THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2023/0017

BETWEEN:

FLOREAT REAL ESTATE LIMITED

Appellant

and

[1] XYZ
[2] CHIA HSING WANG
[3] REAL ASSETS (RA) GLOBAL OPPORTUNITY FUND I LTD

Respondents

Before:

The Hon. Mde. Vicki Ann Ellis	Justice of Appeal
The Hon. Mr. Trevor Ward	Justice of Appeal
The Hon. Mr. Gerard St. C Farara	Justice of Appeal [Ag.]

Appearances:

Mr. Andrew Hunter KC with him Mr. William Hare, Mr. Alistair Abbott and Mr. Christopher Bromilow for the Appellant

Mr. James Collins KC with him Mr. Benedict Tompkins, Mr. Andrew Willins and Ms. Tamara Cameron for the Respondents

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2023: December 4;
2024: April 25;
Re-Issued: May 3 2024.

Interlocutory appeal – Appeal against order appointing joint provisional liquidators – Standing – Whether Mr. Wang had standing to apply for the appointment of joint provisional liquidators over RAGOF – Bare trusts – Whether XYZ held the XYZ shares on a bare trust for Mr. Wang – Derivative claims – Whether there were special circumstances entitling Mr. Wang to seek the appointment of joint provisional liquidators over RAGOF on a derivative basis – Abuse of court – Subsequent interlocutory proceedings – Whether a subsequent interlocutory application involving the same parties and same issues runs afoul *of the abuse of court principles – Whether the dismissal of Ladd v Marshall applications precludes an applicant from introducing that same evidence in the subsequent interlocutory application - The rule in Hollington v Hewthorn – Whether the rule in Hollington v Hewthorn applies to the reliance on decisions of another court in interlocutory applications*

The appellant, Floreat Real Estate Limited ("FRE"), is a professional fund incorporated in Jersey and is part of what has been described as the Floreat Group of Companies ("the Floreat Group"). At all material times, FRE served as the investment adviser of Real Assets (RA) Global Opportunity Fund I Limited ("RAGOF"), a fund incorporated under the laws of the Territory of the Virgin Islands ("the BVI"). The Floreat Group, at all material times, managed the assets of RAGOF, which includes real property in England known as 'Springs Farm'. Certain shares in RAGOF are registered in the name of the first respondent, XYZ a company registered in England ("the XYZ shares"). It is common ground that the XYZ shares are ultimately beneficially owned by Mr. Chia Hsing Wang ("Mr. Wang"), the second respondent. The XYZ shares are held by XYZ subject to a written nominee agreement titled 'Agreement Concerning Transactions with Non-Traditional Investment Products (NTIP) by [XYZ]' between Mr. Wang and XY, a Bank, which is the parent company of XYZ ("the XY Nominee Agreement"). The XY Nominee Agreement is governed by the laws of Switzerland and XYZ is not itself a party to the said agreement.

In August and September of 2021, Mr. Wang brought two related sets of proceedings before the Commercial Court in the BVI. In Claim No. 144/2021, he sought and obtained an order of Wallbank J appointing joint receivers over the XYZ shares from Wallbank J. In Claim No. 150/2021, Mr. Wang and the court appointed joint receivers sought an order winding up RAGOF and, in the meantime, an order appointing joint provisional liquidators ("JPLs") over RAGOF ("the First JPL Application"), which application was granted by Jack J. These orders were made ex parte and were both discharged and not continued by Wallbank J on 19th August 2022 ("the Discharge Judgment"), which decision was upheld by this Court in a judgment delivered on 6th June 2023 ("the First Appeal Judgment").

On 20th June 2023, some 14 days after the delivery of the First Appeal Judgment, Mr. Wang filed a second application for the appointment of JPLs over RAGOF ("the Second JPL Application"). Mr. Wang asserted that he had standing to move the court to appoint JPLs over RAGOF on the bases that (i) he holds signed instruments of transfer in respect of certain shares held as his nominee by Bank Julius Baer & Co in RAGOF ("the JB shares"), and he was therefore a person to whom shares in a company had been transferred within the extended meaning of 'member' in section 2 of the Insolvency Act 2003; (ii) in separate proceedings, he had sought retrospective rectification of RAGOF's share register to record his ownership of the JB Shares; (iii) the application was being pursued on a derivative basis in respect of the XYZ shares which are beneficially owned by him; and (iv) as an applicant for a winding up order over RAGOF, he was entitled to seek the appointment of JPLs.

On 20th July 2023, at an inter partes hearing and in an ex tempore judgment, Wallbank J granted the Second JPL Application. He found that Mr. Wang had standing to maintain the Originating Application brought in Claim No. 150/2021 on 30th August 2021 for the compulsory liquidation of RAGOF derivatively on behalf of XYZ as the registered shareholder of the XYZ shares. Accordingly, Wallbank J ordered that Claim No. 150/2021 be reconstituted so that Mr. Wang becomes the sole applicant and that XYZ becomes the third respondent in the said proceedings. This is the order from which FRE has appealed.

By notice of appeal filed on 11th August 2023, FRE relied on 4 grounds of appeal and in a counter notice of appeal filed on 28th August 2023, Mr. Wang relied on 2 grounds of appeal. However, broadly speaking, two main issues fell to be determined by this Court. These are: (i) Whether Mr. Wang had standing, whether in the derivative sense or as a member of RAGOF within the extended meaning of 'member' in section 2 of the Insolvency Act as the owner of the JB shares in RAGOF, to apply for the appointment of JPLs over RAGOF; and (ii) Whether the Second JPL Application was an abuse of process, whether Wallbank J had applied the wrong test and whether his finding of special or exceptional circumstances in granting the Second JPL Application and making the order appointing JPLs, was wrong. Additionally, on Mr. Wang's counter notice of appeal, if the order appointing JPLs were to be set aside, whether Wallbank J's dismissal of Mr. Wang's application for certain alternative relief, including injunctive relief, was wrong.

Held: dismissing the appeal with costs to Mr. Wang, dismissing ground 3(a) of the counter appeal and making no order on ground 3(b) with costs in relation to ground 3(a) to FRE, and making the orders set out at paragraphs 246 and 247 below, that:

1. Section 184C of the BVI Business Companies Act 2004 applies only to applications by a shareholder/member to bring a derivative claim or to intervene in existing proceedings in which the company is a party in the name and on behalf of the company. There is no provision in the Insolvency Act 2003 or in any other applicable statute law which provides for an application for permission to bring a derivative claim based on the existence of a bare trust or, absent a bare trust, upon demonstrated 'special circumstances'. These concepts were developed by the courts to facilitate actions brought by beneficiaries for reliefs to protect and preserve the assets of a trust or trust property, especially in circumstances where such assets or trust property are in real danger of being dissipated or misappropriated, and the trustee refuses or is unable to act to protect the assets or property of the trust. These species of derivative actions are not to be likened to the derivative actions of a 'member' of a company brought or undertaken in the name of the company under section 184C, as the beneficiary of the trust is not the registered owner of the shares in the company, and hence not a 'member' of the company.

   Section 184C of the **BVI Business Companies Act 2004** Act No. 16 of 2004 of the Laws of the Virgin Islands considered; Section 170 of the **Insolvency Act 2003** Act No. 5 of 2003 of the Laws of the Virgin Islands considered.

2. Separate and apart from the provisions of section 184C of the BVI Business Companies Act 2004, BVI law recognizes and has adopted as part of its procedural and substantive law, the legal concept of derivative claims brought by beneficiaries of shares held in a company. Derivative claims based upon the existence of a bare trust or on the existence of special circumstances requiring the court to act to protect the property or assets of a trust, are available to beneficiaries and may be brought with respect to statutory remedies under the BVI's company law and insolvency

regime, including in relation to applications to appoint provisional liquidators. Accordingly, section 184C has no application to 'derivative trust proceedings' brought by a beneficiary under a bare trust or in special circumstances. Section 184C was therefore not engaged in the Second JPL Application and no permission of the court below was required for Mr. Wang to bring the Second JPL Application on a derivative basis. In relation to that limb of the Second JPL Application, Mr. Wang was seeking relief not as a shareholder of RAGOF, but in his capacity, purportedly, as the beneficiary under a bare trust of the XYZ shares in RAGOF.

Roberts v Gill & Co [2010] UKSC 22 applied; **Joseph Hayim Hayim and another v Citibank N.A. and another** [1987] AC 730 applied; **Tipp Investments PCC v Chagala Group Limited et al** BVIHC(COM) 2016/102 (delivered 9th November 2016, unreported) followed; **Thelma Paraskevaides and another v Citco Trust Corporation Ltd and others** BVIHCMAP2018/0046 (delivered 30th March 2020, unreported) followed.

3. The concept of an economic interest to be protected, while permitted by virtue of the expanded meaning of the term 'member' in section 2 of the **Insolvency Act 2003** must be subject to the specific and mandatory terms of the articles of the company in question. Pursuant to Article 17.5.1 of RAGOF's Articles, the prior approval of the Board of Directors of an intended transferee is a mandatory requirement. It is not in dispute that this provision was not complied with by Julius Baer prior to signing the instruments of transfer of the JB Shares in RAGOF to Mr. Wang. In fact, when an attempt was made to seek the approval of the directors, this was done by Mr. Wang's BVI lawyers, and not by the registered shareholder Julius Baer as Article 17.5.1 requires. The effect of these provisions in the Articles means that the instruments of transfer of the JB Shares to Mr. Wang were null and void pursuant to Article 18.2, as the learned judge correctly found. In those circumstances, it cannot be gainsaid that Mr. Wang had an economic or contractual interest to protect by virtue of or resting upon instruments of transfer in his favour that were null and void, such that the expanded meaning of the term 'member' in section 2 of the Insolvency Act 2003 applied to him rendering him a person who in his own right was entitled to bring the Second JPL Application. Ground 3(a) of his counter appeal therefore fails.

   Section 2 of the **Insolvency Act 2003** Act No. 5 of 2003 of the Laws of the Virgin Islands considered applied; **McCarthy Surfacing Limited** [2006] EWHC 832 (Ch) distinguished; **Re A Company** [1986] BCLC 391 distinguished; **Harris v Jones** [2011] EWHC 1518 (Ch) distinguished.

4. Although XYZ is not directly a party to the XY Nominee Agreement, it clearly holds the XYZ shares at the behest of its principal, XY, subject to and upon the terms and conditions of the said nominee agreement entered into by XY and Mr. Wang on 27th March 2015. It is well arguable, based on BVI trust law trust principles, that this gives rise prima facie to the existence of a bare trust between XYZ as registered owner holding title to what is ultimately Mr. Wang's property, the XYZ shares in RAGOF. Further, it was not necessary for the purposes of the Second JPL

Application, for Wallbank J to be satisfied conclusively that the XYZ shares are held by XYZ on a bare trust for Mr. Wang. He need only be satisfied that this point was well arguable in order to allow Mr. Wang to proceed on a derivative basis to appoint JPLs. Viewed in this way, and absent any expert evidence as to Swiss law or English law, Wallbank J was correct to conclude that it cannot be seriously disputed that XYZ holds the XYZ shares on bare trust for Mr. Wang and that that was sufficient to clear the way for him to bring a derivative claim.

5. The test as to whether there are special circumstances entitling a beneficiary of an estate to bring a derivative action is two-fold. First, the circumstances must be sufficiently special to warrant the beneficiary proceeding on a derivative basis; and second, it must be just, in the circumstances, for the beneficiary to proceed on a derivative basis. For this category of 'derivative claims' certain factors need to be present. They are: (1) the existence of a trust other than a bare trust; (2) some asset or property of the trust estate in need of protection; (3) the trustee is unable or unwilling to act to protect the trust estate; and (4) the beneficiary claimant must be at least one of the beneficiaries capable of acting to protect the trust estate, but he/she need not be the only beneficiary capable of so acting. In this category of derivative actions, the court is called upon to assess whether the circumstances are sufficiently special to warrant the beneficiary bringing a derivative action and that 'justice' requires that the claimant beneficiary should be allowed to pursue the remedy in the court and have the question or questions in issue decided by the court.

   Roberts v Gill & Co [2010] UKSC 22 applied; **Joseph Hayim Hayim v Citibank N.A.** [1987] AC 730 applied; **Paraskevaides v Citco Trust Corporation Ltd** BVIHCMAP2018/0046 (delivered 30th March 2020, unreported) followed.

6. In this case, there is no basis, whether of law or fact, to disturb the finding by Wallbank J that there were 'special circumstances' shown on the evidence for Mr. Wang, the beneficial owner of the XYZ shares and the JB Shares, to have derivative standing to seek the appointment of JPLs, and to proceed with Claim No. 150/2021 derivatively. It is clear from the affidavit evidence and documents that Mr. Wang took steps to have both the XYZ shares, and JB Shares transferred to himself, in order to enable him to become a registered member of RAGOF entitled, in his own right, to bring an action to protect RAGOF, its assets, and his interests. Wallbank J was also correct to find on the evidence before him that FRE and or the Floreat individuals had sought to obstruct or block Mr. Wang's efforts to be registered as a member of RAGOF. While strictly speaking it may not be correct to say that XYZ has 'refused' to act to protect the assets of RAGOF, it is correct that it has declined to do so or to participate in the extant proceedings. This leads to the same result whereby the trustee is unable or unwilling to act, and is enough to justify Mr. Wang, as the beneficial owner of the shares, proceeding on a derivative standing basis. Furthermore, Wallbank J, in assessing the risk, found that there was a real and present risk of harm to RAGOF if Mr. Wang, as the beneficial owner of 97% of RAGOF, is unable to proceed on a derivative basis to protect the assets of RAGOF and his interest therein. As a matter of principle, this Court ought to pay

deference to the learned judge's conclusion on this issue. Accordingly, Wallbank J properly assessed and weighed the factors relied on by Mr. Wang as amounting to circumstances that were 'sufficiently special' and determined that it was 'just', in all the circumstances, for Mr. Wang, as the beneficiary of shares in RAGOF, to be able to proceed derivatively.

7. A subsequent interlocutory application involving the same parties and regarding the same or similar relief and/or issues and/or points (including points which could or ought to have been taken in the first proceedings) will run foul of the abuse of court principles, unless the applicant can satisfy the court that it does not on one of two bases. The first is where the applicant in the second application can show that there has been some 'significant and material' change of circumstances from when the first or earlier application was decided; and the second, is where the applicant can put before the court 'new' evidence, that is evidence which the applicant did not know and could not reasonably have discovered at the time of the first hearing. The threshold test is not, as FRE suggested 'very substantial and exceptional material change of circumstances such that justice requires reconsideration of the issue of regrant'.

   Koza Limited v Koza Altin Isletmeleri [2020] EWCA Civ 1018 applied; **Hunter v Chief Constable of the West Midlands Police** [1982] AC 529 considered; **Henderson v Henderson** (1843) 3 Hare 100; **Chanel v Woolworth** [1981] 1 WLR 485 considered.

8. The dismissal of the three *Ladd v Marshall* applications in the First Appeal to adduce fresh or purportedly new evidence before the Court of Appeal in support of Mr. Wang's appeal, did not operate to exclude or to prevent such materials, if relevant, from being relied on before the first instance judge on the Second JPL Application, in support of the contention that there had been a 'significant and material' change of circumstances from when the First JPL Application was adjudicated, the ex parte order discharged by Wallbank J, and the appeal therefrom also dismissed. Different principles and considerations apply as between a *Ladd v Marshall* application before an appellate court, and those to be applied by a judge in the High Court charged in a second application with determining whether the said application amounts to an abuse of process in light of a first and unsuccessful application. The test in the latter is whether it has been demonstrated that a 'significant and material' change of circumstances has been demonstrated from that which pertained when the first application was decided. Accordingly, the applicant in a second application is not precluded from adducing material which was not admitted by the appellate court because, on an application of the *Ladd v Marshall* criteria, the application failed. Such material can be relied upon as part and parcel of the cache of 'new' evidence sufficiently material to satisfy the first instance court that the 'abuse of court' principles have been dispelled.

   Ladd v Marshall [1954] 3 All ER 745 considered; **Flavio Maluf v Durant International Corp** BVIHCMAP2021/0025 (delivered 13th January 2022, unreported) considered.

9. 'New' evidence, which was not accepted by an appellate court on a *Ladd v Marshall* application requires close and careful scrutiny by a first instance court. For example, if that evidence or part or parts of it, had been rejected in the *Ladd v Marshall* application before the appellate court, on the basis that it did not satisfy the first criterion of *Ladd v Marshall*, then such evidence would prima facie be caught by the abuse principles and could not be used by the applicant in the second application to show a 'significant and material' change of circumstances or 'new' evidence of the type described under the second limb of the threshold test in **Koza Ltd v Koza Altin Isletmeleri**. However, in this case, Wallbank J was correct in finding that simply because the same categories of evidence were in play, did not prevent the Second JPL Application from being made and heard on its merits. New or fuller evidence can, and here did, change the picture. Instead of some degree of speculation and supposition, there was now greater certainty with respect to the risk to RAGOF's assets.

10. It is a fallacy of principle, to categorize the Second JPL Application as a 'regrant'. It is not. As Wallbank J correctly found, it was a fresh application. The discharge of the First JPL order and the unsuccessful appeal therefrom, rested, in large measure, not so much on the quality of the evidence of serious wrongdoing, but on the breaches of the duty of full and frank disclosure, and failure to put alternative remedies, as found in the Discharge Decision and upheld by the First Appeal Judgment. The appeal having failed on these bases, it was certainly open to Mr. Wang to seek to become a registered shareholder of RAGOF, and where this process was delayed or encountered certain obstacles, to move the court in interlocutory proceedings on a derivative basis, as the beneficial owner of the XYZ shares and the person with an economic interest at risk to be protected. Mr. Wang was entitled to assert, as he did in the court below, that there was new or additional evidence of sufficient cogency showing a 'significant and material change' of circumstances, or new evidence not available on the First JPL Application, entitling him at the interlocutory stage, to the reliefs sought by the Second JPL Application. In the same vein, FRE's argument that the Second JPL Application is essentially a re-hearing of the First JPL Application is also without merit. The fact that an issue was part of the claim in Claim No. 150/2021 or an allegation in the First JPL Application, is not dispositive of the question of whether additional or new evidence in relation to the same issue or allegation cannot properly be considered on the Second JPL Application, where the same or similar issues or points have been relied on. One of the criticisms at the discharge hearing was that several of the categories of allegations of wrongdoing remain just that, mere allegations, unsupported by any cogent evidence upon which a judge can grant the reliefs being sought. Accordingly, Mr. Wang cannot now be legitimately criticized for producing additional or new evidence aimed at buttressing the previously made allegations of serious wrongdoing, in circumstances where much has unfolded in relation to these matters.

11. The rule in *Hollington*, which prevents the admission of decisions of a court in an earlier trial being used as evidence in a subsequent civil action or trial, even one arising out of the same facts, no longer applies to the reliance on decisions of

another court in interlocutory applications. This is so because, in interlocutory proceedings, the court is not called upon to make final decisions, but to determine whether there is a serious issue to be tried or whether there is a real risk of dissipation or, as in the instant matter, whether the appointment of provisional liquidators is 'necessary' for the purpose of maintaining the value of assets owned or managed by the company or it is in the public interest, pending the full trial and determination of the application to wind up the company by appointing liquidators. The latter type of interlocutory proceeding, albeit having serious consequences for a company before the trial of the winding up application, is in no way a final determination of the issues in the winding up application or of the wide discretionary powers granted to the court under section 167 of the Insolvency Act 2003. The jurisdiction and discretion of the judge ultimately hearing the winding up petition, even if it is the same judge who heard the application to appoint provisional liquidators, is in no way fettered or constrained by any evidentiary assessments or findings made at the interlocutory stage. Accordingly, Wallbank J did not err when taking into account the findings of Justice Kawaley in the Cayman Proceedings.

Hollington v Hewthorn [1943] 1 KB 587 applied; **Sabbagh v Khoury** [2014] EWHC 3233 (Comm) considered; **Rogers v Hoyle** [2014] EWCA Civ 257 considered; **Calyon (a company incorporated under the laws of the Republic of France) v Michailaidis and others** [2009] UKPC 34 distinguished.

12. As FRE has failed on all of its grounds of appeal and has failed to satisfy this Court that the order appointing JPLs over RAGOF should be set aside, the issue of Wallbank J's dismissal of Mr. Wang's alternative application for certain reliefs did not arise for consideration.

JUDGMENT

[1] **FARARA JA [AG.]:** This is the second round of interlocutory appeals to this Court involving the two main protagonists, the appellant, Floreat Real Estate Limited ("FRE"), and the second respondent, Chia Hsing Wang ("Mr. Wang"). Both rounds of appeals concern interlocutory orders made by a judge of the Commercial Division of the High Court in the Territory of the Virgin Islands ("the BVI"). The first round of appeals (collectively "the First Appeal") was from the discharge and non-regrant of two ex parte orders ("the ex parte orders"). The first ex parte order made in Claim No. BVIHC(COM)2021/0144 ("Claim No. 144/2021") on the application of Mr. Wang, was for the appointment of receivers over certain shares held beneficially by the first respondent, XYZ ("the XYZ shares"), in the third respondent company, Real Assets (RA) Global Opportunity Fund I Limited ("RAGOF"), a fund incorporated under the

laws of the BVI. The second ex parte order in Claim No. BVIHC(COM)2021/0150 ("Claim No. 150/2021"), was for the appointment of joint provisional liquidators ("JPLs") over RAGOF. The appeals against the discharge of the ex parte orders were dismissed by this Court in a written judgment delivered on 6th June 2023 ("the First Appeal Judgment"). This second round of appeals ("the Second Appeal") is from an order made after an inter partes hearing before Wallbank J ("the learned judge") in Claim No. 150/2021 on the application of Mr. Wang, appointing (for the second time) JPLs of RAGOF.

The First Appeal

[2] More specifically, the First Appeal consisted of two appeals: BVIHCMAP2022/0055 ("Appeal No. 55/2022") and BVIHCMAP2022/0056 ("Appeal No. 56 of 2022") which were heard together. The First Appeal was from the written judgment of the learned judge dated 19th August 2022 by which he discharged two orders obtained ex parte in Claim No. 144/2021 and Claim No. 150/2021 (separate but related actions) ("the Discharge Judgment"). Appeal No. 55/2022 concerned the discharge of an order made ex parte by the learned judge on 26th August 2021 in Claim No. 144/2021 appointing joint receivers over certain shares held beneficially by the first respondent, XYZ, in RAGOF, and empowering the joint receivers to commence separate proceedings for the liquidation of RAGOF. Appeal No. 56/2022 concerned the discharge of an ex parte order made by Jack J on 1st September 2021 in Claim No. 150/2021 for the appointment of JPLs of RAGOF. Both appeals were heard together, and the Discharge Judgment was upheld by this Court in the First Appeal Judgment. An application by Mr. Wang for conditional leave to appeal the First Appeal Judgment to His Majesty in Council was dismissed by this Court on 28th July 2023.

The Second Appeal

[3] On this, the Second Appeal, FRE appeals the ex tempore judgment and orders made by the learned judge on 20th July 2023, approximately 1.5 months after the First Appeal Judgment. In brief, this appeal and the counter appeal are from an

order made by the learned judge after an inter partes hearing whereby the learned judge granted a second application filed by Mr. Wang on 20th June 2023 ("the Second JPL Application") made some 14 days after the First Appeal Judgment to appoint JPLs over RAGOF. In granting the Second JPL Application, the learned judge found that Mr. Wang 'has standing to maintain the Originating Application filed on 30th August 2021 derivatively on behalf of XYZ as the registered shareholder of the shares which XYZ hold beneficially in RAGOF on behalf of the Applicant.' Accordingly, the learned judge ordered that Claim No. 150/2021 be reconstituted so that Mr. Wang becomes the sole applicant, and so that XYZ will henceforth be the third respondent in the said proceedings. The learned judge also made an order granting permission for Mr. Wang to serve XYZ with said proceedings out of the jurisdiction.

Matters central to the first and second JPL applications and appeals

[4] Four matters were of central importance to each of the two applications by Mr. Wang in Claim No. 150/2021 for orders appointing JPLs over RAGOF, and to the decision reached in the Discharge Judgment and First Appeal Judgement. These factors are also of importance to the determination of this Second Appeal.

(1) Standing and the shares held beneficially by XYZ in RAGOF

[5] The first is that certain shares in RAGOF are registered in the name of XYZ (the XYZ shares). The XYZ shares (and this is common ground) are ultimately beneficially owned by Mr. Wang. The XYZ shares are held by XYZ subject to a written nominee agreement titled 'Agreement Concerning Transactions with Non-Traditional Investment Products (NTIP) by [XYZ]' between Mr. Wang and XY (a Bank, which is the parent of XYZ), a company incorporated in the United Kingdon ("the XY Nominee Agreement"). The XY Nominee Agreement is governed by the laws of Switzerland. However, XYZ is not a party to this nominee agreement. In making the First JPL Application (and the ex parte receivership application), Mr. Wang had accepted and relied on the fact that he was not a shareholder in or 'member' of RAGOF, and did not have standing to bring the application in Claim No.

150/2021 to appoint provisional liquidators over RAGOF. In bringing the two ex parte applications, Mr. Wang also accepted that XYZ, the registered owner of the XYZ shares in RAGOF, would not consent to bringing either the application to appoint receivers, or the winding up proceedings and concomitant application to appoint JPLs. It was also Mr. Wang's case, at the ex parte and inter partes discharge hearings and in the First Appeal, that if he was to seek to have the XYZ shares transferred into his name, the RAGOF directors would block the transfer and would be 'encouraged or coerced into purportedly exercising powers to sell or compulsorily redeem these shares of which Mr. Wang is the ultimate beneficial owner'.

(2) Allegations of serious wrongdoing in relation to RAGOF and the Cayman Funds

[6] The second matter of central importance is the various allegations of serious wrongdoing relating to the management of RAGOF and some of its assets made by Mr. Wang in Claim No. 150/2021 against the appellant, "FRE", the adviser to RAGOF, and also by persons described collectively as the Floreat Principals ("the allegations of serious wrongdoing"). Before the judge below in the Second JPL Application, the allegations of serious wrongdoing as made originally in the First JPL Application, are said by Mr. Wang to be buttressed and further substantiated by the evidence, documents and findings in the Cayman proceedings ("the Cayman Proceedings"), and, to some extent, by the proceedings before the courts of England ("the English Proceedings"), and the written reports of the JPLs appointed by virtue of the now discharged ex parte order made in August 2021 in the First JPL Application as well as the JPLs appointed in the Cayman Proceedings.

[7] In the Cayman Proceedings, similar, though not identical, allegations have also been made by Mr. Wang in relation to the management of the assets of three related Funds in the Cayman Islands ("the Cayman Islands Funds"). The allegations in relation to the Cayman Islands Funds have been the subject of proceedings brought before the Cayman Island courts to wind up the said Funds. These proceedings have culminated in certain findings and decisions of the Cayman Islands courts

(Kawaley J) which Mr. Wang sought to rely on in three **Ladd v Marshall**[1] applications brought in the First Appeal. These documents and findings also formed an important part of the evidence put before the judge in support of the Second JPL Application, the subject of this appeal.

(3) Findings of non-innocent breaches of the Duty of Full and Frank Disclosure

[8] The third matter of central importance is the finding by the learned judge in the Discharge Judgment, upheld in the First Appeal Judgment, of serious non-innocent breaches by the applicant, Mr. Wang, of the duty of full and frank disclosure and fair presentation ("the duty of full and frank disclosure") in making and obtaining the two ex parte orders, and the refusal both by the learned judge and by this Court to regrant the said orders. These findings of breaches of the duty of full and frank disclosure by Mr. Wang concern, most importantly, the representation made by his then leading counsel during the ex parte hearing of the First JPL Application, of the existence of an absolute right of forced redemption of the XYZ shares in RAGOF by its directors, as justification for the said application being proceeded with on an urgent without notice basis. However, as matters turned out, this representation of an absolute right to a forced redemption was not borne out by the Articles of RAGOF, to which relevant articles Mr. Wang's said lead counsel did not take the presiding judge. This representation was found, both by the learned judge in the Discharge Judgment and by this Court in the First Appeal Judgment, to have been wrong as a matter of construction of the relevant articles, and a deliberate or non-innocent representation aimed at achieving the advantage of proceeding on an ex parte basis. Moreover, it was found that the said representation or misrepresentation was intended to and did serve to dissuade the learned judge, as he intimated, from granting a short adjournment of the first application to permit FRE to respond to it, and for the application to be determined after an inter partes hearing. This was one of, if not the primary, grounds upon which the learned judge

[1] [1954] 3 All ER 745.

discharged the first JPL order, which ground was upheld by this Court in the First Appeal Judgment.

[9] The discharge of the first JPL order for breaches of the duty of full and frank disclosure is one of FRE's main grounds in this appeal against the decision and order granting the Second JPL Application and appointing JPLs over RAGOF and for the said order to be set aside. It has featured much in the written and oral submissions of the appellant. In addition to the issue of whether the learned judge erred in holding that Mr. Wang had standing on a derivative basis to bring the Second JPL Application, it is a primary ground of appeal by FRE that in view of the breaches of the duty of full and frank disclosure and the refusal to regrant, the learned judge ought to have dismissed the Second Application. It is FRE's case that the learned judge erred by not considering or by giving insufficient consideration to the prior findings of non-innocent or deliberate breaches of the duty of full and frank disclosure, and the refusal to order a regrant as the court's sanction or penalty for Mr. Wang's breach of the said duty.

[10] Hitched to this ground is the argument by the appellant that the Second JPL Application was grounded primarily upon the same or substantially the same evidence and allegations of serious wrongdoing in the management of RAGOF and its assets, which evidence and documents were the subject of the three unsuccessful **Ladd v Marshall** applications, and which evidence had been considered and rejected by this Court as not having an important influence on the outcome of Appeal No. 55/2022 and Appeal No. 56/2022. Furthermore, and in the same vein, it is a primary submission of FRE in this appeal that the learned judge erred when he failed to address his mind to the appropriate test when considering the Second JPL Application, in that he failed to consider and to determine whether, having regard to the finding of non-innocent breaches of the duty of full and frank disclosure, Mr. Wang was required, but failed to put before the learned judge, new evidence demonstrating special or exceptional circumstances why the Second JPL Application ought to be granted.

(4) Finding of alternative remedies to receivership and appointment of JPLs

[11] The fourth matter, related to the third, is the finding in both in the Discharge Judgment and the First Appeal Judgment, that certain alternative remedies were available to Mr. Wang other than seeking the draconian reliefs of a receivership order over the XYZ shares and the appointment of JPLs, as a precursor to putting RAGOF into compulsory liquidation. These alternative remedies were not pursued by Mr. Wang nor had they been put to the presiding judge in Mr. Wang's first round of ex parte applications. An important consideration was that these alternative remedies went directly to the question of whether it was just or convenient to make the receivership order and/or the first JPL order in the first place. These alternative remedies included, but were not limited to, taking steps to transfer or to put the XYZ shares in the name of Mr. Wang, thereby imbuing him with the requisite standing to move the court directly for appropriate relief, instead of Mr. Wang adopting the somewhat convoluted two-step ex parte litigation strategy conceived and deployed for the purpose of having the XYZ shares either put in his, Mr. Wang's, name, or in the name of a new and willing third-party nominee.

Background

[12] Much of the chronological factual matters relative to the parties and the background to the claims of serious wrongdoing and mismanagement by FRE and the Floreat Principals of the assets of RAGOF, are set out in the written judgment of this Court in Appeal No. 55/2022 and Appeal No. 56/2022, and hence do not require being repeated here in any detail.

[13] FRE is a professional fund incorporated in Jersey and is part of what has been described as the Floreat Group of Companies ("the Floreat Group"). At all material times, FRE served as the investment adviser of RAGOF. Floreat Real Asset Investment Management Ltd ("FRAIM"), one member company of the Floreat Group, is or was the investment manager of RAGOF. Both FRE and FRAIM are said to be owned by Mr. Mutaz Otaibi ("M. Otaibi") who, together with his brother, Mr. Hussam Otaibi ("H. Otaibi") and one Mr. James Wilcox (collectively, "the Floreat

Principals"), own and control the Floreat Group. At all material times, the Floreat Group managed the assets of RAGOF, which includes real property in England known as 'Springs Farm'.

[14] In August and September of 2021, Mr. Wang brought two related sets of proceedings before the Commercial Court in the BVI. The first is Claim No. 144/ 2021 by which Mr. Wang sought and obtained the appointment of joint receivers over the XYZ shares in RAGOF. The second, Claim No. 150/2021, commenced by Mr. Wang and the court appointed joint receivers appointed in Claim No. 144/2021, was for an order winding up RAGOF and, in the meantime, for appointment of JPLs of RAGOF. Having commenced Claim No. 144/2021, Mr. Wang applied for and obtained ex parte on 26th August 2021 from the learned judge, an order appointing joint receivers of the XYZ shares in RAGOF. Next, Mr. Wang, and the JPLs on behalf of XYZ, brought Claim No. 150/2021 on 30th August 2021 for the compulsory liquidation of RAGOF. On the same day, Mr. Wang and the joint receivers applied ex parte in the said proceedings, on an urgent basis, for the appointment of JPLs of RAGOF ("the First JPL Application"). On 1st September 2021 Jack J granted the First JPL Application and made an order appointing JPLs over RAGOF. These two orders (by Wallbank J and Jack J) were made without notice to FRE, a named defendant in both proceedings. As stated above, both ex parte orders were discharged and not continued or regranted by the learned judge on 19th August 2022, which decision was upheld by this Court in the First Appeal Judgment.

[15] The first respondent, XYZ, was named as a defendant in Claim No. 144/2021 and as a co-claimant in Claim No. 150/2021. However, XYZ has not actively participated in either proceeding. Likewise, XY has not been a named party in and has throughout not taken part in the said proceedings, in the resulting appeal proceedings in Appeal No. 55/2022 and Appeal No. 56/2022, in the Second JPL Application, or the hearing of this appeal and cross-appeal.

[16] Leave to appeal, along with a temporary limited stay of the Discharge Judgment, having been granted by the learned judge on 23rd September 2022, the Discharge Judgment was upheld by this Court in a written judgment delivered on 6th June 2023, including the decision not to regrant the said ex parte orders. In doing so, this Court refused to grant three separate **Ladd v Marshall** applications brought in the First Appeal by Mr. Wang (except to the limited extent of permitting into evidence an affidavit, 'Ford 1', explaining the origins and use in the proceedings, of the filename 'Project Ninja'). These three applications were dismissed on the basis that the materials sought to be adduced were either not evidence at all or were irrelevant or did not satisfy the second limb of the **Ladd v Marshall** test in that they would not have had an important influence on the outcome of the appeals and on the discharge and non-regrant of the orders. Mr. Wang's application for leave to appeal the First Appeal Judgment to His Majesty in Council was refused by this Court in a written judgment delivered on 28th July 2023.

Second JPL application

[17] Mr. Wang's Second JPL Application was filed on 20th June 2023 in Claim No. 150/2021. By the Second JPL Application, Mr. Wang sought a number of orders, including (materially to this appeal) that (i) to the extent necessary, Claim No. 150/2021 be reconstituted with XYZ becoming a defendant/respondent; (ii) Mr. Wang be granted leave to serve the proceedings on XYZ out of the jurisdiction; (iii) pursuant to section 170 of the **Insolvency Act 2003**,[2] Cosimo Borrelli and Colin Wilson be appointed joint provisional liquidators of RAGOF. Mr. Wang also sought certain reliefs in the alternative (collectively "the Alternative Remedies"). These are, in brief, (a) an injunction restraining the respondents, RAGOF and FRE, from taking certain steps to redeem the XYZ shares without his written permission; and (b) an order that the JPLs be appointed receivers for the purpose of monitoring compliance with the said injunction and over certain specified assets, namely, (i) the claims of RAGOF (including its subsidiaries) brought before the High Court of Justice of England & Wales in Claim CL-2022-

[2] Act No. 5 of 2003 of the Laws of the Virgin Islands.

000474 against Mutaz. Otaibi and others (the English Proceedings), and (ii) the right to bring, compromise or defend any proceedings brought in the name of RAGOF, or against RAGOF, to which FRE or any person or entity affiliated with FRE is a party (the "Other Claims").

[18] The Second JPL Application was made on several grounds, more fully developed in the First Affidavit of David Lee ("Lee1") filed in support. These include, evidentially, certain matters which were relied upon in support of the First JPL Application; matters subsequent to the hearing of the First JPL Application and since the Discharge Judgment, in particular, certain reports by the (original) court appointed JPLs and matters emanating from the Cayman Proceedings and the English Proceedings, which were the subject of the three unsuccessful **Ladd v Marshall** applications filed in the First Appeal; and matters and documents in the Cayman Proceedings and the English Proceedings and otherwise in the period since the hearing of the First JPL Application in the Commercial Court. These matters and the relevant documents are set out at paragraph 3 of the grounds of the Second JPL Application.

[19] The grounds relied on by Mr. Wang in the Second JPL Application may be summarized as follows:

(i) the dismissal by the Grand Court of 'applications by the management shareholders of the three Floreat Cayman Islands investment funds, PIF, Long View and GFIF (the Cayman Funds) (i.e. entities in the same position as RAGOF) to be joined into the similar proceedings in which receivership orders had been made appointing receivers (Cayman Receivers) in concurrent proceedings in the Cayman Islands relating to the three related Floreat investment funds, finding that they had no standing to do so'; and dismissing applications by those management shareholders to discharge the JPL Orders made in the winding up proceedings brought by the Cayman Receivers.

(ii) a number of reports prepared by the Cayman JPLs appointed by the Grand Court 'which demonstrate that there is, contrary to the submissions made by FRE in this Court, a significant risk that the assets of RAGOF may be dealt with improperly', the extent of the misconduct and mismanagement uncovered by those reports is such that the Cayman JPLs brought the English Proceedings before the High Court of Justice of England & Wales against, amongst others, 'RAGOF's investment manager, investment advisor and various of the Floreat Principals, in respect of their conduct of the affairs of the Cayman Funds and RAGOF;

(ii) the 6-week trial of the application for appointment of liquidators in the Grand Court which began on 3rd April 2023, in which Mr. Wang made 'substantially similar allegations to those made in these proceedings, including in relation to the improper conduct of the affairs of RAGOF' and in which proceedings two former directors of RAGOF, Trinda Blackmore and David Whitworth gave evidence at trial – Ms. Blackmore on behalf of the petitioner and Mr. Whitmore on behalf of the 'Floreat party'. In cross examination Mr. Whitmore made significant concessions in relation to the conduct of the affairs of the Floreat Funds, including RAGOF, which supported Mr. Wang's case. His evidence along with the evidence of Mr. Priaulx, a director of one of the Cayman Funds, 'confirmed that the supposedly independent directors provided no adequate check upon the conduct of, ultimately, the Floreat Principals in controlling the Cayman Funds and RAGOF', and 'strongly supported' Mr. Wang's claim that 'there has been serious misconduct in relation to the management of RAGOF's affairs.'

(iv) in the proceedings before the Grand Court, the Floreat Principals seized upon the extraordinary tactic of abandoning their defence of the Cayman Proceedings altogether, launching instead an application to strike out the Cayman Proceedings on ground of alleged witness intimidation which the judge found were 'fantastical', which application was dismissed the judge holding that they had, from the beginning of the trial embarked upon a 'skillfully executed strategy of disrupting the scheduled course of the trial and preventing the Court from making findings finally disposing of the proceedings'.

(v) since the ex parte hearings in these proceedings, FRE has sought to obstruct the transfer of shares from nominees into Mr. Wang's name, 'demonstrating that [Mr. Wang's] fears to that effect presented to the Court to justify the need for the receivership were entirely justified'.

(vi) amongst the new evidence which has emerged from the Cayman Proceedings is that the dishonesty of FRE, and the Floreat Principals, in relation to RAGOF and other related funds which they manage, 'is so extensive that Provisional Liquidators are necessary in order to protect and preserve the assets of RAGOF'. This additional evidence (in summary) is listed in the Originating Application and in the Certificate of Urgency filed 20th June 2023 as:

(a) Unanswered expert evidence that FRE caused GFIF (to which RAGOF made very substantial loans procured by the Floreat Principals outside of its permitted purposes) to suffer prospective losses of approximately US$100 million as a result of its mismanagement and self-dealing;

(b) M. Otaibi's own words that he had 'prostituted' the Cayman Funds and RAGOF by Making GFIF enter into transactions worth more than US$80 million which he knew were not in the best interest of the funds;

(c) The finding by the judge in the Cayman Proceedings that there was 'clear evidence that Springs Farm was for some years used (by Hussam) for private purposes without Mr. Wang knowing it was a RAGOF property', which finding stands in stark contrast to the evidence put forward by FRE in these proceedings;

(d) Evidence from Mr. Whitmore, a director of RAGOF, that she was not told of H. Otaibi's use of Springs Farm and her belief that had she been told she would have more closely scrutinized the expenses to ensure that sums were not being paid by RAGOF as a result of his use of the property, which evidence is in stark contrast to the evidence put forward by FRE in these proceedings;

(e) The same director, Ms. Whitmore's, evidence, that she had not been told of the existence of the JVA (joint venture agreement) which FRE has used in these proceedings to justify his use of Springs Farm, about which she should have been informed as a director of RAGOF, and that RAGOF 'was operated in a way inconsistent with the existence of the JVA';

(f) Evidence from another director of RAGOF confirming the unchecked and often undisclosed abuse by the Floreat parties of the assets of RAGOF and the other funds.

More will be said later in this judgment of these evidential matters, documents and developments as set out in the various affidavits and exhibits filed in or relied upon in support of the Second JPL Application.

[20] In support of the Second JPL Application, Mr. Wang filed the Affidavit of David James Lee ("Lee 1") on 12th July 2023 with exhibits.[3] Mr. Lee is a partner at the law firm Appleby (Cayman) Limited with overall responsibility for the Cayman Proceedings before the Grand Court brought on behalf of Mr. Wang. At paragraph 7 of Lee 1, it is averred that the Second JPL Application was based on 'new and further evidence of wrongdoing', which evidence had emerged 'principally (though not exclusively) in the related Cayman winding up proceedings'. In opposition to the Second JPL Application, FRE filed four separate affidavits. These are the Fourth Affidavit of Andrew John Cooke ("Cooke 4") filed on 7th July 2023, the Sixth Affidavit of Mutaz Otaibi ("M. Otaibi 6") filed on 7th July 2023, the First Affidavit of Lorenzo Gianello ("Gianello 1"), a director of RAGOF, filed on 7th July 2023, and the Affidavit of Oliver James Elgie ("Elgie 1") filed on 12th July 2023 - the purpose of which was to exhibit a contemporaneous note of the hearing before the Court of Appeal on 7th July 2023 in Appeal No. 55/2022 and Appeal No. 56/2022 at the 'Consequential Hearing'. In response to the FRE affidavit filings in opposition to the Second Application, Mr. Wang filed the Second Affidavit of David James Lee ("Lee 2") on 11th July 2023.

[21] In his written submissions (paragraphs 10.1 to 10.3) in the court below in support of the Second JPL Application, Mr. Wang asserted or advanced that he had standing to move the court to appoint JPLs over RAGOF on three alternative bases. Also, in oral submissions, a fourth basis was contended for by his leading counsel. These four alternative bases are:

(1) **Julius Baer Share Transfer Basis**: He holds signed instruments of transfer in respect of certain shares held ("the JB Shares") as his nominee by Bank Julius Baer & Co ("Julius Baer") in RAGOF and he was therefore 'a person to whom shares in a company have been transferred or transmitted by law' within the meaning of the expanded definition of 'member' in section 2 of the **Insolvency Act 2003**.

[3] See Record of Appeal, Vol. 1, pp. 295-323.

(2) Rectification Basis: In a separate action filed on 2nd June 2023 ("the JB Share Transfer Proceedings") he seeks retrospective rectification of RAGOF's share register to record his ownership of the JB Shares on the basis of the same instruments of transfer referred to in (1) above. He contended: 'That claim constitutes a good prima facie case for Mr. Wang having the necessary standing in the present application [Second JPL Application] for interim relief, preserving the position pending rectification; and as a matter of case management, it is in any event appropriate to direct the hearing of the rectification claim in parallel with that of the petition.'

(3) Derivative Claim Basis: In respect of the shares in RAGOF held by XYZ and beneficially owned by Mr. Wang, Mr. Wang pursues this application [Second JPL Application] on a derivative basis, on familiar grounds which are (if necessary) readily characterizable as 'special circumstances' (fn 4: Interim relief on Mr. Wang's derivative application will also have the effect of preserving the position in relation to the XYZ shares pending determination of a fresh receivership application in the CS Share Transfer Proceedings)'

(4) Applicant for Winding up Basis: This basis for Mr. Wang having the requisite standing to bring the Second JPL Application, was advanced during the hearing before the learned judge by Mr. Wang's counsel. As I understand it, Mr. Wang asserted that as an applicant for a winding up order over RAGOF, he was also entitled and had standing to bring an application to appoint JPLs over RAGOF.

I shall return to these four bases when dealing with ground 1 of the appellant's appeal and ground 3(a) of Mr. Wang's counter appeal.

Amended Pleadings in No. 150/2021

[22] Mr. Wang's Amended Points of Claim in Claim No. 150/2021 was filed on 21st July 2022 and FRE's Amended Points of Defence on 25th July 2022.

Further, Mr. Wang's Re-Amended Points of Claim were filed on 2nd August 2022 and FRE's Re-Amended Points of Defence on 25th July 2022.

[23] The most recent round of amended pleading came about as a result of a notice of application filed by Mr. Wang on 20th September 2022 for permission to amend the Originating Application and to re-amend the Points of Claim to plead three alternative bases upon which he is entitled or has standing to maintain Claim No. 150/2021, without a Receivership Order. In support of this application, Mr. Wang filed the Sixth Affidavit of Tamara Cameron on 20th September 2022.

[24] By the amendments sought by Mr. Wang, it was pleaded that Mr. Wang has standing to pursue the said proceedings on three alternative bases, namely, (a) as a beneficial owner in respect of the shares held by XYZ in RAGOF by way of derivative claim; (b) as a member of RAGOF under the **Insolvency Act 2003** in light of unregistered instruments of transfer signed by Bank Julius Baer; and (c) as a party to be registered as a shareholder in RAGOF 'in circumstances where Mr. Wang intends to issue a claim for retrospective rectification of the Register of Members with such claim to be heard prior to or alongside the [Second JPL Application]'. Accordingly, that was the state of the pleaded case on Mr. Wang's standing to maintain Claim No. 150/2021 in his own name and to bring the Second JPL Application.

Decision on Second JPL Application

[25] This appeal commenced by FRE by Notice of Appeal filed 11th August 2023, challenges the ex tempore decision by the learned judge delivered on 20th July 2023 ("the Decision") granting the Second JPL Application, and the orders made by the learned judge on 20th and 28th July 2023. By the Order dated 20th July 2023, the learned judge reconstituted the action, Claim No. 150/2021, so that Mr. Wang became the sole applicant and XYZ became the third respondent in the said proceedings; granted permission for Mr. Wang to serve the

proceedings out of the jurisdiction upon XYZ pursuant to CPR 7.3(2), 7.3(10) and/or 7.3(7); required XYZ to file an acknowledgement of service within 14 days of service upon it; and Points of Defence (if so advised) within 28 days of the date of service upon it; granted permission to Mr. Wang to bring the application for the appointment of Provisional Liquidators over RAGOF and to the extent the Mr. Wang requires permission to bring these proceedings derivatively on behalf of XYZ; appointed, pursuant to section 170 of the **Insolvency Act 2003**, Cosimo Borrelli and Colin Wilson jointly and severally as the JPLs of RAGOF, on powers which are to be determined at the JPL Consequential Hearing. Permission was also granted to FRE to appeal against the said order, and for Mr. Wang to cross-appeal 'against the Court's finding that he did not have standing to pursue these proceedings on the further ground that he is a member within the meaning of section 2(1) of the Insolvency Act 2003.' As mentioned earlier, in granting the Second JPL Application the learned judge found that Mr. Wang had standing to maintain the Originating Application filed on 30th August 2021 in Claim No. 150/2021 derivatively, on behalf of XYZ, the registered shareholder of the XYZ shares in RAGOF.

[26] By order made by the learned judge on 28th July 2023 at the JPL Consequential Hearing, it was ordered that the JPLs shall have the powers set out in Schedule 2 to the **Insolvency Act 2003** (reproduced in the schedule to the said order) –

> "to the extent necessary to maintain the value of the assets owned or managed by RAGOF or to carry out the functions for which they were appointed, and, except with the JPLs express written consent, to the exclusion of the directors of RAGOF. The purpose of those functions is to protect and preserve the value of RAGOF's assets and those of its subsidiaries and the powers should be used only so far as necessary for that purpose."

It was also ordered that FRE shall pay Mr. Wang's costs of the Second JPL Application.

[27] On 4th August 2023, on an ex parte notice of application dated 27th July 2023 filed by the JPLs appointed pursuant to the order dated 20th June 2023, ("the 4th August 2023 Order") the learned judge made the following orders:

> "1. The JPLs have the power to approve and carry out share transfers pursuant to the constitutional and governing documents of RAGOF in lieu of the directors including (but not limited to) providing "prior written approval" pursuant to Article 17.5.1 of RAGOF's Articles of Association and updating the register of RAGOF;
> 2. The JPLs' costs be in the provisional liquidation."

[28] Pursuant to the 4th August 2023 Order, the JPLs sent an email on 4th August 2023 to Bank Julius Baer & Co Ltd in Switzerland ("Bank Julius Baer") in response to the bank's letter dated 21st July 2023.[4] By their said email, the JPLs informed Bank Julius Baer that the JPLs 'hereby approve, on behalf of RAGOF pursuant to Article 17.5.1 of RAGOF's Articles of Association, the proposed transfer of shares from Bank Julius Baer & Co to Mr. Chia Hsing Wang. Please kindly provide copies of re-executed Stock Transfer Forms as proposed in your letter.'[5] These documents evidence that Mr. Wang became a legal owner in his own right of shares in RAGOF on 11th August 2023. However, thereafter on 21st August 2023 FRE filed an Ordinary Application in Claim No. 150/2021 seeking to set aside the 4th August 2023 order and, on the same day, filed a Notice of Application to Intervene in the rectification proceedings.[6]

Appeal and cross-appeal

[29] In its notice of appeal, FRE relies on four grounds of appeal. These are:

(1) the learned judge erred in finding that Mr. Wang had standing on a derivative basis to bring the application for a Second JPL Order ("the Derivative Standing Issue");

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[4] A copy of Bank Julius Baer's letter dated 21st July 2023 to RAGOF is included in the Second Respondent's Hearing Bundle at pp.90-91.

[5] See a copy of: the share transfer forms dated 7th August 2023 at pp. 96-97 of the Second Respondent's Hearing Bundle; the Subscription Agreement dated 11th August 2023 signed by Bruno Wang at pp.98-118; and RAGOF's Register of Members at pp. 127-130.

[6] See pp. 131-138 of the Second Respondent's Hearing Bundle.

(2) the learned judge erred in his approach to the Second JPL Application – He ought to have dismissed the said application as abusive interlocutory litigation, and there was no evidence of an exceptional material change in circumstances, which is the correct test to be applied, the First JPL Application having been discharged and not regranted ("the Abuse of Process Issue");

(3) the learned judge erred in law by expressly relying on materials, specifically, second-hand conclusions and decisions of other courts or bodies, namely the court in the Cayman Islands, the JPL Reports in the BVI and a decision of the English High Court, which documents and decisions were inadmissible and legally irrelevant in accordance with the rule in **Hollington v Hewthorn**[7] ("the Rule in Hollington Issue"); and

(4) the learned judge's analysis of the evidence before him was unreasonable and flawed in that he reached wrong findings as a matter of fact, his analysis of certain material before him was unreasonable given that it was an interlocutory hearing and none of the material had been tested in evidence, and by failing to give reasons for his factual findings ("the Flawed Evidential Analysis Issue").

[30] On 26th August 2023, Mr. Wang filed a counternotice of appeal challenging the judge's findings on two issues: (i) that Mr. Wang is not a member of RAGOF within the meaning of section 2(1) of the **Insolvency Act 2003**; and (ii) the alternative relief of an injunction sought by Mr. Wang was oppressive and inappropriate and it would inappropriately stifle the directors ability to manage the affairs of RAGOF or would remove control of the defence of this litigation from FRE and the balance of convenience lay against the grant of relief for all the reasons set out in FRE's skeleton argument.

[7] [1943] 1 KB 587.

[31] In his counter notice, Mr. Wang relies on 2 grounds of appeal and seeks to uphold the order appointing the JPLs and, if necessary, to have the dismissal of the alternative relief set aside and to make such orders thereon as is appropriate. The first ground is a standing issue and therefore ought properly to be dealt with when considering the appellant's first ground of appeal – the Derivative Standing Issue. Mr. Wang's two grounds of counterappeal are: -

(i) the learned judge erred in finding that Mr. Wang is not a member of RAGOF within the meaning of section 2(1) of the **Insolvency Act 2003** on the basis of the executed instruments of transfer of shares in RAGOF by the legal owner, Bank Julius Baer, to Mr. Wang ("the Section 2(1) Standing Issue"); and

(ii) having found correctly that the value of the assets of RAGOF were best protected and preserved by the appointment of provisional liquidators, the judge erred in finding that the alternative relief for an injunction sought by Mr. Wang in the Second JPL Application was oppressive and inappropriate, or would inappropriately stifle the directors' ability to manage the affairs of RAGOF, or would remove control of the defence of the litigation from the appellant, FRE, and the balance of convenience lay against the grant of relief for all the reasons set out in the appellant's skeleton argument in the court below.

[32] In oral submissions before this Court, learned counsel for <u>FRE</u>, Mr. Hunter KC, although not abandoning any of the four grounds of appeal, stressed that the main grounds are ground 1 – the Derivative Standing Issue; and ground 2 – the Abuse of Process Issue. His approach was, to some extent, echoed by learned counsel, Mr. Collins KC, for <u>Mr. Wang</u> in his oral submissions. Mr. Collins considered that the appeal and cross-appeal raised, broadly, two main issues: (1) standing, including Mr. Wang's interest (legal) as a member of RAGOF; (2) whether the Second JPL Application was an abuse of process and was there new evidence of wrongdoing or otherwise adduced by Mr. Wang and relied on

by the learned judge, including evidence as to the proceedings before the courts in the Cayman Islands; and (3) the alternative reliefs applied for by Mr. Wang and not granted by the judge.

[33] In my view, there are two main or principal issues arising on the appeal, the determination of which would be dispositive of the appeal. They are:

(1) whether Mr. Wang had standing, whether in the derivative sense or as the owner of the 'JB Shares' in RAGOF, to apply for the appointment of JPLs of RAGOF; and

(2) whether the Second JPL Application was an abuse of process, whether the learned judge applied the wrong test, and whether the learned judge's finding of special or exceptional circumstances in granting the application and making the order appointing JPLs was wrong.

The appellant's grounds 3 and 4, both of which relate to the judge's evaluation and assessment of the evidence, including the non-application of the rule in **Hollington**, are related issues, albeit dealt with as separate grounds of appeal. That leaves, as the final issue, Mr. Wang's second ground of counterappeal – the judge's dismissal of Mr. Wang's alternative application (for certain reliefs), which issue only falls for consideration if the order appointing JPLs is to be set aside.

Issue 1: Standing (1) Derivative Action XYZ Shares: Bare Trust and/or Special Circumstances; (2) Julius Baer Shares – member s. 2 Insolvency Act

[34] The issue of Mr. Wang's standing to bring the Second JPL Application arises by ground 1 of FRE's notice of appeal and by paragraph 3(a) of Mr. Wang's counter notice. In ground 1 of its appeal, FRE seeks to set aside the learned judge's finding that Mr. Wang had standing in the derivative sense pursuant to section 170(2) of the **Insolvency Act 2003** to make the Second JPL Application for an order appointing JPLs over RAGOF. FRE attacks this finding on essentially three principal bases. These are (as set out in its notice of appeal):

(1) No bare trust: For Mr. Wang to be entitled to bring a derivative claim he must have a beneficial interest in the shares under a trust. However, Mr. Wang's shares in XYZ were held pursuant to a contract governed by Swiss law, not a trust. There is no evidence at all that Swiss law recognized that contract to be akin to a bare trust. Accordingly, upon a correct analysis of the terms of Mr. Wang's agreement with the nominee, XYZ, Mr. Wang was not entitled to bring a derivative claim.

(2) Permission to bring a derivative claim not sought: Mr. Wang did not seek permission to bring a derivative claim, which is a substantive, rather than merely procedural, requirement under BVI law.

(3) No special circumstances entitling Mr. Wang to a derivative claim: Even if Mr. Wang had permission to bring a derivative claim, and the contract was akin to a bare trust, there were no special circumstances entitling Mr. Wang to such a claim as:

(a) Mr. Wang has never sought to have the XYZ shares transferred to him;

(b) Mr. Wang had only previously sought to have shares in RAGOF from another nominee, Julius Baer, transferred to him. The Julius Baer transfer failed, as the learned judge agreed, because, Mr. Wang had not sought prior approval from RAGOF's directors, as mandated by the RAGOF Articles of Association; and

(c) XYZ's refusal to bring a claim for a JPL Order was in accordance with the very terms of its nominee agreement with Mr. Wang.

[35] By paragraph 3(a) of his counter notice, Mr. Wang seeks to have this Court set aside the learned judge's finding that he is not (or was not at the time of bringing the Second JPL Application) a 'member' of RAGOF, within the meaning of that

term in section 2(1) of the **Insolvency Act 2003**. In doing so, Mr. Wang seeks to uphold the decision below on this additional ground. Ground 3(a) states-

> "The judge erred in law in finding that Mr. Wang was not a member of RAGOF within the extended definition of member at section 2(1) of the Insolvency Act 2003, on the basis of executed instruments of transfer from the legal owner of certain shares in RAGOF, Bank Julius Baer. Consequently, Mr. Wang had standing to pursue the application as a member within the meaning of section 2(1), as well as on a derivative trust basis as found by the Judge."

[36] The governing statutory provision in the BVI empowering a court to appoint provisional liquidators of a company is section 170 of the **Insolvency Act 2003**. The first predicate under this provision for having standing to apply for the appointment of provisional liquidators is the existence of a filed application to appoint liquidators over the company (the substantive winding-up application), which action must not yet have been determined by the court or withdrawn by the applicant/petitioner. Subsection (1) provides that the application for provisional liquidators must be made by a person specified in subsection (2) and on the grounds specified in subsection (4). The persons listed as having the requisite standing to bring an application to appoint provisional liquidators are (a) the applicant for the appointment of a liquidator; (b) the company; (c) a creditor; (d) a member; (e) the Financial Services Commission; (f) the International Tax Authority; and (g) any person who, under any other enactment, is entitled to apply for an appointment of a liquidator of the company.

[37] The **Insolvency Act 2003** does not contain any provisions concerning bringing a derivative claim. The only such provision in the BVI company law is to be found at section 184C of the **BVI Business Companies Act 2004**[8] which provides for a 'member' of a company to apply to the court for permission to commence or to intervene in proceedings in the name and on behalf of the company.

[8] Act No. 16 of 2004 of the Laws of the Virgin Islands.

[38] With that said, it is common ground that, separate and apart from the provisions of section 184C of the **BVI Business Companies Act 2004**, BVI law recognizes and has adopted, as part of its procedural and substantive law, the legal concept of derivative claims brought both by members of a company and by beneficiaries of shares held in a company. These encompass derivative claims brought with respect to statutory remedies under the BVI's company law and insolvency regime (the **BVI Business Companies Act 2004** and the **Insolvency Act 2003**). Accordingly, it was common ground between the parties to these proceedings, both before the lower court and this Court, that, in principle, derivative claims are permissible under BVI law, including in relation to applications to appoint provisional liquidators.

[39] In support of these important principles of beneficial derivative claims, reliance was placed by both FRE and Mr. Wang, in their respective submissions, on the first instance decision of Davis-White QC, sitting as an acting judge of the Commercial Division, in **Tipp Investments PCC v Chagala Group Limited et al**.[9] In that case, the judge was dealing with a pleaded case of a 'double derivative claim' brought under section 184B of the **BVI Business Companies Act 2004** by the claimant. Tipp was the indirect beneficial owner of the shares or, put differently, indirectly the 'economic owner' of the shares. In considering the position of Tipp in those proceedings, the judge had no difficulty in concluding that he could discern 'no inherent objection' to a double derivative claim.[10] He rejected the submission made by the directors that a derivative claim was not possible in the context of a claim under section 184B. This section permits a member or director of a company to apply to the court for an order directing a director or the company to comply with, or restrain them from engaging in conduct that contravenes the Act or the memorandum or articles of the company.[11] In reaching this conclusion the judge relied on the first instance decision of the High Court in England in **Universal Project Management**

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[9] BVIHC(COM) 2016/102 (delivered 9th November 2016, unreported).
[10] Ibid, para 63.
[11] Ibid, para 64.

Services Ltd v Fort Gilkicker Ltd and others;[12] and the decision of the UK Supreme Court in **Roberts v Gill & Co**.[13] The judge also distinguished the circumstances of the case before him from the fulcrum of the decision in **Eclairs Group Limited v JKX Oil and Gas plc**.[14] This was on the basis that in **Eclairs**, the argument was not that a derivative trust claim was impossible in all cases, but, instead, it was that it was not permitted on the facts of that case.

Appellant's Submissions on Standing

A. Bare Trust – Derivative Claim

[40] On 11th August 2023, FRE filed detailed written submissions in support of its appeal. Also, on 1st December 2023 FRE filed its 'summary of argument' in opposition to Mr. Wang's counter notice or cross appeal.

[41] It is FRE's case in relation to ground 1 of its appeal (standing derivatively on the basis of a bare trust), that the principles applicable to a derivative claim, including bringing an application to appoint JPLs, cannot apply to Mr. Wang in the circumstances of this case. In reaching the conclusion that Mr. Wang had standing on a derivative basis to bring the Second JPL Application, the learned judge erred as a matter of principle and law. It is FRE's submission that by their very essence, derivative claims are creatures of the law of trust. In this regard, reliance was placed on the judgment of this Court in **Thelma Paraskevaides and another v Citco Trust Corporation Ltd**. and others[15] **Paraskevaides** was concerned, in part, with the standing of beneficiaries to bring a derivative claim in respect of trust property without the trustee being made a party to the action. At paragraph 78 Carrington JA [Ag.], delivering the unanimous decision of the Court, stated:

> "The essence of the derivative claim, as stated by the Privy Council in Royal Brunei Airlines Sdn Bhd v Tan, is that the rights of action by the trustees against third parties form part of the property of the estate and can be

[12] [2013] EWHC 348 (Ch).
[13] [2010] UKSC 22.
[14] [2013] EWHC 2631.
[15] BVIHCMAP2018/0046 (delivered 30th March 2020, unreported).

enforced by beneficiaries 'in a suitable case if the trustees are unable or unwilling to do so.'"

[42] It is the appellant's submission that, as a matter of principle, a beneficiary has standing to bring a derivative claim against a third party in place of a trustee 'when a trustee commits a breach of trust or is involved in a conflict of interest and duty or in other exceptional circumstances.' These circumstance 'embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by trustees to the beneficiary in the trust estate'.[16] It is also the appellant's case that while there are no statutory provisions in BVI governing derivative trust claims by beneficiaries of trusts, the requirement for leave to be first obtained before commencing a derivative trust claim is substantive and not merely procedural.

[43] Putting aside the standing issue raised by the counter notice, it is the appellant's submission that the learned judge erroneously held that Mr. Wang had standing on a derivative basis to proceed with Claim No. 150/2021, and for permission to be granted to reconstitute the said action as a derivative claim with Mr. Wang as the claimant, effectively stepping into the shoes of XYZ in order to seek the appointment of JPLs and a winding up of RAGOF. FRE seeks to challenge this finding by the judge below on three primary bases.

No Bare Trust

[44] The first basis is that for there to be a derivative claim by the beneficiary of a trust, it must first be established as a threshold condition that there is a trust in existence as a matter of law. This issue, it is asserted, the learned judge failed to properly consider. Instead, he erroneously held or assumed that there was a trust in existence between XYZ and Mr. Wang when, on a correct analysis, there was none.[17] In fact, the correct position was that the XYZ shares held beneficially by Mr. Wang are not held on or under a trust. Instead, they are

[16] See Joseph Hayim Hayim v Citibank N.A. [1987] AC 730 at 747C & 747F.
[17] See para. 42 of FRE's Skeleton Arguments.

held by XYZ pursuant to the terms of a contract or agreement governed by Swiss law, whereby XYZ is a nominee company of XY, but not of Mr. Wang. The XY Nominee Agreement stipulates:

> "This agreement is applicable to the execution of instructions for the subscription, redemption, receipt, custody, and the transfer (Transactions) of Non-Traditional Investment Products (NTIP) on behalf of and for the account of the Client and in the name of [XY] (Bank), one of its depositories or nominee companies."

[45] It is FRE's submission[18] that the XY Nominee Agreement is not similar to a bare trust, because it expressly provides at clause 13 that 'XYZ' is only bound by the terms contained in the product documentation for the NTIP; and that 'Agreements between the Client and the Issuer or third parties containing agreements that are inconsistent with these terms shall not be observed by the [XY] Bank, and the responsibility for the implementation thereof lies with the Clients themselves. The [XY] Bank reserves the right to alter, as it deems fit, product forms which have to be forwarded to the Issuer or to third parties, especially clauses which are inconsistent with the applicable law or with the [XY] Bank's practices.' As to the governing law of the XY Nominee Agreement, FRE cites clause 18 which provides: 'This agreement is governed by Swiss substantive law to the exclusion of the conflict of laws provisions of Swiss international private law.'

[46] In seeking to make good its submissions on this ground of appeal, FRE challenges the learned judge's conclusion[19] that XYZ holds the XYZ shares on a bare trust for Mr. Wang. This extract from the judge's decision states: 'Moreover, as Mr. Collins for Mr. Wang has said, there can be no real dispute that XYZ holds the shares on bare trust for Mr. Wang. XYZ has confirmed as much in writing…. Mr. Collins moreover says that XYZ's refusal to act is therefore sufficient in itself to open the way to a derivative claim by Mr. Wang.' The reference by the learned judge in this passage to a letter from XYZ

[18] See para. 43 of FRE's Skeleton Arguments.
[19] See Transcript 20/07/23, p. 33 lines. 1-5.

confirmatory of a bare trust in relation to the XYZ shares, is a reference to a letter dated 1st June 2021 ("the 1st June 2021 Letter") from the Relationship Manager at XYZ to Mr. Wang which states: 'The above-mentioned securities are held for your account but in the name of [XYZ] as registered shareholder.'

[47] It is FRE's submission that the judge's analysis leading to a finding or assumption of a bare trust between XYZ and Mr. Wang in relation to the XYZ shares, was flawed for several reasons. Foremost, it did not take account of the XY Nominee Agreement which, on a proper reading, does not refer to or create a trust. Furthermore, the judge reached this flawed conclusion in the absence of any evidence before the court to the effect that XY Nominee Agreement impliedly creates a trust under Swiss law, much less a bare trust. Moreover, as the argument goes, the 1st June 2021 Letter to which the judge made reference as confirming the existence of a bare trust, ought not to be construed in isolation and is not and does not purport to be evidence of the existence of a 'bare trust'.[20]

[48] I would merely observe at this stage, that the extract from the judge's ex tempore decision is the full extent of the learned judge's analysis and finding of a bare trust. The judge did not refer to or undertake any analysis of the terms of the XY Nominee Agreement between XY and Mr. Wang, nor did he embark upon any consideration of the legal effect of that agreement under Swiss law or whether Swiss law on this issue is the same as English/BVI law. This is against the important consideration where, from the inception and throughout these proceedings thus far, XYZ has refused or declined to act or to participate or join in the proceedings, whether Claim No. 141/2021 or Claim No. 150/2021, or to exercise its clear rights as a registered shareholder of RAGOF to bring proceedings to seek any relief or remedy of this court in relation to RAGOF.

[20] See para. 44 of FRE's Skeleton Arguments.

No Special Circumstances

[49] The second basis upon which FRE contends that the judge's finding of derivative standing in favour of Mr. Wang was flawed, is that, absent a bare trust, for there to be a valid derivative action, there must be 'special circumstances' justifying an action being brought in the name of a beneficiary. On this point, FRE argues that the learned judge erred in finding that there were 'special circumstances' entitling Mr. Wang to bring a derivative action. In making a finding of special circumstances the judge stated:

> "In a nutshell, the special circumstances are said to boil down to this, that Mr. Wang has tried to have the shares transferred to himself so that he could apply as a member, but that has not happened with Floreat individuals, FRE, trying to obstruct that and that XYZ has refused to bring proceedings in its own name; all the while, whilst RAGOF's assets are at risk of various forms of self interested dealing by FRE entities and individuals."[21]

[50] The above extract from the judge's ex tempore decision on the Second JPL Application, was preceded by his consideration that Mr. Wang's case for derivative stand rested on his case of 'special circumstances'. The judge went on to identify what factors were being relied on by Mr. Wang to establish that special circumstances had been made out. These were summarized by the judge.[22] They are: (1) the transfer of the Bank Julius Baer shares to Mr. Wang and the proceedings brought by him seeking rectification of the share register of RAGOF retrospectively, of which proceedings the judge remarked he had not been told were hopeless or dismissed in limine; (2) Mr. Wang, as told evidentially in Lee 1, seeking a transfer of the XYZ shares to him and the steps taken by FRE, allegedly, to obstruct the transfer, and the judge's finding that obstruction by FRE and Floreat individuals had occurred to prevent Mr. Wang from becoming a member of RAGOF in his own name and right; (3) the evidence in the form of a letter dated 21st December 2021 to the effect that XYZ had refused to bring proceedings in its own name; (4) XYZ indicating by letter

[21] See Transcript 20/07/23, p.32 lines 17-25.
[22] See Transcript 20/07/23, pp. 31-32.

that it will stand on its right to have service effected on it via the Hague Convention and/or that it will take a neutral position in the proceedings, presumptively, after it has been properly served in this way.

[51] It is FRE's submission that there are no special circumstances in this case upon which the judge could have made a finding or reach the conclusion that Mr. Wang had made out a good case to bring the Second JPL Application and to carry on Claim No. 150/2021, on a derivative basis. In support of this submission FRE points to four reasons.

(i) XYZ shares – Mr. Wang never sought transfer; and (ii) the JB Shares - non-compliance with Articles

[52] The first is that Mr. Wang has never sought to have the XYZ shares transferred to himself. The second is that while he did seek to have the JB Shares transferred to himself, he failed to comply with the express provisions of the Articles of RAGOF (specifically Articles 17.5.1 and 18.2), which required him to obtain the prior approval of the directors. Instead, he (Mr. Wang) sent invalid signed transfer forms to the independent RAGOF directors who did not respond. Moreover, the judge found, correctly says FRE, that the purported transfer of the JB Shares was null and void.[23]

[53] The full account of what the learned judge concluded on this issue is as follows:

> "So what we have here is an express provision in articles [18.2] that any transfer which does not comply with the requirement in 17.5.1 should be null and void. And on the face of this provision in 18.2, the transfer itself is null and void. That means that in accordance with the articles of the company, the transfer of shares from BJB to Mr. Wang was null and void. This not a case where there was otherwise a valid transfer which simply has not been registered."[24]

[23] See Transcript 20/07/23, p.28 lines 1-6.
[24] See Transcript 20/07/23, p.27 lines 24-25 to p.28 lines 1-7.

(iii) No Obstruction of transfer of shares to Mr. Wang

[54] The third reason advanced in submissions by FRE as to why there were no 'special circumstances' warranting Mr. Wang being able to proceed with the Second JPL Application on a derivative basis, is that 'neither Floreat nor FRE Jersey have ever sought to obstruct the transfer of any RAGOF shares from a nominee to Mr. Wang'.[25] Moreover, if Mr. Wang had really wanted to obtain a transfer of the shares held beneficially by any of the other shareholders (Rothschild, Vontobel, Bank Julius Baer or EFG), he could have done so over the last 2 years, and can still do so now. FRE points in argument to the fact that since September 2021 RAGOF has been 'entirely controlled by the JPLs selected by Mr. Wang, though two of the directors are still in office as well'. The imputation here is that during this period Mr. Wang was free to have written to the directors in accordance with Article 17.5.1 and 18.2 requesting approval of any proposed transfer of shares in RAGOF to him. As to the directors themselves, any initial allegations by Mr. Wang concerning their lack of independence have been withdrawn and one of the independent directors even gave evidence for Mr. Wang in the Cayman Proceedings.

(iv) No refusal to sue - Article 15 Nominee Agreement

[55] The fourth reason advanced in argument by FRE against the learned judge's finding of the existence of 'special circumstances', is that Mr. Wang's agreement with XYZ contains an express provision preventing XYZ from engaging 'in any legal action in connection with disputes concerning NTIP'. This is clearly a reference to Art. 15 of the XY Nominee Agreement. FRE posits that this provision was simply a condition of the bargain struck between Mr. Wang and XYZ, which condition XYZ has observed, and which provision Mr. Wang positively relied on as a reason why he needed the receivership. It is, therefore, not a situation of XYZ refusing to sue or to join in Mr. Wang's proceedings before the courts in BVI, in order to thwart his efforts to obtain appropriate relief concerning the alleged mismanagement and serious wrongdoing by FRE and

[25] See para. 45.3 of FRE's Skeleton Arguments.

the Floreat individuals of RAGOF and its assets. In short, FRE argues, if Mr. Wang wants to bring proceedings in his own name, he must obtain a 'valid' transfer of shares into his own name, which he has either not done or has failed to do through no fault of FRE or the Floreat individuals, neither of which have, in fact, been in control of RAGOF since September 2021.

[56] Additionally, FRE posits that the real reason why Mr. Wang had not moved to progress a transfer to him of the XYZ shares in RAGOF in accordance with the Articles, is that Mr. Wang would have to provide warranties certifying that he is a qualifying or professional investor. However, a crucial plank of his cross-jurisdictional strategy has been to claim, contrary to anything which he may have signed in the past, that he was not a professional investor. Reference in this regard was made to this statement of Mr. Wang's leading counsel in his opening submissions on Day 1 of the Cayman Trial, that '[Floreat] seek to portray Mr. Wang as an experienced or professional investor. He was not.'

No application for permission to bring a derivative action

[57] FRE's third basis for asserting that the learned judge's finding on derivative standing was fatally flawed, is that Mr. Wang had not made an application for permission to bring a derivative action. It is posited that this is what is ordinarily required as a precursor to applying to the courts in BVI on a derivative basis or commencing a derivative action, and 'there is no reason that the same requirement should not apply to an application by a shareholder in a company'. In seeking to make good this point, FRE relies on the provisions of section 184C of the **BVI Business Companies Act** which requires a 'member' of a company to apply to the court to bring a derivative claim on behalf of the company, or to intervene in a claim against the company as defendant.

B. Standing as 'member' – Julius Baer Shares and s. 2 Insolvency Act

[58] As regards Mr. Wang's first ground in his counter appeal (3(a) – standing within the extended meaning of 'member' in section 2 of the **Insolvency Act 2003**,

FRE in its filed 'summary of argument' in opposition, relies on several points. The first is that the learned judge's analysis in rejecting the signed JB share transfers as an alternative basis for grounding standing in Mr. Wang to bring the Second JPL Application, was correct.[26] Accordingly, the learned judge's conclusion that, as a matter of law, Mr. Wang was not, on the facts and on the provisions of Articles 17.5.1 and 18.2, a 'member' of RAGOF within the meaning of that term in section 2 of the **Insolvency Act 2003**, cannot be assailed.

[59] At page 29, the learned judge opines: 'The Articles appear on their face to be quite clear that it is the shareholder, which is here BJB [Bank Julius Baer], who should be doing the asking.' He summarizes the position reached and conclusion arrived at in this way: -

> "But in respect of that standing against a member, we don't get there because Mr. Wang simply doesn't come within the definition of member once you read the articles together with the Act. And once you see the facts against the Articles and the Act, once you do all that together, you get that he [Mr. Wang] is not a member. If you leave out the Articles, yes, of course, you are straight in the territory of the case that was decided by the English Chancery Division. But that omits the rather trenchant detail that the Articles here mean something, and they are, on their face, clear."[27]

[60] The case decided in the English Chancery Division to which the judge made reference in the extract above, and with which he treated in some detail earlier in his decision, is **Re McCarthy Surfacing Limited**.[28] I shall return later in this judgment to that case, and to the detailed reasoning of the learned judge on this issue.

[61] FRE relies in opposition to the issue of standing based on the JB Shares, on its skeleton argument in the court below[29] and the oral submissions made at the hearing of the Second JPL Application. The 'key' points which FRE has extracted from those submissions are summarized at paragraph 7.3. They are:

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[26] See Transcript 20/07/23, p. 23 line 20 to p. 30 line 9.
[27] See Transcript 20/07/23, p. 29 line 3 to p. 30 line 9.
[28] [2006] EWHC 832 Ch.
[29] In particular at paras. 93.5 to 93.7.

(i) the Insolvency Act definition of a 'member' includes only those to whom shares have been validly transferred; (ii) there is no valid transfer to Mr. Wang of the JB Shares in accordance with the RAGOF Articles, as there was no prior written approval of the directors as required by Article 17.5.1; and (iii) the very basis on which Mr. Wang obtained the receivership order (ex parte) was that he was not a member of RAGOF.

[62] Mr. Wang's final main point in opposition to the JB Share transfer issue, is that it is impermissible for Mr. Wang to rely on a different purported transfer of shares to him after the July hearing of the Second JPL Application, 'as might be suggested' by paragraphs 10 to 16 of his appeal skeleton argument. Those events are in any event the subject of an unresolved dispute, the hearing of which has been previously listed for 21st February 2024.

[63] This issue will be addressed in greater detail below. However, to put this last point in its proper context, it is clearly a reference to, in particular, the matters relied on and arguments made by Mr. Wang at paragraphs 13 and 14 of his written submissions in this appeal. There, reliance is placed on matters which occurred after the ex tempore decision and orders made by the learned judge on 20th July 2023, the subject of this appeal. However, in those subparagraphs, Mr. Wang refers to and relies upon the following:

(i) the order made by the learned judge on 4th August 2023 on the JPLs application confirming that the JPLs 'have the power to approve and carry out share transfers pursuant to the constitutional and governing documents of RAGOF in lieu of the directors including (but not limited to) providing "prior written approval" pursuant to Article 17.5.1 of RAGOF's Articles of Association and updating the register of members of RAGOF'.

(ii) On 4th August 2023 the JPLs approved the proposed transfer of the JB Shares to Mr. Wang, and on 7th August 2023 Julius Baer executed fresh transfer forms in favour of Mr. Wang as transferee of the JB Shares;

(iii) On 11th August 2023, Mr. Wang executed a subscription agreement which included his warranty as to his status as a 'professional investor'. RAGOF accepted that subscription/transfer and RAGOF's share register was duly updated to reflect Mr. Wang's shareholding.

(iv) Consequently, as of 11th August 2023, Mr. Wang (with the express sanction of the court below) became a 'member' of RAGOF.

(v) Rather than accept this, on 21st August 2023, FRE filed proceedings before the Commercial Division court seeking to set aside the learned judge's 4th August 2023 order and declaring null and void the registration of the new transfer instruments of the JB Shares from Julius Baer to Mr. Wang, who was at all material times the beneficial owner of those shares. And, further, an application to intervene in the Rectification Proceedings, which proceedings are now moot. This notwithstanding, as Mr. Wang is now registered as the legal owner of the JB Shares (or what were the JB Shares) he had legal standing as a 'member' to carry on Claim No. 150/2021. Furthermore, Mr. Wang contends, that setting aside the sanction order made by the learned judge on 4th August 2023, even if successful, does not lead to the result that the subsequent approval of the transfer of the JB Shares to Mr. Wang and or their registration can also be set aside.

Mr. Wang's Submissions on Standing – Bare Trust, Special Circumstances and as a member

[64] On 28th August 2023, Mr. Wang filed detailed written submissions in opposition to the appeal and in support of his counter appeal. The matter of standing is addressed in detail at section D of Mr. Wang's written submissions. More specifically, the issue of standing on the basis of a bare trust entitling Mr. Wang

to bring, on a derivative basis, the Second JPL Application and for Claim No. 150/2021 to be reconstituted with Mr. Wang as the sole applicant, is addressed at paragraphs 19 to 37 of the said submissions. The alternative basis on which Mr. Wang asserts his standing, that is, by virtue of holding signed instruments of transfer of the JB Shares to himself, and thereby bringing himself within the definition of 'member' in the second limb of the extended meaning of that term in section 2 of the **Insolvency Act 2003**, is addressed at paragraphs 38 to 47 of his submissions. Mr. Wang's response to FRE's ground 1 and in support of his ground 3(a) is conveniently encapsulated at paragraph 3.1. a and b of his appeal submissions -

> "(a) The judge was right to find that Mr. Wang, as beneficial owner, had derivative standing to 'step into the shoes' of the legal owner of the shares in RAGOF. The legal owner expressly declined to act; Floreat were (and are) seeking to impede Mr. Wang becoming a legal owner of shares; and there is strong evidence of serious wrongdoing in relation to RAGOF by Floreat and the Floreat Principals. Aside from one hopeless point of law, FRE['s] appeal on this point is a disguised attack on the Judge's assessment of the evidence and exercise of discretion, which does not come close to meeting the standard for appellate intervention on such matters. As is set out below, this is a flaw the permeates FRE['s] appeal."
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> "(b) On the other hand, the Judge erred in finding against Mr. Wang on his standing as a "member" within the definition in s.2 of the [Insolvency] Act, as holder of signed instruments of transfer from [Bank] Julius Baer. That is a question of law, and of construction of RAGOF's Articles."

[65] Mr. Wang's primary case on derivative standing, is that it cannot be seriously disputed that XYZ holds the XYZ shares in RAGOF on a bare trust for him, a fact which XYZ has itself confirmed in writing. Accordingly, XYZ's refusal to act or its inability to act because of Article 15 of the XY Nominee Agreement, is therefore sufficient in itself to open the way for a derivative claim by Mr. Wang.[30]

[30] See para. 60 of Mr. Wang's Skeleton Arguments.

[66] Alternatively, or in addition to the bare trust as a basis for bringing a derivative claim, Mr. Wang argues that the requirement to show 'special circumstances' had been met, and to a good prima facie standard. In support of this submission, Mr. Wang points to four factors. The first is that an administrative action seeking a direction that XYZ petition in its own name, would fail by reason of Article 15 of the XY Nominee Agreement. I understand this point to be that XYZ cannot act since to do so would be contrary to Article 15, and therefore XYZ cannot properly be compelled to act. The second is that FRE (or Floreat) has shown itself willing to obstruct the transfer of legal title in shares in RAGOF to Mr. Wang. In support of this contention, reliance is placed on Lee 1 at paragraph 18 and Lee 2 at paragraphs 31 to 35. Thirdly, pending determination by the lower court of the JB Share Transfer Proceedings, the route to direct action being taken by XYZ is likewise closed. Fourthly, there is a real and present risk of harm to RAGOF, and therefore Mr. Wang's interests, such that it is just for the court to permit Mr. Wang to bring a derivative claim.

The Law

[67] With regard to standing on a derivative basis grounded in a finding of a bare trust, Mr. Wang submits that the essential purpose of a derivative claim is to allow the beneficial owner to step in when no actions or steps are being taken, or can be taken, by those (the trustee) with the legal authority and standing to protect an estate that is under attack by a third party.[31] Mr. Wang submits that, broadly speaking, these types of derivative actions fall within two categories. The first is where there is a bare trust, and the second, absent a bare trust, is where the beneficiary can show special circumstances making it just that he or she can proceed on a derivative basis. Mr. Wang submits that a beneficiary under a bare trust need only show that the trustee refuses to sue. Nothing more need be established.[32] Further, it is only where a bare trust does not exist, that 'special circumstances' must be shown.

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[31] See Paraskevaides case at para. 78.

[32] See Lewin on Trusts (20th ed) at 47-004; citing the decision of the Privy Council in Vandepitte v Preferred Accident Insurance Corporation of New York [1933] AC 70 at 79.

[68] The leading cases in support of this proposition relied on by Mr. Wang are **Joseph Hayim Hayim and another v Citibank**[33] **N.A. and another** and **Roberts v Gill & Co**.[34] These decisions make clear that (i) the categories of 'special circumstances' are not closed; and (ii) the enquiry is a functional one, directed to the question of whether it is 'just for the beneficiary to have the remedy'. In **Hayim**, the court stated:

> "[The] authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owned by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate."

[69] As to the categories of special circumstances being not closed, Lord Collins in **Roberts v Gill & Co**[35] stated:

> "The special circumstances which were identified in the earliest authorities as justifying a beneficiary's action were fraud on the part of the trustee, or collusion between the trustee and the third party, or the insolvency of the trustee, but it has always been clear that these are merely examples of special circumstances, and that the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy."

[70] Mr. Wang also relies on the decision of the Commercial Court in **Tipp** as authority that, under BVI law, derivative claims are available in respect of statutory remedies under the local company and insolvency legislation. In his submissions, Mr. Wang relies, in particular, on the decision in **Tipp** dismissing the argument made by counsel for the directors that a derivative claim was limited to a 'member' of a company, and could not be brought by a beneficiary who had elected to hold his or her interest in the shares in the company by and through a nominee.[36] I hasten to say that no such argument has been proffered by or on behalf of FRE as a means of disentitling Mr. Wang to bring a derivative action in relation to the XYZ shares owed beneficially in RAGOF. In **Tipp**, the

[33] [1987] AC 730.
[34] [2011] 1 AC 240 (SC).
[35] At para. 46.
[36] See para. 64.

judge also adopted as authoritative, the reasoning of Briggs LJ in **Eclairs** where it was explained why a court should be slow to shut out beneficial owners from being able to litigate by way of derivative trust proceedings in an appropriate case.

[71] In applying the salient principles to be extracted from these authorities, Mr. Wang relies upon XYZ's refusal to act as explained in Lee 1 at paragraph 18(vii); and Cameron 6 at paragraphs 12 to 14. In doing so, Mr. Wang cites specifically Article 15 of the XY (mistakenly stated as "XYZ") Nominee Agreement, which stipulates that XYZ will not engage in legal action concerning the XYZ shares. Reliance is also placed on XYZ's 1st June 2021 Letter to the effect that it will not take any part in these proceedings in reliance on the Article 15 stipulation.

[72] In my view, neither Article 15 nor the 1st June 2021 Letter based upon the provisions of Article 15 of the XY Nominee Agreement, show or amount to a 'refusal' by XYZ to act. The simple fact is that by the XY Nominee Agreement, it was agreed to and is binding upon XY and Mr. Wang. It is the bargain struck between these two contracting parties. What XYZ has done by not engaging in any way in these proceedings brought by Mr. Wang, is in accord with or in compliance with the provisions of Article 15 binding on its parent Bank, XY. Accordingly, this is not, strictly speaking a 'refusal' by XYZ to act, as contended by Mr. Wang, but is tantamount to XYZ being unable or considering itself unable to act to protect RAGOF by engaging in litigation before the courts in BVI. However, in my view, this point is really a difference without any real practical or legal consequence. The prevailing state of affairs is that XYZ, as the registered holder of the XYZ shares in RAGOF, cannot act or consider that it is prohibited from acting in these proceedings by virtue of the provisions of Article 15.

Finding of a Bare Trust

[73] In opposition to ground 1 of FRE's appeal, it is Mr. Wang's submission that none of FRE's three-prong attack on the learned judge's finding of a bare trust derivative claim in favour of Mr. Wang, has merit.[37] The first point of attack is on the learned judge's factual finding that the XYZ shares are held on a bare trust for Mr. Wang. The second attack is on the judge's evaluation of the facts and/or exercise of discretion, in finding that (to the extent required) there are 'special circumstances' justifying derivative action. The third attack is a bare assertion, contradicted by both BVI and English law, that a trust-based derivative action requires the court's leave or permission before it may be brought. Each of these 'strands' are dealt with separately by Mr. Wang in his submissions.

(1) Standard of proof on JPL applications

[74] Mr. Wang first takes issue with FRE's submission as to the standard of proof of a trust, that for there to be a derivative action by the beneficiary of a trust, it must be 'established' as a threshold condition that there is a trust. It is Mr. Wang's case, that the applicable standard of proof is not so high. The correct position in law, (as was uncontroversial in the court below says Mr. Wang), is that an application to appoint JPLs is determined by an interlocutory threshold 'somewhat stronger than a triable issue but short of a final determination', that is, whether there is 'a good prima facie case for a winding up'. It is submitted that this threshold applies as well to 'standing' as it applies to other issues. Accordingly, all a court need be satisfied of at the interlocutory stage, is that a 'good prima facie case' as to the existence of the trust is made out on the evidence. At this stage, without delving into the issue of standard of proof, I would note that Mr. Wang has cited no authority in support of this proposition dealing with the discrete issue of the standard of proof in relation to an application to appoint provisional liquidators generally or where, as here, the issue of standing is very much a live one.

[37] See para. 19 of Mr. Wang's Skeleton Arguments.

(2) Did FRE admit the existence of a bare trust?

[75] Secondly, it is submitted by Mr. Wang that it is not open to FRE on this appeal to contend that there was not in this case a trust. Mr. Wang points to paragraph 4.2 of FRE's Amended Points of Defence. It is stated there that FRE pleaded case, to which it ought to be held, is that XYZ holds shares in RAGOF on trust for Mr. Wang.

[76] The citation and reliance on what is allegedly averred in sub-paragraph 4.2 of FRE's Amended Points of Claim, is clearly incorrect or misplaced. The matter of Mr. Wang's beneficial interest in shares in RAGOF is not addressed at paragraph 4.2. That paragraph deals with matters concerning the management of RAGOF, the alleged non-involvement of the Floreat Principals, and the role and function of the Directors and FRAIM in decision making by or on behalf of RAGOF. More to the point, however, at paragraph 5.1 of FRE's Amended Points of Claim, it is admitted that XYZ (denoted there as CSLN) is the legal owner of the XYZ shares. Of more relevance to this point is paragraph 5.2. There FRE pleads as follows: 'It is denied that [XYZ] hold all the Shares on behalf of Mr. Wang. To the contrary, FRE Jersey [same as FRE] <u>believes</u> that various members of the Wang family, including Mr. Wang, have a beneficial interest in all or some of the Shares.' The language used there is somewhat tenuous and equivocal. It is short of a clear admission of a beneficial interest held by Mr. Wang in the XYZ shares in RAGOF, or that XYZ holds those shares on a bare trust for the benefit of Mr. Wang.

[77] However, Mr. Wang does not stop there. He also prays in aid, as demonstrative of FRE being not allowed to contend that there was no trust, the affidavit evidence before the learned judge in the court below from Mr. Wang's side.[38] This evidence spoke to the fact that Mr. Wang 'is the beneficial owner under a bare trust of the shares held by [XYZ]', which statement was not contested by FRE. This is certainly an important bit of evidence. However, in my view, as

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[38] See Cameron 6 at para. 11.

important as this bit of evidence is, it is doubtful that absent this assertion in Cameron 6 being directly denied or controverted by FRE, it is to be considered evidence of the admission of a bare trust. In a matter such as this, where standing is a key issue and where the question of whether there exists a beneficial interest which must be protected by permitting a derivative claim to be brought, the existence of a bare trust is a matter of mixed law and fact. Accordingly, this evidence in Cameron 6 must be examined in the context of the other evidence and the applicable law relating to bare trusts, and how the learned judge treated this issue in arriving at a finding of a bare trust.

[78] Also, in relation to this 'pleading or admission point', Mr. Wang refers to FRE's skeleton argument for the hearing before the learned judge in the court below as further confirmation that FRE did not dispute that Mr. Wang was the beneficial owner of the XYZ shares but, instead, ran a hopeless argument against 'double derivative' proceedings being impermissible in the BVI. This is a point which Mr. Wang contended below was not supported by the facts of this case which do not amount to 'double derivative' proceedings, and which rules or principles are therefore irrelevant. Assuming (without deciding) this contention to be correct, it is questionable, in my view, whether this 'pleading or admission point' relied on by Mr. Wang before this Court, is sufficiently strong as to shut out FRE from relying on the points which it has made challenging the judge's conclusion of a derivative claim based upon the existence of a bare trust. In short, either the points raised by FRE have merit as a matter of fact and law or they do not.

(3) Whether the judge properly considered the evidence on the issue of bare trust

[79] Mr. Wang submits, thirdly, that FRE is wrong when it contends that the learned judge did not properly consider the issue of a bare trust, but simply assumed in favour of its existence. This is one of the key points raised by FRE in support of ground 1 of its appeal. In response to this, Mr. Wang contends that, to the

contrary, the judge considered the evidence before him and made a factual finding on the basis of the evidence. In this regard, Mr. Wang points to an extract from the Decision below at page 33 of the transcript, where the judge stated:

> "Moreover, as Mr. Collins for Mr. Wang has said, there can be no real dispute that XYZ holds shares on bare trust for Mr. Wang. XYZ has confirmed as much in writing. The reference in the bundle is B5/37/4110."

[80] This passage from the Decision shows that the learned judge accepted the contention of a bare trust put forward by counsel for Mr. Wang, and did so on the basis that this issue cannot realistically be disputed. In other words, it was beyond any serious argument to the contrary. The judge also relied on the referenced letter from XYZ as confirmation of this fact. The referenced letter from XYZ (exhibited to Cameron 6) states that the shares are '… held for your account but in the name of [XYZ] as registered shareholder', and refers to a signed declaration by Mr. Wang as to his sole beneficial ownership. Mr. Wang argues that FRE has not identified any reason why the judge's finding of a bare trust ought to be disturbed, and certainly none which would meet the 'high threshold to warrant appellate intervention on this factual question'.

[81] The referenced letter from XYZ is but one piece of evidence before the judge below. The learned judge considered the said letter to be important evidence confirmatory of the XYZ shares being held beneficially on a bare trust for Mr. Wang. In my view. this may be a bit of an evidentiary stretch on the part of the learned judge. The statement in the letter does not speak directly to the existence of a 'trust' or a 'bare trust'. It is certainly arguable that the statement in this letter that the XYZ shares are 'held for your [Mr. Wang's] account' could be indicative of an acknowledgement by XYZ of the existence of some type of trust in favour of Mr. Wang, including, possibly, a bare trust. However, it is not evidence of the existence of a trust or bare trust between XYZ itself and Mr. Wang.

[82] This notwithstanding, the submissions by FRE on this issue go a bit further. It is argued, correctly or incorrectly, that the judge in arriving at his conclusion of a bare trust, an issue which is one of both fact and law, did not do so based upon any examination of the relevant documents and agreements or the applicable law, which is Swiss law, as he ought to have done. Instead, he seemingly came to his conclusion on this important issue mainly on the basis that the existence of a bare trust was confirmed by XYZ in the referenced letter, when in fact, that letter does not speak of a 'bare trust' at all or of a bare trust between XYZ and Mr. Wang. With that said, this is a matter to be examined in greater detail below.

(iv) Is Swiss Law the applicable law?

[83] The fourth point relied on by Mr. Wang in his submissions, is that FRE's argument (not run in the court below) that the relationship between XYZ and Mr. Wang in relation to the XYZ shares is governed by Swiss law, which FRE says the judge failed to consider when reasoning to his conclusion of a bare trust and is inconsistent with a trust, is both wrong and impermissible. Mr. Wang based his submissions on this issue on two factors: (i) FRE is relying on the incorrect agreement; and (ii) in any event, the agreement relied on when properly construed does not assist FRE or lead to the conclusion that Swiss law is the applicable law to the relationship between Mr. Wang and XYZ. Mr. Wang argues that FRE's conclusion that Swiss law is the applicable law is <u>wrong</u> because FRE, in support of this argument, refers to a written agreement between Mr. Wang and XY (XYZ's parent company), but wrongly treats it as an agreement between Mr. Wang and XYZ. To buttress this counterpoint, Mr. Wang cites paragraph 19 of FRE's written appeal submissions, where FRE incorrectly inserts in square brackets 'XYZ' rather than 'XY' into the title of the XY Nominee Agreement; and where at paragraph 43 FRE refers specifically to clause 13 of the XY Nominee Agreement as applying to XYZ, when, as properly construed, the party referred to as the "Bank" in clause 13 and elsewhere in the XY Nominee Agreement is XY, the Swiss parent of XYZ, its English subsidiary.

[84] As further illustrative of his counterpoint, Mr. Wang references paragraph 43 of FRE's submissions, where it is suggested that the Swiss choice of law clause in the XY Nominee Agreement applies to the relationship between Mr. Wang and XYZ (an English incorporated entity) not a party to the XY Nominee Agreement, and despite the fact that the choice of law clause expressly applied only to 'this agreement'. Accordingly, Mr. Wang submits that the correct position is that the relationship between XYZ and Mr. Wang is not governed by the XY Nominee Agreement and, therefore, not by its Swiss choice of law provision. Instead, it is governed by English law. In my view, this argument, if correct, would mean that the BVI Court is well positioned to apply English law and legal principles in determining the issue of whether the relationship between Mr. Wang and XYZ regarding the XYZ shares in RAGOF gives rise, on a proper construction, to a trust or, more specifically, a bare trust. It would therefore follow that the BVI Court would not require expert evidence of Swiss law in relation to a trust or beneficial relationship in order to properly determine this important issue.

[85] Mr. Wang also maintains that this strand of argument by FRE is wrong for the further reason that there is nothing in the XY Nominee Agreement that is inconsistent with XYZ holding the XYZ shares on a bare trust for Mr. Wang. This is illustrated by clause 13 of the XY Nominee Agreement which, apart from FRE's reliance upon it being misplaced, 'addresses the relationship between XY and third parties, not the relationship between XYZ and Mr. Wang'. Moreover, it is clear from the agreement, read as a whole, that NTIPs, such as the XYZ shares in RAGOF, are to be purchased, sold etcetera, on the instructions of the client (in this instant, Mr. Wang), and XY does not exercise any discretion either as to the investment or distribution of funds. Mr. Wang submits that this is a classic bare trust.

[86] Mr. Wang submits further, that this new argument by FRE that the relationship between Mr. Wang and XYZ is based on Swiss law, is impermissible for the following reasons. First, as asserted previously, FRE did not contest the affidavit evidence that XYZ held the shares on a bare trust. Second, the failure by FRE to raise in its evidence in the court below in opposition to the Second JPL Application that the relationship between Mr. Wang and XYZ was governed by the XY Nominee Agreement governed by Swiss law, is particularly egregious in circumstances where (as was known by FRE) 'there is uncontested expert evidence' in the related proceedings (Claim No. 144/2021) that the relationship is not governed by the XY Nominee Agreement. Had this argument been raised below by FRE, Mr. Wang would have refiled the evidence in Claim No.144/2021 in support of the Second JPL Application filed in Claim No. 150/2021. Third, even if, for argument's sake, Swiss law did apply to the relationship between Mr. Wang and XYZ in relation to the XYZ shares, in the absence of this being pleaded and proof of Swiss law as a fact being filed by way of expert evidence in the proceedings, Swiss law is deemed to be the same as BVI or English law. Instead, FRE did not raise this as a point or defence to the Second JPL Application, and elected not to adduce any evidence of Swiss law to the effect that there was no trust.

[87] Mr. Wang encapsulates all these points in this submission: 'while aspects of the XY Agreement are relevant to XYZ's relationship with Mr. Wang (fn. 24 for example, the right not to engage in legal action was invoked by XYZ in declining to take any part in these proceedings, which in turn constitutes part of the special circumstances justifying a derivative claim), it is wrong to suggest that its existence subjects the Wang/XYZ relationship to Swiss law or that it is in any way inconsistent with XYZ holding the shares on bare trust for Mr. Wang.'[39] Further, Mr. Wang contends, that the learned judge was correct to find on the material evidence before him, and applying BVI law (or English law) principles, that the relationship between Mr. Wang and XYZ in relation to the XYZ shares

[39] See para 24.4 of Mr. Wang's Skeleton Arguments.

registered in XYZ's name, is a bare trust, thereby entitling Mr. Wang to have standing on a derivative basis to bring the Second JPL Application, and to have the action in Claim No. 150/2021 reconstituted with Mr. Wang as the sole applicant. This is separate from the two alternative or additional bases upon which Mr. Wang justifies a finding that he had standing to bring the Second JPL Application. These are (i) 'special circumstances' were shown to exist in the court below to permit Mr. Wang to bring a derivative claim, as found by the judge; and (ii) Mr. Wang's case that he was, by virtue of the executed instruments of transfer of the JB Shares to him as transferee, a 'member' of RAGOF pursuant to the extended meaning of that term in s. 2 of the **Insolvency Act 2003**.

B. Special Circumstances

[88] Mr. Wang's primary submission on this aspect is that it is well-established, and indeed common ground, that 'special circumstances' justifying a derivative claim are not required where it is shown that the trust in use governing the relationship between the legal owner and the beneficiary is a bare trust.[40] In support of this statement of principle, reference is made to paragraph 45 of FRE's appeal submissions, which states (in part) '…for there to be a derivative action where there is not a bare trust, there must be some 'special circumstance' justifying an action being brought in the beneficiary's name'. This position as a matter of law, is clearly common ground between the parties. Notably, FRE's case is, first, that there was no bare trust and the judge below was wrong to so find; and, second, absent a bare trust the judge was entitled to examine whether 'special circumstances' had been shown to the requisite standard.

[89] As to the factual issue of whether 'special circumstances' had been shown to exist to the requisite standard by Mr. Wang in making the Second JPL Application, it is Mr. Wang's case that the learned judge made a series of factual findings on each of the specific matters or factors relied on by Mr. Wang. These

[40] See Lewin on Trusts (20th ed) at [47-004].

related to Floreat's (or FRE's) obstruction of his attempts to become a registered shareholder of RAGOF (in relation to both the XYZ shares and the JB Shares); XYZ's refusal to act; and the real risk to RAGOF's assets from the serious misconduct by Floreat, which circumstances the judge correctly characterized as 'special circumstances'.

Obstruction and significant developments in relation to Mr. Wang's standing

[90] The judge below made a positive finding in his Decision that the evidence before him shows that FRE has been obstructing the transfer of the XYZ shares to Mr. Wang.[41] The judge also stated:

> "But there is some history which has been placed before me which indicates at any rate that Floreat individuals have been obstructing Mr. Wang's attempts to become a member in his own right. And I must take the Applicant's evidence to that extent as true for this present purpose."[42]

[91] The judge found that this was one of the 'special circumstances' warranting Mr. Wang proceeding on a derivative basis:

> "In a nutshell, the special circumstances are said to boil down to this, that Mr. Wang has tried to have the shares transferred to himself so that he could apply as a member, but that has not happened with Floreat individuals, FRE, trying to obstruct that and that XYZ has refused to bring proceedings in its own name; all the while, whilst RAGOF's assets are at risk of various forms of self-interested dealing by FRE entities and individuals."

[92] At paragraphs 10 to 16 of his appeal submissions, Mr. Wang identifies and addresses certain 'significant and relevant' developments affecting his standing to bring derivative proceedings for appointment of JPLs, and for Claim No.150/2021 to be reconstituted with himself as the sole applicant. These matters address the allegation, as found by the learned judge below, that Floreat and/or the Floreat Principals have taken or put in motion certain steps and proceedings intended to 'obstruct', or which are obstructive of Mr. Wang's

[41] See Transcript 20/07/23 p. 31 lines 16-18.
[42] See Transcript 20/07/23 p. 31 lines 22-25 and p. 32 lines 1-2.

efforts to have shares in RAGOF transferred to himself and registered in his name as the legal owner entitled, as of right, to bring a derivative claim. In identifying these matters and steps, Mr. Wang also responded to some of the points made in the argument by FRE in its appeal submissions, by which it denies the allegations of 'obstruction' by Floreat and the Floreat Principals, and urge this Court to set aside the judge's positive finding of obstruction.

[93] Mr. Wang first refers to what was advanced by FRE to the court below (as summarized by the learned judge in the Discharge Judgment in 2022), as one alternative to a receivership order. This was to the effect that should Mr. Wang seek a transfer of the XYZ shares into his name, 'there was no evidence at all that the RAGOF directors would have refused to register it'. This was accepted by the judge in the Discharge Judgment as one of the potential alternatives. However, the narrative continues at paragraph 10.1 of Mr. Wang's appeal submissions with this telling and, I would add, somewhat unsettling statement:

> "At that stage, although Floreat had managed to block most of Mr. Wang's attempts to initiate transfers of shares in the Floreat Funds (as set out in Lee 2 para.31(iv) - (ix), (i) Mr. Wang held two signed instruments of transfer for RAGOF shares from Julius Baer; but (ii) there was no direct evidence (as opposed to inference) that Floreat would seek to prevent the directors of RAGOF (or the JPLs) from registering those shares, or that the directors would not do so."

[94] I say telling and unsettling because, by the above statement in Mr. Wang's written submissions before this Court, I understand him to have said that at the time when the lower court was grappling in 2022 at the Discharge Hearing and in the Discharge Judgment, with the issue of Mr. Wang's admitted lack of standing and why he (Mr. Wang) had proceeded in the way in which he had by deploying a two-prong litigation strategy using the draconian remedies and powers of the court, Mr. Wang actually had in his possession, signed instruments of transfer of the JB Shares. In relation to the JB Shares Mr. Wang is the beneficial owner. However, he withheld that information, did not disclose this fact to the court in the first round of proceedings, and did not present the said instruments of transfer to the directors of RAGOF for registration in

compliance with the relevant provisions and requirements of the Articles of RAGOF.

[95] Mr. Wang asserts that following the Discharge Judgment, he renewed his efforts to have shares in RAGOF transferred to himself.[43] However, FRE sought to block the transfer of shares and the directors of RAGOF failed to respond to any of the letters sent to them on his behalf. Also, one such director, Lorenzo Gainello, who provided affidavit evidence for FRE in response to the Second JPL Application, failed to explain his total non-responsiveness to these letters.

[96] Mr. Wang addresses FRE's attempts in its appeal skeleton to deny or to explain away these allegations of obstruction. He refers specifically to a letter dated 8th September 2022 from Forbes Hare, on behalf of its client FRE, to the JPLs asserting that any steps taken to approve a transfer of shares or update the Register of Members, would constitute a contempt of court, and that any transfer to Mr. Wang would be invalid. Mr. Wang also refers to the fact that after the commencement of the Rectification Proceedings by him to have the transfer of the JB Shares to him registered, FRE wrote to the JPLs on 13th June 2023 (through its lawyers) insisting that the JPLs defend those proceedings.

[97] Mr. Wang also argued that FRE's attempts to block the transfer of shares in RAGOF to Mr. Wang has continued. In this regard, he points to the matters concerning the internal process relating to the attempts or steps taken to have the transfer of the JB Shares completed. On 21st July 2023, Julius Baer wrote to RAGOF and the JPLs requesting consent to transfer to Mr. Wang the JB Shares. On 4th August 2023 the learned judge made the order (referred to above) confirming that the JPLs have the power to carry out that share transfer in lieu of the directors of RAGOF and to provide to Julius Baer prior written approval. On the same day, the JPLs approved the said transfer under Article 17.5.1 and on 7th August Julius Baer executed fresh instruments of transfer in

[43] See Lee 1 para. 18; and Lee 2 paras. 33-34.

favour of Mr. Wang. On 11th August 2023 Mr. Wang executed a subscription agreement which included his express warranty as to his status as a professional investor, RAGOF accepted the subscription, the transfer was registered, and the Register of Members updated to reflect Mr. Wang's shareholding. However, rather than accept this, FRE, on 21st August 2023 filed an application in Claim No. 150/2021 seeking to set aside the learned judge's 4th August 2023 Order; and also filed an application to intervene in the Rectification Proceedings.

[98] It is Mr. Wang's submission that what this recent conduct by FRE demonstrates is that FRE is determined to do whatever it can to prevent Mr. Wang (the 97% beneficial owner of RAGOF) from ever being able to seek remedy for Floreat's abuse of RAGOF. Says Mr. Wang, this is the BVI equivalent of the 'skillfully executed strategy' that Floreat sought to deploy in the Cayman Proceedings.

Real Risk of Harm to RAGOF

[99] The judge's findings on this issue were summed up as follows:

> "[T]here is a real and present risk to harm to RAGOF and therefore to Mr. Wang's interest, such that it is just for the beneficiary, that is Mr. Wang, to have the remedy of interim relief pending determination of the petition [for winding up of RAGOF], warranting the appointment of Joint Provisional Liquidators."[44]

[100] Mr. Wang submits that in making this finding, the learned judge was exercising 'discretionary judgment' in determining whether to permit a derivative action. In support for this proposition, he cites this statement at paragraph 46 of the judgment of the UK Supreme Court in the seminal case of **Roberts v Gill & Co**: 'the underlying question is whether the circumstances are <u>sufficiently special</u> to make it <u>just</u> for the beneficiary to have the remedy' (emphasis mine). This formulation of the applicable principle was adopted by this Court in **Paraskevaides** and in **Tipp**.

44 Transcript 20/07/23 at p.33 lines 15-21.

Challenging the judge's findings of fact and evaluation of the evidence

[101] It is Mr. Wang's submission that FRE, in seeking to challenge the judge's findings of fact in relation to the issue of whether 'special circumstances' were made out justifying him proceeding with a derivative action, FRE is disagreeing with or seeking to challenge the judge's factual findings and/or his evaluation of the evidence, and asserting that the judge was wrong in his assessment that the facts were 'sufficiently special'. In denouncing this approach by FRE, Mr. Wang points, at paragraph 30, to a number of paragraphs in FRE's appeal submissions (paragraphs 45.1, 45.3, and 46) as examples of where FRE simply got the facts wrong. I can see no value in repeating any of these examples here, save but one. In relation to paragraph 46 of FRE's appeal submissions where it posits that the real reason why Mr. Wang did not progress the transfer of the JB Shares was his unwillingness to certify his status as a 'qualifying or professional' investor, Mr. Wang counters this by referring to a passage in the judgment below where the judge refers to the evidence before him that Mr. Wang had offered to do just that. Reference is also made to the fact that Mr. Wang has now signed a subscription agreement containing the requisite warranty.

[102] It is Mr. Wang's submission, that FRE has not shown how or why the judge's evaluation of the facts as 'special' or his discretionary judgment as to these facts making it 'just' for Mr. Wang to be permitted the remedy of a derivative action, is wrong or irrational and ought to be disturbed. Accordingly, Mr. Wang submits, that ground 1 of FRE's appeal challenging the judge's finding that Mr. Wang has derivative standing to seek the appointment of JPLs over RAGOF must fail.

B. Was Mr. Wang required to seek leave to bring the Second JPL Application derivatively?

[103] It is Mr. Wang's case that this ground of objection raised by FRE, both in the court below and in this appeal, is without merit and wrong in law. This is the essence of Mr. Wang's argument and submissions at paragraphs 33 to 37 of his written appeal submission. In responding to this point, Mr. Wang seeks to

debunk it by making several counterpoints. The first is that FRE confuses and wrongly conflates two different types of 'derivative' proceedings. The first type is 'shareholder derivative proceedings' where a shareholder brings or seeks to bring proceedings on behalf of a company. This is the type of proceeding provided for in section 184C of the **BVI Business Companies Act 2004**. The second type is 'derivative trust proceedings', which is where a beneficiary seeks to enforce rights that belong in law to the trustee. This is not the type of proceedings provided for under the **BVI Business Companies Act 2004**, whether in section 184C or elsewhere in that Act. I would add, however, for completeness, that there is a third category, or, put differently, another category related to the second category or derivative trust proceedings category. This third category is the 'special circumstances beneficial proceedings'. This is where, absent a bare trust, a beneficiary can show, by cogent evidence, that the underlying circumstances are 'sufficiently special' to convince a court that it is just for the beneficiary to have or to be able to exercise the remedy of a derivative action or proceeding.

[104] It is Mr. Wang's case, in response to this procedural point raised under ground 1 of its appeal, and its reliance, by way of analogy, on the provisions of section 184C for an application for permission to proceed on a derivative basis, that it is incoherent and plainly wrong. This Mr. Wang says is the case because: (i) it is not being alleged that Mr. Wang is a shareholder in XYZ; and (ii) in relation to RAGOF itself, the proceedings (Claim No. 150/2021), while brought against RAGOF, was not brought 'in the name and on behalf of' RAGOF, as is permissible under a section 184C(a) application by a shareholder. It follows, contends Mr. Wang, that section 184C cannot be extended to cover proceedings such as the present, which kind of proceedings are inconsistent with the express language of section 184C and which clearly do not extend to derivative trust claims or proceedings. Mr. Wang also submits that this point taken by FRE, is also inconsistent with relevant case law in BVI and in England, in particular, **Paraskevaides**, **Tipp**, and **Roberts v Gill** per Lord Walker at

paragraph 103 (expressly rejecting the argument that leave was required, and citing approvingly the New Zealand Court of Appeal case of Oates v Consolidated Capital Services Ltd [2009] NSWCA 183).

D. Whether Mr. Wang was a 'member' within section 2 Insolvency Act

[105] This issue arises on Mr. Wang's counter notice. It is not in dispute that at the time of the Second JPL Application and the Decision under appeal, Mr. Wang held executed (signed) instruments of transfer of the JB Shares in RAGOF, which shares are or were held beneficially for Mr. Wang. The issue raised by the counter notice is whether by virtue of the executed instruments of transfer, Mr. Wang was a 'member' of RAGOF within the extended meaning of that term in section 2 of the **Insolvency Act 2003**, thereby entitling him in his own right to bring the application to wind up RAGOF and the Second JPL Application.

[106] Mr. Wang argues that the section 2 definition provides a more expansive approach to the concept or meaning of 'member' for the purposes of the **Insolvency Act 2003**, in that it expressly includes a person who holds a transfer of shares in a company to them, even though they may not be a member of the company within the meaning of the **BVI Business Companies Act 2004** in that their name has not been entered in the register of members of the company as the legal owner of the shares. He posits that the purpose of adopting such an expansive approach, is consistent with the economic reach of the **Insolvency Act 2003**; and section 2 'gives standing to persons requiring a remedy to protect their economic interests associated with shares that have been transferred but not yet registered'. Further, this concept of a 'member' under the **Insolvency Act 2003** was, consistent with the applicable jurisprudential principles, recognized correctly by the judge below[45] when he stated that the definition of member in section 2 of the **Insolvency Act 2003** 'looks to the protection of interests behind a shareholder'.

[45] See Transcript 20/07/2023, p. 25 lines 9-10.

[107] In my view, this much is correct as a matter of the statutory definition of 'member', and the general economic interest and purpose underpinning the Insolvency Act. This expanded definition of 'member' (as compared with the definition under the **BVI Business Companies Act 2004**) is to afford protection to transferees of shares in a company where they have not yet achieved registration as a member in the company's register of members.

[108] In advancing this submission, Mr. Wang referred to a number of English cases on the subject of 'economic interest' associated with the shares. These are cases decided in relation to section 994(2) of the English Companies Act 2006 and its predecessor Act. They are: **McCarthy Surfacing Limited**[46] concerning the predecessor provision to s. 994(2); and **Re A Company**.[47]

[109] Accordingly, Mr. Wang's primary submission in support of this ground of counter appeal, is that the learned judge erred when he found that Mr. Wang fell outwit the expanded definition of 'member' in section 2 of the **Insolvency Act 2003**, for the reason that the judge made that finding was on a very narrow or too narrow a construction of RAGOF's Articles. In coming to this erroneous conclusion, argues Mr. Wang, the learned judge found that the executed transfers of the JB Share to Mr. Wang were 'null and void'. His reasons for so concluding were that Julius Baer, in contravention of Article 18.2 of RAGOF's Articles, did not apply for and obtain the written consent of RAGOF's directors to the transfer of the JB Shares to Mr. Wang, before executing the said instruments of transfer. Mr. Wang posits that this finding or conclusion was wrong as a matter of general law, since any breach of RAGOF's Articles as between Julius Baer and RAGOF, does not affect the position as between Julius Baer and Mr. Wang, which is the exclusive focus of the s. 2 definition. In addition, on the authority of **McCarthy Surfacing Limited**, the expanded definition of member applies even in circumstances where the transferee may

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[46] At paragraph 5.
[47] [1986] BCLC 391 at 393.

never become a shareholder. Furthermore, any such breach of the Articles would not prevent a transfer of beneficial ownership to Mr. Wang as against Julius Baer. In support of these submissions Mr. Wang relies on **Dempsey v Celtic Football and Athletic Co Ltd**;[48] and **Tett v Phoenix Property & Investment Co Ltd**.[49]

[110] The specific provisions of RAGOF's Articles which fell to be construed by the learned judge are articles 17 and 18, more particularly, 17.5.1 and 18.2. It is Mr. Wang's case that the learned judge erred in concluding that the effect of these two provisions was that the executed transfers held by Mr. Wang of the JB Shares were 'null and void' as between Julius Baer and Mr. Wang, such that Mr. Wang was not a 'member' within the expanded meaning of that term in section 2. In making this submission, Mr. Wang advances a construction of these provisions in the Articles different to that reached and applied by the judge. It is Mr. Wang's position that Article 17.4 stipulates that a transfer in terms of the Articles is effected by 'registration'. Thus, a distinction is to be drawn between the 'instrument of transfer' which is the instrumentality, and the 'transfer' which is the process itself, completion of which does not occur until registration. Mr. Wang also asserts that concomitantly Article 18.2 does not declare 'null and void' the instrument of transfer; it bites only on 'the transfer', that is registration. As this argument goes, it follows that the time before which the transferor (in the case Julius Baer) must obtain the consent of the directors in accordance with Article 17.5.1, is the time of registration of the instrument of transfer, not prior to the transferor and transferee executing the instrument of transfer.

[48] [1993] SLT 382 (CSOH) at 385H.
[49] [1984] BCLC 599 (Ch) at 619.

Analysis and Conclusions on Standing

[111] I will deal with the various issues raised concerning the standing of Mr. Wang to bring the Second JPL Application, including the issue raised in the counter appeal, in the following order:

(1) Was Mr. Wang required to obtain permission of the court to apply derivatively for the appointment of JPLs;

(2) Was Mr. Wang, by virtue of holding signed instruments of transfer of the JB Shares, a 'member' of RAGOF within the extended meaning of that term in section 2 of the **Insolvency Act 2003**;

(3) Did XYZ hold the XYZ shares on a bare trust for Mr. Wang entitling him to bring a derivative claim for appointment of JPLs of RAGOF; and

(4) Did Mr. Wang satisfy the requirement of 'special circumstances' entitling him to bring a derivative claim for the appointment of JPLs of RAGOF.

(1) Was Mr. Wang required to obtain permission to apply derivatively for the appointment of JPLs?

[112] This is a short point. Section 184C of the **BVI Business Companies Act 2004** states (in material part) –

"184C(1) Subject to subsection (3), the Court may, on the application of a member of a company, grant leave to that member to –

(a) bring proceedings in the name and on behalf of that company; or

(b) intervene in proceedings to which the company is a party for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company."

[113] The factors which a court is required to take into account in determining whether to grant leave to a member under subsection (1), include those listed at subparagraphs (a) to (e) of subsection (2) of section 184C. Subsection (4) provides for an application for leave to bring a derivative claim in the name of

the company to be served on the company not less than 28 days before it is to be heard, and for the company to be entitled to appear and be heard on the said application. Importantly, by subsection (5), the court may grant 'such interim relief as it considers appropriate' pending determination of the application for leave; and by subsection (6), except as provided in section 184C, a member is not entitled to bring or intervene in any proceedings in the name of or on behalf of the company.

[114] FRE has cited no authority in support of its argument based upon section 184C of the **BVI Business Companies Act 2004** that Mr. Wang was required to apply for and to be granted permission by the court below to bring the Second JPL Application derivatively. As I understand FRE's point, its argument is not that section 184C applies to or has been made applicable to insolvency proceedings, which would include Originating Applications to wind up a company and applications to appoint provisional liquidators. It is, at its highest, that, it stands to reason and common sense, that as section 184C of the **BVI Business Companies Act 2004** requires a shareholder to first apply for and be granted permission by the court to bring a derivative action in the name and on behalf of a company, it must follow logically that a person intending to bring an action or application in their capacity as a beneficiary of shares in a BVI company, must also be subjected to the same requirement of first seeking the permission of the court to proceed derivatively. Respectfully, this argument and reasoning is fallacious and wholly unsupported by any authority or principle of law or statutory provision applicable in the BVI.

[115] In my considered opinion, the fallacy of FRE's argument and reasoning on this issue has been ably exposed by the counterpoints made by Mr. Wang in opposition to it. There is great force in the submissions of Mr. Wang, as summarized above. It cannot be seriously argued that the provisions of section 184C of the **BVI Business Companies Act 2004**, which provide for a prior application by a member of a company to the court for permission to bring a

derivative action in the name and on behalf of the company, can be made applicable (whether by deduction or extrapolation) to derivative trust proceedings, whether of the bare trust type or the 'special circumstances' type. These are simply very different legal concepts from the species of derivative actions contemplated by section 184C. Accordingly, I do not accept, and wholly reject, the argument made by FRE on this issue.

[116] While section 184C of the **BVI Business Companies Act 2004** expressly permits only a 'member' of a company to apply to the court for permission to bring proceedings in the name of the company or to intervene in existing proceedings to which the company is a party, no such provision is to be found in the **Insolvency Act 2003**, nor has section 184C been made applicable to insolvency proceedings under the **Insolvency Act 2003**. More directly, no similar statutory provision has been made applicable to proceedings brought to wind up a company compulsorily under section 162, or an application to appoint provisional liquidators under section 170 of the **Insolvency Act 2003**.

[117] The provisions of section 184C are clear as is its applicability and scope. Section 184C applies only to applications by a shareholder/member to bring a derivative claim or to intervene in existing proceedings in which the company is a party in the name and on behalf of the company – 'derivative shareholder proceedings'. By contrast, there is no provision in the **Insolvency Act 2003** or in any other applicable statute law in BVI which provides for an application for permission to bring a derivative claim based on the existence of a bare trust or, absent a bare trust, upon demonstrated 'special circumstances'. These are concepts developed by the courts specifically to facilitate actions being brought by beneficiaries for reliefs to protect and preserve the assets of a trust or trust property, especially in circumstances where such assets or trust property is in real danger of being dissipated or misappropriated, and the trustee refuses or is, for some reason, unable to act to protect the assets or property of the trust. These species of derivative actions are not to be likened to nor are they based

in principle on the derivative actions of a 'member' of a company brought or undertaken in the name and on behalf of the company. In these latter species of derivative actions, the beneficiary of the trust is not the registered owner of the shares in the company, and hence not a 'member' of the company.

[118] Furthermore, it is indisputable that derivative claims based upon the existence of a bare trust or on the existence of special circumstances requiring the court to act to protect the property or assets of a trust, are available to beneficiaries. This includes, but is not limited to, statutory remedies under the **BVI Business Companies Act 2004** and the **Insolvency Act 2003**. In **Tipp** this Court stated: 'BVI law recognizes the availability of derivative claims in respect of statutory remedies under companies and insolvency legislation.' Authority for this principle can also be had from this Court's decision in **Paraskevaides** where the principles governing derivative trust claims were reviewed. In **Roberts v Gill & Co**, Lord Walker rejected the argument that leave or permission to commence a derivative claim was required. In doing so, the Law Lord cited approvingly this statement of principle of the New Zealand Court of Appeal in **Oates v Consolidated Capital Services Ltd**: '[T]here is no requirement under the general law relating to derivative actions for leave to be obtained before a plaintiff commences such an action.'

[119] Accordingly, section 184C has no application to 'derivative trust proceedings' brought by a beneficiary under a bare trust or in 'special circumstances' such as where the trustee of the shares is refusing or is unable to act to protect the assets of the trust. When viewed in this way, section 184C was not engaged in relation to the proceedings brought by Mr. Wang in Claim No. 150/2021 for the appointment of JPLs (the Second JPL Application), and no permission of the court below was required for Mr. Wang to bring the Second JPL Application on a derivative basis. The Second JPL Application concerned Mr. Wang seeking relief not as a shareholder of RAGOF, but in his capacity, purportedly, as the beneficiary under a bare trust of the XYZ shares in RAGOF.

[120] Lastly, on this issue, Mr. Wang underscores in his submissions that, in any event, the judge below held that if there was a requirement for the court's prior permission to be applied for by Mr. Wang, he is 'content to grant such permission to the extent that it should be required'.[50] For the reasons above, and also mindful of this latter declaration by the learned judge, FRE's argument premised on there being a legal or procedural requirement for the grant of permission to bring, on a derivative basis, the Second JPL Application, fails.

[121] The finding by the learned judge of the existence of a bare trust in relation to the XYZ shares has been challenged by FRE in this appeal and will be addressed later in this judgment. Also, Mr. Wang has challenged the learned judge's finding that he was not at the material time a 'member' of RAGOF within the extended meaning of that term in section 2 of the **Insolvency Act 2003**. If Mr. Wang succeeds on this ground of his counterappeal, it would mean that at the time of bringing the Second JPL Application, he had the requisite standing in his own right under section 170 of the **Insolvency Act 2003** to move the court below to appoint JPLs over RAGOF. In those circumstances, any question as to whether he needed the prior permission of the court to proceed on a derivative basis, would be otiose. Likewise, the question of whether the XYZ shares were held on a bare trust for Mr. Wang would also be otiose, such question being only relevant in circumstances where Mr. Wang was indeed not a 'member' within the extended definition in section 2 of the **Insolvency Act 2003**. Furthermore, there would still remain for consideration, what would be the effect of Mr. Wang now being a registered owner of the JB Shares and, hence, a member of RAGOF, pursuant to the powers exercised by the JPLs under the sanction order of the court below dated 4th August 2023. This latter question would likewise be subject to the outcome of the appeal seeking to have the order dated 20th July 2023 appointing the JPLs set aside.

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[50] See Transcript 20/07/23, p. 33 lines 8-14.

(2) Was Mr. Wang a 'member' within the extended meaning in section 2 of the Insolvency Act 2003?

[122] By section 170(2) of the **Insolvency Act 2003**, a 'member' is one of several categories of persons who or which can apply to the court for the appointment of JPLs. However, subsection (3) requires a 'member' to first obtain the leave of the court to bring such an application.

[123] It is not in dispute that under the **BVI Business Companies Act 2004** a 'member' of a company is defined to include a 'shareholder'. In turn, 'shareholder' is defined in section 78 of the said Act to mean 'a person whose name is entered in the register of members as the holder of one or more shares, or fractional shares, in the company'. Further, the transfer of shares is expressly subject to any limitations or restrictions on the transfer of shares in the constitutional documents of the company (memorandum and articles). In some instances, articles may provide for either the non-transferability of shares or for any such transfer to be subject to the discretionary approval of the directors.

[124] By section 54(1) registered shares are transferred 'by a written instrument of transfer signed by the transferor and containing the name and address of the transferee', unless registration as the holder of shares in the company imposes a liability on the transferee to the company in which case the instrument of transfer must also be signed by the transferee. By section 54(3) the 'instrument of transfer of a registered share shall be sent to the company for registration'. Further, section 54(4), (5) & (8) of the BVI Business Companies Act 2004 states:

> "(4) Subject to the memorandum or articles and to subsection (5), the company shall, on receipt of the instrument of transfer, enter the name of the transferee of the share in the register of members unless the directors resolve to refuse or delay the registration of the transfer for reasons that shall be specified in the resolution.
>
> (5) The directors shall not pass a resolution refusing or delaying the registration of a transfer unless this Act or the memorandum or articles permit them to do so.

(8) The transfer of a registered share is effective when the name of the transferee is entered in the register of members."

[125] However, the term 'member' for the purposes of the **Insolvency Act 2003** is defined in somewhat broader terms that the comparable provision in the **BVI Business Companies Act 2004**. Section 2 of the **Insolvency Act 2003** states as follows:

> ""member" in relation to a company, includes –
> (a) a member of a company limited by guarantee; and
> (b) a person to whom shares in a company have been transferred or transmitted by law, even though that person is not a member of the company within the meaning of the Companies Act."

[126] Articles 17 and 18 of RAGOF's articles (in material part) states:

> "17. TRANSFER OF SHARES
> 17.1 No shareholder shall or shall purport to transfer any Share … unless the transfer is as permitted under this Regulation 17 and is not prohibited under Regulation 18 (Prohibited Transfers).
>
> 17.2 Subject to the Memorandum and the Articles, Shares may be transferred by a written instrument of transfer signed by the transferor and containing the name and address of the transferee, which shall be sent to the Company for registration.
>
> 17.3 …..
>
> 17.4 The transfer of a Share is effective when the name of the transferee is entered on the share register.
>
> 17.5 Any Shareholder that transfers Shares shall:
>
> 17.5.1 <u>first obtain the prior written approval of the Directors</u> or their designees to the <u>proposed transferee</u> of such Shares;
>
> 17.5.2 do all things and execute and deliver all such papers … as may be necessary or reasonably required by the Company <u>in order to consummate the transfer</u> of such Shares; and
>
> 17.5.3 pay to the Company such amounts as may be required for any applicable stock transfer taxes and to pay any expenses reasonably incurred by the Company in connection with such transfer (including reasonable legal fees and expenses).
>
> 18. PROHIBITED TRANSFERS

> 18.1 The transfer or disposal of Shares is prohibited unless:
>
> > 18.1.1 such transfer of the Shares complies with the provisions of these Articles….
> >
> > 18.2 For the avoidance of doubt, any transfer that does not comply with the terms of these Articles shall be null and void and the Company and its Directors shall refuse to recognize any such transfer and shall not reflect on its records any change in record (sic) ownership of the Shares pursuant to such transfer."

[127] It is to be observed that Article 17.1 expressly prohibits a shareholder from even purporting to transfer his shares in RAGOF if such transfer is prohibited under either Article 17 or 18. It is also to be observed, that Articles 17.2,17.3 and 17.4 are similar terms to sections 54(1), (3), (4) and (8), respectively, of the **BVI Business Companies Act 2004**. Importantly, for the purposes of the instant matter, Article 17.5.1 makes it mandatory for any shareholder of RAGOF to first obtain the written approval of the directors of the 'proposed transferee', not the 'transferee' as where, as here, instruments of transfer of the JB Shares from Julius Baer qua transferor to Mr. Wang qua transferee has already been signed or executed purportedly effecting a transfer of the said shares to Mr. Wang. Moreover, Article 18.1.1 mandates that a transfer 'or disposal' of shares in RAGOF is prohibited unless such transfer of disposal 'complies' with the Articles, including Article 17. If that were not sufficiently clear, Article 18.2 puts it beyond doubt that any transfer not in compliance with the Articles (including Article 17) is 'null and void'. In my considered opinion, this is not a reference to a process towards registration of a signed instrument of transfer, but to the actual instrument itself purporting to effect a transfer not in compliance with the Articles, including Article 17.5.1.

[128] Mr. Wang argued, based on a certain construction of the terms 'instrument of transfer' and 'transfer' in Articles 17.4 and 18.2 of RAGOF's Articles, that the word 'transfer' refers to the process under the Articles by which registration of an 'instrument of transfer' is effected and, accordingly, the judge erred in finding that the 'instruments of transfer' of the JB Shares to Mr. Wang were null and

void. In my considered opinion, this construction of Articles 17 and 18 and Mr. Wang's line of argument based upon it, are specious and simply wrong. It does not sit squarely with any proper reading of the clear the provisions of Articles 17.4 and 18.2. By Article 18.2, in particular, it is mandatory for the directors to refuse to recognize any 'transfer' not in compliance with the Article, including Article 17.5.1 which transfer is deemed null and void. In that sense, Article 18.2, which expressly applies to any 'transfer' that does not comply with the Articles (including Art. 17), is using the term 'transfer' to refer to the actual instrument by which a member as transferor purports to effect a transfer of his or her legal interest in and title to the shares and to thereby purport to 'dispose' of those shares in RAGOF. It is not limited to the process of registration as is asserted by Mr. Wang. If that were so, it would create and untenable situation whereby a transferee of shares purportedly transferred by signed instrument not in compliance with Article 17.5.1 in that the prior approval of the proposed transferee had not been obtained from the directors, could nevertheless claim and purport to exercise rights in relation to the company RAGOF, including moving the court to appoint liquidators and provisional liquidators, supposedly in exercise of some economic interest by virtue of a transfer which is null and void the company. I therefore, wholly reject this interpretation of the Articles 17 and 18 posited by or on behalf of Mr. Wang.

[129] Mr. Wang raises another point which in my respectful view has no merit. It is that the matters prescribed by Articles 17.5.2 and 17.5.3 'cannot by their nature be complied with (or complied with in whole) prior to the execution of the instrument of transfer'. He surmised that this being the case, it would therefore be nonsensical to speak of an instrument of transfer being rendered null and void. However, what is omitted from this reasoning is that the first requirement under Article 17.5.1 is the obtaining of the prior written approval of the directors of RAGOF to the 'proposed transferee' of the shares. This requirement must be complied with first, before moving on to the requirements under 17.5.2 and 17.5.3 to, respectively, execute all papers necessary or reasonably required to

consummate the transfer of such shares, and paying to the company the sums required for any necessary stock transfer taxes and expenses reasonably incurred by the company in connection with such transfer, including legal fees and expenses.

[130] It is also Mr. Wang's case that Julius Baer, by executing the instruments of transfer of the JB Shares to Mr. Wang, 'purported to' transfer its shares to Mr. Wang in terms of Article 17.1. However, Article 17.1 expressly denounces any 'purported transfer' which does not comply with Article 17 or is prohibited under Article 18. Thus, it is not that a 'purported transfer' is on some basis exempted from the requirement of compliance with both Articles 17 and 18, and if it does not it is likewise deemed null and void by Article 18.2

[131] Mr. Wang makes another point in relation to this issue. His submission based on the principles enunciated in the cases of **McCarthy Surfacing Limited** and **Re A Company** is summarised as follows:

> "41.3 The definition is satisfied if registration has been requested but refused, or if rectification has not been sought. It is even satisfied in circumstances where rectification "would be unlikely" and/or the transferee "has no prospect of being registered as a member" because of a discretion on the directors to refuse registration. Re McCarthy Surfacing at [21] – 23]. That is consistent with the policy of the expansive approach of the definition, referred to above."

[132] Mr. Wang also submits that consistent with the policy of this expansive approach to the definition of 'member' in section 2 of the **Insolvency Act 2003**, barriers to or disputes about registration as between the transferee and the company are irrelevant. In support of this proposition, he cites **Harris v Jones**[51] which said:

> "Nothing that happened later, in relation to the discussion between the parties as to whether Mr. Harris had made a valid application to be registered as a member or how the directors would exercise their power to refuse to register him, matters…"

[51] [2011] EWHC 1518 (Ch) at [149].

[133] In my considered opinion, these cases deal with circumstances somewhat different from those in the instant matter. None of these cases cited by Mr. Wang deal with the kind of provisions in the articles of the relevant company on all fours with the provisions of Articles 17 and 18 of RAGOF. These articles are not concerned with a discretionary power granted to the directors of the company to refuse to register a properly executed instrument of transfer of shares done in full compliance with the relevant provisions of the articles of the company. In my view, the concept of economic interest to be protected, while permitted by virtue of the expanded meaning of the term 'member' in section 2 of the **Insolvency Act 2003** must be subject to the specific and mandatory terms of the articles of the company. In the instant matter, Articles 17 and 18 are clear. The prior approval of the proposed transferee is a mandatory requirement under Article 17.5.1.

[134] It is not in dispute that this provision was not complied with by Julius Baer prior to signing the instruments of transfer of the JB Shares in RAGOF to Mr. Wang. In fact, when an attempt was made to seek the approval of the directors of the transfer of the JB Shares to Mr. Wang, this was done by Mr. Wang's BVI lawyers, Appleby, by letter dated 23rd December 2022, and not by the registered shareholder Julius Baer as Article 17.5.1 requires. The effect of these provisions in the Articles means that the instruments of transfer of the JB Shares to Mr. Wang were null and void pursuant to Article 18.2, as the learned judge correctly found. The learned judge also recorded in the Decision that counsel for Mr. Wang had accepted that 'Mr. Wang did not hold the transfers which had the directors' prior written approval [of Mr. Wang as transferee]. And that in my view, disqualifies Mr. Wang from standing to apply for the appointment of JPLs as a member'. In those circumstances, it cannot be gainsaid that Mr. Wang had an economic or contractual interest to protect by virtue of or resting upon instruments of transfer in his favour that were null and void, such that the expanded meaning of the term 'member' in section 2 of the **Insolvency Act**

2003 applied to him rendering him a person who in his own right was entitled to bring the Second JPL Application.

[135] Accordingly, for the reasons stated above, ground 3(a) of Mr. Wang's counterappeal fails.

(3) Bare Trust – XYZ Shares

[136] This was a major issue in the court below and likewise on appeal. The points and counterpoints regarding this issue are summarized above in some detail. The key question under this ground of appeal is: Did XYZ hold the XYZ shares on a bare trust for Mr. Wang, as the learned judge held? The learned judge dealt with this issue rather briefly in his ex tempore decision. This is one of the bases upon which FRE challenges the correctness of the learned judge's finding of a bare trust. However, it is FRE's case that the learned judge's finding of a bare trust was erroneous on several bases. FRE argues that not only was the judge's approach to this question flawed, but he failed to consider the threshold condition of whether there is a trust at all. Instead, he merely assumed erroneously there was a trust when, upon a proper analysis, there was not. Specifically, FRE points to the absence of any consideration by the judge of the XY Nominee Agreement governed by Swiss law, pursuant to which nominee agreement FRE states XYZ holds the XYZ shares. FRE also points to the absence of any expert evidence as to Swiss law on the question of whether the said agreement amounts to a bare trust, which it submits it is not.

[137] It is correct that in making a finding of bare trust, the learned judge did not conduct an in-depth analysis of the relevant facts or documentary evidence concerning the relationship in law between XYZ and Mr. Wang (if any), or between XY and Mr. Wang, in relation to the XYZ shares; nor did he consider the legal principles applicable to bare trusts under either Swiss law or English/BVI law. Accordingly, there is some merit in FRE's criticism of the rather perfunctory way in which the learned judge approached this issue and reached

his conclusion of a bare trust. In doing so, the judge essentially accepted the statement by counsel for Mr. Wang that there can be no real dispute that the XYZ shares are held by XYZ on a bare trust for Mr. Wang. He put it this way:

> "Moreover, as Mr. Collins for Mr. Wang has said, there can be no real dispute that XYZ holds shares on bare trust for Mr. Wang. XYZ has confirmed as much in writing. The reference in the bundle is B5/37/4110. Mr. Collins moreover says that XYZ's refusal to act is therefore sufficient in itself to open the way to a derivative claim by Mr. Wang."[52]

[138] The reference in the above extract to written confirmation by XYZ, is to a letter dated 1st June 2021 from the Relationship Manager at XYZ (London nominees) to Mr. Wang. The letter states, in material part: 'The above-mentioned securities [the XYZ shares] are held for your account but in the name of [XYZ] as registered shareholder.'[53]

[139] The evidential value of this letter on the question of the existence of a bare trust or any trust, was dealt with, to some extent, at paragraph 80 above. In my view, on a proper reading, it cannot be said that this this letter is evidence of confirmation from XYZ that it holds the XYZ shares for Mr. Wang on a bare trust or any trust. The statement on this letter is, at best, a representation by XYZ, the nominee of XY (Bank) that the securities mentioned therein (the XYZ shares in RAGOF) are being held in the name of XYZ 'for the account' of Mr. Wang. This statement is not, on its own, evidence confirmatory of the existence of a trust or a bare trust between XYZ and Mr. Wang, albeit it may be pointing to that kind of relationship in law as the basis by which XYZ holds beneficially the XYZ shares. Likewise, the letter, when coupled with other evidence pointing to the existence of a trust, may be considered, collectively, prima facie evidence of the existence of a bare trust between XYZ and Mr. Wang regarding the said shares. In this regard, it is important to note that the representation made in the letter comes from the subsidiary XYZ of XY, which latter Bank is a party to the XY

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[52] Transcript 20/07/23, p.33 lines 1-7.
[53] See Record of Appeal, Vol. 2, p. 674.

Nominee Agreement. It does not emanate from a third party or stranger to the arrangements and transactions leading to the XYZ shares being registered in the name of XYZ, which shares, it is accepted, are beneficially owned by Mr. Wang either directly or indirectly.

[140] It is therefore important to consider what other evidence, if any, was there before the judge below pointing to the existence of a bare trust between XYZ and Mr. Wang. This inquiry will lead inevitably to the documentary evidence before the court below, in particular, the XY Nominee Agreement. It will also lead inevitably to a consideration of what is the applicable law and whether there was before the judge below any acceptable or admissible evidence of fact as to what that law states about a bare trust and/or the effect of the XY Nominee Agreement. Ultimately, the question remains, whether there is sufficient evidence that, prima facie, a trust or bare trust exists between XYZ and Mr. Wang regarding the XYZ shares, as found by the judge.

[141] Before embarking upon this exercise, I would, for completeness, mention a related matter. Although this issue regarding the existence of a bare trust in relation to shares held beneficially in RAGOF, has centered only on the XYZ shares, Mr. Wang asserts that he owns beneficially about 97% of the issued shares in RAGOF. In this vein, the learned judge also addressed, very briefly in his ex tempore decision, the beneficial ownership by Mr. Wang of the 200 JB Shares:

> "Moreover, Mr. Wang is, it would appear, certainly for the purposes or as between BJB [Bank Julius Baer] and Mr. Wang, Mr. Wang is the underlying beneficial owner of those shares."[54]

[142] It is trite that a bare trust may come into existence by operation of law or as a result of a document or instrument the effect of which gives rise, in law, to a bare trust. In considering this issue, the starting point must be a consideration of the relevant documentary evidence before the judge below concerning the

[54] See Transcript 20/07/23, p. 31 lines 4-6.

XYZ shares in RAGOF, and how they came to be held beneficially in the name of XYZ. It is common ground between the parties in these proceedings, that while the legal interest in these shares is in the name of XYZ as the registered owner, it does not own them, but holds them beneficially of Mr. Wang.

[143] Before considering the documentary evidence, however, Mr. Wang argues a number of 'threshold' issues. The first is that the standard of proof required of him in the instant matter was not to have the court make a final or conclusive determination as to the existence of the trust. Instead, the judge below was required to be satisfied to the standard of a good prima facie case that a trust or bare trust existed between XYZ and Mr. Wang regarding the XYZ shares. This is because, on an interlocutory application to appoint JPLs, Mr. Wang need only show that he is 'likely to obtain a winding up order'.[55]

[144] I do not consider that this principle articulated by Mr. Wang with regard to the standard of proof at this interlocutory stage of the winding up proceedings, can be seriously disputed. That this is the correct position, is in keeping with the jurisdiction and power to be exercised by the court under section 170 of the **Insolvency Act 2003** to appoint provisional liquidators, upon being satisfied that to do so is 'necessary for the purpose of maintaining the value of assets owned or managed by the company'. Pursuant to section 170, the appointment of provisional liquidators is made pending the making of a winding up order appointing liquidators under section 162(1) of the **Insolvency Act 2003**. In considering an application to wind up a company, the court has a wide discretionary power under section 167 to make such order as it sees fit, including declining to make a winding up order, or dismissing the application, or making an interim order.

[55] See Re Union Accident Insurance Co. Ltd [1972] 1 All ER 1105 (Ch) at 1110; and RCC v Rochdale Drinks Distributors Ltd [2012] 1 BCLC 748 (CA) at [77].

[145] Mr. Wang raises another threshold point. It is that FRE is effectively estopped from contending that no trust exists. This, it is argued, is by virtue of FRE's pleading at paragraph 4.2 of its Amended Defence of a 'beneficial interest'; FRE's failure to challenge or to dispute the averment in Cameron 6 that Mr. Wang 'is the beneficial owner under a bare trust of the shares held by [XYZ]'; and FRE's failure in its skeleton argument below to dispute that Mr. Wang was the beneficial owner of the XYZ shares. I would point out that none of these points were considered by the judge when reasoning to his conclusion of a bare trust. These three points are also summarized and addressed in paragraphs 73 to 76 above. I adopt here and rely on what was said in those earlier paragraphs. In my considered view, for the reasons given, none of these points are sufficiently cogent to make it impermissible for FRE to argue in the appeal that the learned judge's conclusion or assumption of a bare trust between XYZ and Mr. Wang, was incorrect as a matter of the documentary evidence and the applicable law. However, taken singularly or collectively, the said pleading and evidential matters are of some value when considering, ultimately, the correctness of the judge's conclusion of a bare trust, as they are indicative of non-denials or express denials by FRE of statements or pleadings that the XYZ shares are held by XYZ beneficially on a bare trust or a trust for Mr. Wang.

[146] I now turn to deal with the documentary evidence before considering the issue of the applicable law. It is indisputable that XY is the Swiss parent of XYZ. However, they are two separate legal entities, XY is incorporated in Switzerland and XYZ in London, England. It is also indisputable that the XY Nominee Agreement referenced by FRE in its written submissions on this issue, is between XY and Mr. Wang. XYZ is not a party to the said agreement. The agreement is described on its face as an 'Agreement Concerning Transactions with Non-Traditional Investment Products (NTIP) by [XY]'. I shall, nevertheless, for brevity, continue to refer to it as the 'XY Nominee Agreement'. It is dated 27th March 2015 and is an agreement between XY (the Bank) and

Mr. Wang (the Client). It comprises some 18 clauses. However, for present purposes, I shall only reference a few of them.

[147] Clause 1 of the XY Nominee Agreement, importantly, deals with the 'scope' of the agreement. It provides (in part):

> "This agreement is applicable to the execution of instructions for the subscription, redemption, receipt, custody and the transfer (Transactions) of [NTIP] on behalf of and for the account of the Client [Mr. Wang] by and in the name of [XY], one of its depositories or nominee companies……'
> 'The Client accepts that the Bank's services associated with this agreement are essentially provided only under the terms of a pure safekeeping account relationship (so-called Execution-Only). This agreement, however, also covers Transactions executed on the basis of certain advisory services, in case such services are provided by the Bank to the Client. These advisory services may consist of general information, details about investment opportunities, markets, rates/market prices and also specific recommendations with respect to NTIP…"

[148] Clause 8, also important, sets out the nominee structure. It states:

> "8. Nominee Structure
> The Client is aware that NTIP Transactions are executed through a nominee structure. In this process, the units of the NTIP are held in collective custody in the name of the Bank [XY] or of its depositaries with the Issuer of the NTIP. This structure, where the Bank or one of its depositories is the registered unit holder, contains operational and legal implications for the Client, especially compared to the Client being registered directly with the NTIP. The Client hereby authorizes and officially appoints the Bank to appear as a unit holder formally acting on behalf of and for the account of the Client. The Bank must fulfill the required duty of due diligence in the selection, instruction and monitoring of the appointed third parties. Under no circumstances will the Bank be held liable in the case of slight negligence on the part of agents or associates as defined under art. 101 para 2 and 3 of the Swiss Code of Obligations."

[149] Clause 12 states (in part) -

> "12. Corporate Actions and Additional Product Information
> …….
> 'Clients note that, owing to the structure via which the NTIP units are held (in the name of the Bank, but on behalf of and on the account of the Client), they are not permitted to attend general, creditor or similar meetings (Clients are not granted power of attorney). In such cases, Clients can

instruct the Bank to have the NTIP units transferred to themselves or to a designated third party. …..'

'The Bank exercises the voting rights in accordance with the Client's instruction, only in written form and only insofar as this is possible in a form consolidated for the complete portfolios of the Client."

[150] And clause 15 (in material part) –

"15. Indemnification
'The Client undertakes to support and indemnify the Bank against all losses, liability and compensation claims, costs or expenses (including legal costs and expenses in connection with the defence or settlement of all claims, litigation or legal disputes), which the Bank effectively incurs in meeting its obligations, the exceptions being willful misconduct or gross negligence on the part of the Bank. ….'
…..

'The Bank will not engage in any legal action in connection with disputes concerning NTIP. In such cases, the Client can instruct the Bank to have the units transferred to the Client or to a designated third party. The Bank accepts no responsibility for any refusal by the Issuer to execute the transfer of units to the Client or to a designated third party. In these cases too, the Bank will not engage in any legal action against Issuers or third parties."

[151] As mentioned above, the XY Nominee Agreement is between XY (Bank) and Mr. Wang. However, it expressly provides for the units, the XYZ shares, to be held for an on behalf of the Client, Mr. Wang, either by XY 'or one of its depositories or nominees'. In the instant matter, the XYZ shares are in fact held by XY's depository or nominee company, XYZ, presumptively subject to the terms and conditions of the said agreement. From the stated scope of the XY Nominee Agreement, it is clear it concerns, generally, the executing or carrying out of written instructions by XY concerning the NTIPs which are held either by XY or by one of its depositories or nominees. In the instant matter, it is not in dispute that the NTIPs covered by this nominee agreement and to which it pertains, are the XYZ shares in RAGOF, which shares are held, not directly by XY, but by and in the name of its nominee/depository XYZ, subject to the terms and conditions of the said nominee agreement. The 'nominee structure' clause (clause 8), expressly provides for the NTIP Transactions to be executed through

a ‘nominee structure’, whereby the units of the NTIP are held in ‘collective custody’ in the name of XY or one of its depositories, with the Issuer, in this case RAGOF. Accordingly, by the structure provided for under this agreement, either the Bank [XY] or one of its depositories [XYZ] is the ‘registered unit holder’. Here the registered unit holder is XYZ, one of the depositories or nominees of XY.

[152] By clause 18 - ‘Place of Performance, Applicable Laws, and Place of Jurisdiction’, the XY Nominee Agreement is governed by ‘Swiss substantive law to the exclusion of the conflict of laws provisions of Swiss international private law’. This is an important provision on which FRE places much emphasis and reliance in its submissions. FRE posits that the consequence of this nominee agreement being governed by Swiss law, is that it required expert evidence of Swiss substantive law to be led by Mr. Wang in the court below. Absent this evidence of Swiss law concerning the nature and legal effect of this agreement before the learned judge and whether it creates or gives rise to a bare trust or any trust, it was wrong for the learned judge to conclude or to simply assume that the XYZ shares were held by XYZ on a bare trust for Mr. Wang. Further, in any event, this agreement on a proper construction, does not give rise to any trust under Swiss law much less to a bare trust, as found, incorrectly, FRE submits, by the learned judge.

[153] Mr. Wang, on the other hand, submits that this is wrong and impermissible. The gravamen of his submission is that FRE points to the ‘XY Nominee Agreement’, and wrongly treats it as an agreement between Mr. Wang and XYZ and, further, FRE’s reference in submissions to clause 13 and other provisions thereof, are entirely misplaced. Mr. Wang also posits that the correct position regarding the law applicable to any legal relationship between XYZ, an English company, and Mr. Wang, is English law and not Swiss law, as the reliance on the governing law clause of the XY Nominee Agreement, to which XYZ is not a party, cannot be correct. Furthermore, Mr. Wang argues, there is nothing in the

XY Nominee Agreement which is inconsistent with XYZ holding the XYZ shares on bare trust for Mr. Wang.

[154] In my considered view, there is merit in both sets of submissions and counterpoints. First, by the very terms of the XY Nominee Agreement, it was intended to govern, if not bind as a matter of contract, the relationship between not just Mr. Wang and XY, but also Mr. Wang and a depository or nominee of XY, in this case, XYZ. That relationship as provided for under the XY Nominee Agreement is one governed by Swiss law. In those circumstances, it is more than arguable that the relationship by which XYZ is the registered owner of the XYZ shares by appointment of its parent, XY, is governed by Swiss law. If this is not correct, it is also arguable that any such relationship between XYZ and Mr. Wang concerning the said shares, would be one governed by English law, being the place of incorporation and domicile of XYZ. If that position is also incorrect, then absent any evidence of Swiss law or English law, the default position would apply whereby BVI law relating to trusts and bare trusts would or ought to be applied. In this respect, there is no relevant difference between English law and BVI law in relation to bare trusts. Accordingly, this would be, in the end, a difference without any significance to the central question of whether XYZ held the XYZ shares on a bare trust for Mr. Wang.

[155] There are no written documents between XYZ and Mr. Wang. The only agreement concerning the XYZ shares is the XY Nominee Agreement between XY and Mr. Wang. This agreement provides for a 'nominee structure' whereby, in this instance, the XYZ shares are not held directly by XY, but by its depository or nominee, XYZ, in which name the NTIP (the XY shares) are registered with the Issuer, RAGOF. Under the terms of this agreement, that structure contains operational and legal implications for Mr. Wang with regard to the XYZ shares, as set out in the said agreement. Therefore, on its face, this nominee agreement, is one whereby XYZ is the instrumentality through which XY decides to hold the NTIP, the XYZ shares, the property beneficially owned by

Mr. Wang. Furthermore, clause 8 of the XY Nominee Agreement expressly purports to establish and to circumscribe the limits of the 'nominee structure' through and by which the XYZ shares were to be held in 'collective custody' in the name of XY (Bank) or one of its depositories (XYZ) with the Issuer (RAGOF).

[156] In my opinion, notwithstanding the that XYZ is not directly a party to the XY Nominee Agreement, it clearly holds the XYZ shares at the behest of its principal, XY, subject to and upon the terms and conditions of the said nominee agreement entered into by XY and Mr. Wang on 27th March 2015. In my view, it is well arguable, based upon BVI trust law principles, that this gives rise prima facie to the existence of a bare trust between XYZ as registered owner holding title to what is, admittedly, Mr. Wang's property. Further, it was not in my view necessary for the purposes of the Second JPL Application, for the learned judge to conclusively be satisfied that the XYZ shares are held by XYZ on a bare trust for Mr. Wang. He need only be satisfied that this point was well-arguable in order to allow Mr. Wang to proceed on a derivative basis to appoint JPLs. Viewed in this way, and absent any expert evidence as to Swiss law or English law, the learned judge was correct to conclude that it cannot be seriously disputed that XYZ holds the XYZ shares on bare trust for Mr. Wang.

[157] Indeed, XYZ is the person into whose hands the property of Mr. Wang is being held, as the letter dated 1st June 2021 states. By this letter, XYZ is confirming the very nominee structure provided for under and by virtue of the XY Nominee Agreement. This conclusion is further buttressed by the reliance by XYZ on the specific provision (quoted above) of clause 16 of the XY Nominee Agreement, stipulating as a condition, that XY (and it must also mean its depositories and nominee companies) will not engage in any legal action in connection with disputes concerning the XYZ shares. XYZ has been steadfast in declining to bring or to participate in this litigation, including the two rounds of appeals, or take over or be voluntarily made a party to these proceedings brought by Mr. Wang for appointment of receivers and provisional liquidators. In short, XYZ

has thus far adopted a non-participating posture in this litigation, apparently in reliance on the above provision in clause 16.

[158] For the reasons above, I conclude that the learned judge was correct, as a matter of BVI and/or English law, and as a matter of the terms of the XY Nominee Agreement itself, to conclude that there can be no real dispute that XYZ holds the XYZ shares on a bare trust for Mr. Wang, and that is sufficient to clear the way for Mr. Wang to bring a derivative claim. Accordingly, this ground of appeal by FRE also fails.

(4) Special Circumstances and Obstruction

[159] Having upheld the judge's finding of a bare trust, the question of whether there were special circumstances shown such as to enable Mr. Wang to bring a derivative action, would, strictly speaking, not be necessary. However, the judge below grounded his decision on the derivative standing issue on both the bare trust and special circumstances footings. Moreover, the parties have argued both limbs of the derivative standing issue in the appeal. For these reasons, and for the added reason that were this Court's decision on the finding of a bare trust to be incorrect, it would be necessary to also pronounce on the issue of special circumstances in this judgment in determining whether Mr. Wang was entitled to proceed derivatively in bringing the Second JPL Application. Accordingly, I now move on to address the 'special circumstances' issue.

Judge's Findings of Special Circumstances

[160] This issue is dealt with head on by the learned judge in his ex tempore decision.[56] The judge mused that this issue had been 'argued hotly' before him by the parties. However, he did not find it necessary to 'go through the elaborate points that were raised in argument'. He proceeded to identify five factors relied on by Mr. Wang in the Second JPL Application in seeking to satisfy him that

[56] See Transcript 20/07/23 pp. 30-32.

‘special circumstances’ were made out enabling Mr. Wang to proceed on the basis of derivative standing. These five factors are (with some edits):

> (1) “That [Bank Julius Baer] has purported to transfer the [JB Shares] which it holds to Mr. Wang and that also indicates that [Bank Julius Baer] had an intention to do so. Moreover, Mr. Wang is, it would appear, certainly for the purposes or as between [Bank Julius Baer] and Mr. Wang, Mr. Wang is the underlying beneficial owner of those shares.”
>
> (2) “[O]n the 1st of June 2023, Mr. Wang has brought legal proceedings to seek rectification of the share register [of RAGOF] to reflect his shareholding [the JB Shares]. I haven’t been told much about those proceedings, but equally I haven’t been told they are being dismissed in limine as hopeless.”
>
> (3) “Moreover, another special circumstance is that Mr. Wang is seeking, he says, through Lee 1, to be seeking a transfer of shares held by XYZ in legal proceedings. And Mr. Wang submits that FRE have been obstructing the transfers. The evidence is that they have been. It doesn’t just come down to not answering requests from Mr. Wang to register a transfer or to accept a Subscription Agreement in circumstances perhaps where it should have been Bank Julius Baer to have been making the requests. But there is some history which has been placed before me which indicates at any rate that Floreat individuals have been obstructing Mr. Wang’s attempts to become a member in his own right. And I must take the Applicant’s [Mr. Wang’s} evidence to that extent as true for this present purpose.”
>
> (4) “Furthermore, the evidence on behalf of the [Mr. Wang] is that XYZ has refused to bring proceedings in its own name and in that respect, [Mr. Wang] refers to a letter dated the 21st of December 2021 to that effect.”
>
> (5) “[Mr. Wang] further says that XYZ has indicated that it will not accept service but that it will stand on its rights to have service effected on it via the Hague Convention route. Although, by another letter dated the 16th of September 2022, XYZ has equally indicated that it will take a neutral position in the proceedings, presumably, that is, after such time as it has been properly served by the Hague Convention route.”

[161] The learned judge went on to surmise:

> “In a nutshell, the special circumstances are said to boil down to this, that Mr. Wang has tried to have the shares transferred to himself so that he could apply as a member, but that has not happened with Floreat individuals, FRE, trying to obstruct that and that XYZ has refused to bring proceedings in its own name; all the while, whilst RAGOF’s assets are at

risk of various forms of self-interested dealing by FRE entities and individuals."[57]

…

"In the meantime, there is a real and present risk of harm to RAGOF and therefore to Mr. Wang's interest, such that it is just for the beneficiary, that is Mr. Wang, to have the remedy of interim relief pending determination of the [winding-up] petition, warranting the appointment of Joint Provisional Liquidators."[58] (transcript p. 33, L. 15-21)

[162] It is clear from the above passages, that the learned judge found that there were 'special circumstances' shown to his satisfaction, so as to make it just that Mr. Wang be entitled to proceed derivatively as the beneficial owner of the XYZ shares and the JB Shares. These special circumstances were: (1) the attempts or steps taken by Mr. Wang, separately, to have the XYZ shares and JB Shares transferred into his name so as to give him standing in his own right as a 'member' of RAGOF, to apply to the BVI court for certain interim reliefs; (2) the attempts or steps taken by the Floreat individuals and FRE, to obstruct these steps and to block Mr. Wang from becoming a registered member; (3) the refusal by XYZ, as trustee of the XYZ shares, to bring proceedings in its own name or to take an active part in the extant proceedings to protect RAGOF and Mr. Wang's interest; and (4) the real and present risk (as the judge assessed it) of harm to RAGOF and to Mr. Wang's interest in RAGOF as the beneficial owner of the vast majority (97%) of the issued shares.

FRE's Submissions

[163] It is FRE's case on this issue, that the learned judge erred in finding there were special circumstances justifying Mr. Wang proceedings on a derivative basis. It is submitted that, in fact, there were no special circumstances made out by Mr. Wang in the Second JPL Application; and the four factors identified and relied on by the judge as constituting 'special circumstances' did not, as a matter of fact and law, constitute 'special circumstances.' Accordingly, the judge's finding on this issue was erroneous and ought to be set aside. In attempting to

[57] See Transcript 20/07/23, p. 32 lines 17-25.
[58] See Transcript 20/07/23, p. 33 lines15-21.

make good these submissions, FRE posits four points,[59] all of which are challenged and disputed by Mr. Wang in his submissions. They are: -

(i) Mr. Wang has never sought to have the XYZ shares transferred to himself.

(ii) While Mr. Wang did seek to have the JB Shares transferred to himself, he omitted to follow the correct procedure under the Articles of RAGOF, and sent invalid share transfer instruments to the independent directors of RAGOF, as accepted by the judge in the Decision, who (correctly) did not respond to his request.

(iii) The judge's finding that Floreat individuals and FRE have attempted to obstruct the transfer of any RAGOF shares from a nominee to Mr. Wang is incorrect. It was always open to Mr. Wang to obtain a transfer of shares held beneficially for him by Rothschild, Vontobel, Bank Julius Baer or EFG, and since September 2021 RAGOF has (by virtue of the court orders below) been in the control of JPLs selected by Mr. Wang and appointed by the court, even though two of the directors are still in office. However, he did not avail himself of the opportunity and did not put into motion the steps under the Articles to obtain approval of a proposed transfer of shares to himself. Moreover, any initial allegations about the lack of independence of the RAGOF directors have been withdrawn by Mr. Wang and one of the independent directors, Mr. Blackmore, has given evidence for Mr. Wang in the Cayman Proceedings.

(iv) Clause 15 of the XY Nominee Agreement which prohibits XY from engaging in any legal action in connection with the XYZ shares, is a condition of the bargain 'made by Mr. Wang and XYZ'. Accordingly, it is not correct that XYZ is refusing to act or to bring

[59] See para. 45 of FRE's Skeleton Arguments.

legal proceedings in order to thwart Mr. Wang. Moreover, if Mr. Wang wishes to 'sue in his capacity as the beneficial owner' of the XYZ shares, he must obtain a transfer of those shares to himself and sue in his own name. However, he has not tried to obtain such a transfer of the XYZ shares.

[164] In addition, FRE posits that the real reason why Mr. Wang has not 'progressed' the transfer of shares to himself, in accordance with RAGOF's Articles, is that he would have to certify that he was a qualifying or professional investor. This warranty would be contrary to what he may have signed in the past, and he has steadfastly maintained as a crucial part of his cross-jurisdictional litigation strategy, that he is not a 'professional investor'. This he has done as recently as in the Cayman Proceedings where, on Day 1 of the trial, his leading counsel stated that Floreat seeks to portray Mr. Wang as an experienced or professional investor, when he is not. FRE maintains that it is for this reason that Mr. Wang 'has still not given such a warranty' that he is a qualified investor; and has only recently, by solicitors' letter dated 23rd December 2022, indicated that he is 'willing to provide the warranties required to constitute him as a Qualified or Professional Investor'. FRE therefore contends that the judge erred as a matter of fact and law and his finding of 'special circumstances' must be set aside.

Mr. Wang's Submissions

[165] Mr. Wang's response to FRE's grounds of appeal and submissions on this issue, is that the learned judge's finding of special circumstances was correct and there is no basis upon which this Court can or ought to set it aside. It is submitted that in determining this issue, the learned judge was exercising a discretionary judgment as to whether Mr. Wang has standing on a derivative basis, and FRE has been unable to show any good basis upon which this Court can or ought to disturb the learned judge's assessment of the evidence and factual finding, and the exercise of discretion in concluding that it was just that Mr. Wang, as the beneficial owner of the shares, should be entitled to that

remedy. In support of this submission, Mr. Wang relies on the formulation of the applicable test in the decision of the UK Supreme Court in **Roberts v Gill & Co** (applied by this Court in **Paraskevaides**). Lord Collins at paragraph 46 put it this way:

> "… the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy…."

That this was the correct test cannot and is not disputed.

[166] Mr. Wang contends that FRE is seeking to challenge the learned judge's evaluation of the evidence and whether the matters, as found by him, were, in his assessment, 'sufficiently special', so that it would be 'just' for Mr. Wang to proceed on a derivative basis. This Mr. Wang submits, is a high bar and, in the instant matter, an impossible task and one which, in any event, FRE has failed to address let alone meet.[60]

[167] Regarding the proper approach to appellate restraint and the criterion to be applied when dealing with appeals from a judge's evaluation or assessment of the evidence, the weight to be given to certain factors, and appeals from the exercise of discretion, Mr. Wang relies on a number of authoritative pronouncements in several decisions of this Court and the Privy Council. One such decision is **Arricano Real Estate PLC v Stockman Interhold S.A.**,[61] where this Court reviewed and distilled the jurisprudence from its previous decisions and from certain English cases. Another decision cited is **Green Elite Ltd (in liquidation) v Mr. Fang Ankong et al**.[62] There, this Court explained that the question of 'how heavily each factor should be weighed in the balancing exercise is a matter for the judge at first instance and this Court ought to give great deference to the conclusion reached by the judge'.

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[60] See para. 17 of Mr. Wang's Skeleton Arguments.
[61] BVIHCMAP2021/0009 (delivered 8th February 2022, unreported) at para. 66.
[62] BVIHCMAP2019/0030 (delivered 11th June 2021, unreported).

[168] In **Ming Siu Hung v JF Ming Inc and another**,[63] Lord Briggs states:

> "A view that a judge should have given "more weight" to a relevant matter is not within the scope of appellate review. Matters of weight when exercising a discretion are for the judge, provided that his assessment of weight is not irrational."

[169] In **Hadmor Productions Ltd v Hamilton**,[64] Lord Diplock opined:

> "[i]t must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently."

[170] As to factual matters, Mr. Wang contends that FRE's assertion that he never sought to have the XYZ shares transferred to himself is wrong. Mr. Wang posits that, as explained in Lee 1 and Lee 2, following the Discharge Judgment, he renewed his efforts to have shares in RAGOF transferred to himself, but these efforts where obstructed by FRE, which sought to block the transfers taking place; and RAGOF's directors filed to respond to the several letters sent to them by his BVI lawyers requesting registration of transfers of shares. Mr. Wang points specifically to his claim in Claim No. 144/2021 (as explained and referred to in Lee 1 at paragraphs 12 and 18(vi) dealing with the 'Share Transfer Proceedings'). In brief, this case concerns rectification of the Register of Shares of RAGOF to have Mr. Wang registered as the owner of the JB Shares.

[171] On the issue of 'obstruction', found as a fact by the judge, Mr. Wang takes aim at FRE's submission that neither it or the Floreat individuals have in fact sought to obstruct the transfer of shares to him. He maintains that the evidence before the judge disclosed that FRE and the Floreat individuals have obstructed and continue to obstruct the transfer of the JB Shares to Mr. Wang. In this regard, Mr. Wang refers to a letter dated 8th September 2022 by which FRE, through its BVI lawyers, instead of leaving the matter of the registration of the shares sought to be transferred to the directors, wrote to the JPLs threatening that any

63 [2021] UKPC 1.
64 [1983] AC 191 at 220.

steps they would take to approve the transfer and to update the Register of Members of RAGOF, would constitute a contempt of court, and that any transfer to Mr. Wang would be invalid. Mr. Wang also referred to the fact that subsequent to the commencement of the Rectification Proceedings, FRE wrote to the JPLs on 13th June 2023 insisting, at length, that the JPLs defend those proceedings so that Mr. Wang's name was not entered in the Register of Members.

[172] Mr. Wang also takes issue with FRE's assertion that the real reason why Mr. Wang has not progressed the transfer to himself of various shares in RAGOF held beneficially, is because he wants to avoid having to warrant that he is a qualified or professional investor. In this regard, Mr. Wang refers to the evidence and the judge's finding that he had offered to do just that.[65] This is the reference by the judge to a letter dated 21st December 2022 from Mr. Wang's BVI lawyers to the directors of RAGOF seeking approval of the transfer of the JB Shares to himself, and his tendering of a Subscription Agreement 'which I am told warranted that he is a qualified investor'. Reference was also made to a letter dated 23rd December 2022 from Mr. Wang's BVI lawyers, in which he answered or addressed every one of FRE's objections; offered to sign a new subscription agreement 'tailored to reflect the fact that this was a transfer rather than new subscription'; and enclosing a draft agreement with the necessary certification. However, the directors failed to respond to this letter and so the matter did not progress, but not through any fault of Mr. Wang.[66]

[173] Further with regard to the continued attempt by FRE to block the transfer of the JB Shares to himself, Mr. Wang points to: (i) a letter dated 21st July 2023 from Julius Baer to RAGOF and the JPLs requesting consent to transfer the said shares to Mr. Wang; (ii) the order made 4th August 2023 by the learned judge in Claim No. 150/2021 confirming the JPLs power to approve and to carry into effect the transfer of the JB Shares pursuant to the Articles, including providing

[65] See Transcript 20/07/23, p. 28 lines 16-21.
[66] See para. 12 of Mr. Wang's Skeleton Arguments.

the required 'prior written approval' of Mr. Wang as transferee pursuant to Article 17.1.5; (iii) that on 4th August 2023 the JPLs approved the transfer of the JB Shares to Mr. Wang; (iv) on 7th August 2023 Julius Baer executed new instruments of transfer of the JB Shares to Mr. Wang; (v) on 11th August 2023, Mr. Wang executed the Subscription Agreement with the warranty as to his status as a 'professional investor', RAGOF accepted the subscription agreement and share transfer, and its Register of Members was updated to reflect Mr. Wang's shareholding in RAGOF; and (vi) consequently as of 11th August 2023 Mr. Wang, with the sanction of the court below, became a 'member' of RAGOF in his own right. This all notwithstanding, FRE on 21st August 2023 filed two applications in the BVI court. The first in Claim No. 150/2021 to set aside the order made by the learned judge on 4th August 202, and to declare 'null and void' the registration of the transfers of the JB Shares from Julius Baer to Mr. Wang; and the second, an application to intervene in the Rectification Proceedings, which proceedings Mr. Wang contend are now moot because of Mr. Wang's registration as a shareholder and member of RAGOF.

[174] It is further submitted that, in any event, the registration of Mr. Wang as the legal owner of the JB Shares, thereby imbuing him with the legal standing as a member of RAGOF, cannot now be set aside by FRE's challenge to the court's sanction given by order dated 4th August 2023. He argues that setting aside the sanction order of the court below, cannot result in setting aside the subsequent approval of the transfer or the registration of Mr. Wang as a member. The short point is that setting aside the sanction order 'would not set aside actions taken pursuant to it prior to it being set aside'. In support of this proposition, Mr. Wang cites the decision in **Barnes v Eastenders Cash & Carry plc**.[67] It is also submitted that the approval and registration can only be set aside if the JPLs acted fraudulently, in bad faith or in a way that 'was so utterly unreasonable and

[67] [2015] 1 AC 1 at paras. 73 and 84.

absurd that no reasonable man would have done it'.[68] Moreover, no suggestion has been made by FRE that the JPLs acted in bad faith or perversely when seeking sanction or acting on it when given by the court. Accordingly, submits Mr. Wang, his registration as a member of RAGOF 'is overwhelmingly likely to stand, irrespective of the challenge to the sanction' which, it is argued, is itself an abuse.[69]

[175] Mr. Wang argues that the above-stated attempts by FRE by its two 21st August 2021 applications to 'undo the registration' of Mr. Wang as a shareholder and member of RAGOF, is further evidence of FRE's continuing active obstruction of Mr. Wang's attempts and steps to become a registered shareholder. Accordingly, this 'means that Mr. Wang's derivative standing and his standing under section 2 of the Insolvency Act 2003 as holder of the signed instruments of transfer from Julius Baer (whether or not registered) remains live issues which require determination'.[70] Furthermore, it is submitted, what this recent conduct shows is that 'FRE is determined to do whatever it can to prevent Mr. Wang (who is the 97% beneficial owner of RAGOF) from ever being able to seek remedy for Floreat's abuse of RAGOF'. Finally, Mr. Wang surmises that the various conduct of and steps taken by FRE to prevent or to obstruct Mr. Wang becoming a registered member of RAGOF, is the BVI equivalent of the 'skillfully executed strategy' that Floreat sought to deploy in the Cayman Proceedings. For all these reasons FRE's appeal against the learned judge's decision that Mr. Wang has derivative standing to seek appointment of JPLs to RAGOF, ought to fail.

Analysis and Conclusion on Special Circumstances

[176] The test as to whether there are special circumstances entitling a beneficiary of an estate to bring a derivative action, is as formulated by Lord Collins in **Roberts v Gill & Co** in the extract at paragraph 165 above. The essential elements are

[68] Re Edennote Ltd [1996] BCC 718 per Nourse LJ at 722.
[69] See para. 14.2 of Mr. Wang's Skeleton Arguments.
[70] See para. 15.2 of Mr. Wang's Skeleton Arguments.

twofold. (1) The circumstances must be sufficiently special to warrant the beneficiary proceeding on a derivative basis; and (2) it must be just, in the circumstances, for the beneficiary to proceed on a derivative basis. For this category of 'derivative claims' certain factors need to be present. They are: (1) the existence of a trust other than a bare trust; (2) some asset or property of the trust estate in need of protection; (3) the trustee is unable or unwilling to act to protect the trust estate; and (4) the beneficiary claimant must be at least one of the beneficiaries capable of acting to protect the trust estate, but he/she need not be the only beneficiary capable of so acting. The court is called upon to assess whether the circumstances are sufficiently special to warrant the beneficiary bringing a derivative action and that 'justice' requires that the claimant beneficiary should be allowed to pursue the remedy in the court and have the question or questions in issue decided by the court.

[177] In **Hayim**, Lord Templeman in the Privy Council stated:

> "These authorities demonstrate that a beneficiary has no cause of action against a third party save in exceptional circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owned (sic) by the trustee to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate."
>
> "…when a trustee commits a breach of trust or is involved in a conflict of interest and duty or in other exceptional circumstances a beneficiary may be allowed to sue a third party in the place of the trustee. But a beneficiary allowed to take proceedings cannot be in a better position than a trustee carrying out his duties in a proper manner."

[178] Finally, on the law, in **Paraskevaides**, Carrington JA [Ag.] opined:

> "The essence of the derivative claim, as stated by the Privy Council in Royal Brunei Airlines Sdn Bhd v Tan, is that the rights of action by the trustees against third parties form part of the property of the estate and can be enforced by beneficiaries "in a suitable case if the trustees are unable or unwilling to do so."…
>
> If the failure by a trustee to protect the estate satisfies the requirement of special circumstances, it would seem to me to be properly arguable that the absence of a trustee to protect the estate should also satisfy this

> requirement as both situations lead to similar results; that is, that no steps are being taken to protect an estate that is under attack by a third party."

[179] In my considered view, there is no basis, whether of law or fact, to disturb the finding by the learned judge that there were 'special circumstances' shown on the evidence for Mr. Wang, the beneficial owner of the XYZ shares and the JB Shares, to have derivative standing to seek the appointment of JPLs, and to proceed with Claim No. 150/2021 derivatively. FRE has not, in its grounds of appeal and submissions before this Court, shown to the requisite standard for appellate interference, that the learned judge's finding was patently wrong or that his assessment of the factual evidence so incorrect as to render it not just for Mr. Wang to have this remedy.

[180] In considering the issue of 'special circumstances', the learned judge was cognizant of and applied the test or principles set out in the passage from **Robert v Gill & Co** at paragraph 165 above and applied by this Court in **Paraskevaides**. He properly assessed and weighed the factors relied on by Mr. Wang as amounting to circumstances that were 'sufficiently special'. He determined, in his evaluation and judgment, that it was 'just', in all the circumstances, for Mr. Wang, as the beneficiary of shares in RAGOF, to be able to proceed derivatively. This conclusion was reached in the exercise by the learned judge of his undoubted discretion, and FRE has not shown any cogent or solid basis upon which this Court can or ought to interfere.

[181] The four factors found and relied upon by the learned judge are, in my view, grounded in the evidence and clearly sufficiently special, in the circumstances of this case, to imbue Mr. Wang with the derivative standing necessary to bring the Second JPL Application, and to obtain the reliefs sought therein. As to the first factor, it is clear from the affidavit evidence and documents that Mr. Wang took steps to have both the XYZ shares and JB Shares transferred to himself, in order to enable him to be a registered member of RAGOF entitled, in his own right, to bring an action to protect RAGOF, its assets, and his interests. As to

the second factor, the judge was correct to find on the evidence before him that FRE and or the Floreat individuals had sought to obstruct or block Mr. Wang's efforts to be registered as a member of RAGOF.

[182] Indeed, on the evidence, it may be reasonable to conclude, without deciding, that these obstructive efforts have continued after the learned judge's decision under appeal. FRE resorted to having its BVI lawyers write letters challenging the correctness of Mr. Wang's request to be registered as a member of RAGOF, by questioning the validity of the instruments of transfer of the JB Shares from Julius Baer to him. As is readily apparent, FRE is not a participating shareholder of RAGOF, but nevertheless by their actions purported to intervene in the registration process and the discharge by the directors of their functions and duties under the relevant Articles. This is so regardless of where the merits lie when those Articles are properly considered and applied. Likewise, FRE seeks to challenge the 4th August 2023 order of the learned judge and to have it set aside. They also seek to compel the JPLs to defend the Rectification Claim brought by Mr. Wang. However, if FRE's appeal is unsuccessful, those proceedings would be rendered otiose, as Mr. Wang has been registered as a member of RAGOF entitled to continue to pursue Claim No. 150/2021.

[183] As to the third factor relied on by the judge, while strictly speaking it may not be correct to say that XYZ has 'refused' to act to protect the assets of RAGOF, it is correct that it has declined to do so or to participate in the extant proceedings before the courts in BVI initiated by Mr. Wang. This position was apparently taken by XYZ on the basis that it is not under any obligation to do so and is not required to do so pursuant to clause 15 of the XY Nominee Agreement. If correct, this would mean, in practical terms, that it is not possible for XYZ as the legal owner of the XYZ shares, to act in the circumstances. In my opinion, this leads to the same result whereby the trustee is unable or unwilling to act, and is enough to justify Mr. Wang, as the beneficial owner of the shares, proceeding on a derivative standing basis.

[184] The fourth factor relied on by the judge in making his finding of 'special circumstances' justifying Mr. Wang proceeding on a derivative basis, is that there was a real and present risk of harm to RAGOF if Mr. Wang, as the beneficial owner of 97% of RAGOF, is unable to proceed on a derivative basis to protect the assets of RAGOF and his interest therein. This factor rests on the learned judge's assessment of the risk. As a matter of principle, this Court ought to pay deference to the learned judge's conclusion on this issue. His evaluative judgment ought to be respected and upheld by this Court unless it has been shown to be blatantly wrong, and FRE has not been able to show that it is. There was ample evidence before the learned judge upon which he could reasonably have reached that judgment and conclusion. Moreover, this finding goes directly to the important question of whether it was 'just' to allow Mr. Wang, as the beneficial owner, to have that remedy by proceeding on a derivative basis. This question is a matter of the exercise by the learned judge of discretionary judgment, as Mr. Wang submits. FRE has not shown any cogent or good reason why that exercise of discretion ought to be set aside, and I decline to do so.

[185] For the reasons above, I decline to set aside the learned judge's finding of 'special circumstances' and FRE's ground of appeal on this issue fails.

Issue 2 – Abuse of Process and no new evidence
FRE's Submissions

(**1) Abuse of Process**

[186] Ground 2 of FRE's appeal – the 'abuse of process ground' - raises a number of issues or sub-grounds. Firstly, FRE argues that the Second JPL Application for appointment of JPLs, having been brought after the First JPL Application which ultimately failed at the inter partes hearing below and on appeal, was or amounted to an abuse of the court's process, and on this basis alone ought to have been dismissed by the learned judge. Secondly, FRE contends that the general principle is that the consequences of a non-innocent breach of the duty

of full and frank disclosure, save in exceptional circumstances, is penal, that is the discharge of any order obtained ex parte without a regrant, and the judge erred in his approach to the Second JPL Application which he ought to have dismissed as 'abusive interlocutory re-litigation'. Thirdly, it is submitted that none of the material relied on by Mr. Wang in support of the Second JPL Application met the hurdle of demonstrating a 'very substantial material change of circumstances' justifying the grant of essentially the same order that had been previously discharged and not regranted by the court below, and which decision was upheld by the First Appeal Judgment.

Interlocutory re-litigation abusive -the law and principles

[187] FRE submits that interlocutory re-litigation is abusive as it offends the principle of res judicata. This type of re-litigation, as was explained by Lord Sumption in **Virgin Atlantic Airways Ltd v Zodiac Seats (UK) Ltd**,[71] encompasses different legal doctrines. The first is 'issue estoppel', which is where a previously decided issue between the same parties is common to an issue to be decided in a subsequent application or claim. The second is the doctrine of 'abuse of process' in accordance with the rule in **Henderson v Henderson**,[72] where a point was raised in later proceedings that had been raised in earlier proceedings between the same parties. It is FRE's submission that these two types of abuse sometimes overlap and they undergird two distinct public doctrines. The first is 'finality of litigation' and the second is the principle that parties should not be 'vexed twice on the same cause'.

[188] FRE also cites the recent decision of the English Court of Appeal in **Koza Limited and another v Koza Altin Isletmeleri AS**[73] as authority for the proposition that there are two types of 'abuse of process', namely, 'Henderson

[71] [2013] UKSC 46 at para. 17.
[72] (1843) 3 Hare 100.
[73] [2020] EWCA Civ 1018 at paras. 30 to 42.

abuse'; and where there is collateral attack on a final decision of another court – 'Hunter abuse' (**Hunter v Chief Constable of the West Midlands Police**).[74]

[189] Specifically with regard to interlocutory matters, FRE placed much reliance on this passage from the decision of the English Court of Appeal in **Chanel Ltd. v F.W. Woolworth Co. Ltd and others**[75] (cited approvingly in Koza) –

> "The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change in circumstances or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position."

[190] In **Koza**, it was observed:

> "The Henderson and Hunter principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing… There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to ne applied to interlocutory hearings. In every case the principles are those identified in paragraphs [30] to [40] above, the application of which will reflect that within a single set of proceedings, a party should generally bring forward in argument all points reasonably available to him at the first opportunity; and that to allow him to take them serially in subsequent applications would generally permit abuse in the form of unfair harassment of the other party and obstruction of the efficacy of the judicial process by determining the necessary finality of unappealed interlocutory decisions."

[74] [1982] AC 529.
[75] [1981] 1 WLR 485.

[191] Certain important principles can be extracted from the passage quoted from **Koza** above. First, both the **Henderson** 'abuse of process' principle and the **Hunter** 'collateral attack' principle, apply with equal force to interlocutory proceedings as they do to final decisions. This is so as a matter of public policy. Second, both principles – abuse of process and collateral attack – apply, with equal force, not just to points taken in the earlier proceedings which are either the same or substantially the same as points taken in the subsequent proceedings, but also to points which could have been taken in the earlier proceedings that are now sought to be taken and relied upon in the subsequent or second proceeding, involving the same parties. Third, a party will not be permitted to re-litigate the same issue or points or to seek the same relief in interlocutory proceedings absent a 'significant and material change of circumstances' or 'facts which he did not know or could not reasonably have discovered' at the time of the first proceeding. Fourth, properly viewed, the test to be applied is the same for interlocutory proceedings as it is for final proceedings. Fifth, a party seeking to rely on the same point or to seek the same relief in the second interlocutory proceedings as it did or ought to have done in the first interlocutory proceedings, amounts to an abuse of process and an impermissible obstruction of the efficacy of the judicial process. Sixth, the **Hunter** and **Henderson** principles do not exclude a second interlocutory application for the same relief involving the same parties, but the applicant in the second application must satisfy the test and that there is a 'significant or material change of circumstances' or his justifiable lack of knowledge of material facts at the time of the First JPL Application. Seventh, when viewed in the round, these principles are important tenets of and central to the principle of res judicata upon which our civil law legal system is grounded.

(3) Effect of the consequence of non-innocent breach of duty of full and frank disclosure

[192] FRE submits that the learned judge ought to have dismissed the Second JPL Application as abusive re-litigation proceedings, because the Second JPL

Application seeks exactly the same relief as the First JPL Application, and the order granting the First JPL Application was discharged without re-grant, which decision was upheld on appeal. It is FRE's case, that in entertaining the Second JPL Application, the judge failed to recognise that it offended the **Hunter** and **Henderson** principles, and the penal approach which courts take to breaches of the duty of full and frank disclosure, and to the re-grant of ex parte orders. In this regard, it is submitted that the learned judge wrongly held that these principles were not engaged on the Second JPL Application since the said application was not for a re-grant, but a fresh application. FRE argues that this is a distinction without a difference because the Second JPL Application was for the same relief as the First JPL Application; and, in substance, the Second JPL Application was for a re-grant of this relief. In not appreciating this and in not approaching the Second JPL Application in this way, FRE submits, that the judge erred such that his decision on the Second JPL Application ought to be set aside.[76]

[193] FRE also argues that the Second JPL Application was a 'paradigm example of Hunter abuse, as an impermissible collateral attack' on the decisions discharging the ex parte order without re-grant, and upholding that decision on appeal. It is also contended that the Second JPL Application was an impermissible departure from the penal consequences for non-innocent breaches of the duty of full and frank disclosure, as upheld by this Court in the First Appeal Judgment.[77] In short, it is abusive and impermissible, says FRE, for Mr. Wang to seek to avoid the decisions of the Commercial Court and this Court, that the consequence of the breach of the duty of full and frank disclosure is that the first order, obtained ex parte, appointing JPLs, be discharged and not regranted, and to do so by seeking to obtain the same relief by way of a fresh application – the Second JPL Application.

[76] See para. 57 of FRE's Skeleton Arguments.
[77] See para. 220, affirming the principles in Tugushev v Orlov [2019] EWHC 2021 (Comm).

[194] FRE argues that having regard to the abuse of court principles in **Hunter** and **Henderson**, and the penal approach in **Tugushev** to non-innocent breaches of the duty of full and frank disclosure, the judge below ought to have applied a high threshold before allowing the Second JPL Application. This high threshold was not met by Mr. Wang. This is because it 'will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged', and not regranted. The same relief should only be granted on a fresh application where there is shown to be 'very substantial and exceptional material change of circumstances such that justice requires reconsideration of the issue of regrant'. It is submitted that the learned judge erred in not imposing such a high threshold when granting the new order appointing JPLs.

[195] Additionally, FRE submits that, in any event, the material relied on by the learned judge was 'almost entirely the same material' that was before the Court of Appeal in the three **Ladd v Marshall** applications when the Court considered whether or not to regrant the First JPL Order. The evidence which the learned judge characterized as 'new and fuller', had been considered by the Court of Appeal in the First Appeal Judgment when determining not to regrant the First JPL Order because of the penal consequences of non-innocent breaches of the duty of full and frank disclosure. In short, Mr. Wang was denied regrant by the Court of Appeal on the same alleged 'further evidence', on the basis that this evidence was not sufficiently material to override the strong public policy interests in punishing breaches of the duty of full and frank disclosure, but Mr. Wang was, by the decision on the Second JPL Application, wrongly permitted, just weeks later to obtain a nearly identical order.

[196] FRE further submits that the Second JPL Order is also a paradigm example of **Henderson** abuse, in that the material relied on did not establish any 'significant and material change of circumstances', justifying him applying a second time for relief which he could have applied for in September 2021, January and

February 2022 or September 2022. Further, the said material is not 'meaningfully new', as it is very similar to evidence already put forward in the First JPL Application by Mr. Wang.

[197] In support of its submission that the evidence did not constitute a material change of circumstances, FRE, at paragraph 63 of its written appeal submissions, catalogues the judge's reliance on some six matters as constituting a material change of circumstances, and sought to demonstrate why they were not, either individually or collectively. These are: (i) the value of the Springs Farm property and the evidence from the Cayman Proceedings indicating that it was worth 4.1 million pounds less than when it was purchased; (ii) the alleged 'profligate spending' on H. Otaibi's personal enjoyment of Springs Farm; (iii) the finding of the Cayman judge that there was 'clear evidence that Springs Farm was for some years used for private purposes without Mr. Wang knowing it was a RAGOF property'; (iv) evidence that the Deed of Indemnity was not in RAGOF's interest as supported by the testimony of Mr. Whitworth in the Cayman Proceedings; (v) evidence that the Aviation Notes were not a permitted investment; and (vi) evidence that the Floreat principals stood to personally benefit from the sale of the Aviation Notes, as recognized by the judge in the Cayman Proceedings. It is FRE's position that none of these matters or pieces of purported evidence constituted a significant or material change in circumstances justifying re-litigation by way of the Second JPL Application, as they were all matters which were covered by the First JPL Application, and the unsuccessful **Ladd v Marshall** applications in the First Appeal.

[198] FRE also takes aim at the inexplicable position that the Second JPL Order could be granted by the judge in circumstances where, just over a month before the Second JPL Application was heard, the Court of Appeal, with the benefit of most of the so-called 'new' evidence, refused to regrant the First JPL Order, on the express basis that its discharge and refusal to regrant, was a necessary penal

sanction to deter breaches of the duty of full and frank disclosure. Accordingly, it is FRE's case on this issue, that none of the material put before the learned judge by Mr. Wang in support of his Second JPL Application met the threshold of a very substantial and material change of circumstances, justifying the grant of the Second JPL Order in circumstances where the First JPL Order had been discharged and not regranted. Further, as recognized by the Court of Appeal, the purported new evidence sought to be adduced on appeal in the three **Ladd v Marshall** applications, would not have had a material effect on the outcome of the case, and was accordingly rejected.

Mr. Wang's Submissions
The Law

[199] Mr. Wang agrees, and there is no dispute, that the 'abuse of process' doctrine, in particular, **Hunter** abuse and **Henderson** abuse principles, apply in interlocutory proceedings, including proceedings under the **Insolvency Act 2003** to appoint provisional liquidators. This doctrine requires that 'a party should generally bring forward in argument all points reasonably available to him at the first opportunity'.[78] Mr. Wang also underscores the point that the abuse principles come with an important qualification. This is that a second or subsequent application will not be abusive where there is 'a significant and material change in circumstances' or the applicant 'becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing'. Moreover, the policy which underlines these principles is the protection of 'the necessary finality of unappealed interlocutory decisions'. These points are uncontroversial.

[200] However, Mr. Wang submits that, in the context of an appeal, it is important for an appellate court to bear in mind the 'fact sensitive and evaluative nature of the decision', as to whether the procedural bar consequent upon the abuse of process doctrine should apply in a given case. Accordingly, the assessment as

[78] See Koza Ltd v Koza Altin Isletmeleri.

to whether abuse of process is present in a given set of circumstances, requires 'a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case'.[79] Viewed in this way, it is these types of circumstances which call for appellate restraint and deference to the decision and assessment of the first instance judge.

Mr. Wang's alleged abusive interlocutory re-litigation

[201] It is Mr. Wang's submission that the judge below did not err in considering the Second JPL Application to be a 'fresh' inter partes interlocutory application, and not, as FRE contends, as something analogous to a second determination or re-run of, essentially, of the first ex parte application, in so far as it concerns the regrant of the first ex parte JPL order discharged for breaches of the duty of full and frank disclosure. Moreover, it is submitted, the granting of the Second JPL Order the subject of this appeal, was in no way inconsistent with nor did it in any way undermine the 2022 ex parte JPL Discharge. Likewise, it did not in any way undermine this Court's decision upholding the judge's discharge order, or its rejection of the three **Ladd v Marshall** applications.

[202] My Wang submits that FRE's submissions wrongly conflate the inquiry in the court below as to whether there is a material change of circumstances or new evidence, with the very different question of the refusal by this Court in the First Appeal to admit fresh evidence pursuant to the **Ladd v Marshall** applications. The granting of the Second JPL Order in 2023 is not inconsistent with, and does not undermine the 2022 Discharge Decision of the first JPL ex parte order, this Court's dismissal of the appeal from that decision, or this Court's rejection of the three **Ladd v Marshall** applications.

[203] Mr. Wang also characterizes FRE's submissions as being conceptually muddled, wrong as a matter of law, and wrong in their criticism of the learned judge. Whether to regrant an ex parte order discharged at the return date,

[79] Per Lord Bingham in Johnson v Gore Wood & Co [2002] 2 AC 1 (HL) at para. 31.

involves a specific jurisdiction governed by specific principles developed in the context of the duty of full and frank disclosure, as stated authoritatively in **Brink's Mat Ltd v Elcombe**.[80] In support of this proposition, Mr. Wang points to the two-fold purpose for discharging an ex parte order in cases of breach of the duty of full and frank disclosure: 'It will deprive the wrongdoer of an advantage improperly obtained …[b]ut it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty.'

[204] Also, says Mr. Wang, in regulating the admission of new evidence on appeal under the **Ladd v Marshall** criteria, the appellate court applies a restrictive approach, especially in the application of the first and second criteria. Importantly, the first criterion is that the evidence sought to be adduced must have existed at the time of the trial or the hearing, but could not have been obtained with reasonable diligence on the part of the applicant. Also, importantly, the second criterion is whether the evidence sought to be adduced on appeal would have an important bearing or influence on the determination of the issue or issues before the court. In this regard, FRE relies on this passage from the decision of this Court in the First Appeal Judgment at paragraph 79:

> "To satisfy the first criteria, the basic principle is that the evidence sought to be relied on must have existed at the time of the trial or hearing, but could not have been obtained with reasonable diligence by the appellant, but in 'exceptional circumstances, the court has a discretion to admit, at the appellate stage, evidence which did not exist (essentially 'new evidence'). However, 'such circumstances are exceptional, and there must be compelling reasons why 'new' evidence ought to be admitted."

[205] Mr. Wang submits that, by contrast, the purpose of the 'abuse of process' doctrine is to regulate subsequent applications at first instance. However, it is not concerned with maintaining the appropriate degree of appellate restraint, and the approach to 'new evidence' or material change in circumstances, is

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[80] [1988] 1 WLR 1350.

entirely different from the **Ladd v Marshall** principles. It is submitted that it is incorrect to say that a party making a second application has to show 'exceptional circumstances'. To the contrary, the test is whether there has been a change in circumstances that is 'significant and material'. This approach is intended to allow the court considering the second application, to evaluate the new evidence and to determine whether in the new circumstances the result should not be different to that of the First JPL Application. Accordingly, it is submitted that the fact that the Court of Appeal dismissed the **Ladd v Marshall** applications, is and was irrelevant to the different question of whether the Second JPL Application was abusive, viz, whether there was a significant and material change of circumstances or the applicant has become aware of facts which he/she did not know and could not reasonably have discovered at the time of the First JPL Application.

[206] Mr. Wang posits that the decision to grant the Second JPL Application does not cut across the finality of the penal aspect of the judge's earlier decision to discharge the first ex parte JPL order and not to regrant it; nor is the deterrent aspect of the penal discharge diminished. This is so because a decision to discharge an ex parte order obtained in breach of the duty of full and frank disclosure does not mean that the ex parte order should not have been made. It simply deprives the wrongdoer of an advantage improperly obtained and serves as a deterrent to others who make ex parte applications.

[207] Mr. Wang takes issue with FRE's criticisms of the judge's characterization of the evidence as 'new'. It is submitted that the determination of whether a given piece of evidence or category of evidence is 'sufficient' in terms of the test to be applied in the abuse of process doctrine, such as to justify a subsequent application, is a question of 'evidential evaluation', which is a matter for the first instance judge, to whom the Court of Appeal will give considerable deference. It is also submitted that FRE's contentions that the material identified by the judge was not 'materially new' are wrong, and none of the three reasons

advanced by FRE are sufficient to disturb the learned judge's evaluation of the material before him. Mr. Wang's analysis and submissions in response to these criticisms are set out in considerable detail at paragraphs 61 and 62 of his appeal submissions. These do not bear repeating here, and are to be considered as read.

Analysis and Conclusions – Abuse of Process

[208] I now proceed to analyze the parties' submissions and counterpoints on the issue of 'abuse of process'. Regarding the application or non-application of the rule in **Hollington v Hewthorn** to interlocutory proceedings (FRE's ground 3) and the parties' submissions thereon, I shall also address this issue, but fairly briefly, after dealing with the abuse of process issue, as it can, or potentially could, have some bearing on whether Mr. Wang had demonstrated evidentially a significant and material change of circumstances or new evidence when bringing the Second JPL Application.

(1) The law of abuse of process and the threshold test in interlocutory proceedings

[209] Much of the principles applicable to the doctrine of 'abuse of process' have been traversed by the parties in their written and oral submissions before this Court, including the underlying rationale and public interest component of the doctrine. The parties are in agreement that the principles relating to abuse, both in the **Henderson** and **Hunter** categories of abuse, were thoroughly reviewed and distilled by the English Court of Appeal in **Koza**. The parties are also ad idem that these principles and the applicable threshold test to disapply the doctrine, apply with equal force to interlocutory decisions as they do to final decisions. The parties are also ad idem on the specific **Hunter** abuse and **Henderson** abuse principles, and that in certain circumstances, there may be an overlap between these two types or categories of abuse. As to what is the correct test to be applied in interlocutory matters to disapply the abuse of court doctrine, the parties, while referring to the formulation of the test in **Koza**, differ at times in

the way in which they have sought to express this test in written submissions. In this respect, Mr. Wang has accused FRE of, at times, restating the test incorrectly, and thereby attributing to it a much higher threshold than the relevant authorities demonstrate. In my considered view, there is merit in this criticism.

[210] In **Chanel v Woolworth**, a case concerning the infringement of registered trademarks and passing-off, the English Court of Appeal dismissed an application for leave to appeal from a first instance decision. In giving the decision of the court, Buckley LJ opined:

> "…the defendants, are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adjournment, which they would probably have obtained. Even in interlocutory matters a [party] cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position."

[211] It is to be noted that, as formulated in **Chanel**, the first limb of the threshold test as to whether a subsequent application concerning the same relief is an abuse of court, is that there must be a 'significant' change of circumstances or new evidence. In **Koza**, (on which both parties rely) Popplewell LJ's formulation of the threshold test is 'significant and material'. At paragraph 42, the Lord Justice summed up the rationale for and application of the **Henderson** and **Hunter** abuse of court principles to interlocutory decisions in this way:

> "In my judgment the tension is more apparent than real. The Henderson and Hunter principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This is not a departure from the principle in

> Johnson v Gore Wood that it is not sufficient to establish that a point could have been taken on an earlier occasion, but a recognition that where it should have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive."

[212] I am of the view that there is no real or material difference between these two similar formulations of the threshold test to be deployed when determining whether a subsequent application runs afoul of the abuse of process doctrine, whether of the **Henderson** or **Hunter** type. Put simply, in order for a change of circumstances to be 'significant', it or they must clearly be 'material' to the matters in issue in both the first and second applications. It is difficult to conceive of circumstances or factual matters being considered by a court to be 'significant', but at the same time not 'material' to the matters in issue on both the first and second applications.

[213] With that said, it is clearly understood from the authorities that the preferred and accepted formulation of the threshold test as to whether the abuse of court principles apply or not in relation to a subsequent application seeking the same or similar relief, is as formulated in **Koza**. This is the most recent authoritative formulation, and one which has been adopted and applied in subsequent decisions, including of this Court. Accordingly, a subsequent interlocutory application involving the same parties and regarding the same or similar relief and/or issues and/or points (including points which could or ought to have been taken in the first proceedings) will run afoul of the abuse of court principles (whether of the **Henderson** or **Hunter** type), unless the applicant can satisfy the court that it does not on one of two bases. The first is where the applicant in the second application can show that there has been some 'significant and material' change of circumstances from when the first or earlier application was decided; and the second, is where the applicant can put before the court 'new' evidence, in the way that expression is used in the said authorities, that is evidence which the applicant did not know and could not reasonably have discovered at the time of the first hearing. The threshold test is not, as FRE

suggests at paragraph 59 of its written submissions, '<u>very substantial and exceptional material change</u> of circumstances such that justice requires reconsideration of the issue of regrant'.

Findings of the learned judge

[214] Having found that XYZ held the XYZ shares in RAGOF on a bare trust for Mr. Wang entitling him to proceed derivatively and having also found that 'special circumstances' were made out by Mr. Wang warranting him proceeding on a derivative basis to bring the Second JPL Application, the learned judge went on to consider certain 'other aspects' of the matter before him as argued by counsel for both parties.

Ladd v Marshall Point

[215] The first of these is the **Ladd v Marshall** point. In my considered view there is nothing to this point raised by FRE. Put simply, the dismissal of the three **Ladd v Marshall** applications to adduce fresh or purportedly new evidence before the Court of Appeal in support of Mr. Wang's appeal, does not operate to exclude or to prevent such materials, if relevant, from being relied on before the first instance judge on the Second JPL Application, in support of the contention that there had been a 'significant and material' change of circumstances from when the First JPL Application was adjudicated, the ex parte order discharged by the judge, and the appeal therefrom also dismissed.

[216] FRE's argument before the judge on the Second JPL Application was that Mr. Wang, while not relying on this evidence before the judge on the First JPL Application, failed to have the evidence or materials sought to be adduced in the appeal allowed, and therefore, to seek to rely on that evidence or materials in support of the Second JPL Application, is an abuse of process and should not have been allowed by the judge below. This argument was roundly rejected by the learned judge in his ex tempore decision as being 'misconceived'. In reaching this conclusion, the learned judge considered the purpose of the

Ladd v Marshall principles as stated in this Court's judgment in **Flavio Maluf v Durant International Corp**. **and another**[81] There, Farara JA [Ag.], at paragraph 26 posited, inter alia, that the purpose of the three criteria in the **Ladd v Marshall** test for the admission on appeal of fresh evidence 'is intended to ensure that the important requirements of finality to litigation and a court managing litigation justly and proportionately are adhered to and are only to be derogated from in circumstances where the application to adduce fresh evidence satisfies all three requirements for admission'. Of course, the three **Ladd v Marshall** criteria are not hard and fast rules or conditions and their application in a given circumstance, must be tempered to some extent by the court's overriding objective to manage cases justly.

[217] In my view, the learned judge correctly observed that the **Ladd v Marshall** criteria 'is designed to preserve the integrity of an appellate court as a review court and that proceedings before the appellate court are not intended to be a rolling continuation of an application begun before the lower court'. Accordingly, I reject this point raised by FRE in its submissions. In doing so, I adopt as correct the submissions and argument by Mr. Wang in countering this point. Different principles and considerations apply as between a **Ladd v Marshall** application before an appellate court, and those to be applied by a judge in the High Court charged in a second application with determining whether the said application amounts to an abuse of process in light of a first and unsuccessful application. The test in the latter is whether a 'significant and material' change of circumstances has been demonstrated from that which pertained when the First JPL Application was decided. Accordingly, the applicant in a second application is not precluded from adducing material which was not admitted by the appellate court because, on an application of the **Ladd v Marshall** criteria, the application failed. In my judgment, such material can be relied upon as part and parcel of the cache of 'new' evidence sufficiently material to satisfy the first instance court that the 'abuse of court' principles have been dispelled.

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[81] BVIHCMAP2021/0025 (delivered 13th January 2022, unreported).

[218] However, this is a matter which requires of the court below close and careful scrutiny of the 'new' evidence. For example, if that evidence or part or parts of it, had been rejected in the **Ladd v Marshall** application before the appellate court, on the basis that it did not satisfy the first criterion of **Ladd v Marshall**, then such evidence would prima facie be caught by the abuse principles and could not be used by the applicant in the second application to show a 'significant and material' change of circumstances or 'new' evidence of the type described under the second limb of the threshold test in **Koza**.

[219] FRE placed much reliance in its submissions on the application of the second criterion of **Ladd v Marshall** – that the evidence is such that it would probably have an important influence on the result of the case, though it need not be decisive, and the finding by the Court of Appeal in the First Appeal Judgment that several of the matters sought to be introduced by Mr. Wang as fresh evidence, failed this requirement. These findings by the Court of Appeal of a failure to satisfy the second criterion, was based on a consideration of the issues which fell to be determined in the appeal itself, as they relate to the discharge by the judge below of the first ex parte JPL order upon the reasons or bases upheld by the judge. Essentially, the first order was discharged by the learned judge because of breaches of the duty of full and frank disclosure. This finding rested on two bases. The first was a non-innocent misrepresentation by Mr. Wang's then leading counsel at the ex parte hearing, and the second was the failure by Mr. Wang to put before the judge alternative remedies available to him to seeking a winding up order and the appointment of JPLs. Such alternative remedies including, importantly, having the XYZ shares transferred to him and registered in his name, thereby providing him with the requisite standing in his own right to bring the said claims. Viewed in this way, the failure of the **Ladd v Marshall** applications to satisfy the second criterion, does not preclude such evidence or material being used in support of the Second JPL Application as part of the cache of evidence demonstrative of 'significant and

material' change in circumstances from the First JPL Application. Neither are such materials excluded from the consideration of new evidence, such as to disapply the principles relating to abuse.

[220] Finally on this point, in my view, the learned judge below was correct when he mused: 'Just because the same categories of evidence are in play does not prevent such an application [Second JPL Application] being launched and heard on its merits. New or fuller evidence can, and here does, change the picture. Instead of some degree of speculation and supposition, there is now greater certainty in respect of the risk to RAGOF's assets'.[82]

Is the Second JPL Application a re-grant of the First JPL Application?

[221] In my view, and with the greatest respect, it is a fallacy of principle, to categorize the Second JPL Application as a 'regrant'. It is not. As the learned judge correctly found, it was a fresh application. The fact that it was brought a mere few weeks after the judgment of the Court of Appeal in the First Appeal, while perhaps at first blush curious, is of no real moment. In the instant matter, the discharge of the first JPL order and the unsuccessful appeal therefrom, rested, in large measure, not so much on the quality of the evidence of serious wrongdoing (although this was an issue at the inter partes hearing), but on the breaches of the duty of full and frank disclosure, and failure to put alternative remedies, as found in the Discharge Decision and upheld by the First Appeal Judgment. The appeal having failed on these bases, it was certainly open to Mr. Wang to not sit back and await his faith in the proceedings below, but to seek to become a registered shareholder of RAGOF, and where this process was delayed or encountered certain obstacles, to move the court in interlocutory proceedings on a derivative basis, as the beneficial owner of the XYZ shares and the person with an economic interest at risk and to be protected. And to do so based on what he and those advising him saw as made out, that is, a 'bare trust' of the XYZ shares, or 'special circumstances' warranting him proceeding

[82] See Transcript 20/07/23, p. 36 lines 4-10.

derivatively. Mr. Wang was entitled to assert, as he did in the court below, that there was new or additional evidence of sufficient cogency showing a 'significant and material change' of circumstances, or new evidence not available on the First JPL Application, entitling him at the interlocutory stage, to the reliefs sought by the Second JPL Application.

New Evidence – Was Second JPL Application a re-hearing of the First JPL Application?

[222] To FRE's point that the Second JPL Application is essentially a re-hearing of the First JPL Application, I respectfully differ. The success of this point rests on whether Mr. Wang relied on 'new' evidence in support of the Second JPL Application. This is so whether the same or very similar issues were in play in the Second JPL Application as were also in play in the First (ex parte) JPL Application. The learned judge found that there was new evidence.[83] The judge (from page 36 to 39) pointed to and summarized the elements of new evidence dealt with by lead counsel for Mr. Wang before him, and as set out in the notice of application and in the supporting affidavits. These are:

(i) Springs Farm: new evidence That RAGOF overpaid for Springs Farm supported now by an expert valuation evidence in the Cayman Proceedings valuing the said property at 4.1 million pounds sterling less than the purchase price. To this FRE says in its submissions that Mr. Wang has previously pleaded in his winding up petition (supported by valuation evidence) that Springs Farm was worth 5 million pounds less than the purchase price.

(ii) H. Otaibi's Profligate Spending: new evidence that there was profligate spending on H. Otaibi's personal enjoyment of the property. To this FRE says, in essence, that this allegation had been made before in the JPL Claim alleging that various items of

[83] See Transcript 20/07/23 p. 36 line 22.

expenditure were for H. Otaibi's personal use, which allegations are disputed.

(iii) Finding by Judge in the Cayman Proceedings: finding by Justice Kawaley in the Cayman Proceedings that 'there was clear evidence that Springs Farm was for some years used for private purposes without Mr. Wang knowing it was a RAGOF property'. To this FRE says that the learned judge erred by importing this finding, contrary to the rule in **Hollington**. I shall address the applicability of this rule to interlocutory proceedings a bit later.

(v) Springs Farm Deed of Indemnity: new evidence from Mr. Wang that the Springs Farm Indemnity could not have been in the best interest of RAGOF and the ongoing failure to make a call on the indemnity is 'a clear example of the interest of the Floreat Principals being wrongly preferred to those of the investors of the Fund'. To this FRE says that the loss to RAGOF had been before the Court of Appeal (but not admitted as fresh evidence), and the evidence of Mr. Whitworth was before the Court of Appeal in the Third **Ladd v Marshall** application (which was unsuccessful). However, the learned judge went on to say that the Deed of Indemnity not being in RAGOF's best interest, has now effectively been admitted on behalf of Floreat in evidence in the Cayman Proceedings given by Mr. Whitworth, where he agreed to such a proposition. Again, the question is whether this evidence is excluded from the judge's proper consideration.

(vi) Springs Farm a Large Uncrystallized Loss to RAGOF: This new evidence is taken from the Cayman Proceedings where the expert evidence there put the current value of Springs Farm at 16 to 16.25 million pounds, which, the judge stressed is 11.4 to 11.6 million pounds less than its total cost to fund. The judge continues: 'And in

Cayman, Mr. Whitworth effectively admitted that regardless of RAGOF's interests, whilst Floreat is in control, no call has or ever will be made on the Deed of Indemnity to realize even that impaired value, because that will be contrary to the interests of Floreat and of Hussam.'

(vi) Aviation Notes and Conflict of Interest: The judge refers to Mr. Wang saying in his evidence that there appears to be a deliberate use of RAGOF's funds to make a not permitted investment in the Aviation Notes. While characterizing this allegation as 'controversial', the judge states: "… what appears to be the case is that the Floreat Principals and other Floreat persons and entities profited from that transaction with their own fees they would extract from it. In other words, a conflict of interest. And as Justice Kawaley found in Cayman Proceedings:

> "The issuance of Aviation Notes with the same directors acting on the issuing and investing side" entailed "blindingly obvious conflict."

To these matters, FRE says the Aviation Notes was a pleaded issue in the JPL Claim and an allegation which Mr. Wang has maintained for some time, rather than a new development. RE also posits that the learned judge relied on this evidence from the Cayman Proceedings contrary to the rule in **Hollington**; and the same claims are set out in the JPL Claim which was before the Court of Appeal in the Second **Ladd v Marshall** application (which was unsuccessful).

[223] In my view, the fact that an issue was part of the claim in Claim No. 150/2021 or an allegation in the First JPL Application, is not dispositive of the question of whether additional or new evidence in relation to the same issue or allegation cannot properly be considered on the Second JPL Application, where the same or similar issues or points have been relied on. One of the criticisms before the learned judge at the discharge hearing, and one which had some traction with

the learned judge, was that several of the categories of allegations of wrongdoing remain just that, mere allegations, unsupported by any cogent evidence upon which a judge can grant the reliefs being sought. Accordingly, Mr. Wang cannot now be legitimately criticized for producing additional or new evidence aimed at buttressing the previously made allegations of serious wrongdoing, in circumstances where much has unfolded in relation to these matters, particularly in the Cayman Proceedings, subsequent to the discharge hearing and the First Appeal. Also, and this was addressed above, the fact that materials were before the Court of Appeal on the three **Ladd v Marshall** applications, does not exclude reliance upon such materials on a second application for the same or similar relief. One would have to show that this material was excluded for the reason that it was not new or fresh evidence.

[224] FRE submitted that none of these pieces of evidence constitute a 'significant or material' change of circumstances justifying the re-litigation of the matter covered in the hearing and discharge of the First JPL Application. In fact, the way the judge saw this evidence is quite different:

> "So those are just some points on the evidence that has become clearer since the matter was previously before this Court on previous occasions. The Cayman Proceedings have occurred since then. As I made a point of saying, there was an application before this Court in September – 23rd of September 2022 is when this Court made an order discharging the appointment of Provisional Liquidators. The Cayman Proceedings took place in a six-week trial beginning on the 3rd of April 2023. In other words, several months after the discharge of the Joint Provisional Liquidators here. So necessarily, all that further information that came out in Cayman which does strengthen the impression of self-dealing and risk to property if left in the hands of Floreat and Floreat individuals, and if left in the hands of directors who appear not to be either fully informed, so I've heard over the last couple of days, and indeed be kept out of information, there is a risk to the property. So, in light of that, it is appropriate for Joint Provisional Liquidators to be appointed."[84]

> …
> "If there is a conflict of interest and people are motivated by the conflict of interest to make money out of a transaction in their own interest which

[84] See Transcript 20/07/23 p.39 lines 7-25 to p.40 lines 1-2.

> conflicts with that of the underlying beneficiaries, then there is at least in principle a potential claim for a secret profit and other disgorgement to be made. So, there is a risk to the assets of RAGOF if left in the control of the Floreat Principals and the Floreat individuals and indeed, the current directors."[85]

[225] I respectfully disagree with FRE's classification of the evidence relied on by the learned judge as not being 'significant and material'. In my considered view, the said evidence, properly considered, while addressing a lot of the same categories of issues and some of the same allegations made in the first ex parte application and at the discharge hearing, is evidence much of which comes out of the Cayman Proceedings. It is therefore, evidence which was not available at the time of the First JPL Application and discharge hearing. In my view, this evidence buttresses the previously somewhat thin evidence supportive of the various elements of alleged wrongdoing in relation to the management of RAGOF and its properties. This is therefore new evidence upon which a second application for the same relief could properly be grounded. I am also satisfied, as was the learned judge, that this evidence amounted to a 'significant and material change in circumstances' and the Second JPL Application was not abusive. Put another way, the said evidence was materially significant to put the Second JPL Application outside of the realm of the abuse of court doctrine. I now move to consider the ground of appeal (ground 3) dealing with the application of the rule in **Hollington**.

Rule in Hollington v Hewthorn
FRE's Submissions

[226] This issue and ground of appeal (ground 3) is addressed by FRE at paragraphs 67 to 74 of its written appeal submissions. The essence of this rule was set out by Christopher Clarke LJ in the English Court of Appeal in **Rogers v Hoyle**[86] which reads in part:

> "…the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent

[85] See Transcript 20/07/23 p. 40 lines 10-18.
[86] [2014] EWCA Civ 257.

> trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge"), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard."

[227] In **Calyon (a company incorporated under the laws of the Republic of France) v Michailaidis and others**,[87] the Privy Council considering the principle in **Hollington** opined:

> "…the essential reasoning is compelling: unless the second court goes into the facts for itself, it cannot actually tell what weight it should properly attach to the previous decision. Which means that the previous decision itself cannot be relied upon."

[228] FRE submits that the underlying rationale for the principle in **Hollington**, as recognized by the Privy Council in **Michailaidis** is applicable to interlocutory proceedings as much as it is to trials or final proceedings. Accordingly, it is submitted that any argument to the contrary is wrong in law. Further, it is FRE's case that in determining that there were 'special circumstances' enabling Mr. Wang to proceed derivatively, and then to appoint JPLs over RAGOF, the learned judge relied on purported 'new evidence' adduced by Mr. Wang in Lee 1. However, Lee 1 included three pieces of evidence which are caught by the rule in **Hollington** and were therefore inadmissible. These three pieces of evidence concern:

(1) **First, the judge relied on purported findings by the court in the Cayman Proceedings, which purported findings were inadmissible under the rule in Hollington:** FRE submits that this

[87] [2009] UKPC 34.

evidence is unreliable on four bases: (i) the Cayman Proceedings were between different parties and concerned different issues; (ii) any findings made in the Cayman Proceedings were made without a full trial, which was not possible because of a series of complex procedural developments, including an application on the eve of the trial to have most of the trial heard in camera. The upshot was that while Mr. Wang gave evidence, the court in the Cayman Islands did not hear evidence from the Floreat Principals, any experts, or the JPLs; (iii) much of the Cayman Proceedings took place in private, with large parts of the hearing bundle sealed; and (iv) the Cayman Proceedings were only indirectly concerned with RAGOF. Accordingly, very limited discovery was given in respect of RAGOF in those proceedings, and RAGOF was not the focus of the evidence filed in those proceedings.

(2) **Second, the judge erred in relying on a judgment of the English High Court (referred to in Lee 1) and remarked that the judge there found M. Otaibi's evidence in those proceedings to be untruthful:** That judgment was, as the Court of Appeal opined, 'a judgement of another court between different parties, and is not evidence of anything, and to rely on it would be to breach the principle in Hollington'. Furthermore, the English Court of Appeal's decision (referred to in Lee 1) that the fee that M. Otaibi received would have been received anyway, and there was no loss to GFIF (a Cayman Fund) as a result of the payment having been diverted.

(3) **Third, the judge erred in taking into account the report of the JPLs prepared and filed in the proceedings below, after the hearing of the First (ex parte) Application:** These JPL reports are not findings, and any views expressed by them therein are merely provisional views expressed by third parties which have not been subjected to scrutiny.

Mr. Wang's Submissions

[229] Mr. Wang submits that the arguments advanced by FRE in relation to this issue are without merit for the reasons that: (i) FRE cites no authority in support of its proposition that the rule in **Hollington** applies to interlocutory proceedings, and the BVI and English cases state the opposite; (ii) the judge below relied predominantly on admissible evidence from the Cayman Proceedings, not on Justice Kawaley's findings in those proceedings, and he did not refer to the English judgments at all; and (iii) the learned judge was entitled to take into account the JPLs' reports which do not contain judicial findings and are therefore not caught by the rule in **Hollington**.

[230] As to the first of these counterpoints, Mr. Wang reiterates that the learned judge was faced with an interlocutory application to appoint JPLs, which attracted an interlocutory threshold 'somewhat stronger than a triable issue, but short of a final determination'. It is also contended that there is a clear line of BVI cases to the effect that 'judicial findings in other proceedings are admissible in relation to such an interlocutory threshold'. Reference is made specifically to **VTB Bank (Public Joint Stock Company) v Miccros Group Ltd**;[88] **Great Panorama International Ltd v Qin Hui**;[89] and **AO Alfa Bank v Kipford Ventures Ltd**.[90] These are all first instance decisions in cases all dealing with the 'good arguable In Carr case' freezing injunction threshold.

[231] Mr. Wang in his submissions also relies on the judgment of Carr J in **Sabbagh v Khoury**[91] cited in the BVI cases listed above. In **Sabbagh**, the judge states the judicial finding in other proceedings may indicate 'what material at trial there might be' by assisting in 'identifying the evidence which can reasonably be expected to be available at trial', and '[t]o deploy the findings of another court in

[88] BVIHC (Com) 2018/0067 (delivered 23rd January 2020, unreported) at paras. 84 to 86.
[89] BVIHC (Com) 2019/0180 (delivered 13th August 2020, unreported) at paras. 17 to 26.
[90] BVIHC (Com) 2020/0219 (delivered 14th December 2021, unreported) at paras. 59 to 62.
[91] [2014] EWHC 3233 (Comm) at paras. 202 to 207.

this way does not endanger a fair trial for any of the parties'. I merely observe that all of these cases cited are first instance decisions.

[232] Mr. Wang submits, in the alternative, that were the rule in Hollington applicable to interlocutory proceedings, the judge below did not infringe the rule in any of the three ways alleged by FRE. As to the Cayman Proceedings, it is submitted that apart from two instances, the judge relied on the underlying evidence obtained through the Cayman Proceedings, and not the finding of Justice Kawaley. These pieces of evidence from the said proceedings are admissible, says Mr. Wang, as 'documentary hearsay in civil proceedings in the usual way. Further, in the two instances where the learned judge did recite the findings of Kawaley J in the Cayman Proceedings, those findings were substantiated by admissible documentary evidence before the learned judge, and the aspect of his decision where he made mention of these findings - new evidence of serious wrongdoing on the part of Floreat in relation to RAGOF – 'was amply supported by the learned judge's other findings made on the basis of admissible evidence'.

[233] As to the English Proceedings involving Floreat, Mr. Wang contends that those proceedings and the judgments in them were not referred to at all by the learned judge. The judge did not rely on them or make any findings on the basis of judicial findings in those proceedings. In relation to the JPL Reports, Mr. Wang argues that the judge below did not rely or make any findings based on the content of the JPL Reports. Moreover, the rule in **Hollington** only applies to judicial or quasi-judicial findings of another decision maker, whereas a third party report which is not judicial or of a quasi-judicial nature is 'admissible for its record of factual evidence (of whatever degree of hearsay) and its expert opinion'.[92]

[92] See Rogers v Hoyle at paras. 31 and 57.

Analysis and Conclusions on application of Rule in Hollington

[234] The question of the application of the rule in **Hollington** to interlocutory proceedings has not been decided before by this Court. On this issue, the parties have pointed the Court to authoritative decisions, including from the Privy Council, which helpfully explain the application of the principle underlying this rule. The extract (cited above) from **Rogers v Hoyle** speaks to the application of the principle to 'trials' and refers to the findings of the 'trial judge'. This language does not readily serve as confirmatory of the extension or application of this principle to interlocutory proceedings. Moreover, interlocutory proceedings are, by their very nature, proceedings initiated upon an application filed in existing substantive proceedings, and concern a range of permissible interlocutory or case management issues or reliefs, where the standard of proof varies and falls somewhere between a 'good arguable case', 'realistic prospect of success' and 'special or exceptional circumstances', but fall short of the civil trial standard of proof on a balance of probabilities.

[235] The case from which this rule emanates, **Hollington v Hewthorn**, a decision of the English Court of Appeal in 1943, concerned a claim for damages based on an action for negligence arising out of a collision between two motor cars. At the trial the plaintiff sought to give evidence of a conviction of the defendant driver for careless driving at the time of the collision. The court found that both as a matter of principle and authority, the evidence of the conviction was inadmissible. Goddard LJ delivering the judgment of the King's Bench Division stated:

> "If a conviction can be admitted, not as an estoppel, but as prima facie evidence, so ought an acquittal, and this only goes to show that the court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case. Without dealing with every case and text-book that were cited in the argument, we are of opinion that, both on principle and authority, the conviction was rightly rejected."

[236] The Privy Council case of **Michailaidis**, cited by Mr. Wang, concerned on appeal the ownership of one collection of the furniture of the late Eileen Gray,

the designer and maker of "Art Deco" type furniture in the 1920s and 1930's in Paris, France. The issue on appeal was from a decision refusing summary judgment based upon the prior decision of the Courts in Greece that the ownership of the said collection had been conclusively determined by the Greek courts. The passage relied on by FRE at paragraph 226 above is from paragraph 27 of the opinion of Lord Rodger of Earlsferry delivering the decision of the Board. At paragraph 28 the learned Law Lord noted that the decision in **Hollington** has been criticized by Lord Diplock in **Hunter v Chief Constable of the West Midlands**; and by Lord Hoffman in **Arthur JS Hall v Simons**. He also observed that there is a well-known exception to the rule in the case of the facts found in the reports of company inspectors acting under statute. He then continued:

> "Hollington continues to embody the common law as to the effect of previous decisions: "In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties", Land Securities v Westminster City Council [1933] 1 WLR 286, 288E-F per Hoffmann J."

[237] At paragraphs 32 and 33 of the decision in **Michailaidis**, Lord Rodger states-

> "32. Their Lordships are accordingly satisfied that, even if it were open to them to do so, they would not accede to Mr. Steinfeld's submission that they should depart from the established principles underlying Hollington…
>
> 33. For all these reasons, the Board sees no basis for admitting evidence of the Greek judgment, far less for holding that it should be regarded as furnishing prima facie evidence, for the purposes of these proceedings that Mrs. Michailidis and Mrs. Papadimitriou were the owners of the Collection at the time when it was sold."

[238] The passage immediately above (para. 33) is an important one. However, the application based on the judgment and decision in the Greek proceedings, was for summary judgment before the courts in Gibraltar. In my view, a summary judgment application is for a 'final' judgment in the case or on a cause of action within the case or claim. It is not strictly, nor is it akin, to interlocutory proceedings, such as an application for the appointment of provisional

liquidators under section 170 of the **Insolvency Act 2003**. Where summary judgment leads to a final judgment in the claim, the defendant or party against whom the judgment is given, is entitled to appeal that judgment without first obtaining the permission of the court. Where the summary judgment is of the second type, that is, depository of an issue or issues in the case, but not the entire claim or all causes of action, that too, is a final judgment as it concerns that specific aspect or the claim or cause of action and an appeal therefore, would not require the leave of a court. Viewed in this way, the court in **Michailaidis** was dealing, potentially, with a final judgment were the application successful. They were not dealing with an interlocutory application or proceeding.

[239] This brings me to the first decision in **Sabbagh v Khoury** cited by counsel for Mr. Wang as being to the effect that judicial findings in other proceedings are admissible in relation to applications where the interlocutory threshold 'is somewhat stronger than a triable issue, but short of a final determination'. This is a curious way in which to frame this proposition. Taking the proposition on its face, Mr. Wang seems to be saying that the rule in **Hollington** applies to only those interlocutory proceedings or applications which require a final decision or determination of an issue. An example of this would be a summary judgment application as in **Michailaidis**. But in relation to all other interlocutory applications or proceedings it does not.

[240] At paragraph 203 of **Sabbagh**, Carr J opined:

> "There is no risk to fairness of a trial if such material is introduced on the question of whether or not there is a serious issue to be tried. Such material can assist in identifying the evidence which can reasonably be expected to be available at trial, to which a court is entitled to have regard at the interlocutory stage. Reliance is placed on Joint Stock Co Aeroflot – Russian Airlines v Berezovsky (supra). There, when considering the question of whether or not there was a serious issue to be tried for the purpose of service out of the jurisdiction, Aikens LJ held that the Claimant could rely on the findings of the Swiss criminal court…"

[241] The dicta in **Sabbagh** has been applied by Jack J in the Commercial Division in **VTB Bank v Miccros** at paragraph 85; in **Great Panorama** at paragraph 26; and in **AO Alfa Bank** at paragraph 59 where the judge concluded: 'But in my judgment, [the rule in Hollington] no longer represents the law on interlocutory applications where it's necessary to consider whether a party has shown a good arguable case'.

[242] In my judgment, the rule in **Hollington**, if it did much earlier, no longer applies to the reliance on decisions of another court in interlocutory applications, where the court is not called upon to make final decisions or determinations. This approach accords with the modern approach to exceptions to this rule, and is grounded on solid principles which were so ably set out by Carr J in **Sabbagh**. This is correct because, in most interlocutory proceedings, the court is not called upon to make final decisions, but to determine whether there is a serious issue to be tried or whether there is a real risk of dissipation or, as in the instant matter, whether the appointment of provisional liquidators is 'necessary' for the purpose of maintaining the value of assets owned or managed by the company or it is in the public interest, pending the full trial and determination of the application to wind up the company by appointing liquidators. The latter type of interlocutory proceeding, albeit having serious consequences for a company before the trial of the winding up application, is in no way a final determination of the issues in the winding up application or of the wide discretionary powers granted to the court under section 167 of the **Insolvency Act 2003**. The jurisdiction and discretion of the judge ultimately hearing the winding up petition, even if it is the same judge who heard the application to appoint provisional liquidators, is in no way fettered or constrained by any evidentiary assessments or findings made at the interlocutory stage.

[243] Accordingly, it is my considered view, that the learned judge did not err when taking into account both the evidence coming from the Cayman Proceedings and, in some respects, the findings of Justice Kawaley. This is enough to

dispose of the major point of challenge to the judge's approach taken by FRE. As to the other two points, I agree with Mr. Wang that they likewise are without merit. They are, accordingly, and for the reasons advanced on Mr. Wang's behalf, also rejected. For these reasons, this ground of appeal also fails.

Ground 4 – The judge's unreasonable and flawed analysis of the evidence

[244] This final ground of FRE's appeal can be dealt with shortly. FRE argues that the judge's analysis of the evidence before him was unreasonable and flawed 'given that it was an interlocutory hearing and none of the evidence before him had been tested in evidence'. Examples of this so-called flawed and unreasonable analysis are set out in FRE written submissions at paragraphs 75.1 to 75.3,76, 77.1 to 77.3 and 78. I do not consider it necessary for the purposes of this decision to summarize these points. Suffice it to be said that I have read them all and can see no merit in any of them. I have also read paragraphs 71 to 75 of Mr. Wang's written submissions in response to this ground of appeal, and I am substantially in agreement with the counterpoints made on behalf of Mr. Wang in answer, and I would, respectfully, adopt them. Accordingly, and for the reason given in brief, this ground of appeal also fails.

Mr. Wang's alternative relief - ground 3(b)

[245] As has been accepted, this ground would only arise for consideration in the event that FRE's appeal was allowed. As FRE has failed on all grounds of it appeal, I do not need to address this ground of Mr. Wang's counter appeal, and I decline to do so.

Disposition and orders

[246] FRE has failed on all grounds of its appeal. Accordingly, FRE's appeal is dismissed with costs to Mr. Wang to be assessed by a judge of the Commercial Division, if not agreed by the parties within 21 days from the date of delivery of this judgment.

[247] Mr. Wang fails on ground 3(a) of his counterappeal on the issue of whether he was a 'member' of RAGOF within the extended meaning of this term in section 2 of the **Insolvency Act 2003**. The learned judge's finding on this issue is upheld. Mr. Wang shall pay FRE's cost of the counter appeal limited to that ground 3(a) only, such costs to be assessed by a judge of the Commercial Division, if not agreed by the parties within 21 days from the date of delivery of this judgment.

[248] It remains for me to thank leading counsel for both FRE and Mr. Wang and their respective teams, for the helpful and detailed submissions, written and oral, in this appeal. These submissions have assisted the Court greatly in its consideration of the several issues and in reaching its conclusions on the appeal and counterappeal.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Chief Registrar