IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 3

Court of Appeal / Civil Appeal No 23 of 2024

Between

CH Biovest Pte Ltd

… *Appellant*

And

(1) Envy Asset Management Pte Ltd (in liquidation)
(2) Bob Yap Cheng Ghee
(3) Tay Puay Cheng
(4) Toh Ai Ling

… *Respondents*

In the matter of Originating Application No 311 of 2023

Between

(1) Envy Asset Management Pte Ltd (in liquidation)
(2) Bob Yap Cheng Ghee
(3) Tay Puay Cheng
(4) Toh Ai Ling

… *Claimants*

And

CH Biovest Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Insolvency Law — Avoidance of transactions]

TABLE OF CONTENTS

INTRODUCTION **1**

THE MATERIAL FACTS **2**

THE DECISION BELOW **5**

THE PARTIES' CASES ON APPEAL **8**

ISSUES TO BE DETERMINED **11**

THE PRELIMINARY ISSUES **12**

WAS THERE A THRESHOLD REQUIREMENT TO INVOKE THE AVOIDANCE PROVISIONS FOR THE RIGHT TYPE OF TRANSACTION? 12

WAS EAM OBLIGED TO PAY PROFITS TO THE APPELLANT? 15

THE SUBSTANTIVE ISSUES **25**

WHETHER THE PAYMENTS COULD BE AVOIDED UNDER S 73B OF THE CLPA 25

Consideration under s 73B(3) of the CLPA must be of adequate value *26*

The appellant did not provide consideration for the Overwithdrawn Sums *31*

WHETHER THE PAYMENTS COULD BE AVOIDED UNDER S 224 OF THE IRDA 31

Did the payments fall within the second limb of s 224(3)(a) of the IRDA? *33*

Did the payment come within the first limb of s 224(3)(a) of the IRDA? *39*

Was EAM unable to pay its debts? *40*

CONCLUSION **45**

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CH Biovest Pte Ltd
v
Envy Asset Management Pte Ltd (in liquidation) and others

[2025] SGCA 3

Court of Appeal — Civil Appeal No 23 of 2024
Sundaresh Menon CJ, Steven Chong JCA and Kannan Ramesh JAD
16 October 2024

4 February 2025

Kannan Ramesh JAD (delivering the grounds of decision of the court):

Introduction

1 This appeal arose from the collapse of the Envy group of companies, which purported to operate a business of purchasing and reselling nickel. Investors were offered the opportunity to fund the purchase of nickel in exchange for attractive returns from the profits of resale. In truth, this was a Ponzi scheme. There were no transactions in nickel, and consequently no profits to be paid to investors. Any purported profits made by the investors were fictitious and in fact paid out from the funds of other investors. The appellant was one such investor, having received from the first respondent, one of the companies within the group, more than $2m in excess of its investment principal.

2 Unsurprisingly, the Ponzi scheme met its inevitable end and collapsed into insolvency, leaving many investors with little more than a claim against the now insolvent entities. In these circumstances, the liquidators of the companies – charged to maximise the assets available for distribution to the creditors – looked to investors who had profited such as the appellant and commenced proceedings to claw back the fictitious profits that were paid. The proceedings were brought on the basis of the statutory avoidance provisions in s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("CLPA") and s 224 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("IRDA"), as in force at the time the payments were made.

3 The appellant resisted the proceedings and sought to keep the fictitious profits that it had received on the basis that it was contractually entitled to them. The appellant was unsuccessful below and was ordered by the General Division of the High Court to repay the fictitious profits. Having considered the issues, we came to the same conclusion and therefore dismissed the appeal.

4 We now deliver our full grounds of decision.

The material facts

5 The full background facts have been set out in the judgment of the Judge of the General Division of the High Court (the "Judge"): see *Envy Asset Management Pte Ltd (in liquidation) and others v CH Biovest Pte Ltd* [2024] SGHC 46 (the "Judgment"). We repeat only the aspects material to the appeal.

6 The Ponzi scheme (the "Scheme") was operated by the first respondent, Envy Asset Management Pte Ltd ("EAM"), Envy Management Holdings Pte Ltd and Envy Global Trading Pte Ltd ("EGT") (collectively, the "Envy

Companies”). All three are presently in liquidation, with the second, third and fourth respondents having been appointed as joint and several liquidators of each (the “Liquidators”).

7 EAM was initially the primary operating vehicle of the Scheme. Its purported business involved the purchase of London Metal Exchange (“LME”) Nickel Grade Metal from an Australian company known as Poseidon Nickel Limited (“Poseidon”) at a 16% to 25% discount off the LME benchmark prices. EAM would then re-sell the nickel to various third-party buyers at a higher price.

8 Investors were offered the opportunity to partake in the purchase of LME Nickel Grade Metal on this basis by entering into Letters of Agreement (“LOAs”) with EAM. The appellant, CH Biovest Pte Ltd, was one such investor. The key terms of each LOA were as follows:

(a) Clause 2.1 provided that the investor would provide a stipulated “Investment Amount”, which EAM would use solely for investment in LME Nickel Grade Metal over a stipulated three-month period.

(b) Clause 3 provided that the “Investment Amount” represented a buy-in into EAM’s “Portfolio”, which was defined in clause 1.8 to be EAM’s invested asset holdings in LME Nickel Grade Metal purchased from Poseidon at a stipulated price. For value received, EAM would be liable to pay the investor the “Investment Amount” plus any “Appreciation”, which was defined to mean the fair market value of each liquid asset of EAM at any given time after the “Effective Date” (defined as the date of the relevant LOA) minus the fair market value of each liquid asset of EAM as of the Effective Date (or the date of the acquisition if that date was after the Effective Date) after the deduction of stipulated fees (clause 1.2). This, in essence, represented EAM's profit on its nickel trades which it was liable to pay to the investor, and we refer to it as such hereinafter. Upon "Expiration" (which was defined as a date three months after the Effective Date of the relevant LOA), EAM was liable to pay the Investment Amount and Appreciation net of any commission, shipping and insurance costs and hedging costs. In the event the trades were not profitable, the investor was guaranteed a minimum of 85% of the Investment Amount upon Expiration (as defined) (clause 1.5).

9 Upon the expiry of each LOA, the investor could choose to withdraw any returns or "roll-over" the returns into a new LOA.

10 Between June 2019 and February 2020, the appellant executed nine LOAs with EAM, investing a total of $5,480,246 and receiving $7,799,730 in return, achieving a "profit" of $2,319,484 (the "Overwithdrawn Sums"). It was agreed between all the parties that there was no actual nickel trading carried out by EAM and the "profit" received by the appellant was paid out of moneys invested by other investors.

11 The collapse of the Scheme began soon after in March 2020 when the Monetary Authority of Singapore ("MAS") placed EAM on its Investor Alert List, highlighting that EAM had reportedly misrepresented to investors that it was in the process of applying for a licence from the MAS. No such application had in fact been submitted. Following this, the Envy Companies were restructured. Much of the business operations were transferred to EGT, which became the new operating vehicle, and the Scheme changed into one where investors would purchase a proportion of receivables purportedly due under forward contracts. This did not last long – on 22 March 2021, the key person

behind the Envy Companies, Mr Ng Yu Zhi ("NYZ"), was charged for cheating and fraudulent trading, and the Envy Companies applied to place themselves in judicial management soon after. NYZ is presently facing trial for these charges before the General Division of the High Court.

12 Interim judicial managers ("IJMs") were appointed over the Envy Companies on 27 April 2021. The IJMs issued an IJMs' Report, detailing their finding that the Envy Companies' purported nickel trading business was non-existent. Subsequently, the IJMs identified potential avenues of recovery against certain "Overwithdrawn Investors" including the appellant. The IJMs then applied to wind up the Envy Companies, and winding up orders were made on 16 August 2021. The second, third and fourth respondents were appointed the Liquidators.

13 Following the winding up of the Envy Companies, the Liquidators commenced the application below to recover the Overwithdrawn Sums. It bears emphasis that the Liquidators' claim was restricted only to those sums which represented the appellant's "profit", and not to the entirety of the sums paid to the appellant. In other words, the Liquidators sought to recover only the "profit" and not the "Investment Amount" as well. The Liquidators did not explain why the claim was restricted to the "profit" and we say no more. We therefore proceeded on this basis.

The decision below

14 In the proceedings below, the Liquidators sought recovery of the Overwithdrawn Sums on three grounds. First, EAM had made the payments with the intent to defraud creditors within the meaning of s 73B of the CLPA and/or s 438 read with s 439 of the IRDA. Though s 73B of the CLPA was repealed and replaced by the IRDA provisions effective from 30 July 2020, it

was the applicable provision as payment of the Overwithdrawn Sums were made before 30 July 2020 (Judgment at [87]). Second, the payments were transactions at an undervalue within the meaning of s 224 of the IRDA. Third, the payments were recoverable by way of unjust enrichment.

15 The appellant raised a multitude of arguments in its defence. First, that the statutory avoidance provisions were inapplicable because the Overwithdrawn Sums were never EAM's assets to begin with, but only moneys it held on either a *Quistclose* trust or an institutional constructive trust for its investors. Second, that the Liquidators had chosen the *wrong* avoidance provisions because the purpose or policy underpinnings of s 73B of the CLPA and s 224 of the IRDA did not align with the Liquidators' goals of ensuring an even distribution of assets among creditors. Instead, the proper avenue was through avoidance provisions in the IRDA relating to unfair preference. Thus, the appellant sought a dismissal of the claims without the need to examine the substantive elements of each provision. Third, the appellant contested the claim under s 73B of the CLPA on the ground that EAM's real intention was not to defraud creditors but to keep the Scheme alive, and that the appellant had provided good consideration for the Overwithdrawn Sums and therefore had a defence under s 73B(3) of the CLPA. Fourth, the appellant contested the claim under s 224 of the IRDA, raising the same argument that it had provided consideration for the Overwithdrawn Sums, and further disputing that EAM was either unable to pay its debts at the time of the payments, or had become unable to do so as a result. Finally, the appellant resisted the unjust enrichment claim, arguing that there was no total failure of consideration because EAM had received commission payments deductible from the "profit" which was paid to the appellant.

16 The Judge rejected the Liquidators' argument that the Overwithdrawn Sums held by the appellant were subject to a *Quistclose* trust or an institutional constructive trust (Judgment at [56] and [63]). The parties have not challenged this aspect of the Judge's decision on appeal, and we say no more on it.

17 The Judge held that there was no error in the Liquidators' choice of avoidance provisions. The Judge drew a distinction between transactions at an undervalue and unfair preferences, relying on the Court of Appeal's decision in *Rothstar Group Ltd v Leow Quek Shiong and other appeals* [2022] 2 SLR 158 ("*Rothstar*") for the proposition that a transaction where a company applied its assets towards the discharge of its existing debt or other liability would fall within the latter category (and presumably, that the provisions targeting undervalue transactions such as s 73B of the CLPA and s 224 of the IRDA would be inapplicable). However, the Judge found that the payment of the Overwithdrawn Sums did not go towards the discharge of EAM's liabilities to the appellant. Such liabilities never arose because they were contingent upon EAM making a profit on its nickel trading. Since there was never any nickel trading to begin with, EAM was never under a liability to pay any profit to the appellant. The payments were therefore outside the realm of unfair preference and there was no error in the Liquidators' reliance on s 73B of the CLPA and s 224 of the IRDA (Judgment at [68]–[84]).

18 On the claim under s 73B of the CLPA, the Judge found that the Overwithdrawn Sums were paid with an actual intent to defraud EAM's creditors (Judgment at [121]). As for the defence of good consideration under s 73B(3), the Judge was of the view that "consideration" for the purpose of the provision bore the same meaning as in contract law. However, as there never was any profit because there was no nickel trading, payment of the Overwithdrawn Sums were not referable to any payment by the appellant of its

principal investment, or to any promise to pay commission on such profit, with the result that there was no consideration (Judgment at [125]–[136]).

19 As for the claim under s 224 of the IRDA, the Judge held that payment of the Overwithdrawn Sums fell within the second limb of s 224(3)(*a*) of the IRDA. The Judge held that the analysis of consideration under s 224(3)(*a*) mirrored the analysis under s 73B of the CLPA as no meaningful distinction could be drawn between the two provisions in this respect. The Judge was also satisfied that EAM was unable to pay its debts within the meaning of s 226(2)(*a*) of the IRDA, relying on the proposition that a Ponzi scheme was insolvent from the outset, as well as EAM's consistent use of its moneys to pay (a) NYZ, and its other directors and employees; (b) its overhead costs; and (c) referral fees and fictitious profits to investors (Judgment at [173]–[174]).

20 Lastly, the Judge dismissed the unjust enrichment claim on the ground that the present case concerned an absence of consideration as opposed to a total failure of consideration, with the result that there was no applicable unjust factor (Judgment at [194]).

21 Consequently, the Judge ordered the appellant to repay the Overwithdrawn Sums.

The parties' cases on appeal

22 On appeal, the appellant challenged the Judge's decision to allow the claims under s 73B of the CLPA and s 224 of the IRDA.

23 The appellant's primary contention was that on an objective analysis of the LOAs, EAM had in fact come under an obligation to pay profit to the appellant. That analysis could not be influenced by the subsequent discovery

that EAM had acted fraudulently. To this end, counsel for the appellant, Mr Kenneth Pereira ("Mr Pereira"), heavily relied on the decision of the Judicial Committee of the Privy Council in *Fairfield Sentry Limited (in Liquidation) v Migani and others* [2014] UKPC 9 ("*Fairfield Sentry*"), as we will discuss below. Thus, in making payment of the Overwithdrawn Sums, EAM was simply performing its obligations under the LOAs and discharging its contractual liabilities to the appellant.

24 Following from this primary contention, the appellant submitted that the payment of the Overwithdrawn Sums went towards the discharge of EAM's contractual liabilities to the appellant. Therefore, the payment could only at most be regarded as a potential unfair preference, for which the Liquidators had invoked the wrong avoidance provisions.

25 It also followed that the claim under s 73B of the CLPA should fail – the appellant could rely on the defence under s 73B(3) as it had provided consideration for payment of the Overwithdrawn Sums.

26 As for the claim under s 224 of the IRDA, the appellant submitted that the Judge was wrong to hold that the analysis of consideration under s 224(3)(*a*) of the IRDA should mirror that in s 73B(3) of the CLPA. The appellant argued that this ignored the wording of s 224(3)(*a*), which was only concerned with whether the transaction was *on terms* that provided for EAM to receive no consideration. The appellant submitted that it had provided consideration for the LOAs through its payment of the Investment Amount to EAM and its promise to pay commission on any profit. Thus, this was not a case where EAM had entered into a transaction on terms where it would receive no consideration.

27 The second string to the appellant's bow on the claim under s 224 of the IRDA related to the Judge's finding that EAM was unable to pay its debts at the time payment of the Overwithdrawn Sums was made. The appellant submitted that this was wrong on two grounds. First, the Judge's reliance on the proposition that a Ponzi scheme was insolvent from the outset, as its total liabilities would always exceed its total assets from the moment it took in its first "investment". The appellant argued that the Judge was inconsistent in his reasoning because he had declined to apply the same principle in his analysis of the claim under s 73B of the CLPA, relying instead on the fact that EAM did not guarantee the payment of profits under the LOAs and only promised repayment of 85% of the Investment Amount. Second, the appellant submitted that the Judge's approach was akin to a finding that EAM was balance sheet insolvent, whereas the proper question was whether it was *cash flow* insolvent.

28 The Liquidators disputed the appellant's primary contention, maintaining that EAM was never contractually obliged to pay any profit to the appellant as there was no profit to begin with. The Liquidators disputed the appellant's reliance on *Fairfield Sentry*, arguing that the case was distinguishable on the facts.

29 The Liquidators also sought to generally defend the Judge's reasoning on the issue of consideration under both s 73B of the CLPA and s 224 of the IRDA. In respect of the finding that EAM was unable to pay its debts within the meaning of s 226(2)(*a*) of the IRDA, the Liquidators sought to rationalise the Judge's conclusion as being consistent with the cash flow test.

30 However, the Liquidators submitted that the Judge was wrong to dismiss the claim in unjust enrichment. The Liquidators argued that the unjust factor of a total failure of consideration was in fact made out because the purported basis

for payment of the Overwithdrawn Sums – the discharge of EAM's contractual obligation to pay any profit – did not exist. The Liquidators argued that if this submission was accepted, it would constitute an alternative basis to affirm the Judge's decision to order repayment of the Overwithdrawn Sums.

Issues to be determined

31 In our view, two preliminary issues (the "Preliminary Issues") arose for determination:

(a) whether payment of the Overwithdrawn Sums was made in discharge of EAM's contractual obligation to pay profits to the appellant; and

(b) whether the Liquidators had erred in their choice of avoidance provisions.

32 If we decided against the appellant on the Preliminary Issues, the following issues (the "Substantive Issues") would then arise for consideration:

(a) whether the appellant had provided consideration entitling it to rely on the defence under s 73B(3) of the CLPA;

(b) whether payment for the Overwithdrawn Sums was a transaction at an undervalue within the meaning of s 224(3)(*a*) of the IRDA; and

(c) whether EAM was unable to pay its debts within the meaning of s 226(2)(*a*) of the IRDA.

33 Given our conclusions on the aforementioned issues, as we will elaborate on below, we did not find it necessary to address the claim in unjust enrichment.

The Preliminary Issues

34 We first address the Preliminary Issues. At first glance, the second issue in relation to the Liquidators' choice of avoidance provisions would appear to depend on our determination of the first issue in relation to the characterisation of the payment of the Overwithdrawn Sums. This was certainly the basis on which the parties argued these issues. For reasons we will explain later in these grounds, we found that the characterisation of the payment of the Overwithdrawn Sums was misconceived. However, the second issue raises the question of whether there is even a threshold requirement to invoke the right avoidance provision. We therefore found it appropriate to address the second issue first.

Was there a threshold requirement to invoke the avoidance provisions for the right type of transaction?

35 As we explained at [15] above, the appellant's submission that the Liquidators had erred in their choice of avoidance provisions was on the assumption that there was a threshold requirement that a claimant relying on a statutory avoidance provision had to first show that it had elected to proceed under the correct provision for the transaction in question. In this respect, the appellant placed significant weight on the conceptual distinction between statutory avoidance provisions which target transactions at an undervalue, and provisions which target unfair preferences.

36 The Judge appeared to accept this proposition but held that the Liquidators did not err in their choice of s 73B of the CLPA and s 224 of the IRDA as the payment was an undervalue transaction rather than an unfair preference.

37 In our view, there was no threshold requirement as contended. While we agreed that a conceptual distinction could be drawn between the various statutory avoidance provisions, that did not in itself warrant the imposition of a preliminary "filtering" or threshold requirement as advanced by the appellant (see [35] above). Indeed, it would be wrong to premise any threshold requirement of this sort on the basis that the different avoidance provisions serve distinct and exclusive policy objectives. As we will explain, they do not.

38 In the context of a company in liquidation, the avoidance provisions of the IRDA (as well as s 73B of the CLPA) serve only one policy imperative – to preserve the assets of the company (the "Preservation Rationale"). As we observed in *DGJ v Ocean Tankers (Pte) Ltd (in liquidation) and another appeal* [2024] SGCA 57 ("*Ocean Tankers*") at [148], the Preservation Rationale is reflected in two facets of the liquidation regime. The first is in the shielding of the company's assets by having the assets of the company brought into the liquidator's custody (s 140(1) of the IRDA) and protected by way of a statutory moratorium on claims against the company (s 133(1) of the IRDA). The second is in the avoidance provisions, which aid the liquidators in reconstituting the insolvent company's assets.

39 A clear exposition of how the various categories of avoidance provisions serve the same common policy – that is, the Preservation Rationale – can be found in *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten gen ed) (Sweet & Maxwell, 5th Ed, 2018) ("*Goode*") at para 13-03:

> *The conditions of avoidance vary according to the particular ground of avoidance involved but are for the most part dictated by a common policy, namely 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.* All but two of the grounds of avoidance known to insolvency law involve the unjust enrichment of a particular party at the expense of other creditors, whether they are

> preferential creditors or ordinary unsecured creditors. Once this crucial point is grasped, much of the legislative structure falls into place. The unjust enrichment may affect other creditors in one of two ways. It may reduce the company's net asset value, as where it involves a transfer of the insolvent company's property to another party, otherwise than as a creditor, at a wholly inadequate price or a purchase of property by the company at an inflated price; or it may, without disturbing the company's net asset position, involve payment or transfer to a particular creditor in satisfaction or reduction of his debt, with the result that the creditor is put in a better position than if the company had immediately entered insolvency proceedings without the payment or transfer having been made, and the ordinary distributional rules (including, in the case of non-preferential unsecured creditors, the statutory provisions for rateable or pro rata distribution) applied. The avoidance provisions may thus be seen as necessary both to preserve the company's net asset value and to ensure equality of distribution, at least among classes of creditors. …
>
> [emphasis added]

40 The Preservation Rationale, however, is not an end in itself. It operates in tandem with the "Distribution Rationale" (*ie*, that the assets of the company are preserved for the purpose of distribution) to safeguard the integrity of the liquidation process: see *Ocean Tankers* at [143]. The ultimate goal of that process is the protection of the creditors of the company and to ensure a *pari passu* distribution of assets.

41 There is a further objection to the appellant's contention – nothing in the language of either s 73B of the CLPA or s 224 of the IRDA sets out a threshold requirement as contended. If such a requirement was intended, one would have expected it to have been clearly spelt out in the statute. Indeed, if there was a question as to whether the correct avoidance provision had been used to target the transaction in question, it would rightly fall to be determined *by the express requirements of the provision itself*. In short, a claim, that as pleaded, would not satisfy one or more elements of the relevant provision, would fail for that reason.

42 We were therefore satisfied that this submission was misconceived and rejected it. With respect, it was therefore not necessary for the Judge to have made any determination as to whether the Liquidators had "erred" in their choice of avoidance provisions.

Was EAM obliged to pay profits to the appellant?

43 We turn to the appellant's primary contention – that EAM was in fact contractually liable to pay the profits to the appellant, and that it had done exactly that when it made payment of the Overwithdrawn Sums. This contention was difficult to understand. As a matter of logic. given the appellant's acceptance that EAM had not carried out any trades in nickel, there were simply no profits to speak of. It followed that there was no contractual obligation to pay any profits.

44 However, Mr Pereira argued that it would be wrong for the court to have regard to the fact of EAM's fraud. Mr Pereira submitted that to do so would be to take into account the subjective perspective of EAM and matters that came to light after the LOAs were entered into. This would be contrary to principles of contract law relating to the interpretation of contracts.

45 In support of this contention, Mr Pereira relied on the judgment of the Privy Council in *Fairfield Sentry*. The case involved the collapse of a mutual fund (the "Fund") which had placed the vast majority of its assets with Bernard L Madoff Investment Securities LLC ("BLMIS") for management. Investors subscribed for shares in the Fund at a net asset value ("NAV") per share on the date of purchase and could redeem their shares at the NAV per share on the day the redemption was effected. Crucially, Article 11 of the Fund's Articles of Association provided for a certification mechanism to the effect that all parties would be bound by any certificate as to the Fund's NAV per share given in good

faith by or on behalf of the directors. The Fund's NAV per share was communicated in regular statements to the investors by the Fund's administrator, and the calculations were made on the basis of reports from BLMIS. After it emerged that BLMIS was operating a Ponzi scheme and its reports were fictitious, the Fund collapsed and was wound up. The liquidators of the Fund commenced claims in unjust enrichment against those investors who had successfully redeemed their shares before the Fund's collapse. This was on the footing that the moneys were paid to the investors in the mistaken belief that the Fund's assets were as stated by BLMIS, when in fact that was fictitious. It was agreed by all parties that the claims would fail if the investors were contractually entitled to the payments from the Fund, and this in turn depended on whether the Fund was contractually obliged to pay the true NAV per share determined in light of the fraud, or the NAV per share determined by the directors at the time of redemption. The Privy Council held that the regular communications of the Fund's NAV per share constituted a certification under Article 11 which obliged the Fund to pay out on the NAV per share as determined by the directors' communications. The liquidators' claims therefore failed.

46 Mr Pereira argued that we should take a similar approach to the Privy Council in *Fairfield Sentry*, to the effect that the subsequent discovery of EAM's fraud should not affect the analysis of EAM's contractual obligation to pay the profits on its nickel trades. In Mr Pereira's submission, it was clear under the terms of each LOA that EAM's obligation to pay the profits would crystallise upon the expiry of the three-month period (Expiration as defined in [8(b)] above). The amount of profit which was payable could be ascertained by calculating the difference between the stipulated purchase price in clause 1.8 of the LOA (see [8(b)] above) and the fair market value of the nickel on the Expiry

Date (as defined), which an investor could obtain by checking the prices on the LME Market.

47 We disagreed. The flaw in this submission was that the LOAs in the present case did not contain any certification clause of the kind seen in *Fairfield Sentry*. Under clause 1.2 of each LOA, "Appreciation" (*ie*, the profit) was clearly tied to the fair market value of "each liquid asset of [EAM]". It was clearly contemplated under clause 1.8 of each LOA that EAM would in fact have *actual* asset holdings in LME Nickel Grade Metal. No clause in the LOAs provided that EAM could simply certify the profits in some way which would bind all parties. Indeed, Mr Pereira recognised this crucial gap and invited us to read such a mechanism into the LOAs. However, there was no basis for us to do so. Thus, on an objective analysis of the terms of the LOAs, it was clear that EAM was never under an obligation to pay any profits, because it did not have any nickel assets or trades to begin with. *Fairfield Sentry* was therefore distinguishable on the facts.

48 In any event, fundamentally, we did not think that the presence of such a certification clause would permit EAM to render valid what was otherwise a fiction. The question of whether a contractual obligation has arisen – in this case, EAM's obligation to pay the profits to the appellant – is one of construction of the terms of the contract (the LOAs). It is axiomatic that the construction exercise requires a consideration of both the text and the *context* of the contract. Where the text appears plain and unambiguous inasmuch as it admits of one clear meaning but the meaning of the text would lead to an absurd result (including one which demonstrates an absence of business common sense), the court may, on re-examination, conclude that the text was not in fact as plain and unambiguous as originally thought. In such a situation, the context would be an essential tool in the interpretation of what the parties objectively

intended (see *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 at [31], [32] and [35]).

49 In other words, the LOAs cannot be interpreted in ignorance of the relevant context of the parties' commercial agreement. In this case, the agreement, in substance, was an investment scheme. The appellant, as the investor, placed moneys with EAM, with the promise of returns generated by EAM's purported investment strategy, which was to trade in nickel to achieve a profit. It would be absurd, in our view, to hold that EAM was contractually obliged to pay returns which were generated not by the execution of that investment strategy, but by fraudulent activity on EAM's part. It would be equally absurd to hold that a certification clause could constitute a contractual solution, permitting the investee to fraudulently certify that such returns were in fact the legitimate fruits of a promised investment strategy that was never carried out. It seemed to us that what Mr Pereira did not address was the significance of the fact that as between the parties to the contract in *Fairfield Sentry*, their relationship was entirely governed by the terms of their contract. The Ponzi scheme in question, which was operated by BLMIS, was a step removed from their contractual relationship. The outcome might well have been different as between the Fund in which the investor had invested, and BLMIS but that was not the case we were faced with.

50 We found support for this approach in the Privy Council's subsequent decision in *Skandinaviska Enskilda Banken AB (Publ) v Conway and another (as Joint Official Liquidators of Weavering Macro Fixed Income Fund Ltd)* [2019] UKPC 36 ("*Conway*").

51 *Conway* involved a similar investment structure to *Fairfield Sentry*, with investors subscribing to shares in a Cayman Islands-incorporated company (the "Company") which engaged an investment manager, Weavering Capital (UK) Ltd ("WCUK") to manage its investments. The Company's redemption mechanism was similar in that shares would be redeemed at the Company's NAV per share as determined by the directors. The key difference was that WCUK's director, Chief Executive Officer and Principal Investment Manager, one Magnus Peterson, was found by the court to be a *de facto* director and the controlling mind of the Company. It emerged that Magnus Peterson had been fraudulently inflating the Company's NAV through interest rate swaps which he knew to be worthless. The Company was in truth incurring massive losses and by the time the fraud was discovered, the Company was unable to pay its redemption requests. After the Company was placed in liquidation, the liquidators commenced a claim to avoid redemption payments made to an investor on the ground that they amounted to unfair preferences.

52 The issue before the court was a narrow one – whether the Company was unable to pay its debts at the time of payment. The investor argued that the Company was not insolvent at that time. The investor's argument was that the Company was not contractually obliged to make payment on the basis of the fraudulent NAV as the Company's published NAVs were fraudulently inflated by Magnus Peterson. Consequently, none of the redeemers were creditors of the Company for the redemption amount that was determined in each case based on the fraudulent NAV. Instead, the Company was only liable to the extent of its real (and lower) NAVs. The Company was thus not insolvent at the time the payments were made. The liquidators opposed this and relied on *Fairfield Sentry* to argue, much like the appellant in the present appeal, that the fraud should not be considered in the construction of the relevant terms. However, the Privy Council in *Conway* distinguished *Fairfield Sentry* on the basis that the

fraud which operated in the assessment of the NAV in that case was external to the fund and did not involve a situation where the directors themselves had fraudulently inflated the value of the Company's assets (*Conway* at [24]). The Privy Council agreed with the investor's submission, holding that (*Conway* at [27]):

> … nothing in the contract constituted by the articles purported to permit the directors of the Company to carry out a fraudulent determination of the NAV and that, even if it had, such a fraudulent determination could not bind redeeming shareholders. The Board considers that the dishonest valuation of assets was not made 'pursuant to these articles' and therefore was not 'binding on all persons' …

53 However, notwithstanding the Privy Council's agreement with the investor's submission, it held that the investor was procedurally barred from challenging the fraudulently determined NAV (*Conway* at [30]). This did not impact the observation cited above.

54 We generally agreed with the approach to the construction of the contract in *Conway*, with one qualification. While the Privy Council had distinguished *Fairfield Sentry* on the basis that the fraud in that case was external to the Fund, we think this is best understood in terms of whether the agreement between the contracting parties was actually being performed. In the case of *Fairfield Sentry*, the payments to the investors were based on a NAV that assumed that the value as represented by the external party (BLMIS) was correct. The certification of the NAV was made by the Fund's professional administrator, who was not privy to BLMIS's fraud. As a matter of contract between the parties – the Fund and its investors – the payments were made in accordance with the agreed formula. The contractual bargain was therefore performed. However, in the case of *Conway* and in the present appeal, the directors of the investee were themselves party to the fraud and the contractual

bargain was never performed. This was not a case where an external party had achieved a fraud on the contracting parties resulting on inflated or erroneous payments. It is in this context that "internal" and "external" should be understood.

55 We were satisfied that *Fairfield Sentry* and *Conway* could therefore be reconciled under this approach. Seen in this light, the decision in *Fairfield Sentry* was correct on its facts – the Fund had actually performed its investment strategy by having its assets placed with BLMIS; that fact was not changed by the subsequent discovery of BLMIS's fraud. As we have noted at [49] above, the fraud was an issue between the Fund and the BLMIS and did not impact the contractual relationship between the Fund and the investors. However, the facts of *Conway* and indeed of this appeal clearly presented a different situation.

56 The reality in this appeal was that the parties had agreed that the appellant would receive a return based on a promised investment strategy – those returns would be generated by EAM's profits from the purchase and resale of LME Nickel Grade Metal. That strategy was never carried out, and there were therefore no profits to speak of. It followed that no profits could have arisen from the non-existent trade in nickel, and consequently that there could be no contractual obligation to pay any profits to the appellant.

57 We found that a similar approach was taken in the United States (the "US"), where the Uniform Fraudulent Transfer Act ("UFTA"), which was the relevant legislation enacted in most US states targeting fraudulent conveyances in most US states, shared some similarities with s 73B of the CLPA. This is unsurprising as both the Singapore and the US provisions were derived from the same predecessor English legislation (see [67] below).

58 The US approach is illustrated by the case of *Donell v Kowell* 533 F 3d 762 (9th Cir, 2008) ("*Donell*"), which concerned a Ponzi scheme operated by J.T. Wallenbrock & Associates ("Wallenbrock"). Wallenbrock sold promissory notes to investors which guaranteed a 20% return at the end of a three-month maturity period. In its investment materials, Wallenbrock purported to use investors' moneys to purchase accounts receivables of Malaysian latex glove manufacturers at significant discounts in exchange for immediate cash payments to the manufacturers. Wallenbrock would then carry the receivables until it received full payment from the manufacturers' buyers: see *SEC v. J.T. Wallenbrock* 313 F 3d 532 (9th Cir, 2002) at 535–536. After the Ponzi scheme came to light, Wallenbrock was placed in receivership. Wallenbrock's receiver applied to disgorge the "profits" paid out by Wallenbrock to an investor under the UFTA as enacted in § 3439.04(a) of the Civil Code of California, which provided:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:
>
> > (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
> >
> > (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

59 At first instance, the district court held that the receiver was entitled to recover from one Robert Kowell ("Kowell") those payments made to him within the statutory limitation period. Kowell's appeal was dismissed by the US Court of Appeals for the Ninth Circuit. Materially, the court rejected Kowell's argument that he had provided "reasonably equivalent value" by virtue of his initial investment in the scheme. The court stated (at 777–778) as follows:

> Payouts of 'profits' made by Ponzi scheme operators are not payments of return on investment from an actual business venture. Rather, they are payments that deplete the assets of the scheme operator for the purpose of creating the appearance of a profitable business venture. *Id.* at 756-57. The appearance of a profitable business venture is used to convince early investors to 'roll over' their investment instead of withdrawing it, and to convince new investors that the promised returns are guaranteed. … Up to the amount that 'profit' payments return the innocent investor's initial outlay, these payments are settlements against the defrauded investor's restitution claim. Up to this amount, therefore, there is an exchange of 'reasonably equivalent value' for the defrauded investor's outlay. Amounts above this, however, are merely used to keep the fraud going by giving the false impression that the scheme is a profitable, legitimate business. These amounts are not a 'reasonably equivalent' exchange for the defrauded investor's initial outlay.
>
> In this case, Kowell never actually possessed an interest in a company purchasing account receivables from Malaysian glove manufacturers. The investment strategy promised by Wallenbrock's officers was a lie to induce Kowell and investors like him to fund Wallenbrock. What Wallenbrock did was to return to Kowell his own money, plus money from subsequent 'investors,' to persuade Kowell to continue to invest and to secure testimonial evidence from people like Kowell to induce others to invest. Although Kowell was putting real money into Wallenbrock, and was getting what looked like real profits in return, in fact he never received 'reasonably equivalent value' for his investment, just cash that was moved around in an elaborate shell game.

60 In finding that the "profits" received by the investor were not a "reasonably equivalent" exchange for the investor's initial investment, the court in *Donell* had essentially arrived at the same conclusion as we have in the

present case – that those payments could not be characterised as the operator's performance of the investment contracts. We would highlight that this conclusion was reached *notwithstanding* that the contracts (*ie*, the promissory notes) provided for the payment of *interest*. While interest payments would ordinarily amount to a debt payable regardless of whether the debtor's underlying business was actually generating profits, it was significant that the court construed the contract *in light of the parties' agreement*, in particular taking into consideration the promise in Wallenbrock's investment materials as to how investors' moneys would be used to generate the returns. In that respect, we were in agreement with the analysis in *Donell*.

61 However, it is obvious that *not every contract* entered into with a Ponzi operator can be construed in this manner. As stated above (at [49]), the touchstone of the analysis is the parties' commercial bargain and the terms of their agreement. If the performance of that agreement is not predicated upon the Ponzi operator carrying out its promised investment strategy, then the two must be treated as separate. For example, if the Ponzi operator had obtained a legitimate loan from a bank to finance a lease of office premises, interest payable on that loan would not be seen as non-contractual, because the bank was not lending into the investment scheme itself. We did not come across any authorities suggesting that interest payments in such a situation would be regarded as non-contractual. To do so would, in our view, be overinclusive in so far as it could extend to any contract entered into with an entity which was later found to be operating a Ponzi scheme. In our view, a distinction must be drawn between lending or investing into the scheme on the one hand and entering into a legitimate transaction such as a loan agreement with the entity on the other.

62 We therefore rejected the submission that EAM was contractually obliged to pay the profits in the shape of the Overwithdrawn Sums to the appellant. No such obligation arose, because there were no profits to begin with. The payments were therefore entirely non-contractual in nature.

63 Since we found against the appellant on the Preliminary Issues, it became necessary to examine the Substantive Issues relating to the claims under s 73B of the CLPA and s 224 of the IRDA.

The Substantive Issues

Whether the payments could be avoided under s 73B of the CLPA

64 We start with the claim under s 73B of the CLPA. The section provides:

> **Voluntary conveyances to defraud creditors voidable.**
>
> 73B.—(1) Except as provided in this section, every conveyance of property, made whether before or after 12th November 1993, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.
>
> …
>
> (3) This section does not extend to any estate or interest in property disposed of for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the disposition, notice of the intent to defraud creditors.

65 To establish a claim under s 73B of the CLPA, a claimant must show that (a) there has been a conveyance of property; (b) the conveyance was made with the intent of defrauding creditors; and (c) the claimant is a person who was prejudiced by the foregoing conveyance of property. The defendant, who is generally the recipient of the property conveyed, may defeat the claim by establishing a defence under s 73B(3). To rely on this defence, the defendant must show that (a) he acquired the "property for valuable consideration and in

good faith or upon good consideration and in good faith"; and (b) he did not have notice of the debtor's intent to defraud his creditors (see *Wong Ser Wan v Ng Bok Eng Holdings Pte Ltd and another* [2004] 4 SLR(R) 365 ("*Wong Ser Wan*") at [5]).

Consideration under s 73B(3) of the CLPA must be of adequate value

66 The only issue before us was whether the appellant had established the element of consideration for the purpose of the defence in s 73B(3), as it was common ground that s 73B was applicable. To address this issue, it was necessary, in our view, to have regard to the historical background of the defence.

67 Section 73B of the CLPA was enacted in 1993. In *Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 ("*Quah Kay Tee*") at [6]–[9], the Court of Appeal explored the legislative history of the provision, which traced back to the Statute of 13 Elizabethan 1571 (c 5) intituled An Act Against Fraudulent Deeds, Gifts, Alienations, Etc ("the Elizabethan Statute"). As observed in *Quah Kay Tee* (at [26]), the purpose of the Elizabethan Statute was:

> [T]o prevent debtors from dealing with their property in any way to the prejudice of their creditors. It in fact considers a man deeply indebted as no longer the true owner of his property but rather, a trustee of it for the benefit of his creditors. Therefore, the statute gives priority to debts over voluntary and fraudulent conveyances and attempts to prevent a man in his lifetime from delaying, hindering or defrauding his just creditors.

68 Materially, the defence of consideration was also present in the Elizabethan Statute, in the following terms:

> VI Provided also . . . that this Act . . . shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured . . . which Estate or Interest is *or shall be upon good consideration and bona fide* lawfully conveyed or

> assured to any person or persons ... not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge or such covin, fraud or collusion as is aforesaid ...
>
> [emphasis added]

69 While the Elizabethan Statute contained only a reference to "good consideration", it was recognised in an early authority that "the intent of the Act was, that the consideration in such case should be *valuable*; for equity requires, that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are" [emphasis added] (see *Twyne's Case* (1601) 76 ER 809 ("*Twyne's Case*") at 814).

70 Further, support for the requirement that the consideration provided should be of adequate value can be found in Sydney Edward Williams, *Kerr on Fraud and Mistake* (Sweet & Maxwell, 6th Ed, 1920) at 272:

> With reference to the consideration that is needed to bring a conveyance within this section, it may be here observed that the words and intention of the section must be fully satisfied; and, as laid down in an old case [citing *Twyne's Case*], *the words 'good consideration' in the statute are to be taken to mean 'valuable consideration.'* To come within the proviso of the fifth section, a conveyance must be for both valuable consideration and also *bona fide*, 'by which it appears that, as a gift made on a good consideration, if it be not also *bona fide*, is not within the proviso, so as a gift made *bona fide*, if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration, and also *bona fide*' …
>
> *Conveyances grounded on meritorious consideration alone … or on a consideration entirely inadequate … are looked on as voluntary.*
>
> [emphasis added]

71 It was therefore clear that, as a matter of history, a recipient of property resisting an application to avoid a fraudulent conveyance under the Elizabethan Statute had to show that he had provided *adequate value* for the property conveyed.

72 The Elizabethan Statute was replaced by para 31 of Part II of the Third Schedule to the Law of Property (Amendment) Act 1924 (c 5) (UK), which was then re-enacted as s 172 of the Law of Property Act 1925 (c 20) (UK) (*Quah Kay Tee* at [9]). It was at this point that the words "for valuable consideration and in good faith" were added. There does not appear to be any clear evidence as to the reason for this addition. One possibility we would venture to suggest is that this was to codify what had been the prevailing understanding of "good consideration" in the original wording of the Elizabethan Statute. In our view, this would accord with the purpose of the Elizabethan Statute (see [67] above).

73 We observed that a similar view was taken by the Review Committee on Insolvency Law and Practice (whose recommendations led to the Insolvency Act 1986 (c 45) (UK) (the "Insolvency Act 1986")) – that "it is difficult in the context to give any logical meaning to 'good', as distinguished from 'valuable', consideration": see UK, Review Committee on Insolvency Law and Practice, *Report of the Review Committee* (Cmnd 8558, 1982) at para 1215 (Chairman: Sir Kenneth Cork) (the "Cork Report"). In fact, the Cork Report made a recommendation – albeit one that was not ultimately adopted – to re-enact s 172 to make clear that the section would apply even to transfers supported by valuable consideration if that "[did] not consist of full consideration in money or money's worth received by the debtor" (at paras 1283–1284).

74 The requirement that consideration for the purposes of s 73B of the CLPA had to be of adequate value was also affirmed in two decisions of the High Court.

75 In *Wong Ser Wan*, the court was concerned with an application under s 73B of the CLPA to set aside (a) a transfer of a residential property for a consideration of US$2m, and (b) a transfer of certain shares for a consideration

of US$1m, by one Mr Ng Cheong Ling ("Mr Ng") to companies owned and controlled by his family. The court found that the assets had been transferred with an intent to defraud creditors (*Wong Ser Wan* at [38]). As for the requirement of consideration, the court found the consideration for the residential property to be considerably less than its market value and clearly inadequate. The court did not make a finding that the shares had been transferred at an undervalue, but found that the consideration had been arbitrarily fixed and that no attempt had been made to ascertain their correct value. The court further found that the transferees of the assets could not establish the elements of good faith and ignorance of Mr Ng's intent to defraud (*Wong Ser Wan* at [56] and [62]). The transfers were therefore set aside.

76 In *Wang Xiaopu v Koh Mui Lee and others* [2023] 5 SLR 717 ("*Wang Xiaopu*"), the court was concerned with an application under s 73B of the CLPA, among others, to set aside the transfer of one Dr Goh Seng Heng's ("Dr Goh") joint tenancy interest in a residential property to his wife, Mdm Koh Mui Lee ("Mdm Koh"), for $5.25m. The court stated that it was necessary to determine whether the transaction had been undervalued because this would shed light on the question of whether Mdm Koh had provided good or valuable consideration for the property (*Wang Xiaopu* at [175]). The court ultimately concluded on the evidence that the property was not sold at an undervalue (*Wang Xiaopu* at [186]).

77 It was therefore clear, on an analysis of the legislative history and the case law, that s 73B(3) of the CLPA requires a recipient to have provided consideration of adequate value for the property received.

78 The Judge took a different view of the requirement of consideration. The Judge reasoned that a plain reading of s 73B(3) suggested that there were two

disjunctive limbs by which the requirement could be satisfied, *viz* "for valuable consideration and in good faith" or "upon good consideration and in good faith", and that these two limbs must be substantively different to avoid tautology. On this basis, the Judge was of the opinion that "good consideration" did not require any inquiry into value and could therefore include nominal consideration. It followed that the requirement of consideration under s 73B(3) would essentially be the same as in contract law (Judgment at [94]–[95]).

79 Respectfully, we disagreed with the Judge's interpretation of the provision. First, this was inconsistent with the historical understanding of s 73B and its predecessor provisions as we discussed above (see [67]–[77] above). Second, in our view, it would defeat the purpose of s 73B to read the consideration requirement in s 73B(3) as being coterminous with the concept of consideration in contract law. In contract law, the requirement of consideration goes towards the inquiry of whether a valid contract has been formed. A contract is valid even if consideration provided is only nominal (*Lim Quee Choo v Tan Jin Sin and Others* [2008] SGHC 133 at [26]). Section 73B of the CLPA, however, is concerned with dealings in property which prejudice creditors. That valuable property has been transferred by a debtor to a recipient under a valid contract supported by nominal consideration makes it no less prejudicial to the debtor's creditors – the fact remains that significant value has been eroded from the debtor's estate, and therefore from the reach of his creditors.

80 In our judgment, the words "for valuable consideration and in good faith or upon good consideration and in good faith" in s 73B of the CLPA should therefore be regarded as a singular defence, requiring that the defendant must have acted in good faith and provided consideration of adequate value for the property received.

The appellant did not provide consideration for the Overwithdrawn Sums

81 With the above principles in mind, the issue of whether the appellant could rely on the defence in s 73B of the CLPA was straightforward. It was clear that the appellant had provided consideration in entering into the LOAs as a matter of contract law. That, however, was not consequential as the issue is not whether there was a binding contract between EAM and the appellant. As explained (at [66]–[80] above), the focus of s 73B is not on the validity of the contract under which property has been conveyed. Rather, it is on the validity of the conveyance itself, which in this case is the payment of the Overwithdrawn Sums. The requirement of the defence under s 73B(3) is that the recipient must have provided not merely consideration, but *value* for the property received. The real question is therefore whether the appellant provided good consideration for the Overwithdrawn Sums. This in turn raises the question of whether there was any basis for the payment.

82 As stated above, EAM's payment of the Overwithdrawn Sums bore no connection to its contractual obligations under the LOAs. They were essentially non-contractual, and in our view, it could not be said that the appellant had provided any value for them, let alone valuable or good consideration. The appellant was therefore not entitled to avail of the defence in s 73B(3) of the CLPA.

83 Accordingly, we dismissed the appeal in relation to the claim under s 73B of the CLPA.

Whether the payments could be avoided under s 224 of the IRDA

84 We turn to the claim under s 224 of the IRDA. A claimant must establish the following elements:

(a) First, the company is in judicial management or is being wound up (s 224(1)).

(b) Second, the company entered into a transaction with a person at an undervalue, namely by:

(i) making a gift to that person or otherwise entering into a transaction with that person on terms that provided for the company to receive no consideration (s 224(3)(*a*)); or

(ii) entering into a transaction with that person for a consideration the value of which, in money or money's worth, was significantly less than the value, in money or money's worth, of the consideration provided by the company (s 224(3)(*b*)).

(c) Third, the transaction must have been entered into at the "relevant time", *ie*, within a period of three years before the commencement of the judicial management or winding up (s 226(1)(*a*)), provided that the company was unable to pay its debts (within the meaning of s 125(2)) at that time, or became unable to pay its debts in consequence of the transaction (s 226(2)).

85 The defendant to such a claim may nonetheless avail himself of the defence under s 224(4) of the IRDA by showing that (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. No such defence was (or indeed could have been) raised in the present circumstances.

86 The only issues before us were whether the Judge was correct to find (a) that the payment of the Overwithdrawn Sums was a transaction at an undervalue within the meaning of s 224(3)(*a*); and (b) that EAM was unable to pay its debts at the time it made the payments.

Did the payments fall within the second limb of s 224(3)(a) of the IRDA?

87 We start with the issue of whether the payment of the Overwithdrawn Sums was a transaction at an undervalue within the meaning of s 224(3)(*a*) of the IRDA. Section 224(3)(*a*) contemplates two distinctive limbs – first, that the company makes a gift to a person; or second, that the company enters into a transaction with a person on terms that provide for the company to receive no consideration.

88 While the Judge did not expressly state which limb of s 224(3)(*a*) was applicable, it was clear that the Judge had regarded payment of the Overwithdrawn Sums as falling within the second limb of s 224(3)(*a*), *ie*, that by making the payments, EAM had entered into a transaction with the appellant on terms that provided for EAM to receive no consideration.

89 The appellant challenged this conclusion, relying on the fact that it had provided consideration for the LOAs. This argument was premised on the appellant's contention that the payment of the Overwithdrawn Sums should be regarded as the payment of profits to the appellant pursuant to EAM's contractual obligations under the LOAs.

90 As a starting point, given our conclusions above in respect of s 73B of the CLPA, it followed that "consideration" for the purposes of s 73B could not be understood the same way as in s 224(3) of the IRDA. In *Rothstar*, it was held that "consideration" for the purpose of s 98(3) of the Bankruptcy Act (Cap 20,

2009 Rev Ed) (the "BA") bears the normal meaning ascribed to it in contract law (*Rothstar* at [24]). We agreed that the same could be said for the meaning of consideration in s 224(3) of the IRDA as this section is similarly worded to s 98(3) of the BA which it replaced for the purpose of liquidations and judicial management. However, it is important to bear in mind the observations in *Rothstar* at [24] on the differing textures of consideration as used in the various subsections of s 98(3) of the BA. For instance, as regards s 98(3)(*a*) of the BA, which is now s 224(3)(*a*) of the IRDA, the inquiry is on the existence of consideration. On the other hand, as regards s 98(3)(*c*) of the BA, now s 224(3)(*b*) of the IRDA, the inquiry requires a comparison of the value between the consideration provided and the consideration received.

91 However, the focus of the analysis in s 224 of the IRDA was not on whether the appellant had provided consideration for the LOAs. Rather, the various aspects of considerations are merely touchstones to the overarching inquiry of whether the payment of the Overwithdrawn Sums constituted a transaction at an undervalue. The underlying premise of the appellant's argument was that in paying the Overwithdrawn Sums, EAM was simply performing its obligations under the LOAs (which the appellant had provided consideration for). For the reasons explained above (at [43]–[62]), we disagreed with this premise. Payment of the Overwithdrawn Sums was, in truth, entirely non-contractual and bore no connection to the LOAs. It therefore did not assist the appellant to argue that it had provided consideration for the LOAs.

92 However, with respect, we did not agree with the Judge that the second limb of s 224(3)(*a*) was the applicable provision. We were not satisfied that EAM, in making *unilateral* extra-contractual payments to the appellant, should be regarded as having entered into a transaction with the appellant on terms that provided for EAM to receive no consideration. The ordinary meaning of the

second limb, in our view, suggested that some form of mutual dealing between the parties would be required.

93 To be clear, it was not our view that mutual dealings were required in *every case* where s 224 was invoked. That much is made clear by s 2(1) of the IRDA, which defines "transaction" as including "any gift, agreement or arrangement", and provides that "any reference to entering into a transaction is to be construed accordingly", as well as by the inclusion of a gift as a transaction at an undervalue pursuant to the first limb of s 224(3)(*a*) (see also the English Court of Appeal's decision in *BAT Industries plc and others v Sequana SA* [2019] Bus LR 2178 ("*Sequana*") at [58]). Rather, our focus was on the proper interpretation of "transaction" as used in the chapeau to s 224(3) and *as qualified by* the words "on terms that provide for the company to receive no consideration" under the second limb of s 224(3)(*a*).

94 Two decisions of the Court of Appeal were relevant in this regard, namely *Mercator & Noordstar NV v Velstra Pte Ltd (in liquidation)* [2003] 4 SLR(R) 667 ("*Mercator*") and *Velstra Pte Ltd v Dexia Bank NV* [2005] 1 SLR(R) 154 ("*Velstra*"). These decisions, which arose out of the same liquidation proceedings, were made under the insolvency regime which existed before the enactment of the IRDA. Pursuant to that regime, an application to avoid an undervalue transaction would be made pursuant s 329 of the Companies Act (Cap 50, 1994 Rev Ed), which incorporated the rules relating to personal bankruptcy in s 98 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) (which is *in pari materia* to s 98 of the BA). As stated earlier, s 98(3) of the BA is similarly worded to s 224 of the IRDA.

95 *Mercator* concerned an application to avoid a payment of money by the insolvent company to a creditor of an associate company. The Court of Appeal

held that a payment *simpliciter* would come within the meaning of "transaction" in s 98 of the BA. The court reasoned that a gift was expressly included within the definition of "transaction" in the BA, notwithstanding that it was a unilateral act, and reasoned by analogy that a simple payment should also be regarded as a "transaction" (*Mercator* at [22]–[28]).

96 We did not find much assistance from *Mercator*, because the court's focus appeared to be on the meaning of "transaction" for the purposes of s 98(1) of the BA, which concerned the general power of the Official Assignee to apply to the court for an order in respect of a transaction at an undervalue (see [94] above). The court did not consider specifically whether a payment *simpliciter* would fall within s 98(3)(*a*) of the BA, which, as noted earlier, is similarly worded to s 224(3)(*a*) of the IRDA. The reasoning in *Mercator* focused on likening a simple payment to a gift (*Mercator* at [24]). In our view, the appropriate approach would have been to ask whether the payment constituted a gift within the meaning of s 98(3)(*a*).

97 We found support for this view in *Velstra*. While the case did not involve consideration of s 98(3)(*a*) of the BA, the Court of Appeal took the view that the plain meaning of "entered into a transaction with any person" in s 98(1) connoted mutual dealings, and that a gift was an express statutory exception to the mutuality rule (*Velstra* at [22]–[23]). Furthermore, the donor party must have intended to make the payment or pass the property to the recipient. Thus, a mistaken payment would not fall within s 98(1) and would have to be recovered on the basis of unjust enrichment (*Velstra* at [26] and [33]). In this context, a payment of moneys with the intention that the recipient receives the property in those moneys would amount to nothing other than a gift. To this extent, we would prefer the analysis in *Velstra* over that in *Mercator*.

98 We turn to the English authorities, which are relevant given the similarities between s 224 of the IRDA and the corresponding provisions of the Insolvency Act 1986.

99 In the English High Court decision of *Re Hampton Capital Ltd* [2016] 1 BCLC 374 ("*Hampton Capital*"), the court had to consider an application to avoid certain payments made by Hampton Capital Ltd ("Hampton") to a company, Elite Performance Cars Ltd ("Elite"), as transactions at an undervalue under s 238(4)(a) of the Insolvency Act 1986, which is *in pari materia* with s 224(3)(*a*) of the IRDA. These payments were made by a director of Hampton at the behest of another individual who, in the court's view, was a "plausible con-man". The court found that the payments did not fall within the scope of s 238(4)(a) of the Insolvency Act 1986. First, they could not be said to be gifts, because the director who made the payments never intended to make a gift to Elite (*Hampton Capital* at [36]). The court rejected the contention that Hampton had entered into a transaction with Elite on terms that provided for it to receive no consideration, because there was no evidence of any dealings between the two (*Hampton Capital* at [37]). The court also rejected the proposition that a simple payment could fall within the second limb of s 238(4)(a), stating at [38] that:

> I am aware that s 436 of the 1986 Act contains a definition of 'transaction' as including a 'gift, agreement or arrangement' and references to 'entering into a transaction' are to be construed 'accordingly'. Nevertheless, I cannot accept that the mere transmission of money, the mere making of a payment, without any form of dealing between the paying company and the payee, can constitute the entering into of a transaction by the company with the payee (at any rate where the transaction is not a 'gift'). What is required, on the language of s 238(4), is the entering into of a transaction between two parties. Without straining the language of the section, this must require some engagement, or at least communication, between the two parties and not merely a disposition of money which results in one party's money

> landing up in the bank account of the other without anything said or done by that other.

100 We found *Hampton Capital* to be persuasive in so far as mutual dealings were a clear indicium for a transaction to fall within the second limb of s 224(3)(*a*) of the IRDA.

101 The Judge relied on *Sequana* as support for the view that payment of the Overwithdrawn Sums could come within the scope of the second limb of s 224(3)(*a*) of the IRDA (Judgment at [175]–[178]). *Sequana* concerned an application to avoid a dividend payment under s 423 of the Insolvency Act 1986. One of the elements of s 423 is that the impugned transaction must be a transaction at an undervalue, under materially the same provision as in s 224(3) of the IRDA. *Sequana* held (at [50]) that a dividend payment could be regarded as a transaction on terms which provided for the company to receive no consideration. The Judge drew an analogy between a dividend payment and payment of the Overwithdrawn Sums, rationalising that they shared a common core, namely that both were payments to which the payee had no legal right to call upon or, put differently, both were not payments in discharge of any legal right or legal liability owed by the payee (Judgment at [177]). On this basis, he concluded that the second limb of s 224(3)(*a*) of the IRDA was applicable.

102 We agree with the analysis and conclusion in *Sequana*. However, with respect, the analogy drawn by the Judge between payment of Overwithdrawn Sums and the payment of a dividend is incorrect. There is a fundamental difference between the two. The former was an extra-contractual payment. The latter is a payment made pursuant to a contractual obligation that arises upon the declaration of dividends by the company. As observed in *Sequana* (at [38]), a share is a bundle of rights, one of which is the right to receive any dividends declared or paid on the share. Significantly, the right arising if a dividend is

declared is not independent of the original investment but is the return on the investment. That is certainly not the case in this case as payment of the Overwithdrawn Sums had nothing to do with the investments in the Scheme that were made by the appellant pursuant to the LOAs. As to what would be regarded as a "transaction" for the purpose of the second limb of s 224(3)(*a*), *Sequana* (at [53]) emphasised the importance of the bilateral nature of the relevant transactions, requiring at least some element of dealing between the parties, citing amongst others *Hampton Capital.* Accordingly, we were of the view that *Sequana* did not support the Judge's view that second limb of s 224(3)(*a*) of the IRDA applied to payment of the Overwithdrawn Sums.

103 Thus, in our judgment, payment of the Overwithdrawn Sums did not constitute a transaction with the appellant on terms which provided for EAM to receive no consideration.

Did the payment come within the first limb of s 224(3)(a) of the IRDA?

104 Notwithstanding that the second limb of s 224(3)(*a*) did not apply, we were satisfied that payment of the Overwithdrawn Sums were gifts within the meaning of the first limb of the section.

105 While "gift" is not defined in the IRDA, we were satisfied that the term was to be accorded its ordinary meaning in law. A gift requires (a) delivery of the subject matter of the gift; and (b) an intention to gift (*Toh Eng Tiah v Jiang Angelina and another appeal* [2021] SGCA 17 at [52]).

106 A different definition was suggested in *Goode* at para 13-20 – that a gift was simply "a transfer of an asset for no consideration". We were not persuaded that this was a sufficient definition. It seemed to us that a mistaken payment would satisfy this definition, despite the natural meaning of "gift" not

encompassing such a payment. It seemed to us that in proposing this definition, *Goode* did not intend this result. In this regard, we observed that the two categories of gifts discussed in *Goode* – gratuitous payments to employees and payments to charity – were both classic situations of gifts which included the element of an intention to gift. This was consistent with the analysis in *Hampton Capital*, where the court declined to find that payments were gifts in circumstances where there was clearly no intention to gift (see [99] above). We therefore were of the view that the definition in *Goode* was not appropriate.

107 It was not disputed that the Overwithdrawn Sums were paid to the appellant. We were also satisfied that EAM did intend to make that payment to and for the appellant to retain the benefit of the moneys. This was undoubtedly done for nefarious purposes – *ie*, to maintain the fiction that EAM's nickel trading business was genuine and was genuinely generating returns for investors. However, that does not detract from whether there was an intention to gift the Overwithdrawn Sums to the appellant.

108 We were therefore satisfied that the Overwithdrawn Sums were gifts to the appellant falling within the first limb of s 224(3)(*a*) of the IRDA.

Was EAM unable to pay its debts?

109 We turn to the second issue relating to whether EAM was unable to pay its debts at the time that it made the payments. Section 226(2)(*a*) of the IRDA makes clear that this is to be determined with reference to s 125(2) of the IRDA, which relates to the circumstances in which a company may be wound up by the court. Sections 125(2)(*a*) and (*b*) did not apply in this case, leaving only s 125(2)(*c*), which provides that a company is deemed to be unable to pay its debts if:

> … it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court must take into account the contingent and prospective liabilities of the company.

110 It is uncontroversial that 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 as set out in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 ("*Sun Electric*"). The cash flow test involves an assessment of whether the company's current assets exceed its current liabilities (defined respectively as assets which will be realisable and debts which will fall due within a 12-month timeframe) such that it is able to meet all debts as and when they fall due (*Sun Electric* at [65]). The court adopts a commercial rather than a technical view of insolvency, and the question to be answered is whether the company's assets are realisable within a timeframe that would allow each of the debts to be paid as and when it becomes payable, and whether any liquidity problem can be cured in the reasonably near future. The debts to be considered need not be already due or demanded, and include contingent and prospective liabilities (*Sun Electric* at [66]–[68]). The court should also consider the following non-exhaustive list of factors in applying the cash flow test (*Sun Electric* at [69]):

(a) the quantum of all debts which are due or will be due in the reasonably near future;

(b) whether payment is being demanded or is likely to be demanded for those debts;

(c) whether the company has failed to pay any of its debts, the quantum of such debt, and for how long the company has failed to pay it;

(d) the length of time which has passed since the commencement of the winding-up proceedings;

(e) the value of the company's current assets and assets which will be realisable in the reasonably near future;

(f) the state of the company's business, in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales;

(g) any other income or payment which the company may receive in the reasonably near future; and

(h) arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts.

111 It was not clear to us that the Judge had applied the cash flow test as set out above. Rather, the Judge relied on the principle that a Ponzi scheme is insolvent from the outset, while also citing EAM's other cash outflows (see [19] above).

112 The principle that a Ponzi scheme is insolvent from the outset originates from the US. In *Cunningham v Brown* 265 US 1 (1924) ("*Cunningham*"), a case which arose from the insolvency of Charles Ponzi, the namesake of the Ponzi scheme, the US Supreme Court made the following observation:

> He was always insolvent and became daily more so, the more his business succeeded. He made no investments of any kind,

> so that all the money he had at any time was solely the result of loans by his dupes.

113 Various US courts have since cited *Cunningham* for the proposition that a Ponzi scheme is, as a matter of law, insolvent from its inception: see *Warfield v Byron* 436 F 3d 551 (5th Cir, 2006) at 558; and *Martino v Edison Worldwide Capital (In re Randy)* 189 BR 425 (Bankr ND Ill, 1995) at 441. The principle has also been adopted in some Canadian jurisdictions: see the decision of the Alberta Queen's Bench (Canada) in *Titan Investments Ltd Partnership (Re)* (2005) 383 AR 323 (QB) at [16]; and the British Columbia Supreme Court (Canada) in *Samji (Trustee of) v Whitmore* [2017] BCJ No 2143 at [49].

114 We did not think that the principle in *Cunningham* should be adopted in Singapore for two reasons. First, the applicable test for insolvency in the US is the balance sheet test: see *In re Taubman* 160 BR 964 (Bankr SD Ohio, 1993) at 978–979. While such a general principle is understandable in the context of the balance sheet test, on the basis that a Ponzi scheme's total liabilities will always exceed its total assets, that is not the test which applies in Singapore. Second, the question of insolvency under s 125(2)(*c*) of the IRDA, in our view, is ultimately a question of fact in all cases, including those which involve Ponzi operations. It would not be appropriate to rely on a general principle of law to determine that question.

115 We therefore examined the issue afresh in light of the principles canvassed above. While the appellant argued that the Judge had applied the wrong test in concluding that EAM was insolvent when it paid the Overwithdrawn Sums, it did not offer any real analysis as to why EAM was not insolvent under the cash flow test beyond a reference to the fact that EAM had only promised to repay 85% of an investor's investment sum under each LOA. This point did not assist the appellant's case. In fact, it was evidence that EAM

owed liabilities which were both significant (85% of the investment sum under each LOA) *and* current (being due upon the expiration of three months after each LOA was entered into). In addition to its liabilities under the LOAs, EAM's fraudulent conduct would undoubtedly have exposed it to claims for damages by investors for breach of contract and fraudulent misrepresentation among other things. These were contingent liabilities which were very much relevant in the application of the cash flow test (see [110] above).

116 Further, it was evident that as a matter of commercial reality, EAM was never going to have sufficient realisable assets to pay its debts and liabilities as they fell due. EAM did not carry out nickel trading or any other legitimate, revenue-generating business. EAM could only generate cash inflows by entering into further LOAs with investors – the same LOAs which obliged it to repay 85% of the investment amount upon the expiry of three months, regardless of whether EAM was earning any profits from its (non-existent) nickel trading business, and exposed it to contingent liabilities as described above. In turn, those moneys were used to pay (a) NYZ, and its other directors and employees; (b) its overhead costs; and (c) referral fees and fictitious profits to earlier investors (see [19] above). Not all of these payments were legitimate – for example, the IJMs identified a significant number of transfers into bank accounts held by NYZ personally (at paras 2.3.5–2.3.6 of the IJMs' Report dated 25 May 2021). In fact, according to the IJMs' latest report dated 2 July 2021, the transfers made by the Envy Companies to NYZ or individuals and entities associated with him amounted to over $475m (at para 2.2.1 of the Update to the IJMs' Report). Some of these transfers were not even recorded in the Companies' bank records, let alone explained. Although EAM may well have had a claim against NYZ to recover the rerouted moneys, it was evident that as a matter of commercial reality, EAM would not have been able to realise those moneys to pay its debts as they fell due.

117 To sum up, on an application of the cash flow test, we were satisfied that EAM *was* hopelessly insolvent and unable to pay its debts for the purposes of s 226(2)(*a*) of the IRDA.

118 We therefore dismissed the appeal in relation to the claim under s 224 of the IRDA.

Conclusion

119 To conclude, we were satisfied that the claims under s 73B of the CLPA and s 224 of the IRDA were both made out. That being the case, there was no need for us to address the submissions in relation to the claim in unjust enrichment and we took no view on them. We dismissed the appeal and awarded costs in the aggregate sum of $60,000 to the Liquidators, with the usual consequential orders.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Pereira Kenetth Jerald, Keerthana Narayanan and Ooi Tsu Chong David (Aldgate Chambers LLC) for the appellant;
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