

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

[2021] SGHC 176

Originating Summons No 78 of 2021

Between

Rothstar Group Ltd

... Plaintiff

And

(1) Chee Yoh Chuang

(2) Lin Yueh Hung

... Defendants

Originating Summons No 87 of 2021

Between

Leow Quek Shiong

... Plaintiff

And

Rothstar Group Ltd

... Defendant

Originating Summons No 89 of 2021

Between

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

... Plaintiff

And

Rothstar Group Ltd

... Defendant

GROUND OF DECISION

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

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Rothstar Group Ltd
v
Chee Yoh Chuang and another and other matters

[2021] SGHC 176

General Division of the High Court — Originating Summons No 78 of 2021;
Originating Summons No 87 of 2021; Originating Summons No 89 of 2021
Chua Lee Ming J
28 April 2021

12 July 2021

Chua Lee Ming J:

Introduction

1 The applications in Originating Summons Nos 78 of 2021, 87 of 2021 and 89 of 2021 (“OS 78, OS 87 and OS 89”) centred around the mortgage of a property at 23 Jalan Tanah Puteh (“the Property”). At the relevant time, the Property was held by Pictorial Development Pte Ltd (“Pictorial”) and one Ng Say Peck (“Ng”).¹ On 2 December 2019, the Property was mortgaged to Rothstar Group Ltd (“Rothstar”) and the mortgage was registered on 5 December 2019 (“the Mortgage”).²

2 Ng was adjudged a bankrupt on 12 March 2020;³ Pictorial was wound up on 19 June 2020.⁴ OS 87 was an application by Pictorial’s liquidator (the “Liquidator”) while OS 89 was an application by the private trustees in

bankruptcy of Ng (the “Private Trustees”). The Liquidator and the Private Trustees sought to void the Mortgage on the ground that it was a transaction at an undervalue and/or that it was a voluntary conveyance made to defraud creditors. OS 78 was an application by Rothstar to remove a caveat lodged by the Private Trustees.

3 I granted the applications in OS 87 and OS 89 and declared the Mortgage void. I dismissed OS 78. Rothstar has appealed against my decisions.

Facts

Circumstances leading to the Mortgage

4 Pictorial was incorporated in Singapore and its sole significant asset was its ownership of 99% of the Property.⁵ Ng was Pictorial’s sole shareholder and one of its two directors, the other director being his wife.⁶ He owned the remaining 1% of the Property.⁷

5 Agritrade International (Pte) Ltd (“AIPL”) was a commodity trading company incorporated in Singapore. It was also the holding company of a group of companies, under Agritrade Resources Ltd, that were involved in the business of commodity trading, raw material manufacturing, and energy and mining. Ng and his son, Ng Xinwei (“Ng Xinwei”) were at all material times the only two directors and shareholders of AIPL.⁸

6 Pursuant to a Loan Agreement dated 9 April 2019 (“the Loan Agreement”), Rothstar gave a loan of \$5m to AIPL (the “Loan”).⁹ According to Rothstar, the \$5m was fully disbursed by 25 April 2019.¹⁰ Ng Xinwei signed an acknowledgement of receipt of the \$5m loan, dated 2 May 2019, on behalf of AIPL.¹¹

7 Under cl 4 of the Loan Agreement, AIPL was to procure a third-party equitable mortgage in favour of Rothstar. Pursuant to an Agreement for Equitable Mortgage dated 10 June 2019 (the “Equitable Mortgage”), Pictorial and Ng granted an equitable mortgage over the Property to Rothstar as security for the fulfilment of AIPL’s obligations under the Loan Agreement.¹² Pursuant to an Escrow Agreement, also dated 10 June 2019, the title deed to the Property was held by the escrow agent for the benefit of Pictorial, Ng, AIPL and Rothstar on the terms contained in the Escrow Agreement.¹³

8 Under the Loan Agreement, the loan was to be repaid by 16 July 2019. AIPL did not make repayment. On 20 August 2019, Rothstar and AIPL signed an Addendum to Loan Agreement under which the date of repayment was extended to 1 November 2019 (the “1st Addendum”).¹⁴ On 4 November 2019, Rothstar and AIPL signed another Addendum to Loan Agreement under which the date of repayment was further extended to 1 February 2020 (the “2nd Addendum”).¹⁵

9 According to Rothstar, on 14 November 2019, AIPL requested a further loan from Rothstar. Rothstar informed AIPL that in order for Rothstar to consider granting the further loan, the equitable mortgage needed to be converted to a legal mortgage.¹⁶

10 However, according to Ng Xinwei, Rothstar approached AIPL in November 2019 and said that it had heard rumours about AIPL’s financial situation.¹⁷ Rothstar threatened to recall the loan and enforce the equitable mortgage unless it was granted a legal mortgage. To avoid that, the Mortgage was granted to Rothstar.

11 On 27 November 2019, Rothstar, AIPL, Ng and Pictorial entered into a Deed of Discharge and Termination (the “Deed of Discharge”) under which the Equitable Mortgage was terminated “[i]n consideration of [Ng and Pictorial] agreeing to grant a legal mortgage to [Rothstar] over the [Property]”.¹⁸

12 On 2 December 2019, Ng and Pictorial executed the Mortgage.¹⁹ Under the Mortgage, Ng and Pictorial covenanted to pay Rothstar all monies owing to Rothstar by them as well as monies owing to Rothstar by AIPL. The Mortgage was given as security for all sums due and payable by Ng, Pictorial and/or AIPL. No further loans were in fact given by Rothstar to AIPL.

Collapse of AIPL

13 On 16 January 2020, AIPL applied for a moratorium under s 211B of the Companies Act (Cap 50, 2006 Rev Ed) (“Companies Act”) in HC/OS 45/2020 (“OS 45”), in hopes of buying time to restructure its debts and liabilities.²⁰ On 14 February 2020, AIPL’s application was dismissed and on that same day, one of its creditors applied to place AIPL under judicial management.²¹ Interim judicial managers were subsequently appointed and on 26 March 2020, AIPL was placed under judicial management.²² The judicial managers filed a winding up application on 4 September 2020 and AIPL was wound up on 21 September 2020.²³

Bankruptcy of Ng and liquidation of Pictorial

14 Ng, his wife and Ng Xinwei signed a guarantee dated 22 April 2019 (the “Guarantee”) in respect of banking facilities granted to AIPL by Commerzbank Aktiengesellschaft, Singapore Branch (“Commerzbank”).²⁴

15 AIPL defaulted on the banking facilities and letters of demands dated 17 and 18 December 2020 were sent to AIPL and the guarantors.²⁵ No payment was made by AIPL or the guarantors and as such, on 10 February 2020, Commerzbank filed bankruptcy applications against Ng and his wife.²⁶

16 On 12 March 2020, a bankruptcy order was made against Ng. Separately, a bankruptcy order was also made against Ng’s wife. As they had been adjudged bankrupts, Ng and his wife were disqualified from acting as directors of Pictorial. Ng subsequently absconded and has been uncontactable since.²⁷

17 On 18 March 2020, the Private Trustees lodged a caveat against the Property on the basis that the assets and properties of Ng, including his interest in the Property, vested in the Private Trustees upon Ng’s bankruptcy.²⁸

18 On 30 April 2020, the Private Trustees filed an application to compulsorily wind up Pictorial. On 19 June 2020 Pictorial was ordered to be wound up.²⁹

Issues to be decided

19 The grounds for the applications by the Private Trustees of Ng in OS 89 and the Liquidator in OS 87 were similar in substance. In summary, they argued that the Mortgage should be declared void for two reasons:

- (a) The Mortgage granted by Ng and Pictorial to Rothstar was an undervalued transaction that may be set aside under s 98 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) (“Bankruptcy Act”); and
- (b) Alternatively, the Mortgage was a voluntary conveyance made to defraud creditors and was thus voidable under s 73B of the

Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) (“CLPA”).

20 Rothstar’s application in OS 78 to remove the caveat lodged by the Private Trustees was premised on the argument that the Private Trustees did not have a valid interest in the Property. Rothstar’s application in OS 78 thus depended on whether the Mortgage was valid.

21 The broad issues before me were:

- (a) Whether the Mortgage was an undervalued transaction under s 98 of the Bankruptcy Act?
- (b) Whether the Mortgage was a voluntary conveyance made to defraud creditors under s 73B of the CLPA?

Whether the Mortgage was an undervalued transaction

22 The Bankruptcy Act has been repealed and s 98 of the Bankruptcy Act is now found in s 224 (where a company is in judicial management or is being wound up) and s 361 (where an individual is adjudged bankrupt) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) (“IRDA”). However, the Bankruptcy Act continues to apply to the present case because the winding up application against Pictorial and the bankruptcy application against Ng were both made before the IRDA came into operation on 30 July 2020 (see ss 525 and 526 IRDA).

23 Section 98 of the Bankruptcy Act was applicable to the Liquidator’s application, pursuant to s 329 of the Companies Act read with the Companies (Application of Bankruptcy Act Provisions) Regulations 1995 (Cap 50, Rg 3, 1996 Rev Ed) (“the Regulations”).

24 Section 98 of the Bankruptcy Act provides as follows:

Transactions at an undervalue

98.—(1) Subject to this section and sections 100 and 102, where an individual is adjudged bankrupt and he has at the relevant time (as defined in section 100) entered into a transaction with any person at an undervalue, the Official Assignee may apply to the court for an order under this section.

(2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction.

(3) For the purposes of this section and sections 100 and 102, an individual enters into a transaction with a person at an undervalue if —

- (a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration;
- (b) he enters into a transaction with that person in consideration of marriage; or
- (c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.

25 Section 100 of the Bankruptcy Act provides as follows:

Relevant time under sections 98 and 99

100.—(1) Subject to this section, the time at which an individual enters into a transaction at an undervalue or gives an unfair preference shall be a relevant time if the transaction is entered into or the preference given —

- (a) in the case of a transaction at an undervalue —
 - (i) where the bankruptcy application on which the individual is adjudged bankrupt is based on a presumption referred to in section 62(d), within the period commencing 5 years before the day on which the relevant bankruptcy application is made and ending on the day of the making of the bankruptcy application on which the individual is adjudged bankrupt; or

- (ii) in any other case, within the period of 5 years ending on the day of the making of the bankruptcy application on which the individual is adjudged bankrupt

...

(2) Where an individual enters into a transaction at an undervalue or gives an unfair preference at a time mentioned in subsection (1)(a), (b) or (c), that time is not a relevant time for the purposes of sections 98 and 99 unless the individual —

- (a) is insolvent at that time; or
- (b) becomes insolvent in consequence of the transaction or preference.

(3) Where a transaction is entered into at an undervalue by an individual with a person who is an associate of his (otherwise than by reason only of being his employee), the requirements under subsection (2) shall be presumed to be satisfied unless the contrary is shown.

(4) For the purposes of subsection (2), an individual shall be insolvent if —

- (a) he is unable to pay his debts as they fall due; or
- (b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities.

...

Section 102 of the Bankruptcy Act deals with orders that may made under ss 98 and 99.

26 In addition, reg 6 of the Regulations provides as follows:

Orders under section 98 of Bankruptcy Act

6. The court shall not make an order referred to in section 98 of the Bankruptcy Act [Cap. 20] in respect of a transaction at an undervalue if it is satisfied —

- (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business; and

- (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

27 In this case, the Liquidator and the Private Trustees had to prove the following:

- (a) The Mortgage was a transaction for the purposes of s 98 of the Bankruptcy Act.
- (b) The Mortgage took place within the relevant period.
- (c) The Mortgage was at an undervalue.
- (d) Pictorial and Ng were insolvent at the time of the Mortgage or became insolvent as a consequence of the Mortgage.

See, also, *Mercator & Noordstar NV v Velstra Pte Ltd (in liquidation)* [2003] 4 SLR(R) 667 (“*Mercator*”) at [21].

28 It was for Rothstar to demonstrate that it was entitled to rely on the defence under reg 6 of the Regulations, as against the Liquidator.

Whether there was a transaction

29 There was no question that the Mortgage was a transaction. The ordinary meaning of the word “transaction” encompasses a wide range of possibilities and includes a “dealing”: *Mercator* at [23]. Rothstar submitted that the Mortgage could not be a “transaction” on the authority of *Re MC Bacon Ltd* [1990] BCLC 324 (“*MC Bacon*”). However, as explained below, in my view, the principle in *MC Bacon* relates to the question of whether the transaction was undervalued.

Whether the Mortgage was granted during the relevant time period

30 It was not disputed that the Mortgage was granted within the period of 5 years before the bankruptcy and winding up applications. The Mortgage was granted on 2 December 2019, the winding-up application against Pictorial was made on 4 September 2020 and the bankruptcy application against Ng was made on 10 February 2020.

Whether the Mortgage was at an undervalue

31 Two issues arose. The first was a question of law, *ie*, whether the Mortgage, being a grant of security, could constitute an undervalued transaction for purposes of s 98 of the Bankruptcy Act. The second was a question of fact, *ie*, whether on the facts of this case, the Mortgage was entered into at an undervalue.

Whether a grant of security can constitute an undervalued transaction

32 In *MC Bacon*, a company executed a first mortgage debenture in favour of a bank. Subsequently, the company went into liquidation. The liquidator applied to set aside the debenture as a voidable preference under s 239 of the Insolvency Act 1986 (c 45) (UK) (the “1986 Act”) or as an undervalued transaction under s 238 of the same Act. The court dismissed the application. Millett J held, among other things, that the transaction was not one at an undervalue, and said, at 340:

Section 238 of the 1986 Act is concerned with the depletion of a company’s assets by transactions at an undervalue. Section 238(4) of the Act defines a transaction at an undervalue as follows:

For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if — (a) the company makes a gift to that person or otherwise enters into a transaction with that

person on terms that provide for the company to receive no consideration, or (b) the company 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 company.'

The granting of the debenture was not a gift, nor was it without consideration. The consideration consisted of the bank's forbearance from calling in the overdraft and its honouring of cheques and making of fresh advances to the company during the continuance of the facility. The applicant relies therefore on para (b).

...

In my judgment, the applicant's claim to characterise the granting of the bank's debenture as a transaction at an undervalue is misconceived. The mere creation of a security over a company's assets does not deplete them and does not come within [s 234(4)(b) of the 1986 Act]. By charging its assets the company appropriates them to meet the liabilities due to the secured creditor and adversely affects the rights of other creditors in the event of insolvency. But it does not deplete its assets or diminish their value. It retains the right to redeem and the right to sell or remortgage the charged assets. All it loses is the ability to apply the proceeds otherwise than in satisfaction of the secured debt. That is not something capable of valuation in monetary terms and is not customarily disposed of for value.

... By granting the debenture the company parted with nothing of value, and the value of the consideration which it received in return was incapable of being measured in money or money's worth.

33 The definition of an undervalued transaction in s 238(4) of the 1986 Act is similar to that found in s 98(3)(a) and (c) of our Bankruptcy Act (see [24] above).

34 In *Hill v Spread Trustee Co Ltd and another* [2007] 1 WLR 2404 ("*Hill*"), the English High Court found that there was no consideration for certain charges and an assignment, for the purposes of s 423(1)(a) of the 1986 Act (see *Hill* at [92]). Section 423(1)(a) provides that a person enters into a transaction with another person at an undervalue if "he ... enters into a

transaction with the other person on terms that provide for him to receive no consideration” (see *Hill* at p 2440).

35 Before the English Court of Appeal, the appellant in *Hill* argued, relying on *MC Bacon*, that a grant of security could not constitute a transaction for no consideration. The English Court of Appeal rejected the argument and held as follows (at [93]):

... [The appellant’s] argument relies on the holding of Millett J in *In re MC Bacon Ltd* [1990] BCLC 324, 340–341 that the grant of security cannot constitute a transaction at an undervalue. It does not follow from this that a transaction involving the grant of security can never amount to a transaction for no consideration. In my judgment, it is no different from any other transaction in that respect. This in my judgment was also the view of Millett J who was careful to point out, at p 340F, that the security in the case before him was not given without consideration because it was given in exchange for forbearance by the creditor.

In the event, the Court of Appeal agreed with the High Court that the appellant had given no consideration (at [98]).

36 Sections 238 and 423 are two ways in which antecedent transactions may be challenged under the 1986 Act. Section 238 deals with transactions at an undervalue which occurred during the “relevant time” (s 238(2)), when the company was unable to pay its debts or became unable to pay its debts as a result of the transaction (s 240(2)). “Relevant time” is defined in s 240(1)(a) as the two-year period ending with the “onset of insolvency”. The “onset of insolvency” is defined in s 240(3) and refers to the date of the commencement of the winding up in the case of a company going into liquidation.

37 Section 423 deals with transactions to defraud creditors and applies to transactions entered into at an undervalue. However, s 423 differs from s 238 in two respects. First, s 423 imposes an additional requirement – undervalued

transactions may be set aside under s 423 only if they were entered into for the purpose of putting assets beyond the reach of a creditor or otherwise prejudicing the interest of the creditor (s 423(3)). Second, there is no requirement in s 423 that the transaction must have occurred during the “relevant time”.

38 Sections 238(4) and 423(1) contain similar definitions of a transaction at an undervalue. Sections 238(4)(a) and 423(1)(a) define it as a transaction in respect of which no consideration is received (the “no consideration limb”), whilst ss 238(4)(b) and 423(1)(c) define it as a transaction in which the value of the consideration received is significantly less than that given, both values being measured in money or money’s worth, (the “value comparison limb”). The definition in s 423(b) (transactions entered into in consideration of marriage) is not relevant for present purposes.

39 In *Feakins v Department for Environment Food and Rural Affairs* [2007] BCC 54 (“*Feakins*”), a differently constituted English Court of Appeal cited the decision in *MC Bacon* (that the granting of charges did not deplete the grantor’s assets) with approval (at [72]). The facts in *Feakins* are not relevant for present purposes. The transaction that was being impugned in *Feakins* was a sale of a farm that was subject to a mortgage; the transaction itself did not involve the grant of security.

40 In Singapore, the High Court in *Encus International Pte Ltd (in compulsory liquidation) v Tenacious Investment Pte Ltd and others* [2016] 2 SLR 1178 noted (at [36]) that the question of law as to whether a grant of security can qualify in principle as an undervalued transaction, was not settled. The Court referred to *MC Bacon*, *Hill* and *Feakins* and also noted that *MC Bacon* was strongly endorsed by Prof Roy Goode in Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at para 13-38 (at

[36]–[38]). Although the Court expressed a preference for the approach in *Hill*, ultimately, the Court left the question open as it was not required to decide the question (at [39]). The Court found that the transaction in question could not have created an equitable mortgage or other security.

41 In my respectful view, the decisions in *MC Bacon* and *Hill* are not inconsistent with each other and both are correct. The decision in *MC Bacon* was in respect of the value comparison limb under s 238(4)(b) of the 1986 Act. The Court expressly found that the “granting of the debenture was not a gift, nor was it without consideration” (see [32] above). However, the decision in *Hill* was in respect of the no consideration limb under s 423(1)(a) of the 1986 Act. This distinction between the two cases is important.

42 The value comparison limb requires an assessment of the value of the consideration given against the value of the consideration received. It was in this context that Millett J decided in *MC Bacon* that the appellant’s grant of the debenture could not be a transaction at an undervalue because mere creation of the security over the company’s assets did not deplete them (see [32] above). As Millett J said, by granting the debenture “the company parted with nothing of value”. Millett J also went on to find that the value of the consideration received was incapable of being measured in money or money’s worth. For these reasons, Millett J concluded that the debenture could not qualify as an undervalued transaction under s 238(4)(b) of the 1986 Act.

43 In *Hill*, the High Court found that there was no consideration for the charges and assignment, for the purposes of the no consideration limb in s 423(1)(a). The issue before the Court of Appeal was in respect of the no consideration limb, the question being whether the appellant, who was the *beneficiary* of the charges and assignment, had given consideration for the

security. The fact that the grant of security did not deplete the grantor's assets was relevant to the question as to the value of the consideration given by the *grantor*; it was irrelevant to the question whether the *beneficiary* of the security had given consideration. Under the no consideration limb, the value of the consideration given by the grantor of the security did not arise.

Whether the Mortgage was an undervalued transaction on the facts

44 The Liquidator and the Private Trustees relied on both the no consideration limb and the value comparison limb in s 98(3)(a) and (c) of the Bankruptcy Act, respectively.

45 With respect to s 98(3)(a), I disagreed with Rothstar's submissions that that it had given consideration for the Mortgage in that:

- (a) it forbore from enforcing (i) its rights for repayment of the Loan, and (ii) the Equitable Mortgage;
- (b) it granted extension of time for the repayment of the Loan;
- (c) it agreed to consider a further loan to AIPL; and
- (d) it had given AIPL the Loan.

46 Ng and Pictorial executed the Mortgage on 2 December 2019. At that time, the Loan was not yet due, the repayment date having been extended to 1 February 2020 pursuant to the 2nd Addendum (see [8] above). The Loan Agreement had no provision enabling Rothstar to demand repayment before the due date. Under the Equitable Mortgage, Rothstar had no right to enforce the Equitable Mortgage before the Loan had fallen due.³⁰ Therefore, there was

nothing for Rothstar to forbear. Rothstar's submission that its forbearance amounted to consideration for the Mortgage, was wholly unmeritorious.

47 Rothstar's submission that it had given consideration for the Mortgage because it had granted extension of time for repayment of the Loan was equally unmeritorious. The repayment date for the Loan was extended on 4 November 2019 to 1 February 2020 by way of the 2nd Addendum. In addition, Rothstar's own evidence was that the Mortgage came about after AIPL requested a further loan on *14 November 2019* (see [9] above). The 2nd Addendum could not have been the consideration for the Mortgage.

48 Rothstar claimed that the Mortgage was granted in order for Rothstar simply to *consider* whether to grant a further loan to AIPL. I found this assertion implausible and unbelievable. Ng Xinwei's evidence that Rothstar asked for a legal mortgage because it had heard rumours about AIPL's financial situation (see [10] above) seemed more likely. As for Ng Xinwei's assertion that Rothstar threatened to recall the Loan if the legal mortgage was not given, it would seem that Ng and Ng Xinwei might not have been aware that Rothstar had no right to recall the Loan. In addition, there was nothing in the Deed of Discharge or the Mortgage that supported Rothstar's assertion that the consideration for the Mortgage was its agreement to consider whether to grant a further loan to AIPL. In any event, as explained in [62] below, even if it was true that the Mortgage was granted in order for Rothstar to consider whether to grant a further loan to AIPL, it would not have made any difference to the outcome of this case.

49 Rothstar's submission that the Loan was consideration for the Mortgage simply did not make sense. The Loan Agreement was entered into on *9 April 2019*. The Equitable Mortgage was given as security for the Loan. The Mortgage was executed only on 2 December 2019.

50 However, pursuant to cl 2.1 of the Deed of Discharge, Rothstar had agreed to the termination of the Equitable Mortgage, and the release and discharge of AIPL, Ng and Pictorial from all claims under or in connection with the Equitable Mortgage, in consideration of Ng and Pictorial agreeing to grant the Mortgage. It is true that under the Mortgage, the Property continued to be security for the Loan and AIPL's liability for the Loan remained. In fact, under the Mortgage, Pictorial and Ng became liable for the Loan as well. Nevertheless, in my view, the discharge of the Equitable Mortgage and release from claims under the Equitable Mortgage constituted valid consideration in law. The value of the consideration for purposes of s 98(3)(c), which is dealt with below, was a separate question.

51 I therefore agreed with Rothstar that it had provided consideration for the Mortgage. I concluded that the Liquidator and the Private Trustees could not rely on s 98(3)(a).

52 With respect to the value comparison limb in s 98(3)(c), Rothstar relied on *MC Bacon* and submitted that the Mortgage could not constitute an undervalued transaction.

53 However, the Liquidator and Private Trustees referred me to Roy Goode and Kristin van Zweiten, *Goode on Principles of Corporate Insolvency Law* (Sweet & Maxwell, 5th Ed, 2018) ("*Corporate Insolvency Law*"). In *Corporate Insolvency Law*, the authors explained the decision in *MC Bacon* and went on to state as follows (at para 13–35 on p 647):

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

54 I agreed with the view expressed in *Corporate Insolvency Law*. Ng and Pictorial had given the Mortgage as security for their own indebtedness, but also (in fact, primarily) for the indebtedness of AIPL (a third party). It was clear that the creation of the Mortgage could result in the value of the Property being depleted, or as the authors put it in *Corporate Insolvency Law*, the “loss of a charged asset”. The decision in *MC Bacon* would not apply in such a situation.

55 Accordingly, I concluded that, as a matter of legal principle, the granting of the Mortgage in this case could constitute an undervalued transaction for the purposes of s 98(3)(c) of the Bankruptcy Act.

Whether, on the facts, the Mortgage was granted at an undervalue

56 The next step was to consider whether, on the facts, the Mortgage satisfied the value comparison limb in s 98(3)(c). The value comparison limb requires an assessment (a) of the value, in money or money’s worth, of the consideration received by Pictorial and Ng, (b) of the value, in money or money’s worth, of the consideration given by Pictorial and Ng, and (c) as to whether the value received was “significantly less” than the value given.

57 The Liquidator and the Private Trustees disputed Rothstar’s claim that it had disbursed the Loan to AIPL. However, in my view, on the face of the evidence, there was enough to show that the Loan had been disbursed to AIPL.

58 Rothstar explained that as its available funds then were held in RMB in the People’s Republic of China, AIPL agreed to the Loan being disbursed in RMB in China.³¹ A total amount of RMB25,037,374 was disbursed to accounts in China, designated by Ng and Ng Xinwei, by 25 April 2019.³² Ng signed an acknowledgment of receipt of the funds, dated 2 May 2019 on behalf of AIPL.³³ It appeared that the sum of RMB25,037,374 was then converted into US\$. Ng

signed an undated acknowledgment on behalf of AIPL, in which he acknowledged receipt of US\$1,000,300 on 7 May 2019 and US\$2,582,300 on 13 May 2019 under the Loan Agreement.³⁴

59 AIPL's bank statements confirmed receipt of US\$1,000,300 on 7 May 2019 and US\$2,582,300 on 16 May 2019.³⁵ The Liquidator and the Private Trustees argued that there was no documentary evidence that the funds came from Rothstar. However, in my view, Rothstar had produced sufficient evidence that the Loan had been disbursed to AIPL, such as to shift the evidential burden to the Liquidator and the Private Trustees. The Liquidator and the Private Trustees had no other evidence to the contrary. During submissions, the Liquidator also accepted that there was no evidence of any conspiracy between Rothstar and Ng.

60 That said, the Loan was for the benefit of AIPL. I agreed with the Liquidator and the Private Trustees that Pictorial and Ng could not be said to have received the value of the Loan. AIPL was a separate entity. Pictorial was not even part of the AIPL group of companies. Rothstar relied on the principle in contract law that consideration need only move from the promisee and need not move to the promisor.³⁶ Rothstar's reliance on this principle was clearly misconceived. In this case, the principle clearly had no application. Section 98(3)(c) expressly requires an assessment as to whether the value of the consideration received by Pictorial and Ng was significantly less than that given by them.

61 Rothstar also argued that the Loan benefited Ng because AIPL was Ng's main business. I disagreed with Rothstar. The mere fact that Ng was a director and shareholder of AIPL did not mean that Ng therefore received the value of the Loan for purposes of s 98(3)(c). There was no other evidence to show how

the Loan benefited Pictorial and/or Ng. Even if it could be said that the Loan benefited Ng in some way, the value of that benefit could not be the full amount of the Loan. There was no basis upon which the value of that benefit could be assessed in money or money's worth, as required under s 98(3)(c).

62 Further, even if one accepted Rothstar's claim that it gave consideration for the Mortgage by agreeing to consider whether to grant a further loan to AIPL, that was still of no benefit to Pictorial or Ng. In any event, the value of this benefit to Pictorial or Ng (if at all, there was any) was at best dubious and, further, could not be assessed in money or money's worth.

63 As part of the arrangement under which the Mortgage was given, the Equitable Mortgage was terminated. However, even this was of no benefit to Pictorial and Ng since the Equitable Mortgage was replaced with the Mortgage.

64 On the other hand, pursuant to the Mortgage, Pictorial and Ng gave Rothstar a legal mortgage over the Property, which was valued at approximately \$4.5m in March 2020, subject to inspection.³⁷ In addition, Pictorial and Ng also took on the obligation to repay the Loan, as primary obligors.

65 Clearly, the value of any consideration received by Pictorial and Ng with respect to the Mortgage was significantly less than the value of the consideration provided by them. In the circumstances, I was satisfied that the grant of the Mortgage satisfied the requirements of s 98(3)(c).

Whether Ng and Pictorial were insolvent or became insolvent

66 Pursuant to s 100(2) of the Bankruptcy Act, it had to be shown that Pictorial and Ng were insolvent as of 2 December 2019 or became insolvent as a result of the granting of the Mortgage.

67 The Liquidator submitted that Pictorial became insolvent as a result of the grant of the Mortgage.³⁸ Pursuant to the Mortgage, Pictorial became liable for the Loan (see [12] above). Based on its unaudited financial statements in 2018, Pictorial had total liabilities of \$450,932; its total liabilities increased to more than \$5.4m after it took on liability for the Loan pursuant to the Mortgage.³⁹ As against its liabilities, Pictorial's sole significant asset was its 99% ownership of the Property, which was valued at \$4.5m in 2020. Rothstar submitted that the Property was valued at \$5m in 2017 and that it had likely increased in value.⁴⁰ In my view, it was incumbent on Rothstar to produce evidence of a more recent valuation, instead of relying on one done in 2017 and speculating as to the current value of the Property.

68 The Liquidator also submitted that Pictorial's sole shareholder, Ng, was also facing financial difficulties during the relevant period and there was thus no prospect of a capital injection into Pictorial by Ng.⁴¹

69 The Private Trustees submitted that Ng was insolvent at the time the Mortgage was granted or became insolvent in consequence of the transaction.⁴² AIPL was facing financial difficulties and Ng would have been liable as guarantor in respect of various banking facilities granted to AIPL.⁴³ The Private Trustees had received proofs of debt amounting to over \$1.3bn from Ng's creditors and at least \$1.2bn of these debts were attributable to banking facilities granted to AIPL; Ng's known assets would not have been sufficient to settle the above debts.⁴⁴

70 I agreed with the Liquidator and the Private Trustees and found that (a) Pictorial became insolvent as a result of the Mortgage, and (b) Ng was insolvent as of 2 December 2019 when the Mortgage was granted or became insolvent as a result of the Mortgage.

Whether the defence under reg 6 was available to Rothstar

71 Regulation 6 applies only to companies and not individuals. As such, the defence was available to Rothstar (if at all) only as against the Liquidator. Regulation 6 was not available to Rothstar as against the Private Trustees.

72 Rothstar did not rely on reg 6 in its written submissions but sought to do so during oral submissions. I could not see how it could be said that Pictorial granted the Mortgage for the purpose of carrying on its business or that Pictorial had reasonable grounds for believing that the Mortgage would benefit it. It was clear that the Mortgage was granted for the purposes of carrying on *AIPL*'s business and for *AIPL*'s benefit. Pictorial did not hold any shares in *AIPL* and was not part of the *AIPL* group. *AIPL*'s business had nothing to do with Pictorial's business.

73 Rothstar submitted that Pictorial's business was Ng's business. Presumably, Rothstar meant that *AIPL*'s business was therefore also Pictorial's business, based on its earlier submission that *AIPL* was Ng's main business (see [61] above). In my view, Rothstar's submission could not be supported. Pictorial and *AIPL* were separate and distinct legal entities. The mere fact that Ng was the sole shareholder of Pictorial and one of two shareholders of *AIPL* did not mean that Pictorial's business included *AIPL*'s business. Accordingly, the defence in reg 6 was not available to Rothstar.

Conclusion on s 98

74 I concluded that the granting of the Mortgage was an undervalued transaction that was void under s 98 of the Bankruptcy Act and that reg 6 did not afford Rothstar any defence.

Whether the Mortgage was a voluntary conveyance made to defraud creditors

75 Section 73B of the CLPA was repealed following the commencement of the IRDA and appears in a different form in ss 438 and 439 of the IRDA. However, pursuant to reg 15 of the Insolvency, Restructuring and Dissolution (Saving and Transitional Provisions) Regulations 2020 (S 623/2020), it remains applicable in the present case as the Mortgage was granted before 30 July 2020. Section 73B of the CLPA provided as follows:

Voluntary conveyances to defraud creditors voidable.

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

(2) This section does not affect the law relating to bankruptcy for the time being in force.

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

76 To successfully void the Mortgage on the ground that it was a voluntary conveyance made to defraud creditors, the Liquidator and the Private Trustees had to show that:

- (a) the Mortgage was a “conveyance of property”;
- (b) the Mortgage was granted with the intent to defraud creditors;
and
- (c) the Liquidator and the Private Trustees were prejudiced by the grant of the Mortgage.

See *Wong Ser Wan v Ng Bok Eng Holdings Pte Ltd and another* [2004] 4 SLR(R) 365 (“*Wong Ser Wan*”) at [5].

77 It was for Rothstar to show that it was entitled to rely on the defence under s 73B(3): *Wong Ser Wan* at [27].

Whether the Mortgage was a conveyance of property

78 Section 2 of the CLPA defines “conveyance” to include a mortgage. It was not disputed that the grant of the Mortgage was a conveyance of property for the purposes of s 73B of the CLPA.

Whether there was intent to defraud creditors

79 The Liquidator and the Private Trustees referred me to *Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 (“*Quah Kay Tee*”), *Wong Ser Wan* and *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 (“*Larsen*”). These cases stand for the following principles:

- (a) The word “defraud” in the context of s 73B(1) meant “hinder, delay or defraud” and carried the meaning of depriving creditors of timely recourse to property that would otherwise be applicable for their benefit: *Wong Ser Wan* at [6].
- (b) Where a transfer has been made for valuable consideration, evidence of actual intent to defraud will be required: *Quah Kay Tee* at [14]; *Wong Ser Wan* at [8].
- (c) However, where a transfer has been made without or with nominal consideration, the transferor’s intent to defraud will be

established if he was “deeply indebted” at the time of the transfer: *Quah Kay Tee* at [23]; *Wong Ser Wan* at [7].

(d) The transferor would be “deeply indebted” if he was indebted to the extent of insolvency or became so as a result of the transfer: *Quah Kay Tee* at [29]; *Larsen* at [54]–[56].

80 If there had been no consideration, or only nominal consideration, for the Mortgage, the intent to defraud would have been easily established by virtue of the fact that Pictorial became insolvent as a result of the Mortgage and Ng was insolvent when the Mortgage was granted or became insolvent as a result of the Mortgage. In such event, the defence in s 73B(3) would not have been available to Rothstar since the requirement of “valuable consideration” or “good consideration” in s 73B(3) would not have been met.

81 However, I had found that consideration was given for the Mortgage. The Liquidator and the Private Trustees therefore had to prove actual intent on the part of Pictorial and Ng to defraud their creditors. In my view, the Liquidator and the Private Trustees failed to prove actual intent to defraud. Before the Mortgage was granted, Pictorial’s and Ng’s creditors already had no recourse to the Property to the extent that the Property had been given as security for the Loan, pursuant to the Equitable Mortgage. Under the Mortgage, the Property remained as security for the Loan. Therefore, the Mortgage did not deprive Pictorial’s and Ng’s creditors of any recourse against the Property that they might otherwise have had.

Whether the Liquidator and the Private Trustees were prejudiced by the grant of the Mortgage

82 Pictorial’s creditors and Ng’s creditors were clearly persons prejudiced by the grant of the Mortgage. The Liquidator and the Private Trustees were the representatives of Pictorial’s creditors and Ng’s creditors respectively. As such, they fell within the scope of “persons prejudiced” by the grant of the Mortgage and have standing under s 73B of the CLPA: *Williams and others v Lloyd and another* (1934) 50 CLR 341 at 362.

Conclusion on s 73B

83 The Liquidator and the Private Trustees failed to establish actual intent to defraud and were thus not entitled to void the Mortgage under s 73B of the CLPA. Consequently, it was unnecessary for me to decide whether Rothstar would have been entitled to rely on the defence in s 73B(3). I would only add that it was not clear what was the difference between “valuable consideration” and “good consideration” in s 73B(3); the submissions before me did not deal with this.

Whether the caveat should be removed

84 Under s 127(1) of the Land Titles Act (Cap 157, 2004 Rev Ed) (“LTA”), a caveatee may summon a caveator to attend before the court to show cause why the caveat should not be withdrawn or otherwise removed.

85 Under s 76(1) read with s 36(1) of the Bankruptcy Act, upon the making of the bankruptcy order, the property of the bankrupt shall vest in the private trustee. Under s 111 of the LTA, when the private trustee takes possession of land under a bankruptcy order, he may lodge a caveat under s 115 of the LTA.

The Private Trustees lodged the caveat against the Property based on these provisions.

86 The thrust of Rothstar's case was that the Mortgage meant that the Property fell outside the pool of assets that vested in the Private Trustees. Rothstar argued that therefore the Private Trustees had no caveatable interest in Property. As I had found that the Mortgage was void, I dismissed OS 78.

Conclusion

87 The Liquidator and the Private Trustees were entitled to void the Mortgage on the ground that it was an undervalued transaction under s 98 of the Bankruptcy Act. However, they were not entitled to void the Mortgage under s 73B of the CLPA because intent to defraud creditors had not been proved.

88 Accordingly, I dismissed OS 78 and granted the applications in OS 87 and OS 89. I ordered Rothstar to pay the costs of OS 87 fixed at \$12,000 inclusive of disbursements and the costs of OS 89 and OS 78 fixed at \$20,000 inclusive of disbursements.

Chua Lee Ming
Judge of the High Court

Tan Wen Cheng Adrian and Tan Choon Yuan Delson (August Law Corporation) for the plaintiff in Originating Summons No 78 of

2021, the defendant in Originating Summons No 87 of 2021 and
Originating Summons No 89 of 2021;
Chua Beng Chye, Raelene Pereira and Yeoh Su Yi (Rajah & Tann
Singapore LLP) for the defendants in Originating Summons No 78 of
2021 and the plaintiffs in Originating Summons No 89 of 2021;
Sim Kwan Kiat and Wong Ye Yang (Rajah & Tann Singapore LLP)
for the plaintiff in Originating Summons No 87 of 2021.

- 1 Leow Quek Shiong's 1st affidavit in OS 87 affirmed on 20 January 2021 ("Leow Quek
Shiong's 1st affidavit in OS 87"), at para 8.
- 2 Leow Quek Shiong's 1st affidavit in OS 87, at pp 31–52.
- 3 Lin Yueh Hung's 1st affidavit in OS 89 affirmed on 20 January 2021 ("Lin Yueh
Hung's 1st affidavit in OS 89"), at para 6 and pp 26–27.
- 4 Leow Quek Shiong's 1st affidavit in OS 87, at para 6 and pp 25–26.
- 5 Leow Quek Shiong's 1st affidavit in OS 87, at para 41; Lin Yueh Hung's 1st affidavit
in OS 89, at para 7(b).
- 6 Lin Yueh Hung's 1st affidavit in OS 89, at para 7(b) and pp 36–39.
- 7 Lin Yueh Hung's 1st affidavit in OS 89, at para 28(b); Leow Quek Shiong's 1st
affidavit in OS 87, at para 8.
- 8 Lin Yueh Hung's 1st affidavit in OS 89, at pp 28–35.
- 9 Chew Shee Koon Malcolm's 1st affidavit in OS 78 affirmed on 23 March 2021
("Malcolm Chew's 1st affidavit in OS 78"), at pp 33–39.
- 10 Malcolm Chew's 1st affidavit in OS 78, at para 16.
- 11 Malcolm Chew's 1st affidavit in OS 78, at p 457.
- 12 Malcolm Chew's 1st affidavit in OS 78, at pp 52–59.
- 13 Malcolm Chew's 1st affidavit in OS 78, at pp 40–51.
- 14 Malcolm Chew's 1st affidavit in OS 78, at pp 60–64.
- 15 Malcolm Chew's 1st affidavit in OS 78, at pp 65–69.
- 16 Malcolm Chew's 1st affidavit in OS 78, at paras 18–19.
- 17 Ng Xinwei's 2nd affidavit in OS 45 affirmed on 10 February 2020, at para 94.
- 18 Malcolm Chew's 1st affidavit in OS 78, at pp 70–73.
- 19 Malcolm Chew's 1st affidavit in OS 78, at pp 76–95.
- 20 Ng Xinwei's 1st affidavit in OS 45 filed on 16 January 2020 ("Ng Xinwei's 1st
affidavit in OS 45"), at paras 100–104.
- 21 Leow Quek Shiong's 1st affidavit in OS 87, at paras 14–15; Lin Yueh Hung's 1st
affidavit in OS 89, at paras 12–13.
- 22 Leow Quek Shiong's 1st affidavit in OS 87, at paras 16–19; Lin Yueh Hung's 1st
affidavit in OS 89, at paras 16–17.
- 23 Leow Quek Shiong's 1st affidavit in OS 87, at paras 20–21; Lin Yueh Hung's 1st
affidavit in OS 89, at paras 18–19.
- 24 Lin Yueh Hung's 1st affidavit in OS 89, at pp 105–115.
- 25 Lin Yueh Hung's 1st affidavit in OS 89, at para 21.
- 26 Lin Yueh Hung's 1st affidavit in OS 89, at para 22.

- 27 Lin Yueh Hung’s 1st affidavit in OS 89, at para 31; Leow Quek Shiong’s 1st affidavit
in OS 87, at para 27.
- 28 Lin Yueh Hung’s 1st affidavit in OS 78 affirmed on 5 March 2021, at paras 10–12.
- 29 Lin Yueh Hung’s 1st affidavit in OS 89, at para 33.
- 30 Malcolm Chew’s 1st affidavit in OS 78, at p 57 (cl 5).
- 31 Malcolm Chew’s 1st affidavit in OS 78, at paras 50–52.
- 32 Malcolm Chew’s 1st affidavit in OS 78, at para 54.
- 33 Malcolm Chew’s 1st affidavit in OS 78, at p 457.
- 34 Malcolm Chew’s 1st affidavit in OS 87, at p 134.
- 35 Lin Yueh Hung’s 3rd affidavit in OS 89, affirmed on 13 April 2021, at pp 30 and 144.
- 36 Rothstar’s Written Submissions, at para 116.
- 37 Leow Quek Shiong’s 1st affidavit in OS 87, at para 31(f).
- 38 Plaintiff’s Written Submissions in OS 87 dated 22 April 2021 (“Liquidator’s Written
Submissions”), at paras 60–62.
- 39 Liquidator’s Written Submissions, at para 62; Leow Quek Shiong 1st affidavit in OS
87, at para 41.
- 40 Defendant’s Written Submissions for OS 87 and OS 89 dated 22 April 2021
 (“Rothstar’s Written Submissions”), at para 93; Malcolm Chew’s 1st affidavit in OS
87, at para 61.
- 41 Liquidator’s Written Submissions, at para 62.
- 42 Private Trustees’ Written Submissions in OS 89 and OS 78 dated 22 April 2021
 (“Private Trustees’ Written Submissions”), at para 68.
- 43 Lin Yueh Hung’s 1st affidavit in OS 89, at para 51.
- 44 Lin Yueh Hung’s 1st affidavit in OS 89, at para 52.