

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHC (COM) 2023/0243

BETWEEN:

**[1] NABIL MARC ABDUL-MASSIH
[2] ANCILE INVESTMENT COMPANY
[3] ANCILE SECURITIES COMPANY**

Claimants

and

**[1] RYAN PAUL JARVIS
[2] JOHN JOHNSTON
(AS JOINT LIQUIDATORS OF PHOENIX COMMODITIES PVT LIMITED)
[3] PAUL JAMES LEGGETT
(AS LIQUIDATOR OF PHOENIX GLOBAL DMCC)
[4] PHOENIX GLOBAL DMCC (IN LIQUIDATION)
[5] PHOENIX COMMODITIES PVT LTD (IN LIQUIDATION)**

Defendants/Respondents

Appearances:

Mr. David Alexander KC (instructed by Ogier, BVI) and, with him, Mr. Brian Lacy, Mr. Alexander Bryant, and Ms Emily Rivett (all of Ogier) for the Claimants

The Defendants neither attended nor were represented at the hearing

2025: July 17

REASONS FOR THE DECISIONS OF THE COURT MADE ON 17 JULY 2025

Background to the claim

- [1] **MITHANI J. [Ag]:** These are my brief reasons (“my Reasons”, “the Reasons” or “these Reasons”) for the various orders that I made at the trial of this claim (“the Present Claim”) that took place on 17 July 2025.
- [2] The First Claimant, Nabil Marc Abdul-Massih (“Mr. Abdul-Massih”) is, and was at all material times: (a) a director of Inoks Capital S.A. (“Inoks”), a Swiss asset management, authorised by the Swiss Financial Market Supervisory Authority; (b) a director of the Ancile Fund (“Ancile Fund”), an exempted company with limited liability incorporated in the Cayman Islands; (c) a director of the Second Claimant, Ancile Investment (an exempt company with limited liability incorporated in the Cayman Islands) (“Ancile Investment”); and (d) a director of the Third Claimant, Ancile Securities (an exempt company with limited liability incorporated in the Cayman Islands) (“Ancile Securities”).
- [3] Unless the context otherwise requires, any reference in these Reasons to “the Claimants” or “the Claimant” is intended to be a reference to any one or more of Mr. Abdul-Massih, Ancile Investment, and Ancile Securities; likewise, any reference to “the Defendants” is intended to be a reference to any one more of the defendants to the Present Claim.
- [4] Ancile Investment and Ancile Securities (“the Ancile Companies”) are both wholly-owned subsidiaries of the Ancile Fund. The First Defendant, Ryan Paul Jarvis (“Mr. Jarvis”) is a partner working in the Financial Advisory Service in Deloitte LLP’s office in the BVI and one of the two current BVI joint liquidators (“the BVI Liquidators”) of the Fifth Defendant, Phoenix Commodities PVT Limited (“Phoenix BVI”), a company incorporated the BVI. The other BVI joint liquidator is John Johnston (“Mr. Johnston”), the Chief Executive Officer of Deloitte (Caribbean and Bermuda).

- [5] The Third Defendant, Paul James Leggett of Deloitte & Touche, is a Deloitte partner, a financial advisory leader of Deloitte, and the liquidator of Phoenix Global DMCC (“the Dubai Liquidator”). The Fourth Defendant, Phoenix Global DMCC (In Liquidation) (“Phoenix Dubai”), is a body corporate incorporated under the laws of the Dubai Multi Commodities Centre free zone, United Arab Emirates. The reference to “the Liquidators” herein shall include one or more of the BVI Liquidators and the Dubai Liquidator.
- [6] At all material times, Phoenix BVI was the ultimate parent of a group (“the Phoenix Group”) of about 90 companies operating in many jurisdictions across the world. The Phoenix Group was a global integrated food and agriculture business which was, *inter alia*, engaged in commodities trading. Phoenix Dubai, which was one of the Phoenix Group’s primary operating companies, was a wholly owned subsidiary of Phoenix BVI.
- [7] In 2007, the Phoenix Group approached Inoks to provide funding for its commodities trading business. Thereafter, commencing in November 2007, the Ancile Companies entered into arrangements with the Phoenix Group whereby money was lent to the Phoenix Group by Ancile Investment, with security for such borrowing being provided by the Phoenix Group to Ancile Securities as Security Trustee.
- [8] Between 2007 and 2019, Ancile Investment, acting by Mr. Abdul-Massih as its director (and later also by other authorised signatories for the Ancile Companies), lent monies to the Phoenix Group as one of the Phoenix Group’s contractual financing counterparties in sums amounting to, in aggregate, more than USD 450,000,000.
- [9] Much of the rest that followed is set out in the amended statement of claim and the written evidence served by the Claimants.
- [10] In March 2020, the Phoenix Group, on the one hand, and Inoks and/or the Ancile Companies, on the other, entered into an agreement (“the March 2020 Agreement”) under which the parties agreed, *inter alia*:

- (a) Ancile Investment would advance USD 15,000,000 to Phoenix Dubai for the purchase of 71,599.0454 MT of milling wheat that was anticipated to be delivered from Ukraine;
- (b) Ancile Investment would be granted security over certain West African rice;
- (c) Phoenix Dubai would transfer to Ancile Securities equity interests ("the Shares") owned by Phoenix Dubai (but not Phoenix BVI) in Phoenix Agro Ltd (a Ukrainian company), Phoenix Green Farms BV (a Netherlands company), Agro Syndicate Kazakhstan (a Kazakhstan limited liability partnership) and Phoenix Feed Mills (another Kazakhstan limited liability partnership);
- (d) the debt then due to the Ancile Companies by Phoenix Dubai pursuant to the financing referenced above would be reduced by the cumulative value of the Shares;
- (e) Phoenix Dubai would have the opportunity to have the re-transfer of the Shares on certain conditions; and
- (f) Two Suretyship Agreements would be entered into, one in respect of certain financing transactions that had taken place between the parties and the other in respect of certain other financing transactions that had taken place between the parties.

[11] It was also agreed by the parties that any existing security held by the Ancile Companies over the Ukrainian assets would be redone to regularise the existing security and ensure that there was no possibility of it being in any way invalid.

- [12] On 20 April 2020, Phoenix BVI was placed into liquidation in the BVI under the **BVI Insolvency Act 2003** (“the **BVIA 2003**”) by way of a qualifying resolution of its shareholders.
- [13] On 8 May 2020, at the first meeting of creditors of Phoenix BVI, Mr. Jarvis and Matthew David Smith (“Mr. Smith”), also of Deloitte LLP, were appointed as joint liquidators of Phoenix BVI pursuant to s. 179(4)(a) of the **BVIA 2003**.
- [14] As noted above, the current joint liquidators of Phoenix BVI are Mr. Jarvis and Mr. Johnston.
- [15] On 30 April 2020, Mr. Abdul-Massih, on behalf of the Ancile Companies, wrote to the then liquidators of Phoenix BVI notifying them that their appointment as liquidators of Phoenix BVI constituted an event of default under some of the agreements or arrangements summarised above; and, subsequently, enforcement letters were issued by the Ancile Companies in respect of that default.
- [16] On 9 June 2020, Phoenix Dubai was placed into liquidation. The current liquidator of Phoenix Dubai is Mr. Leggett.
- [17] The Liquidators of Phoenix BVI and/or Phoenix Dubai have intimated various claims (“the Intended Claims”) against the Claimants arising from the Claimants’ relationship with Phoenix BVI and Phoenix Dubai prior to their liquidation.
- [18] The Intended Claims included the following claim by Phoenix BVI and Phoenix Dubai and their respective liquidators, or one or more of them:
- (a) alleging that Mr. Abdul-Massih was a director of Phoenix BVI and/or Phoenix Dubai;
 - (b) alleging that in effecting the transfer of the Shares, Mr. Abdul-Massih had acted in breach of his alleged duties to Phoenix BVI and/or Phoenix Dubai; and

- (c) stating that they would issue proceedings against Mr. Abdul-Massih for breaches of his duties and for insolvent trading in the BVI and the Cayman Islands.

[19] As presently formulated in various documents sent by the Defendants to the Claimants, the Intended Claims, *inter alia*:

- (a) allege that Mr. Abdul-Massih was a director of Phoenix BVI and/or Phoenix Dubai and, accordingly, owed various fiduciary duties to Phoenix BVI and Phoenix Dubai;
- (b) allege that Mr. Abdul-Massih was in breach of those fiduciary duties;
- (c) allege that Mr. Abdul-Massih is liable to contribute to the assets of Phoenix BVI and/or Phoenix Dubai for insolvent trading;
- (d) allege that the Ancile Companies knew of Mr. Abdul-Massih's breaches of duty and are liable to return the Shares to Phoenix BVI and/or Phoenix Dubai, and/or are liable to account to Phoenix BVI and/or Phoenix Dubai as constructive trustees in relation to the Shares; alternatively, Phoenix BVI and/or Phoenix Dubai could trace into any money or assets derived from the Shares and/or and are liable to Phoenix BVI and/or Phoenix Dubai for knowing receipt and/or enrichment; and
- (e) allege that the amount claimable by Phoenix BVI and/or Phoenix Dubai from Mr. Abdul-Massih and the Ancile Companies is over USD 100,357,908.36 for the above breaches of duty; and that, in addition, the amount claimable from Mr. Abdul-Massih for insolvent trading is a further USD 415,366,057.29.

[20] As noted above, the Intended Claims were first intimated by the Defendants in May 2021. However, as at the date of the hearing of the Present Claim, no steps had been taken to issue them, though there have been proceedings in the Netherlands firstly by the Dubai Liquidator and secondly by the BVI Liquidator arising from some of the transactions referred to above. These proceedings – the details of which are summarised in paras. 37-41 of the skeleton argument prepared by Mr. Alexander KC – do not form part of the relief sought in the Present Claim and do not require any further mention.

The relief sought in the claim, the law, analysis, and discussion

Introduction

[21] The Claimants seek, *inter alia*, the following declaratory relief from this court ("the Court" or "this Court"):

- (a) that Mr. Abdul-Massih has never been a *de jure*, a *de facto*, and/or a shadow director of either Phoenix BVI or Phoenix Dubai;
- (b) Mr. Abdul-Massih has never owed any fiduciary or other director's duty to either Phoenix BVI or Phoenix Dubai;
- (c) Mr. Abdul-Massih has not been in breach of any fiduciary duty owed to either Phoenix BVI or Phoenix Dubai;
- (d) the BVI Liquidators and/or Phoenix BVI have no valid constructive trust claim against the Ancile Companies;
- (e) the Dubai Liquidator and/or Phoenix Dubai have no valid claim against Mr. Abdul-Massih or the Ancile Companies in relation to any of the Intended Claims;

- (f) the Dubai Liquidator and/or Phoenix Dubai have no valid claim in knowing receipt or unjust enrichment against the Ancile Companies;
- (g) none of the BVI Liquidators, the Dubai Liquidator, Phoenix BVI, or Phoenix Dubai has any other valid claim under BVI or Cayman law against Mr. Abdul-Massih or the Ancile Companies arising out of the facts set out in the attached Statement of Claim.

[22] The Claimants also seek an order from this Court that the Defendants, and each of them, are prohibited from taking further proceedings against the Claimants which arise out of the facts and matters specified in the Present Claim without the prior permission of a **Judge of the High Court of Justice, Commercial Division of the British Virgin Islands**.

[23] In the following paragraphs of Mr. Alexander KC's skeleton argument, he states why the Claimants wish to obtain the above relief. It is appropriate to set out what he says in full:

"42 Despite proceedings in BVI and Cayman having been threatened against Mr. Abdul-Massih and the Ancile Companies from May 2021, by November 2023 (so 2½ years later) no such proceedings had been issued by Phoenix BVI, Phoenix Dubai, the BVI Liquidators or the Dubai Liquidator in either the BVI or Cayman...

43 The threatened proceedings in BVI and Cayman were substantial in that by them, the BVI Liquidators and the Dubai Liquidator made claims for USD 500 million. However, the failure to commence the proceedings in BVI and Cayman by November 2023 had created unnecessarily long commercial uncertainty for the Ancile Companies and Mr. Abdul-Massih and had had significant negative consequences.

44 For example, in relation to the Ancile Companies and the Ancile Fund:

44.1 Receipt of the BVI LBA and the Cayman LBA automatically triggered disclosure requirements for both the Ancile Companies

and their parent entity, the Ancile Fund. Consequently, from 2021, the Ancile Fund had been compelled to assess, annually, the extent and status of any threatened and ensuing litigation and its likely outcome. This then formed part of the reporting obligations of the Ancile Fund and the Ancile Companies.

44.2 As a result of the increased disclosure requirements, the Ancile Companies had not been able to raise financing from entities beyond the Ancile Fund. Consequently, the Ancile Fund had been forced to support the Ancile Companies financially for all their operational costs and holdings for a very substantial proportion of their financial needs (more than USD 80-90 million as at 31 January 2024).

44.3 In addition, the required financial disclosures had triggered the Ancile Fund being classified as “Higher Risk” (unwarranted when the threatened proceedings had not even been brought) based on (1) substantial costs (financial and in terms of human resources) required to defend the threatened litigation (2) increased market uncertainty on the fair value of the Ancile Funds’ assets as impacted by the threatened litigation and (3) the loss of value to the Ancile Fund if the litigation had a negative outcome. This reduced the attractiveness of the Ancile Fund to potential investors and the marketability of the Ancile Fund to new investors. It also had consequences such as reducing the Ancile Fund’s assets under management by more than USD 105 million as at 31 January 2024

...

45 As regards Mr. Abdul-Massih personally, not only did the threatened proceedings place him and his family under considerable stress, knowing that proceedings could be commenced against him in any one of a number of jurisdictions concurrently or consecutively but also Mr. Abdul-Massih:

45.1 Had to spend considerable time and effort liaising with counsel in numerous jurisdictions (e.g. Cayman, the Netherlands and Switzerland) and this took him away

from his other duties to Inoks, the Ancile Fund and the Ancile Companies.

45.2 Could not purchase a home following his move to Zurich from Geneva because the existence of the threatened proceedings would have had to be disclosed and, given the size of the claims, had repercussions on his ability to obtain credit;

45.3 Had to disclose the existence of the threatened proceedings to all parties he acts for or on behalf of, as well as to the D&O and PI insurance underwriters of Inoks and the Ancile Fund in Cayman and Luxembourg; and

45.4 Had been exposed to a substantial personal legal spend.”

[24] The Claimants accept that the time for bringing the Intended Claims has not expired but seek the above relief for the reasons stated above.

[25] Before a court should grant declaratory relief of the type sought by the Claimants, it needs to be satisfied that:

- (a) it has the power to do so;
- (b) the legal and factual basis upon which the declaratory relief is sought is made out, i.e., that, as a matter of both law and fact, the case supporting the declaratory relief is made out by the Claimants to the standard of proof that this Court has to apply; and
- (c) as granting the declaratory relief is discretionary, the discretion should be exercised in favour of the Claimants.

[26] The same position applies to the injunctive relief sought by the Claimants.

Does the Court have power to grant the declaratory relief in the terms sought by the Claimants or at all?

[27] A summary of the principles upon which the Court will grant declaratory relief is set out in a recent case that I heard – **Oasis Core Investments Funds Ltd v Hollysys Automation Technologies Ltd**.¹ It is only necessary that I refer to one passage of that judgment, at [57]:

“[D]eclaratory relief of the type granted in that case] is perfectly within the jurisdiction of this Court to grant. Indeed, CPR 40.20 of England and Wales, which (so far as I am aware) is not replicated in the ECSC CPR makes it clear that declaratory relief may be granted even if a claimant does not apply for it. In the words of Lord Lane in **Imperial Tobacco Ltd v Attorney-General** [1981] AC 718 at 742 and 750, citing **Pyx Granite Co Ltd v Ministry of Housing and Local Government** [1960] AC 260 and **Ealing London Borough Council v Race Relations Board** [1972] AC 342 in support: “Anyone is in principle entitled to apply to the court for a declaration as to their rights unless statutorily prohibited expressly or by necessary implication.” However, this principle is subject to the well-known exception that the court will not exercise its discretion to grant declaratory relief where it is not needed, i.e., the court will not act “in vain”: see, for example, **Cruz City 1 Mauritius Holdings v Unitech Ltd** [2014] EWHC 3131 (Comm); **JSC VTB Bank v Skurikhin** [2015] EWHC 2131 (Comm); and **Pitt and another v Holt v Futter and others** [2013] UKSC 26, [2013] 2 AC 108.”

[28] In **Global Mining Development Mining LP v China National Global Gold Group Hong Kong Ltd**,² I made the following additional observations about the power of this Court to grant declaratory relief:

“It has long been the law that where a declaration is appropriate, it should be granted. This has been established by a wealth of authority. I need only refer to the case that I mentioned in the course of my exchanges with counsel – **Rolls-Royce plc v Unite The Union** [2009] EWCA Civ 387, [2010] 1 WLR 318 – about how wide the power of the court is to grant declaratory relief. Declaratory relief may, therefore, even be granted in a case such as **Bank St Petersburg** [i.e., **Bank St. Petersburg v Arkhangelsky** [2014] EWHC 574 (Ch)], though, on the facts, Hildyard J was right not to grant it because it would have served no useful purpose in that case. Indeed, declaratory relief may even be possible where a person seeks a determination that he is not guilty of a criminal charge that may be brought against him, though, as was said by **Viscount Dilhorne** in **Imperial Tobacco Ltd v Attorney-General** [1981] AC 718 at 742, ‘it would [have to] be a very exceptional case in which it would be right to do so’.”

¹ BVIHCM BVIHCM2024/0619, 0620, 0621 & 0622, 4 March 2025.

² BVIHC (COM) 0070 OF 2023, 16 July 2025, at [104].

[29] Nor is this Court precluded from granting a negative declaration where the circumstances of a case make it appropriate for the Court to do so. I respectfully adopt the following observations made by Mr. Alexander KC in his skeleton argument:

“79 A claim for a negative declaration is for a declaration by the court that the defendant has no valid claim or right against the claimant: see **Dicey, Morris and Collins on the Conflict of Laws, 16th Ed at 12-055**.

80 In the past in England it has been said that such a declaration would rarely be made, and that in most cases the person who seeks it will be left to set up its defence in the action when it is brought: **Guaranty Trust Co v Hannay [1915] 2 KB 536 at 564-565 (CA) ...**

81 However, the **English Court of Appeal** has made it plain (in a case applied in BVI in **Mossack Fonseca v Registrar of Corporate Affairs (Appeal 13 of 2005)** that it no longer maintains an attitude of hostility to an application for a negative declaration. As **Lord Woolf MR** said in **Messier-Dowty Ltd v Sabena SA [2000] 1 WLR 2040 (CA)** at [36]: ‘I can see no valid reason for taking an adverse view of negative declaratory relief ... The use of negative declarations domestically has expanded over recent years. In the appropriate cases their use can be valuable and constructive’.

82 As **Lord Woolf** also said in the same case at [41]: ‘The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice’.

83 The BVI Court plainly has a discretionary power to grant a negative declaratory judgment: see s.22 of the Eastern Caribbean Supreme Court (Virgin Islands) Act 1969. That such is the case is also clear from the Eastern Caribbean Supreme Court, Court of Appeal decision in **Johann Greuner v Monika Patsy Greuner, Civil Appeal No 8 of 2003, 22 September 2003 at paras [12] and [13] ...** where **Saunders JA**, giving the judgment of the Court (the other members were **Redhead JA** and **Georges JA**) said this: ‘

[12] ... In substance what is being sought here is a negative declaration ...

[13] As outlined in **The Declaratory Judgment by the Rt Hon Lord Woolf**, a claimant may seek a negative declaration where no right has, as yet, been infringed. If the claimant is subjected to a demand or is threatened with action, then it may be useful to obtain such a declaration. Whilst in these cases no traditional “wrong” has yet been committed or immediately threatened, a condition of affairs is disclosed which indicates the existence of a cloud upon the [claimant]’s rights, a cloud which endangers his peace of mind, his freedom, his pecuniary interests. This is a tangible interest which the law protects against impairment, and by protecting it, promotes social peace’.

84 In **BNP Paribas SA v Trattamento Rifuti Metropolitani [2020] EWHC 2436 (Comm)**, the court emphasised that ultimately the decision whether to grant a negative declaration is discretionary and said that the issues which the court should consider included the following:

84.1 Negative declarations should be scrutinised and their use rejected where it would serve no useful purpose;

84.2 The prime purpose is to do justice in the particular case (which includes justice to the claimant and the defendant);

84.3 The court must consider whether the grant of declaratory relief is the most effective way of resolving the issues raised. In answering that question, the court should consider what options are available to resolve the issue.

85 A negative declaration will only be granted where the underlying issue is sufficiently clearly defined to render it properly justiciable. In this regard, it is necessary that:

85.1 The court is in a position to make a decision, with clarity, across the whole scope of the relief; and

85.2 The defendant is able to understand and address the claim for a negative declaration in its full scope: **Millen v Karen Millen Fashions Ltd [2016] EWHC 2014 (Ch)**.

- 86 The question of negative declarations has been considered in the present case in the Webster judgment [i.e., in his judgment in these proceedings which I handed down on 11 December 2024]. In that judgment, **Justice Webster** reviewed the law in relation to negative declarations at paragraphs [27] to [29]. In paragraph [27]:
- 86.1 He said that claims for negative declarations are now part of English and BVI law and the power to grant them has been recognised by the courts;
 - 86.2 He referred to **Messier Dowty Ltd v Sabena SA** and the fact that **Lord Woolf MR** had acknowledged the usefulness of negative declarations;
 - 86.3 He quoted from that case, including (1) referring to the fact that where a negative declaration would help to ensure that the aims of justice are achieved the courts should not be reluctant to grant such declarations and (2) saying that negative declarations can and do assist in achieving justice;
 - 86.4 He referred to the fact that what he quoted had been cited with approval in **Mossack Fonseca v Registrar of Corporate Affairs** where the Court of Appeal allowed the appeal against a judge's refusal to grant a declaration;
 - 86.5 He referred to **Johann Greuner v Monica Greuner** and said that he found the quotation from Saunders JA in that case (the quotation is outlined at paragraph 82 above) to be helpful and said it was a good summary of the reasons why a negative declaratory order may be useful to prevent a threatened invasion of a person's rights (as he said was being asserted by the Claimants in the present case).
- 87 In paragraph [28], **Justice Webster**:
- 87.1 Said that **Saunders JA** had gone on to deal with a situation where a negative declaration should not be granted because it was being used for strategic reasons.
 - 87.2 Quoted the following from what **Saunders JA** said: 'There are extant proceedings in Texas between the parties on the issue of the alleged loan. A Court should be wary of allowing claimants to derive a jurisdictional advantage by obtaining negative declarations here when it would be more appropriate for the proceedings giving rise to the declaration to be tried in another jurisdiction'.

87.3 Said that this passage reflected the Liquidators' position on the use of the negative declaration procedure and that it is their position that the Claimants, and Mr. Abdul-Massih in particular, are using the procedure to avoid trial in other jurisdictions where there are ongoing proceedings (Switzerland and the Netherlands), and to bring the trial of the claims to the BVI which, presumably, they see as a more favourable jurisdiction.

88 In paragraph [29], **Justice Webster** said this: 'I find that the use of the negative declaration procedure was open to the Claimants on the facts. The Proceedings will likely resolve these important issues which are integral to the disputes between the parties that need to be resolved. The BVI Court is the better forum for resolving these issues because they include matters that are of internal management of Phoenix BVI and are therefore governed by BVI law. Whether the declarations are granted is an entirely different matter and will depend on the Court's assessment of the claims in the Proceeding'".

[30] Subject to being satisfied about the various matters referred to above (such as this Court being in a position to make a decision, with clarity, across the whole scope of the relief), like Webster J, I consider that it is entirely appropriate to make a declaration in the terms sought by the Claimants.

Is there a clear legal and factual basis upon which the Court can grant relief

Burden and Standard of Proof

[31] As a general rule, it is for a party asserting a claim to demonstrate that the claim is made out. If the Defendants had brought the Intended Claims, it would have been up to them to demonstrate that the legal and factual bases of the Intended Claims were made out. However, as the Present Claim is brought by the Claimants, it is for them to prove that the necessary ingredients for seeking the declaratory and other relief they do are made out, by reference to the observations made in the authorities cited above. However, although the

primary burden of proof remains with the claimant, the evidential burden may, in an appropriate case, switch to the defendant.

- [32] The position was correctly stated by Miles J (as he then was) in **Brent LBC v Malvern Mews Tenants Association**,³ in the following terms:

“Where a party claims a negative declaration as to the existence of a legal right, the overall burden of persuasion is and remains on that party; it is required to satisfy the court that the discretion to award a declaration should be exercised its way. But an evidential burden on specific issues within the dispute may well fall on the other party. Where one of the issues is whether a party has the benefit of a legal right adverse to the property of another, it may well be incumbent on that party to adduce at least some evidence of the existence of the right. In **Poste Hotels v Cousins [2020] EWHC 582 (Ch)** ... the defendant counterclaimed for a negative declaration that the Claimant did not enjoy certain parking rights over a third party’s land by prescription. **Morgan J** at [93] rejected the argument that the defendant should bear the burden of proving the non-existence of the parking rights. I agree. A party asserting a legal right over the property of another (even if only by way of defence to a claim for a negative declaration) may reasonably be expected to provide some evidence for the existence of the right. Easements are rights adverse to an owner of a property and they do not arise without some good basis in fact; a party asserting such a right in proceedings (even if defensively) should in general be expected to call some evidence to sustain it. If it does not it risks the court deciding that the right does not exist. That is not to say that the overall burden of persuasion does not remain on the party claiming the negative declaration; it does.”

- [33] The overall assessment of the evidence in connection with an issue arising in a claim is within the sole province of a trial judge. However, in the present case, for the explanations that I give in these Reasons, my actual findings will not be based on the niceties of where the burden of proof lies. That is because wherever the burden lies, the evidence supporting the findings that I have made is clear.

- [34] I should also make it clear that I have not considered it appropriate to decide every point that has been raised by the Claimants in the Intended Claim. I have only decided those points relied upon by the Claimants (and the Defendants’

³ [2020] EWHC 1024 (Ch), at [23].

response (if any) to them) in order to determine whether the Present Claim is made out. This approach is in line with cases such as **Weymont v Place**,⁴ and **English v Emery Reimbold & Strick Ltd**.⁵

- [35] The standard of proof is the usual civil standard of proof – the balance of probabilities. There is no heightened standard of proof simply because the allegations which are made by the Defendants against the Claimants are of a serious nature, breaches of fiduciary duties and the like: see the decision of the House of Lords in **Re B**⁶ and of the UK Supreme Court in **Re S-B**.⁷

***De facto* or Shadow Director**

- [36] A significant, if not substantial, part of the case of the Defendants against the Claimants is based on the premise that, at all material times during the events summarised above, Mr. Abdul-Massih acted as a *de facto* or shadow director of Phoenix BVI or Phoenix Dubai, there being no suggestion that he was a *de jure* director of either of those entities.

- [37] The leading case on *de facto* directors is **Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v Holland**.⁸ In that case, Lord Collins, who was one of the majority of the three justices who found in favour of the defendant, stated, at [93]:

“It seems to me that in the present context of the fiduciary duty of a director not to dispose wrongfully of the company’s assets, the crucial question is whether the person assumed the duties of a director. Both **Sir Nicolas Browne-Wilkinson V-C** in **Re Lo-Line Electric Motors Ltd** [1988] BCLC 698 at 707, [1988] Ch 477 at 490 and **Millett J** in **Re Hydrodam (Corby) Ltd** [1994] 2 BCLC 180 at 183 referred to the assumption of office as a mark of a *de facto* director. In **Fayers Legal Services Ltd v Day** (11 April 2001, unreported), a case relating to breach of fiduciary duty, **Patten J**, rejecting a claim that the defendant was a *de facto* director of the company and had been in breach of

⁴ [2015] EWCA Civ 289 at [4]–[6], per Patten LJ.

⁵ [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409.

⁶ [2008] UKHL 35.

⁷ [2009] UKSC 17.

⁸ [2010] UKSC 51, [2011] 1 All ER 430, [2011] 1 BCLC 141.

fiduciary duty, said that in order to make him liable for misfeasance as a *de facto* director the person must be part of the corporate governing structure, and the claimants had to prove that he assumed a role in the company sufficient to impose on him a fiduciary duty to the company and to make him responsible for the misuse of its assets. It seems to me that that is the correct formulation in a case of the present kind. See also **Primlake Ltd (in liq) v Matthews Associates [2006] EWHC 1227 (Ch)** at [284], [2007] 1 BCLC 666 at [284].”

[38] The substance of the approach in *Holland* has been adopted by the Court of Appeal of the Eastern Caribbean Supreme Court: see **Byers v Chen**.⁹ The Privy Council has confirmed this to be the correct view: **Ciban Management Corporation v Citco (BVI) Ltd**.¹⁰

[39] In **Smithton v Nagggar**,¹¹ at [45] and [76], Arden LJ (as he then was) took the view that, in all cases, the decision whether someone was a *de facto* director boiled down to a question of fact and degree. She also stated, at [20], that, since the **Holland** case, it was not necessary to consider many cases in addition to that case. It is not necessary for me, therefore, to consider the various other cases cited by Mr. Alexander KC.

[40] With minor differences, that are immaterial in the context of the Present Claim, the meaning of the expression “shadow director” is the same in the BVI, the Cayman Islands and the UK. It describes a person in accordance with whose directions or instructions the functional majority of the directors of a company are accustomed to act. However, a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity.

[41] There is some dispute about whether the **BVI Business Companies Act 2004** extends to shadow directors. In **Dekel v Clerkenwell Lifestyle Ltd**,¹² I held that it did not. However, that case is currently subject to an appeal (permission to appeal having been granted by me), so the Court of Appeal may rule otherwise.

⁹ BVIHCVAP 2015/0011, 12 June 2018.

¹⁰ [2020] UKPC 21, at [51].

¹¹ [2014] EWCA Civ 939.

¹² BVIHC (COM) 0466 of 2024, 4 March 2025.

In the context of the present claim, this issue is irrelevant because even if the concept of “shadow directors” extends to the acts and omissions complained of by the Defendants in the Intended Claims, for the reasons summarised in this judgment, there is no realistic prospect of the Defendants being able to establish that Mr. Abdul-Massih acted in that capacity.

[42] The leading case on the meaning of the expression “shadow director” is **Secretary of State for Trade and Industry v Deverell**.¹³ Having conducted a review of the legislation, and a number of the authorities on shadow directorship, Morritt LJ expressed his conclusions in several propositions, *passim*:

- (1) The definition of a shadow director is to be construed in the normal way to give effect to the Parliamentary intention, ascertainable from the mischief to be dealt with and the words used.
- (2) The duty of the court is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. However, it is not necessary that such influence should be exercised over the whole field of its corporate activities.
- (3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained in the light of all the evidence. It is not necessary to prove the understanding or expectation of either the giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence. Evidence of such understanding or expectation may be relevant but it cannot be conclusive. The label attached by either or both parties then or thereafter cannot be more than a factor in considering whether

¹³ [2001] Ch 340.

the communication came within the statutory description of direction or instruction.

- (4) Non-professional advice may come within the statutory definition. The proviso excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover, the concepts of “direction” and ‘instruction’ do not exclude the concept of ‘advice’ because all three share the common feature of “guidance”.
- (5) Whilst it will normally be sufficient to show that, in the face of “directions or instructions” from the alleged shadow director, the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions, it will not be necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are “accustomed to act in accordance with” such directions or instructions. In looking for the additional ingredient of a subservient role or the surrender of discretion by the board, the first instance judge had imposed a qualification beyond that justified by the statutory language.
- (6) Caution has to be exercised in the use of epithets or descriptions in place of the statutory definition of “shadow director”. While the use of such epithets or descriptions may be very effective in graphically conveying the effect of the definition in the light of the facts of any given case, there is a danger that they might mislead when transposed to the facts of other cases and suggest a higher test than that required by the statutory definition of the expression “shadow director”. What is needed is that the board must be accustomed to act on the directions or instructions of the shadow director. Such directions and instructions do not have to extend over all or most of the corporate activities of the company; nor was it

necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board are accustomed to act in accordance with them.

- (7) It is not necessary to the recognition of a shadow director that he should lurk in the shadows, though frequently he may. Lurking in the shadows may occur, but is not an essential ingredient to a finding of shadow directorship. **Morritt LJ** gave as an example the case of a person resident abroad who owned all the shares in a company but chose to operate it through a local board of directors. From time to time, the owner, to the knowledge of all to whom it may be of concern, might give directions to the local board about what to do, but take no part in the management of the company himself. Such an owner may be a shadow director notwithstanding that he takes no steps to hide the part he plays in the affairs of the company.

- [43] The fiduciary and other duties that directors owe to a company do not require any consideration here. That is because, for the reasons given in this judgment, there is no realistic prospect of the Defendants being able to establish that Mr. Abdul-Massih acted in that capacity. The basis for seeking to establish that Mr. Abdul-Massih was a director of one or both entities is little more than a bare assertion unsupported by any evidence.

Constructive Trust, tracing, account, knowing receipt, and enrichment

- [44] On the basis that I am satisfied that Mr. Abdul-Massih was not a director of Phoenix BVI or Phoenix Dubai, and there is no other basis for holding that he owed any fiduciary or other duty to those entities, it is difficult to see how any of the above remedies contended for by the Defendants in the Intended Claims. They do not, therefore, require further consideration in this judgment.

Insolvent or Fraudulent Trading

- [45] Broadly speaking, insolvent trading, or wrongful trading as it is referred to in England and Wales, applies in the BVI, where a director of a company that has gone into an insolvent liquidation knew or ought to have concluded before the company went into liquidation there was no reasonable prospect that the company would avoid going into insolvent liquidation, and that person was a director of the company at that time. I do not believe that there is an equivalent provision in Cayman.
- [46] So far as the Intended Claims include a claim for insolvent trading in the BVI, that claim has no realistic prospect of success because (quite apart from any of the other requirements of insolvent trading) Mr. Abdul-Massih was never a director of Phoenix BVI or Phoenix Dubai.
- [47] In order to establish a claim for fraudulent trading, the liquidator of a company (who is the only person able to bring such a claim) must demonstrate that the business of the company was carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose. Leaving aside whether any of the Defendants can bring such a claim, I cannot see how, on the material submitted to me, the requirement of “dishonesty”, which is an essential ingredient of the claim, can be demonstrated by the Defendants.

Anti-avoidance provisions

- [48] Leaving aside the nomenclature used to describe “voidable preferences” and “undervalue transactions” in different jurisdictions and the largely immaterial statutory differences setting out the conditions of liability in those jurisdictions, the provisions in Cayman that govern such transactions are ss. 145-146 of the **Cayman Islands’ Companies Act** and s. 4 of the **Cayman Fraudulent Dispositions Act**. The equivalent provisions in the BVI are contained in **PART VIII of the BVIA 2003**. A summary of the relevant Cayman Law is set out in Mr. Alex Potts KC’s expert report included in the trial bundles.

[49] Leaving aside the conditions for establishing liability under the above statutory provisions, it is difficult to see how ss. 145 and 146 can apply in the present case. That is because neither Phoenix BVI nor Phoenix Dubai is a Cayman company.

[50] Nor would s. 4 of the **Cayman Fraudulent Dispositions Act**. At para. 64.6 of his report, Mr. Potts explains why:

“There is no valid fraudulent disposition claim under Section 4 of the Cayman FDA against either Mr. Abdul-Massih and/or the Ancile Companies. In particular, there was no disposition of property at an undervalue nor any disposition made with intent to defraud within the meaning of Section 4(1) of the FDA.

- (1) The Share Transfers were made pursuant to the March 2020 Agreement and/or the Suretyship Agreements; and/or
- (2) The Share Transfers were not at an undervalue; and/or
- (3) Neither Mr. Dhawan (a de facto director of Phoenix Dubai) nor anyone else at Phoenix Dubai had an intent to defraud Phoenix Dubai’s creditors in relation to the Share Transfers.”

[51] This opinion has to be correct if one accepts the uncontroverted evidence of the Phoenix Dubai *de jure* directors.

Factual and expert evidence

[52] The lay witnesses called by the Claimants were various former directors of Phoenix BVI and Phoenix Dubai. Despite these proceedings being served on the Defendants, and the Defendants knowing about the trial on 17 July 2025, they did not attend the trial to question those witnesses. Nor did they file any written evidence in opposition to the Present Claim.

[53] The evidence of the lay witnesses called by the Claimants was clear and entirely consistent with the position adopted by the Claimants in the Present Claim. I accept the substance of their evidence and also of Mr. Abdul-Massih, who also gave written and oral evidence.

- [54] Apart from Mr. Potts, the substance of whose expert opinion I agree with, I also heard oral evidence from Ms Nicola Jackson, a partner at Charles Russell Speechlys LLP, who gave an expert's report on UAE law and how the DMCC regulations applied in the Dubai Multi Commodities Centre (DMCC). I gave permission at the trial to allow the Claimants to rely on that report. I accept the substance of both her written report and oral evidence.
- [55] Mr. Alexander KC drew my attention to the material which the Defendants had asked him to draw to my attention. There was nothing in that material that supported anything they had or may have had to say. The Defendants did not file or serve any written evidence, nor did they attend the trial of the Present Claim to cross-examine the factual and expert evidence that the Claimants sought to rely on.
- [56] Based on: (a) the exposition of the law summarised above, and dealt with in more detail in Mr. Alexander KC's skeleton argument, and at the trial; (b) the written and oral evidence of the lay witnesses called by the Claimants; and (c) the expert evidence of Mr. Potts and Ms Jackson, I come to the sure conclusion, on the standard of proof I need to apply to determine the Present Claim, that the Intended Claims are without substance.

Exercise of discretion to make declaratory orders

- [57] The power of a court to grant declaratory relief is discretionary. The discretion is wide and unfettered, subject only to the limitation that it should be exercised judicially, taking into account all the circumstances of a particular case and having regard to the purpose for which the discretion exists. The Court will not exercise its discretion to grant declaratory relief where it is not needed, i.e., the court will not act "in vain": see, for example, **Cruz City 1 Mauritius Holdings v**

Unitech Ltd;¹⁴ **JSC VTB Bank v Skurikhin;**¹⁵ and **Pitt and another v Holt v Futter and others.**¹⁶

[58] In the present case, the limitation period for bringing the Intended Claims has not expired. It may, therefore, be contended by the Defendants that the declaratory relief sought in the Present Claim should not be granted. However, I disagree. For the reasons canvassed above, this Court should give clarity and certainty and, so far as it can, closure to the Claimants so they can carry on with their business affairs going forward.

[59] I, therefore, indicated to Mr. Alexander KC that I would grant the substance of the declaratory relief sought in the Present Claim to the Claimants.

Grant of injunction

[60] Arising from the factual background referred to above, the Claimants seek what is effectively an anti-suit injunction in the terms set out in the Present Claim.

[61] The basis upon which Mr. Alexander KC contends that the injunctions should be granted is set out in the following paragraphs of his skeleton argument:

“187 The Claimants submit that the Court should grant the injunction referred to in paragraph 83 of the Amended Statement of Claim on the basis that there is an imminent risk of irreparable harm. If the injunction is not granted, based on their past conduct, there is a strong possibility that the Defendants (or one or more of them) will seek to pursue Mr. Abdul-Massih and/or the Ancile Companies in other jurisdictions based on the facts and matters the subject of the BVI Proceedings. Despite being officers of the Court, the Defendants have refused to provide undertakings. They have refused to participate in the BVI Proceedings. They have not withdrawn their threats of pursuing litigation even in Cayman or BVI: indeed, Phoenix BVI’s Acknowledgment of Service ... and Harneys’ letter of 3 January 2025 ... expressly indicate that the Defendants maintain what they say in the draft BVI Statement of Claim and in the draft

¹⁴ [2014] EWHC 3131 (Comm).

¹⁵ [2015] EWHC 2131 (Comm).

¹⁶ [2013] UKSC 26, [2013] 2 AC 108.

Cayman Statement of Claim and, as per the Harney's letter, "make no admissions of liability of fact whatsoever" in relation to the BVI Proceedings. They have already pursued claims in the Netherlands (twice) and Switzerland. They have also sought to portray matters to the Swiss court (twice) in a way which is misleading in relation to whether Mr. Abdul-Massih was a director of Phoenix BVI. What is more, they have done this once even after their strike out/jurisdiction challenges failed before Justice Webster and he had indicated that the BVI Court was the right place for the BVI Proceedings to be dealt with.

188 If the Defendants are not required to seek the permission of the Court before taking any such proceedings, whether in BVI or elsewhere, irreparable harm would be caused and damages would not be an adequate remedy. The Claimants keep having to incur substantial costs to deal with the actual or threatened proceedings both in BVI and abroad, much of which is irrecoverable (particularly, so far, in the Netherlands and Switzerland) but also in BVI and Cayman. Their actions also cause damage to the Ancile Companies in their business and to Mr. Abdul-Massih's life. What is more, there is no indication that the Defendants have any, or sufficient, assets to pay for the damage caused, some of which cannot be compensated in money in any event. Presumably, that is why they refused to provide a cross-undertaking in damages in respect of the undertakings given by the [Claimants].

189 In the circumstances it is submitted that it is just and convenient to grant the injunction sought, particularly when it does not prevent the Defendants from commencing proceedings; all it prevents is the Defendants doing that without the leave of the BVI Court. It is also just and convenient because two of the Defendants are officers of the Court and therefore subject to the Court's supervision, but also because as officers of the Court, those two of the Defendants are required to act as the Court itself would and yet the BVI Liquidators have sought to mislead a foreign court, the Swiss Court, twice to the detriment of Mr. Abdul-Massih and once in circumstances where the BVI Court has previously determined that the question of whether Mr. Abdul-Massih is a director of Phoenix BVI should be determined by the BVI Court. Furthermore, if the Defendants had really thought that they had any defence to this very limited."

[62] I respectfully agree with Mr. Alexander KC. This is an entirely appropriate injunction for me to grant in the circumstances.

Conclusion

[63] This judgment explains my reasons for making the orders I did on 17 July 2025.

[64] I am grateful to Mr. Alexander KC and those appearing with him for their assistance.

Abbas Mithani KC
High Court Judge (Ag)

By the Court

Registrar