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

[2024] SGHC 322

Suit No 229 of 2021

Between

(1) SW Trustees Pte Ltd (in compulsory liquidation)
(2) Farooq Ahmad Mann

… *Plaintiffs*

And

(1) Teodros Ashenafi Tesemma (also known as Tewodros Ashenafi)
(2) Cheng Ka Wai
(3) Chooi Kok Yaw
(4) Alexander Ressos
(5) Sino Africa Trading Ltd
(6) Coca-Cola Sabco (East Africa) Ltd

… *Defendants*

And

Teodros Ashenafi Tesemma also known as Tewodros Ashenafi

… *Third Party*

JUDGMENT

[Insolvency Law — Avoidance of transactions — Transactions at an undervalue — Value of consideration given]
[Insolvency Law — Avoidance of transactions — Transactions at an undervalue — Value of consideration received]
[Insolvency Law — Avoidance of transactions — Transactions at an undervalue — Remedies]
[Companies — Directors — Duties — Breach of director's duties]
[Tort — Conspiracy — Unlawful means conspiracy]
[Insolvency Law — Winding up — Liquidator — Duties]

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SW Trustees Pte Ltd (in compulsory liquidation) and another v Teodros Ashenafi Tesemma (also known as Tewodros Ashenafi) and others (Teodros Ashenafi Tesemma (also known as Tewodros Ashenafi), third party)

[2024] SGHC 322

General Division of the High Court — Suit No 229 of 2021
Hri Kumar Nair J
24–27 September, 1–2, 8, 15–18 October, 8 November 2024

16 December 2024

Hri Kumar Nair J:

Introduction

1 A liquidator's task is almost always a challenging one. He or she assumes management of the insolvent entity without any substantive knowledge of its history or affairs, and is expected to, within a short time, understand the entity's business, reconstruct events which led to its insolvency and determine what action(s) needs to be taken to realise the best return for its creditors. To facilitate this, the law confers on the liquidator significant powers of inquiry and investigation as well as to commence proceedings to unwind unfavourable transactions, recover assets belonging to the entity, and seek redress against those who may have caused it harm. But the liquidator must exercise those powers responsibly and reasonably – he or she is duty bound to act in the best

interests of the creditors and, in the case of a court-appointed liquidator, is an officer of the court with consequential obligations.

2 This action involved an attempt by a court-appointed liquidator to effectively unwind, and seek other reliefs in respect of, two sizeable transactions entered by the insolvent entity as well as to obtain damages for breach of fiduciary duties and conspiracies between the former officers of the insolvent entity and two other parties. The action against three of the former officers were subsequently withdrawn, while the former owner and/or controller of the entity, as well as a party owned by him, did not appear at the trial. The trial therefore only proceeded against a single defendant. It nonetheless engaged interesting issues on undervalue transactions, the valuation of shares (owned by the insolvent company) in the insolvency context and the appropriate remedies.

Facts

The parties

3 The first plaintiff was SW Trustees Pte Ltd ("SWT"), a company incorporated in Singapore and carrying on the business of investment holding, management and administration of trusts, and consultancy services.[1] It was wound up on 21 June 2019 *vide* HC/ORC 4169/2019.[2]

4 The second plaintiff, Mr Farooq Ahmad Mann ("Mr Mann"), was appointed as the liquidator of SWT upon its winding up.[3]

1 Statement of Claim (Amendment No. 2) dated 9 November 2023 ("SOC") at para 1.

2 2AB836–2AB837.

3 SOC at para 2; 2AB836–2AB837.

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5 The first defendant, Mr Teodros Ashenafi Tesemma (also known as Tewodros Ashenafi) ("Mr Ashenafi"), was an Ethiopian citizen. He was a director of SWT from 1 September 2004 to 1 August 2017,[4] and the sole shareholder of SWT from 30 May 2016 to 27 February 2018.[5] While Mr Ashenafi initially participated in the proceedings, including by filing a defence and updating the same twice, he ceased to participate on or around 31 July 2024 when his solicitors discharged themselves.

6 The second defendant was Mr Cheng Ka Wai ("Mr Cheng"), who was a director of SWT from 11 December 2009 to 1 August 2017.[6] Mr Cheng was employed by Mr Ashenafi from sometime in or around 2005 to February 2022, albeit in different capacities throughout this period.[7] The action against Mr Cheng was discontinued as at 21 February 2023 (see below at [40]).

7 The third defendant was Mr Chooi Kok Yaw ("Mr Chooi"), who was a director of SWT from 10 October 2012[8] to 1 August 2017.[9] Mr Chooi was SWT's corporate secretary from 31 July 2011[10] to the date of its winding up, *ie*, 21 June 2019.[11] The action against Mr Chooi was discontinued as at 19 December 2023 (see below at [40]).

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4 1st Defendant's Defence (Amendment No. 2) dated 12 April 2024 ("1DD") at para 5 read with SOC at para 3.

5 1DD at para 6.

6 Affidavit of Evidence-in-Chief ("AEIC") of Cheng Ka Wai dated 11 July 2024 ("AEIC Cheng") at para 1; AEIC of Farooq Ahmad Mann dated 15 July 2024 ("AEIC Mann") at para 9(a)(ii).

7 AEIC Cheng at paras 13–23.

8 AEIC of Chooi Kok Yaw dated 15 July 2024 ("AEIC Chooi") at para 13; AEIC Mann at para 9(a)(iii).

9 AEIC Chooi at para 15; AEIC Mann at para 9(a)(iii).

10 AEIC Chooi at para 11.

11 AEIC Mann at para 9(a)(iii).

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8 The fourth defendant was Dr Alexander Ressos ("Dr Ressos"), who was the sole director of SWT from 1 August 2017[12] to the date of its winding up, *ie*, 21 June 2019.[13] The action against Dr Ressos was discontinued as at 19 December 2023 (see below at [40]).

9 The fifth defendant was Sino Africa Trading Ltd ("Sino Africa"), a company with its registered address in the British Virgin Islands ("BVI").[14] Sino Africa was wholly and/or beneficially owned and/or controlled by Mr Ashenafi.[15] Like Mr Ashenafi, Sino Africa initially participated in the proceedings, including by filing its defence. Its solicitors were discharged sometime in October 2022, after which it was not represented nor did it attend these proceedings (see below at [65]–[67]).

10 The sixth defendant was Coca-Cola Sabco (East Africa) Ltd ("CCSEA"). CCSEA was wholly owned by Coca-Cola Beverages Africa Proprietary Ltd ("CCBA").[16] In turn, CCBA was an indirect subsidiary of The Coca-Cola Company, a company incorporated in the US and listed on the New York Stock Exchange.[17]

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12 AEIC of Alexander Ressos dated 24 July 2024 ("AEIC Ressos") at paras 1, 26.

13 AEIC Mann at para 9.

14 1st and 5th Defendants' Defence (Amendment No. 1) dated 3 June 2022 ("5DD") at para 10.

15 1DD at para 11.

16 Defence of the 6th Defendant (Amendment No. 3) dated 28 May 2024 ("6DD") at para 4(a); AEIC of Adriaan Marais dated 15 July 2024 ("AEIC Marais") at paras 1, 16.

17 6DD at para 4(a).

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Background to the dispute

Project Savannah

11 In late 2014, The Coca-Cola Company (together with its subsidiaries, "TCCC"), SABMiller plc (together with its subsidiaries, "SABMiller Group") and Gutsche Family Investments Proprietary Ltd ("GFI") entered an agreement to consolidate the bottling operations of their respective non-alcoholic beverage businesses in Southern and East Africa, to be housed under CCBA. This merger, which would bring together operations in multiple markets across Africa with an annual revenue of US$2.9b, was designated "Project Savannah".[18]

12 Broadly, Project Savannah would be effected as follows:

(a) the merger parties would agree on which of their bottling and manufacturing assets would be contributed to CCBA;

(b) an indicative value would be assigned to the assets contributed; and

(c) the assets would be transferred to CCBA.

The merger parties would then be shareholders in CCBA, in proportion to the indicative value contributed by each merger party.[19] According to Mr Adriaan Marais ("Mr Marais"), CCBA's Deputy Company Secretary, the indicative value of the assets contributed by each merger party was calculated based on the individual asset's earnings before interest, taxes, depreciation and

[18] AEIC Marais at para 9.

[19] AEIC Marais at para 11.

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amortisation ("EBITDA") in their respective audited financial statements for 2014 multiplied by an agreed multiple.[20]

13 Amongst other contributions of interests in entities to CCBA, TCCC contributed its 20% shareholding in CCSEA, GFI contributed its 80% shareholding in CCSEA and SABMiller Group contributed its 75% shareholding in Ambo International Holdings Ltd ("AIHL").[21] At the material time, SWT held the remaining 25% shares in AIHL.[22]

14 AIHL was a holding company with no operations of its own. In and around 2014, its main asset was a 67% shareholding in Ambo Mineral Water Share Company ("Ambo Min"), an Ethiopian company that owned and operated a bottling plant in Ambo Senkele, Ethiopia, with rights in the "Ambo" brand of beverages. The remaining 33% shareholding in Ambo Min was held by the Ethiopian Governments' Privatisation and Public Enterprises Supervising Authority ("PPESA").[23]

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20 AEIC Marais at para 13.

21 AEIC Marais at paras 12(a)–12(c).

22 AEIC Marais at para 18.

23 AEIC Marais at para 19.

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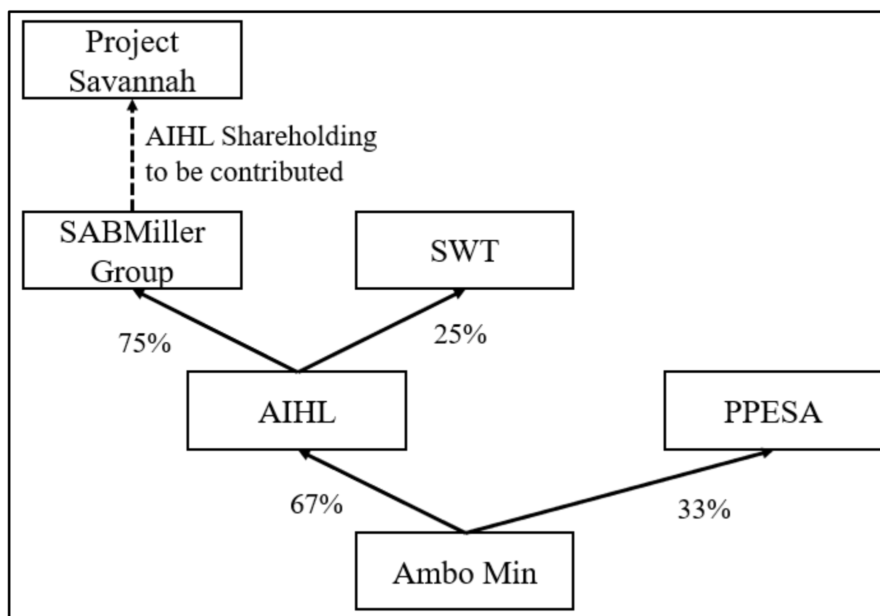
15 Below is a visual representation of the shareholding structure at and around 2014:



16 Apart from the shareholding in Ambo Min being contributed to CCBA (through AIHL), Ambo Min had further relevance to Project Savannah: the merger parties had agreed that Ambo Min would sell the Ambo brand to TCCC.[24]

17 On 27 May 2015, after Project Savannah was announced and before its completion, PPESA notified SABMiller Group that it wished to sell its 33% stake in Ambo Min for an amount in Ethiopian Birr ("ETB") (then) equivalent to US$19,782,807.[25] On 19 June 2015, SABMiller Group, through its subsidiary, AIHL, confirmed its interest for AIHL to acquire PPESA's 33% minority stake in Ambo Min at the proposed price.[26] By a letter dated

24 6AB3927.

25 AEIC Marais at para 21; see also 6AB3927.

26 AEIC Marais at para 22; 8AB5491.

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3 July 2015, AIHL informed PPESA that the purchase price would be paid after the execution of a share purchase agreement, a draft of which was attached to its letter.[27] However, the sale did not take place before the completion of Project Savannah on 2 July 2016.[28] According to an investment memorandum dated 15 July 2016 prepared by SABMiller Group (the "SABMiller Group Investment Memo"), this was due to "a number of factors, including a restructuring of Ethiopian Government ministries which resulted in the transfer of responsibility for the investment in [Ambo Min] from PPESA to the Ministry of Public Enterprises".[29] I shall refer to the Ethiopian Ministry of Public Enterprises as "MoPE". That said, the merger parties to Project Savannah agreed to work together post-closing to resolve "the ownership issues regarding the Ambo brand".[30] This, Mr Marais explained, meant that the merger parties wanted Ambo Min to be wholly owned by AIHL, as soon as possible.[31] This had the benefit of securing the ability to sell the Ambo brand from Ambo Min to TCCC.[32]

18 At and around the closing of Project Savannah, SABMiller Group transferred its 75% shareholding in AIHL to CCBA while GFI and TCCC transferred their shareholdings in CCSEA to CCBA. As part of an internal restructuring, CCBA then transferred its 75% shareholding in AIHL to CCSEA.

27 8AB5493.

28 AEIC Marais at para 26; 6AB3927.

29 6AB3927.

30 6AB3927.

31 Transcript (8 October 2024) at p 68 line 14 to p 69 line 5.

32 6AB3928.

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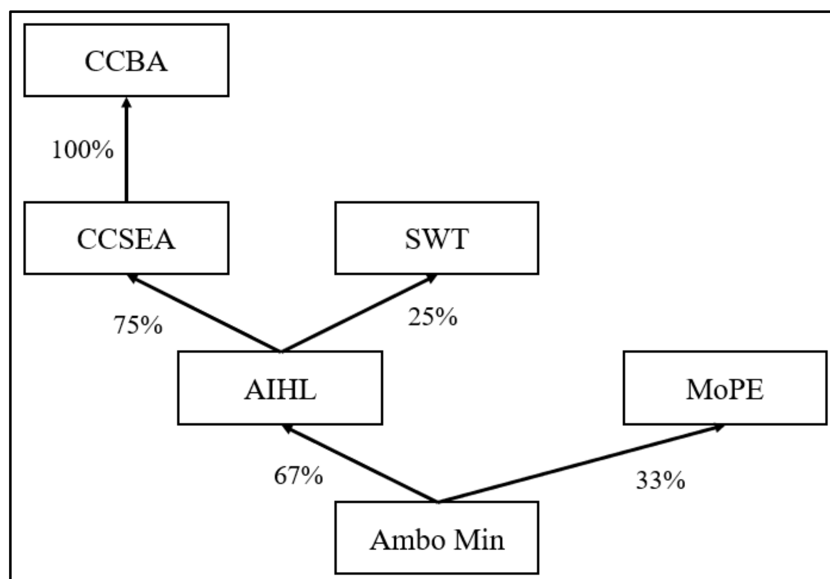
19 Below is a visual representation of the shareholding structure after the completion of Project Savannah in July 2016:



The Ambo Min Sale

20 According to the SABMiller Group Investment Memo, after the completion of Project Savannah, MoPE raised the Ethiopian government's desire to dispose of its 33% minority stake in Ambo Min at the same price proposed in May 2015, *ie*, US$19,782,807 (the "Ambo Min Share Consideration").[33]

21 While the SABMiller Group Investment Memo contemplated that 75% of this sale price would be funded by CCBA (as the parent company of CCSEA that held 75% of AIHL) and 25% would be funded by SWT,[34] it transpired that CCSEA wholly funded the purchase consideration by way of an equity injection into AIHL in exchange for an allotment of new shares in the same. After the

33 AEIC Marais at para 31; 6AB3927, 6AB3930.

34 6AB3930.

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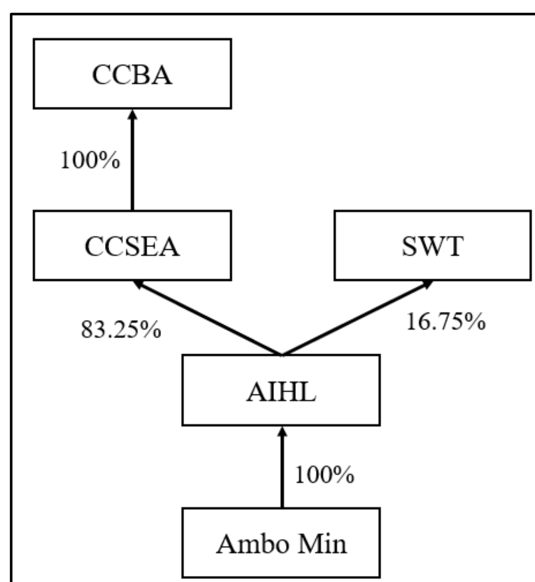
equity injection and share allotment on or around 14 December 2016, SWT's shareholding in AIHL was diluted to 16.75% and CCSEA's shareholding increased to 83.25%.[35]

22 AIHL successfully completed its purchase of MoPE's 33% stake in Ambo Min in or around December 2016 pursuant to a contract of sale dated 15 December 2016 between itself and MoPE.[36] I shall refer to this transaction as the "Ambo Min Sale".

23 As a result of the share allotment to CCSEA and the Ambo Min Sale, the shareholding structure changed again:



The AIHL Sale

24 On or around 31 March 2017, CCSEA purchased SWT's 16.75% minority stake in AIHL (the "Disposed AIHL Shares") for the sum of

35 AEIC Marais at para 42.

36 AEIC Marais at para 43; 10AB6917–10AB6926.

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US$10,796,784 (the "AIHL Share Consideration"),[37] pursuant to a Share Purchase Agreement dated 23 March 2017,[38] as amended by an addendum dated 31 March 2017[39] (collectively, the "SPA").[40] I shall refer to this transaction as the "AIHL Sale". In purchasing the Disposed AIHL Shares, CCSEA became the sole shareholder of AIHL, and so CCBA indirectly owned 100% of Ambo Min.[41] One of the key issues in this action was whether the AIHL Sale was at an undervalue.

25 What was critical was how the parties to the SPA arrived at the AIHL Share Consideration. CCSEA's evidence was that no valuation of the Disposed AIHL Shares was carried out. Instead, referencing the Ambo Min Sale, the indicative equity value for 100% of Ambo Min was US$59,947,900. As Ambo Min was AIHL's main asset, CCBA notionally treated AIHL's implied equity value as being the same as that of Ambo Min, *ie*, US$59,947,900. This translated to a value of US$10,041,273 for the Disposed AIHL Shares, representing 16.75% of the said implied equity value.[42] On top of this, CCSEA claimed that during the negotiations of the SPA, SWT wanted it to pay an *additional* US$755,511, which represented SWT's share of unpaid dividends that AIHL "should" have declared and paid to shareholders following Ambo Min's declarations of dividends in 2014 and 2015.[43] The purchase price therefore totalled US$10,796,784, *ie*, the AIHL Share Consideration.

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37 6AB4094, 6AB4096.

38 6AB4090–6AB4109.

39 6AB4154–6AB4161.

40 AEIC Marais at para 45.

41 AEIC Marais at para 45.

42 AEIC Marais at paras 52–53; 6AB3938.

43 AEIC Marais at paras 103–106; 6AB3939.

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26 Under the SPA, the AIHL Share Consideration was to be, and had been, discharged in the following manner:[44]

(a) On 28 March 2017, CCSEA transferred the sum of US$4,375,000 to a bank account with Standard Bank (Mauritius) Ltd ("SBM") in the name of SWT. Consequently, on 29 March 2017, SBM confirmed that SWT's indebtedness to it under a term loan facility was fully and finally discharged.[45]

(b) On 1 April 2017, CCSEA transferred the sum of US$4,543,759 to a bank account with the Hongkong and Shanghai Banking Corp ("HSBC") in the name of Wealth Direct Ltd ("Wealth Direct").[46]

(c) On 1 April 2017, CCSEA transferred the sum of US$755,511 to a bank account with HSBC in the name of Long River Holdings (HK) Ltd ("Long River").[47]

(d) On 1 April 2017, CCSEA transferred the sum of US$43,047 to AIHL to discharge a debt owed by SWT to AIHL.[48]

(e) CCSEA assumed the liabilities of US$1,079,467 owed by one Southwest Development plc ("SWD") to Ambo Min.[49] According to Mr Cheng, SWD was owned by Mr Ashenafi.[50]

44 AEIC Marais at para 46.

45 Chronology dated 20 September 2024 ("Chronology") at para 92(a).

46 Chronology at paras 92(b)(i), 95; 6AB4186.

47 Chronology at para 92(b)(ii); 6AB4190.

48 Chronology at para 92(b)(iv); 6AB4188.

49 Chronology at para 92(b)(iii).

50 AEIC Cheng at para 73(a)(i); Transcript (1 October 2024) at p 101 lines 9–13.

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The SWE Share Transfer

27 Prior to April 2017, SWT also held 44,111 shares in Southwest Energy (BVI) Ltd ("SWE (BVI)") (the "SWE Shares"), a company incorporated in the BVI. The plaintiffs alleged that these shares were owned by SWT[51] while Mr Ashenafi and Sino Africa contended in their defence that the shares were held on trust for Mr Ashenafi.[52] By an instrument of transfer dated 28 April 2017 signed by Mr Ashenafi,[53] SWT transferred 39,957 of its shares in SWE (the "Disposed SWE Shares") to Sino Africa.[54] I shall refer to this as the "SWE Share Transfer". The transfer instrument bore Mr Ashenafi's signatures on behalf of both the transferor and transferee, which were both witnessed by Mr Cheng,[55] and stated the transfer to be by SWT on behalf of one SW Development Trust ("SWDT").[56] SWT received no consideration for this transfer.[57]

The SGI Creditors

28 Sometime in or around 2008, SGI SWE Ltd, a company incorporated in the BVI, and Schulze Global Investment Holdings, a corporation incorporated in Delaware, USA, (collectively, the "SGI Creditors") purchased shares in SWE (BVI). At all material times, Mr Ashenafi was managing the activities of SWE

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51 SOC at para 21B.

52 1DD at paras 19B.1, 19B.3, 20.

53 5AB3635.

54 SOC at para 22, 1DD at para 20; Chronology at para 97; 5AB3635.

55 SOC at para 22.1; 1DD at paras 20–20.1.

56 SOC at para 22.1; 1DD at para 20.1

57 SOC at para 22.4; 1DD at para 20.3.

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(BVI). Southwest Energy (HK) Ltd ("SWE (HK)") was a wholly owned subsidiary of SWE (BVI).[58]

29 Sometime in or around March 2011, one Mr Gabriel David Gottlieb Schulze ("Mr Schulze"), a director of the SGI Creditors, was appointed to the boards of SWE (BVI) and SWE (HK) following the SGI Creditors' investment.[59]

30 According to Mr Schulze, the SGI Creditors suspected that Mr Ashenafi was using SWE (BVI) to funnel monies to himself and his companies. Mr Schulze therefore began asking questions during board meetings.[60] In February 2013, Mr Ashenafi informed Mr Schulze that he was no longer welcomed as a board member of SWE (BVI) and SWE (HK). Mr Schulze resigned from his directorships.[61] Without any board presence, the SGI Creditors had little oversight over the affairs of SWE (BVI).[62]

31 The SGI Creditors decided to sell their shares in SWE (BVI) in light of their "increasingly grave concerns" about the management of the business.[63] Thus, on 7 November 2014, the SGI Creditors and Mr Schulze entered a share purchase agreement with SWT to sell their shareholding in SWE (BVI) for US$3,149,882.28.[64] Pursuant to this agreement, SWT was to pay the purchase

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58 AEIC of Gabriel David Gottlieb Schulze dated 15 July 2024 ("AEIC Shulze") at para 6.

59 AEIC Schulze at para 7.

60 AEIC Schulze at para 8.

61 AEIC Schulze at para 9.

62 AEIC Schulze at para 10.

63 AEIC Schulze at para 12.

64 AEIC Schulze at para 13.

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price on 7 February 2015, although this could be postponed by up to 30 days.[65] However, the purchase price remained unpaid.[66]

32 On 7 March 2016, the SGI Creditors commenced arbitration proceedings against SWT (the "Arbitration").[67] Prior to and after the commencement of the Arbitration, Mr Ashenafi reached out to Mr Schulze to negotiate a settlement.[68] Eventually, on 29 March 2017, the SGI Creditors, SWT, Mr Ashenafi and Mr Schulze entered a settlement agreement (the "Settlement Agreement") under which, *inter alia*, SWT was to pay to the SGI Creditors and Mr Schulze the purchase price for the SWE (BVI) shares as agreed in the share purchase agreement.[69] By this time, the AIHL Sale had taken place and CCSEA was in the process of discharging the AIHL Share Consideration in the manner stipulated in the SPA (see above at [24] and [26]).

33 SWT and Mr Ashenafi failed to honour the Settlement Agreement,[70] and so the Arbitration proceeded.[71] A final award was issued on 21 July 2017 (the "Final Award"), wherein the tribunal, *inter alia*, ordered SWT to pay the SGI Creditors the agreed sale price of US$3,149,882.28 and interest.[72]

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65 AEIC Schulze at para 16.

66 AEIC Schulze at paras 23–33.

67 AEIC Schulze at para 34.

68 AEIC Schulze at paras 37–38.

69 Chronology at paras 93–93(a); 5AB3749–5AB3753; AEIC Schulze at paras 39–40.

70 AEIC Schulze at para 41.

71 Chronology at para 93(c).

72 Chronology at para 103; 5AB3755–5AB3793; AEIC Schulz at paras 42-43.

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34 On 9 October 2017, the SGI Creditors applied for leave to enforce the Final Award against SWT in Singapore *vide* HC/OS 1137/2017,[73] which application was granted the next day *vide* HC/ORC 6562/2017 ("ORC 6562").[74]

35 On 24 October 2017, SWT applied to set aside ORC 6562 and for a stay of proceedings by the SGI Creditors *vide* HC/SUM 4874/2017.[75] This application was dismissed on 20 December 2017.[76]

The change in ownership of SWT

36 On 27 February 2018, Mr Ashenafi transferred his shareholding in SWT to Satomi Services Ltd ("Satomi"), a company incorporated in Seychelles, for a consideration of S$1. This was effected by way of an instrument of share transfer, signed by Mr Ashenafi and Dr Ressos, in his capacity as a director of Satomi.[77]

The liquidation of SWT

37 On 23 April 2018, the SGI Creditors, through its then-solicitors, served a statutory demand on SWT, demanding the monies due under the Final Award amounting to S$5,782,972.18 at that time.[78] As the statutory demand went unsatisfied, the SGI Creditors applied to wind up SWT on 3 July 2018 *vide*

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73 Chronology at para 108; 1AB2–1AB3.

74 Chronology at para 109; 1AB169–1AB170.

75 Chronology at para 110; 1AB172–1AB173.

76 Chronology at para 110; 1AB276–1AB277.

77 5AB3245.

78 Chronology at para 123; 2AB1408–2AB1411; AEIC Schulz at para 53.

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HC/CWU 137/2018.[79] This application was granted on 21 June 2019 and Mr Mann was appointed as the liquidator of SWT.[80]

Procedural history

38 On 3 March 2021, SWT commenced these proceedings,[81] against all six defendants.[82] Mr Mann was made a plaintiff to these proceedings in or around 18 May 2022.

39 According to Mr Schulz, the SGI Creditors were the only creditors of SWT, and therefore any recovery made by SWT in this action would be to the (sole) benefit of the SGI Creditors.[83]

The discontinuance of the action against Mr Cheng, Mr Chooi and Dr Ressos

40 By December 2023, the proceedings against Mr Cheng, Mr Chooi and Dr Ressos were discontinued on the application of the plaintiffs.[84] This was in exchange for the said defendants giving evidence in these proceedings,[85] which they did.

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79 Chronology at para 125.

80 Chronology at para 129; 2AB836–2AB837; AEIC Schulz at para 54.

81 Chronology at para 130; AEIC Ressos at para 60.

82 Statement of Claim dated 3 March 2021.

83 AEIC Schulz at para 55.

84 Chronology at paras 133–137; AEIC Cheng at para 8; AEIC Ressos at paras 78, 80; AEIC Chooi at paras 6, 8; 10AB7115–10AB7117, 10AB7144–10AB7145, 10AB7480–10AB7481.

85 AEIC Cheng at para 9; Affidavit of Alexander Ressos dated 25 March 2023 at paras 8–9; AEIC Ressos at para 77(b); AEIC Chooi at para 7.

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The absence of Mr Ashenafi and Sino Africa

41 As canvassed, both Mr Ashenafi and Sino Africa initially participated in these proceedings but eventually ceased to do so (see above at [5] and [9]). They were both absent at trial and did not file any affidavits or call any witnesses.

The parties' cases

42 I examine the plaintiffs' pleadings in some detail as the case they ran, and the evidence presented, against CCSEA at the trial departed from their pleadings.

The plaintiffs' case

Undervalue Transactions

43 The plaintiffs averred that Mr Ashenafi, from a time (at the latest) shortly after the commencement of the Arbitration, had taken steps calculated to and did in fact dissipate the assets of SWT, thereby ensuring that the SGI Creditors would not obtain the benefit of the Settlement Agreement or the fruit of any subsequent enforcement proceedings against SWT.[86] To this end, Mr Ashenafi, with the assistance, knowledge, acquiescence, and/or consent of the other directors of SWT, caused SWT to enter three transactions at an undervalue (collectively, the "Undervalue Transactions") and SWT's assets were dissipated as a result.[87]

44 In so far as the Undervalue Transactions were transactions at an undervalue for the purposes of s 224 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") (and s 329 of the Companies

[86] SOC at para 20A.

[87] SOC at para 20B.

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Act (Cap 50, 2006 Rev Ed) ("CA") read with s 98 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("BA")), they were voidable.[88]

(1) First Undervalue Transaction: the AIHL Sale

45 The plaintiffs averred that the AIHL Sale (*ie*, the sale of the Disposed AIHL Shares to CCSEA pursuant to the SPA) was a transaction at an undervalue because the AIHL Share Consideration (*ie*, US$10,796,784) was "significantly less than the value of" the Disposed AIHL Shares,[89] and that SWT became insolvent as a result of this transaction.[90] I shall refer to this as the "First Undervalue Transaction".

46 However, the plaintiffs did not plead what the true value of the Disposed AIHL Shares was at the time of the SPA. It was only in its evidence that the plaintiffs advanced a value of between US$15,110,000 and US$16,006,000,[91] *ie*, that the AIHL Sale Consideration was approximately 30% below the value of the Disposed AIHL Shares.[92]

(2) Second Undervalue Transaction: the disposal of the AIHL Share Consideration

47 The plaintiffs averred that SWT received the benefit of only US$5m of the AIHL Share Consideration as CCSEA had "caused the sum of [US$5m] to be paid on [SWT's] behalf to [SBM], and thereby retired [SWT's] indebtedness

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88 SOC at para 20C.

89 SOC at para 21.2.

90 SOC at para 21.3.

91 AEIC of Ong Woon Pheng dated 12 July 2024 ("AEIC Ong") at para 9.

92 Plaintiffs' Submissions dated 8 November 2024 ("Plaintiffs Submissions") at para 31(b).

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to [SBM] pursuant to a facility".[93] In their Reply (Amendment No. 3) to the 6th Defendant's Defence (Amendment No. 3) dated 10 June 2024 and their closing submissions dated 8 November 2024, the plaintiffs accepted that CCSEA had instead paid US$4,375,000 to SWT's bank account with SBM, and relied on this figure in place of the pleaded figure of US$5m.[94]

48 As to *part of* the remainder of the AIHL Share Consideration (the "Diverted AIHL Share Consideration"), the plaintiffs claimed this had been transferred to third parties namely:[95]

(a) US$4,543,759 to Wealth Direct;[96] and

(b) US$755,581 to Long River.[97] In their Reply, the plaintiffs revised the amount transferred to US$755,511.[98]

Given that SWT received no consideration or benefit from Wealth Direct and Long River for these transfers, the said transfers were transactions at an undervalue.[99] I shall refer to these transfers as the "Second Undervalue Transaction".

49 Wealth Direct and Long River were both companies beneficially owned and/or controlled by Mr Ashenafi, and of which he was the sole shareholder and

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93 SOC at paras 21A–21A.1.

94 Reply (Amendment No. 3) to the 6th Defendant's Defence (Amendment No. 3) dated 10 June 2024 ("Reply") at para 7; Plaintiffs Submissions at para 76(e).

95 SOC at para 21A.2.

96 SOC at para 21A.2.1.

97 SOC at para 21A.2.2.

98 Reply at para 7.2.

99 SOC at para 21A.3.

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director.[100] The plaintiffs pleaded that Mr Ashenafi had negotiated the terms of the SPA to provide for the transfers of the Diverted AIHL Share Consideration to Wealth Direct and Long River, and thereby caused SWT to enter and/or carry out the said transactions at an undervalue.[101]

50 The plaintiffs did not plead that CCSEA's payment of US$43,047 to AIHL and CCSEA's assumption of SWD's liability of US$1,079,467 (see above at [26(d)] and [26(e)]) were wrongful diversions of the AIHL Share Consideration. In fact, the plaintiffs accepted in their closing submissions that SWT received the benefit in respect of the payment of US$43,047 by CCSEA to AIHL.[102]

51 Notably, it was *not* the plaintiffs' pleaded case that CCSEA was responsible or liable for the Second Undervalue Transaction.

(3) Third Undervalue Transaction: the transfer of the Disposed SWE Shares

52 The plaintiffs averred that Mr Ashenafi with the assistance, knowledge, acquiescence and/or consent of Mr Cheng and/or Mr Chooi, and Sino Africa, procured and caused SWT to transfer the Disposed SWE Shares to Sino Africa,[103] that SWT received no consideration for this transfer,[104] and that as a result, SWT became insolvent.[105] As such, the transfer of the Disposed SWE

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100 SOC at para 21A.6.

101 SOC at para 21A.4.

102 Plaintiffs Submissions at para 77.

103 SOC at para 22.

104 SOC at para 22.4.

105 SOC at para 22.5

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Shares to Sino Africa was a transaction at an undervalue.[106] I shall refer to this as the "Third Undervalue Transaction".

Concealment of the Undervalue Transactions

53 The plaintiffs pleaded that Mr Ashenafi, Mr Cheng, Mr Chooi and Dr Ressos sought to conceal the Undervalue Transactions by fraudulently removing the Disposed AIHL Shares and the Disposed SWE Shares from SWT's financial statements for the financial years 2015 to 2017.[107] To this end, Mr Ashenafi created and/or caused to be created and backdated counterfeit documents which purported to evidence the trust arrangements between SWT and SWDT – namely three letters of addition dated between 2008 and 2010 in relation to the Disposed AIHL Shares (collectively, the "Letters of Addition") and one letter of addition dated around 2014 in relation to shares in CAPTS Beverage Holdings – [108] copies of which were then presented by Mr Cheng and Dr Ressos, at the behest and on the instructions of Mr Ashenafi, to SWT's then-auditors to procure adjustments to the audited accounts for the financial years 2016 and 2017.[109] The adjustments were made or sought to be made in or around 2018,[110] with the intention of leaving SWT with no real assets to pay its creditors in the anticipated liquidation.[111]

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106 SOC at para 20B; Plaintiffs Submissions at para 6.

107 SOC at paras 26, 26.6.

108 SOC at paras 26.6.1–26.6.1(d).

109 SOC at para 26.6.2.

110 SOC at paras 26.5, 26.6.2.

111 SOC at para 26.8.1.

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Claims for breach of director's duties

54 The plaintiffs averred that Mr Ashenafi owed various duties to SWT *qua* director.[112] In breach of these fiduciary duties, Mr Ashenafi, along with Mr Cheng and Mr Chooi, caused SWT to enter the Undervalue Transactions.[113] The plaintiffs alleged that these Undervalue Transactions benefitted Mr Ashenafi and/or were for his personal gain to the detriment of SWT,[114] and that SWT suffered loss as a result.[115]

Claims in conspiracy

55 The plaintiffs alleged three separate conspiracies.

56 First, Mr Ashenafi, Mr Cheng, Mr Chooi, Dr Ressos and/or CCSEA "wrongfully and with intent to injure [SWT] and/or its creditors and/or to cause loss to [SWT] and/or its creditors by unlawful means conspired and combined to cause [SWT] to carry out the sale and purchase of the Disposed [AIHL] Shares, which was a transaction at an undervalue".[116]

57 Second, Mr Ashenafi, Mr Cheng, Mr Chooi, and/or Dr Ressos, "wrongfully and with intent to injure [SWT] and/or its creditors and/or cause loss to [SWT] and/or its creditors by unlawful means conspired and combined to cause the Diverted [AIHL] Share Consideration to be transferred to Wealth

[112] SOC at para 42.

[113] SOC at para 44.

[114] SOC at para 44.2.

[115] SOC at para 44.3.

[116] SOC at para 52.

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Direct and [Long River]".[117] Notably, it was not the plaintiffs' case that CCSEA was a participant of this conspiracy.

58 Third, Mr Ashenafi, Mr Cheng, Mr Chooi, Dr Ressos, and/or Sino Africa "wrongfully and with intent to injure [SWT] and/or its creditors and/or cause loss to [SWT] and/or its creditors by unlawful means conspired and combined to cause [SWT] to transfer the Disposed SWE Shares to Sino Africa, which transfer was a transaction at an undervalue".[118]

Mr Ashenafi's case

59 As noted above, Mr Ashenafi did not give evidence nor made submissions. Based on his Defence, his case was that:

(a) SWT was incorporated for the sole purpose of administering SWDT and holding assets on trust for himself. To that end, SWT executed a Deed of Settlement with one Jocelyn Tan Siang Luang ("Ms Jocelyn Tan") dated 31 October 2003 (the "Trust Deed"),[119] under which SWT was appointed as the first trustee of SWDT.[120]

(b) Sino Africa was, at all material times, wholly and/or beneficially owned and/or controlled by him.[121]

117 SOC at para 52A.

118 SOC at para 52B.

119 5AB3647–5AB3689.

120 1DD at para 4.

121 1DD at para 11.

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(c) The Disposed AIHL Shares[122] and the SWE Shares[123] were held by SWT on trust for himself at all material times. The consideration for the acquisition of the Disposed AIHL Shares[124] and the SWE Shares[125] by SWT was not provided by it, and instead was provided for and/or procured by Mr Ashenafi. Specific to the SWE Shares, each of the relevant share certificates recorded that SWT held the shares "on behalf of [SWDT]".[126]

60 As to the disposal of the AIHL Share Consideration, Mr Ashenafi accepted that Wealth Direct and Long River were companies beneficially owned and controlled by him.[127] However, he denied that the transfers to these entities were made at an undervalue as SWT was not entitled to receive any consideration from them for the transfers.[128]

61 Mr Ashenafi admitted that SWT received no consideration for the SWE Share Transfer. However, given that the Disposed SWE Shares were held on trust for him, he contended that SWT was not entitled to receive any consideration for the transfer of those shares.[129]

62 In response to the allegations of concealment, Mr Ashenafi denied that the Letters of Addition were "counterfeit documents", and contended that the

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122 1DD at paras 12A, 13A.2(a)–13A.2(c), 13A.2(e), 19, 40.2.

123 1DD at paras 19B.1, 19B.3, 20, 22.5.6(a), 40.2.

124 1DD at para 12A.2.

125 1DD at para 19B.2.

126 1DD at paras 19B.1, 20.1.

127 1DD at para 19A.3.

128 1DD at para 19A.4.

129 1DD at para 20.3.

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signatures on them were genuine and that their contents accurately reflected the fact that SWT held the Disposed AIHL Shares on trust for himself.[130]

63 Mr Ashenafi denied committing any breach of fiduciary duties by causing SWT to enter the Undervalue Transactions, since the Disposed AIHL Shares and the Disposed SWE Shares were held on trust by SWT for himself.[131] For the same reason, SWT did not suffer any loss as it was not the beneficial owner of those shares.[132]

64 Finally, Mr Ashenafi denied engaging in any conspiracy to cause harm to SWT.[133]

Sino Africa's case

65 Before setting out Sino Africa's case, I set out the procedural history *vis-à-vis* the filing of its defence. On 26 May 2021 – some two months after SWT commenced proceedings –Sino Africa filed a notice of appointment of solicitor, followed by a memorandum of appearance. At this time, Mr Ashenafi had not been served or entered an appearance.[134]

66 Subsequently, Mr Ashenafi filed a memorandum of appearance, appointing the same solicitors as Sino Africa. On 24 August 2021, Mr Ashenafi and Sino Africa filed a joint defence. After the plaintiffs filed their Statement of Claim (Amendment No. 1) dated 18 May 2022, Mr Ashenafi and Sino Africa

130 1DD at para 22.5.1(b).

131 1DD at paras 40, 40.2.

132 1DD at para 40.3.

133 1DD at paras 42A–42A.1

134 Letter from Salem Ibrahim LLC dated 28 May 2021 at para 1.

filed their amended joint defence, *ie*, the 1st and 5th Defendants' Defence (Amendment No. 1) dated 3 June 2022. This was the last pleading filed by Sino Africa.

67 Sometime in October 2022, Mr Ashenafi's and Sino Africa's then-solicitors were discharged from acting for them.

68 Mr Ashenafi appointed new solicitors on 11 November 2022, while Sino Africa remained unrepresented. On 24 October 2023, Mr Ashenafi's solicitors were discharged from acting for him.

69 On 13 March 2024, Mr Ashenafi appointed new solicitors. On 12 April 2024, he filed his amended defence, *ie*, the 1st Defendant's Defence (Amendment No. 2). In doing so, he struck off all averments, assertions and allegations made by Sino Africa in that pleading.

70 Given that Mr Ashenafi was in no position to amend Sino Africa's pleading, the last defence filed by Sino Africa, *ie*, the 1st and 5th Defendants' Defence (Amendment No. 1) dated 3 June 2022, stood as its pleading. This was notwithstanding that it was a *joint* defence. In so far as that pleading included averments, assertions and allegations made by Mr Ashenafi, I understood those to be subject to and replaced by Mr Ashenafi's amended defence, *ie*, the 1st Defendant's Defence (Amendment No. 2).

71 Moving to its defence, Sino Africa averred that the Disposed AIHL Shares and the Disposed SWE Shares were, at all material times, held by SWT on behalf of SWDT and the transfer of the Disposed AIHL Shares from SWT to CCSEA was carried out by SWT on behalf of SWDT.[135] SWT did not receive

[135] 5DD at paras 19–21.

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any funds for the AIHL Sale as it was not entitled to the funds.[136] As the Disposed AIHL Shares and the Disposed SWE Shares were assets held on behalf of SWDT, there was no wrongful depletion of assets and the AIHL Sale and SWE Share Transfer were not transactions at undervalue.[137]

72 For the same reason, Sino Africa denied being a participant in a conspiracy to cause financial loss to SWT and its creditors.[138]

CCSEA's case

73 CCSEA did not dispute that the AIHL Sale took place on or around 23 March 2017 for the AIHL Share Consideration pursuant to the SPA (see above at [24]).[139] However, CCSEA denied that the First and Second Undervalue Transactions were undervalue transactions within the meaning of s 224 of the IRDA or s 329 of the CA read with s 98 of the BA.[140] In this regard, it maintained that:

(a) the AIHL Share Consideration;[141]

(b) further and/or in the alternative, the value of the payment of US$4,375,000 to SBM;[142]

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136 5DD at para 19.

137 5DD at para 21.

138 5DD at para 42 read with Statement of Claim (Amendment No. 1) dated 10 May 2022 at paras 50–53.

139 6DD at para 4A(a).

140 6DD at para 6A.

141 6DD at para 7(d).

142 6DD at para 21A(g).

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(c) further and/or in the alternative, the value of the payment of US$4,375,000 to SBM and the sum of US$43,047 (corresponding to the payment to AIHL);[143]

(d) further and/or in the alternative, the cumulative value of (i) the payment of US$4,375,000 to SBM, (ii) the sum of US$4,543,759 (corresponding to the payment to Wealth Direct) and (iii) the sum of US$43,047 (corresponding to the payment to AIHL);[144]

were not significantly less than the value, in money or money's worth, than the value of the Disposed AIHL Shares at the time of the SPA.

74 CCSEA admitted that no valuation of the Disposed AIHL Shares was carried out for the purpose of the SPA, and that the AIHL Share Consideration did not reflect, and was not intended to reflect, the fair market value of the Disposed AIHL Shares. Instead, the AIHL Share Consideration reflected CCSEA's "unique commercial considerations" as the majority shareholder of AIHL.[145]

75 In agreeing that the AIHL Share Consideration had been discharged in the manner described above at [26], CCSEA alleged that it was SWT's then-solicitors who had proposed that the payment of the AIHL Share Consideration be structured in that manner and that CCSEA had no reason to look behind or make inquiries regarding SWT's intentions. Further, CCSEA averred that absent any knowledge of fraud or insolvency on the part of SWT, it was usual

143 6DD at para 21G.

144 6DD at para 21H.

145 6DD at para 13A.

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commercial practice in Mauritius (being the governing law of the SPA) for the purchaser in a sale and purchase transaction to make payments to the vendor directly, and/or to persons nominated by the vendor in the written contractual documents.[146] Given that the payments were made as per the SPA, CCSEA was a *bona fide* purchaser for value.[147]

76 According to CCSEA, as the AIHL Share Consideration exceeded the fair market value of the Disposed AIHL Shares, SWT could not have become insolvent because of the AIHL Sale. Further, CCSEA did not admit that SWT (a) became unable to pay its debts as at March 2017; and/or (b) became unable to pay its debts in consequence of the AIHL Sale.[148]

77 CCSEA denied acting in concert with any of the other defendants and denied any involvement in any conspiracy to cause damage or injury to SWT and/or its creditors.[149]

Issues to be determined

78 The issues to be determined were:

(a) whether the Disposed AIHL Shares and the Disposed SWE Shares were held on trust by SWT for Mr Ashenafi;

(b) whether the parties had engaged in any undervalue transactions;

(c) whether Mr Ashenafi had breached his fiduciary duties owed to SWT; and

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[146] 6DD at para 17.

[147] 6DD at para 19.

[148] 6DD at para 19C.

[149] 6DD at para 28.

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(d) whether Mr Ashenafi and/or Sino Africa and/or CCSEA were liable for conspiracy against SWT.

79 Despite the non-participation of Mr Ashenafi and Sino Africa, the trial against them proceeded *on the merits*. The court has the power to proceed with a trial on the merits, even in the absence of the defendant, and thereafter grant judgment on the merits if justified in doing so by the evidence: see *Indian Overseas Bank v Svil Agro Pte Ltd and others* [2014] 3 SLR 892 at [32]–[33]; see also O 35 r 1(2) of the Rules of Court (2014 Rev Ed).

80 The non-participation of Mr Ashenafi and Sino Africa did not, by itself, shift the legal or evidential burden of proof. Neither did it impact the standard of proof to be met. It remained for the plaintiffs to prove their claims as asserted, on a balance of probabilities, by adducing the necessary evidence. In this regard, in so far as any fact was admitted by either Mr Ashenafi or Sino Africa in their pleadings, I consider that fact to be undisputed as between the plaintiffs and that party. Where a fact was not admitted, it fell to the plaintiffs to prove that affirmatively, if the burden fell on them to do so.

The Disposed AIHL Shares and the Disposed SWE Shares were not held on trust for Mr Ashenafi

81 The case against Mr Ashenafi and Sino Africa turned, in the main, on their contention that the Disposed AIHL Shares and the Disposed SWE Shares were held by SWT on trust for SWDT and/or Mr Ashenafi (see above at [59(c)] and [71]). Mr Ashenafi would otherwise not be entitled to deal with them for his own benefit or against the interests of SWT, and would be in breach of his fiduciary duties if he did so.

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82 Based on his defence, Mr Ashenafi relied on (a) the Trust Deed; (b) specific to the Disposed AIHL Shares, the Letters of Addition; and (c) specific to the Disposed SWE Shares, the fact that the relevant share certificates stated that SWT held the said shares "on behalf of [SWDT]" (see above at [59(a)], [59(c)] and [62]). In addition, Sino Africa averred that several Certificates of Incumbency for SWE issued by Offshore Incorporations Ltd or Vistra (BVI) Ltd from July 2009 to February 2017 (the "Certificates of Incumbency")[150] stated that SWT was a shareholder "on behalf of [SWDT]" at the relevant date.[151]

83 The plaintiffs submitted that there was insufficient evidence to prove the existence of a trust, save for the Trust Deed.[152] The Trust Deed states that a trust known as SWDT was created,[153] and that SWT was the trustee of that trust while Mr Ashenafi was, what appeared to be, the principal beneficiary.[154] However, neither Mr Ashenafi nor Ms Jocelyn Tan gave evidence on the Trust Deed. Further, even if I accept the Trust Deed as evidence of *a* trust, that does not resolve the question of whether the Disposed AIHL Shares and the Disposed SWE Shares were assets subject to that trust. In fact, the Trust Deed only refers to a sum of S$10 as being subject to the trust at its establishment.[155]

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150 5AB3564–5AB3565, 5AB3567–5AB3568, 5AB3570–5AB3571, 5AB3573–5AB3574, 5AB3608–5AB3610, 5AB3612–5AB3615, 5AB3617–5AB3620, 5AB3622–5AB3625, 5AB3627–5AB3630, 5AB3637–5AB3640, 5AB3642–5AB3645.

151 5DD at para 28.

152 Plaintiffs Submissions at paras 10(a), 98(c).

153 5AB3650.

154 5AB3650–5AB3651.

155 5AB3650.

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84 With respect to the Disposed SWE Shares, Mr Mann testified that the share certificates which purportedly showed that SWT held the Disposed SWE Shares on behalf of SWDT were not the same shares, as identified by their unique share numbers, that had been transferred to Sino Africa.[156] In the absence of share certificates evidencing that the Disposed SWE Shares were held on trust, Mr Ashenafi's and Sino Africa's assertion was unsupported.

85 As for the Certificates of Incumbency, these were inconclusive:

(a) Even though the certificates stated that the shareholding in SWE (BVI) was held on behalf of SWDT, SWT's own *audited* financial statements (for the financial year ended 2013 onwards) recognised SWT as the owner of some shares in SWE (BVI).[157]

(b) There was no evidence as to the accuracy of these certificates. On its face, the certificates stated that the information contained was "to the best of [the certifier's] knowledge and according to the [certifier's] records". There was no evidence of how these certificates came to be issued, particularly how they were prepared and the source documents consulted.

86 With respect to the Disposed AIHL Shares, the only evidence that these shares were held by SWT on trust were the Letters of Addition.[158] These were letters from Mr Ashenafi to SWT as trustee of SWDT stating that Mr Ashenafi was adding some number of shares in AIHL to the trust while concurrently declaring that he was the "legal and beneficial owner" of those shares. Each

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[156] AEIC Mann at paras 28–28(a)(iv).

[157] 4AB2968; 4AB2998; 4AB3035.

[158] 5AB3293, 5AB3296, 5AB3299.

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Letter of Addition was followed up by an acknowledgement by SWT, signed by (apparently) Mr Ashenafi, confirming its acceptance and consent to the addition of the AIHL shares to the trust.[159]

87 The plaintiffs submitted that the Letters of Addition were questionable. They only surfaced after Mr Ashenafi had requested a template for such letters from Dr Ressos in or around the time Mr Ashenafi knew that the Arbitration would be decided in favour of the SGI Creditors.[160] Dr Ressos testified that on or around 15 February 2018, Mr Ashenafi had asked him how assets could be added to a trust after it was formed, to which Dr Ressos explained that this would be by way of letters of addition. Mr Ashenafi then asked and obtained Dr Ressos' advice that assets held on trust by a company would not be available to a liquidator for distribution if the company went into liquidation. During the same call, Mr Ashenafi requested for a template letter of addition, which Dr Ressos provided to Mr Cheng.[161] At that time, Mr Cheng was employed by Mr Ashenafi although he was not a director of SWT (see above at [6]). Dr Ressos clarified that the template he provided closely resembled templates which he created for, and that was provided to, Mr Ashenafi or Mr Cheng sometime in 2014 and 2017.[162]

88 According to Mr Cheng, in or around November 2017, Mr Ashenafi informed him that all assets of SWT belonged to SWDT and that he had found the "original" letters of addition, which included the Letters of Addition, in his safe box. By this time, the Final Award had already been issued and the SGI

159 5AB3294, 5AB3297, 5AB3300.

160 Plaintiffs Submissions at para 98(b).

161 AEIC Ressos at paras 39–39(g).

162 AECI Ressos at paras 39(g)–39(i).

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Creditors had begun taking steps to enforce the same against SWT (see above at [33]–[34]). Mr Cheng deposed that this was the *first* time he had heard of or seen the Letters of Addition. According to him, the Letters of Addition closely resembled the templates provided by Dr Ressos in 2014 and 2017.[163]

89 In spite of the resemblance to templates that Dr Ressos created in 2014 at the earliest, the Letters of Addition were dated between 2008 and 2010.

90 Given the above circumstances, and in the absence of any evidence from Mr Ashenafi, I placed no weight on the Letters of Addition. Mr Ashenafi's claim that the Disposed AIHL Shares were held by SWT on trust for him was therefore unsupported by any evidence.

91 On the contrary, the contemporaneous documentary evidence showed that the Disposed SWE Shares and the Disposed AIHL Shares were owned by SWT.

92 First, the SWE Shares were expressly recognised as assets belonging to SWT in its audited financial statements for the financial years ended 2013,[164] 2014,[165] and 2015,[166] and in its unaudited financial statements for the financial year ended 2016.[167] Similarly, SWT's audited financial statements for the

163 AEIC Cheng at para 50.

164 4AB2961, 4AB2968.

165 4AB2981, 4AB2998.

166 4AB3018, 4AB3035.

167 4AB3051, 4AB3066.

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financial years ended 2010,[168] 2011,[169] 2012,[170] 2013,[171] 2014,[172] 2015,[173] and the unaudited financial statements for the financial year ended 2016[174] consistently recognised the Disposed AIHL Shares as assets of SWT. Mr Ashenafi himself signed off on the audited financial statements for the financial years ended 2012,[175] 2013[176], 2014[177] and 2015,[178] stating that they gave "a true and fair view of the state of affairs of [SWT]".

93 It was only in the unaudited financial statements of the financial year ended 2017 that SWT sought to make adjustments to the financial statements corresponding to the years 2015 and 2016 to, *inter alia*, remove the SWE Shares and the Disposed AIHL Shares from its balance sheet.[179] This set of financial statements were signed off by Dr Ressos on 13 August 2018,[180] *after* the AIHL Sale was completed and the SWE Share Transfer was performed. This was also *after* the Final Award was issued.

[168] 4AB2898, 4AB2906.

[169] 4AB2919, 4AB2927.

[170] 4AB2940, 4AB2948.

[171] 4AB2961, 4AB2969.

[172] 4AB2981, 4AB2998.

[173] 4AB3018, 4AB3035.

[174] 4AB3051, 4AB3066.

[175] 4AB2937.

[176] 4AB2328.

[177] 4AB2977.

[178] 4AB3012–4AB3013.

[179] 5AB3101.

[180] 5AB3082.

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94 Second, the way SWT dealt with the SWE Shares corroborated the fact that SWT was and considered itself the beneficial owner of the Disposed SWE Shares. On or around 27 December 2011, SWT's board of directors unanimously consented to SWT entering a facility agreement with a bank for a loan of US$3.8m, pursuant to which SWT would pledge its legal and *beneficial* interests its shares of SWE (BVI) for the purpose of granting a security interest to the bank.[181] In addition, this approval was followed by SWT granting an equitable mortgage in favour of the said bank over its shares in SWE (BVI) sometime in or around 16 January 2012.[182] Pursuant to cl 4.6(a) of the equitable mortgage agreement, it was expressly stipulated that SWT shall not permit to subsist any trust over the mortgaged shares without the written consent of the bank. This evidenced that at least the mortgaged SWE (BVI) shares were beneficially owned by SWT.

95 Third, as for the Disposed AIHL Shares, SWT had unequivocally warrantied in the SPA at cl 5.1.2 that it was "the legal and beneficial owner of the [Disposed AIHL Shares]".[183] Notably, Mr Ashenafi executed the SPA on behalf of SWT.[184]

96 Fourth, Mr Cheng gave evidence that sometime in or around mid-2012, Mr Ashenafi instructed him that the Disposed AIHL Shares should be "under SWT, and not under [SWDT]" and that [SWDT] "was no longer applicable".[185] As such, irrespective of whether there may have been a trust to begin with, the

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[181] 5AB3168–5AB3170.

[182] 5AB3581–5AB3604.

[183] 6AB4098.

[184] 6AB4105.

[185] AEIC Cheng at para 37, see also para 49.

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evidence suggested that by mid-2012 there was no trust to speak of, and thus, the Disposed AIHL Shares and the Disposed SWE Shares were beneficially owned by SWT at the time of their transfers to CCSEA and Sino Africa respectively.

97 Therefore, there was sufficient evidence to conclude that, on the balance of probabilities, the Disposed AIHL Shares and the Disposed SWE Shares were *not* held by SWT on trust for Mr Ashenafi or SWDT.

98 In the circumstances, the action turned on whether the plaintiffs were able to make out their case on the Undervalue Transactions.

Only the Third Undervalue Transaction was made out

The law on undervalue transactions

99 Sections 224 and 226 of the IRDA state:

> **Transactions at undervalue**
>
> 224.—(1) Subject to this section and sections 226 and 227, where a company is in judicial management or is being wound up, and the company has at the relevant time (as defined in section 226) entered into a transaction with any person at an undervalue, 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 entered into that transaction.
>
> (3) For the purposes of this section and sections 226 and 227, a company enters into a transaction with a person at an undervalue if —
>
> > (*a*) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or
> >
> > (*b*) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in

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> money or money's worth, of the consideration provided by the company.
>
> (4) The Court must not make an order under this section in respect of a transaction at an undervalue if —
>
> (*a*) the company entered into the transaction in good faith and for the purpose of carrying on its business; and
>
> (*b*) at the time the company entered into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.
>
> **Relevant time under sections 224 and 225**
>
> 226.—(1) Subject to this section, the time at which a company enters into a transaction at an undervalue or gives an unfair preference is a relevant time if the transaction is entered into or the preference given —
>
> (*a)* in the case of a transaction at an undervalue — within the period starting 3 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;
>
> …
>
> (2) Where a company enters into a transaction at an undervalue or 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.
>
> (3) Where a transaction is entered into at an undervalue by a company with a person who is connected with the company (otherwise than by reason only of being the company's employee), the requirements under subsection (2) are presumed to be satisfied unless the contrary is shown.
>
> …

100 Sections 224 and 226 of the IRDA replace the previous avoidance regime for undervalue transactions under s 329 of the CA read with s 98 of the

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BA. That said, s 224(3) of the IRDA – which stipulates what a transaction at an undervalue is – is in *pari materia* with:

(a) ss 98(3)(*a*) and 93(3)(*c*) of the BA; and

(b) s 238(4) (undervalue transactions for corporate insolvency), ss 339(3)(*a*) and 339(3)(*c*) (undervalue transactions for personal bankruptcy), and ss 423(1)(*a*) and 423(1)(*c*) (transactions defrauding creditors) of the Insolvency Act 1986 (c 45) (UK).

101 In this regard, the Court of Appeal in *Rothstar Group Ltd v Leow Quek Shiong and other appeals* [2022] 2 SLR 158 ("*Rothstar*") at [23] confirmed that the applicable principles in relation to undervalue transactions remain largely unchanged even after the enactment of the IRDA. To that end, the authorities that analyse the relevant provisions under the BA and the CA remain instructive.

102 For a transaction to come within s 224 of the IRDA, the following elements must be satisfied: see *Mercator & Noordstar NV v Velstra Pte Ltd (in liquidation)* [2003] 4 SLR(R) 667 at [21] in the context of s 98(3) of the BA:

(a) There must have been a transaction.

(b) The transaction must have taken place within the relevant period.

(c) It must be shown that the transaction was at an undervalue.

(d) The company under liquidation was insolvent at the time of the transaction.

A transaction would also fall within the reach of s 224 of the IRDA if the company became insolvent in consequence of the transaction: s 226(2)(*b*) of the IRDA.

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103 Section 224(3)(*b*) of the IRDA expressly requires a comparison of value between the consideration provided and the consideration received by the (insolvent) company: *Rothstar* at [24].

The SWE Share Transfer was a transaction at an undervalue

104 It was not disputed that the SWE Share Transfer was for no consideration (see above at [61] and [71]). This was even though SWT's financial statements for the year ended 2013 valued the SWE Shares at US$5,580,878,[186] which appeared to remain unchanged throughout the period SWT owned the shares.[187] This meant that the value of the Disposed SWE Shares amounted to US$5,055,318.23. Absent any other valuation proffered, and given that Mr Ashenafi himself signed off on the audited financial statements stating that they gave "a true and fair view of the state of affairs of [SWT]" (see above at [92]), this was the best evidence of the value of the Disposed SWE Shares.

105 Mr Ashenafi's and Sino Africa's defence that SWT was not entitled to receive any consideration as the Disposed SWE Shares were held on trust was not made out, given my finding that the said shares were beneficially owned by SWT.

106 The SWE Share Transfer was a transaction that took place on 28 April 2017 (see above at [27]), which was within three years of the winding up of SWT, *ie*, 21 June 2019 (see above at [37]).

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[186] 4AB2961, 4AB2968.

[187] 4AB2998, 4AB3034, 4AB3066.

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107 Given that Mr Ashenafi was a director of SWT at the material time and that Sino Africa was a company wholly and/or beneficially owned and/or controlled by him (see above at [9] and [59(b)]), a presumption arose by virtue of s 226(3) of the IRDA (see above at [99]) that SWT was insolvent or became insolvent as a consequence of the SWE Share Transfer.

108 That presumption was not rebutted on the evidence; on the contrary, the evidence suggested that SWT was insolvent at the material time. Hence, even if the presumption did not apply, I would have found that SWT was unable to pay its debts, within the meaning of s 125(2) of the IRDA, at the time of the SWE Share Transfer (see below at [240]–[248]).

109 Pulling the threads together, I found that the SWE Share Transfer was a transaction at an undervalue under s 224(1) of the IRDA.

The AIHL Sale was not a transaction at an undervalue

110 The analysis with respect to the AIHL Sale was more involved, not least because of the plaintiffs' pleaded case. According to the plaintiffs, the AIHL Sale was a transaction at an undervalue because the AIHL Share Consideration was "arithmetically consistent" with the Ambo Min Sale,[188] and that was itself a transaction at an undervalue on account of an alleged adjustment to AIHL's accounts for the financial year ended 31 March 2015 to reflect a small loss, and depress the valuation of Ambo Min.[189] That pleaded case was flawed and unsustainable because:

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[188] SOC at para 21.2.1.

[189] SOC at paras 21.2.3(a)–21.2.3(c).

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(a) There was no evidence that the consideration for the Ambo Min Sale was based on AIHL's or Ambo Min's financial statements or projected performance. The documentary evidence showed that PPESA proposed the price of US$19,782,807 (*ie*, the Ambo Min Share Consideration),[190] which SABMiller Group, through AIHL, accepted (see above at [17]).[191] There was no evidence of any negotiation or how PPESA arrived at the proposed price.

(b) Critically, there was no evidence that the Ambo Min Sale was at an undervalue. No valuation of Ambo Min was carried out to facilitate the Ambo Min Sale. Further, the plaintiffs' expert was *not* asked to carry out a valuation to determine the value of Ambo Min at the material time.

(c) Subsequent to the completion of Project Savannah, MoPE reiterated the government's desire to dispose of its stake in Ambo Min at the same price previously agreed, *ie*, the Ambo Min Share Consideration.[192] The shareholders of CCBA, which included SABMiller Group, appeared to have agreed to this price because it was not significantly different from their own internal valuation of Ambo Min.[193] However, that valuation was not based on Ambo Min's finances and operations in isolation, but rather its value in the context of and relative to other entities or businesses involved in Project Savannah.[194] Indeed, the SABMiller Group Investment Memo noted that the financial performance of Ambo Min had deteriorated since the earlier agreement

190 8AB5493; 6AB3297.

191 8AB5491.

192 6AB3927, 6AB3930.

193 6AB3930.

194 6AB3930; AEIC Marais at para 20.

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on the Ambo Min Share Consideration in June 2015,[195] but the CCBA shareholders nonetheless agreed to complete the sale at the same price.

(d) The alleged "adjustment" to AIHL's accounts was entirely irrelevant to the Ambo Min Share Consideration as:

(i) the "adjustment" in *AIHL's* accounts did not and could not affect the valuation of *Ambo Min*;

(ii) the Ambo Min Share Consideration was based on the price proposed by PPESA, which concerned the price of Ambo Min's shares, and not AIHL's shares; and

(iii) the Ambo Min Share Consideration was based on the price proposed by PPESA in *May* 2015, which was agreed *prior to* the "adjustment" made to the AIHL financial statements that the independent auditors signed off on in *October* 2015.[196]

(e) In any event, even if the Ambo Min Sale was at an undervalue, it did not necessarily follow that that the AIHL Sale would also be at an undervalue given that (i) the financial position of Ambo Min (and therefore the value of AIHL) may have deteriorated by 23 March 2017; and (ii) the material issue was the value of *AIHL* as at 23 March 2017.

111 For completeness, there was also no evidence that the "adjustment" to AIHL's accounts was improper or made with a view to depress the Ambo Min Share Consideration:

195 6AB3930.

196 6AB4448.

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(a) The plaintiffs' primary basis was that AIHL reported profits in 2014 and 2016, and the recorded loss of US$53,510 in 2015 was therefore inexplicable.[197] That was plainly not, by itself, a sufficient ground to support their assertion.

(b) On the contrary, the evidence showed that from AIHL's incorporation in 2009 to 2020, AIHL reported losses in nine out of 12 years.[198] The evidence also established that while AIHL recognised profits when Ambo Min declared dividends, AIHL did not receive payment of those dividends due to Ethiopian foreign exchange problems.[199] AIHL's losses for the financial year ended 2015 ("FY2015") were therefore not inconsistent with AIHL's historical performance. Further, AIHL's profit of US$3m for the financial year ended 2014 ("FY2014") was on account of a reversal of a previously recorded impairment loss, and not on account of increased revenue.[200]

(c) The relevant AIHL accounts were independently audited, with the auditors opining that it gave "a true and fair view of the financial position of [SWT]".[201]

(d) Mr Mann referred to an e-mail from Mr Ashenafi to Mr Cheng dated 25 August 2015,[202] wherein the former stated that while AIHL had

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197 AEIC Mann at paras 47(d)(i)–47(d)(vi).

198 6D2 at pp 1–2.

199 6AB3947; 6AB4130–6AB4131; 10AB7022–10AB7023; 10AB7025–10AB7030; 10AB7038–10AB7039; Transcript (25 September 2024) at p 138 line 13 to p 144 line 6.

200 6AB4396, 6AB4406.

201 6AB4448.

202 AEIC Mann at para 47(d)(vii).

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made a profit of US$4m for 2015, an accounting adjustment had to be made which showed a small loss.[203] However, there was not a shred of evidence to corroborate this assertion. As mentioned, the financial statements for that year were independently audited. This assertion was also not supported by the historical financial results of AIHL, which never reported profits as high as that since its incorporation, and even all the way till 2020. The e-mail was therefore insufficient evidence to support the conclusion that the "adjustment" was improper.

112 Further, while the plaintiffs pleaded that the Disposed AIHL Shares were worth "*significantly more*" than the AIHL Share Consideration (*ie*, US$10,796,784),[204] the pleadings were deficient as the plaintiffs did not plead what the fair value of the Disposed AIHL Shares was as at 23 March 2017.

The value of the Disposed AIHL Shares

113 Unsurprisingly, at the trial, the plaintiffs' abandoned their assertions with respect to the Ambo Min Sale and focused on the value of the Disposed AIHL Shares as at the date of the SPA, *ie*, 23 March 2017.

114 The plaintiffs and CCSEA led evidence from two experts, who gave widely different valuations of the Disposed AIHL Shares:

(a) the plaintiffs' expert, Mr Ong Woon Peng ("Mr Ong"), in his Valuation Report of 20 March 2024 ("Mr Ong's Report"), valued the

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203 8AB5550.

204 SOC at para 21.2.4.

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Disposed AIHL Shares in the range of US$15.605m to US$16.57m;[205] which he later amended to US$15,110,000 and US$16,006,000,[206] while

(b) CCSEA's expert, Mr Andrew Ooi Lih De ("Mr Ooi"), in his Expert Report of 29 February 2024 ("Mr Ooi's Report"), valued the Disposed AIHL Shares in the range of USD1.1m to USD1.9m.[207]

115 Both experts agreed that in valuing the Disposed AIHL Shares, the critical question was the value of Ambo Min:[208]

(a) AIHL was an investment holding company, with no operations of its own. AIHL's main asset was its 100% shareholding in Ambo Min. The value of the Disposed AIHL Shares would therefore depend on the value of Ambo Min.[209]

(b) Once the value of Ambo Min was determined, both experts adopted the same valuation approach, *ie*, the asset approach, applying the summation method or the adjusted book value method, to determine the value of AIHL, and therefore the Disposed AIHL Shares.[210]

The discussion below therefore focuses on the valuation of Ambo Min as at 23 March 2017.

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205 AEIC Ong at para 7; Valuation Report by Ong Woon Pheng dated 20 March 2024 ("Expert Report of Ong") at p 20.

206 AEIC Ong at para 9, pp 1125, 1113.

207 Expert Report of Andew Ooi dated 29 February 2024 ("Expert Report of Ooi") at para 6.1.

208 Transcript (15 October 2024) at p 14 lines 8–16.

209 Expert Report of Ooi at para 4.6(a); Expert Report of Ong at p 11.

210 Expert Report of Ooi at para 4.6(d); Expert Report of Ong at p 16; Transcript (15 October 2024) at p 15 lines 7–13.

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116 For completeness, I highlight that in the financial statements of AIHL for the financial year ended 31 March 2017, the 100% shareholding in Ambo Min carried a book value of US$40,782,807.[211] However, both experts agreed that the book value may not represent the true value of Ambo Min (and therefore the Disposed AIHL Shares), and an independent valuation was necessary.[212]

117 I now address the main differences between the valuations advanced by the experts.

(1) The appropriate valuation approach: market value versus equitable value

118 One of the main disagreements was whether the appropriate value of the AIHL Shares was its equitable value (used by Mr Ong) or market value (used by Mr Ooi). Both experts agreed that the correct approach was critical "because a basis of value may influence or dictate the selection of methods, inputs, assumptions and ultimate value".[213]

119 The International Valuation Standards (the "IVS"), relied on by both experts,[214] defined the terms as follows:

(a) Equitable Value: "Equitable Value is the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties. Equitable Value requires the assessment of the price that is fair between

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[211] 7AB4587.

[212] Transcript (15 October 2024) p 14 line 17 to p 15 line 6.

[213] Experts' List of Agreed and Non-Agreed Issues dated 17 September 2024 at s/n 2.

[214] Transcript (15 October 2024) at p 15 line 14 to p 16 line 12.

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two specific, identified parties considering the respective advantages or disadvantages that each will gain from the transaction."[215]

(b) Market Value: "Market Value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."[216]

120 One critical difference between the two was the application of discounts. According to Mr Ooi, the market value of the Disposed AIHL Shares must consider two disamenities:

(a) Given that AIHL was a private company (whose shares cannot be freely sold or traded on an exchange) and that the Disposed AIHL Shares represented a minority stake, those shares lacked marketability.[217] Mr Ooi therefore applied a discount for lack of marketability ("DLOM") of 16%, based on data he presented in his report.[218]

(b) Given that the Disposed AIHL Shares represented a minority interest in AIHL, Mr Ooi applied a discount for lack of control ("DLOC") of 18%.[219] Mr Ooi appeared to be relying on the same reason for both discounts, *ie*, the minority stake in AIHL, but nothing turned on this and this approach went unchallenged.

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215 Expert Report of Ong at p 1019.

216 Expert Report of Ong at p 1016; Expert Report of Ooi at p 119.

217 Expert Report of Ooi at para 7.93(a); Response Report of Andrew Ooi dated 28 June 2024 ("Response Report of Ooi") at para 5.5.

218 Expert Report of Ooi at para 7.93(b).

219 Expert Report of Ooi at para 7.93(c).

121 Mr Ong did not apply any discounts given that he was assessing the equitable value of the AIHL Shares,[220] where marketability and control were already accounted for by virtue of the purchaser being CCSEA, the majority shareholder of AIHL. Nonetheless, he accepted that if he were assessing market value, he would apply a DLOC of 18% to the value of the Disposed AIHL Shares – as Mr Ooi did – irrespective of the *method* of valuation used,[221] and a DLOM of 20% to the value of *Ambo Min* only when using the discounted cash flow method ("DCFM") to calculate the value of Ambo Min.[222] He also testified that he would apply a DLOM of 20%–30% to the value of the Disposed AIHL Shares when employing the prior transaction method ("PTM"), on the assumption that such a discount was not priced in the Ambo Min Sale.[223] He accepted the fact that Ambo Min could not pay dividends upwards to AIHL (due to foreign exchange problems in Ethiopia) would make the Disposed AIHL Shares less marketable, which would increase the DLOM closer to 30%.[224] Mr Ooi's DLOM of 16% did not take this factor into account.[225]

122 Mr Ong however opined that the equitable value was the relevant value because:

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220 Expert Report of Ong at p 17; Rebuttal Report of Ong Woon Pheng dated 28 June 2024 ("Rebuttal Report of Ong") at para 23.

221 P1 at pp 3–4.

222 P1 at p 3.

223 Transcript (15 October 2024) at p 101 line 22 to p 109 line 16.

224 Transcript (15 October 2024) at p 122 to p 123 line 3.

225 Expert Report of Ooi at para 7.93(a).

(a) he had been instructed that the issue was whether the AIHL Share Consideration was an undervaluation for the Disposed AIHL Shares;[226]

(b) he had been instructed to draw reference to s 98 of the BA (read with s 329 of the CA) relating to transactions at an undervalue;[227]

(c) from these instructions and his understanding of s 98 of the BA, the relevant context "should be between [SWT] and [CCSEA], not any market participant";[228] and

(d) "[g]iven that the parties to the transaction … are identified, the appropriate basis of value … is equitable value."[229]

123 In short, Mr Ong considered the equitable value to be appropriate as the relevant transaction dealt with an identified purchaser, *ie*, CCSEA, which was an existing shareholder of AIHL and which would gain certain advantages in becoming the sole shareholder of Ambo Min. When asked the basis for his interpretation of s 98 of the BA, he clarified that it was from his plain reading of the provision and not from any prior experience or legal advice.[230]

124 In my view, the appropriate value was the market value (as adopted by Mr Ooi), and the application of equitable value was plainly misconceived.

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226 Rebuttal Report of Ong at para 10.

227 Rebuttal Report of Ong at para 11.

228 Rebuttal Report of Ong at para 12.

229 Rebuttal Report of Ong at para 13.

230 Transcript (15 October 2024) at p 22 lines 9–17.

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125 First, the use of equitable value as the measure would not be consistent with the plain language of s 224(3)(*b*) of the IRDA (see above at [99] and [103]). The provision is concerned with a comparison between the value of the AIHL Shares against what SWT received (see below at [215]), and *not* the value of the AIHL Shares "that reflects the interests of" CCSEA. How CCSEA may have *subjectively* perceived or assessed the value it was giving or receiving was irrelevant.

126 Second, such an interpretation was consistent with the purpose of the provisions governing the avoidance of antecedent transactions in an insolvency, including s 224(3) of the IRDA, which is to "protect the general body of creditors against a diminution of the assets available to them by a transaction which confers an unfair or improper advantage on the other party": *Rothstar* at [1], citing *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten gen ed) (Sweet & Maxwell, 5th Ed, 2019) ("*Goode on Principles of Corporate Insolvency Law*") at para 13-03.

127 Principally, the question must be: in comparison to *what* is the relevant asset undervalued? Section 224(2) of the IRDA empowers to court "to make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction". Section 224 protects creditors of the insolvent company by enabling the court to reverse an undervalue transaction, or grant other relief, so that the full value of the asset will be available for distribution to all creditors. The provision therefore assumes that the subject asset could have fetched a significantly higher price had it been offered to the world at large (and therefore to other interested buyers). That engages the market value of the asset.

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128 Third, Mr Ong's argument was illogical. On his own case, the AIHL Share Consideration necessarily reflected the respective interests of SWT and CCSEA and the advantage they will each gain from the transaction. On that premise, Mr Ong was effectively arguing that the AIHL Sale must have been an undervalue had CCSEA paid less than what the Disposed AIHL Shares might have been worth *in CCSEA's own internal or subjective assessment*, even if that price was higher than what others might have been willing to pay. But CCSEA cannot be compelled to purchase the Disposed AIHL Shares at a price higher than it had agreed to pay. If the sale was then set aside or had not taken place, how would SWT's creditors be better off?

129 Indeed, in the plaintiffs' closing submissions, they accepted that:[231]

(a) market participants would regard the Disposed AIHL Shares as being less attractive than to CCSEA because they would be a minority shareholder, and would not be able to influence key decisions, have access to information, or "may risk being oppressed" by CCSEA;

(b) a sale to market participants would fetch a lower price as compared to what CCSEA, as a majority shareholder, would pay; and

(c) there was "no such market in reality for SWT to sell its shares to any other third party at the material time".

These arguments undermined the plaintiffs' case that the AIHL Sale was at an undervalue.

[231] Plaintiffs Submissions at paras 41, 44, 46.

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130 Fourth, the necessary consequence of Mr Ong's argument was that for the purposes of determining whether a transaction had been entered at an undervalue, the value of the consideration offered by the insolvent party may be *different* depending on the identity of the counterparty. That would not only give rise to uncertainty as to whether a transaction may be set aside in the future, it would also lead to unfair outcomes, *eg*, where the (insolvent) company had sold similar assets to two different parties, but only one of the transactions was deemed an undervalue.

131 Fifthly, that the market value was the appropriate value was amply supported by authority.

132 The learned authors of *Goode on Principles of Corporate Insolvency Law* at para 13-26 state:

> The question to be determined in each case is whether the value of the consideration given by the company significantly exceeds the value received by the company. *This has to be assessed from the viewpoint of the company, not the other party.* So while an asset of the company may be disposed of for full value, the sale may nevertheless be a transaction at an undervalue if its effect is to reduce the value of the remaining assets held by the company and this effect was part of the bargain. In other words, the consideration provided by the company is considered to include any bargained-for detriment it suffers to its remaining assets or business, for example, because of a "ransom" power it confers on the other party. *Conversely, the fact that an asset has a special value to the purchaser—for example, for where it is a painting which completes his collection—is to be ignored in determining whether the company has parted with it at an undervalue; what has to be compared (leaving aside questions of detriment) is the consideration received by the company and the market value of the asset rather than its ransom value.* [emphasis added]

133 Further, the learned authors of Rebecca Parry *et al*, *Transaction Avoidance in Insolvencies* (Oxford University Press, 3rd Ed, 2018) at para 4.96 state:

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> It is difficult to argue that it is a transaction at undervalue for a debtor to sell an asset to a person who has a special reason for purchasing that asset if the price paid is not greater than the market price. *The value given and received under a transaction is to be assessed primarily from the perspective of the debtor and so it will not normally be of importance that the purchaser is acquiring the asset, for example, to complete a set or for sentimental value.* [emphasis added]

134 These remarks are consistent with the approach laid down by the Court of Appeal in *Rothstar* at [25]: the comparative exercise must be undertaken *from the perspective of the insolvent company* and the material comparison is between the value received by the company and the value provided by the company, not the value received or provided by any other party.

135 That the correct approach is the determination of the market value of the subject asset has been adopted in numerous cases: see, for example, *Parakou Shipping Pte Ltd (in liquidation) v Liu Cheng Chan* [2017] SGHC 15 ("*Parakou*") at [97] and [99]; *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 WLR 143 at [30]; *Re Brabon, Treharne v Brabon* [2001] BCLC 11 at 38; *Ailyan and anor v Smith and ors* [2010] EWHC 24 (Ch) at [52] and [69]; and *Stanley and anor v TMK Finance Ltd and anor* [2010] EWHC 3349 (Ch) at [124].

136 Accordingly, when valuing the Disposed AIHL Shares, the correct inquiry was what they were worth to SWT, and not what they were worth to CCSEA. This negated the application of the equitable value.

137 In the circumstances, I rejected the valuation advanced in Mr Ong's Report as he had adopted the wrong approach.

138 Nonetheless, by a letter to the court dated 10 October 2024 ("P1"), the plaintiffs' solicitors forwarded a written memorandum issued by Mr Ong where

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he attempted to calculate the market value of the Disposed AIHL Shares. I shall address the contents of P1 below.

(2) The appropriate method of valuation

139 The other main difference was the *method* of valuation the experts adopted.

140 Mr Ong adopted the "market approach"[232] which, according to the IVS, "provides an indication of value by comparing the asset with identical or comparable (that is similar) assets for which price information is available",[233] *eg*, by comparing that asset with similar assets that have been (recently) sold. In this case, Mr Ong adopted the PTM: he ascertained certain financial ratios using the value of Ambo Min as determined by the Ambo Min Sale, and then applied those ratios to Ambo Min as at March 2017, after making certain adjustments to account for the change in the financial position of Ambo Min between the Ambo Min Sale and the AIHL Sale.[234]

141 Mr Ooi adopted the "income approach"[235] which, according to the IVS, "provides an indication of value by converting future cash flow to a single current value. … [T]he value of an asset is determined by reference to the value of income, cash flow or costs savings generated by the assets."[236] In this regard, Mr Ooi adopted the DCFM,[237] through which the forecasted cash flow is

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232 Expert Report of Ong at p 16.

233 Expert Report of Ong at p 1028; see also Expert Report of Ooi at para 4.4(b).

234 Expert Report of Ong at pp 40–44.

235 Expert Report of Ooi at para 4.6(b).

236 Expert Report of Ong at p 1043; see also Expert Report of Ooi at para 4.4(a).

237 Expert Report of Ooi at para 4.6(b).

discounted back to the relevant valuation date, resulting in a present value of the asset.[238] Mr Ooi also supplemented his valuation with the "market approach", using the Guideline Public Company Method ("GPCM"),[239] which utilises information on transactions involving assets that are the same or similar to the subject asset to arrive at an indication of value.[240] He did so by ascertaining certain financial ratios against a list of guideline public companies that operate within the beverage industry in Africa, making appropriate adjustments and then applying those to Ambo Min.[241]

142 The different methods had their advantages and disadvantages. In short, the PTM was premised on the Ambo Min Sale reflecting a fair value of Ambo Min, while the DCFM turned on the reasonableness of Ambo Min's forecast of its business operations and therefore involved some judgment on the part of Ambo Min's management.

(A) PTM

143 I first deal with Mr Ong's reliance on the PTM. The IVS provides useful guidance on how to apply the PTM:[242]

> 30.7 A valuer should choose comparable transactions within the following context:
>
> (a) evidence of several transactions is generally preferrable to a single transaction or event,
>
> (b) evidence from transactions of very similar assets (ideally identical) provides a better indication of value than assets where the transaction prices require significant adjustments,

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238 Expert Report of Ong at p 1035.

239 Expert Report of Ooi at para 4.6(b).

240 Expert Report of Ong at p 1029.

241 Expert Report of Ooi at paras 7.75–7.82.

242 Expert Report of Ong at pp 1030–1031.

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> (c) transactions that happen closer to the valuation date are more representative of the market at that date than older/dated transactions, particularly in volatile markets,
>
> (d) for most bases of value, the transactions should be "arm's length" between unrelated parties,
>
> (e) sufficient information on the transaction should be available to allow the valuer to develop a reasonable understanding of the comparable asset and assess the valuation metrics/comparable evidence,
>
> (f) information on the comparable transactions should be from a reliable and trusted source, and
>
> (g) actual transactions provide better valuation evidence than intended transactions.
>
> [emphasis in original omitted]

144 In Mr Ong's Report, he stated:[243]

> The [PTM] … was applied because an offer for 33% interest in [Ambo Min] was made to the Ethiopian government (MoPE) in June 2015 through [AIHL]. Given this transaction involved the local government and was initiated and approved by CCSEA (where [SWT] did not participate in this transaction, hence was diluted from 25% to 16.75%), this valuation method should produce a strong indication of value consistent with the selected basis of value i.e. equitable value.

145 In Mr Ong's Rebuttal Report dated 28 June 2024 ("Mr Ong's Rebuttal Report"), he reiterated:[244]

> As I have explained in 'Section C. Appropriate Basis of Value' above, the appropriate basis of value is equitable value, not market value. In which case, … the PTM should be applied.

146 In other words, Mr Ong's use of the PTM was premised on his position that it was appropriate to determine the *equitable value* of the AIHL Shares, which approach I have rejected.

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[243] Expert Report of Ong at p 16.

[244] Rebuttal Report of Ong at para 31.

147 Mr Ong also asserted that the Ambo Min Sale was an appropriate prior transaction as:

(a) it involved Ambo Min shares;

(b) the Ambo Min Sale was a transaction with the Ethiopian government, a party not related to both CCSEA and SWT, and so was an arms-length transaction;[245] and

(c) the Ambo Min Share Consideration was agreed just two years before the AIHL Sale.[246]

148 But Mr Ong's reliance on the Ambo Min Sale was highly problematic.

149 First, there was no evidence as to how the Ambo Min Share Consideration was arrived at, particularly whether the parties negotiated the price or how that price was determined (see above at [110(a)]).

150 What was evident was that the CCBA shareholders were incentivised to buy out MoPE's interests as part of the plan under Project Savannah and to secure the rights to the Ambo brand for TCCC (see above at [16]).

151 The Ambo Min Share Consideration of US$19,782,807 for a 33% stake of Ambo Min gave Ambo Min an implied equity value of US$59,947,900. According to the SABMiller Group Investment Memo, the parties to Project Savannah had valued Ambo Min at US$70,191,793,[247] which was derived by

245 Rebuttal Report of Ong at para 36; Transcript (15 October 2024) at p 173 line 24 to p 174 line 11.

246 Rebuttal Report of Ong at para 39.

247 6AB3930.

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applying an unknown multiple to Ambo Min's EBITDA for the financial year ended 2014 (see above at [12]).[248] Mr Marais further explained that if CCSEA bought the Disposed AIHL Shares at a price that departed significantly from how Ambo Min was valued in the context of Project Savannah, the other merger parties might have reopened commercial points in the merger.[249]

152 Second, the critical issue was what a willing buyer, in an arm's length transaction acting knowledgeably, prudently and without compulsion, would pay for the Disposed AIHL Shares.[250] As Mr Ong acknowledged,[251] such a buyer would not simply accept, or treat as determinative, the Ambo Min Share Consideration as evidencing the true value of Ambo Min in 2015. Indeed, this was because:

(a) There was no information as to how the Ambo Min Share Consideration was determined (see above at [110(a)]).[252]

(b) Importantly, the Ambo Min Sale was a purchase of shares in a business in Ethiopia from the Ethiopian *government*, and that may not reflect a deal conducted at arm's length. The facts set out above suggested that there was little, if any, negotiation. Using the PTM suggested that an ordinary seller would have been in the same bargaining position as the Ethiopian government, which was unlikely.

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248 AEIC Marais at para 13.

249 Transcript (8 October 2024) at p 75 line 25 to p 77 line 16.

250 Transcript (16 October 2024) at p 38 lines 9–14, p 42 line 12 to p 43 line 11.

251 Transcript (16 October 2024) at p 39 line 21 to p 40 line 2.

252 Transcript (15 October 2024) at p 92 lines 13–20, p 93 lines 18–22, p 94 line 15, p 131 lines 4–21, p 134 lines 12–21; Transcript (16 October 2024) at p 39 lines 13–20.

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(c) The Ambo Min Share Consideration likely reflected the specific interests of the parties to that deal, given CCBA's shareholders' interests in securing a 100% stake in Ambo Min as part of the plan under Project Savannah by buying out MoPE (see above at [17]).

(d) The SABMiller Group Investment Memo highlighted that Ambo Min's profitability had deteriorated from the time the Ambo Min Share Consideration was agreed (in or around June 2015) to the time of the memo in July 2016.[253] CCBA's shareholders decided, however, to maintain the earlier price despite this deterioration. This further suggested that the deal was not based, or not based entirely, on objective market values.

153 The use of PTM in this instance therefore went against the guidance highlighted in the IVS (see above at [143]) because (a) there was only a single transaction, *ie*, the Ambo Min Sale; (b) there was no evidence that the Ambo Min Sale was at "arm's length"; and (c) there was insufficient information on the Ambo Min Sale available to allow the valuer to develop a reasonable understanding of it and assess the valuation metrics.

154 In response to these deficiencies, Mr Ong testified that there was a "presumption" that the Ambo Min Sale was done at market value.[254] I rejected that. Mr Ong did not provide any basis for such a "presumption", and there was no reason for such a presumption to exist. Mr Ong's evidence only underscored his blinkered approach in carrying out his valuation.

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253 6AB3930.

254 Transcript (15 October 2024) at p 130 line 21 to p 131 line 1.

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155 For completeness, I deal with CCSEA's argument that the Ambo Min Sale did not reflect a transaction at arm's length because it had been made under compulsion.[255] It referred to the SABMiller Group Investment Memo, wherein it was stated that MoPE was demanding the transaction be executed as a matter of urgency and was threatening to sell its minority stake in Ambo Min to a third party, effectively ignoring any pre-emption rights that AIHL had.[256] I did not accept that argument. According to the SABMiller Group Investment Memo, the "threat" was made by the Ethiopian government in 2016, after the completion of Project Savannah. As noted, the deal was stalled because of a restructuring within the Ethiopian government (see above at [17]). After the restructuring, the Ethiopian government allegedly pressed for the deal to be completed urgently. However, this was not relevant as (a) the Ambo Min Share Consideration was determined in mid-2015, and there was no suggestion that the price was agreed to under compulsion; and (b) the SABMiller Group Investment Memo suggested that the stakeholders of Project Savannah (or the CCBA shareholders) agreed to proceed with the sale as the Ambo Min Share Consideration was acceptable to them. As noted, CCSEA did not want to reopen any commercial points with respect to the merger (see above at [151]).

156 Nonetheless, the (alleged) threat was consistent with my finding above as to the special position of the Ethiopian government (see above at [152(b)]).

157 Separately, Mr Ong's calculation of Ambo Min's value using the PTM suffered serious errors.

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[255] 6th Defendant's Closing Submissions dated 8 November 2024 ("CCSEA Submissions") at paras 95, 97.

[256] 6AB3927.

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158 Without intending to over-simplify his methodology, Mr Ong adopted the following approach:[257]

(a) He first derived the enterprise value ("EV") (*ie*, the value of the business) of Ambo Min based on its share price in the Ambo Min Sale.

(b) He then derived an "implied EV/OCF multiple" of 31.44 (based on Ambo Min's operating cash flow, or "OCF", for FY2015) and 28.95 (based on an average of Ambo Min's OCF for FY2014 and FY2015). In other words, he used Ambo Min's cash flow as a proxy for its financial performance.

(c) To determine the OCF from 1 April 2016 to 31 March 2017, Mr Ong estimated the OCF from 1 April 2016 to 31 December 2016 (a period of nine months) and then extrapolated that figure to 12 months. This gave the "annualised 31 Dec FY2016 OCF". Mr Ong also derived the average of the annualised 31 Dec FY2016 OCF and the OCF for the financial year ending 31 March 2016.

(d) He then applied the implied EV/OCF multiples to Ambo Min's two OCF figures to arrive at a range of Ambo Min's EV, and subsequently with some further adjustments, a range of Ambo Min's equity values.

(e) He carried out the same exercise, using Ambo Min's revenue figures instead of OCF, and derived an implied EV/Revenue multiple of 3.40 (based on Ambo Min's FY2015 revenue) and 3.64 (based on the average of Ambo Min's FY2014 and FY2015 revenue), and arrived at a different range of equity values.

[257] Expert Report of Ong at pp 40–44; AEIC Ong at pp 1132–1133.

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(f) He applied an 80:20 weighting in favour of the equity values based on OCF as compared to revenue.

(g) He arrived at an equity value for Ambo Min in the range of US$88,046,144 to US$93,397,194.

(h) It was from this equity value range that he determined the Disposed AIHL Shares, applying the summation method, was valued in the range of US$15,109,821 to US$16,006,122 (without applying any DLOC and DLOM).

159 In short, the valuation was premised on:

(a) the Ambo Min Sale (and the Ambo Min Share Consideration) reflecting a fair value for Ambo Min;

(b) the OCF of Ambo Min as calculated by Mr Ong being an accurate proxy for its financial performance; and

(c) there having been no change in Ambo Min's financial performance from 31 December 2016 to 23 March 2017.

160 This methodology was fundamentally flawed for several reasons.

161 First, for the reasons above, it assumed without basis that the Ambo Min Sale reflected a fair value for Ambo Min. Mr Ong simply relied on his "presumption", which I have rejected. The very premise of his valuation was therefore unsound.

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162 Second, the use of OCF as a proxy for Ambo Min's financial performance was problematic. As Mr Ooi pointed out,[258] and which Mr Ong accepted,[259] the EV/OCF multiple was not a commonly used multiple for valuations. It was not even listed in the IVS as a multiple used to value companies.[260] This was because OCF was highly subjective and:[261]

> … is influenced by changes in net working capital items like accounts receivable, accounts payable, and inventory. Accordingly, the OCF may fluctuate significantly, depending on the changes in net working capital in that particular financial year.

Mr Ooi explained this in detail in his Response Report dated 28 June 2024 ("Mr Ooi's Response Report"),[262] which was not challenged.

163 Mr Ooi's criticisms were borne out in Ambo Min's financial statements. The higher OCF of Ambo Min in 2017 was not on account of better financial performance; instead, the increased cash appeared to have arisen from (a) new borrowings in the form of higher trade payables; and (b) the collection of past trade receivables.[263] These observations were unchallenged by Mr Ong, who accepted that applications of the OCF multiple were prone to errors such as these.[264]

164 Third, there was no basis for Mr Ong to determine the OCF from 1 April 2016 to 31 March 2017 by estimating the OCF from 1 April 2016 to

[258] Response Report of Ooi at para 4.10.

[259] Transcript (15 October 2024) at p 216 line 23 to p 217 line 8.

[260] Response Report of Ooi at para 4.11.

[261] Response Report of Ooi at para 4.13.

[262] Response Report of Ooi at paras 4.14–4.16.

[263] Transcript (15 October 2024) at p 153 line 12 to p 154 line 6.

[264] Transcript (15 October 2024) at p 156 lines 3–16.

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31 December 2016 and then annualising that figure. Ambo Min's management accounts contained data for the OCF from 1 January 2017 to 31 March 2017,[265] but that was ignored by Mr Ong without good reason. This made a significant difference in the calculations: while Mr Ong's nine-month OCF from 1 April 2016 to 31 December 2016 was a positive ETB 55.6m, the three-month OCF from 1 January 2017 to 31 March 2017 was a negative ETB 17.4m, resulting in a twelve-month OCF from 1 April 2016 to 31 March 2017 of ETB 38.2m.[266] This was significantly lower than Mr Ong's estimated figure of ETB 74.1m.[267]

165 Fourth, Mr Ong gave no justification for applying an 80:20 weighting in favour of the equity value based on OCF as compared to revenue. It was an arbitrary computation.

166 Fifth, the flaw in Mr Ong's methodology was exposed by one simple fact. The equity value of Ambo Min based on the Ambo Min Sale was approximately US$59m, and using his method, Mr Ong calculated Ambo Min's equity value as at 23 March 2017 to be in the range of about US$88m to US$93m. In other words, according to Mr Ong, Ambo Min's financial position had significantly improved after the Ambo Min Sale. But Ambo Min's financial statements painted a completely different picture. As Mr Ooi pointed out,[268] Ambo Min's financial performance (*ie*, earnings and profitability margins) had significantly deteriorated from the FY2014 to 31 December 2016. For example:

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265 8AB5967.

266 Response Report of Ooi at para 4.22.

267 AEIC Ong at p 1132.

268 Response Report of Ooi at para 4.5.

(a) Ambo Min had swung from a positive EBITDA of ETB 43.5m and EBITDA margin of 14.2% in FY2014 to a negative EBITDA of ETB 22.9m and negative EBITDA margin of 10.8% in the nine-month period ended 31 December 2016.

(b) Similarly, Ambo Min had swung from a positive net income of ETB 1.7m and net income margin of 0.5% in FY2014 to a negative net income of ETB 177.7m and negative net income margin of 84.2% in the nine-month period ended 31 December 2016.

This significant decline was observable in Mr Ong's own computations, particularly in relation to the normalised EBITDA and Earnings Before Interest and Taxes ("EBIT") margins, which he had prepared for his DCFM computations.[269]

167 In fact, Mr Ooi subjected the PTM and Mr Ong's EV/OCF methodology to the necessary adjustments to the OCF figures used by Mr Ong as well as other adjustments and derived an equity value of Ambo Min of US$28,233,706.[270] This would be consistent with the deterioration of Ambo Min's financial performance as evidence by its financial statements. This also resulted in the Disposed AIHL Shares being valued at about US$3.5m after applying the DLOC and the DLOM.[271] Mr Ooi's computation was not challenged by the plaintiffs. I clarify that Mr Ooi did not advance this valuation given his position that neither the PTM[272] nor the use of the OCF multiple[273] was appropriate.

[269] P1 at p 5, P3 at p 1.

[270] Response Report of Ooi at para 4.36.

[271] Response Report of Ooi at para 4.37.

[272] Response Report of Ooi at para 4.1.

[273] Response Report of Ooi at para 4.19.

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168 I therefore rejected Mr Ong's valuation of the Disposed AIHL Shares because of his flawed approach in ascertaining the equitable value, his use of the PTM as well as his calculations. For completeness, Mr Ong also sought to derive the market value for the Disposed AIHL Shares simply by applying a DLOC to his equitable value derived using the PTM,[274] but that did not address the fundamental errors in his analysis.

169 In any case, Mr Ong still declined to apply a DLOM, contending that it "had been implicitly captured in the prior transaction [*ie*, the Ambo Min Sale]".[275] This was, however, a baseless assumption. Whether any DLOM had in fact been applied was unknown. Further, the fact that Ambo Min could not pay dividends up to AIHL due to foreign exchange controls, thereby causing the *AIHL Shares* to be less marketable (see above at [121]), does not necessarily apply to shares of *Ambo Min*.

(B) DCFM

170 Mr Ooi concluded that the market value of the Disposed AIHL Shares as at 23 March 2017 ranged from US$1.1m to US$1.5m applying the DCFM:[276]

(a) The estimated enterprise value of Ambo Min was in the range of USD14m to USD 17.8m.

(b) After making several adjustments, the estimated equity value of Ambo Min was in the range of US$7.5m to US$11.3m.

274 P1 at p 3.

275 P1 at p 3.

276 Expert Report of Ooi at paras 7.84–7.94.

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(c) However, as Ambo Min had net assets of US$8.2m, he used that figure as the lower end of the range, *ie*, the estimated equity value of Ambo Min was in the range of *US$8.2m* to US$11.3m.

(d) Applying the summation method or the adjusted book value method (which both experts agreed on), the value of the 100% equity interest in AIHL would be in the range of US$10.4m to US$13.4m.

(e) After applying the DLOC and the DLOM – the quantum of which both experts did not materially disagree on (see above at [120]–[121]) – Mr Ooi valued the Disposed AIHL Shares in the range of US$1.1m to US$1.5m.

171 I found the DCFM an appropriate method to value Ambo Min, and therefore, the Disposed AIHL Shares. It was a well-recognised and accepted method for valuing a business. Further, since Ambo Min was an active operating company and the sole asset of AIHL, a prospective purchaser of the Disposed AIHL Shares would be concerned about a valuation based on the business prospects of Ambo Min. Mr Ong acknowledged this.[277] In this regard, a valuation of Ambo Min using the DCFM (as opposed to taking reference from the opaque Ambo Min Sale) would be a better indicator of what a prospective buyer would be willing to pay for the Disposed AIHL Shares. Mr Ong also did not question Mr Ooi's application of the DCFM, but only various assumptions made, and data points used, by Mr Ooi. I address these in detail below.

172 In the circumstances, Mr Ong's reasons for not applying the DCFM warranted scrutiny:

[277] Transcript (16 October 2024) at p 41 lines 7–11.

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(a) In Mr Ong's Report, he stated that the DCFM "was not applied because financial forecast / projections as of [23 March 2017] was not furnished to us".[278] He testified at trial that he had requested for these forecasts from Mr Mann and Mr Cheng in early March 2024, around the time he was appointed as an expert. However, he was only forwarded a three-year consolidated projection for "Ambo and CAPTS"; a five-year projection for "Spirit" and a projected income statement for Ambo Min.[279] He found these to be inadequate. He clarified that he had been told by Mr Mann and Mr Cheng that these were the only projections available and he therefore had to work within those limitations.[280]

(b) That said, the parties exchanged their respective experts' first reports on or about 20 March 2024. Mr Ong would have seen the financial forecasts exhibited in Mr Ooi's Report. The parties then exchanged their experts' second reports on or around 28 June 2024. Notably, Mr Ong could have, but did not, produce a DCFM valuation in his Rebuttal Report. Instead, he only included a single paragraph setting out five grounds questioning the accuracy of Mr Ooi's DCFM valuation (the "Five Grounds").[281]

(c) At a case conference on 15 August 2024, I directed the plaintiffs to write to the court, *inter alia*, indicating whether Mr Ong wished to issue a valuation report using the DCFM given that he had since come into possession of the financial forecasts.

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278 Expert Report of Ong at p 16.

279 Expert Report of Ong at pp 816–823.

280 Transcript (18 October 2024) at p 80 line 24 to p 84 line 1.

281 Rebuttal Report of Ong at para 85.

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(d) The plaintiffs' solicitors wrote on 21 August 2024 stating Mr Ong's position that the DCFM should not be employed because:[282]

> After reviewing the financial projections prepared by the management of AIHL, Mr Ong is of the view that the key assumptions implied in the financial projections are not credible and/or not supported by actual historical performance, industry and economic outlook.
>
> There also continues to be missing information from the financial projections …
>
> Mr Ong further does not have access to the management of AIHL to make enquiries / seek clarifications on AIHL's historical performance and the financial projections.

173 I did not find this explanation satisfactory. While experts are appointed by the parties, their primary duty is to the court. In this case, given that the DCFM was an appropriate method of valuation, and Mr Ong's only apparent objections were to the lack or reliability of the data, he could have asked questions or sought clarification on those points. It was also highly unsatisfactory that the plaintiffs had failed to furnish Mr Ong with the relevant financial forecasts. In cross-examination, Mr Mann confirmed that he did not ask CCSEA for access to management of AIHL or Ambo Min, or request for the information Mr Ong said was unavailable.[283]

174 Further, it was significant that Mr Ong was only engaged on or about *4 March 2024*,[284] just a few months before the trial was scheduled to commence. However, as CCSEA's solicitors pointed out in their letter to the court of 6 September 2024,[285] the plaintiffs had made some requests for the disclosure of

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282 Letter from Tito Isaac & Co LLP to the Court dated 21 August 2024 at para 3.

283 Transcript (27 September 2024) at p 72 lines 5–17.

284 P2 at pp 1, 5.

285 Letter from Rajah & Tann Asia to the Court dated 6 September 2024 at para 12.

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valuation-related documents, and these were all dealt with by March 2023. As the deadlines for the exchange of expert reports had been adjourned or missed on several occasions, "unless orders" were issued for the parties to exchange expert reports by 29 February 2024, which the plaintiffs failed to comply with. The plaintiffs' solicitors informed the court on 27 February 2024 – two days before the deadline – that they were replacing their then-valuation expert. Mr Ong was then engaged in March 2024, and the expert reports were exchanged on 20 March 2024. According to CCSEA's solicitors, since March 2023, the plaintiffs had never approached CCSEA to ask for the information and documents that Mr Ong said was unavailable to him, and this was so even after the parties had exchanged their first expert reports on 20 March 2024.[286]

175 It therefore appeared that Mr Ong was hurriedly engaged, and he was not provided with – nor were requests made for – the information which would have been relevant to his valuation. Mr Ong compounded these difficulties by not asking for the relevant information himself when it must have been apparent to him that these were available. He did not even do so after having sight of Mr Ooi's Report, which included the documents and information that Mr Ooi had relied on.[287] As it turned out, much of Mr Ong's criticisms of Mr Ooi's valuation were misplaced.

176 At the case conferences on 27 September 2024 and 8 October 2024, I informed the parties that as the experts were giving evidence via "hot-tubbing", they should come prepared to address their counterpart's approach and methodology, and to put in writing any additional matters they might wish to

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[286] Letter from Rajah & Tann Asia to the Court dated 6 September 2024 at para 34.

[287] Expert Report of Ooi at Annexes 1–28.

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raise so as to give notice to their counterpart and facilitate the evidentiary hearing.

177 By a letter from the plaintiffs' solicitors dated 10 October 2024, the plaintiffs' submitted P1 which, *inter alia*, set out five other reasons why the assumptions adopted in Mr Ooi's DCFM valuation were not "credible and/or supportable" (the "Five P1 Grounds").[288] In P1, Mr Ong, for the first time, carried out a valuation of the Disposed AIHL Shares based on the DCFM and arrived at a value of US$1.8m.[289] On the second last day of trial, he disclosed that he had made a serious computational error, and tendered a new computation exhibited in P3, wherein he valued the Disposed AIHL Shares at US$5,437,211.[290] As I explain later, even this figure suffered a serious error.

178 I now deal with what Mr Ong considered were errors made by Mr Ooi.

(I) THE FIVE P1 GROUNDS

179 First, Mr Ong took issue with the forecast of revenue growth for the nine-month period ended 31 December 2017 of negative 9.2%. He pointed out that the actual growth for the financial year ended March 2016 was negative 19% and the same for the last 12 months ("LTM") ended 31 March 2017 was negative 7.8%, which showed an upward trend. This was confirmed by the forecast of a growth of positive 6.1% for the financial year ended 2018. He therefore expected that growth for the nine-month period ended 31 December 2017 to be "somewhere in between negative 7.8% and positive 6.1%" and suggested 0% or "a very small negative", as opposed to a negative

288 P1 at p 3.

289 P1 at p 3.

290 P3 at p 2.

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9.2% as forecasted.[291] That would give an average forecasted growth for the five-year period of 2017 to 2021 of 6.3%, higher than the forecasted average of 4.5%. In short, Mr Ong was asserting that the forecast had understated Ambo Min's future growth, and therefore its value.

180 Mr Ooi's position was that the management's forecast was reliable given that they were the ones involved in Ambo Min and would have had better sight of the performance in the year(s) to come.[292]

181 I need not comment on this issue as the difference was ultimately not material – applying Mr Ong's suggested revenue growth figure for Ambo Min of 0% in place of a negative 9.2% for the nine-month period ended 31 December 2017, the valuation of the Disposed AIHL Shares (as calculated by Mr Ong) would only increase from US$5,437,211 to US$5,803,151.[293]

182 Second, Mr Ong questioned the forecasted normalised EBIT margin for the nine-month period ended 31 December 2017 and the financial year ended 2018 of 0.8% and 4.9%, respectively, when the average normalised EBIT margin for the period comprising the financial years ended March 2013 to March 2016 had an average normalised EBIT margin of 10.5%.[294] However, in making this criticism, Mr Ong ignored the *negative* normalised EBIT margin of 29.3% for the LTM ended March 2017, although it was the most recent figure available based on the actual performance of Ambo Min (as opposed to forecasts) and therefore, more accurate. Mr Ong simply dismissed the figure as

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[291] Transcript (16 October 2024) at p 65 line 13 to p 66 line 25.

[292] Transcript (16 October 2024) at p 68 lines 2–12.

[293] P4 at p 2.

[294] P1 at p 3.

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an "outlier",[295] as there were significant one-time write-offs in that financial period which depressed Ambo Min's margins. But Mr Ong accepted that the figures were already normalised by excluding the write-offs.[296] Mr Ong also accepted that given the downward trend in the preceding four years (excluding the alleged "outlier"), it was not unreasonable for Ambo Min's management to forecast the figures as presented.[297] His decision to exclude the figures for LTM ended March 2017 therefore undermined his criticism of Mr Ooi's valuation. Indeed, when Mr Ong included the actual figures for LTM ended March 2017 into his historical averages, he conceded that the forecasts, when compared to those averages, were not unreasonable.[298] Mr Ong's unprincipled exclusion of relevant data was troubling. I therefore rejected Mr Ong's argument.

183 Further, as CCSEA's counsel pointed out,[299] the forecasted normalised EBIT margin for the financial year ended 2021 was 17.4%, which was a figure Ambo Min had never previously achieved, and which Mr Ong conceded could be described as optimistic.[300]

184 Third, Mr Ong questioned the net working capital ("NWC") figures as the NWC to revenue ratios during the forecasted period ranged between negative 11.3% and negative 23%, whereas the same during the preceding years (*ie*, financial years ended March 2013 to March 2016) ranged between positive 7.8% to positive 21.4%.[301] While questioning this assumption, Mr Ong could

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[295] Transcript (16 October 2024) at p 90 lines 13–17, p 91 lines 7–11.

[296] Transcript (16 October 2024) at p 98 lines 7–18.

[297] Transcript (16 October 2024) at p 93 lines 3–18.

[298] Transcript (16 October 2024) at p 95 lines 14–20.

[299] Transcript (16 October 2024) at p 101 lines 10–16.

[300] Transcript (16 October 2024) at p 104 lines 16–25.

[301] P1 at p 3.

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not say whether adopting the historical range he proposed would have a positive or negative impact on the value derived through the application of the DCFM – he had not done the calculations.[302] I therefore dismissed this criticism.

185 Fourth, Mr Ong observed that the forecasted depreciation and amortisation for the financial years ended 2018 to 2021 ranged from US$2.1m to US$2.6m, whereas the historical figures for the financial years ended March 2013 to March 2016 ranged from US$1.3m to US$1.6m.[303] This was related to the discussion on the normalised EBIT margin (see above at [182]–[183]). Mr Ong accepted that the earlier issue had considered depreciation, and effectively agreed that this added nothing to his argument.[304]

186 Fifth, Mr Ong observed an increase in the average capital expenditure ("CAPEX") to revenue ratio when comparing the historical average (*ie*, 10.8%) with the forecasted average (*ie*, 17.9%).[305] In effect, he questioned the increased projected capital spending in the forecasted years. He also pointed out that he would expect to see higher growth with higher capital spending, and the forecasts did not provide for this.[306]

187 As with the first criticism (see above at [181]), nothing material turned on this. Mr Ong calculated the DCFM value based on a historical average CAPEX to revenue ratio of 10.8% and arrived at a valuation of US$5,810,580

302 Transcript (16 October 2024) at p 126 line 16 to p 127 line 6.

303 P1 at p 3.

304 Transcript (16 October 2024) at p 145 line 1–7.

305 P1 at p 3.

306 Transcript (16 October 2024) at p 151 line 24 to p 153 line 25.

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for the Disposed AIHL Shares,[307] which was an inconsequential difference from his earlier calculation of US$5,437,211.

188 In fact, even accepting both Mr Ong's first and fifth criticisms together, the value of the Disposed AIHL Shares increased marginally to US$5,897,136,[308] which was a valuation that was still subject to a further material error (see below at [202]).

(II) *THE FIVE GROUNDS*

189 I now deal briefly with the Five Grounds.

190 The first, second, fourth and fifth grounds (at paras 85(a), 85(b), 85(d) and 85(e) of Mr Ong's Rebuttal Report, respectively) were disposed of quickly:

(a) Mr Ong's contention that neither a DLOM nor a DLOC should be applied has been discussed above. Mr Ong accepted that a DLOC and a DLOM should be applied to determine the market value of the Disposed AIHL Shares (see above at [121]).

(b) Mr Ong's allegation that Mr Ooi had failed to make adjustments for "asset 'stripped away' from [AIHL] and/or [Ambo Min]" was baseless as there was no evidence that any assets had been stripped away.

(c) Mr Ong agreed with Mr Ooi that the treatment of non-operating liabilities had ultimately no impact on the DCFM calculation.[309]

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[307] P5 at p 2.

[308] P6 at p 2.

[309] Transcript (17 October 2024) at p 144 line 9 to p 145 line 10.

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(d) Mr Ong accepted that any inclusion of deferred tax liabilities by Mr Ooi was not material.[310]

191 The main area of disagreement between the experts was in relation to their respective computations of the Weighted Average Cost of Capital ("WACC").

192 WACC is used to calculate the equity value of a company. The *beta* – which denotes the volatility of risk of a security or share compared to the market – is critical to WACC calculations as it helps to 'weigh' the cost of equity by accounting for risk. To calculate the *beta* of Ambo Min, the valuer would gather a list of comparable companies' unlevered *betas,* take the average and re-lever it based on Ambo Min's capital structure. To clarify, the unlevered *beta* is essentially the unlevered weighted average cost, *ie*, what the average cost would be without using debt or leverage. The *beta* is then used as part of the formula to calculate the WACC. A *beta* of '1' means that the company is as risky as others in the industry. A lower *beta* value means the company has a lower risk, and so cash flows are discounted at a lower rate, in turn resulting in a higher equity value.[311]

193 In Mr Ong's Rebuttal Report, he stated that the WACC used by Mr Ooi was "not appropriate" because:

(a) Mr Ooi had inappropriately used an unlevered *beta* of 0.80. This value was based on guideline public companies selected by Mr Ooi which were predominantly operating in the alcoholic beverage industry

[310] Transcript (17 October 2024) at p 139 line 21 to p 140 line 7.

[311] Transcript (17 October 2024) at p 57 line 3 to p 59 line 5.

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and therefore a significantly different industry or market segment than that which Ambo Min operated in.[312]

(b) The appropriate unlevered *beta* was 0.47, based on the same industry data source used by Mr Ooi, *ie*, data from Professor Aswath Damodaran ("Professor Damodaran"). Using an unlevered *beta* of 0.47 resulted in a WACC of 14.4% to 16%, as compared to 16.6% to 18.6% as computed by Mr Ooi.[313]

A lower WACC would, all else being equal, translate to a higher valuation for Ambo Min.[314]

194 I do not propose to deal in detail with the differences between the experts' WACC computations as these were ultimately irrelevant. On Mr Ong's (revised) valuation, and using his own WACC computation, he valued the Disposed AIHL Shares at US$5,437,211.[315] This was well below the AIHL Share Consideration and therefore did not support the plaintiffs' pleaded case that the Disposed AIHL Shares had been sold at an undervalue, much less a significant undervalue (see above at [45]). Indeed, it did not even support the plaintiffs' (unpleaded) case that it was significantly lower than the value *received* by SWT given my findings at [236] below.

195 Nonetheless, I did not accept Mr Ong's criticisms of Mr Ooi's computation of the unlevered *beta*.

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312 Rebuttal Report of Ong at paras 66–68.

313 Rebuttal Report of Ong at paras 72–73.

314 Rebuttal Report of Ong at para 74.

315 P3 at p 2.

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196 Mr Ong's *beta* value was based on 40 (although the experts initially thought this to be 36) soft drink companies cited by Professor Damodaran from emerging markets around the world, *ie*, not confined to continental Africa, where Ambo Min operated.[316] He did not examine or verify the underlying data or take any steps to filter out any company with unreliable data. On the other hand, Mr Ooi curated the data from Professor Damodaran, did his own search of comparable companies and selected nine companies in Africa, eight of which sold alcoholic beverages and the remaining one sold soft drinks. He then extracted the *beta* values of these companies and selected those which had sufficient data points and were statistically reliable.[317]

197 Both approaches were prone to some error. Mr Ong simply accepted the companies used by Professor Damodaran without examining the underlying data and included companies not operating in Africa. Indeed, it was also not clear what data Professor Damodaran looked at or how he arrived at his *beta* figure, which Mr Ong simply adopted. Mr Ooi's selection was largely based on companies in Africa but selling alcohol. Mr Ooi attempted to show that his *beta* figure was more accurate by using the soft drink companies cited by Professor Damodaran and filtering out those with low, poor or no data points using his firm's in-house software.[318] This resulted in a higher *beta* value of 0.97,[319] which was closer to the value of 0.80 he had adopted.

198 Mr Ong accepted that it would be appropriate to curate or stress test the companies chosen by Professor Damodaran to improve the accuracy of the *beta*

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316 Transcript (17 October 2024) at p 62 line 20 to p 64 line 15, p 65 lines 21–25, p 66 lines 17–22.

317 Transcript (17 October 2024) at p 66 lines 7–14.

318 Transcript (17 October 2024) at p 66 line 21 to p 70 line 22.

319 6D6 at p 7.

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value,[320] but that he did not do this.[321]. He also accepted that the steps taken by Mr Ooi to improve the quality of the data were "meaningful".[322]

199 I highlight one significant error in Mr Ong's computation of the WACC, which underscored the unreliability of his evidence and his DCFM valuation, namely his calculation of the Terminal Growth Rate. The Terminal Growth Rate is the constant rate at which the company is expected to grow in perpetuity and is a critical component in any DCFM valuation. A higher Terminal Growth Rate results in a higher value of the business and *vice versa*.[323] One of the key components of the Terminal Growth Rate is the applicable inflation rate.[324]

200 In his (revised) DCFM computation, Mr Ong used a Terminal Growth Rate of 11%, which was derived from the average of:[325]

(a) the ten-year (*ie*, 2017–2026) average inflation of 8%; and

(b) the ten-year (*ie*, 2017–2026) average nominal growth of Ethiopia's Gross Domestic Product ("GDP") (in USD) of 14%, which was derived by adding the ten-year average of Ethiopia's real GDP growth (in USD) of 6% and the ten-year average inflation of 8%.

201 In contrast, Mr Ooi applied a Terminal Growth Rate of 8.1%, which was based on a forecasted long-term real GDP growth of 6.3% and a forecasted

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320 Transcript (17 October 2024) at p 72 line 19 to p 73 line 5.

321 Transcript (17 October 2024) at p 74 line 10–13.

322 Transcript (17 October 2024) at p 74 lines 5–8.

323 Transcript (17 October 2024) at p 24 lines 1–5.

324 Transcript (17 October 2024) at p 22 lines 15–25.

325 P3 at p 1; P1 at p 12.

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long-term inflation of USD of 1.9%.[326] In essence, the main difference between the experts was the value of the inflation rate they each applied. As explained above, a lower inflation rate leads to a lower Terminal Growth Rate, which results in a lower DCFM value.

202 But Mr Ong had applied the wrong inflation rate in his computation. He derived the figure of 8% from an extract of a publication by Business Monitor International Ltd[327] and assumed that it reflected Ethiopia's inflation in USD terms. However, when the full report was shown to him under cross-examination, he accepted that it was inflation in ETB terms,[328] and that his proposed inflation rate of 8% was therefore wrong.[329] This caused his Terminal Growth Rate and his DCFM value to be overstated. Mr Ong did not offer any revised valuation of the Disposed AIHL Shares based on a revised Terminal Growth Rate – but it was evident that it would have been materially lower than his figure of US$5,437,211. In any event, Mr Ong did not offer any challenge to Mr Ooi's Terminal Growth Rate unrelated to the inflation figure used, and so Mr Ooi's estimate remained largely uncontested.

(C) GPCM

203 In addition to the DCFM, Mr Ooi applied the GPCM (see above at [141]) and arrived at a valuation of Ambo Min in the range of US$8.2m to

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326 Expert Report of Ooi at para 7.69.

327 P8 at p 18.

328 Transcript (18 October 2024) at p 67 lines 4–16.

329 Transcript (18 October 2024) at p 67 line 21 to p 68 line 12.

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US$14.7m,[330] which translated to the value of the Disposed AIHL Shares being in the range of US$1.1m to US$1.9m.[331]

204 In using the GPCM, Mr Ong valued the Disposed AIHL Shares at between US$7.7m and US$8.8m.[332]

205 I will not go into a detailed discussion of the GPCM as both experts agreed that it was not a reliable method in this instance, there being no suitable comparators for Ambo Min.[333] They both agreed that at best, the GPCM could be used as a "sanity check" of the values determined using the PTM or the DCFM.[334]

206 Mr Ong used the same data as Mr Ooi. The main reason why his valuation was starkly different from Mr Ooi's was because he had derived his data of the EV of Ambo Min as at 23 March 2017 based on the Ambo Min Sale, on the assumption that the Ambo Min Sale represented a fair value for Ambo Min.[335] I have found that it did not (see above at [148]–[156] and [161]). I also note that Mr Ong's calculation was based on the OCF, which I earlier found unreliable (see above at [162]–[163]). Mr Ong had also disregarded Ambo Min's financial results for LTM ended March 2017 even though those were the most recent prior to the date of the AIHL Sale. As explained (see above at [182]), Mr Ong did so because of the significant write-offs in the financial year ended 2016 but he conceded that he could have used the normalised figures for

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330 Expert Report of Ooi at para 7.88(b).

331 Expert Report of Ooi at paras 7.92, 7.94.

332 P1 at p 4.

333 Transcript (18 October 2024) at p 84 lines 7–17.

334 Transcript (18 October 2024) at p 84 lines 15–21, p 96 lines 14–17.

335 Transcript (18 October 2024) at p 85 lines 7–21.

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that year (*ie*, after adjusting for the write-offs) as Mr Ooi had done.[336] Significantly, Mr Ong agreed that if the Ambo Min Sale was disregarded, he had no issues with Mr Ooi's analysis.[337] I therefore disregarded the GPCM valuation put forward by Mr Ong which, in any event, represented the equitable value for the Disposed AIHL Shares (that being an approach I have rejected).

207 The GPCM as applied by Mr Ooi did provide some support for his valuation based on the DCFM, given that the ranges were in the same ballpark. In any event, even absent the GPCM, I would have found Mr Ooi's valuation using the DCFM more reliable for the reasons set out above.

208 For completeness, Mr Ong also valued the Disposed AIHL Shares as at the date of SWT's liquidation, but I did not consider that date relevant as the issue was whether the Disposed AIHL Shares were sold at an undervalue as at the date of the SPA.

(3) The value of the Disposed AIHL Shares

209 In summary, I rejected Mr Ong's approach of deriving the Disposed AIHL Shares' equitable value and, further, his adoption and application of the PTM (irrespective of whether to compute the equitable or market value of the Disposed AIHL Shares). As for Mr Ong's (revised) DCFM calculations of the market value of the Disposed AIHL Shares, these were based on the wrong inflation rate and therefore did not represent the market value of the Disposed AIHL Shares. I accepted Mr Ooi's valuation of the Disposed AIHL Shares as more reliable. Ultimately, even on their own evidence, and within the parameters of (a) the market value approach; and (b) the DCFM, the plaintiffs

[336] Transcript (18 October 2024) at p 93 line 1 to p 94 line 2.

[337] Transcript (18 October 2024) at p 89 lines 8–14.

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had not established what the value of the Disposed AIHL Shares was, save for that it would be less than US$5,437,211 (see above at [202]).

The value of the consideration received by SWT

210 Having considered the value of the consideration provided by SWT, *ie*, the value of the Disposed AIHL Shares, I now turn to the value of the consideration it received in return.

211 To recapitulate, the plaintiffs' pleaded case was that the AIHL Sale was a transaction at an undervalue because the *AIHL Share Consideration* was "significantly less than the value of" the Disposed AIHL Shares (see above at [45]). In other words, the relevant comparison was between the value of the Disposed AIHL Shares and the AIHL Share Consideration, *ie*, US$10,796,784. Based on my finding above on the value of the Disposed AIHL Shares, this case plainly failed.

212 However, the plaintiffs modified their case at trial and in their closing submissions, arguing instead that "one should look at the value of the *benefit received* by SWT (and not the value of the consideration provided by [CCSEA]" [emphasis added].[338]

213 This was not pleaded, which the plaintiffs acknowledged. However, they submitted that this did not prevent them from advancing their new case because, citing *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 ("*OMG Holdings*") at [18], "evidence given at trial can, where appropriate, overcome defects in the pleadings, provided that the other party is not taken by surprise or irreparably prejudiced". They submitted that there has been no prejudice to

[338] Plaintiffs Submissions at para 36(c).

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CCSEA given the way it had understood the plaintiffs' case and the manner it had pleaded its defence.[339]

214 I accepted the plaintiffs' revised case for two principal reasons. First, the defendants suffered no prejudice. CCSEA had pleaded and led evidence to address the Diverted AIHL Consideration.[340] CCSEA's closing submissions also addressed these payments.[341] As for Mr Ashenafi, the plaintiffs' revised case made no difference to him because his defence was that the Disposed AIHL Shares were held on trust for him and SWT was not entitled to receive any consideration from the AIHL Sale (see above at [59(c)]).

215 Second, the plaintiffs' revised case was consistent with the law on undervalue transactions. As set out, the relevant comparison of value is between the consideration provided and the consideration *received* (see above at [103]). In that respect, there is no requirement for the consideration to have been received by the insolvent company directly, although that consideration received by a third party is relevant only in so far as value accrues to the company: *Rothstar* at [26]–[28], citing *Velstra Pte Ltd v Dexia Bank NV* [2005] 1 SLR(R) 154 and *Re Thoars (decd) (No 2); Reid v Ramlort Ltd (No 2)* [2005] 1 BCLC 331 ("*Re Thoars*").

216 I reproduce the brief facts of *Re Thoars* as summarised by the Court of Appeal in *Rothstar* at [28] as they have some relevance to the present case:

> The grantor ("Mr Thoars"), since deceased, owned and controlled two companies which owed a significant debt to one of their suppliers, Ramlort Ltd ("Ramlort"). Although Mr Thoars was under no direct personal liability to Ramlort in respect of

339 Plaintiffs Submissions at para 36(e).

340 6DD at paras 19D–21H.

341 CCSEA Submissions at paras 52–74.

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> his companies' indebtedness, he was under some pressure to arrange for the payment of this indebtedness. He executed a declaration of trust declaring that he held the benefits of a whole life assurance policy on his life on trust for Ramlort absolutely. As consideration for this declaration of trust, Ramlort made two payments: a payment of £1,100 to a third party, and a loan of £1,900 to Mr Thoars himself (see *Thoars* at [2] and [12]). The English Court of Appeal disagreed with the finding of the judge below that the value of the consideration received by Mr Thoars was nil. It took the view that the loan of £1,900 had to have had more than a nominal value in money or money's worth from Mr Thoars's point of view, notwithstanding that it was repayable on demand. *Notably, the English Court of Appeal also held (in the absence of any evidence as to the circumstances in which this payment was made) that "the payment of £1,100 to the third party at, presumably, the direction of Mr Thoars, ha[d] on the face of it a value to Mr Thoars equal to its face value".* The English Court of Appeal therefore proceeded on the basis that the value received by Mr Thoars was "not substantially less than £3,000" (*Thoars* at [120]). [emphasis added]

217 I supplement this summary by noting that the English Court of Appeal in *Re Thoars* also acknowledged Mr Thoars' evidence that he received the payment of £1,100 from the third party in cash: *Re Thoars* at [21] and [120].

218 The consideration given to third parties by CCSEA, such as the payments to Wealth Direct and Long River, could be analogised to the £1,100 payment in *Re Thoars*. First, both were at the instruction of the grantor, *ie*, Mr Thoars or SWT. Second, there was some evidence that the payment translated into a benefit that accrued to the grantor. In *Re Thoars*, this was the cash that Mr Thoars received from the third party. In the present case, this was the discharge of SWT's liability to VLTCM Ltd ("VLTCM") (see below at [224]–[231]).

219 The plaintiffs accepted that "a key consideration would therefore be whether the payments made by [CCSEA] to the third parties did ultimately

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benefit SWT".[342] I therefore address the plaintiffs' revised case and determine what was the consideration or benefit *received* by SWT from the AIHL Sale.

220 CCSEA contended that SWT received the *full value* of the AIHL Sale Consideration.[343]

(a) With respect to the payment of US$4,375,000 to SBM, this payment allowed SWT to "fully and finally discharge its liabilities owed to [SBM] who was a secured creditor with respect to [SWT]", which at the date of the SPA was a debt of US$4,375,000 under a loan facility with SBM and interest of US$16,880.23. This payment also allowed SWT to "fully and finally discharge any contingent liabilities owed to SABMiller PLC" in respect of its guarantee for the loan facility.[344]

(b) With respect to the payment of US$43,047 to AIHL, SWT was a debtor to AIHL in the same sum and CCSEA's payment fully and finally discharged that debt.[345]

(c) With respect to the assumption of liability of US$1,079,467 owed by SWD, the discharge of this liability accrued as a benefit to SWT who was its controller.[346]

(d) With respect to the payment of US$4,543,759 to Wealth Direct, CCSEA contended that the said sum was applied to reduce SWT's liabilities owed to a creditor, VLTCM, and therefore SWT received "the

342 Plaintiffs Submissions at para 36(d).

343 6DD at para 19D(a).

344 6DD at paras 21A(d)–21A(f).

345 6DD at para 21B.

346 6DD at para 21C.

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value of discharging [SWT's] then-indebtedness of at least US$4,543,759 to [VLTCM]".[347]

(e) Finally, but for CCSEA's purchase of the AIHL Shares, SWT would not have been entitled to the sum of US$755,511 that was paid to Long River as that sum represented SWT's alleged claim to dividends declared by Ambo Min that could not be paid up to AIHL and in turn to SWT.[348]

221 I pause to quickly dispose of CCSEA's argument about the payment to Long River. It was irrelevant that SWT may not have received that sum of money but for the AIHL Sale. Ultimately, this sum was baked into the price of the Disposed AIHL Shares. The critical question was whether SWT received a benefit from this payment.

222 Turning back, the plaintiffs accepted that SWT received the benefit of (a) US$4,375,000 being the payment to SBM (see above at [47]);[349] and (b) US$43,047 being the payment by CCSEA to AIHL (see above at [50]).[350] Together, these totalled a sum of US$4,418,047. That said, the plaintiffs took the position in their closing submissions that the benefit accrued to SWT was valued at US$4,586,806.[351] The plaintiffs did not explain how they derived this said figure, which was unsatisfactory.

223 I now deal with the other payments made by CCSEA.

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347 6DD at paras 21D–21D(f).

348 6DD at paras 21E–21E(c).

349 Plaintiffs Submissions at paras 76, 76(c), 76(e).

350 Plaintiffs Submissions at para 77.

351 Plaintiffs Submissions at paras 79(c)–79(d).

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(1) The VLTCM Loan

224 It was not disputed that in or around 2014, VLTCM granted a loan of US$5m to SWT (the "VLTCM Loan"), pursuant to a loan facility agreement. The loan was repayable by 15 December 2014 and interest accrued at the rate of 6.5% per annum if the loan was repaid on time. Otherwise, the interest would retroactively increase to 20% per annum from the date of drawdown to the date of repayment.[352] Mr Ashenafi was the guarantor of this loan.[353]

225 This loan was recognised in SWT's audited financial statements for the financial year ended 2015,[354] and unaudited financial statements for the financial year ended 2016,[355] which was signed off by Dr Ressos as director of SWT on 11 August 2017.[356] While VLTCM was not mentioned by name on those statements, the relevant entry reflected an interest bearing loan of 20%, and Mr Mann stated that he was not aware of any other facility that matched this rate of interest and that it was more likely than not this referred to the VLTCM Loan.[357]

226 In addition, Mr Cheng had referred to the outstanding VLTCM Loan in his correspondence with Mr Ashenafi and Dr Ressos in his e-mail to them on 30 November 2016.[358]

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[352] 4AB2384–4AB2390; 6DD at para 21D(a); Reply at paras 8.1–8.3; Plaintiffs Submissions at para 83(c); CCSEA Submissions at para 53.

[353] 4AB2385.

[354] 4AB3037.

[355] 4AB3068

[356] 4AB3049.

[357] Transcript (25 September 2024) at p 12 lines 11–22, p 17 lines 9–12.

[358] 6DBOD Vol 1 at p 22.

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227 VLTCM had also signed an audit confirmation for SWT's auditors that SWT was liable to it for, *inter alia*, a loan of US$5m.[359]

228 I found that the VLTCM Loan had been discharged by the payment to Wealth Direct and part of the payment to Long River:

(a) On 1 April 2017, CCSEA transferred the sum of US$4,543,759 to Wealth Direct,[360] and the sum of US$755,511 to Long River.[361]

(b) On 3 April 2017, Wealth Direct transferred US$5m to VLTCM.[362] The payment was made to the same account that SWT was required to make payment to as stipulated in the loan facility agreement,[363] and the payment reference stated "SW Trustees".

(c) According to Mr Cheng, who had access to Wealth Direct's bank accounts, the sum of US$4,543,759 transferred to Wealth Direct from CCSEA was used to pay down the VLTCM Loan of US$5m. The balance, *ie*, US$456,241, was paid out of the sum of $755,511 that was paid to Long River by CCSEA, which was thereafter transferred to Wealth Direct to pay down the VLTCM Loan.[364] Crucially, it was Mr Cheng who had set up the bank instructions given to HSBC by Wealth Direct.[365] Mr Cheng was the plaintiffs' own witness, and his evidence was not challenged.

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359 4AB2405.

360 6AB4186.

361 6AB4190.

362 2CB1116.

363 4AB2385.

364 Transcript (1 October 2024) at p 128 line 16 to p 129 line 25.

365 Transcript (1 October 2024) at p 26 lines 6–9.

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(d) On 21 September 2017, Mr Cheng e-mailed Astute Group, SWT's then-accountants stating, *inter alia*, that SWT had settled the loan from VLTCM on 3 April 2017, attaching the payment confirmation from HSBC in respect of Wealth Direct's instructions.[366]

(e) The debt to VLTCM no longer appeared in SWT's draft management accounts as at 31 December 2017.[367]

(f) Mr Mann testified that the VLTCM Loan was not reflected as a liability (at the time of the winding up of SWT in 2019). Neither was VLTCM disclosed as a creditor in SWT's statement of affairs nor did VLTCM file a proof of debt, whether in relation to the principal or the interest of the loan.[368] Mr Mann also accepted that since 2019 (coinciding with his appointment as liquidator), VLTCM had never surfaced to make a claim.[369] In short, by 2019, there was no evidence of any liability to VLTCM.

(g) The plaintiffs' counsel accepted in her opening statement that SWT's liability to VLTCM did exist at the material time of the payments of the Diverted AIHL Share Consideration.[370]

(h) Mr Mann accepted that by 2021, the VLTCM Loan had been "settled", although he caveated that it was in Mr Ashenafi's interest to settle this.[371]

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366 6DBOD Vol 1 at pp 36–55.

367 6DBOD Vol 1 at p 84.

368 Transcript (25 September 2024) at p 15 lines 12–15, p 79 line 24 to p 80 line 3.

369 Transcript (25 September 2024) at p 80 lines 20–22.

370 Transcript (24 September 2024) at p 15 lines 4–18.

371 Transcript (25 September 2024) at p 58 line 17 to p 59 line 8.

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229 I note that Mr Mann did not – despite being able to – make any enquiries with VLTCM about the VLTCM Loan or its repayment.[372] The plaintiffs defended Mr Mann's conduct in submitting that it was not the duty of Mr Mann as liquidator to actively seek to reach out to potential creditors of SWT, and that the onus lay on the creditor to file a proof of debt.[373] That completely missed the point:

(a) It was the plaintiffs' case that the payment from CCSEA was not used for SWT's benefit, despite the documentary evidence and the testimony of their own witness, Mr Cheng, that the payment was used to settle SWT's liabilities. The evidential burden was on them to disprove that evidence.

(b) As the court-appointed liquidator of SWT, Mr Mann was the only person in this suit who had a legal right to obtain the relevant information from VLTCM about SWT's account with it.

(c) Most importantly, Mr Mann was under a duty to obtain all relevant information and to assist the court to arrive at a correct and just decision. A liquidator is an officer of the court and owes a higher duty to the court than to his or her clients, is obliged to inquire into the underlying reasons for the company's demise as well as the peculiar responsibility and particular role of management in the antecedent events in a diligent manner: see *Liquidator of W&P Piling Pte Ltd v Chew Yin What and others* [2004] SGHC 108 ("*Liquidator of W&P Piling*") at [1], [20] and [25]. It was especially incumbent on Mr Mann to do so as he was bringing a claim against CCSEA and others on the

372 Transcript (25 September 2024) at p 15 lines 18–22.

373 Plaintiffs Submissions at para 83(f).

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basis that SWT had been deprived of the benefits of the Diverted AIHL Share Consideration. Yet, Mr Mann took no steps to reach out to VLTCM and obtain the relevant information, including details of the VLTCM Loan and whether and how it was repaid.

230 The plaintiffs made several contentions in relation to the discharge of the VLTCM Loan, which I found were without merit:

(a) They argued that save for the events in [228(b)] and [228(e)] above, there was no other evidence that the liability owed by SWT to VLTCM was discharged.[374] The plaintiffs' attempt to cast doubt on the discharge of the VLTCM Loan was contrary to Mr Mann's own evidence that it was indeed discharged (see above at [228(h)]). To the same end, the plaintiffs argued that there was no documentary evidence from VLTCM itself that the liability owed by SWT had in fact been discharged.[375] However, when coupled with evidence of the bank transfers, the contemporaneous correspondence as well as the testimony of Mr Cheng who was a director of SWT at the material time and the person who had arranged the transfer by Wealth Direct, I found that there was sufficient evidence that the VLTCM Loan had been discharged with funds from the Diverted AIHL Share Consideration. To the extent that the plaintiffs argued that further evidence was required, it was within Mr Mann's remit to obtain that information, which he failed to do.

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374 Plaintiffs Submissions at paras 83(b), 83(e).

375 Plaintiffs Submissions at para 83(e).

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(b) The plaintiffs also pointed out that Mr Ashenafi did not himself plead that the VLTCM Loan was discharged.[376] That may be true, but it was of no assistance to the plaintiffs' case since Mr Ashenafi's position was simply that SWT was not entitled to any consideration at all. In this regard, it was irrelevant to Mr Ashenafi's defence how the payments to Wealth Direct and Long River were applied, and whether SWT received a benefit from them.

(c) Mr Mann claimed that he had, after investigations, "concluded that the VLTCM loan was not utilised for the benefit of SWT, and should not have even been recognised as a liability in the books of SWT". As such, any repayment would not be for the benefit of SWT.[377] However, no evidence was adduced to support this belief and Mr Mann conceded that he had no basis to deny SWT's liability to VLTCM.[378] Even if the proceeds from the VLTCM Loan may have been misused by Mr Ashenafi (for which there was no evidence), that alone does not negate SWT's liability to VLTCM.

(d) The plaintiffs argued that even if the VLTCM Loan was discharged, there was no evidence that this was by virtue of the payment by CCSEA to Wealth Direct. Instead, in the draft management accounts for SWT for the year ended 2017, that were produced on or around 30 July 2018,[379] adjustments had been made to the accounts for the financial year ended 2016 to reflect that the liability to VLTCM ceased

376 Plaintiffs Submissions at para 83(b).

377 Plaintiffs Submissions at para 83(d).

378 Transcript (25 September 2024) at p 23 line 19 to p 24 line 5.

379 6DBOD Vol 2 at pp 83–90.

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to exist from then.[380] This argument was problematic. Putting aside that the management accounts were only in *draft* form, SWT's unaudited financial statements for the year ended 2016, which were signed off *after* these management accounts were circulated, still recognised the liability to VLTCM (see above at [225]). In so far as the draft management accounts sought to introduce an adjustment, this was not reflected in the final unaudited accounts issued. In any event, no reason was cited for the adjustments, which were sought well after the VLTCM Loan had been discharged.

(e) The plaintiffs finally submitted that it was also Mr Cheng's position that Mr Ashenafi had instructed him that the loan liability to VLTCM did not belong to SWT,[381] and so if Mr Cheng's testimony was accepted, it must follow that the discharge of the VLTCM loan liability was not a benefit received by SWT.[382] First, it was fallacious to suggest that Mr Cheng's testimony should either be accepted or rejected as a whole. The court should be wary of the maxim *falsus in uno, falsus in omnibus* – false in one thing, false in everything; a court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other: see *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [59]–[61]. Second, Mr Cheng's testimony of what Mr Ashenafi said about the VLTCM Loan was hearsay. Third, Mr Cheng's evidence was that Mr Ashenafi had instructed him to remove *all the assets and liabilities* from SWT's financial statements, which included the liability

380 Plaintiffs Submissions at para 83(g).

381 Transcript (1 October 2024) at p 95 line 19 to p 98 line 22.

382 Plaintiffs Submissions at para 83(h).

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to VLTCM. This was at the same time that Mr Ashenafi had produced the Letters of Addition. There was no explanation by Mr Ashenafi as to his instructions beyond a bare assertion that the assets and liabilities did not belong to SWT. Like the Letters of Addition (see above at [90]), I placed no weight on these instructions.

231 Therefore, by reason of the discharge of the VLTCM Loan, SWT received the benefit of US$5m from the payments to Wealth Direct and Long River. However, the balance sum of US$299,270 paid to Long River remained unaccounted for, and I therefore found that SWT did not receive any benefit from this sum.

232 CCSEA submitted that the payment of US$5m from Wealth Direct to VLTCM also operated to discharge SWT's liability for the accrued interest under the loan totalling US$3,000,000,[383] or in the alternative, US$875,000.[384] However, this was not clear: there were no contemporaneous documents or evidence explaining why VLTCM did not pursue payment of the accrued interest or whether the same had been compromised. CCSEA had therefore failed to establish that the payment of USD$5m conferred an additional benefit to SWT in respect of accrued or payable interest. Ultimately, the interest portion did not make a difference in view of the total benefit received by SWT from the AIHL Sale Consideration (see below at [236]).

(2) The assumption of SWD's liability

233 To recapitulate, the plaintiffs did not plead that CCSEA's assumption of SWD's liability in the amount of US$1,079,467 to Ambo Min *was not* a benefit

383 CCSEA Submissions at para 59.

384 CCSEA Submissions at para 61.

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accruing to SWT (see above at [50]). Neither did they admit that this *was* a benefit accruing to SWT. Their closing submissions were silent in this respect as well.

234 CCSEA contended that SWT received a benefit of the same value because "the Court is entitled to assume that when an insolvent company directs a counterparty to pay a 3rd party, the insolvent company obtains a benefit equal to the face value of that payment, where there is no evidence otherwise", referring to *Re Thoars*.[385] *Re Thoars* can be distinguished since there was direct evidence from Mr Thoars about the benefit he received on account of the payment to the third party. As the payment was not made to SWT, the evidential burden was on CCSEA to prove that SWT benefitted from the same. Here, there was a complete lack of evidence as to how the assumption of SWD's liability to Ambo Min benefitted SWT.

235 I therefore found that SWT did not receive any benefit from the assumption of SWD's liability in the amount of US$1,079,467. Similar to the interest component of the VLTCM Loan, this ultimately did not make a difference.

(3) Total consideration received by SWT

236 Given that the plaintiffs accepted that SWT received the benefit of US$4,418,047 (see above at [222]) and given my finding that SWT received the benefit of US$5m to discharge its liability under the VLTCM Loan (see above at [231]), the total benefit accruing to, and therefore consideration *received* by, SWT as a consequence of the AIHL Sale was at least US$9,418,047.

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385 CCSEA Submissions at paras 69–81.

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237 Given my findings on the value of the Disposed AIHL Shares above, the plaintiffs have failed to discharge their burden of proving that the Disposed AIHL Shares were worth significantly more than the consideration SWT received. In any event, the plaintiffs failed to even discharge their burden of proving that the value of the Disposed AIHL Shares was significantly more than US$4,418,047, which was the benefit SWT indisputably received. The AIHL Sale was therefore not an undervalue transaction.

SWT was insolvent at the time of the AIHL Sale and/or the disposal of the AIHL Share Consideration

238 In view of my finding that the AIHL Sale was not a transaction at an undervalue, it was not necessary for me to determine, pursuant to s 226(2) of the IRDA, whether SWT was at the time of the transaction, or as a consequence of the transaction became, unable to pay its debts within the meaning of s 125(2) of the IRDA. I nevertheless considered this for completeness.

239 The sole test to determine whether a company is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA is the cash flow test: see *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 ("*Sun Electric*") at [56] and [65]. The cash flow test "assesses whether the company's current assets exceed its current liabilities such that it is able to meet all its debts as and when they fall due": *Sun Electric* at [65]. In accordance with the standard accounting definition for the term "current", the terms "current assets" and "current liabilities" for the purpose of the cash flow test mean assets that can be realised and debts that will fall due within the next 12 months: *Sun Electric* at [65]. The element of futurity that is thereby incorporated into the cash flow test is necessary for the law to be consistent with commercial reality and to avoid absurd and uncommercial outcomes: *Sun Electric* at [67].

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240 I found that SWT was unable to pay its debts as they fell due at and around the time of the AIHL Sale and the SWE Share Transfer.

241 First, on or about 30 November 2016, some four to five months before the AIHL Sale and the SWE Share Transfer, Mr Cheng sent an email to Mr Ashenafi and Dr Ressos noting the following:[386]

(a) SWT owed SBM US$4.375m and VLTCM US$5m. In addition, there was a "bad guy amount claim" of US$3.15m that SWT would be liable for, obviously referring to the claim by the SGI Creditors in the Arbitration. Mr Cheng also noted that the "arbitration case is highly possible".

(b) Since the realisable value of SWT's shares of AIHL would be around US$10.04m, there were not enough funds to settle all SWT's liabilities and Mr Ashenafi had to "think about the funding from other source[s]".

(c) Finally, Mr Cheng stated that they had to issue the audit report for SWT immediately, otherwise the report would have to record the contingent liability and the SGI Creditors' arbitration claim. This would cause SWT's accounts to reflect a "deficiency" which would trigger SBM to call for repayment of its facility.

242 It was clear from this e-mail that Mr Cheng, who was SWT's director at the material time, recognised that SWT would not be able to meet its liabilities as they fell due in the months to come.

[386] 6DBOD Vol 1 at p 22.

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243 Second, on 29 March 2017, the SGI Creditors, SWT, Mr Ashenafi and Mr Schulze entered the Settlement Agreement which obliged SWT to pay to the SGI Creditors and Mr Schulze the sum of US$3,149,882.28 (see above at [32]). Concurrent to this, the SPA had been executed and CCSEA was in the process of making the relevant transfers of the various payments forming the AIHL Share Consideration. The fact that SWT entered the Settlement Agreement was clear acknowledgment on its part that it was liable to the SGI Creditors for a sum of over US$3m.

244 Third, in the independent auditor's report on SWT's financial statements for the financial year ended 2015, the auditors noted that (a) SWT's current liabilities exceeded its current assets by S$11,956,871 and its total liabilities exceeded its total assets by S$4,519,556; and (b) there was significant doubt as to the ability of SWT to continue as a going concern.[387]

245 In that set of financial statements, SWT's current assets comprising cash and balances totalled only S$85,550, while its current liabilities totalled S$12,042,421,[388] which included the VLTCM Loan that was booked as a short-term borrowing of S$7,072,500.[389]. The loan facility with SBM was reflected as a long-term borrowing of S$6,188,438, which was noted to be repayable on 28 August 2017.[390]

246 In SWT's unaudited financial statements for the financial year ended 2016, the same picture emerged. As at 31 December 2016, its current assets

[387] 4AB3015.

[388] 4AB3018.

[389] 4AB3037.

[390] 4AB3036.

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totalled S$13,315 while its current liabilities amounted to S$19,183,196,[391] which included the loan facility with SBM in the amount of S$6,325,813 and the VLTCM Loan in the amount of S$7,229,500.[392]

247 Evidently, SWT was insolvent even without including its liability to the SGI Creditors which, based on the e-mail, was deliberately excluded from its financial statements.

248 There was no evidence that SWT's financial situation improved from then to the time of the AIHL Sale or the SWE Share Transfer. Rather, these deficiencies were likely to have continued up to the SWE Share Transfer given that SWT was primarily an investment holding company with no operations of its own.

Remedies for the Undervalue Transaction(s)

The remedies available under ss 224 and 227 of the IRDA

249 Pursuant to s 224(2) of the IRDA, the court is empowered to "make *such order as it thinks fit* for restoring the position to what it would have been if the company had not entered into that transaction [at an undervalue]" [emphasis added].

250 As to the appropriate remedy, the High Court in *Living the Link (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others* [2016] 3 SLR 621 ("*Living the Link*") at [73] cited the *dicta* of the English Court of Appeal in *Ramlort Ltd v Michael James Meston Reid* [2004] EWCA Civ 800 at [125]:

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391 4AB3051.

392 4AB3068.

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> [A]s a matter of general approach, in deciding what is the appropriate remedy where there has been transaction at an undervalue the Court does not start with the presumption in favour of monetary compensation as opposed to setting the transaction aside and reinvesting the asset transferred. Indeed, in my judgement, in considering what is the appropriate remedy on the facts of any particular case the Court should not start from any priori position. Each case will turn on its particular facts, and the task of the Court in every case is to fashion the most appropriate remedy with a view to restoring, so far as it is practicable and just to do so, the position as it 'would have been if [the debtor] had not entered into the transaction'. In some cases that remedy may take the form of reversing the transaction; in others it may not. In some cases it may take the form of an order for monetary compensation; in others it may not.

251 It is also established that the court may, in appropriate cases, allow the defendant to retain the asset in return for a payment of the difference between the full value of the asset and the value which was in fact received by the company: *Goode on Principles of Corporate Insolvency Law* at paras 13-52–13-54; see *Living the Link* at [75], citing an earlier edition of *Goode on Principles of Corporate Insolvency Law* and *Pena v Coyne (No 2)* [2004] 2 BCLC 730; see also *Parakou* at [193].

The appropriate remedy

252 With respect to the Disposed SWE Shares, the plaintiffs sought an order that Mr Ashenafi and/or Sino Africa are jointly and/or severally liable to the plaintiffs for the sum of US$5,055,318, being the book value of the Disposed SWE Shares (see above at [104]).[393] The plaintiffs did not seek to avoid or reverse the SWE Share Transfer.

253 I note that in their pleadings, the plaintiffs sought US$17,823,820, being the value of the Disposed SWE Shares reflected in the financial statements of

393 Plaintiffs Submissions at para 103.

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SWT from 2013 to 2016[394] – but it was unclear where this figure was derived from. Given that they were eventually seeking a lower sum, there was no prejudice to Mr Ashenafi and/or Sino Africa and the plaintiffs were taken to be proceeding on the lower amount.

254 I found it appropriate to order that Sino Africa pay the plaintiffs the sum of US$5,055,318. It was unclear if Sino Africa continues to hold the Disposed SWE Shares or if they have been transferred to a third-party – the latter of which may frustrate any relief that SWT was entitled to.

Mr Ashenafi breached his fiduciary duties owed to SWT

The law of duties owed by a director

255 It is trite that a director is a fiduciary of their company and has an overriding duty to act in good faith in the interests of the company: see *BIT Baltic Investment & Trading Pte Ltd (in compulsory liquidation) v Wee See Boon* [2023] 1 SLR 1648 ("*BIT Baltic*") at [30]. A director's fiduciary duties to the company are: (a) the duty to act honestly and in good faith in the best interests of the company; (b) the duty not to exercise his powers for an improper purpose such as to profit personally from his office; and (c) the duty not to place himself in a position which will result in a conflict of interest between his duties to the company and his personal interests: *BIT Baltic* at [31], citing *DM Divers Technics Pte Ltd v Tee Chin Hock* [2004] 4 SLR(R) 424 at [80]–[81]. These are consistent with the duties set out in s 157 of the Companies Act 1967 (2020 Rev Ed). A breach of fiduciary duties will typically entitle a claimant to the relief of equitable compensation: *BIT Baltic* at [30].

[394] SOC at Claims 3(b), 4(c), 5(c).

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My findings

256 In respect of the SWE Share Transfer, which I found to be a transaction at an undervalue, I found that Mr Ashenafi had breached his fiduciary duties owed *qua* director to SWT (as pleaded in the Statement of Claim (Amendment No. 2) dated 9 November 2023 (the "SOC")).[395]

257 First, Mr Ashenafi had signed off on behalf of SWT and Sino Africa on the instrument of transfer dated 28 April 2017.[396] He was therefore responsible for and had caused the SWE Share Transfer to a company owned and controlled by him for no consideration.

258 Second, Mr Ashenafi attempted to conceal the SWE Share Transfer by causing adjustments in the accounts of SWT to falsely reflect that the Disposed SWE Shares were not assets belonging to SWT in performing the following acts:

(a) He claimed to Mr Cheng sometime in or around 4 November 2017 that the SWE Shares were held on trust by SWT for SWDT;[397] and

(b) He instructed Mr Cheng to remove all assets, including the SWE Shares, from SWT's financial statements and to reclassify them for the financial year ended 2017.[398] This extended to instructing Mr Cheng and

395 SOC at paras 42–42.5.

396 5AB3635.

397 AEIC Cheng at paras 49–50.

398 AEIC Cheng at para 51; AEIC Ressos at paras 49–50, 52.

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Dr Ressos to procure revisions of the audited financial statements for the financial years ended 2010 to 2015.[399]

259 Further, Mr Ashenafi transferred his shareholding in SWT to Satomi for a nominal consideration (see above at [36]), which I found was motivated by his intention to distance himself from SWT in anticipation of an inevitable examination by SWT's liquidator regarding SWT's prior transactions, as contended by the plaintiffs.[400]

260 In respect of the AIHL Sale, as I have found that it was not a transaction at an undervalue, I dismiss the claims for breach of fiduciary duties.

261 In respect of the Diverted AIHL Share Consideration, I had found that a sum of US$299,270 paid to Long River remained unaccounted for and that SWT did not receive any benefit from this sum. Since Mr Ashenafi directed the manner of the discharge of the AIHL Share Consideration, he was responsible for the disposal of the same. He had breached his fiduciary duties in failing to ensure that SWT benefitted from the *full* payment to Long River, and he was therefore liable to SWT for the sum unaccounted for.

262 In addition, I had also found that there was insufficient proof that SWT benefitted from CCSEA's assumption of SWD's liability (see above at [235]). This being the case, I would have found Mr Ashenafi liable for breach of his fiduciary duties for this diversion of the AIHL Share Consideration as well. However, this was not pursued by the plaintiffs. In fact, in their closing submissions, they expressly stated that their claims against Mr Ashenafi (and

399 AEIC Cheng at paras 53–54.

400 SOC at para 30.3; Plaintiffs Submissions at para 16(iv).

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CCSEA) concerning the diversion of the AIHL Share Consideration were only in relation to the payments to Wealth Direct and Long River.[401]

Claim in conspiracy

The law of conspiracy

263 To succeed in their claim for unlawful conspiracy, the plaintiffs must demonstrate the following elements: see *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112]:

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators intended to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy.

264 It is uncontroversial that a claimant will be entitled to (generally, compensatory) damages for a claim in conspiracy: see, for example, *Ong Han Ling and another v American International Assurance Co Ltd and others* [2018] 5 SLR 549 at [13].

[401] Plaintiffs Submissions at paras 78–78(b).

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No conspiracy in respect of the First Undervalue Transaction

265 Given my finding above that the First Undervalue Transaction was not a transaction at an undervalue, I dismiss the plaintiffs' claim in conspiracy in this respect.

266 In any case, there was no evidence that CCSEA was acting in concert or in furtherance of an agreement to cause loss to SWT and/or its creditors. Neither was there any evidence that CCSEA intended to injure SWT and/or its creditors by participating in the AIHL Sale.

Conspiracy in respect of the Second Undervalue Transaction

267 To recapitulate, the conspiracy pleaded in respect of the Second Undervalue Transaction only concerned Mr Ashenafi and the directors of SWT (*ie*, Mr Cheng, Mr Chooi and Dr Ressos), and not CCSEA (see above at [57]).

268 The plaintiffs did not pursue this claim in their closing submissions. In any event, to the extent that the plaintiffs sought to prove that CCSEA was liable in conspiracy for the payments to Wealth Direct and Long River, that was not their pleaded case.

269 Further, Mr Ashenafi's liability for this conspiracy would be the same as his liability for his breach of fiduciary duties arising from the part payment in the sum of US$299,270 to Long River that was unaccounted for.

Conspiracy in respect of the Third Undervalue Transaction

270 I found that the Third Undervalue Transaction, *ie*, the SWE Share Transfer, was a transaction at an undervalue. I also found that Mr Ashenafi had breached his fiduciary duties owed to SWT. This was an unlawful act capable

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of grounding a claim in conspiracy: see *Chew Kong Huat and others v Ricwil (Singapore) Pte Ltd* [1999] 3 SLR(R) 1167 at [35].

271 In addition, I found that Mr Ashenafi and Sino Africa had the common intention of causing loss to SWT and/or its creditors for their own benefit. This was easily inferred from the fact that the SWE Share Transfer was for no consideration, despite the Disposed SWE Shares having a book value of more than US$5m. In this regard, it was not Mr Ashenafi's defence that the Disposed SWE Shares had no value, but that they were held by SWT on trust for him.

272 Therefore, I found that Mr Ashenafi and Sino Africa were liable in conspiracy for the loss occasioned to SWT and/or its creditors due to the SWE Share Transfer, with damages of US$5,055,318, being the value of the Disposed SWE Shares.

My observations on Mr Mann's conduct as a liquidator

273 I close by making some observations about the prosecution of this action, several aspects of which were highly unsatisfactory. These must be understood in the context of Mr Mann being an officer of the court who was expected to act diligently and reasonably to assess the steps to be taken to maximise returns to SWT's creditors and to review aspects of SWT's management that may have had a bearing on SWT's demise: *Liquidator of W&P Piling* at [1]. A liquidator has no mandate to commence litigation which has no real prospect of succeeding and the court has an important role in ensuring so: *Liquidator of W&P Piling* at [27]. Further, having commenced litigation, Mr Mann was under an obligation to pursue the claim without delay and to obtain and bring all relevant evidence in his possession or power to the attention of the court, even if it was not favourable to his case.

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274 First, this action was commenced on 3 March 2021, but only came to trial *three and a half years* later. This delay was regrettable. It could not be attributed to any difficulty in serving the defendants – by 7 December 2021, they had all filed their defences.

275 Second, a key plank of the claim was that the AIHL Share Consideration was significantly lower that the value of the Disposed AIHL Shares. However, Mr Mann did not obtain a valuation of the Disposed AIHL Shares prior to filing this action.[402] As noted, Mr Ong was only engaged in March 2024 – three years after this action was commenced and after the initial deadline to exchange expert reports had passed. Mr Ong's Report was only issued on 20 March 2024 (see above at [174]). Further, the plaintiffs' pleaded case was flawed and no attempt was even made to adduce evidence to support the same (see above at [110]–[112]).

276 Third, and related to the above, the reliefs pleaded as against CCSEA made little sense. The plaintiffs first asked for a declaration that the AIHL Sale was "voidable and liable to be set aside in whole or in part"[403] – but did not ask for the same to be voided. Then, *as an alternative to this*, "to the extent that the [AIHL Sale was] not voidable", the plaintiffs asked for "the difference between the consideration received for [the AIHL Sale] and the actual market value of [the Disposed AIHL Shares], to be assessed".[404] But, as stated above, the plaintiffs did not know what the "actual market value" of the Disposed AIHL Shares was at the time the action was filed (and indeed, not for some years later),

402 Transcript (27 September 2024) at p 101 lines 1–4.

403 SOC at Claim 1.

404 SOC at Claim 3(a).

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and therefore could not have known whether it was worth pursuing a claim against CCSEA.

277 Fourth, as much as Mr Mann professed to have thoroughly investigated the affairs of SWT in an impartial and independent manner,[405] he failed to make basic enquiries with VLTCM in respect of the VLTCM Loan and its repayment despite accepting that he was able to.[406] Mr Mann made no effort to find out key pieces of information such as when the VLTCM Loan was discharged and whether this was from the funds paid to Wealth Direct, as well as whether any interest was payable, and if so, if it was in fact paid or compromised. It was especially incumbent on him to do so as he was bringing a claim against CCSEA and others on the basis that SWT had been deprived of the benefits of the payments to Wealth Direct and Long River and he would have been aware from the documents alone that those funds may have been used to discharge the VLTCM Loan.

278 Mr Mann's position appeared to be that he need not take any such steps because the VLTCM Loan was Mr Ashenafi's "*de facto* personal loan".[407] However, this was neither pleaded nor supported in his affidavit of evidence-in-chief. Mr Mann accepted that the proceeds from the VLTCM Loan were received in SWT's bank account,[408] but he did not make any enquiries with VLTCM as to the circumstances of the VLTCM Loan. Further, if Mr Mann genuinely believed that Mr Ashenafi had misused the proceeds of the VLTCM

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405 Transcript (24 September 2024) at p 48 lines 8–21; AEIC Mann at para 7.

406 Transcript (25 September 2024) at p 15 lines 9–22.

407 Transcript (25 September 2024) at p 4 line 12 to p 5 line 2, p 23 lines 19–24.

408 Transcript (25 September 2024) at p 9 lines 5–10, lines 16–19.

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Loan, why did he not make a claim against him for this substantial amount? Mr Mann's approach was difficult to reconcile or rationalise.

279 Fifth, Mr Mann had failed to act in the best interest of the creditors by omitting to make a claim in respect of CCSEA's assumption of SWD's liability to Ambo Min when there was no evidence of SWT benefitting from the same. In fact, there was no evidence of Mr Mann even conducting any investigation into this specific diversion of the AIHL Share Consideration. It was rich for Mr Mann to accuse CCSEA of failing to conduct any due diligence to evaluate why it was asked to make payments to third parties,[409] when Mr Mann himself failed to follow up and ask the very questions that could have shed light on these matters.

280 Sixth, despite the long run-up to trial, the plaintiffs could not decide what their case was. They filed an application to amend their SOC *vide* HC/SUM 2514/2024 on 3 September 2024, less than three weeks before the start of the trial. The application was heard and dismissed (with costs) by me on the same day trial commenced. Substantively, the plaintiffs sought to introduce a new cause of action against CCSEA for dishonestly assisting Mr Ashenafi to breach his fiduciary duties by making payments to Wealth Direct and Long River. In my brief grounds, I found the proposed pleading to be entirely inadequate and embarrassing. The new cause of action was also time barred. Notably, the plaintiffs had earlier pleaded a case in dishonest assistance against CCSEA, only to abandon it in May 2023. This flip-flopping evidenced the lack of thought that went into shaping and pursuing this action.

[409] AEIC Mann at para 60(a).

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281 Seventh, even with respect to the claims that were pleaded, specifically relating to the AIHL Sale being a transaction at an undervalue, the plaintiffs' case was unclear, muddled and obfuscating. As set out, the plaintiffs pleaded a case that distinguished between the AIHL Sale and the disposal of the AIHL Sale Consideration; but proceeded on a different case that conflated the two.

Conclusion

Reliefs

282 In summary, I found that:

(a) Sino Africa is liable for the sum of US$5,055,318, being the book value of the Disposed SWE Shares, for (i) being party to the SWE Share Transfer which was a transaction at an undervalue; and (ii) conspiracy to cause loss to SWT and/or its creditors.

(b) Mr Ashenafi is liable for the sum of US$5,055,318, being the book value of the Disposed SWE Shares, for (i) breach of fiduciary duties in procuring the SWE Share Transfer; and (ii) conspiracy to cause loss to SWT and/or its creditors.

(c) Mr Ashenafi is liable for the sum US$299,270, being the balance of the sum paid to Long River that remained unaccounted, for breach of fiduciary duties in procuring this payment.

283 Sino Africa and Mr Ashenafi are to be jointly and severally liable in respect of the sum of US$5,055,318 in [282(a)] and [282(b)] above.

284 I dismiss the action as against CCSEA.

Costs

285 I order:

(a) the plaintiffs to pay costs to CCSEA in the amount of $300,000 (excluding disbursements) in respect of the dismissal of the claim. The parties are directed to attempt to agree on the disbursements claimed by CCSEA and failing that, are to write to the court within 14 days listing the items they cannot agree on and their submissions in relation to the same (limited to seven pages).

(b) Mr Ashenafi and Sino Africa to jointly and severally pay costs to the plaintiffs in the amount of $162,000 (excluding disbursements). This includes the costs of the interlocutory applications which were ordered but not quantified. The plaintiffs are to file within 14 days a list of disbursements incurred in respect of the claims against Mr Ashenafi and Sino Africa.

Hri Kumar Nair
Judge of the High Court

Isaac Tito Shane, Sindhu Nair d/o Muralidharan Nair and Lim Chu Yech (Tito Isaac & Co LLP) for the first and second plaintiffs;
The first and fifth defendants absent and unrepresented;
Zhu Ming-Ren Wilson and Naomi Lim Bao Bao (Rajah & Tann Singapore LLP) for the sixth defendant.

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