

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

[2023] SGHC 285

Originating Application No 657 of 2023

In the matter of Sections 361 and 438 of the
Insolvency, Restructuring and Dissolution
Act 2018

And

In the matter of Order 4, Rule 7 of the Rules
of Court 2021

Between

- (1) DDP
In his capacity as the joint and several
trustees of the bankruptcy estate of [B]
- (2) DDQ
In his capacity as the joint and several
trustees of the bankruptcy estate of [B]

... Claimants

And

- (1) DDR (a minor)
- (2) The Registrar of Titles

... Defendants

JUDGMENT

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

[Insolvency Law — Avoidance of transactions — Transactions defrauding creditors]

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**DDP (in his capacity as the joint and several trustees of the
bankruptcy estate of [B]) and another**

v

DDR (a minor) and another

[2023] SGHC 285

General Division of the High Court — Originating Application No 657 of
2023

Goh Yihan J

14 August 2023

10 October 2023

Judgment reserved.

Goh Yihan J:

1 This is an application brought by the claimants, who are the joint and several trustees (“Private Trustees”) of the bankruptcy estate of [B], for the following principal reliefs against the defendants:

- (a) a declaration that the transfer (the “Transfer”) of the beneficial interest in the property located at [address redacted] (the “Property”) by [B] to the first defendant, *ie*, his son, pursuant to a Declaration of Trust dated 3 July 2020 (the “Trust Deed”) is an undervalue transaction within the meaning of s 361 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the “IRDA”);

- (b) further and/or in the alternative, a declaration that the Transfer was made with the intent to defraud the creditors of [B] within the meaning of s 438 of the IRDA;
- (c) pursuant to an order made in terms of (a) and/or (b) above, that the Trust Deed be set aside;
- (d) pursuant to an order made in terms of (a) and/or (b) above, that the beneficial ownership of the Property shall vest in the bankruptcy estate of [B]; and
- (e) pursuant to an order made in terms of (a) and/or (b) above, that the second defendant, *ie*, the Registrar of Titles, be directed to rectify the land register to reflect that the Property vests in the bankruptcy estate of [B] absolutely and is not held on trust for the benefit of the first defendant.

2 To be clear, the first defendant, [DDR], is the son of [B] and his wife, [C]. [C] filed an affidavit stating that she is not taking a position on whether this application should be granted in favour of the claimants.¹ [C] was content for the claimants, in their capacities as the Private Trustees, to persuade the court that this application satisfies the necessary legal requirements.

3 After considering the claimants' submissions, I make an order in terms of prayers (a), (c), (d), and (e), as set out at [1] above. I make no order as to prayer (b) because I have not had the benefit of full arguments from both sides on the application of s 438 of the IRDA, which has not been fully interpreted and applied in Singapore before. However, because the claimants do make

¹ Affidavit of [C] dated 2 August 2023 (“[C]’s affidavit”) at para 5.

submissions on s 438, I take this opportunity to make some tentative observations on its application.

Background facts

4 I begin with the background facts. [B] is the beneficial owner of several companies (the “Companies”). The Companies first applied to place themselves in judicial management, which the High Court granted.² Later, the interim judicial managers applied to wind up the Companies, on the basis that “none of the purposes of a judicial management as set out in section 89(1) of the IRDA [could] be achieved”.³ The High Court ordered that each of the Companies be wound up by orders of court.⁴

5 Subsequently, some of the Companies and the liquidators (“the plaintiffs”) commenced a suit in the High Court against, amongst other defendants, [B]. The plaintiffs’ case against [B] was principally premised on the latter’s illegal transfer of investors’ assets to himself without any proper or legitimate basis. The plaintiffs obtained summary judgment against [B] for the investors’ assets.⁵

6 Subsequently, the plaintiffs served a statutory demand on [B]. The plaintiffs demanded repayment of the sums awarded in the summary judgment. [B] failed to satisfy this statutory demand. The plaintiffs then applied for a bankruptcy order against [B]. The High Court ordered that [B] be adjudged a

² Affidavit of [DDP] dated 28 June 2023 (“[DDP]’s affidavit”) at pp 25–30.

³ [DDP]’s affidavit at p 70, paras 6.1.1–6.1.2.

⁴ [DDP]’s affidavit at pp 165–170.

⁵ [DDP]’s affidavit at pp 341–343.

bankrupt. The court also appointed the claimants to act as the Private Trustees of the bankruptcy estate of [B].

7 During their ensuing investigations into [B]’s affairs, the claimants discovered the Trust Deed. The Trust Deed was made by [B] on 3 July 2020 in the following terms:⁶

THIS **DECLARATION OF TRUST** is made this day of **3rd** JULY 2020 by the following parties:-

[B] (NRIC NO. redacted) of [address redacted] (Hereinafter called “the Trustee”).

[emphasis in original]

8 The Trust Deed recorded that upon [B]’s purchase of the Property, [B] would hold the Property on trust for the first defendant, even though the first defendant did not pay for the purchase of the Property. The relevant terms of the Trust Deed are as follows:⁷

WHEREAS:-

(1) The Trustee [ie, [B]] intends to purchase the property known as **[address redacted]** (“the Property”),

(2) The purchase of the Property is entirely for the benefit of **[the first defendant] ...** (“the Beneficiary”) who is the SON of the Trustee **[B]**.

(3) *Upon the purchase of the Property, the Beneficiary [ie, the first defendant] shall at all times be the beneficial owner of the Property notwithstanding that the Beneficiary did not pay for the purchase of the Property.*

(4) The Trustee has agreed to execute this Declaration in respect of the Property in the manner hereinafter appearing.

⁶ [DDP]’s affidavit at p 353.

⁷ [DDP]’s affidavit at p 353.

NOW THIS INDENTURE WITNESSETH that in pursuance of the premises the Trustee [*ie*, [B]] hereby declares that *the Trustee shall hold the Property as sole proprietor in trust for the Beneficiary [ie, the first defendant]* and that the Trustee will at his own discretion or at the requests of the Beneficiary transfer the Property to such person or persons at such time or times and in such manner or otherwise deal with the Property as the Trustee deems fit or as the Beneficiary shall direct.

[emphasis in original in bold; emphasis added in italics]

9 Following the execution of the Trust Deed, [B] purchased the Property by way of a contract dated 8 July 2020. On 30 September 2020, by way of a registration of the Transfer Instrument, the legal title in the Property was transferred to [B].⁸ As such, pursuant to the Trust Deed, the beneficial ownership of the Property was passed to the first defendant on 30 September 2020.

10 The claimants have therefore commenced this application to, among other things, set aside the Trust Deed, and return the beneficial interest in the Property to the bankruptcy estate of [B].

My decision: the application is granted pursuant to s 361 of the IRDA

11 I find that the Transfer of the beneficial interest in the Property by [B] to the first defendant pursuant to the Trust Deed is a transaction at an undervalue within the meaning of s 361 of the IRDA.

The generally applicable law

12 Sections 361(1) and (2) of the IRDA provide as follows:

⁸ [DDP]'s affidavit at pp 357–360.

Transactions at undervalue

361.—(1) Subject to this section and sections 363 and 365, where an individual is adjudged bankrupt and the individual has at the relevant time (as defined in section 363) entered into a transaction with any person at an undervalue, the Official Assignee may apply to the Court for an order under this section.

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

13 Accordingly, pursuant to s 361 read with the other relevant provisions of the IRDA, the court is entitled to set aside a transaction entered into by an adjudged bankrupt with any person if:

- (a) the transaction was at an undervalue (as defined in s 361(3) of the IRDA);
- (b) the individual entered into the transaction within the relevant time, *ie*, three years before commencement of the bankruptcy application in court (see s 361(1) read with s 363(1)(a)(ii) of the IRDA); and
- (c) the individual was insolvent at the time of the transaction or becomes insolvent in consequence of the transaction (see s 363(2) of the IRDA).

14 For the reasons that I explain below, I find that the three elements set out above are satisfied in the present case.

The requirements under s 361(1) of the IRDA are satisfied

The transfer of beneficial interest in the Property to the first defendant is a transaction at an undervalue

15 First, I am satisfied that the transfer of the beneficial interest in the Property to the first defendant is a transaction at an undervalue. In this regard, s 361(3) of the IRDA defines a transaction at an undervalue in the following terms:

(3) For the purposes of this section and sections 363 and 365, an individual enters into a transaction with a person at an undervalue if —

(a) the individual makes a gift to that person or the individual otherwise enters into a transaction with that person on terms that provide for the individual to receive no consideration;

(b) the individual enters into a transaction with that person in consideration of marriage; or

(c) the individual enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.

16 It is clear that [B]'s disposal of his beneficial interest in the Property pursuant to the Trust Deed for the benefit of the first defendant, was a gift *inter vivos* and is thus a transaction at an undervalue under s 361(3)(a) of the IRDA. This is because in [C]'s first affidavit, she states that “[she] asked [B] to purchase the Property *as a gift* for [their] son [*ie*, the first defendant] as well” [emphasis added].⁹

⁹ [C]'s affidavit at para 7.

17 In the alternative, it is also clear that [B]’s disposal of his beneficial interest in the Property is a transaction at an undervalue under s 361(3)(a) of the IRDA because [B] received no consideration from the transaction. Indeed, the Trust Deed expressly states that “the [first defendant] shall at all times be the beneficial owner of the Property notwithstanding that the [first defendant] did not pay for the purchase of the Property”.¹⁰

18 Finally, in the further alternative, it is also clear that the transaction is a transaction at an undervalue under s 361(3)(c) of the IRDA because [B] received no consideration at all in return for his transfer of beneficial interest in the Property. This must mean that the value of the consideration that [B] received in exchange (of which there was none) must necessarily be, in money or money’s worth, significantly less than the value, in money or money’s worth, of the consideration provided by [B] (see the Court of Appeal decision of *Rothstar Group Ltd v Leow Quek Shiong and other appeals* [2022] 2 SLR 158 at [25]–[26], [29], and [34]).

The transaction was made within the relevant time

19 Second, I am satisfied that the transaction was made within the relevant time. [B]’s transfer of the beneficial interest in the Property to the first defendant on 30 September 2020, which was pursuant to the Trust Deed, occurred within three years before the bankruptcy application was filed on 12 July 2022.

¹⁰ [DDP]’s affidavit at p 353.

[B] was insolvent when he transferred the beneficial interest in the Property to the first defendant

20 Third, I am satisfied that [B] was insolvent when he transferred the beneficial interest in the Property to the first defendant. In this regard, under s 363(3) of the IRDA, because the first defendant is an associate of [B], [B] is presumed to have been insolvent at the time of the transaction. Section 363(3) provides as follows:

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

For clarity, s 363(2), which is referred to in s 363(3), pertains to the requirement that the individual who enters into a transaction at an undervalue is insolvent.

21 In this regard, it is clear that an “associate” for the purposes of s 363(3) includes a “relative”, which is in turn defined in s 364(7) of the IRDA as a “lineal ancestor or lineal descendant”. The first defendant, being [B]’s son, is his “associate” for the purposes of s 363(3). Therefore, the presumption of insolvency in s 363(3) operates against [B]. The burden thus lies on the first defendant, as the transferee of the beneficial interest in the Property, to disprove [B]’s insolvency at the time of the transaction (see the High Court decision of *Sim Guan Seng and others v One Organisation Ltd and others* [2023] 3 SLR 590 at [156]).

22 However, the first defendant has not adduced any evidence to disprove [B]’s insolvency at the time of the transaction. Accordingly, for the purposes of s 361 read with s 363(2) of the IRDA, [B] was insolvent at the time when he transferred beneficial interest in the Property to the first defendant.

No good reason not to make the order under s 361(2) of the IRDA

23 In the circumstances, I am of the view that it is appropriate to make an order under s 361(2) of the IRDA. However, it is clear that the court has a discretion *not* to make the order restoring the position to what it would have been had the bankrupt individual not entered into the transaction (see the High Court decision of *Christie, Hamish Alexander (as private trustee in bankruptcy of Tan Boon Kian) v Tan Boon Kian and others* [2021] 4 SLR 809 (“*Christie, Hamish Alexander*”) at [79]). That said, the court will usually make the order if all the statutory requirements are satisfied (see *Christie, Hamish Alexander* at [89]). Since the first defendant has not advanced any reason for me to exercise my discretion not to make the order under s 361(2), I accordingly do so.

Some observations on s 438 of the IRDA

24 The claimants further prayed for an alternative order that the Transfer was made with the intent to defraud the creditors of [B] within the meaning of s 438 of the IRDA. As mentioned above (at [3]), I make no order as to this prayer because I have not had the benefit of full arguments from both sides on the application of s 438(4) of the IRDA, which has not been fully interpreted and applied in Singapore before. However, since the claimants have made submissions on the application of this section, I take the opportunity to make some observations on its application.

25 As a preliminary point, it bears mentioning that reg 15 of the Insolvency, Restructuring and Dissolution (Saving and Transitional Provisions) Regulations 2020 provides that s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) (the “CLPA 1994”) continues to apply to any conveyance of property before 30 July 2020. In the present case, the Trust Deed entered into on 3 July 2020 merely expressed [B]’s intention to purchase the

Property. It was only on 30 September 2020 that the legal title in the Property was passed to [B] by way of the registration of the Transfer Instrument on that date. As such, the beneficial ownership of the Property was transferred to the first defendant only on 30 September 2020. On the basis of these facts, the “conveyance” of the Property for the purposes of reg 15 should be 30 September 2020. Therefore, s 438 of the IRDA, and not s 73B of the CLPA, applies to the present case.

The generally applicable law

26 With the above in mind, s 438 of the IRDA provides, in so far as relevant, as follows:

Transactions defrauding creditors

438.—(1) This section relates to any transaction entered into by a person (called in this section and section 439 the debtor) with another person at an undervalue.

(2) For the purposes of subsection (1), a debtor enters into a transaction with another person at an undervalue if —

(a) the debtor makes a gift to the other person or the debtor otherwise enters into a transaction with the other person on terms that provide for the debtor to receive no consideration;

(b) the debtor enters into a transaction with the other person in consideration of marriage; or

(c) the debtor enters into a transaction with the other person for a consideration the value of which, in money or money’s worth, is significantly less than the value, in money or money’s worth, of the consideration provided by the debtor.

(3) Where a debtor enters into a transaction at an undervalue, the Court may, if satisfied under subsection (4), make such order as the Court thinks fit for —

(a) restoring the position to what it would have been if the transaction had not been entered into; and

(b) protecting the interests of any person who is, or is capable of being, prejudiced by the transaction (called in this section a victim).

(4) An order under subsection (3) may only be made if the Court is satisfied that a transaction at an undervalue was entered into by a debtor for the purpose —

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against the debtor; or

(b) of otherwise prejudicing the interests of any person in relation to a claim which the person is making or may make against the debtor.

...

27 Accordingly, under s 438 of the IRDA, the court can set aside a transaction at an undervalue that a debtor entered into with another person, if the transaction was entered into for the purposes set out in s 438(4). Under s 438(2), a transaction at an “undervalue” is defined in identical terms with s 361(3) of the IRDA. Where these requirements are met, the court has the discretion to make an order under the terms of s 438(3).

28 It is relevant to highlight that s 438 was introduced into the IRDA to replace s 73B of the CLPA 1994. The following observations made by the Law Reform Committee in 2013 are instructive (see Singapore, Ministry of Law, *Report of the Insolvency Law Review Committee: Final Report* (2013) (Chairperson: Lee Eng Beng SC) (the “Report”) at pp 184–185).

(a) Section 73B of the CLPA 1994 mirrors the language of s 172 of the Law of Property Act 1925 (c 20) (UK), the latter having since been repealed and replaced with s 423 of the Insolvency Act 1986 (c 45) (UK) (the “UK IA”).

(b) There are three main differences between s 73B of the CLPA 1994 and s 423 of the UK IA. First, s 423 focuses on

transactions at an undervalue, which is a narrower category than s 73B that applies to “every conveyance of property”. Second, s 423 eschews the requirement of having to prove an “intention to defraud creditors” in favour of a subjective inquiry into the purpose of the transaction. Third, s 423 provides prescriptive remedies, while s 73B simply provides that a successfully impugned transaction is voidable.

(c) Given that claims under s 73B of the CLPA 1994 are closely intertwined with insolvency proceedings, s 73B should be shifted to the IRDA and amended to mirror s 423 of the UK IA. This has the advantage of, among others, ensuring that the scope of the provision coincides with its underlying policy rationale, *ie*, preserving the net asset value of the company for distribution amongst its creditors.

29 In my view, these observations are instructive as to how s 438 of the IRDA is to be interpreted. It is clear from these observations that s 438 of the IRDA is not meant to be an exact replica of s 73B of the CLPA 1994. Therefore, the cases interpreting s 73B may be of limited value in the interpretation of s 438. Conversely, as noted in the Report, the new s 438 of the IRDA is meant to mirror s 423 of the UK IA. This must mean that the cases interpreting s 423 of the UK IA are highly persuasive in the interpretation of s 438 of the IRDA. Of course, s 438 is to be interpreted with its underlying policy rationale in mind, which is to preserve the net asset value of the company concerned so as to maximise the possible distribution to the creditors.

The requirements under s 438 of the IRDA

30 I come now to the requirements under s 438 of the IRDA, which can be applied in three steps:

- (a) first, pursuant to s 438(1) of the IRDA, the court must be satisfied that the transaction concerned was entered into at an undervalue, as defined by s 438(2);
- (b) second, the court must then be satisfied that the transaction at an undervalue was entered into by the debtor for the purposes spelt out in s 438(4) of the IRDA, which broadly relate to the transaction being entered into with the intent to defraud or prejudice creditors;
- (c) third, the court can then make an order under s 438(3) of the IRDA.

First step: the transaction concerned must be one entered into at an undervalue

31 To begin, since s 438(2) defines a transaction at an undervalue in identical terms as s 361(3) of the IRDA, it follows that the same principles used to determine whether a transfer was a transaction at an undervalue for the purposes of s 361(3) must apply equally to s 438(2). There is therefore an established body of case law to guide the courts' application of s 438(2), in satisfaction of the requirement under s 439(1) that the transaction concerned being one that was entered into at an undervalue.

Second step: the court must be satisfied that the transaction at an undervalue was entered into by the debtor for the purposes spelt out in s 438(4) of the IRDA

32 I come now to s 438(4) of the IRDA, which requires a court to be satisfied that the transaction at an undervalue was entered into by a debtor for the purpose of either: (a) putting assets beyond the reach of a person who is making, or may at some time make, a claim against the debtor; or (b) otherwise prejudicing the interests of any person in relation to a claim which the person is

making or may make against the debtor. Since there is no Singapore decision that has interpreted s 438(4) of the IRDA, for the reasons that I have set out above in relation to the Report, I am of the view that the English Court of Appeal's interpretation of s 423 of the UK IA, which is *in pari materia* with s 438, would be instructive.

33 I turn first to the relevant sub provisions of s 423 of the UK IA, which are as follows:

423 Transactions defrauding creditors.

(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—

(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;

(b) he enters into a transaction with the other in consideration of marriage; or

(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—

(a) restoring the position to what it would have been if the transaction had not been entered into, and

(b) protecting the interests of persons who are victims of the transaction.

(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

...

34 In *BAT Industries plc and others v Sequana SA* [2019] Bus LR 2178, the English Court of Appeal held (at [66]) that it is sufficient to demonstrate that the debtor, who entered into the transaction at an undervalue sought to be set aside, subjectively intended to put assets beyond the reach of actual or potential creditors. This therefore eschews the requirement of having to prove an “intention to defraud creditors”, which was found in s 73B of the CLPA 1994. In this regard, the specified purpose need not be the sole or dominant purpose of the transaction.

35 Thus, in the English Court of Appeal decision of *Inland Revenue Commissioners v Hashmi* [2002] 2 BCLC 489, the Inland Revenue Commissioners (“IRC”) brought a claim under s 423 against a debtor. The debtor had purchased a property and on the same day executed a trust deed to transfer his beneficial interest therein to his son, in consideration of natural love and affection. The son claimed there were two purposes in making the trust deed: (a) the primary purpose of providing for the son; and (b) a secondary purpose of transferring the property to the son at an undervalue. However, the court found that the purpose of putting assets beyond the reach of a potential creditor did not have to be the dominant purpose for the transaction to be caught under s 423, and it sufficed if it was a substantial purpose. On the facts, the court found that the requirements in s 423 were satisfied and set aside the trust deed.

Third step: the court's exercise of discretion to make an order under s 438(3) of the IRDA

36 Once the requirements under s 438(3), read with ss 438(1), (2), and (4) of the IRDA, are satisfied, the court has a discretion to decide on the type of relief to be granted. The relief granted should be for the purposes laid out in ss 438(3)(a) and 438(3)(b) of the IRDA. In this regard, the examples of possible reliefs are set out in s 439 of the IRDA:

Provisions which may be made by order under section 438

439.—(1) Without limiting section 438(3) but subject to subsection (2), an order made under that section with respect to a transaction may —

- (a) require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is deemed to be made;
- (b) require any property to be so vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is deemed to be made, if the property represents, in any person's hands, the application either of the proceeds of sale of property transferred as part of the transaction or of money so transferred;
- (c) release or discharge (in whole or in part) any security given by the debtor;
- (d) require any person to pay to any other person in respect of benefits received from the debtor such sums as the Court may direct;
- (e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction to be under such new or revived obligations as the Court thinks appropriate; and
- (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction.

(2) An order under section 438 may affect the property of, or impose any obligation, on any person whether or not that person is the person with whom the debtor entered into the transaction, but must not —

(a) prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest; and

(b) require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless the person who received the benefit was a party to the transaction.

...

37 Section 425 of the UK IA is substantially similar:

425 Provision which may be made by order under s. 423.

(1) Without prejudice to the generality of section 423, an order made under that section with respect to a transaction may (subject as follows)—

(a) require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made;

(b) require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of the money so transferred;

(c) release or discharge (in whole or in part) any security given by the debtor;

(d) require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct;

(e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction to be under such new or revived obligations as the court thinks appropriate;

(f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and

for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction.

(2) An order under section 423 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction; but such an order—

(a) shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and

(b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

38 Applying ss 423 and 425 of the UK IA, in the English High Court decision of *4Eng Ltd v Harper and others* [2010] 1 BCLC 176 (“*4Eng Ltd*”) (at [13]), Sales J said that the making of any order requires a “further balancing of the interests of the transferor’s creditors and of the transferee to be determined by the court”. The learned judge laid down the following principles (at [13]–[14]), which I respectfully think could apply in the Singapore context:

(a) The nature of any order and the extent of the relief granted by the court should take into account the mental state of the transferee, and the degree of their involvement in the fraudulent scheme of the debtor/transferor to put assets out of the reach of his creditors.

(b) Where an asset has been transferred to a transferee who has no knowledge that the transferor acted with a relevant purpose in making the transfer, and the transferee has simply held the asset, ordinarily the appropriate order should be an order for the transfer of the asset to the transferor or to the creditors directly.

(c) However, if the transferee has changed his position on the basis of the receipt in a way that would make it unfair to him to repay the money, it would not be appropriate for the court to make an order requiring the transferee to pay back a sum equivalent to the amount he received.

39 Subsequently, the English High Court in *In re Fowlds (A Bankrupt) Bucknall and another v Wilson* [2022] 1 WLR 61 (“*Re Fowlds*”) added a gloss to the analysis in *4Eng Ltd* by drawing a distinction between the court’s exercise of its discretion under s 423 of the UK IA, and statutory clawback claims under ss 339 and 340 of the UK IA. Trower J found (at [69]) that it may be more appropriate to carry out a balancing exercise in s 423 cases, which is between the interests of the creditors or victims of the transferor on the one hand and the transferee on the other. This is because s 423 contemplates single victim or limited victim cases, in which it is more likely to be possible to strike a balance between the victim of the transferor and an innocent transferee (at [71]). On the other hand, in statutory clawback claims, the balancing exercise is between the interests of the transferee and all of those interested in the statutory scheme, which “will rarely be an exercise on which it is *appropriate* for the court to embark or even *practical* if it were to attempt to do so” (at [71]) [emphasis added].

40 Returning to the present case, while I have endeavoured to suggest how s 438 of the IRDA could be applied, I make no order as to prayer (b) of the present application in the absence of full arguments.

Conclusion

41 For all of these reasons, I make an order in terms of prayers (a), (c), (d), and (e), as set out at [1] above.

42 Unless the parties are able to agree on costs, they are to tender written submissions on the appropriate costs order within 14 days of this decision, limited to seven pages each.

Goh Yihan
Judge of the High Court

Lin Weiwen Moses and Manvindar Kaur Sethi d/o Sarwan Singh
(Shook Lin & Bok LLP) for the claimants;
Loo Chieh Ling Kate and Jerelyn Tay Yee Ying
(Ling Law Corporation) for the first defendant;
The second defendant absent and unrepresented.
