EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 2023/0040

BETWEEN:

C2 CAPITAL LIMITED

Claimant

-and-

INFINITY PARTICLES LIMITED

Defendant

Appearances:

Mr Paul Chaisty KC, with him Mr Adam Hinks, and Mr Renell Benjamin of Walkers for the Claimant

Mr Stephen Moverley Smith KC, with him Mr James Noble, Ms Amelia Tan, and Mr Ryan Chong of Carey Olsen for the Defendant

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2024: October 7- 10, 14-17, and 22nd

November 28th

JUDGMENT

EXPRESSIONS AND ABBREVIATIONS USED IN THIS JUDGMENT

[1] **MITHANI J [AG.]:** In this judgment, unless otherwise stated or the context otherwise requires, the following words and expressions shall have the following meanings assigned to them:

"the Agreements" shall mean "the Letter Agreements" or any other agreement (oral, or otherwise) found by this Court to have been concluded between the Parties;

"the Amount Claimed" shall mean the sum of US$9,159,564.74, excluding interest, claimed by the Claimant against the Defendant in the Claim, or any part of that amount;

"Chih" shall mean Cheung Chih Tin;

"Chih's witness statement" shall mean Chih's witness statement dated 16 July 2024;

"the Claim" or "this Claim" shall mean the claim made by the Claimants against the Defendant in this action;

"the Claimant" or "C2" shall mean C2 CAPITAL LIMITED;

"the Overarching Agreement" or "the Co-Investment Arrangement" shall mean the agreement allegedly reached between the Parties (or between Chih and Jenkin in their personal capacity) to explore joint investment opportunities between the Claimant and the Defendant or between Chih and Jenkin;

"the Court" or "this Court" shall mean this Division of the High Court of the Eastern Caribbean Supreme Court, based in the territory of the Virgin Islands, hearing the Claim;

"the Defendant" or "Infinity" shall mean INFINITY PARTICLES LIMITED;

“the Disputed Investments” shall mean the investments that are the subject of the Claim, known as “Kayak Investment Partners Offshore Fund Ltd” (or "Kayak"); “Global Uprising, PBC” (or "Cotopaxi"); “Appier Holdings Inc” (or "Appier"); “Loyal Valley Capital Advantage Fund LP1” (or "Loyal Valley"); “JAND Inc (or "Warby Parker") and “CRCM Fintech Fund, LP” ("CRCM"). The reference to an individual disputed investment shall be made by describing the name of the disputed investment followed by the word “Investment”, for example, the “Kayak Investment”;

“the FSMA 2000” shall mean the UK Financial Services and Markets Act 2000;

“the investment opportunities” shall mean opportunities for investment alleged by Chih to have been introduced by him (whether in his personal capacity or on behalf of the Claimant) to Jenkin or the Defendant and shall include any one or more of such opportunities;

“the Investment Period” shall mean the period during which the Disputed Investments were made, being the period from roughly 2015 to 2021;

“the investments” shall mean the investments made by the Defendant in relation to the investment opportunities and shall include any one or more of such investments;

“JAMM ACTIVE” shall mean JAMM Active Limited. A helpful chart is provided in Bundle D2, Vol.1, p. 1496 of how this company fits within the structure of the company or companies owned by Jenkin and/or Chih or their associates. So far as the beneficial ownership of JAMM Active and the other companies in the chart is disputed by the Parties, the dispute is not materially relevant to my determination of the Claim.

“Jenkin” shall mean CHIANG, Wei-Ta 江韋達, also known as JENKIN CHIANG;

“Jenkin’s witness statement” shall mean Jenkin’s signed but undated witness statement filed with this Court on 17 July 2024;

"Jerry" shall mean Chi, Shen-Tien, an in-house financial analyst employed by JAMM Active from June 2021 to October 2021. He was reassigned and employed by Jowett from October 2021 to October 2022.

"Jowett" means Jowett Investment Co. Limited, a company within the JAMM Group, controlled by Jenkin;

"the Letter Agreements" or the "side letters" shall mean the side letters purportedly entered into between the Parties relating to the Disputed Investments. The reference to an individual letter agreement relating to a particular disputed investment shall be made by describing the Disputed Investment followed by the words "Letter Agreement", for example, "the Kayak Letter Agreement";

"the Parties" shall mean the Claimant and the Defendant;

"the proceedings" or "these proceedings" shall mean the proceedings that form the subject of the Claim;

"the SIBA 2010" shall mean the Securities and Investment Business Act 2010; and

"witness statement" or "written evidence" shall mean any witness statement made, or affidavit sworn, by any person in the Claim, and shall include any document signed by any person which is allowed by the Court to stand as a person's written evidence in the Claim.

[2] In addition, in this judgment, unless otherwise stated or the context otherwise requires :

(a) any reference to "the Agreements" shall be to any one or more agreements found by the Court to have been concluded by the Parties;

(b) any reference to "the Disputed Investments" shall be to any one or more Disputed Investments;

(c) any reference to "the Letter Agreements" shall be to any one or more Letter Agreements;

(d) where a passage in a court judgment or a publication is cited, the passage will not include any footnote references contained in it; and

(e) the reference to Chih or Jenkin shall be to those individuals personally or, to any company or companies owned or controlled by, or associated with, them (including in the case of Chih, the Claimant and, in the case of Jenkin, the Defendant).

[3] The other expressions that I will use in this judgment will be obvious from the description I give to them in the course of this judgment.

THE CLAIM

[4] In the Claim, as now formulated in the Amended Statement of Claim dated 27 August 2024, the Claimant seeks the payment of US$9,159,564.74 (i.e., the Amount Claimed), together with interest on that amount, from the Defendant.

[5] The Claimant alleges that, in or around 2015, Chih and Jenkin agreed, over a series of oral discussions, to explore joint investment opportunities. They eventually reached a binding oral agreement in the matter. This agreement (referred to in these proceedings, and defined herein, as the "Overarching Agreement" or the "Co-Investment Arrangement") was to the following effect:

(a) the Claimant, through Chih, would look for suitable financial opportunities, for the Defendant, through Jenkin, to invest in;

(b) the Claimant would act as "financial advisor" to the Defendant. The evidence of Chih was that the expression "financial advisor" in the Agreements was not being used by him in any technical sense, but simply to denote that he would look out for financial opportunities for the Defendant to invest in;

(c) the Claimant and the Defendant would share equally in any net profits from the investments, after the payment to the Defendant of a return on the capital it invested, in the sum of 2% per annum of the amount invested;

(d) if any investment made a loss, the net loss made on the investment would be shared equally by the Parties [1]; and

(e) each investment would be the subject of separate and distinct letters ("the Letter Agreements") to be signed by the Claimant and the Defendant to reflect the Overarching Agreement and provide a record of the terms upon which each relevant investment was made.

[6] In accordance with the Overarching Agreement, a standard Letter of Agreement ("Letter Agreement", also referred to in these proceedings as a "side letter") was prepared and agreed upon between the Claimant and the Defendant in relation to each investment opportunity taken up by the Defendant.

[7] The Letter Agreements are not all identical. However, a typical or standard Letter Agreement was in the following terms:

> "This letter confirms that C2 Capital Limited (Advisor) will serve[2] as the financial advisor to Infinity Particles Limited (Infinity) related to [ ] for the investment in [ ]. Infinity will promptly execute all necessary documents and fund the investment amount on a timely basis. In consideration of the advisory role, Advisor will be responsible for 50% of any losses and will share 50% in any gains beyond 2% IRR resulting from the Investment. Thus, any distribution from Investment will go 100% to Infinity until the cumulative amount (taking into account all prior distributions made or deemed made to Infinity) distributed would provide Infinity with an Internal Rate of Return of 2%. Thereafter, any distribution from Investment will go 50% to Advisor as consideration. If Investment fails to return 100% of contributed capital, Advisor is obligated to pay Infinity 50% of the

[1] It is not clear how the 2% return on the capital investment was to be treated if the investment made a loss. Perhaps the answer lies in Jerry's reference to 48% in his email dated 24 October 2021, referred to below. However, for present purposes, that point is largely academic.

[2] The Defendant points out that four of the Letter Agreements record that the Claimant "has served" instead of "will serve" as financial advisor. It contends that if the Claimant had already performed such services, the purported consideration to support those agreements was "past consideration" and cannot, therefore, support the existence of a valid agreement. The Claimant seeks to argue that the relationship between the Parties was set out in the Overarching Agreement and that the Letter Agreement did little more than "record" that relationship by reference to each individual investment: see, for example, Chih's witness statement, para. 15 *et seq*; and Transcript Days 2 and 3, *passim.* If the Claimant can successfully establish the existence of the Overarching Agreement, then it might provide a complete answer to the Defendant's contention on this issue. It may also be an answer to some of the other contentions advanced by the Defendant, such as whether the consideration provided by the Defendant under the Letter Agreements was "past consideration".

realized loss after fully accounting for all distributions to Infinity from Investment."

[8] Between the Investment Period, i.e., 2015 and 2021, some 50 investments were made by the Defendant in investments alleged to have been introduced by the Claimant to the Defendant. Each investment was the subject of a Letter Agreement in the terms (or substantially the terms) set out above. They included the following investments ("the Disputed Investments"), which form the subject of the Claim:

(a) Kayak Investment Partners Offshore Fund Ltd ("Kayak"), made on or about 3 March 2016, in which a total sum of US$5,000,000 was invested by the Defendant. The net profit from the investment was US$744,341.63, of which the Claimant's share was US$372,170.82.

(b) Global Uprising, PBC ("Cotopaxi"), made on or about 13 February 2017, in which a total sum of US$500.000.53 was invested by the Defendant. The net profit from the investment was US$460.280.33, of which the Claimant's share was US$230,140.17.

(c) Appier Holdings Inc ("Appier"), made on or about 17 August 2017, in which a total sum of US$250,017.00 was invested by the Defendant. The net profit from the investment was US$579,453.56, of which the Claimant's share was US$289,726.78;

(d) Loyal Valley Capital Advantage Fund LP1 ("Loyal Valley"), made on or about 29 December 2017, in which a total sum of US$5,000,000.00 was invested. The net profit from the investment was US$10,452,393.88, of which the Claimant's share was US$5,226,196.94.

(e) JAND Inc ("Warby Parker"), made on or about 19 December 2019, in which a total sum of US$1,101,169 was invested. The net profit from the investment was US$2,596,465.20, of which the Claimant's share was US$1,298,232.60.

(f) CRCM Fintech Fund, LP ("CRCM"), made on or about 29 July 2020, in which a total sum of US$1,250,000 was invested. The net profit from the investment was US$3,486,194.87, of which the Claimant's share was US$1,743,097.43.

[9] The Claimant, therefore, claims the Amount Claimed, i.e., the total sum of US$9,159,564.74, excluding interest, which it asserts is its share of the net profits arising from the Disputed Investments.

[10] As already mentioned, there were several other investments made by the Defendant as a result of investment opportunities alleged to have been introduced to it by the Claimant. The Claimant accepts that although most of the investments made significant, or even substantial, profit, some made losses. It accepts, therefore, that the Defendant is entitled to credit for those investments that made losses, i.e., that those losses should be taken into account in calculating the final amount that is due to the Claimant. However, the Claimant states that it does not have enough information about those other investments (whether profit-making or loss-making) to include them in the Claim. The Claim does not seek an account of the net profit alleged to be due to it concerning those other investments. This means that if the Claim is successful, there can be expected to be more litigation between the Parties about what further amounts, if any, may be due to the Claimant[3]. As Chih pointedly observed, in the course of his evidence on the third day of the trial[4]:

> "They [i.e., the other investments] will be litigated in the future, by the way. Right now, I am just focusing on six cases for these claims, but that's for a future litigation. I am happy to do that in a future trial."

[11] The Defendant had made a counterclaim seeking to bring the loss-making investments into account. However, it decided not to proceed with that counterclaim on the first day of the trial. The only substantive matter for determination in the Claim, therefore, is whether the Claimant should be paid the Amount Claimed plus interest on that amount.

THE BACKGROUND CIRCUMSTANCES

[12] For the purposes of this judgment, it is only necessary to give a brief account of the background circumstances giving rise to the Claim. That is because although the facts, matters, and evidence that give rise to the Claim are in substantial dispute between the Parties, the generic background

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[3] The Claimant's position is that even taking into account the loss-making projects, there will still be a substantial amount due to it.
[4] See Court Transcript, Day 3, p. 42, lines 19-23.

circumstances leading to the dispute between them, and the bringing of the Claim, are largely uncontroversial.

[13] The Claimant and the Defendant are both BVI companies. The shares in the Claimant are owned entirely by Amy Hsu Jing-Yea ("Amy"), Chih's wife, who is the sole director of that company. However, even though Chih is not a *de jure* director of the Claimant, there is little doubt that, in the context of the activities of the Claimant in connection with the Disputed Investments at any rate, he acted as its *de facto* director.

[14] The Defendant is directly owned and controlled by Jenkin.

[15] Chih is a graduate of the Harvard Business School and Harvard Law School. He claims that he has a broad business network in the US and Asia, and that his work involves several other activities, including, *inter alia*, fund management and acting as "special advisor" to investment managers.

[16] Jenkin is a successful businessman. He founded Joy Textile Limited ("Joy"), a very prosperous textile trading and manufacturing company based in Taiwan. The success of Joy was entirely or largely due to Jenkin. At one point in time, Joy was employing more than 300 skilled people and bringing in an annual revenue of over US$300 million. Jenkin's business successes with Joy allowed him to build up some personal wealth, which he then invested into real estate, venture capital firms, and various start-up companies. Those investments also appear to have been hugely prosperous.

[17] Chih and Jenkin first met in 2006. They subsequently became close personal friends and regularly discussed personal wealth and investment-related matters together. Chih says that he fundamentally trusted Jenkin and treated him like a younger brother. Likewise, Jenkin says that they were good friends, that both of them trusted each other, and that he had always been open and upfront about his business dealings and sought to be generous with Chih.

[18] In or around 2015, Jenkin decided to take his textile business with Joy public by way of an IPO. Jenkin's plan for the IPO was predicated on a partnership-based business model. The idea was to invest in promising new strategic ventures, with a view to eventually integrating their operations with Joy's existing textile-manufacturing business. In the interim, these strategic IPO investments would be held by the Defendant, Jenkin's offshore holding entity in the BVI.

[19] As part of the intended IPO, Jenkin incorporated a Cayman Islands company, JAMM Group Limited ("JAMM Group"), which was intended to be the listing entity for the IPO. To spearhead the operations for the intended IPO, JAMM Active Limited ("JAMM Active") was incorporated and established in Hong Kong, and it served as the managing entity for JAMM Group and its related companies. Although JAMM Active was incorporated in Hong Kong, its day-to-day work and operations were carried out from its offices in Taiwan.

[20] On account of their close friendship, Jenkin invited Chih to collaborate with him on the intended IPO. Chih agreed. Chih was formally employed as co-chairman by JAMM Active with effect from 1 August 2016 under the terms of an employment contract of the same date ("the employment contract") and was responsible for leading the intended IPO. As the Co-Chairman of JAMM Active, Chih was paid a monthly salary of US$10,000.

[21] In July 2020, Chih requested that his salary from JAMM Active be paid to the Claimant instead, for personal reasons. JAMM Active, accordingly, entered into a consultancy services agreement dated 1 August 2020 ("the consultancy agreement") with the Claimant. As part of this agreement, the Claimant was obliged, amongst other things, to seek investment opportunities, and provide monthly consulting services to JAMM Active.

[22] Chih was also appointed a director of JAMM Group and given a small holding of shares in JAMM Group.

[23] The Claimant alleges that it introduced various investment opportunities to the Defendant in which the Defendant made investments. The Disputed Investments represent what the Claimant claims were six such investment opportunities introduced by the Claimant to the Defendant in which investments were made by the Defendant. The Amount Claimed is alleged by the Claimant to represent 50% of the net profits of the Disputed Investments.

[24] Unfortunately for Chih and Jenkin, the IPO never materialised. Whatever the cause of that, Chih and Jenkin decided to part company. Chih stopped working for JAMM Active sometime in or around February 2022.

[25] Put simply, the dispute that forms the subject of the Claim is whether the Claimant is entitled to recover the Amount Claimed, based on the six investment opportunities that it (through Chih) introduced to Jenkin and into which Jenkin (through the Defendant) had made investments.

THE BASIS OF THE DEFENDANT'S OPPOSITION TO THE CLAIM

[26] The Defendant disputes the Claim on several grounds, each relied upon in addition or alternatively to any other ground. They include the following:

(a) The Defendant disputes that there was any "Overarching Agreement" either in the terms alleged by the Claimant or at all.

(b) The Defendant disputes that the Letter Agreements were signed by Jenkin or any other person on behalf of the Defendant.

(c) So far as any of the Letter Agreements were only signed by Jenkin, but not by Chih, the Defendant claims that there was no valid agreement between them for the making of the investments referred to in those Letter Agreements.

(d) The Claimant failed to perform its obligations under the terms of the Agreements and there was, in the circumstances, a total failure of consideration.

(e) If any work was performed by the Claimant under a Letter Agreement, it was performed prior to the Letter Agreement being signed on behalf of the Defendant. Any consideration purportedly provided by the Defendant under the terms of the Letter Agreement is, therefore, past consideration.

(f) Chih and/or the Claimant were fully remunerated for introducing investment opportunities to Jenkin or the Defendant under the terms of Chih's employment contract with JAMM Active and/or under the terms of the consultancy agreement entered into by JAMM Active in favour of the Claimant. There is no sum due, therefore, from the Defendant to the Claimant.

(g) Jenkin disputes that the Disputed Investments (or at least, some of the Disputed Investments) were introduced to him, or the Defendant, by Chih.

(h) Jenkin disputes that there was any intention on the part of the Parties to create legal relations. He claims that any investment opportunities that were introduced to him by Chih were introduced because of his close friendship with Chih, or were introduced by Chih in his capacity as a director of the JAMM Group.

(i) The Agreements (which include the Overarching Agreement and/or the Letter Agreements) were illegal and/or unenforceable under BVI Law and/or under Taiwanese Law, being the alleged place where the obligations of the Parties under the terms of those agreements fell to be performed.

THE ISSUES IN THE CLAIM

[27] Both parties have submitted a detailed list of issues that they invite the Court to determine to decide the Claim. I consider that the following issues fairly summarise what I must determine. It encompasses all the material issues that arise in the Claim. It also encompasses all the material issues set out in the lists of issues that the Parties have submitted. There is some degree of overlap between the various issues. It follows that my determination of those issues in this judgment should not be considered in isolation. They should all be considered together.

[28] The issues that arise in the Claim are:

(a) Did the Parties enter into or conclude an overarching agreement in the terms, or substantially the terms, of the Overarching Agreement ("the Overarching Agreement Issue")?

(b) Were the Letter Agreements signed by Jenkin or by some other person on behalf of the Defendant ("the Defendant's Signature Issue")?

(c) Does the failure of Chih or some other person on behalf of the Claimant to sign a Letter Agreement mean that there was no, or no valid, agreement between the Parties for the making of the investment referred to in that Letter Agreement ("the Claimant's Signature Issue")?

(d) Was consideration provided by the Claimant for the work allegedly performed under the Agreements and/or was the consideration past consideration ("the Consideration Issue")?

(e) Did the Claimant fail to perform its obligations under the terms of the Agreements ("the Performance Issue")?

(f) Were Chih and/or the Claimant remunerated for the work done on the Disputed Investments by JAMM Active ("the Remuneration Issue")?

(g) Were the investment opportunities that relate to the Disputed Investments introduced by Chih? If they were, was it on account of the friendship between Chih and Jenkin ("the Legal Relations Issue")?

(h) Are the Agreements illegal and/or unenforceable under BVI Law and/or Taiwanese Law and, if so, what are the consequences of such illegality ("the Illegality Issue")?

[29] The Defendant has raised every conceivable point to support its opposition to the Claim. It is not necessary for me to determine every point raised by the Defendant. It is only necessary for me to determine those points, and those facts and matters, that I consider are necessary for me to decide whether the allegations made by the Claimant are made out and, if they are, whether they warrant the relief sought by the Claimant against the Defendant being granted to the Claimant. This approach has been endorsed in many cases: see, by way of examples, **Weymont v Place [2015] EWCA Civ 289,** at [4]–[6], per Patten LJ**;** and **English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409**.

BURDEN AND STANDARD OF PROOF IN THE CLAIM

[30] The burden of proving the facts and matters upon which the Claimant relies in seeking to make good the Claim rests upon him.

[31] Although the primary burden of proving a fact in a claim will invariably lie with the party asserting that fact, there may be situations where the onus of proving certain facts and matters on which

reliance is placed by a party will lie upon that party. As the authors of **Halsbury's Laws of England** state[5]:

> "The evidential burden (or the burden of adducing evidence) will rest initially upon the party bearing the legal burden. However, rather than referring to a shifting burden, it may be more accurate to say that it is the need to respond to the other party's case that changes as the trial progresses according to the balance of evidence given by each party at any particular stage. If the party bearing the legal burden fails to adduce evidence, he has failed to discharge his burden and there will be no need for the other party to respond; however, if the party bearing the legal burden brings evidence tending to prove his claim, the other party may in response wish to raise an issue and must then bear the burden of adducing evidence in respect of all material facts … Where there is a rebuttable presumption of law in favour of one party, the burden of rebutting it lies upon the other. Therefore, a party suing on a bill of exchange need not initially give any evidence of consideration, or that he is a holder in due course, since there are presumptions to this effect in his favour. Similarly, a presumption of death may assist a party. In negligence claims, a claimant may be able to rely upon the doctrine of *res ipsa loquitur* to introduce a presumption of fact, or in claims where it is relevant to any issue that a person did or did not commit a criminal offence, previous convictions may be pleaded. Where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it often lies upon the latter, but there is no general rule of law to this effect. There is authority contrary to this exception, but it certainly exists and has frequently been applied by the courts. This is particularly the case in magistrates' courts and in criminal proceedings based on statute, and in some employers' liability situations. In civil cases, the incidence of the burden of proof may be determined by agreement between the parties, so far as not prohibited by statute."

[32] Thus, and this is by way of example only, if the Claimant can establish the existence of a document purporting to have been signed by or on behalf of the Defendant, and the Defendant disputes the authenticity of that document, it becomes necessary for Defendant to prove that the document was not signed by or on its behalf. In the present case, therefore, on the basis that the Claimant has been able to establish that the Letter Agreements appear to have been signed by Jenkin, it is for Jenkin to establish that the signatures appearing on the Letter Agreements were not his.

[33] The standard of proof in both the situations referred to above is the usual civil standard of proof – the balance of probabilities. There is no heightened standard of proof simply because the allegations which each party makes against the other are, as in the present case, of a serious nature: see the decision of the House of Lords in **Re B [2008] UKHL 35** and of the Supreme

[5] **See Halsbury's Laws of England, 5th Edition, Reissue, Civil Procedure, Volume 12, 2020, paras 699 and 700.**

Court in **Re S-B [2009] UKSC 17.** Any findings I make are to this standard of proof, regardless of the language I use in this judgment. Thus, in the example given above, the Defendant need only establish, to the civil standard of proof, that the signatures appearing on the Letter Agreements were not Jenkin's. However, for the reasons that are referred to below, my factual findings are not based on the niceties of where the burden of proof lies. I am clear that wherever the burden lies, the evidence supporting the findings that I have made is clear.

[34] The overall assessment of the evidence in connection with an issue arising in a claim is within the sole province of the trial judge. However, the guidance provided in **Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)**, about how the court should evaluate competing evidence is important. In that case, Leggatt J (as he then was) said that the presence of contemporaneous documents (and their contents) would be of substantial importance in the assessment and evaluation of the oral evidence of the witnesses. In the context of this case, that point is important. That is because, while Jenkin maintains that the Defendant had not agreed to pay the Claimant any of the net profits of an investment, the contemporaneous documents generated by or on behalf of the Parties (unless they were forged or created without the authority or knowledge of Jenkin) show a completely different picture.

[35] I do not read **Gestmin** as saying that one simply disregards the oral evidence of the parties. But the important point here is that where there are contemporaneous documents supporting an account put forward by one party, there has to be convincing evidence to demonstrate that those documents do not reflect what the parties had agreed to do. That is not to say that the burden of proof switches from one party to another but simply that the court must regard that as an important consideration in its evaluation of the evidence (both written and oral) that has been adduced in the proceedings. In the context of the conclusion of an oral contract, the position was emphasised by Eyre J in **Mansion Place Ltd v Fox Industrial Services Ltd [2021] EWHC 2972 (TCC)**, at [55], in the following terms:

> "In determining whether there is an enforceable contract, the court must look at the witnesses' evidence through the prism of the contemporaneous documents; of their subsequent actions; of those events which are accepted or clearly demonstrated to have happened; and of inherent likelihood. The impression made by the demeanour of a witness must be set against those matters and to the extent that the contemporaneous documents in particular show a picture different from that depicted by a particular witness it is the former and not the latter which I should regard as more likely to be an accurate account of what happened."

OVERVIEW OF THE EVIDENCE IN THE CLAIM

[36] I heard evidence from the following witnesses:

(a) Chih;

(b) Jerry;

(c) Neil Blumenthal ("Mr Blumenthal");

(d) Nowell Chernick ("Mr Chernick");

(e) Ms Brooke Harley ("Ms Harley");

(f) Ms Chou Ying ("Vivian"); and

(g) Jenkin.

[37] I also heard evidence from, Szu-Yu Liu Queenie ("Ms Liu") and Alex Yeh ("Mr Yeh"), both experts in Taiwanese Law, in support of what each of them had said in their written expert reports about the legality or otherwise of the Disputed Investments under Taiwanese Law.

[38] It is appropriate for me to provide an overview of the evidence of the lay witnesses who gave oral evidence before I deal in detail with the various issues that I have identified which need determining. I will deal with the evidence of the experts later in this judgment.

Jenkin

[39] I start first, perhaps unusually (because Jenkin gave evidence on behalf of the Defendant, and I should ideally first deal with the evidence of Chih and the other witnesses who gave evidence on behalf of the Claimant before Jenkin's evidence) with the evidence of Jenkin.

[40] The overall quality of the evidence of Jenkin was both poor and unsatisfactory. For large parts, I found the evidence to be simply untruthful. Judges do not make findings of this type lightly and I have not done so in this case. I have made this finding after careful consideration of what he had

to say in his evidence (both written and oral) by reference to the contemporaneous documents produced by or on behalf of the Parties. I was struggling to see how anything he had to say on the areas of evidence that were disputed by Chih could be borne out by those documents. I will deal with examples of this below and as I analyse the various issues I need to determine.

[41] I regret having to make this finding. Jenkin must have worked very hard to get to where he is. He is an extremely intelligent individual and a very impressive businessman. Those qualities came through clearly when he was answering questions. He was polite when he answered questions from me but much less so when Mr Chaisty asked him questions.

[42] I agree with Mr Chaisty that Jenkin's demeanour was different when answering Mr Chaisty's questions. He was unnecessarily confrontational and hostile. He refused to answer simple questions that were put to him. It was clear that he had thought of a strategy that he would deploy when giving evidence and that he would stick to that strategy. The strategy essentially involved repeating the answers he had given, referring to the documents in the bundles when he was asked questions, and simply drawing attention, in generic terms, to the position that he had advanced in the Defendant's defence to the Claim.

[43] He gave a completely distorted picture of his relationship with Chih, both in his written and oral evidence. He sought to portray himself as the victim of Chih's machinations, by reference to what Mr Moverley Smith had said in his cross-examination of Chih as Chih's attempt to "muscle in on [his] investments and having aspirations to become [his] financial advisor." When probed further into this allegation – made for the first time in the course of Mr Moverley Smith's cross-examination of Chih – he sought to distance himself from those words claiming they were Mr Moverley Smith's words, not his: see Court Transcript. Day 6, p. 169, line 9 to p. 170, line 13:

"Q Can you tell me, please, in very simple terms so that I can understand it how this muscling in theory, which, I think, is what you are saying your attorney advocates on your behalf, how does this muscling in theory fit in and how does it actually apply, please?

A. Mr. Smith will do that in his closing.

Q. No, no, I am asking you to.

A. I am not an attorney. I cannot answer such a legal question for you.

Q. No, no. You see, Mr. Smith would not advocate a factual proposition just by making it up himself. He can't do that. He does that on behalf of his client. I am not asking you to engage with me in any conversations that you've had with Mr. Moverley Smith. He does it based on instructions. You don't, as a lawyer, just make some thing up. And I asked you, when I referred you to his muscling in theory, whether you agreed with it, whether you agreed with what it was that he was putting forward and you said, you did. So it's quite an important, an interesting theory because it's one we've never heard before. It was mentioned at, I think, about five to 1:00 last Wednesday. So can you tell me, please, given that you agree with that proposition, just tell me in simple terms how this theory applies and how it works in the context of everything that we have seen so far?

A. I am not going to comment on the way we are going to do our case to you. My attorney would do that."

[44] Examples of his refusal to answer straightforward questions can be found throughout the transcripts of his evidence. For example, on Day 5 of the trial, he had the following exchange with Mr Chaisty[6]:

Q. Now, just give the Court an approximate idea of the amount of profit that Infinity has made from those 54 investments?

A. Most of the 54 investments is not done, so I have no idea how much, exactly. If you are asking me an exact number, I cannot give you an exact number because I do not have the information in front of me. I cannot make a guess of something that you want a definite answer. I cannot answer the question.

Q. Let's do it in stages. Almost all of these 54 investments are profit-making. How much profit has been made by these 54 that you are referring to in that sentence that I have read to you now six times?

A. Again, I do not have the figure in front of me, and then a lot of the investments is not finished. I do not have the information in front of me to give you an answer."

[45] And then these remarkable answers to the question put by Mr Chaisty about the profit that the completed investments realised to the nearest $5 million[7]:

"Q. In respect of those investments which are finished, approximately how much profits has been made, to the nearest, if you need to, five million, just to give you some flexibility?

A. Fifty-four which ones are finished. Do you know which ones are finished, so that I can tell you the answer?

[6] See Court Transcript, Day 5, p. 77, line 1 to p. 78, line 7.
[7] See Court Transcript, Day 5, p. 78, line 11 to p. 79, line 1.

Q. Of course not, you do though. We don't. We don't have transparency. So of the 54, how many are completed and how much profit has been made?

A. I don't have it in front of me.

Q. So of the six that are the subject of this litigation, the profit that was made was roundabout 18 million because we are claiming half at 9 million, okay. So six yielded roundabout 18 million. Are the others on a par with those six?

A. No, some of them had significant loss like Qiming, I believe, some loss, but I don't have the exact figure.

Chih

[46] I found Chih, for the most part, to be a straightforward, honest, and reliable witness. He gave spontaneous answers to the questions that were asked of him. Mr Chaisty pointed out that there were instances where Mr Moverley Smith did not challenge the answers provided by Chih[8] and that meant that the Court had to accept that his answers were correct. There is some substance in that point[9], though ultimately the evaluation of the evidence of a witness is entirely down to the Judge.

[47] Chih's evidence was also fair. He did not rely on any false points and was prepared to make concessions whenever that was appropriate. An example is provided by the following exchange between him and Mr Moverley Smith about his failure to sign some of the Letter Agreements:

"Q. You were essentially relying on the overriding agreement to justify not signing this document?

A. In all that action and practically speaking, I had said the original document was in Taiwan. I wasn't in Taiwan. So with the fact that Jenkin acknowledged it, and as you noticed from the WeChat dialogue with Mark and Jenkin, he signed them off, right. And that's something that -- and so once he signed them and I got the message that he signed them, to me that's acceptance. So it wasn't as urgent. And because of COVID, I was never in Taiwan, so I can't physically sign them.

Q. Okay.

[8] See Court Transcript, Day 3, pp. 86-88.
[9] See, for example, the comments made **in EPI Environmental Technologies v. Symphony Plastic [2004] EWHC** 2945 (Ch), at [74]-[76] and **TUI UK Ltd v Griffiths [2023] UKSC 48**, at [42] and [70] about the requirement to put a party's case in cross-examination.

A. But your point is taken, sir. I mean, in hindsight, I should have signed them." (Emphasis supplied)

Chih could have given a protracted explanation about why he decided not to sign those Letter Agreements. He did not, even though Mr Moverley Smith's questioning may have been aimed at getting him to concede that his Claim stood or fell, based on the validity of the Overarching Agreement, and if the Overarching Agreement was never concluded, his claim had to fail. His answer was that with the benefit of hindsight, he would have done so.

[48] That is not to say that I found every aspect of his evidence satisfactory. There were parts of his evidence which were not convincing. I give examples of a few of these at paras. 96-103 of this judgment. For the reasons there referred to, I am not satisfied that the Overarching Agreement was a binding agreement concluded by or on behalf of the Parties.

[49] Nor do I understand Chih's reference to the Claimant and the Defendant having entered into 100 Letter Agreements, when Chih had failed to make mention of that number any time previously. It is possible that there were 100 or so Letter Agreements entered into representing that number of investments. However, that number was only mentioned for the first time in Chih's oral evidence[10].

Jerry

[50] Jerry was an in-house financial analyst employed by JAMM Active from June 2021 to October 2021. He was reassigned to be employed by Jowett from October 2021 to October 2022.

[51] He, together with Mark Mi ("Mark") and Vivian, were hired at different times, by JAMM Active as part of the "Co-Investment Team" which was set up to regularise the investment opportunities that the Parties had agreed to enter into. Chih explains this in para. 30 onwards of his witness statement:

> "In or around 2018, Jenkin and I decided to professionalize the investment process. The arrangement until then was that the accounting team at JAMM Active, led by Annie Chen, who spoke limited English and did not have any relevant investment analysis experience to assess the investment opportunities, had been responsible for the various back-office requirements relating to the investments made to date. However, as the size

[10] See, for example, Court Transcript, Day 2, pp. 78-79, 138.

and number of investments increased over time and since all the investments were outside of Taiwan, it was necessary to recruit and employ more people who can communicate in English and have relevant international investment experience to assist with due diligence and monitoring investments made pursuant to the Co-Investment Arrangement. Accordingly, JAMM Active hired Mark Mi in September 2018 and Jerry Chih and Vivian Chou in June 2021 who, together with me and Jenkin, formed the co-investment team.

Due to the fact that I was co-founder and co-chairman of JAMM Active, the recruitment of Mark, Jerry and Vivian to assist with the co-investments, and for all the paperwork and hardcopies to be kept by JAMM Active, made sense…

Once Mark Mi joined the team a more structured investment process was implemented. The deal sourcing was done by me via my network and the team comprising of Mark, Jerry and Vivian would vet such opportunities by conducting basic business and financial analysis. I would make a decision on whether an investment was viable or not, Jenkin would decide on behalf of Infinity whether to proceed or not, the team would liaise with the team from the invested entity regarding the documents required, Jenkin would execute the investment on behalf of Infinity and the team would track the investment and perform quarterly reviews for Jenkin and me."

[52] Chih relies substantially on the evidence of Jerry and Vivian to support the Claim. A summary of Jerry's account concerning the investment enterprises entered into by the Claimant and the Defendant is set out at paras. 5 onwards of his witness statement dated 1 July 2024:

"I was … offered the inhouse financial analyst position and worked alongside Mark Mi and Vivian Chou. My job was to conduct research and due diligence on investment opportunities sourced by Chih for the investments that he and Jenkin would make together. Chih would make a decision on whether to proceed with an investment and after confirming with Jenkin whether to proceed, Jenkin would execute the necessary paperwork on behalf of Infinity … which was the investment vehicle and the entity through which the co-investments were made.

For the various investments, a side letter was prepared by Mark or me which would record the fact that, amongst other things, Infinity would fund the investment and C2 Capital Ltd would share 50/50 in any losses and gains. I would leave the side letters for Jenkin and collect them after he had signed them.

I reported mostly to Chih regarding the investments. Various WeChat message groups which included me, Mark, Chih and Jenkin were set up to assist with this as Chih lived in Shanghai and was often travelling and rarely in Taiwan.

During my employment, I was provided with two email accounts: one associated with the JAMM Active domain and the other with the C2 domain. It was standard practice for every member of the investment team to have two email accounts. For investment related correspondence, the investment used the C2 email accounts.

During the end of 2021 and the beginning of 2022, Mark Mi and I prepared an excel spreadsheet which listed the investments that had been realised and recorded the profit split between Chih and Jenkin. … Chih, Jenkin and I discussed its preparation and what investments to include in person and over WeChat.

In on around the beginning of 2022, I was involved in corresponding with the various investment contacts to ensure that, where necessary, the address that various notices regarding the co-investments were sent to was switched from C2 email accounts to JAMM Active email accounts."

[53] The oral evidence of Jerry fully supported his written account.

[54] Jerry's evidence withstood Mr Moverley Smith's firm, but fair, cross-examination. I cannot see that he said anything in the course of Mr Moverley Smith's cross-examination that, in any way, cast doubt on the veracity of the account that he gave both in his witness statements and during his oral evidence.

[55] This can clearly be seen from the Court Transcript of the proceedings on Day 4 in which Jerry confirmed, without any serious challenge to what he had to say, that:

(a) the investment enterprises were to be undertaken outside the fabric business;

(b) his job was entirely consistent with the account given by Chih: see Court Transcript, Day 4, pp 11-12 to the following effect:

> "So during that meeting I was explained as my job will be helping this joint investment group to do investment research and vetting as an in-house analyst. So we are going to help Mr. Chih to do investment research and vetting and also manage a portfolio."

(c) he worked as a team with Chih, Mark, Vivian and Jenkin "as the person who confirmed the investment."

(d) The investments were not made by JAMM Active: see Court Transcript, Day 4, p. 12:

> Q. And you said that it was in house. So presumably you're doing that essentially for JAMM Active your employer, certainly at the start, is that right?

A. <u>So we are not actually doing for JAMM Active</u> because the investment is not done by JAMM Active. We are helping Chih and Jenkin to manage their personal investment." (Emphasis supplied).

[56] Nor did Jerry himself propose any investments himself or suggest the entities that should undertake the investments: see Court Transcript, Day 4, pp 18-23:

Q. Were you involved in proposing any investments to either Jenkin or Chih?

A. No.

Q. So in terms of the investments, are you saying you were simply monitoring the investments that had already been made, is that right?

A. So for investments, what I did this too, was I was to, helping to do the research and also the vetting and analysis on it and to make the research results represent to the team.

Q. And in terms of that material, did you then communicate with Jenkin or Chih as to what you had discovered?

A. I did communicate with them on the investment.

Q. And in terms of the investing entity, were you involved in any decision about who was going to make any investment? Were you aware of who was going to make any investment?

A. Do you mean did I decide which entity will be used or --

Q. I'm just looking at the period – because you're involved for only about nine months, aren't you I suppose, in relation to the, to JAMM Active and Jowett? So your employment was only from June '21 to October 2022?

A. Um hmm.

Q. And what I'm asking you is whether any investments were made during that period and –

A. Yeah.

Q. And in relation to the ones that were made, were you involved in deciding what entity was going to be actually making the investment?

A. I'm not the one who made the decision. So I just followed like which entity did they want to use.

Q. And what entities were available to be used?

A. It's mostly Infinity Particle Limited.

Q. Were there other entities?

A. I think there is CC Partners.

Q. Right. Could you tell me a little bit about CC Partners. What did you understand CC Partners was?

A. It's just another entity that we use to invest.

Q. And in relation to CC Partners, is that CC Partners Group Limited you're referring to? Would that sound about right?

A. Yes.

Q. And were you aware of whether, when CC Partners Group Limited was being used, the decision to use that vehicle was being made by Jenkin or by Chih, were you aware of who was making a decision about that?

A. You mean who's making a final decision of what do we invest through CC Partners?

Q. Exactly, yes.

A. So I think all investment were to be signed by Jenkin. So I think that's the final like decision maker.

Q. And was that because the money being used for the investment was coming from Jenkin?

A. Yes.

……

Q. So you say: 'My job was to conduct research and due diligence on investment opportunities sourced by Chih. Chih would make a decision on whether to proceed with an investment, and if Chih decided to proceed, Jenkin would execute the investment on behalf of Infinity Particles...'

And I'd just like to look at that with you just for a moment. So here you're saying that Chih was making a decision as to whether to proceed. And if he made that decision, then Jenkin would execute the investment? Do you see that?

A. Yes, I see that.

Q. Is that correct to your recollection as to what happened?

A. Yes. Since the investment is sourced by Chih and also he will review our investment research results, he will make the, like decide if this is a good investment. And if he thinks so, then he will talk to Jenkin and ask him to sign and proceed with the investment.

Q. Sorry, I just want to check so that if there was any difference between that analysis and what you say at B/30 at paragraph 5. So if we go back to your current witness statement at paragraph 5 at B/30.

A. Yes.

Q. Do you see there you explain it slightly differently? You say: "Chih would make a decision on whether to proceed...and, after confirming with Jenkin whether to proceed, Jenkin would execute the necessary paperwork ..." So that seems to be suggesting that Jenkin had the final word about whether or not the investment would proceed as opposed to Chih making a decision.

A. Yes, both of them needed to confirm on the investments."

[57] Jerry also gave an account of Annie Chen's ("Annie") role in the making of the investments by the Defendant: see Court Transcript, Day 4, pp. 12-13:

"Q. And what about Annie Chen. Was she someone you dealt with?

A. Annie Chen, we do, we did co-work with her as she was the finance person for the investment.

….

Q. When you say for the investment, what are you referring to there?

A. Yeah. So Annie Chen's role is to help foremost to control the finance and also the accounting of these investments that's being done for both Chih and Jenkin as the joint investor.

Q. And in terms of the persons or people she was working for, she was working for both Chih and for Jenkin as you saw it, is that right?

A. Yes, she did work with both of them."

[58] Jerry's evidence was compelling. It entirely supported the Claimant's allegations. I accept the substance of it. There is nothing in the point that, by referring to the "personal investments" of Chih and Jenkin, this Court cannot be certain that the contracting parties to the introduction of the investment opportunities were the Claimant and the Defendant. Jerry would not have given any thought to the vehicle or vehicles through which the investments were to be made. He understood that, in each case, the entities would be those that Chih and Jenkin had agreed to.

Neil Blumenthal

[59] There was nothing controversial about the written and oral evidence of Neil Blumenthal.

[60] Mr Blumenthal was one of the founders of Warby Parker.

[61] In his witness statement dated 2 July 2024, Mr Blumenthal explained the business of Warby Parker and how he came to meet Chih. Once he had come to know Chih well, Chih suggested to him that he might wish to invest in Warby Parker. At paras. 5-7 of his witness statement dated 2 July 2024, Mr Blumenthal sets out how this came about.

[62] Mr Blumenthal also states in his witness statement that he was aware that Chih intended to make a proposed investment in Warby Parker with a friend. He later found out that this friend was Jenkin. Although he did not know Jenkin, and had not spoken to him, this was acceptable to Warby Parker provided Chih was involved in the investment. At paras. 8 and 9 of his witness statement, he explains why:

> "The only reason why Chih was able to acquire Warby Parker shares is because of my co-founder and my developing friendship with Chih … We had plenty of interested buyers, including existing investors … but wanted to have Chih as an investor, so that we could call on him for advice.
>
> … we were incredibly deliberate of who we let invest and become Warby Parker shareholders. We even had restrictions on stock transfers to ensure that only folks approved by the founders could acquire shares. We never would have enabled Chih's business partner alone to invest in Warby Parker or buy shares from others. We enabled Chih to invest in Warby Parker and do so through the entity he preferred to use."

[63] Mr Blumenthal was clear that the Defendant's investment in Warby Parker was only going to be possible if Chih was involved in it. He could not have been clearer: there would have been no prospect of any investment in Warby Parker by Jenkin unless Chih was involved with it. While he, personally, had no knowledge of the vehicle or entity through which the investment was to be made, or who owned that entity, he had thought that Chih was involved in it and thought him to be "really the representative and the investor in our minds." He made it clear that for the investment that was proposed to be made in Warby Parker, "as long as Chih was the point person

and this was a business partner whom [we] trusted, then we were comfortable having them own Warby Parker stock[11].”

[64] I am not sure that I understood the purpose of Mr Moverley Smith’s questioning about whether Chih had misled Warby Parker into thinking that Chih owned the Defendant. It is possible that this questioning was aimed at casting doubt on Chih’s honesty and integrity. Whether or not it was (and leaving aside the admissibility of this type of “character evidence”), it is clear not just that Chih had not sought to mislead anyone but also that even if Warby Parker knew that Chih had no direct or indirect interest in the ownership of the Defendant, it would have allowed the Defendant to acquire its shares, provided it could be satisfied that Chih was spearheading the proposed acquisition. It seems to me also likely to have been the case that even if Chih had an interest in the Defendant, Warby Parker would not have allowed any investment to be made in it if Chih was not the “point person”, i.e., the spokesman for the entity that was involved in the proposed acquisition.

[65] Like the other witnesses who provided evidence to support the Claim, Mr Blumenthal’s evidence provided powerful support for the position advanced by Chih in the Claim. He was clear: without Chih, there would have been no deal. There can be no doubt that the involvement of Chih was the most crucial factor in closing the deal with Warby Parker. I am clear that there had been no misleading of Warby Parker by Chih and even if there had been, it would not have made the slightest difference to Warby Parker. It is not that Warby Parker could not have carried out its own due diligence on the Defendant company if it mattered to it. The reason it allowed the Defendant to invest in it was because of Chih’s association with the Defendant.

Nowell Chernick

[66] The evidence of Mr Chernick also supported the account given by Chih.

[67] He was the co-founder and managing director of Kayak. He had one meeting with Jenkin and Chih, but otherwise, all his dealings were with Chih. In the one meeting that Jenkin had attended with Chih, Mr Chernick explained that Jenkin had remained silent throughout the meeting, and he, that is Mr Chernick, had little knowledge of how Jenkin fitted in with the proposed investment

[11] See Court Transcript, Day 4, p. 93, line 25 to p. 94, line 2.

that was being discussed by Chih with him and his colleagues. Mr Chernick was under the clear impression that Chih was the lead player in the proposed investment, describing him in para. 8 of his witness statement as “the front office, sourcing the ideas and making [the] investment” while Jenkin was “the back office, completing subscription documents and overseeing subscription.”

[68] Mr Chernick too appeared to think that the investment was being made by Chih or, at any rate, Chih was the lead player in the proposed investment. He, likewise, took the view, as stated in para. 11 of his witness statement, that “from his and Kayak’s perspective, Chih was our investor and what he was doing with the legal entities that were responsible for the contributions into and withdrawals out of the fund was his business and not so much ours so long as the legal entities [met] out internal processes.” Plainly, the Defendant did, otherwise it would not have been allowed to invest in Kayak.

[69] Mr Chernick was not aware, until he was informed, in the course of his cross-examination by Mr Moverley Smith, that Jenkin owned Infinity and that Chih had no legal or beneficial interest in that company. He said that if he had been aware of this, he might have “asked more questions” and would have wanted “to have a direct connection and correspondence with Jenkin if he was the ultimate decision maker.” Although Mr Chernick did not suggest as emphatically as Mr Blumenthal that, without Chih’s involvement, there would be no deal, there is no question that to him and his colleagues at Kayak, the involvement of Chih was an important reason for the decision made by them about whether they should allow the Defendant to invest in their company.

Ms Brooke Harley

[70] Ms Harley furnished a short witness statement in relation to the Claim.

[71] She was the co-founder of Campfire Capital Limited Partnership ("Campfire Capital"), a venture capital firm based in Vancouver that focused on early-stage investments in technology and retail. Between 2009 and 2011, Ms Harley was employed as director of Business Development at Lululemon Athletica Inc ("Lululemon"), an athletic apparel company listed on the NASDAQ. Between 2011 and 2015, she was Lululemon's Director of International Operations.

[72] In June 2015, Ms Harley left Lululemon to start Campfire Capital. She was a general partner in Campfire Capital and was arranging finance on its behalf during the period from roughly September 2015 to mid-late 2016.

[73] She sought out Chih, to whom she had been introduced by a former colleague, to invest in Campfire Capital. In or around March 2016, Campfire Capital became aware of a potential investment opportunity in Cotopaxi and notified Chih of that opportunity. She thinks that at some point, Chih made Campfire Capital aware that he would be interested in doing some direct investment of his own alongside Campfire Capital in companies in which Campfire Capital was investing. However, she had no involvement with Chih or Jenkin's proposed investment in Cotopaxi and had little or no knowledge of what investment Chih, Jenkin, or any of their companies made in Cotopaxi. She confirmed that she had personally not heard of, or come across, Jenkin.

[74] In summary, her evidence was that, so far as she knew, the negotiations and discussions about any investment in Cotopaxi were undertaken purely by Chih.

<u>ADVERSE INFERENCES FOR FAILING TO CALL ANNIE CHEN AND MARK MI</u>

[75] The Claimant contends that the Defendant should have called Annie and Mark to give evidence. It contends that if they had been called, they would either have supported the account given by Chih or, substantially or significantly undermined the account provided by Jenkin in his written and oral evidence. The Claimant, therefore, asks me to make an adverse inference about the Defendant's failure to call those witnesses.

[76] I agree that Annie and Mark could (and should) have been called as witnesses.

[77] Annie's evidence is central to the relationship between Chih and Jenkin and their respective companies. She features very heavily in the documentation upon which the Claimant relies (in addition to her emails included or referred to in the various bundles) and would have had a great deal to say about the issues in this case. The Claimant's legal practitioners attempted to contact her to see if she was prepared to give written and oral evidence but received no reply. Similar efforts were made by them to get Mark to provide written and oral evidence but that too proved fruitless. Mark, who was also heavily involved in the various transactions between September 2018 and December 2021, was also not called by the Defendant.

[78] I agree with Mr Chaisty that a deliberate decision was made by the Defendant not to call them.

[79] If Annie and Mark had been called by the Defendant to give evidence, it is possible (though highly unlikely) that their evidence might have provided some support for what Jenkin was saying in his company's defence to the Claim. However, given the documents relied upon by the Claimant, it is more likely to have supported the Claimant's position in the Claim and substantially undermined Jenkin's evidence. That much is abundantly clear from the documentation that I have independently reviewed about their involvement in the Disputed Investments.

[80] Annie continues to work for Jenkin or one of the companies that he, directly or indirectly, owns or controls. It is difficult to see how if she gave a truthful account of her relationship with Chih and Jenkin and their respective companies – and I have little doubt she would have done so – there could be any conceivable explanation for the many emails and other documents that were generated by her, which Jenkin sought to impugn. Any honest explanation from her about her role and responsibilities in the Disputed Investments and the other investments between the Parties would undoubtedly have demonstrated that there was not a scintilla of truth in what Jenkin was saying. In the unlikely event that she had supported Jenkin's account of the allegations made by him, it could have exposed her to a risk of serious wrongdoing in the conduct of her responsibilities on behalf of JAMM Active or JAMM Group. Loyal employee or not, Jenkin is unlikely to have allowed her to escape her responsibilities, bearing in mind how he initiated complaints about Jerry and Vivian in Taiwan which led to criminal proceedings being brought against them.

[81] Jenkin could have secured Annie's attendance at court. In the course of his oral evidence, he gave the following explanation about why this was not possible[12]:

> "Q. We have not yet heard your explanation as to how your signature appear on those documents. The very lady that you trusted for the last ten or so years, who can come along and give us this explanation, you just chose not to call because she says she feels a bit uncomfortable, is that your position?
>
> A. Like I said, I spoke to her, she said she is uncomfortable and does not want to come unless it is required by the law.

[12] See Court Transcript, Day 5, p. 115, line 4 to p. 116, line 20.

Q. What if you say, well, it is not so much required by the law, Annie Chen, it is the fact that it would do me an absolute huge service and assistance if you would just come along and tell the truth. She would have done that for you, wouldn't she?

A. I can't say because that's what she told me. She said she would not come out unless it is required by the law.

Q. That's simply untrue, is it? You've made a deliberate decision not to call her because you know that the last person you want in this courtroom is Annie Chen because she would answer my [sic] answers truthfully and that would be against your interest, that's the reason she is not here, isn't it?

A. Are you accusing me I'm a liar?

Q. Yes, let's not beat about the bush, I am accusing you of lying. She would have been here if you had asked her to be here, wouldn't she?

A. I think you need to prove that I am liar.

Q. Well, what I am saying to you is it just bears no sense whatever. You are in this piece of litigation, it could cost you tens of millions ultimately to owe to my client. The one person who holds the key, who apparently has no skin in the game, the one person who holds the key to this is Annie Chen and where is she? She is back in Taiwan. So where is the logic in not encouraging her, and your persuasion no doubt I suggest would have succeeded, in coming along and helping you?

A. I already said I spoke to her and then she doesn't want to be involved and then unless it is required by the law."

[82] To say that this explanation is bizarre is an understatement. It is a disingenuous attempt by Jenkin to avoid witnesses giving evidence who are likely to have completely undermined his evidence in the Claim. The fact is that Annie assisted Jenkin in the criminal proceedings in Taiwan based on the allegations that he had made against Vivian and Jerry in those proceedings. Although Jenkin suggested that Annie gave evidence in those proceedings because she was required by law to do so, there is no reason why she could not have done so in the Claim if Jenkin, her employer, and someone who trusted her (and she him), had requested her to do so.

[83] Jenkin refers to Jerry and Vivian both being investigated in Taiwan for "offences against confidentiality", though the investigations against Vivian have been dismissed and, according to Chih, those against Jerry are also likely to be dismissed. At para. 85(d) of his witness statement, Jenkin states that "Annie has been called as a witness in the Taiwanese criminal proceedings, and she has stated that she does not recall sending these Letter Agreements to Chih." If that

statement is correct, and Annie has given evidence in Taiwan that she did not send the Letter Agreements upon which Chih relies in support of the account that he gives to this Court, it is difficult to understand how Jenkin can say that he decided not to call her because she was uncomfortable about giving evidence. This is not a small claim, even by the standards of this Court. Indeed, the possibility exists that substantial further claims be brought against the Defendant. Annie's ability to support what Jenkin was saying (i.e., that she had not sent any of the Letter Agreements) by direct evidence would be precisely why he would have wanted to call her.

[84] Likewise, there was no good reason for the Defendant not to have called Mark to give evidence. Like Annie, the Claimant's legal practitioners attempted to contact Mark but were unsuccessful. Jenkin indicated that he was in regular contact with Mark, the last contact having taken place some two months ago. Jenkin could, at least, have asked Mark about whether he would be prepared to attend court to give evidence. Jenkin gave no, or no satisfactory, explanation about why he did not do this. Mark would have provided valuable information to this Court on the contents of documents that are shown to have emanated from him, the circumstances in which the Letter Agreements came to be signed by Jenkin, and Jenkin's review of the periodic settlement statements mentioned below.

[85] Is it appropriate for me to make an adverse inference about the failure of the Defendant to call those witnesses?

[86] The principles that govern when a court may make an adverse inference arising from the failure of a party to call a witness that that party could have called are set out in several cases. They include **Wiszniewski v Central Manchester HA [1998] P.I.Q.R. P324, Jaffray v Society of Lloyds [2002] EWCA Civ 1101, Riva Properties Ltd and others v Foster and Partners Ltd [2017] EWHC 2574 (TCC), Benham Ltd v Kythira Investments Ltd [2003] EWCA Civ 1794, and EnergySolutions EU Limited v Nuclear Commissioning [2016] EWHC 1988 (KB)**.

[87] In **Jaffray v Society of Lloyds [2002] EWCA Civ 1101**, at [406], Waller LJ (giving the judgment of the Court) said:

> "It seems to us that on aspects where the evidence points in a direction against Lloyd's in an area which could have been dealt with by Mr Randall the Judge should have drawn an adverse inference from Lloyd's failure to call Mr Randall to deal with it. This does not

> mean that any allegation that the names make against Mr Randall must be accepted because he did not give evidence. It simply means that where the evidence points in a direction an adverse inference can be drawn from a failure to call a witness to deal with it."

[88] However, the best exposition of those principles is contained in the judgment of Brooke LJ in **Wisznieswki**, at p 340:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

[89] It does not appear to me to be relevant that the attendance of Annie and Mark to give evidence could not have been compelled under pain of some sort of criminal sanction as it appears to have been possible in Taiwan. The fact is that, whether or not their attendance could be compelled, their attendance could have been secured by Jenkin because of his relationship with them (particularly Annie) but was not.

[90] I consider that it is entirely appropriate for me to make an adverse inference about the failure of the Defendant to call Annie and Mark to give evidence. It is plain to me that the absence of what I consider to be crucial evidence from them in this case (in the form of written and oral evidence) is likely down to the fact that the case of the Defendant on several issues I need to determine would not have withstood proper scrutiny if they had been called. That said, it is important that I point out that I would have come to the same factual findings even if I had decided not to make adverse findings of any sort against the Defendant as a result of its failure to call those witnesses.

ANALYSIS AND DISCUSSION

[91] I now turn to the issues that I need to determine.

The Overarching Agreement Issue

[92] I have already touched upon this above. However, it is necessary for me to deal with the issue in more detail.

[93] The question of whether the Overarching Agreement is a binding agreement reached between Chih and Jenkin on behalf of their respective companies is primarily a question of fact.

[94] It is undisputed between the Parties that no formalities are required for an agreement, such as the "Overarching Agreement", to be binding between the alleged parties to the agreement. However, it is for the party asserting the existence of such an agreement to demonstrate that the "agreement" between them was binding.

[95] The issue for this Court is whether – and if so when – the Overarching Agreement between Chih and Jenkin (or their respective companies) was a properly concluded and binding agreement.

[96] I have already indicated that Chih's evidence on this issue was not clear.

[97] I am unable to accept that Chih thought that the Overarching Agreement was a binding agreement reached between the Claimant and the Defendant. I say so for several reasons.

[98] First, the expressions used to describe it suggest that it was little more than an "agreement in principle" between him and Jenkin (or their respective companies) to enter into various investments for which they would share the net profits equally. The expressions he used to describe the Overarching Agreement (also referred to in the documents as "the Co-Investment Agreement") included "understanding"[13], "overarching understanding"[14], "oral understanding"[15], "general understanding"[16], "idea"[17], "and "overarching idea"[18]. The use of these expressions

[13] See, for example, Court Transcript, Day 2, p. 116-117.
[14] See Court Transcript, Day 2, p, 119.
[15] See Court Transcript, Day 2, p. 117.
[16] See Court Transcript, Day 2, p. 121-2.
[17] See, for example, Court Transcript, Day 2, p. 122.
[18] *Ibid*.

does not suggest to me that Chih thought that there was ever a binding agreement between Chih and Jenkin or their respective companies, based on what he calls the Overarching Agreement or the Co-Investment Arrangement.

[99] Second, it must have been obvious to Chih – a law graduate from the Harvard Law School – that there was a difference between an "understanding" and an "agreement". He was quick to point out, for example, that as a general rule, no formalities were required for an agreement to be concluded[19], so must also have known that the expression "understanding" was markedly different from "agreement", even one that was concluded orally. While that may be said to undermine his case on the existence of a binding Overarching Agreement, it demonstrates that he was not seeking to "over-egg the pudding" by describing the Overarching Agreement as something which it was not. He could easily have been much firmer in his evidence by describing that what he and Chih had agreed was a binding agreement and simply maintained that position throughout the trial, as Jenkin had done in relation to some of the arguments that he had advanced before the Court. While, of course, Chih's primary position was that the Overarching Agreement was a firmly concluded deal between them, his own evidence did not support this position.

[100] Third, there were several exchanges between Chih and Mr Moverley Smith in which it was clear that Chih could not have believed that there was a binding Overarching Agreement of the type that he had suggested in his written and oral evidence. Examples of these exchanges include the following:

<u>Court Transcript, Day 2, pp 116-117 (emphasis supplied)</u>

Q. So you say 'understanding', is that because there wasn't actually an agreement. You say it's an understanding. It was just a --

A. Well, I mean, I don't know -- <u>I mean, technically there's no written agreement, but it's an understanding between two parties</u>. So an offer was made and the other side accepted and from 2016 on, we have done over a 100 investments together with e-mails, with WeChat, with phonecalls and with these quarterly report reviews, and an acknowledgment, co-investment letters. So I believe, sir, we need look at the totality of what's going on and decide what is the intent.

[19] See Court Transcript, Day 3, p. 19: "When you have an agreement which people, sign, the agreements reach when both people sign; isn't it? One party signs, the other party signs? A. It depends. There's a lot of agreements. That's just oral… ." The references to "Court Transcript" in this judgment are to the transcript of the proceedings prepared by the court reporters, rather than the transcripts of some of the evidence prepared by an independent transcriber by or on behalf of one or both parties.

Q. So what His Lordship has to look at is the overall picture of, and any specific agreement in 2015; is that right?

A. Well, there is an agreement. It's an oral agreement, an overcharging agreement and basically it is supported and backed up in terms of intent by all of the things we've been talking about.

Q. You used the word 'understanding' didn't you? Is that what you are really talking about?

A. Well, understanding and agreement to me is the same thing.

Q. There was nothing formal agreed, was there?

A. Well, it is very formal because we have all these other things that actually support the fact that it's a business arrangement."

Court Transcript, Day 2, pp 123-4 (emphasis supplied)

Q. Well, what I am trying to get at is that there wasn't actually an agreement along these lines. You might have had an idea that this would be a nice thing to do, but there was no actual agreement about it, was there?

A. Sir, if there was no actual agreement, we wouldn't do all the things that we did. You know that quarterly report that we do every quarter, it takes months, literally weeks, like a week or two to prepare. We have e-mails, I spent time, I travel on behalf of these investments to make sure they are correct. I talked to Jenkin on a regular basis about them. So I'm not sure what you mean by there's no agreement. I mean, I think, if you are saying there's no overarching agreement, technically, I agree with you. Technically, you are right.

Q. And there is no overarching oral agreement either.

A. Of course there is, otherwise why would we do all these different investments and have it done in a systemic fashion? I'm sorry, I apologise. I'm a little bit emotional about this, but it is just a little bit, I'm trying to understand like, you know, what you're trying to get at here.

[101] Fourth, the Court applies an objective test in deciding whether a validly concluded binding agreement has been reached between the parties. As the authors of **Chitty on Contracts, 35th Edition, Eds: Hugh Beale *et al* ("Chitty on Contracts")** observe[20]:

"In deciding whether the parties have reached agreement, the courts normally apply the objective test … Under this test, once the parties have to all outward appearances

[20] See **Chitty on Contracts**, Volume 1, at 4-002.

agreed in the same terms on the same subject-matter, then neither can, generally, rely on some unexpressed qualification or reservation to show that they had not in fact agreed to the terms to which they had appeared to agree. Such subjective reservations of one party therefore do not prevent the formation of a contract. Equally, a party who completes and signs a contractual document "cannot avoid its consequences by saying that they did not read it or did not understand it". The rule just stated does not apply, however, in favour of a party who knows, or ought to have known, that the other does not assent to the terms proposed in a notice displayed by the former party: e.g. where an offer is expressed in a language which the offeree, to the offeror's knowledge, does not understand; or where the course of dealing shows that the offeree must have known that the offeror did not mean what they had said; or, arguably, where the offeree ought to have known that the offeror's offer contained an error. Likewise, the objective test applies when determining the identity of the parties to the contract."

[102] Even if I am wrong about whether Chih genuinely believed that the Overarching Agreement was a binding agreement reached between the Parties, looking at the facts objectively, I cannot see, based on the matters referred to in paras. 97-101 of this judgment, how I could come to that conclusion. If the Letter Agreements did no more than simply record the investments that the Defendant had made into investment opportunities introduced to him by Chih, then I question why: (a) the Letter Agreements did not refer to the Overarching Agreement; (b) Chih drafted the Letter Agreements as formal agreements between the Parties, purportedly setting out the terms of the Overarching Agreements; (c) either party needed to sign the Letter Agreements; (d) the Letter Agreement expressly set out (or repeated) the obligations of the Parties; and (e) Chih felt the need to chase members of the Co-Investment Team to have Jenkin sign the Letter Agreements and send copies of the agreements to him, as to which, see paras. 127, 128, 134 and 135 of this judgment.

[103] Finally, on this point, if there had been a binding "Overarching Agreement", I would have expected Chih to know when it was firmed up. There is very little information about this either in the Statement of Claim or in Chih's witness statement. Mr Moverley Smith sought to obtain more information about it but was provided with answers that were far from satisfactory. I took the matter up with Chih, after the conclusion of Mr Moverley Smith's cross-examination and was none the wiser, as the following exchanges (Court Transcript, Day 3, pp 89-91) demonstrate:

"THE COURT: Can I just ask you this, in relation to the overarching agreement that has been mentioned in so much detail, you must remember, must you not, when that discussion took place that resulted in this overarching agreement or understanding to have taken place? I mean, was it when you were having lunch with them? Was it on the telephone? Was it on one occasion? Was on it on several occasions? What's your evidence there? Because looking at the pleadings and looking at the statement, your statement, it's not entirely clear when this understanding became firmed up.

.

THE WITNESS: My Lord, from my recollection, we started talking about it in 2015, especially when we did the JAMM Active incorporation. So it was a concept that we had been talking about. And basically, we, you know, now is it through meals, phone calls or just spending time together.

THE COURT: But there must have come a point in time where it was clear what was being agreed.

THE WITNESS: Yes.

THE COURT: Are you going to be paid 50 percent of the net profit? And did you say to him, for example, look, our agreement is now that we will do this and can you have, do you have any recollection of when that final, you know, indication was given? And he said oh yes, yes, of course.

THE WITNESS: I understand, My Lord, what you are saying and I don't remember the specific date. But one thing I can point to is that Sir actually shared a WeChat where Jenkin said going forward, let's use Infinity Particle for all these investments going forward. So I am assuming that the understanding that we had definitely happened before that.

THE COURT: But you can't recall. What you are saying is that this happened in a series of exchanges that you had.

THE WITNESS: Yes, My Lord.

THE COURT: And there came a point when that was what was agreed. But you cannot recollect exactly when that was.

THE WITNESS: My Lord, I can't point to any specific moment. But like I said, for me the frustrating thing is that this relationship happened, evolved over time. And then we evolved into two things: one, JAMM Active going public, newco, and two, we do these joint investments together as business partners."

[104] It is also appropriate, in this context, to note para. 7.4 of the Practice Direction, supplementing the English CPR 1999, which contains the following provision:

> "Where a claim is based upon an oral agreement, the particulars of claim should set out the contractual words used and state by whom, to whom, when and where they were spoken."

[105] So far as I know, there is no equivalent of this provision in the ECSC CPR. However, r. 8.7 of the ECSC CPR (which mirrors the provision of English CPR 16.4) provides that "the claimant must include in the claim form or in the statement of claim a statement of all the facts on which the

claimant relies". The absence of the particulars referred to above (whether in the Statement of Claim or even Chih's witness statement) is telling. If there was any substance in Chih's assertion that he believed there to be an Overarching Agreement between the Parties, some attempt at the very least, should have been made by him to provide the essential terms of such an agreement and information about the words used by him and Jenkin, or their gist, resulting in the making of the agreement.

[106] I am satisfied that several discussions between the Parties, about potential investment opportunities being introduced by Chih to Jenkin, took place. I am also satisfied that these discussions culminated in an "agreement in principle" being reached between the Parties that Chih, on behalf of the Claimant, would provide investment opportunities from time to time to Jenkin and that they would share equally in the net profit realised (after the payment of the sum of 2% per annum by way of return on the capital invested by Jenkin) or loss made by the investment. This would be on an *ad hoc* basis, as and when Chih became aware of an investment opportunity that he thought Jenkin might wish to invest in. It would then be up to Jenkin to decide whether to proceed with that investment opportunity. A binding agreement was only reached by the Parties once Jenkin signed the Letter Agreement relating to that investment or injected funds into it.

[107] As to the "making" of "agreements in principle", **Chitty on Contracts**, Volume 1, at 4-146, states:

> "Parties may reach agreement on essential matters of principle, but leave important points unsettled so that their agreement is incomplete, and therefore not binding. It has, for example, been held that there was no contract where an agreement for a lease failed to specify the date on which the term was to commence; that an agreement 'in principle' for the redevelopment and disposal of residential property, which specified core terms but left important matters, such as the timing of the project, for future discussion was an 'incomplete agreement' and so did not amount to a binding contract; that an agreement for sale of land by instalments was not a binding contract where it provided for conveyance of 'a proportionate part' as each instalment of the price was paid, but failed to specify which part is to be conveyed on each payment; that where, though agreement had been reached 'covering some significant matters', there was no contract because 'many fundamental matters remained to be resolved', that an agreement to transfer money and property conditional on the transferee's retraction of comments in an affidavit, an undertaking of confidentiality and the transferor's satisfaction, was not intended to be binding until the conditions were fulfilled, the conditions being, anyway, too uncertain, that any agreement reached by the parties was not binding as it failed to cover 'significant' and 'essential' issues such as the division of profits and the distribution of the risk of litigation between parties, and that an agreement to design a racing car was not binding as it failed to deal with numerous matters of considerable commercial importance, including who would have ownership over the relevant intellectual property

> rights. An agreement is also incomplete if it expressly provides that it is 'subject to' specified points; there is no contract in such a case until either those points are resolved or the parties agree that their resolution is no longer necessary for the agreement to enter into contractual force."

[108] I do not consider that there is any certainty, or sufficient particularity, about the discussions between Chih and Jenkin to make it possible for me to come to the finding that the Overarching Agreement was a binding agreement reached between the Parties. It was no more than an agreement in principle between Chih and Jenkin.

[109] I am clear, therefore, that the Overarching Agreement was not a finally concluded agreement between the Claimant and the Defendant. Chih was wrong to suggest that it was. A valid agreement was only concluded at the point when the Letter Agreement was signed or, if no Letter Agreement was signed, when Jenkin invested funds in an investment opportunity that was afforded to him. So, for the point at which the agreement between the Parties was concluded, this has to be on the date when the Letter Agreement was signed by Jenkin or the date of the investment being made by the injection of the funds by Jenkin in relation to an investment opportunity introduced by Chih, whichever date was earlier. It almost goes without saying that if Jenkin either failed to sign a Letter Agreement or to make an injection of funds in relation to an investment opportunity, that was an end to the matter and no binding contract came, or could have come, into existence between the Parties in relation to that opportunity.

[110] I consider that this is supported by the express terms of the Letter Agreement, which states that Infinity will "promptly execute all necessary documents and fund the investment amount [in relation to the investment specified in the Letter Agreement] on a timely basis." The only proper interpretation that can be given to this provision is that the Parties were entering into an agreement for the investment specified in the Letter Agreement when the Letter Agreement was signed by Jenkin. Accordingly, if at that stage, no investment of funds had been made by Jenkin, it became necessary for him to do so "on a timely basis" (disregarding, for this purpose, whether those words are certain enough to be enforced). If no Letter Agreement was signed by Jenkin, but an injection of funds was made by him in an investment opportunity introduced to him by Chih, the Defendant became liable to pay 50% of the net profit (or, as the case may be, the Claimant became liable to pay half of the loss) made by the investment on the basis that, once that injection of funds was made, there had to be an implied agreement between the Parties. In either case, the terms were those as set out in the relevant Letter Agreement. I do not know whether the difference in the wording of the Letter Agreements referred to in para. 26(e) of this

judgment is intended to reflect this distinction. I have not checked this because of the findings I have made. However, if it does, it provides further support for Chih's position in the Claim.

[111] While, therefore, I come to the conclusion that there was no binding Overarching Agreement, I am satisfied that even without a Letter Agreement, once the investment was made by Jenkin, a binding agreement between the Parties was concluded under which the Defendant became obliged to pay 50% of the net profit in relation to the Investment to the Claimant. Likewise, if the Investment made a loss, the Claimant became liable to pay half the amount of that loss to the Defendant.

[112] It follows that the alternative basis upon which the Claim is made (i.e., under the Letter Agreements) must succeed, subject to the various defences raised by the Defendant. That is because each of the Disputed Investments is represented by a signed Letter Agreement.

[113] The Overarching Agreement Issue must, therefore, be decided against the Claimant, though, as I have said, this does not have any significant bearing on the Claim because each Disputed Investment is represented by a Letter Agreement. Nor is it likely to have any significant bearing on any future claim that the Claimant may wish to bring against the Defendant in relation to investment opportunities introduced by the Claimant to the Defendant but that is not a matter for this Court. So far as either party seeks to carry any findings made in these proceedings to any future proceedings, they will be aware of cases such as **Hunter v Chief Constable of West Midlands [1982] AC 529**, **Johnson v Gore Wood & Co [2002] 2 A.C. 1**, and **Ashmore v British Coal Corp [1990] 2 Q.B. 338**, including the summary of the relevant principles set out in **Re Queen's Moat House Plc, Secretary of State for Trade and Industry v Bairstow [2003] EWCA Civ 321, [2004] Ch 1**.

The Defendant's Signature Issue

[114] Were the Letter Agreements signed by Jenkin or by some other person on behalf of the Defendant?

[115] It is worth summarising what Jenkin has to say about this. At para. 81 onwards of his witness statement, Jenkin said:

“81. It is also C2's position that I had signed the alleged Letter Agreements ‘in the presence of members of the Co-investment Team’. Again, this seems implausible to me, for the same reasons which I have just set out above.

82. I note that the Letter Agreements appear to contain my ‘wet-ink’ physical signatures. Where physical signatures are required, my usual practice was to print out and to sign the documents at the Taiwan branch of JAMM Active Limited. The dates on which some of these Letter Agreements were allegedly signed by me are therefore unusual.

(a) A Letter Agreement in respect of the Kayak Investment was allegedly signed on 1 July 2017. That day was a Saturday. I do not go into the office on weekends, and it is unlikely that I would have physically signed a document on that date.

(b) Three Letter Agreements were allegedly signed on 8 December 2017 (relating to Arete Macro Feeder Fund, Shearwater International Inc., and NXT Ventures Fund I, LLC). I was travelling and in the Maldives from 6 to 15 December 2017. I was not in Taiwan, and it is unlikely that I would have physically signed such documents on that date.

(c) A Letter Agreement in respect of the CRCM Investment was allegedly signed on 3 October 2018. I was travelling and on a business trip in Jordan from 30 September 2018 to 4 October 2018. I was not in Taiwan, and it is unlikely that I would have physically signed such a document on that date.

(d) A Letter Agreement in respect of the Zoo Capital Fund I.LP was allegedly signed on 11 February 2020. I was travelling and on a business trip in Vietnam from between 9 to 14 February 2020. I was not in Taiwan, and it is unlikely that I would have physically signed such a document on that date.

(e) A copy of the certificate of entry and exit dates, evidencing the dates I was in Taiwan, from between 2016 to 2024 can be found at pages 175 to 181 of Exhibit CW-1.

83 I note that the majority of the Letter Agreements which C2 is now suing on also do not bear Chih's signature, including the following:

(a) the Appier Letter Agreement dated 20 September 2019;

(b) the LVC Letter Agreement dated 20 September 2019;

(c) the Warby Parker Letter Agreement dated 19 December 2019; and

(d) the CRCM Letter Agreement dated 29 June 2020.

84 I also do not recall ever obtaining legal advice on these alleged Letter Agreements, which would have been a basic step for a commercial transaction of this nature.

85 To compound matters, there are no physical records or copies of these alleged Letter Agreements.

(a) C2's position, as set out in Walkers letter dated 4 December 2023, is that it 'does not have copies of the original Letter Agreements as they are kept at JAMM Active's office and remain in the possession of [Infinity'…

(b) I confirm that Infinity does not possess the physical copies of these alleged Letter Agreements and has no records of these alleged Letter Agreements.

(c) I also do not understand why C2 would not have physical copies of the original Letter Agreements. I have asked Annie to assist me with scanning documents in the past. On each of those occasions, the usual practice would be for Annie to return me the physical copies of the documents after they had been scanned. If it is C2's case that Annie had similarly assisted Chih to scan such documents, then it would only have been natural for the physical copies of such documents to be returned to Chih thereafter.

(d) Further, I understand that these Letter Agreements are the subject of criminal investigations in Taiwan (which I will elaborate on further below). I also understand that Annie has been called as a witness in these Taiwanese criminal proceedings, and she has stated that she does not recall sending these Letter Agreements to Chih.

86 For completeness, I note that C2 has disclosed copies of WeChat conversations between myself and Chih which suggest that I had signed off on various 'side letters'. These include exchanges between myself and Chih dated 21 March 2018 and 6 December 2021 … My understanding is that 'side letters' are typically entered into with the investment entity, and to supplement the main terms of the investment. While I do not recall exactly what these "side letters" were, I do not believe that they would have been a reference to the alleged Letter Agreements. I also note that the WeChat conversation on 6 December 2021 would have occurred on a date well after the 54 alleged Letter Agreements were allegedly concluded (and therefore appear to be entirely unrelated)."

[116] I wholly reject the assertion that Jenkin did not sign the Letter Agreements.

[117] Jenkin's evidence on this issue was not just inherently inconsistent and weak, but also untrue.

[118] At its highest, what Jenkin says is that he cannot recall signing the Letter Agreements and that the first time he saw them was when the Claim was intimated or initiated, other than in relation to the Warby Parker Investment. The Letter Agreement relating to that investment was provided

to the Defendant's legal practitioners, Carey Olsen, by the Claimant's legal practitioners, Walkers, on 10 November 2022, and Jenkin saw that Letter Agreement on or around that date.

[119] Jenkin summarises his position about this in para. 88 of his witness statement:

> "In light of the matters set out in paragraphs 80 to 87 above and the fact that I do not recall signing any alleged Letter Agreement, I have reason to believe that I would not have signed the alleged Letter Agreements. I should mention that JAMM Active Limited has been the victim of employee fraud in the past. JAMM Active Limited has filed a criminal complaint against a former employee, and the former employee was prosecuted for, amongst other things, falsifying documents."

[120] The assertion that Jenkin did not sign the Letter Agreements is a palpable untruth.

[121] I start with what Chih says about the Letter Agreements. At para. 24 onwards of his witness statement, Chih states that, in summary, the way his arrangement with Jenkin worked was as follows: Chih would identify and give his opinion on the viability of any proposed investment following which Jenkin would determine, on behalf of the Defendant, whether to proceed with the investment or not. For each investment, a Letter Agreement, which he and Jenkin referred to as a "side-letter", was prepared by JAMM Group's employees. These employees were Annie, Mark, and Jerry. Chih described that the purpose of the Letter Agreement was "to document the investments that had been agreed between the Parties in which Jenkin had agreed to invest." There were times when Chih signed a Letter Agreement first and gave it to Annie or left it in the Defendant's office so she could obtain Jenkin's signature to it. Once this was done, Annie would send a digital copy of the agreement to both Chih and Jenkin via email. The originals were kept in the JAMM Active office. Over time, and as the number of investments increased, once the content of the Letter Agreement was completed, Annie, Mark, or Jerry, depending on who had prepared it, would take a hard copy to Jenkin's office for his signature. After Jenkin had signed the Letter Agreement, Annie, Mark, or Jerry would scan and send a copy to Chih via email or upload it to a Dropbox account, created by Mark for Chih, to view and sign at Chih's convenience. Chih said that it was common practice for him and Jenkin to upload documents to a Dropbox and to mainly communicate via email, WeChat, or telephone. Specifically, none of the Letter Agreements were signed electronically, so the signatures on the Letter Agreements were all Jenkin's, written in his handwriting.

[122] I accept that this is what happened. It is supported by ample documentary evidence, including the clear evidence of Jerry and Vivian. The only way Jenkin can prove that the signatures on the Letter Agreements were not his would be by having a handwriting expert analyse from the original documents whether the signatures were his. This is not possible because the original documents cannot be traced. Chih says that the originals are with Jenkin and Jerry and Vivian support what he says. Jenkin says that they are not in his possession, though he says this without having conducted any search about where Chih, Jerry, and Vivian said they might be.

[123] I consider that the Letter Agreements are in Jenkin's possession or control. His inability to trace them appears to me to be a convenient excuse on his part not to allow them to be forensically examined for fear that the examination may prove that the signatures were his.

[124] In my judgment, there can be no conceivable basis for Jenkin to assert that he did not sign the Letter Agreements, still less that he was unaware of what Annie, Mark, or Jerry were doing.

[125] Jenkin was taken through various documents in the bundles which demonstrated that he knew exactly what was going on, even if he claimed that the signatures on the Letter Agreements were not his. I do not intend to deal with every document that was put to him. It suffices if I give a few examples of how unreliable his evidence was on this issue.

[126] Let me first start with Chih's evidence.

[127] Paragraph 27 of Chih's statement sets out a few examples recording the discussions and communication that he had with Mark and the other members of the Co-Investment Team about the investment opportunities and/or the investments that Jenkin made, based on those introductions:

(a) on 2 October 2018, Mark confirmed to Chih by WeChat that he had "sent updated draft side letter [meaning an updated Letter Agreement]";

(b) on 21 September 2021, Mark confirmed to Chih by a WeChat message that he was training Jerry about the side letters and would make sure that the letters were up to date and done after every investment;

(c) on 26 September 2021, Mark sent an email to Chih in which he stated: "Side Letters: Working with Jerry to get up to date. Will need Jenkin and you to sign a lot of updated letters";

(d) on 28 September 2021, Mark and Chih exchanged messages in which Chih explained that he wanted to review all the missing side letters and get them executed by 15 October 2021;

(e) on 11 October 2021, Mark sent an email to Chih in which he stated: "Side Letters: Will work to get them executed this week";

(f) on 17 October 2021, Mark sent an email to Chih in which he stated: "Side Letters and CC Partner Letter: Work in process. Once Jenkin signed will provide you to sign";

(g) on 20 October 2021, Mark raised some queries with Chih by WeChat about the side letters;

(h) on 21 October 2021, Mark sent a WeChat message to Chih referring to the Dropbox (CDropbox/_CC Investments/CC Partner Portfolio/Side Letters) where all the digital copies of the side letters were saved;

(i) on 24 October 2021, Mark sent an email to Chih in which he said: "To confirm, C2 responsible for 50% of any losses and share 48% of any gain?";

(j) on 31 October 2021, Mark sent an email to Chih in which he stated: "Side Letters and CC Partner Letter: Will go in office this week to get Jenkin to sign. Will mail you after";

(k) on 5 November 2021, in response to a voice note Chih left about getting all the side letters signed, Mark sent a WeChat message stating: "ok on the side letters";

(l) on 14 November 2021, Mark sent a WeChat message to Chih in which he stated: "Side Letters: Went over with Annie and will have Jenkin sign"; and

(m) on 12 January 2022, Mark sent a WeChat message to Chih referring to the Dropbox where the side letters were saved.

[128] There are also several WeChat exchanges between Chih and Jenkin where they discussed the Letter Agreements and the co-investment relationship between them. Examples of these are given in para. 28 of Chih's witness statement. They included:

(a) a message on 21 March 2018 when Jenkin confirmed that "side letters all signed";

(b) a message on 6 December 2021 when, in response to Chih's request to Jenkin to sign the side letters, he responded "yeah half signed", "will finish by tomorrow", "big deck to sign", "just hasn't been in the office that long and that often" "but working on it".

(c) In a group chat on 6 December 2021 with Mark and Jenkin, Chih stated "Jenkin will have all side letters signed by tomorrow" to which Jenkin replied, "yeah have already signed more than half".

[129] Given the foregoing, it is incomprehensible how Jenkin could allege that he was unaware of the Letter Agreements. He knew full well what they were and why they needed to be signed by him.

[130] Chih stated that, in or about 2018, he and Jenkin decided to "professionalise" the investment process. The arrangement until then was that the accounting team at JAMM Active, led by Annie, who spoke limited English and did not have any relevant investment analysis experience to assess the investment opportunities, had been responsible for the various back-office requirements relating to the investments made. However, as the size and number of investments increased over time and since all the investments were outside of Taiwan, it was necessary to recruit and employ more people who could communicate in English and have relevant international investment experience to assist with due diligence and monitoring the investments made by the Defendant pursuant to the investment opportunities introduced to Chih by Jenkin.

[131] JAMM Active hired Mark in September 2018 and Jerry and Vivian in June 2021 who, together with Chih and Jenkin, worked collaboratively to deal with the investments that Chih and Jenkin

had agreed to make. This group of individuals (referred to by Chih as the "Co-Investment Team") provided what Chih described as a "more structured investment process [which] was implemented … [with] the deal sourcing [to be] done by [Chih] via [his] network and the team comprising of Mark, Jerry, and Vivian would vet such opportunities by conducting basic business and financial analysis." Chih would decide on whether an investment was viable or not, Jenkin would decide, on behalf of Infinity, whether to proceed with it or not, the team would liaise with the team from the proposed investment entity regarding the documents required, Jenkin would execute the investment on behalf of Infinity, and the team would track the investment and perform quarterly reviews for Jenkin and Chih.

[132] Jenkin had no answer to what Chih had to say. He repeatedly said that his position was set out in his witness statement. As indicated above, when asked whether he had searched to see whether the original Letter Agreements which Chih claimed were in his possession or control, he said he had not because he had not seen them and that had to mean that he did not have them.

[133] It is worth setting out some of Jenkin's exchanges with Mr Chaisty. It shows his unwillingness to answer straightforward questions put to him by Mr Chaisty, his refusal to elaborate on anything he said in his witness statement, and his indignance at the fact that Mr Chaisty even had the temerity to question him about matters that must have been obvious to him from the papers generated by him and his lawyers in the bundles.

[134] It is appropriate first to set out what he had to say in his exchanges with Mr Chaisty about Annie's emails to Chih relating to the Disputed Investments. Jenkin trusted Annie completely. As I have said above, she remains a loyal and trusted employee of Jenkin's and he, obviously, is in regular communication and contact with her[21].

> "Q For example F2, that's your signature, isn't it?
>
> A. I cannot affirm this is my signature because this is not original. I cannot tell if this is my signature.
>
> Q. … if you look at F3, F5, F6, they are all your signatures, aren't they?
>
> A. I said I cannot affirm it is my signature because I have not recall seeing the document.
>
> Q. So you have spoken to Annie Chen about this presumably?

[21] See Court Transcript, Day 5, p. 121, line 16, to p. 123, line 24.

…

Q. Well, if you look and see, what on earth is she up to, is really what I am asking you? If you look at F1, there she is on the 20th of March 2018 attaching as a document, that document that you can see at F2 and she does it repeatedly. You must have spoken presumably to Annie Chen about what it was that she was up to?

A. I did spoke to her.

Q. You did speak to her. You don't see anywhere in your witness statement, any even hearsay evidence from you as to what these conversations with Annie Chen may have revealed about these documents, do we?

A. I recall in my statement I did say scanning and then she doesn't recall scanning what. You have to look at my witness statement. I believe it is in there.

Q. You see, all that we understand at the moment your case to be, is that you don't recall signing these documents. That's the top and bottom of it, isn't it?

A. I don't recall seeing the documents.

Q. So how is it that these documents bear your signature or at least purportedly bear your signature?

…

A. I am curious too.

Q. I see. Well, the answer is very simple, isn't it, it's because you sign[ed] them and Annie Chen, your trusted employee, Annie Chen, acting in your interest and not contrary to them, had this document in her possession and scanned it and sent it to Chih as part of the arrangement that existed between you. That's the simple truth, isn't it?

A. No, what you are saying is not what I said.

Q. And your case against that, as I understand it, your only evidence against that is you don't recall signing the documents, correct?

A. My evidence is put forward in my witness statements.

Q. Yes. Which amounts to saying you don't recall signing them, correct?

A. Again, my witness statement is what I said about my defence."

[135] Next, it is necessary to set out his explanation, in his own words, about the emails and documents, and importantly, the quarterly reports generated by Jerry and others who were part of the Co-Investment Team[22]:

[22] See Court Transcript, Day 5, p. 134, line 18 to p. 137, line 8.

Q. Okay. She [i.e., Vivian] also said that you saw quarterly reports which had C2 family office on them, was she lying?

A. I did not see them.

Q. You never saw -- just so we are clear, you say you never saw any quarterly report?

A. I have not seen until I see it from the bundle.

Q. Right. So both Jerry and Vivian were mistaken when they both said that you had seen quarterly reports; is that correct?

A. I have not seen quarterly report.

Q. Right. How were you able to keep up-to-date with the developments in respect of Infinity's investment?

A. I do not keep up-to-date, my team does.

Q. Right. So you put millions of dollars in it over the years and you are not interested in what's happening?

A. Infinity has a very small portion of your wealth.

Q. It may well be a small proportion of your wealth, but even for a man of great wealth, I would have thought several millions was of some passing relevance and interest; is that not the case?

A. I am telling you I have -- Infinity is a small part of my wealth and then I have a team that looks and take care --

Q. So for six years, 2016 to 2022, over -- well, over 50, but I think Chih to Mr. Moverley Smith's concern said 100 at one stage, investments have been made over those years. I think Vivian said one a month or thereabout. So all this money goes in and that's it, you are not interested anymore, is that right, in what's happening with your money?

A. The money is in my name and then my team keeps looking after for it and then I think that's what they do and then I trust them.

Q. That well may be, but you don't even have the slightest interest to check and get them to produce report so you can review them?

A. I am very busy with my JAMM Active. I have many, many business and it is just a very small portion of my wealth.

Q. Okay. What is, apart from saying you don't recall -- I know no case has been put to Mr. Chih about how that signature which purports to be yours appears on those documents, but in fairness I think I will give you the opportunity … what's your explanation about those documents that appear to bear your signature? Do you have one?

A. I am curious too.

Q. But after all these years, you have nothing to tell the Court other than you can't recall; is that correct?

A. I have a suggestion.

Q. What's your suggestion?

A. In my witness statement, I have suggested that my company has been through employee fraud.

Q. Yes.

A. And so this happened before.

Q. Yes.

A. I don't know if it could happen again."

[136] Jenkin appeared to suggest, later in his evidence, that he may have been the victim of fraud or forgery in the past but could not say much more than that because fraud and forgery were serious allegations for him to make without proof. It almost goes without saying that there is not the slightest evidence of any wrongdoing on the part of any member of the Co-Investment Team so far as their communication with Chih and Jenkin about the Disputed Investments is concerned.

[137] But suppose one accepts – and I do not – that Jenkin did not sign the documents relating to the Disputed Investments (or any other joint investment) between the parties. Suppose also that Jerry and Vivian, together with Chih and others, were part of a conspiracy to defraud him or his companies, which Jenkin does not expressly allege (and which I do not accept in any event) but which is the only way that he might advance a case for impugning the Letter Agreements. How, it has to be questioned, can Jenkin explain the emails and documents forwarded from Annie and Mark to Chih referring to the Disputed Investments and the other joint investments between the parties and his own emails referred to above? The answer to the question is that he simply cannot provide any explanation or any explanation that might withstand proper scrutiny by this Court.

[138] Jenkin was clear that he trusted Annie completely, stating that expressly in the course of his evidence. If, therefore, there was some sort of conspiracy against Jenkin or his companies, it

must have included Annie or some other person, who without Annie's authority or knowledge, sent emails and documents to Chih regarding the various investment opportunities. The alternative explanation is that Annie must have gone on "a frolic of her own" and sought to send documents to Chih about those investments, simply on Chih's say-so, clueless about what she was doing.

[139] Even on Jenkin's account, the first explanation cannot be correct. As Jenkin said, Annie is, and was, a trusted employee of his and would never have behaved in the way he appears to allege that Jenkin and Vivian did or might have done. The other explanation would be bizarre but is in any event not supported by the documentation generated by her. I need only refer to the following exchanges between Mr Chaisty and Jenkin[23]:

> "Q. She [i.e., Annie] is not somebody, as far as you are concerned, who would consciously and deliberately act contrary to your interest?
>
> A. I hope she would not.
>
> Q. No. But you are not suggesting she ever has, are you?
>
> A. I don't think she has. I cannot say something I am not 100 percent certain.
>
> Q. You wouldn't expect her, for example, to send an e-mail with attachments that she didn't think were properly sent on your behalf?
>
> A. She would have sent stuff that's not from me and then on behalf of Chih, because Chih is a co-chairman.
>
> Q. She wouldn't deliberately and knowingly sent a document as an attachment to an e-mail --
>
> A. If she knows the content --
>
> Q. … She wouldn't deliberately, would she, and knowingly send an e-mail that seem to have purported to bear your signature if she didn't believe that your signature was genuine?
>
> A. She would not send a document that she knows involve me and she read it and then if she knows it is involving both of -- whoever the party is and then if it is important she will always CC me. If she does not CC me, that means it's something not important.
>
> …

[23] See Court Transcript, Day 5, p. 112, line 18 to p. 114, line 13.

Q. My question was relatively simple I thought. She would not, as far as you are concerned, as a person that you would place trust and confidence in, she would not knowingly send as an attachment a document which purported to bear your signature if she didn't believe it bore your signature, would she?

A. From what I see, it is a scan of a document and then whatever she sent, what she is thinking, I am not sure, but I trust her.

Q. Could you just give me a yes or a no answer, please. As far as you are concerned, Annie Chen would not knowingly and deliberately send an attachment to an e-mail which purported to bear your signature if she did not believe that it was your signature, would she?

A. If she read it, I believe she will not."

[140] The same can be said about Mark. He is no longer associated, or has any business or professional relationship, with Jenkin. However, he regularly meets Jenkin, the last time being about two or three months ago. If Jenkin thought that Mark might have been responsible for any wrongdoing in the conduct of his duties and responsibilities towards either JAMM Active, Infinity or any other company, one would expect Jenkin to have no communication with him.

[141] Just as there was no proper explanation provided by Jenkin about the documents sent by Annie, there was none about the documents generated, and sent to Chih, by Mark.

[142] In those circumstances, there is no doubt in my mind that Jenkin:

(a) read and signed the Letter Agreements;

(b) expressly authorised Annie, Jerry, Mark or Vivian to send the signed Letter Agreements to Chih;

(c) was fully aware of the discussions taking place and communication passing between Chih and Annie, Jerry, Mark, and Vivian;

(e) read all the emails relating to the Letter Agreements and Disputed Investments, or had the opportunity to do so; and

(f) was fully aware of the terms of the Letter Agreements and had agreed with their contents

[143] The Defendant's Signature Issue must, therefore, be decided in favour of the Claimant.

[144] While not relevant to this or any other issue I need to decide, one further point seems to me to be appropriate for mention.

[145] If there had been any fraud or forgery involved in relation to the generation by the Co-Investment Team of the communication I have mentioned, it would have needed to involve Annie or Mark. So far as Annie is concerned, Jenkin was clear (though in the exchanges set out in para. 139 of this judgment, not entirely 100%!) that she would not participate in under-handed dealings affecting Jenkin. But, unless Chih was also involved in it, it is at least possible, even in the case of a forgery, that Jenkin would be prevented from contending that the Letter Agreements were not enforceable against Infinity, having been fully aware that the signature on those agreements was not his but allowing it to be represented by his actions (or inaction) that he stood by the terms of the agreements[24]. This is particularly so, given that the investment opportunities were likely to, and did, make substantial profit for him. I simply make this point by way of completeness. I do not suggest for a moment that Mr Chaisty might also have relied on this point to firm up his client's defence on this issue. I do so because, however one looks at the facts of this case, Jenkin's defence on the Defendant's Signature Issue was always hopeless and never going to succeed.

The Claimant's Signature Issue

[146] Does the failure of Chih or some other person on behalf of the Claimant to sign a Letter Agreement mean that there was no, or no valid, agreement between the Parties for the making of the investment referred to in that Letter Agreement?

[147] I start with the basic proposition – accepted by the Parties – that an "agreement" of the type that is the subject of the Claim does not need to be, or be evidenced, in writing. Nor are there other formalities prescribed for such an agreement.

[24] For the relevant principles, see **Estoppel by Conduct and Election**, 3rd Ed, 2023. Keane, P (Ed), Thomson Reuters especially para. 1-0006 *et seq* and para. 5-001 *et seq*.

[148] I have already indicated that each Letter Agreement constituted a separate and distinct binding agreement between the Parties relating to a particular investment once Jenkin signed the Letter Agreement or, if earlier, when an injection of funds into that investment was made by Jenkin. In either case, the terms were those set out in the relevant Letter Agreement.

[149] So far as the Disputed Investments are concerned, as there is a Letter Agreement representing each investment, the agreement between Chih and Jenkin became binding when Jenkin signed the Letter Agreement or, if earlier, when the injection of funds was made into an investment by Jenkin. Chih's signature on the Letter Agreement was not necessary. If it became necessary for Jenkin to enforce the Agreement, he could simply point to his signature on the Letter Agreement and his injection of funds to demonstrate that a valid and binding agreement was concluded between them, i.e., from his signature of the agreement and his compliance with it by the injection of funds into the investment opportunity provided to him.

[150] The law makes it clear that an offer and acceptance, culminating in a binding agreement between the parties, does not have to be made expressly. It may be, and often is, implied from the conduct of the parties: see **Chitty on Contracts**, Volume 1, at 4-035:

> "An offer may be accepted by conduct. For example, an offer to buy goods can be accepted by supplying them, although the facts may show that the initial request is merely an invitation to treat, the supply of the goods constitutes the offer, and the unequivocal acceptance of the [offer] constitutes the acceptance "… An offer to sell goods made by sending them to the offeree can be accepted by using them …; an offer contained in a request for services can be accepted by beginning to render them; an offer of services may be accepted by the offeree's conduct in arranging an appointment in certain circumstances; where a customer of a bank draws a cheque which will, if honoured, cause their account to be overdrawn, the bank, by deciding to honour the cheque, impliedly accepts the customer's implied request for an overdraft on the bank's usual terms; and when a car park ticketing machine displays a notice that overpaid sums would be accepted with no change given, the offer is accepted by the customer paying the stipulated sum or more, and pressing a green button to obtain a ticket."

[151] Once the investment was made, there was no conceivable basis for Jenkin to argue that an agreement between the Parties had not been reached, even where the Letter Agreement relating to that investment was not signed by Chih or someone on behalf of the Claimant.

[152] It follows that I agree with the Claimant that this ground of opposition to the Claim cannot be maintained.

[153] The Claimant's Signature Issue must, therefore, be decided in favour of the Claimant.

The Consideration Issue

[154] Was consideration provided by the Claimant for the work allegedly performed under the Agreements and/or was the consideration past consideration?

[155] There are many strands to this argument advanced by the Defendant.

[156] First, it is alleged by the Defendant that the Claimant agreed to serve as the "financial advisor" to the Defendant. It is contended on behalf of the Defendant that, on that basis, the Letter Agreements cannot be binding between the Parties because, by Chih's own admission, the Claimant had not provided the services that it had contracted to provide under the terms of the Letter Agreements. However, Chih expressly stated in his written and oral evidence that neither he nor the Claimant provided any financial advice to the Defendant.

[157] The position of Chih concerning the services he and/or his company provided is summarised in para. 24 of his witness statement in the following terms:

> "Although we used the term "financial advisor" in the Letter Agreements, neither [sic] me nor C2 was acting as a financial advisor in the literal sense. It was simply a term used to characterise my role through C2 to share investment opportunities with Jenkin as part of the Co-Investment Arrangement. I was sharing my private investment opportunities with my friend and business partner such that we would share in any subsequent profits or losses. As such, no thought was given as to whether this arrangement might require regulatory approval in the BVI or elsewhere. The way the process worked would be that, in accordance with the arrangement, I would identify and give my opinion on the viability of any proposed investment following which Jenkin would determine on behalf of Infinity whether to proceed with the investment or not. It was very much a co-investment arrangement with a business partner and friend as opposed to a financial advisor relationship."

[158] Chih reiterated this at various points in the course of giving evidence. For example, on Day 2 of the trial, in response to questions from Mr Moverley Smith, he said this[25]:

[25] See Court Transcript, Day 2, p. 146, line 13 to p. 147, line 5.

"Q. So you chose the words of the Letter Agreements. We've discussed that earlier, didn't we?

And you could have drafted the letter such that it says "in consideration of sharing my investment opportunity with you, we will share in the subsequent profits and losses"? That's what it could have said, isn't it?

A. Sir, in hindsight, yes and I think again it goes back to what we talked about throughout this whole process in terms of evolution and history right. Again, this is for recordkeeping, just acknowledged the fact that these agreements exist in case there is a misunderstanding or something happened to one of us, that there's a record that these things exist and I'm liable but I also benefit when we make money, and I'm liable if we lose money.

…

Q. You see, I have some difficulty of understanding why, if you were not going to act as a financial advisor, you would choose to describe yourself as acting as a financial advisor in this document.

A. I can't explain that except for the fact that, you know, it was just words that I used because it was just easier. It's just a couple of words as opposed to the sentence that you mentioned…"

[159] The Defendant's case on this issue is clear. It says that the obligation of the Claimant was to act as the "financial advisor" to the Defendant about the Disputed Investments and the other investments introduced by it to the Claimant. It maintains that, on Chih's own admission, the Claimant did not, provide any financial advice to the Defendant. In those circumstances, the Letter Agreements were not supported by any consideration flowing from the Claimant to the Defendant and cannot be enforced by the Claimant against the Defendant.

[160] I have already set out Chih's response to this point. He says that, in hindsight, he might have used more appropriate terminology, but there was no doubt that what had been agreed was that his company would provide investment opportunities to the Defendant and that it was up to the Defendant to decide whether it should proceed with those opportunities. That did not mean that the Claimant had not provided any services to the Defendant. It had, but the Letter Agreements had used inappropriate language by referring to the Claimant providing financial advice. In reality, both parties well knew that what that expression meant was that the Claimant would provide investment opportunities to the Defendant, and it was for the Defendant to decide whether it should accept those opportunities. If it did, the Claimant was entitled to be paid half of the net

profit of any investment that made a profit and to pay half of the losses if an investment made a loss.

[161] Jenkin maintains that his argument must succeed if the expression “financial advisor” is given its “plain and ordinary” meaning.

[162] Jenkin relies on para. 4 of Part A of Sch. 2 to the SIBA 2010 as the starting point for the interpretation of the expression of “financial advisor”. This provision states:

> "**4. Providing Investment Advice**
>
> (a) Advising a person on investments (other than as the investment adviser of a mutual fund) where the advice:
>
> (i) is given to the person in his capacity as an investor, or a potential investor, or in his capacity as agent for an investor or potential investor; and
>
> (ii) concerns the merits of the investor, or a potential investor, doing any of the following (whether as principal or agent):
>
> (A) buying, selling, subscribing for or underwriting a particular investment; or
>
> (B) exercising any right conferred by an investment to acquire, sell, subscribe for, underwrite or convert an investment."

[163] Jenkin contends that if the meaning of the expression is construed by reference to para. 4 of Part A, then it is obvious that Chih and, therefore, the Claimant did not provide any financial advice. In the circumstances, there was no consideration to support the existence of the Agreements, or the consideration purportedly provided or agreed to be provided had wholly failed.

[164] Jenkin further contends that there is no basis to construe the expression “financial advisor” in the manner contended for by Chih. He says this for several reasons:

(a) the words were deliberately chosen by Chih, who has a law degree and must have known what he was saying;

(b) there is no basis that the “plain and ordinary” meaning of the expression should not be applied in the present case;

(c) if Chih had meant to say something other than the plain and ordinary meaning of the expression, and the Letter Agreements used the wrong nomenclature, the Defendant should have applied to rectify the Letter Agreements. It did not; and

(d) if there is any ambiguity as to the term “financial advisor”, the Court should resolve the ambiguity in favour of the Defendant, applying the *contra proferentum* rule of construction, i.e., the meaning of the expression “financial advisor” should be construed against the party that drafted the provision in question. As Chih was the sole draftsman of the Letter Agreements, and Jenkin had no input in them, the expression should be interpreted against the Claimant: see **Chitty on Contracts**, Volume 1, at 16-111 *et seq*.

[165] It is right to point out that it is highly unlikely that either party had thought that the expression “financial advisor” would have the meaning contended for by the Defendant. I am unable to accept that either party intended it to mean what Jenkin asserts it means. I am not sure that either Chih or Jenkin knew that the Letter Agreements might potentially be illegal, still less what the SIBA 2010 was and how it might apply to their relationship.

[166] I accept, of course, that the starting point in the construction of a contract is to look at the express terms of the agreement to ascertain what was agreed upon between the parties. The court has to look at the intention of the parties, when construing those terms, objectively in order to ascertain the parties’ true intention. As the Court of Appeal of the Eastern Caribbean Supreme Court observed in **Ocean Conversion BVI Limited v Attorney General HCVAP 2009/019**, at [71]:

> “The construction of a contract is a matter for the court and does not depend on the understanding of the parties. As Lord Diplock noted in **Bahamas International Trust Company Limited and Another v Threadgold** [at [1974] 3 All E.R. 881 at 884d]: ‘In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim for rectification, cannot be bound by any concession made by any of the parties as to what its language means. This is so even in the court before which the concession is made; a fortiori in the court to which an appeal from the judgment of that court is brought. The reason is that the construction of a written document is a question of law.’ It is for the judge to decide

for himself what is the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, and market in which the parties are operating. When one speaks of intention of the parties to the contract, one is speaking objectively; the parties cannot themselves give direct evidence of what their intention was, and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties."

[167] The courts have developed various rules of construction to assist with the interpretation of the words used by the parties to ascertain the objective intention of the parties as a result of the use of those words. One such rule is the "four corners rule". The effect of this rule was explained by the Court of Appeal of the Eastern Caribbean Supreme Court in **Bon Bank Ltd v General Business Company Limited NEVHCVAP2019/000**, at [56], in the following terms:

> " … the learned judge stated that in deciding whether there was a binding contract, she [would] look at 'the terms of the letters and the conduct of the parties'. In support of this principle she referred to an extract from the decision in **Lovell & Christmas Ltd v Wall**[26] . There, Cozens-Hardy MR, opined that it is a well-established principle of English law that 'it is for the court to construe a written document'. And it is irrelevant and improper to ask what the parties, prior to the execution of the instrument, intended or understood. In short, evidence as to the intention or understanding of the parties to a binding agreement are irrelevant to the court's determination of what the actual words of the document, which fall to be construed, mean. It is for the court to determine the meaning of the words within the four corners of the agreement and the context in which the agreement was made. Likewise, it falls to the court to construe or to interpret a document to determine whether it is an offer and if so, its terms or proposals."

[168] There is no defined meaning of the expression "financial advisor" in the SIBA 2010, even though that Act contains the definitions of many expressions used in it. In addition, the expression is not specifically used in that Act, so the suggestion that I must give the expression the meaning that Jenkin says must be its plain and ordinary meaning under the SIBA 2010 seems somewhat fanciful. There is no obvious meaning for that expression, and I cannot see how the meaning sought to be ascribed to that expression by Jenkin can be described as its "plain and ordinary" meaning.

[26] (1911) 104 LT 85.

[169] Even the alleged ordinary "dictionary" meaning of that expression is not straightforward. Indeed, it is full of difficulties. For example, the **Oxford English Dictionary** defines the expression "financial adviser" (i.e., the alternative spelling of the expression) as[27]:

> "A person who gives advice on financial matters; *spec.* a person whose job is to provide advice to clients on investments, financial products and services, etc."

[170] The ordinary usage of that expression does not connote the meaning that the Defendant invites me to accept. In fact, the examples given in the **Oxford English Dictionary** of its use suggest the contrary[28]:

> "That right honourable gentleman was the principal financial adviser of all Mr. Addington's financial measures."
>
> "Financial adviser to some heads of departments, whose accounts went a little wonky."
>
> "If you are sceptical ask your financial adviser about the soundness of Series 'E' Victory."
>
> "Some investors believe that since you have to pay for investment services anyway, you might as well hire a commission-based or fee-based financial adviser."

[171] I could understand a case along the lines contended by the Defendant being made out if the Claimant had used the expression "professional financial advisor", "authorised financial advisor", "independent financial advisor", or simply "authorised person" (an expression expressly defined in s. 31 of the FSMA 2000 as a person authorised for the purposes set out in that Act), all of which are used in a technical sense or may have been understood by the parties to have a technical meaning. But I am satisfied that by simply using "financial advisor", Chih and Jenkin were not seeking to ascribe the technical meaning to that expression that the Defendant contends for. This was an agreement that was drafted by a person who, though a law graduate, could not have intended to give that expression the technical meaning contended for by Jenkin. Nor would Jenkin have thought that the expression had a technical meaning. It is significant that if the language had been modified slightly, as suggested by Mr Moverley Smith (by the use of the words "sharing my investment opportunity with you" instead of "serve as financial advisor"), this line of argument, on Jenkin's own case, would have failed. But, in this context, it is important

[27] See the Oxford English version, accessible at https://www.oed.com/dictionary/financial-adviser_n?tab=meaning_and_use#1366005680100; last accessed on 6 November 2024.
[28] *Ibid*.

to point out that, Harvard Law degree or not, the Letter Agreements were prepared in such simplistic terms that to think that Chih might have done better with their wording to make the Parties' obligations under them clearer, is to expect too much of Chih. The suggestion made by Mr Moverley Smith of the form of words that Chih might have used may have been appropriate for a professional lawyer. I would not expect that sort of exactitude of language from a layman, which, despite his law degree, is how I would describe Chih.

[172] I accept Chih's evidence of how he and Jenkin understood the expression to mean, i.e., that he would provide investment opportunities to the Defendant, which the Defendant was free to accept. If he accepted them, Jenkin would pay him half of the profits generated from the investment. If he did not accept the opportunities, then there was no agreement. Of course, Chih was prepared to put his neck on the line. If the investment made a loss, he would be responsible for 50% of the loss, so that if, for example, all the investments made a loss, he would, depending on the losses made, have to pay substantial sums of money to the Defendant out of his (or, more appropriately, the Claimant's) own pocket. This does not seem to me to be the sort of deal that a financial advisor, properly called, would be willing to enter into with a client.

[173] It follows that even if one applies the "four-corner" rule of construction, in my judgment, there is no ambiguity about what the Parties had agreed: the obligation of the Clamant was simply to provide investment opportunities to the Defendant, rather than the financial services of the type contended for by Jenkin that would have required a licence.

[174] There is no ambiguity in mind about what was intended by the Parties by the use of the expression "financial advisor". Accordingly, the application of the *contra proferentem* rule has no application in the present case.

[175] However, even if the expression "financial advisor" has the technical meaning contended for by the Defendant, I am unable to accept that it was ever agreed that the Claimant was supposed to provide financial services or advice in a way that a professional financial advisor, needing a licence or authorisation, would be expected to provide.

[176] It is noticeable that at no stage until the Claim was intimated to the Defendant did Jenkin complain that he had not received financial advice in the technical manner that he now seeks to ascribe to

the expression "financial advisor". If he had thought for a moment that Chih was not providing the financial advice that his company had agreed to do, one would expect him to complain to Chih. He did not. The reason was that he was receiving the exact services that Chih had agreed to provide to him and, perhaps more importantly, he was making substantial profits overall from the provision of those services.

[177] But neither the "four-corner rule" nor the *contra proferentem* rule is inflexible.

[178] Sir Kim Lewison, a Lord Justice of Appeal in England and Wales and the author of **The Interpretation of Contracts,** 8th Edn, 2023, Sweet and Maxwell, says, in the preamble to section 17 of Chapter 3 of that work, that:

> "In construing any written agreement the court is entitled to look at evidence of the objective factual background known to the parties or reasonably available to them at or before the date of the contract. This principle applies even if the contract appears to be unambiguous. There is no conceptual limit to background. It can include anything relevant which would have affected the way in which the document would have been understood by a reasonable person. However, this does not entitle the court to look at evidence of the parties' subjective intentions; nor to ascribe to the words of the contract a meaning that they cannot legitimately bear."

[179] Although this statement was made by Sir Kim in a non-judicial capacity, the substance of the statements has been recognised in several cases.

[180] In **Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd [2008] EWHC 2379 (TCC)**, Coulson J (as he then was) said, at [12]:

> "it is always necessary for the court to consider the factual background to a commercial contract even if the wording of that contract might be regarded as unambiguous or sensible."

[181] In **Investors Compensation Scheme v West Bromwich Building Society** [1998] 1 W.L.R. 896 at 912-3, Lord Hoffmann said:

> "The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next [i.e., the subjective intention of the parties] it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

> The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them."

[182] In **BCCI v Ali [2002] UKHL 8, [2002] A.C. 251**, at [39], Lord Hoffman clarified what he meant by the "admissible background", stating:

> "When … I said that the admissible background included 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: '… we do not easily accept that people have made linguistic mistakes, particularly in formal documents.' I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage."

[183] Based on the above cases, this Court is perfectly entitled to take into account the background circumstances in this case. This is especially so as the evidence of Jenkin about the inclusion of the words "financial advisor", and what he believed was meant by it, was simply wrong. He could never have thought, nor could any reasonable person, that it was being used in any technical sense.

[184] I also consider that the interpretation least likely to have been understood by a reasonable person, looking at matters objectively, is the interpretation that Jenkin invites me to accept.

[185] It follows that if one considers the background circumstances, which include the dealings between Chih and Jenkin, the communication that took place between them, and the communication that took place by the Parties with the Co-Investment Team, one can readily conclude that the expression "financial advisor" was being used in the sense contended for by Chih. I unhesitatingly come to that conclusion.

[186] Mr Moverley Smith refers to decision in **Chartbrook Ltd v Persimmmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101**, at [14]-[15], in which Lord Hofmann stated that:

> "… we do not easily accept that people have made linguistic mistakes, particularly in formal documents… but said that in some cases the context and background drove a court to the conclusion that "something must have gone wrong with the language…
>
> It clearly requires a strong case to persuade the court that something must have gone wrong with the language… It is fortunately rare because most draftsmen of formal documents think about what they are saying and use language with care…"

[187] In my view, **Chartbrook** was dealing with an entirely different situation. In that case, the parties had made an obvious linguistic mistake in respect of a "formal document", which needed to be corrected. In the present case, Chih chose the language that best described the parties' relationship. He might have used more precise language, as Mr Moverley Smith suggested. However, the language used is more amenable to the interpretation that Chih placed rather than the meaning ascribed to it by Jenkin.

[188] But even if there was a linguistic mistake of the type referred to in **Chartbook**, it is precisely the sort of mistake that **Chartbrook** says may be corrected by the court. This was made clear if the passage in [15] is quoted in full and from para. [16] of the opinion of Lord Hoffmann:

> "It clearly requires a strong case to persuade the court that something must have gone wrong with the language and the judge and the majority of the Court of Appeal did not think that such a case had been made out. On the other hand, Lawrence Collins LJ thought it had. It is, I am afraid, not unusual that an interpretation which does not strike one person as sufficiently irrational to justify a conclusion that there has been a linguistic mistake will seem commercially absurd to another: compare the **Kirin-Amgen case [2005] All ER 667, 684–685**. Such a division of opinion occurred in the **Investors Compensation Scheme case itself [1998] 1 WLR 896.** The subtleties of language are such that no judicial guidelines or statements of principle can prevent it from sometimes happening. It is fortunately rare because most draftsmen of formal documents think about what they are saying and use language with care. But this appears to be an exceptional case in which the drafting was careless and no one noticed.
>
> I agree with the dissenting opinion of Lawrence Collins LJ because I think that to interpret the definition of ARP in accordance with ordinary rules of syntax makes no commercial sense. The term "minimum guaranteed residential unit value", defined by reference to total residential land value, strongly suggests that this was to be a guaranteed minimum payment for the land value in respect of an individual flat. A guaranteed minimum payment connotes the possibility of a larger payment which,

depending upon some contingency, may or may not fall due. Hence the term “additional residential payment”. The element of contingency is reinforced by para 3.3 of the sixth schedule, which speaks of the “date of payment *if any* of the balancing payment.” (Emphasis supplied by the Judge).

[189] In those circumstances, the contention of the Defendant that the Claimant did not provide financial services of the type purportedly agreed between the Parties is simply not tenable. The Claimant did provide those services. I come to this conclusion, whether it is based on the application of the plain and ordinary meaning of the expression “financial advisor” or the premise, given the background facts and circumstances, that it is the only proper conclusion for me to come to as representing the objective intention of the Parties. I am satisfied, therefore, that what was agreed between them, looking at matters objectively through the lens of a reasonable person, was that the service to be provided by Chih was to introduce investment opportunities to Jenkin, nothing more, nothing less.

[190] Nor can there be said to have been a total failure of consideration. There has been no payment of any amounts by the Defendant to the Claimant under the terms of the Letter Agreements. There has, therefore, been no performance by the Defendant of any of the terms of the Letter Agreements. Accordingly, there has been no consideration provided by the Defendant to the Claimant which can be said to have failed.

[191] The “past consideration” point is also without substance.

[192] The basis of that point is summarised in Mr Moverley Smith’s skeleton argument in the following terms:

> “If C2 had already performed such services, then that would amount to past consideration, which is not capable of supporting these Letter Agreements in law. The following extract from **Chitty** is instructive (at 6-029).
>
> "**Past consideration is no consideration**
>
> The consideration for a promise must be given in return for the promise. If the act or forbearance alleged to constitute the consideration has already been done before, and independently of, the giving of the promise, it is said to amount to “past consideration”; and such past acts or forbearances do not in law amount to consideration for the promise…"

[193] There is little to support this proposition either in the Amended Defence and Counterclaim or Jenkin's witness statement. There appears to be good reason for this. It is that this proposition is simply not sustainable on the facts of this case.

[194] In the first place, I have already found that each Letter Agreement constituted a separate agreement between the Parties to undertake the investment referred to in it, so the consideration cannot be said to be past consideration. I have also found that the point at which the agreement between the Parties was made was when Jenkin decided to invest in a particular investment by injecting funds into the investment or when he signed the Letter Agreement, whichever was earlier.

[195] Mr Moverley Smith refers to the decision in **Dent v Bennett [1839] 41 E.R. 105**, which concerned a contract for medical and surgical services that was entered into two years after such services had been provided. The English Court found (*passim*, at pp. 106 and 107) that "if [this] is to be looked at as a contract for value" it must be based on "the consideration of future services so secured" and if the agreement was founded on the "past services", it would amount to nothing more than a "purely voluntary, and gratuitous reward" (at p. 107).

[196] Even if one takes the dates when the Letter Agreements were sent out to the Defendant, and signed by Jenkin on behalf of the Defendant, as the point at which the agreement relating to an individual transaction was concluded, this argument simply does not get off the ground.

[197] The argument relating to consideration being past can only proceed on the premise that once an introduction was made by Chih, his and his company's role came to an end, and he did no other work to facilitate the conclusion of the agreement. That is simply incorrect. In relation to every investment, work on the part of the Claimant continued for a substantial period of time to enable the investment made by the Defendant to come to fruition. This facilitation or monitoring of what was happening with the investment was necessary from Chih's point of view as much to ensure that the investment did not make a loss (for which the Claimant would be responsible for half) as to ensure that the investment turned a profit in which case, he stood to obtain 50% of the net profits from it.

[198] **Chitty on Contracts**, Volume 1, at 6-030 demonstrates the fallacy of the type of argument that the Defendant is running:

In determining whether consideration is past, the courts are not, it is submitted, bound to apply a strictly chronological test. If the giving of the consideration and the making of the promise are substantially one transaction, the exact order in which these events occur is not decisive. Where, for example, a contract of affreightment (COA) had been made between A and B on 13 August 2008, and a guarantee was given by C to A of B's performance on 28 August in pursuance of B's obligation under the COA to procure such a guarantee (though not from C but from D), it was held that the consideration for the guarantee was not past as the guarantee formed "part and parcel of the single transaction [**Classic Maritime Inc v Lion Diversified Holdings Berhad [2009] EWHC 1142 (Comm), [2010] 1 Lloyd's Rep. 59**]."

[199] In any event, arguments of this type can usually be avoided by an alternative claim being made by a claimant against a defendant in "quantum meruit". As **Chitty on Contracts**, Volume 1, at 6-033 states:

"An act done before the promise was made can be consideration for the promise if three conditions are satisfied. First, the act must have been done at the request of the promisor; secondly, it must have been understood that payment would be made; and thirdly, the payment, if it had been promised in advance, must have been legally recoverable. In such a case the promisee is, quite apart from the subsequent promise, entitled to a quantum meruit for their services. The promise can be regarded either as fixing the amount of that quantum meruit or as being given in consideration of the promisee's releasing their quantum meruit claim. On the other hand, a past service for which payment was not expected, or one for which payment, though expected, is not legally recoverable, is no consideration for a subsequent promise to pay for it.

[200] I mentioned this this point in my exchanges with Mr Chaisty: see Court Transcript, Day 1, p. 4, lines 15-20. I have no doubt that the only reason that such an alternative claim was not made by Mr Chaisty, on behalf of the Claimant, was that the position advanced by the Defendant on this issue argument was spurious. It was never likely to succeed.

[201] It follows that the "past consideration" argument is also without substance.

[202] The Consideration Issue must, therefore, be decided wholly in favour of the Claimant.

The Performance Issue

[203] Did the Claimant fail to perform its obligations under the terms of the Agreements?

[204] I am not sure I understand the Defendant's case on this issue.

[205] So far as it is suggested that Chih performed services either because of his friendship with Jenkin or in his capacity as an employee or officer of JAMM Active (or as a result of the consultancy agreement between JAMM Active and the Defendant), there is no substance in any of this, as I set out below.

[206] But it seems that on this issue, Jenkin's case is not just that Chih's services were performed gratuitously for the Defendant, or that they were performed in his capacity as an employee or officer, or by the Claimant as a consultant of JAMM Active, but also that he did not make any of the introductions for which the Claimant seeks payment. Jenkin maintains that the introductions were made by others or by members of staff of his various companies.

[207] Jenkin's case is summarised in the table that his counsel, Ms Amelia Tan, produces in para. 8 of her affidavit sworn on 5 July 2023.

[208] In that table, she deals specifically with each of the Disputed Investments and the basis upon which Jenkin asserts that the introductions were not made by Chih.

[209] First, even disregarding the written and oral evidence in these proceedings, there is no evidence to support what Ms Tan says on behalf of Jenkin. The statements she makes, on his behalf, are bare statements.

[210] But importantly, the evidence entirely supports Chih's case.

[211] Take, for example, the Cotopaxi Investment. In the summary table in para 9 of Ms Tan's witness statement, it is said, on behalf of Jenkin, that he was introduced to this investment "through Campfire Capital".

[212] The evidence of Ms Harley on this point could not have been clearer. As summarised above, it was Chih who introduced Jenkin to this investment.

[213] The same can be seen to be true of some of the other investment opportunities introduced by Chih to Jenkin. The oral evidence of Mr Blumenthal and Mr Chernick entirely supports what Chih says about who introduced Warby Parker and Kayak investment opportunities respectively to Jenkin.

[214] But perhaps the most compelling piece of evidence is what Vivian and Jerry had to say about this in oral evidence.

[215] Vivian told the Court that the investment opportunities came from Chih. Chih would be introduced to investment opportunities and "he would ask the [Co-Investment] team to review or research and … after Chih made a decision whether we would want to do the investment and if he decided to do the investment, then I or Jerry will prepare the subscription documents and we will give it to Jenkin and ask him to sign …." [29]

[216] Likewise, Jerry was clear that all the investment opportunities were sourced through Chih[30]:

> "Q And you said a few minutes ago that the investments were mostly sourced by Chih?
>
> A. Yes.
>
> Q. So there were some investments presumably that weren't sourced by Chih?
>
> A. No. So basically all of them are either directly to Chih or through Chih's network."

[217] When asked about this, Jenkin either provided answers that did not make sense or simply refused to answer questions put to him. He frequently disputed that Chih was the source of any investment opportunity. However, when confronted with evidence that was indisputable, he either said that the investment opportunity came through Chih's efforts on behalf of JAMM Active or because of his close friendship with Chih.

[218] The following exchange, which I provide by way of example may be considered to be illustrative of this fact[31]:

> Q. My question was, you accept that this [the Loyal Valley Investment] was introduced as a consequence or as a result of a direct personal relationship that Chih had with somebody called, I believe, Ling Li Juk [phonetic].
>
> A. … I said I know this was introduced by Andy and then to Chih.
> … If you say anything more than, I don't have the document in front of me.
>
> Q. … Chih told you about this opportunity. You accept that. You found out about it

[29] See Court Transcript, Day 5, p. 31, line 25 to p. 32, line 10
[30] See Court Transcript, Day 4, p. 42, lines 8 to 15.
[31] See Court Transcript, Day 6, p. 175, line 2 to p. 177, line 8.

only --

There was a WeChat message that he forwarded, you know, that was with Q. And then Chih says to you it's:

'Another fund to invest - the guy I told you" -- "the guy in China I told you about." And you don't seem to remember it. But my point is, really, it's just the same thing that we've had now ongoing that Chih has his contacts, Chih is approached, an opportunity arises, Chih shares it with you, correct?

A. Yes, Chih shared this with me as a friend. That's what I said in my statement.

Q. No. Chih shares this with you, effectively, as a business partner, as it's been described by various people, whereby if an investment is made and a profit is made, the profit will be split

A. I disagree with you. I have already made my point.

Q. So you are saying out of the kindness of his heart, he offers you this opportunity to make millions and he gets nothing in return?

A. He send this to me as a friend. I said it.".

[219] Then, later in the transcript, this exchange[32]:

"Q. And then if you look at 1294, No. 9, there is Global Uprising, Cotopaxi, Infinity: Investment Amount: $250,004.91. 2 percent interest. Then a calculation of the total profit. And then on the right-hand side, the 50/50 split between you and Chih. And then below that is the other one, 249,000 odd. 2 percent interest to you, and then the split of profit. And then on the right-hand side, the 50/50 split. Again, all of that information that's contained there is entirely consistent with my client's position. Can you provide, in respect of at least this one, any explanation as to how it is that Mark and Jerry produced this document containing that information that I've just referred you to?

A. My position is the same."

[220] I reject Jenkin's evidence about the introductions not having been made by Chih. I am satisfied that all of the introductions relating to the Disputed Investments were made by Chih on behalf of the Claimant.

[221] The Performance Issue must, therefore, be decided in favour of the Claimant.

The Remuneration Issue

[32] See Court Transcript, Day 6, p. 151, line 14 to p. 152, line 4.

[222] Was Chih or the Claimant remunerated for the work done on the Disputed Investments by JAMM Active

[223] It does not take a great deal of further analysis to come to the sure conclusion that the answer to this question is "NO".

[224] First, it is difficult to know Jenkin's position about who provided the investment opportunities. He seems to be running several inconsistent arguments. He disputes that the investment opportunities were provided to him by Chih but then goes on to say that even if they were, it was because of Chih's long-standing friendship with him and that Chih could not reasonably expect to be paid for providing those opportunities to him. Further, and in any event, he claims that Chih was fully remunerated for providing those opportunities by the salary payments that were made to him by JAMM Active, and, subsequently, the consultancy fee paid by JAMM Active to the Claimant.

[225] One only has to look at the Letter Agreements to know that the case of the Defendant on the Remuneration Issued is flawed.

[226] But even disregarding the Letter Agreements, the position advanced by the Defendant is misconceived.

[227] The starting point for Jenkin's argument has to be Chih's employment contract with JAMM Active Limited, and later the consultancy agreement that was entered into by JAMM Active in favour of the Claimant to replace that employment contract.

[228] The Claimant had a consultancy agreement with JAMM Active with the specific object of the services therein referred to being provided by the Claimant to JAMM Active. There was no employment or consultancy agreement between the Claimant and the Defendant.

[229] Seen in its proper context, it was the Defendant, not JAMM Active, that made the investments and that is reflected by the terms of the Letter Agreements reached between the Parties. There is no suggestion anywhere in the documents contained in the various bundles that the investment opportunities were being provided by JAMM Active, rather than the Claimant. Indeed, the following excerpt from Day 5 of the trial appears to suggest that, in relation to some investment

opportunities at any rate, Jenkin himself accepted that the introductions were not made by JAMM Active but by Chih personally[33]:

> "Q. … In return for bringing investment opportunities to you, in return for monitoring those investments, in terms of speaking to you about the wisdom of entering into those investments, for all of that which has generated millions, if not tens of millions of profit, he was going to get $10,000 a month; is that correct?
>
> A. His job is to be hired by JAMM Active and then he helped me with some investment personally as a friend which he did since I know him."

[230] The other points relied upon by the Claimant are also valid. First, Chih's employment contract was entered into several months after the first Kayak Investment was made. If this is correct, it has to be questioned how Chih could be remunerated by JAMM Active for facilitating that investment. There is nothing in the employment contract or consultancy agreement, so far as I can see, that seeks to remunerate Chih or the Claimant for past services. Second, the employment contract[34] was governed by the laws of Hong Kong, which is consistent with the fact that the services by Chih or the Claimant were provided to a Hong Kong company. Third, JAMM Active was in the "fabric" business and it is plain that there was a careful distinction made by Chih and Jenkin between the services performed by Chih under his employment contract (or the Claimant under the consultancy agreement), which were performed for JAMM Active, and the investment introductions made by Chih (all of a completely different nature to the work undertaken by him for JAMM Active) that were undertaken by him (through the Claimant) on behalf of the Defendant. It is difficult to see how one can extrapolate from the mere existence of a company controlled by Jenkin (JAMM Active) that the services provided by Chih of introducing investment opportunities must have been provided on behalf of JAMM Active and not the Claimant. The fact is that JAMM Active and the Defendant were different companies and carried on different types of business. In addition, the relationship of Chih and, subsequently, the Claimant with JAMM Active was governed under a different agreement or agreements from the relationship that existed between the Claimant and the Defendant.

[231] In fact, Chih can be forgiven for thinking that, at some stage, it might even have been suggested to him by the Defendant that if there were any binding agreements, they were not between the Parties but between Chih and Jenkin personally, between Chih and Infinity, or between Chih and

[33] Court Transcript, Day 5, p. 97, lines 14 to 23.
[34] The consultancy agreement appears to contain no "governing law" clause: see Vol D1, Vol. 2, pp 783-785.

the Defendant – see the following response to a question put to him by Mr Moverley Smith on Day 2 of the Trial[35]

> A. Sir, are you trying to imply that he owes me the money under me personally? If he is willing to pay me personally, I am happy to take that too."

[232] On the basis that I have found that the contractual relationship between the Parties was represented by the terms of the Letter Agreements, there can be no basis for contending that the Parties to the Disputed Investments were anyone other than the Claimant and the Defendant.

[233] Jenkin refers to the fact that clause 1 of the consultancy agreement expressly provided that the Claimant's role would be to "perform services on fabric market research, customer development, maintaining customer relationships, <u>seeking investment opportunities</u>, and to assist from time to time on such other matters as the Client may request…" (Emphasis supplied). This had to mean that the investment opportunities that Chih introduced to Jenkin fell within the scope of clause 1 for which Chih (through the Claimant) was fully remunerated by JAMM Active. However, this cannot be correct. INFINITY had a separate existence, and was in a different type of business, from JAMM Active. There is nothing in the consultancy agreement that suggests that investment opportunities introduced by Chih to INFINITY, a distinct and separate company from JAMM Active (that also did a different type of business from JAMM Active) were included in the description of the services that the Claimant had contracted to provide to JAMM Active in clause 1. There might have been some slight support for this argument if the description of the services that were to be provided by the Claimant had expressly or impliedly included services provided by the Claimant to INFINITY or if the definition of "Client" had been expressly extended to cover Infinity, or even impliedly, for example, by the use of such words of "association" or "relation" to define "Client" as to make it clear that the investment opportunities being provided by the Claimant to JAMM Active also extended to INFINITY. However, even in such a case, it would require compelling evidence to support the assertion that the investment opportunities were provided to JAMM Active and not INFINITY. There is no such evidence in the present case.

[234] While there might be some support for Jenkin's case, based on the fact that some of Chih's expenses for facilitating the investments were paid by JAMM Active, Chih had a perfectly reasonable explanation for this. He said – and I accept his evidence – that it was agreed between

[35] See Court Transcript, Day 3, p. 55, lines 18 to 20.

Chih and Jenkin that these expenses could be put through JAMM Active's books. Chih also had a direct or indirect interest in JAMM Active, albeit a minority one (the extent of which is disputed), so it could not be said that it was Jenkin who was solely responsible for "paying" those expenses.

[235] The Remuneration Issue must, therefore, be decided in favour of the Claimant.

The Legal Relations Issue

[236] Were the investment opportunities allegedly passed by Chih to Jenkin (on behalf of the Defendant) because of the friendship between Chih and Jenkin, meaning that Chih had neither any entitlement nor expectation to be paid for the work that the Claimant did?

[237] This contention only appears to have been pursued, at best, as a "makeweight". That is because Jenkin well knows that it is entirely devoid of merit.

[238] The determination of this issue involves the Court having to decide whether there was any intention to create legal relations between Chih and Jenkin or their respective companies, i.e., whether Chih provided the investment opportunities concerning the Disputed Investments to Jenkin out of his past friendship with Chih.

[239] **Chitty on Contracts**, Volume 1, at 4-208, sets out the following statement of principle on this subject:

> "In the case of ordinary commercial transactions it is not normally necessary to prove that the parties to an express agreement in fact intended to create legal relations. The onus of proving that there was no such intention 'is on the party who asserts that no legal effect is intended, and the onus is a heavy one[36]': [see, for example, **Edwards v Skyways Ltd [1964] 1 W.L.R. 349, 355**]. In deciding whether the onus has been discharged, the courts will be influenced by the importance of the agreement to the parties, and by the fact that one of them acted in reliance on it."

[240] In **New Media Holding Co LLC v Kuznetsov [2016] EWHC 360 (QB)**, for example, the court found an intention to create legal relations in respect of a "Term Sheet" signed by both parties. The court found that the terms of the document were brief, did not mention consideration and the document itself was prepared casually and informally, requiring further formalities for

[36] The reference to a "heavy burden" should not be understood as suggesting that the standard of proof is other than the balance of probabilities: see **Re B (children) (sexual abuse: standard of proof) [2008] UKHL 35, [2008] 4 All ER 1** and **Re S-B (children) (non-accidental injury) [2009] UKSC 17, [2010] 1 All ER 705**.

enforcement. However, it also found that the parties were experienced and sophisticated businessmen, the document contained clear express terms and was consistent with a legally binding agreement. In addition, the "Term Sheet" was consistent with an intention that this be part of a package agreement and the parties' pre-existing relationship, itself raised a strong presumption that the parties intended to be legally bound.

[241] There is little to distinguish **New Media** from the facts of the present case, other than to say that the present case constitutes a much stronger basis for rejecting Jenkin's contention.

[242] There are several reasons why Jenkin's contention is without merit. The following are examples only.

[243] First the existence of the Letter Agreements. It is inconceivable that Jenkin thought that Chih was doing him a favour (or several favours) by introducing investment opportunities to him because of their past friendship. If this was even remotely plausible there would have been no need for the Letter Agreements to be prepared by or on behalf of the Claimant and signed by Jenkin.

[244] Second, Chih's "monitoring" of the Disputed Investments. Even if one accepts the entirety of Jenkin's account on this (i.e., that he had not read any of the emails that passed between him and Annie, Vivian, Jerry, or Mark), the fact is that Chih was keeping a close eye on the realisation of the Disputed Investments to ensure that his "interest" in those investments was protected. There would be no reason for Chih to do this if he was only acting out of friendship and could not reasonably have been expected to be paid for the introductions he made.

[245] Third, the vast sums of the Disputed Investments. It would be entirely implausible for Jenkin to think that Chih was doing all the work he did without expecting to be paid for it.

[246] Fourth, Jenkin's own evidence about this demonstrated that he was not convinced himself about what he was saying: see, for example, the following excerpt from Day 5 of the trial[37]:

> Q. Could you go to paragraph 229 of your witness statement … 'Chih had assisted me in relation to the Disputed Investments, but it was always understood that he would be doing so in his capacity as a personal friend, or as an employee of JAMM Active Limited.' Now, I suggest to you it can't be both. It is either -- and the disputed investments, of course, are those that start on the 3rd of March 2016 with Kayak and go all the way through to the last one that we are dealing,

[37] See Court Transcript, Day 5, p. 106, line 6 to p. 107, line 9.

which is CRCM. Which is it? Was it always understood that he was doing that as a personal friend or it was always understood that he was doing it as an employee of JAMM Active? Which one?

A. As it said, both.

Q. Well, how can it be both?

A. Why not?

Q. Well, is he doing it as an employee of JAMM Active or was he doing it as a friend? They are two different scenarios.

A. Are we saying we cannot hire a friend to be your employee?

Q. No, but the friend then becomes an employee. So are you saying that he did these things and it was always understood that he was doing these things as an employee of JAMM Active?

A. He was a friend and was also an employee of mine.

[247] The following excerpt from Day 6 of the proceedings is to similar effect[38]:

"Q … And you don't seem to remember it. But my point is, really, it's just the same thing that we've had now ongoing that Chih has his contacts, Chih is approached, an opportunity arises, Chih shares it with you, correct?

A. Yes, Chih shared this with me as a friend. That's what I said in my statement.

Q. No. Chih shares this with you, effectively, as a business partner, as it's been described by various people, whereby if an investment is made and a profit is made, the profit will be split 50/50, yes?

A. I disagree with you. I have already made my point.

Q. So you are saying out of the kindness of his heart, he offers you this opportunity to make millions and he gets nothing in return?

A. He send this to me as a friend. I said it.

[248] What is clear from these excerpts, and Jenkin's overall case on this issue, is that he was content to run two mutually inconsistent arguments on this and the Remuneration Issue. While both issues were weak, one of them had to fail purely on a consideration of the pleadings[39] and, for

[38] See Court Transcript, Day 5, p. 176, line 15 to p. 177, line 8.
[39] See, for example, **Wyatt v Vince (Nos 1 and 2) [2015] UKSC 14**.

my part, I would have been willing to strike out the Defendant's case on the Legal Relations Issue, pursuant to ECSC CPR 26.3(1)(b), on the ground that it did not disclose a reasonable case to defend the Claim. In any event, it is difficult to see how this issue could have survived an application for summary judgment.

[249] For the above reasons, the Legal Relations Issue must be decided in favour of the Claimant.

The illegality Issue

[250] If, contrary to my finding above, the Claimant was carrying out an investment business, are the Letter Agreements illegal and/or unenforceable under BVI Law and/or Taiwanese Law and, if so, what are the consequences of such illegality?

[251] In my judgment, deciding whether an agreement is affected by illegality that involves domestic law and foreign law involves two stages.

[252] The first stage is for the court to determine whether the agreement is illegal under domestic law and the consequences of that illegality under that law. If after applying the first stage, the court concludes that it should not permit the enforcement of any part of the agreement under domestic law, that will be an end to the matter. The court will not have to consider whether the agreement is also illegal or unenforceable under the laws of any other country. However, if it comes to the opposite conclusion (including that it should allow a part or parts of the agreement to be enforced under domestic law), it must go on to the second stage, which is to determine whether the agreement (or the part of it that it permits to be enforced under domestic law) may be illegal under foreign law and the consequences of that illegality.

[253] In the present case, allowing the enforcement of parts of an agreement does not arise. As considered in para. 335 of this judgment, under BVI Law governing the regulation of business investments, the choice for the Court is a binary one. It must allow the enforcement of the entirety of a Letter Agreement or not at all.

[254] I will refer to the first stage as the "First Stage" and to the second stage as "the Second Stage".

[255] It is appropriate that I first deal with whether the Letter Agreements are enforceable under BVI Law, i.e., the First Stage, and then, whether they are enforceable under Taiwanese Law, i.e., the Second Stage.

A Under BVI Law – the First Stage

[256] The Defendant maintains that even if the Claimant can demonstrate that the Parties had entered into "binding" agreements in the terms of the Letter Agreements, the services that the Claimant was required to undertake (and allegedly undertook) under those agreements were illegal under the laws of the BVI, and that the Letter Agreements are, consequently, unenforceable.

[257] The basis upon which this assertion is made by the Defendant is that the Letter Agreements expressly stated that the Claimant would serve "as the financial advisor to Infinity Particles Limited (Infinity) related to the" particular investment to which the Letter Agreement related. (Emphasis supplied). The argument continues that, acting in this manner would amount to a breach of laws of the BVI, because the Claimant would have been carrying on an "investment business" without proper authorisation, i.e., with an appropriate licence covering that activity.

[258] I have already found that the expression "financial advisor" in the Letter Agreements was not used in the technical sense contended for by the Defendant and that the services provided by the Claimant did not constitute the provision of financial services. On this basis, there cannot be a breach of the provisions of the SIBA 2010 and, therefore, the BVI Law governing the conduct of investment businesses. However, if I am wrong about this, and the Claimant was providing a form of business investment, can it be said that the Defendant was carrying on an investment business in contravention of the SIBA 2010?

[259] The statutory provisions governing the conduct of "investment business" in the BVI are to be found in s.4 of the SIBA 2010.

[260] The material parts of s. 4 of that Act are in the following terms:

> "(1) Subject to subsections (2) and (3), no person[40] shall carry on, or hold himself or herself out as carrying on, investment business of any kind in or from within the

[40] The expression "person" is defined, in s. 2(1) of the SIBA 2010 as "an individual or an undertaking and includes a mutual fund, however constituted." The expression "undertaking is defined, in the same sub-section, to mean: (a) a company; (b) a

Virgin Islands unless he or she holds a licence authorising him or her to carry on that kind of investment business.

(2) For the purposes of, but without limiting, subsection (1)—

(a) a person carries on investment business in the Virgin Islands if—

(i) he or she occupies premises in the Virgin Islands for the purposes of carrying on investment business; or

(ii) he or she solicits a person in the Virgin Islands for the purpose of offering to provide a service that constitutes investment business; and

(b) a <u>BVI business company</u> that carries on, or holds itself out as carrying on, investment business outside the Virgin Islands is deemed to carry on, or hold itself out as carrying on, investment business from within the Virgin Islands.

(3) Subsection (1) does not apply to any person excluded under Schedule 2, Part C in such circumstances and to such extent as may be specified." (Emphasis supplied).

[261] Section 3 of the SIBA 2010 defines a person as carrying on an "investment business", if "<u>by way of business</u>, he or she engages in an activity that:

(a) is of a kind specified as an investment activity in Schedule 2, Part A; and

(b) is not excluded by Schedule 2, Part B." (Emphasis supplied).

[262] The provisions of Part A of Sch. 2 that the Defendant relies upon are those specified in paras. 2, 3 and 4 of that Part.

[263] Paragraph 2 of Part A of the Schedule is in the following terms:

"**Arranging Deals in Investments**

Making arrangements with a view to:

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partnership; or (c) an unincorporated association. This makes it clear that the provisions of the SIBA 2010 apply to individuals, partnerships, and corporations.

(a) another person (whether as a principal or an agent) buying, selling, subscribing for or underwriting a particular investment, being arrangements which bring about, or would bring about, the transaction in question; or

(b) a person who participates in the arrangements buying, selling, subscribing for or underwriting investments."

[264] The Claimant is a BVI company and is, therefore, governed by the above statutory provisions. The Claimant also accepts that if it is subject to the licensing requirements of the SIBA 2010, it did not obtain, and did not at any material time have, a licence to carry out that business.

[265] The Defendant contends that, based on the Claimant's own case, it was, or would have been, operating as an investment business. It refers to Chih's Witness Statement (at paras. 34, 44 and 69) in which he states, *inter alia*, that he had:

(a) shared investment opportunities with Jenkin, and organised deals with Chih's investment contacts;

(b) arranged the execution of legal investment documents and the wiring of funds for the Defendant to enter into the transactions; and

(c) gave instructions regarding the sale of shares for an investment.

[266] The Defendant alleges that the acts referred to in the preceding paragraph amount to the Claimant arranging deals in investments, and dealing in, or managing, investments, which would be caught by the provisions of para. 2 of Part A of Sch. 2 to the SIBA 2010 and, therefore, by the requirement to have an appropriate licence to undertake business investments referred to in that Act.

[267] It does not strike me as obvious that if the Claimant was carrying on investment activities, it was doing so "by way of business", still less that those activities constituted the carrying on of a "business investment".

[268] As I observe below, I fully appreciate that the expression "business", though not defined in the SIBA 2010, has a wide meaning and may, in an appropriate case, even include an isolated transaction, as has been made clear in many cases, particularly those involving fiscal legislation

in the United Kingdom[41]. However, in the context of the present situation, the only activities that the Claimant carried out were to introduce investment opportunities to a single client (i.e., the Defendant) with whom it had a contractual relationship, rather than to a third party. This type of activity does not appear to me to be "by way of business" involving the Claimant and the Defendant in the conventional manner in which that expression is understood.

[269] In **Financial Services Authority v Anderson and others [2010] EWHC 599 (Ch),** the court had to consider whether the defendants, who had taken money from individuals with an obligation to repay that money with specified interest on a particular date, had taken deposits "by way of a business" in breach of s. 22 of the FSMA 2000 and arts. 5 and 6 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. The monies received were used to lend to others. None of the defendants had provided property services or security to those individuals. The defendants alleged that they had not accepted deposits. The monies they received were loans made to them, but in so far as the monies they received were deposits, they had not received them by way of business either in the ordinary sense of that expression or in the sense defined in article 6 of the 2001 Order. Lewison J (as he then was) found, on the facts, that the defendants had received the amounts by way of deposit "by way of business". However, he went on to say, at [49]-[51] that:

> "[49] Section 22 says that an activity is only a regulated activity if it is carried on 'by way of business. This expression is not defined, but the Business Order [i.e., the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 lays down some circumstances in which the carrying on of an activity is not carrying it on by way of business. So the first hurdle that the Financial Services Authority ('FSA') must overcome is to show beyond serious argument that in the case of each defendant the activity of deposit taking was carried on by way of business.
>
> [50] The word "business" is an etymological chameleon; it suits its meaning to the context in which it is found: see **Town Investments Ltd v Department of the Environment [1978] AC 359, 383**. At its broadest, it may mean anything that is not done for pleasure (**Rolls v Miller (1884) 27 Ch D 71, 53 LJ Ch 682, 32 WR 806**, where keeping a house where working girls – in the literal sense – were given free board and lodging was a business). In some contexts, the performance of regulatory activities may not count as business activities (**Institute of Chartered Accountants v Customs & Excise Commissioners [1999] 2 All ER 449, [1999] STC 398, [1999] 1 WLR 701**) but in other contexts

[41] See, for example, **Cornelius v Phillips [1918] A.C. 199**, in the context of the meaning of that word for the purpose of the UK Partnership Act 1890. See also the more recent case of **Patel v Barlows [2020] EWHC 2753 (Ch), [2021] 4 W.L.R. 6**, at [112] and [113], where it was stated that the purchase of a single property with a view to its subsequent sale may constitute a business.

it will. I do not think that I can or should try to define what the expression means in the context of s. 22.

[51] Whatever the precise meaning of the phrase, I have no doubt that each of the defendants took deposits 'by way of business' in the general sense of the phrase. I say this for the following reasons. (i) Each of the defendants took or purported to take deposits with a view to making money. In the case of Mr Anderson and Mr Peacock their profit was to come from the difference between the interest rate they paid and the interest rate they were to receive from Mr Pruthi. In Mr Pruthi's case the profit was to come from the ultimate borrowers. (ii) Each of the defendants took deposits over a substantial period of time and at regular intervals. (iii) The number of deposits taken by each defendant, even accepting Mr Anderson's challenge to the precise number in his case, was also substantial. So also was the number of depositors. Mr Pruthi took deposits from 'aggregators' who in turn took deposits from others. (iv) In each case the amounts involved are very large. Even if there is a dispute about quantum, it is plain that the undisputed amounts in the case of each defendant are to be counted in millions of pounds. (v) The deposits that Mr Anderson and Mr Pruthi took were paid into their respective "business" bank accounts. (vi) Mr Pruthi has consistently described his activities in his evidence as his "business"; and Mr Anderson's two witnesses, Mr Khan and Mr Southern, each say that Mr Anderson described his activity as a "business venture". Mr Peacock's standard letter said that the arrangement with him was a 'commercial' one."

[270] As is the position under the FSMA 2000, the expression "by way of business" is not defined in the SIBA 2010. However, as noted above, the expression "business investment" is defined, by reference to the "included activities", referred to in Part A of Sch. 2.

[271] Before one gets to consider the meaning of the expression "business investment", one needs to consider whether the activities in question were carried out "by way of business". In other words, in order to fall within the scope of the licensing provisions of the SIBA 2010, the activities prohibited in Sch. 2 to that Act have to be carried on "by way of business". As the cases referred to above demonstrate, the meaning of these words will vary depending on the context in which they are used and the facts and circumstances of an individual case in which that context arises.

[272] I am not able to accept that, on the facts of this case, the activities in question were carried out "by way of business"[42].

[273] The Claimant and the Defendant undoubtedly had a business relationship and so far as each company's relationship with third parties was concerned, their activities were carried out by way

[42] Indeed, if I had accepted the Defendant's case on the Legal Relations Issue, I would inevitably have had to find that the Claimant's activities were not carried out by way of business. However, of course, I would have needed to dismiss the Claim on the basis that there was no intention between the Parties to create any legal relationship.

of business with those third parties. But I do not accept that, as between themselves, they were conducting a business in the sense in which that expression is understood to mean. What appears to be required here is for the Parties to carry out a common business together.

[274] It may be argued that this interpretation of the expression "by way of business" is flawed because of the broad definition of that expression which has been used in several cases to which I have referred. But if the broad definition of the expression is correct, it would render the words "by way of business" largely otiose because the requirements of that expression would be satisfied in every case where the provisions of SIBA 2010 fell to be considered, other than in unusual cases, such as where the relationship between the parties does not involve a commercial activity: see, for example**, Smith v Anderson (1828) 38 ER 838**.

[275] In my view, for the reasons stated above, the facts of the present case may be distinguished from those in **Anderson**. In my judgment, the Claimant was not conducting its activities by way of business. This analysis is supported by the express provisions of the SIBA 2010, though I accept the force of the counterargument that the Parties were carrying out their activities by way of business.

[276] In any event, it is not obvious to me that the Claimant's role in the introduction of the Disputed Investments to the Defendant amounted to the making of arrangements for the investment into the various enterprises by the Claimant within the meaning of the expression "making arrangements" in para. 2 of Part A of Sch. 2[43]. The Claimant's role involved little more than introducing investments to the Defendant in which it could invest and making the introduction between the Defendant and the proposed investment entity. Undoubtedly, the Claimant undertook work to enable the Defendant to decide whether it should invest in a particular enterprise. However, the decision to do so was made entirely by the Defendant once the investment opportunity was introduced by Chih to Jenkin. If the Defendant decided to do so, the arrangements for the making of the investment were entirely down to the Defendant, though the Claimant retained some "monitoring" role, as part of the Co-Investment Team, as much to ensure that if the investment made a profit, he could receive his percentage of the net profit immediately or at least in good time, or that the investment did not make a loss.

[43] For the meaning of the expression in an entirely separate context, see **Card Protection Plan Ltd v Customs and Excise Commissioners (No 2) [2002] 1 A.C. 202**. There is little in that case that assists on the interpretation of that expression for the present purpose.

[277] Accordingly, if the Claimant had any subsequent role, it was to ensure that once the decision to invest had been made by the Defendant, his interest in his share of the profits was protected. I would not describe the subsequent role of the Defendant, once the investment was decided upon, to even be subsidiary or ancillary to the making of the investment by the Defendant. If it had facilitated the making of the arrangements for the investment, as is alleged by the Defendant, it would have known significantly more about the investments than it appears to have done. Even in relation to the Disputed Investments, the Claimant only had the briefest information available to it to bring the Claim.

[278] If this analysis is correct, then it is difficult to see how the licensing provisions of the SIBA 2010 apply to the business relationship between the Claimant and the Defendant, whether in relation to the activities that are prohibited under para. 2 of Part A of Sch. 2 or paras. 3 or 4 of that Part. Indeed, it is clear that exclusions specified in Parts B and C of Sch. 2 are predicated on the basis that the included activities were carried on "by way of business". If they were not, one would not have to resort to the exclusions to consider whether they applied.

[279] However, paras. 3 and 4 are worth further mention because even if they are considered on their own, there can be no conceivable basis for contending that the Agreements are caught by their terms.

[280] Paragraph 3 is in the following terms:

> **"Managing Investments**
>
> (a) Managing investments belonging to another person in circumstances involving the exercise of discretion (other than as manager of a mutual fund).
>
> (b) Acting as manager of a mutual fund."

[281] I cannot see how the Claimant can be said to have been managing any investments, which form the subject of the Disputed Investments, for the Defendant. I agree with Mr Chaisty that the type of management envisaged by para. 3 is a formal and specific role in the management of an investment. The Claimant had no such role. The Claimant did no more than introduce specific investment opportunities for the Defendant. It was then up to the Defendant to decide whether to make that investment. The making of the investment and how it was secured, protected, and

managed was entirely down to the Defendant. Chih made this clear in his oral evidence. He was not challenged on that evidence[44]:

> "Q. So what I am putting to you is that proposition, Mr. Chih, that you were seeking to get yourself in a position where you were able to manage his investments and make a profit from him.
>
> A. Sir, I did not manage them. It was co-investment. We did it together. It's a partnership. Remember he had to sign all the legal documents, wire all the money, so this is not a financial advisory agreement where I have discretion, full discretion."

[282] Likewise, para. 4 (so far as the Defendant relies on it) has no application in the present case. It states:

> **"Providing Investment Advice**
>
> (a) Advising a person on investments (other than as the investment adviser of a mutual fund) where the advice—
>
> (i) is given to the person in his or her capacity as an investor, or a potential investor, or in his or her capacity as agent for an investor or potential investor; and
>
> (ii) concerns the merits of the investor, or a potential investor, doing any of the following (whether as principal or agent) —
>
> (A) buying, selling, subscribing for or underwriting a particular investment; or
>
> (B) exercising any right conferred by an investment to acquire, sell, subscribe for, underwrite or convert an investment.
>
> (b) Acting as the investment adviser of a mutual fund."

[283] Whether the Claimant was providing investment advice which fell within para. 4 is fact-specific.

[284] There can be no conceivable basis upon which the Claimant can be said to have been providing "investment advice" in the terms in which that expression is used in para. 4.

44 See Court Transcript, Day 2, p. 25, line 25 to p. 26, line 9.

[285] At the expense of repetition, the Claimant did little more than identify investments that it thought might be worth the Defendant investing in so that they could both benefit from any investment that the Defendant undertook. This was done based on Chih's enquiries and contacts which were entirely personal to him. There was no formal advice of the type encompassed by the section. The due diligence carried out was by the "Co-Investment Team" that included Jenkin and other personnel of JAMM Active, so, even if investment advice was given by the Claimant to the Defendant, it was neither given by the Claimant in a professional or business capacity nor was relied upon, or intended to be relied upon, by the Defendant, directly or indirectly, without the Defendant undertaking its own due diligence and obtaining its own advice on the viability of the investment.

[286] The Defendant also appears to rely on para. 1 of Part A of Sch. 2 in support of its contention that the Disputed Investments are caught by the licensing provisions of Sch.2.

[287] I respectfully disagree.

[288] Paragraph 1 of Part A applies to: (a) the buying, selling, subscribing for or underwriting investments "as an agent" or (b) the buying, selling, subscribing for or underwriting investments "as principal". It is difficult to see how the Claimant could fall into either category. As an introducer of potential investments, he was neither the principal nor the agent of the Defendant.

[289] It follows, therefore, that the careful analysis provided by Mr Moverley Smith in relation to the analogous or related provisions of the UK Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the UKFSMARAO"), the Perimeter Guidance Manual published by the UK Financial Services Authority, and the English cases to which he refers (i.e**., Financial Conduct Authority v Avacade Ltd (in Liquidation) [2021] EWCA Civ 1206, Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474, and R (on the application of Tenetconnect Services Limited) v Financial Ombudsman and John and Frances Thorpe [2018] EWHC 459 (Admin)**) does not appear to me to have any application.

[290] In **Re Paradigm Holding Ltd 2004-05 CILR 542**, a decision of the Grand Court of the Cayman Island, Henderson J, at [29], said the following about the Cayman Island's equivalent legislation to the SIBA 2010:

"There are a number of specific exemptions provided in the Fourth Schedule to persons who would otherwise be caught by the terms of the S.I.B. Law. None of these have application to the activities of AoW and AVE. The S.I.B. Law is essentially consumer protection legislation, designed to protect the investing public. It requires persons engaged in the business of selling securities to register under the Law and to abide by the regulatory regime established under it. The intent of the legislation is remedial. For these reasons, the legislation should be construed broadly. When determining whether a certain business activity is caught by the Law, the emphasis must be on substance not form." (Emphasis supplied).

[291] Whatever complaints are made by the Defendant to the form in which the Disputed Investments took, in substance the agreement between the Claimant was straightforward. In short, the Claimant would introduce investment opportunities to the Defendant. It remained for the Defendant to decide, after it had done its due diligence, whether to proceed with it. If it did, the Claimant and the Defendant would be entitled to share in the net profits (or be responsible for the losses) equally. If it did not, that was the end of the matter[45]. There was nothing remarkable about what was agreed between them, other than the Defendant's attempt to avoid its obligations to make payment to the Claimant by raising technical legal arguments which, on a proper analysis, have little merit.

[292] But even if the activities are prohibited, do any of the exemptions in Part B of Sch. 2 to the SIBA 2010 apply? In addition, or alternatively, is the Claimant an "excluded person" under any of the provisions of Part C of Sch. 2 to that Act? If any of the exceptions apply or the Claimant falls within the category of "excluded person", the licensing requirements of the SIBA 2020 will not apply to it.

[293] The principal exemption that the Claimant relies on under Part B of Sch.2 is that contained in para. 2(5) of that Part.

[294] Paragraph 2(5) is in the following terms:

"Enabling parties to communicate

[45] It is difficult to understand how this situation stands alongside para. 2 of Part B of Sch. 2 which states that "the following activities are deemed not to constitute arranging deals in investments for the purposes of paragraph 2 of Part A in the circumstances and to the extent specified … (a) [i]n relation to paragraph 2(a) of Part A, arrangements which do not, or would not, bring about the transaction to which the arrangements relate." If a potential investment is excluded if it does not result in a deal, it is difficult to understand how a person proposing an investment can protect himself from being in breach of the SIBA 2010 if a deal he introduces comes to fruition.

> Making arrangements to provide means by which one party to a transaction (or potential transaction) is able to communicate with other parties to the transaction or transactions."

[295] I agree with the Defendant that the Claimant was not merely enabling the Defendant to communicate with potential investors. The functions of the Claimant were substantially more than this.

[296] Paragraph 8.32.4 of the Perimeter Guidance Manual published by the UK Financial Services Authority explains the meaning of these words in the context of the application of art. 27 of the UKFSMARAO, which is framed in similar terms to para. 2(5)) of Part B:

> "The ordinary business of a publisher or broadcaster can involve him in publishing or broadcasting financial promotions (for example, advertisements) on behalf of authorised or exempt persons. Journalists who write about investments or financial services may promote the services of an authorised or exempt person…The [UKFSMARAO] contains an exclusion (article 27: Enabling parties to communicate) to bring a degree of certainty to this area. This applies to arrangements which might otherwise fall within article 25(2) merely because they provide the means by which one party to a transaction (or potential transaction) is able to communicate with other parties. In the FCA's view, the crucial element of the exclusion is the inclusion of the word 'merely'. So that, where a publisher, broadcaster or Internet website operator goes beyond what is necessary for him to provide his service of publishing, broadcasting or otherwise facilitating the issue of promotions, he may well bring himself within the scope of article 25(2)."

[297] The Claimant was not simply making arrangements for the Defendant to communicate with the Defendant. Its role was the more substantial role of facilitating contact by the Defendant with potential investors to enable the Defendant to decide whether to make investments in the investments that had been introduced by the Defendant to it and, if the Defendant decided to invest, to facilitate the completion of the investment. It is difficult to see, therefore, how the services performed by the Claimant fall within the scope of para. 2(5).

[298] Would the activities of the Claimant have been covered under the "joint enterprise" provisions of para. 4 of Part C of Sch. 2 to the SIBA 2010?

[299] Paragraph 4 of Part C states that a person who is a participant in a "joint enterprise" is an "excluded person [i.e., a person who does not carry on investment business and, therefore does not need an investment business licence] where he or she undertakes an activity that constitutes

investment business (a) with, or for, another participant in the same joint enterprise; and (b) for the purposes of, or in connection with, the joint enterprise."

[300] But for the technical meaning of the expression in s. 2(1) of the SIBA 2010, I would, like the Claimant, have described the relationship between the parties as a "joint enterprise". However, the expression joint enterprise has a specific meaning in s. 2(1).

[301] Section 2(1) describes a "joint enterprise" as:

> "an enterprise into which 2 or more persons enter for a commercial purpose related to a business carried on by those persons, other than an investment business, and, where one of the participants is an undertaking, each undertaking in the same group as the first undertaking is regarded as a participant in the joint enterprise."

[302] Section 2(1) also contains the definition of the expression "participant". It states that "'participant', in relation to a joint enterprise, means a person who has entered into the joint enterprise".

[303] The activities of the Claimant do not fall within the definition of "joint enterprise" in s. 2(1). That is because the Claimant and the Defendant cannot be said to have entered into the same business or enterprise that both of them carried out together.

[304] Arguably, there is a more powerful case for contending that the partnership exclusion in para. 5 of Part C to Sch. 2 to the SIBA 2010 applies.

[305] Paragraph 5 of Part C states:

> "A person who is a partner in a partnership is an excluded person where he or she undertakes an activity that constitutes investment business—
>
> (a) with or for another partner in the same partnership; and
>
> (b) for the purposes of, or in connection with, the partnership."

[306] The expression "partnership" is defined in s. 2(1) of the SIBA 2010 as "includ[ing]: (a) a limited partnership, wherever situated; and (b) a partnership constituted or formed under the law of a country outside the Virgin Islands."

[307] If the activities in which the Parties were involved constituted an "investment business", it is arguable that the exclusion is para. 5 applies as the activity was carried out by the Parties in partnership within the meaning of s. 3 of the BVI Partnership Act, which defines that expression in the same terms as s. 1 of the UK Partnerships Act 1890 as "the relation which subsists between persons carrying on a business in common with a view of profit." The restriction on the application of the joint venture exclusion in para. 4 ("an enterprise into which 2 or more persons enter for a commercial purpose related to a business carried on by those persons, other than an investment business") does not apply to the partnership exclusion specified in para. 5.

[308] The relationship between the Parties supports the classic hallmarks of a partnership between them. The business activities that the Parties agreed to carry out with third-party investors were to be carried out together for their common benefit. The Claimant was to recommend business opportunities to the Defendant in return for which they were to share the net profits equally and (importantly) bear any losses also equally: see the exposition of the law on the subject provided in **Patel v Barlows [2020] EWHC 2753 (Ch), [2021] 4 W.L.R. 6**[46], at [100]-[127] by the English Court of Appeal in **Sotheby's v Mark Weiss Limited and others [2020] EWCA Civ 1570**, at [84], per Carr LJ (as she then was).

[309] Based on the above analysis, I can see no reason why the Claimant and the Defendant could not be said, in the present case, to have acted as partners.

[310] In the circumstances, I am satisfied that the agreement between the Parties did not involve any breach of the SIBA 2010.

[311] But even if I am wrong about this, does a breach of the SIBA 2010 prevent the enforcement of the Letter Agreements by the Claimant?

[312] In order to answer this question, one must start with s. 50F of the SIBA 2010, the relevant parts of which state:

> "(1) An agreement to which this section applies that is made by a person in the course of carrying on unauthorised financial services business is unenforceable against the other party to the agreement.
>
> (2) The other party to an agreement referred to in subsection (1) is entitled to recover—

[46] One of my decisions, sitting in my capacity as a Judge of the High Court.

(a) any money or other property paid or transferred by him or her under the agreement; and

(b) compensation for any loss sustained by him or her as a result of having parted with it.

(3) This section applies to an agreement … (b) the making or performance of which constitutes, or is part of, the unauthorised financial services business being carried on.”

[313] The prima facie position, therefore, is that the Letter Agreements are not enforceable. However, s. 50F is subject to the provisions of s. 50G of the SIBA 2010.

[314] Section 50G is in the following terms:

“(1) Where an agreement is unenforceable by reason of section 50F, the amount of compensation recoverable as a result of that section is—

(a) such amount as may be agreed by the parties; or

(b) on the application of either party, the amount determined by the Court.

(2) Notwithstanding section 50F, if the Court is satisfied that it is just and equitable in the circumstances of the case, it may allow—

(a) the agreement to be enforced, or

(b) money and property paid or transferred under the agreement to be retained,

by the person carrying on unauthorised financial services business.

(3) In considering whether to allow the agreement to be enforced or the money or property paid or transferred under the agreement to be retained, the Court shall have regard to whether the person carrying on unauthorised financial services business reasonably believed that he or she was not carrying on unauthorised financial services business by making the agreement.

(4) If the person against whom the agreement is unenforceable—

(a) elects not to perform the agreement, or

(b) as a result of this section, recovers money paid or other property transferred by him or her under the agreement, he or she must repay any money and return any other property received by him or her under the agreement.

(5) If property transferred under the agreement has passed to a third party, a reference in section 50F or this section to that property is to be read as a reference to its value at the time of its transfer under the agreement.

(6) The commission of an offence under this Act or any regulatory legislation does not make the agreement concerned illegal or invalid to any greater extent than is provided by section 50F."

[315] The Court has a discretion under s. 50G to allow an agreement that does not comply with the licensing requirements of the SIBA 2010 to be enforced if it is "just and equitable" to do so.

[316] In deciding whether it is just and equitable to allow an agreement to be enforced, s. 50G(3) expressly requires the Court "to have regard to whether the person carrying on unauthorised financial services business reasonably believed that he or she was not carrying on unauthorised financial services business by making the agreement."

[317] There is no question in my mind that Chih had no idea that the involvement of the Claimant in the Disputed Investments might be unlawful. This is not only made clear in para. 24 of his witness statement[47] but also para. 111 of his witness statement:

> "When the Co-Investment Arrangement was agreed, and throughout the whole time that the Letter Agreements were entered into, it was never considered by me that the arrangement would or could in any way constitute unauthorized financial services as a matter of BVI law or anywhere else and, given that Jenkin was happy to sign them without seeking any outside legal counsel at any point in time during our partnership together, I believe that Jenkin clearly thought the same. The arrangement was extremely simple in that I was sharing my investment opportunities with Jenkin, the team would monitor and administer them, Jenkin and I would share the profit or loss after he was paid a cost of capital for the usage of the capital, and we would use our respective investment vehicles to facilitate this. The possibility that any of the activities performed under the arrangement might constitute an unauthorized financial services business in the BVI or elsewhere never crossed my mind. Therefore, I believe in the circumstances that it is rightful that the agreements made between C2 and Infinity in accordance with the Letter Agreements should be enforced."

[47] Per Chih: "As such, no thought was given as to whether this arrangement might require regulatory approval in the BVI or elsewhere."

[318] This statement (on which Chih was not challenged) must be correct. It would have been foolhardy for Chih to have ignored the requirement to have a licence if he knew this was necessary, particularly given the number of investment opportunities he introduced to Jenkin. Chih would also have known that the lack of a licence was more likely to be an issue for him, rather than Jenkin.

[319] On the issue of the belief of Chih, I take the unhesitating view that Chih believed that the Claimant was not carrying on unauthorised financial services business by making the Agreements which are recorded by the terms of the Letter Agreements. Nor do I consider that any member of the Co-Investment Team believed that what Chih and Jenkin were doing required a licence or other form of authorisation. If any of them thought that they did, I have no doubt that they would have raised it with Chih and Jenkin.

[320] The question that the Court needs to determine is whether that belief was reasonable.

[321] The Defendant relies on the following observations of the English Court of Appeal in **Charles Cleland Helden v Strathmore Limited [2011] EWCA Civ 542** (when construing the similarly-worded provisions of s. 25 of the FSMA 2000) to suggest that Chih's belief was not reasonable.

[322] In **Helden**, Lord Neuberger MR with whom the other members of the Court (Smith and Elias LJJ) agreed, said, at [46]-[48]:

> "In my view, the only possible objection which could be taken to the analysis in paras [97] and [100] of the judgment and the resulting conclusion, is the implicit interpretation of s 28(5) which the judge appears to have adopted. He seems to have thought that that subsection assisted Strathmore, in the sense that it applied in a case such as this, where the person in breach of the general prohibition was unaware of FSMA or its possible prohibition of the transaction in question, and where it was, in all the circumstances, reasonable for that person to be so unaware. However, there is a powerful argument for saying that a person cannot contend that he 'reasonably believed that he was not contravening the general prohibition by making [an] agreement', if he was wholly unaware of the existence of the prohibition at the time of the agreement.
>
> It seems to me that there is considerable force in the simple linguistic point that a person cannot believe that he is not contravening a rule, if he is wholly unaware of the rule. Believing that one is not doing something is simply not the same thing as not believing one is doing something: to believe wrongly that one is not committing an act requires a degree of knowledge as to what that act is or entails, whereas wrongly not believing one is committing an act requires a degree of absence of knowledge, which renders it easier to contend that it would apply where one is ignorant of the existence of the act.

> Against that, there is some force in the point that it is unlikely that Parliament could have intended that a person who wrongly, but reasonably, believes that he is not contravening a statute should be better off than a person who was, reasonably, unaware that the statute applied. Having said that, the answer to that point may be that people who carry on regulated activity and are ignorant of the law, even if reasonably so, should be more at risk, because they are more of a danger to the public, than those who carry on such activity, and are aware of the law, and reasonably, albeit wrongly, conclude that it does not apply."

[323] Lord Neuberger considered that the contentions put forward by the respondent before the first-instance judge (Newey J, as he then was) about the reasonableness of the respondent's belief were less persuasive than those that had been advanced by the appellant. At paras. [49]-[51], he explained why:

> "In support of his contention that the judge was right in his apparent interpretation of s 28(5), Mr Philpott [counsel for the respondent] referred to the decision of the House of Lords in **R v Johnstone [2003] UKHL 28, [2003] 3 All ER 884, [2003] 1 WLR 1736**. That case involved consideration of the criminal liability for unauthorised use of a registered trade mark under s 92(1) of the Trade Marks Act 1994. Section 92(5) provides that it is a defence for an accused person 'to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark'.
>
> Lord Nicholls of Birkenhead referred (at [42]) to a decision of the Divisional Court, **Torbay Council v Singh [1999] IP & T 54**, where it had been held that s 92(5) was not available as a defence 'where the defendant does not know of the existence of the registered trade mark in question'. He then referred to later cases where this holding had been doubted, and said this in the following paragraph:
>
>> 'I share these doubts. The interpretation adopted in **Singh's** case draws a distinction Parliament cannot have intended. The language of the subsection gives no support to this distinction. Section 92(5) is concerned to provide a defence where the person charged has a reasonable belief in the lawfulness of what he did. Those who act honestly and reasonably are not to be visited with criminal sanctions. It makes no sense to confine this defence to cases where the defendant is aware of the existence of the registered trade mark and exclude altogether those cases where the defendant is not. Section 92(5) provides a defence where the defendant believes on reasonable grounds his use of the sign does not infringe a registered trade mark of whose existence he is aware. It would be extraordinary if the subsection does not equally furnish a defence in the stronger case where the reason why the defendant believes his use of the sign does not infringe a registered trade mark is that he reasonably believes no relevant trade mark is registered. Section 92(5) is to be interpreted as including the latter case as well as the former.'

Lord Nicholls was concerned with a case where there were reasonable grounds to believe that a trademark had not been registered. This case is more akin to a defendant who was unaware that there was a system of registration at all. For reasons I have given at [47] above, it is more difficult to bring ignorance of the law within the scope of s 28(5). Nonetheless, there is some support for the judge's approach in these observations of Lord Nicholls, in particular where he states that the intention is to provide a defence where the person charged has a reasonable belief in the lawfulness of what he did. Furthermore, there are points of distinction between that case and this. First, no criminal sanction is involved under s 28 of FSMA: s 28 is concerned with enforceability, and has nothing to do with criminality, which is dealt with by s 23, which has its own, not altogether dissimilar, defence in s 23(3). Secondly, s 28(5) identifies one factor which has to be taken into account when carrying out a much more wide-ranging exercise under s 28(3), whereas s 92(5) of the 1994 Act sets out a single, binary, potential defence. Thirdly, ignorance of the existence of the legal requirements of FSMA, which is what is being relied on by Strathmore in its argument, is rather different from ignorance of a simple fact, such as the existence of a trade mark."

[324] It is plain from para. [46] of Lord Neuberger's judgment that while favouring the arguments advanced by the appellant, he was not suggesting that the arguments that found favour before the first-instance judge were unsustainable. Indeed, the Court of Appeal refused to interfere with the exercise of the discretion by the first-instance judge in favour of finding that it was just and equitable to allow the agreement to be enforced between the parties. That much is clear from what Lord Neuberger said, later on in his judgment, at [51]-[52]:

"It is unnecessary to resolve this difficult issue, and I would therefore prefer not to do so, not least because I am not convinced that we have had as full submissions on the point as it may merit. Even accepting in Mr Helden's favour that the judge did assume that Strathmore could rely on s 28(5) (which he may well have done) and that he was wrong in so doing (which he may well have been), I consider that he reached the right decision on the question whether Strathmore could rely on s 28(3). In my view the reasons he gave at paras [97] and [100], when taken together, make out a strong case for Strathmore being entitled to enforce the 2006 charge, and the agreement in relation to the £25,000 loan, notwithstanding the breach of FSMA, even if s 28(5) does not assist Strathmore's case.

The judge considered the issue in a careful and thorough way, and, if he did go wrong in his interpretation of s 28(5), it is fanciful to think that that would have affected his ultimate conclusion."

[325] In my judgment, whether a belief is reasonably held cannot be decided by compartmentalising the belief of the person concerned under one or the other scenario considered by the Court of Appeal. Each case will be fact-specific, and the question has to be decided at the point when the agreement is made, based on all the circumstances of the case. In other words, the court should take a holistic approach to the issue. It is inappropriate, in my view, to seek to set out which

scenario should be applied to the facts. The Court should, in every case, hold to the strict words of the statute and look at all the circumstances.

[326] I am in no doubt that the belief held by Chih was reasonable. First, it would not have been obvious to many – even a qualified "non-specialist" legal practitioner – that entering into the Disputed Investments might contravene the requirements of SIBA 2010. Second, Chih and Jenkin had been friends for a substantial time and not unnaturally, neither thought a formal agreement, drawn up through lawyers was necessary, particularly if it jeopardised any investment opportunity that needed to be proceeded with quickly. Third, while appreciating that professional lawyers might, out of an abundance of caution, have thought it necessary to apply for a licence to avoid issues of this type arising, I am not sure that this would have been necessary for the reasons I have already given. Finally, even if one accepts the arguments advanced by the appellant to the Court of Appeal in **Helden**, referred to above as more compelling, there is a distinction to be derived between that case and the present one. In that case, there were several factors (eight in all) that would (or should) have made it obvious that the licensing provisions of the FSMA 2000 might be breached. In the present case, it would not have been obvious to Chih that this could be the case; of course, the thought never entered Jenkin's mind, so both Chih and Jenkin were oblivious to the possibility that the licensing provisions of the SIBA 2010 might apply to the Agreements.

[327] The factor specified in s. 50G(3) is not the only factor that the court has to consider. The court may take any other relevant matters into account. This is not just clear from the plain words of s. 50G but also from the decision of the Court of Appeal in **Helden** (see specifically, para. [51] of the judgment). However, undoubtedly the matter referred to in s. 50G(3) will be the most important factor.

[328] Lest it be suggested otherwise from my analysis of this issue, I do not consider that s. 50G(3) imposes a "threshold" requirement which must be satisfied before a court goes on to consider any other factor that may be relevant. That too is obvious from the express words of the statute but is also clear from the observations referred to above in **Helden**. In theory, this means that, even if the belief held is wholly unreasonable because, for example, the party seeking to enforce the agreement knew that the terms of the agreement were unlawful, the court could still allow the agreement to be enforced, though, in such a situation, it is difficult immediately to conceive of circumstances where the court would.

[329] In **Helden**, the factors that the first-instance judge found to warrant the enforcement of the agreement were:

(a) the sizeable number of loans made by the defendant;

(b) the fact that the loans had been made over a period of many years and with some regularity;

(c) the substantial amounts of money advanced by the defendant;

(d) the fact that the loans had been made with a view to profit;

(e) the fact that the parties' friendship had grown out of their financial relationship, not the other way round;

(f) the fact that though the arrangements were said to be informal, solicitors had often been instructed, the loans were generally secured, and records had been kept of the transactions;

(g) the loans to the claimant formed part of a chain of not-dissimilar transactions, albeit that they were the only ones involving investment activity; and

(h) the fact that the defendant was a limited company with commercial objects.

[330] The Judge also had regard to the following factors: (i) the fact that the claimant had had the use of the property that the defendant's loan had enabled him to buy since 2006 without making any rent or interest payments; (ii) the property had increased substantially in value; (iii) the defendant would not have been willing to make the loan on an unsecured basis; (iv) the defendant could have expected to have generated a return on the amount of the main loan by investing it elsewhere had it not been lent to the claimant; (v) there was no question of the claimant having been taken advantage of, given his considerable experience in property matters; (vi) the claimant had preferred not to pursue alternative funding because of his concern that he should be able to

make the lump sum repayments without penalty; and (vii) the claimant had not identified how he would have been better placed if the defendant had been an “authorised” person for the purposes of the FSMA 2000.

[331] In the circumstances, the first-instance judge held that it was just and equitable to enforce the agreement reached between the parties.

[332] The present case is not dissimilar to the position that applied in **Helden**, though, in **Helden**, the Court was concerned with a loan agreement and charge document executed by the parties and, in the present case, it is concerned with the legality (or otherwise) of several investment opportunities introduced by the Claimant to the Defendant, resulting in the Defendant investing funds in the Disputed Investments.

[333] The factors in this case which it is appropriate for me to take into account are roughly equivalent to those that were taken into account in **Heldon**:

(a) Neither Chih nor the Defendant knew that the Agreements might be illegal.

(b) Chih and Jenkin are highly successful businessmen. They are well-accustomed to dealing with their business transactions through the medium of limited companies, and are fully aware of the advantage of doing so through BVI companies. Neither can claim that the other had an unfair advantage in the negotiations that led to the agreement in principle reached between them and, subsequently, the Agreements.

(b) The sums invested by the Defendant were huge and are likely to have made, even if one takes into account the losses made on some of the investments introduced, substantial profit – so much so that Jenkin could not recall, even to the nearest $5million, what those profits were. If the enterprises were loss-making or collectively loss-making, I have no doubt that he would have remembered.

(c) It would be wholly unfair for the Court to refuse to allow the Agreements to be enforced, given the huge overall profit (not challenged by Jenkin) made by the investment opportunities introduced by Chih. There is some suggestion on the part of Jenkin that the terms of the Letter Agreements – if the Court were to allow them to be enforced – operate unfairly. The case for this is made out in para. 78(c) of his witness statement where he says:

> "the Letter Agreements state that C2 would be entitled to half of the profits from the investments, even though C2 did not contribute any of the investment capital. That is grossly disproportionate and unfair. The alleged Letter Agreements also stand in sharp contrast to the past arrangements and understanding between Chih and myself. As I have explained above, on each occasion where it was agreed that Chih and I would "share" equally in the profits (and the losses) of an investment, it was always the case that each of us would be responsible for contributing half of the investment capital, and regardless of who "introduced" the investment. C2 (and Chih) did not contribute any capital to any of Infinity's investments, and there is no reason why C2 (or Chih) should now be entitled to half of the profits."

I agree with the Claimant: so far as it is asserted that the agreement is one-sided, this was not because Chih sought to take advantage of Jenkin, a fact reflected by the huge profits made by the investments. It may just as well be said that if this Court did not allow the Agreements to be enforced, it would give an iniquitous and wholly unconscionable advantage to the Defendant by allowing the Defendant to keep all of the profits generated as a result of Chih's work in introducing investment opportunities to Jenkin.

(d) As the Claimant rightly points out, just as was the case in **Heney**, the relationship and agreement between Chih and Jenkin came from their mutual trust and confidence as a result of their friendship. The financial developments and agreements came first from the friendship, and not the other way round.

(d) The Defendant is unlikely to have invested in other investments as they are unlikely to have been as profitable as those introduced by the Claimant – or, at any rate – there is no evidence that he would.

(e) The Claimant and Chih did not operate a business open to strangers or other investors.

(f) The services provided by the Claimant were to a single “client”, the Defendant. Importantly, there is no evidence that Jenkin was looking or would have looked elsewhere for business opportunities.

(g) The ultimate decision about whether to invest was Jenkin’s. There is no evidence that Chih sought to persuade Jenkin to make an investment which Jenkin was reluctant to make.

(h) There is no explanation provided to the Court, on behalf of the Defendant, as to what would have been required to obtain authorisation under the SIBA 2010.

(i) There is no evidence as to how the Defendant might have been treated differently if the Claimant had been authorised under the SIBA 2010 or how its position may have been prejudiced by any lack of authorisation.

(j) The Claimant had agreed to pay 50% of the losses made on any investment.

(k) As the Defendant readily accepts, the SIBA 2010 is essentially consumer-protection legislation. It is designed to protect the investing public, by requiring persons engaged in investment business to register and abide by the established regulatory regime. Neither Jenkin nor the Defendant can be said to be, or to have acted as, a “consumer” within the meaning of that expression, as it is commonly understood.

[334] Of course, as Mr Moverley Smith rightly states, it is for the Claimant to demonstrate that the discretion in s. 50G should be exercised in its favour. I am satisfied, for the reasons set out above, that the Claimant has amply demonstrated that.

[335] In the circumstances, even if I had come to the conclusion that the Agreements were illegal, I would have exercised my discretion in favour of allowing the Claimant to enforce them against

the Defendant. Section 50G(2) makes it clear[48] that if the Court decides to exercise its discretion in favour of allowing a party to enforce an unlawful agreement, it can only do so in its entirety. In other words, it cannot pick and choose which parts of the agreement it will allow to be enforced. It must either allow the agreement may be enforced in whole or not at all. However, as I have found that there were separate agreements in relation to each of the Disputed Investments, it is open for me to find that only some of the Agreements may be enforced. However, I can see no basis to come to that finding.

[336] It follows that the First Stage must be determined wholly in favour of the Claimant. So far as necessary, I allow all of the Letter Agreements relating to the Disputed Investments to be enforced by the Claimant against the Defendant pursuant to the discretion I have under s. 50G of the SIBA 2010.

B Under Taiwanese Law – the Second Stage

[337] On the basis that I have found, under the First Stage, that I should permit the enforcement of the Letter Agreements under BVI Law, I now need to apply the Second Stage.

[338] Unlike the position that applies under s. 50G of the SIBA 2010, it appears to be possible for a court to allow enforcement of part only of an agreement that is illegal under foreign law.

[339] The Defendant's pleaded case on this issue is summarised in para. 5.3 of the Amended Defence in the following terms:

> "the place of performance of the alleged Co-Investment Arrangement and Letter Agreements is Taiwan. As a matter of Taiwanese law:
>
> 5.3.1. Article 4 of the Securities Investment Trust and Consulting Act ("SITCA") provides that any business that provides 'analysis, opinions, or recommendations on matters relating to investment in or trading of securities' in return for compensation is a 'securities investment consulting enterprise'. A 'securities investment consulting enterprise' must operate with the permission of the Financial Supervisory Commission and apply for its approval. It is therefore illegal under the SITCA for the Claimant, as a securities investment consulting enterprise, to act as financial advisor and/or to promote any

[48] This has to be clear from the express words of s. 50G(2) which state that if the if the Court is satisfied that it is just and equitable in the circumstances of the case, it may allow "the agreement" to be enforced. That has to mean the entire agreement, not any part or parts of it.

investment (regardless of the location of such investment) within the territory of Taiwan without obtaining the relevant approval from the Financial Supervisory Commission.

5.3.2. Article 13(3) of the Securities Investment Consulting Business Management Regulations ('Regulations') further provides that a securities investment consulting enterprise may not engage in conduct including 'stipulating that gains or losses from securities investments will be shared with a customer'. It is therefore illegal for the Claimant, as a securities investment consulting enterprise, to share any investment income or losses with the Defendant pursuant to the alleged Letter Agreements.

5.3.3. Article 10(2) of the Regulations also provides that a securities investment consulting enterprise shall produce a written securities investment consulting contract stipulating the rights and obligations and legal liability of the parties to the contract. The alleged Letter Agreements are therefore invalid and unenforceable as they do not comply with the formality requirements under the Regulations and are not signed by both parties."

[340] Even if one accepts the case of the Defendant in its entirety on this point, it is difficult to understand how it assists the Defendant in contending that the Agreements are unenforceable.

[341] The Parties relied upon expert evidence to support the positions they were advancing before the court. The Claimant's expert was Ms Liu. The Defendant's expert was Mr Yeh.

[342] I found the evidence of both experts very difficult to understand. Ms Liu had no, or no significant, experience in providing expert evidence. Mr Yeh did have some limited experience but failed properly to address the crucial issue of the civil effects of an agreement that was illegal under Taiwanese Law.

[343] It was common ground between the experts that a breach of the provisions of SITCA could give rise to possible criminal consequences. However, neither expert could state with any certainty what the civil consequences of such a breach would be.

[344] So far as I understood the expert evidence (and the repetition of the same question or clarification of a question by both counsel to elucidate a clear answer from the expert appeared to have had little success, particularly in the case of Ms Liu) I prefer the evidence of Mr Yeh. The evidence of Ms Liu was inherently weak.

[345] If the Claimant was providing financial advice, then there is no question that as many as 50 investments that Chih maintains were undertaken with his or his company's assistance would fall within the scope of the licensing provisions of SITCA. However, the crucial questions here are:

(a) whether the Claimant or Chih provided financial advice;

(b) if either of them had, whether the performance of those services were wholly or partly undertaken in Taiwan;

(c) if the services were performed partly in Taiwan, whether they could be said to be sufficient to warrant the Taiwanese Court to refuse to allow the Agreements to be enforced; and

(d) the position of the BVI courts to the enforcement of the Agreements, based on the above.

[346] In my judgment, the defence of the Defendant on this point falls on all the above counts.

[347] I have already found that neither Chih nor the Claimant provided financial advice to the Defendant. That, by itself, disposes of the whole Illegality Issue (including the Second Stage) in favour of the Claimant.

[348] But suppose they were providing financial advice. Can they be said to have been performing those services wholly or partly in Taiwan?

[349] The Defendant contends that they were and relies upon the following matters to support that contention.

[350] First, the fact that the Claimant's sole director and shareholder was Amy, Chih's wife. The Claimant has, or had at the relevant time, no employees. Amy is based in Taiwan. It is, thus, contended by the Defendant that the Claimant was little more than a "shell" company that carried out no activities in the BVI. The only registered director and shareholder was in Taiwan so, the argument goes, if there was any connection between the Claimant and its owners or controllers, that connection was through Taiwan.

[351] I cannot see how this has any relevance in the present case. Suppose, for argument's sake, there were five directors and shareholders of the company, all of whom had an equal number of shares in it and took an active part in its running, but were based in different countries. How, it must be questioned, could this argument apply in such a case? The fact is that the Claimant is a BVI company, and to decide this issue based on where an individual shareholder or director resides seems to me to be misconceived. It would be to treat the company as the same person as those who control it, rather than as a separate legal entity.

[352] Second, it is alleged by the Defendant that the Claimant held itself out to the public, through its LinkedIn page, as being an investment firm having a family office based in Taipei.

[353] There is nothing in this point.

[354] Whether the LinkedIn page was created by Vivian (as Chih suggested) or by Chih himself, and whether he had seen this page or not, I cannot see any basis upon which it could conceivably support the assertion that the Claimant was based in Taipei. The fact is not a shred of evidence has been produced to demonstrate that the Claimant had a branch, business or office, or carried out any of its operations or activities, in Taipei.

[355] Third, the fact that Chih's employment contract with JAMM Active expressly stated that his place of employment would be in Taipei. Chih stated that he lived in Shanghai but accepted that he regularly visited Taipei. Those facts, together with the further fact that the other members of the Co-Investment Team were all based in Taiwan, meant, the Defendant submits, that the services provided by Chih were being performed, or largely performed, in Taiwan.

[356] I reject that argument. The fact is Chih was not employed by the Defendant, but by JAMM Active. I have already found that none of the services that involved introducing investment opportunities to the Defendant were provided by Chih (whether personally or on behalf of the Claimant) to JAMM Active. In any event, JAMM Active was incorporated in Hong Kong. Accordingly, regardless of whether Chih provided his services under this employment contract in Taiwan or elsewhere in the world, it was provided to a company that was based in Hong Kong.

[357] Fourth, the Defendant states that it is significant that the services provided by the Claimant would have been received by Jenkin (on behalf of the Defendant) in Taiwan. I do not see that has any relevance to the issue I need to determine. If it did, it would lead to the absurdity that, if a

controlling director or shareholder happened to be resident in Taiwan (even temporarily), SITCA would apply, but not if he happened to be elsewhere.

[358] Fifth, nor is there any substance in the point about where the Letter Agreements were signed. It is difficult to see how where they were signed could have any particular significance. In the age of the internet and the electronic transmission and sharing of documents, not to mention virtual signatures and the like, this point will usually be of no relevance and, in this case, that is undoubtedly the case. The ease with which SITCA could be avoided by documents being signed elsewhere makes this highly unlikely.

[359] Likewise, there is no significance about where the representative of the Defendant who received advice is based. Again, the ease with which SITCA could be avoided, in such a case, makes it unlikely that this point is of any great importance. Mr Moverley Smith said that this might be looking at matters in an inappropriate setting, commenting that "what makes the difference is the recipient of any such services is in Taiwan, and Mr. Yeh also refers to keeping documents in Taiwan… Apparently that may make a difference, but obviously the crucial point is that … the service has been provided to somebody in Taiwan."

[360] I disagree with this for the reasons already indicated. The services provided by Chih were to a BVI company. The Parties had decided, for entirely understandable fiscal reasons, to have BVI companies regulate their business relationship. It is difficult to see how the setting up of, or the agreement to do business through, a corporate structure that the Parties had agreed to could be completely disregarded, or be largely irrelevant, because of the few possible connections which the Defendant claimed Chih had to Taiwan or the fact that Jenkin was based in Taiwan[49].

[361] Significantly also, the location of the Disputed Investments had little to do with Taiwan. While both Ms Liu and Mr Yeh appeared to think this might not be of great importance[50], the overall expert evidence was so unsatisfactory, particularly from Ms Liu, that it is difficult to reach firm conclusions about this. It would have been helpful to have had some literature on how the Taiwanese authorities and judiciary interpret these provisions.

[49] While, based on the argument made by Mr Moverley Smith, the point is not hugely important in the context of this case, the Defendant's obligation to perform the Agreements (by making payment of 50% of the net profits from the investments to the Claimant) arose entirely in BVI. This follows from the general rule that a promisor must seek out the promisee and perform his promise wherever the promisee may be: See **Chitty on Contracts,** Volume 1, paras. 25-006 and 25-063.
[50] I found even this area of their evidence very difficult to understand.

[362] It follows that neither any individual factor nor all the factors combined lead to the conclusion that the services were performed by the Claimant in Taiwan. Indeed, it would be surprising that the slight or incidental connection to Taiwan could have the consequence of rendering the performance of the Agreements illegal.

[363] But even if it does, I am unclear what consequences the illegality would have on the performance of the Agreements.

[364] The burden of proving the consequences of foreign illegality is on the Defendant.

[365] The expert evidence does not deal with the consequences of any finding of illegality in terms of a possible prosecution or penalty in Taiwan. Nor does it deal with the situation concerning the enforceability of the Agreements in civil proceedings in Taiwan.

[366] The Defendant states that if the performance of a contract, directly or indirectly, contravenes the laws of a particular country, the Court should not allow it to be enforced.

[367] The Defendant relies on the following passage in **Dicey, Morris & Collins on Conflict of Laws** 16th Edition[51], at para. 32-257, in support of that proposition:

> "It has already been seen that at common law there was thought to be a principle that a contract (whether lawful by its governing law or not) was, in general, invalid in so far as the performance of it was unlawful by the law of the country where the contract was to be performed (*lex loci solutionis*). This principle, as formulated in the second edition of this work, was adopted by the Court of Appeal in the Ralli Bros case [i.e., **Ralli Bros v Compania Naviera Sota y Aznar** [1920] 2 K.B. 287]. For many years, however, doubts existed as to whether it was a rule of the conflict of laws (as its formulation would suggest) or is, on the contrary, a principle of the domestic law of contract relating to illegality of performance. The answer to that question is important, as it will determine whether the principle can continue to be applied alongside Art.9(3) of the Rome I Regulation. If **Ralli Bros** is a principle of the conflict of laws governing the effect of illegality under the law of the place of performance for all contracts, whether or not governed by English law, it would be incompatible with the exhaustive character of Art.9(3).875 If, however, **Ralli Bros** is part of English contract law, and the foreign illegality is only a matter of fact that is taken into account in its application, then it is perfectly consistent with Art.9(3), even if the two may operate alongside one another on the same facts. As appears below, the latter view seems to have prevailed."

[51] See **Dicey, Morris and Collins on Conflict of Laws** (16th Edition), Eds: Lord Collins of Mapesbury *et al*.

[368] In **Regazzoni v K.C. Sethia (1944) Ltd [1958] A.C. 301**, the House of Lords stated that the above principle is founded on considerations of public policy and international comity. At pp. 318-319, Viscount Simonds observed:

> "It is, on the other hand, nothing else than comity which has influenced our courts to refuse as a matter of public policy to enforce, or to award damages for the breach of, a contract which involves the violation of foreign law on foreign soil, and it is the limits of this principle that we have to examine. If the principle is, as I think it clearly is, based on public policy, your Lordships will not hesitate, while disclaiming any intention to create any new head of public policy, to apply an old principle to new circumstances.
>
> Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign State, and it will do so because public policy demands that deference to international comity. The question is what contracts?"

[369] The substance of this principle has been applied in the BVI. In the decision of this Court in **AB Limited & Ors vs GH Limited BVIHCM 2021/0192**, Wallbank J declined to enforce parts of an arbitral award that would be illegal under the laws of Thailand, stating:

> "… Since the Tribunal made awards which were in direct conflict with Thai public policy, this Court is entitled to refuse enforcement of the awards. The reason the BVI Court can do so is because the BVI Court should have regard to the public policy of a friendly foreign state, because comity is part of the public policy of the BVI. Thailand is a foreign friendly State, to which the BVI extends comity. Whilst BVI public policy has no problem with compound interest, monthly or annual or otherwise, comity indicates that the BVI courts should not enforce an award which is illegal under Thai law…"

[370] Of course, illegality *per se* is insufficient to render a contract unenforceable. As Lord Collins of Mapesbury, sitting in the capacity of a non-permanent judge in the Hong Kong Court of Final Appeal, said in **Ryder Industries Limited v Chan Shui Woo [2015] 18 HKCFAR 544**, at [50]:

> "The principle <u>is one of public policy</u>, and these decisions [on illegality] have to be read in the light of the foreign legislation which was involved. In *Foster v Driscoll* [i.e., ***Foster v Driscoll* [1929] 1 KB 470**] it was the prohibition laws mandated under the 18th amendment to the US Constitution. In *Regazzoni v Sethia* [i.e., **Regazzoni v KC Sethia (1944) Ltd [1958] A.C. 301**], it was Indian sanctions against South Africa. Plainly, <u>it does not apply to every breach of foreign law</u>." (Emphasis supplied).

[371] At paras. [57] and [58] of his judgment in **Ryder**, Lord Collins set out the following general principles that governed when a domestic court might refuse to enforce an agreement that was illegal under the laws of another country:

> "There may nevertheless be cases in which a sufficiently serious breach of foreign law which reflects important policies of the foreign state or separate law district may be such that it would be contrary to public policy to enforce a contract. But there is no basis in authority or principle for holding that *every* breach of foreign law would come into this category. In *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 diamond dealers exported diamonds to the Federal Republic of Germany and when the diamonds were stolen from the warehouse insurers refused to pay on the ground that the dealers had misrepresented their value in an invoice in order to reduce VAT payable in Germany. This was a criminal offence in Germany. The Court of Appeal decided that it was not contrary to public policy to enforce the insurance contract because (among other reasons) the false invoice did not involve any deception of the insurers and the dealers were not relying on the invoice in their action against the insurers. Aspects of this decision must be treated with considerable reserve because its "public conscience" discretionary approach to illegality was disapproved in *Tinsley v Milligan* [1994] 1 AC 340, at 360-361, and in **Apotex** [i.e**., Les Laboratoires Servier v Apotex Inc [2015] AC 430**], at [14]-[15], and **Bilta (UK) Ltd v Nazir (No 2) [2015] 2 WLR 1168***,* at [61], although it may be consistent with ***Hounga v Allen* [2014] 1 WLR 2889**.
>
> I would therefore reject the submission made on behalf of Timely that comity requires the Hong Kong court to treat the contract as unenforceable because of incidental breaches under PRC law in its perform."

[372] What is clear from **Ryder** is that the effects on a contract of the illegality of another state will depend entirely on the circumstances of each individual case. In order, therefore, to be able to rely on any illegality under Taiwanese Law, the Defendant must demonstrate that "a sufficiently serious breach of foreign law which reflects important policies of the foreign state or separate law" was involved "such that it would be contrary to public policy to enforce [the Letter Agreements]."

[373] At para. [59] of **Ryder**, Lord Collins said:

> "It follows that, when these principles are applied to the facts of this case, there is no basis for denying relief. First, there is no suggestion that performance of the contract in accordance with its terms was prohibited by PRC law. Second, there was no finding that the parties had agreed to a scheme whereby PRC law would be contravened. The judge refused to allow Timely to broaden the scope of evidence to encompass assertions that the agreement had been formulated with an illegal objective in mind … Third, there was no finding that Saitek always intended to commit what is described as the fourth illegality. But, even if it had so intended, it would be extraordinary if it could be regarded as contrary to public policy in Hong Kong to enforce a contract because of breaches in the PRC which the judge found (a) not to be a very serious contravention of the law; (b) not to be conduct which could be described as iniquitous; (c) not to have resulted in actual criminal or enforcement proceedings in the PRC; (d) to have been mere administrative contraventions … . There is no principle of law or public policy which would lead to

such a conclusion, which would be contrary to commonsense and justice."

[374] The decision in **Ryder** sets out some of the factors that the Court should take into account in deciding how to approach the Second Stage. They include whether:

(a) the breach in question amounted to a serious contravention of the relevant statutory or other legal provisions said to make the agreement illegal;

(b) the conduct in question involved conduct which could be described as iniquitous;

(c) the conduct would have resulted in actual criminal or enforcement proceedings being taken for the contravention in the foreign jurisdiction; and

(d) the contravention could be said to be more than "mere administrative contravention".

[375] The above factors are not exhaustive. As I have said, every case will depend on its own individual circumstances.

[376] In **Magdeev v Tsvetkov [2020] EWHC 887 (Comm)**, a decision of the English High Court, Cockerill J observed that the guidance in **Patel v Mirza**[52] (which sets out how a court should approach the civil consequences of an agreement that is illegal under domestic law)[53] did not govern how the decision of a court under the Second Stage should be applied. This was because the principles that applied under the First Stage (i.e., illegality under domestic law) were different from the principles that applied under the Second Stage (i.e., illegality arising from breaches of foreign law). However, she said that the **Patel v Mirza** guidance might be relevant to the application of the Second Stage in the following respect: each test involved the court undertaking a "balancing exercise" and although the principles governing their application were different, the balancing exercise had to be conducted taking all relevant circumstances into account.

[52] **Patel v Mirza [2020] UKSC 42, [2017] A.C. 467.**

[53] The First Stage guidance in **Patel v Mirza** would only appear to apply where a statutory provision does not make express provision about the civil consequences of an illegal agreement. As s. 50F of the SIBA 2010 does, **Patel v Mirza** is largely irrelevant in deciding how the court should approach such consequences, though it may have some relevance in deciding how the court should approach the exercise of its discretion under s. 50G of that Act.

[377] Under the regime that required consideration of the effect of foreign illegality, i.e., under the Second Stage, she explained the correct approach that a court had to take:

> "**Patel v Mirza** does provide a guide in this sense. Surely it is right in both cases that a balancing exercise has to be performed, though the elements in the balancing exercise will at least in part be different because the public policy which underpins the question in the foreign illegality cases is different to that which affects **Patel v Mirza** type cases. One does not go to the questions at which Lord Toulson arrived via a consideration of the caselaw and academic thinking on domestic illegality. One does not specifically invoke proportionality, because that assumes an understanding of the questions of weight and gravity which may not be available in respect of a foreign court's or foreign judicature's priorities. But where the clear answer is not given by either of the main principles, one balances the relevant factors discernible from the case law in the light of the underpinning principle. It is thus that one gets to the factors which Lord Collins set out in **Ryder**. These are the kind of factors which are relevant to the particular public policy."

[378] In **Magdeev**, the court took into account the following factors in deciding that the agreement could be enforced: (a) the performance of the dominant part of the contract did not involve illegality; it was only the structure employed that led to this result; (b) there were no criminal charges brought for contravention or civil enforcement proceedings commenced in the foreign jurisdiction; and (c) the contravention involved a "small incident of a perfectly legitimate transaction", and it would be contrary to justice to refuse enforcement in such a case.

[379] The Defendant contends that the facts of the present case may be distinguished from **Magdeev** in a number of material respects.

[380] First, it asserts that, unlike **Magdeev**, the illegality in the present case, forms a dominant part of the performance contemplated by the Letter Agreements. The illegality under the SITCA arises from the provision of financial advice, which is expressed to be the only consideration provided under the Letter Agreements. In other words, the Letter Agreements were designed to implement the exact conduct that was prohibited and regulated under the SITCA. The breaches of the SITCA arose as a direct result of (and can by no means be described as "incidental to") the performance of those Agreements.

[381] Second, the terms of the Letter Agreements expressly provide that the Claimant would have to act as a “financial advisor. That is precisely the sort of conduct which the SITCA seeks to regulate.

[382] Third, the SITCA reflects an important policy in Taiwan. Mr Yeh's Report explains that Taiwan has "a significant public interest in maintaining order in the securities market and in protecting investors' rights"[54]. Ms Liu's Report agrees with this. She, likewise, notes that the SITCA was "specially enacted" to "foster the sound operations and development of securities investment trust and consulting business… and protect investment" and that "in order to achieve the legislative intent, SITCA incorporates [various] penalty provisions[55]." I am not sure that this can be said to be any different in any other jurisdiction.

[383] Fourth, the conduct of the Claimant was iniquitous. The Defendant states that the Letter Agreements were intended to mislead financial institutions as to the true state of the partnership between Chih and Jenkin. Jenkin relies on a decision from the Samoan Court[56] – which suggests that this would not be the first time that Chih has engaged in such conduct:

> "[12] The Applicant claims that the Loan Agreement was not really a loan but an arrangement to facilitate a large transfer of money without raising any red flags with the banks. In support of this argument, the Applicant through [Chih] further deposes that the loan agreement does not have any interest rates, collateral or guarantees typical of loan agreements. The problem with this argument is, the loan agreement was drafted by the Applicant.…
>
> [30] Mr [Chih] for M&M in his affidavit dated 15 November 2023 said the agreement is structured as a loan for the purpose of large money transfers to comply with anti-money laundering regulations… It is concerning the allegations by Mr [Chih] if indeed the loan agreement was created to facilitate money laundering. If accepted, Mr [Chih] is implicating his participation in an illegal activity…"

[384] Fifth, and while there do not presently appear to be any criminal proceedings against the Claimant, it would be entirely reasonable to suppose that such criminal proceedings would (or could) have been launched based on the contraventions complained of.

[385] Sixth, the violations of the SITCA were serious in nature. The SITCA is a criminal statute. Violations would not amount to mere "administrative contravention(s)". They would attract criminal consequences.

[386] I reject the Defendant's contentions.

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[54] See Mr Yeh's Expert Report, at p. [32] [C/32].
[55] See Ms Liu's Expert Report, at p 3 [C/7].
[56] See Bundle D1, Vol. 3, pp.1431-1435.

[387] It is difficult for me to understand how illegal conduct under domestic law which a court decides is insufficient to warrant a promisee being deprived of his ability to enforce a contract either under SIBA 2010, or some other basis (such as **Patel v Mirza**), can then found a sufficient basis, on the same facts, to make it inappropriate for the promisee to enforce it because of the laws of another country. I accept, of course, that the two situations have to be considered separately. I also accept that there is a powerful argument for saying that even if the conduct complained of is not illegal under domestic law, the court could still refuse to enforce it if it is illegal under the laws of another county. This would be where it found that the conduct involving the breach of foreign law was so serious that it should refuse to enforce a contract on what has been referred to in these proceedings as "public interest" reasons.

[388] However, I consider that there is a difference between the two situations. Where a court has permitted the enforcement of a contract under **Patel v Mirza** or, in this case, SIBA 2010, the court will, or will likely, already have concluded that there are no public policy considerations to deprive the promisee of his ability to enforce the contract on account of any foreign illegality. In those circumstances, it would be odd, if, under the Second Stage it has to conduct, applying, **Ryder**, it comes to the precise opposite conclusion.

[389] It would have to be a rare case where the court concluded that a promisee would be allowed to enforce the agreement, applying the First Stage, but not the Second Stage. Of course, if the First Stage results in the refusal of the court to enforce the agreement, then conducting the balancing exercise under the Second Stage would be irrelevant. But there would have to be compelling reasons for the court to refuse to allow the contract to be enforced under the Second Stage when it has come to the clear conclusion that it should allow enforcement of it under the First Stage. There are no such compelling reasons here.

[390] It follows, in my judgment, that, in addition to the factors identified in **Ryder** and **Magdeev**, an important factor to take into account would be whether the court has permitted the enforcement of the agreement under the First Stage. If it has, that will, undoubtedly be a crucial consideration for the court to take into account, even if it is not determinative of the matter.

[391] I would also add to the factors identified in **Ryder** and **Magdeev** under the Second Stage, the following additional factors that the court should take into account:

(a) whether the contravention on the part of the promisee was deliberate;

(b) whether the promisee ought to have taken legal or other professional advice before entering into the contract;

(c) if the promisee took legal or other professional advice, the nature of that advice (so far as he is prepared to waive privilege in relation to it); and

(d) whether the promisee sought to comply with the relevant law and the nature and extent of that compliance, including whether the compliance was rendered difficult or impossible by him for reasons outside his control.

[392] As I have indicated, these factors are not exhaustive. In the final analysis, each case will have to be decided on its own individual facts and circumstances.

[393] I have already found that even if there had been a breach of s. 50F of the SIBA 2010, I would have permitted the enforcement of the Agreements under s. 50G of the SIBA 2010. In those circumstances, I find it difficult to see how I could conclude that the Agreements should not be enforced under the Second Stage – i.e., on the principles set out in **Ryder** and **Magdeev** – at any rate without a single additional factor being advanced by the Defendant in support of the contention that the Agreements should not be enforced.

[394] In any event, even if the application of the Second Stage requires an independent consideration of the factors relied upon, I come to the unhesitating conclusion that I should not prevent the Agreements from being enforced in full.

[395] On this point, I will deal with each of the arguments advanced by the Defendant in turn.

[396] The first point made by the Defendant is that the illegality, in the present case, forms a dominant part of the performance contemplated by the Letter Agreements. I have already dealt with this. For the reasons I have already indicated, I am unable to accept this.

[397] Second, the Defendant relies on the express terms of the Letter Agreements which provide that the Claimant was to act as "financial advisor". I have already found that the expression "financial advisor" was not, and was never intended to be, used in the technical sense contended for by

the Defendant. The Claimant might have used more appropriate terminology in the Letter Agreements, but, in my judgment, on the facts that apply here, it meant little more that the Claimant would introduce investment opportunities to the Defendant, and it was up to the Defendant, after it had undertaken its own due diligence, to decide whether to proceed with it.

[398] Third, the Defendant asserts that the SITCA reflects an important policy in Taiwan. Whether or not that is correct, neither the expert evidence nor any other evidence furnished by the Defendant demonstrates the likely view the Taiwanese authorities would take in relation to such a breach. Specifically, there is no evidence in the opinion advanced by the Defendant about whether the Taiwanese courts would – and the extent to which it would –allow such an agreement, concluded between two BVI companies, based on the location of the investments, to be enforced.

[399] Fourth, the reference by the Defendant to the conduct of the Claimant being "iniquitous" is, at best, a *non-sequitur*. In reality, it is completely incorrect. The Defendant has made a small fortune (even by Jenkin's standards, based on his inability to recall how much profit he had made from the investments introduced to him by Chih to the nearest $5 million) as a result of Chih's connections. What Jenkin invites me to accept is to find it iniquitous to allow any of the substantial profits that Jenkin has made from the investments to be paid to Chih, even though all the profits from the investments were made entirely from Chih's connections – i.e., investments, and profits from them, that he would not have made if Chih had not introduced the investment opportunities to him. Surely, if there is any iniquity, it has to be on the part of Jenkin for refusing to provide any recompense to Chih for the services he provided to Jenkin.

[400] The Defendant's assertion that financial institutions may have been misled into thinking that Chih, rather than Jenkin, was the investor in the various investments is simply not borne out by the facts. In fact, the contrary proposition is correct. So far as the Warby Parker and Kayak investments were concerned, the evidence of Mr Blumenthal and Mr Chernick was clear. They were neither misled nor would it have made any difference to them if they knew that the investor was Jenkin and not Chih, provided it was Chih who spearheaded all the negotiations. Even if they had been misled, it had no effect whatsoever on Jenkin's position as regards the investments.

[401] The reference to the remarks made in the Samoan case is a complete irrelevance. Whatever that court might have said about the prior character of Chih in any previous proceedings, the alleged bad character of Chih (which is what the Defendant seeks to rely on) is inadmissible in

these proceedings. The character being relied on is not of a BVI court and is not of a type, such as “similar fact” evidence, that could be adduced in these proceedings: see **Phipson on Evidence (Hodge M Malek KC (Ed), 20th Edn, Sweet & Maxwell, 2021),** para. 20.05 *et seq*.

[402] Fifth, there is no basis upon which the contention that it would be “reasonable to suppose” that criminal proceedings would have been launched based on the contraventions complained of is correct. There is no evidence of this and the expert evidence on this was wholly unsatisfactory.

[403] Sixth, the allegation that the violation of the SITCA is “serious in nature” is likewise unsupported by any evidence. Again, the expert evidence on this was wholly unsatisfactory. There is no evidence about what would be required to apply for a licence in Taiwan and whether that would merely have been an administrative exercise. Importantly, the illegality only involved one “client” – the Defendant – and no loss or prejudice whatsoever was suffered by it arising from the violation of SITCA. In fact, the complete contrary position applies here. The Defendant has made a substantial profit from the investments. The only person who will suffer any loss or prejudice if the Agreements are not allowed to be enforced is the Claimant.

[404] Nor is it clear how it can be alleged by the Defendant that the breach complained of would be such as to make it contrary to public policy to enforce the Agreements, particularly given that I have already found that such breaches would not militate against the court allowing the Letter Agreements to be enforced under SIBA 2010.

[405] The application of the Second Stage must, therefore, be determined in favour of the Claimant

[406] The Illegality Issue must, therefore, be decided wholly in favour of the Claimant.

[407] In the circumstances, I reject that the Defendant is entitled to withhold payment to the Claimant of the Amount Claimed, based on the illegality arguments raised by him.

<u>CONCLUSION</u>

[408] None of the grounds upon which the Claim has been defended are valid.

[409] It follows that the Claimant is entitled to recover the Amount Claimed in full together with interest.

[410] Judgment will, therefore, be entered for the Claimant for the Amount Claimed and interest.

MATTERS ARISING

[411] The Parties are requested to agree the precise amount payable to the Claimant (to include interest).

[412] Issues relating to costs and any other matters arising from this judgment may be dealt with when judgment is handed down. I will ask my judicial assistant to list the matter for a short hearing, which I am perfectly content should take place remotely. I consider that a time estimate of 1 hour would be sufficient for the hearing. I invite counsel to lodge an approved minute of an order to reflect my judgment at least 48 hours before the hearing.

ACKNOWLEDGMENTS

[413] I again express my deep and sincere gratitude to counsel, both for the manner of the presentation of their clients' cases and for their cooperation throughout the trial. Although I have decided most issues in, and determined, the Claim against the Defendant, and have expressed strong criticism of Jenkin's evidence, I do not attribute anything I have said about that evidence either to Mr Moverley Smith or those appearing with, or instructing, him. He and his team have done everything they possibly can (and a lot more) to present the Defendant's case in the best possible way to the court. The length of this judgment reflects the intransigence of Jenkin to deal satisfactorily with any questions put to him (other than to refer to his written evidence) which has necessarily resulted in my having to put together the pieces of a large jigsaw. However, in the main, the length of the judgment reflects my great admiration of Mr Moverley Smith's ingenuity in presenting his client's case. Like Mr Chaisty, I found the determination of the Claim straightforward. However, but for Mr Moverley Smith's many technical arguments, advanced before me with great erudition, the length of the judgment would have been substantially shorter.

Abbas Mithani
High Court Judge

By the Court

Registrar