as between a winding-up application and winding-up order, the consequences of a provisional liquidation order should be aligned with the former rather than the latter.

130 For these reasons, although the claimants' submission based on s 131(1) of the CA was rendered moot by my finding that the Security Documents could be challenged at the point of their creation as unfair preferences, I am inclined to the view that s 131(1) of the CA did not assist the claimants in so far as it could not unwind enforcement of the Security Documents that had occurred before the winding-up order against GLH.

(3) Whether the first Receivables Agreement was an illegal contract

131 As 1 July 2020 fell outside the "relevant time" under s 226(1)(*b*) of the IRDA, the first Receivables Agreement could not be challenged as an unfair preference. Instead, the claimants took a different angle: they contended that the

first Receivables Agreement was tainted with illegality as it was entered into in breach of the 1st *Mareva* Injunction that had been in force at the time.[81]

132 This was a creative argument which, unfortunately, the claimants did not really develop on in either their written or oral submissions. Consequently, although I was ultimately satisfied that this was a plausible argument that did meet the threshold of a serious issue to be tried, I reached this conclusion with less conviction than with the claimants' arguments on unfair preference above.

133 As a preliminary point, I considered whether GL Thailand could be said to have breached (or assisted GLH's breach) of the 1st *Mareva* Injunction by entering into the first Receivables Agreement. A plea of illegality will fail *in limine* if the proponent is unable to prove any illegality in the first place (see *The Law of Contract in Singapore* at para 13.005).

134 Although the defendant did not make any arguments on this point, I was satisfied that there was a serious question to be tried that GL Thailand could be said to have itself breached or assisted GLH's breach of the 1st *Mareva* Injunction. Under s 4(8) of the Administration of Justice (Protection) Act 2016 (2020 Rev Ed) ("AJ(P)A"), a party commits contempt of court if it causes or abets the breach of a court order either with the intention of causing such breach or having knowledge of such breach. Given that GL Thailand and GLH had a few common directors, GL Thailand could not sensibly claim to have had no notice of the existence of the 1st *Mareva* Injunction hanging over GLH at the time. It was thus highly arguable that GL Thailand had knowingly assisted in a

[81] CWS at paras 68 and 71.

breach of the 1st *Mareva* Injunction by GLH; whether it did or did not do so was a matter to be finally determined in OC 565.

135 The leading case on contractual illegality is the Court of Appeal decision in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 ("*Ochroid*"). I adopt the framework laid down there for the purposes of my analysis.

136 The first question is to ascertain if the contract (as opposed to merely the conduct) was prohibited either pursuant to a statute (expressly or impliedly) or an established head of common law public policy. If the contract was so prohibited, then it would *ipso facto* be rendered void and unenforceable, and cannot be saved by any balancing or other process, including the principle of proportionality (see *Ochroid* at [22] and [27]–[29]).

137 This is subject to the caveat of contracts that are not unlawful *per se* but which were entered into with the object of committing an illegal act, a category which turns on the intention of one or both of the parties to break the law at the time that the contract was made. Examples of contracts falling within this category include (see *Ochroid* at [35]):

(a) contracts entered into with the object of using the subject matter of the contract for an illegal purpose;

(b) contracts entered into with the intention of using the contractual documentation for an illegal purpose;

(c) contracts which were intended to be performed in an illegal manner; and

(d) contracts entered into with the intention of contravening a statutory provision, although not prohibited by that provision *per se*.

In this category of case, the principle of proportionality would apply to determine if the contract is enforceable (see *Ochroid* at [36]–[39]).

138 The claimants did not identify *what* type of illegality was engaged in either of their written or oral submissions. They cited the Court of Appeal decision of *Lee Shieh-Peen Clement and another v Ho Chin Nguang and others* [2010] 4 SLR 801 ("*Clement Lee*") for the general proposition that court orders had to be obeyed, that the *raison d'être* for this commonsense principle was the public interest in the administration of justice (at [15]), and the court's warning that "[d]eliberate concealment or what seems like clever manoeuvres to get round a Mareva injunction will be dealt with accordingly" (at [17]).[82] There was then a leap in logic to the desired conclusion that the first Receivables Agreement "was prejudicial to the administration of justice" and therefore "rendered void and unenforceable on the basis that it is tainted with illegality".[83]

139 But statements of such generality as those found in *Clement Lee*, although no doubt correct and important, did not answer the specific question at hand. A party who seeks to persuade the court of its position must both apprise itself of the applicable legal principles, or the requirements for the relief it seeks, *and demonstrate how they apply or are satisfied on the facts of the present case*. This is all the more so when a party is making what appears to be (as this argument entailed) a novel application of an existing doctrine. Although the

82 CWS at para 70.

83 CWS at para 71.

claimants filed a supplementary bundle of authorities[84] after the filing of their written submissions which included the Court of Appeal decisions in *Ochroid* and *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 – both of which are the lodestar decisions on the illegality doctrine under Singapore law – they did not *explain* how these authorities applied when it came to their oral submissions.[85] In this case, I was willing to connect the dots; but it should not be taken for granted that the court would invariably do so.

140 In my view, taking a generous view of the claimants' case, I was satisfied that there was a serious issue to be tried as to whether the first Receivables Agreement was an illegal contract in the second sense described in *Ochroid* (see [137] above) – *ie*, a contract not unlawful *per se* but which was entered into for the purposes of an illegal act. Although the claimants' reference to *Clement Lee* disclosed a faint allusion to the established head of common law public policy prohibiting contracts prejudicial to the administration of justice, I was not convinced that the first Receivables Agreement was a contract (as opposed to merely conduct) that fell afoul of this prohibition. Instead, it seemed to me that a sounder view was that the first Receivables Agreement was not *per se* illegal but which was entered into for the unlawful object of breaching or undermining the 1st *Mareva* Injunction that was then in force. For the same reason, although a breach of the 1st *Mareva* Injunction could amount to contempt of court under ss 4(1)(*a*) and 4(8) of the AJ(P)A, I was not convinced that this was a case of statutory illegality.

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84 Claimant's Supplementary Bundle of Authorities dated 3 October 2024.

85 Notes of Argument (7 October 2024) at p 4:6–9.

141 As an aside, although not directly on point, I found support for the view that a breach of a court order could have consequences under private law (including illegality) by reference to two other contexts. First, more tangentially, it has been held that contempt of court – *viz*, a breach of a *Mareva* injunction – could constitute unlawful means for the purposes of the tort of unlawful means conspiracy, and therefore sound in damages (see the UK Supreme Court decision of *JSC BTA Bank v Ablyazov and another (No 14)* [2020] AC 727). Second, and perhaps a closer analogy, our courts have previously refused enforcement of foreign judgments as contrary to Singapore public policy on the basis that the foreign judgment had been procured in breach of an anti-suit injunction issued by, and therefore in contempt of, the Singapore courts (see the recent Court of Appeal decision of *Gonzalo Gil White v Oro Negro Drilling Pte Ltd and others* [2024] 1 SLR 307 at [79], affirming the High Court decision of *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 at [65]). In my view, assuming, *arguendo*, that GL Thailand had either breached or assisted in GLH's breach of the 1st *Mareva* Injunction, it was plausibly arguable that the first Receivables Agreement that was entered in furtherance of a common intention to do so was tainted with illegality.

142 For these reasons, although I reached this conclusion with more reservation than with the claimants' case on unfair preference, I was ultimately satisfied that there was a serious issue to be tried as to whether the first Receivables Agreement was a contract tainted with illegality.

The balance of convenience lay in favour of granting the injunctions

143 Turning to the balance of convenience, I was satisfied that the balance of convenience lay in favour of granting the interim prohibitory injunctions sought by the claimants.

(1) Whether damages would have been an adequate remedy for the claimants

144 The starting point was to assess if the claimants would be adequately compensated by damages if the injunctions were refused and that decision turned out to be wrong (see [46(a)] above). In this regard, I accepted the claimants' submission that damages would not be an adequate remedy.[86] If the injunctions were not issued, GL Thailand would be at liberty to continue enforcing the disputed securities under the Security Documents and dealing with the receivables assigned to it under the Receivables Agreements. This created the real risk (as opposed to merely a fanciful possibility) that GL Thailand could freeze out the claimants (in particular, Mr Borrelli) from the subsidiaries' affairs and dissipate the assets of the subsidiaries. Although I accepted the theoretical possibility that GL Thailand could be ordered to pay a sum representing the diminished value of the shares of GLH's subsidiaries, such a loss appeared to me likely difficult to quantify, and therefore, restoration of the value of the shares to GLH by GL Thailand was a far less attractive option as compared to holding the ring.

145 As mentioned above, I was satisfied that there was a real risk, as opposed to a fanciful possibility, that GL Thailand would dissipate the assets of GLH's subsidiaries if not restrained by injunction pending the determination of

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86 CWS at para 76.

OC 565. I have already found above that there was a serious issue to be tried as to whether GL Thailand had assisted in a breach of the 1st *Mareva* Injunction by GLH (see [28] above). Further, as the claimants pointed out, it was also arguable that GL Thailand's conduct in enforcing some of the disputed securities under the Security Documents constituted a breach of the 2nd *Mareva* Injunction currently in force.[87] The claimants bolstered this submission by referring to GL Thailand's unsuccessful application in SUM 3287 to vary the 2nd *Mareva* Injunction, which they said betrayed GL Thailand's awareness that it had been bound by the 2nd *Mareva* Injunction. The fact that GL Thailand went on to enforce the disputed securities despite the court's dismissal of SUM 3287 indicated a tendency that GL Thailand would act with impunity.[88]

146 I accepted, in fairness to GL Thailand, the possibility, as communicated by Mr Duhart, that GL Thailand could have made a genuine error in applying to the court in SUM 3287 if it was indeed the position that it could have enforced its securities without being in breach of the 2nd *Mareva* Injunction (see [30] above). In *Taylor v Van Dutch Marine Holding Ltd and others (TCA Global Credit Master Fund LP intervening)* [2017] 1 WLR 2571 ("*Taylor*"), the English High Court held that, in principle, a secured creditor could enforce its security notwithstanding that the debtor was subject to a *Mareva* injunction. Mann J explained the position as follows (at [10]–[12] and [17]):

> 10 In the absence of authority it would seem to me to be clear that principle does not stand in the way of a secured creditor enforcing its security over charged assets caught by a freezing order. The whole point of a freezing order, as is now well established, is to prevent a defendant from dissipating its assets improperly in the face of a claim by the claimant. It is a remedy which operates personally against the defendant (or any

87 CWS at paras 35–36.

88 CWS at para 33–35.

other person identified as a respondent in the injunction and against whom the injunction is specifically directed). It does not operate so as to give security to the creditor; and it does not operate so as to affect the genuine rights of third parties over those assets.

11 The present injunction operates in exactly that way. It is in familiar form and I do not need to set out its terms in this judgment. It operates to prevent each of the defendants from dissipating or disposing of their respective assets. It does not in terms bar anyone else, who might have an independent right over the assets, from disposing of them. Third parties might be caught by the order if, for example, their acts fell to be treated as acts of the defendants, or if they were otherwise done so is [*sic*] to defeat the order in some improper way, but that is different.

12 Thus, in my view, *a third party with security over property which is frozen by the freezing order would not need to obtain permission in order to exercise that security because the exercise of disposal rights under that security would not be an act prohibited by the order*. If, for example, the third party uses a power of sale in order to dispose of the property, that would not be a disposal by the defendant notwithstanding any technicality which might arise out of the fact, which is common to many securities, that the exercise of a power of sale is technically done as agent for the mortgagor. Nor would it be any form of dissipation because the secured debt already exists and the secured property is already encumbered with it. *The enforcement by the mortgagor would not be an infringement of the letter of the order; nor would it be contrary to the spirit of the order* which, as I have explained, does not operate so as to give the claimant a prior right in the form of security over the assets. If the freezing order does not destroy, or affect, the rights of a chargee or mortgagee (which it does not) there is no reason why it should operate so as to restrain the exercise of the rights of that person. The exercise of those rights would not infringe the order. It follows therefore, in my view, that strictly speaking a chargee or mortgagee, in a normal case, would not need to obtain a release of [*sic*] variation of the freezing order.

…

17 In all the circumstances I prefer the principled approach which determines that, *in a normal security enforcement situation which does not involve anything which could properly be classed as a disposal by the defendant, which is not collusive (in an infringement of the order) and which does not amount to aiding and abetting a breach of the order, a secured creditor does not need a variation of a freezing order*. That approach also

> happens to lead to a sensible practical result. If it were not correct then in every freezing order case a secured creditor would have to apply for a variation, which would run up unnecessary costs, not least because, in the absence of some suggestion or collusion or sham, the claimant could never object to the variation. *It may be that in some complex cases the anxiety of a secured creditor to tread warily in an apparently hostile litigation environment would lead to a safety first approach of seeking a variation, but I do not consider it to be generally necessary in what I will call a standard case …*
>
> [emphasis added]

147 There does not appear to have been any local authority on this, but the principle in *Taylor* has since been followed in Hong Kong (see the Hong Kong Court of First Instance decision of *China Merchants Bank Co, Ltd (Taiyuan Branch) v Cai Sui Xin (Prosper Talent Ltd, Third Party)* [2018] HKCFI 2358 at [39]), and recently affirmed by the Privy Council in *Fang and others v Attorney General* (2023) 26 ITELR 273 ("*Fang*"). In *Fang*, Credit Suisse had financed the purchase of an apartment in Singapore that it had a mortgage over. The owner of the apartment, one Mr Tantular, had been convicted of fraud and money laundering by the Indonesian authorities, who sought and obtained the assistance of the Attorney-General of Jersey to obtain *saisies judiciaire* under Jersey law (a broad analogue to the *Mareva* injunction) that covered the Singapore apartment. As Mr Tantular and his family were desirous of having Credit Suisse assign its rights under the mortgage to an old family friend, one Mr Koswara, Credit Suisse applied and obtained a declaration that it was entitled to do so. Although the Board held that the declaration should not have been granted on the facts (at [158]–[159]), Lord Hamblen, Lord Stephens, and Lady Rose made clear that it was not necessary for Credit Suisse to have sought a declaration or variation of the *saisies judiciaire* before making a decision on whether to accede to Mr Tantular's request (at [156]–[157]):

> 156 The Board considers it is not necessary for a bank to apply to the court to vary a *saisie judiciaire* in every case where it proposes to assign a mortgage over property in which the net equity is realisable property. Rather, *it was open to Credit Suisse to form an assessment in good faith as to whether the circumstances surrounding the proposed assignment of the mortgage might have interfered with the administration of justice. If an incorrect assessment had been made, then Credit Suisse might have been liable in contempt.* As a general proposition this is unlikely to be the position if the assignment of the mortgage is in the ordinary course of banking business from one regulated bank to another. However, that was not the case. The proposed assignment by Credit Suisse was not to another regulated bank in the ordinary course of banking business. Rather, the proposed assignment was to Mr Koswara [an "old friend" of the party subject to the *saisie judiciaire*] and, as Mr Muzhar stated … the differences between Credit Suisse and Mr Koswara could not be more clear-cut.
>
> 157 In cases where there is any uncertainty whether an accusation of interference with the administration of justice might be made against a bank in the position of Credit Suisse according to these principles, it may be prudent for the bank to apply to the court for an order varying the *saisie judiciaire*. In this case, it is clear that Credit Suisse was uncertain whether an accusation of contempt of court would be made against it if it assigned its rights under the mortgage to Mr Koswara. Indeed, a substantial case could be made that Credit Suisse knew that it would be aiding and abetting a breach of the *saisies judiciaires* by assigning its rights under the mortgage to Mr Koswara. In those circumstances Credit Suisse was not prepared to assign its interest under the mortgage unless it received the assurance of a court order on an application to vary the *saisies judiciaires*. The family hoped that if Credit Suisse received the assurance that it would not be in contempt of court, then it would proceed to assign its rights under the mortgage to Mr Koswara.
>
> [emphasis added]

148 Thus, applying the principle in *Taylor*, it was not beyond the realm of theoretical possibility that GL Thailand could have enforced the securities under the Security Documents without requiring a variation of the 2nd *Mareva* Injunction. It is likely that GL Thailand did appreciate the near virtual certainty that its enforcement of its securities under the Security Documents would be

attacked as a collusive transaction, and therefore, its application in SUM 3287 was probably, like the approach taken by Credit Suisse in *Fang*, what Mann J called in *Taylor* "a safety first approach". For the avoidance of doubt, I make no finding on this. But, in my view, this was in danger of missing the point. The fact of the matter was that GL Thailand did seek the court's sanction to enforce its securities (even if it had not been strictly necessary), which the court *declined*. It would have been one thing if, like the Board observed at [156] of *Fang*, GL Thailand had *not* applied for a variation of the 2nd *Mareva* Injunction and, acting based on a genuine belief in its unfettered rights, enforced its securities at the risk of being subsequently held in contempt of court. But GL Thailand *did* apply for a variation, and the court declined it – the implication of this was that the court had decided, for whatever reason, that GL Thailand could *not* enforce its securities. By going on to do so, GL Thailand acted in blatant disregard of the court's decision. That disregard alone supported the need for injunctions directly against it pending the determination of OC 565. Even if, as Mr Duhart claimed, GL Thailand had subsequently revisited its position and considered both its decision to make an application and the court's decision in SUM 3287 to be wrong, the decision remained binding on GL Thailand until it was appealed successfully or set aside, which it was not (see *Farooq Ahmad Mann* at [58]). It is trite that it is the plain and unqualified obligation of any person against whom an order has been made to obey it unless and until the order is discharged, including – and indeed, especially – where the person affected by the order believes it to be irregular or even void (see the English Court of Appeal decision of *Hadkinson v Hadkinson* [1952] P 285 at 288, affirmed by the High Court in *OCM Opportunities Fund II, LP and others v Burhan Uray (alias Wong Ming Kiong) and others* [2005] 3 SLR(R) 60 at [29]).

149 At this juncture, I should highlight my awareness that, at least to a limited extent, the claimants' submission that GL Thailand would dissipate the assets of GLH's subsidiaries appeared to engage the test of "real risk of dissipation" that lies at the heart of the *Mareva* injunction. The present application was, of course, not an application for a *Mareva* injunction against GL Thailand proper. Although this briefly gave me some pause as to the relevance of the claimants' submission, I found valuable guidance on this in *Farooq Ahmad Mann*.

150 In *Farooq Ahmad Mann*, the General Division of the High Court considered the issue of whether the general balance of convenience test for interim injunctions was applicable to *Mareva* injunctions. Xu J undertook an illuminating analysis of the general juridical nature of the *Mareva* injunction and, specifically, the concept of "dissipation" for the purposes of a *Mareva* injunction. Although he answered the issue in the negative (at [109]), the learned judge explained that the reason for this was that the "real risk of dissipation" test was functionally symmetrical with the general balance of convenience test. After explaining that the *Mareva* injunction was a way by which the court protected against abuses of its process by a party seeking to frustrate the enforcement of its judgments through unjustified dealing of its assets (at [110]–[125]), Xu J went on to make the following observations which are worth setting out in full (at [126]–[129]):

> 126 Once the nature and content of the "real risk of dissipation" requirement is properly understood (as I have endeavoured to expand on above), there should not be any confusion of the sort demonstrated in Ms Xia's submissions involving the cross-pollination of the balance of convenience test into the context of *Mareva* injunctions. More specifically, if it is appreciated that the *Mareva* injunction is intended only to restrain *unjustified* dealings of assets, there is no warrant for

> any further intercession of the balance of convenience test as a matter of principle.
>
> 127 The reason, in simple terms, is that the carve-out for justified dealings already provides adequate protection for the defendant. This is especially so since, as I noted above, the scope of the carve-out would be necessarily specific to the defendant's own circumstances (see [121]–[123] above). There is thus ***an identity between the purposes of the real risk of dissipation requirement in* Mareva *injunctions and the balance of convenience test in interlocutory injunctions generally***, insofar as both are concerned with protecting the defendant's interests**.**
>
> 128 The point can alternatively be put in this way. ***The* Mareva *injunction is, in a sense, a prohibitory injunction relating to the dealing with one's assets. From this perspective, the distinction between justified and unjustified dealings which lies at the heart of the* Mareva *jurisdiction is, in substance, a specialised application of the balance of convenience test*. *Specifically, the boundary line between justified and unjustified dealings itself represents the balance of convenience: if an act by the defendant constitutes unjustified dealing, the balance of convenience would weigh against the doing of that act, resulting in the defendant being justifiably enjoined from doing it***.
>
> 129 This is also consistent with the underlying justification for the court's intervention through the imposition of a *Mareva* injunction. As I have explained above, the court intervenes, at least in part, to safeguard against the potentiality of the defendant abusing its process by taking steps to deliberately render a judgment or order of court ineffectual (see [116] above). That is, to my mind, an overriding interest that supplants any private interest or convenience of either party to the dispute. ***It can never be in the balance of convenience for the interests of justice to be suborned in this way***.
>
> [original emphasis in italics; emphasis added in bold italics]

151 In my view, it stands to reason from the above that, if a course of conduct during the pendency of the proceedings would have the effect of defeating the efficacy of the court's order, that is an indicator that the balance of convenience lies in favour of enjoining such conduct. In the context of interim injunctions governed by the *American Cyanamid* principles, whether a certain course of

conduct would have such a deleterious effect would turn, at least in part, on whether the deleterious effect can be reversed or mitigated by an award of damages. Indeed, this is consistent with, and supports, Xu J's conclusion that the general balance of convenience test does not apply in the *Mareva* injunction context: given that the entire purpose of the *Mareva* injunction is to prevent the defendant from disabling itself from meeting an award of damages, it would be illogical to ask if, but for the grant of the injunction, the prejudice suffered by the claimant in the form of the defendant's unjustified dealing of its assets could be compensated in damages.

152 Thus, even though the present application was not an application for a *Mareva* injunction against GL Thailand, the fact that GL Thailand could potentially defeat the object of OC 565 pending its final determination by procuring the dissipation of the subsidiaries' assets, in a manner with which it was foreseeable that damages could not be an adequate recompense, was to my mind a relevant factor.

(2) Whether damages would have been an adequate remedy for GL Thailand

153 Having determined that damages would not be an adequate remedy for the claimants, the next question that arose was whether damages would be an adequate remedy for GL Thailand in the event that the injunction were to issue and turn out to have been wrongly granted (see [46(b)] above).

154 I was satisfied that damages would be an adequate remedy for GL Thailand.

155 GL Thailand suggested that it would be irreparably prejudiced if rendered unable to exercise its rights to the remaining securities under the Security Documents as, in the event that the securities fell in value, it would have an increased exposure as an unsecured creditor. Since GLH was insolvent, there was a real risk that it would not be able to cover the shortfall, and it was unclear if Mr Borrelli was providing a personal undertaking in damages along with GLH.[89]

156 I was not convinced by these arguments. First, it seemed to me largely speculative as to whether there would be a shortfall to begin with; in any event, any shortfall was unlikely to be so drastic – *ie*, the value of the securities tanking significantly in value – in the interim pending determination of OC 565. As a liquidator, Mr Borrelli was an officer of the court and was also subject to various duties, including a duty to do all in his power to protect and preserve the assets of the company (see Andrew R Keay, *McPherson & Keay: The Law of Company Liquidation* (Sweet & Maxwell, 5th Ed, 2021) at para 9-076). Even if GL Thailand was correct in its contention that, competence-wise, it would be in a better position to operate the subsidiaries than Mr Borrelli,[90] this did not, to my mind, do much to tip the balance. There was no indication that Mr Borrelli was so inapt or otherwise incapable to perform his duty to preserve the value of GLH's assets, nor did I think it could have been seriously suggested that he was acting in bad faith *vis-à-vis* GL Thailand. Further, if GL Thailand was subsequently disgruntled with Mr Borrelli's decisions or actions, it could seek recourse in the courts at the appropriate juncture (see s 190 of the IRDA).

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89 TK-1 at para 48.

90 DWS at para 41.

157 Second, I did not agree that there was ambiguity as to whether Mr Borrelli was giving a personal undertaking in damages. In his affidavit filed in support of this application, Mr Borrelli had stated:[91]

> I am prepared to give an undertaking as to damages such that if the Honourable Court later finds that any injunction granted has caused loss to GL Thailand, and decides that GL Thailand should be compensated for that loss, the Claimants will comply with any such order that the Court may make.

Based on this statement I did not perceive Mr Borrelli as having expressed any reservation or refusal to give a personal undertaking.

158 Indeed, if Mr Borrelli or GLH was seeking to withhold an undertaking, it would have been incumbent on them to justify such a position as the undertaking is "a standard requirement that accompanies the court's grant of an injunction almost as a matter of course" (see the High Court decision of *CHS CPO GmbH (in bankruptcy) and another v Vikas Goel and others* [2005] 3 SLR(R) 202 at [18]). In the English Court of Appeal decision of *JSC Mezhdunarodniy Promyshlenniy Bank and another v Pugachev* [2016] 1 WLR 160, Lewison LJ said that "[t]he default position is that an applicant for an interim injunction is required to give an unlimited cross-undertaking in damages", and although the court may make exception "where the applicant has no personal interest in the litigation and is bringing the action on behalf of others" (as a liquidator does), he "[did] not consider that the mere fact that litigation is being brought by a liquidator of an insolvent company compels the conclusion that the cross-undertaking must be capped" (at [68]–[69]). Both of these propositions were recently confirmed by the same court in *Hunt (as provisional liquidator of Black Capital) v Ubhi* [2023] 2 All ER

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91 CB-1 at para 111.

(Comm) 887. Mr Borrelli made no apparent attempt to depart from the default rule. In the event, there is local authority for the proposition that, even if no undertaking has been expressly given, the law would imply an undertaking from an applicant for an interim injunction if the injunction is granted (see the High Court decisions of *Neptune Capital Group Ltd and others v Sunmax Global Capital Fund 1 Pte Ltd and another* [2016] 4 SLR 1177 at [43] and *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [116], both citing the English High Court decision of *SmithKline Beecham plc and others v Apotex Europe Ltd and others* [2006] 1 WLR 872 at [29]–[30]).

159 In these premises, there were adequate safeguards in place such that the prospect of significant and irreparable harm being visited on GL Thailand if an injunction turned out to be wrongly granted was, in my view, more apparent than real.

(3) Whether, in any event, the balance of convenience lay in the claimants' or GL Thailand's favour

160 Although it was not strictly necessary for me to consider the balance of convenience proper given my conclusions above that damages would be an adequate remedy to GL Thailand but not the claimants, I shall do so for completeness. Had it been necessary to resolve the issue at this stage, I would nonetheless have reached the same conclusion that the balance of convenience lay in favour of granting the interim prohibitory injunctions sought by the claimants. This was for three reasons.

161 First, at least in so far as the claimants' primary claim on unfair preference was concerned, I was satisfied for the reasons set out in my analysis

above that the claimants had much the better argument than GL Thailand, such that the merits of their claim would have operated to tilt the balance of convenience in their favour (see [41] above).

162 Second, the consequences of wrongly denying the injunctions to the claimants appeared to be considerably more drastic than wrongly granting the injunctions to the claimants. The degree of uncertainty and difficulty in quantifying any diminution in the value of the subsidiaries' shares resulting from GL Thailand's dissipation of the subsidiaries' assets (if the injunctions were wrongly denied) was significantly greater than measuring the shortfall in value of GL Thailand's securities (if the injunctions were wrongly granted).

163 Third, as a last resort where all other factors appear balanced, the court would lean in favour of preserving the *status quo* (see *American Cyanamid* at 408). The relevant *status quo* is the state of affairs that existed during the period immediately before the issue of proceedings (see the High Court decision of *Challenger Technologies Ltd v Courts (Singapore) Pte Ltd* [2015] 5 SLR 679 at [43], citing the House of Lords decision of *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130). Here, preserving the *status quo* entailed allowing GL Thailand to retain the benefits it had already received (as opposed to requiring it to disgorge them) but restraining it from further exercising any rights under the disputed Security Documents and Receivables Agreements until OC 565 was determined. This naturally weighed in favour of issuing the interim *prohibitory* injunctions to accomplish this.

(4) Conclusion

164 For all of the above reasons, being satisfied that there were serious issues to be tried and that the balance of convenience lay in favour of the claimants, I

granted the interim prohibitory injunctions sought by the claimants in prayers (a) and (d) (see [32] above).

The ancillary disclosure order sought by the claimants was granted

165 I come to the claimants' application in prayer (e) for an ancillary disclosure order. The disclosures sought by the claimants concerned the following matters:[92]

(a) what steps (if any) GL Thailand had taken to exercise rights under the Security Documents;

(b) whether GL Thailand had received any assets GLH (including dividends and distributions of any kind) referred to in the Security Documents;

(c) whether GL Thailand had received any payment from third parties in respect of loans or receivables referred to in the Receivables Agreements, and if such payment(s) had been received, GL Thailand was to provide an account of the payment(s) received; and

(d) whether GL Thailand had received any assets or payment from GLH since 11 April 2021.

166 The claimants relied on the High Court decision of *Sea Trucks Offshore Ltd and others v Roomans, Jacobus Johannes and others* [2019] 3 SLR 836 ("*Sea Trucks*") in support of their application for the above disclosures. However, with respect, the claimants did not appear to appreciate that the

92 HC/SUM 2102/2024, Annex C.

context of *Sea Trucks* was different as it concerned an ancillary disclosure order to support a *Mareva* injunction. Thus, the claimants cited statements from [45] of *Sea Trucks* in relation to the need for information about the location and details of a defendant's assets to enable the claimant to police the *Mareva* injunction, but did not explain whether and if so, why or how, the same logic applied to the interim prohibitory injunctions they sought. I would reiterate my observation at [139] above that it should not be assumed that it suffices for parties to plot some disparate points on the graph and expect the court to connect the dots; the citation of an authority is only as good as it is explained or otherwise demonstrated to be relevant or applicable to the party's position (see, for a related observation, the High Court decision of *Darsan Jitendra Jhaveri v Lakshmi Anil Salgaocar (administratrix of the estate of Anil Vassudeva Salgaocar, deceased) and another and another suit* [2024] SGHC 276 at [78]).

167 Be that as it may, and bearing in mind that the defendants did not make *any* submissions on the issue of the ancillary disclosure order (and did not really resist it), I was satisfied that there was an adequate legal basis for granting the disclosures sought.

168 I propose to take the *Mareva* injunction context as a starting point and to work outwards from there to the present context of interim prohibitory injunctions. In *Sea Trucks*, Andrew Ang SJ referred to the seminar Court of Appeal decision in *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558, where Sundaresh Menon CJ had said the following on the underlying rationale of ancillary disclosure orders as "an integral part of the court's Mareva jurisdiction and an ordinary adjunct to a Mareva injunction" (at [101]–[102]):

> 101 In *Petromar Energy Resources Pte Ltd v Glencore International AG* [1999] 1 SLR(R) 115, this court cautioned (at [21] *per* L P Thean JA) that the disclosure order that is granted ancillary to a Mareva injunction serves a limited but focused purpose:
>
> > [T]he disclosure order is merely an ancillary order made in aid of a Mareva injunction in order for the plaintiff to determine the location of the defendant's assets and take appropriate steps to preserve them pending trial.
>
> It aims to give the plaintiff a snapshot of the defendant's assets at the time of disclosure. *This is to enable the plaintiff to police the injunction and ensure that the defendant's assets are kept at the steady state which the Mareva injunction seeks to preserve.* After all, if the court is satisfied that there is a real risk of dissipation, then it generally follows, as a matter of logic, that *there should be a capability to police the Mareva injunction granted. …*
>
> 102 … Ancillary disclosure orders have been recognised to be highly intrusive and can entail potentially severe ramifications. But, these severe intrusions on privacy are tolerated because *a Mareva injunction without an accompanying disclosure order will often be toothless. …*
>
> [emphasis added]

169 In my view, a general principle that can be distilled from the grant of ancillary disclosure orders to *Mareva* injunctions is that they are intended to ensure the efficacy of the *Mareva* injunctions. Seen in this light, there seemed to me to be no impediment, as a matter of principle, to disclosure orders being made ancillary to other types of interim injunctions if the disclosure would ensure the efficacy of the underlying injunction(s).

170 Support for this view can be found in Hodge M Malek & Paul Matthews, *Disclosure* (Sweet & Maxwell, 6th Ed, 2023), as the learned authors observe that ancillary disclosure orders are not *sui generis* to *Mareva* injunctions but can apply to other species of interim injunctions, as "the court has jurisdiction at an interlocutory stage (indeed, even before proceedings are

commenced) both under s 37 of the Senior Courts Act 1981 and its own inherent jurisdiction to order disclosure of facts or documents which are *important in ensuring the effectiveness of the injunction*" [emphasis added] (at paras 2-14–2-15). In this regard, the referenced provision under English law – s 37 of the Senior Courts Act 1981 (c 54) (UK) ("SCA 1981") – sets out the injunctive jurisdiction of the English High Court:

> **37 Powers of High Court with respect to injunctions and receivers**
>
> (1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
>
> (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.
>
> …

It can be seen that the general touchstone of the court's exercise of power under s 37(1) of the SCA 1981 is that it must be "just and convenient to do so".

171 In the English High Court decision of *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1987] 1 WLR 1711 ("*Maclaine Watson*"), Millett J (as he then was) considered that s 37 of the SCA 1981 was not confined to ancillary disclosure orders in the context of *Mareva* injunctions. Although it was urged upon him that the court's power to make an ancillary disclosure order was parasitic on an underlying *Mareva* injunction, Millett J gave this argument short shrift (at 1716):

> In this case the applicants rightly do not seek a *Mareva* injunction. There is no reason to believe that the I.T.C. will remove its assets from the jurisdiction in order to defeat execution. The applicants seek only an order for discovery in aid of execution, the procedure of Order 48 being unavailable. The I.T.C. contend that there is no jurisdiction to make such an order in the absence of a *Mareva* injunction. ***It is, however, fallacious to reason from the fact that an order for***

> ***discovery can be made as ancillary to a* Mareva *injunction to the conclusion that it cannot be made except as ancillary to such an injunction.*** *The source of the jurisdiction is the same, and so is the ground for exercising it, viz. that it appears to the court to be just and convenient to do so. …*
>
> [emphasis added in italics and bold italics]

172 Millett J then went on to cite the instructive decision of the English Court of Appeal in *A J Bekhor & Co Ltd v Bilton* [1981] QB 923. Although that was strictly a decision concerning an ancillary disclosure order to a *Mareva* injunction, it is apparent that the court's observations are of a more general application, and relate more generally to the court's power to ensure the efficacy of its orders (at 954):

> … In my judgment a judge has the duty to prevent his court [*sic*] being misused as far as the law allows, but the means by which he can perform that duty are limited by the authority of Parliament, of the rules of his court and of decided cases. Those means do, however, include what is reasonably necessary to performing effectively a judge's duties and exercising his powers. *In doing what appears to him just or convenient he cannot overstep their lawfully authorised limits, but* ***he can do what makes their performance and exercise effective. He has a judicial discretion to implement a lawful order by ancillary orders obviously required for their efficacy, even though not previously made or expressly authorised****.* This implied jurisdiction, inherent because implicit in powers already recognised and exercised, and so different from any general or residual inherent jurisdiction, is hard to define and is to be assumed with caution. But *to deny this kind of inherent jurisdiction altogether would be to refuse to judges incidental powers recognised as inherent or implicit in statutory powers granted to public authorities, to shorten the arm of justice and to diminish the value of the courts.*
>
> [emphasis added in italics and bold italics]

173 In my judgment, it is indisputable that the Singapore courts must have the same ability to ensure the effectiveness of their orders, including interim prohibitory injunctions like the present. In *Maclaine Watson*, Millett J observed

that "the order sought may properly be said to be sought *in aid of or for the purpose of implementing the judgment previously obtained by the applicants*" [emphasis added], and in light of this "there [was] no doubt that it [was] just and convenient to make it" (at 1717). Notably, the Singapore courts' injunctive powers are also subject to the same touchstone of "just and convenient" as the English High Court's power under s 37(1) of the SCA 1981 (see s 4(10) of the CLA). Adding to that, the general power under O 3 r 2(2) of the ROC 2021 would seem to support the existence of a power to make an ancillary disclosure order in support of an interim prohibitory injunction if the court considers it necessary to ensure the injunction's efficacy.

174 In the present case, I was satisfied that, in order for the claimants to be able to monitor GL Thailand's compliance with the interim prohibitory injunctions restraining it from taking further steps in relation to the disputed Security Documents and Receivables Agreements, it was necessary for the claimants to be apprised of GL Thailand's current position under the Security Documents and Receivables Agreements. The claimants obviously could not police a state of affairs that they were unaware of.

175 For these reasons, I was satisfied that I had the power to grant the disclosure order sought by the claimants, and that the present case was an appropriate one to exercise my power to do so. I thus granted prayer (e) of the claimants' application respecting the disclosure order.

Statutory injunctions under s 270 of the IRDA

176 Although I rested my decision on the court's general jurisdiction to grant injunctions, the claimants had also brought the present application on the footing of the specific jurisdiction under s 270 of the IRDA to issue statutory

injunctions to restrain contraventions of certain provisions of the IRDA. Given the dearth of authority that has considered the application of s 270, it may be useful to identify some general principles that may function as a springboard for further development in future cases.

177 I start by setting out the material parts of s 270 of the IRDA for the purposes of the discussion below:

> **Injunctions**
>
> **270.**—(1) Where a person (*A*) has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of Parts 4 to 11, the Court may, on the application of —
>
> (*a*) the Official Receiver; or
>
> (*b*) any person whose interests have been, are or would be affected by the conduct,
>
> grant an injunction restraining *A* from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring *A* to do any act or thing.
>
> (2) Where a person (*A*) has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that *A* is required by Parts 4 to 11 to do, the Court may, on the application of —
>
> (*a*) the Official Receiver; or
>
> (*b*) any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing,
>
> grant an injunction requiring *A* to do that act or thing.
>
> …
>
> (5) Where an application is made to the Court for the grant of an injunction restraining a person from engaging in conduct of a particular kind, the power of the Court to grant the injunction may be exercised —
>
> (*a*) if the Court is satisfied that the person has engaged in conduct of that kind — whether or not it appears to

> the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; or
>
> (*b*) if it appears to the Court that, in the event that an injunction is not granted, it is likely the person will engage in conduct of that kind — whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the firstmentioned person engages in conduct of that kind.
>
> (6) Where an application is made to the Court for a grant of an injunction requiring a person to do a particular act or thing, the power of the Court to grant the injunction may be exercised —
>
> (*a*) if the Court is satisfied that the person has refused or failed to do that act or thing — whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; or
>
> (*b*) if it appears to the Court that, in the event that an injunction is not granted, it is likely the person will refuse or fail to do that act or thing — whether or not the person has previously refused or failed to do that act or thing and whether or not there is an imminent danger of substantial damage to any person if the firstmentioned person refuses or fails to do that act or thing.
>
> …
>
> (8) Where the Court has power under this section to grant an injunction restraining a person from engaging in a particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person.

178 A few basic propositions summarising the statutory scheme above are as follows. Section 270 of the IRDA sets out the court's power to restrain contraventions of Parts 4 to 11 of the IRDA. A contravention can take the form of either a positive act that is prohibited by the IRDA or an omission to do an act that is required by the IRDA. A contravention by positive act can be restrained by prohibitory injunction (s 270(1)), and a contravention by omission

can be redressed by mandatory injunction (s 270(2)). The court may issue a prohibitory or mandatory injunction if (a) it is satisfied that the positive act or omission constituting the contravention has occurred (regardless of whether it appears to the court that the contravention would reoccur or continue); or (b) it is satisfied that, but for the grant of the injunction, the positive act or omission constituting the contravention is likely to occur (regardless of whether it has previously occurred or whether imminent or substantial damage would arise from the contravention) (ss 270(5) and 270(6)). In a case where the court may grant an injunction, it can either add to or substitute the grant of the injunction with an award of damages (s 270(8)).

179 The structure of s 270 of the IRDA is identical to s 409A of the CA, save that s 409A of the CA addresses contraventions of provisions of the CA, as opposed to provisions of the IRDA. Thus, in principle, authorities that have addressed s 409A of the CA – although I note that they are relatively few and far between – would be relevant to the interpretation and application of s 270 of the IRDA. For instance, the High Court in *Mukherjee Amitava v DyStar Global Holdings (Singapore) Pte Ltd and others* [2018] 5 SLR 256 ("*Mukherjee Amitava*") confirmed that a contravention of the relevant Act is a condition precedent for the grant of relief under s 409A of the CA (at [83]). Subject to the qualification that "contravention" should encompass a past, existing or likely future contravention, that would be so *vis-à-vis* s 270 of the IRDA – indeed, that much emerges from the statutory language on its face.

180 But beyond this threshold condition, there is a conspicuous silence on the criterion that the court should apply when weighing or assessing an application under s 270 of the IRDA. Although ss 270(1) and 270(2) state that the court may grant an injunction if it is of the opinion that it is "desirable to do

so", that is a rather vague yardstick. In this connection, the only local decision that provides some general guidance is the High Court decision of *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2004] 3 SLR(R) 12 ("*Tang Yoke Kheng*"). In that case, Lai Kew Chai J considered that the court's power under s 409A of the CA was not limited by the usual principles applicable to injunctions and their constituent requirements. The learned judge considered that whilst these could remain relevant considerations, the court should also be guided by the additional consideration of whether the grant of the statutory injunction would serve the purposes of the CA (at [18]–[19]). Given the abovementioned structural identity between s 270 of the IRDA and s 409A of the CA, this guidance ought to apply *mutatis mutandis* to s 270 of the IRDA.

181 It may be useful to refer to similar legislation in foreign jurisdictions. Under Australian law, s 1324 of the Australian CA empowers the Australian courts to issue injunctions against contraventions of the Australian CA. A similar debate as that considered by Lai J in *Tang Yoke Kheng* as to the extent to which the Australian courts' powers under s 1324 of the Australian CA are constrained by the usual principles governing injunctions under general law has arisen in the Australian jurisprudence.

182 In *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd and another* (2002) 42 ACSR 605 ("*Mauer-Swisse*"), the Supreme Court of New South Wales noted that there was an inconsistency in the Australian authorities as to the approach under s 1324 of the Australian CA to interim injunctions. Specifically, some decisions had taken the view that, whereas the grant of permanent injunctions were not constrained by traditional equitable considerations, interim injunctions were to be approached "as if [the

court] were simply exercising ordinary equitable jurisdiction: the court considers only whether there is a serious question to be tried and where the balance of convenience lies" (at [12]). Palmer J considered that, because the court's jurisdiction flowed directly from s 1324 of the Australian CA, there was no justification for constraining the court's powers to those under its traditional equitable jurisdiction (at [19]). There was also no reason for drawing a distinction between permanent and interim injunctions (at [21]). The considerations that the court could take into account could be "gathered under the broad question whether the injunction would have some utility or would serve some purpose within the contemplation of the [Australian CA]" (at [36]).

183 In contrast, in the subsequent decision of the Supreme Court of Queensland in *Australian Securities and Investments Commission v Cycclone Magnetic Engines Inc and others* (2009) 71 ACSR 1 ("*Cycclone*"), Martin J considered the view in *Mauer-Swisse* to be "not something to which [he could] subscribe" in so far as it related to interim injunctions. Instead, he preferred the view that, in applications for interim relief "the ordinary principles (relating to whether there is a serious question to be tried and the balance of convenience) should be applied". However, Martin J also accepted that the court's power under s 1324 of the Australian CA was subject to the caveat that a statutory injunction should only issue if it was "directed to and appropriate to achieve an end such as enforcing and giving effect to the statute" (at [248]).

184 Despite the express disagreement, the difference in opinion between the courts in *Mauer-Swisse* and *Cycclone* seems somewhat elusive given that both accepted that the court had to take into account whether the grant of an injunction forwarded the statutory purpose. It appears to me that the difference is in *how* statutory purpose is used in each approach. In *Mauer-Swisse*, Palmer J

used it as a justification to *override* or *go beyond* traditional equitable principles, whereas in *Cycclone*, Martin J considered the statutory purpose to *narrow* the scope of the court's power from its equitable jurisdiction, as it was a further requirement that had to be satisfied beyond the usual requirements of a serious issue to be tried and balance of convenience.

185 On balance, I am persuaded that the view adopted by Palmer J, which is also aligned with that expressed by Lai J in *Tang Yoke Kheng*, is the preferable option. The approach in *Cycclone*, as I understand it, means that the statutory injunction provisions in the legislation are largely rendered otiose because a claimant would simply apply for an ordinary equitable injunction as it does not have to meet the further hurdle of consistency with the statutory purpose. Given that Parliament is not readily assumed to be legislating in vain, I would prefer the view that s 409A of the CA and s 270 of the IRDA were intended by Parliament to grant the courts powers that they did not already have, which would be so if the traditional equitable principles were merely a guide to, as opposed to being exhaustive of, the scope of the court's power. An uncompromising adherence to the equitable principles when applying s 270 of the IRDA should yield to the statutory purpose if necessary.

186 Theorising slightly, as regards s 270 of the IRDA, one conceivable difference that a departure from the *American Cyanamid* principles could make is in relation to the requirement of adequacy of damages for the defendant. It would be recalled that, under *American Cyanamid*, the inadequacy of damages for the defendant is a factor that can weigh heavily against the grant of an injunction. The inadequacy of damages includes the consideration of whether, even if damages could in principle remedy the prejudice suffered by the defendant from an erroneous issue of the injunction, the claimant would be able

to pay the damages. In the case of a claimant that is an insolvent company, this could potentially be a significant hurdle for it to cross: its insolvency means that it would likely be unable to meet any subsequent award of damages. To this extent, an insolvent company applying for an interim injunction starts behind the eight ball, because the balance of convenience is generally tilted against it by virtue of its impecuniosity that tends to strengthen the defendant's case that it would suffer prejudice that cannot be adequately compensated in damages. In my view, this is one situation where the court may, by reason of not being bound by the rigours of the *American Cyanamid* principles, grant an injunction if it is satisfied that doing so would be in the interests of the insolvent company and its creditors, as well as the policy underlying the insolvency regime. Though not invariably, insolvent companies are often associated with misfeasance or fraud. In this connection, our courts have recognised a public policy imperative in favour of investigating and redressing allegations of misfeasance by former directors and controllers of insolvent companies (see the General Division of the High Court decisions of *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd (in compulsory liquidation)* [2023] 4 SLR 1575 at [39] and *Re Mingda Holding Pte Ltd and another matter* [2024] SGHC 130 at [117]). It is thus not unreasonable that, where a liquidator seeks to bring proceedings to reverse transactions that insolvency law deems objectionable, the court may form the view that a statutory injunction should issue in the interests of enforcing the IRDA and the policies underlying insolvency law notwithstanding that the defendant could fairly argue based on *American Cyanamid* that an ordinary injunction should not issue. For the same reason, although the applicant's cross-undertaking in damages is a standard part of the grant of an injunction (see [158] above), it may in principle not be so *vis-à-vis* the statutory injunction under s 270 of the IRDA. For the avoidance of doubt, I raise these possibilities only

as suggestions and illustrations of the breadth of the court's statutory injunctive jurisdiction.

187 In my view, a general framework for approaching applications for statutory injunctions under s 270 of the IRDA, which can be further developed upon in future cases, can be set out as follows:

(a) First, has there been, or will there be, a contravention of Parts 4 to 11 of the IRDA? A contravention includes a past contravention, ongoing contravention or a likely future contravention, and also includes contraventions by positive acts or omissions.

(b) Second, does the applicant have *locus standi* to seek a statutory injunction under s 270? The only persons with *locus standi* under s 270 are: (i) the Official Receiver; or (ii) any person whose interests have been, are or would be affected by the conduct amounting to a contravention of Parts 4 to 11 of the IRDA. As regards the latter category, the Australian courts have provided the useful working definition of any person whose interests "go beyond the mere interest of a member of the public", and it is "not necessary that personal rights of a proprietary nature or rights analogous thereto are or may be affected" by the contravening conduct (see the Supreme Court of Victoria decision of *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* (1984) 8 ACLR 609 at 613, and more recently, the Federal Court of Australia decision of *BPESAM IV M Ltd and another v DRA Global Ltd (ACN 662 581 935) and others* (2020) 145 ACSR 116 at [231]–[234]).

(c) Third, should the court exercise its discretion to grant an injunction? The use of the permissive "may" in ss 270(1) and 270(2)

> means that the grant of relief is expressly discretionary in nature, even if a relevant contravention has been established (see the General Division of the High Court decisions of *Mukherjee Amitava* at [45]–[46] and *Bhavin Rashmi Mehta v Chetan Mehta and others* [2022] SGHC 173 at [38]). The court may refer to the principles applicable to the grant of injunctions under the general law, but these are not exhaustive of the court's power under s 270. Overarchingly, the court must consider if the grant of an injunction would be consistent with and further the statutory purpose. In this regard, the statutory purpose should, in principle, include both the general policies underlying the IRDA, as well as the specific provision(s) alleged to have been contravened (or the subject of likely contravention).

188 In the present case, had it been necessary to rely on s 270 of the IRDA (which, to be clear, it was not), I would likely have been prepared to grant a statutory injunction in the same terms as the interim prohibitory injunctions in prayers (a) and (d).

189 The claimants had alleged in OC 565 that the Security Documents and Receivables Agreements (save for the first Receivables Agreement) were unfair preferences, a species of transaction viewed as objectionable by insolvency law, and a contravention of the IRDA – specifically, s 225 of the IRDA (a provision contained in Part 9 of the IRDA). In oral submissions, GL Thailand argued that there had been no contravention of the IRDA as the Security Documents and Receivables Agreements were not unfair preferences until the court pronounced them to be such. Thus, entering into a transaction constituting an unfair preference did not amount to a contravention of the IRDA, albeit there was a

statutory remedy to have the transaction unwound.[93] I was not persuaded by this rather circular argument. An unfair preference is liable to be set aside *precisely because* it is a transaction entered into in contravention of s 225 of the IRDA. GL Thailand's attempt to divorce the statutory remedy from an underlying contravention of the IRDA was thus fallacious.

190 The claimants, as the company in insolvent liquidation and its liquidator, were self-evidently persons with *locus standi* to apply under s 270 of the IRDA as their interests were affected by the (alleged) contravention of s 225 of the IRDA. Even though it could be argued that GLH strictly did not suffer any *loss* as the giving of a preference has a neutral effect on the debtor's net asset position (see [92] above), taking a different perspective, as an insolvent company at the material time, GLH was in the eyes of the law a "vehicle for the protection of [its] general creditors", such that detriment suffered by its creditors (in the form of poorer recoveries in GLH's liquidation) could be viewed in law as detriment suffered by GLH itself (see the UK Supreme Court decision of *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc* [2023] AC 761 ("*Stanford International Bank*") at [93], [108] and [112]–[113]). This explains why there is a shift in the content of company directors' duty to act *bona fide* in the best interests of the company when the company enters the twilight zone of insolvency that requires them to take into account the interests of the company's creditors (see generally, the Court of Appeal decision of *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 ("*Foo Kian Beng*") and the UK Supreme Court decision of *BTI 2014 LLC v Sequana SA and others* [2024] AC 211 ("*Sequana*")).

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[93] Notes of Argument (7 October 2024) at p 6:26–31.

191 For completeness, in adopting this analysis, I am cognisant that, in *Inter-Pacific Petroleum Pte Ltd (in liquidation) v Goh Jin Hian* [2024] SGHC 178 ("*Inter-Pacific Petroleum*"), the General Division of the High Court cautioned (after a detailed analysis of *Stanford International Bank*) that there were limits to which the proposition that a company was a legal abstraction of its creditors' interests could be taken due to the principle of separate legal personality (at [233]–[235]). However, the situation in that case is distinguishable: the issue was whether the company suffered *loss* that could found a compensatory claim under a private law cause of action, and the court (rightly) recognised that a company suffers no *loss* when its net asset position does not change. The present context is different. The inquiry is not whether GLH suffered legally cognisable "loss"; where a liquidator pursues a statutory right of action under s 225 of the IRDA to unwind a transaction as an unfair preference, the existence of "loss" in the ordinary sense is irrelevant, and it is in my view legitimate to give effect to the underlying policy of the unfair preference regime and view an insolvent company's "interests" for the purposes of s 270 of the IRDA as including the interests of its creditors who, in light of the insolvency, are the main economic stakeholders of the company (see *Inter-Pacific Petroleum* at [189], citing *Foo Kian Beng* at [72] and *Sequana* at [59]).

192 Finally, in so far as the exercise of discretion is concerned, for the same reasons above, I would also have exercised my discretion in favour of granting interim prohibitory injunctions under s 270(1) of the IRDA. Indeed, the case for granting an injunction under s 270(1) would arguably be stronger given that the court is in principle entitled to place less weight on the claimants' inability to potentially compensate GL Thailand, by subordinating the risk of prejudice to GL Thailand – which I had, in any event, assessed to be speculative (see [156] above) – to the interests of GLH's unsecured creditors as a whole.

Conclusion

193 For the reasons that I have attempted to explain in detail above, I granted the interim prohibitory injunctions sought by the claimants in prayers (a) and (d), as well as the ancillary disclosure order in prayer (e).

194 The parties agreed that the costs of this application should be costs in the cause.[94] I considered this to be an appropriate costs order for an application for an interim injunction. Since the purpose of the injunction is to hold the ring pending the determination of the substantive dispute between the parties, if the court's later decision is that the injunction should not have been granted, it would be sensible (although not an immutable rule) for the claimant to bear the costs even though it had been successful on the injunction application since its success then was only provisional. Although I would point out that it may also be reasonable for the court hearing the injunction application to reserve the issue of costs to the court hearing the substantive merits, I was content for costs to be in the cause given the parties' agreement.

Goh Yihan
Judge of the High Court

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94 Notes of Argument (7 October 2024) at p 8:17–21.

Nair Suresh Sukumaran, Ang Chee Kwang Andrew, Tan Tse Hsien Bryan, Brendan Cheow Weng Yew, Too Tat Rui and Joshua Goh Zemin (PK Wong & Nair LLC) for the claimants;
Luis Inaki Duhart Gonzalez and Lee Shi Han Ignatius (Selvam LLC) for the defendant.
