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

[2022] SGHC 194

Suit No 1078 of 2017

Between

(1) Sim Guan Seng
(2) Khor Boon Hong
(3) Goh Yeow Kiang Victor

… *Plaintiffs*

And

(1) One Organisation Limited
(2) Chee Yin Meh
(3) Gateway Plus Limited

… *Defendants*

JUDGMENT

[Insolvency Law — Administration of insolvent estates]
[Insolvency Law — Avoidance of transactions — Transactions at an undervalue]
[Insolvency Law — Avoidance of transactions — Unfair preferences]

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26 August 2022 Judgment reserved.

Vinodh Coomaraswamy J:

Background facts

1 On 30 March 2017, a bankruptcy order was made against a businessman known as Fan Kow Hin ("the Bankrupt").[1] The order appointed the plaintiffs jointly as his trustees in bankruptcy ("the Trustees").

2 The plaintiffs have formed the view that the Bankrupt entered into ten transactions with one or more of the defendants before his bankruptcy which: (a) are fraudulent transactions calculated to put assets out of the reach of his creditors; (b) are transactions at an undervalue or unfair preferences; or (c) give the Bankrupt a cause of action for a civil remedy.

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[1] Third Plaintiff's Affidavit of Evidence-in-Chief filed on 20 December 2019 ("P3's AEIC") at p 141; HC/ORC 2050/2017 in HC/B 479/2017.

3 The Trustees have therefore commenced this action against the defendants seeking orders requiring the defendants to restore the bankrupt's estate to the position it would have been in if these transactions had not taken place or for a civil remedy arising from the Bankrupt's cause of action.

4 The bankruptcy order against the Bankrupt was made under s 59 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the Act"). It is common ground, therefore, that the subject matter of this action, insofar as it involves the statutory law of insolvency, is governed by the Act rather than by its successor statute, the Insolvency, Restructuring and Dissolution Act 2018. In any event, the provisions of both statutes have identical effect insofar as they are material to the Trustees' claims.

The Bankrupt and the parties

The Bankrupt

5 The Bankrupt is not a party to this action. But he lies at the heart of the transactions which form the subject matter of this action. I therefore begin with a thumbnail sketch of the Bankrupt and his path to bankruptcy.

6 The Bankrupt describes himself as "an entrepreneur, businessman and business consultant".[2] He appears to have displayed conspicuous acumen and, at least until his bankruptcy, to have enjoyed considerable success in each of these capacities.

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[2] The Bankrupt's Affidavit of Evidence-in-Chief filed on 16 January 2020 ("the Bankrupt's AEIC") at para 1.

7 During a career of over 35 years, the Bankrupt held senior executive positions in several listed companies[3] including Fraser & Neave, Limited and DBS Land Limited. He has also held office as a director in many other listed companies, including Raffles Holdings Limited, Ascott Holdings Limited, Yeo Hiap Seng Limited, Parkway Holdings Limited (now known as IHH Healthcare Berhad), UM Land Berhad in Malaysia and Australand Limited in Australia.[4]

8 Of particular interest for present purposes is the Bankrupt's role in two companies operating in the healthcare sector which he co-founded[5] and took to a listing on the Catalist board of the Singapore Exchange. The Bankrupt was a substantial shareholder of both of these companies at their founding. Whether and to what extent he continues to have an interest, direct or indirect, in shares in these companies forms part of the subject matter of this action.

9 The first company is Healthway Medical Corporation Limited ("HMC").[6] HMC was listed in July 2008. The Bankrupt was the Executive Chairman of HMC from July 2008 to May 2015.[7] The Bankrupt and his nominees (see [86]–[87] below for the sense in which I use this term) are, or at least were at one time, substantial shareholders of HMC. These nominees include the first defendant and the Bankrupt's business associates.

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3 The Bankrupt's AEIC at paras 6 to 7.

4 The Bankrupt's AEIC at para 8.

5 The Bankrupt's AEIC at para 7.

6 The Bankrupt's AEIC at para 6.

7 The Bankrupt's AEIC at para 7.

10 The second company is International Healthway Corporation Limited ("IHC"). IHC was listed in July 2013.[8] The Bankrupt was the Chief Executive Officer of IHC from May 2015 to January 2016.[9] One of IHC's substantial shareholders is HMC. The Bankrupt and his nominees, again including the first defendant and the Bankrupt's business associates are, or at least were at one time, the remaining substantial shareholders of IHC.

11 Both HMC and IHC have been known by other names at various times during their existence. For convenience, I shall refer to them at all times as HMC and IHC.

12 In 2015, the Bankrupt owned about 27% of IHC's shares, either personally or through his nominees. In September 2015, there was a 70% collapse in the price of IHC shares. In his affidavit in support of his bankruptcy application, the Bankrupt traces the beginning of his financial distress to this event in September 2015. The collapse in the price of IHC shares affected the Bankrupt's financial position most directly and most obviously by reducing the value of his substantial shareholding in IHC. But it also reduced the value of his substantial shareholding in HMC, a major shareholder in IHC. As a result, from September 2015, the Bankrupt was exposed to actual or apprehended defaults and cross-defaults and a cascade of litigation and arbitration.

13 The Bankrupt's financial distress appears to have come to a head in the first quarter of 2017. On 8 March 2017, the Bankrupt filed an application to have himself adjudicated bankrupt. He no doubt intended thereby to protect himself and his estate from further unilateral creditor action. In his application,

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8 P3's AEIC at para 8(2).

9 The Bankrupt's AEIC at para 7.

the Bankrupt nominated the three plaintiffs to be his trustees in bankruptcy. The Trustees were duly appointed his trustees on 30 March 2017. Upon the making of the order, all of the Bankrupt's property vested in the Trustees under s 76(1) read with s 36(2) of the Act.

14 The Trustees commenced this action in December 2017.

15 The defendants initially named the Bankrupt as a witness for the defence at trial. But shortly before the exchange of affidavits of evidence in chief in December 2019, the defendants decided not to call the Bankrupt.[10] The Trustees therefore issued a subpoena to compel the Bankrupt to give evidence for the Trustees at trial.[11]

16 Curiously, even though the Bankrupt was giving evidence under subpoena, he chose to file an affidavit of evidence in chief rather than to give oral evidence in chief, as would be more usual. Even more curiously, even though the Bankrupt was to be a witness for the Trustees at trial, he drafted and even filed the affidavit himself, without the involvement of the Trustees' solicitors or, it appears, any other legal assistance.

The defendants

17 The second defendant is the Bankrupt's wife. She is an accountant by training and an entrepreneur.[12]

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10 Trustees' Closing Submissions dated 18 June 2020 at para 156.

11 The Bankrupt's AEIC at para 4.

12 Second Defendant's Affidavit of Evidence-in-Chief filed on 20 December 2019 ("D2's AEIC") at para 1.

18 The first defendant is a company incorporated in 2006 in the British Virgin Islands. The first defendant's share capital is divided into 100 shares. In March 2007, the Bankrupt was allotted 58 of those 100 shares. The second defendant holds the remaining 42 shares. One of the transactions which the Trustees challenge in this action is the Bankrupt's transfer of his 58 shares in the first defendant to the second defendant.

19 The third defendant is a wholly owned subsidiary of the first defendant.

20 The second defendant is the sole authorised representative of the sole corporate director of the first defendant and also of the (different) sole corporate director of the third defendant.[13] For convenience, I will refer to her as a director of both corporate defendants. She gave evidence at trial, therefore, not just for herself but also for the two corporate defendants.

21 One of the issues in dispute in this action is whether, and if so for what periods, the Bankrupt was a director of the two corporate defendants. In my view, I need not make any findings of fact on this issue. That is because I am satisfied on the totality of the evidence adduced at trial, and despite any oral evidence from the Bankrupt or the second defendant to the contrary, that the Bankrupt has at all material times been a person in accordance with whose directions the second defendant (as the sole authorised representative of the sole corporate director of the two corporate defendants) was accustomed to act in relation to their affairs. In other words, I find that the Bankrupt was what is commonly called a shadow director of both the first and third defendants.

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[13] D2's AEIC at paras 3–4.

Three documents dated 28 February 2010

22 The starting point in analysing the claims and defences in this action are three documents. All three documents bear the typewritten date 28 February 2010. The first document is headed "Agreement for Securities Lending" ("SLA").[14] The second document is headed "Shareholder Agreement for Minority Protection" ("SAMP").[15] The third document is headed "Points of Agreement for Securities Lending" ("POA").[16]

23 I now describe the first two of these documents, before explaining how the third made its appearance in this action.

The SLA

24 The SLA is, on its face, a formal document. It is obviously drawn up by a lawyer or adapted by a layperson from a *pro forma* agreement drawn up by a lawyer. It comprises 12 pages with 19 numbered sections. It is signed by the Bankrupt and the second defendant in her capacity as a director of the first defendant. Both their signatures are witnessed by a business associate of the Bankrupt, one Aathar Ah Kong Andrew ("Mr Aathar"). Mr Aathar features prominently in the Bankrupt's business dealings.

25 The SLA contains three key provisions. First, the first defendant agrees to lend to the Bankrupt 401m HMC shares valued at $63m. Second, both the first defendant and the Bankrupt have the right to terminate the share loan and unwind it at any time. Third, if the first defendant terminates the loan, the

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14 D2's AEIC at p CYM-1 420.

15 Plaintiffs' Bundle of Documents Vol 2 ("2 PB") pp 755–760.

16 D2's AEIC at p CYM-1 417.

Bankrupt is obliged to transfer to the first defendant either 401m HMC shares or equivalent securities worth $63m within one business day of the first defendant's demand to that effect.

The Shareholder Agreement for Minority Protection

26 Like the SLA, the SAMP is, on its face, a formal document obviously drawn up by a lawyer or adapted by a lay person from a *pro forma* agreement drawn up by a lawyer. It comprises six pages with 13 numbered sections. It is signed by the Bankrupt and the second defendant in her personal capacity. Like the SLA, both their signatures are witnessed by Mr Aathar.

27 The SAMP contains three key provisions. First, it makes an express connection to the SLA by reciting that the Bankrupt and the first defendant were also entering into the SLA under which the first defendant would lend the Bankrupt 401m HMC shares worth $63m. Second, the SAMP gives the second defendant an option to purchase all 58 of the Bankrupt's shares in the first defendant for $1 if the first defendant terminates the share loan in accordance with the SLA and the Bankrupt breaches his obligation to transfer 401m HMC shares or equivalent securities worth $63m to the first defendant within one business day of a demand to that effect. Third, the second defendant is empowered to exercise her option by giving notice in writing to the Bankrupt setting a date for him to complete the sale and purchase of his 58 shares in the first defendant.

28 In addition, the Bankrupt and the defendants produced in discovery a number of notices and demands allegedly signed by the second defendant in her personal capacity or on behalf of the first defendant between 2011 and 2015 in connection with the first or second defendants' rights under the SLA and the

SAMP.[17] I describe these notices and demands in my summary of the defendants' defence at [35]–[43] below.

29 The Bankrupt disclosed the SLA, the SAMP and these notices and demands to the Trustees in 2017.

The SLA and the SAMP were created in 2016 and backdated

30 By particulars of pleadings supplied in July 2019, the second defendant admitted that: (a) the Bankrupt and she had created and signed the SLA and the SAMP only in September 2016, not February 2010; and (b) they had then falsely backdated the SLA and the SAMP to 28 February 2010.[18]

31 By her affidavit of evidence in chief filed in December 2019,[19] the second defendant admits that the SLA and the SAMP are null and void and devoid of legal effect (see [49] below).

32 In cross-examination at trial, the second defendant admitted that: (a) the Bankrupt and she had created and signed the notices and demands allegedly issued under the SLA and the SAMP (see [28] above and [35]–[43] below) only in September 2016; and (b) they had then falsely backdated these notices and demands to the dates which they bear between 2011 and 2015 or to the dates attributed to them in the defendants' joint defence.[20]

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17 Trustees' Closing Submissions dated 18 June 2020 at para 201.

18 D2's AEIC at para 40; Defendants' Particulars Served Pursuant to Request dated 17 June 2019 at para 1(1), Setting Down Bundle ("SDB") Tab 13, p 343.

19 D2's AEIC at para 40.

20 Certified Transcript, 11 February 2020, page 4 line 22 to 23 (2 PB 966 signed shortly after 7 September 2016); page 5 lines 11 to 12 (2 PB 969); page 5 lines 23 to 25 (4 PB 2074).

33 The Bankrupt therefore advanced a false narrative to the Trustees about the SLA, the SAMP and the notices and demands in 2017. The defendants adopted that false narrative in their defence in this action, knowing it to be false. That has obvious consequences for the Bankrupt's and the second defendant's credibility. I deal with that at [54]–[62] below.

The defendants' false narrative based on the SLA and the SAMP

34 I now summarise at [35]–[43] below the defendants' pleaded defence. The contents of these paragraphs describe the defendants' defence and do not constitute any findings on the truth of that defence.

35 In July 2009, the first defendant owned legally and beneficially at least 100m HMC shares. In July 2009, the first defendant lent 100m HMC shares to the Bankrupt.

36 In late 2009, the first defendant and the Bankrupt were negotiating the terms on which the first defendant would lend a further 301m HMC shares to the Bankrupt. The purpose of the loan was to facilitate the Bankrupt's fundraising efforts to launch his new business venture, which was later to become IHC.

37 These negotiations concluded in February 2010 with the Bankrupt and the first defendant signing the SLA and with the Bankrupt and the second defendant signing the SAMP. They did so as part of a single transaction in February 2010.

38 The SLA and the SAMP are genuine agreements. The six key points of both agreements (see [25] and [27]) above have binding contractual force on the Bankrupt, the first defendant and the second defendant.

39 The Bankrupt and the first defendant agreed that the 100m HMC shares which the first defendant had already lent to the Bankrupt in July 2009 would be treated as part of the 401m HMC shares which the first defendant had agreed to lend to the Bankrupt under the SLA. That left only a further 301m HMC shares for the first defendant to lend to the Bankrupt. The first defendant duly lent these 301m shares to the Bankrupt or to his order in eight tranches: one tranche in February 2010, one tranche in April 2010, one tranche in July 2010, one tranche in February 2011, two tranches in March 2011 and two tranches in June 2011. After lending these 401m shares to the Bankrupt, the first defendant was left holding zero HMC shares in June 2011.

40 By a letter dated 5 November 2011, the first defendant exercised its right under the SLA to terminate the loan of 401m HMC shares to the Bankrupt and demanded the return of the shares.[21] As a result, the Bankrupt was obliged to transfer to the first defendant 401m HMC shares or equivalent securities worth $63m within one business day.

41 The Bankrupt failed to perform this obligation. On 8 January 2012, the first defendant issued a notice of default to the Bankrupt, arising from his failure to fulfil his obligations under the SLA triggered by the first defendant's notice of demand dated 5 November 2011.

42 By a letter sent on or about 10 January 2012, the second defendant exercised her option under the SAMP and required the Bankrupt to transfer his 58 shares in the first defendant to the second defendant on 12 January 2012.[22]

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21 D2's AEIC at p CYM-1 445.

22 D2's AEIC at p CYM-1 446.

43 On or about 4 November 2013, the Bankrupt transferred his 58 shares in the first defendant to the second defendant pursuant to his obligations under the SAMP.[23] This transfer had no effect on the Bankrupt's obligation under the SLA to transfer 401m HMC shares or equivalent securities worth $63m to the first defendant. The Bankrupt remains subject to that obligation to this day.

44 On any reasonable reading of the defence, it conveys to the reader that each of these notices and demands were prepared, signed, issued and received on or about the dates attributed to them in the defence.

The defendants admit the false narrative

45 As I have mentioned, the Bankrupt and the defendants now admit that: (a) the Bankrupt and the second defendant created the SLA, the SAMP and the notices and demands in September 2016; and (b) they then falsely backdated these documents by up to six years.

46 The defendants nevertheless continue to claim that the Bankrupt, the first defendant and the second defendant did enter into a written agreement setting out the six key terms which appear on the face of the SLA and the SAMP (see [25] and [27] above) in February 2010. That written agreement is the POA. The POA is the third document dated 28 February 2010 which the defendants have produced.

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[23] D2's AEIC at p CYM-1 447.

The POA

47 The defendants disclosed the POA for the first time in April 2019.[24] The POA is like the SLA and the SAMP in three respects. First, it bears the date 28 February 2010. Second, it bears the signature of the Bankrupt and the second defendant and is impressed with the first defendant's company stamp. Third, it contains language which reflects the substance of all six of the key terms of the SLA and the SAMP (see [25] and [27] above).

48 The POA is unlike the SLA and the SAMP in four respects. First, the POA is a single document comprising only six numbered paragraphs set out over two-thirds of a single page. Second, the POA does not bear the hallmarks of having been drawn up or adapted from an agreement drawn up by a lawyer. It is recorded in the language of a layperson. Thus, the six key points of the SLA and the SAMP are expressed in the POA in very different language from that found in the SLA and the SAMP. Third, the signatures of the Bankrupt and the second defendant on the POA are not witnessed. Finally, the second defendant signed the POA only once, with no designation of the capacity in which she did so.

49 The defendants' case now rests on the POA and not the SLA or the SAMP. In her affidavit, she explains that it was the POA – not the SLA and the SAMP – that was signed at the conclusion of the negotiations for the share loan (see [36] above). Her evidence now is that: (a) the Bankrupt and she signed the POA in February 2010 to record the terms on which the first defendant would lend the 401m shares to the Bankrupt while protecting her interest as a minority shareholder in the first defendant; and (b) that she and the Bankrupt created the

[24] P3's AEIC at para 38(3).

SLA and the SAMP in September 2016 as a "long form agreement" to "regularize" the POA which they had already signed on or about 28 February 2010.

50 This is how the second defendant puts it in her affidavit of evidence in chief (internal references omitted):

> 40. [The Bankrupt] suggested that there should be something in writing to protect my position as a shareholder of [the first defendant]. The [POA] was drawn up and executed on 28 February 2010 .... On or about 7 September 2016, a "long form" agreement ... was prepared and signed .... The LFA was dated 28 February 2010 to "regularize" what [the Bankrupt] and I had already accomplished on 28 February 2010 the [POA] [*sic*]. I do not wish to rely on the LFA in the Defence. l accept that the LFA executed on 7 September 2016 is null and void and of no effect.

51 This paragraph refers only to the "long form agreement" being null and void and devoid of legal effect. That could be taken as a reference only to the SLA and not to the SAMP. Indeed, the defendants' closing written submissions proceed on that basis. But the second defendant accepted in cross-examination that the SAMP is also null and void and devoid of legal effect, and that the defendants' case now rests principally on the POA.[25] This reliance on the POA is consistent with the defendants' presentation of their case in their closing submissions after trial. In any event, if a finding is required, I find that the Bankrupt and the second defendant created the SAMP together with the SLA in September 2016 and at that time falsely dated it 28 February 2010.

52 In April 2019, together with the POA, the defendants disclosed a second set of notices and demands purportedly sent between 2011 and 2015 pursuant

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[25] Certified Transcript, 17 February 2020, page 14 lines 6 to 9; page 15 lines 3 to 9; Certified Transcript, 14 February 2020, page 98 lines 9 to 16; page 99 lines 2 to 13.

to the POA. The defendants admitted only at trial that the set of notices and demands disclosed before April 2019 was created in September 2016 and falsely backdated. But the defendants maintain that the set disclosed after April 2019 was created, signed, issued and received on or about the dates between 2011 and 2015 attributed to them in the defence.

53 As I have mentioned, the case which now emerges from the second defendant's evidence and the defendants' closing written submissions is not the case which the defendants advance through their joint defence. The defence remains unamended, and continues to plead reliance on the SLA, the SAMP and the notices and demands allegedly is issued under them.

Consequences on the Bankrupt's and the second defendant's credibility

54 This false narrative which the Bankrupt presented to the Trustees and which the defendants adopted in their defence carries very obvious and very serious consequences for the credibility of both the Bankrupt and the second defendant.

55 Presenting the false narrative was not simply a momentary lapse of judgment. The deception was broad in scope and in time. It involved the Bankrupt and the second defendant creating, signing and falsely dating two agreements. It involved the Bankrupt and the second defendant creating and signing several falsely dated notices purporting to have been issued over a period of four years.

56 The Bankrupt maintained the false narrative for almost two years, from August 2017 to July 2019. In August 2017, the Trustees' solicitors asked the Bankrupt to produce documents evidencing the first defendant's loan of 401m

HMC shares to the Bankrupt.[26] In response, the Bankrupt sent a copy of the SLA to the Trustees.[27] At an interview in September 2017, the Bankrupt told the Trustees' solicitors that the SLA and the SAMP were signed as a single document at the same time in Singapore in February 2010.[28]

57 The Bankrupt suggests that he was, in this interview, referring to the POA and not to the SLA and the SAMP. I reject this suggestion. The first defendant referred the Trustees' solicitors in this interview to specific clauses of the SLA, not found in the POA, to support his false narrative.[29] In cross-examination, the Bankrupt finally accepted that it was the SLA and not the POA he referred to at this interview.[30] Further, in October 2018, in response to a specific query from the Trustees' solicitors, the Bankrupt informed the Trustees that, although he could not remember when the SLA and the SAMP were signed, it would have been on or about 28 February 2010. The first time that the Bankrupt referred to the POA in any interview with the Trustees' solicitors was in December 2019.[31]

58 The defendants maintained the false narrative for over a year, from June 2018, when they adopted it by pleading it in their defence, until July 2019, when

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26 Plaintiffs' Bundle of Documents Vol 11 ("11 PB") p 6548 at 6550 para 4(3)(a)(ii).

27 11 PB pp 6552–6553; Certified Transcript, 7 February 2020, page 40 line 4 to page 41 line 5.

28 Plaintiffs' 2nd Supplemental Bundle of Documents ("2 PSB") p 227 at 284 (page 58 of transcript); Bundle of Affidavits of Evidence-in-Chief ("BA") Tab 1, Vol 2 at pp 6 and 7; P3's AEIC, Exhibit VG-84, p 1220 at 1225–1226; Plaintiffs' Bundle of Documents Vol 9 ("9 PB") p 4933 at 4938–4939.

29 2 PB p 754; BA Tab 1, Vol 2, P3's AEIC, Exhibit VG-84, p 1220 at 1224; 2 PSB p 227 at 276 (page 50 of transcript); Plaintiffs' Bundle of Documents Vol 8 p 4919 at 4923.

30 Certified Transcript, 7 February 2020, page 40 lines 12 to 18, page 41 lines 1 to 6.

31 Certified Transcript, 7 February 2020, page 41 lines 6 to 14.

they acknowledged the false backdating.[32] Even then, they did abandon the false narrative out of genuine remorse or a genuine desire to present the truth. They did so only because the Trustees sought particulars of the defendants' pleading and were about to reveal their deception by commissioning a forensic examination of the SLA and the SAMP. I find that the defendants had every intention of maintaining the false narrative until judgment in this action. They abandoned it only because they realised that the Trustees' forensic examination of the SLA and the SAMP was about to reveal the false narrative. More egregiously, the Bankrupt and the defendants did not disclose even then that the notices and demands allegedly issued under the SLA and the SAMP were also falsely backdated.[33]

59 I have no hesitation in finding that the Bankrupt and the second defendant hatched a deliberate plan in September 2016, a time when the Bankrupt had already been in financial distress for a year, to create and falsely date documents to serve as evidence supporting a false narrative. Their intention was (in anticipation of bankruptcy) to deceive the Official Receiver or a trustee in bankruptcy and (in anticipation of litigation) to deceive a court. It bears reiterating that the Bankrupt was adjudicated bankrupt on his own application and not that of a creditor.

60 The defendants' deception is, in one sense, a continuing deception. They made false statements of fact in their defence knowing them to be false. Despite admitting that these statements are false, the defendants have never applied to amend their defence to withdraw the statements and to rest their defence on the

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32 Defendants' Particulars Served Pursuant to Request dated 17 June 2019 at para 1(1), SDB Tab 13, p 343.

33 Certified Transcript, 11 February 2020, page 4 lines 22 to 23; page 5 lines 11 to 12; page 5 lines 23 to 25.

truth. Procedurally, the false statements in the defence continue to form the backbone of the only formal basis on which the defendants ask me to exonerate them from liability in this action.

61 Further, because of the scope and audacity of this deception, I consider both the Bankrupt's evidence and the second defendant's evidence to be highly unsatisfactory, not just on the SLA, the SAMP, the POA and the notices and demands allegedly issued under them, but on every issue which I have to decide in this action. I therefore treat their oral evidence on every contested issue of fact with the utmost caution and the greatest scepticism, save only to the extent that their oral evidence amounts to an admission within the meaning of s 17 read with s 19 of the Evidence Act (Cap 97, 1997 Rev Ed) or is corroborated by contemporaneous and independent documentary evidence.

62 None of these findings are intended to cast any aspersions on the defendants' solicitors who drafted the defence or who were the medium by which the defendants made their disclosure of documents. The defendants' solicitors were no doubt as much a victim of the Bankrupt's and the defendants' deception as the Trustees and the court.

The defendants' current position

63 The defendants' position, taken in the second defendant's evidence and in their closing written submissions, is that the SLA and the SAMP are null and void and devoid of legal effect. They therefore expressly disavow any reliance in this action on those documents, or on the notices and demands allegedly issued under them.

64 The defendants do, however, now rely on the POA and the notices and demands allegedly issued under it on every issue of fact for which their pleaded defence relies on the SLA, the SAMP and the notices and demands allegedly issued under them.

65 The Trustees submit that the defendants' case should stand or fall on the case pleaded in their defence, and not on their case as advanced through the Bankrupt's and the second defendant's evidence at trial and closing written submissions. They submit that the Trustees should succeed in this action *in limine* on a point of pleading alone: (a) because the defence which the defendants now advance through the evidence of the Bankrupt and the second defendant and in their closing written submissions is a fundamental and impermissible departure from their pleaded defence; (b) because the defendants now admit that the two agreements which form the centrepiece of their defence are null and void and devoid of legal effect; and (c) because the defence rests on statements of fact which the defendants pleaded knowing that they were false and which the defendants maintain as their pleaded case despite admitting they are false.

66 The Trustees, quite rightly, do not press this point strongly. I prefer not to decide this case on a point of pleading. That remains my view despite the very serious deception and abuse of process which the defendants practised on the court by filing and leaving unamended a defence they know to be false.

67 As an indulgence to the defendants, I will analyse the Trustees' claims and the defendants' defences on the merits. I do so on the assumption that: (a) the defendants put forward the POA as a truly dated document recording a genuine agreement reached between the plaintiff, the first defendant and the second defendant in February 2010; (b) the defendants' defence now relies on

the POA on every issue of fact for which their pleaded defence relies on the SLA and the SAMP; and (c) the defendants' defence now relies on the notices and demands allegedly issued under the POA on every issue of fact for which their pleaded defence relies on the notices and demands allegedly issued under the SLA and the SAMP.

68 I now turn to consider whether the POA is a truly-dated agreement.

My findings on the POA

69 I find that the POA, like the SLA and the SAMP, is a falsely backdated agreement. I come to that conclusion for five reasons.

70 First, given the Bankrupt's and the second defendant's admitted propensity for creating and falsely backdating self-serving documents, I accord only the slightest weight not just to their oral evidence but also to any document emanating from them. On the issue of whether the POA was created and signed in February 2010, they have every incentive to lie. One obvious incentive is simply to avoid liability on the merits of the plaintiff's case. A more subtle incentive is that, facing the exposure of their deception practiced through the SLA and the SAMP, they had an incentive to minimise the scope of the deception by maintaining that the substance of their case is true and it is only through the documents tendered in support of their case that they sought to deceive the Trustees and the court.

71 Second, the defendants produced the POA and the notices and demands allegedly issued under it for the first time in April 2019. The Bankrupt did not produce these documents to the Trustees when they made a specific request for this class of documents in 2017. The defendants made no reference to these

documents in their defence, which was filed in January 2018 and amended in June 2018. The defendants did not disclose these documents in their initial round of disclosure in this action in February 2019. All of these failures cause especial concern given the Bankrupt's and the second defendant's admitted propensity for creating and falsely backdating self-serving documents. These omissions strongly suggest to me that the POA and the notices and demands allegedly issued under it are a recent fabrication and not truly dated documents.

72 Third, even if I accept the defendants' case that the first defendant lent 100m out of the 401m HMC shares to the Bankrupt in July 2009,[34] there is no evidence that the first defendant had any basis in February 2010 to expect that it would acquire a further 301m HMC shares with which to discharge its obligation to lend a total of 401m HMC shares to the Bankrupt.

73 Indeed, the available objective evidence militates against any such finding. The first point I make is that I have thus far rounded off the number of HMC shares which the first defendant undertook a contractual obligation to lend to the Bankrupt under the POA. The POA states that the first defendant's contractual obligation is to lend the exact figure of 401,359,748 HMC shares to the Bankrupt. As I have mentioned, it is the defendant's case that when the first defendant lent the last tranche of HMC shares to the Bankrupt in June 2011, that left the first defendant with zero HMC shares. The first defendant's obligation to the Bankrupt under the POA was therefore fully discharged in June 2011 with the first defendant having lent the Bankrupt a total of exactly 401,359,748 HMC shares between July 2009 and June 2011.

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34 Defence (Amendment No. 2) ("Defence") at para 4.1.8, SDB Tab 10, p 280 at p 287.

74 This means that the Bankrupt, the first defendant and the second defendant somehow, in February 2010, foresaw that exactly 301,359,748 more HMC shares would be transferred, allotted, declared by way of scrip dividend or vested by way of a rights issue or bonus shares in the first defendant between February 2010 and June 2011, not one share more or one share less. That is highly improbable. It is more likely to me that this figure of 401,359,748 was inserted into a falsely dated POA after it was calculated in June 2011.

75 I also reject the defendants' case that the first defendant in fact lent 401m shares to the Bankrupt in July 2009. It is true that the first defendant transferred 100m HMC shares to the Bankrupt in July 2009. But HMC's substantial shareholder disclosure records that the first defendant was transferring these 100m HMC shares to the Bankrupt for no consideration because he already owned the shares beneficially. The contemporaneous documents show that the first defendant was a bare trustee of these 100m HMC shares for the Bankrupt, not a lender of these 100m HMC shares to the Bankrupt.[35] This contradicts the defendants' explanation that the transfer was a loan. I reject the Bankrupt's explanation.

76 Further, this explanation finds no support in the terms of the SLA or the POA. Neither record that the first defendant had already fulfilled in part its obligation to lend 401m HMC shares to the Bankrupt. On the face of these documents, the first defendant would be in breach if its obligations if lent the Bankrupt only 301m HMC shares in or after February 2010.

77 The defendants' submission in response is that the terms of HMC's substantial shareholder disclosure in July 2009 was mistaken. The Bankrupt

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35 BA Tab 1, Vol 2, P3's AEIC, Exhibit VG-83 p 1216 at 1218.

claims that another director of HMC simply cut and pasted into this disclosure the text of the other director's own and unrelated disclosure from an earlier transfer.[36] I reject this explanation. There is no contemporaneous documentary evidence or even the oral evidence of any officer of HMC to support the Bankrupt's oral evidence. It is supported only by the Bankrupt's own self-serving assertion. Further, the earlier disclosure is not, in fact, identical to HMC's disclosure of the first defendant's transfer of 100m shares. It is materially different in that the disclosure of the Bankrupt's transfer expressly says that the transfer is for zero consideration.[37]

78 Fourth, the Bankrupt and the defendants were unable to provide any satisfactory explanation as to why, if the POA was indeed created and executed in February 2010, it was necessary for the Bankrupt and the second defendant to create the SLA and the SAMP in September 2016 to "regularize" it. On the defendants' case, the POA captured in an enforceable contract all six of the key terms of the supposed agreement which the parties to it reached in February 2010.

79 The explanation offered by the Bankrupt was as follows:[38]

> Q. … You have agreed to it earlier, but just for the record, again, you agree with [the second defendant] that the [SLA] was dated on 28 February 2010 to regularise what had already been accomplished on 28 February 2010?
>
> A. Yes. Can I elaborate?
>
> Q. Go ahead.
>
> A. I think when [the first defendant] took on to get a long form agreement, it was intended to be more

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36 BA Tab 4, Vol 5, the Bankrupt's AEIC at p 25 paras 64–65.

37 Plaintiffs' Bundle of Documents Vol 1 ("1 PB") p 529.

38 Certified Transcript, 7 February 2020, page 79, lines 10 to 21.

> comprehensive, and I understand that [the first defendant] has now been advised by its lawyers that this document is less suitable than the [POA], and therefore it does not fulfil what was intended by [the first defendant] to achieve.

80 I do not accept that either the first defendant, the second defendant or the Bankrupt could ever have been advised by any lawyer to create more than six years after the fact and falsely backdate a more "suitable" and "comprehensive" agreement which simply restated in more formal language the key commercial terms of an earlier genuine agreement in the form of the POA which was entered into in February 2010 and truly dated. The conduct of the Bankrupt and the defendants in drawing up the SLA and the SAMP in September 2016 suggests to me very strongly that the POA was not in existence when the SLA and the SAMP were created.

81 Finally, as the Trustees point out, the POA and all of the notices and demands allegedly issued under it which contain the first defendant's company stamp (being four of the seven documents) show the first defendant's name entirely in uppercase. These four documents were, on the defendants' current case, created, signed and stamped on four different dates between 2010 and 2015. There is evidence that the first defendant had another company stamp in use during this period in which the first defendant's name was spelled with initial capital letters only. The fact that four documents said to have been created at different times over a span of five years use the same version of the first defendant's two (or possibly more) company stamps also suggests that these four documents were, in fact, created, signed and stamped on a single occasion. That, in turn, suggests that all seven documents were created on one occasion and falsely backdated.

82 I therefore reject the Bankrupt's and the second defendant's oral evidence that the POA was created and signed in February 2010. Further, they have put in evidence only a copy of the POA. They maintain that the original POA is no longer available. A copy cannot, obviously be submitted for any meaningful forensic analysis. Their oral evidence therefore cannot be corroborated or contradicted by a forensic analysis of the POA. There is therefore, quite conveniently for the Bankrupt and the second defendant, no independent means by which to verify their oral evidence.

83 The findings I have made so far mean that the POA is, like the SLA and the SAMP, a document which is null and void and devoid of legal effect.

84 In any event, even if the POA was in truth created and executed in February 2010, I am satisfied on the balance of probabilities that it was a sham agreement. I find that the Bankrupt, the first defendant and the second defendant had no intention whatsoever that the POA should create the legal rights and obligations which it gives the appearance of creating (*Belfield International (Hong Kong) Ltd v Sheagar s/o T M Veloo* [2014] 1 SLR 24 ("*Belfield*") at [33]); *Zulaikha Bee bte Mohideen Abdul Kadir v Quek Chek Khiang and others* [2014] 4 SLR 532 ("*Zulaikha*") at [58]).

85 It is true that the burden of proving that a document is a sham rests on the party alleging it to be a sham. It is also true that there is a strong presumption that parties intend to be bound by the provisions of the agreements they enter into (*Belfield* at [34]; *Zulaikha* at [58]). But it remains the case that a party who alleges a document to be a sham need only discharge that burden on the balance of probabilities. Given the peculiar features of this case and in particular my findings about the Bankrupt's and the second defendant's dishonesty, I am satisfied that the Trustees have discharged that burden.

86 I am satisfied on the balance of probabilities that at all material times the Bankrupt used the second defendant as well as the companies which he or the second defendant owned or controlled as his nominees in connection with his business affairs, and more particularly in connection with his substantial shareholding in HMC and IHC. The companies which the Bankrupt used as his nominees include but are not limited to the first defendant and the third defendant.

87 By the term "nominee", I do not mean that the Bankrupt used the defendants and other nominees to hold assets on bare trust for him. Who holds the beneficial interest in any assets as between the Bankrupt and the nominee remains a separate question of law to be determined on the specific facts relating to a specific asset. By the term "nominee", I mean simply that the Bankrupt used the defendants and other legal persons to hold assets subject to his direction, with the intention and the expectation that the nominee would comply with his directions to transfer these assets to himself or to his order without question; and even though his nominees were under no legal obligation to do so and even if they held full title to the assets at law and in equity. And I am also satisfied that the defendants and his other nominees did in fact comply with the Bankrupt's directions to this effect without question.

88 Therefore, while I accept that the first defendant transferred 401m HMC shares to the Bankrupt or to his order between July 2009 and June 2011, I do not accept that the first defendant did so pursuant to any legal obligation, whether under the POA or any other agreement. Further, while I accept that the first defendant did not intend these 401m HMC shares to be a gift to the Bankrupt, I find that the first defendant intended the Bankrupt to have full title to these HMC shares at law and in equity, so that the Bankrupt could deal with

them as though they were his own absolutely, and be subject to no legal obligation to return the HMC shares or to account for their value to the first defendant. The first defendant transferred the 401m HMC shares to the Bankrupt purely on the strength of the first defendant's faith in the Bankrupt that he would return the shares or account to the first defendant for the value of the shares at some time and in some way, despite having no legal obligation to do so. I do not accept that the Bankrupt ever intended to give the second defendant an option to acquire his shares in the first defendant if he failed to return to the first defendant 401m HMC shares or equivalent securities worth $63m.

89 I find further that the first defendant transferred these 401m HMC shares to the Bankrupt at the direction of the Bankrupt, where necessary exercised through the medium of the second defendant. In other words, the Bankrupt directed all of these transfers totalling 401m HMC shares, as well as the transactions which form the subject matter of this action, both for the transferor and the transferee.

90 On those findings, even if the Bankrupt and the defendants are telling the truth when they say that they created and signed the POA in February 2010, the POA was and is a sham. The Bankrupt, the first defendant and the second defendant intended it to be devoid of legal effect and to be nothing more than a pretence to mislead third parties (*iTronic Holdings Pte Ltd v Tan Swee Leon and another suit* [2016] 3 SLR 663 ("*iTronic*") at [63]). Even if truly-dated, it is therefore devoid of legal effect.

The Bankrupt's solvency at the material times

91 The transactions which the Trustees challenge in this action took place during two broad periods of time in 2016 and 2017. Although I will explain the significance of these periods in the course of my analysis, it suffices for now to say that the two broad periods are: (a) between February and May 2016; and (b) February 2017, shortly before the Bankrupt was adjudicated bankrupt.[39]

92 The Trustees' case is that the bankrupt was insolvent in both of these broad periods. The relevant test of insolvency which I must apply to ascertain the Bankrupt's solvency or insolvency is found in s 100(4) of the Act:

> (4) … [A]n individual shall be insolvent if —
>
> (a) he is unable to pay his debts as they fall due; or
>
> (b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities.

93 In summary, I find that the Bankrupt was insolvent during both of these periods. Indeed, I am prepared to go so far as to say that he was insolvent from the time that IHC share price collapsed in September 2015 onwards. Before setting out the reasons for these findings, I make some preliminary findings on the reliability of the evidence of solvency which the parties have presented.

Evidence of solvency

94 There are only three categories of evidence available as to the Bankrupt's solvency during these three periods: (a) the evidence of the Bankrupt, both in his affidavit of evidence in chief and in cross-examination; (b) the evidence of the second defendant, both in her affidavit of evidence in

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[39] Trustees' Closing Submissions dated 18 June 2020 at para 159.

chief and in cross-examination; and (c) the contemporaneous and independent evidence which the Trustees have gathered on the matters in issue in the course of administering the Bankrupt's estate.

95 For reasons which I have already set out, I approach the evidence of both the Bankrupt and the second defendant with the utmost caution. I therefore place the greatest weight on the third of these three categories, and on the inferences to be drawn from the inherent probabilities arising from this category of evidence and from the undisputed and indisputable facts and circumstances surrounding this category of evidence.

96 I now set out some additional reasons for treating the Bankrupt's and the second defendant's evidence of the Bankrupt's solvency during these two periods with the utmost caution.

The Bankrupt's evidence

97 For two reasons, I treat the Bankrupt's evidence as to his solvency during these periods with the utmost caution.

98 First, the Bankrupt drew up his affidavit of evidence in chief and gave his evidence in cross-examination in a self-serving and defensive manner. Apart from some introductory material about his commercial background, his affidavit of evidence in chief is confined to denying any wrongdoing on his part, denying selected elements of the Trustees' case on insolvency as well as on the substance of the impugned transactions and to making minor and ultimately immaterial complaints about the conduct of the Trustees and their solicitors in interviewing him and in interpreting his answers in those interviews.

99 It is obvious from the content of his affidavit of evidence in chief and the manner in which he answered questions in cross-examination that he was determined merely to respond to the Trustees' case rather than to be forthcoming. In other words, he was content to limit his evidence to finding fault with the Trustees' case and intent on not revealing any information about his assets or liabilities which the Trustees did not already know. He gave his evidence to advance his and the second defendant's interests, not to assist the court to ascertain the truth. It is particularly telling that the Bankrupt does not elaborate on his liabilities during these periods. Section 100(4)(*b*) requires me to take into account the Bankrupt's contingent and prospective liabilities in ascertaining whether he was insolvent within the meaning of s 100(4)(*b*) of the Act.

100 Second, whether the Bankrupt was or was not solvent between 2013 and 2017 is a matter especially within the Bankrupt's knowledge. It is true that the Bankrupt is not a party to this action. Section 108 of the Evidence Act cannot, therefore, operate to cast on to him or on to the defendants the burden of proving his solvency. However, there is much force in the Trustees' point that the Bankrupt could quite easily have included in his affidavit of evidence in chief a rough balance sheet setting out his assets and liabilities between 2013 and 2017, all from his personal knowledge and supported by the contemporaneous and independent documentary evidence which he almost certainly must have.[40] He is, after all, obliged under s 81 of the Act to submit his statement of affairs and under s 82 of the Act to submit accounts.

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[40] Certified Transcript, 17 February 2020, page 44 lines 4 to 12.

101 It is telling that the Bankrupt did not deign to provide any such accounts or balance sheets. Instead, he chose either to rely on general assertions about his solvency or to quibble with elements of the Trustees' case on solvency.

102 I therefore consider the Bankrupt's oral evidence of only the slightest assistance in ascertaining whether he was solvent during these two periods.

The second defendant's evidence

103 The second defendant's evidence of the Bankrupt's solvency is even more unsatisfactory than the Bankrupt's. After introducing herself, the second defendant begins her affidavit of evidence in chief by saying this:

> 2. I have personal knowledge of the matters stated in this affidavit except where I say otherwise. As to matters which are not of my personal knowledge, I depose to them on the basis of the information which I believe to be true and which are contained in the records of the 1st Defendant which I have kept as a director of the 1st Defendant from I February 2006 until 18 August 2017, and from conversations with my husband Fan Kow Hin, the Bankrupt in B.479/2017. Where statements in this affidavit consist of propositions of law, these are based on advice given by the Defendants' solicitors, Ang & Partners, which l believe are correct.

104 A paragraph like this has no place whatsoever in an affidavit of evidence in chief. Under O 38 r 2(1) of the Rules of Court (2014 Rev Ed), an affidavit of evidence in chief stands at trial in the place of a witness's oral evidence in chief. O 38 r 2(5) provides that nothing in O 38 r 2 makes any evidence admissible at trial which would be inadmissible if given orally. Section s 62(1) of the Evidence Act provides that evidence at trial on issues of fact must be direct evidence. In order for the oral evidence of a witness of fact to be admissible at trial, it must be evidence of a fact which the witness perceived through her own physical senses (whether sight, hearing or any other sense) or in any other manner. That is what is meant by the shorthand term "personal knowledge".

Section 62(1) of the Evidence Act is the hearsay rule stated in the Evidence Act's customary inclusionary form rather than in the common law's customary exclusionary form.

105 The direct evidence rule from the Evidence Act is reflected not only in the provisions of the Rules of Court which deal with affidavits of evidence in chief, but also in the provisions of the Rules of Court which deal with affidavits generally. Under O 41 r 5(1) of the Rules of Court, an affidavit is permitted to contain only those facts which the deponent is able to prove of his own knowledge. This is subject only to the exceptions set out in O 41 r 5 itself. One of those exceptions is found in O 41 r 5(2) of the Rules of Court. That subrule permits an affidavit to contain statements of fact which the deponent makes on information and belief. But that exception applies only to an affidavit sworn or affirmed for use in interlocutory applications. An affidavit of evidence in chief is, by definition, sworn or affirmed for use at trial (see *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2014] 1 SLR 814 at [51]). Order 41 r 5(2) cannot apply to an affidavit of evidence in chief, which is governed by the general rule in O 41 r 5(1), O 38 r 2 of the Rules of Court and in s 62(1) of the Evidence Act.

106 The mere fact that the second defendant's statements of fact about the Bankrupt's solvency during these periods are based on her conversations with the Bankrupt cannot therefore render them admissible at trial. Furthermore, the second defendant has not applied under O 38 r 3(2)(*a*) for leave to give evidence on information and belief about the Bankrupt's solvency during these periods. Nor has she even attempted to comply with the notice procedure under O 38 r 4. That procedure is a condition precedent to admitting her evidence of the

Bankrupt's solvency during these periods under any of the exceptions to s 62(1) of the Evidence Act which are set out in s 32(1) of the Evidence Act.

107 Even more egregiously, there is no evidential or procedural scope whatsoever for a witness of fact, such as the second defendant, to give evidence of propositions of law in an affidavit of evidence in chief, whether upon information and belief or otherwise (see the concluding sentence in paragraph 2 of her affidavit of evidence in chief, set out [103] above).

108 The defendant's evidence about the Bankrupt's solvency during these periods comprises statements of fact about his assets and liabilities at various times. These statements include two tables in her affidavit of evidence in chief.[41] As the Trustees point out,[42] she has no personal knowledge of the Bankrupt's solvency at any time. She admitted this herself in cross-examination.[43] Her evidence that the Bankrupt was solvent at any given time is not direct evidence on that issue within the meaning of s 62(1) of the Evidence Act. She has not brought that evidence within any of the exceptions to that rule of admissibility. The second defendant's evidence is wholly inadmissible to prove that the Bankrupt was solvent at any time.

109 In any event, even if I am wrong on this, or even if the second defendant had secured an order under O 38 r 3(2)(*a*) or complied with the notice procedure under O 38 r 4 and brought her evidence on this issue within an available exception to s 62(1) of the Evidence Act, I would have attached only the slightest weight to her evidence. I say that for three reasons. First, as I have

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41 D2's AEIC at paras 61 and 65.

42 Trustees' Closing Submissions dated 18 June 2020 at para 154.

43 Certified Transcript, 17 February 2020, page 49 line 21 to page 50 line 7; page 45 lines 15 to 24; page 47 lines 2 to 9.

already stated and as the second defendant herself accepts, she has no personal knowledge of these facts. Second, the best evidence of the Bankrupt's solvency comes from the Bankrupt himself. The Trustees have made the Bankrupt's evidence available to me, albeit under subpoena. The second defendant herself concedes that her evidence of the Bankrupt's debts, assets and liabilities originates from the Bankrupt himself. Given that I have the Bankrupt's evidence on these matters before me (for whatever it may be worth), there is no reason for me to attach any weight to the second defendant's second-hand evidence of the Bankrupt's evidence. Third, as the Trustees point out,[44] the Bankrupt himself says that the second defendant's evidence about his solvency is wrong in certain material respects. His evidence is that the tables in the second defendant's affidavit of evidence in chief include assets which *did not* belong to him and exclude other assets which *did* belong to him.[45] He also expressly disavowed aspects of the second defendant's computation of his solvency as found in her affidavit of evidence in chief.[46]

110 In any event, as with the Bankrupt, my most important reason for treating the second defendant's evidence with utmost caution is because of her admitted and knowing participation in a deception practised on the Trustees and the court.

111 In summary, I hold that the second defendant's evidence of the Bankrupt's solvency during these three periods is inadmissible. Even if, contrary to my holding, it is admissible, I would treat it with the utmost caution.

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44 Trustees' Closing Submissions dated 18 June 2020 at para 155.

45 Certified Transcript, 11 February 2020, page 112 lines 1 to 6; page 112 line 24 to page 113 line 2; page 115 lines 9 to 17; Certified Transcript, 12 February 2020, page 65 lines 10 to 13.

46 Certified Transcript, 12 February 2020, page 33 lines 10 to 16.

The contemporaneous and independent evidence

112 Given my findings on the quality of the Bankrupt's and the second defendant's evidence of the Bankrupt's solvency, I have no alternative but to place the greatest weight on the contemporaneous and independent documentary evidence and on the inherent probabilities arising from them.

113 Having considered this evidence, I am satisfied that the Bankrupt was insolvent during both of these relevant periods and, indeed, was insolvent from September 2015 onwards.

February and May 2016

114 The first relevant period runs from February to May 2016. The Bankrupt and the defendants submit that the Bankrupt was solvent at this time. I reject this submission.

The Bankrupt was insolvent within the meaning of s 100(4)(a) of the Act

115 I find that the Bankrupt was insolvent within the meaning of s 100(4)(*a*) of the Act in and after September 2015. The evidence shows that he undertook an obligation in July 2013 under a Deed of Undertaking to guarantee that the counterparty to the deed would receive certain minimum proceeds upon selling certain shares (see *The Enterprise Fund II Limited v Jong Hee Sen* [2020] 3 SLR 419 ("*The Enterprise Fund II*") at [11], [13] and [24]). A sum of just under $12m fell due in April 2014 under the terms of the deed. The Bankrupt accepts that he was jointly and severally liable for this sum and was unable to pay it to the

creditor.[47] As a result, between April 2014 and February 2015, he met the creditor eight times to ask for more time to make payment (see *The Enterprise Fund II* at [92] and [98]). The Bankrupt had still not performed this obligation as at September 2015.[48]

116 The Bankrupt failed to pay this debt when it fell due. I draw the inference that that is because he was unable to pay it when it fell due or indeed at any time thereafter. His financial position deteriorated substantially in September 2015, when IHC's share price collapsed by 70%. That suffices for a finding that the Bankrupt was insolvent in and after September 2015 within the meaning of s 100(4)(*a*) of the Act. That covers the period in question: February to May 2016.

The Bankrupt was insolvent within the meaning of s 100(4)(b) of the Act

117 As for s 100(4)(*b*) of the Act, the best evidence available of the Bankrupt's assets and liabilities between February and May 2016 is a table of his assets and liabilities drawn up as at September 2015 in the second defendant's affidavit of evidence in chief. I have already explained that this evidence is inadmissible through the second defendant. Further, the Bankrupt did not adopt this table in its entirety.

118 Nevertheless, even if this evidence was admissible, I accept the Trustees' submission that the value of the Bankrupt's assets was, in September 2015 and at least up to February to May 2016, less than the value of his

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47 BA Tab 5, Vol 6, Third Plaintiff's 2nd Affidavit of Evidence-in-Chief filed on 31 January 2020 ("P3's 2nd AEIC") at p 17, para 21; Certified Transcript, 12 February 2020, page 35 lines 5 to 6; page 35 lines 14 to 19; page 36 lines 1 to 3.

48 Certified Transcript, 12 February 2020, page 36 lines 1 to 3; page 37 line 13 to page 38 line 9.

liabilities, taking into account his contingent and prospective liabilities. The Bankrupt's and the defendants' submission to the contrary overstate his assets and understate his liabilities.

119 The Bankrupt and the defendants claim that the Bankrupt owned 402m IHC shares worth $35.4m.[49] The Bankrupt attributes to himself as at September 2015 the value of 66.9m IHC shares which were owned by the first defendant. But at this time, the Bankrupt had a beneficial interest only in 9m IHC shares.[50] Any IHC shares beyond that is merely a deemed interest, not a beneficial interest.

120 The concept of a deemed interest is one established in the law relating to the regulations of securities including the regulation of takeovers and mergers. It has nothing to do with the law of property. There is no legal basis on which to attribute as an asset on his personal balance sheet the value of anything beyond the 9m IHC shares which the Bankrupt actually owned.

121 The Bankrupt and the defendants claim that the Bankrupt owned 138.2m HMC shares worth $3.9m.[51] But, as the Trustees point out, the Bankrupt was unable to state unequivocally that he owned these shares. Indeed, he admitted that he may have borrowed these shares from the first defendant. If that is true, his ownership of the shares would be entirely offset by an equivalent liability to

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49 D2's AEIC at para 65.

50 Certified Transcript, 11 February 2020, page 112 lines 1 to 6; page 112 line 24 to page 113 line 2; BA Tab 2, Vol 5, D2's AEIC pp CYM-1 474–475, also at Plaintiffs' Bundle of Documents Vol 4 ("4 PB") p 1988 at 1991–1992.

51 D2's AEIC at para 65.

the first defendant to return 138.2m HMC shares or equivalent securities of the same value to the first defendant.[52]

122 The Bankrupt and the defendants claim that the Bankrupt owned 66.9m HMC shares worth $1.87m through the first defendant.[53] For reasons set out below, I find that the Bankrupt continued to hold 58 shares in the first defendant until February 2017. So, at most 58% of this value can be attributed notionally to the Bankrupt's balance sheet in September 2015 or as at February to May 2016. Further, the Bankrupt admitted that the first defendant had liabilities which would have to be deducted from the first defendant's assets before deriving a national value to be attributed to the Bankrupt's 58 shares in the first defendant.[54] The true figure attributable to the Bankrupt's personal balance sheet for these shares is therefore less than 58% of $1.87m.

123 The Bankrupt and the defendants claim that the Bankrupt and the second defendant owned two real properties worth $10m. They quantify his 50% share of the value of these real properties at $5m.[55] I accept the Trustees' submission that this figure is overstated. As the Trustees point out, these real properties were in fact sold for a total of $5.8m in 2017. I accept that this is a reasonable approximation of their value in February to May 2016. Further, the real properties were encumbered with loans of at least $3.26m.[56] The amount of

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52 Certified Transcript, 11 February 2020, page 116 lines 1 to 15.

53 D2's AEIC at para 65; Certified Transcript, 11 February 2020, page 118 line 25 to page 119 line 1.

54 Certified Transcript, 11 February 2020, page 119 lines 5 to 16.

55 Certified Transcript, 12 February 2020, page 18 line 20 to page 19 line 7.

56 Trial exhibit P4, 1st Affidavit of Mdm Chee Yin Meh dated 24 July 2018 in HC/OS 906/2018; Certified Transcript, 12 February 2020, page 22 lines 2 to 5; page 22 lines 6 to 9.

these loans would have been higher in February to May 2016. Accordingly, the true value to be attributed to these two properties is $5.8m less at least $3.26m, *ie*, $2.54m, and not $10m as claimed.[57] The Bankrupt's 50% share of the unencumbered value of these two real properties would have been only $1.27m, not $5m as claimed.

124 The Bankrupt and the defendants claim that Mr Aathar owed the Bankrupt $30m as at September 2015. However, the Bankrupt himself expressly admitted that the debt was owed not to the Bankrupt, but to a company known as Golden Cliff International Ltd ("Golden Cliff").[58] Golden Cliff is yet another nominee of the Bankrupt.

125 It is true that Golden Cliff is wholly owned by the Bankrupt. But the Bankrupt expressly admitted that Golden Cliff has substantial contingent liabilities. These were not taken into account before attributing a value to Mr Aathar's receivable in the Bankrupt's personal balance sheet.[59]

126 In any event, the following three points are not disputed. Mr Aathar's personal solvency, and his ability to repay the $30m loan, was tied closely to the value of his 8% stake in IHC. His financial status was also affected when IHC's share price collapsed by 70% in September 2015.[60] On the defendants' own case, Golden Cliff itself was insolvent by March 2016 because it

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57 Certified Transcript, 12 February 2020, page 19 lines 12 to 23.

58 Certified Transcript, 12 February 2020, page 12 lines 17 to 20.

59 Certified Transcript, 12 February 2020, page 14 line 22 to page 15 line 5; page 13 line 19 to page 14 line 21.

60 Certified Transcript, 12 February 2020, page 18 lines 6 to 13.

considered this $30m receivable to be irrecoverable from Mr Aathar.[61] The period in question is February to May 2016. I therefore accept that this receivable from Mr Aathar was worthless during this period.

127 Taking all of these points into account, the true state of the Bankrupt's assets and liabilities in February to May 2016 was that he owned assets of no more than $12m and owed liabilities of at least $126m. His liabilities dwarfed his assets. I therefore accept that the Bankrupt was insolvent within the meaning of s 100(4)(*b*) of the Act between February and May 2016.

February 2017

128 The second period for which the Bankrupt's solvency is relevant is February 2017. I have no hesitation in finding that the Bankrupt was insolvent in February 2017. Any assertion to the contrary is not credible for the following two reasons.

129 First, it will be recalled that the Bankrupt presented his application to have himself adjudicated bankrupt on 8 March 2017. He supported his application with an affidavit which he affirmed also on 8 March 2017. In that affidavit, he admitted, on penalty of perjury, that he had assets worth only $3.7m as against liabilities of over $166.6m.[62] The total value of the proofs of debt filed against the Bankrupt is over $212m.[63] Liabilities of this magnitude could not have accrued and did not accrue in a matter of weeks or even in the two calendar months of February and March 2017. Indeed, in cross-examination, he admitted that he could not be

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61 BA Tab 2, Vol 5, D2's AEIC at p CYM-1 633, also see Plaintiffs' Bundle of Documents Vol 6 ("6 PB") p 3581.

62 Plaintiffs' Bundle of Documents Vol 7 ("7 PB") p 4169, para 2.

63 BA Tab 5, Vol 6, P3's 2nd AEIC at pp 18–20.

certain that his liabilities did not exceed his assets by January or February 2017.[64]

130 In the same affidavit, the Bankrupt attributes the root cause of his insolvency to the 70% collapse in IHC share price in September 2015.[65] That led to actual or apprehended defaults and cross-defaults on loans he had taken and guarantees he had given to develop his businesses and to a cascade of litigation commencing in 2016.[66] He found himself unable to support all of his financial commitments.[67] In fact, the Bankrupt's affidavit acknowledges, albeit tacitly and in not so many words, that his contingent and prospective liabilities rendered him insolvent within the meaning of s 100(4)(*b*) of the Act from September 2015 onwards, and in any event certainly well before February 2017.

131 Second, I do not accept the Bankrupt's suggestion at trial that an arbitration award handed down only on 20 February 2017 is what tipped him into solvency.[68] This arbitration award was only for the sum of $13.6m.[69] That is less than 10% of his admitted liabilities of over $166.6m as at 8 March 2017. It may well be true that this arbitration award is what triggered the Bankrupt's decision to seek protection from unilateral creditor action by applying to have himself adjudicated bankrupt. But it is simply not credible that but for this award, the Bankrupt would have been solvent in February 2017.

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64 Certified Transcript, 12 February 2020, page 55 lines 18 to 25.

65 Certified Transcript, 12 February 2020, page 45 line 23 to page 46 line 6.

66 D2's AEIC at para 68.

67 7 PB pp 4170–4171, paras 8–13.

68 Certified Transcript, 12 February 2020, page 60 lines 15 to 18.

69 7 PB p 4172, para 14.

132 I now turn to consider the Trustees' ten claims against the second defendant.

First transaction

133 The first transaction which the Trustees challenge is the Bankrupt's transfer to the second defendant of 58 shares which he held in the first defendant.

The parties' cases

134 It is common ground that the Bankrupt was allotted 58 shares in the first defendant in March 2007. The second defendant owned the remaining 42 shares in the first defendant. The Bankrupt and the defendants claim that he transferred these 58 shares to the second defendant in November 2013, as a result of which he no longer owns any shares in the first defendant.[70]

135 The Bankrupt's and the defendants' case is that the Bankrupt transferred these shares to the second defendant after the second defendant exercised her option under the SAMP and in exchange for the first defendant's agreement not to take legal action against him arising from his breach of his obligation under the POA to transfer to the first defendant 401m HMC shares or equivalent securities worth $63m.[71]

136 The Trustees' case in response rests on three points. First, the POA is a sham agreement. I have already accepted this submission. Second, the Bankrupt transferred these shares to the second defendant for no consideration or for only

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70 Defence at para 6.1.5, SDB Tab 10, p 280 at p 293.

71 BA Tab 1, Vol 1, P3's AEIC at p 6, para 9.

nominal consideration, intending to put those assets out of the reach of his creditors. This transaction should therefore be set aside as a fraudulent conveyance, as a transaction at an undervalue or an unfair preference. Finally, the transfer was the result of a conspiracy between the defendants and the Bankrupt to injure the Bankrupt's economic interests by unlawful means, rendering the defendants liable to pay damages to the Bankrupt's estate in tort.

137 For the reasons which follow, I accept the Trustees' submission that the Bankrupt's transfer of these shares to the second defendant was a fraudulent conveyance and a transaction at an undervalue. But I do not accept their submission that they are entitled to recover damages from the defendants for an actionable conspiracy between the Bankrupt and the defendants in respect of these shares.

Fraudulent conveyance

138 The Trustees first submission is that the Bankrupt's transfer of his 58 shares in the first defendant to the second defendant was a fraudulent conveyance within the meaning of s 73B of the Conveyancing and Law of Property Act 1886 (Cap 61, 1994 Rev Ed) ("the CLPA"). To succeed in that submission, the Trustees must establish the following five elements:

(a) The transfer of these shares was a conveyance of property.

(b) That the Bankrupt conveyed the shares with the intent of defrauding his creditors.

(c) The Bankrupt's creditors were prejudiced by the conveyance of the shares.

(d) The Bankrupt did not dispose of his interest in the shares for valuable consideration and in good faith or upon good consideration and in good faith.

(e) The second defendant did not have, at the time of the transfer, notice of the Bankrupt's intent to defraud his creditors.

139 Of these five elements, there can be no doubt on the first, third and fourth elements. The shares are property. The Bankrupt's transfer of the shares to the second defendant was a conveyance of that property. The conveyance of the shares has prejudiced the Bankrupt's creditors because it took these shares out of the pool of the Bankrupt's assets available to repay his creditors *pari passu*. The consideration which the second defendant paid for the transfer of the Bankrupt's shares was $1, *ie*, it was purely nominal. The SLA, the SAMP and the POA all having been admitted or found to be devoid of legal effect, the Bankrupt was under no obligation whatsoever to transfer the shares to the second defendant. Further, for the reasons set out at [158]–[171] below, I accept that shares in the first defendant had substantial value at all material times. The Bankrupt therefore did not convey the shares to the second defendant for valuable consideration or upon good consideration.

140 Only the following two elements remain in issue: (a) whether the Bankrupt transferred these shares to the second defendant with intent to defraud his creditors; and (b) whether the second defendant had notice of the Bankrupt's fraudulent intent. For the following reasons, I accept the Trustees' case on both points.

141 Whether the Bankrupt had the necessary fraudulent intent and whether the second defendant had notice of it is to be tested at the time of the transfer.

The first question then, is when the Bankrupt transferred his 58 shares to the second defendant. It is the Bankrupt's and the defendants' case that the Bankrupt did so in a single tranche of all 58 shares. The Bankrupt and the defendants thereby admit that the transfer took place on a single date. The question is whether that date is in November 2013, as the Bankrupt and the defendants submit, or on a date after 17 February 2017, as the Trustees submit.

142 For the reasons which follow, I accept the Trustees' submission that the Bankrupt transferred these shares to the second defendant on a date after 17 February 2017.

When were the Bankrupt's 58 shares in the first defendant transferred to the second defendant?

143 On 17 February 2017, IHC made a substantial shareholder declaration. This declaration described the Bankrupt as a substantial shareholder of the first defendant. IHC disclosed that the Bankrupt had a deemed interest in the IHC shares which the first defendant then owned. IHC made this disclosure expressly on the basis that the Bankrupt then owned shares in the first defendant. IHC did not make this disclosure on the basis that the Bankrupt was the spouse of the second defendant, who owned all of the shares in the first defendant. Further, this declaration would have been necessary only if the Bankrupt was entitled to exercise or control the exercise of more than 20% of the voting shares in the first defendant.[72] The defendants' case is that, after November 2013, the Bankrupt controlled no voting rights in the first defendant whatsoever. IHC's disclosure on 17 February 2017 directly contradicts the Bankrupt's and the

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72 Trustees' Closing Submissions dated 18 June 2020 at para 211(4)(c).

defendants' evidence. I reject their evidence and hold that the Bankrupt continued to own 58 shares in the first defendant as late as 17 February 2017.

144 The Bankrupt's evidence in response is that IHC's substantial shareholder disclosure was somehow mistaken. I do not accept this evidence. The Bankrupt is an experienced businessman. He has long experience of being an executive and a non-executive director of listed companies and of the regulatory regime covering them. The evidence shows that over 100 substantial shareholder declarations had been made over the years in respect of his holdings in public companies. I find it unlikely that he or a company which he led would have made such a fundamental mistake. The Bankrupt and IHC were assisted in making these substantial shareholder disclosures by IHC's Catalist sponsor as well as IHC's regulatory and compliance staff. I find it equally unlikely that any of these regulatory and compliance professionals would have made such a fundamental mistake.

145 The defendants offered no independent evidence of any such mistake, for example by calling a representative of the Catalist sponsor or of IHC's regulatory and compliance staff.[73] For reasons I have already given, I treat the Bankrupt's evidence with the utmost caution. I therefore reject the Bankrupt's uncorroborated evidence.

146 I now turn to consider the Bankrupt's intent and whether the second defendant had notice of that intent in February 2017.

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[73] Certified Transcript, 11 February 2020, page 107 lines 7 to 17.

The Bankrupt's fraudulent intent

147 I have no hesitation in finding that the Bankrupt had the necessary fraudulent intent.

148 First, I have found that the Bankrupt and the second defendant hatched a deliberate plan in September 2016 – a time when the Bankrupt had already been in financial distress if not insolvent for a year – to create and falsely date documents to support a false narrative in anticipation of bankruptcy and litigation. I find also that the purpose of this plan was to create a plausible and fraudulent paper trail to take the Bankrupt's 58 shares in the first defendant out of the pool of the Bankrupt's assets available to satisfy creditors' claims.

149 It is true that September 2016 is about six months before the Bankrupt's bankruptcy order. But, as I have also found, his fraudulent intent was a sustained deception which continued even after he was adjudicated bankrupt and up to trial. I therefore have no hesitation in finding that he was acting pursuant to this fraudulent intent at all times in and after September 2016, including at the time these shares were transferred to the second defendant, which I have found to be at some point after 17 February 2017.

150 Second, and in any event, on my findings, the Bankrupt is presumed to have acted with fraudulent intent. He conveyed the shares to the second defendant for nominal consideration at a time when the Bankrupt was insolvent, *ie*, February 2017. If a person conveys property to another for no consideration or for nominal consideration and that person is then insolvent or becomes insolvent by reason of the conveyance, a fraudulent intent for the purposes of s 73B of the CLPA will be irrebuttably imputed to that person, even if he did

not subjectively intend to defraud his creditors: *Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 ("*Quah Kay Tee*") at [21]–[37].

151 I have found that the Bankrupt was insolvent in February 2017. The circumstances of this case therefore warrant imputing irrebuttably to the Bankrupt an intent to defraud his creditors regardless of his subjective intent.

The second defendant's fraudulent intent

152 As for the second defendant, she actively participated in the Bankrupt's fraudulent intent in two ways. First, she participated in creating and signing the SLA, the SAMP, the POA and the notices and demands allegedly issued under all three agreements. Second, she adopted the Bankrupt's false narrative by pleading it as her defence, knowing it to be false.

153 Indeed, I am prepared to find that the second defendant had more than simply notice of the Bankrupt's fraudulent intent. I find that the Bankrupt's fraudulent intent was in fact the common fraudulent intent of both the Bankrupt and the second defendant at all times in and after September 2016 up until the trial of this action.

Conclusion on fraudulent conveyance

154 For the foregoing reasons, I accept that the Bankrupt's conveyance of 58 shares in the first defendant to the second defendant took place after 17 February 2017, and therefore at a time when he was insolvent. I further accept that the conveyance took place pursuant to the Bankrupt and the second defendant's common fraudulent intention. It was a fraudulent conveyance within the meaning of s 73B of the CLPA.

Undervalue transaction

155 The Trustees' alternative submission is that the Bankrupt's transfer of his 58 shares in the first defendant to the second defendant was a transaction at an undervalue within the meaning of s 98 of the Act. I accept this submission.

156 I have found that the transfer took place after 17 February 2017. I have also found that the Bankrupt was then insolvent. In any event, the Bankrupt is presumed to be insolvent at the time of the transfer. That is because the second defendant is the Bankrupt's wife and therefore an associate of his within the meaning of s 101(2) of the Act. As such, by reason of s 100(3) of the Act, the Bankrupt is presumed to have been insolvent at the time he transferred the 58 shares to the second defendant or to have become insolvent by reason of the transfer. The burden is on the second defendant, as the transferee of the shares, to disprove the Bankrupt's insolvency. The second defendant has failed to discharge that burden.

157 The Bankrupt's transfer of the 58 shares to the second defendant was at an undervalue. The second defendant paid only nominal consideration of $1 for the shares. Furthermore, I have found that the POA is a sham and devoid of legal effect. Therefore, the Bankrupt was not obliged to sell those shares to the second defendant for $1 or indeed at any price. The transfer of the shares was, in economic substance, a gift by the Bankrupt to the second defendant.

158 In response, the defendants submit that shares in the first defendant were worthless because it had been insolvent from 2013 onwards.[74] I do not accept that submission for the following reasons.

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74 BA Tab 2, Vol 4, D2's AEIC at p 20, para 57; Certified Transcript, 14 February 2020, page 23 lines 2 to 25.

159 First, there would be no incentive for the second defendant to take a transfer of the shares in the first defendant, even for nominal consideration of $1, if they were worthless. The second defendant's own conduct therefore suggests that shares in the first defendant had some value at the time of transfer.

160 Second, there would have been no reason for the Bankrupt and the second defendant to hatch a deliberate plan in September 2016 to create and falsely date documents to serve as evidence supporting a false narrative to explain the transfer of these 58 shares if the first defendant was indeed insolvent from 2013 onwards, thereby rendering its shares worthless.

161 Third, the evidence shows that the Bankrupt conveyed assets to the first defendant on nine occasions between 2013 and 2017. If the first defendant was truly insolvent from 2013 onwards, there would be no reason for the Bankrupt to do this and every reason for him not to do this. Doing this would simply put assets within the reach of the first defendant's creditors to which those creditors would not otherwise have had access.

162 Fourth, I do not accept that the defendants have produced any or any sufficient evidence to establish that the first defendant was insolvent from 2013 onwards. It is the defendants who assert that the first defendant was insolvent from 2013 onwards. Further, the financial state of the first defendant is a matter especially within the knowledge of the first defendant and of the second defendant, as a director of the first defendant. They bear the burden of proof on this issue under ss 103 and 108 of the Evidence Act.

163 The defendants have produced a statement of the first defendant's assets and liabilities drawn up as at 4 November 2013. This statement allegedly shows that the first defendant's liabilities exceeded its assets by $22.6m as at that date.

I reject this statement. This statement self-servingly understates its assets and overstates its liabilities.

164 This statement shows that the first defendant held only 8.1m IHC shares worth $2.9m in November 2013. In fact, IHC's contemporaneous substantial shareholder declarations show that the first defendant held 19.3m IHC shares worth $5.8m at that time. The defendants attempted to explain this discrepancy on the basis that the first defendant transferred 11.2m IHC shares to the Bankrupt in September 2013. But IHC's substantial shareholder declarations in October 2013 and January 2014, *ie*, after September 2013, show that the first defendant continued to hold 19.3m IHC shares.

165 This statement is contradicted by the defendants' own case on what they refer to as "the IHC Dividend Agreement".[75] According to the defendants, the Bankrupt held 33.03m IHC shares worth $15.8m on trust for the first defendant under the terms of the IHC Dividend Agreement. The defendants' case on the IHC Dividend Agreement is as follows. When IHC was listed in July 2013, HMC distributed a special dividend of 82.29 IHC shares *in specie* from HMC's shareholding in IHC for every 1,000 shares held by a shareholder of HMC. At that time, the first defendant had transferred a total of 401m HMC shares to the Bankrupt between July 2009 and June 2011. As such, the Bankrupt was entitled to and did receive 33.03m IHC shares by way of an *in specie* dividend from HMC. In July 2013, the second defendant in her capacity as the first defendant's agent agreed orally with the Bankrupt that the Bankrupt would hold these 33.03m IHC shares on trust for the first defendant. This agreement is what the defendants refer to as the IHC Dividend Agreement. I find below that there was never any agreement to this effect.

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75 Defence at para 13.1.3, SDB Tab 10, p 280 at p 305.

166 In any event, it suffices to say for present purposes that, for the defendants' own case to be internally consistent, these 33.03m IHC shares worth $15.8m should be reflected in the first defendant's balance sheet as at 4 November 2013. That is because their case is that these 33.03m IHC shares were an asset beneficially owned by the first defendant, albeit with legal title held by the Bankrupt. But these IHC shares are omitted entirely from this statement.

167 The defendants' only explanation for this omission is that the 33.03m IHC shares covered by the IHC Dividend Agreement are represented by 8.1m IHC shares held in the first defendant's own name which the second defendant has included in this statement. As the Trustees point out, this explanation is unsatisfactory. If the Bankrupt were holding 33.03m shares on trust for the first defendant, as the defendants claim, why would 8m of them be held in the first defendant's own name? And in any event, this explanation fails to account for the remaining 24.93m IHC shares alleged to be subject to the IHC Dividend Agreement. These 24.9m IHC shares appear nowhere in this statement.

168 Fifth, this statement is materially inconsistent with the first defendant's unaudited accounts which the defendants have produced. The unaudited accounts show that the first defendant had assets as at December 2013 of $13.5m whereas this statement shows assets as at November 2013 of only $4.7m. There is no satisfactory explanation for this material discrepancy over such a short period. The unaudited accounts show that the first defendant owes the second defendant $1.57m whereas this statement shows that the first defendant owes the second defendant $1.71m. Again, there is no satisfactory explanation for this material discrepancy. The unaudited accounts show an asset of $71m, being a receivable said to be due from the Bankrupt under the POA. This receivable does not appear in this statement. Again, there is no satisfactory

explanation for this material discrepancy. The unaudited accounts write down this receivable by $70m on account of the Bankrupt's financial distress. But it remains the defendants' position that the Bankrupt was solvent right up to February 2017. There is no satisfactory explanation for this contradictory position. The unaudited accounts include the 33.03m shares which the Bankrupt allegedly held on trust for the first defendant under the IHC Dividend Agreement. This statement, as I have already pointed out, does not.

169 All of these discrepancies leave me in no doubt that this statement and the first defendant's unaudited accounts as at December 2013 are no more satisfactory and no more reliable as evidence than the Bankrupt's and the second defendant's oral evidence. Neither document assists the defendants in discharging their burden on this issue.

170 Sixth, the only two liabilities of the first defendant disclosed in this statement are loans allegedly due to the first defendant and to a company known as Silver Wave. The defendants have produced no evidence that either creditor ever actually advanced any money to the first defendant. They have also produced no evidence as to what the first defendant did with the money advanced. From this statement, it appears that the first defendant has dissipated the proceeds of the loan with no assets to show for it. I draw the adverse inference that there are other assets of the first defendant, connected to the first defendant's use of these loans, which the defendants have failed to disclose.

171 For all of these reasons, I am not satisfied on the balance of probabilities that the first defendant was indeed insolvent at any time from 2013 until the Bankrupt's bankruptcy. I therefore accept the Trustees' case that the consideration of $1 paid by the second defendant for the Bankrupt's shares in the first defendant was an undervalue.

Unfair preference

172 The Trustees' alternative claim is that the Bankrupt's transfer of his 58 shares in the first defendant to the second defendant is an unfair preference.

173 One of the conditions precedent for this transfer to be challenged as an unfair preference is that the second defendant was a creditor of the Bankrupt at the time of the transfer. The Trustees' claim fails on this ground. On my findings thus far, the second defendant was not a creditor of the Bankrupt in February 2017.

174 The Trustees submit that the second defendant was a creditor of the Bankrupt because she had an unsecured claim against the Bankrupt for damages arising from his failure to transfer his shares in the first defendant to her. However, I have found the POA to be a sham and devoid of legal effect. The Bankrupt was therefore never under any obligation to transfer these shares to the second defendant. She could therefore never have had any claim against the Bankrupt for breach of any such obligation. The second defendant is not a creditor of the Bankrupt.

175 As a result, one of the conditions precedent for this transfer to be challenged as an unfair preference has not been met. The Trustees' challenge on this ground must fail.

Trust

176 The Trustees' further alternative claim is that the Bankrupt transferred his 58 shares in the first defendant to the second defendant pursuant to sham agreements as a result of which the second defendant holds these shares on trust for the Trustees.

177 The defendants have admitted that the SLA and the SAMP are null and void and devoid of legal effect. Further, I have found that the POA is a sham and devoid of legal effect. On that basis, the Trustees seek a declaration that the second defendant holds these 58 shares in the first defendant on trust for the Bankrupt.

178 The proposition of law on which the Trustees rely for this claim is as follows: where a transferor transfers assets to a transferee pursuant to a sham agreement, the transferee holds the assets on trust for the transferor in the first instance; and on trust for the transferor's trustee in bankruptcy if the transferee continues to hold the property when the transferor is adjudicated bankrupt.

179 As authority for this proposition, the Trustees rely on two English cases.

180 The first case is *Eric Stonham (Trustee in Bankruptcy of Sebastian Ramrattan) v Sebastian Ramrattan and another* [2010] EWHC 1033 (Ch) ("*Stonham*"). In that case, the bankrupt conveyed property to his wife by use of a transfer in which he forged the signature of his wife as well as of the witnesses. At first instance, the court characterised the transfer as a "sham" intended to remove assets from the reach of the bankrupt's creditors. On appeal, Mann J (as he then was) held that the transfer was effective at least, as a matter of English law relating to registered land, to convey legal title to the property to the bankrupt's wife. But because the transfer was a forgery and devoid of any legal effect, it could not convey the beneficial interest in the property to her. The result was that she held the legal title to the property on trust for the bankrupt in the first instance and, upon his bankruptcy, for his trustee in bankruptcy (at [27]). The appeal from Mann J's decision is reported as *Stonham v Ramrattan and another* [2011] 1 WLR 1617. The appeal turned on a different point and the

English Court of Appeal summarised without comment Mann J's reasoning on the point on which the Trustees now rely.

181 The second case is *Godfrey v Torpy* [2007] Bus LR 1203; [2007] All ER (D) 181 (Apr) ("*Godfrey*"). In that case the plaintiff argued that two properties which a bankrupt had transferred to a third party were either: (a) transferred pursuant to sham agreements and therefore held on trust for the bankrupt; or (b) transactions at an undervalue (at [11]). The court found that the bankrupt had used forged documents (at [93], [138] and [142]) to transfer both properties to the third party before she was adjudicated bankrupt. As a result, the court declared that the third party held both properties as bare trustee for the bankrupt (at [158]).

182 I do not accept that *Stonham* and *Godfrey* stand for the very wide proposition which the Trustees advance. These cases did not turn on the nature of the bankrupt's intent in effecting the transfer but on a fundamental defect in the means by which the bankrupt effected the transfer. The bankrupts in both cases used forged documents to effect a purported transfer of property. The court held that the forged documents were devoid of legal effect. That left the property rights in the properties unchanged. But the properties were land, and therefore the defective transfers were effective to convey ownership under the applicable law. But because the means of transfer were devoid of effect, being forgeries, equity intervened to separate the beneficial interest in the property from the legal title to the property. That is why a trust arose in those two cases.

183 In the present case, the Bankrupt's intent in carrying out the transfer of his 58 shares in the first defendant, as I have found, was to defraud his creditors. This fraudulent intent did not detract from his intent to convey title to the shares to the second defendant. In fact, it reinforces his intent do so. It was his intent

to put the shares out of reach of his creditors by vesting title to the shares to the second defendant. He carried out his intent by means of a share transfer form. His fraudulent intent does not render the share transfer form devoid of legal effect. It was not a sham. Further, there is no suggestion that the share transfer form was devoid of legal effect by reason of forgery or some other fundamental defect. The fact that he was motivated by a fraudulent intent directed at third parties (the Trustees and the Bankrupt's creditors) and the fact that he was under no contractual obligation to transfer the shares to the second defendant does not, in itself, operate in equity to separate legal title to the shares from the beneficial interest in the shares. The transfer was therefore effective to vest title to the shares in the second defendant.

184 The result is no different even if I take the broader view and recognise that the Bankrupt and the second defendant created the POA as a sham document expressing an illusory contractual obligation as a plausible pretext for the transfer. The only result of my finding that the POA is a sham and devoid of legal effect is to render the Bankrupt's transfer of the shares to the second defendant a gift rather than a sale. It does not, in itself, effect a separation of the legal title from the beneficial interest in the shares. And to the extent that his intent constitutes a constructive fraud, that is the basis of the law relating to s 73B of the CLPA, on which the Trustees have already succeeded.

185 If the Trustees' submission were correct, every gift by a transferor with a fraudulent intent towards his creditors would permit the transferor, before he was adjudicated bankrupt, to secure a declaration that the transferee holds the gift on trust for the transferor. And it would permit every trustee in bankruptcy, after the transferor is adjudicated bankrupt, to secure such a declaration. That cannot be correct. It would create intolerable instability in property rights pre-

bankruptcy. And it would render otiose the law on fraudulent conveyances and undervalue transactions post-bankruptcy.

186 I therefore do not accept that the second defendant held the Bankrupt's 58 shares in the first defendant on trust for the Bankrupt before 30 March 2017 or on trust for the Trustees after that date.

Restitution

187 The Trustees' next alternative claim is that the second defendant is liable to make restitution of the Bankrupt's 58 shares in the first defendant to the Trustees in the law of unjust enrichment because the shares were transferred to her on a total failure of consideration.

188 This claim cannot succeed. This claim asserts a cause of action which accrued to the Bankrupt before his bankruptcy, and which has now vested in the Trustees by reason of the Bankrupt's bankruptcy. It does not assert a claim which vests in the Trustees by reason of the bankruptcy or under the law of personal insolvency.

189 The effect of my findings on the Bankrupt's transfer of these shares is no different from finding that the Bankrupt made a gift of his 58 shares in the first defendant to the second defendant. In those circumstances, the Bankrupt would not have had a cause of action to recover the shares from the second defendant pre-bankruptcy. Nor does a transfer of property without legal basis, in itself, give rise to a cause of action for restitution in unjust enrichment.

190 There is a cause of action for restitution on a failure of consideration only if the property was transferred on a basis which has failed. There is no such

basis here. The Trustees can be in no better position than the Bankrupt in relation to pre-bankruptcy claims such as this.

191 The mere fact that the Bankrupt and the second defendant acted pre-bankruptcy with intent to defraud his creditors does not give the Trustees a post-bankruptcy cause of action in restitution, whether on a total failure of consideration or otherwise.

Conspiracy

192 The Trustees' final alternative claim is that the Bankrupt, the first defendant and the second defendant conspired to act to the detriment of the Bankrupt's creditors by unlawful means, *ie*, by wrongfully seeking to transfer the Bankrupt's shares in the first defendant to the second defendant as a fraudulent conveyance contrary to s 73B of the CLPA or a transaction at an undervalue contrary to s 98 of the Act.

193 This claim cannot succeed. Insofar as the Bankrupt acted contrary to his own economic interests by transferring his shares in the first defendant to the second defendant for no consideration, that is not actionable by the Bankrupt because he suffered no injury. As I have found, the effect of what the Bankrupt did was no different from making a gift of these 58 shares to the second defendant. He did that of his own free will, albeit motivated by a desire to defraud his creditors contrary to the law. That intent does not, in itself, vitiate his intent to make the gift. Making a gift in the exercise of one's own free will cannot be economic injury to the person giving the gift. It does not give that person a cause of action in the tort of conspiracy against the recipient of the gift, even if they were both acting with intent to default the gift giver's creditors.

Suppressing that mischief is what the law of fraudulent conveyances and undervalue transactions is addressed towards.

194 In any event, insofar as the alleged conspiracy did cause economic injury to the Bankrupt's creditors, and even assuming injury to a third party to be actionable in the tort of conspiracy by unlawful means (as opposed to the tort of causing loss by unlawful means), the Bankrupt's creditors are not the plaintiffs in this action. And rights of action which accrue to a bankrupt's creditors by reason of his conduct do not, by that reason alone, vest in his trustee in bankruptcy. Those rights can be asserted only by the creditors themselves.

195 The Trustees' claim in conspiracy therefore fails.

Alleged trust over 29 of the Bankrupt's 58 shares in the first defendant

196 The second defendant alleges that the Bankrupt holds 29 of his 58 shares in the first defendant on trust for the second defendant.

197 I reject this submission for two reasons.

198 First, this aspect of the defendants' case is pleaded nowhere. The defence does plead that, upon the first defendant allotting and issuing 58 shares to the Bankrupt in 2007, he initially held 29 of the shares on an express oral trust for the second defendant. But nowhere does the defence plead that the Bankrupt continued to hold 29 out of his 58 shares in the first defendant on trust for the second defendant at the time he transferred those shares to the second defendant.

199 Second, this submission is contrary to the defendants' pleaded case. The defendants' pleaded case is that this alleged express oral trust which the

Bankrupt declared in favour of the second defendant over 29 of his 58 shares in the first defendant was "settled" by the Bankrupt procuring two of his business associates to transfer their 42 shares in the first defendant to the second defendant.

200 This allegation is a pure afterthought. It is rejected.

Remedy

201 For all of the foregoing reasons, the Trustees are entitled to an order: (a) that the Bankrupt's transfer of his 58 shares in the first defendant to the second defendant is a fraudulent conveyance and a transaction at an undervalue and (b) that the second defendant transfer the 58 shares to the Trustees or to their order.

Second transaction

202 The second transaction which the Trustees raise is the first defendant's transfers in April 2010 and June 2011 of 233.6m shares said to be owned by the Bankrupt into the first defendant's accounts with DMG & Partners Securities Pte Ltd ("DMG").

The origin of the 233.6m HMC shares

203 As I have mentioned, it is the defendants' pleaded case that the first defendant transferred 401m HMC shares to the Bankrupt between July 2009 and June 2011 by way of a loan pursuant to the POA in eight tranches. It is also the defendants' pleaded case that, at the Bankrupt's direction, the first defendant appropriated to this loan a total of 194.7m HMC shares which it held and transferred those 194.7m shares into one or more brokerage accounts which the first defendant maintained with DMG.

204 The Bankrupt gave a slightly different number in his interviews with the Trustees' solicitors. He admitted that the first defendant held 233.6m HMC shares on trust for him in its accounts with DMG.[76] As between the defendants and the Bankrupt, the Bankrupt is in the best position to know the true number. It will also be recalled that I have found that the Bankrupt was at all material times a shadow director of the first defendant and the person who directed all of these transfers either as transferor or transferee. I therefore take the Bankrupt's statement as his admission that the true number of shares is 233.6m and not 194.7m.

205 It is common ground that DMG has at no time transferred any of these 233.6m HMC shares back to the first defendant.[77] *A fortiori*, the first defendant has at no time transferred any of these 233.6m HMC shares to the Bankrupt.

206 The Trustees seek to recover these 233.6m HMC shares from the first defendant. Their case is twofold. First, on the defendants' pleaded case, the first defendant lent these 233.6m shares to the Bankrupt. In law, that vested title to the shares in the Bankrupt. The Bankrupt then directed the first defendant to transfer these 233.6m shares into brokerage accounts with DMG in the first defendant's name rather than in the Bankrupt's name. He did so with no intention to make a gift of the shares to the first defendant. The first defendant therefore holds these shares on trust for the Bankrupt, leaving the first defendant at best with only a personal claim against the Bankrupt for his failure to return these shares.

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76 Statement of Claim ("SOC") at para 25–29, SDB Tab 9, pp 234–235; BA Tab 2, Vol. 4, D2's AEIC at p 26, para 70; Defence at paras 5.2.3, 5.2.8 and 5.2.9, SDB Tab 10, p 280 at pp 290–291.

77 Certified Transcript, 14 February 2020, page 27 lines 17 to 20; Certified Transcript, 12 February 2020, page 95 lines 14 to 20.

207 The defendants' position is that the Bankrupt was never intended to acquire title to these shares under the terms of the share lending agreement set out in the POA.[78] Title to the 233.6m shares therefore remained at all times vested in the first defendant, even after the Bankrupt directed the first defendant to appropriate these HMC shares to the loan and transfer them to DMG.

208 I accept the Trustees' case and reject the defendants' case. I have already found that the POA is a sham and devoid of legal effect; and that the first defendant transferred the 401m shares to the Bankrupt or to his order at his direction, and without any contractual obligation to do so. That finding in itself suffices to establish that title to these shares vested in the Bankrupt before his bankruptcy.

209 In any event, I will analyse the defendants' case as it has been presented. For the purposes of the remaining analysis, I assume that the first defendant transferred the 233.6m shares to the Bankrupt as a loan under the terms of the POA.

The commercial purpose of the POA was to vest title in the Bankrupt

210 I accept the Trustees' submission that title to the 233.6m shares vested in the Bankrupt in April 2010 and June 2011 when the first defendant appropriated the 233.6m shares to the loan. That is simply the commercial purpose of a loan of shares.

211 The commercial purpose of a loan of shares is to allow the borrower to deal with the shares as though they were his own during the period of lending with only a personal obligation to the lender to return an equivalent number of

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78 BA Tab 2, Vol 4, D2's AEIC at p 27, para 75.

the borrowed shares at the end of the borrowing period. A typical but by no means exclusive reason for borrowing shares is to allow the borrower to short sell the shares, *ie*, to benefit from a downward movement in the price of the shares by selling and delivering the shares to a purchaser, hoping to buy the shares back at a lower price before the borrowing period ends and the borrower's personal obligation to return equivalent shares arises.

212 It is fundamental to the commercial purpose of a share loan that the borrower acquire full and good title to the shares and be able to deliver full and good title to the shares (see *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Limited* (2008) 246 ALR 361 at [45]). Further, it is antithetical to the commercial purpose of a share lending agreement for there to be any separation of legal title from the beneficial interest in the shares (see *CMG Equity Investments Pty Ltd v Australia and New Zealand Banking Group Ltd* (2008) 65 ACSR 650 at [13]–[14]).

213 Despite all this, a share lending agreement is simply a contract. It is therefore, of course, open to a lender and a borrower of shares to agree in their contract that the lender will retain some proprietary interest in the shares during the period of borrowing. But there is no such provision in the POA.

214 The Bankrupt well understood that this was the commercial purpose and effect of lending the 401m HMC shares. In his interviews with the Trustees' solicitors, he accepted that he considered himself at liberty to deal with these shares as he saw fit, *ie*, without the first defendant's knowledge or consent.[79]

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[79] 9 PB p 5145 at 5163 and 5178; 2 PSB p 331 at 374–375.

215 In his affidavit of evidence in chief, the Bankrupt disavowed this position. Instead, he insisted that he and the first defendant never intended that title to the 233.6m shares should vest in him.[80] I do not accept this self-serving evidence. It is contrary to the commercial purpose of a share lending agreement. It is not supported by any of the terms in the POA. It is contrary to his own evidence under cross-examination, where he reiterated that he considered himself at liberty to deal with the 401m HMC shares as he saw fit without the first defendant's knowledge or consent.[81]

216 I therefore accept that the first defendant holds the 233.6m shares on trust for the Bankrupt. Further, the trust is a bare trust. The Trustees, standing in the shoes of the Bankrupt, are entitled to terminate the bare trust for and on behalf of the Bankrupt under the principle in *Saunders v Vautier* (1841) 4 Beav 115.

217 The Trustees are therefore entitled to: (a) a declaration that the first defendant holds the 233.6m shares in the first defendant's accounts with DMG on trust for the Bankrupt; and (b) an order that the first defendant transfer the 233.6m shares from DMG to the Trustees or to their order.

Third transaction

218 In 2015 and 2016, the Bankrupt transferred certain assets to the first defendant. The defendants' case is that he did so in part performance of his obligation under the POA to return 401m HMC shares to the first defendant. The Trustees's case is that the return of these assets were fraudulent conveyances, transactions at an undervalue or unfair preferences.

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80 BA Tab 4 Vol 5, the Bankrupt's AEIC at p 49 para 138.

81 Certified Transcript, 12 February 2020, page 91, lines 13 to 18.

219 The assets in question are the following:

(a) A bloc of 55.9m HMC shares worth $1.79m which the Bankrupt transferred to the first defendant in January 2016. The Bankrupt, the first defendant and the second defendant all admit that this transfer took place.[82]

(b) A parcel of as yet unparticularised assets worth between $10m and $21.5m which the Bankrupt transferred to the first defendant in 2015 and 2016.

220 The first defendant admits that it received assets worth $21.5m from the first defendant. That admission appears in the proof of debt which it lodged with the Trustees in September 2017. The proof of debt alleges that the Bankrupt has a liability of $63m to the first defendant for his failure to fulfil his obligation under the POA to transfer 401m HMC shares or equivalent securities worth $63m to the first defendant on demand.[83] However, the first defendant accepts in its proof of debt that out of this total liability of $63m, only $41.5m[84] remains outstanding. The first defendant thereby accepts that the Bankrupt has discharged its alleged liability of $63m under the POA to the extent of $21.5m, being the difference between $63m and $41.5m.

221 The Bankrupt admitted in his interviews with the Trustees' solicitors that he had made substantial transfers of money or shares to the first defendant

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82 Certified Transcript, 17 February 2020, page 33 lines 18 to 22; page 34 lines 1 to 24; Certified Transcript, 12 February 2020, page 75 lines 5 to 11.

83 BA Tab 1 Vol 3, P3's AEIC at Exhibit VG-94, p 1720 at 1724, letter dated 28 February 2017; Certified Transcript, 17 February 2020, page 36 line 24 to page 37 line 1.

84 BA Tab 1 Vol 3, P3's AEIC at Exhibit VG-94, p 1720 at 1724, letter dated 28 February 2017.

to reduce his liability under the POA. In correspondence, he has quantified his remaining liability to the first defendant at $45.6m.[85] This implies that he has transferred assets worth about $17.4m to the first defendant to reduce his liability of $63m to $45.6m.

222 I therefore accept as a fact, based on the Bankrupt's and the first defendant's admissions, that the Bankrupt transferred substantial but as yet unparticularised assets to the first defendant in 2015 and 2016.

Fraudulent conveyances

223 I accept that these transfers were fraudulent conveyances. The transfers were undoubtedly conveyances. They also had the effect of removing assets from the Bankrupt's estate for the sole benefit of the first defendant. For reasons I have already given, I also accept that this was the defendant's intended effect and that that intention was fraudulent.

224 In any event, the Bankrupt carried out these transfers for no consideration. As I have found, the POA is a sham and devoid of legal effect. If a person conveys property to another for no consideration or for nominal consideration and that person is then insolvent or becomes insolvent by reason of the conveyance, a fraudulent intent for the purposes of s 73B of the CLPA will be irrebuttably imputed to that person, even if he did not subjectively intend to defraud his creditors: *Quah Kay Tee* at [21]–[37].

225 The Trustees are entitled to relief in relation to this fraudulent conveyance.

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85 9 PB p 4981 at 4983.

Transactions at an undervalue

226 I accept the Trustees' alternative case that these transfers were transactions at an undervalue within the meaning of s 98 of the Act.

227 I have found that the Bankrupt was insolvent since September 2015. In any event, the first defendant was an associate of the Bankrupt from 2007 onwards, by reason of: (a) the Bankrupt's control of the first defendant, either solely or with the second defendant, up until 2017; (b) his holding office formally as a director of the first defendant, by his own admission, from at least March 2016 to May 2016;[86] (c) in any event, his shadow directorship of the first defendant from 2007 to the present day; and (d) because the first defendant is a trustee for the Bankrupt, at least in relation the 233.6m HMC shares in the first defendant's accounts with DMG.

228 As a result, it is presumed that the Bankrupt was insolvent throughout the period that the Bankrupt transferred these assets to the first defendant. In any event, I am prepared for reasons already given to find that the Bankrupt was insolvent from September 2015 onwards.

229 All of these transfers were at an undervalue. I have found the POA to be a sham and devoid of legal effect. These transfers were made without any legal obligation requiring the Bankrupt to do so. The Bankrupt received nothing in return for the transfers, not even the discharge or extinction of a legal liability to the first defendant. There was simply no such liability. The conveyances amount to the Bankrupt making gifts to the first defendant. On that ground alone, they are recoverable as a transaction at an undervalue.

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86 BA Tab 4 Vol 5, the Bankrupt's AEIC at para 78.

The above transfers are unfair preferences

230 The Trustees' alternative claim is that these transfers to the first defendant were unfair preferences.

231 Given my finding that the POA was a sham and devoid of legal effect, the first defendant was never a creditor of the Bankrupt, whether current, contingent or prospective. On that ground alone, this claim must fail.

Remedy

232 For these reasons, I accept that the first defendant is liable to restore to the Bankrupt's estate all of the transfers it received from the Bankrupt by way of alleged part-performance of his alleged obligation under the POA. This includes the 55.9m HMC shares which the Bankrupt transferred to the first defendant in January 2016.[87] The Trustees have also sought an order for an account to be taken of the remaining transfers of assets which the Bankrupt made for this purpose. The Trustees shall have an order for that account to be taken.

Fourth transaction

One Organisation Pte Ltd

233 The Bankrupt owned all 1,000 of the shares in a company known as One Organisation Private Limited ("OOPL").[88] OOPL in turn owned 55.87m HMC shares and 7.1m IHC shares at the end of December 2015. In February 2016,

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87 Certified Transcript, 17 February 2020, page 33 lines 18 to 22.

88 BA Tab 1 Vol 1, P3's AEIC at p 58, para 69.

the Bankrupt transferred his 1,000 shares in OOPL to the third defendant for nominal consideration of US$1.

234 The Trustees submit that this transfer was a fraudulent conveyance, a transaction at an undervalue and an unfair preference. Their case is that OOPL had a net value of over $2.18m as at 31 December 2015. That figure is derived from its formal financial statements drawn up to that date and lodged with ACRA in March 2016.

235 The defendants' submissions are as follows. The Bankrupt transferred the 1,000 OOPL shares to the third defendant for good consideration. That consideration was the first defendant's agreement to reduce the Bankrupt's liability of $63m to the first defendant under the POA by $999,896. The first defendant's agreement to this set off is recorded in an Offset Agreement dated 4 February 2016 between the first defendant, the Bankrupt and the third defendant.[89] The value of $999,896 ascribed to the set off was OOPL's net value at the time of the transfer. This is shown by OOPL's management accounts as at 11 January 2016.[90] Further, OOPL's net value as at 31 December 2015 was only $278,118[91] and not $2.18m as alleged by the Trustees.

236 I accept the Trustees' submissions and reject the defendants' submissions.[92]

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89 BA Tab 1 Vol 1, P3's AEIC at p 59, para 72; BA Tab 2 Vol 4, D2's AEIC at p 33, para 103.

90 BA Tab 2, Vol 4, D2's AEIC at p 31, para 96; BA Tab 1, Vol 3, P3's AEIC at Exhibit VG-111, pp 2063–2064, also in 9 PB p 4991.

91 Defence at para 10.2.3, SDB Tab 10, p 280 at p 299.

92 BA Tab 2, Vol. 4, D2's AEIC at p 30, para 93, table showing "Defendants' Adjusted Valuation" at 5th column.

The value of OOPL

237 There are before me four different assertions of the value of OOPL at the end of 2015 and in early 2016. In chronological order, they are as follows:

(a) The defendants' pleaded case that OOPL was worth only $278,118 as at 31 December 2015.[93]

(b) OOPL's formal financial statements lodged with ACRA in March 2016 which show that OOPL had net assets of $2.18m as at 31 December 2015.

(c) The defendants' pleaded case that OOPL was worth $999,896 on 11 January 2016, as evidenced by its management accounts as at that date and as evidenced by the amount which the Bankrupt and the first defendant agreed was to be set-off against the Bankrupt's alleged $63m liability to the first defendant.[94]

(d) The second defendant's evidence that OOPL was worth negative $899,334 at the time the Bankrupt transferred the 1,000 OOPL shares to the third defendant, *ie*, February 2016.[95]

238 I do not consider OOPL's management accounts as at 11 January 2016 to be reliable evidence of OOPL's value at that date, let alone in February 2016. The figure for OOPL's net value derived from these management accounts is almost half the value shown in OOPL's formal financial statements drawn up as at 31 December 2015 and duly lodged with ACRA in March 2016. Part of

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93 Defence at para 10.2.3, SDB Tab 10, p 280 at p 299.

94 BA Tab 1, Vol 3, P3's AEIC at Exhibit VG-111, p 2064, also in 9 PB p 4991.

95 BA Tab 2, Vol 4, D2's AEIC at p 33, paras 102–103.

this difference can be attributed to OOPL appearing to have disposed of 25m HMC shares between 31 December 2015 and 11 January 2016. But HMC's contemporaneous substantial shareholder disclosures do not record any such change in OOPL's shareholding in HMC. Part of this difference can also be attributed to OOPL appearing to have disposed of 1m IHC shares and a number of other shares in unlisted companies between these two dates. But OOPL appears to have acquired nothing in return as a result of these transactions.[96] I therefore reject the value of $999,896 as at 11 January 2016 as derived from OOPL's management accounts.

239 I do not consider the second defendant's evidence that OOPL was worth negative $899,334 in February 2016 to be reliable evidence of OOPL's value. This evidence was unsupported by any objective or contemporaneous evidence. Further, this assertion ran directly contrary to the defendants' pleaded case that OOPL was worth $999,896 in February 2016.

240 I do not accept the defendants' pleaded case that OOPL was worth only $999,896 in February 2016 or only $278,118 as at 31 December 2015.[97] I consider the value of $2.18m shown in OOPL's formal financial statements as at 31 December 2015 to be by far the more reliable evidence of the value of OOPL's shares in December 2015. These are OOPL's formal financial statements. It chose to lodge these financial statements with ACRA as a matter of public record. The first defendant must have been satisfied then that these formal financial statements represented a true ad fair view of the first defendant's financial position. Because they were lodged with ACRA in March 2016, these financial statements are also the only evidence of OOPL's financial

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96 BA Tab 1, Vol 1, P3's AEIC at p 61, para 75(3).

97 Defence at para 10.2.3, SDB Tab 10, p 280 at p 299.

position in or about February 2016 which could not have been produced for or in the course of this litigation. I cannot ignore the Bankrupt's and the second defendant's propensity to produce and falsely date self-serving documents for or in anticipation of this litigation. To that extent, I reject all of the other figures which the defendants now put forward for OOPL's value as self-serving afterthoughts.

241 It is true that the value of $2.18m to be derived from OOPLs formal financial statements does not take into account loans and advances of $1.9m from OOPL's shareholders. But OOPL itself classified these loans in its formal financial statements as equity rather than debt.[98] As the Trustees explained in cross-examination,[99] this is not commonly done but is an indication of a company's intention to convert the debt into equity. It is no doubt for this reason that OOPL's management accounts as at 11 January 2016 do not record these loans and advances from shareholders at all and do not take them into account in calculating OOPL's net asset value as at that date.

242 I also accept that the formal financial statements as at 31 December 2015 are the most reliable evidence of OOPL's value at the time the Bankrupt transferred his 1,000 shares in OOPL to the third defendant in February 2016. There is no reliable evidence of any genuine and material change in OOPL's value between 31 December 2015 and February 2016.

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98 BA Tab 1, Vol. 3, P3's AEIC at Exhibit VG-112, p 2073, also in Plaintiffs' Bundle of Documents Vol 5 ("5 PB") p 2862.

99 Certified Transcript, 4 February 2020, page 68 lines 15 to 19.

243 I therefore find that the Bankrupt's 1,000 shares in OOPL were worth $2.18m at the time he transferred them to the third defendant for US$1 in February 2016.

1,000 OOPL shares

244 This transfer was a fraudulent conveyance. I have already made my findings as to the Bankrupt's and the second defendant's common fraudulent intent. This intent is attributable not only to them as individuals but also to the first defendant. It is also attributable to the first defendant's subsidiaries. This includes the third defendant. The third defendant was another one of the Bankrupt's nominees and was at all material times under the control of the Bankrupt and the second defendant through the first defendant.

245 The result of the transfer was to put 1,000 shares in OOPL – and through them substantial shares in HMC and IHC – out of the reach of the Bankrupt's creditors. On my findings, the Bankrupt received at most only nominal consideration for these shares. As against the third defendant, he received only US$1. As against the first defendant, he had no liability to the first defendant under the POA because the POA is a sham and devoid of legal effect. And even if the POA were a genuine agreement, the amount which the Bankrupt agreed to set off against his liability of $63m to the first defendant was only $999,896. That is substantially less than $2.18m, *ie*, the true value of the Bankrupt's 1,000 OOPL shares as I have found it to be.

Transaction at an undervalue

246 I accept that the Bankrupt's transfer of his 1,000 OOPL shares to the third defendant was a transaction at an undervalue within the meaning of s 98 of the Act.

247 He disposed of these shares in February 2016. That was well within the five-year period before his bankruptcy during which transactions at an undervalue can be challenged and reversed.[100]

248 I have found as a fact that the Bankrupt was insolvent in February 2016. In any event, the Bankrupt is presumed to have been insolvent at that time or to have become insolvent by reason of the transaction. That is because the third defendant is an associate of the Bankrupt within the meaning of s 100(3) of the Act. The Bankrupt is taken to have control of the third defendant through his control of the first defendant. As I have mentioned, the third defendant is a wholly owned subsidiary of the first defendant. The Bankrupt was therefore at all material times "entitled to exercise, or control the exercise of, one-third or more of the voting power" of the first defendant. This makes the third defendant an associate of the Bankrupt within the meaning of s 101(9)(*b*) of the Act.

249 On any view of the facts as I have found them to be, this was a transaction at an undervalue. As against the third defendant, he received only nominal consideration of US$1. As against the first defendant, he either had no liability at all to the first defendant under the POA or he agreed to set off against that liability a sum which was substantially less than what I have found the true value of his shares in OOPL to be.

Unfair preference

250 It is not the Trustees' case that the third defendant was a creditor of the Bankrupt in February 2016. I have also found that the POA was a sham and devoid of legal effect. As a result, the first defendant was also not a creditor of

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100 BA Tab 2, Vol 4, D2's AEIC at p 2, para 4.

the Bankrupt. There is no scope, therefore, to treat the Bankrupt's transfer of 1,000 OOPL shares to the third defendant as an unfair preference to either the first defendant or the third defendant.

Remedy

251 On the basis that the assets of OOPL may have been dissipated between February 2016 and the date of this judgment, the Trustees seek as a remedy a declaration that the third defendant holds the sum of $2.18m on trust for the Bankrupt, being the value of his 1,000 shares in OOPL at the time of the undervalue transaction.

252 I accept this submission. Section 98(2) of the Act empowers me, upon finding that a transaction was a transaction at an undervalue, to make such order restoring the estate's position to what it would have been if the Bankrupt had not entered into that transaction. I therefore consider that I am not confined to making an order requiring the third defendant simply to transfer the 1,000 shares in OOPL to the Trustees for and on behalf of the Bankrupt *in specie*.

253 I consider that I have the power to order the third defendant to pay to the Trustees for and on behalf of the Bankrupt the sum of $2.18m.

Fifth transaction

254 Yet another of the Bankrupt's nominees was a company known as Golden Cliff. The Bankrupt used Golden Cliff as a vehicle to hold part of his interest in IHC.[101] The Bankrupt is the sole owner of Golden Cliff, holding its

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101 BA Tab 1, Vol 1, P3's AEIC at paras 79–80.

sole share. In May 2016, the Bankrupt transferred his one share in Golden Cliff to the first defendant for $1.[102]

255 The Trustees' submission is that this transfer was a fraudulent conveyance, a transaction at an undervalue and an unfair preference.

256 The first defendant's submission is that Golden Cliff was insolvent at the time of transfer[103] and that the Bankrupt transferred his share in Golden Cliff to the first defendant because he could no longer provide financial support to Golden Cliff in its ongoing litigation. As a result, the first defendant took over ownership of Golden Cliff in order to do so.[104]

257 I accept the Trustees' submission and reject the first defendant's submission for the following reasons.

258 First, on the first defendant's own case, it is now the sole shareholder of Golden Cliff. Golden Cliff's current and historical financial status are therefore now matters which are especially within the knowledge of the first defendant. Further, it is the first defendant who asserts that Golden Cliff was insolvent in May 2016. Therefore, under s 103 and s 108 of the Evidence Act, the burden of proving Golden Cliff's insolvency in May 2016 rests on the first defendant. The first defendant has failed to discharge this burden on the balance of probabilities.

259 As the Trustees point out, the only evidence which the first defendant has produced of Golden Cliff's financial status in May 2016 is both inadequate and unreliable. That evidence comprises a one-page document said to be Golden

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102 BA Tab 1, Vol 1, P3's AEIC at para 81.

103 Defence at paras 11.1.3–11.1.4, SDB Tab 10, p 280 at pp 300–301.

104 BA Tab 2, Vol 4, D2's AEIC at para 118.

Cliff's management accounts as at 31 March 2016.[105] This document is in fact drawn up in the form of a balance sheet. The second defendant admitted under cross-examination that the defendants have no other evidence to offer the court of Golden Cliff's financial position in May 2016.[106]

260 This balance sheet is unreliable for several reasons. First, there is no evidence that it is a historical record, drawn up on or about the date that it bears, March 2016, or at some other time contemporaneously with the transfer. Second, the balance sheet is unaudited. There is therefore no independent verification of the truth of its contents. Given the Bankrupt's and the defendants' established propensity to create self-serving documents to advance their interests in ongoing or anticipated litigation, I consider my suspicions to be entirely justified.

261 The third reason the balance sheet is unreliable is because it is contradicted by what little contemporaneous and independent evidence is available. The balance sheet purports to record that Golden Cliff held 76.75m IHC shares as at 31 March 2016. But IHC's substantial shareholder disclosures contradict this. In January 2016, IHC disclosed that Golden Cliff held 192m IHC shares as at that date and that the Bankrupt had a deemed interest in those shares.[107] In February 2017, IHC disclosed that Golden Cliff held 182.5m IHC shares.[108] The balance sheet is drawn up on a date between the dates of these two disclosures but shows that Golden Cliff held less than half the IHC shares

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105 BA Tab 2, Vol 5, D2's AEIC at p CYM-1 633; referred to in BA Tab 2, Vol 4, D2's AEIC at p 34, para 109, also see 6 PB p 3581.

106 Certified Transcript, 14 February 2020, page 47 line 23 to page 48 line 1.

107 BA Tab 5 Vol 7, P3's 2nd AEIC, Exhibit VG-146, p 1534 at 1538, para 9.

108 BA Tab 5 Vol 7, P3's 2nd AEIC, Exhibit VG-146, p 1546 at 1551, para 9; P3's AEIC at para 34.

reflected in either of these disclosures, with no accompanying substantial shareholder disclosure disclosing the change. The defendants failed to explain this discrepancy.

262 The balance sheet also purports to record that Golden Cliff had receivables of $27.3m from one of the Bankrupt's business associates which were written down to nil. The defendants offered no basis for this total write down.[109] Further, the second defendant's affidavit of evidence in chief treats the same receivable as being recoverable in full just six months earlier for the purpose of establishing that the Bankrupt was solvent then.[110] The defendants treat this business associate's solvency in a self-serving manner: recoverable when it suits them to establish the Bankrupt's solvency but irrecoverable when it suits them to establish Golden Cliff's insolvency.

263 Finally, I accept the Trustees' submission that the Bankrupt's and the defendants' conduct shows that there was some value in the Bankrupt's one share in Golden Cliff and that it was not then insolvent as claimed.[111] Why else would the Bankrupt transfer his one share in Golden Cliff to the first defendant and why would the first defendant pay even $1 for it?

One share in Golden Cliff Share

264 I accept that the Bankrupt's transfer of his one share in Golden Cliff was a fraudulent conveyance.

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109 Certified Transcript, 12 February 2020, page 118 lines 18 to 24.

110 BA Tab 2, Vol 4, D2's AEIC at para 65.

111 BA Tab 2, Vol 4, D2's AEIC at para 109.

265 The transfer took place for no consideration or nominal consideration, *ie*, $1. I have found that the POA is a sham and devoid of legal effect. The Bankrupt was under no obligation to the first defendant to make this transfer. It amounts to a gift. As I have already noted, if a person conveys property to another for no consideration or for nominal consideration and that person is then insolvent or becomes insolvent by reason of the conveyance, a fraudulent intent for the purposes of s 73B of the CLPA will be irrebuttably imputed to that person, even if he did not subjectively intend to defraud his creditors: *Quah Kay Tee* at [21]–[37].

266 I have also already made my findings about the Bankrupt's and the second defendant's common fraudulent intention. I find that that intention motivated this transfer too. This transaction was therefore a fraudulent conveyance.

Transaction at an undervalue

267 The Trustees' alternative claim is that the Bankrupt's transfer of his one share in Golden Cliff Share to the first defendant for $1 was a transaction at an undervalue within the meaning of s 98 of the Act. I accept this submission.

268 The Bankrupt disposed of his one share in Golden Cliff within five years before the commencement of his bankruptcy.

269 I have found as a fact that the Bankrupt was insolvent in May 2016. In any event, the first defendant is an associate of the Bankrupt within the meaning of s 101 of the Act. The Bankrupt is therefore presumed to be insolvent at the time of this transfer or to have become insolvent by reason of the transfer under s 100(3) of the Act.

270 The transfer took place for consideration of US$1. Further, the POA was a sham and is devoid of legal effect. The Bankrupt was under no legal obligation to the first defendant and received no benefit by reason of the transfer.

Remedy

271 The Trustees are entitled to: (a) a declaration that the first defendant holds the one share in Golden Cliff as a result of a fraudulent conveyance or an undervalue transaction; and (b) an order that the first defendant transfer that one share to the Trustees for and on behalf of the Bankrupt and his estate.

Sixth transaction

The Bankrupt's Hong Leong Finance account

272 It is common ground that, on or about 7 February 2017, the Bankrupt transferred just over $782,000 from his account with Hong Leong Finance Limited to the second defendant.

273 The Trustees' case is that the Bankrupt did so for no consideration, making this transfer a fraudulent conveyance, an undervalue transaction and an unfair preference.

274 The defendants' case is as follows. The Bankrupt transferred the $782,000 to the second defendant as agent for the first defendant in partial discharge of his liability to the first defendant[112] under the "IHC Dividend Agreement". I have already summarised the substance of the IHC Dividend Agreement above.

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112 Defence at para 13.5.2, SDB Tab 10, p 280 at p 307.

275 I do not accept the defendants' case for the following reasons.

276 First, the defendants' entire case rests only on the Bankrupt's and the second defendant's oral assertion: (a) that the IHC Dividend Agreement exists; and (b) that that agreement was the reason for this transfer. For reasons I have already given, I accord their oral assertions only the slightest credit.

277 Further, the Bankrupt did not refer to the IHC Dividend Agreement as the reason for the transfer in the only contemporaneous document which is available. That document is his withdrawal instruction to Hong Leong Finance Limited. In that instruction, the Bankrupt stated the reason for this transfer to be simply "Withdrawal of credit balance".[113]

278 Second, the Bankrupt and the defendants offer no convincing reason for the Bankrupt transferring these funds to an account in the second defendant's name as agent for the second defendant rather than directly to an account in the first defendant's name.

279 I am satisfied on the balance of probabilities that: (a) the IHC Dividend Agreement never existed; (b) the Bankrupt intended to benefit the second defendant, not the first defendant, by this transfer; and (c) the Bankrupt's transfer of this sum to the second defendant was made for no consideration.

The transfer of $782,314.83 was a fraudulent conveyance

280 I accept the Trustees' submission that the Bankrupt's transfer of this sum to the second defendant was made with the intent of defrauding creditors. I have already made my findings about the Bankrupt's and the second defendant's

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113 BA Tab 1 Vol 4, P3's AEIC, Exhibit VG-128, p 2567; 7 PB p 4060.

common fraudulent intention. I also do not consider it a coincidence that the Bankrupt carried out this transfer just a month before the Bankrupt was adjudicated bankrupt. Nor is it a coincidence that the transfer was to his wife. I have no doubt that the reason for this transfer was not any purported IHC Dividend Agreement but the Bankrupt's attempt to put assets beyond the reach of creditors in anticipation of his bankruptcy, and even to make provision for his wife and family in that event.

281 In any event, as I have already posited, if a person conveys property to another for no consideration or for nominal consideration and that person is then insolvent or becomes insolvent by reason of the conveyance, a fraudulent intent for the purposes of s 73B of the CLPA will be irrebuttably imputed to that person, even if he did not subjectively intend to defraud his creditors: *Quah Kay Tee* at [21]–[37].

282 This transfer took place for no consideration. I have found that the IHC Dividend Agreement did not exist. I have found that the Bankrupt was insolvent in February 2017.

283 I therefore find that the Bankrupt's payment of $782,000 to the second defendant was a fraudulent conveyance.

The transfer of $782,314.83 was an undervalue transaction

284 The Trustees' alternative case is that this transfer was a transaction at an undervalue within the meaning of s 98 of the Act.

285 I have found that the Bankrupt was insolvent in February 2017. In any event, the second defendant is an associate of the Bankrupt. He is therefore

presumed to be insolvent at the time of the transaction or to have become insolvent by reason of the transaction.

286 The Bankrupt received nothing in return for this transfer. It amounted to a gift to the second defendant. It was a transfer at an undervalue.

Remedy

287 The Trustees are therefore entitled to an order the second defendant pay the sum of $782,314.83 to the Trustees for and on behalf of the Bankrupt and his estate.

Seventh transaction

IHC bonds

288 It is common ground that the Bankrupt sold 1.25m bonds issued by IHC to the first defendant on 13 February 2017. The par value of these bonds was $1.25m. Anybody who held these bonds to redemption would therefore receive payment from IHC of $1.25m plus the unpaid interest accrued up to redemption.[114] At that time, the maturity date of the bonds was one or two years in the future.[115] The Bankrupt transferred the bonds to the first defendant at a price of $0.85m,[116] or 68% of the bonds' par value. This represented the market price of the bonds at the time.

289 The first defendant paid the $0.85m price to the Bankrupt. The Bankrupt transferred it from an account in his name to an account in the joint names of

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114 P3's AEIC at para 93.

115 Certified Transcript, 6 February 2020, page 7 lines 15 to 17.

116 P3's AEIC at para 91.

the Bankrupt and the second defendant. He then transferred it into an account in the second defendant's sole name.[117]

290 On 24 February 2017, just 14 days after the transfer, IHC duly redeemed the bonds. As a result, the first defendant received from IHC $1.27m comprising the principal of $1.25m due on redemption plus accrued interest.[118]

291 As a result: (a) the Bankrupt transferred the bonds to the first defendant and received no consideration in return; and (b) the first defendant realised a profit of $0.42m on the bonds within 14 days of the transfer; and (c) the second defendant received $850,000 in an account in her sole name for no consideration.

292 The Trustees' case is that the Bankrupt's transfer of these bonds to the first defendant was a fraudulent conveyance, a transaction at an undervalue and an unfair preference.

Fraudulent conveyance

293 I accept the Trustees' submission that the Bankrupt's sale of the IHC bonds to the first defendant was a fraudulent conveyance. The Bankrupt knew at the time of the transfer that the bonds would be redeemed in full. In order to explain the reasons for this finding, it is necessary to explain the background to this sale in more detail.

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117 P3's AEIC at paras 102–103; Certified Transcript, 14 February 2020, page 53 line 14 to page 54 line 3.

118 P3's AEIC at para 96.

294 The Bankrupt was an insider of IHC. He was the group Chief Executive Officer of IHC from May 2015 to January 2016.[119] He then continued as a management advisor to IHC up to January 2017.[120] He admitted in cross-examination that he continued to have contact with IHC until the last quarter of 2016.[121] He was also a substantial shareholder of IHC.

295 He ceased to be a substantial shareholder of IHC on 23 January 2017. On that day, he reduced his shareholding in IHC from 23% to 4.67%. That triggered a change of control provision in the bonds. This provision gave bondholders the option to redeem the bonds at par. The Bankrupt knew that his decision to reduce his shareholding in IHC would trigger this change of control provision and the bondholders' option to redeem the bonds.[122]

296 It is true that the price which the first defendant paid was within a reasonable margin of the market price. And the price of the bonds was then depressed because of well-founded fears that IHC might default.[123] But as an insider of IHC and a significant shareholder in IHC, the Bankrupt knew that IHC was in the process of being acquired by a conglomerate with deep pockets. This information was not yet public,[124] and therefore was not reflected in the market price of the bonds. The Bankrupt also knew that the acquirer would not let IHC default so soon after the acquisition. The Bankrupt therefore knew that the first defendant could earn a virtually risk-free profit of $0.42m within two

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119 P3's AEIC at para 8(2).

120 BA Vol 4, P3's AEIC, Exhibit VG-125, p 2441, IHC's Annual Report 2016 at p 37.

121 Certified Transcript, 12 February 2020, page 146 line 13 to page 147 line 8.

122 P3's AEIC at para 88.

123 Certified Transcript, 12 February 2020, page 144 lines 4 to 5.

124 Certified Transcript, 12 February 2020, page 144 lines 4 to 5.

weeks of the transfer if it bought the bonds from the Bankrupt at the market price.[125]

297 The defendants' case is that KGI Securities (Singapore) Pte Ltd ("KGI"), the brokerage who held the bonds for the Bankrupt, force sold the bonds.[126] I do not accept that the sale of the bonds was a forced sale, *ie*, one directed or conducted by the brokerage to reduce the Bankrupt's liabilities.[127] I am satisfied that this sale was a voluntary sale by the Bankrupt and not one conducted or directed by KGI.

298 If a person conveys property to another for no consideration or for nominal consideration and that person is then insolvent or becomes insolvent by reason of the conveyance, a fraudulent intent for the purposes of s 73B of the CLPA will be irrebuttably imputed to that person, even if he did not subjectively intend to defraud his creditors: *Quah Kay Tee* at [21]–[37].

299 I have already found that the Bankrupt was insolvent in February 2017. The Bankrupt therefore transferred the bonds to the first defendant for no consideration at a time when he was insolvent. The transfer was for no consideration because the Bankrupt intended at the time of the sale not to keep the proceeds of sale but to put them at the second defendant's sole disposal.[128] That is what he did by paying the proceeds of sale ultimately into the second defendant's sole account.

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125 P3's AEIC at paras 88–90 and 94.

126 The Bankrupt's AEIC at para 160.

127 Certified Transcript, 12 February 2020, page 145 lines 14 to 18.

128 P3's AEIC at paras 102–103; Certified Transcript, 12 February 2020, page 152 lines 1 to 19.

300 In the alternative, I am satisfied that the transfer took place for a consideration of $850,000 which was well below the true value of the IHC bonds as known to the Bankrupt in circumstances in which he intended the first defendant to earn the difference between the true value of the bonds, *ie*, $1.27m, and the $0.85m which the first defendant paid.

301 It was the Bankrupt's and the second defendant's common and fraudulent intention in selling the bonds to put the bonds and their proceeds of sale out of reach of the Bankrupt's creditors.

302 I therefore find that the sale of the bonds is a fraudulent conveyance.

Transaction at an undervalue

303 The Trustees' alternative case is that the Bankrupt's sale of the bonds is a transaction at an undervalue within the meaning of s 98 of the Act.

304 I have found as a fact that the Bankrupt was insolvent in February 2017. Alternatively, the Bankrupt is presumed to be insolvent because the first defendant and the second defendant are his associates.

305 The Bankrupt's sale of the bonds was at an undervalue. As against the second defendant, this is because he intended from the outset that the entire sale consideration should not come to him but should go to her. As against the first defendant, he knowingly sold bonds worth $1.27m for $0.85m.

306 I therefore find that the defendant's sale of the bonds to the first defendant was a transaction at an undervalue.

Unfair preference

307 The Trustees' alternative claim is that the Bankrupt's sale of the bonds and remittance of the sale proceeds to the second defendant is an unfair preference.

308 Neither the first defendant nor the second defendant were creditors of the Bankrupt at the material time. The sale of the bonds to the first defendant and the transfer of the sale proceeds to the second defendant cannot be an unfair preference.

Total failure of consideration

309 The Trustees' alternative claim is that the first defendant is obliged to make restitution of the bonds in the law of unjust enrichment by reason of a total failure of consideration.

310 For the reasons set out at [187]–[191] above, the Trustees do not have a cause of action in unjust enrichment on a total failure of consideration or at all.

Remedy

311 I have found that the Bankrupt's sale of the bonds to the first defendant was a fraudulent conveyance and a transaction at an undervalue. The Trustees ask for the following orders:

(a) An order that the second defendant pay $850,000 to the Trustees on behalf of the Bankrupt and his estate; and

(b) The first defendant pay $416,128.88, being the difference between the sum which the first defendant received from IHC on

redemption and the sum which the first defendant paid (ultimately to the second defendant) for the bonds.

312 I accept that the Trustees are entitled to this order.

Eighth transaction

The Bankrupt subscribes for redeemable convertible preferences shares in the first defendant

313 In January 2012, the Bankrupt entered into a subscription agreement with the first defendant.[129] Under the subscription agreement, the first defendant agreed to allot and issue to the Bankrupt five redeemable, convertible preference shares ("RCPS") in the capital of the first defendant at a subscription price of $10,000 per share. The subscription agreement allowed the Bankrupt to pay the total subscription price of $50,000 due in four instalments of $12,500 on 31 December of each of four years, from 2013 to 2016.[130] The subscription agreement also gave the first defendant the right, on notice to the Bankrupt, to cancel the RCPS if the Bankrupt defaulted in paying the subscription price.

314 The Bankrupt never made any payments towards the subscription price for the RCPS. In January 2017, the first defendant gave the Bankrupt notice that he was in default in paying the subscription price for the RCPS.[131] In February 2017, the first defendant terminated the subscription agreement and, with it, the Bankrupt's right to be allotted five RCPS in the first defendant.

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129 2 PB p 977.

130 2 PB p 993.

131 BA Tab 2 Vol 5, D2's AEIC at p CYM-1 627.

Fraudulent conveyance

315 The Trustees' case is that the termination of the subscription agreement in February 2017 was a fraudulent conveyance because it amounted to the first defendant extinguishing the Bankrupt's right to be allotted the five RCPS in the first defendant in exchange for which the Bankrupt received no consideration, and was entered into with fraudulent intent in order to put the five RCPS out of the reach of the Bankrupt's creditors.

316 The defendants' submission is that the essential element for a conveyance is absent in relation to the RCPS. I accept the defendants' submission.

317 The subscription agreement did not create or convey any property to the Bankrupt. It merely gave him a contractual right to call on the first defendant to allot and issue five RCPS to him upon paying the final instalment of the subscription price on 31 December 2016. Until and unless the first defendant allotted and issued the RCPS, the Bankrupt would not own any property.

318 When the first defendant exercised its right to terminate the subscription agreement, all it did was to extinguish the contractual rights which the subscription agreement conferred upon the Bankrupt. There was no property in existence for the first defendant to convey to anyone. And no property was conveyed by extinguishing a contractual right. Section 2 of the CLPA defines "conveyance" 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; and 'convey' has a corresponding meaning". Nothing of the sort occurred in February 2017.

319 In light of this finding, it is not necessary to consider any of the other elements necessary to establish a fraudulent conveyance.

320 The first defendant's termination of the subscription agreement may entitle the Bankrupt to relief from forfeiture in equity. I hold that it was not a fraudulent conveyance.

The termination of the five RCPS was an undervalue transaction

321 The Trustees' alternative submission is that the first defendant's exercise of its right to terminate the subscription agreement in February 2017 was a transaction at an undervalue.

322 Once again, I point out that the subscription agreement did not create or convey any property rights to the Bankrupt. Similarly, the first defendant's termination of the subscription agreement was the unilateral exercise of a valid contractual right to terminate the subscription agreement. It was not a transaction.

323 Given this finding, it is not necessary to analyse the other elements of a transaction at an undervalue. I hold that the first defendant's termination of the Bankrupt's right to be allotted five RCPS in the first defendant was not a transaction at an undervalue.

The termination of the five RCPS was an unfair preference

324 The Trustees' alternative submission is that the first defendant's exercise of its right to terminate the subscription agreement in February 2017 was an unfair preference in favour of the second defendant.

325 The second defendant was not a creditor of the first defendant. There is no basis for the termination of the subscription to be characterised as an unfair preference.

Ninth transaction

The first defendant buys 57.8 m HMC shares from the Bankrupt

326 It is common ground that, on 27 February 2017, the Bankrupt borrowed $2.77m from KGI.[132] The $2.77m was credited to the Bankrupt's joint account with the second defendant. The second defendant withdrew $2.77m from the account by way of a cashier's order drawn in favour of the first defendant.

327 On 1 March 2017, the Bankrupt sold 57.8m HMC shares to the first defendant at a price of $2.77m by way of a married deal.[133] As a result, the first defendant received 57.8m HMC shares from the Bankrupt. In exchange, the first defendant paid $2.77m to the Bankrupt. The Bankrupt then used the $2.77m to repay his broker.

328 The Trustees' case is that this transaction was either a fraudulent conveyance of or a transaction at an undervalue of either the 57.8m shares or the $2.77m. In my view, there can be no fraudulent conveyance or undervalue transaction in relation the $2.77m. That money came from the Bankrupt's broker at the beginning of this three-way transaction and was returned to the Bankrupt's broker at the end of the transaction. The Trustees' only possible claim is in respect of the 57.8m HMC shares.

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132 Certified Transcript, 12 February 2020, page 82 line 10 to page 83 line 8.

133 Certified Transcript, 12 February 2020, page 148 lines 14 to 17; the Bankrupt's AEIC at para 165.

Fraudulent conveyance

329 I accept that the Bankrupt's transfer of the 57.8m shares to the first defendant was a fraudulent conveyance.

330 The economic effect of the transaction was to vest 57.8m HMC shares in the first defendant for no consideration to the Bankrupt. Although the transaction was structured as a sale, and although $2.77m changed hands, that money did not originate from the first defendant at the beginning of this three-way transaction and was not retained by the Bankrupt at the end of the transaction.

331 This circular movement of $2.77m was intentional.[134] It took place on the cusp of the Bankrupt's bankruptcy. It was part of the Bankrupt's and the second defendant's fraudulent common intention to place assets, in this case the 57.8m HMC shares, beyond the reach of the Bankrupt's creditors in anticipation of his bankruptcy. In any event, there is an irrebuttable presumption of a fraudulent intent because this conveyance was made by the Bankrupt for no consideration while he was insolvent: *Ng Bok Eng Holdings Pte Ltd and another v Wong Ser Wan* [2005] 4 SLR(R) 561 at [16]; *Quah Kay Tee* at [21].

332 The transaction resulted in a substantial asset being lost to the first defendant for no consideration to the Bankrupt.

333 I hold that this transfer was a fraudulent conveyance.

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134 Certified Transcript, 12 February 2020, page 149 lines 21 to 24.

Transactions at an undervalue

334 The Trustees' alternative case is that the disposal of the 57.8m shares was a transaction at an undervalue within the meaning of s 98 of the Act.

335 I accept this submission.

336 I have found that the transaction took place when the Bankrupt was insolvent. In any event, there is a presumption of insolvency because the first defendant is an associate of the Bankrupt.

337 I have already found that the first defendant's shares have value. The Bankrupt received nothing of value in exchange for the 57.8m HMC shares. It was a transaction at an undervalue.

Remedy

338 As a result of my findings, the Trustees are entitled to: (a) a declaration that the transfer of the 57.8m shares is a transaction at an undervalue; and (b) an order requiring the first defendant to transfer the 57.8m shares to the Trustees for and on behalf of the Bankrupt.

Tenth transaction

339 The Trustees' final claim is that the IHC Dividend Agreement was a fraudulent conveyance or a transaction at an undervalue within the meaning of s 98 of the Act. The Trustees advance this claim without prejudice to their primary position that the IHC Dividend Agreement never existed.

340 I have accepted that there was no such agreement as the IHC Dividend Agreement. It is therefore not necessary for me to analyse this claim further.

Conclusion

341 I now invite the parties to draw up the formal orders to be entered to give effect to my findings and holdings in this judgment. I will also hear from the parties on costs.

Vinodh Coomaraswamy
Judge of the High Court

Andrew Chan, Alexander Yeo and Chew Jing Wei (Allen & Gledhill LLP) for the plaintiffs;
Goh Kok Leong, Daniel Tan and Dillion Chua (Ang & Partners) for the defendants.