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

[2023] SGHCR 15

Originating Claim No 194 of 2023 (Summonses Nos 1965 and 1967 of 2023)

Between

(1) Xiang Da Marine Pte Ltd (in creditors' voluntary liquidation)
(2) Farooq Ahmad Mann

… *Claimants*

And

(1) Zhang Xianming
(2) Wu Jianshi
(3) Fu Ning Marine Pte Ltd
(4) Ji Ning Marine Pte Ltd
(5) Qing Ning Marine Pte Ltd

… *Defendants*

JUDGMENT

[Civil Procedure — Striking out]
[Insolvency Law — Avoidance of transactions — Transactions at an undervalue]

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Xiang Da Marine Pte Ltd (in creditors' voluntary liquidation) and another
v
Zhang Xianming and others

[2023] SGHCR 15

General Division of the High Court — Originating Claim No 194 of 2023
(Summonses Nos 1965 and 1967 of 2023)
AR Perry Peh
14 August 2023

7 September 2023 Judgment reserved.

AR Perry Peh:

Introduction

1 HC/SUM 1965/2023 ("SUM 1965") is an application by the third, fourth and fifth defendants in HC/OC 194/2023 ("OC 194") to strike out the claimants' claims against them in their entirety, pursuant to O 9 r 16 of the Rules of Court 2021 ("ROC 2021"). These claims arise out of a set of transactions under which the first claimant transferred its assets to the third to fifth defendants, which the claimants allege was a transaction at an undervalue within s 98(3)(*a*) and/or s 98(3)(*c*) of the Bankruptcy Act (Cap 20, 2008 Rev Ed) ("the Bankruptcy Act") read with s 329 of the Companies Act (Cap 50, 2006 Rev Ed) then-in-force ("the Companies Act"). The third to fifth defendants argue that the claims against them are unsustainable, either on the basis of the claimants' pleading alone, or in the light of the objective evidence and contemporaneous

documents relating to the transactions. As an alternative to striking out, in HC/SUM 1967/2023 ("SUM 1967"), the third to fifth defendants ask that the claimants provide security for their costs in defending the claims.

Background

2 The first claimant, Xiang Da Marine Pte Ltd ("Xiang Da") was a Singapore-incorporated company in the business of freight and ship management. It was placed into creditors' voluntary liquidation on 21 February 2020, and the second claimant is its liquidator.[1] The third to fifth defendants are respectively Fu Ning Marine Pte Ltd ("Fu Ning"), Ji Ning Marine Pte Ltd ("Ji Ning") and Qing Ning Marine Pte Ltd ("Qing Ning"). I will refer to them collectively as "the Defendants". The first and second defendants, whom I will refer to as "Zhang" and "Wu" respectively, were directors of Xiang Da at the time of the alleged undervalue transactions. At the time of the hearing before me, Zhang and Wu, who appear to be located outside of Singapore, have not been served with the originating process in OC 194.

3 At the material time, Xiang Da, Fu Ning, Ji Ning and Qing Ning shared the same ultimate parent company.[2] Xiang Da was a wholly owned subsidiary of CSC Oil Transportation (S) Pte Ltd ("CSC Oil"). On the other hand, the Defendants were wholly owned subsidiaries of one Nanjing Tanker Corporation (S) Pte Ltd ("NTCS"). Both NTCS and CSC Oil are wholly owned subsidiaries of one Nanjing Tanker Corporation ("NTC"), a company incorporated in the People's Republic of China ("PRC"). On or about 2 August 2018, CSC

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1 Statement of Claim ("SOC") at paras 1–2.

2 SOC at para 8.

transferred all its shares in Xiang Da to one Link Height Limited, a company incorporated in the British Virgin Islands.[3]

The claims

4 The claimants aver in the Statement of Claim ("the SOC") that, on or about 31 March 2017, Zhang and Wu caused Xiang Da to enter into agreements ("the Agreements") for the transfer of three vessels, *CSC Friendship*, *Chang Hang Guang Rong* and *Chang Hang Xing Yun* ("the Vessels"), to Fu Ning, Ji Ning and Qing Ning respectively. I refer to these transfers as "the Transactions". The Vessels were Xiang Da's main revenue generating assets.[4] Under the Agreements, the Vessels were allegedly sold at a price of US$19,929,112.09, US$19,353,252.05 and US$18,110,117.11, respectively. The claimants aver that the disposal of the Vessels were transactions at an undervalue within s 98(3)(*a*) and/or s 98(3)(*c*) of the Bankruptcy Act,[5] as the disposal was for "no consideration or for a consideration at a value which is significantly less than the value of [the Vessels] in money or money's worth". This was because "no actual transfer of cash" had been made for the sale and "[n]o sale proceeds were paid to Xiang Da by the Defendants". Instead, the "consideration" for the transfer of the Vessels was based on their respective net book values, and "accounting entries" were purportedly made to the accounts of Xiang Da and CSC Oil to "set off against amounts that were allegedly owed by Xiang Da to CSC Oil and/or others".[6] The claimants also aver that, after the Vessels were transferred, the Defendants generated substantial revenues using the Vessels,

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3 SOC at para 8(a), Defence of the 3rd to 5th Defendants ("Defence") at para 9(b).

4 SOC at para 11.

5 SOC at para 14. The reference to s 98(3)(*b*) would appear to be a typographical error.

6 SOC at para 14(a).

and two of the Vessels were used by the Defendants to obtain loans from finance companies.[7]

5 The claimants plead that Xiang Da had been insolvent or had been in a parlous financial position at the time of the Transactions and became insolvent as a result of the Transactions.[8] The claimants aver that for the financial year ending 31 December 2016, Xiang Da's total liabilities exceeded its assets, and for the financial year ending 31 December 2017, Xiang Da's total assets stood at US$1, and it recorded no profits but a loss of US$692,428.[9]

6 The claimants also aver that, on 1 April 2017, one Ningbo Group Co Ltd ("Ningbo"), a PRC company, commenced HC/ADM 56/2017 ("ADM 56") against Xiang Da, seeking US$16,131,644.41 in damages against Xiang Da. The claimants allege that, at the time Xiang Da entered into the Agreements, Zhang and Wu (as Xiang Da's directors) knew or ought to have known about the claims by Ningbo.[10] In January 2019, Xiang Da commenced Third Party Proceedings against Clearlake Shipping Pte Ltd and Gunvor Singapore Pte Ltd ("C&G") seeking an indemnity or contribution from them in respect of Ningbo's claim in ADM 56. C&G successfully obtained from the English courts an anti-suit injunction to restrain Xiang Da from continuing with the Third Party Proceedings in ADM 56, the result of which was that Xiang Da was ordered to pay C&G respectively costs of GBP 369,807.40 and GBP 225,638.08. Xiang

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7 SOC at paras 12, 14(a) and 14(b).

8 SOC at para 13.

9 SOC at paras 13(a) and 13(b).

10 SOC at para 13(c).

Da was also ordered by the Singapore courts to pay costs and disbursements to C&G, respectively amounting to S$44,451.47 and US$24,603.73.[11]

7 It is not in dispute that the Ningbo's claim against Xiang Da was eventually settled, and ADM 56 was discontinued pursuant to a Deed of Settlement entered into between Xiang Da and Ningbo on 16 August 2019.[12] The outstanding costs and disbursements owed by Xiang Da to C&G however remain unsatisfied. It would appear from the financial indemnity provided by C&G to Xiang Da's liquidator (*ie*, the second claimant) to pursue OC 194[13] that C&G are the *real* claimants in OC 194 (see *Ho Wing On Christopher and others v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R) 817 at [68]), and that the genesis of OC 194 are these outstanding costs and disbursements owed to C&G by Xiang Da. The gist of C&G's complaint appears to be that the Vessels, which were otherwise assets against which these outstanding costs and disbursements could have been satisfied, were put out of their reach as a result of the Transactions.[14]

8 The claimants' claims against Zhang, Wu and the Defendants are premised entirely on the Transactions being at an undervalue within s 98(3)(*a*) and/or s 98(3)(*c*) of the Bankruptcy Act.[15] As against Zhang and Wu, the claimants seek, among other things, a declaration that they have acted in breach of their fiduciary and/or statutory duties as directors by carrying out or causing the Transactions to have been carried out, and that they are liable for fraudulent

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11 SOC at para 27.

12 Defence at para 19(e); 1st Affidavit of Cheng Guangyu ("Cheng's Affidavit") at para 74.

13 1st Affidavit of Farooq Ahmad Mann ("Mann's Affidavit") at para 34.

14 Mann's Affidavit at para 20(h).

15 SOC at para 29.

trading under s 340(1) of the Companies Act in respect of the Transactions. As against the Defendants, the claimants seek, among other things, a declaration that the Defendants are liable for knowing receipt and/or dishonest assistance in respect of the Transactions and an order for the Transactions to be declared void.

The defence

9 The Defendants do not dispute that the Transactions had taken place, and that the Vessels had been disposed of at the price recorded in the Agreements.[16] Nor do the Defendants dispute that the sale price of the Vessels in the Agreements had been calculated based on the Vessels' net book values at the material time.[17] The Defendants' case, however, is that the Transactions had taken place pursuant to a corporate debt reorganisation plan instituted by NTC, pursuant to which Xiang Da received good consideration by having its debts under intercompany loans extended by CSC Oil to Xiang Da as well as its other liabilities written off, and further, that the Transactions were not at an undervalue, and in any event, Xiang Da was not insolvent at the time of the Transactions.

10 The Defendants aver that the sale of the Vessels had been effected pursuant to a proposal by NTC's board to reorganise the assets and debts of its foreign subsidiaries, which included CSC Oil and Xiang Da ("the Reorganisation Proposal"), and that it had been considered by NTC's board from as early as September 2016.[18] Under the Reorganisation Proposal, NTCS was to be incorporated, and it was in turn to incorporate various one-ship companies (such as the Defendants) as special purpose vehicles to take over the

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16 Defence at para 10.

17 Defence at paras 11 and 13.

18 Defence at para 12; Cheng's Affidavit at paras 22–28.

ownership of various vessels, which included the Vessels. The debts and liabilities of NTC's foreign subsidiaries like Xiang Da would be settled through direct repayment, write-offs and set-offs, and following which these subsidiaries would be dissolved. On 26 October 2016, the Reorganisation Proposal was approved by a majority of NTC's shareholders, and subsequently, another resolution was passed on 20 December 2016 for NTCS to purchase through its subsidiaries, vessels owned by CSC Oil and its subsidiaries at their net book values. Pursuant to this, the Agreements were entered into on or before 17 March 2017.[19] The Defendants therefore deny that the Agreements had been entered into in anticipation of the pending claim by Ningbo against Xiang Da in ADM 56.[20]

11 The Defendants aver that Xiang Da had received valuable consideration for the Transactions. By way of context, the Defendants explained that both Xiang Da and themselves did not operate any bank account in their own names, and the arrangement was for their respective parent (CSC Oil and NTCS respectively) to receive and make payments on their behalf, and all such payments made and received by CSC Oil and NTCS on the subsidiaries' behalf were recorded in running accounts between the parent and each respective subsidiary. These running accounts also recorded the intercompany loans extended by each parent to its subsidiary.[21]

12 Pursuant to the Agreements, NTCS, on behalf of the Defendants, remitted payments to CSC Oil corresponding to 20% of the purchase price of

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19 Defence at para 11.

20 Defence at para 29(a).

21 Defence at paras 14(b) and 14(c).

each of the Vessels,[22] which was the deposit required under the Agreements.[23] Thereafter, CSC Oil gave Xiang Da an advance credit corresponding to the purchase price of each of the Vessels and the price of bunkers and lubricating oils on board, which was used to set off the intercompany debts owed by Xiang Da to CSC Oil.[24] Subsequently, NTCS remitted payments to CSC Oil on behalf of the Defendants for the balance purchase price and the price of the bunkers and lubricating oil on board each of the Vessels,[25] and in respect of one of the Vessels NTCS accepted an assignment of CSC Oil's debts in lieu of payment of part of the purchase price.[26]

13 While the Defendants accept that Xiang Da's financial statements ending 31 December 2016 record its liabilities as exceeding its total assets,[27] they deny that Xiang Da was insolvent or in a parlous financial position at the time of the Transactions. They aver that Xiang Da was in a position to pay its debts as they fell due because: (a) the bulk of Xiang Da's liabilities were debts owed to CSC Oil under intercompany loans which Xiang Da would not be called on by CSC Oil to repay, and which was intended to be written off pursuant to the Reorganisation Proposal; and (b) for debts owed by Xiang Da to its other trade and finance creditors, Xiang Da was able to pay them as they fell due by utilising its operating income and drawing on an unsecured and interest free loan from CSC Oil.[28] As for Xiang Da's financial statements ending 31

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22 Defence at para 14(d)(i), 14(e)(i) and 14(f)(i).

23 Cheng's Affidavit at paras 38 and 42–43.

24 Defence at para 14(d)(iii), 14(e)(iii) and 14(f)(iii).

25 Defence at paras 14(d)(iv)–(vii), 14(e)(iv)–(v), 14(f)(iv)–(v).

26 Defence at para 14(d)(vi).

27 Defence at para 16.

28 Defence at para 15(b).

December 2017, the Defendants point out that Xiang Da's total liabilities were recorded as zero.[29]

14 Finally, in connection with ADM 56, the Defendants aver that, notwithstanding ADM 56 having been commenced on 1 April 2017, Xiang Da only became aware of ADM 56 on or after 26 May 2017,[30] and that in any event, it owed no liability to Ningbo as a result of the claims in ADM 56 because those claims were eventually settled with Ningbo without any admission of liability by Xiang Da.[31] As for the unsatisfied debts arising from the orders for payment of costs and disbursements made in connection with the Third Party proceedings commenced by Xiang Da in ADM 56 and the anti-suit injunction obtained by C&G, these liabilities did not exist at the time of the Transactions, and only came into being more than two years after the Transactions.[32]

The submissions

15 The Defendants make the following arguments in connection with SUM 1965, which is their application to strike out the claimants' claims in their entirety. First, the claimants' pleadings disclose no reasonable cause of action. This is because the claimants accept that "consideration" had been provided for the Transactions by way of a credit to Xiang Da that was used to set off the debts owed by Xiang Da to CSC Oil, and the claimants only take issue with it not having been provided by an actual transfer of cash to Xiang Da. That no actual transfer of cash was received is no basis to allege that consideration had

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29 Defence at para 17(b).

30 Defence at para 19(d).

31 Defence at para 19(e).

32 Defence at paras 29(g) and 29(i).

not been provided.[33] Further, the claimants have simply pleaded that the Vessels had been sold at their net book values, but do not plead the basis on which they are alleging that the net book value of the Vessels is significantly less than their true or market value at the material time.[34]

16 Secondly, the evidence also shows that the Transactions were *not* at an undervalue within s 98(3) of the Bankruptcy Act. The evidence of the running accounts between CSC Oil and Xiang Da showed that Xiang Da had received good consideration for the Transactions by having its debts to CSC Oil set off by those sums received by CSC Oil from NTCS as payment for the Vessels.[35] The Defendants also adduced valuation reports relating to the Vessels, which they say show that the consideration that Xiang Da received for the Transactions (net book value of the Vessels) was in fact higher than their market value at the material time.[36] The Defendants also emphasise that the Transactions had resulted in Xiang Da receiving the additional benefit of having all its debts and liabilities owed to CSC Oil as well as other creditors written off as part of the Reorganisation Proposal.[37] In any event, Xiang Da was neither cash flow nor balance sheet insolvent at the time of the Transactions.[38] The claims in ADM 56 should also not be taken into account in assessing Xiang Da's solvency at the time of the Transactions.[39]

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33 Defendants' written submissions at paras 48–50.

34 Defendants' written submissions at paras 50–52.

35 Defendants' written submissions at paras 57–60.

36 Defendants' written submissions at paras 71–73.

37 Defendants' written submissions at para 69.

38 Defendants' written submissions at paras 83–84.

39 Defendants' written submissions at paras 90–91.

17 The claimants raise the following in response. First, no consideration had been provided for the Transactions because Xiang Da received no actual payment for the Vessels.[40] In oral submissions, the claimants' counsel explained that this was significant because, since Xiang Da was in a parlous financial state at the time of the Transactions, its directors owed a duty to take into account the interests of Xiang Da's creditors, and the fact that Xiang Da received no actual payment meant that Xiang Da's creditors also received no benefit from the Transactions. The set-off, which did not benefit those creditors in any way, could not amount to consideration.[41] Although not stated explicitly, it appears from the position taken by the claimants that they are not disputing that NTCS had in fact provided to CSC Oil payment for the Vessels on the Defendants' behalf, and that such payment had been used towards setting off Xiang Da's intercompany debts to CSC Oil,[42] though I note the claimants do dispute these intercompany debts.[43]

18 Secondly, any consideration provided for the Transactions fell short of the value of the Vessels at the material time. The claimants point out that the payments that NTCS had remitted to CSC Oil as payment for the purchase price of the Vessels was less than 23% of the stated purchase price in the Agreements, which indicates that any consideration provided by the Defendants was far lower than the consideration provided by Xiang Da.[44] The intercompany debts between CSC Oil and Xiang Da and which had purportedly been set off pursuant to the receipt of the purchase price of the Vessels are also highly questionable

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40 Claimants' written submissions at para 82.

41 Claimants' written submissions at para 80.

42 Mann's Affidavit at para 19.

43 Mann's Affidavit at paras 20(j)–20(k); claimants' written submissions at para 81.

44 Mann's Affidavit at para 20(i); claimants' written submissions at para 96.

and have not been proven to exist.[45] Further, the substantial revenue generated by the Defendants from the use of the Vessels subsequent to the Transactions and the loans that the Defendants were able to obtain using the Vessels as collateral showed that the Vessels had been sold at an undervalue.[46] The claimants also questioned the credibility of the valuation reports adduced by the Defendants,[47] though they did not adduce any valuation reports of their own.

19 Finally, Xiang Da was insolvent at the time of the Transactions.[48] Xiang Da was insolvent on both a cash flow and balance sheet basis because of the substantial debts owed to CSC Oil under the intercompany loans, which the claimants say CSC Oil had intended to call on for repayment. The claimants also argue that the claims in ADM 56, which arose from a carriage of goods involving the Vessels that had taken place in April 2016, should be taken into account in assessing the solvency of Xiang Da.

20 As for SUM 1967, which is the Defendants' application for security for costs ("SFC") of S$150,000 for the period up to and including the trial of OC 194, the claimants raised two main arguments as to why the Defendants are not entitled to SFC. First, they argue that Xiang Da's current financial situation had been wrongfully brought about by the Transactions for which the Defendants are responsible. Xiang Da's ability to pursue its claims should therefore not be stifled by SFC. Secondly, they point out that the second claimant has obtained a liquidator's indemnity from C&G, and that C&G would pay for any costs orders made in OC 194.

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45 Mann's Affidavit at para 20(j); claimants' written submissions at para 95.

46 Mann's Affidavit at paras 20(a)–20(e); claimants' written submissions at paras 86–87.

47 Mann's Affidavit at para 20(e); claimants' written submissions at paras 88–89.

48 Claimants' written submissions at paras 66–70.

The applicable principles

Transactions at an undervalue

21 For a transaction to come within s 98(3) of the Bankruptcy Act, which is made applicable to companies by s 329(1) of the Companies Act: (a) there must be a "transaction"; (b) taking place within the "relevant period"; (c) which was at an "undervalue" within the meaning of s 98(3); and (d) the company was "insolvent" at the time of the transaction (see *Mercator & Noordstar NV v Velstra Pte Ltd (in liquidation)* [2003] 4 SLR(R) 667 ("*Mercator*") at [21]). Section 98(3) of the Bankruptcy Act sets out three circumstances in which an undervalue transaction can arise, only two of which are relevant to the present case: (a) where the grantor makes a gift to the grantee or enters into a transaction with the grantee on terms that provide for the grantor *no* consideration (s 98(3)(*a*)); or (b) where the grantor enters into a transaction with the grantee for a consideration the value of which is "significantly less" than the value of the consideration provided by the grantor (s 98(3)(*c*)).

22 In this case, there is no dispute that the sale of the Vessels was a "transaction" (see *Mercator* at [23]–[24]). On the claimants' pleaded case, the Agreements were entered into on or about 31 March 2017,[49] and Xiang Da was placed into creditors' voluntary liquidation on 21 February 2020.[50] Hence, there is also no dispute that the Transactions took place within the "relevant period", which is the five-year period ending on the date the winding up of the company is deemed to have commenced (see s 100(1)(*a*) of the Bankruptcy Act read with ss 291(6) and 329(2)(*b*) of the Companies Act). The only dispute is whether the

49 SOC at paras 11 and 13(a).

50 SOC at para 1.

Transactions were at an "undervalue" within s 98(3), and whether Xiang Da was insolvent at the time of the Transactions.

Striking out

23 Order 9 r 16 of the ROC 2021, on which the Defendants rely, provides three grounds pursuant to which "any or part of any pleading" may be struck out: (a) that it discloses no reasonable cause of action or defence; (b) it is an abuse of process of the Court; or (c) it is in the interests of justice to do so. In *Iskandar bin Rahmat and others v Attorney-General and another* [2022] 2 SLR 1018 (at [16]–[19]), the Court of Appeal explained the tests applicable to each of these limbs:

> (a) Under O 9 r 16(1)(*a*), the test is whether the action has some chance of success when only the allegations in the pleadings are concerned. If that is the case, then the action would not be struck out.
>
> (b) Under O 9 r 16(1)(*b*), the question is whether the judicial process is being used as a means of vexation and oppression in the process of litigation. The inquiry includes considerations of public policy and the interests of justice. This limb also signifies that the process of the court must be used *bona fide* and must not be abused.
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> (c) Under O 9 r 16(1)(*c*), the question is whether the case is one where the court should exercise its inherent jurisdiction to prevent injustice, such as where the claim is "plainly or obviously unsustainable".

24 For the purposes of O 9 r 16(1)(*c*), a claim is plainly or obviously unsustainable either where it is "legally unsustainable" or "factually

unsustainable" (see *The "Bunga Melati 5"* [2012] 4 SLR 546 at [39]–[40]). A claim is "legally unsustainable" where it would be clear as a matter of law that a party would not be entitled to the remedy sought even if it were to succeed in proving all the facts he offers to prove. A claim is "factually unsustainable" where it could be said with confidence before trial that the factual basis for the claim is entirely without substance, which can be the case if it were clear beyond question that the facts pleaded are contradicted by all the documents or other material on which it is based.

The issues

25 The Defendants' arguments in SUM 1965 focus on the *unsustainability* of the claimants' claims, either on the basis of the pleadings alone, or when the pleaded facts are viewed together with the affidavit evidence adduced in SUM 1965. It is therefore apparent that the Defendants are relying on O 9 r 16(1)(*a*) and O 9 r 16(1)(*c*).

26 Since the Defendants rely on evidence to show that the Transactions were *not* at an undervalue and that Xiang Da was *not* insolvent at the material time (see [16] above), I understand the Defendants to be contending that the claimants' claims are *factually* unsustainable for the purposes of O 9 r 16(1)(*c*). On the other hand, I understand the Defendants' argument about the claimants' omission to plead in the SOC facts showing that the net book value of the Vessels is significantly less than the value of the Vessels at the material time (see [15] above) as a contention that the SOC discloses no reasonable cause of action for the purposes of O 9 r 16(1)(*a*), to the extent the claimants' claims are premised upon the Transactions being at an undervalue within s 98(3)(*c*) of the Bankruptcy Act.

27 However, the Defendants' argument that the claimants have "no basis" to allege that no consideration was provided because there had been no actual transfer of cash to Xiang Da (see [15] above), although framed in terms of saying that the SOC discloses no reasonable cause of action, is in my view better understood as saying that the claimants' claims are *legally* unsustainable, to the extent they are premised upon the Transactions being at an undervalue within s 98(3)(*a*) of the Bankruptcy Act. This is so for two reasons. First, the Defendants' point is that even if the claimants succeed in proving that there had been no actual transfer of cash, the claimants will not be any closer to showing that no consideration had been provided for the purposes of proving that the Transactions were at an undervalue within the meaning of s 98(3)(*a*), since there is no requirement at law that contractual consideration must take the form of property moving from the promisee to the promisor. Secondly, whether the pleadings disclose a reasonable cause of action for the purposes of O 9 r 16(1)(*a*) should be determined by reference to the pleadings *alone* (see [23(a)] above). I do not think it appropriate for the court to view the pleadings in conjunction with the applicable legal principles and draw conclusions as to the *legal* strengths or weaknesses of the claimants' pleaded case in determining whether a reasonable cause of action is disclosed. After all, the fact that a claimant's case is weak and hence unlikely to succeed is no ground for striking out under O 9 r 16(1)(*a*) (see *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 ("*Gabriel Peter*") at [21]).

28 In the light of the above, the following issues arise for consideration:

(a) To the extent the claimants' claims are premised on the Transactions being at an undervalue within s 98(3)(*c*) of the Bankruptcy Act, whether the SOC discloses no reasonable cause of action against the Defendants?

(b) To the extent the claimants' claims are premised on the Transactions being at an undervalue within s 98(3)(*a*) of the Bankruptcy Act, whether they are legally unsustainable because the pleaded facts, if proven, do not show that the Transactions had taken place at an undervalue within s 98(3)(*a*)?

(c) Whether the claimants' claims are factually unsustainable because the affidavit evidence shows that the Transactions had not taken place at an undervalue within s 98(3)(*a*) and/or s 98(3)(*c*) of the Bankruptcy Act?

(d) Whether the claimants' claims are factually unsustainable because the affidavit evidence shows that Xiang Da had not been insolvent at the time of the Transactions and so s 98 of the Bankruptcy Act is in any event inapplicable?

(e) In the event SUM 1965 is dismissed, whether the Defendants are entitled to SFC against the claimants?

Whether the claimants' claims premised on s 98(3)(*c*) of the Bankruptcy Act disclose no reasonable cause of action against the Defendants?

29 The gist of the Defendants' complaint is that the SOC contains no pleading as to the significance of the Vessels being transacted at their net book value, and specifically, that it had not been pleaded that the net book value of the Vessels was significantly less than their market or fair value at the material time. To recall, the claimants' pleaded case is that the Transactions involved the disposal of the Vessels at their net book values.

30 Under our rules of civil procedure, the onus is on a claimant who commences a claim against a defendant to plead all "material facts" in respect

of every cause of action that it chooses to pursue against the defendant, and furnish sufficient particulars for the defendant to have reasonable notice of the case it has to meet; "material facts" are those facts which are necessary to formulate a *complete* cause of action (see *Chandra Winata Lie v Citibank NA* [2015] 1 SLR 875 ("*Chandra Winata Lie*") at [34]; *EA Apartments Pte Ltd v Tan Bek and others* [2017] 3 SLR 559 at [21]). Where the claimant omits such material facts, it can come no closer to succeeding in the cause of action pursued, even if all the pleaded facts are eventually proven. A defendant should therefore not have to undergo the expense of trial to have the claim thrown out, and it is entitled to have the claimant's claim struck out on the basis that the pleading discloses no reasonable cause of action against it.

31 The starting point of this analysis, therefore, is what are the "material facts" that a claimant must plead if it advances a claim founded upon an alleged transaction at an undervalue within s 98(3)(*c*) of the Bankruptcy Act. Under that subsection, a transaction is at an undervalue if it is entered into by the grantor for a consideration the value of which is "significantly less than the value, in money or money's worth" of the consideration provided by the grantor. The focus is on a *comparison* of value between the consideration provided by the grantor and the consideration received from the grantee, from the perspective of the grantor (see *Rothstar Group Ltd v Leow Quek Shiong and other appeals* [2022] 2 SLR 158 ("*Rothstar*") (at [24]–[25]).

32 Hence, the material fact that a claimant seeking to allege a transaction at an undervalue within s 98(3)(*c*) of the Bankruptcy Act must plead is that which *shows* that the value at which the asset had been disposed by the grantor (in other words, the consideration received) was significantly less than what it actually had been worth at the time of the transaction (in other words, the consideration provided). Therefore, typically, the claimant would state in its

pleadings what, on its case, ought to be the value of the asset at the time of the transaction and the value at which the asset had been disposed of pursuant to the alleged undervalue transaction. In other cases, it can also be self-apparent from the pleaded facts that the value at which the asset was disposed is significantly less than its actual or market value at the material time – for example, where assets of objectively considerable value are disposed of for nominal consideration.

33 With the above mind, I turn to the relevant parts of the SOC which aver that the sale of the Vessels took place at an undervalue, which are set out in full below:[51]

> 12. However, no sale proceeds were paid to Xiang Da by any of these 3 companies [referring to Fu Ning, Ji Ning and Qing Ning] that allegedly bought the said 3 Vessels [referring to the Vessels]. Instead, the consideration for the transfer of the 3 Vessels was based on the respective net book values of each of the 3 Vessels. No actual transfer of funds was carried out but accounting entries were purportedly made to the accounts of Xiang Da and CSC Oil to set off against amounts that were allegedly owed by Xiang Da to CSC Oil and/or others.
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> 14. The Transactions … were transactions at undervalue …
>
> a. The Transactions were entered into … for no consideration or for a consideration which is significantly less than the value of the 3 Vessels in money or in money's worth. No sale proceeds were paid to Xiang Da by any of the 3 companies who took over ownership of the said 3 Vessels. Instead, the consideration for the transfer of the 3 Vessels was based on the respective net book values for each of the 3 Vessels and no actual transfer of cash was made for the said purchases but accounting entries were purportedly made to

[51] SOC at paras 12 and 14(a).

> the accounts of Xiang Da and CSC Oil to set off against amounts that were allegedly owed by Xiang Da to CSC Oil and/or others.
>
> b. After the 3 Vessels [referring to the Vessels] were transferred to Fu Ning, Ji Ning and Qing Ning, the 3 companies generated substantial revenues from all the 3 Vessels. Two of the 3 Vessels were also used by the companies to obtain loans from finance companies.

34 To the extent the claimants' claims in OC 194 are premised on the Transactions being at an undervalue within s 98(3)(*c*) of the Bankruptcy Act, the SOC is deficient. None of the pleaded facts can show that the value at which the Vessels were disposed had been less or significantly less than what they had been worth at the time of the Transactions. The claimants simply plead that the Vessels were sold at their net book value. However, because there is no mention in the SOC as to what, on the claimants' case, is the value of the Vessels at the material time, no significance can be attributed to the pleaded fact that the Vessels had been disposed of at net book value. A pleading that the Vessels had been sold at net book value is by itself of no consequence because the net book value of an asset is at any one point in time either below, approximate to or above its market value.

35 For completeness, I add that this is not simply a case where the SOC is defective in not containing the necessary particulars – which might well be the case if the claimants had pleaded as a bare assertion that the net book value of the Vessels is lower than their actual value at the material time, but failed to plead *why*; the latter would constitute particulars to which its opponents are entitled, in order to properly understand the nature of the case against them. In this case, the claimants do not even plead as a bare assertion that the net book value of the Vessels was lower than their actual or market value at the material time.

36 I accept that the claimants do plead at the start of para 14(a) of the SOC that the Vessels were sold for a consideration that is "significantly less than the value of [the Vessels] in money or in money's worth". The claimants also plead at para 14(b) that the Vessels, subsequent to the Transactions, came to generate significant revenue for the Defendants. From these paragraphs, one may *surmise* that the claimants' case is that the net book value of the Vessels would have been lower than what they were actually worth at the material time, given the substantial financial benefit that they came to generate for the Defendants subsequent to the Transactions. In my view, however, this cannot be read as a pleading of a material fact for the purposes of a cause of action under s 98(3)(*c*) of the Bankruptcy Act. That these paragraphs give rise to a *suggestion* as to what the claimants' claim *might* be means that there are multiple *possible* meanings associated with the claimants' pleading, and is precisely *the very defect* that warrants the claimants' claims being struck out. Since the burden is on the claimants to properly plead its case (see *Chandra Winata Lie* ([30] above) at [34]), it is incorrect as a matter of principle to require the Defendants and *a fortiori* the court to opt for a reading that is most favourable to the claimants in determining if the pleading discloses a reasonable cause of action.

37 It has been emphasised that the court should only exercise its power to strike out in "plain and obvious" cases (see *Gabriel Peter* ([27] above) at [18]). The conclusion that I have reached above does not detract from that caution. On the basis of the SOC as it stands, even if the claimants succeed in proving their pleaded case at trial – in particular, that the Defendants did, subsequent to the Transactions, generate substantial revenue from and obtained financial benefit from the use of the Vessels – none of the proven facts would allow the court to determine if the Transactions were at an undervalue within s 98(3)(*c*) of the Bankruptcy Act. Irrespective of the quantum of financial benefit obtained by

the Defendants from the Transactions, whether the Vessels had been disposed for a lesser consideration than what they were actually worth still comes to be measured on the basis of what they had been worth before or at the time of the Transactions, and there is no basis on which that assessment can take place since the claimants plead no facts pertaining to what the market or fair value of the Vessels were at the material time.

38 For the reasons above, to the extent the claimants' claim are premised on the Transactions being at an undervalue within s 98(3)(*c*) of the Bankruptcy Act, the SOC discloses no reasonable cause of action against the Defendants and these claims should be struck out.

Whether the claimants' claims premised on s 98(3)(*a*) of the Bankruptcy Act are legally unsustainable?

39 I now turn to the second issue. As a starting point, it is not in dispute, as pleaded in the SOC, that Xiang Da did not receive any actual payment for the purchase price of the Vessels, and instead, Xiang Da enjoyed a set-off of its debts owed to CSC Oil and/or others pursuant to the Transactions. The Defendants argue that, on the basis of these facts, consideration had been provided for the sale of the Vessels, and the Transactions cannot be at an undervalue within s 98(3)(*a*) of the Bankruptcy Act.

40 Section 98(3) of the Bankruptcy Act is concerned with consideration in the contractual sense (see *Rothstar* ([31] above) at [24]). Specifically, s 98(3)(*a*) is concerned with the *existence* of consideration (see *Rothstar* at [24]). Therefore, a transaction comes within s 98(3)(*a*) if *no* contractual consideration had been provided by the grantee to the grantor. The law of contract requires that consideration be sufficient in that it must be of some value in the eyes of the law, but does not require it to be adequate in the sense of having an objective

value, since it is for the contracting parties and not the court to assess the merits of their bargain (see Andrew Phang Boon Leong gen ed, *The Law of Contract in Singapore* (Academy Publishing, 2nd Ed, 2022) ("*Contract Law in Singapore*") at para 04.026).

41 It is trite that consideration can exist, even if no property of the promisee had moved to the promisor in exchange for the promise. This is because valuable consideration is not restricted only to some right or interest accruing to the promisor, but it can take the form of some detriment or loss suffered by the promisee, in the case of which the promisor nevertheless obtains some corresponding benefit as a result of the detriment or loss incurred by the promisee (see generally, *Contract Law in Singapore* at para 04.004). This can be illustrated with some examples. A promisee's forbearance to sue is good consideration for a promise (see *Contract Law in Singapore* at para 04.034). The extension of *credit* to a grantor-company by the grantee, without any transmission of property from the grantee to the grantor, also constitutes valid consideration, which our courts have considered as bringing a transaction outside of s 98(3)(*a*) of the Bankruptcy Act (see *Vesltra Pte Ltd v Dexia Bank NV* [2005] 1 SLR(R) 154 at [48]–[49]).

42 For the claimants to succeed in a claim based on s 98(3)(*a*), they must prove that Xiang Da had received *no* consideration from the disposal of the Vessels. The claimants' only pleading pertaining to s 98(3)(*a*) is that no sale proceeds had been paid to Xiang Da by any of the Defendants and that there had been no actual transfer of cash to Xiang Da for the Transactions (see [33] above). That the Defendants paid no sale proceeds to Xiang Da, and that there had been no actual transfer of cash to Xiang Da, do not in any way show that Xiang Da received *no* consideration for the Transactions. To put it another way, even if the claimants succeed in proving at trial that the Defendants paid no sale

proceeds to Xiang Da and/or that Xiang Da received no actual cash payment, the claimants are not any closer to showing that the Transactions were at an undervalue within s 98(3)(*a*) of the Bankruptcy Act. To the extent the claimants' claims are premised on s 98(3)(*a*), they are legally unsustainable.

43 I accept that the claimants do plead in the SOC that in exchange for the disposal of the Vessels, Xiang Da received the benefit of having its debts to CSC Oil and/or others set off (see [33] above). In so far as the set-off was the *quid pro quo* for the Transactions, it might be contended that this did *not* flow from the Defendants, from whose perspective the provision of consideration is to be assessed for they are in the position of a promisee in this context (see *Contract Law in Singapore* at para 04.021). The question then is whether this part of the pleading can be read as supporting the claimant's case that *no* consideration had been provided for the purposes of s 98(3)(*a*), so that any such claim based on s 98(3)(*a*) is *not* legally unsustainable. I answer this in the negative for two reasons.

44 First, for a claim to be struck out on the basis that it is legally unsustainable, the court must be satisfied that the pleaded facts even if proven in their entirety would not entitle the claimant to the relief sought. Thus, for me to conclude that the claimants' case is legally unsustainable for the purposes of s 98(3)(*a*), I need only be satisfied that the facts as pleaded by the claimant even if proven would fail to show that contractual consideration had been *absent*; I do not have to be satisfied that the pleaded facts if proven would show that consideration had been provided, though that would obviously be stronger grounds for striking out. Returning to the present case, the *possibility* that the set-off might eventually be relied on by the claimants at trial as the *quid pro quo* in supporting an argument that the set-off did not constitute good consideration because it did not flow directly from the Defendants as the grantees under the

Transactions, only means that I cannot conclude that consideration had been provided on the basis of the pleaded facts assumed as proven. That, however, is not a conclusion that I have to arrive at in order to find that the claimants' claims are legally unsustainable.

45 Secondly, on a related note to the previous point, one might well say that the *possibility* of the set-off being relied on by the claimants as showing that there had been no good consideration would mean that the claimants' claim is *not* legally unsustainable after all because there is still something in the SOC by way of pleaded facts that *might* well show that consideration was absent. However, this can only assist the claimants if, in the first place, it is reasonably apparent from the SOC that they intend to rely on this *possibility* in their claims based on s 98(3)(*a*) against the Defendants. I am not satisfied that this is the case here.

46 Based on the SOC as it stands (see [33] above), the claimants do *not* rely on the set-off as part of their case that consideration had been absent. In other words, it is not the claimants' pleaded case in the SOC that if such set-off constituted the *quid pro quo* for the Transactions, then it would not have been valid consideration anyway because it did not flow from the Defendants and so consideration was absent. There is also nothing in the SOC which states or even suggests that the Defendants did not suffer a corresponding detriment as a result of the benefit that Xiang Da had purportedly obtained from the set-off. Given the centrality of pleadings in delineating the parameters of a dispute (see *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [36]), based on the SOC as it stands, I am not quite sure whether the Defendants would be permitted to advance at trial a case based on the set-off not being valid consideration because it did not flow from the Defendants. All that the claimants

are entitled to prove at trial, which is delineated by their pleaded case, is that consideration for Xiang Da under the Transactions had been provided by way of set-off of Xiang Da's debts to CSC Oil. That alone, however, does not bring the claimants any closer to showing that consideration had been *absent* for the purposes of s 98(3)(*a*). I should also emphasise that the key plank of the claimants' arguments in the present proceedings is that there had been *no* consideration for the sale of the Vessels because Xiang Da received no actual payment for the Transactions (see [17] above); the claimants did not argue that the set-off would not constitute valid consideration on the basis that funds for the set-off had not moved from the Defendants.[52]

47 For the reasons above, to the extent the claimants' claims are premised on the Transactions being at an undervalue within s 98(3)(*a*) of the Bankruptcy Act, these claims are legally unsustainable and should be struck out.

48 Before I conclude this section, let me address the claimants' argument that no consideration had been provided for the Transactions for the purposes of s 98(3)(*a*) because Xiang Da's creditors received no benefit from the Transactions since no actual payment was made to Xiang Da for the disposal of the Vessels. In my view, this argument does not assist the claimants.

49 First, the grantor and its creditors are distinct legal entities and s 98(3), quite clearly, is concerned with consideration provided to the grantor and *not* its creditors. Secondly, s 98(3) prohibits transactions at an undervalue, not with the objective of ensuring that any benefit provided to the grantor by the grantee in exchange for consideration provided by the grantor accrues to the benefit of all the grantor's creditors. Instead, the objective of s 98 is to protect the creditors

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52 Claimants' written submissions at paras 75–82.

against a *diminution of the grantor's assets* brought about by a transaction conferring an unfair or improper advantage on a particular creditor (see *Mercator* ([21] above) at [27]). That Xiang Da's creditors received no direct benefit from the disposal of the Vessels is not in and of itself relevant. Further, on the claimants' pleaded case, the objective of s 98 does not appear to have been engaged because the claimants accept that the Transactions resulted in the set-off of Xiang Da's debts to CSC Oil and/or others, which would have served to reduce Xiang Da's liabilities. There can accordingly be no diminution of Xiang Da's assets.

Whether the claimants' claims are factually unsustainable because the Transactions were not at an undervalue?

50 Since the claimants' claims against the Defendants are premised entirely on the Transactions being at an undervalue within s 98(3)(*a*) and/or s 98(3)(*c*) of the Bankruptcy Act (see [8] above), given my conclusions above, the entirety of the claimants' claims against the Defendants are to be struck out, and so I allow SUM 1965. The remaining two issues pertaining to the factual sustainability of the claimants' claims therefore do not arise for consideration, but I briefly address them given the arguments that have been made.

51 SUM 1965 is not concerned with whether the disposal of the Vessels was in fact an undervalue transaction; that is an issue to be determined when the claims in OC 194 come to be tried on the merits, for which the legal burden falls on the claimants (see *Kon Yin Tong and another v Leow Boon Cher and others* [2011] SGHC 228 at [49]). The question in SUM 1965 is simply whether there is any factual basis for the claimants' claims, and the burden is on the Defendants to demonstrate that there is none. The Defendants must satisfy the court, on the basis of the affidavit evidence adduced, that it is "clear beyond

question" (see *The "Bunga Melati 5"* ([24] above) at [50]) that the Transactions were *not* at an undervalue within s 98(3)(*a*) or s 98(3)(*c*) of the Bankruptcy Act. On the other hand, it suffices for the claimants to resist striking out by showing that they have at least an "arguable case", even if it appeared to be weak on the merits (see *The "Bunga Melati 5"* at [47]). To this end, the proof which the claimant may point to can be nothing more than his own uncorroborated and self-serving testimony as to facts within his personal knowledge (see *Chandra Winata Lie* ([30] above) at [35]).

52 For the Defendants to show that the claimants' claims have no factual basis, they must show either: (a) consideration *had been provided* by the Defendants to Xiang Da for the Transactions, so that the Transactions were not at an undervalue within s 98(3)(*a*) of the Bankruptcy Act; or (b) the consideration provided by the Defendants for the Transactions was *not* significantly less than the value of the Vessels, so that the Transactions were not at an undervalue within s 98(3)(*c*) of the Bankruptcy Act. In other words, to demonstrate that the claimants' claims have no factual basis, the Defendants must point to evidence showing the very opposite of what is required to constitute a cause of action based on s 98(3)(*a*) or s 98(3)(*c*).

53 In connection with s 98(3)(*a*), the Defendants say that consideration had been provided. The Defendants point to evidence of the running accounts between (a) CSC Oil and Xiang Da and (b) NTCS and each of the Defendants. The running accounts between NTCS and each of the Defendants record NTCS debiting from its accounts with each of the Defendants a sum corresponding to the full purchase price of each of the Vessels.[53] The running accounts between CSC Oil and Xiang Da (which is a separate document) shows, on the same day

[53] Cheng's affidavit at paras 45(b), 46(c) and 47(b).

the debit transaction in NTCS's running accounts had taken place, a corresponding sum was credited to Xiang Da's favour, which was then used to set off against the intercompany debts owed by Xiang Da to CSC Oil.[54]

54 As mentioned earlier, the facts as pleaded in the SOC, even if proven at trial, do not show the *absence* of consideration and so any claim based on s 98(3)(*a*) is legally unsustainable (see [47] above). Be that as it may, assuming that the SOC is not defective as such and so the claimants are entitled to mount a claim based on s 98(3)(*a*), I am not satisfied that it is "clear beyond question" that consideration had been provided. The claimants attack the intercompany debts between CSC Oil and Xiang Da, saying that they are "highly questionable" and "not even proven" to be debts that really exist.[55] They question the necessity of some of the expenses that Xiang Da had incurred, and for which a debt became owing to CSC Oil in the running accounts, which they say cast doubts on whether these debts were genuine in the first place.[56]

55 If the intercompany debts do not exist, then there would have been no basis for CSC Oil to have used the funds from NTCS in the manner recorded in the running accounts, and in those circumstances, Xiang Da cannot be said to have obtained any benefit from the disposal of the Vessels. In other words, whether the running accounts conclusively show that consideration had been provided is a matter turning on whether the purported intercompany debts between CSC Oil and Xiang Da indeed exist and whether they are indeed as represented in the running accounts. There is nothing before me to show that the intercompany debts as represented in the running accounts are beyond

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54 Cheng's affidavit at paras 45(c), 46(d) and 47(c).

55 Mann's Affidavit at para 20(j).

56 Mann's Affidavit at para 20(k).

question and the objections raised by the claimants suggest precisely the opposite.

56 On this point, the Defendants argue that Xiang Da's audited financial statements for the year ending 2016 provide an independent source of evidence about the intercompany debts – the sum recorded therein as owing by Xiang Da to CSC Oil corresponds with that in the running accounts.[57] I accept that the audited financial statements would be a credible source of Xiang Da's financial information at the material time, but it does not address the claimants' objection about the intercompany debts. The claimants, as I understand, do not dispute that the running accounts indeed record Xiang Da as owing CSC Oil certain sums of monies at various points in time. Their point is that Xiang Da is unlikely to have incurred several of these expenses in the first place and so the debts as recorded, which arise from these expenses, are not genuine. The claimants' objections can only be answered by going behind the numbers, including the audited financial statements. I therefore accept that it is at least arguable as to whether the intercompany debts exist and on this basis the evidence does not conclusively show that consideration had been provided to render the claimants' claims based on s 98(3)(*a*) factually unsustainable.

57 In connection with s 98(3)(*c*), the Defendants say that the Vessels had not been sold at an undervalue. They rely on two points in support. First, they emphasise that the court, in valuing consideration, should look at the whole of the transaction and the totality of the benefits received, and so it is significant that Xiang Da had received the benefit of having all its debts and liabilities owed to CSC Oil and other creditors discharged following the Transactions as part of the Reorganisation Plan. Secondly, valuation reports also show that the value

[57] Defendants' written submissions at para 63.

for which the Vessels had been sold under the Agreements (net book value) were on par with if not exceeded their fair value at the time the Agreements were entered into.[58] In response, the claimants question the Defendants' reliance on the valuation reports. For example, they say that it is unknown what parameters had been provided to the valuers for the purposes of the valuation exercise.[59] The claimants also argue that the value of the Vessels ought to take into account their revenue-generating potential[60] and it is unclear if this attribute had been raised by the Defendants to the valuer.[61]

58 As mentioned earlier, the SOC contains no pleading of fact showing that the net book value of the Vessels was significantly less than their market value at the material time (see [34] above). The pleadings as they stand therefore do not disclose a reasonable cause of action for a claim based on s 98(3)(*c*). Be that as it may, assuming that the SOC was not defective as such and the claimants are entitled to mount a claim based on s 98(3)(*c*) and on the basis that the Vessels were disposed of at a value significantly less than their market value at the time of the Agreements, I am similarly not satisfied that it is not "clear beyond question" that the net book value of the Vessels approximated to or exceeded their market value at the material time.

59 Although the Defendants have adduced valuation reports that *prima facie* are reliable and credible, the claimants have cast doubts on the methodology by which the valuation therein had been arrived at. Whether that methodology is appropriate for the circumstances of the case, and in turn

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58 Cheng's Affidavit at paras 35–37.

59 Mann's Affidavit at para 20(e).

60 Claimants' written submissions at paras 85 and 87.

61 Mann's Affidavit at para 20(e).

whether the valuation arrived at is a fair one, are matters to be determined at the trial of the action. The questions raised by the claimants about the valuers' methodology suffice to give rise to an *arguable* case that the valuation of the Vessels as recorded in the valuation reports, which largely approximate to the value under the Agreements, do not represent their fair market value at the material time. There is accordingly no conclusive evidence before the court as to what the market value of the Vessels had been at the time of the Agreements, and so there is no evidence before the court contradicting the factual basis of a claim premised on s 98(3)(*c*).

60 I should also add that, in so far as it is the Defendants' case that Xiang Da had received benefits of having all its debts and liabilities set off pursuant to the Transactions, whether those benefits bring the Transactions outside of s 98(3)(*c*) is also a matter dependent on a comparison of the value of these benefits with the fair valuation of the Vessels at the material time. There is no conclusive evidence before the court as to the latter (see [59] above), and so even if Xiang Da had received such benefits – which the claimants appear to question anyway as they challenge the existence of the very debts and liabilities that had been set off (see [55] above) – that alone does not contradict the factual basis of a claim premised on s 98(3)(*c*).

Whether the claimants' claims are factually unsustainable because Xiang Da had not been insolvent at the material time?

61 An essential element of the cause of action which the claimants seek to pursue against the Defendants is that Xiang Da had been insolvent, in particular, at the time the Agreements were entered into (see *Encus International Pte Ltd (in compulsory liquidation) v Tenacious Investment Pte Ltd and others* [2016] 2 SLR 1178 ("*Encus International*") at [53]). The solvency of a company, in the

context of an undervalue transaction, can be determined by the cash flow test or the balance sheet test, or both, depending on the circumstances of the case (see *Encus International* at [53]; *Parakou Shipping Pte Ltd (in liquidation) v Liu Cheng Chan and others* [2017] SGHC 15 ("*Parakou*") at [64]). Under the cash flow test, a company is insolvent if it is unable to pay its debts as they fall due; under the balance sheet test, a company is insolvent if the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities (see *Parakou* at [64]).

62 For the Defendants to show that the claims are factually unsustainable on the basis of Xiang Da's solvency, they need to show that Xiang Da was *not* insolvent at the material time on the basis of *both* the balance sheet and cash flow tests. On the other hand, the claimants need only show an arguable case about Xiang Da's solvency on either test.

63 Xiang Da's audited financial statements for the year ending 31 December 2016 recorded Xiang Da's total assets as US$59,225,567 and its total liabilities as US$63,635,898.[62] Of the total liabilities, US$47,850,800 is recorded as an intercompany loan owing to "Immediate parent company" (a reference to CSC Oil) that is "unsecured, interest-free and no repayment term".[63] Xiang Da's audited financial statements for the year ending 31 December 2017 recorded it as having no liabilities and with total assets worth US$1.[64] The Defendants explain that this is because, following the Transactions, CSC Oil wrote off the intercompany debts owed by Xiang Da to CSC Oil, and also continued to pay off all Xiang Da's other trade creditors as and when those other

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62 Cheng's Affidavit at p 519.

63 Cheng's Affidavit at p 537.

64 Cheng's Affidavit at p 556.

debts fell due.[65] I also note that, for the purposes of these proceedings, the parties have proceeded on the basis that Xiang Da's financial position at the time the Agreements were entered into is to be determined on the basis of its 2016 audited financial statements.[66]

64 Although Xiang Da's assets exceed its liabilities as at the time of the Agreements, the Defendants' position is that Xiang Da is nevertheless *not* balance sheet insolvent. This Defendants argue that the liabilities under the intercompany loans with CSC Oil should be disregarded when applying the balance sheet test because at all material times, there was no intention on the part of CSC Oil to demand repayment of the loan. Indeed, it was a term of the Reorganisation Plan that CSC Oil would write off Xiang Da's liabilities under the intercompany loans after the Transactions were concluded pursuant to the Reorganisation Plan.[67]

65 The question of whether Xiang Da was balance sheet insolvent turns on whether CSC Oil intended to demand repayment of the intercompany loans at the time of the Agreements, an issue for which there are arguments going both ways. On the one hand, it is persuasive for the Defendants to contend that the carrying into effect of the Reorganisation Proposal shows that CSC Oil did not intend to call on the debts under the intercompany loans, which would have thrown a spanner into what the Reorganisation Proposal was to achieve. This would militate in favour of the liabilities under the intercompany loans being excluded from the balance sheet test. After all, the court adopts a commercial

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65 Cheng's Affidavit at paras 55–59.

66 Defendants' written submissions at paras 83(g) and 84(a); Claimants' written submissions at para 68.

67 Defendants' written submissions at para 84(d).

and not technical approach in determining balance sheet insolvency, and a deficiency of net assets *per se* is indicative but not determinative of insolvency (see *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo and others* [2004] 1 SLR(R) 434 ("*Chip Thye*") at [19]). On the other hand, under the terms of the Reorganisation Proposal, it was never intended that CSC Oil would write off Xiang Da's debts *gratuitously*. Further, given the sequence of events contemplated under the Reorganisation Proposal (see [10] above), it appears that CSC Oil would only have proceeded with writing off Xiang Da's debts after it received the sale proceeds of the Vessels. Indeed, based on the running accounts that the Defendants have adduced as evidence, each time CSC Oil received monies to the credit of Xiang Da, they were immediately used to set off debts owed by Xiang Da to CSC Oil. It is to some extent persuasive for the claimants to contend that CSC Oil's course of conduct is inconsistent with it *never* intending to call on the debts under the intercompany loans.[68]

66 Turning to the cash flow test, the Defendants' position is that Xiang Da had been able to pay its debts as they fell due at the time of the Agreements because, as recorded in Xiang Da's 2017 and 2015 audited financial statements, CSC Oil had undertaken to provide the necessary financial support to Xiang Da to enable Xiang Da to continue in operate and meet its liabilities as and when they fell due.[69] The court should therefore take into account the financial support from CSC Oil in determining the cash flow solvency of Xiang Da. The Defendants also emphasise that the bulk of Xiang Da's debts at the time of the Agreements were debts under the intercompany loans, for which CSC Oil had no intention to demand repayment. These debts under the intercompany loan

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68 Claimants' written submissions at paras 85(e)–85(f).

69 Cheng's Affidavit at para 60; Mann's Affidavit at p 116.

should therefore be excluded from the assessment of solvency under the cash flow test.[70]

67 The question of whether Xiang Da was cash flow insolvent turns on whether CSC Oil intended to demand repayment under the intercompany loans at the time of the Agreements and whether CSC Oil would have continued to provide the necessary financial support to Xiang Da to enable it to meet all its liabilities as they fell due. Again, there are arguments going both ways for each of these issues. On the one hand, and for the reasons mentioned earlier (at [65]), the evidence suggests that CSC did not intend to call on the debts under the intercompany loans. If that were the case, then these debts are to be ignored in determining Xiang Da's cash flow insolvency (see *Seah Chee Wan and another v Connectus Group Pte Ltd* [2019] SGHC 228 at [107]). It is also not in dispute that CSC Oil had indeed, following the Transactions, paid off Xiang Da's other trade and financial liabilities so that these liabilities were all reduced to zero in the 2017 audited financial statements,[71] consistent with the statements of support provided previously. Similarly, such financial support that would enable Xiang Da to discharge its debts are relevant in the assessment of its cash flow solvency (see *Chip Thye* ([65] above) at [17]–[19]). On the other hand, as I have mentioned earlier, it is to some extent persuasive for the claimants to contend that CSC Oil's course of conduct is inconsistent with it never intending to call on the debts under the intercompany loans. The statements of support are also not conclusive as to whether CSC Oil would provide such financial support to Xiang Da *in any event*.

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70 Defendants' written submissions at paras 83(d)–83(g).

71 Cheng's Affidavit at para 56.

68 The presence of doubts either way in connection with the issues of whether CSC Oil intended to demand repayment of the intercompany loans and/or whether CSC Oil would have continued to provide the necessary financial support to Xiang Da to enable it to meet its liabilities as they fell due, emphasise the need for the question of whether Xiang Da was balance sheet and/or cash flow insolvent to be resolved at trial, where these issues may be determined pursuant to a full fact-finding process. A court should not in a striking out application choose between conflicting accounts of crucial facts like these (see *The Bunga Melati 5* ([24] above) at [45]). I therefore cannot conclude, on the evidence before me, that Xiang Da was neither balance sheet insolvent nor cash flow insolvent at the time of the Agreements, which is the requisite threshold for me to find that the claimants' claims are factually unsustainable.

69 For completeness, I address the claimants' argument that the claims under ADM 56 (see [6] above) ought to be taken into account in assessing Xiang Da's solvency under the balance sheet test because these claims constitute a "contingent liability" at the time of the Agreements.[72] The point made by the claimants is that these claims arise from a contract of carriage that had been entered into by Xiang Da in April 2016, and Zhang and Wu had entered into the Agreements in anticipation of the commencement of ADM 56 on 1 April 2017.

70 A "contingent liability" is a liability or loss which arises out of an *existing* legal obligation or state of affairs but which is dependent on the happening of an event which may or may not occur; whether a contingent liability should be taken into account in assessing the company's solvency at a material time depends on whether it is reasonably likely to materialise (see *OP3*

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72 Mann's Affidavit at para 21(d); Claimants' written submissions at para 71.

International Pte Ltd (in liquidation) v Foo Kian Beng [2022] SGHC 225 ("*OP3 International*") at [37]).

71 The court should not employ hindsight in considering the question of contingent liability; this analysis is rooted in the facts and circumstances at a particular point in time, and a company and its directors cannot possibly be expected to act on the basis of facts and circumstances which they are unaware and of which they would only become aware at some point in the future (see *OP3 International* at [44]–[45]). In this vein, I note that the Defendants have relied heavily on the fact that the claims in ADM 56 were subsequently withdrawn and culminated in a Deed of Settlement, and that Xiang Da had been informed sometime in June 2017 by Ningbo's lawyers that ADM 56 had been filed purely for "strategic purposes"[73] to argue that the claims in ADM 56 are not contingent liabilities. Following the caution in *OP3 International*, the fact that the claims in ADM 56 *subsequently* came to be regarded as without merit is not conclusive as to whether those claims were reasonably likely to crystalise into liabilities for Xiang Da at the time the Agreements were entered into and in turn, what Xiang Da's directors would have perceived of those claims at that point in time. The focus should be on what were the facts and circumstances known to Xiang Da's directors at the time the Agreements were entered into.

72 In terms of the chronology of events, it is not in dispute that ADM 56 was only commenced *after* the Agreements were entered into. As the Defendants' counsel explained in their submissions, the Agreements would have been concluded by 17 March 2017 at the latest. This is because the Agreements provided for the deposit for the purchase price of the Vessels to be

73 Cheng's affidavit at paras 64 and 65.

paid within three banking days from the date of the Agreement,[74] and based on a remittance slip recording a transfer of the sum total of the deposit for the Vessels from NTCS to CSC Oil on 17 March 2017,[75] it cannot be in dispute that the deposit was paid by 17 March 2017. The Defendants' position that they only came to know of ADM 56 on 26 May 2017[76] also appear to be undisputed by the claimants who did not respond to this in their reply affidavit filed for these proceedings. However, the claimants' case is that Zhang and Wu had procured Xiang Da's entry into the Agreements *in anticipation* of the claims in ADM 56.[77] On that basis, that ADM 56 was commenced *after* the Agreements were entered into, or that the Defendants only came to know of ADM 56 in May 2017, is neither here nor there. The key is Zhang and Wu's state of mind at the time the Agreements were entered into and whether the circumstances *then* were such that they would have considered it likely that Xiang Da will eventually be found liable for the claims in ADM 56, so that these claims can be regarded as contingent liabilities. These are matters that can only be determined at a trial. Accordingly, I cannot conclude on the evidence before me that the claims in ADM 56 are contingent liabilities for the purposes of assessing Xiang Da's solvency, or otherwise.

Whether the claimants should be ordered to pay SFC to the Defendants?

73 This issue does not arise for consideration given my conclusion above that the claimants' claims against the Defendants are to be struck out.

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74 Cheng's Affidavit at pp 194, 201 and 208.

75 Cheng's Affidavit at para 42.

76 Cheng's Affidavit at para 64.

77 SOC at para 25.

Nonetheless, if I had to decide the issue, I would have ordered the claimants to pay SFC. Let me briefly explain.

74 A two-stage test applies in considering whether SFC should be ordered: the first stage concerns whether the court's discretion to order SFC under s 388(1) of the Companies Act 1967 (2020 Rev Ed) or O 9 r 12 of the ROC 2021 should be invoked; the second stage concerns whether it is just for the court to order SFC having regard to all the relevant circumstances of the case (see *SW Trustees Pte Ltd (in compulsory liquidation) and another v Teodros Ashenafi Tesemma and others* [2023] SGHC 160 ("*SW Trustees*") at [14]). As the parties' arguments showed, there is no dispute that the first stage of the inquiry had been satisfied. Xiang Da is an insolvent company in liquidation. As for the second claimant, being the liquidator of Xiang Da, he is a "nominal plaintiff", and the fact that C&G had provided to him an indemnity to pursue the claims in OC 194 against the Defendants[78] only serve to emphasise that the second claimant himself will *not* be paying any of the Defendants' costs (see also *SW Trustees* at [27]).

75 In my view, having regard to all the circumstances of the case, it is just for SFC to be ordered, and I reject the arguments put forward the claimants in resisting the Defendants' entitlement to SFC. First, I disagree with the claimants that their claims would be stifled if SFC were ordered; to the contrary, the indemnity provided by C&G to the second claimant explicitly states that C&G would indemnify the claimants in connection with any SFC that the court may order the claimants to furnish.[79] Secondly, I reject the claimants' argument that Xiang Da's current state of affairs had been brought about by the Transactions.

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78 Mann's Affidavit at para 34.

79 Mann's Affidavit at p 971.

Based on Xiang Da's unaudited financial statements ending 31 December 2016, prior to the Transactions, Xiang Da's liabilities exceeded its assets. However, based on the unaudited financial statements ending 31 December 2017, these liabilities were apparently reduced to zero. The liabilities that Xiang Da is presently faced would appear to have arisen out of orders for payment of costs and disbursements made in C&G's favour in respect of Third Party Proceedings in ADM 56, which were commenced only in January 2019 (see [6] above).[80] I do not see how it can be contended that the Transactions brought about Xiang Da's current financial state of affairs, when the court proceedings from which these present liabilities arose were commenced significantly after the Transactions were concluded. Thirdly, the fact that C&G has provided an indemnity to the second claimant does not mean that the Defendants would have recourse for their costs in OC 194. C&G's indemnity to the *second claimant* does not in effect give an indemnity to the Defendants; the indemnity is for the second claimant's benefit alone (see *SW Trustees* ([74] above) at [46]). In the absence of SFC, the Defendants are limited to the claimants *alone* for the recovery of costs, if any.

76 As for the quantum of the SFC, the Defendants have asked for a total sum of $150,000, up to and including the trial of OC 194. The Defendants explained that they have arrived at this figure by using: (a) $70,000 for pre-trial costs (the uppermost limit of the costs range for Commercial cases in the Costs Guidelines in Appendix G of the Supreme Court Practice Directions 2021 ("Appendix G")); and (b) a sum total of $80,000 for trial costs, which is arrived at using a daily tariff of $16,000 (which is also the uppermost limit of the relevant costs range in Appendix G) multiplied by five days, assuming a five-

[80] Cheng's Affidavit at para 79.

day trial.[81] The claimants submit that using the uppermost limit of the costs range is justified because if OC 194 proceeds to trial, it is likely to involve expert witnesses pertaining to the valuation of the Vessels and/or the accounts of Xiang Da for the purposes of determining its solvency. Also, much of the evidence in OC 194, including documentary evidence and witness testimony, would have to be translated or interpreted into Chinese. The claimants did not dispute any of that or propose a different quantum for SFC.

77 I agree with the Defendants that it would be appropriate to rely on the uppermost limit of the relevant costs range in Appendix G to quantify SFC. However, I have reservations as to whether the Defendants ought to be entitled to SFC for trial costs at this stage, where the matter appears to be quite far from being set down for trial, and there appears to be no visibility as to who are the factual or expert witnesses that both sides will call upon to testify. SFC is meant to protect a defendant's costs exposure brought upon by litigation by an impecunious claimant. A defendant can only be expected to apply for SFC for a particular stage of the proceedings when it comes to possess the relevant information on which it may determine its likely costs exposure for that stage of the proceedings (see *SW Trustees* ([74] above) at [64]). On this basis, it is difficult to see why the Defendants should be entitled to SFC for a stage of the proceedings, in connection with which the parties presently appear to have no information on. I accept that SFC applications under the ROC 2021 are to be made as part of the single application pending trial ("SAPT") (see O 9 r 9(4) of the ROC 2021), but surely it could not have been an intended consequence of the SAPT that a defendant can now be entitled to SFC for a part of the court proceedings for which there is no material or information that can enable the

81 Defendants' written submissions at para 112.

defendant to ascertain its likely costs exposure or for the claimant to assess if the quantum of SFC requested for by the defendant is justified. Also, notwithstanding the SAPT, the court has the power to allow a defendant to apply for SFC even after the SAPT, if new information subsequently emerges as to enable the defendant to better quantify the SFC it needs with respect to later stages of the proceedings (see *SW Trustees* at [65]). Therefore, if the issue had arisen for decision, I would have limited the SFC to which the claimants are entitled to the pre-trial stage which, adopting the claimants' quantification, is fixed at $70,000.

Conclusion

78 For the above reasons, I allow SUM 1965 and I order that the claimants' claims in OC 194 be struck out in their entirety pursuant to O 9 r 16(1)(*a*) and O 9 r 16(1)(*c*) of the ROC 2021, as these claims are premised on the Transactions being at an undervalue within s 98(3)(*a*) and/or s 98(3)(*c*) of the Bankruptcy Act which, in my view, respectively disclose no reasonable cause of action and are legally unsustainable.

79 I will hear the parties on the consequential orders to be made in respect of SUM 1967 as well as the costs of these summonses separately.

Postscript

80 At the hearing where I delivered this judgment to the parties, the claimants' counsel pointed out that there were *also* claims against Zhang and Wu for breach of fiduciary and/or statutory duties (see [8] above) by virtue of them having procured Xiang Da's entry into the Transactions *alone*, irrespective of whether the Transactions had been at an undervalue within s 98(3) of the Bankruptcy Act, and the claimants' claims for knowing receipt and/or dishonest

assistance against the Defendants were in part also based on those breaches. An issue was therefore raised as to whether my decision in SUM 1965, which proceeded on the basis that the claimants' claims against the Defendants were premised entirely on the Transactions being at an undervalue within s 98(3) of the Bankruptcy Act (see [50] above), would not have dealt with those claims for knowing receipt and/or dishonest assistance identified by counsel.

81 I did not consider this to be an issue. Let me explain why so by reference to the SOC itself. Paragraphs 11 to 13 of the SOC describe the Transactions, the manner in which they were carried out, and that Xiang Da had been insolvent at the time of the Transactions or became insolvent as a result of the Transactions. Paragraph 14 of the SOC goes on to plead that the Transactions were, for the reasons I have alluded to earlier in reciting the claimants' case (see [4] above), at an undervalue. Paragraphs 15 to 18 set out the various duties owed by Zhang and Wu as directors and/or trustees of Xiang Da's assets and also that Zhang and Wu owed duties to Xiang Da's creditors given Xiang Da's insolvency or parlous financial state at the time of the Transactions. Paragraph 19 of the SOC then states:

> In breach of their abovestated fiduciary and/or statutory duties and/or their duties as trustees, Zhang and/or Wu carried out or caused to have been carried out *the Transactions above without any sale proceeds having been paid to Xiang Da and, as stated in paragraphs 14(a) and 14(b) above, the Transactions were carried out at an undervalue.* As a result, Xiang Da suffered loss and damage.
>
> [emphasis added in italics and underline]

The remainder of the SOC sets out the claims for knowing receipt and/or dishonest assistance against the Defendants, as well as the claims for fraudulent trading against Zhang and Wu, and finally, the reliefs sought by the claimants.

82 The claimants' counsel emphasised that the part of para 19 of the SOC which I have italicised above and specifically the word "and" showed the disjunction between *the Transactions* and *the Transactions having been carried out at an undervalue*. I accept this, in so far as it is a description of the words contained in para 19 of the SOC. However, no material facts whatsoever have been pleaded by the claimants as to how Xiang Da's entry into the Transactions *alone* gave rise to a breach of fiduciary and/or statutory duties by Zhang and/or Wu. In the absence of such pleaded facts, obviously the SOC could *not* have been read as containing claims against Zhang and/or Wu for breach of fiduciary and/or statutory duties, mounted on the basis of them having procured Xiang Da's entry into the Transactions *alone* independently of whether the Transactions were at an undervalue. Be that as it may, if I were wrong in my reading of the SOC, the absence of such material facts would mean that even if any such claims existed, the SOC discloses no reasonable cause of action, and they are liable to be struck out pursuant to O 9 r 16(1)(*a*) of the ROC 2021 in any event. Finally, I should also add, as the parties' submissions and their respective positions in SUM 1965 clearly show (see [15]–[19] above), this characterisation of the claimants' claim is not that which had been relied on by the claimants for the purposes of SUM 1965.

Perry Peh
Assistant Registrar

Anthony Soh (Alcove Law LLC) for the claimants;
Una Khng, Huang Peide and Iris Ng (Helmsman LLC) for the third to fifth defendants.
