IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 246

Originating Summons No 380 of 2017

In the matter of section 76 and section 76A of the Companies Act (Cap 50, 2006 Rev Ed)

Between

International Healthway Corporation Ltd

… *Plaintiff*

And

(1) The Enterprise Fund III Ltd
(2) VMF3 Ltd
(3) Value Monetization III Ltd

… *Defendants*

GROUNDS OF DECISION

[Companies] — [Capital] — [Share capital] — [Share buybacks]

[Equity] — [Estoppel] — [Estoppel in defiance of statute]

[Equity] — [Remedies] — [Rescission] — [Bars to rescission]

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International Healthway Corp Ltd
v
The Enterprise Fund III Ltd and others

[2018] SGHC 246

High Court — Originating Summons No 380 of 2017
Hoo Sheau Peng J
15 February, 21 May 2018; 2 July 2018

13 November 2018

Hoo Sheau Peng J:

Introduction

1 This application is concerned with the validity of certain contracts and transactions when a company *indirectly* acquires its own shares in contravention of s 76(1A)(*a*)(i) of the Companies Act (Cap 50, 2006 Rev Ed) ("CA"), and raises several points about s 76A of the CA.

2 The brief facts are as follows. Under a facility agreement, the three defendants ("Crest Funds"), agreed to advance a sum of $20m to the plaintiff, International Healthway Corporation Ltd ("IHC"). Certain security agreements were entered into by IHC. Using funds from the facility, the first defendant, The Enterprise Fund III Ltd ("EFIII"), purchased IHC's shares from the open market ("open market acquisitions"). Then, EFIII held the shares on behalf of IHC ("the trust arrangement").

3 By way of a written notice, IHC sought to *avoid* the share acquisitions, the facility agreement and the security agreements on the basis that the transactions were related to the indirect acquisitions by the company of its own shares in contravention of s 76(1A)(*a*)(i) of the CA. This was in exercise of its rights under s 76A(2) of the CA, which provided that "related" transactions shall be *voidable* at the option of the company. Having avoided these contracts, IHC took the position that it did not owe any *contractual* liability to the Crest Funds. Unsurprisingly, the Crest Funds disputed IHC's position.

4 Therefore, this application was brought for the court to determine the status of the transactions. After hearing the parties, I held that while the open market acquisitions were not void by virtue of s 76A(1A), the trust arrangement was void under s 76A(1)(*a*) of the CA. Also, I held that the facility agreement and the security agreements were voidable as "related" transactions within the meaning of s 76A(2) of the CA, and that IHC had avoided these "related" transactions by way of its written notice.

5 While I decided the application in favour of IHC, it was not disputed by IHC that the Crest Funds have recourse to s 76A(4) of the CA, to apply to the court for any order or orders, as the court thinks just and equitable, against IHC or any other person, in respect of any resulting loss or damage the Crest Funds have suffered or are likely to suffer.

6 The Crest Funds have appealed, and I now give the full grounds of my decision.

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Background

7 IHC, now known as OUE Lippo Healthcare Limited, is a company incorporated in Singapore and listed on the Catalist board of the Singapore Exchange ("SGX").

8 Two shareholders of IHC, Fan Kow Hin ("Mr Fan") and Andrew Aathar ("Mr Aathar"), were involved in the negotiations leading up to the transactions. Mr Fan and Mr Aathar were substantial shareholders of IHC. Mr Fan was also the Chief Executive Officer of IHC from 17 May 2015 to 31 January 2016.

9 The Crest Funds are three funds managed by fund management firm Crest Capital Asia Fund Management Pte Ltd, which is in turn a wholly-owned subsidiary of Crest Capital Asia Pte Ltd ("Crest Capital"). Tan Yang Hwee ("Mr Tan"), was the investment director of Crest Capital and the representative of the Crest Funds.

10 On 3 April 2015, Mr Tan and Mr Aathar spoke via telephone and discussed the provision of a credit facility to IHC. The substance of that discussion was recorded in an email from Mr Aathar to Mr Tan (copied to Mr Fan) dated 4 April 2015, in which Mr Aathar expressed concerns about imminent short-selling of IHC shares, and requested a standby credit facility of $20m "for use against this activity". Mr Aathar also proposed that the facility be extended for a short term of one to two months, at an interest rate of 3.5% per month, and suggested that IHC shares "be bought and held by [the Crest Funds] directly".

11 Importantly, Mr Aathar suggested that instead of disbursing the funds to IHC to be paid to a broker to purchase the shares, the Crest Funds could purchase the shares on IHC's behalf through its own broker. The Crest Funds

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were agreeable to this suggestion as it avoided a circuitous arrangement and afforded them additional security in respect of any drawdown under the facility.

12 In an email dated 9 April 2015, Mr Tan sent Mr Aathar and Mr Fan a draft term sheet, in which the proposed security for the facility was, *inter alia*, a pledge of the IHC shares purchased using the facility. The purpose of the facility was stated as being "[t]o fund the general working capital".

13 On 16 April 2015, the parties entered into a facility agreement providing for the credit facility of up to $20m extended by the Crest Entities to IHC. The agreement of 16 April 2015 was later superseded by way of an agreement dated 30 July 2015. This is the facility agreement mentioned at [2] above, which will be referred to as the "Standby Facility", and which was secured by the following security agreements:

(a) Three deeds of charge all dated 30 July 2015 by IHC in favour of the Crest Funds in relation to the share capital of three wholly owned subsidiaries, being IHC Medical Re Pte Ltd, IHC Management Pte Ltd and IHC Management (Australia) Pty Ltd ("Deeds of Charges"); and

(b) Two deeds of undertaking both dated 30 July 2015 by IHC Management Pte Ltd and IHC Management (Australia) Pty Ltd respectively, in favour of the Crest Funds ("Deeds of Undertaking").

14 From April to August 2015, acting on IHC's instructions given by Mr Aathar, EFIII executed drawdowns on the Standby Facility to purchase IHC shares on the open market, and I have referred to these as the "open market acquisitions". These shares were then held in the name of EFIII on behalf of IHC, in what I have referred to as the "trust arrangement". Overall, a total sum of $17,332,081.15 was drawn down under the Standby Facility for the purchase

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of 59,304,800 IHC shares on 14 occasions from 16 April 2015 to 24 August 2015 at share prices ranging from $0.285 to $0.31 per share.

15 On 9 September 2015, the SGX issued an announcement advising shareholders and potential investors to exercise caution when dealing in IHC shares as its review of the trades in IHC showed that more than 60% of the total traded volume of IHC shares in the period since April 2015 to the date of the advisory appeared to be conducted by "a handful of individuals who seem to be connected to each other". After the SGX advisory was issued, the share price of IHC fell from $0.31 to a low of $0.10 by the end of September 2015.

16 Subsequently, IHC defaulted on the Standby Facility. On 19 October 2015, EFIII issued a letter of demand to IHC for payment of the interest charges on the facility ("Standby Fees") which were in arrears. The Standby Fees had been paid for the months of April and May 2015, but not for June 2015 onwards. On 15 April 2016, the Crest Funds appointed receivers over the charged shares in the three IHC subsidiaries pursuant to the Deeds of Charges.

17 On 23 January 2017, an extraordinary general meeting of IHC was held. At this meeting, the incumbent board of directors was removed in its entirety and replaced by a new board. According to IHC, it was only after the new board had taken over control that the contraventions of the CA came to light, and legal action against the Crest Funds was then commenced.

18 On 8 March 2017, IHC's solicitors, Rajah & Tann LLP ("R&T") issued the written notice to the Crest Funds' solicitors, WongPartnership LLP ("WongPartnership"), asserting that the acquisition by IHC of its own shares was in contravention of s 76(1A)(*a*) of the CA, and that pursuant to s 76A(2) of the CA, both the acquisition of the IHC shares and the Standby Facility were

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voidable at the option of IHC. IHC also purported to exercise its right to *avoid* those transactions, and asserted that the Crest Funds no longer had any claim against IHC under the Standby Facility, and the security agreements will not confer any security on the Crest Funds.

19 On 20 March 2017, WongPartnership responded to the written notice on behalf of the Crest Funds, denying that the transactions were void or voidable at the option of IHC.

20 On 6 April 2017, IHC commenced the present proceedings against the Crest Funds. The following prayers were sought:

(a) A declaration that the following transactions are voidable at the option of the plaintiff under s 76A(2) of the CA:

(i) the Standby Facility;

(ii) the Deeds of Charge;

(iii) the Deeds of Undertaking; and

(iv) the acquisitions of the shares of IHC by EFIII on IHC's behalf.

(b) A declaration that the transactions were avoided by IHC by way of the written notice.

(c) A declaration that IHC bears no contractual obligation or liability whatsoever to the Crest Funds in relation to the transactions.

The statutory framework

21 I now set out the relevant statutory framework.

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22 Section 76 of the CA imposes restrictions on a company financing dealings in its shares, which includes the three situations of share buy-backs, the giving of financial assistance for share acquisitions and the lending of money on security of its shares. For present purposes, what is pertinent is the prohibition against share buy-backs which is stated as follows:

> **Company financing dealings in its shares, etc.**
>
> **76.**—(1A) Except as otherwise expressly provided by this Act, *a company shall not* —
>
> (*a*) whether directly or *indirectly*, in any way —
>
> (i) *acquire shares* or *units of shares in the company*…
>
> [emphasis added]

23 Section 76A of the CA sets out the consequences of a company financing dealings in its shares on certain contracts and transactions. Specifically, s 76A(1) renders certain contracts or transactions entered into in contravention of s 76 void. However, in relation to "a disposition of book-entry securities", s 76A(1A) dis-applies s 76A(1). Thereafter, s 76A(2) provides for the circumstances under which other contracts or transactions entered into in contravention of s 76, as well as "related" contracts or transactions, shall be voidable at the option of the company. Again, I set out the pertinent provisions in relation to the prohibition against share buy-backs as follows:

> **Consequences of company financing dealings in its shares, etc.**
>
> **76A.**—(1) The following contracts or transactions made or entered into in contravention of section 76 shall be *void*:
>
> (*a*) *a contract or transaction by which a company acquires or purports to acquire its own shares* or *units of its own shares*...;
>
> …

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> (1A) *Subsection (1) shall not apply to a disposition of book-entry securities*, but a Court, on being satisfied that a disposition of book-entry securities would in the absence of this subsection be void may, on the application of the Registrar or any other person, order the transfer of the shares acquired in contravention of subsection (1).
>
> (2) *Subject to subsection (1),* a contract or transaction made or entered into in contravention of section 76, *or a contract or transaction related to such contract or transaction, shall be voidable at the option of the company*. The company may, *subject to the following provisions of this section*, *avoid* any contract or transaction to which this subsection applies by *giving notice in writing* to the other party or parties to the contract or transaction.
>
> [emphasis added]

24 Where contracts or transactions are void or avoided, s 76A(4) provides for recourse by third parties, for the court to make orders as it may think just and equitable on the application of any person who has suffered (or is likely to suffer) any resulting loss or damage.

25 For completeness, I note that the prohibition against share buy-backs protects creditors against the reduction of capital, and serves other purposes such as to protect the investing public against manipulation of share price by use of the company's money: see *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, 3rd Ed, 2009) at para 12.9). While statutory inroads have been made into the prohibition against share buy-backs, the present facts do not engage those provisions. With the statutory framework in mind, I turn to the parties' cases.

The parties' cases

Plaintiff's case

26 By IHC's case, the transactions which IHC sought to avoid fell broadly into two groups – (i) the share acquisitions; and (ii) the Standby Facility and the

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security agreements which I shall refer to collectively as the "loan agreements".

27 In relation to the share acquisitions, IHC clarified that there are two constituent parts. It had sought to avoid only the trust arrangement pursuant to which EFIII held the shares on IHC's behalf, and not the open market acquisitions. The end result would be that EFIII would hold the IHC shares as the legal and beneficial owner. Upon my request for further arguments on the question of whether the trust arrangement was void rather than voidable, IHC then argued that the trust arrangement was void as a "contract or transaction by which a company acquires… its own shares" within the meaning of s 76A(1)(*a*) of the CA. Section 76A(1A), which dis-applies the voiding provision to dispositions of book-entry securities, did not apply to the trust arrangement, but, if at all, to the open market acquisitions. In the alternative, IHC argued that the trust arrangement was voidable under s 76A(2) of the CA.

28 As for the loan agreements, IHC argued that these were voidable under s 76A(2) of the CA as transactions "related" to the share acquisitions. Although the facility did not stipulate that the funds were to be applied towards the purchase of IHC shares, the Crest Funds knew from the beginning that the funds were intended to be applied to that purpose, and were in fact applied exclusively to that purpose. Further, the facility was in part secured by a pledge of the IHC shares purchased using the funds disbursed.

29 On the Crest Funds' argument that IHC was estopped from electing to treat the transactions as voidable under s 76A(2) of the CA (see [33] below), IHC argued that estoppel cannot be relied on in defiance of a statute. The legislative purpose of ss 76 and 76A of the CA is to protect the interests of the company by ensuring that the company's capital is not improperly eroded and

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to prevent market manipulation. Holding IHC estopped from avoiding the transactions would run counter to these legislative objectives, and would be tantamount to repealing those provisions. IHC further argued that it could not be estopped from asserting the true facts – *ie*, that the acquisition was an irremediable breach of the prohibition on share buy-backs – when the Crest Funds was itself aware, or constructively aware, of those facts.

30 On the applicability of third party interests and the doctrine of affirmation as common law bars to rescission (see [34] below), IHC responded that third party interests could be adequately dealt with under s 76A(4) of the CA, and that there could be no affirmation by payment of the Standby Fees.

Defendants' case

31 The Crest Funds' position was that neither the share acquisitions nor the loan agreements were void or voidable. On the share acquisitions, the Crest Funds argued that the open market acquisitions and the trust arrangement formed part and parcel of the same transaction by which IHC indirectly acquired its own shares. Section 76A(1)(*a*) therefore applied so as to render both the constituent parts void. Likewise, s 76A(1A) applied both to the open market acquisitions and the trust arrangement, dis-applying the voiding effect to both parts of the transaction. Accordingly, the trust arrangement was not void. This being the case, the trust arrangement ought not to be held voidable under s 76A(2) of the CA. It would run counter to Parliament's intention if a transaction saved from being rendered void by s 76A(1A) might yet be declared voidable under s 76A(2).

32 As for the loan agreements, s 76A(2) had no application. There was no room for "related" transactions where share buy-backs were concerned. In this regard, it was pointed out that s 76A(14), in deeming certain types of

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transactions "related" transactions, does not make provision for transactions relating to share buy-backs. In any case, the loan agreements could not be said to be "related" to the share acquisitions. Nothing in the Standby Facility stated that the funds had to be used for the acquisition of the IHC shares. The purchase and pledge of the IHC shares was never a term of the Standby Facility, and was at best a separate agreement reached after the Standby Facility had been granted.

33 In any case, IHC could not avoid the transactions because it had made representations to the Crest Funds to the effect that it had done all that was necessary to ensure the validity of those transactions, and was thereby estopped from asserting the contrary, *ie*, that the transactions were entered into in breach of ss 76 and 76A of the CA.

34 Finally, the common law bars to rescission applied. IHC lost its right to avoid the transactions by affirmation. By continuing to make payments of the Standby Fees under the Standby Facility, it had acted in a manner consistent only with affirming the contract. Also, third party interests militated against the avoidance of the transactions.

Issues to be determined

35 The following issues fell for determination:

(a) Whether the trust arrangement was void or voidable under ss 76A(1)(*a*) or 76A(2) of the CA respectively.

(b) Whether the loan agreements were voidable as transactions "related" to the trust arrangement under s 76A(2) of the CA.

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(c) To the extent that any of the transactions were voidable, whether the plaintiff was estopped from exercising its right to avoid those transactions pursuant to s 76A(2) of the CA.

(d) To the extent that any of the transactions were voidable, whether the common law bars to rescission applied in respect of the purported avoidance of the transactions pursuant to s 76A(2) of the CA.

Issue 1: Whether the trust arrangement was void or voidable

36 As set out above, the share acquisitions comprised two aspects. IHC shares were acquired by EFIII from the open market, and then held on behalf of IHC. It was undisputed by the parties that by indirectly acquiring its own shares IHC contravened s 76(1A)(*a*)(i) of the CA, which prohibits a company from acquiring, directly or indirectly, shares in the company. As for the consequences of such a breach, s 76A(1)(*a*) provides that "a contract or transaction by which a company acquires or purports to acquire its own shares" shall be void, and not merely voidable.

37 In this connection, the Crest Funds quite rightly conceded that the trust arrangement would ordinarily be void under s 76A(1)(*a*) of the CA, since it was part of the means by which IHC indirectly acquired rights in its own shares. Where parties departed was whether s 76A(1A) of the CA (which dis-applies s 76A(1)(*a*)) operated such that the trust arrangement would not be void.

38 It seems to me clear that the phrase "contract or transaction" would be wide enough to encompass an arrangement by which a company's shares are held on trust by a nominee. As pointed out by IHC, "transaction" is a word with a wide ambit, and it has been defined to include "[t]he act or an instance of conducting business or other dealings" (*Black's Law Dictionary* (Bryan A

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Garner gen ed) (Thomson Reuters, 10th Ed, 2014) at p 1726) ("*Black's Law Dictionary*").

39 Indeed, when determining whether a transaction is void under s 76A(1)(*a*), the court's focus is on identifying the "*transaction by which* a company acquires… its own shares or units of its own shares" (emphasis added). In my analysis, the trust arrangement was the transaction by which IHC became beneficially interested in the shares. In and of itself, the trust arrangement constituted a dealing by which IHC acquired "its own shares or *units* of its own shares" (emphasis added). I note that "unit" is defined in s 4(1) of the CA to mean, "in relation to a share, … any right or interest, *whether legal or equitable,* in the share" (emphasis added). Therefore, it seems to me that the arrangement by which a nominee holds a company's shares on trust for the company would, on its own, form a "transaction by which a company acquires … its own shares or units of its own shares".

40 For this proposition, I found some guidance in the authorities on the common law prohibition against share buy-backs. At common law, where consideration moves from a company, and shares are purchased by and held in trust for a company by a third party, such a trust is invalid as offending the common law prohibition against share buy-backs: see *Kirby v Wilkins* [1929] 2 Ch 444 ("*Kirby v Wilkins*"). This remains so even where the arrangement is simply an oral agreement for a nominee to hold the shares on the company's behalf: see *Re Galpin, ex parte Chowilla Timber Supply Co Ltd* (1967) 11 FLR 155 ("*Re Galpin*").

41 As mentioned, what the parties disagreed on was whether, in relation to the trust arrangement, s 76A(1A) operated. To reiterate, s 76A(1A) states that "[s]ubsection (1) shall not apply to a disposition of book-entry securities". It

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was common ground that IHC's shares were publicly traded in Singapore, and were "book-entry securities" within the meaning of s 76A(1A).

42 According to *Black's Law Dictionary* at p 572*,* a disposition involves "[t]he act of transferring something to another's care or possession…; the relinquishing of property (a testamentary disposition of all the assets)". In construing the scope and meaning of "disposition" in s 76A(1A), it also bears emphasising that s 76A(1A) of the CA (and its predecessor, s 130M of the Companies Act (Cap 50, 1990 Rev Ed) was enacted to uphold security of transfer and protect the integrity of the scripless trading system. The learned authors of *Woon's Corporations Law* (LexisNexis, 2017) had this to say (at para 1801):

> The problem with scripless trading is that the whole system is predicated upon the ability of a seller to transfer good title to a buyer. If any acquisition of shares is void, all subsequent transfers of shares are also void. This would seriously impede scripless trading of shares.

43 It seems to me that the provision is primarily concerned with market disposals or transfers. In other words, s 76A(1A) was enacted to prevent a scenario where the automatic avoidance of a scripless trade by operation of law results in a situation where all transacting parties downstream of the voided disposal or transfer find themselves in limbo. It therefore dis-applies s 76A(1) in relation to such dispositions.

44 Although the share acquisitions involved dispositions of book-entry securities, I accepted IHC's submission that the trust arrangement was a transaction which remained caught by s 76A(1)(*a*) of the CA. The avoidance of the trust arrangement would not lead to the scenario that s 76A(1A) was enacted to prevent. The trust arrangement was between EFIII and IHC only, and avoidance of that arrangement would result in the legal and beneficial interests

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in the IHC shares being vested in EFIII. Unlike the dispositions from the multiple sellers on the open market to EFIII, the trust arrangement was not a transaction which could potentially affect subsequent transactions on the open market.

45 The mischief which s 76A(1A) was intended to address would be dealt with by preserving the validity of the open market acquisitions, which fell quite neatly into the meaning of "disposition" of book-entry securities, where there were transfers of property on the market. Insofar as the trust arrangement between EFIII and IHC was concerned, it did not appear to me to be a "disposition" within the meaning of s 76A(1A). By limiting the ambit of s 76A(1A), effect can be given to s 76A(1)(*a*) of the CA, so as to serve the latter's purposes.

46 The common law authorities appear to reflect this view. I have already referred to *Kirby v Wilkins* and *Re Galpin*, where the trust itself was viewed to be invalid. Other cases also contemplate that in such situations, the trustee or nominee remains liable to the seller of the shares. In *Trevor v Whitworth* (1887) 12 App Cas 409, a director had purchased 533 shares of the company for £3305 and held them on behalf of the company as trustee. £505 was paid up in cash with the unpaid balance of £2800 recorded as a loan to the company. The company subsequently went into liquidation and the seller sued the company to recover the unpaid sale balance. The House of Lords held that the purchase of the shares was a transaction *ultra vires* of the company and therefore void. It dismissed the seller's claim, but observed (at 424) that the trustee holding the shares on the company's behalf (*ie*, the director) remained liable to the seller:

> … [W]hen a company buys and holds its own shares, the device is sometimes resorted to of taking the transfer to a nominee, who is entered in the register, and holds the shares as trustee for the company, which undertakes to indemnify him from

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> future calls. In that case, if the company goes into liquidation before its capital is fully paid up, *the trustee is liable personally as a contributory for the amount then unpaid…* [emphasis added]

47 In sum, I accepted IHC's arguments, and found that the trust arrangement was void under s 76A(1)(*a*) of the CA. In practical terms, this meant that beneficial ownership of the IHC shares did not pass to IHC, and EFIII retains full legal and beneficial ownership of the IHC shares. For completeness, as set out above at [23], s 76A(2) provides for the circumstances under which a transaction in contravention of s 76 of the CA shall be voidable at the option of the company. It was common ground that if the trust arrangement was void under s 76A(1)(*a*), it could not also be voidable under s 76A(2) of the CA. This is because s 76A(2) is made "[s]ubject to subsection (1)", and only has application to contracts or transactions not covered by s 76A(1) of the CA. Having found that the trust arrangement was void under s 76A(1)(*a*), I shall not proceed to consider IHC's alternative argument that in any case, the trust arrangement was voidable.

Issue 2: Whether the loan agreements were voidable as related transactions

48 I turn now to the validity of the loan agreements – *ie*, the Standby Facility and the security agreements. IHC's position was that the loan agreements were voidable (and had been avoided) under s 76A(2) as transactions "related to" the share acquisitions. There was no dispute that IHC had given the requisite written notice to the Crest Funds of its intention to avoid the transactions. Instead, the Crest Funds argued that the loan agreements were not voidable for two reasons:

(a) There are simply no "related" transactions where share buy-backs are concerned; and

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(b) Even if there were, the loan agreements were not "related" transactions within the meaning of s 76A(2) of the CA.

Whether s 76A(2) contemplates there being transactions "related to" share buy-backs

49 The Crest Funds submitted that s 76A(2) was simply not applicable because it is not contemplated that there could be any transactions "related to" share buy-backs. According to the Crest Funds, s 76(1A)(*a*) is singularly aimed at preventing a company from acquiring its own shares, and that rendering that acquisition void would in all cases wholly achieve the objective of that provision and put all relevant parties in the position they were in prior to the offending transaction having occurred. "Related" transactions only arise in connection with the other two prohibitions contained in s 76 of the CA, involving a company giving financial assistance for the acquisition of its shares or lending money on the security of its own shares.

50 In this regard, the Crest Funds pointed to s 76A(14) of the CA, which is the only provision which elaborates on the meaning of "related", and argued that the provision offered an exhaustive definition as follows:

> **76A.**—(14) If a company makes a contract or engages in a transaction under which it *gives financial assistance* as mentioned in section 76(1) *or lends money* as mentioned in section 76(1A)(*b*), any contract or transaction made or engaged in as a result of or by means of, or in relation to, that financial assistance or money *shall be deemed* for the purposes of this section to be *related* to the first-mentioned contract or transaction. [emphasis added]

That s 76A(14) omits reference to s 76(1A)(*a*) (*ie*, a company's acquisition of its own shares) and only refers to ss 76(1) and 76(1A)(*b*) (*ie*, financial assistance and lending money on the security of its own shares respectively) indicated that Parliament did not envisage that there would be any "related" transactions

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where share buy-backs are concerned. In support of the submission that a deeming provision like s 76A(14) could be exhaustive of the meanings attached to the particular words in a statute, the Crest Funds referred to the Court of Appeal's decision in *Swee Hong Investment Pte Ltd v Swee Hong Exim Pte Ltd and another* [1994] 3 SLR(R) 259 ("*Swee Hong*").

51 On a plain reading of s 76A, it is clear that the provision does not limit "related" transactions to only those related to a company's provision of financial assistance or money on the security of its own shares. Instead, s 76A envisages "related" transactions as those related to transactions in contravention of s 76. Evidently, this would include transactions in breach of the prohibition on share buy-backs.

52 Turning to *Swee Hong*, the appeal arose out of a claim against, *inter alia*, the Government for damages for certain breaches of statutory duty. Section 7(1) of the Government Proceedings Act (Cap 121, 1985 Rev Ed) provided that no proceedings shall lie against the Government on account of the acts or omissions of any public officer in the "exercise of the public duties of the Government", and s 7(2) provided that "[f]or the purposes of subsection (1), 'exercise of public duties' *includes*" (emphasis added) a list of four categories of public works. Notwithstanding that the word "includes" was used, the Court of Appeal held (at [39]) that the categories of works enumerated in s 7(2) were exhaustive of the definition of 'exercise of public duties'.

53 While the word "includes" was interpreted as affording an exhaustive explanation of the meaning of 'exercise of public duties' in that case, the Court of Appeal also acknowledged that the word "includes" typically has the effect of *enlarging* the meaning of the word or phrase in the statute by adding to its natural meaning, and that the former, restrictive interpretation of the word

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"includes" should only be arrived at where the context of the Act in question is sufficient to show that the usual expansive meaning was not intended (*Swee Hong* at [37]).

54 In my view, *Swee Hong* is of no relevance because it did not consider the effect of deeming provisions. Section 76A(14) is effectively a deeming provision, which is not meant to provide an exhaustive definition of "related" transactions. Besides, it appeared to me that the restrictive interpretation of the word "includes" in *Swee Hong* was in large part influenced by the consideration that an expansive, open-ended definition of "public duties" would result in "intolerable uncertainties" as to the liability of the Government (*Swee Hong* at [40]). Such considerations did not apply in the present case. Once again, nothing in s 76A precludes the existence of "related" transactions where share buy-backs are concerned. Whether or not a particular transaction is "related" to an impugned share acquisition is a matter for the court to decide on the facts in each case, and it is to that issue that I now turn.

Whether the loan agreements were "related" to the share acquisitions

55 The Crest Funds proposed that the standard of "relatedness" in s 76A(2) of the CA could be determined by reference to the test for severance of an illegal contract at common law. On this view, a particular transaction would not be a "related" transaction if it was severable from the impugned transaction at common law.

56 In support of this submission, the Crest Funds referred to *Carney v Herbert* (1984) 57 ALR 691 ("*Carney*"), a decision of the Privy Council relating to the provisions in the New South Wales corporations legislation on financial assistance, which are *in pari materia* with s 76 of the CA. In *Carney*, an agreement was entered into by the appellant's company to purchase shares in

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the target company, Airfoil. To finance the purchase, the appellant (a director of Airfoil) mortgaged the assets of one of Airfoil's subsidiaries in breach of the financial assistance provisions of the New South Wales Act. The mortgages were accordingly illegal and void. The appellant subsequently sought to disclaim the share purchase agreements, refusing to pay on the basis that the share purchase agreements too were illegal and unenforceable. The Privy Council, affirming the decision below, held that the share purchase agreements were severable from the void mortgage, and enforceable.

> The mortgages, like the guarantee, were ancillary to [the sale agreement] for the sole purpose of ensuring the due performance of [the sale agreement] by the purchaser. Mr Carney wanted only the shares in Airfoil. The plaintiffs wanted only the purchase money. It made no difference to the plaintiffs, or to the nature of the transaction, what security was provided so long as it was satisfactory security. The mortgage did not go to the heart of the transaction, and its elimination would leave unchanged the subject matter of the contract and the primary obligations of the vendors and the purchaser.

57 On the facts, the Crest Funds argued that the Standby Facility "did not go to the heart of the illegal transaction" – *ie*, the share acquisitions – because the purchase of shares was not the *raison d'être* of the Standby Facility. Rather, the Standby Facility was a "plain vanilla working capital facility" granted to meet IHC's working capital needs, and was not "related" to the share acquisition within the meaning of s 76A(2) of the CA.

58 I disagreed that the applicable test is that of "severability". *Carney* was not a decision on the voidability of "related" transactions under s 76A(2) (or its counterpart in the New South Wales legislation). The issue before the Board was whether the respondents were barred from suing upon the share agreements *under the common law* because they were tainted by illegality (at 695):

> A plaintiff cannot sue on an illegal agreement. The question therefore arises whether the illegality of the mortgages taints

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> the whole transaction and prevents the vendors suing [the appellant's company] upon the sale agreements… or whether the illegal mortgages can be severed for the purposes of the action from the overall transaction, leaving intact the rights of action against [the appellant's company] and Mr Carney because, by reason of such severance, a plaintiff would not need to sue on any illegal agreement.

59 In my view, the question of whether a transaction is "related" to the transaction contravening s 76 is a fact-sensitive inquiry to be undertaken by the court taking into account the facts and circumstances of each case, and bearing in mind the purposes of the prohibition against share buy-backs as set out at [25] above.

60 Based on the undisputed facts, I found that the loan agreements were "related" to the share acquisition within the meaning of s 76A(2) of the CA, and were therefore voidable at the option of IHC. In fact, I would go so far as to say that the loan agreements were, in the words of IHC, "inextricably linked" to the share acquisitions.

61 While the terms of the Standby Facility purported that the facility was to be used for "general working capital", it was clear that in April 2015, when the Standby Facility was entered into, the Crest Funds were aware that it was intended for use by IHC to purchase its own shares to combat short-selling. In line with this purpose, the Facility was intended to be a short-term facility of a few months. The Crest Funds were also aware that funds were in fact used for the purpose of purchasing shares in IHC over a four-month period in April to August 2015, and for that purpose only. At the risk of repetition, they knew this because the funds were drawn down and the acquisitions carried out by the Crest Funds (specifically, by EFIII). Thereafter, EFIII continued to hold the shares on IHC's behalf. In other words, the Standby Facility (along with the security agreements) were put in place, and the funds were solely used, for the purchase

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of shares in IHC. These were "related" transactions within the meaning of s 76A(2) of the CA and were therefore voidable at the option of IHC.

Issue 3: Whether IHC was estopped from avoiding the transactions

62 Even if the loan agreements were *voidable* at the option of IHC, the Crest Funds argued that IHC nevertheless could not avoid the loan agreements as it was estopped from doing so.

63 Specifically, the Crest Funds relied on estoppel by representation of fact. The requirements for this estoppel are that the representor makes a representation of fact to the representee with the intention of inducing the representee to rely on the said representation, and the representee does rely on it to his detriment. Once established, an estoppel by representation of fact prevents the estopped party from making, or attempting to establish by evidence, any averment substantially at variance with its former representation (*Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532 at [8]).

64 On the Crest Funds' case, IHC had made representations in the Standby Facility that the Standby Facility was entered into (i) not contrary to law, and (ii) in the alternative, that IHC had done all that was necessary to ensure its validity. The relevant clauses are cll 3.2(e), (f) and (g), which I set out below:

> **3. REPRESENTATIONS AND WARRANTIES BY THE WARRANTORS**
>
> **3.2 Warranties as to Status.** Each of the Warrantors [*ie*, IHC, together with Mr Aathar and Mr Fan] represents, warrants and/or undertakes to the Investors [*ie*, the Crest Funds], on a joint and several basis, that:
>
> …
>
> (e) all actions, conditions and things required to be taken, fulfilled and/or done… to:

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> (i) enable each Group Company [*ie*, IHC and its subsidiaries] to lawfully enter into, exercise its rights and/or to perform and comply with its respective obligations under the Transaction Documents;
>
> …
>
> (f) the entry into and the exercise of rights or performance of or compliance with the obligations under the Transaction Documents does not and will not violate or exceed any power or restriction granted or imposed by and/or amount to an event of default under:
>
> (i) any law, regulation, authorisation, directive or order… to which any Group Company or any of the Warrantor is subject…
>
> …
>
> (g) the Warrantors shall… take all such actions and deliver and/or register all such forms or documents as may be required in connection with the Transaction Documents to ensure that the relevant Transaction Documents are and remain valid and enforceable on their terms at all times…

65 According to the Crest Funds, the foregoing clauses were tantamount to a representation that IHC would obtain the necessary "whitewash" approvals to purchase its own shares under s 76B of the CA. In reliance on these representations, the Crest Funds had suffered a detriment by disbursing monies under the Standby Facility. In the circumstances, an estoppel by representation of fact arose, and IHC was estopped from asserting that it did not have the necessary approvals to purchase its own shares, and was thereby estopped from avoiding the loan agreements.

66 In this regard, IHC argued that the Crest Funds could not rely on estoppel in defiance of a statute, citing *Joshua Steven v Joshua Deborah Steven* [2004] 4 SLR(R) 403 ("*Joshua Steven*"). In *Joshua Steven*, the defendants relied on a proprietary estoppel to claim a beneficial interest in a property. However, as the defendants were foreigners, they were prohibited under the Residential Property Act (Cap 274, 1985 Rev Ed) ("RPA") from acquiring any beneficial

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interest. The High Court applied the common law rule that precluded a court from allowing an estoppel "if to do so would be to act in the face of a statute and to give recognition through the admission of one of the parties to a state of affairs which the law has positively declared not to subsist" (at [15]).

67 The Court of Appeal endorsed a more nuanced application of the rule in *Cupid Jewels Pte Ltd v Orchard Central Pte Ltd and another appeal* [2014] 2 SLR 156 ("*Cupid Jewels*"). *Cupid Jewels* concerned a dispute between landlord and tenant over rent, and the landlord sought to apply for and execute a writ of distress pursuant to s 5(1) of the Distress Act (Cap 84, 2013 Rev Ed). The tenant argued that the landlord was estopped from so doing, as the landlord had represented that it would not insist on its strict legal remedies to recover the full rental arrears. The Court of Appeal distinguished *Joshua Steven* and held that an estoppel could in principle arise to bar the exercise of a statutorily-conferred right (at [37]–[38]):

> 37 … Whether or not an estoppel can be applied depends on whether allowing it would act "in the face of a statute" and to effectively allow "a state of affairs which the law has positively declared not to subsist". The purported estoppel in *Joshua Steven* clearly fell within this scope since the RPA expressly imposed an *express prohibition* against the very thing which the estoppel, if recognised, would result in (*ie*, a foreigner having beneficial interest in property restricted under the RPA).
>
> 38 In contrast, in the present case, the Act did not *require* a Writ of Distress to be applied for and executed whenever the conditions of s 5(1) are satisfied. The use of the word "may" in s 5… indicated that the Act was merely *permissive* and not mandatory. That the Act conferred on landlords a special status by way of the special remedy of distress did not necessarily mean that recognising an estoppel would be in defiance of the Act. …
>
> [emphasis in original]

68 On the facts, the Crest Funds argued that the present case was more akin to the situation which presented in *Cupid Jewels*. However, I disagreed with the

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argument. In *Cupid Jewels*, the representation relied on by the tenant was that the landlord would not enforce its strict legal rights. Were an estoppel to be recognised, it would only operate to bar the landlord from the exercise of the statutorily-conferred right to a writ of distress, but not to deny the existence of the right. Here, the representation in question was not that IHC would not exercise its right to avoid the transactions conferred under s 76A(2). Instead, the representation relied on by the Crest Funds was a representation as to the existence of a particular state of affairs – that IHC had obtained the necessary "whitewash" approvals for the transactions. In my view, this is more akin to the situation in *Joshua Steven*, because the Crest Funds' reliance on estoppel would operate to prevent IHC from asserting the existence of a certain state of affairs which is evident on the face of the statute – that the transactions were not "whitewashed" and were therefore voidable.

69 In any event, even if estoppel could arise, on the facts, it was not made out. Assuming that the representations extended to IHC obtaining the necessary "whitewash" approvals for the share acquisitions, I found that the Crest Funds could not be said to have relied on them. As pointed out by IHC, the very structure of the share acquisitions – and, in particular, the trust arrangement pursuant to which EFIII would hold the shares on IHC's behalf – was itself clearly non-compliant with the "whitewash" provisions in the CA:

> (a) The trust arrangement by which the IHC shares were held by a third party, EFIII, on behalf of the company, IHC, was not a permitted method of holding re-purchased shares in treasury under s 76H. Section 76H(2) requires that the company (*ie*, IHC) hold the shares in its own name, but here, the parties had arranged for the shares to be held in the name of EFIII.

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(b) The re-purchased IHC shares were pledged as security in favour of the Crest Funds. However, under s 76H(1)(*b*) read with s 76K(1C), the dealings which a company may effect over its own shares held in treasury does not include the use of such shares as security.

(c) EFIII sought instructions from IHC as to how it should vote in relation to the IHC shares that it held on trust for IHC, although shares held in treasury do not entitle its holder to any voting rights or dividends: s 76J(2)–(4).

70 Given the above, no estoppel arose on the facts. I therefore agreed with IHC that estoppel did not apply to prevent it from exercising its rights pursuant to s 76A(2) of the CA.

Issue 4: Whether the common law bars to rescission applied

71 I turn now to the issue of whether the common law bars to rescission – and, in particular, the doctrine of affirmation and third parties' rights – applied to bar IHC from exercising its right to avoid the loan agreements.

72 The Crest Funds submitted that the common law bars to rescission have been recognised to apply to bar the right to avoid transactions under the rules on financial assistance. They referred to *Shen Yixuan v Maxz Universal Development Group Pte Ltd and others* [2009] SGHC 236 ("*Shen Yixuan*"), where the plaintiff shareholder sought to set aside an allotment of shares by the company to a third party, on the grounds that the allotment amounted to the giving of financial assistance to the third party in contravention of s 76(1)(*a*) of the CA. The court in *Shen Yixuan* observed that where a member of a company applies for authority under s 76A(3) to issue a s 76A(2) notice of avoidance in the name of the company, the court may withhold such authority if there are

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third party interests involved which militate against the setting aside of the contract or transaction (at [12(iii)]).

73 In my view, *Shen Yixuan* was of no direct assistance to the Crest Funds' submission that the common law bars to rescission were applicable. The court's observations at para 12 of *Shen Yixuan* pertained to the factors which a court may consider in deciding whether to grant authority to a member of a company to give a notice of avoidance in the company's name under s 76A(3). It did not purport to set out the circumstances under which a company would be barred from exercising its right to avoid transactions under s 76A(2).

74 The Crest Funds also referred to the case of *Darvall v North Sydney Brick & Tile Co Ltd* (1987) 16 NSWLR 212 ("*Darvall*"). In *Darvall*, it was held that the entry into a joint venture agreement by the company amounted to indirect financial assistance in contravention of s 129 of the Companies (New South Wales) Code, thus rendering it and related transactions voidable at the option of the company under s 130(2) of that same Code (which is *in pari materia* with s 76A(2) of the CA). In discussing whether the joint venture agreement was voidable under s 130(2) of the New South Wales Code, Hodgson J observed that "[a] right to avoid a contract under s 130(2) could be lost by election" (at 248F).

75 In general, the right to avoid a contract may be lost by affirmation where the court is satisfied that the party seeking to avoid the contract (*Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 at [42]):

(a) acts in a manner consistent only with affirming the contract;

(b) communicated his election, *ie*, his choice to affirm the contract, in clear and unequivocal terms; and

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(c) was aware of the facts giving rise to his right to avoid the contract.

76 On the facts, it was argued that IHC had affirmed the Standby Facility by continuing to make payments of the monthly Standby Fees thereunder without qualification and without protest. In all, IHC paid the Standby Fees for the months of April and May 2015. It was also argued that IHC would have been aware of the facts giving rise to its right to avoid the Standby Facility by this time (*ie*, by 16 April 2015), because the Standby Facility had been entered into and drawn down upon, and IHC had instructed EFIII to purchase the IHC shares on its behalf.

77 However, I did not see how the payment of the Standby Fees for only two months, *ie,* April to May 2015, can be taken against IHC as acts *only* consistent with affirming the Standby Facility when no payment was made of the Standby Fees thereafter. It was also unclear to me how those payments could be said to be a clear communication of a choice to affirm the loan agreements. Furthermore, those payments had been made under the direction of the persons who had caused IHC to enter into the share acquisitions and surrounding loan agreements to begin with. Therefore, it was unclear to me that at the material time, IHC could be said to be aware of the facts giving rise to the right to avoid the transactions.

78 Indeed, what was troubling to me was the suggestion that the company's statutorily-conferred right to avoid an illegal transaction under s 76A(2) could be destroyed by the actions of the directors who had caused it to enter into the impugned transactions in the first place. Returning to *Darvall*, it would appear that Hodgson J had had similar concerns:

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> A right to avoid a contract under s 130(2) could be lost by election… *There may also be a question under s 130(2) as to whether actions taken by the directors who caused the company to enter into the contract in question could amount to an election pursuant to which the right was lost.* [emphasis added]

79 It would almost invariably be the case that the impugned contract, before it was sought to be avoided, had been performed for some time under the direction of the directors who had improperly caused the company to enter into the impugned contract. It cannot be that in all such cases, the company then loses its right under s 76A(2) of the CA to avoid the contract. As was previously mentioned, the purpose of s 76A is to protect the company's capital from depletion by the improper acts of its officers. It would undermine this purpose if, by those wrongs, the company should lose its remedy and ability to right those very wrongs.

80 In fact, it has therefore been said that the affirmation must be free from vitiating factors. For example, in the context of a contract voidable for breach of fiduciary duty, the acts of the principal ought not to be taken against him until he is effectively freed from the effects of the breach of duty (Dominic O'Sullivan, Steven Elliott & Rafal Zakrzewski, *The Law of Rescission* (Oxford University Press, 2008) at paras 23.13, 23.15):

> **C. Affirming Party must be Free from the Vitiating Factor**
>
> *(1) Pressure and exploitation*
>
> 23.13 Where a contract or gift is voidable for duress or undue influence, the party imposed upon is capable of affirming only after the duress or undue influence has effectively come to an end. The same principle ought to apply in relation to unconscionable bargains, both as a matter of principle and by analogy with the rule that time does not count as laches and acquiescence for so long as the imposition continues.
>
> …
>
> 23.15 In principle, affirmation of a contract between principal and fiduciary voidable for breach of fiduciary duty is not

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> possible *until after the principal is effectively freed from the effects of the breach of duty. That should require awareness of the material facts, and possibly in some cases, appropriate independent advice.*
>
> [emphasis added]

81 In a similar vein, the actions taken under the direction of the persons who had caused IHC to enter into the share acquisitions and surrounding loan agreements to begin with cannot be taken against IHC as acts affirming the Standby Facility, with awareness of the material facts. Therefore, in my judgment, the doctrine of affirmation did not apply to bar IHC from exercising its right to avoid the loan agreements under s 76A(2) of the CA.

82 I move on to the Crest Funds' argument that third party rights militated against the avoidance of the transactions. While the position I have reached appears to accord protection only to IHC (which itself had violated the statutory prohibition) leaving the Crest Funds to carry the burden of the violation, it must be highlighted that the Crest Funds are not left without recourse. As mentioned above at [24], the statutory framework provides for the rights of third parties as follows:

> **Company financing dealings in its shares, etc.**
>
> **76A.**—(4) Where —
>
> (*a*) a company makes or performs a contract, or engages in a transaction;
>
> (*b*) the contract is made or performed, or the transaction is engaged in, in contravention of section 76 or the contract or transaction is related to a contract that was made or performed, or to a transaction that was engaged in, in contravention of that section; and

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> (*c*) the Court is satisfied, *on the application* of the company or *of any other person*, that the company or *that other person has suffered, or is likely to suffer, loss or damage as a result of* —
>
> …
>
> (iii) the contract or transaction being void by reason of subsection (1) or avoided under subsection (2); or
>
> (iv) a related contract or transaction being void by reason of subsection (1) or avoided under subsection (2),
>
> the Court may make such order or orders as it thinks just and equitable (including, without limiting the generality of the foregoing, all or any of the orders mentioned in subsection (5)) against any party to the contract or transaction or to the related contract or transaction, *or against the company or against any person* who aided, abetted, counselled or procured, or was, by act or omission, in any way, directly or indirectly, knowingly concerned in or party to the contravention.
>
> [emphasis added]

83 As argued by IHC, a company should be fully entitled to the protection accorded to it under the statutory regime to avoid offending transactions. As for third party interests, including the Crest Funds' rights, these questions are more appropriately considered in the context of any application for relief under s 76A(4) of the CA, which allows the court to make orders as it may think just and equitable on the application of any person who has suffered (or is likely to suffer) loss or damage as a result of the affirmation or avoidance of the impugned transaction. I agreed with this submission.

84 To sum up, I found that the loan agreements ([26] above) were voidable at the option of IHC under s 76A(2) of the CA, and that the common law bars to rescission did not apply to prevent IHC from exercising its right.

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Conclusion

85 For all of the foregoing reasons, I made the following orders:

(a) The acquisition by the Crest Funds of the shares of IHC on IHC's behalf pursuant to the Standby Facility (*i.e,* the trust arrangement) was void under s 76A(1)(*a*) of the CA.

(b) The Standby Facility and security agreements were voidable at the option of IHC under s 76A(2), and were avoided by IHC by way of a written notice served on the Crest Funds on 8 March 2017.

(c) IHC does not bear any contractual obligation or liability whatsoever to the Crest Funds in relation to the above contracts and transactions.

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86 I ordered costs against the Crest Funds, fixed at $12,000 with reasonable disbursements.

Hoo Sheau Peng
Judge

Lee Eng Beng SC, Chow Chao Wu Jansen, Danitza Hon Cai Xia and Lee Hui Yi (Rajah & Tann Singapore LLP) for the plaintiff;
Leo Zhen Wei Lionel, Chng Zi Zhao Joel, Tan Kai Yun, Elizabeth Gan Wan Zhen and Daniel Lee Wai Yong (WongPartnership LLP) for the defendants.

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