IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 48

Civil Appeal No 119 of 2018

Between

(1) The Enterprise Fund III Ltd
(2) VMF3 Ltd
(3) Value Monetization III Ltd

… *Appellants*

And

OUE Lippo Healthcare Limited (formerly known as International Healthway Corporation Ltd)

… *Respondent*

In the matter of Originating Summons No 380 of 2017

Between

International Healthway Corporation Ltd

… *Plaintiff*

And

(1) The Enterprise Fund III Ltd
(2) VMF3 Ltd
(3) Value Monetization III Ltd

… *Defendants*

JUDGMENT

[Companies] — [Capital] — [Share capital] — [Company acquiring its own shares]
[Equity] — [Estoppel] — [Estoppel in defiance of statute]

The Enterprise Fund III Ltd and others
v
OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd)

[2019] SGCA 48

Court of Appeal — Civil Appeal No 119 of 2018
Sundaresh Menon CJ, Judith Prakash JA and Steven Chong JA
14 May 2019

13 September 2019 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 Sections 76 and 76A of the Companies Act (Cap 50, 2006 Rev Ed) (the "CA", which abbreviation will also denote, where applicable, the corresponding predecessor version of the Companies Act as it currently stands) generally prohibit a company from dealing in or financing dealings by others in its shares, and spell out the consequences of breaching these prohibitions. The intent that underlies the rule is to safeguard the capital base and assets of a company from being expended on activities that are not part of its business. Nonetheless, this area of company law has vexed business people and commercial lawyers. This appeal affords us the opportunity to examine aspects of these provisions which have not previously been considered by this court.

2 Although s 76 of the CA is widely known to prohibit a company from

providing financial assistance to an acquirer of its own shares, this case does not concern such financial assistance. Rather, it concerns the even more fundamental prohibition against a company acquiring its own shares. What is the breadth of an indirect acquisition under s 76(1A)(*a*)(i)? What is the scope of the saving provision in s 76A(1A) for a disposition of book-entry securities? Can a company be estopped from avoiding loan agreements that were a key element of an offending transaction on the basis that it had made representations and warranties in those agreements that the transaction was lawful? These are some of the questions we address in this judgment.

3 The present dispute stems from the respondent, OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd), having indirectly acquired its own shares. We refer to the respondent as "IHC" because that was the name it bore at the time the indirect acquisition took place. In broad terms, the indirect acquisition comprised three steps: (a) the appellants (the "Crest Funds") advanced a sum of $20m to IHC by way of a standby facility which was secured by various security agreements in their favour (the "supporting security agreements"); (b) the first appellant, the Enterprise Fund III Ltd ("EFIII"), drew funds from the standby facility to purchase IHC shares on the open market (the "open market acquisitions"); and (c) EFIII held the shares purchased on trust for IHC (the "trust arrangement"). We refer to these three components collectively as the "Transaction".

4 IHC underwent a management change after the Transaction was carried out. The new management of IHC considered the Transaction to have been carried out in breach of the prohibition in s 76(1A)(*a*)(i) of the CA against a company acquiring its own shares. IHC sought to avoid all three components of the Transaction on this basis.

5 The matter came before the High Court. The trial judge (the "Judge"), whose decision is set out in *International Healthway Corp Ltd v The Enterprise Fund III Ltd and others* [2018] SGHC 246 (the "GD"), analysed the Transaction as consisting of two broad parts. The first part comprised components (b) and (c) above, meaning the open market acquisitions and the trust arrangement, which the Judge referred to collectively as the "share acquisitions" (GD at [26]). She held that both components were void by virtue of s 76A(1)(*a*), but that the saving provision in s 76A(1A) applied to the open market acquisitions because they involved a disposition of book-entry securities. She therefore concluded that the open market acquisitions were not void. However, she did not think the saving provision affected the trust arrangement, which she held was void. The end result of this was that EFIII was left having both legal *and beneficial* ownership of the IHC shares it had bought on the open market for and at the behest of IHC.

6 The Judge determined that the second part of the Transaction comprised the standby facility and the supporting security arrangements, which she collectively referred to as the "loan agreements" (GD at [26]). She held that the loan agreements were related to the share acquisitions, and were therefore voidable at IHC's option by virtue of s 76A(2) of the CA. IHC had avoided these agreements by giving the Crest Funds written notice of its intention to avoid these agreements and the share acquisitions.

7 In this appeal, the Crest Funds contend that the Judge was wrong to analyse the Transaction as she did. They contend that the entire Transaction, which was always intended to be a single composite whole, must stand or fall together. On this basis, so far as the first part of the Transaction is concerned, the trust arrangement should also be regarded as caught by the saving provision in s 76A(1A) and therefore held not to be void.

8 In addition, as regards the second part of the Transaction, the Crest Funds argue that the loan agreements are not to be regarded as related to the share acquisitions at law because there can be no related transactions where the prohibition on a company acquiring its own shares is breached. They contend that the objective of the prohibition is entirely achieved by making the share acquisitions void, and there is nothing related to the share acquisitions that will have to be avoided in order to restore the parties to their original position. And this is even more the case where, at least according to the Crest Funds, the share acquisitions are validated by the saving provision in s 76A(1A).

9 We disagree with the Crest Funds. Although we take a different view of the way the Transaction ought to be characterised, we agree with the outcome that the Judge reached in this case. We therefore dismiss the appeal. Our reasons are explained below.

The facts

The parties

10 The respondent, IHC, is a company incorporated in Singapore and listed on the Catalist board of the Singapore Exchange ("SGX"). As we have already noted, it has since been renamed OUE Lippo Healthcare Ltd. Two shareholders of IHC, Mr Fan Kow Hin ("Mr Fan") and Mr Andrew Aathar ("Mr Aathar"), were involved in the negotiations leading up to the Transaction. Both of them were substantial shareholders in IHC, and at the traded share price of $0.31 per share in August 2015, their collective shareholdings in IHC were worth more than $166m. Mr Fan was also the chief executive officer ("CEO") of IHC from 17 May 2015 to 31 January 2016.

11 The appellants, the Crest Funds, are three funds managed by the fund management firm Crest Capital Asia Fund Management Pte Ltd, which is, in turn, a wholly-owned subsidiary of Crest Capital Asia Pte Ltd ("Crest Capital"). Mr Tan Yang Hwee ("Mr Tan"), the investment director of Crest Capital, represented the Crest Funds and other entities under the Crest umbrella of companies ("Crest entities") in the negotiations concerning the Transaction.

Background to the dispute

The parties enter into a standby facility agreement and various related security agreements

12 On 3 April 2015, Mr Tan and Mr Aathar had a telephone conversation. The matters discussed in that call were summarised in an email sent by Mr Aathar to Mr Tan the next day. Mr Aathar, ostensibly writing on behalf of IHC, stated that IHC had noticed an unusual sale pattern of its shares on Thursday 2 April 2015. The sale pattern had been analysed with an industry specialist, and the view was taken that there was a "high probability" that there was a "stealth plot" that would lead to an "imminent shorting of IHC shares". To defend IHC against the short-selling attack, Mr Aathar asked that the Crest entities "provide a standby line of $20m for use against this activity". Significantly, one of the terms Mr Aathar proposed was that to defend IHC's share price, "[IHC] [s]hares [could] be bought and held by [the Crest entities] directly". This email was copied to Mr Fan.

13 The Crest entities were amenable to this. In his affidavit dated 10 May 2016 filed in a different matter but which was in evidence before us (the "10 May 2016 affidavit"), Mr Tan attested that Crest Capital, having regard to "the longstanding relationship and [IHC's] ability and willingness to provide the required collateral, … agreed to provide a standby facility for general uses

[*sic*] by [IHC] at standard financing terms which included assets collateralisation … and personal guarantees from [Mr Fan] and [Mr Aathar]".

14 On 6 April 2015, Crest Capital circulated a term sheet (the "Term Sheet") to IHC as well as Mr Fan and Mr Aathar in their capacity as guarantors. The Term Sheet was signed by the former CEO of IHC. Mr Tan noted in his 10 May 2016 affidavit that "one of the proposed securit[ies] for the loan was a 'pledge of IHC shares purchased through Fund'" [emphasis in original omitted].

15 On 16 April 2015, IHC, Mr Fan and Mr Aathar entered into a standby facility agreement with EFIII (the first appellant), Value Monetization III Ltd (the third appellant) and one other Crest entity (namely, the Enterprise Fund II Ltd ("EFII")), by which IHC was granted a facility in the principal amount of $20m. This agreement was superseded by another standby facility agreement on 30 July 2015 for reasons which are not relevant to this appeal. It is only pertinent to note that the second appellant, VMF3 Ltd, replaced EFII as a party to the agreement, with the result that the parties to the agreement were now the Crest Funds, IHC, Mr Fan and Mr Aathar. We use the label "Standby Facility Agreement" to refer to the version of the agreement that applied from time to time as the context of this judgment requires, and similarly, the expression "Standby Facility" to mean the standby facility that was in place throughout the material time.

EFIII makes drawdowns on the Standby Facility

16 Mr Aathar suggested to Crest Capital that instead of disbursing the funds under the Standby Facility to IHC to be paid to a broker to fund the purchase of IHC shares, the Crest entities could purchase the shares on IHC's behalf through their own broker. Mr Tan attested in his 10 May 2016 affidavit that the Crest entities "were agreeable to this suggestion as this approach seemed to avoid a

circuitous arrangement, and afforded them additional security in respect of any drawdown under the Standby Facility".

17 Between 16 April and 24 August 2015, EFIII drew down on the Standby Facility many times to purchase IHC shares on the open market. There were a total of 14 drawdowns amounting in total to $17,332,081.15.

18 It is undisputed that these open market acquisitions were made at the behest and on the instructions of Mr Aathar on IHC's behalf. Mr Tan's description of this arrangement in his 10 May 2016 affidavit bears reproduction:

> 46. Andrew Aathar, on [IHC's] behalf, also verbally informed [Crest Capital] through me that he would be the one giving instructions on [IHC's] buying decisions, as it was a long-standing practice between [the] parties by then.
>
> …
>
> 49. Subsequently, acting on [IHC's] instructions, [EFIII] executed drawdowns on the Standby Facility multiple times to purchase shares on the open market using one of the funds' brokerage account. The said instructions were conveyed through phone calls, SMSes, and WhatsApp text messages to me by Andrew Aathar, acting for and on [IHC's] behalf. …

SGX's trade with caution announcement

19 On 9 September 2015, SGX issued an announcement advising shareholders and potential investors to exercise caution in dealing with IHC shares as it appeared that connected parties were trading IHC shares amongst themselves. IHC's share price plummeted as a result. In the aftermath of this, Mr Fan was adjudicated a bankrupt, and Mr Aathar's application for a voluntary arrangement under the Bankruptcy Act (Cap 20, 2009 Rev Ed) was recently dismissed by this court: see *Aathar Ah Kong Andrew v CIMB Securities (Singapore) Pte Ltd and other appeals and another matter* [2019] 2 SLR 164.

20 Following SGX's announcement, IHC defaulted on the Standby Facility. The Standby Facility Agreement provided that interest charges were to be paid on a monthly basis by way of "Standby Fees". The Standby Fees were paid for the months of April and May 2015, but were not paid from June 2015 onwards. On 19 October 2015, EFIII issued a letter of demand to IHC demanding payment for the period from 16 June to 15 October 2015, amounting to slightly over $2.75m in unpaid fees. IHC was unable to comply with the letter of demand, and after fruitless negotiations between the parties, the Crest Funds issued a notice of default under the Standby Facility Agreement on 7 April 2016.

21 As at May 2016, the outstanding fees and interest due under the Standby Facility were in excess of $5.5m.

Change in IHC's management and IHC's notice of avoidance

22 On 23 January 2017, IHC's board of directors was removed in its entirety by IHC's shareholders. The evidence of Mr Wong Weng Hong, the present CEO of IHC, is that it was only after the new board had taken over control of IHC that the contraventions of the CA came to light.

23 By way of a letter dated 8 March 2017 from its solicitors, Rajah & Tann Singapore LLP, IHC gave the Crest Funds written notice pursuant to s 76A(2) of the CA to avoid the share acquisitions (as defined at [5] above) and the Standby Facility.

24 On 20 March 2017, the Crest Funds responded by letter through their solicitors, WongPartnership LLP, denying that the share acquisitions and the Standby Facility were void or voidable.

The Standby Facility Agreement

25 We summarise some salient aspects of the Standby Facility Agreement. Clause 9 of the Standby Facility Agreement provides for the payment of a Standby Fee by IHC at the rate of 3.5% per month on the principal sum advanced:

> **9. STANDBY FEE**
>
> 9.1 In consideration of the grant of the Facility by [the Crest Funds] to [IHC], [IHC] agrees to pay [a] standby fee, at the rate of 3.5% per month, on the Facility ("Standby Fee"), subject at all times to an aggregate minimum sum equivalent to five (5) months' Standby Fee ("Minimum Standby Fee Amount").
>
> 9.2 Pending Redemption, [the] Standby Fee shall be paid on a monthly basis, in arrears, commencing from the end of the month in which the Disbursement was effected, pro-rated as required.
>
> …

26 The Standby Facility was secured by:

(a) a charge over the entire issued share capital of IHC Medical Re Pte Ltd by way of a Deed of Charge dated 30 July 2015, executed by IHC in favour of the Crest Funds;

(b) a charge over the entire issued share capital of IHC Management Pte Ltd ("IHC Management") by way of a Deed of Charge dated 30 July 2015, executed by IHC in favour of the Crest Funds;

(c) a charge over the entire issued share capital of IHC Management (Australia) Pty Ltd ("IHC Management (Australia)") by way of a Deed of Charge dated 30 July 2015, executed by IHC in favour of the Crest Funds;

(d) various undertakings given by IHC Management and IHC Management (Australia) in favour of the Crest Funds by way of two separate but substantially similar Deeds of Undertaking dated 30 July 2015; and

(e) personal guarantees given by Mr Fan and Mr Aathar.

The IHC shares purchased on the open market using funds drawn under the Standby Facility were also volunteered by Mr Aathar as additional collateral.

The procedural history

27 On 6 April 2017, IHC commenced Originating Summons No 380 of 2017 ("OS 380") for declarations that the Standby Facility and the related Deeds of Charge and Deeds of Undertaking as well as EFIII's acquisition of IHC shares on IHC's behalf were voidable, and had been avoided by way of the written notice issued by IHC on 8 March 2017.

28 OS 380 was heard by the Judge on various dates between February and July 2018, and she gave her decision on 13 November 2018 in favour of IHC.

The decision below

29 As we have already noted, the Judge broke the Transaction down into its constituent parts. She considered the trust arrangement first. She noted that the Crest Funds themselves accepted that the trust arrangement would ordinarily be void pursuant to s 76A(1)(*a*) of the CA since it was part of the means by which IHC indirectly acquired rights in its own shares: GD at [37]. The Crest Funds argued, however, that the trust arrangement was saved by s 76A(1A) of the CA, which dis-applied s 76A(1) where *dispositions* of book-entry securities were concerned. The Judge disagreed. She ruled that the trust arrangement fell

outside the scope of the saving provision. In her view, s 76A(1A) was enacted to uphold the security of transfers of scripless shares and the integrity of the scripless trading system: GD at [42]. The avoidance of the trust arrangement would not give rise to the concerns that s 76A(1A) was enacted to address. The trust arrangement was between EFIII and IHC only, and the avoidance of the arrangement would only result in both the legal and the beneficial interest in the IHC shares purchased by EFIII on the open market being vested in EFIII. The trust arrangement was not a transaction which could potentially affect subsequent transactions on the open market: GD at [44].

30 The Judge then turned to consider the open market acquisitions of IHC shares by EFIII. The open market acquisitions were equally obviously part of the means by which IHC indirectly acquired its own shares. Thus, they would also ordinarily be void. However, s 76A(1A) did apply to these open market dispositions of book-entry securities from third-party sellers to EFIII. Thus, these acquisitions were saved from being rendered void: GD at [45].

31 This left the final component of the Transaction: the loan agreements. The Judge held that these agreements were related to the void share acquisitions, and were therefore voidable at IHC's option pursuant to s 76A(2) of the CA. Before her, the Crest Funds argued that there could be no related transactions where the breach of the CA involved a company acquiring its own shares because the company would be restored to its original position upon the acquisition being made void. In support of this argument, the Crest Funds pointed out that s 76A(14), which deemed certain transactions to be related transactions, gave no examples relating to share buy-backs. The Crest Funds contended that the examples set out in s 76A(14) were exhaustive of the transactions which were deemed to be related transactions.

32 The Judge rejected the Crest Funds' arguments. She held that the plain language of s 76A(2) pointed to "related" transactions being those that were related to any transaction made in contravention of s 76, which included the wrongful acquisition by a company of its own shares: GD at [51]. Further, the case cited by the Crest Funds, *Swee Hong Investment Pte Ltd v Swee Hong Exim Pte Ltd and another (Kiaw Aik Hang Land Pte Ltd and another, third parties) and another appeal* [1994] 3 SLR(R) 259, did not support their contention that the deeming provision in s 76A(14) was exhaustive. Instead, the question of relatedness was a fact-sensitive inquiry to be undertaken by the court having regard to the facts and circumstances of the case, and bearing in mind the purposes of the prohibition against share buy-backs: GD at [59].

33 In the Judge's view, the loan agreements were inextricably linked to the share acquisitions. Although the terms of the Standby Facility Agreement were to the effect that the Standby Facility was to be used for "general working capital", the Crest Funds were aware that it was intended to be used by IHC to purchase its own shares to combat short-selling. The Crest Funds were also aware that the funds made available through the Standby Facility were in fact used for that purpose from April to August 2015, and for that purpose *only*. Indeed, they knew this because EFIII had carried out the open market acquisitions of IHC shares on IHC's behalf, and held the shares purchased on trust for IHC. Thus, the loan agreements were inevitably "related" transactions within the meaning of s 76A(2) of the CA, and therefore voidable at IHC's option: GD at [61].

34 The Crest Funds further argued that IHC was estopped from avoiding the loan agreements. This was because IHC had made representations in the Standby Facility Agreement that: (a) the entry into the Standby Facility was not contrary to law; and (b) IHC had done all that was necessary to ensure its

validity: GD at [64]. The Judge disagreed that IHC was so estopped. In her view, the Crest Funds' reliance on estoppel would operate to prevent IHC from asserting the existence of a certain state of affairs which was evident on the face of the statute – that the Transaction had not been "whitewashed" as required under the CA and was therefore voidable: GD at [68]. She also determined that an estoppel had not arisen in any event because the Crest Funds could not be said to have relied on any representation by IHC that it would obtain the necessary "whitewash" approval for the acquisition of its own shares, given that the very structure of the share acquisitions – in particular, the trust arrangement under which EFIII held the IHC shares purchased on the open market on trust for IHC – was itself clearly non-compliant with the "whitewash" provisions of the CA: GD at [69].

35 In addition, the Judge rejected the Crest Funds' argument that the common law bars to rescission applied to prevent IHC from exercising its right to avoid the loan agreements. The mere fact that IHC had paid Standby Fees for the months of April and May 2015 was not an act that was consistent *only* with its affirming the Standby Facility when no payment of the Standby Fees had been made thereafter. Further, the payments for the months of April and May 2015 had been made under the direction of IHC's previous management, who had caused IHC to enter into the share acquisitions in breach of s 76(1A)(*a*)(i) of the CA in the first place: GD at [77].

36 The result was that the trust arrangement by which EFIII held the IHC shares purchased on the open market on trust for IHC was held to be void; the open market acquisitions were held to be valid; and the loan agreements were held to be voidable and to have been avoided by IHC by way of its written notice of 8 March 2017. This left EFIII as the legal and beneficial owner of the IHC shares it had bought for and at the behest of IHC, and with no recourse to IHC

under the loan agreements. In short, IHC would bear no contractual obligation or liability whatsoever to the Crest Funds in relation to the Transaction: GD at [85].

The parties' cases

The Crest Funds' case

37 The Crest Funds' arguments in this appeal largely parallel those they made before the Judge. They contend that the Judge was wrong to find that the saving provision in s 76A(1A) applied only to the open market acquisitions, but not to the trust arrangement. They submit that these were both part of a single, composite transaction and could not be divided in the way the Judge did. The trust arrangement therefore also ought to have been saved by s 76A(1A). It followed from this that there was no void transaction to speak of that the loan agreements could be said to be "related to".

38 The Crest Funds contend that even if the open market acquisitions and the trust arrangement were held singly or collectively to be void, the Judge was wrong to find that the loan agreements were related to any void transaction. The Crest Funds argue that there can be no "related" transactions within the meaning of s 76A(2) of the CA where a company has acquired its own shares. The reason for this is that the objective of the prohibition in s 76(1A)(*a*)(i) is entirely achieved by making any direct or indirect acquisition by a company of its own shares void, and thus, there would be no purpose left to be achieved in finding any loan agreement pertaining to the offending share acquisition to be a related transaction and thus voidable at the company's option. The company would have been restored to its original position upon the share acquisition being made void, and allowing it to avoid related transactions would confer upon it an unmerited windfall. This interpretation is said to be confirmed by s 76A(14), a

deeming provision which deems the instances set out therein to be "related" transactions for the purposes of s 76A(2).

39 Quite apart from what the CA provides, the Crest Funds also rely on the representations made by IHC in the Standby Facility Agreement to the effect that the Standby Facility was not entered into contrary to law and that IHC had done all that was necessary to ensure its validity. The Crest Funds argue that IHC is estopped, on the basis of those representations, from avoiding the loan agreements.

IHC's case

40 IHC, on its part, mounts a defence of the Judge's decision. In IHC's view, the Judge correctly identified the scope of the saving provision in s 76A(1A) and rightly limited its application to only the open market acquisitions. Only those acquisitions involved a *disposition* of book-entry securities and thus fell within the embrace of s 76A(1A), whereas the trust arrangement did not. The trust arrangement was thus rightly held to be void as it did not fall within the ambit of the saving provision.

41 With regard to the point on related transactions, IHC disagrees with the Crest Funds that the purpose of the prohibition in s 76(1A)(*a*)(i) will be entirely achieved simply by holding the offending share acquisitions in this case to be void. This is because a related transaction, namely, the loan agreements, will still stand, and IHC will then owe both the principal and the interest due under the Standby Facility Agreement despite not having acquired the shares in question. Further, IHC argues that s 76A(2) does not have the restrictive interpretation the Crest Funds give it. Section 76A(14) is only a deeming provision that specifies instances that would fall within s 76A(2). It does not

purport to exhaustively define or delimit the scenarios that s 76A(2) might capture.

42 IHC further argues that the Crest Funds are not entitled to rely on estoppel in the face of a statutory bar. Here, the representations IHC made in the Standby Facility Agreement were not to the effect that it would not pursue its rights under the CA to avoid any part or parts of the Transaction that might be void or voidable under s 76A. Thus, the representations were not broad enough to capture the facts of this case. Moreover, the s 76(1A)(*a*)(i) prohibition on a company acquiring its own shares is intended to protect the company. To permit the Crest Funds to rely on an estoppel to uphold the validity of the loan agreements would be to act in defiance of the statute by allowing the very activity that s 76(1A)(*a*)(i) prohibits.

The issues to be determined

43 There are three issues to be considered in this appeal:

(a) First, does the whole Transaction or any constituent part or parts of it fall within the prohibition in s 76(1A)(*a*)(i) of the CA against a company acquiring its own shares so as to be rendered void by s 76A(1)(*a*)? Consideration of this issue will also involve examining which, if any, part or parts of the Transaction might be saved by the saving provision in s 76A(1A).

(b) Second, if the answer to the first question is in the affirmative, is there any part of the Transaction that would be regarded as related to a void component of the Transaction so as to be voidable at IHC's option pursuant to s 76A(2) of the CA?

(c) Third, are the Crest Funds entitled to rely on an estoppel to argue that IHC is estopped from avoiding the loan agreements?

Issue 1: what part or parts of the Transaction are caught by s 76(1A)(*a*)(i) and made void by s 76A(1)(*a*)?

44 Although the parties have structured their written cases by making arguments on the point about related transactions first, it seems to us more logical to begin by considering what, if any, part or parts of the Transaction are caught by the prohibition in s 76(1A)(*a*)(i) of the CA on a company acquiring its own shares and thus rendered void by s 76A(1)(*a*). After all, it is only after determining exactly what the void part or parts of the Transaction are that we can usefully consider what contracts or transactions are "related" to the void part or parts.

Section 76(1A)(a)(i): the prohibition on a company acquiring its own shares

The law

45 The statutory prohibition on a company directly or indirectly acquiring its own shares is set out in s 76(1A)(*a*)(i) of the CA:

> **Company financing dealings in its shares, etc.**
>
> **76.**— …
>
> (1A) Except as otherwise expressly provided by this Act, *a company shall not* —
>
> (*a*) whether directly or *indirectly*, in any way —
>
> (i) *acquire shares or units of shares in the company* …
>
> …
>
> [emphasis added]

46 The consequences that follow if a company contravenes s 76(1A)(*a*)(i) are set out in s 76A(1) of the CA, in particular, s 76A(1)(*a*). In short, the infringing share acquisition is void:

> **Consequences of company financing dealings in its shares, etc.**
>
> **76A.**—(1) The following contracts or transactions made or entered into in contravention of section 76 shall be *void*:
>
> (*a*) a contract or transaction by which a company acquires or purports to acquire its own shares or units of its own shares ...
>
> …
>
> [emphasis added]

47 It bears noting here that the term "unit" is defined in s 4(1) of the CA to mean "any right or interest, whether legal or equitable, in the share". In this case, EFIII is the legal owner of the IHC shares purchased by way of the open market acquisitions because it acquired those shares on the open market in its own name, but by reason of the trust arrangement, it was not expecting to become the beneficial owner of those shares. IHC correspondingly would stand to acquire the beneficial interest in those shares under the trust arrangement, and the share acquisitions therefore constituted a contract or transaction for the acquisition by IHC of units of its own shares. For convenience, however, we will throughout this judgment refer to IHC having acquired its own shares, and statements to this effect should be read with this understanding in mind.

48 The prohibition in s 76 of the CA draws upon both Australian and English legislation, specifically, s 67 of the Australian Uniform Companies Act 1961 (Cth) and s 54 of the Companies Act 1948 (c 38) (UK). Although cases from those jurisdictions interpreting those provisions might be expected to be persuasive in shedding light on the ambit of s 76 of our CA, the provisions have since diverged in significant ways: see Michael Ewing-Chow & Hans Tjio,

"Providing Assistance for Financial Assistance: *Public Prosecutor v Lew Syn Pau*" [2006] SJLS 465 at p 466. Consequently, reliance on Australian and English case law is likely to be less helpful.

Analysis

49 The essential question before us on the first issue is the ambit of an indirect acquisition within the meaning of s 76(1A)(*a*)(i) of the CA, as would be rendered void by s 76A(1)(*a*).

50 We begin with the statutory language. The language of s 76(1A)(*a*)(i) is very broad, and it is crucial to note that in addition to the phrase "in any way", which is also to be found in the corresponding Australian provision, s 76(1A)(*a*)(i) includes the words "directly or indirectly". In our judgment, this addition clarifies that even those *parts* of a transaction that are not the final or most proximate step in a series of steps taken to effect a company's acquisition of its own shares might nonetheless be caught by the prohibition. This is especially likely to be true in cases where a third party is involved, for example, where a trustee or nominee holds the company's shares on trust for the company's benefit.

51 Indeed, this coheres with the legislative language employed in s 76A(1)(*a*) of the CA. Section 76A(1)(*a*) states that a "contract or transaction" made in contravention of s 76 shall be void. The word "transaction", as the Judge rightly found at [38] of the GD, has a wide ambit and can include "[t]he act or an instance of conducting business or other dealings" (see *Black's Law Dictionary* (Bryan A Garner gen ed) (Thomson Reuters, 10th Ed, 2014) at p 1726). This definition, and the placement in s 76A(1)(*a*) of the word "transaction" in juxtaposition to the word "contract", brings within the ambit of a prohibited indirect acquisition those steps that are not designed in themselves

to affect legal relations as would amount to a "contract", but that may, as a matter of commercial substance, have been necessary to achieve the ultimate outcome of the company acquiring its own shares. In other words, it is not only the immediate and final step in a chain of steps taken to cause a company to acquire its own shares that will amount to a prohibited acquisition; the preceding steps might also fall within the prohibition if they are sufficiently proximate to the intended outcome of the company acquiring its own shares.

52 The question that follows is how the sufficiency of such proximity is to be determined. In our judgment, what is required is an approach that takes into account the commercial substance of the transaction in question. This will necessarily be fact-specific and will vary from case to case. Given the width of the language used in s 76(1A)(*a*)(i) to delineate the prohibition – "whether directly or indirectly, in any way" – it would be unhelpful for bright-line rules to be drawn.

53 That said, we consider that the rationale for the prohibition and the functions achieved by it are useful considerations that inform the assessment of the commercial substance of an impugned transaction. In our judgment, there are two core strands within the rationale behind the prohibition: the first is the prohibition's historical origins in maintaining the *share capital* of a company; the second is the wider concern of protecting the *assets* of a company. We examine these in turn.

54 The first strand, which focuses on the maintenance of capital, can be detected in the legislative pronouncements introducing s 76. The core elements of s 76 as it now exists were introduced into the CA by the Companies (Amendment) Act 1987 (Act 13 of 1987). At the second reading of the Bill that led to this Act (namely, the Companies (Amendment) Bill 1986 (No 9 of 1986)),

the Minister for Finance stated that "[t]he main purpose of the section is to ensure that the capital of the company is preserved intact": see *Singapore Parliamentary Debates, Official Report* (5 May 1986) vol 48 at col 39; see also *Public Prosecutor v Lew Syn Pau and another* [2006] 4 SLR(R) 210 ("*Lew Syn Pau*") at [79].

55 This focus on the maintenance of capital can be traced back to the decision of the House of Lords in *Trevor and another v Whitworth and another* (1887) 12 App Cas 409 ("*Trevor*"). In our judgment, three reasons set out in that decision explain the rationale underlying the prohibition. The first was that the legislation at that time laid down a formal procedure for the reduction of capital. The House of Lords considered that the inclusion of such a carefully worded procedure must mean that the capital of a company should only be susceptible to being reduced in the manner permitted by the statute: at 423 *per* Lord Watson and 438 *per* Lord Macnaghten. Lord Herschell shared in that view and thought that the procedure might be easily sidestepped if the House of Lords held otherwise: at 416. We consider that this reasoning is relevant even today because the CA sets out carefully structured procedures for the reduction of capital: see Division 3A of Part IV of the CA.

56 The second reason articulated in *Trevor* as to the importance of maintaining a company's capital was that the capital of a company should be preserved so as to be available to its creditors in the event of its insolvency. The House of Lords considered that one of the main objects behind the restrictions on the power to reduce a company's capital was to "protect the interests of the outside public who may become [the company's] creditors": *per* Lord Watson at 423 and *per* Lord Macnaghten at 438.

57 The third reason is allied to the second: it is implied in Lord Herschell's speech that shareholders in a limited liability company must rank behind creditors in exchange for the immunity that limitation of liability gives them in respect of claims brought against the company: at 414. The prohibition against a company acquiring its own shares preserves this ranking order as between shareholders and creditors by preventing any capital whatsoever from being returned to shareholders unless the statutory procedures for doing so are complied with.

58 It is true that criticisms have been made of the focus on the preservation of share capital and the maintenance of capital doctrine in general. Thus, it has been questioned whether the prohibition on a company acquiring its own shares can truly fulfil its rationale of preserving capital when there is no requirement that a company's capital must be adequate in the first place, or when it is entirely permissible for a company's capital to be depleted in the course of its business: see the Australian Companies and Securities Law Review Committee, *A Company's Purchase of its Own Shares* (Discussion Paper No 5, June 1986) at para 105.

59 Even so, there remain those who see the continued relevance of the prohibition in preserving a company's share capital. In this regard, we note that in June 2011, the Steering Committee tasked with carrying out a fundamental review of the CA produced a report setting out its recommendations for reform (see *Report of the Steering Committee for Review of the Companies Act* (June 2011) ("the CA Review Report")). One of the topics it considered was financial assistance for the acquisition of shares. The Steering Committee recommended that the financial assistance prohibition be cut down by abolishing its application to private companies (see Recommendation 3.27 at p 3-24 of the CA Review Report). What is more pertinent for present purposes is that the Steering

Committee identified the rationale behind the financial assistance prohibition as being to "ensure that the capital of a company is preserved intact and not eroded by deliberate acts done otherwise than in the ordinary operations of the company undertaken in the pursuit of its objects for which it was established", and affirmed that this rationale "[was] still valid": see para 94 at p 3-23 of the CA Review Report. We consider that those observations would apply with equal force to the prohibition in s 76(1A)(*a*)(i) against a company acquiring its own shares. The prohibition against a company providing financial assistance for the acquisition of its own shares is of course one step removed from the prohibition against a company acquiring its own shares. But both are ultimately concerned with ensuring that a company does not acquire or assist in the acquisition of its own shares.

60 Whatever criticisms have been made of the prohibition against a company acquiring its own shares, we are nevertheless obliged to recognise the rationale of the prohibition as being to preserve a company's share capital because this is what Parliament has expressly articulated the prohibition's rationale to be. Parliament was made aware of the CA Review Report. It chose not to repeal or amend the prohibition, although amendments were made to the CA in 2014 to allow private companies to provide financial assistance for the purchase of their shares under suitable circumstances. Nor did Parliament say anything indicating that the purpose for which s 76 was enacted had changed or been diluted in any way since the pronouncement by the Finance Minister in 1986. We are thus compelled to give effect to the purpose Parliament intended for s 76.

61 In addition to the traditional roots of the prohibition in the preservation of capital, there is a second strand to the rationale underlying the prohibition that sees it performing the wider function of preventing the *assets* of a company

from being depleted. One textbook that sets out this view is *Woon's Corporations Law* (LexisNexis, Looseleaf Ed, 2018) at para 1652, where it is said:

> **S 76(1A)(a) protection of the company's assets from dissipation** The prohibition on a company purchasing its own shares existed at common law: *Trevor v Whitworth* (1887) 12 App Cas 409; *Mookapillai v Liquidator, Sri Saringgit Sdn Bhd* [1981] 2 MLJ 114, 115 per Abdoolcader J. The reason for the prohibition is that the purchase of its own shares by a company would amount to a return of capital to the members …
>
> …
>
> … It is suggested that it was probably not the intention of the legislature to prevent a company from acquiring a beneficial interest in its own shares or from forfeiting shares that have not been paid for. Such transactions were probably legal before the 1987 amendments and there is no indication that the amendments were meant to render such transactions illegal. *As long as the assets of the company are not depleted,* transactions such as these will be outside the mischief of the section.
>
> [emphasis added]

62 This broader rationale is consonant with the reasons identified for the distinct but closely allied prohibition against a company providing financial assistance for the acquisition of its own shares. In *Lew Syn Pau*, the High Court explained that the legislative purpose of the latter prohibition was to "preserve the company's capital and prevent the use of its *assets* in connection with an intended acquisition of its shares" [emphasis added]: at [126]. Similarly, Arden LJ, in the English Court of Appeal's decision in *Chaston v SWP Group plc* [2003] BCC 140, explained (at [31]) that the mischief targeted by the financial assistance prohibition was "the *resources*" [emphasis added] of the company being used to assist the purchaser in making the acquisition, which might "prejudice the interests of the creditors of the [company] or its group, and the interests of any shareholders who do not accept the offer to acquire their shares or to whom the offer is not made". It is significant to us that the focus in

both these judgments was not simply on a company's share capital being depleted, but more broadly on whether the assets of the company in general might be put at risk. These two prohibitions target a common mischief, and we consider that the prohibition in s 76(1A)(*a*)(i) against a company acquiring its own shares should similarly be viewed as not only preventing the depletion of a company's share capital, but also protecting the company's assets more broadly.

63 This inquiry into the rationale behind the prohibition in s 76(1A)(*a*)(i) helpfully informs the assessment of the commercial substance of an impugned transaction, in that a transaction which causes a company's capital and/or assets to be depleted or put at risk would readily be found to fall within the prohibition. Thus, where either of these ills occurs, that *reinforces* the finding under the commercial substance test that the transaction in question is a prohibited transaction that is caught by s 76(1A)(*a*)(i) and rendered void by s 76A(1)(*a*).

64 That said, we caution that although reference to the rationale behind the prohibition will be helpful in assessing whether the commercial substance of an impugned transaction is truly for a prohibited acquisition by a company of its own shares, we are ultimately obliged to apply the law as it is set down in the statute. The statutory language of s 76(1A)(*a*)(i) is very wide, and might conceivably go beyond what is necessary to achieve the objectives we have identified here. If the facts of a case, as viewed through the lens of commercial substance, reveal a prohibited indirect acquisition or transaction, then s 76(1A)(*a*)(i) will be given full force notwithstanding that the company's capital and/or assets were neither actually depleted nor objectively put at risk.

Application to the facts

65 The legislative purpose behind the prohibition on a company acquiring

its own shares having been examined and the proper approach to be taken having been set out, we return to the facts of this case and apply the approach we have identified above at [52].

66 The Crest Funds have strenuously argued that the Judge erred in separating the share acquisitions into: (a) the open market acquisitions; and (b) the trust arrangement. They argue that s 76(1A)(*a*)(i) prohibits even a company's *indirect* acquisition of its own shares, and both components (a) and (b) were part of a single composite *indirect* acquisition. Indeed, they say that "[t]he agreement was for the Crest Funds to buy IHC's shares on IHC's behalf, and each acquisition was done further to an instruction from IHC to purchase the shares on its behalf" [underlining and emphasis in original omitted]. This was not, the Crest Funds contend, "a case of the Crest Funds independently purchasing IHC shares, and then subsequently declaring a trust over those shares in favour of IHC". Thus, the entire indirect acquisition by IHC of its own shares stands or falls as a whole.

67 We agree. On the facts before us, the commercial substance of the Transaction would be ignored if a restrictive view were taken of the Transaction to the effect that it was only the last and final step – the trust arrangement – that amounted to the prohibited indirect acquisition. An argument could be made that it was only this last step that contravened the prohibition in s 76(1A)(*a*)(i) because until EFIII held the IHC shares purchased on the open market on trust for IHC, IHC would simply not have acquired any beneficial interest in those shares and there would have been no acquisition that would be caught by the prohibition.

68 This overly technical argument, however, would fly in the face of the facts. The evidence accords with the Crest Funds' contention that it was agreed

that the Crest Funds would purchase IHC shares *for* IHC. We will go into the evidence in greater detail below, but for present purposes, it is sufficient to note that IHC, too, agrees with this characterisation. And there is ample evidence for this, in that every one of the 14 drawdowns on the Standby Facility was used to purchase IHC shares, with each of those share purchases having been made at the behest and on the instructions of Mr Aathar representing IHC: see [18] above. Thus, the open market acquisitions must stand together with the trust arrangement, and both would be rendered void by s 76A(1)(*a*).

69 We would, however, go further than the Crest Funds. It seems to us that we would still fail to take into account the full commercial substance of the Transaction if we do not also consider the loan agreements as falling within the prohibited indirect acquisition. This is because we agree with the Judge that these agreements were inextricably intertwined with EFIII's purchase of IHC shares.

70 It becomes necessary here to go into the facts in some detail as the Crest Funds heavily contest this point. Mr Tan, the representative of the Crest entities in the negotiations concerning the Transaction, made the following points in his sixth affidavit filed in OS 380:

> 26. … [T]he Standby Facility was separate and distinct from the agreement for the [Crest Funds] to acquire IHC's shares on IHC's behalf.
>
> 27. The Standby Facility was granted on the basis of the long-standing business relationship that the [Crest Funds] had with IHC as well as IHC's ability and willingness to provide sufficient security. The Standby Facility Agreement makes the purpose behind the granting of the Standby Facility clear. The Standby Facility was to be used by IHC "*for general working capital*" and not specifically for IHC to acquire its own shares. The [Crest Funds] do acknowledge, however, that representatives of IHC's management did inform the [Crest Funds] that IHC had intended for the funds disbursed under the Standby Facility to be used for such a purpose.

> 28. However, the granting of the Standby Facility must be understood in the broader context of the parties' commercial relationship. The Crest Entities have had a long-standing business relationship with IHC, and the decision to grant the Standby Facility to meet IHC's working capital needs was also due to the long-standing business relationship that existed between them. …
>
> [emphasis in original]

71 Mr Tan also pointed out that from a lender's perspective, IHC was a listed company, had a good borrowing track record with the Crest Funds and was a creditworthy client. There were therefore no "red flags" that would have alerted the Crest Funds or prompted them to inquire further whether there was any non-compliance with the CA.

72 Although one of the proposed securities offered to the Crest Funds in the Term Sheet for the Standby Facility was a "[p]ledge of IHC shares purchased through Fund" [emphasis in original omitted] (see [14] above), Mr Tan indicated that the Crest Funds "would have been willing to grant the Standby Facility in any event, even without the additional security in the form of the IHC shares". Mr Tan emphasised that there was nothing in the Standby Facility Agreement that expressly required or obliged the Crest Funds to acquire IHC shares on behalf of IHC, and thus, the Standby Facility was an arrangement between the parties that was quite separate from the share acquisitions.

73 This version of the events, in our judgment, simply does not square with the contemporaneous evidence at the time the Standby Facility Agreement was entered into and the drawdowns made on the Standby Facility. The Crest entities' representative, Mr Tan, knew from the outset that the Standby Facility was to be provided for a specific purpose – to fend off a potential short-selling attack on IHC's share price by buying up IHC shares. In the same affidavit referred to at [70] above, Mr Tan stated that it was "not disputed that it was the

representatives of IHC who had informed [the Crest Funds] of IHC's own intention to use the funds under the Standby Facility to acquire the shares of IHC" [underlining in original omitted]. Indeed, Mr Tan recorded that the email of 4 April 2015, "where IHC stated that the Standby Facility would be used to purchase IHC's shares", was copied to him.

74 If that had not been sufficiently clear, the Term Sheet agreed between the Crest Funds and IHC on 6 April 2015 would have made it obvious that the Standby Facility would be used to purchase IHC shares. The Term Sheet states on its face that one of the securities for the proposed facility would be a "[p]ledge of IHC shares purchased through Fund". Mr Tan also acknowledges that "IHC had agreed to pledge IHC's shares and did pledge the said shares, purchased through the drawdowns of the Standby Facility as additional security for the Standby Facility for the [Crest Funds]".

75 Turning to the drawdowns made on the Standby Facility, it was apparent that the Crest Funds were fully aware at all times that the Standby Facility was being used to purchase IHC shares. As we mentioned earlier at [16] above, Mr Aathar proposed that the Crest entities purchase IHC shares through their own broker, and the Crest entities agreed to this proposal because it would, in Mr Tan's own words, avoid a "circuitous arrangement", and moreover, would give them additional security for drawdowns on the Standby Facility. All the drawdowns that were made on the Standby Facility were made for the purpose of purchasing IHC shares: see [17] above. And each drawdown was made on Mr Aathar's instructions and at his behest on behalf of IHC: see [18] above.

76 In our judgment, the evidence strongly supports the Judge's finding that the loan agreements were "inextricably linked" to the share acquisitions: GD at [60]. The Crest Funds knew from the outset that the Standby Facility was to be

used to purchase IHC shares, and this purpose was carried into effect by one of the Crest Funds itself, when EFIII actually executed IHC's instructions, as given by Mr Aathar, to purchase IHC shares. To put things another way, without the loan agreements having been entered into, IHC would not have been put in funds to purchase its own shares. As a matter of commercial substance, these agreements were therefore inseparable from the share acquisitions.

77 We turn then to deal with the Crest Funds' arguments on this point. These arguments were made in the context of contesting the Judge's finding that the loan agreements were "related" transactions within the meaning of s 76A(2), but because the thrust of these arguments is to put some distance between the loan agreements and the share acquisitions, it is appropriate to consider them here.

78 The first argument the Crest Funds make is that "absurd" consequences would arise if all that is required for a loan transaction to be related to a company's acquisition of its own shares is that the lender: (a) knows that the facility is to be used by the company to acquire its own shares; and (b) the facility is *in fact* used to acquire such shares. The Crest Funds contend that a lender of a generic loan who places no restriction as to what the company can do with the loan will be placed in a difficult position simply because it comes to know that the company intends to contravene the CA by acquiring its own shares. This, the Crest Funds say, places an unreasonable burden on lenders to police the companies to whom they lend money to ensure that the latter do not use the loans granted to purchase their own shares.

79 In our view, this argument does not reflect the facts of this case. Although it is true that the Standby Facility Agreement did not say on its face that the Standby Facility was to be used solely to purchase IHC shares, the entire

background to the facility even being made available to IHC was that it was to be used to purchase IHC shares. Thus, although the loan documentation did not say that this was the parties' intended purpose for the Standby Facility, the parties certainly knew this *from the outset* and, indeed, even *before* the facility was granted because this was *why* the facility was granted in the first place. This distinguishes our case from the hypothetical lender who only discovers *after* making a generic loan that the loan might be used for some wrongful ends.

80 The second argument the Crest Funds make is that the evidence is presently insufficient to support the finding that the loan agreements were related to the share acquisitions. They argue that their level of knowledge regarding the purposes to which the Standby Facility would be put and their awareness of a possible breach of the CA ought to have been pursued in more detail, with cross-examination and the conversion of OS 380 to a writ action if necessary. We disagree. In our judgment, the evidence as it stands, and as we have narrated above, is sufficient to ground the Judge's finding that the loan agreements were an essential part of a single, composite transaction intended to put IHC in funds to purchase its own shares.

81 Third, the Crest Funds say that they considered IHC's intended purpose of using the Standby Facility to acquire its own shares irrelevant to their decision to grant the facility. In our judgment, this submission is not supported by the evidence before the court for the reasons we have already canvassed. Mr Tan's comments as to the long-standing relationship between IHC and the Crest Funds go more to the point as to why the Crest Funds felt confident about extending the funds at all. But that is a different point from what the parties intended the funds to be used for once the hurdle of the Crest Funds feeling secure enough to advance the Standby Facility had been crossed.

82 Having taken a holistic view of the evidence through the lens of commercial substance, we are satisfied that the loan agreements also fall within the scope of a prohibited indirect acquisition because this accords with the *purpose* behind the prohibition in s 76(1A)(*a*)(i). The purpose of the prohibition, as we have explained above at [53]–[62], includes ensuring that a company's capital and/or assets are not depleted or put at risk because of steps taken to acquire its own shares. Had s 76A(1)(*a*) not rendered the Transaction void, IHC's capital and/or assets would have been reduced by it. This is because IHC took on an obligation to pay for the funds lent to it under the Standby Facility Agreement, which obligation would have to be met out of its capital and/or assets. Although the Standby Facility was not secured by IHC's assets, but rather, by various guarantees and undertakings from other individuals and entities, there was always the credit risk of those individuals or entities defaulting to which IHC nevertheless remained exposed.

83 In summary, we hold that the entire Transaction, comprising the loan agreements, the open market acquisitions and the trust arrangement, constituted one single, composite transaction that is caught by the prohibition in s 76(1A)(*a*)(i). Section 76A(1)(*a*) in turn operates to render the entire Transaction void. This, however, is not the end of the analysis of the first issue.

Section 76A(1A): the saving provision for dispositions of book-entry securities

84 The next step in the inquiry is to assess whether the saving provision in s 76A(1A) operates to dis-apply the voiding provision in s 76A(1)(*a*) in respect of any part of the Transaction. Specifically, s 76A(1A) dis-applies s 76A(1) where dispositions of book-entry securities are concerned:

> (1A) *Subsection (1) shall not apply to a disposition of book-entry securities*, but a Court, on being satisfied that a disposition of

> book-entry securities would in the absence of this subsection be void may, on the application of the Registrar or any other person, order the transfer of the shares acquired in contravention of subsection (1). [emphasis added]

85 The proper appreciation of the scope of application of s 76A(1A) requires us to examine the circumstances of its introduction and the ills it sought to relieve. Section 76A(1A) was introduced into the CA by the Companies (Amendment) Act 2014 (Act 36 of 2014) (the "2014 Amendment Act"), which repealed its legislative predecessor, s 130M of the CA. Section 130M, in turn, can be traced back to its introduction as part of the amendments effected by the Companies (Amendment) Act 1993 (Act 22 of 1993) (the "1993 Amendment Act").

86 The 1993 Amendment Act had two main objectives. Only one of these concerns us, and this was to make provision for a computerised depository system for the scripless transfer of securities listed on the Stock Exchange of Singapore, as was made clear by the Minister for Finance at the second reading of the Companies (Amendment) Bill 1992 (No 33 of 1992) (the "1992 Bill"): see *Singapore Parliamentary Debates, Official Report* (14 September 1992) vol 60 ("*Singapore Parliamentary Debates* vol 60") at col 228. This was a very substantial undertaking, involving as it did the introduction of an entirely new division to the CA (namely, Division 7A of Part IV) to deal with the new Central Depository System.

87 The aim in introducing the Central Depository System was to ease the cumbersome process of having each transfer of a company's shares evidenced by a share certificate and the delivery of a completed transfer form to the company so that it could enter the name of the transferee in the company register and thereby transfer the legal title to the shares to the transferee. This involved a great deal of paperwork and caused considerable delays in completing

transfers. Under the Central Depository System, the transfer of listed securities was to be effected by book entries in the computer-based records controlled by a central operator, namely, the Central Depository (Pte) Ltd (the "Depository"): see *Singapore Parliamentary Debates* vol 60 at col 229.

88 Section 130M was one of the provisions within the new Division 7A. The 1992 Bill was sent to a Select Committee for review. The Select Committee received representations that, among other things, expressed concerns as to how the finality of registration in the central register maintained by the Depository (the "Depository Register") might impact upon the operation of the prevailing law as to certain transactions being rendered void in certain circumstances. The Select Committee eventually produced an official report of its proceedings, which noted that the proposed s 130M had been amended pursuant to a proposal by Assoc Prof Walter Woon so as to provide that "certain provisions in sections 21, 76A and 106E of the [CA] shall not apply to [the] disposition of book-entry securities": see *Report of the Select Committee on the Companies (Amendment) Bill (Bill No 33/92)* (Part 2 of 1993, 26 April 1993) at p D10. This amendment, it is clear to us, reinforced the finality of the Depository Register.

89 At the third reading of the 1992 Bill, the Minister for Finance, in moving the Bill, also explained the reasons behind s 130M being introduced (see *Singapore Parliamentary Debates, Official Report* (28 May 1993) vol 61 at col 292):

> Several representors have raised the concern that damages may not always be an adequate remedy if a depositor's book-entry securities are wrongly or erroneously transferred out of his securities account. They have suggested that the provision in the proposed section 130J against rectification of the Depository Register be amended, so that remedies other than damages are allowed.
>
> To address the representors' concern but without creating the practical problems in unwinding transactions in a scripless

> system, the Committee has amended the proposed section 130J to allow other remedies such as the re-transfer of shares where no third-party rights are involved. Corresponding amendments have been made to [the] proposed section 130L. The proposed section 130M makes an amendment of a similar effect to sections 21, 76A and 106E of the [CA].

For present purposes, we note the emphasis placed on avoiding "the practical problems [involved] in unwinding transactions in a scripless [trading] system".

90 Section 130M as amended was enacted in the 1993 Amendment Act in the following terms:

> **Non-application of certain provisions in sections 21, 76A and 106E**
>
> **130M.** Sections 21, 76A and 106E, insofar as these sections provide that a transfer or contract of sale of shares or debentures in contravention of either section shall be void, shall not apply to any disposition of book-entry securities; but a Court, on being satisfied that a disposition of book-entry securities would in the absence of this section be void, may, on the application of the Registrar or any other person, make the following order:
>
> > (*a*) in the case of a contravention of section 21 or 76A, order the transfer of the shares acquired in contravention of those sections;
> >
> > (*b*) in the case of a contravention of section 106E, order the purchaser referred to in that section to transfer the shares or debentures, as the case may be, to the seller and may award damages to the purchaser.

91 The points we have just made about the purpose behind s 76A(1A) are also reflected in *Woon's Corporations Law* (LexisNexis, Looseleaf Ed, 2017) at para 1801:

> **Scripless trading** An acquisition of shares in breach of s 76 is not void if the shares are book-entry securities and traded scripless: s 76A(1A). This provision, formerly s 130M of the Companies Act before it was repealed by the Companies (Amendment) Act 2014 (Act 36 of 2014), was inserted at the suggestion of Professor Walter Woon during the Select Committee hearings on the Companies (Amendment) Bill 1992.

> The problem with scripless trading is that the whole system is predicated upon the ability of a seller to transfer good title to a buyer. If any acquisition is void, all subsequent transfers of shares are also void. This would seriously impede [the] scripless trading of shares.
>
> Several listed companies have stockbroking subsidiaries, and there may be situations where the stockbroking subsidiary holds the shares in its listed parent temporarily (eg, where a client defaults in payment). Section 76A(1A) preserves the validity of the transfer to the subsidiary notwithstanding s 76A(1)(a). If the shares are held by the subsidiary, a court may (on the application of a person with sufficient interest) order the re-transfer of those shares (which presumably includes selling them on the market).

92 We turn to consider the meaning of the terms used in s 76A(1A). Where the expression "book-entry securities" is concerned, the definitions provision in the CA, s 4(1), directs us to s 81SF of the Securities and Futures Act (Cap 289, 2006 Rev Ed) (the "SFA"). This is because Division 7A of Part IV of the CA, which originally contained the provisions on the Central Depository System, was repealed by the 2014 Amendment Act and has now become Part IIIAA of the SFA.

93 Section 81SF of the SFA defines "book-entry securities" as follows:

> "Book-entry securities", in relation to the Depository, means securities —
>
> > (*a*) the documents evidencing title to which are deposited by a depositor with the Depository and are registered in the name of the Depository or its nominee; and
> >
> > (*b*) which are transferable by way of book-entry in the Depository Register and not by way of an instrument of transfer …

94 It is also clear from Part IIIAA of the SFA that "dispositions" is a term widely used within that specialised regime to describe the transfer of securities which are made by way of book entry.

95 This inquiry into the legislative history and the text of s 76A(1A) reveals that the provision has a very specific provenance lying in a suite of amendments intended to put into effect the introduction of a scripless trading system, namely, the Central Depository System. In that light, we turn to consider the parties' arguments on s 76A(1A).

96 The Crest Funds argue that the saving provision in s 76A(1A) must apply to both the trust arrangement and the open market acquisitions. They argue that s 76A(1A) saves a "disposition of book-entry securities" from being made void, and a disposition is merely the converse of an acquisition. Thus, the entire indirect acquisition in this case – which involved as its starting point the disposition of book-entry securities by third-party sellers to EFIII as the purchaser – would fall within the scope of the "disposition" mentioned in s 76A(1A). Further, the Crest Funds contend that Parliament did not make any conscious decision in referring to "dispositions" instead of "acquisitions" in s 76A(1A); s 76A(1A) was introduced into the CA at the same time as various other provisions aimed at protecting the scripless trading system, which other provisions also spoke of "dispositions", and "dispositions" was used in s 76A(1A) simply to achieve consistency of expression.

97 We disagree. In our judgment, neither the plain language nor a purposive interpretation of s 76A(1A) supports the Crest Funds' arguments.

98 The plain language of s 76A(1A) speaks of the "disposition of book-entry securities". As we have noted above, s 81SF of the SFA makes clear that book-entry securities are simply scripless shares: they are defined as securities in respect of which the documents evidencing title are deposited with the Depository and registered in the name of the Depository or its nominee. Transfers of such shares are made by way of book entry in the Depository

Register, and not by way of an instrument of transfer. Seen in this light, for there to be a "disposition" of book-entry securities, there must be a transfer of securities or shares involving an entry being made in the Depository Register recording the transfer. In our view, this would entail there being a change in the legal title to the shares or securities concerned. There is no need or basis to extend this to the separation of legal and beneficial title as occurred in this case, when EFIII held the IHC shares purchased on the open market in its own name but intended the beneficial interest in those shares to be held by IHC. In our judgment, the trust arrangement was not a "disposition" within the meaning of s 76A(1A) because it did not involve any transfer of the legal title to the IHC shares which EFIII purchased on the open market.

99 We are fortified in this interpretation of "disposition" as a transfer of the legal title to shares because s 76A(1A) provides that what a court may do if a disposition would, but for the operation of s 76A(1A), be void is to "order the transfer of *the shares* acquired in contravention of [s 76A(1)]" [emphasis added]. It is telling that what the court can do is confined to ordering the transfer of *the shares*, and not the transfer of *units* of the shares. The statutory language in s 76A seems to us very specific, and we find it noteworthy and significant that the voiding provision in s 76A(1)(*a*) refers both to shares *and* units of shares, whereas s 76A(1A), which sets out the saving provision and the consequential powers of the court, refers *only* to shares. This is a distinction with a difference. As we have pointed out at [47] above, a "unit" is defined in s 4(1) of the CA as "any right or interest, whether legal or equitable, in the share". Thus, if the passing of the equitable title to or the beneficial interest in shares were sufficient to amount to a "disposition of book-entry securities" and, thus, to attract the saving provision in s 76A(1A), one would have expected that the court would also have been empowered to order the transfer of *units* of shares.

100 That, however, is not what s 76A(1A) provides. Instead, the provision speaks simply of the court ordering a transfer of "*the shares* acquired in contravention of [s 76A(1)]" [emphasis added], which suggests transfers that would be captured on the Depository Register, and in turn suggests that "dispositions" are limited to transfers of the legal title to shares as it is only these transfers which the Depository Register captures and is concerned about. In this case, IHC was never given the legal title to the IHC shares purchased by EFIII on the open market, which were held in the name of EFIII. Thus, there was no "disposition" to speak of, and the saving provision does not apply to the trust arrangement.

101 The plain reading of s 76A(1A) is buttressed by a purposive interpretation of the provision in the light of the problems which Parliament intended to forestall. The concern was that holding a disposition of book-entry securities to be void would undermine the integrity of the scripless trading system because subsequent purchasers of the affected shares might be left in doubt as to whether their sellers had good title to pass on, and those sellers in turn might well ask whether *their* sellers had had good title to pass on, as the extract from *Woon's Corporations Law* reproduced at [91] above makes clear. In our view, it is this risk of the chain of good title being broken and the finality of the Depository Register being cast into doubt that s 76A(1A) was intended to address, and thus, the "disposition" that s 76A(1A) refers to must be one that would engage the scripless trading system and affect the transfer of the legal title to shares. The trust arrangement did not involve any transfer by way of book entry under the scripless trading system. If the trust arrangement were held to be void, no transfer of book-entry securities under the scripless trading system would be affected at all. Thus, we are satisfied that the term "disposition" in s 76A(1A) was not intended to capture the trust arrangement.

102 Both the plain reading *and* the purposive interpretation of s 76A(1A) are *further* buttressed by the fact that reading s 76A(1A) in this way comports with the statutory objectives of the prohibition in s 76(1A)(*a*)(i) against a company acquiring its own shares. It bears recalling that s 76A(1A) is only a *saving* provision; it is intended to carve out an exception to the general prohibition against a company acquiring its own shares. The saving provision applies because the interests of a different set of third parties also intrude, namely, those parties who have purchased or sold shares under the scripless trading system and whose transfers were registered by way of book entry in the Depository Register. To maintain the confidence of these third parties in the quality of their title to their shares, and thereby also to promote confidence in the scripless trading system as a whole, the saving provision in s 76A(1A) was crafted to apply *narrowly* only to save that part of an otherwise void share acquisition that is made by way of a book-entry transfer of shares under the scripless trading system. There is no other justification to save a company from its contravention of s 76(1A)(*a*)(i).

103 That Parliament must have intended this careful balance to be struck is illustrated by the consequences if the saving provision in s 76A(1A) were interpreted in the way the Crest Funds propose. IHC makes the point that "if the Trust Arrangement is not a separate transaction which is rendered void under s 76A(1)(a), then nothing is rendered void under s 76A(1)(a)". The prohibition in s 76(1A)(*a*)(i) will have entirely lost its bite because a transaction under which IHC obviously acquired its own shares would be entirely saved by the saving provision in s 76A(1A). Because of the way we have characterised the Transaction and because of our finding that all three components of it are caught by the prohibition in s 76(1A)(*a*)(i), IHC's point does not hold fully true: the loan agreements would be void in any event. But it is striking to us that if the trust arrangement were also saved by s 76A(1A), IHC would end up beneficially

owning its own shares, which is the very scenario that the prohibition was intended to prevent. This militates against the expansive interpretation of s 76A(1A) that the Crest Funds seek to give to it.

104 We pause here to address the Crest Funds' arguments that s 76A(1A) must be applied in a way that recognises the commercial substance of the Transaction. The Crest Funds argue that as a matter of commercial substance, both the open market acquisitions and the trust arrangement were part of a single, composite transaction, and thus ought to stand or fall together even where the saving provision is concerned.

105 In our judgment, the commercial substance of the Transaction has been sufficiently recognised by our finding that the entire Transaction is a single indirect acquisition by IHC of its own shares for the purposes of ss 76(1A)(*a*)(i) and 76A(1)(*a*), which renders the entire indirect acquisition void.

106 Equally, however, we must also give effect to s 76A(1A) as purposively interpreted. Section 76A(1A) has its own particular scope of application, as the terminology it employs and its legislative history shows. Indeed, instead of referring to the "contract or transaction" mentioned in s 76A(1)(*a*), or even the "[direct] or [indirect] … acqui[sition]" mentioned in s 76(1A)(*a*)(i), the provision uses the quite different term "disposition" instead. And as we have noted, the term "disposition" originates in the specific context of the scripless trading system, which was intended to cater for specific ills. Thus, the statutory language of s 76A(1A) circumscribes it to a narrow field of application, which accords with the fact, as mentioned above, that it is only a *saving* provision that is meant to operate as an *exception* to the general prohibition in s 76(1A)(*a*)(i).

107 It follows from this that the analysis does not turn so much on the various components of the Transaction having been separated in ignorance of their

commercial substance, as the Crest Funds contend, as on the fact that different statutory provisions have been examined and applied according to their respective parameters. The proper analysis is *not* that the various components of the Transaction are separated at the outset and each held to be void, but with one component then held to be saved by s 76A(1A). Instead, the correct approach, which we have applied here, is to consider at the first step the entire indirect acquisition of IHC shares that was effected by the Transaction as a whole because s 76(1A)(*a*)(i) also captures a company's indirect acquisition of its own shares. At the second step, however, in examining whether s 76A(1A) applies to any part or the whole of the Transaction, s 76A(1A) must be given its appropriate scope, no more and no less, and thus, only that part of the Transaction which s 76A(1A) was intended to save will be saved. The Judge therefore did not err in finding that only the open market acquisitions, which it is undisputed were made by way of book entry in the Depository Register, were saved by s 76A(1A).

Issue 2: are there any voidable "related" transactions?

108 From the way the parties framed their respective cases, Issue 2 would have examined the question whether the loan agreements are "related" to the prohibited share acquisitions, which comprise only the trust arrangement and the open market acquisitions, so as to be voidable at IHC's option pursuant to s 76A(2). Section 76A(2) provides:

> Subject to subsection (1), a contract or transaction made or entered into in contravention of section 76, *or a contract or transaction related to such contract or transaction*, shall be voidable at the option of the company. The company may, subject to the following provisions of this section, avoid any contract or transaction to which this subsection applies by giving notice in writing to the other party or parties to the contract or transaction. [emphasis added]

109 Because of our finding that the entire Transaction is caught by the prohibition in s 76(1A)(*a*)(i) against a company acquiring its own shares and thus made *void* by s 76A(1)(*a*) (apart from the open market acquisitions, which are saved by s 76A(1A)), it becomes unnecessary to consider whether there is any "contract or transaction related to [the Transaction]" which is voidable for the purposes of s 76A(2), and we say nothing more on this at this time.

Issue 3: is IHC estopped from avoiding the loan agreements?

The Crest Funds' arguments on estoppel

110 The Crest Funds have a final string to their bow. They argue that IHC is estopped from avoiding the loan agreements by virtue of certain representations it made in the Standby Facility Agreement, which representations the Crest Funds relied upon to their detriment. In their written case, the Crest Funds focus on two representations, and we reproduce an extract here:

> … The Standby Facility contained various contractual representations by IHC, including:
>
> > (a) That IHC would take all necessary steps to "enable each of [IHC and its subsidiaries] to lawfully enter into … and/or to perform and comply with its respective obligations under the [Standby Facility and the supporting security agreements]"; and
> >
> > (b) That "the entry into and the exercise of rights or performance of or compliance with the obligations under [the Standby Facility and the supporting security agreements] does not and will not violate or exceed any power or restriction granted or imposed by … any law, regulation, authorisation, directive or order … to which [IHC] is subject".
>
> [emphasis in original omitted]

111 These representations correspond to cll 3.2(e)(i) and 3.2(f)(i) of the Standby Facility Agreement. We reproduce these here for completeness:

> **3.2 Warranties as to Status.** Each of the Warrantors [meaning IHC, Mr Fan and Mr Aathar] represents, warrants and/or undertakes to the Investors [meaning the Crest Funds], on a joint and several basis, that:
>
> …
>
> (e) all actions, conditions and things required to be taken, fulfilled and/or done (including, without limitation, the giving of any notifications, the delivery of any forms or documentation, the obtaining of any consents or approvals or the making or filing of any registrations) to:
>
> (i) enable each Group Company [defined in cl 1.1 of the Standby Facility Agreement as IHC and three of its subsidiaries] to lawfully enter into, exercise its rights and/or to perform and comply with its respective obligations under the Transaction Documents …
>
> …
>
> have been or will be taken, fulfilled and done prior to the Disbursement Date.
>
> (f) the entry into and the exercise of rights or performance of or compliance with the obligations under the Transaction Documents does not and will not violate or exceed any power or restriction granted or imposed by and/or amount to an event of default under:
>
> (i) any law, regulation, authorisation, directive or order (whether or not having the force of law) to which any Group Company or any of the Warrantor [*sic*] is subject …
>
> …
>
> …

112 The Crest Funds argue that these warranties amount to clear and unequivocal representations of fact that the entry into the Standby Facility Agreement would not contravene any laws, and also representations in the form of promises that IHC would take all necessary steps to enable it lawfully to enter into the Standby Facility. This means that IHC is estopped by estoppel by representation and promissory estoppel from seeking now to avoid the loan agreements.

113 IHC does not contest that the warranties relied on by the Crest Funds could amount to representations that might serve as the basis of an estoppel. Instead, the focus of its submissions on this issue is that any such estoppel cannot be allowed to stand in defiance of the statutory prohibition in s 76(1A)(*a*)(i) against a company acquiring its own shares and the corresponding voiding provision in s 76A(1)(*a*).

114 Before we turn to consider the law on estoppels in defiance of a statute, we digress to consider the purport of the representations relied upon by IHC. The Judge found that the clauses reproduced at [111] above were tantamount to a representation by IHC that it had obtained the necessary "whitewash" approvals to acquire its own shares under s 76B of the CA: see GD at [68].

115 Section 76B of the CA sets out some general requirements for a company to be able to purchase or otherwise acquire its own shares if it is expressly permitted to do so by its constitution: see s 76B(1). But s 76B has to operate in tandem with any one of the other provisions in ss 76C to 76G of the CA, which set out specific statutory conditions for share repurchases to take place in a variety of scenarios, for example, where the share acquisitions are to be done off-market on an equal access scheme (s 76C), or where the acquisitions are to be done on the market (s 76E). If the general requirements in s 76B as well as the particular requirements in such provisions of ss 76C to 76G as might be applicable are complied with and, where treasury shares are concerned, the conditions in ss 76H to 76K are met, then notwithstanding the prohibition in s 76(1A)(*a*)(i), a company will be permitted to acquire its own shares: see s 76B(1).

116 It is unnecessary for us to go through each of the scenarios in ss 76C to 76G in detail. It suffices for the moment to note that the statutory conditions are

precise, detailed and comprehensive. A sample of the statutory requirements illustrates this. Regardless of which scenario in ss 76C to 76G applies, the common requirements in s 76B must be met. Section 76B(5) provides that shares that are purchased or acquired pursuant to ss 76C, 76D, 76DA or 76E shall be deemed to be cancelled immediately upon their purchase or acquisition, unless they are held in treasury in accordance with s 76H. Section 76H(2) in turn requires that any shares purchased by a company must be held in the company's own name. Further, s 76B(9) requires a public company that has purchased its own shares to lodge a notice of purchase or acquisition in the prescribed form with the Registrar of Companies. Sections 76C to 76G then set out detailed requirements of their own as to the respective procedures for effecting a share repurchase.

117 It becomes immediately evident from the complexity of the provisions in ss 76B to 76G of the CA that a company must meet stringent conditions before it can acquire its own shares. We return to this point below when we consider whether the representations here were sufficient to establish an estoppel that can operate in defiance of ss 76(1A)(*a*)(i) and 76A(1)(*a*) of the CA.

The law on estoppel in defiance of a statute

118 The parties agree on the two cases which might apply in this scenario. The first is the High Court's decision in *Joshua Steven v Joshua Deborah Steven and others* [2004] 4 SLR(R) 403 ("*Joshua Steven*"); the second is the decision of the Court of Appeal in *Cupid Jewels Pte Ltd v Orchard Central Pte Ltd and another appeal* [2014] 2 SLR 156 ("*Cupid Jewels*"). The question here is whether the present facts and representations are more analogous to those in the former or those in the latter.

119 In *Joshua Steven*, the parties were all either members or former members of a group known as the House of Israel. The parties resided at a landed property in Sembawang Place. The plaintiff, who was one of five registered owners of the property, sought an order for the sale of the property. The defendants resisted the action on the basis that they had a beneficial interest in the property by way of proprietary estoppel. The High Court held that the defendants could not rely on such an estoppel in defiance of a statute. Three of the defendants were foreigners when the property was purchased, and would not have been permitted to acquire an interest in the property under the Residential Property Act (Cap 274, 1985 Rev Ed) (the "RPA"). Thus, there could be no estoppel because if there were an estoppel, it would operate in defiance of the RPA and confer on the three defendants who were foreigners a status which the statute prohibited them from acquiring.

120 In *Cupid Jewels*, the tenant alleged that its landlord had represented that it would not enforce its legal rights under the lease. The landlord, however, then applied for a writ of distress to recover the rental arrears owed by the tenant. The tenant argued that the landlord was estopped by promissory estoppel from doing so. The Court of Appeal held that promissory estoppel could apply in principle, but that it did not apply on the facts of the case. The following two paragraphs of the Court of Appeal's judgment are important:

> 37 … In *Joshua Steven*, the property concerned was subject to the Residential Property Act (Cap 274, 1985 Rev Ed) ("the RPA") which expressly restricted the rights of foreigners to acquire an interest in the property in issue. It was within this specific context that Tan J held that a party cannot rely on estoppel in defiance of a statute, because as explained by Viscount Radcliffe in *Kok Hoong* [*v Leong Cheong Kweng Mines Ltd* [1964] AC 993], there are (*Joshua Steven* at [15]):
>
> > … rules that preclude a court from allowing an estoppel, if to do so would be to *act in the face of a statute* and to give recognition through the admission of one of the

> parties to *a state of affairs which the law has positively declared not to subsist*. [emphasis added]
>
> ***Whether or not an estoppel can be applied depends on whether allowing it would act "in the face of a statute" and … effectively allow "a state of affairs which the law has positively declared not to subsist".*** The purported estoppel in *Joshua Steven* clearly fell within this scope since the RPA expressly imposed an *express prohibition* against the very thing which the estoppel, if recognised, would result in (*ie*, a foreigner having beneficial interest in property restricted under the RPA).
>
> 38 In contrast, in the present case, the Act [meaning the Distress Act (Cap 84, 1996 Rev Ed)] did not *require* a Writ of Distress to be applied for and executed whenever the conditions of s 5(1) are satisfied. The use of the word "may" in s 5 of the Act which provided that "[a] landlord or his agent duly authorised in writing *may* apply ex parte to a judge or registrar for an order for the issue of a [Writ of Distress]" [emphasis added] indicated that the Act was merely *permissive* and not mandatory. That the Act conferred on landlords a special status by way of the special remedy of distress did not necessarily mean that recognising an estoppel would be in defiance of the Act. There being no legal basis to preclude the application of the doctrine of promissory estoppel in the present case, we accordingly affirmed the Judge's holding on this preliminary point.
>
> [emphasis in original in italics; emphasis added in bold italics]

Analysis and application to the facts

121 The Crest Funds argue that the representations here fall within the situation envisaged in *Cupid Jewels*. They argue that if IHC were estopped from contending that the loan agreements are voidable for being in contravention of the CA, this would not "effectively allow 'a state of affairs which the law has positively declared not to subsist'". This is because these agreements are only *voidable* and not void, and thus, IHC has a right of avoidance that it does not *necessarily* have to exercise and, indeed, can be estopped from exercising, just as the landlord in *Cupid Jewels* had a right to apply for distress but could have been restrained from exercising that right.

122 We disagree. We have determined that the entire Transaction, including the loan agreements, is a single, composite transaction that is caught by the prohibition in s 76(1A)(*a*)(i) and rendered void by s 76A(1)(*a*), save that s 76A(1A) dis-applies the voiding provision where the open market acquisitions are concerned. IHC thus does not in fact have an option to avoid that it can choose to exercise or not. This makes the present case more analogous to *Joshua Steven* because s 76A(1)(*a*) has the effect of declaring the state of affairs that the loan agreements, too, are void. An estoppel cannot apply in this situation because to allow it to operate would effectively be to allow "a state of affairs which the law has positively declared not to subsist" – or, to put it in more explicit terms, to permit a state of affairs where the loan agreements are not void when we have found that s 76A(1)(*a*) makes them so.

123 That s 76A(1)(*a*) has this effect is made clear by contrasting it with s 76A(2), which is the provision governing those contracts and transactions *related* to "a contract or transaction made or entered into in contravention of section 76". For present purposes, s 76A(1)(*a*) quite simply states that a transaction by which a company acquires its own shares or units of its own shares in contravention of s 76 "shall be void". The company does not have the option of *not* avoiding the transaction even if the transaction is found to have been beneficial to it. In contrast, s 76A(2) expressly provides that "[s]ubject to [the voiding provision in s 76A(1)], a contract or transaction made or entered into in contravention of section 76, or a contract or transaction related to such contract or transaction, *shall be voidable at the option of the company*" [emphasis added]. Section 76A(2) then goes on to set out the procedure by which the company ought to avoid the contract or transaction if it so chooses, which is by giving notice in writing to the other party or parties to the contract or transaction.

124 Significantly, the Crest Funds have not pursued the argument that the estoppels which they rely on can operate in the face of the voiding provision in s 76A(1)(*a*), and have only pursued the point in so far as the loan agreements are considered to be voidable as related transactions for the purposes of s 76A(2). For the reasons we have already canvassed, we have determined that the entire Transaction here, including the loan agreements, is void, although the open market acquisitions are saved by s 76A(1A).

125 To this, it might be said that what IHC is estopped from asserting is not that the Transaction has been made void by s 76A(1)(*a*), but rather, that the Transaction has not been "whitewashed" as required under the CA. If such an estoppel were made out, IHC must accept that as between it and the Crest Funds, the Transaction *has* been "whitewashed" and is thus not void, and therefore, IHC cannot now contend that the Transaction is void.

126 In our judgment, this argument simply does not help the Crest Funds. Such an estoppel would nevertheless impermissibly operate in defiance of the CA. We have found that there has been a prohibited indirect acquisition by IHC of its own shares in contravention of s 76(1A)(*a*)(i). There is no dispute that the "whitewash" procedures stipulated in the CA were not actually carried out. The position therefore is that by virtue of s 76A(1)(*a*), the Transaction is void, although the open market acquisitions are saved by s 76A(1A). The estoppel posited at [125] above, if allowed to operate, would, create exactly the opposite state of affairs – that the Transaction is not void because it has been "whitewashed". It is difficult to see how this could be anything other than permitting a state of affairs that the law has positively declared not to subsist; the two states of affairs are mutually contradictory. As between the state of affairs that the CA has declared (that the Transaction is void, apart from the open market acquisitions, which are saved by s 76A(1A)) and the state of affairs

that the estoppel would establish (that the Transaction is not void), the estoppel must cede to the statute.

127 We turn to a further argument raised by counsel for the Crest Funds, Mr Alvin Yeo Khirn Hai SC. In oral argument before us, Mr Yeo was at pains to emphasise that if IHC were not estopped from avoiding the loan agreements, IHC would be able to shirk its responsibilities and obligations under these agreements entirely even though it was the main instigator and beneficiary of the Transaction. The Crest Funds were certainly participants in a prohibited indirect acquisition, but as between them and IHC, IHC played a far more involved role. IHC proposed the establishment of the Standby Facility, suggested that the Crest entities purchase its shares for it and, acting through Mr Aathar, instructed and directed the Crest entities to make each of the 14 open market acquisitions of its shares, which instructions were executed by EFIII. Moreover, IHC represented to the Crest Funds that it would take all necessary steps to ensure that the Transaction was lawful, which representations the Crest Funds relied upon to their detriment.

128 Leaving aside for the moment the question whether the Crest Funds did actually rely on the representations, which the Judge found they had not (see the GD at [69]), there is no denying the prime role IHC played in procuring the Transaction. We can therefore see the intuitive appeal in the argument that if any party ought not to be allowed to unwind the Transaction, that party ought to be IHC.

129 In the final analysis, however, we consider that IHC is entitled to rely on the prohibition in s 76(1A)(*a*)(i) and the voiding provision in s 76A(1)(*a*). This is so for four reasons. First, s 76A(1)(*a*) simply declares that a transaction is void once it is found to be a prohibited share acquisition caught by the terms

of s 76(1A)(*a*)(i). This is a conclusion effected by the operation of law and does not depend on the relative culpability of the particular parties to the transaction.

130 Second, quite apart from what the statute provides, it is relevant also to consider the scope of the representations made in this case. The clauses reproduced at [111] above are *not* to the effect that IHC would not exercise its legal right under s 76A(2) to avoid the loan agreements, or that it would not assert its legal right to rely on the voiding provision in s 76A(1)(*a*). This is unlike the position in *Cupid Jewels*, where the alleged representation was that the landlord would not enforce its legal rights, which representation, had it been made out, would have allowed a promissory estoppel to operate. Instead, the clauses here, at their highest, are to the effect that IHC would take or had taken the necessary steps to "whitewash" the Transaction, and not that IHC would not enforce its rights under ss 76A(1)(*a*) and 76A(2) against other parties. The Judge made the same point at [68] of the GD.

131 This brings us to the third point, which is that considerable caution must be taken before generic representations and warranties of the sort featured here can be relied upon to establish an estoppel that would allow the Crest Funds simply to sidestep the stringent statutory requirements set out in ss 76B to 76G and, where treasury shares are concerned, ss 76H to 76K for effecting a "whitewash" of a company's acquisition of its own shares. Such broad representations and warranties are commonplace in commercial contracts. If these widely-framed generic representations and warranties could be read as a clear and unequivocal representation by a company that it would not exercise its legal right to rely on the voiding provision in s 76A(1)(*a*), then that right loses much of its force and the significance of the statutory prohibition in s 76(1A)(*a*)(i) on a company acquiring its own shares would in turn be

significantly diluted. This would in effect allow a company to easily sidestep the carefully structured "whitewash" procedures in ss 76B to 76K.

132 Fourth, finding that IHC may rely on the voiding provision in s 76A(1)(*a*) also accords with the purpose behind the prohibition in s 76(1A)(*a*)(i). As we have explained in our discussion above at [53]–[62], the rationale behind this prohibition is to maintain a company's share capital and prevent the company's capital and/or assets from being depleted or put at risk. And lying behind this rationale, we can detect a more fundamental concern that a depletion of a company's capital and/or assets would reduce the pool of assets that creditors of the company might look to in the event of the company's insolvency. In our view, IHC's new management is just as entitled as any other party to rely on the prohibition in s 76(1A)(*a*)(i) to achieve these objectives because they enure not purely to IHC's benefit, but also to the benefit of third parties such as IHC's creditors.

133 We consider that these four reasons taken together weigh strongly in favour of IHC being allowed to rely on the prohibition in s 76(1A)(*a*)(i) and the voiding provision in s 76A(1)(*a*). In the circumstances, it is not necessary for us to decide whether the Crest Funds did indeed rely on the representations which IHC is alleged to have made in the Standby Facility Agreement because even if there were such reliance, it cannot give rise to the estoppel advanced by the Crest Funds.

Conclusion

134 For all these reasons, we hold that the entire Transaction in this case, comprising the loan agreements, the open market acquisitions and the trust arrangement, collectively amounts to a prohibited indirect acquisition for the purposes of the prohibition in s 76(1A)(*a*)(i) of the CA against a company

acquiring its own shares. Section 76A(1)(*a*) thus operates to render the entire Transaction void. The open market acquisitions, however, are saved by s 76A(1A) from being made void as they involved dispositions of book-entry securities.

135 The Crest Funds are unable to succeed in their submission that IHC is estopped from asserting that the loan agreements are void. These agreements have been made void by s 76A(1)(*a*), and to hold that IHC is estopped from relying on this would be to allow an estoppel to operate in defiance of the clear language and policy of ss 76(1A)(*a*)(i) and 76A(1)(*a*) as well as the associated "whitewash" procedures that a company must comply with before it may acquire its own shares. This is impermissible.

136 The practical result of this is that EFIII is now the legal and beneficial owner of the IHC shares it acquired through the open market acquisitions. Further, IHC owes no contractual obligations or liability to the Crest Funds under the loan agreements as these are void.

137 The Crest Funds, however, may have an avenue of recourse. As the Judge noted in her GD at [5], it was not disputed by IHC that the Crest Funds have recourse to s 76A(4) of the CA, and may apply to the court for any order or orders as the court thinks just and equitable against IHC or any other person in respect of any loss or damage they have suffered or are likely to suffer as a result of being party to the Transaction. The Crest Funds have yet to avail themselves of s 76A(4), and this provision was therefore not applied or analysed by the Judge. In these circumstances, we express no view on s 76A(4) and leave the question of its applicability instead to a future occasion should it come before us.

138 In summary, although we differ from the Judge in our characterisation of the Transaction, we agree with the outcome that she arrived at. We therefore dismiss this appeal. Unless the parties are able to come to an agreement on costs, they are to furnish written submissions, limited to five pages each, on the appropriate costs orders in terms of quantum and liability within two weeks of the date of this judgment.

Sundaresh Menon	Judith Prakash	Steven Chong
Chief Justice	Judge of Appeal	Judge of Appeal

Alvin Yeo Khirn Hai SC, Manoj Pillay Sandrasegara, Leo Zhen Wei Lionel, Chng Zi Zhao Joel, Tan Kai Yun and Wong Zheng Hui, Daryl (WongPartnership LLP) for the appellants;
Lee Eng Beng SC, Chow Chao Wu Jansen, Lee Hui Yi and Danitza Hon Cai Xia (Rajah & Tann Singapore LLP) for the respondent.