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

[2024] SGHC 57

Originating Summons No 544 of 2019

In the matter of Section 329 of the
Companies Act (Cap. 50)

And

In the matter of Section 98
of the Bankruptcy Act (Cap. 20)

Between

Affert Resources Pte Ltd (in court
compulsory winding up)

… *Applicant*

And

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

… *Respondents*

JUDGMENT

[Insolvency Law — Avoidance of transactions — Transactions at an undervalue — Whether a waiver is a transaction at an undervalue]
[Insolvency Law — Avoidance of transactions — Transactions at an undervalue — Whether it is appropriate to make a payment order]

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v
Industries Chimiques du Senegal and another

[2024] SGHC 57

General Division of the High Court — Originating Summons No 544 of 2019
Goh Yihan J
28 November 2023

28 February 2024 Judgment reserved.

Goh Yihan J:

1 This is the applicant's application, pursuant to s 329 of the Companies Act (Cap 50, 2006 Rev Ed) (the "CA"), read with s 98 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) (the "BA"), to unwind the effects of a transaction that was allegedly at an undervalue. That transaction is allegedly a waiver (the "alleged waiver") of a debt of US$17,007,263.60 due from the first respondent to the applicant (the "ICS Debt"). In particular, the applicant seeks an order, pursuant to s 329(1) of the CA read with s 98(2) and/or s 102(1)(*d*) of the BA, that the first respondent and/or the second respondent pay the sum of US$17,007,263.60 to the applicant.

2 After taking some time to consider the parties' submissions and the relevant documents, I dismiss the applicant's application for the reasons below.

The background facts

3 I begin with the background facts. The applicant, Affert Resources Pte Ltd ("Affert"), is a company in liquidation. Between May 2012 and June 2013, Affert supplied six batches of sulphur to the first respondent, Industries Chimiques du Senegal ("ICS"), for a total price of US$22,298,264.60.[1] The total amount unpaid on those contracts is US$17,007,263.60, which is the ICS Debt.[2]

4 Affert and ICS, along with another company, Senfer Africa Limited ("Senfer"), were part of the Archean Group of Companies (the "Archean Group") that was based in India. Prior to 2014, the shares in ICS were held in the following manner: 66% of the shares in ICS were held by Senfer, while the remaining 34% was held by the State of Senegal, the Government of India, and the Indian Farmers Fertilisers Cooperative Ltd ("IFFCO") (see the Court of Appeal decision in *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal and another appeal and another matter* [2021] 1 SLR 342 ("*Recovery Vehicle 1 Pte Ltd*") at [9]).

5 In 2014, ICS was facing financial difficulties. It had a negative net value of about US$137m. It had defaulted on most of its loans. It had also incurred losses of about US$163m on a consolidated basis between 1 January 2014 and 19 August 2014 and was close to liquidation.[3] In these circumstances, the

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1 4th Affidavit of Alassane Diallo dated 6 October 2022 ("Diallo's 4th Affidavit") at para 15.

2 5th Affidavit of Alassane Diallo dated 15 November 2023 ("Diallo's 5th Affidavit") at para 7.

3 Diallo's 4th Affidavit at para 21.

Senegal Government and IFFCO welcomed the idea of a new investor in ICS to strengthen the company.

6 It was against this background that the second respondent, Indorama Holdings BV ("IHBV"), emerged as the new investor that the Senegal Government and IFFCO were looking for. On 20 August 2014, IHBV bought 66% of the shares in ICS from Senfer for a total price of US$50m (the "Acquisition").[4] The Acquisition was implemented by executing the following documents, which are all dated 20 August 2014:[5]

(a) a share transfer agreement between Senfer and IHBV, pursuant to which IHBV paid Senfer US$11m for Senfer's shares in ICS;

(b) an assumption of debt agreement ("ADA") between Senfer, IHBV, Archean Industries Private Limited ("Archean"), and Indorama Corporation Pte Ltd ("ICPL"), pursuant to which IHBV assumed Senfer's debts of up to US$30m; and

(c) a side letter to the ADA between IHBV, Senfer, Archean, and ICPL (the "Side Letter"), pursuant to which IHBV agreed to cause ICS to pay to Senfer the sum of US$9m for Senfer's commitment to ensure that ICS's dues to its related entities in the Archean Group were fully settled. The Side Letter stated that:[6]

> [IHBV] shall cause [ICS] to pay to Senfer's bank account or to its order a sum of nine million United States Dollar [*sic*] (USD 9,000,000) as full and final one time

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4 Diallo's 4th Affidavit at paras 20 and 22.

5 Diallo's 4th Affidavit at para 23.

6 Diallo's 4th Affidavit at p 389.

> settlement of all related parties outstandings (including loans if any) as on 30th June 2014 in ICS … provided all the relevant related parties send the required confirmations to this effect to ICS.

On IHBV's case, the sum of US$9m was reduced to US$8,001,886 to adjust for transactions between ICS and the Archean Group entities between 1 July 2014 and 17 September 2014.[7]

7 ICS and IHBV left it to Senfer and the Archean Group to arrange for the settlement of all of ICS's related party outstandings. In this regard, Affert's confirmation pursuant to the Side Letter was made by way of a letter to ICS dated 7 October 2014 (the "7 October Letter"). Affert stated in this Letter that:[8]

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

After receiving this confirmation, as well as confirmations from other Archean Group entities to the effect that ICS's related parties' outstandings had been settled, ICS made a payment of US$8,001,886 to Senfer's order pursuant to the Side Letter. For present purposes, the relevant transaction which Affert says amounts to a waiver is that constituted by the 7 October Letter.[9]

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7 Diallo's 4th Affidavit at para 23(c).

8 Respondents' Written Submissions dated 22 November 2023 ("RWS") at para 15; 1st Affidavit of Abuthahir s/o Abdul Gafoor dated 24 April 2019 ("Abuthahir's 1st Affidavit") at p 156.

9 Diallo's 4th Affidavit at paras 27 and 32.

8 Further, IHBV proceeded to make payment of the purchase price for the Acquisition in tranches by 26 March 2015. By the respondents' case, this was based on the understanding that ICS's dues to Affert were settled. IHBV also injected about US$100m into ICS to rejuvenate ICS's plant and operations. Again, by the respondents' case, IHBV was only willing to pay a total of US$50m to acquire an entity (that is, ICS) that was free of related-party debts. Thus, if Affert had not issued the 7 October Letter, IHBV says that "it would have taken this into account in its negotiations with Senfer and priced the Acquisition accordingly".[10]

9 On 8 February 2017, Affert was placed in creditors' voluntary winding up.[11] Subsequently, on 18 September 2017, Affert was compulsorily wound up. Mr Abuthahir was appointed as its liquidator.[12]

10 On 18 July 2018, Affert commenced HC/S 724/2018 ("Suit 724") against ICS. Affert was eventually substituted as the applicant in this action by its assignee in bankruptcy, Recovery Vehicle 1 Pte Ltd ("RV1"). This was done to pursue the ICS Debt. Relatedly, on 24 April 2019, Affert filed the present application, HC/OS 544/2019 ("OS 544").[13]

11 Subsequently, RV1 was not able to pursue Suit 724. This was because the Court of Appeal had found in CA/CA 31/2020 and CA/CA 32/2020 that,

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10 RWS at para 18; 6th Affidavit of Vishnu Swaroop Baldwa dated 15 November 2023 ("Baldwa's 6th Affidavit") at paras 9(b) and 13.

11 Diallo's 4th Affidavit at p 435.

12 Abuthahir's 1st Affidavit at para 4.

13 Diallo's 4th Affidavit at paras 48 and 51.

among other findings, Affert's claim for the ICS Debt is governed by Senegalese law and is time-barred (see *Recovery Vehicle 1 Pte Ltd*). In the circumstances, Affert amended its claim in OS 544 to join IHBV as a respondent and to seek payment orders against both ICS and IHBV. In this regard, whenever I refer to "Payment Order" in this judgment, I am referring to Affert's prayer in OS 544 for ICS and IHBV to, jointly and severally, pay to Affert the ICS Debt.

The generally applicable law and the relevant issues

12 With these background facts in mind, I turn first to the generally applicable law, which will provide the broad framework against which to develop the discussion below. To begin with, Affert's application is brought pursuant to s 329 of the CA, read with s 98 of the BA. For completeness, I set out the relevant provisions:

> **Undue preference**
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> **329.—**(1) Subject to this Act and such modifications as may be prescribed, any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable under section 98, 99 or 103 of the Bankruptcy Act (Cap. 20) (read with sections 100, 101 and 102 thereof) shall in the event of the company being wound up be void or voidable in like manner.
>
> (2) For the purposes of this section, the date which corresponds with the date of making of the application for a bankruptcy order in the case of an individual shall be —
>
> (*a*) in the case of a winding up by the Court —
>
> (i) the date of the making of the winding up application; or
>
> (ii) where before the making of the winding up application a resolution has been passed by the company for voluntary winding up, the date

> upon which the resolution to wind up the company voluntarily is passed,
>
> whichever is the earlier; and
>
> (*b*) in the case of a voluntary winding up, the date upon which the winding up is deemed by this Act to have commenced.
>
> (3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.
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> **Transactions at an undervalue**
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> **98.—**(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has at the relevant time (as defined in section 100) entered into a transaction with any person at an undervalue, the Official Assignee may apply to the court for an order under this section.
>
> (2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction.
>
> (3) For the purposes of this section and sections 100 and 102, an individual enters into a transaction with a person at an undervalue if —
>
> (*a*) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration;
>
> (*b*) he enters into a transaction with that person in consideration of marriage; or
>
> (*c*) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.

As the Court of Appeal explained in *Rothstar Group Ltd v Leow Quek Shiong and other appeals* [2022] 2 SLR 158 ("*Rothstar*") (at [23]), while s 98(3) of the BA applies only to individuals, s 329(1) of the CA extends the application of these principles to companies.

13 More specifically, the Court of Appeal in *Mercator & Noordstar NV v Velstra Pte Ltd (in liquidation)* [2003] 4 SLR(R) 667 ("*Mercator*") held (at [13] and [21]) that the following elements must be established in order to bring a case within s 98 of the BA:

(a) First, there must have been a transaction.

(b) Second, the transaction must have taken place within the relevant period.

(c) Third, the transaction must have been at an undervalue.

(d) Fourth, the company under liquidation must have been insolvent at the time of the transaction or became insolvent in consequence of the transaction or preference.

14 Since the parties do not dispute that the transaction took place within the relevant period, and that Affert was insolvent at the time of the transaction, or became so in consequence of the transaction, it is not necessary for me to deal with these issues.

15 Therefore, as a starting point, the two substantive issues that arise for my consideration are (a) whether there was a transaction, and (b) whether the transaction was at an undervalue. However, the parties' respective submissions also raise several other issues. In sum, the relevant issues that arise for my consideration are as follows:

(a) Whether the 7 October Letter contains the alleged waiver;

(b) Whether the 7 October Letter constitutes a transaction;

(c) If the answer to the first two questions is in the affirmative, what value Affert gave up by way of the 7 October Letter?

(d) If the answer to the first two questions is in the affirmative, what value Affert received by way of the 7 October Letter? and

(e) Even if there was a transaction at an undervalue, whether it would be appropriate for me to exercise my discretion to make a Payment Order against ICS and/or IHBV.

16 I now discuss each of these issues in turn.

Whether the 7 October Letter contains the alleged waiver

17 I first consider the issue of whether the 7 October Letter even contains the alleged waiver that is said to be at the heart of the present dispute.

18 In this regard, Affert submits that the alleged waiver comprises three emails: (a) an email dated 1 October 2014, where Affert "agree[d] to consider the dues of ICS … as part of the overall consideration for the transaction"; (b) an email dated 3 October 2014, where ICS acknowledged receipt of the previous email, and stated that "it is mutually agreed that the dues to Affert are no longer payable"; and (c) the 7 October Letter. Put differently, Affert submits that the 7 October Letter was merely a confirmation of the parties' agreement, and that the true waiver occurred on 3 October 2014.[14] On the other hand, the respondents submit that the alleged waiver is contained in the 7 October Letter.[15]

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14 Applicant's Written Submissions dated 22 November 2023 ("AWS") at para 8.

15 RWS at paras 15–16.

19 I agree with the respondents that the alleged waiver is contained in the 7 October Letter and not any earlier document. This is because it was only in the 7 October Letter that the relevant sum of US$17,277,886 had been set out. Therefore, in so far as Affert refers to that sum, it was only made known to ICS in the 7 October Letter. As such, the subsequent relevant issues need to be considered bearing in mind that the alleged waiver is contained in the 7 October Letter.

20 Additionally, as a matter of terminology, when I refer to the 7 October Letter, I mean the arrangement that the parties had reached pursuant to it. While not the most accurate, I do this out of convenience.

Whether the 7 October Letter is a "transaction"

The parties' arguments

21 I next consider whether the 7 October Letter is a "transaction" within the terms of s 98 of the BA. In this regard, Affert argues that it is "undisputed" that the 7 October Letter falls within the definition of a "transaction" under s 2 of the BA. Section 2 of the BA provides that a "transaction" includes "any gift, agreement or arrangement". Since a waiver is really the giving up of a chose in action, Affert argues that there is "no reason" why such a waiver would not constitute a "transaction" as defined in the BA.[16]

22 In response, the respondents argue that the 7 October Letter did not involve any mutual dealing between Affert and ICS, much less Affert and IHBV. Indeed, the respondents submit that the 7 October Letter does not

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[16] AWS at para 21.

"waive" a debt of US$17,277,886 owing by ICS to Affert. In fact, there was no such debt of "US$17,277,886" since it is undisputed that the amounts unpaid in respect of the six invoices concerned is only US$17,007,263.60. Moreover, the respondents say that, as of 7 October 2014, US$7,437,349 of that amount was already time-barred.[17]

23 More substantively, the respondents argue that the 7 October Letter was a representation that Affert had made about the amount recorded in its books as being due from ICS and of the fact that Affert would not be pursuing such dues. Thus, the respondents say that Affert was merely issuing a written confirmation to ICS regarding ICS's dues, which Affert knew that IHBV would also rely on. As such, s 98 of the BA does not apply to the 7 October Letter.[18]

My decision: the 7 October Letter is a transaction

The applicable law

24 In my judgment, the 7 October Letter is a transaction under s 98 of the BA. Apart from the definition of a "transaction" in s 2 of the BA, the Court of Appeal in *Mercator*, taking some guidance from the English High Court decision of *Re Taylor Sinclair (Capital) Ltd (in liquidation); Knights v Seymour Pierce Ellis Ltd* [2001] 2 BCLC 176, held (at [23]) that the word "transaction" encompasses a wide range of possible meanings. Chao Hick Tin JA observed that while the word "transaction" ordinarily means a "dealing", it could also mean anything that passes between the parties. However, Chao JA did not agree with the English High Court that a transaction should be narrowly

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17 RWS at para 87.

18 RWS at para 88.

defined to refer to a contract or a mutual dealing. Instead, the learned judge thought (at [24]) that since a gift (which is a unilateral act), came within the definition of "transaction" by virtue of s 2 of the BA, a simple payment (which is at least indicative of a gift), should fall within the meaning of a "transaction".

25 In the subsequent Court of Appeal decision of *Velstra Pte Ltd v Dexia Bank NV* [2005] 1 SLR(R) 154 ("*Velstra*"), the court considered (at [22]) that the plain meaning of the phrase "entered into a transaction with any person", as it appears in s 98(1) of the BA, connotes "mutual dealings, and that the counter party is one with whom the insolvent party wishes to deal". In reconciling this with the court's prior holding that a gift falls within the s 2 definition, Chao JA in *Velstra* opined (at [23]) that "a gift is perhaps an express statutory exception to the mutuality rule". After referring to the Court of Appeal's decision in *Mercator*, Chao JA affirmed (at [33]) that "for a transaction to fall within s 98, the counter party must be a person to whom the donor party intends to make the payment, or pass the property".

The 7 October Letter is a "transaction"

26 Applied to the present case, I do not agree with the respondents that the 7 October Letter is merely a representation that does not rise to the level of a "transaction" within the meaning of s 2 of the BA. Before me, Mr Cavinder Bull SC ("Mr Bull"), who appeared for the respondents, submitted that only a representation, and no independent agreement, arose out of the 7 October Letter. In my view, this argument ignores the wide definition of "transaction" in s 2 of the BA, which also includes an "arrangement".

27 Further, in the 7 October Letter, Affert "[confirms] that [it] will not in future dispute or make any claim on ICS or its subsidiaries for any sort of dues

to [Affert]". This is as much a representation as it is a transaction. The transaction is contained within Affert's representation not to make any claim on ICS for any sort of dues to Affert. Indeed, by the clear terms of s 2 of the BA, this is plainly an "arrangement" between Affert and ICS for the former not to make any claim on ICS for any dues to Affert. This conclusion is also consistent with *Velstra*. In fact, it is clear from Affert's representation that it intended to deal with ICS, being the relevant counterparty mentioned in the 7 October Letter.

28 As such, I conclude that the 7 October Letter plainly constitutes a "transaction" under s 98(1) of the BA. This therefore requires me to go on to consider whether the 7 October Letter is a transaction at an undervalue.

Whether the 7 October Letter is a transaction at an undervalue

The parties' arguments

29 On this key issue, Affert argues that the 7 October Letter was entered into at an undervalue as its terms did not provide for Affert to receive any consideration for the waiver.[19]

30 Further, even if it received consideration for the waiver, Affert argues that any such consideration would be significantly less than the value, in money's worth, of the consideration provided by Affert in granting the waiver. In this regard, Affert argues that, in conducting the value comparison exercise under s 98(3)(*c*) of the BA, the court must undertake the value comparison exercise from the perspective of the grantor, which in this case would be Affert.

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[19] AWS at para 24.

Also, the value of the consideration must be quantifiable in monetary terms, such that abstract or intangible forms of value that cannot be quantified in monetary terms have no place in the value comparison exercise. Finally, where the value of the consideration is precarious or speculative, evidence will be needed to establish and quantify its value in monetary terms to undertake an objective exercise. With these principles in mind, Affert submits that it had received no consideration from the respondents that is quantifiable in monetary terms or otherwise. Indeed, Affert points out that the respondents have not been able to state definitively that Affert had received any benefit which may be quantified in money or money's worth, in exchange for the waiver.[20]

31 In response, the respondents argue that, undertaking the value comparison exercise from Affert's perspective, Affert did not give up anything of value by issuing the 7 October Letter. Instead, Affert stood to benefit significantly by issuing the 7 October Letter and by IHBV proceeding with the Acquisition. More specifically, the respondents submit that Affert did not give up anything of value by issuing the 7 October Letter because Affert was not going to pursue the claims against ICS. Also, by 7 October 2014, nearly half of Affert's claims for the ICS Debt had become time-barred and the remaining US$9,569,914.60 would have become time-barred soon after. In addition, US$1,120,837 of the remaining US$9,569,914.60 was payable in respect of a shipment between Affert, ICS, and Transfert FZCO ("Transfert"). Later, Affert, ICS, and Transfert entered into a Deed of Termination on 24 March 2015 for a full and final settlement in relation to this shipment. It would therefore be unfair for Affert to recover moneys from ICS when Affert had not paid Transfert, and

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[20] AWS at paras 25–29.

when Affert, ICS, and Transfert had settled their matter on the basis that Affert would not claim such moneys from ICS.[21]

32 Further, the respondents submit that Affert benefitted from the issuance of the 7 October Letter. This is because Affert would have known that IHBV was obliged to cause ICS to pay US$9m to Senfer's order under the Side Letter if all of ICS's related parties provided written confirmation that ICS's dues were settled. Thus, Affert's confirmation by way of the 7 October Letter led ICS and IHBV to believe that ICS's dues were settled. It was only under such circumstances that IHBV proceeded to make payments in respect of the Acquisition and ICS made payment of US$8,001,856 to Senfer's order. Affert would consequently have benefitted from the infusion of funds into the Archean Group.[22]

My decision: the 7 October Letter is a transaction at an undervalue

The applicable law

33 As a starting point, the applicable law can be found in the seminal Court of Appeal decision of *Rothstar*. In that decision, Steven Chong JCA laid down two key points in relation to the comparison of value provided for under s 98(3)(*c*) of the BA. First, the value comparison exercise must be undertaken from the perspective of the grantor, that is, the insolvent individual or company. The learned judge pointed out that this approach coheres with the general policy 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

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21 RWS at paras 89(a)–89(b).

22 RWS at para 89(c).

confers an unfair or improper advantage on a particular creditor of the company" (at [25], citing *Mercator* at [27]). Therefore, the material comparison is between the value received by the grantor and the value provided by the grantor, as opposed to the value received and/or provided by any other party. Relatedly, what matters is the *actual* value received and provided by the grantor, rather than the grantor's perceived value (at [29]).

34 Second, 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". Chong JCA observed that when the relevant consideration is received by the grantor in the form of money, the assessment of its value will generally be straightforward. However, when the relevant consideration is received in money's worth, there may be some difficulty in the assessment of its value. In this regard, 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. The learned judge explained (at [34]) that this is needed so that the value of the consideration provided and received by the grantor can be meaningfully compared on the same footing. This would further the policy object of s 98, which is to protect the grantor's assets. As such, abstract or intangible forms of value that cannot be quantified in monetary terms are of no value to the grantor's creditors upon its insolvency and are irrelevant in the value consideration exercise. Finally, 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.

The 7 October Letter is a transaction at an undervalue

35 With these principles in mind, and for the reasons that I will now develop, I conclude that the 7 October Letter is a transaction at an undervalue.

36 As a preliminary point, the value comparison exercise should take place by considering the benefit provided by Affert in money and the benefit received by Affert in money's worth. This is because while the alleged waiver that is provided by Affert can clearly be measured in monetary terms, the benefit received by Affert (if any) are mostly indirect and intangible, and hence must be measured in money's worth. As such, I will also undertake the value comparison exercise by examining: (a) the value Affert provided by the 7 October Letter in money; and (b) the benefit Affert received in return for issuing the said Letter in money's worth.

(1) The value Affert provided in the 7 October Letter

37 With these observations in mind, it is useful to begin the value comparison exercise by ascertaining the monetary value that Affert provided in the 7 October Letter. In this regard, Affert argues that it had provided value by the 7 October Letter by waiving the debts that the respondents owed under six invoices, which I set out in this table:[23]

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[23] Diallo's 4th Affidavit at para 16, AWS at para 4.

No.	Index No.	Invoice Amount
1	02/2012-13 ("Invoice 1")	US$1,573,000
2	013/2012-13 ("Transfert Invoice")	US$1,120,837 outstanding (initially US$5,800,837 owing, but US$4,680,000 paid, with last payment on 9 Jan 2014).
3	014/2012-13 ("Solvadis Invoice")	US$6,475,350
4	003/2013 ("Invoice 4")	US$6,012,500
5	004/2013 ("Invoice 5")	US$1,247,077.60
6	005/2013 ("Invoice 6")	US$1,189,500

38 In response, the respondents argue that the monetary value that Affert provided should be considered in the following manner:

(a) First, two of the six invoices in question – Invoice 1 and the Solvadis Invoice in the table above – (or, more accurately, the debt owing under these invoices) had become time-barred as of 7 October 2014. As such, those invoices should not be included in the calculation of value that Affert provided (the "Limitation Argument").

(b) Second, Affert had waived one of its invoices – the Transfert Invoice – by way of a Deed of Termination dated 24 March 2015 (the "Deed of Termination").

(c) Third, as for the remaining three invoices, which are Invoices 4, 5, and 6, Affert was never going to pursue those invoices against them,

and hence, the value provided by Affert in waiving those invoices should be ascertained at zero (the "Remaining Invoices").[24]

39 For ease of exposition, I will deal with the parties' arguments under the broad headings of (a) the Limitation Argument, (b) the Deed of Termination, and (c) the Remaining Invoices.

(A) THE LIMITATION ARGUMENT

40 I turn first to the Limitation Argument, which extends to Invoice 1 and the Solvadis Invoice. Because the relevant limitation periods had to be determined under Senegalese law, the parties requested their respective experts to provide their views on this issue. In this regard, Senegal adopts a system of corporate law set out by the Organisation for the Harmonisation of Business Law in Africa ("OHADA").

41 As a common starting point, both parties' experts agree that the limitation period in Senegal for payment of Affert's invoices is two years from the time that payment was due. In this regard, article 301 para 2 of the OHADA Uniform Act on General Commercial Law ("UA") provides that the relevant limitation period for a commercial sale is two years. In turn, article 234 para 1 of the UA defines "commercial sale" as "contracts of sale of goods between merchants, natural persons or legal entitles, including contracts for supply of goods intended for manufacturing activities or production". This is to be read with article 235 of the UA, which sets out exceptions to the definition of

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[24] RWS at para 89.

"commercial sale".[25] In the present case, the six invoices issued by Affert to ICS concern the sale of sulphur, which are commercial sales that do not fall within any exception in the UA. As such, unless the two-year limitation period can be suspended or extended, it will apply to the invoices here from the date at which their underlying debts became due.

42 Affert's expert ("Ms Bebohi") says that the total debt as contained in the invoices is not time-barred for two main reasons. The first reason is that the respondents have acknowledged the debt, which under OHADA law, interrupts the limitation period. On Affert's case, the alleged acknowledgement is contained in an internal IHBV email dated 17 September 2014 (the "17 September email").[26] The 17 September email was sent by Mr Manish K Saraf to Mr Munish Jindal, both from IHBV, and stated: "Dear Sir, [a]s of September 17, 2014, $8 million is net payable to Archean group for ICS-related party dues". It then set out a table tabulating the various components of the debt.[27] The second reason is that ICS made part payments between 12 June 2012 and 9 January 2014, which similarly extends the limitation period.[28]

43 In contrast to Ms Bebohi's views, the respondents' expert ("Mr Houda") explains that: (a) once a limitation period has expired, it cannot be restarted, unless it falls within the exceptions contained in articles 21 to 26 of the UA; and

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25 3rd Affidavit of Khaled Aboul El Houda dated 6 October 2022 ("Houda's 3rd Affidavit") at pp 20–21.

26 AWS at para 7(2).

27 Hearing Bundle ("HB") Volume 6 at pp 365−366.

28 AWS at para 73; Affidavit of Sylvie Bebohi Ebongo dated 5 October 2023, Exhibit SBE-1, at paras 5–6, 28 and 33.

(b) where a partial payment is made, it will refresh the unexpired limitation period if the payor expressly connects the partial payment to an invoice.[29] As such, Mr Houda suggests that Invoice 1 was time-barred by 19 July 2014, and the Solvadis Invoice was time-barred by 4 October 2014.

44 Having summarised the experts' evidence regarding Senegalese law on limitation periods, I deal first with the question of whether ICS had acknowledged its debt to Affert, thereby interrupting the limitation period. In this regard, while the parties' experts agree that the acknowledgment of a debt interrupts the limitation period, they disagree on whether the 17 September email amounted to an acknowledgement of a debt. On this point, I agree with Mr Houda that there was no acknowledgment of a debt in the present case. The email was not sent by ICS to Affert and also did not mention any invoices.[30] With this being the case, it cannot be said that ICS had acknowledged its debt to Affert, and in particular, the invoices that are in contention in the present application.

45 Next, I turn to the question of whether ICS had made partial payment of its debt to Affert. Again, both parties' experts agree that where partial payment is made, it will refresh the unexpired limitation period if the payor expressly connects the partial payment to an invoice. In this regard, Affert contended that ICS had made partial payment towards Invoice 1, which concerned the vessel "*MV Xenia*". Mr Adrian Wong ("Mr Wong"), who appeared for Affert, pointed me to Affert's ledger account for the period 1 January 2012 to 31 December 2012, which shows an amount of US$1,737,652.62, received in respect of

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29 RWS at para 3.

30 Houda's 3rd Affidavit at pp 268–269; Houda's 4th Affidavit at pp 12–13.

"*MV Xena/MV Saadet*".[31] Mr Wong contends that this represented a partial payment for the invoice in question. However, as Mr Bull rightly points out, the payment was in respect of "*MV Xena*", which is a different vessel from "*MV Xenia*", the subject of the invoice in question. Mr Wong has not alleged that the ledger account contains a typographical error in this regard. As such, Affert has not shown a connection between the sum of US$722,569.68 and Invoice 1. The limitation period for this invoice was therefore not restarted and expired on 19 July 2014.

46 Finally, I consider the question of the date on which the Solvadis Invoice was due, which bears on the question of when the limitation period started to accrue, and therefore, affects when the limitation period expires. In this regard, the Solvadis Invoice required "payment at sight".[32] What the parties disagree on is the meaning of "payment at sight". Affert takes the position that "payment at sight" means that payment is due when the "relevant document(s) is sighted by the issuing bank", and that for the Solvadis Invoice, the relevant document was the *bill of lading*.[33] In contrast, the respondents argue that "payment at sight" means that payment is due upon presentation of the *invoice*, but that commercial practice generally allows for a maximum of seven days' leeway for payment. Given that the Solvadis Invoice was dated 27 September 2012 and "would have been" sighted by ICS on the same day, it would have been due seven days later, *ie*, 4 October 2012.[34]

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31 HB Vol 2 at p 61.

32 RWS at para 5.

33 AWS at para 72(2).

34 RWS at para 5.

47 I accept the respondents' arguments. It is unlikely that the parties intended for payment to only be due when the bill of lading was presented to the issuing bank. This is because at the relevant time, the bill of lading had been withheld by Solvadis's bank, Nord Bank,[35] and it was unclear when it would be released. I find it unlikely that the parties would have intended for payment to be due by an unspecified, uncertain future date, contingent upon release of the bill of lading. Instead, it is more likely that the parties intended for payment to be due within seven days of the presentation of the invoice. Thus, payment for the Solvadis Invoice would have been due on 4 October 2012. As a result, the limitation period for the Solvadis Invoice expired two years later, on 4 October 2014.

48 I therefore find that when Affert produced the 7 October Letter, two invoices had become time-barred, namely, (a) Invoice 1, which became time-barred by 19 July 2014; and (b) the Solvadis Invoice, which became time-barred by 4 October 2014. Accordingly, out of the total debt that ICS allegedly owed Affert, only US$9,569,914.60 was not time-barred.

(B) THE DEED OF TERMINATION

49 I turn next to the Deed of Termination, which concerns the Transfert Invoice. It is undisputed between the parties that Affert, ICS, and Transfert signed a Deed of Termination dated 24 March 2015.[36] Where the parties disagree is in relation to the *effect* of the Deed of Termination. The respondents submit that, as a result of the Deed of Termination, it would be "unfair" for

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35 11th Affidavit of Abuthahir s/o Abdul Gafoor dated 28 August 2023 ("Abuthahir's 11th Affidavit") at para 65(2)(b).

36 AWS at para 75; RWS at para 27.

Affert to recover US$1,120,837 out of the remaining total debt of US$9,569,914.60,[37] and/or that Affert "should not be seeking payment" in respect of the Transfert Invoice.[38] Admittedly, it is not entirely clear on what legal ground the respondents allege such "unfairness". Needless to say, Affert disagrees with the respondents' submissions.[39]

50 To resolve this disagreement between the parties, I turn first to explain how the Deed of Termination arose from the Transfert shipment. The Transfert shipment was a cargo of bright yellow granular sulphur that Transfert had sold to Affert. Affert had failed to make full payment to Transfert for the cargo, due to ICS's own failure to pay Affert for the cargo. In order to resolve the difficulties, all three parties (Transfert, Affert, and ICS) entered into a full and final settlement under which they agreed that Affert and ICS would be jointly and severally liable to pay Transfert a sum of US$5,674,313.09 (the "Settlement Agreement").[40] Importantly, recital (i) of the Settlement Agreement provides that "Transfert, Affert Resources [*ie*, Affert] and ICS hereby desire to enter into a full and final settlement of *all claims or other matters* arising out of or in connection with the above …" [emphasis added]. Subsequently, the same three parties signed the Deed of Termination, which terminated the Settlement Agreement and caused each of the parties to cease being entitled to "any rights or benefits, howsoever arising, under the Settlement Agreement".[41] Affert also acknowledged that "no amount is payable from ICS to Affert Resources

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37 RWS at para 89(b).

38 RWS at para 28.

39 AWS at para 75.

40 HB Vol 10 at pp 694−698.

41 HB Vol 10 at p 688.

pursuant to the Settlement Agreement or any other agreement or consignment".[42] Yet, Affert now claims that it is owed a debt of US$1,120,837 in respect of the Transfert shipment from ICS, after subtracting part payments.

51 In my judgment, Affert cannot claim a debt of US$1,120,837 from ICS because the Settlement Agreement has terminated this debt. While there is no express termination of a debt owing by ICS to Affert in the Settlement Agreement, I find that recital (i) of the same document amounts to an implied termination of such a debt. This is because recital (i) provides that all three parties desired to fully and finally settle "all claims or other matters" arising from the Transfert shipment. The phrase "other matters" can conceivably include any claims that Affert has against ICS. Indeed, the ultimate result of the Settlement Agreement, which is that Affert and ICS jointly and severally agreed to pay Transfert a settlement sum, would only make commercial sense if Affert has also waived any claim it had against ICS. Otherwise, it is difficult to see why ICS would agree to be jointly and severally liable to pay Transfert the settlement sum, while still being liable to Affert for the same. ICS would only have agreed to do so if its liability was only to Transfert, and not Affert. If this is the effect of the Settlement Agreement, then it is clear that Affert has no further claim arising from the Transfert shipment against ICS.

52 In the alternative, I find that even if ICS's liability to Affert in relation to the Transfert shipment survived the Settlement Agreement by somehow being subsumed thereinto, that liability would have been extinguished by the Deed of Termination. This is because clause 2.1 of the Deed of Termination

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[42] HB Vol 10 at pp 685−691.

provides that the Deed is "in full and final settlement of all Claims by any Party against any other Party arising out of or in connection with the Settlement Agreement".[43]

53 For completeness, I reject Affert's argument that the Settlement Agreement, and by extension, the Deed of Termination, does not concern the bilateral relationship between ICS and Affert. This is because the recital of the Settlement Agreement refers to the entire factual background concerning the Transfert shipment, including ICS's failure to pay Affert for the cargo.[44] Furthermore, recital (B) of the Deed of Termination clearly deals with Affert's and ICS's bilateral relationship by referring specifically to claims by Affert against ICS.[45]

54 In the circumstances, I find that any debt owing to Affert which arose out of the Transfert Shipment has been terminated by the Settlement Agreement, or in the alternative, the Deed of Termination. As such, Affert cannot claim against ICS for the allegedly outstanding US$1,120,837. The result is that the maximum debt allegedly owing by ICS to Affert is US$8,449,007.60.

(C) THE REMAINING INVOICES

55 Given my findings above, only three invoices remain that Affert can claim against ICS. These are Invoices 4, 5, and 6.

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43 HB Vol 10 at pp 684–698.

44 HB Vol 10 at p 695, recitals (g) and (i).

45 HB Vol 10 at p 687.

56 As against these remaining invoices, the respondents argue that Affert would not have pursued the entire ICS Debt in any event. Therefore, by extension, Affert would not have pursued the debts owing under these invoices. The respondents cite a number of factual grounds in support of this assertion: (a) there is no evidence that Affert intended to or took steps to recover the ICS Debt,[46] and indeed, the evidence suggests that its directors did not intend to collect the debt;[47] (b) Affert may have shielded away from pursuing the debt under the Solvadis Invoice against ICS to avoid provoking a counterclaim by ICS for the delivery of defective materials;[48] (c) Affert, at many points, lacked the financial means to pursue the ICS Debt, initially because it was entangled in legal proceedings against another party (Solvadis) ,[49] and subsequently due to its limited funds post-liquidation;[50] (d) Affert would have been unlikely to pursue the ICS Debt given the uncertainty of recovering the debt from ICS, which was in financial distress;[51] and (e) Affert's own financial documents do not reflect any write-off of the ICS Debt.[52]

57 Regarding the respondents' various arguments as to why Affert would not have pursued the ICS Debt, I agree with Affert that, when deciding if the alleged waiver is a transaction at an undervalue, it is not relevant whether Affert would have pursued the said Debt. Apart from the fact that the BA does not

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46 RWS at paras 42−44.

47 RWS at paras 57−60.

48 RWS at para 45.

49 RWS at paras 47−50.

50 RWS at paras 54−56.

51 RWS at para 51.

52 RWS at para 52.

require the court to inquire into whether Affert subjectively intended to pursue the ICS Debt for the purposes of ascertaining if a transaction is at an undervalue, it is logical that the fact that a company's former directors had not pursued or would not pursue claims should not lead a court to find that there was no transaction at an undervalue. Furthermore, as Affert points out, Affert's financial difficulties in mounting a claim for the ICS Debt against the respondents should not be a bar to finding that a transaction is at an undervalue, since a claimant is required to be insolvent to make an application under s 100(2) of the BA in the first place.[53]

58 For completeness, while the respondents have only argued that the value of the ICS Debt should be disregarded *completely*, instead of being *reduced*, in light of the various difficulties that Affert might have had in recovering the said Debt, I find that, had the point been argued, it may have been appropriate in the circumstances to reduce the value provided by Affert through the 7 October Letter. This is because the ICS Debt was, based on the objective evidence, very unlikely to be recoverable. As such, the actual value of the debts may well be significantly less than their face value (see, in this regard, Kristin van Zweiten, *Goode on Principles of Corporate Insolvency Law* (Sweet & Maxwell, 5th Ed, 2018) ("*Goode on Principles of Corporate Insolvency Law*") at para 13−29). Indeed, at the material time, it is undisputed that ICS was in grave financial difficulty and was nearly, if not, insolvent. Therefore, it is not likely that Affert could have recovered anywhere near the full amount of US$8,449,007.60 had they demanded repayment of the outstanding amounts. The difficulties in recovering the debts would have been compounded by the impending limitation

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[53] AWS at para 29(4)(d).

periods. Accordingly, while the face value of the remaining invoices was US$8,449,007.60, I find that, had it been argued in this manner, it might have been appropriate to adjust this value downwards. However, to be fair to Affert, since the argument was not made on this premise, I do not make such a downward adjustment in this case.

59 Accordingly, I find that the value Affert provided in the 7 October Letter is US$8,449,007.60.

(2) The valuable consideration that Affert received in exchange for the 7 October Letter

60 I now turn to the next stage of the valuation exercise, which requires me to determine the value of the consideration received by Affert (see *Rothstar* at [24]).

(A) THE APPLICABLE LAW

61 In my view, the consideration of whether Affert received valuable consideration should be approached by way of two analytically distinct steps. First, I will *identify* the relevant consideration that Affert can be said to have received as a result of the 7 October Letter. Second, I will then calculate the *value* of that consideration that Affert received (see *Rothstar* at [26]).

62 There are several advantages with approaching the valuation exercise through these two steps. First, it maintains the conceptual clarity of the concept of "consideration", which, as Chong JCA in *Rothstar* held, has the normal meaning ascribed to it by the law of contract (see *Rothstar* at [24]). After all, in the law of contract, the court does not generally inquire into the adequacy of consideration (see Andrew Phang and Goh Yihan, *Contract Law in Singapore*

(Kluwer, 2nd Ed, 2021) at paras 221−222). Thus, it is incongruous with the principles of contract law for a court to have to look for "valuable consideration". Instead, it may be more accurate to speak of the court *identifying* consideration first, without assessing its value, save where the value is said to be *de minimis*. Second, this approach readily accommodates the possibility that the consideration could have accrued to another party who was not the insolvent company (or "grantor") (see *Rothstar* at [26]). This is achieved by separating the identification of the consideration (wherever it may have gone) from the exercise of calculating the value that accrued to the grantor (in this case, Affert) as a result of that consideration. In contrast, a composite inquiry of whether the grantor received "valuable consideration" risks inadvertently missing out on any consideration that may not have flowed directly to the grantor.

(B) IDENTIFYING THE CONSIDERATION THAT AFFERT RECEIVED

63 With these principles in mind, I now turn to *identify* the consideration that Affert received in exchange for its 7 October Letter, if any. When the 7 October Letter is considered in the context of the Acquisition, it is clear that Affert received consideration in exchange. It is not disputed that ICS paid US$8,001,886 to Archean Group entities pursuant to the Side Letter, as part of the Acquisition. In particular, ICS paid (a) US$5,418,000 to Mineral Trade Group FZE ("MTG") on 15 October 2014, (b) US$1,078,095 to MTG on 17 October 2014, and (c) US$1,505,791 to Senfer Investments Limited, Jersey ("Senfer Jersey") on 21 October 2014.

64 In this regard, I find that the respondents have shown practical benefits accruing to Affert arising from the 7 October Letter. This is because the 7 October Letter paved the way for the payments to the other Archean Group entities, and taken holistically, Affert must have received practical benefits from

this infusion of funds into the Archean Group. For the purposes of contract law, it is relatively clear that a practical benefit accruing to a contractual party can constitute consideration (see the Court of Appeal decision of *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250; the English Court of Appeal decision of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1). This practical benefit can arise in a variety of ways, including, but not limited to, the broader corporate group being kept in funds, facilitating the continued survival of its constituent companies. In this connection, the courts are quite ready to find the *existence* of such consideration (see the High Court decision of *S Pacific Resources Ltd v Tomolugen Holdings Ltd* [2016] 3 SLR 1049 at [15]), which, I reiterate, is a distinct inquiry from the *valuation* of that consideration. Therefore, I disagree with Affert's argument that the respondents have been unable to particularise or substantiate the supposed benefits received by Affert. Rather, Affert's accounting documents show that it had significant business dealings with various Archean Group entities that received payments from ICS and IHBV as part of the Acquisition.

65 First, Affert's account documents show that it had significant business dealings with MTG. As such, Affert would have received a practical benefit from MTG being kept in funds to continue such business dealings. While such a practical benefit may be characterised as precarious or speculative, the respondents have raised tangible evidence towards the existence of such a benefit objectively.

66 Second, Affert's account documents show that it had significant business dealings with Senfer Jersey, and that Senfer Jersey was indebted to Affert. As such, Affert would have received a practical benefit from Senfer Jersey being kept in funds to continue such business dealings and having the

moneys to repay Affert. In particular, it appears from Affert's Statement of Affairs ("SOA") that Senfer Jersey incurred debts of S$5,347,323 to Affert as of 18 September 2017.[54] Affert's Balance Sheet Schedule for the year ended 31 December 2014 ("2014 BSS") shows that Affert had paid advances of US$4,350,905 to Senfer Jersey as of 31 December 2013 and 31 December 2014.[55] Affert's ledger account for the period 1 January 2013 to 31 December 2013 ("2013 Ledger Account") also reflects two transactions involving Senfer Jersey in May 2013, while its ledger account for the period 1 January 2012 to 31 December 2012 ("2012 Ledger Account") reflects seven transactions between Affert and Senfer Jersey in 2012.[56]

67 Third, pursuant to the ADA, US$30m of the US$50m Acquisition price was paid to the Bank of India and Axis Bank to settle debts owing by Senfer Cyprus to those banks. In this regard, Affert's accounting documents show that it had significant business dealings with Senfer Cyprus and that Senfer Cyprus was indebted to Affert. As such, Affert would have received a practical benefit from Senfer Cyprus being kept in funds to continue such business dealings and also having the funds to repay moneys owing to Affert. In particular, it appears from Affert's SOA that Senfer Cyprus had incurred debts of S$1,435,781 to Affert as of 18 September 2017.[57] Affert's 2014 BSS reflects that Affert had paid advances amounting to US$1,068,290 to Senfer Cyprus as of 31 December 2014 and US$2,750,000 as of 31 December 2013.[58] Affert's 2013 Ledger

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54 HB Vol 2 at p 326.

55 HB Vol 11 at p 415.

56 HB Vol 11 at pp 423 and 426–436.

57 HB Vol 2 at p 326.

58 HB Vol 11 at p 415.

Account reflects one transaction with Senfer Cyprus amounting to US$3,125,000 in March 2013.[59] Finally, Affert's 2012 Ledger Account reflects eight transactions involving Senfer Cyprus in 2012.[60]

68 For completeness, I accept that ICS and IHBV are not privy to the Archean Group's internal arrangements as to how the sum of US$8,001,886 was actually utilised. This is information that is within the Archean Group's purview. However, based on the available evidence, I accept that Affert received consideration in the form of an infusion of funds into the Archean Group.

69 Therefore, I accept that the respondents have succeeded in *identifying* the consideration that Affert received in exchange for the 7 October Letter. The consideration that Affert received consists of various practical benefits arising from its business partners and debtors in the Archean Group being kept in funds.

(C) DETERMINING THE VALUE THAT AFFERT RECEIVED

70 Next, I turn to the question of the value that Affert received as a result of the 7 October Letter. I first consider the question of whether I am required to calculate the specific value that Affert received as a result of the 7 October Letter.

71 Affert argues, and I accept, that the value accruing to Affert must be quantifiable in monetary terms,[61] *ie*, it must be capable of being assessed in

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59 HB Vol 11 at pp 417–424.

60 HB Vol 11 at pp 426–436.

61 AWS at para 26.

money's worth (see *Rothstar* at [30] and [49]). However, there is a distinction between requiring that the benefit be *capable* of quantification, as opposed to requiring that the benefit be *actually* quantified with mathematical certainty. In this regard, Chong JCA in *Rothstar* seemed to have contemplated that a benefit could be capable of quantification while not being calculated with exactitude, when he stated that "the value of the consideration must be *quantifiable in monetary terms*, even if the precise monetary value of the consideration cannot be immediately determined with certainty" [emphasis in original] (at [34]).

72 Therefore, in my view, I am only required to decide the following in relation to the comparison exercise. First, whether the value given and received by the grantor (*ie*, the insolvent individual or company – in this case, Affert) is *capable* of valuation. Second, whether the incoming value is significantly less than the outgoing value. It is therefore not a strict legal requirement for me to ascribe a mathematical value to either the incoming or the outgoing value, as long as I am able to conclude whether the former is or is not significantly less than the latter.

73 I am solidified in my view that numerical exactitude is not required by the approach that various cases, both local and foreign, have taken. Starting with the local cases, the High Court in *Buildspeed Construction Pte Ltd (in liquidation) v Theme Corp Pte Ltd and another* [2000] 1 SLR(R) 287 ("*Buildspeed Construction*") ascribed a range of values to the profit margin that the grantor had given up as a result of the impugned transaction (at [37] and [47]).

74 Some English cases have likewise approached the valuation exercise without requiring numerical exactitude. The case of *Re Thoars (decd) (No 2);*

Reid v Ramlort Ltd (No 2) [2005] 1 BCLC 331 ("*Ramlort*") concerned s 339 of the Insolvency Act 1986 (c 45) (UK) ("UK Insolvency Act"), which is almost identically worded to s 98 of the BA. The English Court of Appeal in *Ramlort* observed that there is nothing in the express words of the provision "which requires the court to ascribe a precise figure either to the outgoing value or to the incoming value". Rather, the court can make a finding that the transaction was at an undervalue if it is "satisfied that, whatever the precise values may be, the incoming value is on any view '*significantly less*' than the outgoing value" [emphasis in original] (at [103]). The approach taken in *Agricultural Mortgage Corporation plc v Woodward and another* [1995] 1 BCLC 1 ("*Agricultural Mortgage Co*") also affirms this view. It concerned s 423(1)(c) of the UK Insolvency Act, which empowers the court to make orders to reverse a transaction that a party has entered into "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 himself". The English Court of Appeal in *Agricultural Mortgage Co* did not appear to have identified any numerical figure, or even a range, for the value accruing to the grantor. Instead, it simply found that the grantor had incurred a "very substantial detriment" under the transaction, as his value of his freehold interest in the farm was diminished by "more than £500,000" (at 9). The Court then concluded that this was "*far* greater in value, in money or money's worth than the value of the consideration provided by [the second defendant]" [emphasis in original] (at 11).

75 From a practical perspective, it is clear why the value comparison exercise cannot always require numerical exactitude. After all, valuation exercises necessarily contain a margin of error due to various factors such as the valuation method used, especially where they concern projected or future

business activity. Thus, in *Buildspeed Construction*, the profit margin on the remaining uncompleted construction work that the grantor gave up was expressed as a range of values due to the difficulty in predicting contractors' profit margins generally. The High Court explained, citing an expert report, that it had to do so because of the variance in calculating profit margins caused by "the wide range of accounting techniques, methods of paying directors and other factors" (at [37]). Likewise, in *Ramlort*, the English Court of Appeal considered the minimum value granted by the grantor (£10,000, at [115]), and the minimum value accrued to the grantor ("not substantially less than £3,000", at [120]). While it may be preferable for a court to arrive at precise figures for the incoming and outgoing value "*in those cases where it is able to do so*" [emphasis in original] (see *Ramlort* at [105]), this does not compel a court to conclude that no value was provided to the grantor in cases when it is not possible to arrive at such precise figures. In such cases, the court is entitled to take a rough-and-ready approach to estimating the difference between the value provided by, and accruing to, the grantor.

76 Having set out the relevant principles, I now consider their application to the facts of the present case. I have already accepted that the 7 October Letter resulted in a practical benefit to Affert through an injection of funds into its various business partners and debtors in the Archean Group. The practical benefits can be grouped into: (a) continued business activity with those business partners, and (b) an increased likelihood that those companies would repay their debts. I accept that these benefits could be capable of valuation. However, as I explained above, I also need to consider whether the incoming value is significantly less than the outgoing value (*ie*, the value comparison exercise). In my view, this is where the respondents face some evidential difficulties. To begin with, the respondents have not led expert evidence as to the valuation.

This is in contrast to the other cases, such as *Buildspeed Construction* and *Ramlort*, where expert evidence was adduced for the estimations in the valuation exercise.

77 Turning to the question of continued business activity, it is difficult to establish the exact value of this practical benefit. While the various ledger entries and accounting documents disclose multiple transactions between Affert and its business partners ranging into millions of dollars, the evidence is still insufficient for me to even begin estimating a value to this benefit.

78 The same applies to the increased likelihood that Senfer Cyprus and Senfer Jersey would repay their debts to Affert. It is true that the respondents have adduced evidence as to the exact debts owing from these companies to Affert, including advances that Affert had paid to them.[62] While it might be argued that this could serve as a starting point for a rough-and-ready calculation as to the value that Affert received, the difficulty is that the value accruing to Affert from these companies' increased likelihood of repaying their loans is not coterminous with the entire quantum of these loans. Indeed, the value Affert derived from an increased likelihood of Senfer Jersey and Senfer Cyprus repaying their debts is less than the value Affert would have derived if these debts had been discharged in their entirety. Based on the evidence before me, it is not possible to estimate a value to this benefit.

79 Therefore, I find that while the practical benefits accruing to Affert could be capable of valuation, the evidence before me does not permit me to determine or even estimate that value. In the round, it is telling that the

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[62] HB Vol 2 p 326; HB Vol 11 p 415.

respondents themselves have not provided a numerical figure, or even a range of figures, that can form the basis for estimating the value that Affert received. Given the lack of expert and documentary evidence, coupled with the respondents' failure to attempt a valuation of the benefit that Affert received, it is not open to me to conjure up a valuation of that benefit on behalf of the respondents.

80 For completeness, I do accept the respondents' argument that they are not privy to the internal arrangements of the Archean Group and could not have known how the moneys transferred to the Archean Group as a result of the 7 October Letter were used.[63] That said, I must make findings on the basis of the evidence that is presented to me. Therefore, despite accepting that the respondents may have faced genuine difficulties in obtaining the necessary evidence, I must still find that they have not managed to value the benefit that Affert received.

(3) Value comparison exercise

81 From the foregoing, the value that Affert gave up as a result of the 7 October Letter was US$8,449,007.60. However, for the reasons above, I find it difficult to even estimate the value that Affert received. More importantly, I do not have sufficient evidence before me to decide that the value that Affert received was likely less or more than the value that it gave up. Accordingly, I am compelled to find that the 7 October Letter is a transaction at an undervalue. However, without making a definitive finding on this matter, I do consider it possible that had the appropriate evidence been adduced before me, the value

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63 RWS at para 25.

that Affert received could have been comparable to (or in excess of) the value that Affert gave up, as a result of the 7 October Letter.

82 Given my findings above, I go on to consider whether, assuming that the 7 October Letter is a transaction at an undervalue, it would be appropriate to make the Payment Order sought by Affert for ICS and IHBV to, jointly and severally, pay to Affert the ICS Debt. For the reasons I will develop, I do not think that it would be appropriate to do so.

Given that the 7 October Letter is a transaction at an undervalue, whether it is appropriate to make the Payment Order

The parties' arguments

83 To begin with, Affert argues that the Payment Order is appropriate because it was deprived of a debt and should therefore be made whole with such an order. It further submits that the Payment Order is appropriate because: (a) ICS was a direct counterparty to the alleged waiver; (b) IHBV was also a party to the alleged waiver and/or also benefitted from it; and (c) the alleged waiver was procured jointly by ICS and IHBV.[64]

84 In response, the respondents' main argument is that even if the 7 October Letter is a transaction at an undervalue, s 98 of the BA allows the court to only *restore* Affert to the position that Affert would have been in if it had not issued the said Letter. Thus, following the English High Court decision of *Re MDA Investment Management Ltd; Whalley v Doney and another* [2004] 1 BCLC 217 ("*Re MDA*"), the court may not reconstruct the position to

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64 AWS at paras 10 and 40.

what it would have been if Affert had, in addition to not issuing the 7 October Letter, also actively pursued the ICS Debt before the applicable limitation periods expired. In sum, the respondents say that even if Affert did not issue the 7 October Letter, it would still not have pursued the ICS Debt before it became completely time-barred. The Payment Order is therefore not restorative.[65] In addition, the respondents also make more specific arguments as to why Payment Orders should not be made against ICS and IHBV specifically.[66]

My decision: it would not be appropriate to make the Payment Order

(1) The order needs to be "restorative"

(A) THE APPLICABLE LAW

85 To begin with, the plain wording of s 98 of the BA is that the court may only "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". This is consistent with the English High Court decision of *Lord v Sinai Securities Ltd and others* [2005] 1 BCLC 295 ("*Sinai Securities*"), which Affert cited, in which Hart J held as follows (at [15]):

> … the court's primary, and possibly only, concern under s 238(3) [of the UK Insolvency Act] is the restoration of the company's position: the position of the counter-party needs to be considered by the court as a general matter of discretion, but the court is not obliged to ensure that his position is restored in every particular to the status quo ante the transaction. There will be many cases where that is simply impossible.

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65 RWS at para 91.

66 RWS at paras 92–102.

Section 238(3) of the UK Insolvency Act provides that "the court shall … make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction". This is similar to s 98(2) of the BA.

86 In light of this similarity, I find the English High Court's approach in *Re MDA*, where Park J considered the appropriate orders to make in relation to a transaction at an undervalue under s 238(3) of the UK Insolvency Act, to be persuasive. In that case, the company and a partnership had sold their businesses and assets to a third party on the basis that they were each to be paid a share of the consideration. However, the company was promised a share that was substantially lower than the value of its business and assets. Correspondingly, the partnership was promised a share that was substantially higher. Park J held that the sale of the company's business and assets was a transaction at an undervalue. Yet the learned judge refused to grant the liquidator's request for orders of payment, being the amount that the company would have received if the consideration was not split with the partnership. Park J explained his reasons as follows (at [123]):

> If IM Ltd [*ie*, the company] had not entered into the transaction with Farlake [*ie*, the third party] (the hypothesis which s 238(3) requires) I believe that it would have had to close down its business, so it would not have been able to receive anything for it. It is of course true that IM Ltd would have been better off if it had entered into a transaction of sale to Farlake but without the feature whereby the consideration was split between itself and MDA partnership. *However, the section permits me only to restore the position to what it would have been if IM Ltd had not entered into the transaction at all: it does not permit me to reconstruct the position to what it would have been if IM Ltd, as well as not entering into the actual transaction, had entered into a different transaction instead.* On the facts of the case, although I consider that IM Ltd did not get full value for what it parted with under the actual transaction, *it would have been in*

> *an even worse condition if it had not entered into the transaction at all.*
>
> [emphasis added]

87 In other words, *Re MDA* (as applied in the Singapore context) makes clear that, pursuant to the plain wording of s 98(2) of the BA, a court must simply restore the position to the *status quo ante*, without going further than that to reconstruct the position to what would have been. To do the latter would be to speculate what the insolvent company would have done. This would not be right. Rather, the plain meaning of a "restorative" order is to restore the insolvent company's position to what it was before the transaction at an undervalue had taken place.

88 However, Affert submits, first, that I should not follow the approach taken in *Re MDA* because Park J's comments were *obiter*.[67] I do not accept this argument. Since the approach in *Re MDA* is the subject of substantive arguments in the present case, I can come to a considered decision as to whether to follow that approach or not. Put differently, the fact that Park J's comments were *obiter* should not prevent me from deciding whether those comments are correct based on the parties' arguments before me. More broadly, it seems unsatisfactory for the *ratio decidendi* and *obiter dictum* distinction to be applied inconsistently, and raised only when it would apparently benefit one party. The distinction should be applied consistently to all cases that are cited in argument, or it should not apply at all. The distinction should not be used when it is only helpful to one party and certainly not, as is the case sometimes, to avoid making more detailed analysis on the substantive strength of an argument.

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67 AWS at para 79.

89 Second, Affert submits that, because most perishable assets would be spoilt or worth significantly less by the time the matter proceeds to court for determination, following *Re MDA* would mean that payment orders for all transactions at an undervalue concerning perishable assets would be refused.[68] From this argument, it appears that Affert understands *Re MDA* as requiring that the assets be physically in existence at the time that the court makes the order. However, I do not read *Re MDA* as imposing such a requirement. Indeed, other cases such as the English High Court case of *Johnson v Arden and others* [2019] 2 BCLC 215 ("*Johnson*") make it clear that the court is not bound to restore the position to exactly that which existed prior to the relevant transaction or preference. Rather, it may make orders "*which in substance achieve that result* but achieve it in a different way" [emphasis added] (at [93]). In this regard, I do not think that Affert's citation of *Sinai Securities* helps its case. The relevant proposition from *Sinai Securities* is that it may sometimes be impossible to restore the *status quo ante* and a court should not do so in those circumstances. However, where it is possible to do so, I do not see a reason in that case or more generally why a court should not do that.

(B) THE PAYMENT ORDER SOUGHT IS NOT RESTORATIVE

90 As such, I adopt the approach taken in *Re MDA* in relation to what a "restorative" order means. In the present case, this means that the court cannot reconstruct the position to what it would have been if Affert had, in addition to, not issuing the 7 October Letter, also actively pursued the ICS Debt before the applicable limitation periods expired. Therefore, even though I have found that the 7 October Letter is a transaction at an undervalue, I decline to order ICS

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[68] AWS at para 79.

and/or IHBV to be jointly or severally liable to pay the ICS Debt to Affert. The setting aside of the 7 October Letter, which is what Affert has prayed for, does not necessarily mean that Affert would have pursued the ICS Debt successfully. As I will now explain, there are indications that Affert would not have pursued the ICS Debt in any event, or that even if it did, it would have been unable to recover the ICS Debt.

91 First, I agree with the respondents that there is no evidence that Affert intended to or took steps to recover the ICS Debt,[69] and indeed the evidence suggests that its directors did not intend to collect the debt.[70] In this regard, I find that Affert's subjective intentions and its directors' failure to pursue the ICS Debt are relevant at this stage, because these go towards determining what the *status quo ante* would have been, if not for the transaction.

92 Second, I find it likely that Affert would not have pursued the ICS Debt because it was concerned that if it did so, ICS might have possibly made a counterclaim for the sub-standard quality of the sulphur in the Solvadis Shipment.[71] While I acknowledge that the evidence in *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd* [2014] 1 SLR 174 ("*Solvadis v Affert*") suggests that the sulphur in the Solvadis Shipment was *not* actually sub-standard (at [31]−[32]), the point is that Affert's subjective apprehension of what it thought was a potentially meritorious counterclaim might still have deterred Affert from claiming for the ICS Debt. After all, in its submissions in

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69 RWS at paras 42−44.

70 RWS at paras 8 and 57−60.

71 RWS at para 45.

Solvadis v Affert, Affert took the position that the sulphur was sub-standard.[72] For completeness, I do not accept Affert's submission that ICS would have been unlikely to proceed with the alleged counterclaim. After all, this argument is based on Ms Vandana's alleged evidence.[73] As a director of Affert at the material time, and not ICS, she cannot testify as to ICS's intentions.

93 In sum, for the reasons above, I find that Affert would have been unlikely to claim for the ICS Debt. Accordingly, it would not be appropriate to make the Payment Order, or any order, at all.

(2) It would not be appropriate to make the Payment Order against IHBV

94 Further, even if it were appropriate to make the Payment Order against ICS because it benefited from the 7 October Letter as a direct addressee, I do not think that it would be appropriate to make the Payment Order against IHBV.

(A) THE APPLICABLE LAW

95 To begin with, the 7 October Letter was not issued to IHBV. Thus, in order for Affert to pursue remedies against IHBV, it needs to show, under s 102(1)(*d*) of the BA, that IHBV had received a direct and tangible benefit from Affert. I do not think that Affert has succeeded in doing so. For completeness, s 102(1)(*d*) provides as follows:

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72 RWS at para 45 generally, see also HB Vol 11 at p 466, para 8 (Affert's Answer and Counterclaim to Arbitration proceedings against Solvadis).

73 AWS at para 29(4)(e)(i), citing Abuthahir's 11th Affidavit at para 17(2), in turn referring to Diallo's 4th Affidavit at p 282, lines 23−24.

> **Orders under sections 98 and 99**
>
> **102.—**(1) Without prejudice to the generality of sections 98(2) and 99(2), an order under either of those sections with respect to a transaction or preference entered into or given by an individual who is subsequently adjudged bankrupt may, subject to this section —
>
> …
>
> (*d*) require any person to pay, in respect of benefits received by him from the individual, such sums to the Official Assignee as the court may direct;

96 In this regard, there is persuasive English authority for the proposition that an order may only be made against a third-party defendant (*ie*, a defendant or respondent against whom an order is being sought, who is not a counterparty to the impugned transaction) if the third party had "personally benefited in monetary terms … in some direct and tangible way" (see the English High Court decision of *In the matter of Oxford Pharmaceuticals Ltd Between: Wilson and another v Masters International (UK) Ltd and another* [2009] EWHC 1753 (Ch) ("*Oxford Pharmaceuticals*") at [83]–[85]). In that case, the liquidator of Oxford Pharmaceuticals Limited ("OPL") claimed that certain payments amounted to preferences of Masters International Limited ("MIL") and Dr Masters, who was a shareholder of MIL, and who had guaranteed the liabilities of MIL and OPL to their bankers. Mr Mark Cawson QC, sitting as a Judge of the High Court, held that he did not have any jurisdiction to grant relief against Dr Masters as Dr Masters had at most received some incidental benefit as a shareholder in MIL. The learned judge said this (at [85]):

> Where the preference amounts, as it did here, to the payment of a sum of money to a creditor, then the obvious starting point to any relief is, as I see it, that the recipient creditor should be ordered to repay the relevant moneys. In my judgment, the appropriate order to make in the circumstances of the present case, subject to the question of deductions that I consider below, is that MIL should repay the £450,000 to OPL. *The monies not having been paid on by MIL to Dr Masters, I do not*

> *consider it appropriate to make an order against him for the purposes of restoring the position of OPL. He may have received some incidental benefit as a shareholder in MIL, but it does not seem to me that the making of an order against Dr Masters is either necessary or appropriate for the purposes of achieving a result required to be achieved by s 289(3).* If, which I do not consider to be the case, I have any discretion to grant relief against Dr Masters in these circumstances, I exercise my discretion against doing so given, in particular, the remedy that exists against MIL and the incidental nature of any benefit that Dr Masters might have gained.
>
> [emphasis added]

97 Similarly, in *Johnson*, the respondents, who were the former officers of a company in liquidation, applied to strike out the applicant liquidator's originating application against them, or alternatively for summary judgment. The liquidator had alleged that the company officers' conduct in declaring payment of a substantial dividend to shareholders amounted to a transaction at an undervalue within s 238 of the UK Insolvency Act and/or a preference within s 239 of the same Act. Thus, Judge Kyriakides had to decide whether, among other issues, s 238, s 239, and s 241 of the UK Insolvency Act limited the court's jurisdiction such that it could only make an order against certain classes of persons (at [87]). Judge Kyriakides held that while the court had the discretion to make orders against third parties, such parties had to subsequently receive the property (whether they continued to hold it or not) or must have otherwise benefitted from the transaction (at [99]). The learned judge thus held that he did not have any jurisdiction to make an order under s 238 and s 239 of the UK Insolvency Act against a director of a company who had "received no benefit from the transaction or preference and whose only role was to direct the company to enter into the transaction or to give the preference" *as he has "nothing to 'restore'"* [emphasis added] (at [101]).

98 In response, Affert argues that there is no need for the third-party defendant to have received a direct and tangible benefit, citing the English High Court decision of *Integral Petroleum SA v Petrogat FZE and others* [2023] EWHC 44 (Comm) ("*Integral Petroleum*") to support its submission. *Integral Petroleum* concerned an application under s 423 of the UK Insolvency Act, which provides that where a person has entered into a transaction at an undervalue to defraud creditors, the court may make such order as it thinks fit for restoring the position to what it would have been if the transaction had not been entered into, and protecting the interests of persons who are victims of the transaction. In that case, the court found that there were transfers defrauding creditors under s 423 of the UK Insolvency Act made to a company ("Company A"). Significantly, David Edwards KC (sitting as a Judge of the English High Court) made payment orders not only against Company A, but also against the second to fourth defendants, even though they were not the immediate recipients of the impugned transfers. While Affert urges me to follow the approach taken in *Integral Petroleum*, I decline to do so as I read that case as having been decided on its particular facts. In *Integral Petroleum*, Edwards KC drew a factual inference that the third-party defendants had directly and tangibly benefited from the impugned transfers to Company A, based on those defendants' objectionable conduct (at [117]). This conduct included, among other things, refusing to identify Company A (in breach of court orders), thus making it impossible for proceedings to be commenced or for a payment order to be made against it (at [96] and [115(i)]), and refusing to disclose information regarding what happened to the funds transferred to Company A (at [115(ii)]), despite being the owners and operators of Company A (at [115(iii)]). As such, I do not think that *Integral Petroleum* greatly helps Affert's case.

99 Affert further argues, using the case of *Ailyan v Smith* [2010] EWHC 24 (Ch) ("*Ailyan*"), that the court can make a payment order against a third-party defendant merely on the ground that that defendant has facilitated and procured an undervalue transaction.[74] In *Ailyan*, the trustees in bankruptcy of Mr Kevin Foster sought repayment of sums paid into a pyramid scheme dishonestly run by the respondents on the ground that these were transactions at an undervalue within the meaning of s 339 of the UK Insolvency Act (at [1]) (s 339 of the UK Insolvency Act being almost identically worded to s 98 of the BA). Some of these moneys were paid into a company called Infocus (Cayman) Ltd rather than the respondents' bank accounts (at [20]). Supposedly, the court made a payment order against the respondents even though there was no evidence that the sum was received by the first to third respondents or that they had benefitted from the sum.[75] However, this is not an accurate reading of *Ailyan*. Although the payments were technically made to Infocus (Cayman) Ltd, the English High Court found that *each of the respondents was a party* to the impugned transactions (pursuant to which the payments were made) (at [47]). Simply put, because the respondents in *Ailyan* were counterparties to the relevant transactions, they were not third-party defendants.

100 To sum up the discussion, the starting point is that an order under s 98 of the BA must be restorative (see *Re MDA*). To achieve this, what the court is effectively doing in many cases is to notionally set aside the transaction, though the power is not expressed in this way (see *Johnson* at [95]). As *Goode on Principles of Corporate Insolvency Law* explains (at para 13−129), "the policy

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74 AWS at para 57, citing *Integral Petroleum* at para 110.

75 AWS at para 58.

underlying most (but not all) of the avoidance provisions is to reverse unjust enrichment" and that as a result, the liquidator's claim is to "recover the asset transferred or its value". Seen in this light, the primary person against which orders should be made is the counterparty to the transaction at an undervalue (see *Johnson* at [95]). In this regard, third-party defendants have "nothing to 'restore'" (see *Johnson* at [101]), and orders against them are therefore exceptional (see *Integral Petroleum* at [111]).

101 Given that orders against third-party defendants are exceptional, I find it appropriate to set down the following principles to guide the court's discretion when making such orders. For such an order to be made, it is not enough if the third-party defendant only facilitated or procured the transaction. Rather, the starting point is that the third-party defendant must be in possession of the property or moneys that were the subject of the impugned transaction(s) (see, *eg*, *Oxford Pharmaceuticals* at [84]). However, the court can make orders against a third-party defendant if that defendant received a direct and tangible monetary benefit as a result of the transaction (see *Oxford Pharmaceuticals* at [84]), in place of a direct transfer of the moneys or property to that defendant. The threshold for finding this is high. As an example, one category of cases where courts have displayed a strong willingness to find a direct and tangible benefit is where the third-party defendant engaged in egregious misconduct (*eg*, *Integral Petroleum*).

(B) THE PAYMENT ORDER SHOULD NOT BE MADE AGAINST IHBV

102 With these principles in mind, I find that the Payment Order, if at all made, should not be made against IHBV. First, IHBV has never had a contractual relationship with Affert. Indeed, on Affert's own case, only ICS and

not IHBV was a "direct counterparty" to the alleged waiver.[76] In this regard, the 7 October Letter speaks for itself: only ICS, and not IHBV, was a party to the Letter. At best, it might be said that IHBV was somehow involved in the alleged waiver by providing the funds to ICS to settle the related party dues owed to the Archean Group. However, such involvement is quite different from being a party *to the transaction*, which is founded solely on the parties to the 7 October Letter. This puts IHBV squarely in the category of third-party defendants.

103 Second, IHBV did not benefit from the alleged waiver in a manner that justifies me making the Payment Order against IHBV. In my view, IHBV did not "need" the alleged waiver for the Acquisition to proceed. The commercial reality was that if Affert did not issue the 7 October Letter, IHBV would have just priced the Acquisition accordingly. It would not be commercial to expect IHBV to have proceeded with the Acquisition by paying the original price of US$50m, of which US$9m was conditioned on Senfer settling all the inter-company outstandings if there was no confirmation that these outstandings had been cleared.

104 Third, the profits and strategic benefits which supposedly accrued to IHBV are too far removed from the alleged waiver for these to constitute direct and tangible benefits. To begin with, the alleged waiver extinguished obligations that *ICS* owed to Affert. Since IHBV did not owe these same obligations, any benefit it received from the alleged waiver was necessarily indirect. As for the identified profits and strategic benefits, these (assuming they had materialised) arose out of the broader *Acquisition* rather than the alleged

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[76] AWS at paras 39−40.

waiver. Therefore, they are essentially consequential gains to IHBV instead of tangible benefits resulting directly from the alleged waiver.

(3) Overall fairness in the exercise of discretion

(A) THE APPLICABLE LAW

105 For completeness, I deal with whether "fairness" is relevant in the context of s 98 of the BA. This question has arisen because the respondents invoke "fairness" in support of various arguments in their submissions. These include: (a) that it would be unfair for Affert to use the avoidance provisions to escape the applicable limitation periods,[77] (b) that it would be unfair for Affert to recover moneys from ICS on the basis of the Transfert shipment when the parties had agreed that Affert would not seek those sums from ICS,[78] and (c) that it would be unfair and contrary to the policy intent of s 98 of the BA for Affert to rewrite the bargain that had been struck between IHBV and Senfer for the acquisition of the latter's stake in ICS.[79] On the other hand, Affert argues that any consideration of "fairness" is beside the point because the "overriding concern [of the transaction avoidance regime] is to ensure the asset value is not lost in the run-up to liquidation, even if this causes hardship to a wholly innocent counterparty" [emphasis in original omitted], citing Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 3rd Ed, 2005) ("*Goode, 3rd ed*") at para 11−67.[80]

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77 RWS at para 83.

78 RWS at para 100.

79 RWS at paras 84 and 104.

80 AWS at para 70.

106 I first deal with Affert's suggestion that the overriding or only consideration of the transaction avoidance regime is to preserve the company's asset value. To my mind, the statement that Affert cites from *Goode, 3rd ed* must be read in context. Specifically, this statement appeared in a discussion on whether the (common law) defence of change of position should or should not apply to a claim under s 238 of the UK Insolvency Act (see *Goode, 3rd ed* at para 11−67). It was used to explain why the defence of a *bona fide* purchaser (and by extension, change of position) is not, and should not be, available to a counterparty to the transaction under the Act. I therefore do not read *Goode, 3rd ed* as proposing a blanket statement of policy or law with the intention of limiting the court's discretion.

107 Further, the general principle is that the assets available for distribution to the general body of creditors in liquidation are those owned by the company when it goes into winding-up or administration (see *Goode on Principles of Corporate Insolvency Law* at para 2−10). The avoidance provisions are the exceptions to this general principle. Thus, given that the policy objective of the avoidance provisions is to reverse transactions conferring an unfair or improper advantage on the counterparty (see *Goode on Principles of Corporate Insolvency Law* at para 13−03), it follows that considerations of fairness are not irrelevant under s 98 of the BA.

108 Furthermore, from a statutory interpretation perspective, there is nothing in the plain words of s 98(2) of the BA that prevents a court from considering fairness. The provision merely gives the court the power to "make such order as it thinks fit", without limiting the matters that the court may consider in deciding what order it should make.

109 Indeed, there is some precedent for a court to consider fairness (at least implicitly) in deciding *not* to order the reversal of a transaction at an undervalue. In this regard, the English High Court decision of *Singla v Brown and another* [2008] Ch 357 ("*Singla*") is instructive. In *Singla*, the trustee in bankruptcy for the first defendant (Mr Brown) sought to set aside a transfer by the first defendant to the second defendant (Mrs Malden-Browne) of 49% of the beneficial interest in a house, on the basis that this was a transaction at an undervalue within the meaning of s 339 of the UK Insolvency Act (s 339 of that Act being almost identically worded to s 98 of the BA).

110 Given that Mrs Malden-Browne had not provided any consideration for this transfer, the court was "driven" to conclude that the transaction was indeed at an undervalue (at [26]). However, the Court decided *not* to set the transaction aside, on the basis of the broader circumstances surrounding the transfer. Just two months prior to the impugned transaction, Mrs Malden-Browne had received the opportunity to purchase the freehold in the house at a very substantial discount (over one-third of the freehold value). This opportunity was "hers and hers alone, nothing to do with Mr Brown" (at [61]). In this regard, Mrs Malden-Browne's intention all along had been to purchase the property in her sole name, but the house was instead put into her and Mr Brown's joint names because the mortgage company insisted on this (at [5]). As a result, the purchase of the property as joint tenants conferred a windfall on Mr Brown of half the value of the discount. The Court considered that the effect of the impugned transaction "was simply to remove that windfall", giving effect to their original intention that Mr Brown was merely to have a nominal interest in the property (at [62]). More broadly, while the Court may not have used the word "fairness", it was implicitly considering the question of fairness, at least to Mr Brown and/or his creditors.

(B) IT WOULD NOT BE FAIR TO MAKE THE PAYMENT ORDER AGAINST THE RESPONDENTS

111 Applied to the present case, I do not think that it would be fair for the Payment Order to be made against the respondents. I disagree with Affert's characterisation that it waived or gave away a debt due from ICS and received "nothing in return".[81] In my view, it is not correct to analyse the 7 October Letter in isolation. While the Letter seemingly contemplates Affert giving up the ICS Debt for nothing in return, the true nature of a transaction "must be viewed in the light of all the relevant circumstances" (see *Velstra* at [43]). Indeed, "[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" (see *Velstra* at [43]).

112 With this in mind, the 7 October Letter must be viewed against the backdrop of the Acquisition. Contrary to Affert's claim that it received "nothing in return" for the alleged waiver, it appears that IHBV only agreed to inject funds for the Acquisition if IHBV was satisfied that ICS's related party outstandings would be settled. In my view, it makes commercial sense for IHBV to insist on the 7 October Letter, as part of the confirmation from all Archean Group entities that ICS's dues to these entitles would be settled. Therefore, bearing in mind the commercial realities of the Acquisition, it would be unfair to the respondents if Affert can retract its confirmation in the 7 October Letter and obtain payments from the respondents for the very amounts that Affert had represented were no longer due. This would not further the policy object of s 98 of the BA and would, in fact, rewrite the bargain that IHBV had struck with

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[81] AWS at para 2.

Senfer for the Acquisition. Indeed, this would put Affert's creditors in a better position than they would have been if Affert had not issued the 7 October Letter.

113 In the final analysis, the reality is that the 7 October Letter cannot be divorced from the Acquisition. The Acquisition would not have made sense without the 7 October Letter. If Affert and its creditors wish to object to the 7 October Letter, they are effectively objecting to the Acquisition as a whole. Seen in that light, if Affert and its creditors wish to object to the 7 October Letter, then their real complaint lies with the controlling minds of the Archean Group who caused and/or procured Affert to facilitate the Acquisition by issuing the 7 October Letter. Any objection that Affert has against the 7 October Letter therefore lies with the Archean Group and not the respondents, as the counterparties to the Acquisition.

Conclusion

114 For all these reasons, I dismiss Affert's application. In summary, I have found that the 7 October Letter is a transaction at an undervalue, but only because I am not able to estimate the valuable consideration that Affert received from the 7 October Letter. Indeed, had there been better evidence before me on this point, I might have well decided that the 7 October Letter is not a transaction at an undervalue. Despite this, I do not think that it is appropriate to make the Payment Order sought against the respondents. More broadly, this is because such an order would rewrite the commercial bargain that the parties had legitimately struck.

115 Unless the parties are able to agree, they are to submit their respective written submissions on the appropriate costs order for this application, limited to seven pages each, within 14 days of this decision.

116 I record my gratitude to both Mr Wong and Mr Bull, as well as their respective teams, for all their able assistance.

Goh Yihan
Judge of the High Court

Wong Soon Peng Adrian, Ang Leong Hao and Sia Bao Huei (Rajah & Tann Singapore LLP) (instructed), Darrell Low Kim Boon and Petrina Tan Heng Kiat (Bih Li & Lee LLP) for the applicant;
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