

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2023/0022

BETWEEN:

GOLDEN MEDITECH STEM CELLS (BVI) COMPANY LIMITED

Appellant

and

[1] BLUE OCEAN CREATION INVESTMENT HONG KONG LTD.

[2] BLUE OCEAN STRUCTURE INVESTMENT COMPANY LTD.

Respondents

Before:

The Hon. Mde. Margaret Price Findlay

Justice of Appeal

The Hon. Mde. Nicola Byer

Justice of Appeal [Ag.]

The Hon. Mr. Darshan Ramdhani KC

Justice of Appeal [Ag.]

Appearances:

Mr. Ben Valentin KC, with him, Mr. John Carrington KC and Ms. Reisa Singh
for the appellant

Mr. David Chivers KC, with him, Ms. Hilary Stonefrost for the respondents

2024: October 29, 30;

2025: July 09.

Commercial appeal – Summary judgment – Rule 15.2 Civil Procedure Rules (Revised Edition) 2023 – Whether the learned judge failed to apply the correct test for summary judgment – Triable issues – Actual and ostensible authority – Alter ego of a company – Whether the appellant’s case is suitable for summary judgment

This appeal arose from proceedings between two groups of companies involving the controlling shareholding interest in a Cayman Island company called Global Cord Blood Corporation (“GCBC”). It was the respondents’ case that the GCBC shares were purchased and paid for by the Ying Peng Fund, a member of their group and that their group beneficially owns the GCBC shares. However, it was the appellant’s case that the respondents’ group purchased the GCBC shares but the full purchase price was not paid, and the outstanding amount was subsequently converted into a particular loan and secured by two charges which was evident by certain relevant documents (“disputed

documents”), the effect of which gives the appellant the beneficial interest in the GCBC shares.

By the time the appellant filed its amended defence and counterclaim, it had become apparent that each group was alleging serious fraud on the part of the other. The respondents contended that the disputed documents were unknown to them and the signatures and company ‘chop’ placed on those disputed documents seeking to bind the respondents’ group are forged. The respondents further contended that there was no sum outstanding for the purchase of the GCBC shares. However, the appellant contended that there was an apparent closing of the GCBC shares which were directly transferred to the second respondent, and that one Mr. Yuan who controlled the respondents’ group had asked the appellant’s group not to disclose this debt from certain limited partners of the respondents’ group. The appellant said that even if the signatures and the ‘chops’ were not the respondents’ representative and group respectively, the respondents were still bound by the disputed documents, as these documents, delivered to the agents of the appellant as they were, must have been executed by a person acting with the authority of the respondent.

It was agreed that the central dispute in the case was whether the disputed documents were forgeries. Therefore, experts were instructed on both sides to determine the issue. The expert evidence that the signatures and the Ying Peng Fund Chop were not genuine was not challenged.

The appellant sought to amend its case twice. The first was an amendment application attempting to raise a claim of trust that the GCBC shares were held on trust for the appellant. This was heard by the learned judge in January 2023 who held that the trust claim was an artificial construct which myopically ignored the overall reality of the matter, devised by a lawyer or a team of lawyers trying to think of ways to save the defence now that the forgery on the share charges had become patent.

The appellant filed an application to re-amend its defence on 7th February 2023 as well as an amended defence and counterclaim on 9th February 2023. The respondents were actively reassessing their case and on 17th February 2023 filed an application for summary judgment of their claim and defence to counterclaim.

The two applications were heard and determined in March 2023 and judgment was handed down on 12th September 2023. The learned judge dismissed the appellant’s application to further amend the amended defence and counterclaim and granted the respondents’ application for summary judgment. In the written judgment, the learned judge made clear that in considering the summary judgment application and the re-amendment application, he treated the re-amendments as already in the pleadings.

By notice of appeal filed on 20th December 2023, the appellants sought to appeal the decision of the learned judge. The appellant contends that the learned judge erred in summarily disposing of the claim and counterclaim. The notice of appeal sets out four grounds of appeal:

- a) The learned judge in reaching his decision that the defence did not disclose any proper ground for defending the claim failed to properly consider [those factual matters challenged];

- b) The judgment applied a rigid and mechanical assessment as to whether there was actual authority without any regard to the parties' past dealings and insufficient regards to the terms of the Partnership Agreement governing Ying Peng.
- c) The judgment failed to adequately render a qualitative assessment of each of the 4 conditions in finding apparent authority in the context of a summary judgment application. In particular, the judgment was wrong to consider sufficiency of a case on the authority issue in such a narrow and confined way in circumstances where the judge had found the prevailing context extensive and identified triable issues;
- d) The judgment did not apply the correct test for summary judgment, and it failed to properly consider whether corroborating evidence (such as Articles 2, 37, 67, and 68 of the Laws of People's Republic of China on Partnerships) which would likely have an impact on any factual finding.

By counter-notice filed on 5th March 2024, the respondents sought to affirm the summary judgment order, the order dismissing the counterclaim and the re-amendment order. In a bid to also resist the appeal, the respondents filed an application to allow fresh evidence. The respondents sought to challenge the following:

- a) Whether there is an outstanding debt is a triable issue and appears to be "squarely an issue for an eventful trial of the present claim";
- b) The analysis of the outstanding debt issue was too profound for summary judgment and as the respondents had formally admitted the appellant's case on payments out of the escrow account in the pleadings quintessentially rendered the issue for the other side to prove at trial; and
- c) There were other "controversies" relating to the following matters between the parties that the judge described as "paradigm examples of triable issues":
 1. The judge said that the respondents have been coy about explaining and revealing how the Ying Peng Fund paid the consideration for the purchase of the GCBC shares and the court has not been told how it was paid, in circumstances where the appellant explained how the payments were made and how, allegedly, some money was paid out of the escrow account for unconnected purposes;
 2. The respondents' evidence is that the creation of the share charges (being the BVI share charge and the Cayman share charge) had been discussed, albeit in connection with Sanpower Group Co., Ltd ("Sanpower"), but they do not explain the circumstances of this and why if there was no loan or an outstanding debt share charges would be needed or even discussed at all; and
 3. The court had an uneasy impression that some business was afoot here concerning the payment of the consideration for the GCBC shares pursuant to the sale and purchase agreement dated 30th December 2016 (the "GCBC SPA") which the claimants themselves were determined not to reveal.

Held: allowing the appeal, dismissing the counter notice, granting leave to the appellant to file its re-amended defence and counterclaim, remitting the matter to a different judge of the High Court for case management with a view to having a trial, ordering that the appellant shall have costs on the appeal and on the counter notice, to be assessed if not agreed that:

1. A claimant who applies for summary judgment on its claim and defence to the defendant's counterclaim pursuant to rule 15.2(a) and (b) of the Civil Procedure Rules (Revised Edition) 2023 ("CPR") must satisfy the court that the defendant has no real prospect of defending the claimant's claim or succeeding on its counterclaim.

Rule 15.2(a) and (b) **Civil Procedure Rules (Revised Edition) 2023** applied.

2. Summary judgment should only be granted if it is clear that a claim cannot be sustained or is an abuse of process. The court must avoid a "mini-trial" and consider the matter based on the pleadings and available evidence, not making a decision that sacrifices justice for procedural efficiency. The court must be cautious when facts are in dispute or further investigation could alter the evidence. Credibility issues, particularly when documents contradict a claimant's assertions, should be addressed, and oral evidence may be necessary. Finally, if multiple issues are involved, summary judgment should not be granted on any issue that is closely tied to other triable issues.

St. Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste SLUHCVP2009/008 (delivered 11th January 2011, unreported) applied. **Getronics Holdings EMEA BV & Anor v Logistic & Transport Consulting Co & Ors** [2004] EWHC 808 (QB) applied; **Doncaster Pharmaceutical Group Ltd. v Bolton Pharmaceutical Co. 100 Ltd.** [2006] EWCA Civ 661 applied.

3. The duty of the appellate court on an appeal against summary judgment is not to simply review the lower court's decision but to examine the pleadings and the evidence which were before the lower court to assess that 'evaluative decision on the facts' as was found. In evaluating the facts, a judge must exercise caution and should not disbelieve any evidence which has not been tested in cross-examination, unless satisfied that it was inherently implausible. In considering whether any fact is 'implausible', on a summary judgment application, a court should scrupulously consider the opposing party's evidence and explanations if any.

Drelle v Servis Terminal LLC [2024] EWHC 521 (Ch) applied.

4. The triable issue of whether there was a debt outstanding in respect of the GCBC shares at the time of the 29th March 2018 Loan Agreement hinges on several reasons. Reasons include the respondents' failure to present clear evidence of the full payment and to explain withdrawals from the Escrow Account as well as the respondents' questionable reliance on the public announcements. Furthermore, findings from previous cases to validate opinions or facts in new proceedings are generally barred and issue estoppel does not apply as the conditions for its use, namely, that the same issue was decided in

both proceedings and that the parties are the same, are not met in this case. In the Hong Kong judgment, the court did not make any definitive finding on the issue as to whether there was any outstanding consideration for the GCBC share purchase. Additionally, the issue of control, particularly in the context of separate corporate entities, cannot be decided on summary judgment. Thus, there are still key factual disputes and insufficient clarity around the payments and the circumstances of the GCBC shares. Therefore, there is a triable issue as to whether there was a debt outstanding. This matter would require further examination at trial.

Hollington v F Hewthorn & Co. Ltd [1943] KB 587 applied. **Halsbury Laws of England** Vol. 11 (2020) at para [1589] applied. **China Stem Cells Holdings Limited v Zheng Ting & Ors**; **China Stem Cells (South) Co. Ltd (Incorporated in the BVI) v Zheng Ting and Ors**; **China Stem Cells (East) Co. Ltd v Chen Bing Albert and Ors**, **China Stem Cells Holdings Ltd. v Zheng Ting and Ors** [2024] HKCFI 481 distinguished.

5. With respect to the issue of whether the appellant had a real prospect of succeeding in establishing that the signature of Mr. Xu on the share charge is genuine, there is evidence of a number of persons on the appellant's side who speak to the creation, execution and delivery of the disputed documents. There is therefore a genuine triable issue as to whether the loan agreement and share charges were discussed, executed, and delivered on behalf of Mr. Xu and Mr. Yuan, even if not personally by them. The lower court's failure to fully analyse the creation, execution, and delivery of the documents may have caused it to overlook a perspective that could have led to a different conclusion.
6. The principles governing actual and ostensible or apparent authority are well established. Actual authority is a consensual agreement between principal and agent, giving the agent the power to act with third parties on the principal's behalf. Actual authority may be expressed or implied and it binds the company and the agent and/or the company and others, whether they are within the company or outside of it. Apparent or ostensible authority complements actual authority in the commercial world. Ostensible authority usually arises when a person with actual authority holds out another person or entity as an agent to act on its behalf. Four conditions must exist to rely on ostensible authority, namely: 1) a representation of authority was made; 2) it came from someone with actual authority; 3) the third party relied on it and 4) the company had the capacity to enter the contract.

Hely-Hutchinson v Brayhead [1968] 1 Q.B. 549 applied; **Law Debenture Trust Corp plc v Ukraine** [2023] 2 All ER (Comm) 191 applied; **East Asia Ltd. v PT Satria Tirtatama Energindo** [2019] 4 LRC 646 applied; **Freeman & Lockyer (a firm) v Bruckhurst Park Properties (Manga) Ltd** [1964] 1 All ER 630 applied.

7. One may be the alter ego of a company even if he is not the sole shareholder, sole director or sole beneficial owner. The term "alter ego of a company" is flexible and fact-specific, referring to someone who effectively controls the company's business. In the circumstances set out in this case, Mr. Kam's

evidence raises a triable issue that Mr. Yuan may be the actual controller or alter ego of Ying Peng.

Ben Hashan v Al Shayif [2009] 1 LFLR 115 applied; **Adam and others v Cape Industries plc and another** [1991] 1 All ER 929 applied.

8. The issues in this case hinge on the credibility of the witnesses on either side. Such issues are intertwined with assessment of the critical documents. Therefore, the case must fall within those categories of cases which are not suitable for the summary judgment process.

JUDGMENT

- [1] **RAMDHANI JA [AG.]:** This is an appeal against a decision of the Virgin Islands' High Court sitting in the commercial jurisdiction, granting summary judgment on a number of issues raised on a claim related to the validity of certain documents and the order of that court dismissing an application to further amend a defence and counterclaim. The respondents (who were the Claimants below), resisting the appeal, have also filed a 'counter-notice' coupled with an application to lead fresh evidence, seeking to affirm the learned judge's decision, both on its own reasoning as well as on other grounds.
- [2] The appeal is allowed reversing the decision and orders made by the learned judge, the counter notice is dismissed, and certain consequential orders made with the effect that the matter is remitted to the high court to take its normal course. As part of these appeal proceedings, an application was also filed by the respondents for an order to allow fresh evidence to be led in a bid to resist the appeal. That application is dismissed. The Court's reasons for its orders are now set out.

Introduction

- [3] This case is one of several cross-border proceedings between two groups of companies, involving the controlling shareholding interest in a Cayman Island company called Global Cord Blood Corporation (the "GCBC shares" and "GCBC" respectively). It is the respondents' case that the GCBC shares were purchased and fully paid for by the Ying Peng Fund, a member of their group and that their group now beneficially owns the GCBC shares. It is the appellant's

case that the respondents' group did purchase the GCBC shares but that the full purchase price was not paid, and the outstanding amount was subsequently converted into a particular loan and secured by two charges which was evidenced by certain relevant documents ("the Disputed Document"), the effect of which gives the appellant the beneficial interest in the GCBC shares.

[4] By the time the amended defence and counterclaim was filed in this case, it had become apparent that each group was alleging serious fraud on the part of the other. It is the respondents' case that the disputed documents are unknown to them and signatures and company 'chop' placed on those disputed documents seeking to bind the respondents' group are forged. The respondents say that there was no sum outstanding on the purchase of the GCBC shares. It is the appellant's case that there was such a sum outstanding even though there was an apparent closing on the sale of the GCBC shares which had been directly transferred to the second respondent, and that one Mr. Yuan who controlled the respondents' group had asked the appellant's group not to disclose this debt from certain limited partners of the respondents' group. The appellant says that even if the signatures and the chops were not the respondents' representative and group respectively, the respondents are still bound by the disputed documents, as these documents, delivered to the agents of the appellant as they were, must have been executed by a person acting with the authority of the respondent.

[5] This assessment of the pleaded case gave rise to the view of the legal representatives on both sides at the time with whom the judge agreed that the central dispute was whether the documents were forgeries and with the permission of the court, experts were instructed on both sides to determine this issue. The learned judge summed up the essence of the experts' reports at paragraph [89] when he states:

"...those experts exchanged their respective reports on 25th November 2022. The result of this was that both sides' experts took the view that the signatures were not genuine. The Defendant's expert concluded that it was 'highly probable' that the signature on each of the Share Charges and the 29th March Loan Agreement were not Mr. Xu's genuine signature, and the purported Ying Peng Fund Chop affixed to the 29th March Loan Agreement was also a forgery."

[6] In the court below, the expert evidence that the signatures and the Ying Peng Chop were not ***genuine*** was not challenged.

[7] The appellant then changed its attorney and sought to amend its case twice. The first was an 'Amendment Application' attempting to raise a claim of trust that the GCBC shares were held on trust for the appellant. This was heard by the learned judge in January 2023. The learned judge held that the 'Trust Claim' was an 'artificial construct, which myopically ignored the overall reality of the matter, devised by a lawyer or a team of lawyers trying to think of ways to save the defence now that the forgery on the share charges had become patent.'

[8] It appears that certain other amendments being proposed on that 'Amendment Application' were considered less controversial by the learned judge, and the appellant filed an Amended Defence and Counterclaim on 9th February 2023. The learned judge explained the scope of that Amendment Defence and Counterclaim as follows:

"The key point of the amendment was to plead not just that Mr. Xu acted for/or an authorized representative of Sanpower Group, Ying Peng and each of the Claimant companies in respect of the alleged contractual documents pertaining to these companies, as had been pleaded in the original Defence and Counterclaim, but also that Mr. Xu had apparent or ostensible authority to act for and/or represent those companies. This pleading amendment was done simply by asserting that Mr. Xu had apparent or ostensible authority."

[9] Even when the first application was being considered, ruled upon, and an 'Amended Defence and Counterclaim' was filed, the appellant was busy preparing another application. This application was filed two days prior to the filing of the Amended Defence and Counterclaim on 7th February 2023, to 're-amend' the Defence and Counterclaim. This Notice of Application explained that this application was to:

"2.1 Clarify the Applicant's Defence that even if the signature of Mr. Xu or the imprint of the company seal of Ying Peng on the March 2018 Documents were found not to be the same as the specimen signatures of Mr. Xu or the specimen company seal of Ying Peng as provided to the parties' handwriting experts, they were affixed on the March 2018 with the knowledge and actual authority (or alternatively, with the ostensible authority) of Mr. Xu Ping;

2.2 Explain why the knowledge or acts of Mr. Xu are attributable to the Claimants and Ying Peng;

2.3 Highlight the fact that the March 2018 Documents were at all material times presented to GMSC and GMHL by Xu Ping and/or his representative as bearing the genuine signature of Xu Ping and/or the genuine company seal imprint of Ying Peng (with no indication that they were not genuine) which constituted an actual (or alternatively, implied) representation of authority. GMSC would not have otherwise accepted the March 2018 Documents as being validly executed by the Claimants and Ying Peng;

2.4 Plead the existence of a debtors balance confirmation sheet which came from the audit procedure for the financial statements of GMHL conducted by KPMG Huazhen LLP back in 2020 ("Debtors Confirmation Sheet"). Ying Peng (through Ying Peng AMC) had never indicated any disagreement with the statement in the Debtors Confirmation Sheet that the Claimants had charged 78,874,106 ordinary shares of GCBC in favour of GMHL and had further affixed its company seal (along with Mr Yuan Yafei's signature) in confirmation that the information was correct and complete. Thus, as late as June 2020, Ying Peng had continued to represent to GMSC and/or GMHL that the March 2018 Documents were validly executed; and

2.5 Emphasize, for the foregoing reasons, that the Claimants are estopped from denying the validity, subsistence, and enforceability of the March 2018 Documents.'

[10] The appellant relied on a number of affidavits in support of this application including an affidavit from one Mr. Kam, who represented the appellant in the sale and purchase of the GCBC shares. Mr. Kam was stated to be the majority shareholder in Global Meditech Holdings Limited ("GMHL") and was a director of GMHL from the 3rd September 2001 to 24th May 2020. GMHL owns 100% shares in the appellant.

[11] The respondents themselves were actively reassessing their case, and on 17th February 2023, they filed an application for summary judgment of their Claim and Defence to Counterclaim. A 'Sixth Affidavit' of one Mr. Xiaoyang Chen was filed in support of this application. They prayed that the court would be pleased to summarily declare that:

(1) "the Share Charge dated 30 March 2018 between Blue Ocean HK and the Defendant in respect of the Blue Ocean BVI shares (the "BVI Share Charge") is void, invalid and of no legal effect; alternatively, that the BVI Share Charge is unenforceable"; and

(2) "the Share Charge dated 30 March 2018 between Blue Ocean BVI and the Defendant in respect of Global Cord Blood Corporation ("GCBC") (the "Cayman Share Charge") is void, invalid and of no legal effect; alternatively, that the Cayman Share Charge is unenforceable."

[12] In grounding this application, the respondents focused the court on the parties' agreement that the 'first issue in the Claim and the Counterclaim is whether the signature on the Share charges that purport to be Mr. Xu's signature are forged'. Pointing out that the parties had agreed that the question of forgery should be the 'subject matter of handwriting expert evidence', the respondents relied on the experts' reports prepared by their own and the appellant's experts. The respondents' expert expressed the opinion that all of the signatures on the disputed documents are forged. The appellant's own expert expressed the opinion that it was 'highly probable' that the signatures on the disputed documents were not Mr. Xu's signature.

[13] The respondents contended, that in the face of this evidence, there could be no finding that the signatures were those of Mr. Xu's and that there would be no need for any trial on this issue. Further, that it 'is inherently unbelievable that anybody would deliberately alter their own signature and company chop in order to later seek to claim that the documents were forged, and that the appellant provides no evidence whatsoever to support this suggestion'. The respondents also contended that in 'parallel proceedings in the Cayman Islands, and in legal proceedings in Hong Kong, the appellant and the appellant's associates have demonstrated a propensity to forge, fabricate and/or manipulate documents, including preparing a forged bank statement, also with a forged chop'.

[14] As far as any 'audit confirmation letter', the respondents contended that, 'that letter cannot possibly be evidence of the non-payment of the GCBC shares consideration by Ying Peng in 2018 because it relates to a different debt, a debt purportedly arising from an offshore remittance procedure undertaken in 2020'.

[15] The respondents also contended that any case founded on the apparent or ostensible authority of Mr. Xu has no real prospect of success because:

- (1) "Any relevant authority to enter into the 29 March Loan Agreement would be that of Ying Peng Fund which is not a party to these proceedings. The Ying Peng Fund according to the Defendant's own case, did not have knowledge of the alleged arrangements that purportedly gave rise to the Share Charges, namely the alleged failure to pay full consideration for the GCBC Shares at closing on 31 January 2018.'
- (2) "The consideration for the GCBC Shares had been paid in full by 31 January 2018 and this is recorded in public announcements made by GMHL, including an annual report that records that GMHL's auditors had conducted an investigation and concluded that full consideration for the GCBC Shares had been received from the Ying Peng Fund."
- (3) "The Defendant knew that Mr. Xu had no authority to bind the Ying Peng Fund and Mr. Xu was not held out as having such authority (because the Defendant had a copy of the Partnership Agreement). The allegation that Mr. Xu had ostensible or other authority is negated (1) by the Defendant's knowledge that the arrangements purported to be made in relation to the consideration for the GCBC Shares were concealed from the Ying Peng Fund; and (2) if what the Defendant pleads were true, Mr. Xu would, to the knowledge of the Defendant, be perpetuating a fraud on Ying Peng and the Claimants."

- [16] The respondents further contended that any 'estoppel' Defence was equally without merit and had no real prospect of success on the same reasons raised in relation to the 'Authority' Defence.
- [17] The respondents asked the court to find that 'there is no reason why the appellant's 'new case' could not have been pleaded as part of the first round of pleadings. They submitted that it is only being raised now because the appellant more recently engaged a new legal team, and this new and unsubstantiated case was being essentially crafted by this new team of lawyers.
- [18] The two applications were heard and determined in March 2023. The learned judge dismissed the appellant's application to further amend its Amended Defence and Counterclaim and granted the respondents' application for summary judgment.

- [19] In a written judgment, the learned Judge made it quite clear that in considering the Summary Judgment Application and the 'Re-Amendment Application', he treated the 're-amendments' as already in the pleadings. The respondents were in agreement with this approach contending that even so, they would still be entitled to summary judgment.
- [20] The learned Judge considered a number of authorities on the applicable principles on the grant of summary judgment, including the cases of **St. Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**¹; **Zong Long v Endushantum Investments Co. Ltd.**²; **Easyair Ltd. v Opal Telecom Ltd.**³; **Doncaster Pharmaceutical Group Ltd. v Bolton Pharmaceutical Co. 100 Ltd.**⁴; **Swain v Hillman**⁵; **ED & F Man Liquid Products v Patel**⁶.
- [21] The learned judge held that on an application of the legal principles, on which the parties generally agreed, and on the consideration of the pleaded cases and the expert evidence, that there was no real prospect that the appellant could sustain any claim that the signatures and the company chop on the disputed documents were genuine.
- [22] In relation to whether Mr. Xu had actual authority, the learned judge accepted that the pleaded case had a fatal omission, and even so, that the evidence, including the documentary evidence, actually showed he had no such authority to execute the disputed documents.
- [23] As far as ostensible authority was concerned, the learned judge held that the appellant failed to satisfy the first two of the four conditions identified by Lord Diplock in **Freeman & Lockyear v Buckhurst Park Properties (Mangal) Ltd.**⁷. Essentially, the court first held that the appellant had failed to present a

¹ SLUHC VAP2009/0008 (delivered 11th January 2010, unreported).

² BVIHC(COM)2017/151 (delivered 2nd April 2019, unreported).

³ [2009] EWHC 339 (Ch).

⁴ [2006] EWCA Civ 661.

⁵ [2001] 2 All ER 91.

⁶ [2003] EWCA Civ 472.

⁷ [1964] QBD 480.

case with a real prospect of success that 'there was a representation, by someone who had actual authority to manage the business of Ying Peng, (which excludes Mr. Xu, because he had no actual authority to do so), that Mr. Xu had authority to execute the 29th March Loan Agreement as a contract of a kind within the scope of Mr. Xu's apparent authority'. The court also held that there is no evidence adduced to show 'that there has been any representation by anyone who had actual authority to manage the business of Ying Peng'. The court rejected the appellant's contention that the evidence showed that Mr. Yuan had the necessary authority to manage the business of Ying Peng, and that Mr. Yuan had made representations that Mr. Xu was authorised to execute the disputed documents.

[24] The learned judge also made a finding that on its own case, the appellant should have been placed on enquiry.

[25] Even in all these findings and conclusion, the learned judge nonetheless considered that it remained a triable issue whether there was a debt outstanding on the purchase of the GCBC shares.

[26] On this appeal, the appellant contends that the learned judge has erred in summarily disposing of the Claim and the Counterclaim. The notice of appeal sets out four grounds of appeal contending that the learned judge erred both in fact as well as law and in principle with the result that his decision was wrong in that:

- (a) The learned judge in reaching his decision that the Defence did not disclose any proper ground for defending the claim failed to properly consider [those factual matters challenged];
- (b) The Judgment applied a rigid and mechanical assessment as to whether there was actual authority without any regard to parties' past dealings and insufficient regard to the terms of the Partnership Agreement governing Ying Peng.
- (c) The Judgment failed to adequately render a qualitative assessment of each of the 4 conditions in finding apparent authority in the context of a summary judgment application. In particular, the judgment was wrong to consider sufficiency of a case on the Authority issue in such a narrow and confined way in circumstances

where the Judge had found the prevailing context contained extensive triable issues.

- (d) The Judgment did not apply the correct test for summary judgment, and it failed to properly consider whether corroborating evidence (such as Articles 2, 37, 67 and 68 of the Laws of People's Republic of China on Partnerships) which would likely have an impact on any factual finding.

[27] The respondents have taken a proactive stance on this appeal by filing a counter notice seeking to affirm the judgments on other grounds and asking this Court to reverse the learned judge's finding that there was a triable issue on whether a part of the consideration for the purchase of the GCBC shares remained outstanding notwithstanding there had been a closing and public announcements by the appellant that it had received the full consideration on the sale.

[28] Further, and in the alternative, the respondents have also sought to support the learned judge's finding that the appellant should have been placed on inquiry in relation to the authority of Mr. Yuan and Mr. Xu to enter into the loan agreement and contended that any such enquiry would have revealed that they lacked such authority.

Analysis, Discussions and findings.

[29] A claimant who applies for summary judgment on its claim and defence to the defendant's counterclaim pursuant to Rule 15.2(a) and (b) of the **Civil Procedure Rules (Revised Edition) 2023** ("CPR") must satisfy the court that the defendant has no real prospect of defending the claimant's claims and the defendant has no real prospect of succeeding on its counterclaim.

[30] In speaking to what is a "real prospect of success" and the approach that the court should take, George-Creque JA (former Chief Justice) in **St. Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste** set out the principle as follows:

"Summary judgment should only be granted in case where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the

words of Lord Woolf in **Swain v Hillman** ...is that a claim or a defence has no “real” (i.e. realistic as opposed to fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case, then it is open to the court to enter summary judgment.”

- [31] It is necessary to emphasise and elaborate on a few points.
- [32] First, a court should always bear in mind that in reaching its conclusion, the court must not conduct a mini-trial (see **Swain v Hillman**). Justice should never be sacrificed at the altar of procedural expediency. As the English Court of Appeal speaking the equivalent English Rule in **Doncaster Pharmaceutical Group Ltd. v Bolton Pharmaceutical Co. 100 Ltd** held:
- “In handling all applications for summary judgment, the court's duty was to keep considerations of procedural justice in proper perspective. Appropriate procedures had to be used for the disposal of cases, otherwise there was a serious risk of injustice. The court should exercise caution in granting summary judgment in certain kinds of case, particularly where there were conflicts of facts on relevant issues which had to be resolved before a judgment could be given. A mini-trial on the facts conducted under CPR 24 without having gone through the normal pre-trial procedures had to be avoided, as it ran a real risk of producing summary injustice. The court should also hesitate about making a final decision without a trial where, even though there was no obvious conflict of fact at the time of the application, reasonable grounds existed for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.”
- [33] These considerations are always intertwined with the realities of litigation where either side hopes to dispose of the other side as quickly as possible. The cases have cautioned that whilst the ‘summary disposal of rubbishy defences is in the interests of justice. The court has to be alert to the defendant, who seeks to avoid summary judgment by making a case look more complicated or more difficult than it really is’. Equally, ‘the court has to also guard against the cocky claimant, who, having decided to go for summary

judgment, confidently presents the factual and legal issues as simpler and easier than they really are and urges the court to be “efficient” that is produce a rapid result in the claimant’s favour”⁸.

[34] Second, a court is not to take at face value and without analysis everything that a claimant says in his case, as in some cases, ‘it may be clear that there is no substance in factual assertions made, particularly if contradicted by contemporaneous documents’. Even so, a court must be alert in those cases involving such document where issues of credibility are nonetheless critical to the ultimate determination of the factual issues between the parties.

[35] In this regard, the case of **Getronics Holdings EMEA BV & Anor v Logistic & Transport Consulting Co & Ors**⁹ noted:

“[13] Where credibility is in issue, as it commonly is, the evidence of a claimant on an application for summary judgment needs to reach a threshold where the defendant’s case can be seen to be not capable of belief. The conclusion must be one which can be reached without the minute examination of documents, correspondence, minutes, and without the necessity of conducting a mini trial on documents. It is a jurisdiction which is designed to deal with cases that are not fit for trial at all. If there are issues which should be investigated at trial they should be left over for trial.”

[36] Moreover, where there are documents seemingly supporting one side, a court ought not to ignore opposing explanatory oral evidence that is likely to cast a different light on the relevance and weight of the documentary evidence. Whether or not any factual assertion is probable is oftentimes bound up with issues of credibility which may only be discerned from oral evidence tested by cross examination.

[37] Thirdly, where a court is considering an application on summary judgment in a case on several issues, that court should hesitate to grant summary judgment on any issue where the court finds that one or more of the other issues are

⁸ [2006] EWCA Civ 661 at paras [11] and [12].

⁹ [2004] EWHC 808 (QB).

triable, and those other issues are integrally bound up with any issue which may appear, when taken by itself, to be amenable to summary judgment.

- [38] The considerations outlined above are critical to this Court's assessment of this case and they have resulted in our disagreement with the learned judge.
- [39] Having regard to the cases for each side, this Court finds that it is useful to approach this analysis considering the question of whether triable issues are disclosed in a particular order. First, whether there is a triable issue on the question as to whether the GCBC shares were fully paid for and how this is relevant to the learned judge's assessment of the primary issues before the court. Second, whether there is a triable issue on whether the disputed documents were executed by or on behalf of Mr. Xu. Third, whether there are triable issues on the 'actual authority' and or the 'ostensible authority' questions.
- [40] There is an additional point for consideration and that is the approach that an appellate court should take on an appeal of this nature where no oral evidence has been given in the court below. The question which arises is, what is the standard of review? Is this appeal to be treated as a review of the judge's decision or a rehearing with a fresh consideration of the material which was before this judge and now before this Court?
- [41] The respondents have asked this Court to consider the case of **Malik v Henley Homes Plc**¹⁰ where the English Court of Appeal stated that:
- "The decision of a judge, at any rate in a case like this, that a defendant has no real prospect of successfully defending a claim is an evaluative decision on the facts. It is not a pure point of law. I think we should only disturb his conclusion if it is one that we are satisfied was not open to him."
- [42] This in essence contemplates some 'degree of reticence' on the part of the appellate court for the decision of the lower court as 'appropriate respect should always be accorded to the decision of the lower court'. (See the cases of **Malik**

¹⁰ [2023] EWCA Civ 726.

v Henley Homes (supra); DB v Chief Constable of Police Service of Northern Ireland¹¹; McFaddens v Chandrasekaran¹².

- [43] This point has been underscored primarily in cases where a trial has taken place, but the appeal courts have cautioned that even in a case where no testimony has been given, as in summary judgment application, the ‘first instance trial should be seen as the ‘main event’ rather than a ‘tryout on the road’. Lord Kerr speaking for the United Kingdom Supreme Court in **DB v Chief Constable of Police Service of Northern Ireland** is equally appropriate. His Lordship stated at para [80]:

“A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent.

- [44] That said, it is the duty of the appellate court on an appeal, not to simply review the lower court’s decision but to examine the pleadings and the evidence which was before the lower court to assess that ‘evaluative decision on the facts’ as was found.
- [45] In the case of **Drelle v Servis Terminal Llc**¹³ the English Court of Appeal cautioned that in evaluating facts, a judge must be careful and ‘*should not disbelieve any evidence which has not been tested in cross-examination, unless satisfied that it was implausible*’. Implausibility may be inherent or it may arise from the other evidence on that party’s case. I would add that in considering whether any fact is ‘implausible’, on a summary judgment application, a court should scrupulously consider the opposing party’s evidence and explanations if any.

¹¹ [2017] UKSC 7.

¹² [2007] EWCA Civ 220.

¹³ [2024] EWHC 521 (Ch).

- [46] This is the approach of this Court on this appeal. I now turn to the questions of triable issues.

Consideration for the GCBC shares – Whether a Triable Issue – Its relevance to the Appeal

- [47] The appellant argued that the epicentre of the case pleaded on the issue of the validity of the disputed documents, is whether there is a debt outstanding for the purchase of the GCBC shares. If there is no debt, then nothing else follows. The appellant is effectively contending that if there is a debt, then the subsequent events relating to the question of whether a loan agreement and charges were discussed and executed, takes on a different context and requires greater care by a court considering the issue of summary judgment.
- [48] It is significant to note in this case that the learned judge found that there was a triable issue on the question of whether this debt was outstanding. The judge considered the matter as follows:

“[208]... I readily see that if there is no outstanding debt, there is nothing the share charges could attach to, and thus they could not be invoked by way of enforcement of this alleged security. Learned counsel for the claimant took the Court through the figures and supporting information. Reminding myself that upon summary judgment the Court should avoid a mini-trial, such an analysis was in my view too profound for summary judgment. That is all the more so in circumstances where the Claimant had formally simply not admitted the Defendant’s case on payments in the Claimants’ pleadings. That quintessentially renders the issue something for the other side to prove, at trial.”

...

[211] ... the Claimants’ side has been coy about explaining and revealing how the Ying Peng Fund paid the Defendant’s side the consideration for the purchase of the GCBC Shares. The Claimants jump straight to formal evidence that it had been paid in full by January 2018. But how it was paid we are not told. Why not? That omission is stark, in circumstances where the Defendant explained the payments were made, and how, allegedly, some money was paid out of the Escrow Account for unconnected purposes, which the Claimants do not deny. The simplest way of meeting this case is to say how much of it the Claimants agreed with and to explain why the remainder was incomplete or wrong. The Claimants have deliberately, it would appear, kept the Court in the dark as what was going on there. Even more suggestively, the Claimants’ evidence is that the creation of share charges had indeed discussed, albeit in connection with Sanpower, but they do not explain the circumstances of this. Again, why not? Why, if

there was no loan, or no outstanding debt, would share charges be needed, or even discussed at all. One is, rightly or wrongly, left with an uneasy impression that some business was afoot here concerning the payment of the GCBC SPA consideration which the Claimants themselves determined not to reveal. Instead, the Claimants seek to brush this off as irrelevant as someone (perhaps) concerning Sanpower. But since it would appear to concern the payment of the GCBC SPA consideration, that would appear to be squarely an issue for an eventual trial of the present claim.”

[212] The controversies relating to such matters between the parties are paradigm examples of triable issues. Their result could be that the Defendant’s case was right all along. As many cases before this Court demonstrate, truth is often stranger than fiction.”

- [49] The respondents have cross appealed on this finding that there is a triable issue on the question as to whether there was a debt outstanding in respect of the GCBC shares at the time when the 29th March Loan Agreement was entered into. They say that this Court should find that the learned judge has reached this decision because he had considered the issue ‘somewhat too profound for summary judgment’, and that was a decision that was not open to the learned judge to make. On this appeal they pointed to evidence of GMHL making public statements in its 2018 Audit Accounts, which public statements had been approved by Mr. Kam, that the consideration for the GCBC shares had been paid in full before January 2018 and that the GCBC SPA had closed by that date. The respondents asked this Court to have regard to the evidence of GMHL’s auditors, KPMG who stated that this transaction had been considered a ‘key audit matter’ and stated that their procedures included ‘inspecting evidence in receipt of the consideration from the [Ying Peng Fund], agreeing and reconciling the consideration received by the Group to the Sale and Purchase Agreement.’ They said that it was on the appellant to now say that this was incorrect and that it should have provided an explanation as to how KPMG could have confirmed that the consideration payable under the GCBC SPA had been received if any of the purchase price remained outstanding. The respondents submit that even the witnesses, who provided evidence in the court below, including Mr. Kam, did not seek to withdraw those public statements made.

- [50] The appellant's pleaded case was that after the full consideration for the GCBC shares had been paid into the Escrow Account, monies were transferred out of the account, never returned, and so full consideration had never been paid. The respondents argued on this appeal that 'some payments may have been made out of the escrow account pursuant to arrangements between Mr. Kam and Mr. Yuan, although the details of those arrangements are not known. Those payments do not involve the Ying Peng Fund and were, on the appellant's own pleaded case, concealed from the Fund. Thus, any money owing to Mr. Kam by Mr. Yuan/Sanpower or vice versa, were part of separate arrangements between those two parties and had nothing to do with the fund. Whatever their arrangement may have been, the respondents say, it does not change the fact that the consideration for the GCBC shares was paid in full by 31st January 2018 when the sale of the GCBC shares was completed and that there was no outstanding debt in relation to those shares at the date when the 29th March Loan agreement was purported to be made.
- [51] The analysis of this part of the case compels this Court to find that this matter must be tried as nothing further in this case disposes of this issue on a summary judgment application.
- [52] The learned judge was right to be concerned about the respondents' stance on the withdrawals from the Escrow Account. They did not deny that the monies may have been transferred out even after the full considerations for the GCBC shares had been paid in. Notably, the full consideration being paid into the Escrow Account is not the same thing as full consideration being paid for the GCBC Shares.
- [53] Even now, the respondents, having accepted that there was an arrangement between Mr. Kam and Mr. Yuan which involved the withdrawal of monies from the Escrow Account, seek to persuade this Court that it was a separate arrangement. However, there has been no evidence from Mr. Yuan to speak to this 'separate arrangement' and/or to contradict Mr. Kam. In fact, there is a letter of complaint by one of the limited partners of the Ying Peng Fund, complaining that monies have been misappropriated from the Fund. There is a

case that monies seemed to have been taken out of the Fund and never paid back.

- [54] I am attracted to the learned judge's view that the respondents have been and are being 'coy' on this issue. They could have presented clear evidence that the consideration had been paid and clarified the issue of withdrawals from the Escrow Account. They did not. (Maybe they could not as this would have been more for the Ying Peng Fund or Ying Peng AMC to do). It may be a significant matter that the Escrow Account remained open after the date for completion. It may also be a significant matter that when the original closing date arrived, Mr. Kam and Mr. Yuan met in / or around September 2017 and committed Ying Peng Fund to a supplemental agreement to GCBC SPA to extend the closing date to the 31st December 2017, and if more time was required for closing, a further US\$10 million for an extension to 31st January 2018.
- [55] The appellant submitted that: "It is undisputed that Ying Peng failed to meet the new closing date... What transpired was that with the full acknowledgement that a sum of RMB 2,002,000,000 remained outstanding, [Mr.] Yuan requested [Mr.] Kam to extend him the courtesy of not kicking up a fuss with Ying Peng (which would only generate unnecessary gossip amongst Guotai Junan and the other limited partners and greatly embarrass him) but to complete the transfer of the shares to Blue Ocean BVI in exchange for his company entering in the Sanpower January 2018 Loan Agreement so that [Mr.] Kam's company would have extra collateral in hand to secure the indebtedness of Ying Peng for the balance of the purchase price which is still owed. [Mr.] Kam agreed."
- [56] The appellant submitted that it 'follows and it is indeed unsurprising that public announcements were issued confirming the fiction that the consideration for the GCBC shares was paid but it is noteworthy that the Escrow Account remained active after the new closing date. The public statements cannot therefore be dispositive of the appellant's case...'
- [57] The respondents' reliance on the public announcements made of the audited accounts does not address those matters set out above. It may be that the

statements made in the audited accounts are using the Sanpower Loan Agreement as 'cash equivalence' for the closing.

[58] In this context, I agree with the learned judge. This Court cannot find that the learned judge is clearly wrong to find that this is a triable issue, and having regard to the approach this Court must take, this conclusion of the learned judge will be affirmed.

[59] I must also address the respondents' counter notice and their application to lead fresh evidence. They have asked this Court to allow evidence of the judgment of Justice Linda Chan in the consolidated cases of **China Stem Cells Holdings Limited v Zheng Ting & Ors; China Stem Cells (South) Co. Ltd (Incorporated in the BVI) v Zheng Ting and Ors; China Stem Cells (East) Co. Ltd v Chen Bing Albert and Ors, China Stem Cells Holdings Ltd. v Zheng Ting and Ors**¹⁴(the "HK Judgment"). The respondents seek to rely on Justice Chan's factual finding that the appellant's witnesses were in breach of their duties as directors by entering into the 2019 security arrangement **since no debt was owing** to the appellant by the Ying Peng Fund. They argue that this judgment was only recently delivered and it should be allowed in as 'fresh evidence' on this appeal with the effect that it demonstrates that an issue estoppel has arisen against the appellant as to the non-existence of the debt.

[60] I have read the judgment of Justice of Appeal Byer, wherein the respondents sought to adduce, as fresh evidence in the appeal, the judgment of Justice Linda Chan in the decision **China Stem Cells Holdings Limited v Zheng Ting & Ors**. I am in agreement that that application be dismissed for the reasons given in that judgment. I agree that the principle established in **Hollington v F Hewthorn & Co Ltd**¹⁵ would, as a general rule, bar the admission of all opinions and or factual findings made by another court in previous proceedings to validate such opinions or prove those facts in subsequent proceedings.

¹⁴ [2024] HKCFI 481.

¹⁵ [1943] KB 587.

[61] I would also join in saying that it is difficult to see how an issue estoppel arises from Justice Chan's judgment. It is appropriate to set out the legal principle. The conditions for raising the issue estoppel are explained by **Halsbury Laws of England**¹⁶ in the following terms:

"The conditions for the application of issue estoppel require a final decision on the issue by a court of competent jurisdiction and that:

- (1) the issue raised in both proceedings is the same; and
- (2) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Deciding if the issue is the 'same' in both cases will depend upon whether the court takes a narrow or a wide view of the extent of the issue determined in the earlier case. ...

Where one party has raised an issue which his opponent alleges is barred by issue estoppel, the opponent may either plead the estoppel and leave the matter to be dealt with at the trial or attempt to have the offending plea struck out."

[62] I have examined the judgment of Justice Chan. As noted, it is the judgment of the High Court of Hong Kong flowing from four separate actions commenced by provisional liquidators (PLs) appointed by the Cayman Islands court over GCBC on the 22nd September 2022, in the names of three (3) indirect wholly owned subsidiaries of GCBC. These actions were commenced by the PLs to take control over certain direct and indirect subsidiaries of GCBC on the basis that they were the only persons with proper authority to control and manage these subsidiaries.

[63] In response to the four actions, certain 'impugned documents' which purported to transfer the subsidiaries from GCBC for nominal consideration were presented to the court to contend that the PLs had no right to control and manage the subsidiaries. The PLs in turn contended that these documents were invalid as being recently created and backdated or made in breach of fiduciary duties and / or improper purposes. It became apparent that Ms. Zheng Ting and Mr. Chen Bing Chuen Albert played an integral role in the execution

¹⁶ Vol. 11 (2020) at para. [1589].

of the impugned documents and so at the trial of issue of the validity of these impugned documents, the credibility of these persons was particularly relevant. Ms. Zheng Ting was an executive director of GMHL during the period of 2012 to May 2019, and an executive director and chairman of the Board of GCBC June 2009 and 2018 respectively. She was also appointed GCBC's Chief Executive Officer before 2016 and was there after the 2016 SPA. Mr. Chen Bing Chuen Albert was a director and Chief Financial Officer of GCBC since 2009.

[64] In summary Ms. Ting and Mr. Albert's case was that these subsidiaries were transferred away to enforce 2019 Security Guarantee/Agreements for the debt owed by Ying Peng under the 2016 SPA. The agreed preliminary issues before the Hong Kong Court were all related to the validity of the impugned documents, namely whether they were recently created and backdated and or made in breach of fiduciary duties or procured by Ms. Ting and Ms. Albert and others for improper purposes.

[65] There were a number of matters which came on for the consideration of the Hong Kong Court in relation to whether Ms. Ting or Mr. Albert could be believed that they had not back dated the impugned documents or had not executed them in breach of their fiduciary duties or for improper purposes. Justice Chan dealt with these matters beginning at paragraph [64] of her judgment and in particular, paragraphs [78] to [82] where the learned judge analysed Ms. Ting's evidence and paragraphs [83] to [86] with regards Ms. Albert's evidence. The learned judge rejected Ms. Ting's evidence that the impugned documents were not backdated finding that this evidence was plagued with inconsistencies and was unreliable. The learned judge reasoned that 'it is inconceivable' that Ms. Ting would not have raised such an important issue with the GCBC's board and obtained its approval prior to the execution of these documents. The learned judge stated that at a minimum, it was expected that Ms. Ting should have insisted that GCBC make a public announcement that it was 'giving' away all the relevant subsidiaries because in that same month (August 2022) GCBC's annual report had stated that the Group still owned all direct and indirect subsidiaries. The learned judge found that Ms. Ting had not put forward

any credible explanation as to why she did not notify or seek approval from the board of GCBC or cause GCBC to make an announcement about the transfers of the subsidiaries. As a significant matter, the learned judge found that the general credibility of Ms. Ting's evidence was affected by her evidence that she had executed certain documents for a particular subsidiary on a particular date when on that date the company was not yet in existence.

[66] Justice Chan made substantially similar findings in relation to Mr. Albert. Much of the analysis dealt with the execution of these impugned documents. The learned judge accepted that Mr. Albert was 'highly evasive and deflectionary in his answers. It is to be noted here that the learned judge agreed that 'the veracity of the 2019 Guarantee and 2019 Security arrangement do not fall within the preliminary issues' but considered that this would not prevent that court from making any findings of credibility of the evidence of these two persons insofar as it relates to their case and the issue as to whether they did in fact execute the documents.

[67] There were no definitive findings that there was no debt outstanding on the 2016 SPA. The learned judge of the Hong Kong Court did speak to this debt at paragraph 124 when her Ladyship rejected the reasons proffered by Ms. Ting and Mr. Albert for believing that the execution of the 2019 Guarantee was in the best interests of the companies concerned. The learned judge stated:

"124 (1) The so-called 'concerns' that the Group would have been in financial peril and its survival at risk if the 2019 Guarantee had not been entered into are wholly without basis.

(2) The assertion that Ying Peng Partnership/Yuan/Sanpower had been in default of paying the purchase price for the Shares by September/October 2019 is contradicted by the statements in the GMHL's annual report for 2017/2018, which stated that (a) KPMG had inspected evidence of receipt of consideration under the 2016 SPA; and (b) the full consideration (and extension fee) had been received, and indeed partly spent. The annual report was approved by the board of directors of GMHL (which included Kam and [Ms. Ting]) and [Mr. Albert] was its corporate finance vice president. Although [Ms. Ting] claims that in the notes to GMHL's 2020 annual report, it was stated that Ying Peng Partnership had not fully paid the relevant amount, *it seemed that if the statements in the 2017/2018 annual report were correct, the amount*

referred to in GMHL's 2020 annual report could not have been a reference to other debts owed by Ying Peng Partnership."

- [68] If these statements could have been relied on to assert that the learned Hong Kong judge had made a conclusive finding on the debt issue, then the very next statement made by the judge puts it beyond doubt. The learned judge stated:

"(3) Even if the purchase price for the Shares remained outstanding by September/October 2019, at most, it would only result in GMHL/GMSC/Kam taking enforcement action against (a) Ying Peng Partnership/Yuan/Sanpower and/or (b) the Shares. Such enforcement action would not have any impact on GCBC or any of its subsidiaries."

- [69] It therefore appears to me that whilst the learned judge was making credibility findings in relation to persons, namely Tina and Albert, who have given evidence in the summary judgment application, that court did not make any definitive finding on the issue as to whether there was any outstanding consideration for the GCBC share purchase.

- [70] On the question of privity, the respondents have argued that *'this Court can decide, to the summary judgment standard, that Mr. Kam was the moving spirit in control of the proceedings in Hong Kong and in this Court in his attempt to keep control of the business conducted by GCBC. In the BVI proceedings Mr. Kam is seeking to ensure that his group retains control of the shares in GCBC, whilst in the HK Proceedings he is seeking to retain control of the business conducted by GCBC's subsidiaries.'*

- [71] These are the same respondents who have argued strenuously that nothing on the pleaded case or the evidence should lead a court to find on a summary basis that Mr. Yuan was the 'moving spirit in control' of Ying Peng. I found that that issue was at the very least a triable one. For all the same reasons, as well as the fact that before the Hong Kong court were simply subsidiary companies of separate corporate personality, and not this appellant or Mr. Kam, this Court cannot rationally determine this matter on a summary judgment basis.

[72] For all these reasons, I find that there is a triable issue on the question as to whether there was a debt outstanding in respect of the GCBC shares at the time when the 29th March Loan Agreement was entered into.

[73] This then must be the context within which the balance of the case must be assessed. Any other approach would be to separate out matters which really must be considered in the round. Anything else would be an artificial exercise. This discussion therefore requires an analysis of the pleadings and evidence relevant to execution of the disputed documents.

The Execution of the Disputed Documents

[74] The learned judge proceeded on the basis of the question framed and agreed upon by the parties that the real question with regards to the disputed documents was whether the appellant had 'a real prospect of succeeding in establishing that the signatures of Mr. Xu on the Share Charges and the 29th March Loan Agreement are genuine'.

[75] The learned judge's findings on this issue are unassailable. He stated:

"Determination of this issue is relatively straight-forward. Both sides instructed handwriting experts, who both appear to have analysed the matter of potential forgeries thoroughly and scientifically. Both came to similar rational and well supported conclusions. There was very little difference between the experts in relation to their conclusions. The Claimants' expert expressed what was in effect certainty that the signatures and chop were not genuine. The Defendant's expert concluded that it was 'highly probable' that the signatures were not genuine.

"This evidence is so strong that there is no real prospect of a claim succeeding that these signatures and the chop were genuine. It is clear that a claim to this effect cannot be sustained."

[76] In the court below and in this Court, the appellant argues that it does not matter whether or not those signatures or the chop were genuine and identified two triable issues, the first of which is framed as the execution issue and the second framed as the authority issue. With regards to these issues, the appellant argued in the court below that:

“29.1. First, even if the signatures of the BVI Share Charge and the Cayman Share Charge are found not to be the same as the specimen signatures of Xu as provided to the handwriting experts for these proceedings (which in the light of the expert evidence D must accept), did Xu nevertheless authorize and/or instruct someone to sign in his name and deliver the BVI Share Charge and the Cayman Share Charge to GMSC [GM BVI] thereby making them just as legal binding on Blue Ocean BVI and/or Blue Ocean HK as if he had signed and delivered them himself (“the Execution Issue”); and

29.2. Second, did Xu have the actual authority to agree to and deliver the BVI Share Charge on behalf of Blue Ocean HK and the Cayman Share Charge on behalf of Blue Ocean BVI? If not, is D entitled to rely on the apparent authority of Xu on the basis that Xu was a director of Blue Ocean HK and Blue Ocean BVI when both the BVI Share Charge and the Cayman Share Charge were executed? (“the Authority issue”)

30. For the reasons stated hereinbelow, it is submitted that both issues raise potentially difficult questions of both fact and law which as the factual issues, largely turn on the credibility of the parties’ respective witnesses thereby making it wholly inappropriate for them to be dealt with by way of summary judgment.”

[77] The learned judge eventually accepted the respondents’ arguments that the outcome of the execution issue did not matter. The learned judge set out the main issue as follows:

“...if the Defendant cannot show Mr. Xu had authority to sign the documents, and if the Defendant cannot show that Ying Peng Fund held out Mr. Xu as having authority to sign the 29th March Loan Agreement on its behalf, the Defendant has no reasonably arguable defence. That, in a nutshell, is the straight and short way to the heart of this case which the claimants have identified.”

[78] Though the learned judge then left the execution Issue, His Lordship did comment much later in his judgment that:

“[209] Moreover, it is unusual enough to come across a transaction connected to a valuable business that was publicly listed on a major stock exchange which is revealed to bear false signatures and chop. It is even more unusual that the party who seeks to rely upon them accuses the alleged contractual counterparty of appending false signatures and chop in order subsequently to be able to disown those documents. Whilst I have come across many allegations of forgery, this is the first time I have been presented with such an allegation”

[79] The respondents drew strength from this view to argue in the court below that the appellant should have pleaded the authority issue from the inception. Even the

learned judge was critical of the fact that it was only a change of attorneys, and after the experts' reports that the appellant had sought to frame his case differently, leading to an attempt to plead a trust issue and then to frame the authority issue as broadly as the re-amendment application sought to do.

[80] This Court, however, considers that this attempt to reframe the case is not unjustified or without good cause. If the appellant's case was true that they were owed a debt and that documents were delivered to secure that debt by way of a loan agreement and charges, then the appellant would have been caught completely flatfooted when these experts would have expressed the opinions that the signatures and the chop were not genuine. The appellant's lawyers must have been left breathless as they had tagged the whole case on whether the signatures were forgeries. They withdrew their appearances from the case, but the case is not theirs to win or lose. It is the litigant's case, and it was at this stage that the court below considered that it was highly unlikely, and effectively held that it was implausible, that a contractual party would place false signatures and a false chop with the intention to later disown and deny those contractual documents. But it is equally plausible as the appellant has contended, and it is a triable issue, that the documents were executed and delivered on Mr. Xu's behalf. Perhaps, the truth is that Mr. Xu had someone sign those documents for him with all of the best intentions in the world but only later formed the view to deny any knowledge of the documents. It is surely not the 'end all' to the execution issue to find that the signatures and the chop on the disputed documents were not genuine. If a finding were to be made that Mr. Xu did have someone deliver those documents purportedly signed by him, it could hardly matter whether the chop is not the 'usual' chop. If Mr. Xu had proper authority to sign and it is shown that he had someone sign the documents on his behalf and place a 'chop' on the document which is not the usual chop of the company, that by itself would not vitiate the validity of the document; it would surely assist in making an argument that Mr. Xu did no such thing.

[81] There is evidence of a number of persons on the appellant's side who speak to the creation, execution and delivery of the disputed documents.

[82] Mr. Chen Bing Chuen Albert is one of these persons. He made an affirmation to resist the summary judgment application. He states that he was previously an authorised representative of the appellant. He states that, to the best of his recollection and belief, the disputed documents came into existence in the following manner:

“9.1. On the 27th February 2018, Mr. Kam met with Mr. Yuan (who was accompanied by, inter alia, Mr. Xu Ping) in Tokyo. In light of Ying Peng’s indebtedness owed to GMSC, Mr. Kam told me that the parties had eventually agreed that: (a) Ying Peng would enter into a loan agreement with GMHL (this was subsequently referred to as the 29th March Loan Agreement); (b) Blue Ocean BVI would enter into a Share Charge charging the GCBC Shares in favour of GMSC (this was subsequently referred to as the Cayman Share Charge); (c) Blue Ocean HK would enter into a share charge charging its shares in Blue Ocean BVI in favour of GMSC (...BVI Share Charge); (d) Mr. Yuan would personally guarantee the payment obligation of Ying Peng under the 29th March Loan Agreement; and Mr. Xu Ping and I were to deal with the actual logistics of what was agreed at this meeting.

9.2. In accordance with the matters which were discussed and agreed at the aforesaid meeting, I went to: - (a) draft a loan agreement between Ying Peng and GMHL; and (b) prepare two share charge documents with the assistance of Messrs. Conyers Dill & Pearman (“Conyers”).

9.3. On 16th March 2018, I personally handed the draft version of the March 2018 Documents to Mr. Xu Ping when he came to Hong Kong to attend the extraordinary general meeting of GCBC that took place at the Hong Kong office of GMHL. I also recall reviewing those documents with Mr. Xu Ping (on behalf of Yuan, Ying Peng, Blue Ocean HK and Blue Ocean BVI). Save for the typos spotted (one major one being that the charger was Sanpower instead of Ying Peng which was an inadvertent mistake on my part when giving instructions to Conyers) that needed to be amended and/or revised, we all confirmed the contents therein were in line with what all parties had agreed to at the February 2018 Tokyo Meeting. I then told Mr. Xu Ping that would personally see to the amendments and hand deliver him the finalized documents as soon as possible.

9.4 In the following few days, I worked on the draft version of the March 2018 Documents (including incorporating Conyers additional comments and changing the charger from Sanpower to Ying Peng) to amend all the typos spotted. I did not engage the assistance of Conyers to do so as this was something that could easily be done on my own laptop and there was simply no reason why we had to incur extra legal costs on something I could do myself.

9.5 To the best of my recollection and belief, after the March 2018 Documents were finalized on 19th March 2018, I met with Mr. Xu Ping

again in Hong Kong and had the opportunity to go through the March 2018 Documents again with Mr. Xu Ping. For ease of execution, I also told Mr. Su Ping that I marked (in pencil) on all relevant signature pages where Mr. Xu Ping and Mr. Yuan needed to sign. After going through the finalized draft of the March 2018 Documents together and confirming the contents therein, Mr. Xu told me that he would take the March 2018 Documents back with him for execution and be in touch after a few days.

9.6 Yet for reasons unbeknown to me, I did not hear back from Mr. Xu at all.

The Delivery of the March 2018 Documents on 28th March 2018

10. On 28th March 2018, Mr. Kam informed me that he was getting increasingly anxious for Mr. Xu Ping had not yet delivered the executed March 2018 Documents back to us and there was an imminent need to get hold of these documents by the end of the day no matter how late it was. As I was still in Hong Kong at the time, I could not be of much assistance other than to help chase Mr. Xu Ping for the March 2018 Documents. When I got hold of Mr. Xu Ping again at around 13:30 he told me he would arrange for the March 2018 Documents to be executed as soon as possible and will find an assistance and/or representative to hand deliver these documents to Mr. Kam by tonight. Mr. Xu Ping also mentioned that his assistant and/or his representative would most likely be taking the train to Beijing. I therefore immediately updated Mr. Kam in this arrangement who then told me to reach out to Ms. Zheng Ting to facilitate the collection of the March 2018 Documents for he had a dinner function to attend to that night and would not be collecting the said documents himself.

11. As such I made a WeChat call to Ms. Zheng Ting at 13:38 to inform her on what Mr. Kam and Mr. Xu Ping has said to me to which she replied she would task her staff to stand by and collect the March 2018 Documents at whichever meet up point as agreed. I also asked if Ms. Zheng could kindly scan the documents to me after it has been delivered for I would want to cross check whether Mr. Xu Ping and/or Mr. Yuan had affixed their signatures and the company seal of Ying Peng at the right places. Ms. Zheng replied in the affirmative.

12. After hanging up the phone, Ms. Zheng sent me the contact details of Miss Fiona Wang and requested that I keep her informed once I learnt from Mr. Xu Ping which train number his assistant and/or representative would be taking to Beijing so that she could arrange for a driver. I therefore immediately forwarded the contact details of Miss Fiona Wang to Mr. Xu Ping over WeChat and informed Mr. Xu Ping that his assistant and/or representative should contact Mr. Fiona Wang to deliver the March 2018 Documents.

13. At approximately 13:45 on the same day, Mr Xu Ping informed me that he had arranged for a representative to hand deliver the March 2018 Documents to Miss Fiona Wang and would be arriving to Beijing at approximately 8 pm. However, Mr. Xu Ping did not share his representative's travel confirmation and /or itinerary to me. I therefore conveyed the same message to Miss Zheng over WeChat at 13:49. at that point, I was still unsure whether Mr. Xu Ping's representative would be travelling by train or by plane to Beijing.

14. Pausing here, I have been told that the Claimants have made a point to the fact that I referred to Mr. Xu Ping's representative as being from someone from Sanpower rather Ying Peng and that is itself telling that the March 2018 Documents were always intended for Sanpower rather than Ying Peng. I totally disagree.

15. The reason why I mentioned that the representative was a 'person from Sanpower' is because, to the best of my knowledge and belief, Ying Peng operated and ran its everyday business at the headquarters of Sanpower at No. 68 Software Avenue, Yuhuatai District, Nanjing, Jiangsu Province China. In fact, this same address was stated to be Ying Peng's correspondence address in the GCBC SPA as well. As such, it was always impressed upon me that Sanpower shared its staff and resources with Ying Peng at Sanpower's headquarters.

16. Furthermore, it is public knowledge that Mr. Xu Ping, Mr. Chen Xiaoyang and Ms Wang Huaizhen, while being investment decision committee members of Ying Peng, are also executive employees of Sanpower Group....

17.

18. ...

19. Shortly thereafter, Mr. Zheng responded by saying she was just opening an envelope that there were roughly 17 pages of documents. She took a photo of one of the pages to me which I recognize to be the execution page of the 29th March 2018 Loan Agreement.

20. From 23:54 on 28th March 2018 to 00:05 of 29th March 2018, Ms. Zheng had trouble scanning all the 17 pages to me which is why the pages were split into three pdf files. I opened the files and found the 17 scanned pages were all of the execution pages of the March 2018 Documents that I handed to Mr. Xu Ping in Hong Kong. After cross checking all 17 pages, I concluded that the signatures of either Mr. Xu Ping or Mr. Yuan as well as the company seal of Ying Peng were all properly affixed at the spaces provided.

21. At 00:32 of 29th March 2018, I confirmed to Ms. Zheng that all execution pages were in order and apologized for troubling so late at night."

- [83] Attached to Albert's affirmation is a copy of what purports to be the WeChat message *from 13:38 on 28th March 2018 to 00:32 of the 29th March 2018* exchanged between Ms. Zheng and himself. A photograph is seen which appears to be the 'signed page of the 29th March Loan Agreement.
- [84] Ms. Zheng Ting corroborates Chen Bing Chuen Albert's written evidence. She also speaks to the WeChat conversations and states that she learned that Mr. Kam had already instructed Miss Fiona Wang to be the one responsible for collecting the disputed documents and to deliver them directly to her. She states that she had collected the documents and had disputed documents from Miss Fiona Wang in the lobby of the Four Seasons Beijing Hotel. She says that the 'documents were contained in a A4 sized brown Manilla envelope, which was itself held in a clear A4 folder'. She states that she scanned copies of several of the pages and that eventually she sent three separate PDF files to Albert.
- [85] Miss Fiona Wang further corroborates these events and speaks directly to her collecting documents from someone who had travelled in on a plane arriving at domestic Terminal 2 at the Beijing Capital International Airport. She has exhibited SMS and iPhone messages which confirms a person's arrival at the airport, and that she was waiting for him. That person later confirmed to her that he was Mr. Xu Ping's representative and that he has a document to deliver to Mr. Kam. She delivered the documents in turn to Ms. Zheng.
- [86] Mr. Kam Yuen also sets out his role corroborating the narrative set out by the previous three persons and speaks to the delivery of documents. He then states that on the 28th March 2018, he sent a voice clip to Mr. Xu Ping and insisted that he get the documents that day. He said that Mr. Xu replied to him, and that several persons had been chasing him for the documents, and he would send them as soon as possible. He exhibits a screenshot of his messages with Mr. Xu.

"36. On 16th March 2018, draft versions of the March 2018 Documents were provided to Mr. Xu Ping when he went to Hong Kong to attend the extraordinary general meeting of GCBC that took place at the Hong Kong office of GMHL. I also recall that Mr. Xu Ping (on behalf of Yuan,

Yong Peng, Blue Ocean HK and Blue Ocean BVI) went through these documents with Mr. Sammy Kong and Albert (in person) and I (over the phone).

37. Save for typos spotted (one major one being that the charger was Sanpower instead of Ying Peng which was an inadvertent mistake on Albert's part) that needed to be amended and/or revised, we all confirmed that the contents therein were in line with what all parties had agreed to at the February 2018 Tokyo Meeting. I recall that Albert had told Mr. Xu Ping that he would personally see to the amendments and hand deliver him the finalized agreements as soon as possible. A few days later, I was informed that a full set of the revised version of the March 2018 Documents was handed over to Mr. Xu Ping for execution.

38. On 28th March 2018, I was extremely anxious for none of us had heard back from Mr. Xu Ping and I needed an executed set of the March 2018 Documents before GMHL's accounting year end on 31 March."

[87] I now turn to the evidence of the respondents on the creation and delivery of the disputed documents. I first consider the second affidavit of Mr. Xu Ping. After stating that he did not execute the disputed documents and only knew about their existence in October 2020, he says:

"16. I can confirm that I was present at a dinner at the Imperial Hotel in Tokyo on 27 February 2018 with Mr. Kam, Mr. Yuan, Wang Caiyi and a number of others. I had travelled to Japan to explore the potential acquisition of a Japanese hospital. Whilst we were in Japan we had dinner with Mr. Kam and others to celebrate the closing of the GCBC SPA and to discuss the possible privatization and relisting of GCBC in the PRC. I have no recollection of any discussions regarding any debt or any loan agreement between Ying Peng Fund and GMHL, or the creation of the BVI Share Charge or the creation of the Cayman Share Charge. It would have been an unusual place to hold such a meeting. I do recall that Mr. Kam talked extensively about developments in gene technology related to Shiba Inu dog breeds.

...

17. I can confirm that the Board of Directors of Blue Ocean HK and Blue Ocean BVI never discussed the creation of the BVI Share Charge or the Cayman Share Charge between February and March 2018. We were not aware of the existence of the BVI Share Charge until 21 October 2020 and were not aware of the Cayman Share Charge until 13 May 2022.

18. The Ying Peng Fund did not know about the purported Loan Agreement dated 29 March 2018. There was no discussion about such an agreement by the Ying Peng Fund's IDC. Similarly, the Ying Peng

Fund was now aware of the existence of such a loan agreement until around 21 October 2020 (at the earliest)."

[88] Speaking to the assertions made by the appellant's witnesses on the issue of the delivery of the disputed documents, Mr. Xu states:

"20. I have reviewed Albert 1 (at paragraph 9.3) in respect of a purported meeting between myself and Mr. Albert at GCBC extraordinary general meeting ('EGM') in Hong Kong on 16 March 2018. I can confirm that I did attend the EGM. I can also confirm that I have no recollection of being handed any documents other than those relevant to the EGM itself. I certainly do not believe I was handed any documents regarding GMHL. I also think it is unlikely that Mr. Albert would have approached me on behalf of GML at the EGM since he conducted his business for Kam/GMHL under the alias 'SK'. I categorically deny that Mr. Albert and I spent any time reviewing any documents together or that I provided any comments on any documents during the EGM."

[89] He gives evidence that he was not in Hong Kong on the 19th March 2018 and exhibits receipts and travel confirmations of his travel out, and states that it would have been impossible for him to be there for any meeting with Albert on the 19th March 2018 as the latter claims. Mr. Xu then states:

"21. The next day, on Saturday 17 March 2018, I travelled from Hong Kong to Macao, which is approximately a one hour ferry ride from Hong Kong. As Macao is a Special Administration Region of the PRC, in order to enter Macao, travelers must enter the territory through border control.

22. From Macao, I flew straight to Shanghai (on China Eastern Airlines with flight number MU2056) which departed Macao at 19:55 and I arrived in Shanghai at 22:20 that evening. A copy of my flight confirmation is exhibited...

23. I stayed in Shanghai until Monday 19 March 2018, when I took a taxi at 12:41 pm from my hotel in Shanghai to the Shanghai train station where I boarded a train to Nanjing. The train departed at 14:15 and arrived approximately 4 hours later in Nanjing. A copy of the taxi receipt, together with my train ticket are exhibited... Upon arrival in Nanjing, I went to my office to work around 18:30. my former office had an entrance barrier where personal entry and exit times were recorded. On 19 March 2018, I entered my office at 18:34, a copy of the entry record is exhibited...

24. Accordingly, it is wholly impossible that I attended a meeting with albert on 19 March 2018 in Hong Kong (as stated in Albert 1 at paragraph 9.5) when I was clearly in Shanghai on 17 March 2018 and travelled from there to Nanjing on 19 March 2018. Nanjing is over 1.

25. The sole purpose of my business trip on 16 March 2018 to Hong Kong was to attend the EGM. I can confirm that during the trip I did not have any discussion regarding any debt or any loan agreement between the Ying Peng Fund and GMHL, or the creation of a BVI Share Charge or the creation of a Cayman Share Charge. I did not have any phone calls with Mr. Kam either.

26. Further, I did not receive by WeChat from Mr. Albert a finalized version of the Cayman Share Charge. I did not at any time discuss over WeChat the signing of the 29 March 2018 Loan Agreement, the BVI Share Charge or the Cayman Share Charge. I note that notwithstanding the defendant has purported to disclose many other WeChat messages, none of these alleged messages have been disclosed.

27. It is possible that I was involved in the arrangements for the transmission of documents from Sanpower to GMHL on 28 March 2018. I did not recall specifically having done so on that particular date, but having been shown the WeChat messages relied on by the Defendant I have some recollection that I was asked to arrange for one of Sanpower's assistants to deliver something personal for Mr. Yuan to Mr. Kam. I did not ever see the items to be delivered. I simply gave instructions to the assistant and passed on his contact details to Mr. Kam. The reason I arranged this is because Mr. Kam always contacted either me or Ms. Yang if he wanted something from Mr. Yuan because he had our contact details due to our involvement in the GCBC SPA. It was quite irritating that he did this because I was, as set out above, involved in mergers and acquisitions for Sanpower but was not involved in the personal affairs of Mr. Yuan. My irritation is evident from the WeChat messages with Mr. Kam, where I noted that he had three of his personnel chasing me, including Mr. Albert, and I expressed displeasure that he engaged in this kind of behaviour. My reference to three of his personnel is clearly a reference to persons working for Mr. Kam (including Mr. Albert) and not Mr. Yuan, Mrs. Yang and Mr. Kam as he suggests at paragraph 41 of Kam 3.

28. The reliance by the Defendant on WeChat is of some concern. I no longer retain my old mobile phones, so I am not able to access my messages from the device (as confirmed in the Claimants Form 11). Further, I am no longer employed by Sanpower and so even if Sanpower backed up such messages I am unable to access them. I also confirm that I did not archive or upload any WeChat messages or emails during my employment with Sanpower to any cloud system. I also understand that there are no emails or drafts of the 29 March 2018 Loan Agreement or the Shares Charges passing between the parties as happened in relation to other loan agreements between Sanpower and GMHL. I can confirm that this is extremely unusual – agreements of this nature and significance would have generated a huge amount of email correspondence and exchanges of drafts for negotiations. I would

have also involved legal counsel for this purpose as well as in house counsel.”

- [90] Apart from issues of credibility and the possibility of mistake on anyone’s part, it would seem to me that there are surely several issues of facts to be determined here. It is difficult to be satisfied that there were no discussions in Tokyo on the creation of a Loan Agreement and share charges when there is an exhibit and phone messages that show a screenshot of the last page of a loan agreement that was sent to Albert by Ms. Zheng on the 28th March 2018. The fact that the agreement is dated 29th March 2018 and that the date of 30th March 2018 Loan Agreement is included in the share charge is explainable. Persons entering into contracts where the parties are not physically present together and where one signs and sends it to the other for execution would often have a date which is different from the date of the first person’s signature.
- [91] Then there is the confirmation by Mr. Xu that he did cause to be sent some documents on the 28th March 2018 for Mr. Kam, and that Mr. Kam was in contact with him, and three other persons, including Albert were ‘chasing him down’ on that day. Then, there are the ‘old phones’ and the old messages which he did not download or keep. This could be a strange thing for a man who seem very meticulous, keeping travel itineraries and even an ‘entry’ and ‘exit’ record for his office building from years ago. Some of this does not fit squarely with what is plausible, but it may be true and that is what trials are for.
- [92] At this stage, and in the circumstances as presented by the evidence, it is difficult to make a finding that the absence of an email trail speaking to the disputed documents or forwarding drafts of these for discussions, that these documents were not created, discussed or executed. Evidence is given by Mr. Albert Chen that he sought the legal assistance of Conyers in the BVI to draft the loan agreement the Share Charges (of which there is an email trail between him and the lawyer), and of face-to-face interactions on the documents, the physical handing over the documents to Mr. Xu and similarly receiving the executed versions by a physical hand-over. Mr. Xu admits being at the EGM meeting but *confirms that he has no recollection of being handed any*

documents other than those relevant to the EGM itself. This is not a denial. I do note that Mr. Xu's statement that had he received such documents that he would have given it to his own lawyers for discussions, and that would mean that he would have an email trail. He says that he does not have such an email trail. He therefore asks the summary judgment court that if he does not have such an email trail, then he did not receive any such documents. It is too early to believe his self-serving logic.

[93] In relation to the credibility issue, the respondents have further sought to rely on evidence led in the Court below that in a related matter, a Cayman Island High Court had made a finding that Mr. Albert Chen had sought to rely on a forged document in those proceedings. In those proceedings, Mr. Chen had not appeared to explain but maintains in these proceedings he did not forge any document. Such a finding that he had forged another document might no doubt be used to discredit Mr. Chen, but in summary judgment proceedings, it cannot rise to the threshold of disbelieving him in relation to other documents which now are the subject of other proceedings. Any reliance on such evidence really underscores why such an issue which is so integrally bound up with the credibility of one or more witnesses must be tried.

[94] The appellant did seek to make the point in the court below that the signatures on the disputed documents were done so clumsily that it was unlikely that they were done by the appellant's side with an intention to rely on these documents. The respondents' expert had concluded in relation to the questioned signature of Mr. Xu that they were 'written with awkward, laboured writing movements, lacking the fluency and spontaneity characteristically found in the known exemplars'. In relation to Mr. Yuan's questioned signature, the respondents' expert concluded that they 'were written slowly and carefully, lacking the vigour and abandonment observed in the known signatures'. The appellant had submitted that it would have been stupid to execute such clumsy forgeries with the intention to rely on them; this not being a case of forgeries on wills where the person purporting to make the signature is now deceased. In this case, the persons would be alive to dispute the signatures. The appellant thus relies on the evidence of the execution and delivery to make their case that Mr. Xu caused

the documents to be delivered, and they must therefore be taken as his acts. There is some merit to this reasoning, and it is one which requires testing at trial.

- [95] I, therefore, find that there is a real triable issue as to whether the Loan Agreement, the BVI Share Charge and the Cayman Share Charge were discussed and executed as the acts of Mr. Xu and Mr. Yuan (even though not by Mr. Xu and Mr. Yuan), and delivered as is asserted by the appellant. This finding therefore compels me to go on to the next issue, the 'Authority issue' which was the focal point of the judgment below. For the reasons which I will now set, I believe that by not carrying out this analysis on the creation, execution and delivery of the disputed documents, the court below may have lost the benefit of another perspective of this case, one which would have likely led the learned judge to another conclusion.

The Authority Issue

- [96] The learned judge treated with the authority issue as the primary issue in the case and essentially held that on an examination of the pleadings, the affidavits/affirmations and the materials before it that there was no triable issue with any reasonable prospect of success on whether Mr. Xu had actual or apparent authority to bind Ying Peng to the Loan Agreement and the Shares Charges.
- [97] This Court finds that the learned judge was wrong in his approach and his findings on the authority issue, both whether there was a triable issue on the actual authority as well the apparent authority of Mr. Xu to bind Ying Peng on the Disputed Documents. This Court proposes to set out the learned judge's findings, briefly state the parties' respective arguments on this appeal then proceed to set out reasons for our disagreement and reversal of the learned Judge's decision.
- [98] The general principles governing the existence of actual and / or ostensible authority of an agent of a company have been well established by the cases.

Denning LJ in the English Court of Appeal case of **Hely-Hutchinson v Brayhead**¹⁷ speaking to the actual authority of an agent explained as follows:

“... actual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director.

They thereby impliedly authorise him to do all such things as fall within the scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also between the company and others, whether they are within the company or outside it.”

[99] Actual authority to an agent may relate to the power to act either generally or in relation to particular matters.

[100] The general rule was recently reaffirmed in the case of **Law Debenture Trust Corp plc v Ukraine**¹⁸, thus:

“Actual authority described a relationship between a principal and agent created by consensual agreement to which they alone were parties, and pursuant to which the principal granted to the agent the right to enter into relations with third parties on the principal behalf. To that agreement a third-party contractor was a stranger: he could be totally ignorant of the existence of any authority on the part of the agent; but if the agent did enter into a contract pursuant to his actual authority, it created rights and liabilities as between the principal and the contractor.”

[101] Apparent or ostensible authority complements actual authority in the commercial world. As a general rule, ostensible authority usually arises when a person with actual authority holds out another person or entity as an agent to act on its behalf. As was confirmed by the Privy Council in **East Asia Ltd. v PT Satria Tirtatama Energindo**¹⁹, citing with approval Lord Diplock’s in **Freeman & Lockyer (a firm) v Bruckhurst Park Properties (Manga) Ltd**²⁰ four conditions which must exist for a third party to be properly able to rely on ostensible authority of an agent of a company:

¹⁷ [1968] 1 Q.B. 549.

¹⁸ [2023] 2 All ER (Comm) 191.

¹⁹ [2019] 4 LRC 646.

²⁰ [1964] 1 All ER 630.

“1. It must be shown that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;

2. that the representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of the particular matter to which the contract relates;

3. that the contractor was induced by the representation to enter into the contract; and

4. that under its memorandum or articles of association the company was not derived of the capacity to enter into a contract of the kind sought to be enforced or to delegate authority to the agent to enter into a contract of that kind.”

[102] The relationship between the principal, that is, the person who has actual authority and the contractor, is an important factor in seeking to find ostensible authority. The court must examine the representation or representations, expressed or by conduct, made by principal to the contractor which creates that relationship. These points were reaffirmed in the **East Asia** case at paras 42 and 43 thus:

“[42] It is also important to have in mind that ostensible authority is a relationship between the principle and the contractor and it is one created by the representation of the principal to enter into a contract of a particular kind. The representation, if acted upon by the contractor by entering into the contract, operates as an estoppel which prevents the principal from contending that he is not bound by the contract: **Freeman & Lockyer (a firm) v Bruckhurst Park Properties (Manga) Ltd.**²¹

[43] A representation which creates apparent or ostensible authority will commonly arise from conduct, that is to say, by the principal permitting the agent to enter into contracts of a particular kind on its behalf. In this way the principal may represent to anyone who becomes aware that the agent is so acting that the agent has authority to enter into contracts of that kind: see, for example, **Armagas Ltd v Mundogas SA**²² and **Freeman v Lockyer**²³.

[103] It is the usual case in the commercial world that the third-party contractor seeks to invoke and rely on the doctrine of ostensible authority where the agent had

²¹ [1964] 1 All ER 630.

²² [1987] LRC (Comm) 311.

²³ [1964] 1 All ER 630.

no such actual authority unless he is put on inquiry. This point is well made in the **East Asia** (supra) case where the court observed:

“The indoor management rule and the doctrine of ostensible authority allow the smooth operation of business by protecting those who are entitled to assume that the person with whom they are dealing has the authority which he claims. But this general principle cannot be involved if he who would invoke it is put upon inquiry. He cannot presume in his favour that things are rightly done if the inquiry he ought to make would tell him that they were wrongly done.”

[104] One view of this case is that the appellant’s case starts with Mr. Yuan having actual authority to act on behalf of Ying Peng Fund and giving actual authority to Mr. Xu to execute the disputed documents on its behalf. In the alternative, the appellant says that Mr. Xu separately had actual authority or at the very least, apparent or ostensible authority to execute and bind the Ying Peng Fund and the Respondents to the disputed documents.

[105] I propose to consider first the question as to whether there was a triable issue as to whether Mr. Yuan had actual authority to act on behalf of Ying Peng Fund. Second, it seems appropriate to then go on to the question of Mr. Xu’s actual and or ostensible authority to act on behalf of Ying Peng Fund and the respondents.

Mr. Yuan’s Actual Authority – A Triable Issue

[106] The learned judge determined that there was no triable case that Mr. Yuan had actual authority to act on behalf of Ying Peng Fund. The learned judge approached the matter as follows:

“[189] Actual authority is a legal concept, which is satisfied by the fulfilment of specific criteria, not by a set of vague impressions in the mind of some third party. Actual authority, like a court’s jurisdiction, is something one has or does not have, in accordance with objectively ascertainable facts and criteria. Whether one has, or does not have, actual authority does not depend on the vagaries of other people’s perceptions.

“[190] Moreover, this is not a case where Mr. Yuan is the sole underlying beneficial owner, sole member and sole director of the Ying Peng Fund, such that it might be probable that ‘in reality’ the entity is his alter ego and that ‘in reality’ he has actual authority to conduct its business. The [Appellant] submitted that:

“Ying Peng AMC is wholly owned by Sanpower Nanjing which is, in turn, wholly owned by Sanpower Group. [Mr.] Yuan therefore, by virtue of his 97.5% shareholding in Sanpower Group, control Ying Peng AMC. In fact, Ying Peng AMC’s corporate particulars (which is extracted from government registries that is made publicly available on the internet) shows that [Mr.] Yuan is stated to be the actual controller of Ying Peng AMC.

This therefore proves that it is actually [Mr.] Yuan who calls the shots for Ying Peng.”

[191] Unfortunately for the [Appellant], this argument and these facts assuming them to be true for present purposes) do not establish that Mr. Yuan had actual authority, in the legal sense, to do anything on behalf of Ying Peng AMC or Ying Peng Fund. It goes no further than to indicate that Mr. Yuan could cause to be changed the persons or entities who do have actual authority, which is not the same thing. The weakness in the [Appellant’s] argument is immediately and inherently betrayed by the imprecise and colloquial reference to ‘calls the shots’, an imprecise term capable of referring to a number of different things.

[192] It is also axiomatic that 97.5% is not 100%. It leaves a minority interest. Whilst such a minority could be overridden in terms of voting power on decisions, the [Appellant] adduced no evidence that the interests of the minority can simply be ignored.

[193] The [Respondents] argue that such a simplistic view is anyway not right. In addition to the [Respondents’] evidence being that the Ying Peng Fund is a limited partnership consisting of Limited Partners (comprising various financial investors) and General Partners (which conduct the management) and that Mr. Yuan does not himself have any authority to act for, nor does he hold any position at, Ying Peng AMC or the Ying Peng Fund, the [Respondents] pointed to the following in contending that Ying Peng is not a ‘Yuan entity’:

‘8. ... It is clear from the Appendix to the Partnership Agreement that Mr. Yuan, through his interest in Sanpower, only has a 15.31% equity interest in Ying Peng...

9. Second, Ying Peng Asset Management Co., Ltd (Ying Peng AMC) can only act as General Partner in good faith in the interests of Ying Peng (...see Article 9.5.2(2)).

10. Mr. Kam acknowledges that he has received a copy of the Partnership Agreement, but he suggests that no legal due diligence was done because nothing came of it. This is evidently wrong. The [Appellant] clearly had full knowledge of the terms of the Partnership Agreement. Look at the

Framework Agreement pursuant to which the [Appellant] agreed to become a partner. This was a binding agreement, albeit conditional. ... Mr. Kam's evidence is inconsistent with the existence of the Framework Agreement, which he has ignored. Also look at Golden Meditech Holdings Limited's public announcement of the Framework Agreement, ... which provides a summary of the terms of the Partnership Agreement... including the fact that potential investment decisions must be passed by at least three members....

11. It is particularly interesting that the [Appellant] knew that the Partnership included entities wholly independent from Sanpower and Sanpower's interests represented a minority financial interest.'

[194] The [Appellant's] position amounts to a contention that the entire legal and management structure of the Ying Peng Fund should be ignored, in favour of an informal 'reality', even though the Ying Peng Fund's main operating asset (GCBC) is a large and very valuable business, which is or was publicly listed on a stock exchange, with all the regulation and transparency that entails. That is a deeply unconvincing proposition, and in the circumstances where the [Appellant] clearly knew about how the Ying Peng Fund formally and legally functioned, one that is fanciful.

[195] On the other hand, there is no evidence that Mr. Yuan had actual authority to manage the business of the Ying Peng Fund either generally or in respect of those matters to which the 29th March 2018 Loan Agreement relates, and strong evidence that he did not...."

[107] Having found that Mr. Yuan had no actual authority to act on behalf of Ying Peng Fund, the learned judge stated that the appellant should have been put on inquiry in this case, and any inquiry would have led one to ask Mr. Yuan (and or Mr. Xu) to show the basis of his authority to act.

[108] In as far as Mr. Xu's actual authority was concerned, the learned judge accepted the respondents' contention that the appellant had pleaded no facts or matters that support a case that Mr. Xu had actual authority of the Ying Peng Fund to execute the 29th March 2018 Loan Agreement or of the Blue Ocean entities to execute the Shares Charges. The learned judge considered that this was an important omission. The Court stated:

"[166] A litigant who seeks summary judgment does not seek some kind of general finding that the court prefers its case to that of the other side, thereby vindicating the litigants' rights. The applicant for summary

judgment does so with respect to averments set out in pleadings, the evidence before the court. Any likely evidence that may be adduced before the matter were to come on for trial. Whilst it is true that averments made in pleadings can be fleshed out in witness statements, at the same time CPR 8.7(1) requires that '[t]he claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies' and CPR 10.5(1) similarly requires that '[t]he defence must set out all the facts on which the defendant relies to dispute the claim.'

[167] This means that no factual case has been advanced by the Defendant setting out why Mr. Xu is asserted to have had actual authority to bind the Ying Peng Fund to the terms of the 29th March 2018 Loan Agreement. The Defendant had simply asserted that Mr. Xu was the authorised representative of, inter alia, the Ying Peng Fund. Where no factual case has been advanced, it cannot sensibly be said that upon its face such a claim is unsustainable, or in other words, that the claim has a reasonable prospect of success. One can ask rhetorically, what could a respondent to a summary judgment application point to in such circumstances to persuade a court that he does have a reasonable prospect of success despite his omission? It is difficult to see what; and if he can, why did he not include the explanation as required by CPR? It should thus be understood that a party who does no more than make bald assertions cannot expect to avoid summary judgment thereby."

[109] The learned judge considered that if that omission was not enough to satisfy the summary judgment test in relation to Mr. Xu's alleged authority, to execute the loan agreement on behalf of Ying Peng Fund, there is no actual evidence that Mr. Xu had such authority. In fact, the learned judge agreed with the respondents that there was 'considerable evidence' that he did not have such authority. The learned Judge accepted that Article 19.3 of the Partnership Agreement made it very clear that Mr. Xu was expressly barred from engaging in *debt financing* or to provide external guarantees in the name of the Partnership, and that the disputed documents were caught under this expressed disability.

[110] Further, the learned judge considering Articles 20 and 23.2 of the Partnership Agreement which created an Investment Decision Committee of which Mr. Xu was one of five members, appointed to participate in investment decisions, and accepted the respondents' contentions that this Committee must have been required to participate in any decisions regarding the disputed documents and

that the appellant must have known that Mr. Xu could not have acted on his own.

- [111] The learned judge therefore found that there was no evidence that Mr. Xu was the 'sole representative' or 'authorised representative of Ying Peng Fund, save in respect of the Escrow Agreement where Mr. Xu is described as the 'Authorised Representative of Ying Peng [Fund]'; nothing in the Partnership Agreement or the Escrow Agreement gave Mr. Xu any general authority to represent Ying Peng Fund. The Court stated:

"[171] The [Respondents'] contention that MR. Xu did not have any general authority to cause Ying Peng Fund to enter into transactions such as the 29th March 2018 Loan Agreement is supported by the underlying documents in evidence, and there is none pointing the other way. The [Appellant's] assertion that Mr. Xu had actual authority is incompatible with the Ying Peng's Partnership Agreement, which had been available on the [Appellant's] side."

[172] In my respectful judgment, on the pleadings and the evidence, the Defendant's case that Mr. Xu had actual authority to bind Ying Peng to the 29th March 2018 Loan Agreement is unsustainable. The net result must be for the Court to record a finding that Mr. Xu had not actual authority."

- [112] This is a unique case. It is immediately apparent that even in circumstances where part of the consideration for the GCBC shares may be outstanding (with the court below deeming that a triable issue), the primary party Ying Peng Fund, who would be responsible for any such debt, is not before the court, and there is no one really before the court speaking on its behalf on all pertinent matters. It is equally apparent that whilst much of the appellant's case relates to Ying Peng AMC and Mr. Yuan, they too are not before the court, and no-one has chosen to give any evidence on their behalf.

- [113] This action has been grounded on the validity (or lack thereof) of the 29th March 2018 Loan Agreement and the Share Charges, and there has been an apparent struggle but a strong temptation first, to confine the matter to the 'forgeries' and false chop, and second, primarily to the constitutional document, the Ying Peng Partnership Agreement. With due deference to the learned judge who is a very experienced judge in the commercial court, I hold the view that His Lordship's

approach and conclusions are wrong and unsustainable in considering the application for summary judgment.

[114] First, it is necessary to treat with the pleadings point.

[115] As was noted by the learned judge, the appellant has simply asserted in its pleadings that Mr. Xu was the authorised representative of the respondents and the Ying Peng Fund. The pleadings state that it was with their knowledge and approval that Mr. Xu had caused the disputed documents to be executed. The learned judge considered this to be a fatal omission, he nonetheless went on to examine the evidence contained in the affidavits filed pursuant to **CPR 15.5(2)** in response to the application for summary judgment. He was right to do so for reasons now set out.

[116] Under the CPR, in any case, it is the statement of case and not the basic pleadings which is regarded as being at the core of litigation. It is now accepted that the statement of case should clearly set out the general nature of a party's case, and to identify the issues and the extent of the dispute between the parties. As was noted in *Caribbean Civil Court Practice*²⁴:

“The need for extensive statements of case, including particulars, should be reduced by the requirement to exchange witness statements. In the majority of proceedings, identification of the documents upon which a party relied, together with copies of that party's witness statements, made the detail of the nature of a party's case obvious to the other side. The need for particulars in statements of case, in order to avoid taking another party by surprise, was now reduced. Statements of case should make clear the general nature of a party's case. They were not, however, superfluous. They were critical to identify the issues and the extent of the dispute between the parties.”

[117] Whilst the ‘statements of case played a critical role in civil litigation which should not be diminished,’ once the general nature of the case is set out in the pleadings, the details of particulars which would have once been required to be contained in pleadings, may be set out in the witness statements or affidavits.

²⁴The *Caribbean Civil Court Practice* (3rd edn, LexisNexis 2024) at Chapter 17, ‘Statement of Case’ Note 17,6.

(See **East Caribbean Flour Mills Ltd v Ormiston Ken Boyea**²⁵; See also **UK Learning Academy v Secretary of State for Education**²⁶)

[118] Thus, where in a case, the pleadings make it clear that a case of actual and apparent authority is being made out, it would be proper to consider the witness statements or affidavits to ascertain whether sufficient details or particulars are being given to identify the issue and the extent of the dispute between the parties.

[119] In any event, what was and is being considered is an application for summary judgment. **CPR 15.5(2)** makes it clear that on such an application, a respondent who wishes to oppose the application may file evidence on affidavit. The intent of this rule is clear. Such affidavits are intended to provide evidence consistent with the pleaded case, upon which a respondent to such an application intends to rely on to show that there are triable issues. I, therefore, do not consider that there is a 'fatal' omission in the pleadings on this summary judgment application.

[120] What then is revealed in the evidence? What is the case for the actual authority of Mr. Yuan and the actual and / or apparent authority of Mr. Xu?

[121] In the search for 'actual authority' the appellant has contended throughout, that all of the circumstances of the case must be considered, especially the dealings between Mr. Kam and Mr. Yuan and then Mr. Kam and Ying Peng Fund. What the appellant is essentially arguing is that Mr. Yuan is the 'alter ego' of Ying Peng AMC which in turn is the entity which can bind the Ying Peng Fund, and it is Mr. Yuan who has given actual authority to Mr. Xu. The appellant has also argued as a separate matter, that Mr. Xu had actual and or ostensible authority to act on behalf of the respondents' companies. Of course, on the other side, the respondents now submit that the learned judge's analysis was correct.

²⁵ SVGHC VAP2006/0012 (delivered 16th July 2007, unreported).

²⁶ [2020] EWCA Civ 370.

[122] We agree that an important element of understanding the appellant's case that Mr. Yuan was the alter ego and the *de facto* director of Ying Peng AMC and therefore had the power as Executive Partner of Ying Peng Fund, is the circumstances of the meeting and relationship between Mr. Kam and Mr. Yuan.

[123] The learned judge briefly treated with the relationship between Mr. Kam and Mr. Yuan at paragraphs [119] and [120] where he stated:

“[119] Mr. Kam began by explaining how he begun to do business with Mr. Yuan. This part of Mr. Kam's narrative was clearly designed to establish that Mr. Kam regarded Mr. Yuan as the individual behind the Ying Peng Fund.

[120] Mr. Kam related that:

“Nevertheless, in the course of my dealings with Yuan, I found that he generally caused Mr. Xu Ping ('Mr. Xu'), Mr. Yang Huaizhen ('Ms Yang') and Mr. Chen Xiaoyang ('Mr. Chen') as effectively his alter ego to carry out his mandate for his various businesses.”

[124] In my view, it would have been important to place the evidence of the early meetings between Mr. Kam and Mr. Yuan within the context of evidence of the initial attempts by Mr. Yuan to purchase the GCBC shares through another entity and the nature of the dealing between the parties. This is not a finding of facts but a simple setting out the appellant's case as its highest for the purposes of this assessment of whether a triable issue exists on Mr. Yuan's authority to act on behalf of Ying Peng Fund.

[125] So, what is the evidence on these matters?

[126] This is set out primarily in the 'Third Affirmation of Mr. Kam Yuen. He states as follows:

“5. I currently own the majority of the shares in Golden Meditech Holdings Limited (GMHL) and was a director of GMHL from the 3rd September 2001 to 24th May 2020. GMHL owns 100% shares in the Appellant.

A.2 My Relationship with Yuan Yafei ('Yuan')

6. Yuan has always been a business tycoon who is very well known in the business circles in Mainland China. He is well famed for his wealth in Mainland China and the Hurun Rich List as the 32nd wealthiest

individual in China with a net worth of approximately RMB40 billion. His wealth and fame in the business circle and his investment overseas also culminated in his private meeting with Prince Williams in March 2015 in Yunnan and October 2015 in the United Kingdom as well as his private meeting with the Honourable Madam Theresa May (the then Prime Minister in the United Kingdom) in Shanghai. All of this is well documented in newspaper articles and various websites (including Sanpower's own official website). ...

7. Yuan's strong political stature and influence has also led to his appointment as, a Member of the National Committee of the Chinese People's Political Consultative Conference in 2013. This is a highly influential policy consultative body in Mainland China whose members are all known to be prominent industry elites and they carry the power to advise and put proposals for political and social issues to all government bodies in Mainland China....

8. I first got acquainted with Yuan in or around 2014 when Yuan, on behalf of Sanpower Group Cr., Ltd. ('Sanpower Group') entered into a sales and purchase agreement with GM Investment Company Limited (a subsidiary of GMHL) to purchase its 27.9% of shareholding in a company called Fortress Group Limited at a consideration price of approximately USD101 Million.

9. Since then, as reported, Yuan always displayed to me a trustworthy and reliable business partner and he particularly demonstrated to me his apparent sincerity to help me. By way of the following examples, at one point, I was very impressed and indeed touched by his apparent unreserved help to my own business.

- a) In or about June 2015, GMHL announced an open offer for the purposes of raising monies for future investment which entailed a loan from Citic Group for USD 70 million. Without any hesitation, Yuan offered and did provide a personal guarantee which rendered substantial support to me in this process.
- b) In or about December 2016, I wanted to privatise GMHL. This entailed an investment structure with Huarong Group for HKD700 million investment. Again, without hesitation, Yuan offered and did provide a personal guarantee to Huarong which greatly assisted the privatization.

10. By reason of the foregoing, Yuan always appeared to be as a very respectable and responsible business partner with very substantial financial and potential resources. Until my disputes with him recently, I would not have had the slightest suspicion that Yuan would injury the interests of his business partners.

A.3 Acquisition of GCBC Shares

11. During the second quarter of 2015, Yuan, expressed an interest in acquiring my entire medical business held directly and indirectly under GMHL which later came to realise that he would like to have Nanjing Xinjiekou Department Store Co. Ltd. (Stock No. 600682) ('NJXD') as the vehicle to do so. In this connection, I appreciate that Yuan has always been in control of hundreds of companies either directly or otherwise. The extent of his multi-national conglomerate business structure and network is so opaque that outsiders like me simply could not appreciate or fully comprehend. Nevertheless, in the course of my dealing with Yuan, I found that he generally caused Mr. Xu and Ms. Yang Huaizhen (Ms. Yang) and Mr. Chen Xiaoyang (Mr. Chen) as effectively his alter ego to carry out his mandate for his various businesses.

12. I then discussed the framework idea of the potential acquisition with Yuan. The intended acquisition started with acquiring GCBC first (to which GMHL, holding 25.4% shareholding in GCBC, was its single biggest shareholder at the time). After that, GMHL was to make use of the proceeds from this acquisition to invest and develop its other existing medically related businesses, whereby Yuan's subsidiary would undertake to acquire all of GMHL's medically related assets thereafter."

[127] In my view, these are significant matters. If true, it shows that Mr. Yuan was not only the driving force in acquiring the shares of GCBC, but that he was seeking to do so through one of his subsidiaries. It is noted that the Partnership Agreement was signed on the 1st December 2016, before the first Share Purchase Agreement was signed, and then it was Mr. Yang Huaixhan who signed on behalf of the proposed purchase company, Nanjing Xinjiekou Department Store. It is Mr. Xu who signed the second Share Purchase Agreement and then signs the Escrow Agreement and is the signatory on the Escrow Account. Mr. Kam continues:

"13. As I understand from Yuan, his aim was to acquire GMHL's entire medical business enabling Sanpower Group to undergo a business transformation/restructuring and to list GCBC with Shanghai and Shenzhen Stock Exchanges as an A-share company in the Mainland China. For such purpose, Yuan would need to acquire more than 50% of the shareholding in GCBC.

[128] Mr. Kam makes the point that he knew that Mr. Yuan absolutely controlled a number of companies, and that even the Respondents' companies are Mr. Yuan

entities. A list of these companies is set out in the Re-amended Defence and Counterclaim. Mr. Kam states:

“16. ...[Mr.] Yuan’s loyal personal aides including, inter alios, Mr. Xu, who came forward to represent Sanpower Group, Ying Peng, Blue Ocean HK... and Blue Ocean BVI..., have always appeared to be authorised to deal with GM Group and me. In fact, based on my understanding from Yuan, he indeed acted through Mr. Xu, Ms. Yang and Mr. Chen (as his diehard personal aides) to have a tight grip over all of his business entities including Sanpower Group and, later, Ying Peng. Hence, I have no plausible ground to believe that [Mr.] Yuan or (with [Mr.] Yuan’s endorsement) his personal aides, e.g. Mr. Xu would not have secured any requisite authority to act for [Mr.] Yuan’s business entities.”

[129] The appellant has relied on the Partnership Agreement as declaring that Ying Peng AMC is the Executive Partner of the Ying Peng Fund, with the powers to manage and carry out all the functions of the Fund. It was the appellant’s submission in the court below that:

“Ying Peng AMC is wholly owned by Sanpower Nanjing which is, in turn, wholly owned by Sanpower Group, Yuan therefore, by virtue of the 97.5% shareholding in Sanpower Group controls Ying Peng AMC. In fact, Ying Peng AMC’s corporate particulars (which is extracted from government registries that is made publicly available on the internet) shows that Yuan is stated to be the ‘actual controller’ of Ying Peng AMC.”

[130] The appellant has sought to build a case to contend that Mr. Yuan is the alter ego and the *de facto director or controller* of the Ying Peng AMC, this being a matter which must first be separately considered, and that the Appellant says, is an imminently triable matter. The appellant’s case is that if Mr. Yuan is the alter ego of Ying Peng AMC which the Executive Partner of the Ying Peng Fund, he has been given actual authority to carry out the functions of the Ping Peng Fund and to thereby authorise an agent, Mr. Xu to execute the disputed documents. Mr. Xu is, of course, also a director of both of the respondents’ companies and he would have, in the context of everything else, the apparent authority to execute the Share Charges.

[131] Mr. Yuan did not give any evidence in this case. There is therefore no evidence to rebut the evidence of Mr. Kam on the interactions and discussions between

Mr. Kam and Mr. Yuan and whether Mr. Yuan is the *actual controller* of many companies, including Ying Peng AMC.

[132] The respondents have separated out Ying Peng Fund from this group. On this issue, the respondents have argued that:

“The Respondents do not dispute that [Mr.] Yuan, in his capacity as indirect shareholder, is the ultimate controller of Ying Peng AMC and that Ying Peng AMC is one of the managers of the Ying Peng Fund, but [Mr.] Yuan is not a decision maker in the Ying Peng Fund’s corporate structure and does not owe any duties to Ying Peng AMC and Ying Peng Fund. As the Judge noted, the evidence on [Mr.] Yuan role goes no further than a support a conclusion that [Mr.] Yuan could change the persons or entities who do not have actual authority, and this is not the same thing as having actual authority to bind the Ying Peng Fund to contracts.”

[133] The respondents, on this appeal, relied on the finding of the Court below that Mr. Kam’s evidence was ‘vague and unparticularized’. They repeated arguments which the learned Judge had accepted that *‘the partnership agreement did not provide Mr. Yuan with any authority to act and Mr. Yuan did hold any position at Ying Peng AMC or the Ying Peng Fund; the Ying Peng Fund is not a ‘Yuan Entity’ because Sanpower only has a 15.31% equity interest in that fund; and Ying Peng AMC, under the Partnership Agreement, has a duty to act in good faith in the interests of the Ying Peng Fund, and [Mr.] Yuan has not such duty.’*

[134] The respondents argue that ‘the appellant’s case that [Mr.] Yuan had such actual authority is founded on a misconception that a person who controls the shares in a holding company can cause a subsidiary to enter into an agreement which ignores the separation of corporate entities and also the different roles and responsibilities of shareholders and directors.’

[135] I have considered the submissions made by both parties on this issue. I have examined the evidence, and I must disagree with the learned judge’s finding that there was no triable issue on whether Mr. Yuan had actual authority to carry on the business of Ying Peng AMC.

- [136] In this case, the Court below also considered that it was not ‘probable’ that Mr. Yuan could be alter ego of Ying Peng AMC because he only held 97.5% of its shares, and that the appellant had adduced no evidence that the interests of the minority could simply be overridden. I do not agree that this minority shareholding of 2.5% must mean that it was improbable that Mr. Yuan was the alter ego of a company if, in reality, he has actual authority to conduct its business.
- [137] It is difficult to see how the Court below could have arrived at a finding that it was improbable on the pleaded case and the evidence that Mr. Yuan did not have actual authority; that the description of Mr. Yuan in the corporate particulars of Ying Peng AMC as an ‘actual controller’, did not support a finding that Mr. Yuan had actual authority to do anything on behalf of Ying Peng Fund as that simply went no further than indicating that Mr. Yuan could change the person or entities that do have such authority.
- [138] I do not agree that the case that the appellant has presented on the summary judgment application is so vague and unparticularised as the learned judge suggested and that it was fatal that the appellant did not present a case which stated expressly that Mr. Yuan was the *sole beneficial owner, sole member and sole director of the Ying Peng Fund*. This is not the only way that it could be shown that a person is ‘in reality’ the alter ego of a company in the sense that he has actual authority to conduct its business.
- [139] It may be that he is the driving force behind the company with implied general authority to conduct business on behalf of the company. It may be in relation to a bona fide third party, that there has been a course of dealing with the company, and he is the sole person who has acted continuously on behalf of the company and carried out acts which have been ratified by the company, or which have not been challenged by the company which has notice of these dealings. One may be the alter ego of a company even if one is not the sole shareholder, sole director or sole beneficial owner. (See **Ben Hashan v Al Shayif** ²⁷). The

²⁷ [2009] 1 LFLR 115 at para [146].

expression 'alter ego' when used to describe the relationship between the company and the person who carries on its business is a flexible concept which is fact dependent. (See **Adam and others v Cape Industries plc and another**²⁸).

- [140] Mr. Kam has raised significant matters on his evidence. On the evidence recited above, it is Mr. Yuan, who Mr. Kam says he has always dealt with on matters related to the sale and purchase of the GCBC shares. It is difficult to see how this evidence could have been completely discounted, discredited or minimised without any answer from Mr. Yuan. It is difficult to see how, at this stage with a significant gap in any narrative in opposition, they could be separated out from the management of the affairs of Ying Peng Fund.
- [141] There is sufficient evidence of Mr. Kam to create triable issues that Mr. Yuan is really the 'alter ego' in the sense that is the 'actual controller' of Ying Peng AMC. This is the case which is being cast by the 're-amended' Defence and counterclaim and the evidence filed in opposition to the application for summary judgment. That would mean that Mr. Yuan would be entitled to act on behalf of Ying Peng AMC as the 'Executive Partner'. With the course of dealings between the Mr. Kam and Mr. Yuan, especially with regards, the sale of the GCBC shares, and the fact that to date Mr. Yuan and Ying Peng AMC has not presented any contrary evidence, it is surprising that this matter could be determined summarily without a trial.
- [142] It would seem to me (apart from considerations of the expressed language of the Partnership Agreement), that at this stage there would be sufficient (insert word) to allow the appellant's appeal, since there is a triable issue as to whether Mr. Yuan had actual authority. For the same reasons (including the evidence that Mr. Xu caused the disputed document to be delivered to the Appellant's side), there would be a triable issue that Mr. Xu also had actual or at a minimum, apparent authority to execute these documents. The appellant's case, which is triable, is that Mr. Yuan had actual authority as Ying Peng AMC (the Executive

²⁸ [1991] 1 All ER 929.

Partner) to manage and carry on the affairs of the Ying Peng Fund and that he gave actual authority to Mr. Xu to execute the disputed documents. This would satisfy the first two of the four conditions identified by Lord Diplock in **Freeman & Lockyer v Bruckhurst Park Properties (Mangal) Ltd**²⁹ for there to be apparent authority in this case.

[143] It is to be noted that the learned judge appeared to have placed considerable emphasis on the 'constitutional documents' of the Ying Peng Fund. The learned judge effectively agreed with the respondents there was 'considerable evidence' that anyone purportedly acting on behalf of Ying Peng Fund did not have authority to execute the Disputed Documents. The learned judge accepted that Article 19.3 of the Partnership Agreement made it very clear that Mr. Xu (and for that matter Mr. Yuan) was expressly barred from engaging in '*debt financing*' in the name of the Partnership, and that the disputed documents were caught under this expressed disability.

[144] Further, the learned judge considered Articles 20 and 23.2 of the Partnership Agreement which created an Investment Decision Committee of which Mr. Xu was one of five members, appointed to participate in investment decisions, and accepted the respondents' contentions that this Committee must have been required to participate in any decisions regarding the disputed documents and that the appellant must have known that Mr. Xu could not have acted on his own.

[145] The learned judge therefore found that there was no evidence that Mr. Xu was the 'sole representative' or 'authorised representative of Ying Peng [Fund]', save in respect of the Escrow Agreement where Mr. Xu is described as the 'Authorised Representative of Ying Peng [Fund]'; nothing in the Partnership Agreement or the escrow Agreement gave Mr. Xu any general authority to represent Ying Peng Fund. The Court stated:

"[171] The [Respondents'] contention that MR. Xu did not have any general authority to cause Ying Peng Fund to enter into transactions such as the 29th March 2018 Loan Agreement is supported by the

²⁹ (1964) 1 All ER 630.

underlying documents in evidence, and there is none pointing the other way. The [Appellant's] assertion that Mr. Xu had actual authority is incompatible with the Ying Peng's Partnership Agreement, which had been available on the [Appellant's] side."

[172] In my respectful judgment, on the pleadings and the evidence, the Defendant's case that Mr. Xu had actual authority to bind Ying Peng to the 29th March 2018 Loan Agreement is unsustainable. The net result must be for the Court to record a finding that Mr. Xu had not actual authority."

[146] This Court has already concluded that there is a triable issue as to whether Mr. Yuan has actual authority and whether he gave Mr. Xu actual authority to execute the Disputed Documents. Insofar as the Partnership Agreement is concerned, it would appear that these 'constitutional documents' do not affect Mr. Yuan's power to give Mr. Xu actual authority to execute these documents on behalf of the Ying Peng Fund.

[147] Chapter 7 of the Partnership Agreement speaks to 'Execution of the Partnership Affairs'. Clause 19.1 carves out the role of 'Executive Partner' identified in clause 9.5.2(3) of the Agreement. It is important to set out certain parts of Clause 19. It states:

"19.1.1 The Partners unanimously agree to appoint the General Partner, namely [Ying Peng AMC], as the Executive Partner ('Executive Partner').

19.1.2 During the existence of the Partnership, the Partnership shall not replace the Executive Partner, unless the Executive Partner is subject to statutory removal and such removal is unanimously approved by all other Partners. When the Executive Partner must be replaced, Guotai Junan Haojing shall act as the Executive Partner.

19.2. The Executive Partner shall externally represent the Partnership and execute the partnership affairs and the other partners no longer carry out partnership affairs. The proceeds arising from the execution of partnership affairs by the Executive Partner shall belong to the Partnership, and any costs and losses in connection with the execution of partnership affairs shall be borne by the Partnership in accordance with this Agreement."

[148] Some limitation is placed on the powers of the Executive Partner. This is clause 19.3 which states:

“19.3 The Executive Partner shall have the right to manage and dispose of the affairs of the Partnership, provided that the Executive Partner shall not engage in debt financing or provide external guarantees in the name of the Partnership.”

[149] The learned judge appeared to have accepted the respondents’ arguments that Article 19.3 of the Partnership Agreement is an express carve out which imposed a prohibition on either Mr. Xu (the logic of this argument must mean that this also include Mr. Yuan) from executing the disputed documents on the basis that it amounts to ‘debt financing’.

[150] The appellant on the other hand submitted in the court below that an ordinary google search of the ordinary meaning of ‘debt financing’ reveals that the phrase means ‘raising money by the issue of bonds and other instruments as opposed to equity financing... it means that the Partnership cannot take a loan for the purposes of carrying on its business.’ The appellant says that the disputed documents simply treated with an existing loan and could not fall into the category of ‘debt financing’. It says that the learned judge appeared to have been more focused on the Investment Decisions Committee and its role in investment decisions, and that if Mr. Xu was going to execute these documents, this was a matter for the Committee to consider, leaving this issue on the assumption that the 29th March Loan Agreement amounted to ‘debt financing’.

[151] It is the appellant’s case that the 29th March Loan Agreement simply memorializes the existing debt, that is the outstanding consideration for the GCBC shares and so it is not caught by Article 19.3. The appellant submits that since the Partnership Agreement is governed by PRC law, one would require expert opinion to determine the extent of the carve out created by Article 19.3, and that the parties had not yet had an opportunity to present such evidence, this being a matter for trial.

[152] In the court below the respondent also weighed in on the google definition of ‘debt financing’. They submitted that the first item that came up says: ‘Debt funding (also referred to as debt financing or debt lending) is a way for a business to raise capital through means of borrowing. This funding will need to

be repaid at an arranged later date, usually through regular repayments with added interests’.

[153] The learned judge properly disregarded these google excursions. Whilst google appears to be a veritable unlimited source of information, it cannot be accepted to a reliable source in a matter such as this, even if it is for the purpose of showing that there is some debate or uncertainty on any topic. The google references in this case were surprising.

[154] The Black’s Law Dictionary³⁰ defines the phrase as: “*Raising funds by issuing bonds or notes or borrowing from a financial institution. Contrasted with equity financing which is raising funds by issuing and selling stocks. Corporate borrowing or money generally on a long-term basis for acquiring working capital or for retiring current indebtedness*’. This speaks to the borrowing of money. I do not see why if it is not from a financial institution, it cannot be debt financing. This Black’s Dictionary definition relates to English and American law. Would it the same in an agreement which is governed by PRC law? It does not speak to the concept of memorializing an existing debt, that is money is already owed which is now being acknowledged. Would that be ‘debt financing’? By way of an analogy, what if there was a court order for a debt? Would the recognition and acknowledgment of that court order amount to ‘debt financing’?

[155] The learned judge did not set out his reasons for finding that the memorializing of a previous debt amounted to debt financing, neither did His Lordship address why, in the context that this was an agreement governed by PRC law, it was considered that the meaning of this phrase was so straightforward that expert evidence was not necessary, and that Article 19.3 was in fact breached here. In the *circumstances of this case*, the absence of reasons by the Learned Judge, and in recognition that an acknowledgment of an existing debt may not fall to be properly considered ‘debt financing’, this Court is of the view that this should have been a matter on which expert evidence should have been taken.

³⁰ *Black’s Law Dictionary* (6th edn, West Publishing Co 1990).

- [156] The appellant also points to Article 37 of the PRC Partnership Act which expressly states that a partnership cannot rely on any restrictions placed on the rights of the general partners in managing partnership affairs against a bona fide third party'. The appellant has argued in the court below and in this Court that the 'Disputed Documents were for the purposes of an existing debt owed to it under the GCBC SPA and were made in good faith, and that the appellant was never under an obligation to investigate what 'debt financing' means so to understand the restrictions on Ying Peng AMC and or its agents'. The appellant contends that it is a bona fide third party for the purposes of this Article.
- [157] In the circumstances of this case, where clearly there is a triable issue on the existence of the debt, and the obvious fraud one of these groups of companies are seeking to commit on the other, it would seem to me that the meetings and the oral discussions between the parties are critical matters to determine the issue first whether there is a debt outstanding on the sale of the GCBC shares, and (on this narrow point) whether the appellant was in fact a bona fide third party for the purposes of the PRC Partnership Act.
- [158] Much of the same rationale applies to the role of the Ying Peng Fund Investment Decision Committee which is created by the Partnership Agreement. If the Loan Agreement falls outside the scope of Article 19.3, it could properly be regarded as a matter which does not require a decision of the Investment Decision Committee. Only a trial would determine this. So, it would be premature to say at this stage that the appellant is asking the court to disregard the entire management structure of the Ying Peng Fund.
- [159] Having regards to these findings, it would hardly matter that the appellant may have been placed on any inquiry. In fact, if Mr. Yuan is the alter ego of Ying Peng AMC, the ultimate controller, and was the person carrying out the functions of the Executive Partner of Ying Peng then any inquiry would have been pointless. The fact that Mr. Yuan wanted to keep the details of the debt from the limited partners of the Ying Peng Fund does not by itself mean that the Ying Peng Fund was unaware of the details; Mr. Yuan's knowledge would be the knowledge of the Ying Peng Fund, he being the alter ego. In these

circumstances, Mr. Xu would have been properly authorised to execute the 29th March Loan Agreement. These are triable matters.

[160] As far as the Share Charges are concerned, the question which would consequentially arises is whether Mr. Xu had actual or apparent authority to execute these documents. The learned judge considered that having regards to the finding of invalidity related to the 29th March Loan Agreement, there was no need to go on to decide whether Mr. Xu had actual or apparent authority to sign the Share Charges. It would seem to me that the determination of this matter is integrally bound with the determination of the other issues. This is especially so, since the respondents companies exist simply as holding companies for the GCBC shares which was acquired by the Ying Peng Fund; Blue Ocean BVI is simply a holding company for the GCBC Shares, and Blue Ocean HK wholly owns Blue Ocean BVI. More significantly, Mr. Xu is a director of both companies.

[161] In these circumstances where the learned judge effectively tied the validity of the Share Charges to the 29th March Loan Agreement, there is no need to go any further but to leave this matter to the trial court as well.

Conclusions and Disposition

[162] This is a matter which has engaged the lower courts over several days, with the court being taken painstakingly through a number of documents and numerous affidavits setting out in instances, opposing versions and seeking to provide context and explain several of the many documents. Many arguments were taken on issues of credibility with the respondents even seeking to rely on credibility findings made by foreign courts. Credibility was part of the basis upon which the learned judge ruled that at least one issue, that is the debt issue, was unresolved and remained a triable issue.

[163] Each issue in this case hinge in part on the credibility of the witnesses on either side. Such issues are intertwined with assessment of the critical documents. If Mr. Xu was not telling the truth about the debt issue or the execution issue, might this not affect this credibility on the authority issue? Mr. Kam may also be less than truthful, but he has not been so far answered by Mr. Yuan.

[164] In all of the circumstances of this case, it is difficult to see how the court below could have arrived at those conclusions on the summary judgment application. This case must fall within those categories of cases which are not suitable for the summary judgment process.

[165] The appeal is therefore allowed, and the counter notice is dismissed. Leave granted to the appellant to file its 're-amended' Defence and Counterclaim. The matter is to be remitted to a different judge of the High Court to be case managed for trial. The appellant shall have costs, on the appeal and on the counter notice, to be assessed if not agreed.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Nicola Byer
Justice of Appeal [Ag.]

By the Court

Chief Registrar