IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 25

Civil Appeal No 36 of 2021

Between

Rothstar Group Limited

… *Appellant*

And

Leow Quek Shiong

… *Respondent*

In the matter of Originating Summons No 87 of 2021

Between

Leow Quek Shiong

… *Plaintiff*

And

Rothstar Group Limited

… *Defendant*

Civil Appeal No 37 of 2021

Between

Rothstar Group Limited

… *Appellant*

And

(1) Lin Yueh Hung
(2) Chee Yoh Chuang

… *Respondents*

In the matter of Originating Summons No 89 of 2021

Between

(1) Chee Yoh Chuang
(2) Lin Yueh Hung

… *Plaintiffs*

And

Rothstar Group Limited

… *Defendant*

Civil Appeal No 38 of 2021

Between

Rothstar Group Limited

… *Appellant*

And

(1) Lin Yueh Hung
(2) Chee Yoh Chuang

… *Respondents*

In the matter of Originating Summons No 78 of 2021

Between

Rothstar Group Limited

… *Plaintiff*

And

(1) Chee Yoh Chuang
(2) Lin Yueh Hung

… *Defendants*

JUDGMENT

[Civil Procedure — Appeals — Leave to introduce new points on appeal]
[Insolvency Law — Avoidance of transactions — Transactions at an undervalue]
[Land — Caveats — Remedies of caveatee]
[Land — Conveyance — Voluntary conveyances to defraud creditors]

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v
Leow Quek Shiong and other appeals

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Court of Appeal — Civil Appeals Nos 36, 37 and 38 of 2021
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27 January 2022

21 March 2022 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 Upon the insolvency of an individual or a company, the statutory scheme set out in the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the BA"), the Companies Act (Cap 50, 2006 Rev Ed) ("the CA"), and now the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("the IRDA") governs the avoidance of certain antecedent transactions. While the conditions for avoidance vary according to the particular ground of avoidance and type of transaction in issue, they are generally animated by a common policy: namely, "protect[ing] the general body of creditors against a diminution of the assets available to them by a transaction which confers an unfair or improper advantage on the other party" (*Goode on Principles of Corporate Insolvency Law* (Kristin van Zweiten gen ed) (Sweet & Maxwell, 5th Ed, 2018) ("*Goode*") at para 13–03). The appeals before us have brought into focus several questions

relating to one such category of transactions: transactions at an undervalue within the scope of s 98 of the BA. In particular, these appeals raise for determination, for what we understand to be the first time, the question of whether the grant of security for the *existing indebtedness* of a *third party* can constitute a transaction at an undervalue, and thus the applicability and scope of the principle articulated in the English case of *Re MC Bacon Ltd* [1990] BCLC 324 ("*MC Bacon*") in our law.

2 These appeals have also provided us with an opportunity to clarify the proper interpretation and application of s 98(3)(*c*) of the BA, which provides that a transaction will be at an undervalue if it is entered into for consideration the value of which is significantly less than the value provided, with both values being measured in money or money's worth.

3 We begin with an overview of the salient facts, a proper understanding of which is necessary to appreciate the specific legal issues raised.

Facts

Background

4 At all material times, Mr Ng Say Pek ("NSP") and his son were the only two shareholders and directors of Agritrade International (Pte) Ltd ("AIPL"). NSP was also the sole shareholder and one of the two directors of Pictorial Development Pte Ltd ("Pictorial"), with the other director being his wife.

5 Pictorial owned 99% of a residential property that was NSP's family home ("the Property"), with the remaining 1% owned by NSP in his own name.

Mortgages granted to Rothstar

6 Under a loan agreement dated 9 April 2019 ("the Loan Agreement") between AIPL and Rothstar Group Limited ("Rothstar"), Rothstar agreed to extend a loan of $5m ("the Loan") to AIPL. As security for the payment and discharge of the Loan, AIPL was to procure a third-party equitable mortgage in respect of the Property in favour of Rothstar. On 10 June 2019, NSP and Pictorial granted an equitable mortgage over the Property ("the Equitable Mortgage") to Rothstar as security for the fulfilment of AIPL's obligations under the Loan Agreement.

7 AIPL failed to make repayment of the Loan by 16 July 2019, the date stipulated under the Loan Agreement. Thereafter, the deadline for the repayment of the Loan was extended twice, on 20 August 2019 and 4 November 2019, for a total of six months until 1 February 2020. On 27 November 2019, Rothstar, AIPL, Pictorial and NSP entered into a Deed of Discharge and Termination ("the Deed of Discharge"), under which the Equitable Mortgage was terminated in consideration of NSP and Pictorial agreeing to grant a legal mortgage over the Property to Rothstar. On 2 December 2019, NSP and Pictorial executed the legal mortgage ("the Legal Mortgage"), as security for all sums due and payable by them and/or AIPL to Rothstar. The Legal Mortgage was registered on 5 December 2019.

8 On or around 21 December 2019, NSP absconded from Singapore. AIPL failed to repay the Loan by 1 February 2020.

Insolvency of Pictorial, NSP and AIPL

9 A bankruptcy order was made against NSP on 12 March 2020 and private trustees in bankruptcy ("the Private Trustees") were appointed. On

18 March 2020, the Private Trustees lodged a caveat against the Property on the basis that NSP's assets, including his 1% interest in the Property, vested in them upon NSP's bankruptcy ("the Private Trustees' Caveat"). On 30 April 2020, the Private Trustees applied to compulsorily wind up Pictorial. On 19 June 2020, Pictorial was ordered to be wound up and a liquidator ("the Liquidator") was appointed. On 29 June 2020, the Liquidator lodged a further caveat against the Property ("the Liquidator's Caveat"). Thereafter, AIPL was placed under judicial management. Its judicial managers filed a winding up application on 4 September 2020 and AIPL was wound up on 21 September 2020.

Commencement of proceedings

10 On 20 January 2021, the Liquidator and the Private Trustees applied for the Legal Mortgage to be set aside on the ground that it was a transaction at an undervalue or a voluntary conveyance to defraud creditors, and for Rothstar to deliver vacant possession of the Property to them. In response, on 26 January 2021, Rothstar applied under s 127(1) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the LTA") for the Private Trustees to show cause as to why the Private Trustees' Caveat should not be removed.

11 The winding up and bankruptcy applications against Pictorial and NSP respectively were made, and the Legal Mortgage was granted, before the IRDA came into operation on 30 July 2020. It is undisputed that the pre-IRDA versions of the BA, the CA and the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("the CLPA") are the applicable statutes.

Decision below

12 In *Rothstar Group Ltd v Chee Yoh Chuang and another and other matters* [2021] SGHC 176 ("the GD"), the High Court judge below ("the

Judge") held that the Legal Mortgage was void as a transaction at an undervalue. Although Rothstar had provided valid consideration for the Legal Mortgage in the form of the discharge of the Equitable Mortgage, such that s 98(3)(*a*) of the BA did not apply (GD at [50]–[51]), the Legal Mortgage was entered into at an undervalue within s 98(3)(*c*) of the BA as the value of any consideration received by Pictorial and NSP with respect to the Legal Mortgage was significantly less than the value of the consideration provided by them. The Loan was for AIPL's benefit, and Pictorial and NSP could not be said to have received the value of the Loan (GD at [60]–[65]). The Judge also found that Pictorial became insolvent as a result of the Legal Mortgage, and that NSP either was insolvent when the Legal Mortgage was granted or became insolvent as a result of the Legal Mortgage (GD at [70]). Further, Reg 6 of the Companies (Application of Bankruptcy Act Provisions) Regulations (GN No S 293/1995) ("the Regulations") was not available to Rothstar as against the Liquidator as it could not be said that Pictorial had granted the Legal Mortgage for the purpose of carrying on its business, or that Pictorial had reasonable grounds for believing that the Legal Mortgage would benefit it (GD at [71]–[73]).

13 However, the Judge found that the Legal Mortgage was *not* a voluntary conveyance to defraud creditors. As consideration had been given for the Legal Mortgage, there had to be actual intent on the part of Pictorial and NSP to defraud their creditors. The Judge found that the Liquidator and the Private Trustees had failed to prove the requisite actual intent to defraud (GD at [81]).

14 Having found that the Legal Mortgage was void, the Judge consequently dismissed Rothstar's application to remove the Private Trustees' Caveat (GD at [86]).

Summonses for leave to raise new points on appeal

15 Before we address the substantive issues arising in these appeals, we deal briefly with the parties' applications under O 57 r 9A(4)(*b*) of the Rules of Court (2014 Rev Ed) for leave to raise several new points on appeal. The new points Rothstar sought to raise related to whether Pictorial became insolvent as a result of the grant of the Legal Mortgage; whether the Liquidator and the Private Trustees were estopped from arguing that Pictorial and NSP were insolvent or became insolvent when they granted the Legal Mortgage; and whether the Judge should have voided the Legal Mortgage in view of the previously existing Equitable Mortgage. In response, the Liquidator and the Private Trustees sought to raise new points relating to the validity and priority of the Equitable Mortgage.

16 At the commencement of the hearing before us on 27 January 2022, we allowed all the applications as the new points were essentially questions of law and, as the parties confirmed, no fresh evidence was required for these points to be determined on appeal. As this court noted in *Liew Kit Fah and others v Koh Keng Chew and others* [2020] 1 SLR 275 at [14], an appellate court will generally be open to consider new arguments where these involve questions of law that can be answered without further evidence.

Issues to be determined

17 The following issues arise for our determination in these appeals:

(a) First, whether the Legal Mortgage should be set aside on the ground that it was a transaction at an undervalue within s 98 of the BA. This in turn raises three sub-issues:

(i) whether the Legal Mortgage was granted at an undervalue (including whether and when the grant of security for an existing debt can constitute a transaction at an undervalue);

(ii) whether Pictorial and NSP were insolvent at the time of, or became insolvent as a result of, granting the Legal Mortgage; and

(iii) the appropriate order that should be made under s 98(2) of the BA.

(b) Second, whether the Legal Mortgage was a voluntary conveyance to defraud creditors under s 73B(1) of the CLPA.

(c) Third, whether the Private Trustees' Caveat ought to be removed.

Issue 1: Whether the Legal Mortgage was a transaction at an undervalue

18 We begin with the issue of whether the Legal Mortgage was a transaction at an undervalue within the scope of s 98 of the BA, which lies at the heart of these appeals.

Whether the Legal Mortgage was granted at an undervalue

The parties' arguments

19 Rothstar makes two broad arguments in support of its submission that that the Legal Mortgage was not a transaction at an undervalue. First, *MC Bacon* stands for the proposition that the grant of a security cannot constitute an undervalued transaction. Second, the Judge erred in three respects in finding

that the value of the consideration received by Pictorial and NSP was significantly less than the value of the consideration provided by them:

(a) the Legal Mortgage must be viewed holistically to identify the commercial bargain struck by the parties, and the court should compare the value of the Loan granted by Rothstar to AIPL with the value of the Legal Mortgage granted (which are approximately the same);

(b) the Judge erred in finding that the value of any benefit received by Pictorial and NSP from the Loan to AIPL was clearly less than the value of the Legal Mortgage granted, because the Judge should have taken into account the commercial benefit received by Pictorial and NSP from the Loan in view of the close connections between NSP, AIPL and Pictorial; and

(c) the Judge (at [60] of the GD) incorrectly imposed a requirement that the consideration had to be received by Pictorial and NSP personally.

20 The Liquidator and the Private Trustees make three submissions in response. First, the principle in *MC Bacon* concerns a party who has granted security for its *own* indebtedness, and the grant of a security for the indebtedness of a *third party* (as in the present case) can constitute an undervalued transaction. Second, s 98(3)(*c*) of the BA requires the value of the consideration to be received by the insolvent party personally. Third, the value of what Pictorial and NSP received from the Loan is significantly less than the value of what they gave up in granting the Legal Mortgage.

21 We first consider the proper interpretation and requirements of s 98(3)(*c*) of the BA, which was the focus of the parties' arguments on appeal.

Against this backdrop, we deal with the question of whether and when the grant of security for an existing debt can constitute a transaction at an undervalue, before addressing the application of these principles to the facts of the present case.

*Section 98(3)(*c*) of the BA*

22 Section 98(3) of the BA sets out three situations in which a party can be said to have entered into a transaction at an undervalue. Leaving aside s 98(3)(*b*), which deals with transactions entered into in consideration of marriage, s 98(3) provides as follows:

> **Transactions at an undervalue**
>
> **98.**— … (3) For the purposes of this section and sections 100 and 102, an individual enters into a transaction with a person at an undervalue if —
>
> (*a*) he makes a gift to that person or he otherwise enters into a transaction with that person on *terms that provide for him to receive no consideration*; … or
>
> (*c*) he enters into a transaction with that person for a *consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided* by the individual.
>
> [emphasis added]

23 While s 98(3) of the BA on its face applies only to individuals, s 329(1) of the CA extends the application of these principles to companies. For convenience, we refer only to the relevant provisions of s 98 of the BA in the analysis that follows. We also note that, in cases to which the IRDA applies, such transactions would now be governed by ss 224 and 361 of the IRDA for companies and individuals respectively. However, the applicable principles remain largely unchanged, and our analysis below should apply equally to transactions at an undervalue under ss 224 and 361 of the IRDA.

24 "Consideration" is not defined for the purposes of s 98(3) of the BA, but "would appear to have the normal meaning ascribed to it by the law of contract" (see *Goode* at para 13–23, commenting on the equivalent provision in s 238(4) of the Insolvency Act 1986 (c 45) (UK) ("the UK Insolvency Act")). However, it is clear from the statutory wording that each limb of s 98(3) focuses on a different aspect of consideration. Whereas s 98(3)(*a*) is concerned only with the *existence* of consideration in the contractual sense, s 98(3)(*c*) expressly requires a *comparison of value* between the consideration provided and the consideration received.

25 In undertaking the comparison of value stipulated under s 98(3)(*c*), two points are key. The first is that the value comparison exercise must be undertaken from the perspective of the *grantor* (*ie*, the insolvent individual or company). This point was highlighted by Millett J (as he then was) in *MC Bacon* at 340G and coheres with the policy object of s 98 as a whole, which is "to *protect the interest of the general body of creditors against a diminution of assets* brought about by a transaction which confers an unfair or improper advantage on a particular creditor of the company" [emphasis added] (*Mercator & Noordstar NV v Velstra Pte Ltd (in liquidation)* [2003] 4 SLR(R) 667 at [27]; see also *Velstra Pte Ltd v Dexia Bank NV* [2005] 1 SLR(R) 154 ("*Velstra*") at [44]). For the purposes of protecting the *grantor's* creditors, what is crucial is a diminution in the value of the *grantor's* assets. Therefore, the material comparison is between the value received by the grantor and the value provided by the grantor, not the value received or provided by any other party.

26 This leads us neatly to Rothstar's contention that s 98(3)(*c*) of the BA does not require the court to compare the value of the consideration received by the grantor *personally* with that given by the grantor. It is true that there is no requirement for the *consideration* to have been received by the grantor directly:

consideration need not move directly from the grantor to the counterparty or *vice versa* (see John Armour, "Transactions at an Undervalue" in *Vulnerable Transactions in Corporate Insolvency* (Howard Bennett and John Armour gen eds) (Hart Publishing, 2003) ("Bennett & Armour") at para 2.87). However, although the relevant consideration need not have been received by the grantor directly, the *value* of that consideration is nonetheless relevant in the value comparison exercise under s 98(3)(*c*) *only in so far as it accrues to the grantor*. This is aptly illustrated by the hypothetical example given at para 13–23 of *Goode*:

> … [I]f G Ltd gives a guarantee to C in consideration of an advance by C to G Ltd's parent, D Plc, and G Ltd then goes into winding-up, *while the consideration for the guarantee is the advance by C to D Plc, the value of that consideration for the purpose of s.238 is* ***its value to the surety, G Ltd****, not its value to D Plc.*
>
> [emphasis added in italics and bold italics]

27 This approach is consistent with both parties' interpretation of the decision in *Velstra*. There, no consideration was provided by the counterparty (Artesia Bank) to the insolvent company (Velstra) directly, and what was regarded as "full consideration" for Velstra's remittance to Artesia Bank was the extension of credit by Artesia Bank to three individuals, referred to collectively as "LH&W". At the relevant time, LH&W owed Artesia Bank over US$20m, and this court held that it was fair to infer that Velstra had requested its bank to notify Artesia Bank of its incoming funds "pursuant to an arrangement made between Velstra and LH&W who were related". In the result, this court concluded that the remittance would not have been a transaction at an undervalue (*Velstra* at [47]–[49]). Rothstar is therefore correct to argue that *Velstra* demonstrates that the *consideration* under s 98(3)(*c*) need not be received directly by the grantor. At the same time, the Liquidator is also correct to point out that Velstra had effectively benefited from the payment it made to

Artesia Bank, which supports the position that s 98(3)(*c*) requires an assessment of the *value received* by the grantor *personally*.

28 A further example may be found in the decision of the Court of Appeal of England and Wales in *Re Thoars (decd) (No 2); Reid v Ramlort Ltd (No 2)* [2005] 1 BCLC 331 ("*Thoars*"). The grantor (Mr Thoars), since deceased, owned and controlled two companies which owed a significant debt to one of their suppliers, Ramlort Ltd ("Ramlort"). Although Mr Thoars was under no direct personal liability to Ramlort in respect of his companies' indebtedness, he was under some pressure to arrange for the payment of this indebtedness. He executed a declaration of trust declaring that he held the benefits of a whole life assurance policy on his life on trust for Ramlort absolutely. As consideration for this declaration of trust, Ramlort made two payments: a payment of £1,100 to a third party, and a loan of £1,900 to Mr Thoars himself (see *Thoars* at [2] and [12]). The English Court of Appeal disagreed with the finding of the judge below that the value of the consideration received by Mr Thoars was nil. It took the view that the loan of £1,900 had to have had more than a nominal value in money or money's worth from Mr Thoars' point of view, notwithstanding that it was repayable on demand. Notably, the English Court of Appeal also held (in the absence of any evidence as to the circumstances in which this payment was made) that "the payment of £1,100 to the third party at, presumably, the direction of Mr Thoars, ha[d] on the face of it a value to Mr Thoars equal to its face value". The English Court of Appeal therefore proceeded on the basis that the value received by Mr Thoars was "not substantially less than £3000" (*Thoars* at [120]). This, in our view, clearly illustrates the point that consideration received by a third party can nevertheless have value to the grantor, and it is this latter value that is relevant in the value comparison exercise under s 98(3)(*c*).

29 However, the fact that the value comparison exercise is undertaken from the perspective of the grantor does not mean that the grantor's mere *perception* of value will suffice. At the hearing before us, counsel for Rothstar, Mr Bazul Ashhab, suggested that it was not necessary to consider whether there was actual value received by the grantor, so long as there was a perception of value by the grantor, albeit assessed objectively rather than subjectively. We disagree. In our view, there is no basis in the language of s 98(3)(*c*) of the BA for the grantor's perception of value, whether objectively or subjectively assessed, to be taken into account. Such an approach would also undermine the policy object of s 98 of protecting the grantor's creditors against a diminution of the grantor's assets (see [25] above). In our judgment, what matters for this purpose is the *actual* value received and provided by the grantor. The introduction of the nebulous concept of the grantor's perceived value would render the value comparison exercise unworkable and arbitrary, as this perceived value would be incommensurable with the actual value provided by the grantor. In this regard, although the policy object of s 98 may overlap with the policy concern underlying unfair preferences, which are governed by s 99 of the BA, a key difference between the two statutory regimes is that the party who gives an unfair preference must have been influenced by a subjective desire to prefer the recipient (s 99(4) of the BA and *DBS Bank Ltd v Tam Chee Chong and another (judicial managers of Jurong Hi-Tech Industries Pte Ltd (under judicial management))* [2011] 4 SLR 948 at [22] and [26]). In contrast, in our view, s 98(3)(*c*) is not concerned with the intentions or perceptions of the grantor; its focus is instead on the *diminution in the actual value of the grantor's assets*.

30 This brings us to the second key point, which is that s 98(3)(*c*) of the BA requires both the value of the consideration provided and the value of the consideration received by the grantor to be assessed "in money or money's

worth". Where the relevant consideration is received by the grantor in the form of money, the assessment of its value will generally be straightforward. The assessment of value in *money's worth* may pose some difficulty. We give a few illustrative examples of the kinds of consideration with value to the grantor that is capable of being assessed in money's worth.

31 In *Feakins and another v Department for Environment, Food and Rural Affairs* [2005] EWCA Civ 1513 ("*Feakins*"), the consideration received by the grantor was the *discharge of his indebtedness* to a bank of approximately £450,000. The value of this consideration in money or money's worth was held to be significantly less than the value of the benefit received by the other party to the transaction, which was the transfer of an asset worth approximately £1m (*Feakins* at [80]–[81]).

32 In *Buildspeed Construction Pte Ltd (in liquidation) v Theme Corp Pte Ltd and another* [2000] 1 SLR(R) 287 ("*Buildspeed Construction*"), the insolvent company (Buildspeed) had entered into a novation agreement with another company (Theme Corp), under which Buildspeed would be released from the building contract and Theme Corp would take over the performance of the building contract. The consideration received by Buildspeed comprised: (a) the *release from further performance* under the building contract, (b) the *release from liability for delay* beyond a certain date, and (c) the *release from liability for defects and other obligations* under the building contract in the execution of the works down to that date (*Buildspeed Construction* at [22]). The consideration provided by Buildspeed was the uncompleted part of the building contract (the value of which, in money or money's worth, was the price payable by the Buildspeed's employer for the balance works); the amount payable under an interim certificate; and a sum of retention moneys (*Buildspeed Construction* at [38]). The value of the consideration Buildspeed received was assessed with

reference to a surveyor's report to be significantly less than the consideration Buildspeed provided (*Buildspeed Construction* at [47]).

33 These examples can be contrasted with cases where the relevant consideration was held *not* to be measurable in money or money's worth. In *MC Bacon*, the ability to apply the proceeds of charged assets otherwise than in satisfaction of the secured debt was held to be "not something capable of valuation in monetary terms and … not customarily disposed of for value" (*MC Bacon* at 340I–341A). This led Millett J to conclude that the insolvent company's creation of a security over its assets was not a transaction at an undervalue, which we discuss in more detail at [35]–[45] below. Another illustration is provided by the House of Lords' decision in *Phillips and another v Brewin Dolphin Bell Lawrie Ltd and another* [2001] 1 WLR 143 ("*Phillips*"). Although the relevant transaction in that case was a share sale agreement under which the insolvent company had sold its shares to another company (BD), the consideration for the shares was not only the set of obligations assumed by BD under the share sale agreement, but also the entry by BD's parent company (PCG) into a separate sub-lease agreement under which it covenanted to pay the insolvent company the purchase price for the shares through the payment of an annual sum for four years (*Phillips* at [21]). The *value* of PCG's covenant under the sub-lease agreement in money or money's worth was, however, found to be nil: the covenant was "precarious" from the outset because the sub-lease agreement constituted a breach of the terms of the head leases. This meant that the head leases became terminable at any time by the head lessors, which would in turn bring to an end the sub-lease and PCG's payment obligations thereunder. The House of Lords remarked that if a covenant with such precarious character was to have value attributed to it for the purposes of s 238 of the UK Insolvency Act, that value had to "be placed on a more firm footing than that of speculative

suggestion", and it was for the party relying on that consideration to establish its value (*Phillips* at [22]–[28]).

34 In our view, these non-exhaustive examples illustrate the general point that the value of the consideration must be *quantifiable in monetary terms*, even if the precise monetary value of the consideration cannot be immediately determined with certainty. This is necessary in order for the value of the consideration provided and received by the grantor to be meaningfully compared on the same footing. It bears reiterating that the policy object of s 98 is to protect the grantor's creditors against a diminution in the value of the grantor's assets (see [25] above). Abstract or intangible forms of value which cannot be quantified in monetary terms are of no value to the grantor's creditors upon its insolvency, and as such have no place in the value comparison exercise. Further, where the value of the consideration is precarious or speculative, some evidence will be needed to establish and quantify its value in monetary terms in order to undertake an objective comparison.

Grant of security for an existing debt

35 With the above principles in mind, we turn to the proposition that the grant of security for an existing debt cannot in principle constitute a transaction at an undervalue, for which Rothstar relies on Millett J's decision in *MC Bacon*.

36 In *MC Bacon*, the insolvent company had granted a first mortgage debenture over its assets in favour of a bank, as security for its overdraft with that bank. The liquidator of the company applied to have the bank's debenture set aside as either a voidable preference or a transaction at an undervalue. Millett J first held that the granting of the debenture was not a transaction for *no consideration* within s 238(4)(*a*) of the UK Insolvency Act (which is *in pari*

materia to s 98(3)(*a*) of the BA) because there was consideration consisting of the bank's forbearance from calling in the overdraft, its honouring of cheques and the making of fresh advances to the company during the continuance of the overdraft facility (*MC Bacon* at 340F). In holding that the granting of the debenture was also not a transaction where the consideration received was *significantly less* than the consideration provided, within s 238(4)(*b*) of the UK Insolvency Act (which is *in pari materia* to 98(3)(*c*) of the BA), Millett J stated (at 340H–341A):

> … [T[he applicant's claim to characterise the granting of the bank's debenture as a transaction at an undervalue is misconceived. *The mere creation of a security over a company's assets does not deplete them* and does not come within the paragraph. By charging its assets the company appropriates them to meet the liabilities due to the secured creditor and adversely affects the rights of other creditors in the event of insolvency. *But it does not deplete its assets or diminish their value.* It retains the right to redeem and the right to sell or remortgage the charged assets. *All it loses is the ability to apply the proceeds otherwise than in satisfaction of the secured debt. That is not something capable of valuation in monetary terms and is not customarily disposed of for value.*
>
> [emphasis added]

37 A different approach was taken by the English Court of Appeal in *Hill v Spread Trustee Co Ltd and another* [2007] 1 WLR 2404 ("*Hill*"), where the insolvent individual had granted various charges as security for loans made to him by his settlement trustees, and his trustee in bankruptcy subsequently argued that the charges constituted transactions defrauding creditors under s 423 of the UK Insolvency Act. The definition of a transaction at an undervalue under ss 423(1)(*a*) and 423(1)(*c*) of the UK Insolvency Act is *in pari materia* with that under ss 98(3)(*a*) and 98(3)(*c*) of the BA respectively. Arden LJ (as she then was) held that it did not follow from Millett J's holding in *MC Bacon* that the grant of security could *never* be for no consideration under s 423(1)(*a*), and that it was "no different from any other transaction in that respect" (*Hill* at [93]).

This was, Arden LJ noted, consistent with Millett J's finding in *MC Bacon* that consideration *had* been given for the granting of the debenture. However, notwithstanding her finding (at [98] of *Hill*) that no consideration had been given for the grant of the charges on the facts of *Hill*, Arden LJ went on to doubt whether the principle in *MC Bacon* would apply in relation to s 423(1)(*c*), and stated that she "would provisionally not have accepted the argument that the grant of security in this case did not involve the disposition of any property right in favour of the trustees" because the value created by the debtor in granting the security (namely, "the value of the right to have recourse to the security and to take priority over other creditors") should be taken into account (*Hill* at [138]).

38 These two UK decisions were recently considered by the High Court in *Encus International Pte Ltd (in compulsory liquidation) v Tenacious Investment Pte Ltd and others* [2016] 2 SLR 1178 ("*Encus*"). While Judith Prakash J (as she then was) was not required to decide whether the approach in *MC Bacon* or *Hill* was correct or preferable under Singapore law (because no security could have been created on the facts), she expressed an *obiter* preference for the approach in *Hill* because, "[w]hile no doubt rare, it is possible that a situation will arise in which security is given without fresh consideration" (*Encus* at [39]).

39 Confronted with the two different approaches taken by the UK courts, the Judge took the view that *MC Bacon* and *Hill* "are not inconsistent with each other and both are correct", on the basis that *MC Bacon* was decided in respect of the value comparison limb of the definition of a transaction at an undervalue, whereas *Hill* was decided in respect of the no consideration limb (GD at [41]–[43]). However, while the principle articulated in *MC Bacon* relates specifically to the value comparison limb (in s 98(3)(*c*) of the BA or its counterpart in the UK Insolvency Act), and Arden LJ's remarks at [93] of *Hill* relate specifically to the no consideration limb (in s 98(3)(*a*) of the BA or its counterpart in the

UK Insolvency Act), the scope of Arden LJ's comments at [138] of *Hill* cannot be so neatly confined. Instead of seeking to reconcile *MC Bacon* and *Hill* in the manner suggested by the Judge, in our view, it would be desirable to take a firm position on this issue. In that respect, our preference is to adopt the principle in *MC Bacon* as part of Singapore law over the approach in *Hill*. In our judgment, the grant of security for the *grantor's existing debt* will not, in principle, constitute a transaction at an undervalue, for the reasons explained by Millett J in *MC Bacon*.

40 The principle in *MC Bacon* has been followed in the UK, for example in *Feakins* (at [72]) and *Burnden Holdings (UK) Ltd (in liquidation) and another v Fielding and another* [2019] EWHC 1566 (Ch) ("*Burnden*") (at [503]–[504]). It has also received academic support. As *Goode* explains, the grant of security for a previously unsecured loan is not a transaction at an undervalue because it "does not reduce the net assets of the company but *merely attaches an existing liability to an existing asset*, leaving the net balance sheet figures *unchanged*" [emphasis added]. Instead, because its effect is "simply to allocate the asset given in security to a particular creditor instead of leaving it available for creditors generally", it will be more appropriate to examine the impugned transaction in the context of the principles governing unfair preferences (*Goode* at para 13–35). Another perspective from which to view this is that, even though the grant of a security interest has value to the *chargee* (who is placed in a better position on the grantor's insolvency), there is "no transfer of value" from the *grantor's* point of view because its "net position is the same": prior to the grant of the charge, the company is liable to have its assets seized by execution if it defaults on the underlying debt; and after the charge is granted, it remains liable to have them seized by enforcement of the charge (Bennett & Armour at para 2.91). For these reasons, we are of the view

that the principle in *MC Bacon* is not only supported by the weight of authority, but also sound in *principle*.

41 We have two further reasons for declining to adopt Arden LJ's approach in *Hill*. First, as Zacaroli J noted in *Burnden* at [505], the value of the right to have recourse to the security and to take priority over other creditors in *Hill* had value only from the point of view of the *creditor* (the party *receiving* the security), whereas the value comparison exercise (in s 98(3)(*c*) of the BA and s 423(1)(*c*) of the UK Insolvency Act) requires value provided and received to be viewed from the point of view of the *grantor*. Second, with respect, Arden LJ's approach may confuse a transaction at an undervalue with an unfair preference given to particular creditors (see [40] above; see also *Goode* at para 13–35, footnote 131). As we have explained at [29] above, although there may be some overlap between the statutory regimes governing unfair preferences and transactions at an undervalue, each has a distinct focus and they should not be confused or conflated. We highlight that these two points are different sides of the same coin, in that Arden LJ's approach in *Hill* focuses, in our respectful view, incorrectly, on what the *grantee* of the security receives rather than on what the *grantor* gives up.

42 Nevertheless, the common denominator to the approaches taken in *MC Bacon* and *Hill* is that a *comparison of value* must be undertaken. The principle in *MC Bacon* thus applies *within*, and not in the alternative to, the value comparison exercise in s 98(3)(*c*) of the BA. It simply reflects the logical position that where security is granted in respect of the grantor's existing debt, the value of the consideration provided by the grantor is nil because the grant of security in these circumstances does not deplete or diminish the grantor's assets. It follows from this that the value of the consideration received by the grantor in these situations cannot be significantly less than the value of the consideration

provided by him. The suggestion made by Mr Ashhab during the hearing that the principle in *MC Bacon* should apply *to the exclusion of* the value comparison exercise in s 98(3)(*c*) so long as the relevant transaction is the grant of *any* security is, therefore, misconceived. The statutory framework governing transactions at an undervalue is set out in s 98(3)(*c*), and the overriding question thereunder remains whether the value of the consideration received by the grantor is significantly less than the value of the consideration provided by the grantor. The principle in *MC Bacon* does not supplant this statutory framework even in cases involving the grant of security for an existing debt.

43 When this is kept in mind, it becomes clear that the principle in *MC Bacon* cannot be applied as a blanket rule to *all* grants of security for existing debts. In particular, it clearly does not apply where the relevant security is granted in respect of a *third party's* existing debt. In those circumstances, it is clear that the grant of the security *would* reduce the net assets of the grantor as it would impose a *new* liability which the grantor did not previously have. That is why the endorsement of the principle in *MC Bacon* in *Goode* is expressly qualified as follows (*Goode* at para 13–35):

> *The position is otherwise, of course, where the company gives security for the indebtedness of a third party*, for in that situation realisation of the security does not result in the discharge of any debt owed by the company, *which accordingly suffers a loss of the charged asset.*
>
> [emphasis added]

44 In this regard, it should be noted that *MC Bacon*, *Hill* and *Burnden* all concerned the grant of security for the grantor's *own* indebtedness, not that of a third party. That having been said, Rothstar argues that *Burnden* was a case where security was granted by a company (BHUK) and its subsidiaries for a loan given by the shareholders to BHUK, and that the English High Court there

decided, following *MC Bacon*, that a grant of security could not constitute an undervalued transaction even in this three-party context. This is, however, not borne out upon a closer reading of *Burnden*. At [504] of *Burnden*, applying the principle in *MC Bacon*, the court clearly stated that "[c]onsidered *from the point of view of BHUK*, the grant of security involved no transfer of value *from BHUK*" [emphasis added]. *Burnden* thus illustrates that the comparison of value is to be undertaken from the perspective of the grantor of the security. Further, given that the loan in *Burnden* was made to *BHUK itself*, it does not detract from our view that the grant of security for a third party's debts can constitute a transaction at an undervalue.

45 We therefore agree with counsel for the Liquidator and the Private Trustees, Mr Lee Eng Beng SC, that the scope of the principle in *MC Bacon* is limited to security granted for the grantor's *own* existing debt. It does not extend to the grant of security for *a third party*'s debt, and such a grant of security can, in principle, constitute a transaction at an undervalue under s 98(3)(*c*) of the BA.

Application to the facts

46 Having set out the relevant principles, we now consider their application to the facts of the present case.

47 The value *provided* by Pictorial and NSP was, in our view, twofold. First, Pictorial and NSP granted the Legal Mortgage over the Property to Rothstar. As we have explained at [42]–[45] above, this did deplete their assets because the existing debt secured by the Legal Mortgage was a debt owed by a *third party* (AIPL), and not a debt owed by Pictorial and NSP themselves. Second, on a proper construction of the terms of the Legal Mortgage, Pictorial

and NSP assumed a new *primary obligation to repay the Loan* which had not been present under the earlier Equitable Mortgage, and which (contrary to Rothstar's written submission) was not contingent on the value of the Property being insufficient to fully discharge the Loan. The Legal Mortgage itself and cll 1.1 and 6.7 of its Covenants and Conditions make clear that Pictorial and NSP covenanted thereunder to pay all moneys owing to Rothstar by AIPL and/or by them in respect of the Loan, and that the Legal Mortgage secured Pictorial and NSP's new primary obligation to repay the Loan as well as AIPL's obligation to repay the same. At the hearing before us, Mr Ashhab eventually accepted that Pictorial and NSP became liable for the Loan as primary obligors under the Legal Mortgage. That Pictorial and NSP may have had bleak prospects of repaying the Loan themselves, which Rothstar emphasised, is beside the point: what Pictorial and NSP gave Rothstar was the benefit of an additional personal obligation to repay the Loan which they assumed, secured by the Legal Mortgage, and which gave Rothstar personal claims against them in their insolvency.

48 Turning to the value *received* by Pictorial and NSP, we first accept the Judge's factual finding that the Loan was indeed disbursed by Rothstar to AIPL (at [57]–[59] of the GD). In our view, the Liquidator and the Private Trustees have not provided any basis for us to depart from this finding, which the Judge arrived at after having considered the evidence before him. We therefore proceed on the basis that AIPL did indeed receive the Loan. However, we disagree with the Judge's finding that the Loan could not have constituted consideration for the Legal Mortgage because the Loan Agreement was entered into on 9 April 2019 with the Equitable Mortgage given as security for the Loan, while the Legal Mortgage was executed only on 2 December 2019 (at [45(d)] and [49] of the GD, in the context of the Judge's analysis of s 98(3)(*a*) of the

BA). In the Judge's view, the only consideration provided for the Legal Mortgage was the discharge of the Equitable Mortgage under the Deed of Discharge (see [50]–[51] of the GD). On this analysis, the value to be assessed under s 98(3)(*c*) would be limited to the value of that discharge. This, in our judgment, takes an artificially narrow view of the situation that fails to reflect the true commercial arrangement between the parties. As observed in *Velstra* at [43], "[w]hat is the true nature of a transaction must be viewed in the light of all the relevant circumstances", and "[t]o truncate the facts and view each event as distinct and separate would inevitably lead to a wholly erroneous conclusion, based as it does on a partial view of things". The reality of the parties' arrangement was that the Legal Mortgage was not granted *only* in consideration of the discharge of the Equitable Mortgage; instead, *both* the Equitable Mortgage and the Legal Mortgage that replaced it were granted by Pictorial and NSP in consideration of the *Loan* extended by Rothstar to AIPL. It should be borne in mind that the Loan itself was not a one-off transaction beginning and ending with the Loan Agreement on 9 April 2019: after AIPL failed to repay the Loan by the initially stipulated deadline, the deadline for repayment was extended twice until 1 February 2020. AIPL's obligations in respect of the Loan (beginning on 9 April 2019 and continuing past 1 February 2020) thus ran parallel to the obligations assumed by Pictorial and NSP under, first, the Equitable Mortgage (which was granted on 10 June 2019), and then the Legal Mortgage (which they agreed to grant on 27 November 2019 and executed on 2 December 2019). These two sets of obligations were inextricably linked, and we therefore accept that the consideration received by *AIPL* in the form of the Loan is in principle relevant in assessing the value received by Pictorial and NSP from the grant of the Legal Mortgage.

49 However, the critical question for the purposes of s 98(3)(*c*) is what the *value* of the Loan to AIPL was *to Pictorial and NSP*. The Judge found that there was no evidence of Pictorial and NSP receiving the value of the Loan or any benefit therefrom that could be assessed in money or money's worth (GD at [60]–[61]). We see no reason to disturb this finding. Rothstar seeks to persuade us to the contrary by emphasising the close commercial relationship between NSP, AIPL and Pictorial, and urges us to conclude that the Loan conferred a commercial or practical benefit on NSP and Pictorial by increasing the cash flow available to AIPL and thus to NSP (who is a significant shareholder of AIPL) and Pictorial (because NSP, as the 100% shareholder of Pictorial, would then be able to make the necessary capital injections to support Pictorial financially). However, while we accept that the value of commercial or practical benefits can be taken into account in the value comparison exercise under s 98(3)(*c*) of the BA in so far as such value is capable of being measured in money or money's worth, the benefit Rothstar claims that Pictorial and NSP received from the Loan to AIPL is an *unparticularised and unsubstantiated* benefit which is said to accrue to Pictorial and NSP *merely by dint of their association with AIPL*. In our view, such an amorphous benefit (if any) cannot be valued in money or money's worth, and therefore has no place in the value comparison exercise. In this regard, no weight can be placed on the fact that Pictorial passed shareholders' and board of directors' resolutions in support of granting the Legal Mortgage, given that Pictorial's sole shareholder was NSP and its only two directors were NSP and his wife. Contrary to what Rothstar contends, the close connections between NSP, AIPL and Pictorial weigh *against* a finding that the Loan was of any real value to Pictorial or NSP. Moreover, for the reasons we have explained at [29] above, Pictorial and NSP's *perception* of the value they might receive from the transaction is irrelevant.

50 Even if this amorphous benefit could be ascribed value for the purposes of the value comparison exercise, this value would be attenuated by the holding structure of AIPL. While AIPL's only two directors and shareholders were NSP and his son, with NSP holding approximately 40% to 50% of AIPL's shares, any indirect value of the Loan to NSP would still be far less than its face value as it would be shared between NSP and his son, instead of accruing solely to NSP. Any value derived by *Pictorial* from capital injections which might then have been made by NSP would have been even further diminished.

51 There is, therefore, no value received by Pictorial and NSP in money or money's worth which can be compared with the significant value provided by them. This being the case, the Legal Mortgage was a transaction entered into by Pictorial and NSP for a consideration the value of which, in money or money's worth, was significantly less than the value in money or money's worth of the consideration provided by them. Accordingly, we agree with the Judge that the Legal Mortgage was a transaction at an undervalue under s 98(3)(*c*) of the BA.

Whether Pictorial and NSP were insolvent at the time of, or became insolvent as a result of, granting the Legal Mortgage

52 The next question is whether Pictorial and NSP were insolvent at the time of, or became insolvent as a result of, granting the Legal Mortgage, as required under s 100(2) of the BA. The Judge found that Pictorial and NSP were indeed insolvent at the relevant time (GD at [70]). Rothstar's case on appeal focuses on arguing that *Pictorial* did not become insolvent as a result of the grant of the Legal Mortgage.

53 We reject at the outset Rothstar's argument, made in reliance on *MC Bacon*, that Pictorial's assets were not depleted by the Legal Mortgage because the grant of a mortgage does not deplete a company's assets. As we have held

at [42]–[45] above, the grant of a mortgage as security for the indebtedness of a third party *does* deplete the assets of the mortgagor. We also reject Rothstar's submission that the Judge erred in accepting the Liquidator's evidence that Pictorial became insolvent after it took on liability for the Loan pursuant to the Legal Mortgage. In our view, Rothstar has not provided any basis for us to overturn the Judge's finding of fact on this point. As we have held at [47] above, Pictorial and NSP assumed an additional primary obligation to repay the Loan under the terms of the Legal Mortgage. In these circumstances, we have no doubt that even if Pictorial was not already insolvent at the time of granting the Legal Mortgage, it certainly became insolvent when it assumed an additional primary obligation to repay the Loan as a result of granting the Legal Mortgage.

54 The final new argument raised by Rothstar on appeal in relation to Pictorial and NSP's insolvency is that Pictorial and NSP (and therefore, the Liquidator and the Private Trustees) are estopped from arguing that they were insolvent at the time of the Legal Mortgage or became insolvent as a result thereof, because of various warranties and covenants they had made in the Legal Mortgage. Rothstar argues that Pictorial and NSP warranted in the Legal Mortgage that it would constitute valid and binding obligations; that they were not in default of any of their obligations for the payment of borrowed moneys; that Rothstar's rights under the Legal Mortgage would not be prejudiced by any allegations of an undervalued transaction; and that it would be valid and binding notwithstanding the insolvency of Pictorial and NSP. In response, the Liquidator and the Private Trustees contend that no contractual estoppel can be raised because this would defy the statutory provisions on the avoidance of transactions at an undervalue. Parties would then be allowed to contract out of s 98 of the BA if they employed the appropriate wording, rendering it toothless and frustrating its policy object.

55 We agree with the Liquidator and the Private Trustees that allowing these provisions of the Legal Mortgage to estop them from arguing that the Legal Mortgage is liable to be avoided as a transaction at an undervalue would indeed subvert the statutory scheme of s 98 of the BA. It is well established that estoppel cannot operate where it would act in the face of a statute and effectively allow a state of affairs which the law has positively declared not to subsist: *Cupid Jewels Pte Ltd v Orchard Central Pte Ltd and another appeal* [2014] 2 SLR 156 ("*Cupid Jewels*") at [37] and *The Enterprise Fund III Ltd and others v OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd)* [2019] 2 SLR 524 ("*The Enterprise Fund*") at [122]. The relevant "state of affairs" here is the enforceability of the Legal Mortgage.

56 Rothstar's submission is similar to that rejected by this court in *The Enterprise Fund*. There, it was argued that a company was estopped from seeking to avoid certain loan agreements under s 76 of the CA by virtue of certain representations it had made which allegedly amounted to clear and unequivocal representations of fact that its entry into the loan agreements would not contravene any laws, and representations in the form of promises that the company would take all necessary steps to enable it to lawfully enter into the loan agreements. In rejecting this argument, this court held that the loan agreements were part of a composite transaction caught by the prohibition in s 76(1A)(*a*)(i), and that an estoppel would effectively permit a state of affairs where the loan agreements were not void when the court had found that s 76A(1)(*a*) made them so (*The Enterprise Fund* at [110]–[112] and [122]). The comments at [131] of *The Enterprise Fund*, albeit made in relation to the statutory regime governing a company's acquisition of its own shares, are also pertinent to the present case: "considerable caution must be taken before generic representations and warranties … can be relied upon to establish an estoppel"

that would allow a party to "sidestep" the statutory scheme, as such widely-framed representations and warranties are commonplace in commercial contracts, and this would significantly dilute the significance of the statutory prohibitions.

57 We are also unable to accept Rothstar's reliance on this court's decision in *Cupid Jewels*. In that case, this court held that allowing promissory estoppel to apply to prevent a landlord from insisting on its strict legal remedies to recover rental arrears would *not* be in defiance of the Distress Act (Cap 84, 1996 Rev Ed), because the relevant provision of that Act did not *require* a writ of distress to be applied for by a landlord; it was "merely *permissive* and not mandatory" (*Cupid Jewels* at [38]). Rothstar contends that s 98(1) of the BA similarly "does not mandate that an application be brought, nor prohibits any particular state of affairs", and that s 98(2) confers on the court a wide discretion to make any orders it deems fit. This is a disingenuous reading of s 98, which is plainly not designed to confer a "special remedy" on a party (*cf Cupid Jewels* at [38]), but rather to implement a *regulatory scheme* for the avoidance of transactions upon insolvency that would diminish the pool of assets available to the insolvent party's creditors.

58 We add that even if Rothstar's submission is taken more narrowly, such that the provisions of the Legal Mortgage are said to estop the Liquidator and the Private Trustees from making the *factual* argument that Pictorial and NSP were insolvent at the relevant time, this would also be unsustainable. In the present context, where the regulatory regime governing transactions at an undervalue and unfair preferences is engaged once the condition of insolvency is found to be satisfied, an individual or company's state of insolvency is not a purely factual matter. Instead, whether an individual or company is "insolvent" for the purposes of s 100(2) of the BA is a matter for the court to determine,

applying the statutory definition of insolvency in s 100(4) and any applicable presumptions of insolvency (such as that contained in s 100(3) for transactions entered into with associates). An estoppel purporting to preclude such a finding would "impermissibly operate in defiance of" the broader statutory scheme (*The Enterprise Fund* at [126]).

59 We therefore affirm the Judge's finding that Pictorial and NSP were insolvent at the time of, or became insolvent as a result of, granting the Legal Mortgage, and we reject Rothstar's new arguments to the contrary.

The appropriate order under s 98(2) of the BA

60 Having found that the Legal Mortgage was a transaction at an undervalue within s 98(3)(*c*) of the BA, the Judge then held that it was "void" (at [3] and [74] of the GD) and that the Liquidator and the Private Trustees were "entitled to void the [Legal] Mortgage on the ground that it was an undervalued transaction" (at [87] of the GD). With respect, we do not agree with this characterisation of the Legal Mortgage as "void" as a consequence of the Judge's finding that it was a transaction at an undervalue. Under s 98(2) of the BA, the court has the power to "make such order as it thinks fit for *restoring the position* to what it would have been if that individual had not entered into that transaction" [emphasis added]. Section 98 does *not* provide that an undervalued transaction thereunder is void or, for that matter, voidable (see *Buildspeed Construction* at [50]–[51] and *Christie, Hamish Alexander (as private trustee in bankruptcy of Tan Boon Kian) v Tan Boon Kian and others* [2021] 4 SLR 809 at [94]). Instead, the court may, for example, make an order *releasing or discharging* the Legal Mortgage under s 102(1)(*c*) of the BA. Thus, while the effects of the transaction are *reversible* in the court's discretion, the transaction itself subsists unless and until it is discharged pursuant to an order of the court

under s 98(2); it is not retrospectively avoided (see Bennett & Armour at para 2.121 and *Goode* at paras 13–02, 13–03 and 13–43).

61 In our view, the appropriate order under s 98(2) to restore the position to what it would have been if Pictorial and NSP had not granted the Legal Mortgage is an order discharging the Legal Mortgage with prospective effect.

62 We deal at this juncture with two further arguments raised by Rothstar as to the appropriate order. First, Rothstar submits that the original position prior to the Legal Mortgage was that the Equitable Mortgage would have subsisted to secure the Loan to AIPL, pursuant to which Rothstar would have been entitled to sell the Property and utilise the sale proceeds to satisfy the outstanding Loan. However, in our judgment, it would not be appropriate for us to make an order restoring the Equitable Mortgage.

63 Rothstar argues that it is reasonable to surmise that, since the Legal Mortgage was registered by December 2019, it would have registered the Equitable Mortgage (and sought any necessary extensions of time) by December 2019, prior to the insolvency of Pictorial and NSP. We disagree. The Equitable Mortgage was granted on 10 June 2019, more than five months before the parties agreed to replace it with the Legal Mortgage on 27 November 2019 and executed the Legal Mortgage on 2 December 2019. In the period between those two dates, AIPL was granted two extensions for the repayment of the Loan. Yet, no steps appear to have been taken by Rothstar to register the Equitable Mortgage, or even lodge a caveat in respect of its interest in the Property thereunder. It would therefore be entirely conjectural to assume that Rothstar would have registered the Equitable Mortgage by December 2019 had the Legal Mortgage not been granted. Proceeding on the basis that only the *unregistered* Equitable Mortgage would have subsisted if it had not been

replaced by the Legal Mortgage, the Equitable Mortgage – having not been registered within 30 days after its creation on 10 June 2019 – would have been void against the Liquidator and any creditor of Pictorial as an unregistered charge under s 131(1) of the CA. In addition, both the Liquidator and the Private Trustees would have had priority over Rothstar's unregistered interest under s 49(1) of the LTA, by virtue of the Liquidator's Caveat lodged on 29 June 2020 and the Private Trustees' Caveat lodged on 18 March 2020.

64 In any event, we are of the view that the Equitable Mortgage was itself likely to have been a transaction at an undervalue. Our finding that there is no evidence of Pictorial and NSP having received any value from the Loan that can be assessed in money or money's worth for the purposes of the value comparison exercise in respect of the Legal Mortgage applies equally to the Equitable Mortgage. In addition, Pictorial and NSP are likely to have been insolvent as of 10 June 2019 when the Equitable Mortgage was granted. In this regard, we see no reason to depart from the Judge's finding that Pictorial's total liabilities as at 2018 were $450,932, whereas its sole significant asset was its 99% ownership of the Property which was subject to the Equitable Mortgage to secure the Loan of $5m (GD at [67]). By this time, NSP also had approximately $180,000 in total in his bank accounts, and might have had substantially greater liabilities. While there may be insufficient material before the court for us to arrive at a firm conclusion as to whether the Equitable Mortgage would have been liable to be set aside as a transaction at an undervalue, we are not persuaded that it would be appropriate to restore it in the circumstances of the present case given its unregistered status.

65 Second, Rothstar suggests that the court orders the Property to be sold and the proceeds applied to discharge the Loan, with the surplus (if any) to be paid to Pictorial and NSP in their respective proportions, on the ground that this

would most closely approximate the effect of restoring the Equitable Mortgage. Given our decision that the Equitable Mortgage should not be restored, this argument falls away. Further, as the Liquidator and the Private Trustees point out, this would essentially be an order enforcing the Legal Mortgage pursuant to a mortgagee's power of sale on Rothstar's behalf. We can see no legal basis to make such an order.

66 Accordingly, we make an order discharging the Legal Mortgage, without restoring the Equitable Mortgage or making the order for sale as suggested by Rothstar. While we are cognisant that this leaves Rothstar in the rather unenviable position of losing its security and having no effective recourse for the repayment of the Loan, we note that this was part of the risk inherent in securing a loan to one party (*ie*, AIPL) with security provided by a third party (*ie*, Pictorial and NSP).

67 For completeness, we affirm the Judge's finding (at [71]–[73] of the GD) that the defence in Reg 6 of the Regulations is not available to Rothstar. Regulation 6 would have applied as against the Liquidator if (a) Pictorial had granted the Legal Mortgage in good faith and for the purpose of carrying on its business; and (b) at the time it did so, there were reasonable grounds for believing that the transaction would benefit it. Rothstar argues that the Judge erred in arriving at this finding. However, the burden of proving that the defence in Reg 6 is established lies on Rothstar, as the party resisting the making of an order under s 98 of the BA (see *Goode* at 13–37 and Bennett & Armour at para 2.111). In the present case, there is no evidence that Pictorial entered into the Legal Mortgage "for the purpose of carrying on its business", as opposed to *AIPL*'s business. There is also no evidence of Pictorial or NSP receiving any benefit, or of Pictorial having reasonable grounds to believe that it (as opposed to AIPL) would obtain such a benefit, from the Legal Mortgage. We are unable

to accept Rothstar's contention that the transaction was part of Pictorial's business because Pictorial's only business was to hold the Property for NSP's benefit, and NSP wanted to grant the Legal Mortgage as security for the Loan to AIPL, which was his main business; or that this benefit to NSP was a benefit to Pictorial because NSP, being Pictorial's sole shareholder, would then have been able to make capital injections to support Pictorial. In our view, it would impermissibly strain the clear language of Reg 6 if the "business" of personal corporate vehicles was interpreted as extending to whatever the individual that incorporated them wished them to do.

Issue 2: Whether the Legal Mortgage was a voluntary conveyance to defraud creditors

68 We turn now to the issue of whether the Legal Mortgage is voidable as a voluntary conveyance to defraud creditors under s 73B(1) of the CLPA. We agree with the Judge that the Legal Mortgage was *not* a voluntary conveyance to defraud creditors.

69 The applicable principles set out in *Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 ("*Quah Kay Tee*") and *Wong Ser Wan v Ng Bok Eng Holdings Pte Ltd and another* [2004] 4 SLR(R) 365 ("*Wong Ser Wan*") are not in dispute. The Liquidator and the Private Trustees bear the burden of proving that the elements of s 73B(1) of the CLPA are satisfied (*Wong Ser Wan* at [5]).

70 Rothstar submits that there is no reason to disturb the Judge's finding that the Legal Mortgage was not a voluntary conveyance to defraud creditors. Valuable consideration for the Legal Mortgage was provided by way of the Loan disbursed by Rothstar in good faith. Further, even if NSP and Pictorial had had an intention to defraud their creditors, there is no evidence that Rothstar had notice of the same. On the other hand, the Liquidator and the Private Trustees

contend that the Judge erred in holding that the Legal Mortgage was made without the intent to defraud creditors. Having found that the Legal Mortgage was of no benefit to Pictorial or NSP, the Judge should have concluded that no or nominal consideration was provided for the Legal Mortgage, and consequently that it was sufficient to show that Pictorial or NSP was deeply indebted when the Legal Mortgage was granted. In any event, Pictorial and NSP had the actual intent to defraud their creditors by granting the Legal Mortgage.

71 In our view, the Legal Mortgage does not fall within the class of voluntary conveyances made for no or nominal consideration. We affirm the Judge's finding (at [51] and [81] of the GD) that valid consideration was provided by Rothstar for the Legal Mortgage. In our view, this consideration took the form of not only the discharge of the Equitable Mortgage (which the Judge identified at [50] of the GD), but also, as a matter of commercial reality, the Loan extended to AIPL (see [48] above).

72 The Liquidator and the Private Trustees argue, based on the Federal Court of Australia's decision in *Commissioner of Taxation v Oswal (No 6)* (2016) 339 ALR 560 ("*Oswal*"), that a mortgage granted to secure a loan extended to a third party (and not to the mortgagor) is a conveyance for no or nominal consideration. However, we do not think *Oswal* stands for the proposition that the grant of a mortgage to secure a loan extended to a third party is *invariably* a conveyance made for no or nominal consideration. Depending on the circumstances, a loan extended to a third party at the mortgagor's request may well constitute valuable consideration for the grant of security. In any event, as Rothstar correctly points out, the court in *Oswal* inferred that the mortgagor had the requisite intention to defraud her creditors from all the circumstances of the case (see *Oswal* at [75]).

73 As the Legal Mortgage was not granted for no or nominal consideration, it must be shown that Pictorial and NSP acted with the *actual intent to defraud* their creditors, and that the transferee had notice of the transferor's fraudulent intention (see *Quah Kay Tee* at [14] and *Wong Ser Wan* at [8]). The Liquidator and the Private Trustees cannot rely only on the indebtedness of Pictorial and NSP to raise an inference of the requisite intent to defraud. "Defraud" in this context carries the meaning of depriving creditors of timely recourse to property that would otherwise be applicable for their benefit, and the Liquidator and the Private Trustees must establish "some degree of dishonesty" on the part of Pictorial and/or NSP in order to succeed (*Wong Ser Wan* at [6]). We see no reason to depart from the Judge's finding (at [81] of the GD) that actual intent to defraud has not been established. Even if Pictorial and NSP's creditors were in fact worse off after the grant of the Legal Mortgage, there is no evidence that they granted the Legal Mortgage with the *intention* of putting their creditors in a worse position in this manner, or that they acted with any dishonesty in doing so. The various background facts highlighted by the Liquidator and the Private Trustees beginning from May 2019 are, as Rothstar submits, not sufficient to show otherwise. There is also nothing to suggest that Rothstar had notice of any intent on the part of Pictorial or NSP to defraud their respective creditors at the relevant time.

74 We therefore accept the Judge's finding that the Legal Mortgage was not a voluntary conveyance to defraud creditors that would be voidable under s 73B(1) of the CLPA.

Issue 3: Whether the Private Trustees' Caveat ought to be removed

75 The Judge dismissed Rothstar's application to remove the Private Trustees' Caveat on the sole basis that the Legal Mortgage was "void" (GD at

[86]). For the reasons set out at [60] above, we do not agree that the Legal Mortgage's status as a transaction at an undervalue rendered it void. Nevertheless, we affirm the Judge's ultimate decision to dismiss this application on different grounds: namely, that Rothstar can no longer avail itself of the statutory remedy provided to caveatees by s 127(1) of the LTA once the Legal Mortgage is discharged.

76 Once the Legal Mortgage is set aside, Rothstar would cease to have any interest in the Property as a registered legal mortgagee. Rothstar would then no longer be a "caveatee" to whom s 127(1) of the LTA provides a remedy: a "caveatee" is defined in s 4(1) of the LTA as "the proprietor or other owner of land described in a caveat and to whom notice of the caveat is required to be given", and a "proprietor" is "any person who appears from the land-register to be the person entitled to an estate or interest in any land which has been brought under the provisions of this Act, and includes a mortgagee, chargee and lessee". Rothstar does not appear to have lodged any caveat in respect of its claimed interest in the Property under the Legal Mortgage so as to be able to rely on s 127(6) of the LTA. On this basis, we dismiss Rothstar's application for the removal of the Private Trustees' Caveat.

77 Furthermore, Rothstar's submission that the Private Trustees lacked standing to lodge the Private Trustees' Caveat because they had no pre-existing caveatable interest in the Property when the Private Trustees' Caveat was lodged is wholly misconceived. Rothstar relies on the decision in *Power Knight Pte Ltd v Natural Fuel Pte Ltd (in compulsory liquidation) and others* [2010] 3 SLR 82 ("*Power Knight*") in support of its argument that the Property, as an asset secured by the Legal Mortgage, fell outside the general pool of assets available to the unsecured creditors (whom the Private Trustees represent). However, this reliance is misplaced. The liquidators in *Power Knight* were

claiming no interest in the property in their own right; their interest was contingent on the company's unsecured creditors having an interest in the property. Under s 269(2) of the CA, an order of court is necessary for the property of a company to vest in a liquidator. In contrast, s 76(1)(*a*)(i) of the BA provides that the property of a bankrupt individual shall vest in the Official Assignee upon the making of the bankruptcy order, without any further conveyance, assignment or transfer. Thus, by operation of the BA, NSP's 1% interest in the Property vested in the Private Trustees on 12 March 2020 when the bankruptcy order was made. Further, pursuant to s 111 of the LTA read with s 36(1)(*b*) of the BA, the Private Trustees were statutorily entitled to lodge the Private Trustees' Caveat.

78 The Private Trustees therefore had a clear entitlement to lodge and maintain the Private Trustees' Caveat under s 115(1) of the LTA. In contrast, following the discharge of the Legal Mortgage, Rothstar would have *no* interest in the Property. In these circumstances, we do not think it is necessary for us to weigh the balance of convenience (see *Tan Yow Kon v Tan Swat Ping and others* [2006] 3 SLR(R) 881 at [89]). Even if the Private Trustees' interest in the Property is purely economic and limited to 1% of its value (as Rothstar contends), the balance of convenience in this case plainly lies in favour of maintaining the Private Trustees' Caveat.

Conclusion

79 For the foregoing reasons, we dismiss Rothstar's appeals but, for the reasons explained above, we order that the Legal Mortgage be discharged instead of declared void.

80 As to costs, we order Rothstar to pay the Liquidator and the Private Trustees the costs of the appeals. In view of the fact that the Liquidator and the Private Trustees were represented by the same counsel and raised essentially the same arguments to oppose the appeals, we fix the costs of the appeals at $60,000 in total for both the Liquidator and the Private Trustees, inclusive of disbursements. As the new points raised by Rothstar on appeal have not ultimately succeeded, and the Liquidator's and Private Trustees' applications for leave to raise new points were brought in response to Rothstar's applications, we also order Rothstar to pay the costs of the summonses, which we fix at $5,000 in total for both the Liquidator and the Private Trustees, inclusive of disbursements. The usual consequential orders apply.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Chao Hick Tin
Senior Judge

Bazul Ashhab bin Abdul Kader, Chan Cong Yen Lionel, Foo Chuan Min Jerald and Caleb Tan Jia Chween (Oon & Bazul LLP) (instructed), Tan Wen Cheng Adrian, Tan Choon Yuan Delson and

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Lee Eng Beng SC, Chua Beng Chye, Raelene Su-Lin Pereira, Cheong Tian Ci Torsten, Yeoh Su Yi and Foung Han Peow (Rajah & Tann Singapore LLP) for the respondents in CA/CA 37/2021 and CA/CA 38/2021.
