IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 19

Court of Appeal / Civil Appeal No 27 of 2024

Between

(1) Affert Resources Pte Ltd (in court compulsory winding up)

… *Appellant*

And

(1) Industries Chimiques du Senegal
(2) Indorama Holdings BV

… *Respondents*

In the matter of Originating Summons No 544 of 2019

Between

(1) Affert Resources Pte Ltd (in court compulsory winding up)

… *Applicant*

And

(1) Industries Chimiques du Senegal
(2) Indorama Holdings BV

… *Respondents*

GROUNDS OF DECISION

[Insolvency Law — Avoidance of transactions — Transactions at an undervalue]

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v
Industries Chimiques du Senegal and another

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Court of Appeal — Civil Appeal No 27 of 2024
Belinda Ang Saw Ean JCA, Kannan Ramesh JAD and Andrew Phang Boon Leong SJ
22 January 2025

30 April 2025

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

1 The preservation of assets of the estate in an insolvent liquidation has been described as the "Preservation Rationale". It is also vital to reconstitute the estate for the purpose of distribution of the assets to the creditors. This has been described as the "Distribution Rationale" (*DGJ v Ocean Tankers (Pte) Ltd (in liquidation) and another appeal* [2024] 2 SLR 790 at [143] and [148]). Where the assets are disposed of at an undervalue when the debtor is either insolvent or has become insolvent as a result, the estate is reduced and the Preservation and Distribution Rationales are thereby undermined. The power to revisit such transactions and claw back the assets disposed of is therefore crucial in ensuring that the creditors are not disenfranchised.

2 As the term "undervalue" implies, the central inquiry is whether there is adequacy of consideration to support the transaction pursuant to which the

disposition has taken place. This raises two questions – what is the relevant transaction, and how should that transaction be identified. These were the principal issues in the present appeal. Running alongside the principal issues was the ancillary question of remedies in the event there was a transaction at an undervalue.

3 In *Affert Resources Pte Ltd (in compulsory winding up) v Industries Chimiques du Senegal and another* [2024] SGHC 57 (the "Judgment"), a Judge of the General Division (the "Judge") found that the transaction in the present case was at an undervalue, but declined to order the remedies that were sought. Dissatisfied, the applicant below appealed against the Judge's decision. Having considered the parties' submissions, we departed from the Judge's conclusion that the transaction in question was at an undervalue. We therefore dismissed the appeal for the reason just mentioned and awarded costs to the respondents. Our grounds of decision follow and we begin by recounting the salient facts.

The material facts

4 The present appeal arose from Originating Summons No 544 of 2019 ("OS 544"). In summary, OS 544 concerned the acquisition of 66% of the shares in the first respondent, Industries Chimiques du Senegal ("ICS"), then an insolvent company, by the second respondent, Indorama Holdings BV ("Indorama"), for a total consideration of approximately US$50m. As part of the acquisition, debts owed by ICS to its related parties were settled by payments to certain entities in the Archean Group (the "Archean Group"). The Archean Group is a conglomerate based in India comprising entities owned or controlled by the Pendurthi family. A total of US$8,001,886 was paid to various companies in the Archean Group and the related parties issued notices to ICS, confirming that the debts owed by ICS to them had been settled. The appellant,

Affert Resources Pte Ltd ("Affert"), was one such related party. It purported to waive or forgive a debt of US$17,277,886 owed by ICS (the "Waiver"). On 18 September 2017, Affert was placed in compulsory liquidation and it subsequently challenged the Waiver as a transaction at an undervalue. It sought orders: (a) against ICS and Indorama for payment of US$17,007,263.60 (the "Payment Order"); or in the alternative (b) to restore Affert to the position it would have been in but for the Waiver. Declarations were also sought that the Waiver was void and unenforceable as a transaction at an undervalue.

5 Affert is a company incorporated in Singapore. Before it was placed in compulsory liquidation, Affert was in the business of manufacturing and trading fertilisers and mineral ores, and chartering ships and barges. Affert acted as "a 'middleman' for the Archean Group", sourcing for sulphur from suppliers and on-selling the sulphur to ICS. ICS is a Senegal company in the business of producing and exporting phosphate fertiliser products. The sulphur it purchased from Affert was used for this purpose. It was undisputed that the directors of Affert, Mr Ampajalam Syam Kumar ("Mr Syam") and Ms Vandana Hanumanth Rao Bhounsle, were not involved in its business or affairs. Instead, Mr S. M. Sundaram, a Group Finance Director of the Archean Group, and Mr Ranjit Pendurthi, a member of the Pendurthi family, managed Affert's affairs and negotiated the contracts with ICS and with Affert's suppliers.

6 Prior to the sale of the shares in ICS described above, Affert, ICS, and a third company, Senfer Africa Limited ("Senfer") were part of the Archean Group. It was common ground that before 2014, Senfer, Affert and ICS were all ultimately controlled and beneficially owned by the Archean Group, which in turn was owned by the Pendurthi family. Senfer held 66% of the shares in ICS, with the remaining 34% held by the State of Senegal, the Government of India and the Indian Farmers Fertilisers Cooperative Ltd.

7 Between 11 May 2012 and 10 June 2013, Affert supplied six batches of sulphur to ICS under six contracts (the "Sulphur Contracts"), for a total price of US$22,298,264.60. Of this amount, US$5,291,000 was paid, leaving a balance of US$17,007,263.60 (the "ICS Debt"). The sulphur was sourced from Solvadis Commodity Chemicals GmbH ("Solvadis").

8 Prior to the sale of the shares described above, ICS was facing financial difficulties. Its financial statements reflected that the ICS Group, consisting of ICS and its subsidiaries, had a negative net value of about US$137m. ICS's financial statements showed that as at 20 August 2014, it was balance sheet negative – although ICS had total assets of US$421m, it also had total liabilities of $511m. Further, ICS had defaulted on most of its loan obligations, had incurred losses of about US$163m on a consolidated basis between 1 January 2014 and 19 August 2014 and was close to liquidation (Judgment at [5]).

9 Around that time, Affert was also sued by Solvadis in Originating Summons No 681 of 2013 ("OS 681") for non-payment of a shipment of sulphur it had delivered to Affert which Affert had on sold to ICS under one of the Sulphur Contracts (the "Solvadis Shipment"). Affert invoiced ICS for US$6,475,350 under an invoice dated 27 September 2012 (the "Solvadis Invoice"). However, despite taking delivery of the Solvadis Shipment, ICS declined to settle the Solvadis Invoice. According to Affert, ICS refused because the sulphur supplied by Solvadis was of an unsatisfactory quality causing one of ICS's processing plants to shut down. ICS allegedly suffered losses of US$22.4m as a result.

10 In OS 681, Affert asserted that it would counterclaim against Solvadis for any loss it might be liable to ICS, arising from the supply of the unsatisfactory sulphur (the "Affert Counterclaim"). However, the Affert

Counterclaim was never brought. For present purposes, it suffices to note that on 2 August 2013, Solvadis obtained a Mareva injunction (the "Mareva Injunction") against Affert in OS 681. In granting the Mareva Injunction, the court placed little weight on Affert's argument based on the Affert Counterclaim (*Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd* [2014] 1 SLR 174 ("*Solvadis v Affert*") at [34]).

11 In OS 544, ICS's potential counterclaim against Affert for its losses of US$22.4m (the "ICS Counterclaim") was cited by the respondents as a key reason why Affert did not pursue the ICS Debt. Affert challenged this. We elaborate on this below at [72] and in our observations at [110] on the restorative order that follows a finding of a transaction at an undervalue.

12 The financial situation of ICS was such that by January 2014, ICS's shareholders were of the view that it faced the imminent threat of liquidation. A search was initiated for immediate investments to stave off the threat.

13 The search resulted in the acquisition of Senfer's 66% shares in ICS by Indorama on 20 August 2014. The acquisition agreement (the "Acquisition Agreement") comprised the following three documents dated 20 August 2014:

(a) a share transfer agreement (the "Share Transfer Agreement") between Indorama and Senfer under which Indorama was to pay US$11m for Senfer's shares in ICS;

(b) an assumption of debt agreement (the "Assumption of Debt Agreement") between Indorama, Senfer, Archean Industries Private Limited ("Archean Industries") and Indorama Corporation Pte Ltd under which Indorama was to pay US$30m to Senfer's creditor banks; and

(c) a side letter (the "Side Letter") to the Assumption of Debt Agreement between Senfer, Indorama, Archean Industries, and Indorama Corporation Pte Ltd, under which Indorama agreed to cause ICS to pay to Senfer or to Senfer's order the sum of US$9m in full and final settlement of all of ICS's related-party debts in the Archean Group as at 30 June 2014, provided all the related parties sent the confirmations to this effect to ICS.

As we will detail below, the obligations under the Share Transfer Agreement, the Assumption of Debt Agreement and the Side Letter were subsequently performed. Archean Industries was the ultimate holding company of Senfer and Indorama Corporation Pte Ltd was the ultimate holding company of Indorama.

14 On 20 August 2014, Mr Munish Jindal, the Chief Financial Officer and one of the directors of Nigerian entities in the Indorama group, was appointed a director of ICS.

15 Pursuant to the Side Letter, between September and October 2014, the new and former directors and controllers of Affert and ICS exchanged correspondence relating to the Waiver. The exchange culminated in the following pertinent correspondence:

(a) On 1 October 2014 (the "1 October Email"), Mr Syam, using the email address of "Affert [S]ingapore", wrote to Mr Munish Jindal as follows:

> As per the overall understanding on take over of ICS by Indorama, we, hereby, agree to consider the dues of ICS to us as part of the overall consideration for the transaction.

(b) On 3 October 2014 (the "3 October Email"), Mr Munish Jindal replied to Mr Syam as follows:

> We acknowledge receipt of your confirmation that the dues of ICS to [Affert] are part of the settlement reached between Archean Group and Indorama and part of the overall consideration for the acquisition of Archean's shares in ICS by Indorama; therefore it is mutually agreed that the dues to Affert are no longer payable.

(c) On 7 October 2014 (the "7 October Email"), Mr Syam sent an email to Mr Munish Jindal, attaching a letter dated 7 October 2014 (the "7 October Letter") which provided as follows:

> As per the books of Accounts of ICS USD 17,277,886 is due to [Affert] as on 17th September 2014. We confirm that we will not claim this amount as per our understanding.
>
> We hereby confirm that we will not in future dispute or make any claim on ICS or its subsidiaries for any sort of dues to [Affert].

16 After receiving the 7 October Letter and confirmations from the other related parties that their debts had been settled, ICS made various payments totalling US$8,001,886 to Senfer's order, which Indorama clarified was the sum of US$9m stated in the Side Letter, adjusted for transactions between ICS and entities in the Archean Group. The specific payments were US$5,418,000 on 15 October 2014 to Mineral Trade Group FZE ("MTG"), US$1,078,095 on 17 October 2014 to MTG, and US$1,505,791 on 21 October 2014 to Senfer Investments Limited, Jersey ("Senfer Jersey").

17 Within a week of the Acquisition Agreement, Indorama injected equity of US$100m in ICS (the "Equity Injection") to rehabilitate the company. Further sums were invested between 2014 and 2018. The resultant total was

US$396m which included the Equity Injection. Under new ownership and management, ICS was eventually successfully rehabilitated.

Procedural history

18 On 18 July 2018, Affert's liquidators (who were replaced by Recovery Vehicle No. 1 ("RV1"), a Singapore company that was assigned the ICS Debt, on 4 October 2018) commenced Suit No 724 of 2018 ("Suit 724") against ICS seeking payment of the ICS Debt. In *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal and another appeal and another matter* [2021] 1 SLR 342 ("*Recovery Vehicle (CA)*"), this court declined RVI permission to serve the originating process out of jurisdiction. It was held that the Sulphur Contracts were subject to the laws of Senegal, under which the limitation period was either two years or five years after the payments were due (*Recovery Vehicle (CA)* at [67]). However, regardless of which period applied, the claim was time-barred at the latest by 29 July 2018. As the claim was time-barred, it lacked sufficient merit to satisfy the requirement for service out of jurisdiction (*Recovery Vehicle (CA)* at [143] and [153]). It was also held that even if the Waiver was unenforceable and set aside, RV1 would nonetheless not be able to revive its claim for the ICS Debt in view of the time-bar (*Recovery Vehicle (CA)* at [143]).

19 On 24 April 2019, Affert commenced OS 544 against ICS to set aside the Waiver as a transaction at an undervalue. Affert subsequently added Indorama as a second respondent to OS 544 and sought the Payment Order against both ICS and Indorama.

The decision below

20 In OS 544, Affert contended that it received no consideration for the Waiver and even if it did, such consideration was less than the consideration provided by Affert. Affert argued that it should be restored to the position it was in before the Waiver, and the Payment Order would achieve that. As Indorama was a direct counterparty to the Waiver or had directly benefited from the Waiver, it was appropriate to make the Payment Order against it as well.

21 There was an issue over Affert's position on when the Waiver occurred and which document evidenced it. The Judge stated that Affert had submitted that the "true waiver occurred on 3 October 2014" (Judgment at [18]). This appeared to be based on the Notes of Evidence of the hearing of OS 544. However, the Judge's statement was at odds with Affert's written submissions below which asserted that the Waiver was on 1 October 2014 as evidenced by the 1 October Email. On appeal, Affert maintained that its position had always been that the Waiver was on 1 October 2014 as evidenced by the 1 October Email (see [31] below). For reasons that we will explain, it was ultimately not necessary to resolve this issue because whether the Waiver was evidenced by the 1 or 3 October Email was not pertinent to the disposal of the present appeal (see [56] and [66] below).

22 The respondents raised a number of arguments to resist OS 544. First, that the Waiver was a mere representation. Second, that Affert had no intention to claim the ICS Debt because it wanted to avoid the ICS Counterclaim (see [9]–[11] above). Third, that the ICS Debt was partially time-barred. Fourth, that Affert had received a practical benefit from Indorama's payments to Senfer's order under the Side Letter. Fifth, that the Payment Order would not be restorative and in any case, Indorama was neither a direct party to the Waiver

nor a recipient of any direct benefit thereof. Sixth, that it would be unfair to make the Payment Order against ICS. Notably, the respondents relied on the 7 October Letter as evidencing the Waiver.

23 The Judge did not accept that the Waiver was contained in the 1 October Email or the 3 October Email. He found that the Waiver was instead evidenced by the 7 October Letter as the sum of US$17,277,886 was stated therein (Judgment at [19]). The Judge rejected the respondents' argument that the 7 October Letter was merely a representation and that no independent agreement that would qualify as a "transaction" arose from it (Judgment at [26]). Instead, the Judge held that the 7 October Letter constituted both a representation *and* a "transaction" under s 98(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) (the "Bankruptcy Act") read with s 329 of the Companies Act (Cap 50, 2006 Rev Ed) (the "Companies Act"). This was because Affert's representation that it would not make any claim against ICS showed that Affert intended to deal with ICS. Affert's representation was an "arrangement" between Affert and ICS within s 2(1) of the Bankruptcy Act.

24 The Judge found that the 7 October Letter was a transaction at an undervalue. He weighed the consideration that was given and received by Affert as regards the Waiver. On the consideration given, the Judge held that the debt owed to Affert was in fact US$8,449,007.60. In this regard, various deductions were made to the ICS Debt. First, as only the sum of US$9,569,914.60 was *not* time-barred under the laws of Senegal as at 7 October 2014, the balance of the ICS Debt was deducted as it was not recoverable (Judgment at [41]–[48]). Second, the sum of US$1,120,837 owed by Affert to Transfert FZCO ("Transfert") pursuant to an invoice issued by Transfert (the "Transfert Invoice") was also deducted. The Transfert Invoice was settled pursuant to a Deed of Termination between ICS and Transfert dated 24 March 2015 (the

"Deed of Termination"). The Deed of Termination was preceded by a Settlement Agreement dated 7 May 2014 ("Settlement Agreement"), which the Judge held impliedly terminated the debt owed by ICS to Affert, such that ICS could not claim for the debt under the Transfert Invoice (Judgment at [49]–[54]).

25 The Judge agreed with Affert that it was not relevant whether Affert would have pursued the ICS Debt, as the Bankruptcy Act did not require a subjective inquiry (Judgment at [57]). However, he observed that if the respondents had argued that the value of the ICS Debt should be reduced rather than disregarded completely because the objective evidence showed that the ICS Debt was not likely to be recoverable, the Judge would have adjusted the value downwards (Judgment at [58]). Thus, the value Affert provided was US$8,449,007.60, being that portion of the ICS Debt which was not time-barred or terminated or settled, as at 7 October 2014.

26 On the consideration received, the Judge held that Affert received practical benefits from the payment of a total of US$8,001,886 to MTG and Senfer Jersey pursuant to the Side Letter, and Indorama's assumption of US$30m of debts owed by Senfer Investments Ltd, Cyprus ("Senfer Cyprus"), pursuant to the Assumption of Debt Agreement. This was because Affert had significant business dealings with MTG, Senfer Jersey and Senfer Cyprus (Judgment at [63]–[69]). The Judge accepted that the value accruing to Affert had to be capable of being assessed in money's worth, but numerical exactitude was not required (Judgment at [70]–[75]). However, as there was insufficient evidence to estimate the value of the practical benefits that accrued to Affert, he was "compelled" to find that the Waiver was a transaction at an undervalue (Judgment at [76]–[81]).

27 The Judge relied on the English High Court decisions in *Lord v Sinai Securities Ltd and others* [2005] 1 BCLC 295 ("*Sinai Securities*") and *Re MDA Investment Management Ltd* [2004] 1 BCLC 217 ("*Re MDA*"). Both cases considered s 238(3) of the Insolvency Act 1986 (c 45) (UK) (the "Insolvency Act 1986"), which was similar to s 98(2) of the Bankruptcy Act. The Judge cited *Sinai Securities* at [15] for the proposition that the court's primary concern was the restoration of the company's position and that there might be cases where restoration to the *status quo ante* was impossible. The Judge relied on *Re MDA* for the proposition that a court must restore the position to the *status quo ante*, without going further to reconstruct the position to what it would have been if other steps had been taken by the debtor (Judgment at [85]–[87]). We elaborate on the Judge's reasoning below from [105].

28 Therefore, the Judge held that he could not reconstruct the position to what it would have been if Affert had not issued the 7 October Letter and had pursued the ICS Debt before the limitation periods had expired. The Judge found that Affert's subjective intention and the failure of its directors to pursue the ICS Debt were relevant in determining what the *status quo ante* would have been. The Judge found that Affert would not have pursued the ICS Debt as Affert's directors did not intend to do so and this was likely because of the ICS Counterclaim (Judgment at [90]–[92]). Thus, the Payment Order should not be made against ICS.

29 The Judge found that it was not appropriate to make the Payment Order against Indorama as Indorama was not a "direct counterparty" to the Waiver (Judgment at [102]). Indorama was not in possession of the money that was the subject of the Waiver and Affert had not shown that Indorama had received a direct and tangible benefit from Affert (Judgment at [101]–[104]). Finally, turning to the question of "fairness", the Judge concluded that it would be unfair

for the Payment Order to be made. If Affert could retract the confirmation in the 7 October Letter and obtain payment of the amount it had represented was no longer due, that would rewrite the commercial bargain that Indorama had struck with Senfer and Archean Industries under the Acquisition Agreement (Judgment at [105]–[112]). Accordingly, the Judge declined to make the Payment Order and the other remedies that were sought against ICS and Indorama.

The parties' cases on appeal

Affert's arguments

30 Affert challenged the Judge's decision not to make an order to restore Affert to the position it would have been in if the Waiver had not been issued, given his finding that the 7 October Letter was a transaction at an undervalue.

31 As explained earlier, Affert submitted that the Judge erred in stating that its position was that the Waiver occurred on 3 October 2014. The Waiver occurred on 1 October 2014, as evidenced by the 1 October Email. In relation to the value Affert had given for the purpose of the value comparison exercise, Affert submitted that it had waived US$16,045,264.60 of debt rather than US$8,449,007.60. As regards the debt under the Transfert Invoice, Affert contended that as the respondents did not rely on the Settlement Agreement before the Judge, and the Deed of Termination post-dated the Waiver, the deduction was unwarranted. Affert highlighted the Judge's holding that Affert's subjective intention not to pursue the ICS Debt was not relevant in determining whether there was a transaction at an undervalue. It argued that, when determining the *status quo ante*, it would be speculative to rely on the respondents' claim that Affert might have shied away from pursuing the ICS Debt due to concerns over the ICS Counterclaim.

32 Turning to the value that Affert had received, Affert submitted that it received no practical benefits from the payments to MTG and Senfer Jersey. It argued that in view of the Mareva Injunction, the Archean Group would have no intention of channelling any funds to Affert. We expand on and explain this argument below at [92]–[93].

33 On the Payment Order, Affert submitted that the Judge erred in relying on the subjective intention of Affert's directors in concluding that Affert would not have pursued the ICS Debt. Affert distinguished *Re MDA* on the facts and argued, based on the decision of the English Court of Appeal in *BTI 2014 LLC v Sequana SA and others* [2019] 1 BCLC 347 ("*Sequana (CA)*"), that the appropriate remedy would be to reconstitute the ICS Debt, as the Waiver deprived Affert's creditors of realising its receivables in its liquidation.

34 Affert further submitted that the Payment Order should be made against both ICS and Indorama. It contended that Indorama was party to the Waiver for two reasons: first, because of the involvement of Mr Munish Jindal; second, due to the direct benefit Indorama received as a result of ICS being enriched by the Waiver.

The respondents' arguments

35 The respondents submitted that the 7 October Letter was merely a confirmation by Affert that it would not pursue the ICS Debt, and thus there was no "transaction" for the purpose of s 98 of the Bankruptcy Act.

36 The respondents submitted that Affert did not give up *any* value in issuing the 7 October Letter. The respondents argued that Affert was never going to pursue a claim for the ICS Debt and only did so when it was in liquidation, by which time, the debt was completely time-barred. There were

three reasons why Affert did not pursue the ICS Debt: (a) Affert did not want to trigger the ICS Counterclaim; (b) Affert lacked the financial means to sue ICS; and (c) Affert knew that it was futile to bring the claim because of the poor financial state of ICS. On the value Affert had received, the respondents submitted that Affert received practical benefits from the injection of funds in the Archean Group and from its trading counterparties being kept in funds. Broadly, the respondents contended that when the transaction was looked at holistically, there was no transaction at an undervalue because the Archean Group as a whole was getting a fair benefit, pursuant to the Acquisition Agreement.

37 The respondents submitted that the Payment Order should not be made as it was not restorative. This was because the court could not reconstruct the position to what it would have been if Affert had actively pursued the ICS Debt in circumstances where the Waiver was not issued. The respondents distinguished *Sequana (CA)* on the facts, highlighting their submission that the Waiver did not transfer any value to ICS or Indorama. The respondents also submitted that it would be unfair to make the Payment Order as it would rewrite the commercial bargain that Indorama had struck with Senfer and Archean Industries under the Acquisition Agreement.

Issues to be determined

38 Two issues arose for determination:

(a) first, what was the "transaction" for the purpose of s 98 of the Bankruptcy Act; and

(b) second, whether that transaction was at an undervalue.

The second issue was dispositive of the present appeal.

39 As we answered the second issue in the negative, it became unnecessary to determine whether it would be appropriate to make the Payment Order against ICS and/or Indorama. This question concerned remedies, in particular the nature of the restorative order, and raised issues that should considered more appropriately in the future. For present purposes, it sufficed that some brief preliminary observations were made below at [101]–[118].

Issue 1: What was the "transaction"?

40 The relevant statutory provisions are s 98(1) of the Bankruptcy Act read with s 329 of the Companies Act as the present appeal concerns a company. As the transaction in question preceded the effective date of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA"), s 224 of the IRDA, which replaced s 98(1) of the Bankruptcy Act, was not applicable. That said, the principles we describe in these grounds are broadly applicable to s 224 of the IRDA. Section 98 of the Bankruptcy Act provides as follows:

> **Transactions at an undervalue**
>
> **98**.—(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has at the relevant time (as defined in section 100) entered into a transaction with any person at an undervalue, the Official Assignee may apply to the court for an order under this section.
>
> (2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction.
>
> (3) For the purposes of this section and sections 100 and 102, an individual enters into a transaction with a person at an undervalue if —
>
> (*a*) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration;
>
> (*b*) he enters into a transaction with that person in consideration of marriage; or

> (*c*) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.

The power to make a restorative order is provided for in s 98(2) of the Bankruptcy Act. Section 98(3) provides for three situations where a transaction at an undervalue is entered into. For the purposes of the present appeal, the first and third situations in ss 98(3)(*a*) and 98(3)(*c*) respectively were pertinent.

41 Section 98 of the Bankruptcy Act is to be read with s 329(1) of the Companies Act in the case of companies (*Rothstar Group Ltd v Leow Quek Shiong and other appeals* [2022] 2 SLR 158 ("*Rothstar*") at [23]). Section 329(1) of the Companies Act provides as follows:

> **Undue preference**
>
> **329**.—(1) Subject to this Act and such modifications as may be prescribed, any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable under section 98, 99 or 103 of the Bankruptcy Act (Cap. 20) (read with sections 100, 101 and 102 thereof) shall in the event of the company being wound up be void or voidable in like manner.

42 To establish a transaction at an undervalue, the following four elements must exist (*Mercator & Noordstar NV v Velstra Pte Ltd (in liquidation)* [2003] 4 SLR(R) 667 ("*Mercator*") at [13] and [21]): (a) the transaction that was entered into must be identified; (b) the transaction must have taken place within the relevant period under ss 100(1)(*a*) and 100(2) of the Bankruptcy Act; (c) the transaction must have been at an undervalue within one of the three situations set out in s 98(3) of the Bankruptcy Act; and (d) the company must have been insolvent at the time of the transaction or became insolvent as a result.

43 The second and fourth elements were not in dispute. The first and third elements were engaged. We start with identifying the relevant transaction in the present case, *ie*, the first element.

44 The parties had framed the relevant transaction as the Waiver. In OS 544, Affert sought a declaration that the waiver by Affert of US$17,277,886 due from ICS, *ie*, the Waiver, was the transaction at an undervalue. Before the Judge, the arguments centred on whether the Waiver was the transaction at an undervalue, though, as noted earlier, the parties disagreed on, amongst other things, which document evidenced the Waiver. Accordingly, the Judge's analysis was focused on the Waiver. On appeal, in their written submissions, the parties similarly focused their arguments on the Waiver, again disagreeing on which document evidenced it, as noted earlier.

45 However, in oral submissions, counsel for the respondents Mr Cavinder Bull SC ("Mr Bull") argued for a more expansive understanding of the relevant transaction. He submitted that the transaction should extend beyond the Waiver to include the Acquisition Agreement, arguing that the Waiver should be seen in the context of the Acquisition Agreement. If the transaction was understood holistically as the Waiver in the context of the Acquisition Agreement, it was apparent that there was no transaction at an undervalue as the Archean Group was receiving a fair benefit. In response, counsel for the appellant Mr Colin Seow ("Mr Seow") submitted that although the Side Letter was part of a "package deal", a submission we understood to mean that it was part of the Acquisition Agreement, the Side Letter was not contingent on the Acquisition Agreement. There was no evidence that the Side Letter was a condition precedent to the transaction contemplated under the Acquisition Agreement, or that the parties would renegotiate the terms of the Acquisition Agreement if the confirmations under the Side Letter were not given. Accordingly, the

Acquisition Agreement was not relevant and the focus should solely be on the Waiver as evidenced by the 1 October Email.

46 In our view, the Waiver was not the relevant transaction. The undue focus on the Waiver caused confusion in the analysis on the adequacy of consideration which, in turn, as we point out later at [96]–[97], resulted in a failure by Affert to appreciate that the burden it had to discharge was with regards to *both* the consideration it had given and *received*. For reasons we will explain, the relevant transaction was the arrangement that was in place to facilitate the transaction contemplated under the Acquisition Agreement, namely, the sale of Senfer's 66% equity in ICS to Indorama on terms provided for in the Acquisition Agreement (the "Arrangement").

47 We begin by outlining the law in relation to what is a "transaction" for the purpose of s 98 of the Bankruptcy Act. Section 2 of the Bankruptcy Act defines "transaction" widely as "[including] any gift, agreement or arrangement, and any reference to entering into a transaction shall be construed accordingly". There is good reason why "transaction" is defined widely. An expansive definition is consistent with the objective of s 98 which is to revisit any disposition of assets that is tainted by an inadequacy of consideration to ensure the Preservation and Distribution Rationales are upheld. It is pertinent that the definition is not restricted to a contract that the company has entered into and extends to any "arrangement" that the company was a party to. "Arrangement" is not defined, but has been given an expansive definition in the jurisprudence as illustrated by the authorities we consider below. The observations of this court in *Velstra Pte Ltd v Dexia Bank NV* [2005] 1 SLR(R) 154 ("*Velstra*") (at [43]–[44]) are apposite:

> …. To truncate the facts and view each event as distinct and separate would inevitably lead to a wholly erroneous

> conclusion, based as it does on a partial view of things. … Every case should be looked at objectively and fairly to determine what is the true nature of the transaction, who is the real counter party and whether the transaction was at an undervalue.

It is necessary to contextualise the transaction in light of all the relevant circumstances in order to understand its true nature. This ensures that all the elements that make up the transactions are fully understood, enabling the consideration given and received by the company to be accurately assessed.

48 Paragraphs 13-18 and 13-19 of *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten gen ed) (Sweet & Maxwell, 5th Ed, 2018) ("*Goode on Principles of Corporate Insolvency Law*") are instructive:

> **'Transaction'**
>
> The word 'transaction' has a very wide meaning. It is not confined to contracts but extends to gifts and other arrangements which are not based on contract, and where there is a contract, 'transaction' *may cover not only that contract but any linked transaction, even though involving a different party*. In Australia, it has been established in a series of cases that 'transaction' is wide enough to include: a series of steps over a period involving several parties and not always contractual consequences; a unilateral act; and arrangements giving rise to an estoppel …
>
> **The company as party to the transaction**
>
> A transaction is not within the ambit of s.238 unless it is something that the company can be said to have 'entered into'. The first step is thus to identify the relevant transaction. … The transaction having been identified, the next question is to determine whether the company was a party to it or 'involved in the transaction in issue so that it can properly be said to have entered into it'. While s.238 bites only on transactions to which the company is a party, it is not necessary that all parts of the transaction should involve the same counterparty; the section is capable of applying to a composite transaction in which there is a contract between the company and A, and a separate but linked contract between the company and B. Indeed, *a contract to which the company is not a party at all may nevertheless constitute part of a transaction entered into by the company*

> *where this is the common understanding of the parties and the company. …*
>
> [emphasis added]

Thus, "transaction" may be a corpus of associated or inter-related agreements entered into for a common purpose resulting in the disposition of the asset(s) in question, even if the parties to the agreements may not be the same. The specific agreement pursuant to which the assets were transferred may be one of the agreements in this inter-related group of agreements. This corpus of associated and inter-related agreements undergirded by a unity of purpose would be an "arrangement" under s 2(1) of the Bankruptcy Act and thus a "transaction" under s 98(1) of the Bankruptcy Act. It is sufficient if the company is a party to the arrangement. This view may be discerned from English authorities which considered provisions in the Insolvency Act 1986 which were *in pari materia* with ss 98(3)(*a*) and s 98(3)(*c*) of the Bankruptcy Act, namely ss 238(4) and 423(1) of the Insolvency Act 1986. The definitions of a transaction "at undervalue" as defined in ss 238(4)(a) and 423(1)(a) of the Insolvency Act 1986 are *in pari materia* with s 98(3)(*a*) of the Bankruptcy Act, while ss 238(4)(b) and 423(1)(c) of the Insolvency Act 1986 are *in pari materia* with s 98(3)(*c*) of the Bankruptcy Act (*Rothstar* at [24], [36]–[37]). Similarly, the definition of "transaction" in s 2(1) of the Bankruptcy Act is near-identical to the definition in s 436(1) of the Insolvency Act 1986. It was thus instructive to examine English authorities to ascertain the scope of an "arrangement" under the Bankruptcy Act.

49 In *Department for Environment Food and Rural Affairs v Feakins and another* [2005] All ER (D) 153 (Dec) ("*Feakins*"), the English Court of Appeal held that the debtor there was party to the transaction at an undervalue, even though it was not a party to the sale which was the transaction sought to be

impugned, because he was a party to arrangements that were linked to that transaction.

50 In *Feakins*, a farm was subject to a legal charge in favour of a bank for a debt of £450,000, an equitable charge in favour of a government agency, and an agricultural tenancy which was binding on the bank, in favour of a company owned by the firm's owner. The value of the farm with the agricultural tenancy was £450,000, but if it was sold with vacant possession, it would be worth £1m. The owner of the farm entered into an arrangement with his fiancée pursuant to which the farm owner persuaded the bank to sell the farm to his fiancée for £450,000, subject to the agricultural tenancy. That would have settled the mortgage, but would overreach the equitable charge in favour of the government agency. The fiancée then entered into a contract to sell the unencumbered farm with vacant possession to third-party buyers for £1.03m, on the understanding that the farm owner would procure his company to surrender the agricultural tenancy (at [72]–[73]).

51 The court held that the arrangement between the bank and the farm owner and between the farm owner and his fiancée was an "arrangement" within the definition of "transaction" in s 423 of the Insolvency Act 1986. An "arrangement" was "apt to include an agreement or understanding between parties, whether formal or informal, oral or in writing". A wide reading of "transaction" was consistent with the statutory objective of reconstituting the assets of the estate by avoiding a transaction at an undervalue (*Feakins* at [76]). The arrangement was found to be a transaction at an undervalue. The farm owner had for all practical purposes given a commitment on behalf of his company when he agreed to surrender the tenancy. This had the effect of transferring to his fiancée an asset worth £1m in return for the discharge of a debt of £450,000 owed to the bank, which was significantly less in money or

money's worth than the value of the benefit the fiancée gained. The court also found that the purpose of the transaction was to put the farm out of the reach of the government agency that held the equitable charge.

52 Similarly, in *Phillips and another v Brewin Dolphin Bell Lawrie Ltd and another* [2001] 1 WLR 143 ("*Brewin Dolphin*"), the House of Lords held that a transaction could constitute multiple linked agreements, including collateral agreements between the debtor and another company. The following passage at [20] is pertinent:

> But if a company agrees to sell an asset to A on terms that B agrees to enter into some collateral agreement with the company, the consideration for the asset will, in my opinion, be the combination of the consideration, if any, expressed in the agreement with A and the value of the agreement with B. …

This passage has been described as suggesting that the various linked contracts could together form part of the transaction, in which event, the question becomes what constitutes the consideration (*Goode on Principles of Corporate Insolvency Law* at para 13-19, n 81).

53 The UK Supreme Court decision in *Invest Bank PSC v El-Husseiny and others* [2025] 2 WLR 320 ("*El-Husseiny*") is also helpful. In *El-Husseiny*, the question was whether s 423 of the Insolvency Act 1986 applied to a situation where a debtor procured a company which he owned to transfer a valuable asset owned by the company (and not the debtor) to his son for no consideration or at an undervalue. The transfer of a valuable asset for little or no consideration by the company impacted the value of the debtor's shares in the company to the prejudice of his creditors. The debtor argued that the transfer of the asset was not a transaction for the purpose of the s 423 of the Insolvency Act as the asset was owned by the company and not him.

54 In dismissing the debtor's arguments, the court held that "transaction" as defined in s 436(1) of the Insolvency Act 1986 would include a "transfer by a solvent company owned by a debtor of a valuable asset for no or inadequate consideration" (*El-Husseiny* at [33]–[35]). Such a transfer "necessarily result[ed] in a diminution in the value of the debtor's shares in the company" (at [35]). The arrangement the debtor put in place to procure his company to transfer its asset to his son on terms that provided for no consideration was the "transaction". There was no requirement for the debtor to dispose of property belonging to him (*El-Husseiny* at [33]–[34]).

55 The common thread is that if the company is part of an arrangement comprising a series of associated or inter-connected agreements entered into for a common purpose, that would be an "arrangement" within the meaning of a "transaction" in s 98(1) of the Bankruptcy Act.

56 We were of the view that the "transaction" in the present case was *not* the Waiver (whether encapsulated in the 1 or 3 October Emails or the 7 October Letter). Rather it was the Arrangement. The common purpose was the sale of Senfer's shares in ICS to Indorama. On the vendor's side, the Acquisition Agreement was executed by Senfer and the Archean Industries who shared with Affert a common ultimate controller, the Pendurthi family. The Acquisition Agreement consisted of three interlinked agreements entered into for the primary purpose of facilitating the sale of Senfer's 66% equity in ICS to Indorama on stipulated terms. One component of the Acquisition Agreement was the Side Letter pursuant to which ICS's related parties, such as Affert, would confirm that all of ICS's related party outstandings were fully and finally settled following payment by Indorama of US$9m to Senfer's order. However, while the related parties themselves were not parties to the Acquisition Agreement, they were part of the Arrangement. Senfer and Archean Industries,

as contracting parties to the Acquisition Agreement, specifically the Side Letter, assumed the contractual obligation to procure the related parties to provide the confirmations, in order to complete the sale of Senfer's shares in ICS to Indorama.

57 It is therefore self-evident that by contractually undertaking that the confirmations would be provided, Senfer and Archean Industries were speaking on behalf of the related parties and undertaking that they were in a position to procure the related parties to issue the confirmations. This was unsurprising given the common ultimate shareholder and/or controller of the Archean Group entities (the Pendurthi family), and the objective of the Acquisition Agreement. It was therefore inexorably clear that all the related parties, Affert included, would be procured to perform the obligation under the Side Letter, namely to confirm that the debts owed by ICS to them had been settled.

58 Thus, this arrangement (*ie,* the Arrangement) centred on and for the purpose of performing the Acquisition Agreement, was between Senfer, Archean Industries and all the related parties who were to provide the confirmations, pursuant to the Side Letter. It was not necessary for the related parties to be contracting parties to the Acquisition Agreement. It sufficed that they were part of the Arrangement. This view is consistent with the position expressed in *Feakins*, *Brewin Dolphin* and *El-Husseiny*.

59 Accordingly, the Waiver was issued pursuant to the Arrangement and was inextricably connected to the Acquisition Agreement. To isolate the Waiver from the Arrangement and to disregard the Acquisition Agreement and its context, as Affert sought to do, was to fall into the very error that was warned against by this court in *Velstra* at [43]–[44] (see [47] above). It would also ignore the fact that the Waiver was issued pursuant to obligations assumed

under the Acquisition Agreement by Senfer and Archean Industries. Indeed, Mr Seow accepted that the Waiver was issued pursuant to the Side Letter and that the Side Letter was one component of the overall transactional documents for the share acquisition by Indorama of Senfer's 66% equity in ICS. That being the case, it was difficult to see why the Waiver should be seen in isolation.

60 Accordingly, the Arrangement was the "transaction" that was entered into by Affert for the purposes of s 98(1) of the Bankruptcy Act. It is this transaction that must be measured for the purpose of assessing the adequacy of consideration under s 98(3) of the Bankruptcy Act. As the Acquisition Agreement was at the centre of the Arrangement, the consideration thereunder would be relevant to the question of the adequacy of consideration that was received and given by Affert. We turn to this next.

Issue 2: Was the transaction at an undervalue?

The law on transactions at an undervalue

61 As stated earlier, of the three situations identified in s 98(3) of the Bankruptcy Act (see [40] above), only two were possibly relevant in the present case. As explained in *Rothstar* at [24], s 98(3)(*a*) of the Bankruptcy Act concerns the existence of consideration, *ie*, if the transaction was entered into for *no* consideration. Consideration here assumes the normal meaning ascribed to it by the law of contract. On the other hand, s 98(3)(*c*) requires a comparison of value between the consideration provided and the consideration received. In making that comparison, the exercise must be undertaken from the perspective of the grantor. This is because its purpose is to protect the grantor's creditors from diminution in the value of the grantor's assets. Thus, the material comparison is between the value received by the grantor and the value provided by the grantor, and not the value received or provided by any other party. There

is no requirement for the consideration to have been received by the grantor directly. However, although the grantor does not have to directly receive the consideration for the purpose of the value comparison exercise, any value received by others is relevant *in so far as it accrues to the grantor* (*Rothstar* at [26]). Therefore, the court has to determine the value of the consideration provided by the grantor and the value of the consideration received by or accrued to the grantor, regardless of whether the consideration is *directly* received by the grantor.

62 In determining the value of the consideration, the court examines the whole of the transaction and the totality of both the benefits and the detriments to the parties, and not just the market value of the consideration in isolation from other factors (*Goode on Principles of Corporate Insolvency Law* at para 13-27, citing *Agricultural Mortgage Corp plc v Woodward* [1994] BCC 688).

63 Accordingly, the totality of the benefits and detriments to Affert under or as a result of the Arrangement becomes pertinent. From the vendors' side, Senfer transferred its 66% equity in ICS to Indorama and all of the related parties in the Archean Group agreed not to pursue ICS for its debts. In return, from the purchasers' side, Indorama paid Senfer US$11m under the Share Transfer Agreement, assumed responsibility for Senfer's loan obligations to the Bank of India and Axis Bank of up to US$30m under the Assumption of Debt Agreement, and agreed to pay US$9m to Senfer or to Senfer's order under the Side Letter, of which US$8,001,886 was actually paid. Having compared the value given and received by or accrued to Affert under or as a result of the Arrangement, we were of the view that there was no transaction at an undervalue. We explain.

What was the value of the consideration that Affert provided?

64 We first considered the value of the consideration given by Affert. In our view, the value of the consideration that Affert gave had crystallised when it gave up its claim to the debt owed by ICS. There were two possible dates for assessing when Affert gave up the debt: (a) the date of the Acquisition Agreement or (b) the date of the Waiver. In our view, the relevant date was the date of the Waiver. This is turn raised two inter-related issues: (a) when the Waiver was issued, and (b) what the debt due and owing at that date was. We agreed with the Judge that the Waiver was pursuant to the 7 October Letter. Thus, the starting point for the value given by Affert was the quantum of the debt subsisting as at 7 October 2014. We explain.

The consideration given in the 7 October Letter

65 *Rothstar* made clear at [25] that the value comparison exercise must be undertaken from the perspective of the grantor. The material point of comparison was the diminution in value of the insolvent company's assets (*Rothstar* at [25]). The consideration given by Affert was *not* contained in the Acquisition Agreement itself. While Affert was party to the Arrangement, it was not under an obligation to provide the Waiver when the Side Letter was signed by Senfer, Archean Industries, Indorama and Indorama Corporation Pte Ltd on 20 August 2014, as it was not a contracting party. Thus, the date of the Acquisition Agreement – 20 August 2014 – was not the relevant date for assessing the consideration that was given as that was not the date Affert gave up its claim to the debt owed by ICS. From Affert's perspective, what it actually gave up was the claim for its debt when it confirmed, pursuant to the Arrangement, that the debt owed by ICS was settled. That begged the question of when the Waiver was issued.

66 The parties ran contrasting cases on the date when the consideration that Affert gave crystallised. On appeal, Affert submitted that the Waiver occurred, at the latest, on 1 October 2014, as evinced by the 1 October Email (see [31] above). We did not accept this argument as the material terms of the Waiver had not been finalised in the 1 October Email. In our view, it was an essential element of the Waiver that there would be *consensus ad idem* and certainty between ICS and Affert as to the material terms of the Waiver, such as the quantum of the debt waived (see *Chan Tam Hoi (alias Paul Chan) v Wang Jian and other matters* [2022] SGHC 192 at [97]–[98]). This was because the Waiver was best conceptualised as a "subsequent agreement to discharge [the parties'] counterparts from their contractual obligations under a prior contract by *promising* that they would release their counterparts from their legal obligations under the prior contract" [emphasis in original] (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at para 18.075). As the 1 October Email did not state the quantum of the debt waived, it did not constitute a completed waiver. The quantum was, however, stated in the 7 October Letter. We were therefore of the view that the operative date of the Waiver was 7 October 2014, when the sum of US$17,277,886 was confirmed as settled by Affert in the 7 October Letter, as the Judge had found.

67 The respondents submitted that the 7 October Letter was merely a confirmation that Affert would not pursue the ICS Debt, and thus would not constitute a "transaction" under s 98 of the Bankruptcy Act. To this end, the respondents relied on *Velstra* at [22] and [33] for the proposition that the words "entered into a transaction with any person" in s 98(1) of the Bankruptcy Act connoted mutual dealings, such that a "transaction" must involve a counter party to whom the donor party intended to make payment or pass property. The

respondents thus contended that the Waiver was not an "arrangement" on the basis that the Waiver did not pass any payment or property from Affert to ICS. Instead, the respondents maintained that the 7 October Letter was merely a representation that Affert would not pursue the ICS Debt, rather than a "transaction".

68 We did not accept the respondents' submission as it mischaracterised the "transaction" as the Waiver, which we have explained was incorrect. With the consideration given by Affert identified as the debt subsisting when the Waiver was given on 7 October 2014, we move to consider the *value* of the consideration that was given.

The value given up by the Waiver

69 To ascertain the value of the debt subsisting as at 7 October 2014, we first considered the limitation periods applicable to the ICS Debt. On appeal, Affert did not challenge the Judge's findings on the application of the laws of Senegal to the limitation periods or the expiration dates of the limitation periods set out by Indorama. Between the two possible limitation periods of two years or five years as found by the Court of Appeal (see [18] above), the Judge had found that the limitation period under the laws of Senegal was two years from the time payment was due under each invoice (Judgment at [41]). The debt outstanding under each Sulphur Contract and the expiry date of the limitation period in each case were as follows:

S/N	**Index No.**	**Invoice Amount**	**Expiry of Limitation Period**
1	02/2012-13 ("Invoice 1")	US$1,573,000	19 July 2014

2	013/2012-13 (the Transfert Invoice (see [24] above))	US$1,120,837 (US$4,680,000 paid out of initial US$5,800,837)	9 January 2016
3	014/2012-13 (the "Solvadis Invoice")	US$6,475,350	4 October 2014
4	003/2013	US$6,012,500	29 March 2015
5	004/2013	US$1,247,077.60	5 July 2015
6	005/2013	US$1,189,500	29 July 2015

70 As at 7 October 2014, the limitation periods for Invoice 1 and the Solvadis Invoice had passed and both claims were consequently time-barred. In relation to the Transfert Invoice, we agreed with the Judge that the Settlement Agreement dated 7 May 2014 had impliedly terminated the debt owed by ICS to Affert, to the extent of the Transfert Invoice, and therefore the debt under the Transfert Invoice was no longer recoverable.

71 On appeal, Affert argued that the respondents did not advance a case based on the Settlement Agreement before the Judge. We disagreed. While the focus of the respondents' submissions below was on the Deed of Termination, the Settlement Agreement was expressly mentioned in the respondents' submissions. The respondents' submissions referred to an agreement between Affert and ICS for the latter to pay US$5m to Transfert, with the Settlement Agreement referenced in the footnotes. In our view, it was not wrong for the Judge to have not accepted the position of either party, reviewed all the documents and came to his own conclusions. Therefore, the debt under the Transfert Invoice was fully settled prior to 7 October 2014 and should be deducted from the sum due from ICS to Affert.

72 Another argument raised by the respondents was that Affert gave no value at all in providing the Waiver because Affert would not have pursued the ICS Debt. The respondents contended this for various reasons, such as: (a) Affert's wariness of provoking the ICS Counterclaim; (b) its lack of financial means; and (c) its knowledge of ICS's poor financial condition. This argument was untenable. In *Rothstar* at [29], it was stated that the court is not concerned with the intentions or perceptions of the grantor; its focus was instead on the diminution in the *actual* value of the grantor's assets. Therefore, Affert's directors' subjective concerns were not relevant to the value of the debt that was given up. Ultimately, the burden was on the respondents to demonstrate the impact if any, in monetary terms, that the ICS Counterclaim had on the true value of the ICS Debt. The respondents failed to discharge this burden. Accordingly, we did not regard Affert's perception of the risk posed by the ICS Counterclaim and/or alleged lack of means to bring the claim as relevant factors in determining the value of the debt that Affert gave up.

73 Therefore, the maximum quantum of the debt which was capable of being waived by Affert as at the 7 October Letter was US$8,449,007.60, after deducting the debts owed under Invoice 1, the Solvadis Invoice and the Transfert Invoice. However, it was incorrect to conclude that was the amount of debt that Affert gave up. ICS's poor financial condition was relevant in this regard.

74 Notwithstanding that US$8,449,007.60 of the ICS Debt was due as at the 7 October Letter, we were of the view that the actual value that Affert had forgone was considerably lower than this sum. The value of what an insolvent company gave in exchange for what it received should be measured as the *likely recoverable value of the debt* and not its face value. This is illustrated by the

example given in *Goode on Principles of Corporate Insolvency Law* at para 13-29:

> *Example 2*
>
> Shortly before going into liquidation, Alpha Plc agrees to accept £50,000 from Beta Ltd in settlement of a debt of £100,000 owing by Beta to Alpha, At the time of the agreement, Beta was itself in serious financial difficulty and other creditors were pressing. There was therefore a risk that Beta might go into liquidation and that Alpha would receive only a small dividend, if anything, in the winding-up. *The value of what Alpha gave up in exchange for what it received should be measured as the likely recoverable value of the debt, not its face value.* On this basis, the settlement is not a transaction at an undervalue.
>
> [emphasis added]

This stands to reason as the focus of the value comparison exercise is on what is the actual value that was given and received, for the purpose of assessing whether the estate was wrongfully diminished as a result of the transaction in question. In the case of a claim for a debt that is of questionable recovery, the debt in question is effectively a bad debt. To attribute the face value of the debt in such circumstances would be to distort the value comparison exercise.

75 In our view, as at 7 October 2014, Affert's prospects of recovering the ICS Debt were low, given that ICS in all likelihood was both balance sheet and cash flow insolvent. Having found that ICS had a negative equity and had defaulted on most of its loans (Judgment at [5]), the Judge appeared to be of the same view. A company is insolvent under the cash flow test if it is unable to pay its debts as they fall due and it is balance sheet insolvent if the value of its liabilities exceed the value of its assets, taking into account its contingent and prospective liabilities (s 100(4) of the Bankruptcy Act; *Living the Link Pte Ltd (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others* [2016] 3 SLR 621 ("*Living the Link*") at [31]). As a point of clarification, both the balance sheet and cash flow tests are applicable as s 100(4) of the

Bankruptcy Act expressly provides that an individual's or company's insolvency may be assessed according to either test (see *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 at [55]–[57]). This would be different under s 224 of the IRDA, which makes clear that only the cash flow test, applicable under s 125(2) of the IRDA, is relevant (see *CH Biovest Pte Ltd v Envy Asset Management Pte Ltd (in liquidation) and others* [2025] 1 SLR 141 at [109]–[110]).

76 On appeal, Affert disagreed that ICS was facing financial difficulties. Affert submitted that ICS was neither balance sheet insolvent nor cash flow insolvent, citing four reasons. First, the negative equity of ICS, as opposed to the ICS Group, was about US$89m rather than US$137m. Second, ICS and the ICS Group, which included the subsidiaries of ICS, were holding substantial assets of US$421m and US$411m respectively and had approximately US$9m in cash. Third, with the Equity Injection into ICS after the Acquisition Agreement, ICS had become solvent. Fourth, the Indorama Group had valued the acquisition of ICS as a net gain of about US$171m, noting the importance of a mining concession held by ICS.

77 We were not persuaded by Affert's submission that ICS was not in a poor financial condition prior to the Acquisition Agreement. We acknowledged that ICS's net asset value was negative US$89m and not negative US$137m as the Judge had erroneously found. Although ICS had total assets of around US$421m (inclusive of cash and cash equivalents of around US$9m) as of 20 August 2014, its total liabilities of around US$511m exceeded their assets, resulting in a net *negative* value of US$89m. Nevertheless, the fact remained that even with a negative value of US$89m, ICS was balance sheet insolvent as at 20 August 2014.

78 The Judge found that ICS had defaulted on most of its loans (Judgment at [5]) and was thus unable to pay its debt as it fell due. Affert took issue with the Judge's conclusion. When Mr Seow was pressed on why, he argued that because Affert had cash and cash equivalents of US$9m as at 20 August 2014, it was not cash flow insolvent. When it was pointed out that US$9m was insufficient to even pay the ICS Debt, he fairly conceded the point. The Judge's conclusion was therefore fully justified.

79 We did not accept as relevant the fact that ICS had become solvent as a result of the Equity Injection. This was clearly an attempt by Affert to have its cake and eat it. The injection of capital, while not a binding obligation under the Acquisition Agreement, was nonetheless a key part of the overall understanding that Indorama would provide financing to rescue ICS. Therefore, the Equity Injection was contingent on the obligations under the Acquisition Agreement being performed. This would include the issuance of the confirmations by the related parties pursuant to the Side Letter. Thus, in our view, Affert could not rely on the Equity Injection when it was at the same time seeking to disavow the Waiver.

80 Finally, and for completeness, we did not see the relevance of the valuation that Indorama had placed on the mining concession held by ICS. That had little or no impact on whether ICS was cash flow insolvent. It also had no bearing on whether ICS was balance sheet insolvent. It was fair to presume that the value of the mining concession would have been reflected in ICS's balance sheet. Despite this, the balance sheet reflected a negative value as we have described earlier.

81 Therefore, as ICS did appear to be both balance sheet and cash flow insolvent, Affert was unlikely to recover the face value of the ICS Debt (to the

extent it was not time-barred or subject to the deductibles discussed earlier). It was more likely that Affert would have had to prove for its debt in ICS's insolvency and receive a *pari passu* distribution thereof as an unsecured creditor. Affert had led no evidence on its prospects of recovery against ICS given ICS's parlous financial position. This was a burden for Affert to discharge given that it was Affert who claimed it gave up the ICS Debt in full, which it failed to discharge. It therefore suffices for us to observe that it would have been unlikely that Affert could recover the sum of US$8,449,007.60 from ICS if the claim had been pursued.

What was the value of the consideration that Affert received?

82 We next turn to consider the value of the consideration that Affert had received. There were three parts to the consideration that flowed from Indorama. First, pursuant to the Side Letter, US$9m was to be transferred to Senfer's order in exchange for confirmation by all the related parties that the outstanding debts owed by ICS would be fully and finally settled. This sum was reduced to US$8,001,886 because of certain adjustments which were set out earlier (see [16] above). Second, pursuant to the Assumption of Debt Agreement, US$30m was paid to the Bank of India and Axis Bank to settle debts owing by Senfer Cyprus to those banks. Third, pursuant to the Share Transfer Agreement, US$11m was paid by Indorama to Senfer.

83 Apart from the direct benefit these entities received because of the payments or by reason of the relief from debt obligations, the Archean Group as a whole benefited from the Acquisition Agreement in that the Group was able to extract value from its equity in and extricate itself from a financially-struggling member – ICS – which the Group was neither willing nor able to revitalise. However, this was an intangible benefit, which could not be

quantified in monetary terms, and therefore we excluded it from the assessment of the consideration in the value comparison exercise (*Rothstar* at [34]).

84 The relevant inquiry was the consideration received by or which accrued to Affert. It was apparent that none of the payments stated above was received by Affert. As we explained above at [62], the totality of the benefits and detriments of the parties must be considered in valuing the consideration received by Affert. The question was how the value of the consideration received by various entities in the Archean Group accrued to Affert.

85 That consideration received by a third party may have value to the grantor for the purpose of the value comparison exercise is demonstrated in *Re Thoars (decd) (No 2)* [2005] 1 BCLC 331 ("*Re Thoars*"). In *Re Thoars*, the grantor owned and controlled two companies which owed a debt to a creditor ("Ramlort") of the companies. Despite not being under any personal liability to pay for the debts of the company, the grantor executed a declaration of trust that he held the benefits of a whole life assurance policy on his life on trust for the creditor absolutely. As consideration for the declaration, Ramlort made a payment of £1,100 to a third party and a loan of £1,900 to the grantor.

86 The English Court of Appeal held that the loan of £1,900 must have had more than a nominal value in money or money's worth from the grantor's perspective. Further, the payment of £1,100 "ha[d] on the face of it a value to [the grantor] equal to its face value" (at [120]). Therefore, the value received by the grantor was "not substantially less than £3,000".

87 In our view, *Re Thoars* stands for the proposition that the value of sums paid to a third party may nonetheless be regarded as value to the grantor. The

present case was one such example. The Acquisition and the payments thereunder provided benefits to Affert. We make two points.

88 First, Affert's business model was that of a "middleman" that purchased sulphur from Solvadis and consigned the sulphur to ICS. ICS would process the sulphur for downstream users. When Affert sought to discharge the Mareva Injunction in OS 681 (see [9]–[10] above), Mr Syam deposed that Affert sold commodities like sulphur to members of the Archean Group and "often served as a 'middleman' for the Archean Group". Thus, it was clear that Affert's business was contingent on the financial health of ICS. If ICS was not viable, Affert's business would be compromised and indeed might trend downwards with further transactions that would run the real risk of not being paid, assuming the Mareva Injunction would not be an impediment to such transactions. Thus, the Acquisition Agreement would have presented an opportunity for Affert to unyoke itself from the key role it played *vis-à-vis* supplying the raw materials necessary for ICS's business that was ailing financially.

89 Second, based on Affert's statements of affairs, balance sheets and ledger accounts, it had significant business dealings with MTG and Senfer Jersey (Judgment at [65]–[66]). Senfer Cyprus was indebted to Affert as at 28 September 2017, and there were significant business dealings between Senfer Cyprus and Affert of a few million dollars. We agreed with the Judge that as a result of these payments, Affert benefited in two ways: (a) the increased likelihood of those companies repaying their debts, and (b) the prospect of continued business activity with them (Judgment at [76]).

90 This did in fact materialise. Following the payments of US$5,418,000 and US$1,078,095 under the Side Letter to MTG, Affert's dues to Transfert were resolved by way of the Deed of Termination, as MTG assumed

responsibility for and subsequently settled Affert's debt of US$3,901,171.01 to Transfert. To be clear, Affert's debt to Transfert, which MTG settled, was distinct from the debt ICS owed to Affert under the Transfert Invoice, which we found was settled by the Settlement Agreement at [70] above.

91 Therefore, we were of the view that benefits accrued to Affert from the consideration that flowed from purchaser's side under the Acquisition Agreement.

92 On appeal, Affert submitted that it would not have received any benefit from payments to MTG and Senfer Jersey. It argued that when the Waiver was given, Solvadis had obtained the Mareva Injunction. Thus, the Archean Group had no desire to channel any funds in Affert, or continue to trade with Affert. Affert submitted that this was consistent with the *modus operandi* of the Archean Group to cherry-pick the collection of debts so as to shield the Archean entities from liability to external creditors, and thus there was no intention to pay Affert even if the related parties received money.

93 We were unable to accept Affert's argument. Affert's contentions relied on the observation of the court in *Solvadis v Affert* where it was stated that Affert demonstrated a "seeming lack of commercial morality on the facts" (at [23]) and that it had acted in a way that demonstrated that its probity was not to be relied on (at [34]). However, this observation did not advance Affert's argument. It is trite that in an application for a Mareva injunction, the threshold that the applicant has to cross is *inter alia* a good arguable case (*Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping SA* [2003] 1 SLR(R) 157 at [17]). The observations of the court must therefore be seen through this lens. It was merely a provisional view based on the material before the court, applying the threshold of a good arguable case. Thus, we are unable to conclude that the

Archean Group would have deliberately decided to financially isolate Affert after the Mareva Injunction was granted.

There was no transaction at an undervalue

94 Having found that there was consideration moving from both sides of the Arrangement, this disposed of the appeal in relation to s 98(3)(*a*) of the Bankruptcy Act, as it could not be said that Affert had entered into the Arrangement on terms that provided for Affert to receive *no* consideration.

95 Turning to the value comparison exercise for the purpose of s 98(3)(*c*) of the Bankruptcy Act, we agreed with the Judge that there was no need for numerical exactitude in the assessment. *Rothstar* at [34] sets out that the "value of the consideration must be *quantifiable in monetary terms*, even if the precise monetary value of the consideration cannot be immediately determined with certainty" [emphasis in original]. On this, we agreed with the Judge that the court was entitled to take a rough-and-ready approach in estimating the difference between the value provided by and accruing to the grantor (Judgment at [75]).

96 However, despite concluding that numerical exactitude was not required in the value comparison exercise, the Judge nonetheless felt that he was "compelled" to find that there was a transaction at an undervalue. He arrived at this conclusion because there was no expert evidence to assist him to calculate the value of the practical benefit received by Affert. The Judge was of the view that the burden of proof in this regard was on the respondents. With respect, the Judge erred in concluding as such.

97 In our view, as the applicant, it was for the Affert to demonstrate a *prima facie* case that pursuant to the relevant transaction, it received consideration, in

money or money's worth, that was considerably less than the value, in money or money's worth, it provided (*Mercator* at [33]). It failed to do this. This was perhaps unsurprising given that Affert built its case on the Waiver, isolating the Waiver from the Arrangement. As we have explained, this was an incorrect characterisation of the relevant transaction. As a result, the inquiry became one of whether there was any consideration received by Affert for the Waiver rather than the consideration that Affert received under the Arrangement. This underscored the importance of *correctly characterising* the relevant transaction, which then sets the parameters for the assessment of consideration.

98 Ultimately it was for Affert to show what it gave up and what it received in order to establish that the consideration received was consideration less than the consideration given. We had observed earlier that Affert had not discharged its burden to show that it would have recovered the full value of the debt owing by ICS as at 7 October 2014 (see [81] above). More importantly, Affert had failed to discharge its burden of proof to establish the value of the benefits it had received. Accordingly, for the value comparison exercise, Affect had not shown that the value received was significantly less, in money or money's worth, than the value given in waiving the ICS Debt (to the extent it was not time-barred or subject to deductibles). We were thus unable to conclude that Affert had entered into a transaction at an undervalue within s 98(3)(*c*) of the Bankruptcy Act. Consequently, the appeal was dismissed.

Observations on the restorative order

99 As we had concluded that there was no transaction at an undervalue, the question of remedies did not arise for determination. Ordinarily, two issues would have arisen in relation to this question. First, whether it was appropriate to make the Payment Order against Indorama. Second, whether it was

appropriate to make a restorative order in the present case, whether that be in the form of the Payment Order or otherwise.

100 The first issue raised the question of whether a restorative order might be made against a party who was not the direct recipient of the consideration that was given by the grantor. The second issue raised the question of when it was appropriate to make a restorative order. We make some brief preliminary observations on both issues.

Whether the Payment Order should be made against Indorama

101 As regards the first issue, we note that any benefit to Indorama as a result of the Waiver was only because Indorama was ICS's majority shareholder. It was therefore a reflective or incidental benefit on Indorama's interest as a shareholder. Recognising such benefit as a basis for making a restorative order such as the Payment Order would appear inconsistent with the English High Court authority of *Re Oxford Pharmaceuticals Ltd* [2009] 2 BCLC 485. There, the court had found that a shareholder only received incidental benefit from an unfair preference made to the company he held shares in, and it was thus neither necessary nor appropriate to make an order against the shareholder for the purposes of making a restorative order (at [85]). On a provisional basis, this appears to be correct. In fact, consistent with this view, the restorative order provided in s 102(1) of the Bankruptcy Act (and indeed s 227(1) of the IRDA) appear to be directed at the direct recipient of the company's assets (see [102] below), and not a party who has indirectly benefited.

Whether a restorative order was appropriate

102 We turn to the second issue. The remedy in law for a transaction at an undervalue is a restorative order. Where an individual or company has entered

into a transaction at an undervalue, the court may "make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction" (s 98(2) of the Bankruptcy Act). Section 102 of the Bankruptcy Act provides a non-exhaustive list of orders which may be made:

> **Orders under sections 98 and 99**
>
> **102.**—(1) Without prejudice to the generality of sections 98(2) and 99(2), an order under either of those sections with respect to a transaction or preference entered into or given by an individual who is subsequently adjudged bankrupt may, subject to this section —
>
> (*a*) require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the Official Assignee;
>
> (*b*) require any property to be so vested if it represents in any person's hands the application of the proceeds of sale of property so transferred or of money so transferred;
>
> (*c*) release or discharge (in whole or in part) any security given by the individual;
>
> (*d*) require any person to pay, in respect of benefits received by him from the individual, such sums to the Official Assignee as the court may direct;
>
> (*e*) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction or by the giving of the preference to be under such new or revived obligations to that person as the court thinks appropriate;
>
> (*f*) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for the security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction or by the giving of the unfair preference; and
>
> (*g*) provide for the extent to which any person whose property is vested by the order in the Official Assignee, or on whom obligations are imposed by the order, is to

> be able to prove in the bankruptcy for debts or other liabilities which arose from, or were released or discharged (in whole or in part) under or by, the transaction or the giving of the unfair preference.
>
> (2) An order under section 98 or 99 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the individual in question entered into the transaction or, as the case may be, the person to whom the unfair preference was given.
>
> (3) An order under section 98 or 99 shall not —
>
> (*a*) prejudice any interest in property which was acquired from a person other than that individual and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest; or
>
> (*b*) require a person who received a benefit from the transaction or unfair preference in good faith, for value and without notice of the relevant circumstances to pay a sum to the Official Assignee, except where he was a party to the transaction or the payment is to be in respect of an unfair preference given to that person at a time when he was a creditor of that individual.

103 As Steven Chong J (as he then was) held in *Living the Link* (at [72]–[75]), the expression "as it thinks fit" in s 99(2) of the Bankruptcy Act (which relates to unfair preferences) gives the court a wide discretion, including not making any order if justice so requires. Section 99(2) is *in pari materia* with s 98(2) of the Bankruptcy Act. Similarly, in *Johnson v Arden and others* [2019] 2 BCLC 215 at [93], the English High Court, in considering *in pari materia* provisions in ss 238(3) and 239(3) of the UK Insolvency Act 1986 (which relate to transactions at an undervalue and unfair preferences, respectively), held that the court was not bound to restore the position to exactly that which existed prior to the transaction, but could make orders which "in substance achieve that result but achieve it in a different way". The parties accepted that the court had a broad discretion under s 98(2) of the Bankruptcy Act to make the appropriate order.

104 Relying on *Re MDA* at [123], the Judge held that s 98(2) of the Bankruptcy Act required the court to restore the position to the *status quo ante* without going further to reconstruct the position to the company would have been in if other steps had been taken by the company (Judgment at [85]–[87]). To reconstruct would be to speculate what the company would have done. The plain meaning of a "restorative" order was to restore the insolvent company's position to where it was before the transaction at an undervalue took place.

105 We agreed with the Judge that the approach in these cases should apply to when a restorative order ought to be made. The purpose of a restorative order is to revert to the *status quo ante* (Judgment at [86]–[86]). As *Goode on Principles of Corporate Insolvency Law* highlights at para 13-42, the order that the court is required to make is to restore the company to the position it would have been in if it had not entered into the transaction. However, the court is not permitted to reconstruct the position to where the company would have been if it had entered into a different transaction. Similarly, the order should not leave the company in a better position than before. Account must be taken of any additional income or profits the company would have likely earned if the transaction had not taken place. The respondent will, as a rule, be entitled to counter-restitution of the benefits received by the company, such as repayment of the price it received for the property which is to be retransferred to it, compensation for the value added by any improvements that the respondent has made, or reimbursement of the cost of performing obligations of the company in the counterfactual (*Goode on Principles of Corporate Insolvency Law* at para 13-42).

106 Three decisions of the English courts emphasise the importance of ensuring that the restorative order does not improve the position of the company. In *Feakins*, the order below was varied by restoring the tenancy in order to

prevent the government agency from being placed in a better position (at [87]). A similar approach was taken in *Brewin Dolphin*, where the court varied the order below by giving credit for a loan received by the company (at [34]).

107 In *Weisgard v Pilkington* [1995] BCC 1108 ("*Weisgard*"), the English High Court held that where an asset was returned to the company *in specie*, any improvement to the asset in the interim, such as extensions to the property, may be accounted for in terms of the value that had accrued to the company. The court found that after the undue preference transactions in question, the two directors of the company had expended their personal funds to convert certain flats belonging to the company, which had the effect of enhancing their value. In making the restorative order, the court allowed the directors the opportunity to make a claim for the enhancement in value if they could show that as a result of money they had expended, the value of the flats had been enhanced.

108 Thus, a restorative order must return parties to the position they would have been in if the transaction had not been entered into. It is restoration both ways, at least in terms of the benefits the respondent has conferred on the company. In doing so, the court must not reconstruct the steps that a company might have taken, must not put the company in a better position than it would have been in if the transaction had not occurred, and must account for any enhancement in value of the property to be restored as a result of the respondent's actions.

109 Fashioning the appropriate order as the court "thinks fit" is a discretionary exercise with a broad remit. The discretion extends beyond unwinding each component of the transaction in question to making orders which in substance achieve the *status quo ante* in different ways. A restorative order may affect the property of, or impose any obligation on, any person

whether or not they are the counterparty to the transaction at an undervalue (s 102(2) of the Bankruptcy Act). The caveat is that a restorative order should not prejudice any interest in property which was acquired from a party other than the company, in good faith, for value and without notice of the relevant circumstances (s 102(3)(*a*) of the Bankruptcy Act).

110 We make one further point. The Judge found that Affert's directors' subjective intention not to recover the ICS Debt because of the ICS Counterclaim was relevant in determining what the *status quo ante* would have been, as they affected the likelihood of Affert pursuing the ICS Debt (Judgment at [91]–[93]). In our view, the subjective views and actions of the directors of an insolvent company were generally not relevant for the purposes of assessing the restorative order the court should make. However, to the extent the director's subjective views might reflect an underlying objective difficulty with pursuing recovery that impacts the *status quo ante*, it might be relevant.

111 Having briefly sketched the legal framework applicable to orders under s 98(2) of the Bankruptcy Act, we offer some brief observations on whether it was appropriate for the Payment Order to be made against ICS.

112 In our judgment, even if the Arrangement had been a transaction at an undervalue, there would serious questions as to whether it would be appropriate to make the Payment Order against ICS. There are three possible reasons for this. First, it would require the Acquisition Agreement to be unwound. Second, making the Payment Order would have put Affert in a better position than if the transaction had not occurred. Third, if the Arrangement was unwound, Affert would be left with a potential paper judgment as ICS would be in a state of insolvency in the counterfactual. We address each reason in turn.

Untenable to unwind the entire Arrangement

113 The Payment Order would require the Acquisition Agreement to be unwound. This would appear to be unworkable given the complexity of the transaction and the passage of time. The Acquisition Agreement was a carefully negotiated high value transaction between sophisticated commercial actors. The various confirmations of settlement of debt including the Waiver were an integral and inseparable part of the transaction. Restoring Affert to the position before the Waiver would require the restoration of all the parties to the position they were in before the Acquisition Agreement was entered into. It is readily apparent that this was not possible in the circumstances.

114 The complexity of the Acquisition Agreement was discernible from its myriad components, all of which would have to be unwound. This included the Share Transfer Agreement for the transfer of 66% of the shares in ICS from Senfer to Indorama and the payment of sums of US$11m from Indorama to Senfer, the Assumption of Debt Agreement under which Indorama assumed US$30m of Senfer's debts, and the settlement of all of ICS's related-party debts for the payment of US$8,001,886 under the Side Letter. Seen in the round, the intricacy of the Acquisition Arrangement would require extensive orders to be made to unwind all of these transactions. The *status quo ante* would certainly not be adequately achieved by merely making the Payment Order as that assumes that the transaction as a bilateral agreement between Affert and ICS when it was clearly not.

115 Another complication arose from the length of time since the Arrangement was entered into in 2014. In the interim, benefits have accrued to various parties, including ICS, as a result of ICS's rehabilitation. For example, Indorama had made capital injections of a total of US$396m in ICS between

2014 and 2018, all of which would have to be accounted for as enhancements in ICS's value. A further complication was that on 28 November 2014, after the completion of the Acquisition Agreement and the settlement of all related-party debts, Indorama Corporation Pte Ltd exercised an option to increase its shareholding in ICS to 78% through the issuance of 4,222,518 shares. This would also have to be unwound. The court is empowered to make no order at all "if justice so requires" (*Living the Link* at [72]). Notably, in seeking the Payment Order, Affert made no effort to address the issues surrounding the unwinding of the Acquisition Agreement.

Making the Payment Order excessively improves Affert's position

116 The second reason militating against making the Payment Order was that it would place Affert in a better position than the *status quo ante*. The purpose of a restorative order would be to restore the *status quo ante* which would be Affert's position on 7 October 2014 when the Waiver occurred. By then, as we have noted above at [70], Invoice 1 and the Solvadis Invoice were time-barred. Thus, granting the Payment Order for the full value of the ICS Debt would be inappropriate.

117 What then of the balance of the ICS Debt that was not time-barred on 7 October 2014? In *Recovery Vehicle (CA)* (at [143]), this court had determined that even if a declaration was granted that the Waiver was unenforceable, RV1 would not be able to revive its claim for the ICS Debt, as the claim was time-barred under the laws of Senegal at the latest by 29 July 2018, which was before the matter was heard by the High Court in 2019. To the extent the *status quo ante* was Affert's position on 7 October 2014, the observation in *Recovery Vehicle (CA)* that the claim was time barred by 29 July 2018 would not strictly apply, save as regards Invoice 1 and the Solvadis Invoice. However, the

observation in *Recovery Vehicle (CA)* might nonetheless be relevant if the question was whether Affert would have taken steps on or after 7 October 2014 to pursue a claim for the remaining invoices, prior to the relevant limitation period expiring. If Affert would not, granting the Payment Order for the balance of the ICS Debt would circumvent the time-bar and thereby better Affert's position. In this regard, Affert had not demonstrated that it would have pursued a claim for the remaining invoices, prior to the limitation period expiring at the latest by 29 July 2018. As such, granting the Payment Order would circumvent the time-bar and better Affert's position.

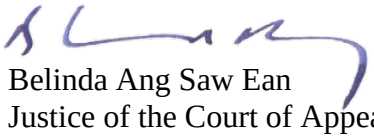
It would be a Pyrrhic victory to reverse the entire transaction

118 Third, even assuming that it would be feasible to undo every component of the Acquisition Agreement and all the resultant benefits, in the counterfactual, Affert would be left with a debt that was owed by ICS as an insolvent company. In the *status quo ante*, ICS would be both balance sheet and cash flow insolvent (see [77]–[78] above). Affert would thus be an unsecured creditor of an insolvent company. Its position in that scenario has been discussed above at [81].

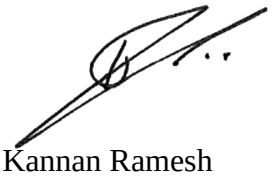
119 These reasons raised serious questions on whether it would have been appropriate to make the Payment Order against ICS.

Conclusion

120 For the reasons above, we dismissed the appeal and awarded costs to the respondents fixed at $55,000 inclusive of disbursements. The usual consequential orders were to apply.



Belinda Ang Saw Ean
Justice of the Court of Appeal



Kannan Ramesh
Judge of the Appellate Division

Andrew Phang Boon Leong
Senior Judge

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