

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2026] SGCA 28

Court of Appeal / Civil Appeal No 25 of 2025

Between

- (1) Lau Lee Sheng
- (2) Teo Wei Wen Benjamin
- (3) Koh Hong Jie (Xu Hongjie)

... Appellants

And

- (1) Envy Asset Management Pte Ltd (in liquidation)
- (2) Envy Management Holdings Pte Ltd (in liquidation)
- (3) Envy Global Trading Pte Ltd (in liquidation)
- (4) Bob Yap Cheng Ghee
- (5) Tay Puay Cheng
- (6) Toh Ai Ling

... Respondents

Court of Appeal / Civil Appeal No 39 of 2025

Between

Shen Xuhuai

... Appellant

And

- (1) Envy Management Holdings Pte Ltd (in liquidation)

- (2) Envy Asset Management Pte Ltd (in liquidation)
- (3) Envy Global Trading Pte Ltd (in liquidation)
- (4) Bob Yap Cheng Ghee
- (5) Toh Ai Ling
- (6) Tay Puay Cheng

... *Respondents*

In the matter of Originating Claim No 193 of 2022

Between

- (1) Envy Asset Management Pte Ltd (in liquidation)
- (2) Envy Management Holdings Pte Ltd (in liquidation)
- (3) Envy Global Trading Pte Ltd (in liquidation)
- (4) Bob Yap Cheng Ghee
- (5) Tay Puay Cheng
- (6) Toh Ai Ling

... *Claimants*

And

- (1) Lau Lee Seng
- (2) Teo Wei Wen Benjamin
- (3) Shen Xuhuai
- (4) Koh Hong Jie (Xu Hongjie)
- (5) Edmund Chan Pak Kum
- (6) Guo Yujia
- (7) Ang Wen Min, Daniel
- (8) Chua Wei Jian Jordan

... *Defendants*

JUDGMENT

[Insolvency Law — Avoidance of transactions — Transactions defrauding creditors]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Lau Lee Sheng and others
v
Envy Asset Management Pte Ltd (in liquidation) and others
and another appeal

[2026] SGCA 28

Court of Appeal — Civil Appeals No 25 and 39 of 2025
Steven Chong JCA, Kannan Ramesh JAD and Judith Prakash SJ
1 April 2026

22 June 2026

Judgment reserved.

Kannan Ramesh JAD (delivering the judgment of the court):

Introduction

1 This appeal is yet another proceeding arising from the collapse of the Envy group of companies. The group operated a Ponzi scheme which was so well orchestrated that a staggering number of individuals were enticed to invest substantial sums of money, with significant losses suffered as a result. In broad strokes, the Ponzi scheme painted the picture of an ostensibly highly profitable business of purchasing and reselling nickel operated by the Envy group. Investors were offered the opportunity to participate in the business by investing significant sums which were to be used for financing the purchase of nickel in exchange for lucrative returns from the profits made upon resale. In truth, this was all a veneer. There was no nickel trading business run by the Envy group and any transactions for the purchase and sale of nickel were in fact non-

existent. The purported profits that were paid out to investors were to keep the Ponzi scheme alive and, typical of the *modus operandi* in such schemes, were in fact moneys recycled from funds invested by others. Central to the operation of the Ponzi scheme was a group of employees who secured investors and received in return lucrative commissions and profit-sharing payments as well as referral fees running into the millions for their efforts. The appellants were some of those employees. It is common ground that the appellants were at the material time acting in good faith as they were unaware that the scheme was fraudulent.

2 The Ponzi scheme eventually unravelled and the Envy group fell into insolvency – which inevitably was the case given that there was no real business – and was put initially under judicial management and soon after into compulsory liquidation. The liquidators of the companies commenced proceedings to claw back certain payments made to the appellants, primarily the commissions, profit-sharing payments and referral fees. The claims were brought on the basis, *inter alia*, that the payments were conveyances or transactions undertaken to defraud creditors under s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) (“CLPA”) and s 438 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) (“IRDA”), and transactions at an undervalue under s 224 of the IRDA, as in force at the relevant time, *ie*, when the relevant payments were made.

3 The appellants resisted the claims and sought to retain the payments on the basis that they had received the payments in good faith and provided valuable consideration. In the alternative, the appellants contended that the court should exercise its discretion and decline to order a claw back. In the proceedings below, a judge of the General Division of the High Court (“Judge”) found that the appellants had to repay the payments, subject to deductions for any excess tax payments they had made as regards the relevant payments, and

ordered accordingly. The Judge’s decision is published as *Envy Asset Management Pte Ltd v Lau Lee Sheng* [2025] SGHC 144 (“Judgment”). The appellants appealed the decision in these appeals.

4 Having carefully considered the parties’ submissions, we find no merit in the appeals, save on one point. In our view, with respect, the Judge erred in ordering a claw back of the referral fees. We therefore allow in part CA/CA 25/2025 (“CA 25”) and dismiss CA/CA 39/2025 (“CA 39”) in its entirety.

Facts

Parties to the dispute

5 The appellants in CA 25 (collectively, the “CA 25 Appellants”) are:

(a) Mr Lau Lee Sheng (“Mr Lau”): Mr Lau was the first defendant below. He was employed by Envy Asset Management Pte Ltd (“EAM”) as a Sales Director from 1 June 2016 to 30 September 2020, and thereafter by Envy Management Holdings Pte Ltd (“EMH”) in the same capacity from 1 October 2020 to 17 May 2021. Mr Lau’s basic salary was \$5,000 per month and he received discretionary bonuses totalling \$27,000 during the course of his employment.

(b) Mr Teo Wei Wen Benjamin (“Mr Teo”): Mr Teo was the second defendant below. He was employed by EAM as a Sales Director from 16 December 2016 to 30 September 2020, and thereafter by EMH in the same capacity from 1 October 2020 to 17 May 2021. Mr Teo’s basic salary was \$5,000 per month and he received discretionary bonuses totalling \$25,000 during the course of his employment.

(c) Mr Koh Hong Jie (“Mr Koh”): Mr Koh was the fourth defendant below. He was employed by EAM as a Sales Associate from 24 October 2018 to 30 September 2020 and thereafter by EMH in the same capacity from 1 October 2020 to 17 May 2021. Mr Koh’s basic salary ranged from \$3,000 to \$3,500 per month and he received discretionary bonuses totalling \$22,600 during the course of his employment.

6 The appellant in CA 39 (“CA 39 Appellant”) and the third defendant below is Ms Shen Xuhuai (“Ms Shen”). She was employed by EAM as a financial accountant from 9 January 2017 to 30 September 2020, and thereafter by EMH as an office operations director from 1 October 2020 to 1 July 2021. Ms Shen’s basic salary ranged from \$2,500 to \$5,500 per month. It appears from the record that Ms Shen was paid at least \$10,000 in discretionary bonuses. The CA 25 Appellants and the CA 39 Appellant are collectively referred to as the “Appellants”.

7 For completeness, we note that the sixth and eighth defendants below did not appeal the Judge’s decision. They were found liable to pay \$2,611,675.90 and \$370,881.56 respectively in claw backs, subject to deductions for any excess income tax payments that they had made (Judgment at [102]). The fifth and seventh defendants entered into settlements and the claims against them were discontinued (Judgment at [8]).

8 The respondents in the present appeals (“Respondents”) comprise three entities that formed the Envy group of companies (“Envy Companies”) and the three joint and several liquidators of these entities. They are:

- (a) EAM;
- (b) EMH;

- (c) Envy Global Trading Pte Ltd (“EGT”);
- (d) Mr Bob Yap Cheng Ghee;
- (e) Mr Tay Puay Cheng; and
- (f) Ms Toh Ai Ling.

Background to the dispute

9 From around 2015 to April 2020, EAM purported to engage in the business of trading physical nickel (“Purported Nickel Trading”), which purportedly involved the purchase, at a discounted rate, of London Metal Exchange Nickel Grade Metal (“Poseidon Nickel”) from Poseidon Nickel Limited (“Poseidon”), an Australian company, which was then resold at a higher price to third parties. The resulting profits were to be distributed to the investors who had participated in what they were led to believe was a legitimate business. While we note that it was indicated elsewhere on the record that the Purported Nickel Trading only begun in February 2016 and not around 2015 as stated in the Judgment, we say no more as the parties did not dispute the precise date and it was ultimately inconsequential to the analysis.

10 On or about 19 March 2020, the Monetary Authority of Singapore (“MAS”) placed EAM on its Investor Alert List for being wrongly perceived as being licensed by MAS. Thereafter, the Purported Nickel Trading business was transferred to EGT, with EMH incorporated as its sole shareholder.

11 The Purported Nickel Trading was an illusion. It was a Ponzi scheme propped up by misrepresentations made to the investors and various forgeries. None of the moneys received from investors was used to purchase Poseidon Nickel. Instead, these funds were dissipated, *inter alia*, in the following ways:

- (a) transferred to Mr Ng Yu Zhi (“NYZ”), the apparent mastermind of the Ponzi scheme;
- (b) paid as directors’ fees to NYZ and Ms Lee Si Ye;
- (c) paid as commissions, profit-sharing payments, referral fees and/or other payments to the employees of the Envy Companies;
- (d) paid as referral fees or “profits” in excess of the invested principal to investors; and
- (e) transferred or paid to related entities such as other companies owned by the Envy Companies or NYZ.

12 On 22 March 2021, the Commercial Affairs Department announced that it had preferred charges against NYZ for cheating and fraudulent trading. On 15 and 16 April 2021, the Envy Companies filed applications to be placed under judicial management and interim judicial management respectively. The interim judicial management was allowed on 27 April 2021. On 2 July 2021, the interim judicial managers applied to place the Envy Companies in compulsory liquidation. The court allowed the applications and appointed the liquidators on 16 August 2021.

Decision below

13 In the proceedings below, the Respondents sought to claw back various payments that were made to the Appellants during their employment with EAM and/or EMH. The sums sought to be clawed back (collectively, the “Payments”) included:

- (a) commissions, which had been agreed by each Appellant with the relevant Envy Company to be based on a percentage of that entity’s

earnings from investments managed or brought in by the Appellant (Judgment at [10], [51]–[54]);

(b) profit-sharing payments, which had been agreed by each Appellant with the relevant Envy Company to be a percentage share of that entity’s profits on the Purported Nickel Trading (Judgment at [10], [51]–[52]);

(c) referral fees, which had been paid to the employees in their capacity as investors rather than as employees based on the amount invested by the referred investor as opposed to the profit or return made by the Envy Companies as a result of the investment (Judgment at [11], [64]–[65]); and

(d) over-withdrawn sums, which were moneys received by the Appellants in their capacity as investors in excess of the principal they had invested in the Purported Nickel Trading (Judgment at [12]). In this judgment, we shall refer to such sums as “over-withdrawn” or “under-withdrawn” as the case may be depending on whether the sum received was in excess or short of the investment principal.

14 The Respondents did not seek to claw back any of the basic salary payments and discretionary bonuses that were paid to the Appellants. As the Payments straddled the repeal of s 73B of the CLPA and commencement of s 438 of the IRDA, both on 30 July 2020, the claw backs were pursued on the following basis:

(a) for the Payments made before 30 July 2020, under s 73B of the CLPA as voluntary conveyances made with the intent to defraud creditors;

- (b) for the Payments made on and after 30 July 2020, as transactions defrauding creditors under s 438 of the IRDA;
- (c) in the alternative:
 - (i) where the relevant Payment fell within the IRDA:
 - (A) as transactions at an undervalue within the relevant time under s 224 of the IRDA; or
 - (B) unfair preferences within the relevant time under s 225 of the IRDA; or
 - (ii) the Appellants were unjustly enriched by the Payments.

Whether the Payments could prima facie be clawed back

Conveyances made with the intent to defraud creditors under s 73B of the CLPA

15 The Judge found that the relevant Payments were conveyances of property made with the intent to defraud creditors within s 73B(1) of the CLPA. The question then was whether the Appellants could rely on the defence under s 73B(3) of the CLPA, which required the Appellants to have acted in good faith (which was not disputed) and have “provided good consideration for the Payments, which in turn [raised] the question of whether there was any basis for the Payments” (Judgment at [43]–[44]).

(1) Over-withdrawn sums

16 On the basis of this court’s decision in *CH Biovest v Envy Asset Management Pte Ltd* [2025] 1 SLR 141 (“*Biovest (CA)*”), the Judge found that the Respondents could claw back the over-withdrawn sums. The over-withdrawn sums corresponded to the “returns” on the Letters of Agreement

(“LOAs”) or Receivables Purchase Agreements (“RPAs”) which were the mechanisms by which the investors invested into the Purported Nickel Trading (Judgment at [12]). The nickel assets under the LOAs and the forward contracts under the RPAs, did not exist, and no returns could therefore have been made by the Envy Companies from the Purported Nickel Trading. The payments of the over-withdrawn sums had no contractual basis and thus the Appellants did not provide valuable consideration for the over-withdrawn sums (Judgment at [45]–[49]).

(2) Commissions and profit-sharing payments

17 The Judge concluded that *per* the terms of their employment contracts, the commissions and profit-sharing payments were based on the Envy Companies making a profit (Judgment at [50]–[56]). Accordingly, the contractual obligation to pay the commissions and profit-sharing payments only arose where actual profits had been made from the Purported Nickel Trading (Judgment at [56]).

18 As actual profits were not made, there was no obligation to pay the commissions and profit-sharing payments. Thus, these were non-contractual payments and the Appellants therefore failed to provide any valuable consideration (Judgment at [57]).

(3) Referral fees

19 The referral fees were paid to Mr Koh and Mr Chua Wei Jian Jordan, the eighth defendant below, and were calculated in the following manner (Judgment at [64]):

(a) Before April 2020, between 0.8% and 2.75% of the amount invested under each investment contract was paid as referral fees (“Pre-April 2020 Referral Fees”).

(b) From April 2020 onwards, 30% to 50% of the Envy Companies’ earnings was paid as referral fees (“Post-April 2020 Referral Fees”). The Judge had defined these referral fees as the “From-April 2020 Referral Fees” below (Judgment at [64(b)]).

Mr Koh was paid a total of \$49,582.70 in Pre-April 2020 Referral Fees. He did not receive any Post-April 2020 Referral Fees.

20 The Judge was of the view that the referral fees differed from the commissions and profit-sharing payments as they were paid to the employees as *investors* for referring other investors to the Purported Nickel Trading. More significantly, the Pre-April 2020 Referral Fees were not based on the Envy Companies’ earnings. Instead, they were based on the *amount invested* by the referred investors (Judgment at [65]).

21 Nevertheless, the Judge found that the Pre-April 2020 Referral Fees amounted to extra-contractual payments as the obligation to pay assumed that the nickel trading business was legitimate, and the Purported Nickel Trading would be carried out. Objectively interpreted, payment was predicated on a *successful* referral of an investor. As the money that was invested was not utilised for the Purported Nickel Trading, there was never a successful referral warranting payment of the referral fees. Thus, there was no obligation on the Envy Companies to pay the Pre-April 2020 Referral Fees (Judgment at [67]).

22 As for the Post-April 2020 Referral Fees, similar to the commissions and profit-sharing payments, the premise was that the Envy Companies were turning

in actual profits. As the Envy Companies never actually made any profit, there was no basis to pay the Post-April 2020 Referral Fees (Judgment at [68]).

23 In sum, the Judge found that all the Payments made before 30 July 2020 were liable to be clawed back as conveyances defrauding creditors under s 73B of the CLPA (Judgment at [70]).

Transactions defrauding creditors under the IRDA

24 The Judge found that all the Payments made on or after 30 July 2020 were subject to claw back as transactions defrauding creditors under s 438 of the IRDA. The Judge assessed that the Payments were transactions at an undervalue as they were essentially gifts to the defendants under s 438(2)(a) of the IRDA. As the Payments were made in the context of a Ponzi scheme, they were presumably made to defraud creditors under s 438(4) of the IRDA and the Judge found that there was such an intent (Judgment at [71]–[73]).

Transactions at an undervalue, unfair preference and unjust enrichment

25 The Judge found that the requirements for setting aside the Payments as transactions at an undervalue under s 224 of the IRDA were made out (Judgment at [74]–[77]). This followed from his conclusion that s 438(2)(a) of the IRDA was satisfied.

26 However, the Judge found that the Respondents’ unfair preference claims under s 225 of the IRDA were not made out as there was no debtor-creditor relationship, given that the Payments were made without any contractual basis and therefore were gifts (Judgment at [78]). The Judge rejected the Respondents’ case in unjust enrichment as there was an absence of any unjust factor (Judgment at [79]–[80]).

The court's exercise of discretion

27 The Judge held that even where the statutory requirements for a claw back of the Payments were met, the court retained the discretion to decline to order a claw back (Judgment at [81]–[86]). However, the discretion had to be “carefully and sparingly exercised”, particularly in the present case where many investors, employees and other parties were affected by the Ponzi scheme (Judgment at [86]).

28 The Judge found that the Appellants had not shown any exceptional circumstances which warranted the exercise of discretion. They were remunerated for their services by their basic salaries and discretionary bonuses which were not being clawed back. The Appellants had failed to show that the work they had performed for the Envy Companies were disproportionate to their salaries and bonuses. Further, the Appellants appeared to retain the benefit of the Payments, and/or they had used the Payments to meet their ordinary living expenses. The Appellants had not shown that their lives changed for the worse as a result of the Payments, warranting the discretion being exercised in their favour (Judgment at [87]). They had failed to show that any detriment that resulted from the alleged change of position was because of their involvement in the Envy Companies. For these reasons, the Judge declined to exercise his discretion not to order a claw back (Judgment at [87(b)]).

29 However, the Judge exercised his discretion to allow the Appellants to “set-off” any excess income tax paid on the Payments against the sums ordered to be clawed back (Judgment at [91]).

The CA 25 Appellants' counterclaims

30 The Judge found that the CA 25 Appellants had not sufficiently proven their counterclaim in fraudulent misrepresentation. They had initially pleaded fraudulent misrepresentation made by the Envy Companies to them as investors, alleging that they were induced to *invest* in the Purported Nickel Trading business. However, as the CA 25 Appellants were over-withdrawn, they did not suffer loss as investors (Judgment at [94]).

31 The Judge also rejected the CA 25 Appellants' *quantum meruit* claim for work done and for fraudulent misrepresentation made to them as employees. The Judge found that because the CA 25 Appellants shifted their case in their closing submissions from fraudulent misrepresentations which induced them to invest in the business to fraudulent misrepresentation made to them as *employees* (Judgment at [92]), it would be prejudicial to the Respondents if the claim was allowed to be raised at such a late stage. The Respondents did not have the opportunity to adduce expert evidence to show that the basic salary payments and discretionary bonuses were appropriate and reasonable remuneration. For the same reason, the *quantum meruit* claim was also rejected (Judgment at [95]). We observe that the Judge's understanding of the CA 25 Appellants' case might not have been correct. They did not advance independent counterclaims for *quantum meruit* and fraudulent misrepresentation made to them as employees. We address this point in detail below (see [78]–[79] below).

Insolvency set-off

32 The Judge held that the Appellants' counterclaims for outstanding commissions, profit-sharing payments, under-withdrawn sums, and unpaid salary were not established. The commissions and profit-sharing payments were

without any basis. As for the under-withdrawn sums and the unpaid salaries, the Judge did not allow an insolvency set-off. There was no mutuality of parties and debts as the moneys clawed back would be for the benefit of creditors and not the relevant companies (Judgment at [96]).

Quantification of payments

33 The Judge accepted that the Respondents had not shown on a balance of probabilities that payments amounting to \$21,000 were indeed made to the CA 39 Appellant and declined to order a claw back of that sum. Thus, the total amount of commissions to be clawed back from the CA 39 Appellant was reduced by \$21,000 (Judgment at [100]).

Conclusion: Total sums clawed back

34 In sum, the Judge found that the following sums (subject to deductions for any excess income tax payments to be calculated) ought to be clawed back from the Appellants, and ordered accordingly (Judgment at [102]):

- (a) Mr Lau: \$17,932,745.26
- (b) Mr Teo: \$10,204,333.11
- (c) Ms Shen: \$6,120,892.95
- (d) Mr Koh: \$4,963,024.65

Parties' cases

Appellants' case

35 The Appellants appeal against the Judge's decision to order the claw back of the: (a) commissions and profit-sharing payments; and (b) referral fees

(collectively, “Challenged Payments”). In addition, the CA 39 Appellant also appeals against the Judge’s decision not to allow an insolvency set-off.

36 The Appellants do not appeal the Judge’s decision to dismiss their various counterclaims. In addition, the CA 25 Appellants do not appeal the Judge’s decision to claw back the over-withdrawn sums.

37 The sums in dispute in the present appeals are as follows:

Appellant	Commissions and profit-sharing payments (S\$)	Referral fees (S\$)	Total (S\$)
CA 25 Appellants			
Mr Lau	17,345,020.46	-	17,345,020.46
Mr Teo	9,932,631.25	-	9,932,631.25
Mr Koh	4,913,441.95	49,582.70	4,963,024.65
CA 39 Appellant			
Ms Shen	6,120,892.95	-	6,120,892.95

These figures do not take into account the deductions for excess income tax payments allowed by the Judge.

The CA 25 Appellants’ case

38 First, regarding the Challenged Payments clawed back under s 73B of the CLPA, the CA 25 Appellants rely on the defence provided for under s 73B(3). The CA 25 Appellants submit that the Judge erred in finding that they had not provided valuable consideration for the Challenged Payments. The CA 25 Appellants argue that the term “profits” in their contracts referred to declared

profits and therefore they were contractually entitled to the sums, and alternatively, that a value comparison is required in every situation and also that the Challenged Payments may be characterised as payments that discharged the Envy Companies' liabilities in respect of claims that the CA 25 Appellants may bring against them. Additionally, Mr Koh maintains that the payment of \$49,582.70 in Pre-April 2020 Referral Fees (which forms part of the Challenged Payments) was predicated on the introduction and receipt of the investments and *not* profits from the Purported Nickel Trading, and therefore should not be clawed back. As Mr Koh did not receive any Post-April 2020 Referral Fees, no issue arises as to the characterisation of those referral fees.

39 Second, regarding the Challenged Payments clawed back under ss 224 and 438 of the IRDA, the CA 25 Appellants argue that the claw back under ss 224(3)(a) and 438(2)(a) of the IRDA was not made out because there was no intention to gift. The Challenged Payments also cannot be clawed back under ss 224(3)(b) or 438(2)(c) of the IRDA as the Respondents failed to demonstrate that the transactions were entered into for a consideration the value of which was significantly less than the consideration provided by the Envy Companies.

40 Third, even if the Challenged Payments may be clawed back, the Judge should have exercised the discretion to decline to order a claw back. The CA 25 Appellants argue that the Judge erred in construing the scope of the discretion too narrowly. In any event, exceptional circumstances exist warranting the exercise of discretion in their favour, *viz*, that the CA 25 Appellants would suffer detriment if required to return the Challenged Payments; they would be made bankrupt; it was unlikely any recovery would be meaningful in light of the substantial debt owed by the Envy Companies to its creditors; and any recovery from the CA 25 Appellants would not be anywhere close to what had been

ordered to be clawed back, given their assets and cash and their inability to satisfy the sum ordered to be paid.

The CA 39 Appellant's case

41 First, the CA 39 Appellant argues that the defence under s 73B(3) of the CLPA is established. She had provided valuable consideration as the Challenged Payments were predicated on declared profit. The court should also not order a claw back in relation to the sum of \$909,473.16 which was never received by her as she reinvested it with the Envy Companies in the Purported Nickel Trading (“Reinvested Sum”).

42 Second, the CA 39 Appellant argues that the Judge erred in clawing back the Challenged Payments under ss 224 and 438 of the IRDA. The Challenged Payments were not gifts under s 224(3)(a) of the IRDA. The CA 39 Appellant had provided clear value for the Challenged Payments by the solicitation of investors for the Envy Companies. Section 438 of the IRDA does not apply for the same reasons.

43 Third, the CA 39 Appellant argues that the court should exercise the discretion to decline to order a claw back of the Challenged Payments. It would be just and equitable to do so as she did not have knowledge of the Ponzi scheme, the Challenged Payments represented a fair amount for the work she carried out, and a claw back would have a disproportionate impact on her. In the alternative, the CA 39 Appellant argues that the court should exercise the discretion not to order a claw back of the sum of \$2,045,288.56 which she had under-withdrawn from the Envy Companies, or the Reinvested Sum of \$909,473.16.

44 Finally, the CA 39 Appellant argues that the under-withdrawn sum of \$2,045,288.56 from the Envy Companies should be subject to an insolvency set-off under s 219 of the IRDA. The Judge erred in finding that there was no mutuality of parties and of debts in this regard.

The Respondents’ case

45 First, the Respondents maintain that the Appellants did not provide consideration of adequate value for the Challenged Payments, for the purpose of s 73B(3) of the CLPA.

46 Second, in respect of the Challenged Payments clawed back under ss 224 and 438 of the IRDA, the Respondents submit that the Judge correctly held that these were undervalued transactions. The Envy Companies were never obliged to make the Challenged Payments. They should be classified as “gratuitous payments to employees”, which would make them gifts.

47 Third, the Respondents submit that the Judge’s exercise of discretion should not be reversed. The threshold for appellate intervention with respect to an exercise of discretion is high, and none of the grounds are met. The Judge applied the correct principles, and his exercise of discretion was justified on the evidence and cannot be said to be plainly wrong. The change of position defence is inapplicable. Even if it does apply, the Appellants have not adduced sufficient evidence to demonstrate financial hardship. The Judge considered the factors relied on by the Appellants and did not find any exceptional circumstances to justify declining to order a claw back.

48 Lastly, the Respondents submit that an insolvency set-off is inapplicable as the statutory causes of action that the Respondents are relying upon are not the Envy Companies’ choses in action. There is thus no mutuality. The absence

of mutuality is further underscored by when the relevant causes of action arose. Mutuality is determined at the commencement of winding up, and the claims by the Respondents arose upon the appointment of the liquidators.

Issues to be determined

49 The following issues arise for consideration in these appeals:

(a) First, *prima facie*, should the Challenged Payments (consisting of commissions, profit-sharing payments and referral fees) be clawed back under s 73B of the CLPA or s 438 of the IRDA as the case may be?

The following sub-issues arise:

(i) whether the Appellants had provided adequate consideration for the commissions and profit-sharing payments which would entitle them to rely on the defence under s 73B(3) of the CLPA or would take the relevant transactions outside of the scope of s 438(2) of the IRDA, as the case may be;

(ii) whether a claw back should be ordered in relation to the Reinvested Sum of \$909,473.16;

(iii) whether Mr Koh had provided consideration of adequate value for the Pre-April 2020 Referral Fees.

(b) Second, should the Judge have exercised the court's discretion not to order a claw back or exercised it by ordering a claw back of a lower amount (meaning lower than that which resulted from the deduction for the excess income tax paid by the Appellants)?

(c) Third, whether the CA 39 Appellant's under-withdrawn sums should be subject to an insolvency set-off.

Issue 1: *Prima facie*, the commissions and profit-sharing payments should be clawed back

The applicable provisions

50 We begin by reiterating the statutory bases on which the Judge had ordered the claw back of the various Challenged Payments (see Judgment at [15]).

(a) The Judge relied on s 73B of the CLPA to order a claw back of the Challenged Payments which *pre-dated* 30 July 2020 as conveyances undertaken with the intent to defraud creditors. Section 73B of the CLPA was repealed with effect from 30 July 2020 and replaced by s 438 of the IRDA, which came into force on the same date. That said, s 73B of the CLPA applies to any conveyance of property made before 30 July 2020 (see *Envy Asset Management Pte Ltd v CH Biovest Pte Ltd* [2024] SGHC 46 (“*Biovest (HC)*”) at [87], citing reg 15 of the Insolvency, Restructuring and Dissolution (Saving and Transitional Provisions) Regulations 2020).

(b) The Judge relied on s 438 of the IRDA, to order a claw back of the Challenged Payments made *on or after* 30 July 2020 as transactions defrauding creditors.

(c) The Judge was satisfied that the claim under s 224 of the IRDA was made out. A s 224 claim allows for the claw back of payments made at the relevant time, *ie*, within a period of three years before the commencement of judicial management or winding up (in this case, before 2 July 2021) as transactions at an undervalue. We observe that this claim would only concern the Challenged Payments that were made on or after the date of commencement of s 224, *ie*, 30 July 2020 (see

Affert Resources Pte Ltd v Industries Chimiques du Senegal [2025] 1 SLR 649 (“*Affert*”) at [40]).

51 Accordingly, for commissions and profit-sharing payments made before 30 July 2020, the applicable provision is s 73B of the CLPA. The Reinvested Sum would also fall into this category as explained below at [94]. For such payments made on or after 30 July 2020, the applicable provisions are s 438 of the IRDA and s 224 of the IRDA. The only category of referral fees relevant in these appeals is the Pre-April 2020 Referral Fees. As those fees were paid to Mr Koh before 30 July 2020, the applicable provision is s 73B of the CLPA. We point out that it was ultimately not necessary to consider specifically s 224 as, for the pre-30 July 2020 Challenged Payments, s 73B of the CLPA broadly covers those payments, and as regards the Challenged Payments made on or after 30 July 2020, s 224 is encapsulated within s 438 of the IRDA.

The nature of consideration under s 73B of the CLPA and s 438 of the IRDA

52 We begin by examining the approach to the analysis of consideration under s 73B of the CLPA and s 438 of the IRDA. The CA 25 Appellants contend that not all extra-contractual payments are unsupported by consideration and subject to claw back. This argument was advanced to meet the Judge’s conclusion that the relevant Payments were gifts as no contractual obligation to pay existed. Conversely, the Respondents contend that the consideration must be referable to the contractual bargain pursuant to which the conveyance was made. The parties refer to this court’s recent decision in *Biovest (CA)* to support their respective positions.

53 It is important to properly situate the analysis in *Biovest (CA)* in the context of the facts and the issues that were considered by this court. *Biovest*

(CA) concerned an investor in the same Ponzi scheme as the present case. There, the relevant investor had entered into LOAs with EAM under which the investor would provide a stipulated Investment Amount which EAM would use for the Purported Nickel Trading, with the profits made as a result to be the basis of the return to be made to the investor. The investment principal was \$5,480,246 and the investor received \$7,799,730, thus achieving a profit, at least on the face of it, of \$2,319,484. It was this sum that was sought to be clawed back and the issue in *Biovest (CA)* was whether the investor had provided adequate consideration to support the payment. Notably, the liquidators did not seek to claw back the amount of the investment principal that had been returned, and the issue of the ability to do so was left open for consideration in an appropriate case.

54 The court in *Biovest (CA)* held that as there were no actual investments in nickel trading, there were no profits made. Therefore, EAM was not contractually obliged to pay the purported profits to the investor (*Biovest (CA)* at [62]). Therefore, the investor did not provide any value for the payment and was not entitled to rely on the defence in s 73B(3) of the CLPA (*Biovest (CA)* at [82]).

55 It is important to be clear about the issue that was before this court in *Biovest (CA)*. The analysis of consideration was contractual because the issue before this court was whether there was consideration under the LOAs to support the payment of the purported profits, which turned on whether there was an entitlement to payment in the first place. It was the investor's primary contention there that EAM had been under a contractual obligation to pay profits to the investor and that the payment went towards the discharge of EAM's contractual liabilities (at [23]–[24]). The focal point of the analysis on whether consideration had been provided for the payments that were made by EAM was

therefore the LOAs between EAM and the investor. It was in that context that this court held that because EAM's payment of the profits bore no connection to EAM's contractual obligations under the LOAs, the payments were essentially non-contractual and it could not be said that the investor had provided any value for them, let alone valuable or good consideration (*Biovest (CA)* at [82]). No argument was advanced in *Biovest (CA)* that the payments could be justified by some form of extra-contractual consideration.

56 Accordingly, *Biovest (CA)* does not stand for the proposition that in every case, extra-contractual payments or conveyances are unsupported by consideration and therefore gifts, or that consideration must always be contractual. However, the analysis of consideration for the purpose of s 73B of the CLPA and s 438(2) of the IRDA is not undertaken in abstract. It is always contextual, and the cornerstone of that is the transaction (or conveyance, as the case may be) that is sought to be impugned. It follows that, in determining whether consideration was given and if so to what extent, the analysis must be within the parameters of the transaction or conveyance. In *Biovest (CA)*, the transaction or conveyance sought to be impugned was the payments that were made by EAM purportedly pursuant to the LOAs. However, as these payments had no connection to the LOAs, the LOAs could not form the basis of the payments and it could not be said that the LOAs were part of or referable to the transaction sought to be impugned. Thus, *Biovest (CA)* is consistent with the proposition that the relevant context for the assessment of consideration is the transaction pursuant to which the payment sought to be impugned was purported to be made.

57 It follows from the fact that the relevant context is the transaction, that the consideration that was given and received must have been within the contemplation of the parties at the time of the transaction as being part of it.

This is clear in our view from the definition of “transaction” in s 2 of the IRDA which states “transaction” includes “any gift, agreement or arrangement”, all of which presuppose an arrangement between the parties. Further, the language of ss 438(1) and (2) of the IRDA makes it evident that it is the transaction that is the touchpoint for the analysis of consideration. This transaction-based approach is also apparent in this court’s explanation in *Affert*, that a transaction should be contextualised in light of all the relevant circumstances in order to understand its true nature, to ensure all elements that make up the transaction are fully understood and to accurately assess the consideration given and received by the company (*Affert* at [47]). Similarly, under s 73B(1) of the CLPA, the question is whether the conveyance of property was undertaken with the intention of defrauding creditors. Section 2 of the CLPA defines “conveyance” broadly and non-exhaustively to include “assignment, appointment, lease, settlement and other assurance made by deed on a sale, mortgage, demise or settlement of any property, and on any other dealing with or for any property”. Again, the assumption is that there is an arrangement between the parties. The assessment of whether the defence of valuable or good consideration and good faith under s 73B(3) of the CLPA is made out must therefore be done with reference to the terms of the conveyance.

58 Thus, unbargained-for benefits subsequently conferred by the counterparty are not relevant in assessing consideration as they do not form part of the transaction (*Claridge v Claridge* [2011] EWHC 2047 at [33] (“*Claridge*”); see also *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten gen ed) (Sweet & Maxwell, 5th Ed, 2018) at para 13–23, fn 96). In *Claridge*, the English High Court noted that under s 339 of the Insolvency Act 1986 (c 45) (“English Insolvency Act”) which relates to transactions at an undervalue, “consideration for a benefit conferred by a transaction *has to be given at the time of the transaction*” [emphasis added] so

as to constitute consideration in relation to it (at [33]). This buttresses the proposition that some, if not a significant degree of, contemporaneity is required in the assessment of consideration.

59 Ultimately, it is important to remember that both s 73B of the CLPA and s 438 of the IRDA have as a common denominator the transaction that is sought to be impugned. It is the consideration that is exchanged in that transaction that is relevant in assessing whether the transaction is upheld or is avoided. To allow a party to ground consideration on factors that were not within their contemplation under the transaction would not be consistent with these provisions.

60 For completeness, we leave open the issue, as this court did in *Biovest (CA)*, of whether an investor may possibly be entitled to keep payments up to their investment principal on the basis that it is supported by consideration. This issue did not arise then and likewise does not arise in these appeals. The issue was considered in the New Zealand Supreme Court’s decision of *McIntosh v Fisk* [2017] 1 NZLR 863 (“*McIntosh*”), a case which also involved a Ponzi scheme. In *McIntosh*, the issue was whether the investor, who had invested \$500,000 and in return was paid \$954,047, was entitled to keep the latter sum. The court came to the unanimous view that the investor could not retain the excess component of the payments amounting to \$454,047, representing the difference between the sum of \$500,000 that was invested and the sum of \$954,047 that was paid out. *Per* Arnold, O’Regan and France JJ at [128], this was because, even though the investor could plausibly have a claim against the asset manager for equitable damages for breach of trust, the \$454,047 component could not have discharged the investor’s *unquantified* and *unknown* claim for equitable damages (see also Young J at [223]–[224] and Glazebrook J at [245]). However, in relation to the payments amounting to \$500,000 which

represented a return of the principal sum invested, the court was split. Arnold, O'Regan and France JJ were of the view that payment of the sum of \$500,000 could be construed as a discharge of an antecedent debt to the investor in terms of a claim for repayment of \$500,000 which was misappropriated and thus had been given for valuable consideration (*McIntosh* at [98]–[100], [128]), and this view was echoed by Young J (*McIntosh* at [222]). Glazebrook J, however, took a different view, finding that the investor was only ever entitled to the returns actually made on his investment and that there was no contractual or other right to any of the profits (*McIntosh* at [245]), although Glazebrook J did not find it necessary to address the investor's argument that it was not necessary for him to know of the claims to be given a discharge (at fn 193).

61 We note that the majority in *McIntosh* allowed the retention of the investment returns up to the principal on the basis that the misappropriation gave rise to an *immediate antecedent debt* which was quantified and could be subject to a discharge. We observe that this analysis runs into the difficulty that the discharge of the antecedent debt was not within the contemplation of the parties when the payment was made. As explained earlier, the consideration must be in the contemplation of the parties at the time of the transaction. *Per* the terms of the agreement, the contemplation of the parties in *McIntosh* was, as Glazebrook J noted in her dissent, that the investor was receiving the promised return on investment. The investor had no entitlement to receive repayment of the investment principal (*McIntosh* at [245]). We say no more. With this we turn to consider the issues.

The commissions and profit-sharing payments transferred before 30 July 2020 may be clawed back as conveyances defrauding creditors under s 73B of the CLPA

The applicable law under s 73B of the CLPA

62 Section 73B of the CLPA, which relates to a conveyance made with intent to defraud creditors, provides:

Voluntary conveyances to defraud creditors voidable

73B.—(1) Except as provided in this section, every conveyance of property, made whether before or after 12th November 1993, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.

...

(3) This section does not extend to any estate or interest in property disposed of for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the disposition, notice of the intent to defraud creditors.

63 To establish a claim under s 73B(1), a claimant must show (a) a conveyance of property; (b) the conveyance of property was made with the intent of defrauding creditors; and (c) the claimant is a person who was prejudiced by the foregoing conveyance of the property (*Biovest (CA)* at [65]).

64 Section 73B(3) of the CLPA provides a *defence* to the defendant, who would generally be the recipient of the property conveyed. To rely on this defence, the defendant must show that: (a) the property was disposed of to him “for valuable consideration and in good faith or upon good consideration and in good faith”; and (b) he did not have notice of the debtor’s intent to defraud his creditors (*Biovest (CA)* at [65]).

65 In *Biovest (CA)*, this court further clarified that while a plain reading of s 73B(3) suggests that there may be two disjunctive limbs by which the

requirement could be satisfied, *ie*, “valuable consideration and in good faith” or “good consideration and in good faith”, the words should be regarded as stipulating a *singular* defence, requiring a defendant to act in good faith and provide consideration of adequate value for the property received (at [75]–[80]). We reaffirm that position.

The commissions and profit-sharing payments were not paid pursuant to a contractual obligation

66 The Appellants do not dispute the Judge’s finding that the commissions and profit-sharing payments fall within s 73B(1) of the CLPA. Further, it is the parties’ common position that the Appellants had acted in good faith. That leaves the remaining question of whether the Appellants had provided consideration of adequate value for the commissions and profit-sharing payments thereby establishing the defence under s 73B(3) of the CLPA. The Appellants contend that they have.

67 The Appellants’ first argument is that the commissions and profit-sharing payments were paid pursuant to a contractual obligation of the Envy Companies under the relevant employment contract, and therefore the Appellants had provided value for them in the form of services rendered pursuant thereto. This argument was the centrepiece of the CA 39 Appellant’s written submissions but it did not feature in the CA 25 Appellants’ written submissions. Counsel for the CA 25 Appellants, Ms Koh Swee Yen SC (“Ms Koh”), clarified at the hearing of these appeals, however, that the CA 25 Appellants also make that argument on appeal. The pith of the argument is that the Judge erred in rejecting the Appellants’ argument below that “profit” in the contractual bargain should be read as *declared profit* as opposed to *actual profit*, such that the Appellants were contractually entitled to receive the commissions and profit-sharing payments based on declared profits, notwithstanding that no

profits were in fact made from the Purported Nickel Trading (see Judgment at [58]–[62]).

68 We do not accept the Appellants’ argument. In our view, the Judge correctly concluded that “profit” meant actual profits and there was therefore no contractual basis to pay the commissions and profit-sharing payments.

69 As a starting point, “profit” must mean the actual profit that was made. Indeed, we struggle to see how “declared” profit could mean anything other than “actual” profit. It is difficult to perceive a situation where the profits that are declared by a company do not reflect the profits that were actually made by the company. If it was otherwise, the financial statements would be misstated and therefore inaccurate. When counsel for the Appellants were invited to identify a situation where “declared” profit should *not* be read as “actual” profit, they struggled to offer a plausible one (see below at [72]–[74] where we deal with the CA 39 Appellant’s submission on this point made at the hearing of these appeals). The CA 39 Appellant also contends that while the Judge found no evidence supporting the view that “profit” referred to “declared profit”, there is equally no evidence that the term referred to “actual profit”, and that the text is silent as to the interpretation of the term itself. We make two points.

(a) It is the Appellants who seek to read “declared” into “profits”. They therefore carry the burden of showing that this was what the parties intended or contemplated at the time of contracting, which burden they have failed to discharge.

(b) While it is true that the text is silent, that is only because there is in fact no necessity to clarify. As a matter of contractual interpretation, it is inconceivable for the parties to have agreed that payment would be made to the Appellants by EAM and EMH from anything other than the

profits that were actually made. By specifically providing for “profits” in the employment contracts as the basis for the obligation to pay, the contemplation was clearly that there must be profits that were actually made to justify and enable payment to be made.

70 Secondly, we are not persuaded that the context of the employment contracts militates in favour of an interpretation of “declared profits”. The starting point in the construction of contracts is the text that parties have used (*CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon* [2018] 1 SLR 170 (“*CIFG*”) at [19(a)]). It is permissible to have regard to the relevant context so long as the relevant contextual points are clear, obvious and known to both parties (*CIFG* at [19(b)]), citing *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129]).

71 Against this, it is clear that the various points that the Appellants are relying on, *eg*, that (a) there is no evidence that the Envy Companies had calculated these sums on the basis of actual profits; (b) the Appellants could only rely on the declaration as to earnings; (c) there was a variance between actual and declared profit; and (d) the Purported Nickel Trading was a Ponzi scheme, are not germane to the relevant context for the purpose of interpreting “profit”. This is because the Appellants were unaware of the fraud and therefore unaware that there would be any difference between actual and declared profits. Their expectation and understanding must therefore have been that the Challenged Payments came out of actual profits. Any reliance by the Appellants on the Envy Companies’ declaration of profits would not advance their case, since their understanding must have been that the Envy Companies’ declared profits also reflected the Envy Companies’ actual profits.

72 Lastly, at the hearing of these appeals, counsel for the CA 39 Appellant Mr Danny Ong SC (“Mr Ong”) submitted that because the company was running a Ponzi scheme, all incoming “investments” would be booked as revenue, and set-off against expenses incurred. From an accounting perspective, that would constitute net profits in the profit and loss statement. On the other hand, the liabilities to the investors would be reflected in the balance sheet. In our view, this argument does not get off the ground for two reasons.

(a) It is fundamentally incorrect to approach the question of what constitutes “profits” by differentiating between a company undertaking a legitimate business and one that is running a Ponzi scheme. As a matter of contractual interpretation, the meaning to be attributed ought to be the same, absent specific language in the contract which sheds a different light. Indeed, we observe that Mr Ong’s proposed accounting treatment is unsupported by the text of the contract or any evidence, expert or otherwise.

(b) The profits or earnings in question in the employment contracts generally refer to the profits made by the Envy Companies *through managing the investments/investors brought in*, as opposed to generic profits booked on the company’s profit and loss statement (see Judgment at [51]–[56]). The fact that no investments were made means that there were no profits *generated from these investments* (see *Biovest (CA)* at [56]). While the employment contract for Mr Lau only stated that profit-sharing payments were to be calculated on the basis of “20% of [EAM’s] monthly net profit”, these payments remain inextricably linked to the investments that the investors had made. This is because Mr Lau had averred in his affidavit of evidence-in-chief (“AEIC”) that the profit-sharing payments were calculated “by reference to the earnings *made by*

EAM on investments/investors brought in ... regardless of portfolio”
[emphasis added].

73 More broadly, we do not accept Mr Ong’s submission because it would essentially permit the Envy Companies to certify profits by simply booking the “investments” as revenue on their profit and loss statement and therein render valid what was otherwise a fiction. In *Biovest (CA)*, this court was of the view that in light of the context of an investment scheme, it would be absurd to hold that EAM was contractually obliged to pay returns generated not by the execution of the promised investment strategy but by fraudulent activity, and in the same vein, it would be equally absurd to regard a contractual certification clause as enabling the payor to fraudulently certify payments as the legitimate fruits of an investment strategy that was never in fact carried out (*Biovest (CA)* at [49]). Likewise, in the context of commissions and profit-sharing payments to be based on *actual* profit, it would be untenable to contend that the Envy Companies had a contractual obligation to pay simply because the Envy Companies could have booked the “investments” as revenue, notwithstanding that the promised investment strategy was never carried out.

74 We are thus not satisfied that a contractual basis existed for the commissions and profit-sharing payments to be made, such that these payments could be seen as paid in exchange for services rendered under the relevant employment contracts. This is in line with our decision in *Biovest (CA)* as discussed at [53] above. As profits and earnings refer to *actual* profits and earnings, the fact that trading in nickel did not take place meant that no profits were generated from the execution of the promised investment strategy. Consequently, the Envy Companies had no contractual obligation to pay commissions and profit-sharing payments.

The commissions and profit-sharing payments were not paid in exchange for extra-contractual consideration

75 We consider the CA 25 Appellants’ alternative argument next. The argument is that even if no contractual basis existed for the commissions and profit-sharing payments, an extra-contractual basis nonetheless existed, and the payments should not be clawed back. The CA 25 Appellants submit that the payments can be seen as (a) contemporaneous settlement payments to discharge putative claims they have against the Envy Companies, or (b) more broadly, as payments in exchange for services provided by the CA 25 Appellants in bringing in investments and investors.

76 We note that the Judge did not appear to deal with this issue in the Judgment, even though the CA 25 Appellants had sought to advance an extra-contractual basis to these payments below. As discussed above (at [56]), *Biovest (CA)* should not be read to stand for the proposition that all extra-contractual payments are necessarily unsupported by consideration and liable to be clawed back. The argument that there was extra-contractual consideration to support the payments would only arise if the point had been pleaded and the facts supported it. In our view, the CA 25 Appellants fail on both counts.

- (1) The commissions and profit-sharing payments cannot be justified as contemporaneous settlement payments

77 We first address the CA 25 Appellants’ contention that the payments can be seen as contemporaneous settlement payments in discharge of putative claims that the CA 25 Appellants had and might bring against the Envy Companies. The CA 25 Appellants identify the following claims which would exist but for these payments: (a) claims for breach of an implied term not to misappropriate the investments raised by the CA 25 Appellants; (b) claims for

fraudulent misrepresentation; and/or (c) claims on a restitutionary/*quantum meruit* basis.

78 In our view, this argument fails *in limine* because it was not pleaded. In response to the Respondents’ contention that the commissions and profit-sharing payments were paid without any proper or legitimate basis, the CA 25 Appellants pleaded in their Defence and Counterclaim (Amendment No 1) dated 9 May 2023 (“Defence”) that they had given value by performing services in their various employment capacities, entitling them to commissions and profit-sharing payments. These payments were paid in the normal and ordinary course of business in return for the CA 25 Appellants discharging their duties as employees. It is therefore clear that the CA 25 Appellants’ pleaded case had been solely premised on contractual consideration, as opposed to any settlement of putative claims they might have.

79 Ms Koh accepted that this argument was not pleaded. However, Ms Koh emphasised that this argument was advanced below and suggested that the Respondents had a full opportunity to deal with the case as argued. We accept that this argument of a discharge of claims was indeed argued in the alternative to contractual consideration before the Judge, even though as alluded to above at [31], the Judge did not expressly deal with this argument as he had apparently construed this submission to be independent counterclaims brought by the CA 25 Appellants (see Judgment at [92]–[95]). The Respondents’ response, in short, was that the Respondents would be prejudiced by the reliance on such claims and that, in any case, there was no evidence led by the CA 25 Appellants as to what the value of the claims would be.

80 We are satisfied that the general rule, that parties are bound by their pleadings, should not be departed from in the circumstances (see *V Nithia v*

Buthmanaban s/o Vaithilingam [2015] 5 SLR 1422 (“*V Nithia*”) at [38]). Had this distinct basis for the commissions and profit-sharing payments been pleaded, the Respondents could have considered adducing evidence to meet this argument head-on, for instance, by quantifying these putative claims for the purpose of showing that the consideration, if it existed at all, was inadequate. Expert evidence could perhaps have been adduced to show that the basic salary payments and discretionary bonuses paid to the CA 25 Appellants were appropriate and reasonable, and if not, what the reasonable remuneration would have been, so as to establish the appropriate level of *quantum meruit* payments. A departure from the general rule is therefore not justified here as this is not a situation where no prejudice is caused to the Respondents or where it would be clearly unjust for the court not to permit so (*V Nithia* at [40]).

81 Quite apart from the deficiency in the pleadings, we are satisfied that the discharge of the putative claims cannot constitute consideration for the commissions and profit-sharing payments. We note that the compromise or release of, or forbearance to press a valid claim or even a doubtful or invalid claim advanced in good faith can provide good consideration (*Hill v Haines* [2008] 2 All ER 901 at [79], see also *Abdul Jalil bin Ahmad bin Talib v A Formation Construction Pte Ltd* [2006] 4 SLR(R) 778 at [42]). However, as discussed above at [56], our view is that the analysis of consideration must be contextual and particular to the conveyance that is sought to be impugned. It is to this end that the analysis must be undertaken in relation to what the parties’ contemplation was at the material time as regards the conveyance.

82 Here, payments – the impugned conveyances – were made purportedly on the basis of obligations under the relevant employment contracts. The parties’ contemplation at the time of the conveyances (for the purpose of assessing consideration) was that the payments were made pursuant to the

employment contracts and nothing else, and that was therefore the context for analysis of consideration. Given that the CA 25 Appellants were not aware of the Ponzi scheme, these putative claims were never in the contemplation of the CA 25 Appellants when payment of the commissions and profit-sharing payments were made. The settlement of the putative claims could not possibly be part of the consideration provided by the CA 25 Appellants in return for the payments they received under their respective employment contracts. Any settlement of these putative claims was never on the negotiating table and cannot therefore be part of the bargain. This, in our view, is fatal to the CA 25 Appellants' argument as they could neither have compromised the putative claims nor could the claims, unliquidated as they were, plausibly have been discharged by the payments. This perhaps explains why the CA 25 Appellants' cases as pleaded in their respective Defences did not identify the settlement of the putative claims as constituting the consideration.

- (2) The introduction of investors and investments could not constitute consideration for the payment of the commissions and profit-sharing payments

83 We turn to the CA 25 Appellants' second point, that the payments were made in exchange for services provided by the CA 25 Appellants in bringing in investments and investors. At the hearing of these appeals, Ms Koh submitted that the commissions and profit-sharing payments may be tied to the investments and investors because without investments and investors, there would be no payments to speak of. Ms Koh emphasised that there was still value in the introduction of investors and investments which could constitute consideration.

84 We do not accept this argument as it constitutes an impermissible attempt to rewrite the contractual bargain. It is evident from the terms of the

relevant employment contracts between the CA 25 Appellants and EAM and EMH, that the payment of commissions and profit-sharing payments was predicated on the existence of actual profits, and not simply investments made by investors who were introduced. The CA 25 Appellants' evidence in their AEICs was that the commissions and profit-sharing payments were paid to the CA 25 Appellants on the basis of the profits purportedly derived from the investments made by investors who they introduced and such introduction was one of the services they were obliged to provide under their employment contracts. It is therefore not open for the CA 25 Appellants to argue that under the employment contract the payments in question were for introducing investors and not based on profits earned from the investments made by the investors.

85 In this connection, the CA 25 Appellants rely on a series of US cases for the proposition that a value comparison exercise is to be taken in *every case*, and in so doing, the court is to ascertain the value of attracting and bringing in investments. Ms Koh placed weight on the decision of the US Bankruptcy Court for the Northern District of Illinois in *First Commer Mgmt Group v Reinhardt (in Re Firs Commer. Mgmt Group)* 279 BR 230 (Bankr. N.D. Ill., 2002) ("*First Commercial Management*"). There the court held that the "critical issue is whether reasonably equivalent value was given and received when the defendant [*ie*, the broker] performed services for the debtor [*ie*, the company operating the Ponzi scheme] and the debtor paid commissions to the defendant in return" (at 235). *First Commercial Management* cited with approval *In re Churchill Mortgage Inv. Corp.* 256 BR 664 (Bankr. S.D.N.Y. 2000) ("*In re Churchill*"), holding that "it would be a legal fiction to say that brokers who produce investors to provide money for a Ponzi scheme are providing nothing of value" (*First Commercial Management* at 237).

86 In our view, these cases do not assist. The US cases which the CA 25 Appellants rely on generally concerned brokers who were remunerated by commissions linked to the face value of the funds brought in or contracts sold or brokered, *ie*, the payments were predicated on the provision of the service itself and *not* linked to the profits made from the investments of the funds procured. The contractual matrix was entirely different. Ms Koh accepted this in the course of her oral submissions.

87 Specifically, *First Commercial Management* concerned a situation where commissions were given to the defendant for *finding investors* and the payment of commissions *was not predicated on profits*. The contractual entitlement to the unpaid commissions was key in that case, as the court was satisfied that in performing services for the debtor by recruiting investors and performing follow up services, the defendant had a claim against the debtor equal to the value of the services performed. There was no depletion of the bankruptcy estate by the payment of the commissions because the debtor received adequate consideration or reasonably equivalent value in the form of a release of any claims the defendant could have asserted for the unpaid commissions (*First Commercial Management* at 239).

88 In the present case, it cannot be said that the CA 25 Appellants had a claim for any commissions because there was no profit arising from investments. Therefore, *First Commercial Management* does not assist the CA 25 Appellants.

89 For completeness, we note that the CA 25 Appellants have also referred to the decision of the US District Court for the Eastern District of Pennsylvania in *Carroll v Stettler* 941 F Supp 2d 572 (US Dist, 2013) (“*Carroll*”), in which the commissions that were paid could be said to be extra-contractual. This is

acknowledged by the Respondents. In *Carroll*, the Ponzi scheme involved the purported purchase and resale of properties at a profit. The defendant employees received commissions computed based on “one-and-a-half percent for each property closing”, but since no property transactions were actually carried out, the payment of the commissions could be said to be extra-contractual. Since the case pertained to a summary judgment application, as the Respondents correctly pointed out, the court held that reasonable minds could disagree about whether the defendants had provided services reasonably equivalent to the value of the moneys paid out to them, noting that there is no evidence that the defendants failed in the scope of their employment (at 581–582). We agree with the Respondents that the utility of this case is limited. The court denied the summary judgment application and did not make a positive finding that the payment of such commissions did amount to an exchange for a reasonably equivalent value. Seen as a whole, this is a single US District Court decision which does not reach a settled view on the merits. It therefore does not assist.

90 We therefore find that the commissions and profit-sharing payments made before 30 July 2020 are *prima facie* voidable under s 73B of the CLPA.

The \$909,473.16 in commissions and profit-sharing payments which the CA 39 Appellant reinvested in the Envy Companies should be clawed back under s 73B of the CLPA

91 We next consider the CA 39 Appellant’s argument that the Reinvested Sum amounting to some \$909,473.16 in commissions and profit-sharing payments was internally reallocated as an investment in the Purported Nickel Trading (defined as the “Reinvested Sum” at [41] above) and was thus not in fact paid out to her. Therefore, as a matter of principle, it should not be clawed back. We note that while this argument was advanced below and rejected, it is not clear from the Judgment what the Judge’s reasons were for doing so.

92 There are three parts to the argument: (a) there was fundamentally no conveyance of property to be set aside; (b) there was no diminution in the value of the estate and accordingly, from the perspective of policy, there was nothing to be clawed back; and (c) the court should exercise its discretion not to claw back this sum. We deal with the first two parts in this section, leaving the last to be dealt with in the next section pertaining to the Judge’s exercise of discretion.

93 Having considered the parties’ submissions, we are of the view that notwithstanding the intuitive attraction of the argument, *prima facie* the Reinvested Sum should nonetheless be clawed back. We are satisfied that there was a conveyance of property for the purpose of s 73B(1) of the CLPA and it ought to be set aside. We explain.

94 As a starting point, the relevant payments that make up the Reinvested Sum span the period from 22 May 2017 to 15 January 2019. Therefore, the relevant provision for the purposes of the analysis is s 73B of the CLPA. This raises the question of whether there was a “conveyance of property” within the meaning of the section. As noted earlier, s 2 of the CLPA defines “conveyance” broadly and non-exhaustively to include “assignment, appointment, lease, settlement and other assurance made by deed on a sale, mortgage, demise or settlement of any property, and on any other dealing with or for any property”. A payment of moneys is clearly a conveyance of property within s 73B(1). The question is therefore whether the relevant Envy Company (in this case, EAM) had purported to discharge its obligations under the employment contract with the CA 39 Appellant to make payment of the sum of \$909,473.16 for commissions and profit-sharing. If it did, there would be payment to the CA 39 Appellant as the obligation that was discharged was the obligation to make payment of commissions and profit-sharing payment. The mode by which

payment was made – whether it be payment to hand or some other mode – is not relevant provided that mode was the CA 39 Appellant’s choice. On the facts, it is indisputable that EAM had purported (because there was no entitlement to receive payment in the first place since no actual profits were made) to discharge the contractual obligation owed to the CA 39 Appellant by channelling the payment *on her instructions* into an investment in the Purported Nickel Trading that she wished to make. The result was that the CA 39 Appellant’s chose in action to receive payment had been discharged.

95 In our view, the conveyance of property here is EAM’s purported discharge of a chose in action belonging to the CA 39 Appellant by channelling, at the CA 39 Appellant’s request, the payment, which might otherwise have been made to hand, into an investment in the Purported Nickel Trading. Although there was no transfer of moneys to the CA 39 Appellant so to speak, that was only because she had chosen not to receive the moneys to hand, instead directing the payment to be invested with EAM. That does not change the legal character of the act *vis-à-vis* the CA 39 Appellant as an act of payment.

96 This situation is no different from the CA 39 Appellant receiving cash to hand and thereafter reinvesting the same in the Purported Nickel Trading. In both situations, EAM would purport to discharge its contractual obligation to make payment, albeit by a different mode. Analysed this way, the fact that the CA 39 Appellant invested in the Purported Nickel Trading using the payment that was made to her by EAM is irrelevant to the question of whether it was legitimate for EAM to make that payment in the first place. That is the relevant question for the purpose of a claim under s 73B of the CLPA.

97 This view is buttressed by the available documentary evidence as to how this reinvestment was operationalised. In the relevant LOAs between the CA 39

Appellant and EAM, it was recorded that the obligation was for the CA 39 Appellant to “provide to [EAM] the Investment Amount [representing the entire sum for investment under a particular LOA], payable in immediately available funds”. It was then recorded that the Investment Amount (or some constituent sum) that was to be the subject of reinvestment “is to be paid to [EAM’s] UOB Corporate Account”. It is therefore apparent that the LOA clearly contemplated that the amounts belonging to the CA 39 Appellant were redirected by EAM internally on the CA 39 Appellant’s instructions to the Purported Nickel Trading as an investment.

98 Mr Ong’s submission appears to be that the CA 39 Appellant had converted the right to receive the Reinvested Sum into the right to receive the profits from the investment stemming from the Reinvested Sum. In other words, that this was a conversion of a declared chose in action from one form to another. Such a transaction would not constitute a “conveyance” that could be set aside. With respect, this mischaracterises the transaction. More fundamentally, it conflates the purported discharge of the contractual obligation to make payment of the Reinvested Sum with the mode of discharge of that obligation. Only the former is relevant to whether there was a conveyance of property.

99 Secondly, we think that there was a diminution in the value of the estate as a result of the conveyance. We note that counsel for the Respondents, Mr David Chan (“Mr Chan”) accepted that from a running accounts perspective, there was nothing taken out of the company and no loss occasioned to EAM. However, in our view, that is not strictly accurate. The subsequent payment in of moneys was not a refund of what was wrongfully paid out and ought not to impact the analysis as to whether the conveyance was bad in the first place. Instead, the moneys subsequently paid in represented the CA 39 Appellant’s

moneys which were invested with EAM for a specific purpose, with the result that the status of the CA 39 Appellant was changed to that of an investor with a corresponding claim as a creditor in that capacity in the insolvency of EAM. The analysis on a claw back is focused on *the anterior transaction – the conveyance* – which purportedly (because there was in fact no profits to trigger the obligation to pay) discharged the debt to the CA 39 Appellant *to the diminution of the estate*, and not the subsequent investment in the Purported Nickel Trading run by EAM. The latter does not validate the former. It is the former that denudes the estate. As alluded to above (at [96]), where cash is paid back to hand and then reinvested, the payment of moneys to hand may be rightly subject to a claw back. This situation is no different.

100 For these reasons, it follows that the fact that moneys were not paid out to hand does not detract from the operation of s 73B of the CLPA, which may still operate to void the commissions and profit-sharing payments that were made purportedly in the discharge of contractual obligations owed by the relevant Envy Company to the CA 39 Appellant. As we had canvassed earlier, there was no consideration to support the payment of the commissions and profit-sharing payments. Therefore, the Reinvested Sum of \$909,473.16, representing part of the commissions and profit-sharing payments, is also *prima facie* liable to claw back.

101 For completeness, we note that s 73B provides for the avoidance of a conveyance of property. Unlike s 438 of the IRDA, it does not statutorily provide a remedy (see s 438(3) of the IRDA). However, upon a voidable conveyance being voided, a right to restitution arises under common law (see the Privy Council’s judgment in *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2020] AC 1111 at [65]–[66], discussing s 172 of the Law of Property Act 1925 (c 20) (UK) (“Law of Property Act”), which is *in pari materia* with s

73B of the CLPA). We are satisfied that on the avoidance of the conveyance of the Reinvested Sum, the CA 39 Appellant is liable to repay the same to the Envy Companies.

The Pre-April 2020 Referral Fees should not be clawed back

The Pre-April 2020 Referral Fees have a contractual basis

102 We turn to consider the Pre-April 2020 Referral Fees. As previously noted, only Mr Koh amongst the Appellants was paid the Pre-April 2020 Referral Fees totalling \$49,582.70, and therefore this issue only arises with regard to Mr Koh and not to the other Appellants (see [19] above). To reiterate, the Pre-April 2020 Referral Fees were all paid before 30 July 2020 and therefore the relevant provision is s 73B of the CLPA.

103 The above analysis on the commissions and profit-sharing payments may not apply to this category of the Pre-April 2020 Referral Fees. As noted by the Judge, the Pre-April 2020 Referral Fees differed from the commissions and profit-sharing payments in that the Pre-April 2020 Referral Fees were based on the amount invested by the referred investor (“0.8% to 2.75% of the amount invested under each contract would be paid as referral fees”) (Judgment at [64]). Mr Koh’s evidence was that he had accepted NYZ’s offer of payment of a referral fee for investors that he introduced to invest with EAM. While Mr Koh recalled that NYZ had told him that the referral fee “will be calculated as a percentage of the earnings made by [EAM] through managing the investment [he referred]”, this does not appear to be correct. The liquidators’ calculation of the Pre-April 2020 Referral Fees points to the fees being based on a percentage of the amount invested under each contract. It appears that the Judge had proceeded on this basis, and we are content to do so as well. Therefore, EAM’s

obligation to pay the Pre-April 2020 Referral Fees did not depend on profits actually made from the Purported Nickel Trading (Judgment at [65]).

104 Mr Koh contended below that he should be entitled to retain the Pre-April 2020 Referral Fees which were given “at the outset of any investment, as opposed to being predicated on profits *per se*” (Judgment at [66]). Nonetheless, the Judge found that the Pre-April 2020 Referral Fees amounted to extra-contractual payments unsupported by consideration as “[t]hese referral fees were agreed upon on the pretext that the Purported Nickel Trading was real and genuine and thus must objectively be interpreted as being predicated on a *successful* referral of another investor into the Purported Nickel Trading”. Since the moneys that were given as investments were never put into the Purported Nickel Trading, there were no successful referrals from which the referral fee could be calculated and no obligation on EAM’s part to pay the Pre-April 2020 Referral Fees (Judgment at [67]).

105 We are not persuaded by the Judge’s reasoning. The Judge accepted that the amounts appeared to be paid based on the face value of the investments that were procured. This would bear some similarity to the US cases which the CA 25 Appellants (including Mr Koh) rely on and which the Respondents distinguish, in their written submissions, on the basis that the trustees in those cases “were seeking to recover commissions that were paid out based on the face value of the funds brought in or contracts sold or brokered i.e. the payments were predicated on the mere provision of the service itself” (see [85]–[88] above). The Respondents accepted in their written submissions that the commissions in those cases had been paid pursuant to what the parties had agreed, and the remaining issue was whether the value purportedly provided under the agreement for their respective commission was adequate. At the hearing, Mr Chan acknowledged that the Pre-April 2020 Referral Fees were

linked to procuring an investment and not profits that were made as a result, and that Mr Koh had fulfilled his end of the bargain. Mr Chan also accepted that the referral fees could be analogised to salaries in so far as the employees did perform their work and the moneys were not paid out of fictitious profits but from the operating expenses of the company.

106 In our judgment, the Pre-April 2020 Referral Fees were not predicated on a successful referral of an investor for the Purported Nickel Trading. This is notwithstanding that the assumption, at least on the face of the obligation, was that the Purported Nickel Trading was a legitimate business and the investment procured would be channelled into it. In this regard, we note that Mr Koh had accepted under cross-examination that even though the referral fees were not related to the profits made by EAM on a particular investment, there should not be any referral fees if there was no actual business of the Purported Nickel Trading. That said, we do not think that his concession is relevant to what is the correct *legal* position, which turns on the terms of the obligation. The obligation was for referral fees to be paid for the investors Mr Koh introduced (see [103] above). Even if there was a general pretext that the Purported Nickel Trading was real, this does not mean that the referral fees should be interpreted as being *conditional* on the actual use of the funds by EAM for investment purposes, if that is not what the obligation stipulated. The Judge did not supply a reason for his view, and with respect, we do not see one.

107 In our view, this must mean that the Pre-April 2020 Referral Fees were indeed supported by consideration as EAM was contractually obligated to pay the same to Mr Koh. *Per* the obligation as agreed between Mr Koh and NYZ, an investment that Mr Koh had procured would entitle him to receive a referral fee. This was independent of whether EAM had properly applied the investment moneys to the Purported Nickel Trading. We emphasise that this does *not*

constitute a certification of profits as proscribed in *Biovest (CA)* and reiterated above at [73]. Mr Koh therefore had provided value and was entitled to receive the Pre-April 2020 Referral Fees. As the Purported Nickel Trading was a Ponzi scheme, any payment that was made thereunder would *prima facie* be with the intent of depleting the pool of assets even where there is an entitlement to receive such payment (see Judgment at [43(b)]). It is not disputed that Mr Koh had acted in good faith, as he was unaware of the Ponzi scheme and therefore did not have the relevant intent. But EAM as the promoter of the Ponzi scheme did. Thus, the question is whether the consideration given was adequate for the Pre-April 2020 Referral Fees that Mr Koh was entitled to receive. This is relevant for the purpose of the defence under s 73B(3) of the CLPA.

Consideration of adequate value was provided for the Pre-April 2020 Referral Fees

108 To be clear, where there is no entitlement to the payment, there would be no consideration for the conveyance under s 73B(1). However, even if there was, there would be depletion of the assets if the consideration that was given for the conveyance was not adequate (*Biovest (CA)* at [79]–[80]). The Respondents argue that the burden of proof lies on Mr Koh to prove the adequacy of consideration under s 73B(3) of the CLPA, while Mr Koh contends that the Respondents as the claimants seeking to set aside the conveyance should bear the burden of proof to show that consideration was inadequate. In our judgment, it is established law that under s 73B(3) of the CLPA, the burden of proof lies on the defendant to show that the consideration is of adequate value (see *Biovest (CA)* at [65], citing *Wong Ser Wan v Ng Bok Eng Holdings* [2004] 4 SLR(R) 365 at [5] with approval; see also *Wang Xiaopu v Koh Mui Lee* [2023] 5 SLR 717 at [72]). It is plainly the case as a matter of statutory construction

that the burden is on the defendant under s 73B(3) of the CLPA and on the claimant under s 438(2) of the IRDA.

109 Mr Koh submits that placing the burden of proof on the defendant results in discordant approaches as between s 73B of the CLPA and s 438 of the IRDA. Under the latter provision, the court must be satisfied that the transaction was entered into at an undervalue (*ie*, that the *claimant* must prove this particular fact) (see *DDP v DDR* [2024] 3 SLR 1457 (“*DDP*”) at [30]). However, we agree with Goh Yihan J’s (as he then was) observation in *DDP* that s 438 of the IRDA, which is meant to mirror s 423 of the English Insolvency Act, is not meant to be an exact replica of s 73B of the CLPA, which was meant to mirror s 172 of the Law of Property Act. As such, cases interpreting s 73B of the CLPA may be of limited value in interpreting s 438 of the IRDA (*DDP* at [28]–[29]), at least as regards where the burden of proof lay.

110 Mr Koh further contends that s 73B of the CLPA is concerned with dealings in property which prejudice creditors, and prejudice to the creditors must be shown through a deficiency in value in the exchange. However, this in our view does not speak to the question on whom the burden of proof should rest, which primarily is a matter of statutory construction. This is equally consistent with the position that prejudice may be proven as a result of a *prima facie* significant erosion of value (as would be the case with the dissipation of funds under a Ponzi scheme), which is the premise on which the Judge had found prejudice (see Judgment at [43(c)]), with the burden then being on the defendant to show adequate consideration and good faith as a defence.

111 Finally, we note that the position in Singapore on the burden of proof is consistent with the approaches taken in other jurisdictions in relation to provisions which are *in pari materia*. In *Lloyds Bank Ltd v Marcan* [1973] 2 All

ER 359 (at 368d–e), the English High Court held that the *transferee* must establish that both requirements of s 172(3) of the Law of Property Act have been met. This was accepted by the parties in that case and is premised on the position taken in relation to the Statute of 13 Elizabethan 1571 (c 5) (UK), its predecessor provision, under which *any person relying on the proviso* must prove both good consideration and that he had no notice of the illegal intent (at 368c–f, citing the English Court of Appeal in *Glegg v Bromley* [1911–13] All ER Rep 1138 at 1147). Commonwealth jurisdictions which have implemented provisions *in pari materia* to s 172(3) of the Law of Property Act have also adopted the same position (see *Richards v Dare* [2001] VSC 466 at [16] (Supreme Court of Victoria); *Re Hale (a bankrupt)* [1974] 2 NZLR 1 at 9–10 (High Court of New Zealand); *Honour Finance Co Ltd v Poon Ting-Chau* [1990] HKCU 421 (Hong Kong Court of Appeal) (“*Honour Finance*”). As noted by the court in *Honour Finance*, this position is “consistent with the general principle that he who claims the benefit of an exemption or exception must bring himself within it and establish his case”. The short point is that s 73B(3) operates as a defence to a claim under s 73B(1) while the absence of consideration or adequate consideration is an element of the cause of action under s 438(2) of the IRDA. As such, it is the defendant who carries the burden of proof of establishing adequate consideration.

112 In the circumstances, we are satisfied that the burden of proof on establishing adequacy of consideration is rightly on Mr Koh. We agree with the Respondents that Mr Koh has not furnished any expert evidence on the market value associated with his efforts in recruiting investors, which may in turn be used as a comparator to determine if the Pre-April 2020 Referral Fees were commensurate to the services that Mr Koh provided for those investments. Mr Koh contends that unless what was paid to him is disproportionate to the services he provided, the payments he received were not subject to claw back.

He cites US case law and refers, as an example, to *First Commercial Management* where it was held that a commission rate of 6.75% to 9.12% of the principal investment amount was reasonably equivalent value in exchange for fundraising services.

113 That said, we are satisfied, in the specific circumstances of this case, there is sufficient evidence that consideration of adequate value was furnished by Mr Koh. As stated above, the context for the analysis on the consideration is the transaction (for the purpose of s 438 of the IRDA) and the conveyance (for the purpose of s 73 of the CLPA). Accordingly, whether consideration was provided and whether it was adequate is understood with reference to the particular conveyance or transaction. In assessing whether a transaction was at an undervalue, this court has held that this inquiry requires a comparison of the value between the consideration provided and the consideration received (*Biovest (CA)* at [90], in relation to s 224(3)(b) of the IRDA). This is to be considered from the perspective of the insolvent transferor, *ie*, the company (see *Rothstar Group Ltd v Leow Quek Shiong* [2022] 2 SLR 158 at [25], in relation to s 98(3)(c) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) which uses a substantially similar wording). We are of the view that the same approach applies to s 73B(3), save that the burden of proof lies on the defendant for reasons canvassed above (see [109]–[111]).

114 Thus, the context for the assessment of the adequacy of consideration is the obligations that were assumed by EAM and Mr Koh. In substance the corresponding obligations were that in the event Mr Koh procured an investor, he would be paid a referral fee by EAM calculated at an agreed percentage of the amount invested by that investor. Clearly, if the percentage that is used to calculate the referral fees is exorbitantly high, that would raise questions as to whether there was any point in procuring the investment in the first place, as the

investee company might not end up with any profit or at least a reasonable one, after deducting for the referral fee, the returns to the investor and operational expenses. Thus, it seems to us that one approach is to place the percentage used in the context of the anticipated return on investment by the investee company. This would be an appropriate approach as it was what was contemplated on the face of things by EAM and Mr Koh when the corresponding obligations were agreed. On the facts of this case, the Envy Companies, including EAM, had represented that they achieved 15% profit on each investment and in one particular instance, estimated that they could achieve roughly a profit of 13.2% in returns to the investor. Seen in this context, the investments Mr Koh procured might be said to be adequate consideration for the referral fees he received, computed at the relatively nominal percentage of 0.8% to 2.75% of the moneys invested.

115 In our view, the fact that EAM did not use the investments as contemplated, instead diverting them to an illegal purpose does not displace this approach. It is important to reinforce the point that the assessment of consideration is performed with regard to the conveyance or transaction at hand. That sets the context for whether the defendant provided adequate consideration for what he had received. In the present case, it is what was contemplated on the face of the transaction that is relevant for this purpose, and not what EAM actually did. Mr Koh, having discharged his end of the bargain by bringing in investors and investments, had no control over what EAM subsequently used the moneys for. EAM's choice to deploy the investment for an illegal or improper purpose should not be relevant in assessing the adequacy of consideration, as the obligation to pay Mr Koh referral fees was specifically delinked from the actual returns that could be made.

116 This brings us to a more fundamental issue, which is whether the moneys received from the investors who were introduced by Mr Koh provided value for the Envy Companies as they were used for a Ponzi scheme. The Respondents briefly raised the argument in their written submissions that in any event, value cannot be provided by the invested moneys because the moneys would be used in a Ponzi scheme and as a result drive the Envy Companies deeper into insolvency. However, the Respondents did not pursue this point before us. We observe that this issue has been the subject of divergent treatment in US jurisprudence. In one line of cases, the US courts have taken the position that no value could be given by brokering services provided in furtherance of a Ponzi scheme, in essence, because the moneys received would drive the company deeper into insolvency and exacerbate the harm caused to defrauded creditors (see *Warfield v Byron* 436 F3d 551 (5th Cir, 2006) at 560, *In re Randy* 189 BR 425 (Bankr ND Ill, 1995) at 441). In another line of cases, the US courts have taken the view that there is no general rule that services furthering a Ponzi scheme are without value, because the focus of the analysis ought to be on the discrete transaction between the debtor and defendant without having regard to the nature of the debtor's overall enterprise (see *In re Churchill* at 679–682, *First Commercial Management* at 237–239). If the financial performance of the debtor's overall enterprise were dispositive as to whether value could be given to the debtor, it would suggest that no one who had provided services to the debtor could prevent avoidance of any transfers they had received as their services would ultimately be rendered in the furtherance of the Ponzi scheme (*In re Churchill* at 681–682, citing *Merrill v Allen (In re Universal Clearing House Company)* 60 BR 985 (Bankr. S.D.N.Y, 2000) at 999).

117 Preliminarily, we are persuaded by the latter line of reasoning. As we had earlier alluded to, the focus of s 73B of the CLPA (and s 438 of the IRDA) is on the conveyance or transaction that is the subject of inquiry. The emphasis

therefore should be on the discrete conveyance and the value that it brings to the debtor. The fact that a debtor chooses to use the money for illegitimate purposes ought not to *ex post facto* render inadequate consideration which would otherwise be of adequate value at the time of the transaction or conveyance. This would leave the referrer at the mercy of the company in the sense that the referrer's entitlement to a defence would be dependent on the subsequent actions of the referee company in utilising the moneys despite there being a contractual entitlement to payment. Indeed, we see force in the concern that any consideration of the overall enterprise may lead to other service providers being unable to avail themselves of the same defence, even though the services provided may be divorced from the Ponzi scheme. This, we think, is consistent with Goh J's view in *Biovest (HC)* that the analysis of consideration ought not to be undertaken with the benefit of hindsight with reference to subsequent events (at [158], citing *Mercator & Noordstar NV v Velstra Pte Ltd* [2003] 4 SLR(R) 667 at [41]). There is a final point. The question of adequacy of consideration only arises after it has been established that the debtor is obliged to make payment to the defendant or the defendant is entitled to payment. To then say that no consideration was received by the debtor because the consideration was channelled into a Ponzi scheme is to effectively negate entitlement and disregard the terms of the transaction or conveyance. That seems incorrect to us. Therefore, our preliminary view is that consideration of adequate value could possibly be given in the form of referral services paid for procuring investors whose investments were ultimately channelled into a Ponzi scheme and that forms the premise of our decision. However, we leave this issue open for future reconsideration as parties have not fully pursued this issue.

118 On the facts and terms of this particular agreement between EAM and Mr Koh, we are of the view that consideration of adequate value was furnished in exchange for the Pre-April 2020 Referral Fees and therefore Mr Koh is

entitled to rely on s 73B(3) of the CLPA as a defence. Our decision should not be read as a general rule that consideration of adequate value can always be given in the form of referral services into a Ponzi scheme. Therefore, we set aside the Judge's order that these sums be clawed back.

The commissions and profit-sharing payments made on 30 July 2020 and after may be clawed back as transactions defrauding creditors under s 438 of the IRDA

The applicable law under s 438 of the IRDA

119 Section 438 of the IRDA is the successor provision to s 73B of the CLPA and relates also to transactions defrauding creditors. Pertinently, under s 438 of the IRDA, a transaction entered into at an undervalue is defined to include, *inter alia*, a gift or a transaction on terms that provide for the debtor to receive no consideration (s 438(2)(a)) and a transaction for 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 debtor (s 438(2)(c)).

120 A transaction at an undervalue may be set aside if the transaction was entered into for the purposes set out in s 438(4) of the IRDA, *viz*:

- (a) to put assets beyond the reach of a person who is making or may at some time make a claim against the debtor (s 438(4)(a)); or
- (b) otherwise prejudicing the interests of any person in relation to a claim which the person is making or may make against the debtor (s 438(4)(b)).

No consideration has been provided for the Challenged Payments

121 The Judge was satisfied that s 438 was applicable to the commissions and profit-sharing payments made on 30 July 2020 and thereafter. First, the Judge found that the commissions and profit-sharing payments were gifts as they were unilateral extra-contractual payments with no form of mutual dealing, with the intention that the Appellants retained the benefit of the moneys (Judgment at [72(a)], [76]). This meant that the transaction was at an undervalue as defined under s 438(2)(a), viz, that it is a gift (Judgment at [72(a)]). Second, the transfers were made with the intent to defraud creditors (Judgment at [72(b)]). The commissions and profit-sharing payments were thus made pursuant to one of the purposes under s 438(4).

122 As canvassed above (at [66]–[90]), our view is that the Appellants provided no consideration, whether contractual or extra-contractual, for the commissions and profit-sharing payments. On this basis, we agree with the Judge that these payments were gratuitous payments to employees and therefore constituted gifts under s 438(2)(a) of the IRDA made pursuant to the purpose of defrauding creditors (see *Biovest (CA)* at [108]). Therefore, the commissions and profit-sharing payments made on 30 July 2020 and thereafter may be clawed back as transactions defrauding creditors under s 438 of the IRDA.

Conclusion on Issue 1

123 We are therefore satisfied that all of the Challenged Payments, save for the Pre-April 2020 Referral Fees, were liable to be clawed back under the relevant statutory provisions.

Issue 2: The Judge did not err in the exercise of his discretion to only order the offset of excess sums paid for income tax

124 Having found that the Challenged Payments were liable to be clawed back, we turn to consider the Appellants’ argument that the Judge ought to have exercised his discretion to not order a claw back of all the Challenged Payments. The CA 39 Appellant further contends that the Judge should not have ordered a claw back of certain specified payments, in particular, the sum of \$2,045,288.56 under-withdrawn by the CA 39 Appellant or, in the alternative, the Reinvested Sum of \$909,473.16.

The applicable law

125 We observe that the parties do not dispute that the Judge had the power to decline to claw back the Challenged Payments under s 73B of the CLPA and ss 224 and 438 of the IRDA (“Relevant Sections”). The Judge held that:

(a) The court had a discretion under s 73B of the CLPA to decline to claw back the Challenged Payments which stemmed from the word “voidable” in the statute, which was changed from the previous wording “clearly and utterly void” (Judgment at [85]). In our view, to conclude that there is no discretion notwithstanding the change would be to render the inclusion of the word “voidable” otiose as every transaction would then be void and not voidable, and there would be no reason for Parliament to amend the statute.

(b) The court had a discretion under s 438(3) of the IRDA on the basis that the statute provides that the court “may”, where “a debtor enters into a transaction at an undervalue”, make such order the court thinks fit to restore the position to what it would have been had the transaction not been entered into and protect the interests of any person

who is, or is capable of being, prejudiced by the transaction (Judgment at [82(a)], citing *DDP* at [27]). This was likewise the case in relation to s 224(2) of the IRDA (Judgment at [82(b)]).

126 As explained by this court in *Sapura Fabrication Sdn Bhd v GAS* [2025] 1 SLR 492 at [93], appellate intervention against the exercise of discretion by the court below is only warranted where: (a) the Judge had misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (b) the Judge, in exercising his discretion, had taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (c) the Judge’s decision was plainly wrong.

The scope of the court’s discretion to decline to order a claw back and the relevant factors

127 Before examining whether appellate intervention against the Judge’s decision is warranted, we first canvass some of the cases referred to by the parties to distil the principles that guide the court’s discretion to decline to order a claw back.

The position in England

128 In *4Eng Ltd v Harper* [2010] 1 BCLC 176 (“*4Eng*”), the claimant brought claims under s 423 of the English Insolvency Act (which is *in pari materia* to s 438 of the IRDA) to set aside transactions entered into by the second defendant, transferring property owned by him to his wife. The issue was the appropriate relief to be granted under s 425 of the English Insolvency Act (which is *in pari materia* to s 439 of the IRDA). The court explained that while the conditions for liability under s 423 of the English Insolvency Act

reflected a balance as established by Parliament between the interests of the creditors and a transferee, whether an order should be made requires “further balancing of the interests of the transferor’s creditors and of the transferee to be determined by the court” (*4Eng* at [13]). The court set out the following considerations that it regarded as relevant to that assessment:

- (a) The nature of any order and the extent of the relief granted by the court should take into account the mental state of the transferee, and the degree of their involvement in the fraudulent scheme of the debtor/transferor to put assets out of the reach of his creditors (*4Eng* at [13]).
- (b) If the transferee received moneys in good faith and has changed his position on the basis of the receipt in a way that would make it unfair to him to repay the money, it would be inappropriate for the court to make an order requiring the transferee to pay back a sum equivalent to the amount he had received. The example given by the court was if a transferee, thinking that it was a valid gift, had spent money on a world cruise which he would otherwise have not taken (*4Eng* at [14(1)]).
- (c) However, where an asset has been transferred to a transferee who has no knowledge that the transferor acted with fraudulent design in making the transfer, and the transferee is simply holding the asset, ordinarily the appropriate order should be for the transfer of the asset to the transferor or to the creditors directly (*4Eng* at [14(2)]). A transferee who takes property knowing that it was transferred to him for a fraudulent design and seeks to further that design may be subject to such orders as may be necessary to protect the creditors to the fullest extent (*4Eng* at [14(3)]).

129 The court in *4Eng* found that although the second defendant’s wife had not been aware that the purpose of the transfer of property, the family home, to her was to protect it from the claimant, she had subsequently lied about the beneficial ownership of the family home in order to safeguard it from steps taken by the claimant to execute against the second defendant’s half-share in the beneficial interest. The court took this conduct into account in declining to exercise its discretion and in making orders to reverse the transfer, notwithstanding her initial innocence (*4Eng* at [61]–[70]).

130 In *Claridge*, the bankrupt and first respondent, Mr Claridge, and the second respondent, Mrs Claridge, were husband and wife. Their matrimonial home was initially subject to a mortgage in favour of Birmingham Midshires Building Society (“BMBS”). After Mr Claridge was made a bankrupt, the trustee sold Mr Claridge’s half share in the beneficial interest in the property to Mrs Claridge. However, no changes were made to the register or mortgage documentation to reflect the change in ownership. Mrs Claridge made the mortgage payments from her bank account, into which Mr Claridge paid his income (*Claridge* at [4]–[7]).

131 Mr and Mrs Claridge thereafter sought to re-mortgage the matrimonial home and took out a loan for £53,379 from Kensington Mortgage Co Ltd (“KMC”). The loan offer was made to Mr and Mrs Claridge jointly and was based on Mr Claridge’s income. The loan amount of £53,379 was used to pay the outstanding balance of £18,990.94 due to BMBS, and the balance of the loan moneys (less legal and other expenses) of £30,719.18 was transferred to Mrs Claridge’s account. The money in Mrs Claridge’s bank account belonged to her, and it was not suggested that Mr Claridge had any rights or interest in them (*Claridge* at [8]–[12]).

132 Subsequently, Mr Claridge was again made a bankrupt and his trustee in bankruptcy sought to impugn the transfer of half of the loan amount to Mrs Claridge as a transaction at an undervalue (*Claridge* at [8]–[15]). The critical transaction was Mr and Mrs Claridge jointly directing Eric Robinson & Co (the solicitors acting for Mr and Mrs Claridge and KMC) to pay BMBS the outstanding mortgage sum owed solely by Mrs Claridge, and thereafter the balance of the loan moneys to Mrs Claridge alone (*Claridge* at [28]–[29]). The issue was whether by doing so, Mr Claridge had, in essence, transferred his share of the loan moneys to Mrs Claridge at an undervalue.

133 The court in *Claridge* found that the substance of the transaction that Mr Claridge had entered into was to confer a benefit on his wife. This was because Mr Claridge’s half-share of the loan moneys was paid to Mrs Claridge’s bank account or to BMBS for Mrs Claridge’s benefit, as she was the sole beneficial owner of the matrimonial home. However, the court declined to make an order under s 339 of the English Insolvency Act (which is *in pari materia* to s 224 of the IRDA). In coming to this conclusion, the court considered *inter alia* that:

- (a) Mrs Claridge had spent the moneys in good faith believing that she was fully entitled to spend them (*Claridge* at [49(ii)]).
- (b) There was no simple way to restore the position to what it would have been had Mr Claridge not entered into the transaction (*Claridge* at [49(ii)]).
- (c) The extent to which Mrs Claridge had benefited from the transaction was limited (*Claridge* at [49(iii)] and [49(vi)]).

- (d) Having regard to the manner in which the trustee introduced the claim at the last minute, there was no unfairness to the trustee (*Claridge* at [49(v)]).

134 *In re Fowlds (A Bankrupt); Bucknall v Wilson* [2022] 1 WLR 61 (“*Re Fowlds*”) concerned the payment of £47,675.51 by a bankrupt, Mr Fowlds, to his stepdaughter, Ms Wilson, in partial discharge of a debt for accountancy services she had provided. The court found that this payment amounted to an unfair preference, but declined to order the stepdaughter to return the payment for, *inter alia*, the following reasons:

- (a) The debt arose from a commercial relationship and was akin to one made by an ordinary commercial creditor acting in good faith without knowledge that the payment was a preference (*Re Fowlds* at [134]).
- (b) Ms Wilson no longer retained the payment (*Re Fowlds* at [135]). She was not able to repay without selling her family home (*In re Fowlds (A Bankrupt) Bucknall v Wilson* [2020] EWHC 1200 (Ch) at [91]).
- (c) The modest size of the payment sought to be recovered (*Re Fowlds* at [138]).
- (d) This case was a single creditor bankruptcy. As a preference claim is a class remedy, where there is only one member of the class, there is less reason to favour the class over the recipient (*Re Fowlds* at [136]).

The position in Singapore

135 We broadly endorse the approach set out in the English cases canvassed, subject to the following observations.

136 In our view, the touchstone that undergirds the approach in the English cases is *prejudice* to the transferee, if an order is made for claw back. It must be remembered that the avoidance provisions of the IRDA serve the policy imperative of preserving the assets of the company by aiding the liquidators or judicial manager in reconstituting the insolvent company's assets (*Biovest (CA)* at [38] and *DGJ v Ocean Tankers (Pte) Ltd* [2024] 2 SLR 790 (“*DGJ*”) at [148]). This has been described as the Preservation Rationale (*DGJ* at [143] and [148]). The same point may be made as regards s 73B of the CLPA, save that the applicants thereunder are any person who is prejudiced by the conveyance, which is potentially a wider class than liquidators and judicial managers. In deciding whether to exercise the discretion, the key inquiry is therefore whether ordering a claw back would be so prejudicial to the transferee as to displace the policy objective of reconstituting the estate. This is ultimately a “balancing of the interests of the transferor's creditors and of the transferee” (*4Eng* at [13]). It is only in exceptional circumstances that the balance will come down in favour of the transferee.

137 In this regard, we note that the court in *Re Fowlds* drew a distinction between the court's exercise of its discretion under s 423 of the English Insolvency Act (which is *in pari materia* to s 438 of the IRDA) on one hand, and under ss 339 and 340 of the English Insolvency Act (which is *in pari materia* to ss 224 and 225 respectively of the IRDA) on the other. The court was of the view that it might be more appropriate to carry out a balancing exercise in cases under s 423 of the English Insolvency Act, where the balance was between the interests of the creditors or victims of the transferor and an innocent transferee. This is because s 423 contemplated a single victim or limited number of victims of the transferor, which made striking a balance between the victim and the innocent transferee or transferees possible (*Re Fowlds* at [69]–[71]). On the other hand, in statutory claw back claims, the balancing exercise was

between the interests of the transferee and all of those interested in the statutory scheme, which “will rarely be an exercise on which it is appropriate for the court to embark or even practical if it were to attempt to do so” (*Re Fowlds* at [71]; see also *DDP* at [39]).

138 We respectfully disagree with the differentiation made in *Re Fowlds* for the simple reason that these provisions – s 438 of the IRDA and ss 224 and 225 of the IRDA – serve the purpose of reconstituting the estate in insolvency by ordering the claw back, subject to the discretion not to order a claw back if there are exceptional circumstances. In making that determination, it seems to us that the size of the creditor pool is a relevant factor only to the extent that it serves to identify the extent of recovery for the creditors in the event that a claw back is ordered. This would be useful in the balancing exercise if a clawback is ordered, namely the benefits of recovery to the creditors when weighed against the prejudice to the transferee, bearing in mind that the policy objective of reconstituting the estate points towards not ordering a claw back only if there are exceptional circumstances. Thus, regardless of the provision in play, the fundamental nature of the balancing exercise is no different.

139 We set out the following non-exhaustive list of factors that should guide the exercise of the discretion, with the caution that in weighing the factors in the balance, the discretion not to order a claw back should only be exercised in exceptional circumstances:

- (a) The mental state of the transferee, and the degree of their involvement in the fraudulent scheme.
- (b) Whether the transferee has changed their position on the basis of the receipt in a way that would make it unfair to them to have to repay the money.

- (c) Whether it is possible to restore the position to the *status quo ante* (see *Affert* at [105]).
- (d) A restorative order should not prejudice any interest in property which was acquired from a party other than the transferor, in good faith, for value and without notice of the relevant circumstances (*Affert* at [109]).
- (e) The impact of having to restore the payment on the transferee.
- (f) The size of the payment sought to be recovered and the benefit to the creditors of ordering a restoration of the payments.

Our decision

140 In our judgment, the Judge did not err in declining to exercise the discretion not to order a claw back of the Challenged Payments (save for the excess income tax paid by the Appellants on these payments).

141 The Appellants have not adduced cogent evidence of the prejudice that they would suffer if a claw back of the Challenged Payments is ordered. While both the CA 25 Appellants and the CA 39 Appellant contend that a claw back order would have an extremely detrimental effect on them, we note that these were broad statements lacking in specificity and particulars, and not supported by any meaningful documentary evidence. The Appellants have provided only a partial account of how some of the Challenged Payments were spent. There is no clear picture of their true current financial positions, or of the actual impact that a claw back order would have on them. The court is thus not in a position to assess whether the prejudice to the Appellants is sufficient to displace the policy objective of reconstituting the estate. As such, we are of the view that the

Appellants have not established any “exceptional circumstances” which warrant the exercise of the court’s discretion.

142 We turn to deal with three further points that counsel for the CA 39 Appellant (in respect of Issue 2 and Issue 3), Mr Aaron Yoong (“Mr Yoong”), emphasised in oral argument. Mr Yoong argued that the three factors weighed in favour of the court exercising its discretion, namely that the Appellants were innocent and were not involved in the fraudulent scheme, the Challenged Payments arose from a commercial relationship between the parties, and recovery of the Challenged Payments from the CA 39 Appellant would be insignificant in comparison to the entirety of the Envy Companies’ debts. The CA 25 Appellants similarly made the first and third points in their written submissions.

143 We are of the view that these points are not persuasive, for the following reasons:

- (a) First, we accept that the Appellants’ innocence is a relevant consideration. As the court in *4Eng* held, “[the] degree of involvement of a defendant in wrongdoing [is] relevant to the extent of recovery available against him” (at [13]). However, it seems to us that innocence is relevant in the sense that if the transferee was not innocent, that would militate strongly against exercising the discretion in the case of s 73B of the CLPA and ss 224 and 438 of the IRDA. Thus, the Appellants’ innocence meant that the exercise of discretion is not foreclosed, but whether it ought to be exercised is influenced by other considerations. Indeed, Mr Yoong accepted that it did not follow that the court should decline to order a claw back in every case where the recipient was not implicated in the scheme. That cannot be a correct proposition.

(b) Second, while the Challenged Payments arose from a commercial relationship between the parties, the Appellants did not explain how this pertained to the central inquiry of prejudice that they would suffer if a claw back was ordered.

(c) Third, even if the sums ordered to be clawed back from the Appellants are insignificant when compared to the entirety of the Envy Companies' debt burden, the point is the Appellants have not adduced concrete evidence of their prejudice. Without this, it is difficult to weigh the recovery to creditors against the prejudice that the Appellants assert they will suffer. In any event, the sum ordered by the Judge to be clawed back is significant in *absolute terms*. That, in our view, is a material consideration given the importance of reconstituting the estate.

144 For completeness, we also see no reason for the discretion to be exercised to decline to claw back either the sum of \$2,045,288.56 (representing the sum under-withdrawn by the CA 39 Appellant) or \$909,473.16 (representing the Reinvested Sum) from the CA 39 Appellant for two reasons. First, as explained earlier in the analysis on the Reinvested Sum, what is sought to be clawed back is not the investment the CA 39 Appellant made in the Purported Nickel Trading *per se*. Rather, it is the anterior payment that was made by the relevant Envy Company purportedly in discharge of a contractual obligation which enabled the investment to be made that is sought to be clawed back. As such, in so far as the CA 39 Appellant's argument is that the Reinvested Sum should not be clawed back because these moneys were never received by her and were in fact with EAM, the argument should be rejected. Second and relatedly, the Reinvested Sum and the under-withdrawn sum of \$2,045,288.56 were investments that the CA 39 Appellant made in the Purported Nickel Trading. In contending that the court should exercise its

discretion to decline to claw back these sums, the CA 39 Appellant is effectively seeking to avoid joining the ranks of unsecured creditors and circumvent the *pari passu* rule.

145 In the circumstances, we are of the view that the Judge did not err in refusing to exercise the discretion not to order a claw back (save for the excess income tax paid by the Appellants on the Challenged Payments), and we accordingly dismiss the appeal on this issue.

Issue 3: An insolvency set-off does not apply

146 We turn to the last issue, which is whether an insolvency set-off under s 219 of the IRDA would apply in the present case. This point is only advanced by the CA 39 Appellant who argues that the under-withdrawn sum of \$2,045,288.56 may be set-off against the claims brought by the Respondents, under s 219 of the IRDA. The CA 25 Appellants do not appeal against the Judge’s finding on this issue. To be clear, the CA 39 Appellant did not particularise whether the under-withdrawn sum was sought to be set-off against the sums clawed back under s 73B of the CLPA or ss 224 and 438 of the IRDA. Nevertheless, as the analysis below makes clear, this does not affect our decision on this issue. Our analysis would apply regardless of which provision the sums were to be clawed back under.

Applicable law

147 An insolvency set-off is statutorily provided for in s 219 of the IRDA. For an insolvency set-off to apply, s 219(2) of the IRDA requires that there be “mutual credits, mutual debts or other mutual dealings between a company and any creditor”. While there are multiple facets of mutuality, the Court of Appeal in *Good Property Land Development Pte Ltd v Société-Générale* [1996] 1

SLR(R) 884 (“*Good Property*”) explained that for mutuality to exist, two conditions must generally be satisfied. First, each claimant must be personally liable for the debt he owes to the other claimant. Second, each claimant must beneficially own the claim which is owed to him by the other claimant and his ownership interest in that claim must be clear and ascertained without inquiry. In this assessment, “[m]utuality sees through to the real beneficial ownership, regardless of who is the legal, nominal, titular or procedural holder of the claim or procedurally the appropriate plaintiff” (*Good Property* at [18]). The relevant time for determining mutuality for the purposes of insolvency set-off in a liquidation is the time of commencement of the winding up (*DGJ* at [165]).

148 An insolvency set-off is an “exception to the *pari passu* rule” and for this reason its scope is “narrowly circumscribed by statute” (*Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 (“*Kyen*”) at [35], see also *DGJ* at [83]). The policy justification for allowing an insolvency set-off was explained by this court in *Kyen* at [36]:

The policy justification for the insolvency set-off is explained by the authors of *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten gen ed) (Sweet & Maxwell, 5th Ed, 2018) at para 9-01, as follows:

... where parties have been giving credit to each other in reliance on their ability to secure payment by withholding what is due from them, it would be unjust, on the advent of liquidation, to deprive the solvent party of his security by compelling him to pay what he owes in full and be left to prove for his own claim. This has traditionally been the policy justification for what is a clear exception to the *pari passu* principle, in that it allows the solvent party to collect payment ahead of other creditors to the extent of the set-off and thus puts him in a position analogous to that of a secured creditor.

Similarly, it is stated in Edward Bailey & Hugo Groves, *Corporate Insolvency: Law and Practice* (LexisNexis, 5th Ed, 2017) at para 26.44 that:

... Insolvency set-off is founded on the premise that a person who engages in mutual dealings with another is entitled to rely on his debts due to that other being a form of security covering the other's debts due to him. Any credit one trader may extend to the other is the less because of the debts he himself owes. The law proceeds on the basis that it would be unreasonable in these circumstances if, on insolvency, debts due to the insolvent had to be paid in full, whereas debts due from the insolvent received only the dividend payable on unsecured debts. ...

149 As the holding of the court in *Kyen* makes clear, the policy justification for an insolvency set-off rests on the premise that the parties have extended credit to each other in reliance on their mutual obligations serving as a form of security.

Our decision

150 The CA 39 Appellant argues that the Judge erred in holding that there was no mutuality simply because the money clawed back from the Appellants would be for the benefit of the creditors (see Judgment at [96(b)]). According to the CA 39 Appellant, such an approach would leave “effectively no possibility of an insolvency set-off in any situation” as the moneys being sought to be clawed back in an insolvency would “always necessarily by definition be for the benefit of the creditors”.

151 In oral arguments, Mr Yoong further contended that there was mutuality in the present case because mutuality looks through to the real beneficial owner of the debt. In this case, the appointment of a liquidator would not destroy that mutuality as the beneficial owner of the claw back was the company. Mr Yoong also argued that the debts sought to be set-off existed at the time of commencement of the winding up as the causes of action which the Envy Companies relied on to claw back the Challenged Payments (*ie*, s 73B of the

CLPA and ss 224 and 438 of the IRDA) would have accrued at the point in time that the Challenged Payments were paid to the CA 39 Appellant.

152 In our view, the Judge did not err in holding that an insolvency set-off under s 219 of the IRDA was not available to the CA 39 Appellant because of an absence of mutuality of parties and of debts.

153 The moneys clawed back via the statutory avoidance provisions provide statutory causes of action for the purpose of reconstituting the estate for the benefit, not of the company, but the creditors. This is underscored by the fact that the causes of action under ss 224 and 438 of the IRDA vest in the *liquidators or judicial managers* as the case may be and not in the company. This is made clear from ss 224(1) and 438(5)(c)(ii) of the IRDA. Seen this way, these are not debts and credits between the company and the party against whom the statutory claim is brought. The moneys clawed back represent sums that are due to the estate that are refundable because of transactions that contravened the statute, and not because of business activities that created a debtor/creditor relationship in favour of the company (see *Liquidator of Leong Seng Hin Piling Pte Ltd v Chan Ah Lek* [2007] 2 SLR(R) 77 (“*Leong Seng*”) at [40]).

154 Further, we agree with the Judge that the true beneficiaries of the moneys clawed back are the *creditors* of the Envy Companies and not the Envy Companies themselves. This is the natural corollary of our holding in *Biovest (CA)* (at [38]) and *DGJ* (at [148]) that the avoidance provisions of the IRDA (as well as s 73B of the CLPA) serve the policy imperative of aiding the liquidators to reconstitute the insolvent company’s assets. There is accordingly no mutuality of parties: the debt owed to the CA 39 Appellant is owed by the Envy Companies, whereas the CA 39 Appellant’s obligation to repay the Challenged Payment is owed to the *creditors* of the Envy Companies.

155 We note that a similar position was taken in other cases. In *Leong Seng, Belinda Ang Saw Ean J* (as she then was) held that there was no real mutuality of debt between the money clawed back from the second defendant for undue preference, and the debt the company owed to him (at [40]). Similarly, in *Ng Bok Eng v Wong Ser Wan* [2005] 4 SLR(R) 561 (“*Ng Bok Eng*”), the Court of Appeal held that the sums clawed back pursuant to s 73B of the CLPA could not ground a set-off because of a lack of mutuality (at [59]–[61]). A similar position has been adopted by the Australian courts in *Morton v Metal Manufacturers Pty Ltd* [2021] FCAFC 228, in relation to a claim for recovery of an unfair preference. As Allsop CJ explained, at [153]:

153 In such circumstances, the debts are not, and cannot be mutual. One debt was owed by the company in its own right to the creditor arising out of historical events in the ordinary course of business dealings. The other obligation to pay is payable by the creditor to the company not as its pre-existing creditor, but pursuant to an order of the court obtained by the liquidator pursuant to his or her rights and exercising his or her statutory duties. Whilst in one sense the payment is received by the company beneficially, it is not payable to, or received by the company in virtue of its own interest or right, or for its own benefit, but in the interest or right, or for the benefit (through the liquidator) of all creditors and for the estate’s administration, under a statutory regime ...

156 For these reasons, it is clear that there is no mutuality. There is a further point. The relevant time for determining mutuality is the commencement of the winding up (*DGJ* at [165]), at which point, the company is presumed to be insolvent. This is generally the date of the making of the winding up application, as provided in s 126(2) of the IRDA. At that date, the cause of action under s 438 of the IRDA had not crystallised, let alone crystallised in favour of the Envy Companies. Further, when it did crystallise upon the making of the winding up order, the cause of action vested in the liquidators. Thus, not only was there no mutuality at the relevant time, but there was also no mutuality of parties at all times. We note that it is not altogether clear whether the Envy

Companies, as the transferors, qualify as “any person thereby prejudiced” and have a claim under s 73B(1) of the CLPA. Our tentative view is that the Envy Companies do not have a claim in the circumstances as they were the transferors under the relevant conveyances and could not be said to be “a person thereby prejudiced” (see *Israel Discount Bank Limited v ACN 078 272 867 Pty Ltd* [2019] FCAFC 90 at [68]; *Cadogan v Cadogan* [1977] 1 WLR 1041 at 1060E–G). It is unnecessary for us to express a view on this given that the set-off claim fails on the other grounds discussed above. That said, given that the conveyance or property sought to be avoided under s 73B(1) is one that was made with the intent to defraud creditors, it is apparent that the creditors are the focus of the provision and must therefore be regarded as “any person thereby prejudiced”. In our view, it would then follow that a trustee in bankruptcy of an individual debtor (*Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [173]), as well as a liquidator or judicial manager of a company, would also be regarded as “any person thereby prejudiced” as they represent respectively the estate in bankruptcy or insolvency and act in the interests of the creditors who were prejudiced by the conveyance by seeking to reconstitute the estate. This approach is consistent with the object of the provision to reconstitute the debtor’s asset pool for the benefit of the creditors and not the debtor. Seen this way, any action, even if brought by the debtor, is for the benefit of the creditors, thereby underscoring the point that there is no mutuality of parties for the purpose of s 219 of the IRDA.

157 For these reasons, permitting an insolvency set-off in the present case would clearly be an unjust violation of the *pari passu* principle. By seeking to set-off her under-withdrawn sums against the Challenged Payments clawed back from her, the CA 39 Appellant is in effect seeking to bypass the *pari passu* principle by securing payment of the under-withdrawn sum ahead of the unsecured creditors. This was clearly explained in *Kyen Resources* at [35],

where this court also explained the limited circumstances under which an insolvency set-off would be permissible (see above at [149]). These circumstances do not exist in the present case. We are therefore of the view that an insolvency set-off is not open to the CA 39 Appellant.

Conclusion

158 To conclude, we are satisfied that the claims under s 73B of the CLPA and s 438 of the IRDA were both made out in relation to the Challenged Payments, save for the sum of \$49,582.70 representing the Pre-April 2020 Referral Fees paid to Mr Koh. With respect, the Judge erred by ordering the claw back of that sum (see [102]–[118] above). We are also satisfied that there is no reason to interfere with the Judge’s exercise of discretion and that an insolvency set-off is not available to the CA 39 Appellant.

159 Accordingly, as stated in [4] above, CA 25 is allowed in part while CA 39 is dismissed in its entirety. We award costs in favour of the Respondents in the sums of \$60,000 all-in as against the CA 25 Appellants on a joint and several basis, and \$30,000 all-in as against the CA 39 Appellant.

Steven Chong
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Judith Prakash
Senior Judge

Koh Swee Yen SC, Liu Zhao Xiang, Teo Jen Min, Victoria Liu Xin Er and Toh Yong Xiang (WongPartnership LLP) for the appellants in CA/CA 25/2025;
Danny Ong Tun Wei SC and Yoong Joon Wei Aaron (Yang Junwei) (Setia Law LLC) for the appellant in CA/CA 39/2025;
Chan Ming Onn David, Fong Zhiwei Daryl, Lin Ruizi, Lai Wei Kang Louis and Tan Wei Sze (Shook Lin & Bok LLP) for the respondents in CA/CA 25/2025 and CA/CA 39/2025.
