THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0055

BETWEEN:

CHIA HSING WANG

Appellant

and

[1] XY
[2] XYZ
[3] FLOREAT REAL ESTATE LIMITED

Respondents

HEARD TOGETHER WITH:

BVIHCMAP2022/0056

BETWEEN:

[1] XYZ
[2] CHIA HSING WANG

Appellants

and

[1] REAL ASSETS (RA) GLOBAL OPPORTUNITY FUND I LTD
[2] FLOREAT REAL ESTATE LIMITED

Respondents

Before:

The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C. Farara — Justice of Appeal [Ag.]

Appearances:

Mr. David Mumford, KC with him Mr. Andrew Willins and Ms. Tamara Cameron for the Appellants in both appeals
Mr. Andrew Hunter, KC with him Mr. Tom Mountford, Ms. Marlena Valles, Mr. William Hare and Mr. Alistair Abbott for Floreat Real Estate Limited
Mr. Rondelle Keller holding a watching brief for XYZ
Mr. Tim Wright holding a watching brief for the joint provisional liquidators of Real Assets (RA) Global Opportunity Fund I Ltd

2022: November 9 & 10;
2023: June 6.

Interlocutory appeal – Application to adduce fresh evidence – Principles in Ladd v Marshall – Whether documents that did not exist at the time of hearing should be allowed as fresh evidence – Whether documents would have important influence on court's determination of issues in court below and on appeal – Appointment of receivers over shares held by XYZ in RAGOF – Appointment of joint provisional liquidators (JPLs) in RAGOF - Whether judge erred in his general observations so as to reach a misconceived conclusion about the real purpose for bringing the Receivership and JPL applications and the artificiality of proceeding with the applications ex parte – Exercise of court's discretion to appoint receivers - Whether it is just or convenient to grant Receivership Order – Factors of particular case to be considered in deciding just or convenient – Duty of full and frank disclosure and fair presentation – Judge's finding of a breach of the duty of full and frank disclosure at the ex parte Receivership and JPL applications – Non innocent breaches of duty - Principles to be applied when dealing with breaches of duty of full and frank disclosure at ex parte hearing for interim relief – Whether the risk of forced redemption raised by counsel misled ex parte judge - Alternative remedies to Receivership and JPL Orders available – Judge's discharge and refusal to regrant Receivership and JPL orders – Whether errors in judgment vitiates judge's conclusion that Receivership and JPL orders ought be set aside and not regranted

Real Assets (RA) Global Opportunity Fund I Ltd ("RAGOF") is a professional fund incorporated in the Territory of the Virgin Islands ("the BVI"). Its main purpose is to invest in real estate worldwide. RAGOF is one of four investment funds, the other three Global Fixed Income I Fund ("GFIF"), Principal Investing Fund I Limited ("PIF") and Long View II Limited ("Long View"), are registered in the Cayman Islands ("the Cayman Funds") and were managed by what is referred to as 'the Floreat Parties'. By orders of the Cayman Islands court in May 2023 liquidators were appointed over two of these funds, namely, PIF and Long View.

Floreat Real Estate Limited ("FRE") is a company incorporated in the United Kingdom. It is the investment adviser of RAGOF and part of the Floreat Group of Companies which also consists of Floreat Real Asset Investment Management Ltd - the investment manager of RAGOF. Mutaz Otaibi ("M. Otaibi") owns FRE and Floreat Real Asset Investment Management Ltd. He together with his brother, Hussam Otaibi ("H. Otaibi"), and James Wilcox (together "the Floreat Principals") own and control the Floreat Group of Companies.

Mr. Chia Hsing Wang ("Mr. Wang") is the ultimate beneficial owner of 97.2% of the shares in RAGOF ("the shares"). The shares (or most of them) are registered in the name of XYZ, a company incorporated under the laws of the United Kingdom and are held pursuant to the terms and conditions of certain private placement memoranda with XY, a Swiss bank.

The Floreat Group of Companies manage the assets of RAGOF which include real properties in England. Mr. Wang discovered what he alleges is serious wrongdoing in the management of RAGOF and its assets, as well as the Cayman Funds. The alleged wrongdoing included the use of the real properties in England for the personal use of the Floreat Principals and their families, impermissible management fees of US$12 million, and the purchase of expensive art. This alleged wrongdoing is said to have led to a loss of trust and confidence with the Floreat Principals and caused Mr. Wang to commence proceedings in the Commercial Court in the BVI, including *ex parte* applications for certain interim relief. This was part of a strategy conceived by Mr. Wang and those advising him to ultimately have the shares in RAGOF put into Mr. Wang's name or the name of a new nominee designated by him. The strategy was to be implemented through various legal proceedings in the court in the BVI and through parallel proceedings in the Cayman Islands in relation to the Cayman Funds.

In the BVI, the first limb of this strategy was to have the BVI court appoint receivers *ex parte* to take control of the shares held by XYZ, as nominee, in RAGOF and for the court to give to the receivers certain express powers, including the power to commence winding up proceedings against RAGOF and to have provisional liquidators appointed pending the making of a winding up order. The second limb of the strategy was for the receivers so appointed to apply to wind up RAGOF, and to place RAGOF under the control of provisional liquidators. On 20th August 2021, Mr. Wang commenced Claim No. BVIHC(COM)2021/0144 against XY and XYZ as part of his strategy to gain full control of the shares in RAGOF. The claim sought an order requiring XY to take all steps required on their part to procure the transfer(s) of the shares in RAGOF, which XYZ holds on behalf of Mr. Wang as beneficial owner, to Mr. Wang and/or such other third party as Mr. Wang may direct; and, alternatively, for specific performance of the nominee arrangements between Mr. Wang and XY. On the same day, Mr. Wang made an *ex parte* application for the urgent appointment of receivers over the shares held by XYZ in RAGOF ("the Receivership Application"). The Receivership Application was granted *ex parte* on 26th August 2021 ("the Receivership Order"). By the Receivership Order, Anna Silver of FFP (BVI) Limited (in the BVI) and Michael Pearson of FFP Limited (in the Cayman Islands) were appointed joint receivers over the shares beneficially owned by Mr. Wang in RAGOF through his nominee, XYZ, with immediate effect. The receivers were empowered, inter alia, to – (a) commence the just and equitable winding up proceedings with respect to RAGOF ("the BVI J&E Liquidation Proceedings"), and to make an application seeking an order for the appointment of joint provisional liquidators over RAGOF; and (b) to commence such related or ancillary applications as the receivers shall deem appropriate, including but not limited to an application for the appointment of provisional liquidators. On 15th September 2021, Mr. Wang applied to continue the Receivership Order and by order dated 4th November 2021, the Receivership Order was continued until the trial of Claim No. BVIHC(COM)2021/0144. Upon obtaining the Receivership Order, Mr. Wang commenced the second limb of his strategy. This involved XYZ (acting by the joint receivers) and Mr. Wang filing an application on 30th August 2021 in Claim No. BVIHC(COM)2021/0150 for orders under sections 159(1)(a) and 162(1)(b) of the Insolvency Act, 2003 ("Insolvency Act") for the appointment of Mr. Kent Benjamin McParland and Mr. Cosimo Borrelli as joint liquidators of RAGOF, on the ground that it is just and equitable for RAGOF to be wound up on the basis 'that there has been a justifiable and irretrievable loss of confidence in the management of the Fund, being the Floreat Management… due to serious issues of wrongdoing'.

On the same day, 30th August 2021, XYZ (acting by the joint receivers) applied *ex parte* on an urgent basis for an order appointing the said Mr. Kent Benjamin McParland and

Mr. Cosimo Borrelli as joint provisional liquidators ("JPLs") of RAGOF, pursuant to section 170 of the Insolvency Act ("the JPL Application"). The JPL Application was granted and an order was made in the Commercial Court on 1st September 2021, appointing the said two persons as JPLs of RAGOF, without the requirement to give security for their appointment ("the JPL Order"). The JPLs were empowered to do several things, including : (i) terminate the investment management and the investment advisory agreement in place between RAGOF and Floreat Real Estate Limited; (ii) commence winding up or insolvency proceedings against any subsidiary of RAGOF; (iii) investigate and report on the affairs of RAGOF and its subsidiaries within and outside the BVI generally, and with specific regard to the identity of the current beneficial owners of all the shares in RAGOF; and (iv) investigate and report on the circumstances leading to the prior ownership by the Otaibi family of the real property in Reading, Berkshire, United Kingdom known as 'Springs Farm' (owned by RAGOF); the extent to which RAGOF and/or the company Springs Farm Limited has received or is due to receive payment of rent in respect of the Otaibi family's occupation of the Springs Farm property; and the sums expended by RAGOF and/or Springs Farm Limited 'as a result of the Otaibi family's occupation of Springs Farm'.

Subsequently, three interlocutory applications came up for hearing *inter partes* before the court below. The first in time was an application by XYZ (acting by the joint receivers) and Mr. Wang dated 23rd September 2021 to continue the JPL Order obtained *ex parte* on 1st September 2021 ("the Continuation Application"). The other two applications were by FRE, filed respectively on 9th November 2021 to discharge the JPL Order, and on 22nd December 2021 to discharge the Receivership Order obtained *ex parte* on 26th August 2021 on grounds which included alleged breaches of the duty of full and frank disclosure and failure to make a fair presentation; that the said *ex parte* order ought not to have been made and/or continued by the judge; that the said *ex parte* order was not necessary to avoid giving advance notice to FRE of the intention of Mr. Wang to seek the appointment of provisional liquidators over RAGOF; and that the *ex parte* order was motivated by various improper collateral purposes on the part of Mr. Wang.

In giving judgment, the learned judge dismissed the Continuation Application and granted the two FRE discharge applications. The judge also made an order staying paragraph 1 of the order in Claim No. BVIHC(COM)2021/0144 (by which he set aside the Receivership Order) pending determination of an appeal or further order of the Court of Appeal. Similarly, in Claim No. BVIHC(COM)2021/0150, the learned judge stayed the orders at paragraphs 1 and 2 by which he dismissed the Continuation Application and discharged the JPL Order, pending determination of the appeal or further order of the Court of Appeal.

Being dissatisfied with the judgment and consequential orders, these two appeals were filed. On 3rd October 2022, Appeal No. BVIHCMAP2022/0055 ("the Receivership Appeal") was commenced by Mr. Wang. On the same day, Appeal No. BVIHCMAP2022/0056 ("the Provisional Liquidators Appeal" or "the PL Appeal") was commenced by both XYZ (acting by the joint receivers) and Mr. Wang. In the Receivership Appeal, Mr. Wang relies on 31 grounds of appeal and in the PL Appeal, the appellants rely on 25 grounds of appeal. The grounds of appeal in both notices of appeal were condensed and addressed by the appellants under five broad headings. These are: (i) the 'general observations', a central theme of which concerned the supposedly improper purpose and artificiality of the *ex parte* applications – (Receivership

Appeal grounds 8 to 13; PL Appeal grounds 8 to 12); (ii) the judge's observations about the jurisdiction to make the Receivership Order and, in doing so, appearing to reach the wrong conclusion that (independently of any question of full and frank disclosure) the continuation of the Receivership Order was not just and convenient – (Receivership Appeal grounds 14 to 20); (iii) whether in considering the duty of full and frank disclosure in connection with the JPL Order, the judge concluded wrongly and for reasons that were not properly explained, that there were deliberate breaches of the duty sufficient to warrant the discharge and refusal to regrant that relief – (PL Appeal grounds 13 to 24); (iv) whether the learned judge reached similar but erroneous and unexplained conclusions in relation to full and frank disclosure in connection with the Receivership Order – (Receivership Appeal grounds 21 to 29); and (v) whether the learned judge wrongly exercised his discretion not to continue or regrant the Receivership Order and the JPL Order – (Receivership Appeal grounds 30 to 38; PL Appeal grounds 25 to 32). At the hearing of these two appeals which were consolidated and heard together on an expedited basis on 9th and 10th November 2022, the Court also heard the appellants on their application filed on 17th October 2022 to admit fresh evidence in the appeals ("the first fresh evidence application"). Following the hearing of the appeals and pending delivery of this judgment, the appellants filed a second application to admit fresh evidence in the appeals ("the second fresh evidence application") on 17th January 2023. The Court indicated that both the first and second fresh evidence applications would be determined by the judgment in the appeals.

Shortly before the judgment in these appeals was to be handed down, the appellants filed on 22nd May 2023, a third application to admit fresh evidence in the appeals ("the third fresh evidence application") consisting, inter alia, of certain very recent orders made by the Grand Court of the Cayman Islands ("the Grand Court") including for the winding up of two of the three Cay Funds, and the transcript of certain parts of the proceedings before the said court. This application is also considered and will be disposed of by this judgment.

Held: Dismissing the first, second and third fresh evidence applications save for the admittance of 'Ford 1' as fresh evidence in the appeals on the first fresh evidence application; dismissing the Receivership Appeal and PL Appeal and making the orders at paragraph 328 of the judgment, that:

[1] The Ladd v Marshall criteria are principles and not rules or special rules to be strictly applied by the court. Accordingly, a party seeking to adduce fresh evidence does not have to show some special ground for the grant of permission to rely on such evidence in the appeal. However, the Ladd v Marshall criteria are to be applied with considerable care and in accordance with the overriding objective of doing justice. The court must also bear in mind that an application to admit fresh evidence in relation to an appeal from a decision in an interlocutory matter is not another opportunity for the losing party to invite the court to rehear the application on the basis of either evidence in existence but not adduced before the court below and which the party seeking to adduce and to rely on it could not have discovered with reasonable diligence; or additional or new evidence not in existence at the time of the first instance hearing.

Thune and Another v London Properties Ltd and Others [1990] 1 WLR 562 at 571 considered; **Banks v Cox** (unreported), 17th July 2000; Court of Appeal (Civil Division) Transcript No. 1476 of 2000, C.A considered; **Ladd v Marshall** [1954] 1 WLR 1489 applied.

[2] The first limb of the Ladd v Marshall criteria is that the fresh evidence sought to be relied on in an appeal must have existed at the time of the trial or hearing in the court below, but which could not have been obtained with reasonable diligence by the applicant. However, in exceptional circumstances, the court has a discretion to admit, at the appellate stage, evidence which did not exist (essentially 'new' evidence) at the hearing of an interlocutory application, where such evidence is capable of further strengthening the court's determination of an issue or finding. Such circumstances are exceptional, and there must be compelling reasons why 'new' evidence ought to be admitted.

Ladd v Marshall Adam Bilzerian et al v Terrence Byron et al SKBHCVAP2019/0032 (delivered 21st July 2020, unreported) followed; **Staray Capital Limited et al v Cha, Yang (also known as Stanley)** BVIHCMAP2013/0009 (delivered 14th July 2014, unreported) followed.

[3] The English Claim claim form, the letter from Carey Olsen dated 20th September 2022, the English Judgment dated 22nd February 2022, the JPL 4th and 5th Reports and Borelli Cayman 3 which the appellants sought to adduce as fresh evidence in the first fresh evidence application, do not satisfy the Ladd v Marshall criteria for admission. As to the claim form in the English Claim, this is not evidence and cannot in any reasonable sense be said to likely have had an important influence on the outcome of the three applications before the learned judge or the appeals from his orders. Further, there are no exceptional circumstances which would warrant permission being granted for the claim form (which is new in the sense that it did not exist at the time of the hearings in the court below) to be admitted or adduced as fresh evidence in the appeals. Similarly, the letter dated 20th September 2022 from Carey Olsen is not in any sense evidence, but the product of lawyers representing a party to litigation. It has no probative or evidential value whether on its own or together with the English Claim and will have no influence whatsoever on the court's determination of the three applications and the appeals. It fails all three limbs of the Ladd v Marshall principles. As it relates to the English Judgment, this judgment was available at the time of the hearing of the applications in the court below. Even if, as the appellants intimate, the English Judgment could not have been adduced with reasonable diligence prior to the first instance hearings, they subsequently sought, impermissibly, to draw the judgment to the judge's attention after the hearing via a letter from the appellants' counsel. The learned judge therefore could not properly consider the English Judgment when rendering his said decision, which is the subject of these appeals. Accordingly, the English Judgment does not meet the criteria for the first limb of the Ladd v Marshall test. Moreover, as to the importance of the evidence, this Court is not satisfied that the English Judgment which is a judgment of another court, between different parties, is important evidence or evidence of anything that

can further advance or have an important influence on the issues in and the outcome on the appeals or the three applications.

[4] In relation to Borelli Cayman 3, this document does not satisfy, in particular, the second Ladd v Marshall criteria. It does not, in any material way, advance or add to the important issues dealt with by the learned judge in his judgment. Likewise, the Court is not satisfied that the JPL 4th and 5th Reports would have an important influence on the result of the appeals. In addition, the JPL 4th and 5th Reports are 'new' evidence which did not exist at the time of hearing of the applications in the court below and the appellants/ applicants have failed to rely on or demonstrate any exceptional circumstances, warranting this Court admitting them as fresh evidence.

[5] In relation to Ford 1, which explains the origin and reasons for the usage of the filename 'Project Ninja', the Court is satisfied that this document ought to be admitted and relied on as new evidence in the appeals. The evidence in Ford 1 goes to the judge's inconsequential treatment of the 'Project Ninja' expression in his judgment, particularly the word 'ninja'. If the judge intended to consider this title or filename in his judgment, and to engage in extensive research and analysis of the meaning and purported negative connotations of the word 'ninja', fairness and justice required him to invite, at minimum, short written evidence and submissions from the appellants, and, if necessary, short submissions from FRE on or about its use, and whether he was entitled or ought properly to draw any inferences (adverse or otherwise) from the appellants' use of it when determining any of the issues which were raised on the three applications. Unfortunately, the learned judge failed to do so.

[6] As to the appellants' second fresh evidence application, the Amended Claim Form and Particulars of Claim in the English Claim which the appellants' sought to adduce as fresh evidence do not satisfy all three limbs of the test in Ladd v Marshall and are not admitted as evidence in the appeals. The Amended Claim Form and Particulars of Claim in the English Claim were not in existence at the time of the hearing of the applications. Moreover, they are not evidence of wrongdoing, but rather the work product of lawyers representing the JPLs. The causes of action, allegations of facts and wrongdoing which the appellants contend these documents highlight are all matters for trial which will not, in the Court's view, have an important influence on the result of the appeals. Put another way, the Court is not satisfied that these documents (not being actual evidence of wrongdoing) would take matters much further.

[7] The appellants' third application filed 22nd May 2023 to be determined on paper, to adduce fresh evidence in the appeals is also dismissed. The new evidence which the appellants sought to adduce is the Fourth Affidavit of Tamara T. Cameron and the exhibits thereto as "TTC-4". These documents all relate to winding up proceedings before the Grand Court and the making in May 2023 of winding up orders by the Grand Court in relation to two of the three Cayman Funds. This new evidence did not exist either at the time of the hearing of the three applications before the judge below or the hearing

and full argument on the appeals. The Court, bearing in mind the principles in which 'new' evidence may be admitted, found no exceptional circumstances warranting the admission of the said affidavit and documents as new evidence in these appeals. The Court was also not satisfied that they or any of them would have an important influence on the outcome of the three applications or the appeals.

[8] The appellants' allegations as to the errors and mischaracterisations by the judge in his general observations made about Mr. Wang's real purpose for bringing the Receivership and JPL Applications and the artificiality of Mr. Wang proceeding *ex parte* to obtain the Receivership and JPL Orders, are without merit and have not been satisfactorily made out so as to undermine the judge's conclusions and to render them patently wrong. The observations and conclusions the learned judge made were reasonable and proper and were open to the learned judge to make on the evidence before him. However, this Court must also consider these observations alongside the judge's other important conclusions which influenced his decision to discharge and to not regrant the Receivership Order and JPL Order in order to be able to properly assess the correctness of the judge's primary conclusions.

[9] The appointment of a receiver is considered a draconian relief which is not to be deployed lightly. Careful consideration must be given to the scope of the court's statutory jurisdiction and the principles which guide the court's exercise of discretion to make a receivership order and on what terms. Section 24 (1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act delimits this power only by what the judge considers is 'just or convenient' in the particular circumstances of the matter.

Section 24(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** Cap. 80 of the Laws of the Virgin Islands applied.

[10] The judge correctly found that he had jurisdiction to appoint receivers. He was therefore obliged to consider factors relevant to the discretionary exercise of the court's power to make a receivership order and whether these factors satisfied him that it was just or convenient to continue or discharge or regrant the Receivership Order. Admittedly, the learned judge erred when he equated the absence of a provision in section 24 dealing with standing to a factor to be considered in the exercise of the court's discretion as to whether it is just or convenient to make a receivership order. This provision goes to the question of standing to apply for a receivership order not to the discretion of the court to make such an order. Notwithstanding this error, the learned judge was entitled to consider the other matters which he did at paragraphs 142 to 146 of his judgment which included, *inter alia,* Mr. Wang's purpose for invoking the court's receivership and winding up/provisional liquidator jurisdictions; Mr. Wang wanting to use the receivership remedy for the sake of using one of its ancillary powers (the just and equitable winding up); and that there were potentially less draconian remedies that Mr. Wang could resort to. Furthermore, in relation to the appellants' contention that the judge's conclusion lacked reasons, while the learned judge regrettably did

not identify the contentions advanced by FRE which he adopted at paragraph 146 of his judgment in arriving at his conclusion that the circumstances of the case does not render it just or convenient to make the Receivership Order, it is clear that the learned judge dealt with the issue of just or convenient throughout paragraphs 142 to 146 of the judgment. The appellants' criticism of the judge's approach at paragraph 146 does not portray the full picture and does not inexorably lead to a conclusion that the judge's reasons for arriving at his conclusion on the issue of just or convenient are flawed and that the appeal should be allowed purely on the ground of a lack of reasons.

Asean Resources Ltd v Ka Wah International Merchant Finance Ltd [1987] LRC (Comm) 835 distinguished; **Mubarak v Mubarak and others** [2008] JRC 136 considered; **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409 considered.

[11] In bringing the JPL Application *ex parte*, the appellants, as applicants, had a duty to make full and frank disclosure, accurate statements or representations of both fact and law, and fair representation of the application. The duty of full and frank disclosure not only relates to the accuracy of statements or representations made to the court, whether in writing or orally, by the applicants and/or their counsel, but extends to disclosing all material facts known to the applicants and which they could have discovered exercising reasonable diligence and inquiries. Importantly, the duty also extends to an obligation, which particularly rests with counsel, to direct the court to the relevant documents and provisions which concern pertinent issues and matters, and to disclose the possible or likely defences, interpretations or counter-interpretations, and the counter-reasons or counter- arguments against the grant of the relief sought.

Alexander Tugushev v Vitaly Orlov and Others (No 2) [2019] EWHC 2031 considered; **Commercial Bank - Cameroun v Nixon Financial Group Limited** BVIHCVAP 2011/005 (delivered 6th June 2011, unreported followed; **Thelma Paraskevaides et al v Citco Trust Corporation Limited et al** BVIHCMAP2018/0046 (delivered 30th March 2020, unreported) followed; **Congentra AG v Sixteen Thirteen Marine SA** [2008] EWHC 1615 (Comm) considered.

[12] A 'deliberate' or non- innocent non-disclosure amounting, implicitly, to an intention to deceive the court or to mislead the court will, except in exceptional circumstances, be visited with an order discharging the order obtained in breach of the duty of full and frank disclosure and fair presentation and in it not being renewed. Whereas, where the non-disclosure is innocent but material, the order obtained may be discharged and, if discharged, may be renewed or regranted. It follows that if an applicant who is guilty of non-disclosure wishes the court to treat the non- disclosure as innocent, the applicant must explain how the non-disclosure came about. Absent an explanation or proper explanation, there is a strong inference that the non- disclosure was not innocent. The onus lies on counsel, at the earliest opportunity, to correct or withdraw (wholly or partially) any such misstatement or misrepresentation made to the court, especially one made during an *ex*

parte hearing. It is impermissible to allow a judge at an *ex parte* hearing to proceed to grant the relief sought on the basis of a false, incorrect, or material overstatement or misrepresentation of the client's case.

Banca Turco Românа S.A. (in liquidation) (acting through its liquidator Fondul De Garantare a Depozitelor Bancare) v Çörtük and others [2018] EWHC 662 (Comm) considered; **Hu Lan v Sundale International Limited et al** BVIHCM 2019/0167 (delivered 6th July 2020, unreported) considered.

[13] In relation to the issue of full and frank disclosure on the JPL Application, the representation by then leading counsel for the applicant of the risk of forced redemption to the shares in RAGOF if the application was not proceeded with *ex parte* was a serious breach of the duty of full and frank disclosure and fair presentation and the judge was correct in so finding. Counsel, in his submissions to the *ex parte* judge, rooted his representation of forced redemption on there being an absolute right to redeem Mr. Wang's shares in RAGOF. He put the position of his client Mr. Wang in more absolute terms and with a much higher degree of certainty and immediacy of risk of a forced redemption of the shares. It was counsel's representations which dissuaded the judge at the *ex parte* hearing from his already declared course of action of adjourning the JPL Application to facilitate an inter partes hearing. Additionally, the learned judge was not taken to any of the documents which underpin the risk of redemption such as the Articles of RAGOF and, in particular, Regulations 1.1 ,4.4 and 20. These provisions, and the possible different interpretations and constructions, were simply ignored and never brought to the attention of the judge at the *ex parte* hearing. Importantly, no counter- argument to the absolute right to compulsory redemption of the shares was put before the learned judge at the *ex parte* hearing of the JPL Application by Mr. Wang or his counsel. The judge was correct to conclude that the omission by counsel and Mr. Wang to take the *ex-parte* judge to the underlying documents and to allude to FRE's likely counter- arguments at the *ex parte* hearing was deliberate.

[14] The duty of full and frank disclosure and fair representation also extended to the appellants addressing the judge on possible defences and counter-arguments to a winding-up order and to the appointment of provisional liquidators, which would have included possible alternative remedies. This the appellants wholly failed to do at the *ex parte* stage. In so doing, the appellants committed a serious breach of the duty of full and frank disclosure and fair presentation, as the learned judge correctly found.

[15] The appellants' contention that the learned judge erred in failing to give proper reasons for his conclusion that the representation made by Mr. Wang as to the risk of redemption 'was very arguably wrong' and thus ought to be set aside, is not correct and ought to be rejected. The bases given by the judge are well supported on any proper and full reading of the judgment, including that counsel's representation as to a forced redemption was 'very arguably wrong'.

[16] As it relates to full and frank disclosure on the Receivership Application, the gravamen of the omission at the *ex parte* Receivership Application hearing, is that no alternative remedies were disclosed to the learned judge including, and especially, the transfer of the shares to Mr. Wang or to a willing nominee. It was appropriate and necessary for the learned judge to consider alternative remedies not just to appointing receivers, but to a winding up and appointment of provisional liquidators over RAGOF. This is so when looked at in the context that the Receivership Application was the first of the two-stage strategy by Mr. Wang to obtain control of the shares. Mr. Wang and his counsel clearly failed to properly and fully disclose to the learned judge at the *ex parte* hearing the various alternative remedies, most significantly the transfer of the shares to Mr. Wang or a willing nominee. Additionally, on the issue of forced redemption, while counsel for the applicants had pointed the judge to Regulation 20 of the Articles, this was primarily to show that Mr. Wang did not fit the definition of 'Qualifying Investor' and that this may lead those in charge of RAGOF to conclude that the fund could force the redemption of his shares. The clear imputation left with the judge was that Mr. Wang's shares needed to be protected by having them put in the hands of court appointed receivers as they were in imminent danger of a forced redemption, when in fact that was not the case on any proper reading of Regulation 20. Furthermore, counsel did not take the judge to the any of the relevant provisions in the Articles, and it was not sufficient to assume that the judge had read Regulation 20 and understood it. Accordingly, the criticisms of the judge's findings of breaches of the duty of full and frank disclosure and fair presentation, leading to his finding that such breaches or omissions were not innocent and that the Receivership Order ought to be discharged, fails.

[17] The principles on discharge and regrant of an order obtained *ex parte* in the face of non-innocent material breaches of the duty of full and frank disclosure and fair presentation are uncontroversial. The general principle is that where material non-disclosure has been established, the court will be astute to ensure that the party in breach is deprived of any advantage which he has received as a result of the breach of duty. Furthermore, where it has been established that the breach was non-innocent, it would be in exceptional circumstances where the order or relief obtained is not discharged. The question of regrant is a matter of discretion in which the court weighs up a number of factors, including the breaches of the duty and the strength of the applicant's case in the substantive proceedings, in determining the ultimate question of what is in the interest of justice. Consequently, the learned judge having found, and this Court having agreed, that the breaches of duty in relation to the *ex parte* hearing of the Receivership Application and the JPL Application were not innocent and were sufficiently serious and culpable to warrant the immediate discharge of the Receivership Order and the JPL Order, the appellants were rightfully deprived of any advantage which they had gained as a result of obtaining the said orders in the circumstances in which they did. As such, the learned judge did not commit any error of principle when he discharged the Orders and refused to regrant them. Furthermore, no exceptional circumstances were shown by the appellants before this Court or the court below as to why

the general principle and consequence of discharge and no regrant ought not be applied.

JUDGMENT

[1] **FARARA JA [AG.]:** These two appeals were consolidated and heard together on an expedited basis on 9th and 10th November 2022. Judgment in both appeals and with respect to the appellants' application filed on 17th October 2022 to admit fresh evidence in the appeals ("the first fresh evidence application") were reserved. On 17th January 2023 the appellants filed a second application to admit fresh evidence in the appeals ("the second fresh evidence application"). By order of the Court dated 1st February 2023, the second fresh evidence application, like the first, will be determined by this judgment.

[2] On 22nd May 2023, a few days before the intended delivery of this judgment during the sitting of the Court for the Territory of the British Virgin Islands ("the BVI") in the week commencing 22nd May 2023, the appellants filed a third application to adduce fresh evidence in the appeals ("the third fresh evidence application") and requested that the said application be dealt with on paper. This notwithstanding, the decision of the Court on the appellants' third fresh evidence application has been incorporated into this judgment.

[3] In Claim No. BVIHC(COM)2021/0150 (now Appeal No. BVIHCMAP2022/0056), Jack J made a 'sealing and gagging' order to facilitate informal notification and discussions with the parties. At the hearing of the appeals, the Court, out of an abundance of caution, made the decision to hear the appeals under seal and the parties did not object. Additionally, in the judgment in the court below, the learned judge anonymised the names of two parties 'to protect their reputations from any harm, through any supposition, which would be entirely misplaced, that they are somehow to be criticized with regard to any of the matters or circumstances herein.'[1] For this reason, the anonymity of these parties will be maintained throughout this judgment.

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[1] See Core Bundle, p.136, para 4 of BVIHC(COM)2021/0150 and BVIHC(COM)2021/0144 (delivered 27th September 2022, unreported) ("the judgment in the court below").

[4] Appeal No. BVIHCMAP2022/0055 ("the Receivership Appeal") was commenced by the appellant, Chia Hsing Wang ("Mr. Wang"), as of right. Appeal No. BVIHCMAP2022/0056 ("the Provisional Liquidators Appeal" or "the PL Appeal") was commenced with the leave of the judge in the court below.[2] Both appeals[3] stem from a single judgment of Wallbank J [Ag.] delivered in two pending actions, namely Claim No. BVIHC(COM)2021/0144 commenced by ("Mr. Wang") and Claim No. BVIHC(COM)2021/0150 commenced by XYZ (by its joint provisional liquidators) and Mr. Wang ("the judgment").[4] The judgment, which was dated 19th August 2022, was in fact delivered on 27th September 2022 (the parties having been notified of the outcome on 19th August 2022). The formal orders consequent upon the judgment are dated 23rd September 2022.[5]

[5] The judgment was dispositive of three interlocutory applications. The first in time was by XYZ (acting by the court appointed joint receivers) and Mr. Wang dated 23rd September 2021 to continue the joint provisional liquidators order obtained *ex parte* on 1st September 2021 ("the Continuation Application"). The other two were by Floreat Real Estate Limited ("FRE"), filed respectively on 9th November 2021 to discharge the JPL Order,[6] and on 22nd December 2021 to discharge the receivership order obtained *ex parte* on 26th August 2021. In the judgment, the learned judge dismissed the Continuation Application and granted the two FRE discharge applications.

Procedural history

[6] Real Assets (RA) Global Opportunity Fund I Ltd ("RAGOF") is a professional fund incorporated in the BVI. Its main purpose is to invest in real estate worldwide. RAGOF is one of four investment funds, the other three (Global Fixed Income I Fund ("GFIF"), Principal Investing Fund I Limited ("PIF") and Long View II Limited ("Long View") being registered in the Cayman Islands ("the Cayman Funds"), are managed by what is referred to as 'the Floreat Parties'. Mr. Wang is the ultimate

[2] Leave to appeal was given on 23rd September 2022.
[3] Filed on 3rd October 2022.
[4] See Tab 7 of the Core Bundle.
[5] See Tabs 8 & 9 of the Core Bundle.
[6] See Record of Appeal Vol. A, p. 37.

beneficial owner of 97.2% of the shares in RAGOF ("the shares"). The shares (or most of them) are registered in the name of XYZ, a company incorporated under the laws of the United Kingdom, and the first appellant in the PL Appeal. The shares are held pursuant to the terms and conditions of certain private placement memoranda with XY, a Swiss bank.

[7] The third and second respondents in the respective appeals, FRE, a company incorporated in the United Kingdom, is owned by Mutaz Otaibi ("M. Otaibi"). It is the investment adviser of RAGOF. Floreat Real Asset Investment Management Ltd (another company owned by M. Otaibi) is the investment manager of RAGOF. M. Otaibi, together with his brother, Hussam Otaibi ("H. Otaibi"), and James Wilcox (together "the Floreat Principals") own and control the Floreat Group of companies.

[8] The Floreat Group of companies manage the assets of RAGOF which include real properties in England. Mr. Wang discovered what he alleges is serious wrongdoing in the management of RAGOF and its assets, as well as the Cayman Funds. The alleged wrongdoing included the use of the real properties in England for the personal use of the Floreat Principals and their families, impermissible management fees of US$12 million, and the purchase of expensive art. This alleged wrongdoing is said to have led to a loss of trust and confidence with the Floreat Principals and caused him, Mr. Wang, to commence proceedings in the Commercial Court in the BVI which included applications for certain interim relief. This was part of a strategy conceived by Mr. Wang and those advising him to ultimately have the shares in RAGOF put into Mr. Wang's name or the name of a new nominee designated by him. As conceived, Mr. Wang's strategy was to be implemented through various legal proceedings, applications, and steps before the court in the BVI, and through parallel proceedings in the Cayman Islands in relation to the Cayman Funds.

[9] In the BVI, the first limb of this strategy was to have the BVI court appoint receivers *ex parte* to take control of the shares held by XYZ, as nominee, in RAGOF and for the court to give to the receivers certain express powers. The

second limb of the strategy was for the receivers so appointed to apply to wind up RAGOF, and to place RAGOF under the control of provisional liquidators. The ultimate objective of this two-pronged strategy was to have the shares in RAGOF held by Mr. Wang's nominee, then under the control of the receivers, transferred either into Mr. Wang's name and full control, or to his designated third-party nominee. This strategy was clearly set out in the certificate of urgency filed by Mr. Wang's lawyers, Appleby (BVI), on 20th August 2021.[7]

Claim No. BVIHC(COM)2021/0144

[10] Mr. Wang began implementing his strategy to gain full control of the shares in RAGOF beneficially owned by him by commencing Claim No. BVIHC(COM)2021/0144 against XY and XYZ on 20th August 2021. On the same day, he made an *ex parte* application for the urgent appointment of receivers over the shares held by XYZ in RAGOF ("the Receivership Application").[8]

[11] Claim No. BVIHC(COM)2021/0144 was for an order requiring XY 'to take all steps required on their part to procure the transfer(s) of the shares in [RAGOF], which [XYZ] holds on behalf of [Mr. Wang] as beneficial owner, to [Mr. Wang] and/or such other third party as [Mr. Wang] may direct'; and, alternatively, for specific performance of the nominee arrangements between Mr. Wang and XY.[9]

[12] In his statement of claim,[10] Mr. Wang claimed that he is the ultimate beneficial owner of 114,222.14 equity shares in RAGOF registered in the name of XYZ pursuant to a custody arrangement ("the CS Agreement") between himself and XY, 'the precise terms of which [he - Mr. Wang] is unaware.' He pleaded that XY manages the shares on his behalf pursuant to the terms of an 'Agreement Concerning transactions with Non-Traditional Investment Products (NTIP) by XY' in relation to the accounts held under the relationship name 'No. 6930866 Sacred'.

[13] By Article 15 of the CS Agreement, the bank, XY, 'will not engage in any legal action in connection with disputes concerning NTIP. In such cases, the Client can instruct

[7] See Record of Appeal Vol. B, p.1814 at paras 1(i) and (ii).
[8] See Record of Appeal Vol. B, p.1820.
[9] See Record of Appeal Vol. B, p.1806.
[10] See Record of Appeal Vol. B, p.1810.

the Bank to have the units transferred to the Client or to a designated third party….'.[11] Mr. Wang also avers that he has serious concerns regarding wrongdoing in relation to his investments in RAGOF and has lost all trust and confidence in the management of RAGOF. Accordingly, he intends to take legal action to protect the value of his investments in RAGOF. Therefore, in reliance on Article 15, he 'is entitled to and hereby does' request a transfer of the shares held beneficially by him in RAGOF to himself or to such other third party as he may direct.

The Receivership Order

[14] The Receivership Application was granted *ex parte* by the learned judge on 26th August 2021 ("the Receivership Order"). By the Receivership Order, Anna Silver of FFP (BVI) Limited (in the BVI) and Michael Pearson of FFP Limited (in the Cayman Islands) were appointed as joint receivers over the shares beneficially owned by Mr. Wang in RAGOF through his nominee, XYZ, with immediate effect. The receivers were empowered, inter alia, to – (a) commence the BVI J&E Proceedings, that is, the just and equitable winding up proceedings with respect to RAGOF, and to make an application seeking an order for the appointment of joint provisional liquidators over RAGOF; and (b) commence such related or ancillary applications as the receivers shall deem appropriate, including but not limited to an application for the appointment of provisional liquidators.

[15] On 15th September 2021, Mr. Wang applied to continue the Receivership Order.[12] By order dated 4th November 2021, the Receivership Order was continued until the trial of Claim No. BVIHC(COM)2021/0144. On 22nd December 2021, FRE[13] applied to discharge the Receivership Order ("the Receivership Discharge Application" or "the RDA").[14] The grounds of the RDA included alleged breaches of the duty of full and frank disclosure and failure to make a fair presentation; that the said *ex parte* order ought not to have been made and/or continued by the judge; that the said *ex parte* order was not necessary to avoid giving advance notice to FRE of the

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[11] See Record of Appeal Vol. B, p.1811 at para 7.
[12] See Record of Appeal Vol. B, p. 1825.
[13] By order dated 23rd December 2021 FRE was granted permission to intervene in Claim No. BVIHC(COM)2021/0144.
[14] See Record of Appeal Vol. A, Pt. 2, pp. 1-5.

intention of Mr. Wang to seek the appointment of provisional liquidators over RAGOF; and that the *ex parte* order was motivated by various improper collateral purposes on the part of Mr. Wang. Several categories of material non-disclosures and unfair presentations were summarised in a schedule to the RDA. The RDA was supported by the first and second affidavits of Christopher Philip Bromilow filed, respectively, on 22nd December 2021 and 12th January 2022.[15] Mr. Wang filed the Fourth Affidavit of David Lewis-Hall in opposition to the RDA.

Claim No. BVIHC(COM)2021/0150

[16] Having obtained the Receivership Order, the second phase of Mr. Wang's strategy unfolded with the commencement, by originating application filed on 30th August 2021, of Claim No. BVIHC(COM)2021/0150[16] by XYZ (acting by the joint receivers) and Mr. Wang, as applicants, for orders under sections 159(1)(a) and 162(1)(b) of the **Insolvency Act, 2003** ("**Insolvency Act**"),[17] for the appointment of Mr. Kent Benjamin McParland and Mr. Cosimo Borrelli as joint liquidators of RAGOF on the ground that it is just and equitable RAGOF to be wound up. This application was supported by the affidavits of Michael Pearson, one of the joint receivers, and Mr. Wang.

[17] At paragraphs 10 to 12, the grounds of the application are summarised as follows:

> "10. The Applicants seek the appointment of joint liquidators on just and equitable grounds and in particular, without limitation, on the basis that there has been a justifiable and irretrievable loss of confidence in the management of the Fund, being the Floreat Management (defined below), due to serious issues of wrongdoing.
>
> 11. To the best of the (sic) Mr. Wang's knowledge, the Fund is solvent and the Applicants therefore have a tangible interest in the proceeds of the winding up of the Fund after the payment of creditors and the costs and expenses of any winding up.
>
> 12. The Shares are participating non-voting shares in the Fund. There is no contractual right or other ability to remove or change the composition of the Fund's board of directors or the Manager. Therefore, the complaints detailed in this Application and the supporting affidavits can only properly be addressed through the appointment of independent official liquidators who will be able to

[15] See Record of Appeal Vol. A, Pt. 2, pp. 11 and 38.
[16] See Record of Appeal Vol. A, p.1.
[17] Act No. 5 of 2003, Laws of the Virgin Islands.

> wind up the Fund in accordance with the applicable laws. The Applicants unequivocally seek a winding up of the Fund as there is no other more suitable remedy to pursue."[18]

[18] The bases for XYZ's (acting by the joint receivers) and Mr. Wang's justifiable loss of confidence in the management of the Floreat Funds (the Cayman Funds: Long View, PIF and GFIF; and the BVI Fund: RAGOF) are detailed at paragraphs 35 to 44, and 45(a) to (c) of the originating application. XYZ and Mr. Wang filed their Points of Claim in Claim No. BVIHC(COM)2021/0150 on 13th December 2021. As was noted therein, the Points of Claim are substantially the same (if not the same) as what is set out in the originating application for appointment of joint liquidators, but with a few highlighted changes including the summary of grounds quoted above. A Points of Defence was filed by FRE on 13th January 2022.

JPL Order

[19] On the same day, 30th August 2021, XYZ (acting by the joint receivers) applied *ex parte* on an urgent basis for an order appointing the said Mr. Kent Benjamin McParland and Mr. Cosimo Borrelli as joint provisional liquidators ("JPLs") of RAGOF, pursuant to section 170 of the **Insolvency Act** ("the JPL Application"). The JPL Application was supported by the affidavits of Mr. Wang and Mr. Michael Pearson. The JPL Application was granted and the JPL Order made by Jack J in the Commercial Court on 1st September 2021, appointing the said two persons as JPLs of RAGOF, without the requirement to give security for their appointment ("the JPL Order"). To obtain the JPL Order, Mr. Wang gave an undertaking to the court to meet the remuneration and expenses of the JPLs up to the sum of US$500,000.00 'such that the costs of the provisional liquidation up to this amount are not borne by [RAGOF].' He also gave the usual cross-undertaking in damages in relation to both the JPL Order and the Receivership Order.

[20] Jack J also made an order sealing the file in Claim No. BVIHC(COM)2021/0150, until service of the JPL Order. Paragraph 5 of the JPL Order states:

> '5. If, by the Return Date, [XYZ] has transferred the Shares to [Mr. Wang] then this action shall proceed as if it had been brought by [Mr. Wang] alone,

[18] Record of Appeal Part 2 Vol. A.

with [XYZ] thereafter not being required to play any further part in the proceedings.'[19]

[21] Interestingly, up to the hearing of these appeals, the shares in RAGOF had not been transferred by XYZ to Mr. Wang or his new nominee. There was no evidence put before the judge below or this Court that Mr. Wang has, at any time, taken any steps, as the ultimate beneficial owner of the said shares, to terminate the nominee relationship with XYZ and/or to have it transfer the 97% shares in RAGOF to him or to some other nominee designated by him.

[22] By the JPL Order, the JPLs were empowered to act jointly or severally. They were also empowered to terminate the investment management agreement dated 31st July 2014 and the investment advisory agreement dated 4th September 2014 in place between RAGOF and Floreat Real Estate Limited (respectively, the investment manager and the investment advisor);[20] and to update or cause to be updated the Register of Members of RAGOF to reflect (i) any transfer of the shares by XYZ to Mr. Wang or to any nominee of his; and (ii) any other transfer of shares currently beneficially owned by Mr. Wang in the said company to him or any nominee of his.

[23] The JPLs were also empowered to commence winding up or insolvency proceedings against any subsidiary of RAGOF, including Springs Farm Limited and RAGOF 33 Grosvenor Street Limited. Their authority extended also to investigating and reporting on the affairs of RAGOF and its subsidiaries within and outside the BVI generally, and with specific regard to the identity of the current beneficial owners of all the shares in RAGOF; and whether there was any connection between any of them and (i) Floreat Merchant Banking Services Limited and its related or affiliated entities; (ii) the Floreat Principals; and/or (iii) any entities owned or controlled directly or indirectly or connected in any way to the Floreat Principals and Floreat Principals' entities. The JPLs powers also extended to investigating and reporting on the legitimacy of all fees, expenses

[19] See Record of Appeal, Part 2, Vol. D.
[20] See Record of Appeal, Part 2, Vol. D p.3 at para 9.

and other sums paid by RAGOF to any of the Floreat Parties from 1st January 2019, including management, advisory, and consultant fees.

[24] The JPLs were also authorised to investigate and report on the circumstances leading to the prior ownership by the Otaibi family of the property in Reading, Berkshire, United Kingdom known as 'Springs Farm' (owned by RAGOF); the extent to which RAGOF and or the company Springs Farm Limited has received or is due to receive payment of rent in respect of the Otaibi family's occupation of the Springs Farm property; and of sums expended by RAGOF and/or Springs Farm Limited 'as a result of the Otaibi family's occupation of Springs Farm'.

[25] The JPL Order was amended on 27th September 2021 and 11th October 2021 respectively. Similar orders appointing joint provisional liquidators were made by the court in the Cayman Islands on 17th September 2021 in relation to the Cayman Funds. The Cayman JPL Order was amended on 25th October 2021. Up to the date of the judgment in the court below (27th September 2022), the JPLs (BVI) had filed with the BVI court three reports. The first is dated 11th October 2021, the second is dated 13th December 2021 and the third is dated 31st January 2022.[21]

Judgment in the court below

[26] By the judgment, the learned judge: (i) dismissed the appellants' Continuation Application to continue the *ex parte* order appointing JPLs over RAGOF; (ii) granted the application filed on 22nd December 2021 by FRE and made an order discharging the JPL Order in Claim No. BVIHC(COM)2021/0150 and; (iii) granted the application by FRE and discharged the *ex parte* Receivership Order in Claim No. BVIHC(COM)2021/0144.

[27] By the orders made on 23rd September 2022 in Claim No. BVIHC(COM)2021/0144, the learned judge stayed paragraph 1 of the order (by which he set aside the Receivership Order) 'pending determination of the Receivership Appeal or further order of the Court, on the basis that [the

[21] See Core Bundle, Tabs 19 and 20.

appellant] will as soon as reasonably practicable seek an order that the Receivership Appeal be expedited and will pursue the appeal with expedition.'[22] The judge also made an order that:

> "[u]ntil determination of the Receivership Appeal, the Receivers shall not (without the sanction of the Court) take active steps pursuant to the Receivership Order, except as may be necessary:
>
> (i) to preserve (but not to progress) the J&E proceedings [the Originating Application filed 30th August 2021 for the appointment of liquidators over RAGOF];
>
> (ii) to deal with matters consequential upon [his judgment]; and
>
> (iii) to prosecute an appeal in the name of the XYZ, against the order discharging the JPLs in BVI HCOM 150 of 2021."[23]

[28] Similarly, in Claim No. BVIHC(COM)2021/0150, the learned judge stayed the orders at paragraphs 1 and 2 by which he dismissed the Continuation Application and discharged the JPL Order, pending determination of the PL Appeal or further order of the Court. He also granted permission to appeal against paragraphs 1 and 2 of the said order, on the basis that the appellants seek an order of this Court expediting the PL Appeal. It was also ordered that pending determination of the PL Appeal, 'the JPLs shall exercise their powers only so far as is necessary to preserve the assets of RAGOF.'[24]

The appeals

[29] Being dissatisfied with the judgment and consequential orders, Mr. Wang (and XYZ in Appeal No. BVIHCMAP2022/0056 only), on 3rd October 2022, filed these two appeals. In BVIHCMAP2022/0055 Mr. Wang appealed the order discharging the Receivership Order, and in BVIHCMAP2022/0056, he and XYZ appealed the orders dismissing the Continuation Application and discharging the JPL Order.[25] In the Receivership Appeal, Mr. Wang relies on 31 grounds of appeal. These grounds relate to the judge's 'general observations' - grounds 8-13; the jurisdiction to make the Receivership Order – grounds 14-20; the duty of

[22] See Core Bundle, Tab 8, p.376 at para 2.
[23] Ibid, at para 3.
[24] See Core Bundle, Tab 9, p.381 at para 6.
[25] See Core Bundle, Tabs 4 and 5.

full and frank disclosure - grounds 21-29; and the discharge and refusal to regrant the Receivership Order – grounds 30-38. In the PL Appeal, the appellants rely on 25 grounds of appeal. These grounds relate to the judge's general observations - grounds 8-12; the duty of full and frank disclosure – grounds 13-24; and the discharge and refusal to regrant the JPL Order – grounds 25-32. As is readily apparent, there is much overlap in the grounds of appeal in both appeals.

[30] At paragraph 8 (Section A - Introduction) of the appellants' skeleton arguments in both appeals, they identify seven 'significant and recurring flaws' in the judgment. These are (with minor stylistic changes) as follows:

(1) The judge formed a mistaken view as to Mr. Wang's motives for bringing the proceedings as being 'simply to secure a cheap and early exit from the Fund'. This was without any proper basis. This led the judge to ignore or to downplay the compelling evidence before him of wrongdoing by the Floreat Principals and Floreat entities and of the risk to the assets.

(2) The judge similarly stigmatised the applications made *ex parte* by Mr. Wang as 'artificial' and 'premeditated' and as an impermissible 'device', which characterisations were 'misconceived'. The *ex parte* applications were designed to avoid 'tipping off' the respondents, and the fact of the Receivership Application being a stepping stone to relief in the JPL Application 'was not contrary to established principles' or in any way inappropriate.

(3) From these two false 'starting points', the judge persuaded himself that the appellants had 'tricked the court into making the *ex parte* orders as part of a premeditated and clandestine strategy'. This view was wholly erroneous and coloured much of the judgment, causing the judge to apparently have a closed mind to the possibility that the relief being sought was 'the only viable way (or at least – which was the correct question – a reasonable and proper way) to address the strong prima facie evidence of wrongdoing before him'.

(4) In assessing what the judge saw as the 'central issue' – the appellants' compliance with their duty of full and frank disclosure - he proceeded on the erroneous basis that the mere existence of arguments as to the possibility of other relief, and the risk Mr. Wang faced, put the appellants in breach of their duty. In particular, his conclusion that 'a mere arguability of a contrary position on the question of whether Mr. Wang's shares were exposed to a risk of compulsory redemption, absent urgent *ex parte* relief, meant that there had been a material failure of full and frank disclosure in that regard', was wrong in principle; and no where did the judge find that anything which the appellants said in the *ex parte* applications and proceedings was wrong.

(5) The judge failed to grapple with the important issue of whether Mr. Wang's status as a 'Qualifying Investor' was relevant to the risk that his shares would be redeemed, and on this issue, the appellants position was right or, at least, they had 'much the better of the argument'.

(6) The judge's finding that counsel for the appellants (at the inter partes hearing) had sought to justify his *ex parte* presentation (on the reason for Mr. Wang bringing the said applications in response to questions from the court) as being fair (when, in the judge's view it was not) involved a deliberate breach of the duty of full and frank disclosure, compounded these errors. That was 'an obvious *non sequitur'* and involved a misdirection in law as to the relevant test, and was a serious finding against counsel which the evidence before the judge came nowhere near justifying.

(7) The unjustified view by the judge of Mr. Wang's reasons for the *ex parte* applications and his unwarranted findings of dishonesty made against his counsel, 'contaminated much of the judgment, and vitiated his overall conclusions on the justice and convenience of continuing the relief obtained *ex parte*, and similarly the exercise of

his power to regrant the orders.' He also failed to take into account (among other things) 'the disproportionate damage that discharging the Orders would cause.'

[31] These seven 'significant and recurring flaws', and the referenced grounds of appeal in both notices of appeal, are dealt with by the appellants at Section C of their skeleton argument under five categories/issues listed at paragraph 43. Each of these five categories are addressed, in detail, at sections C1 to C5. They, and the grounds of appeal to which they relate, are (with minor adjustments) as follows:

(1) the 'general observations', a central theme of which concerned the supposedly improper purpose and artificiality of the *ex parte* applications – (Receivership Appeal grounds 8 to 13; PL Appeal grounds 8 to 12);

(2) the judge's observations about the jurisdiction to make the Receivership Order and, in doing so, appearing to reach the wrong conclusion that (independently of any question of full and frank disclosure) the continuation of the Receivership Order was not just and convenient – (Receivership Appeal grounds 14 to 20);

(3) in considering the duty of full and frank disclosure in connection with the JPL Order, the judge concluded wrongly and for reasons that were not properly explained, that there were deliberate breaches of the duty sufficient to warrant the discharge and refusal to regrant that relief – (PL Appeal grounds 13 to 24);

(4) the learned judge reached similar but erroneous and unexplained conclusions in relation to full and frank disclosure in connection with the Receivership Order – (Receivership Appeal grounds 21 to 29); and

(5) the learned judge wrongly exercised his discretion not to continue or regrant the Receivership Order and the JPL Order –

(Receivership Appeal grounds 30 to 38; PL Appeal grounds 25 to 32).

[32] Before addressing each of these five categories of criticism of the judgment, I stress that the appellants have, at section B of their skeleton argument, catalogued the allegations of misconduct being made against the Floreat Principals and Floreat entities by Mr. Wang in relation to RAGOF and the Cayman Funds in which Mr. Wang is invested. These allegations relate to: (i) Springs Farm; (ii) investment management fees; (iii) the Shanti artwork; (iv) other misconduct in relation to the Cayman Funds; (v) Floreat's responses to the investigations and proceedings concerning the Floreat Funds; and (vi) further evidence of risk to the assets. They are prefaced by this statement:

> "As has been said, these proceedings have come about because there is compelling and wide-ranging evidence of serious wrongdoing perpetrated by the Floreat Principals and Floreat entities in relation to RAGOF and other funds in which Mr. Wang is invested. This misconduct falls squarely within the type of matter – lack of probity – which justifies a loss of confidence in management and properly grounds [for] winding up on the just and equitable ground.[26] Although the learned judge sought to denigrate the Appellants' emphasis on the evidence of wrongdoing as "*well-worn*", it formed an important aspect of the applications before him and of the appeal. His unjustified downplaying of it underpinned or compounded the errors he made (considered below) as to the risks to RAGOF's assets pending trial, as to the likelihood of an eventual winding-up order being made, and as to the proportionality of discharging and not regranting the *ex parte* Orders."[27]

[33] As will be addressed in this judgment, the allegations of wrongdoing being made by Mr. Wang against those responsible for managing RAGOF and the Cayman Funds, in which he has invested and in respect of which he holds, through a nominee, a beneficial interest, are serious. They are, however, matters for trial, and are not for determination at this stage of the proceedings. The principal questions for determination in these appeals, are whether the judge was wrong to set aside the Receivership Order and/or the JPL Order obtained *ex parte* by Mr. Wang and XYZ (acting by the joint receivers) on the grounds on which he did, including that it was not just or convenient to continue them, and on the

[26] See Loch v John Blackwood [1924] AC 783.
[27] Core Bundle Tab 1 p.6 at para 10.

basis that the appellants had committed serious breaches of the duty of full and frank disclosure and fair presentation of the *ex parte* applications; and whether, if discharge of the *ex parte* orders (or any of them) was warranted, it was a proper and justifiable exercise of his discretion not to regrant them.

The fresh evidence applications

[34] Before turning to deal with the various issues and grounds of appeal, it is convenient at this stage to consider and dispose of the appellants' first, second and third fresh evidence applications.

First fresh evidence application

[35] The first application filed on 17th October 2022 was to adduce as fresh evidence in the appeals as to:

(i) proceedings issued on 1st September 2022 in the Commercial Court in England ("the English Claim") by Mr. Cosimo Borrelli (as joint provisional liquidator of GFIF, RAGOF, PIF and Long View (together "the Funds") and 22 others, against M. Otabi, H. Otaibi and certain 15 Floreat entities/parties and the de jure directors of RAGOF; together with a letter dated 20th September 2022 from Carey Olsen, the JPLs' lawyers in BVI, explaining those claims; and

(ii) the First Affidavit of Andrew Ford ("Ford 1"), a solicitor of the Supreme Court of England and Wales and principal of LK LAW LLP (representing Mr. Wang in England in respect of his dispute with Floreat (as defined)), dated 30th September 2022 and filed 3rd October 2022 in BVIHC(COM)M2021/0144, addressing and explaining the use by the solicitors for the appellants of the filename 'Project Ninja'.

[36] This first fresh evidence application is supported by the second affidavit of Tamara Cameron ("Cameron 2"), a lawyer at Appleby (BVI), also filed on 17th October 2022. At paragraph 7 of Cameron 2, the appellants/applicants also seek to adduce the following additional evidence:

(i) a judgment of the English Commercial Court (Knowles CBE) dated 18th February 2022 in proceedings titled 'Floreat Investment Management Limited v Churchill and ors' [28] ("the English Judgment");

(ii) copies of the Fourth Report dated 11th March 2022 ("JPL 4th Report") and Fifth Report dated 14th August 2022 ("JPL 5th Report); and

(iii) the Third Affirmation of Cosimo Borelli dated 16th March 2022 ("Borelli Cayman 3"), one of the JPLs over the Cayman Funds, filed in the Cayman Proceedings.[29]

[37] The various items of documentary evidence sought to be admitted in the appeals are exhibited to Cameron 2 as part of exhibit "TTC-2" (consisting of 1,103 pages). Exhibit "TTC-2" also comprises a number of other documents and materials, in respect of which no specific application to adduce them as evidence in the appeals has been made. Also, in support of this first application, the appellant filed a skeleton argument on 21st October 2022. The application is opposed by the respondents who filed their skeleton argument dated 31st October 2022.

[38] Following the February 2022 hearings in the court below, and before a draft of the judgment to be handed down by the learned judge was circulated to counsel for the parties for their confidential review, certain new or additional documents were sent directly to the judge under cover of a letter dated 14th March 2022 from Appleby (BVI). These are: the English Judgment, the JPL 4th Report, and Borelli Cayman 3. Forbes Hare, on behalf of FRE, objected in writing to the learned judge considering these materials provided to him by Appleby (BVI) in this way. The response from the court office was that the learned judge had instructed the following: '(a) the court does not engage in litigation (or determination) by correspondence; and (b) the court does not require further observations by way of correspondence'.[30]

[28] [2022] EWHC 357 (Comm).
[29] Second Affidavit of Tamara Cameron para. 7.
[30] Ibid, para 14.

[39] I agree fully with the position taken by the judge below in relation to the manner in which the appellants (by their lawyers) sought to put this additional evidence before the learned judge for his consideration, before delivery of his reserved judgment in relation to the three applications heard inter partes in January and February 2022. This means as deployed, writing directly to the court or to the judge to bring to his attention new potential evidential matters and materials, said to be relevant to his determination of certain issues in extant application proceedings already heard by the judge, and without making the appropriate application for them to be considered, is to be frowned upon and deprecated. The proper means to request a court to consider new or additional material not put before the judge at the time of hearing an application, is to first bring the material to the attention of those representing the other parties to the litigation explaining their relevance and inviting them to consent to an application for its admission or to it being adduced. If the other party or parties do not consent, an application ought to be filed for that evidence to be admitted and to be considered by the judge before handing down his decision in the pending matter.

[40] A party should not unilaterally send new documents or materials directly to the court and must only do so through the instrumentality of an application for it to be adduced and considered by the judge. This is an elementary but sacrosanct procedure and principle in civil and commercial litigation under the Civil Procedure Rules.[31] The rules of court and the system of justice under which our courts, and by extension lawyers, operate are required to be practiced before the courts, and are there for important reasons. It is of equal importance to the proper, impartial, and fair administration of justice that these rules be observed and complied with by all parties to litigation, and those representing them in the proceedings.

[41] In this matter, notwithstanding the response from the Commercial Court Office, no application was made by the appellants to admit this 'new' evidence in the proceedings, and for the judge to consider it prior to the delivery of his decision

[31] See comments by Laing LJ in R (on the application of MH (Eritrea)) v Secretary of State for the Home Department [2022] EWCA Civ 1296 at para 54.

on the three applications, the subject of these appeals. Accordingly, the judge rightly did not have regard to any of the materials mentioned in the 14th March 2022 letter from Appleby (BVI), when rendering the judgment discharging the Receivership Order and the JPL Order. It is only prior to the hearing of the appeals from that judgment and consequential orders in November 2022, that the appellants applied for the said evidence (along with other materials) to be admitted and relied on in the appeals themselves.

[42] In support of the first fresh evidence application, the appellants contend (as a preliminary point) that while permission of this Court is required to adduce and to rely on the evidence of the claims issued or to be issued by the JPLs of RAGOF before the English Court and Ford 1 concerning the use of the filename 'Project Ninja', no such permission is necessary with respect to the English Judgment, copies of the JPL 4th and 5th Reports, and Borelli Cayman 3 as these materials were before the court at first instance by virtue of the 14th March 2022 Appleby (BVI) letter. However, to the extent necessary, they also seek this Court's permission to adduce these documents in the appeals. As to Borelli Cayman 3, this affirmation was filed in the Cayman Proceedings and not in the extant proceedings before the Commercial Division in BVI. It is beyond doubt, that documents filed in foreign proceedings, even related proceedings, are not deemed filed also in proceedings before the courts in the BVI (or in any other jurisdiction of the Eastern Caribbean Supreme Court), even if the document, be it a pleading or an affidavit or affirmation, is that of a person appointed as an officer of the BVI court.

[43] The appellants submit that the first fresh evidence application satisfies all three limbs of the **Ladd v Marshall**[32] test for the admission of fresh evidence. They emphasise that it is well-established that an appellate court will adopt a more relaxed approach to the application of the **Ladd v Marshall** criteria when dealing with applications to admit fresh evidence in appeals from interlocutory matters. Indeed, this principle has been recognised and applied by this Court in a number

[32] [1954] 3 All ER 745.

of decisions.[33] Accordingly, the appellants submit that this Court ought to adopt a more relaxed approach to the application of the three limbs of the **Ladd v Marshall** test when dealing with these applications.

[44] The appellants also submit that the English Claims satisfy each of the three limbs of the said test. They were issued on 1st September 2022, well after the conclusion of the last hearing before the judge on 28th February 2022 concerning the three applications, and only came to the attention of the appellants (they say) on 20th September 2022.[34] This evidence, the appellants contend, would probably have an important influence on the outcome of the applications, for two principal reasons. Firstly, it 'undermines a key conclusion of the learned judge, that the absence of findings in the JPL Reports (1st, 2nd and 3rd), and the continuation of the JPLs' investigations, meant that the evidence of wrongdoing contained in the JPL Reports did not justify the continuation of the JPL Order.' They argue that the English Claims coupled with the Carey Olsen letter, are powerful evidence of the conclusions that the JPLs have reached about the misconduct of Floreat and the Floreat Principals in respect of RAGOF's assets.

[45] Secondly, 'it demonstrates that the de jure directors have been ineffective at preventing wrongdoing to such an extent that the JPLs have determined that those directors bear responsibility for that wrongdoing'. They argue that this contradicts the position taken by FRE in the proceedings below to the effect that the supposed independence of these directors of RAGOF 'afforded sufficient protection to the [a]ppellants that the appointment of the JPLs was unnecessary'. As to the third limb, the appellants submit that this evidence is obviously credible. They argue that the fact that the English Claims and the causes of action are disputed by FRE, does not render this document/material incredible. Importantly, the JPLs, as officers of the court, consider that there are good prospects of success in the English Claims.

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33 See: Honourable Guy Joseph (in his personal capacity and in his capacity as Parliamentary Representative for Castries South East) v The Constituency Boundaries Commission et al SLUHCVAP2015/0013 (delivered 1st October 2015, unreported); Adam Bilzerian et al v Terrence Byron et al SKBHCVAP2019/0032 (delivered 21st July 2020, unreported); and Ikana Holdings S D.E. R.L et al v Putney Capital Management Ltd et al BVIHCMAP2021/0027 (delivered 24th January 2022, unreported).
34 See Second Affidavit of Tamara Cameron paras 23 – 24.

[46] As to Ford 1 and Mr. Ford's explanation therein that the use of the filename 'Project Ninja' 'had nothing to do with Mr. Wang's litigation strategy', and was a name selected before the appellants knew of the alleged wrongdoing perpetrated by the Floreat Principals and entities and before any lawyers were appointed in the Caribbean to represent Mr. Wang, the appellants submit that all three limbs of the **Ladd v Marshall** test are likewise satisfied. The use of this filename only came to light when the speaking note of counsel for the appellants was sent to the judge after conclusion of the hearing and before delivery of his judgment, and its significance (if any) only after the draft judgment had been circulated in August 2022.

[47] The appellants argue that the significance of Ford 1 and the explanations therein, as new or fresh evidence, is clear as the learned judge appears to have placed substantial weight on his research about the word 'ninja' when drawing the conclusion that Mr. Wang had pursued 'convoluted and unusual procedural steps' in pursuit of the RAGOF winding up.[35] This conclusion, it is their contention on appeal, was erroneous, and is entirely undermined by the evidence in Ford 1, which evidence the learned judge had not invited explanation or comment from the appellants, prior to including it and commenting adversely on the appellants' use of that file name in his judgment. As to it being clearly credible evidence, the appellants' state simply that this is evidence from an English solicitor with first-hand knowledge of the reason for the selection of the said filename.

[48] In response to the first fresh evidence application, FRE cited certain key principles in the decision of this Court in **Honourable Guy Joseph (in his personal capacity and in his capacity as Parliamentary Representative for Castries South East) v The Constituency Boundaries Commission et al.**[36] These include the onus being on an applicant to put before the first instance court all material which was available to him/her for the purpose of establishing the allegations made and on which he/she relies. While FRE accepts that the

[35] See Appellants' Skeleton Argument at para 14(2).
[36] SLUHCVAP2015/0013 (delivered 1st October 2015, unreported).

application of the **Ladd v Marshall** criteria is more stringent in relation to appeals after a trial and full hearing on the merits, they submit that this is not to suggest that 'the bar is not also exacting in respect of appeals against interlocutory decisions'.[37] In this regard, reliance was placed on this salutary statement of principle by Lord Bingham in **Thune and Another v London Properties Ltd and Others**[38] (cited by this Court in **Guy Joseph**):

> "There is nonetheless a clear duty on parties to present their full case at first instance, and it is very undesirable if interlocutory disputes are argued out afresh on appeal on different materials never put before the judge whose primary discretion it is."

[49] FRE submits, broadly, that the materials which the appellants seek to obtain permission to adduce in the appeals do not satisfy any of the **Ladd v Marshall** criteria. Firstly, the materials which did not exist at the time of the hearing in February 2022 cannot now be admitted under the first criteria. Secondly, these materials do not change the principal findings by the judge below as to serious material non-disclosures and consequently, it cannot be said that they would have an impact on the determination of the issues in the appeals. In this vein, FRE argued that the three alleged 'flaws' in the judge's reasoning to which the appellants contend these further materials relate, are peripheral and not tenable, as they do not concern the primary findings of material non-disclosure.

[50] They submit, firstly, that the appellants' criticism of the judge's use of the word 'artificial' to describe the Receivership Application is weak, as this is the same description adopted by Mr. Wang's counsel himself at the *ex parte* hearing. Second, as to the incorrectness of the judge's finding that there was no real risk of dissipation of RAGOF's assets warranting the *ex parte* appointment of JPLs, the judge appropriately directed himself and correctly evaluated that no real risk of asset dissipation existed, such as would warrant making the orders sought and obtained *ex parte*. Thirdly, as to the correctness of the judge's approach to the JPLs Reports (1st, 2nd and 3rd), and his conclusion that they did not tilt the balance in favour of continuing the JPL Order or a regrant, this was 'within the

[37] See FRE's Skeleton Argument at para 7.
[38] [1990] 1 WLR 562 at 571.

range of reasonable evaluations of the materials before the learned judge' and is not a basis for impugning this conclusion on appeal.[39]

[51] FRE argued that the English Claim was admittedly issued by the JPLs on an avowed protective basis to avoid potential limitation issues and had not been served on any defendants to the said claim. The claims are all denied and will be robustly defended. The English Claim Form and the Carey Olsen Letter were not in existence at the time of the hearing below. They are not materials which can now be deployed at the appeal stage to demonstrate alleged errors in the approach of the judge below. Moreover, they are not in any real sense further 'evidence' (such as documents which have come to light). They are purely a further legal work product of the lawyers who prepared them, and are not saved even if, as said, they were drafted before the judge's perfected judgment was handed down.

[52] Further, these documents (the Claim Form and Carey Olsen letter) do not set out allegations which are, in any sense, new. They represent views of the JPLs which Mr. Wang drew, at great length, to the attention of the judge during the hearing, including references to the JPLs 1st, 2nd and 3rd Reports. As to the second **Ladd v Marshall** criteria, a Claim Form (as a claim) is not 'evidence' of wrongdoing and the appellants/applicants' contention that they constitute powerful evidence of the conclusions that the JPLs have reached about the misconduct of Floreat and the Floreat Principals in respect of RAGOF's assets, is wholly unsustainable; and, the statement by Cary Olsen in their letter that the JPLs consider the English Claims to have a 'good prospect of success', is of no probative value. Both the Claim Form and the Cary Olsen letter having no probative value, neither can be considered credible evidence.

[53] As to Ford 1 and his explanation of the use of the filename 'Project Ninja', FRE 'does not challenge the credibility of the evidence given by Mr. Ford'. However, FRE argued that notwithstanding the judge's clear statement that he drew no conclusion from the use of the name, the appellants seek to admit this affidavit

[39] See FRE's Skeleton Argument at para 15.

as fresh evidence. It is FRE's submission that while Ford 1 responds to the judge's observations about this heading or filename on the appellants' speaking notes, this evidence could have been given in their written submissions if it was felt relevant to do so. In any event, this evidence is not important in the appeals, and will not have an important influence on their outcome, especially since the judge stated: 'Nothing turns on the actual use of this title here'.

[54] With regard to the English Judgment, FRE contends, firstly, (as admitted by Mr. Wang at paragraph 21(1) of the appellants' skeleton argument) that this judgment (dated 18th January 2022) was available at first instance and was published prior to the hearing in February 2022. It was only drawn to the judge's attention by Appleby (BVI)'s letter dated 14th March 2022, which was accompanied by a copy of the said judgment. This was after conclusion of the hearing of the three applications. As noted above, this practice is impermissible and is to be deprecated. However, FRE also argues that the English Judgment is neither evidence nor important evidence. It is the judgment of another court between different parties, is not evidence of anything, and to rely on it would be to breach the principle in **Hollington v F. Hewthorn and Company Limited and another**.[40] In my considered view there is much force in this submission. FRE also argues that, as the judgment is not evidence but a decision of another court involving different parties, it cannot be considered credible evidence for the purpose of these proceedings.

[55] I note, at this stage, that the parties to the said English Claim (and hence the English Judgment) were Floreat Investment Management Limited ("FIML") - as claimant, and Benjamin Churchill, Oumar Diallo, Zaki Mohammed Nuseibeh, IR Relations Ltd and Fatoumta Diallo - as defendants. Mr. Wang, FRE nor RAGOF were parties to this litigation. The claimant, FIML is the assignee of claims from GFIF, an exempted company incorporated in the Cayman Islands. This claim concerned challenges to the way in which the defendants are alleged to have dealt with the early repayment by The Reading Football Club Limited ("Reading FC") of finance raised by it in 2017 from GFIF.

[40] [1943] 1 KB 587 (CA) (applied in Rogers v Hoyle [2015] QB 265 (CA)).

[56] The claim included claims for negligence, breach of fiduciary duty, proprietary claims, deceit, knowing receipt and dishonest assistance and conspiracy. The three 'overarching questions' posited by the claimant in its closing arguments before the English court concerned the entitlement of GFIF to each of three sums, namely, the 'Diverted Sum', the 'Missing Termination Fee Payment', and 'Prepayment Fees'. In answering the three overarching questions, the judge concluded that GFIF was entitled to only the 'Diverted Sum' (not the other two sums); and found that the defendants were liable for that part of the 'Diverted Sum' which they had received, but not on all grounds alleged by GFIF. He accordingly gave judgment for the claimant and ordered that the "Diverted Sum" must be paid back "so that it goes to the current holder of GFIF's rights, which is FIML."

[57] In the section of the English Judgment headed 'Conclusions', Knowles CBE summarised the various findings and conclusions which he reached after a trial. I do not propose to relist all such conclusions. However, at paragraph 496, the judge mused that the trial 'showed the level of distrust and extreme breakdown in relations that was apparent by December 2016 between Mr. Churchill, Mr. Diallo and Mr. Nuseibeh on the one hand and Mr. Mutaz Otaibi and Mr. Hussam Otaibi on the other hand, and has only worsened since... It has generated suspicion that has included unfounded suspicion'. At paragraph 497: '… I was able to accept parts of the evidence of Mr. Mutaz Otaibi, but there were parts I could not accept. The same is true of Mr. Churchill, Mr. Diallo and Mr. Nuseibeh. This was not a case in which any of the four was a witness whose evidence was to be rejected wholesale.' And at paragraph 498: 'Having seen each in the witness box, I do not consider each of Mr. Churchill, Mr. Diallo and Mr. Nuseibeh as men without any integrity, prepared to be dishonest, wherever it suited them. However, through fear of being treated unfairly if they did not, they together **crossed the line from honesty to dishonesty in relation to their conduct over the destination of the Termination Fee but not otherwise.**' (emphasis mine)

[58] As to the JPLs' 4th and 5th Reports and Borelli Cayman 3, FRE submits that these do not satisfy the **Ladd v Marshall** criteria for admission. All three came into existence after the hearing below, and there is no reason, in any event, why Mr. Wang could not, with reasonable diligence, have procured such evidence in advance of the hearing in February 2022. As to their importance to the outcome of any issue in the appeals, FRE argues that these two JPL reports do not contain findings, as they (the JPLs) are not a court of law or a fact-finding tribunal, and Borelli Cayman 3 is an attempt by Mr. Borelli (one of the JPLs) to gloss and add further detail beyond what was stated in the JPL Reports. Accordingly, neither of these reports, or Borelli Cayman 3, can be categorised as 'material credible evidence'.

Second fresh evidence application

[59] By the second application filed on 17th January 2023, the appellants seek to have admitted as evidence in the appeals the third affidavit of Andrew Cooke dated 9th January 2023 in the Cayman Islands proceedings, and Exhibit "AC-3" thereto ("Cooke 3") which, in turn, exhibits the Amended Claim Form dated 14th November 2022 and the Particulars of Claim dated 30th December 2022 in the English Claim CL-2022-000474. This second application is supported by the third affidavit of Tamara Cameron ("Cameron 3") which exhibits the 'new' evidence at exhibit "TC-3"; and by the appellants/applicants' skeleton argument filed on 17th January 2023. The appellants/applicants state that the Amended Claim Form and the Particulars of Claim were unknown to them until 9th January 2023, when they were provided in the related Cayman Islands proceedings behind Cooke 3, filed on behalf of the Floreat Parties to those proceedings.

[60] The Amended Claim Form (sought to be admitted) is an amendment to the original Claim Form filed on 1st September 2022 in the English Claim, which is the subject of the first fresh evidence application.[41] The amendments are stated to include further claims of dishonesty relating to a scheme by the Floreat parties to cause GFIF, one of the Cayman Funds, to subscribe, on 21st December 2016, for US$81 million of Floreat Aviation Notes of substandard quality, but which

[41] See Third Affidavit of Tamara Cameron at para 9.

resulted in very large fees and other commercial benefits for the Floreat Parties, including avoiding millions of dollars of underwriting liability.

[61] It is also surmised by the appellants/applicants, that the Particulars of Claim set out a clear and credible case as to how pervasive and persistent was the dishonesty and abuse by the Floreat Parties in dealing with the assets of the Funds. They raise a powerful prima facie case, independent of Mr. Wang's evidence, that to discharge the *ex parte* orders would leave the Funds in the control of persons guilty of serious wrongdoing – and particularly the use of investors' funds to further their own interests at the expense of those investors.

[62] It is also contended that the details of the claims in the English Claim, as pleaded with specificity in the new materials (the Amended Claim and the Particulars), answer the arguments made by FRE on the first **Ladd v Marshall** application that the claim form only set out unsupported allegations at 'the highest level of generality', and was only a protective measure that had not been served, so was of limited probative value. The appellants/applicants also argue that the evidence as to the claim in the English Claim (as amended and particularised) 'is credible as evidence of the risks referred to above…'

[63] The appellants/applicants submit that the English Claim (as amended) and the Particulars of Claim, would probably have had an important influence on the result of the decision under appeal and, therefore, the second limb of the **Ladd v Marshall** test has been met. They so contend for the reasons outlined at paragraphs 43 and 44 above. In addition, the appellants/applicants argue, inter alia, that the English Claim includes causes of action which go to the heart of the case of wrongdoing which the appellants have alleged before the court below and in the appeals. Further, the new allegations of systematic dishonesty in the operation of the Funds take matters significantly further than the material previously available; in particular, the scale and persistence of wrongdoing set out in the Aviation Notes claim on its own, renders untenable the judge's conclusion regarding the unlikelihood of dissipation of RAGOF's assets.

[64] They also submit that the other two limbs of the **Ladd v Marshall** test are satisfied in that these documents, being statements of case filed in the English Claim, are obviously credible evidence, and they could not, with reasonable diligence, have been deployed at the first instance hearing or the hearing of the appeals, as the Particulars of Claim did not exist until 30th December 2022, and they did not become aware of them until 9th January 2023.

[65] This second application is opposed by FRE, which filed its skeleton argument in opposition on 26th January 2023. They submit that the judge's finding of material non-disclosure at the *ex parte* stage is unassailable and warranted the discharge of the Receivership Order and the JPL Order. The English Claim materials sought now to be admitted do not change this in any way, they are of no real relevance to the issues which arise in the appeals, and none of them meet the **Ladd v Marshall** test. Accordingly, this application, like the first, ought to be dismissed with costs.

[66] As to the first limb of that test – that the evidence could not have been obtained with reasonable diligence for use at the hearing of these applications - FRE stressed that the further English Claim materials were not in existence at the time of the hearing below, and they cannot now be deployed by the appellants/applicants to demonstrate, on appeal, the alleged errors made by the judge in his judgment. Moreover, these materials set out allegations which are heavily disputed by the Floreat parties and reflect the view of the JPLs as detailed in their prior reports, which views and allegations were available and were repeatedly drawn to the judge's attention by Mr. Wang during the first instance hearings, and the judge considered the substance of them when giving his decisions. Accordingly, says FRE, the substance of what Mr. Wang wants now to rely on could with reasonable diligence have been obtained before the hearings before the court below.[42]

[67] FRE also argues that the Particulars of Claim is said (by the appellants/applicants) to contain only one new allegation - relating to the

[42] See FRE's skeleton argument at para 14.

Aviation Notes. They argue that even this allegation is not new since, as the appellants accept, paragraph 38.7B in the Amended Points of Claim in these proceedings contains allegations that the Floreat Management wrongly caused RAGOF to invest in GFIF and the Aviation Notes. Although the Particulars now include an express allegation of dishonesty, none of the particulars of this allegation constitute new evidence in support of that allegation. In this regard, FRE points to paragraph 91, which provided that the JPLs will rely on the structure of GFIF's initial investment in the Aviation Notes 'to support the inference that the Aviation Notes were intended to benefit Floreat to the detriment of GFIF', which structure had been previously addressed in the JPLs reports before the court below.

[68] As to the second limb of the **Ladd v Marshall** test – the probable importance of the new evidence on the result of the case – FRE argues that there is no basis upon which to conclude (as the appellants submit) that the Particulars of Claim set out a credible additional case of significant bad faith on the part of Floreat in the use of investors' funds, which was not present in the original claim form and which provides compelling further evidence of the risk to the Funds' assets should the JPLs be discharged from office. The materials are not further evidence, but rather a further legal work product advancing disputed allegations. In this regard they cite paragraph C1.1(e) of the English Commercial Court Guide 2022 which is to the effect that statements of case should set out factual allegations necessary to establish a course of action or defence, and evidence should not be included. This provision equates (substantively) with rules 8.7(1) and (2) of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** ("CPR") and circumscribes the modern approach to pleadings in civil litigation.

[69] As to the third limb of the test – the evidence must be apparently credible - FRE says simply that since the further English Claim materials have no probative value, these documents cannot be assessed as being, in any form, credible evidence. It is correct that the evidence must be such as 'is presumable to be believed' in order to satisfy this limb. However, it need not be incontrovertible.

Third fresh evidence application

[70] During the week of 22nd May 2023 to 26th May 2023 when this judgment was slated to be delivered during the Court of Appeal's sitting in the BVI, the appellants' filed a third fresh evidence application. The application was filed on 22nd May 2023 and sought to adduce new evidence contained in the Fourth Affidavit of Tamara T. Cameron ("Cameron 4"), also filed 22nd May 2023, and the documents exhibited thereto as "TTC-4".

[71] These documents all relate to winding up proceedings before the Grand Court of the Cayman Islands ("the Grand Court") and the making of winding up orders by the Grand Court in May 2023 in relation to two of the three Cayman Funds. They are specifically:

(i) an order made in the Grand Court on 5th May 2023 in FSD Cause No. 268 of 2021 (IKJ), recording an undertaking given by the second respondent in those proceedings, Floreat Principal Investment Management Limited, to the Grand Court and adjourning the trial of the said cause pending the determination of the second respondent's Strike Out Summons to be filed, and providing for the filing of the Strike Out Summons and other consequential orders and directions;

(iii) the official transcript recording the oral judgment of the Grand Court (Kawaley J) dated 12th May 2023 dismissing the second respondent's Strike Out Application ("the Cayman Strike Out Judgment");

(iv) the orders made by the Grand Court appointing the previously appointed joint provisional liquidators as liquidators over two of the three Cayman Funds, namely, PIF and LV II;

(v) the transcript of Day 16 of the trial proceedings; and

(v) the transcript of Day 13 of the said trial proceedings being the evidence of David Whitworth, a witness for the second respondent in the said proceedings.

[72] The appellants contend that the documents sought to be adduced satisfy all three limbs of the **Ladd v Marshall** test. As to the first limb, they say that these documents were not available at first instance and during the hearing of the appeal having only become available during the course of the Cayman Trial which took place between 3rd April 2023 and 12th May 2023. In this regard, the appellants submit that the Court has a discretion to admit such evidence, 'particularly in a case where the Court is considering the justice and convenience to maintain interim relief granted in ongoing proceedings'. Secondly the appellants say that the documents would have had an important influence on the decision of the first instance judge and on the result of the appeal. The appellants cite various reasons including: that the winding up orders made in the Grand Court would have had an overall influence on the judge at first instance when he considered the justice and convenience of making the Receivership Order and whether it was appropriate to regrant or discharge the JPL order; that it would have prevented the learned judge from falling into certain errors as to the characterisation of the allegations of wrongdoing as merely 'appearances' and certain other conclusions contrary to the appellants' arguments. They also contend that the evidence of Mr. David Whitworth is important because it goes towards demonstrating the misconduct of the Floreat entities and raises serious issues relating to the acquiring of Aviation Notes by GFIF. Lastly, the appellants submit that the evidence is 'plainly credible'.

[73] FRE opposes the third fresh evidence application. In its skeleton argument filed on 30th May 2023 together with the First Affidavit of Andrew John Cooke ("Cooke 1"), FRE says that the materials which the appellants seek to rely on as fresh evidence are not evidence at all and fail the **Ladd v Marshall** test in every respect.

[74] FRE refers in its skeleton to the 'Cayman Strike Out Materials'. This term collectively defines those documents sought to be adduced by the appellants in

relation to a 'procedurally and substantively complex strike out application made by the Floreat parties in the Cayman Proceedings on the grounds of witness intimidation'.[43] FRE submits that these documents fail all three limbs of the test in **Ladd v Marshall**. On the first limb, they say that these documents were not in existence at the time of the hearing and so 'they cannot be sought to be deployed to demonstrate, on appeal, alleged errors in the approach of the Court below'.[44] As to the second limb, FRE suggests that the Cayman Strike Out Materials cannot be regarded as important evidence because they do not relate in any way to, or impact on the findings of Wallbank J when he discharged the *ex parte* orders. Further FRE says that the documents are not evidence that the winding up petitions made in the Grand Court were made on the basis that that Court found misconduct in relation to RAGOF, since the Grant Court only heard a small amount of evidence in relation to the misconduct allegations relating to RAGOF and RAGOF which is not a Cayman Fund was not the subject of any of the winding up petitions in the Cayman Proceedings. As to the third limb, FRE submits that the Cayman Strike Out Materials, not being evidence of misconduct and having no probative value, cannot be assessed as being a form of credible evidence.

[75] Additionally, FRE in Cooke 1 which was filed in response to Cameron 4, asserts that Cameron 4 gives 'an incomplete and materially inaccurate account of the Cayman trial'.[45]

[76] In respect of the Day 13 transcript, the second category of documents addressed in FRE's skeleton, FRE says that this fails all three limbs of the **Ladd v Marshall** test for 'many of the same reasons' set out in their submissions on the Cayman Strike Out Materials. Firstly, FRE submits that the Day 13 Transcript was not in existence at the time of the hearing and fails the first limb. As to the importance of the evidence, again FRE submits that the transcript will not have an important influence on the reason why Wallbank J discharged the

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43 Skeleton Argument of Floreat Real Estate Limited regarding appellants' third Ladd v Marshall Application, paragraph 5.1.
44 Ibid, paragraph 11.
45 Skeleton Argument of Floreat Real Estate Limited regarding appellants' third Ladd v Marshall Application, paragraph 9.

ex parte orders which was because he found that the appellants committed material and non-innocent breaches of their duty of full and frank disclosure in relation to whether FRE had an absolute right to redeem RAGOF's shares. Further, they say that Mr. Whitworth's evidence is of limited probative value as it only addressed certain matters relating to misconduct allegations. Lastly, on the third limb, FRE submits that the Day 13 transcript cannot be assessed as credible evidence without the context of all the other evidence in the Cayman trial and without any evidence that was not given because of the witness intimidation issue that arose.

Ruling on fresh evidence applications
Applicable Principles

[77] Lord Bingham's salutary statement in **Thune**[46] as to the duty on parties to present their full case at first instance, and the undesirability of arguing afresh interlocutory applications on new evidence, must be borne foremost in mind by an appellate court when considering an application to admit fresh evidence in relation to an appeal from a decision in an interlocutory matter. Appeals from interlocutory decisions are not another opportunity for the losing party to invite the Court to rehear the application on the basis of either evidence available but not adduced before the court below and which the party seeking to adduce and to rely on it could not have discovered with reasonable diligence; or additional or new evidence not in existence at the time of the first instance hearing. If this was generally allowed, the justice system would become clogged with many dissatisfied parties seeking to produce and rely on new or other evidence, as a means of rehearing afresh the application at the appellate level. This would be contrary to the important principles of fairness and bringing finality to proceedings, which principles undergird our system of justice.

[78] It is well-established that the **Ladd v Marshall** criteria are principles and not rules or special rules to be strictly applied by the court. Accordingly, a party seeking to adduce fresh evidence does not have to show some special ground for the grant of permission to rely on such evidence in the appeal. However,

[46] Supra note 38.

these criteria are to be applied with considerable care and in accordance with the overriding objective of doing justice enshrined in CPR 1.1. As Morritt L.J. opined in **Banks v Cox**:[47]

> "In my view the principles reflected in the rules in Ladd v Marshall … remain relevant to any application for permission to rely on further evidence, not as rules but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the court below."

[79] To satisfy the first criteria, the basic principle is that the evidence sought to be relied on must have existed at the time of the trial or hearing, but could not have been obtained with reasonable diligence by the applicant.[48] However, in exceptional circumstances, the court has a discretion to admit, at the appellate stage, evidence which did not exist (essentially 'new' evidence) at the hearing of an interlocutory application where such evidence is capable of further strengthening the court's determination of an issue or finding. It is to be stressed that such circumstances are exceptional, and there must be compelling reasons why 'new' evidence ought to be admitted.[49]

First application

[80] As regards the first application to admit fresh evidence, in my judgment the English Claim Form, the letter from Carey Olsen dated 20th September 2022, the English Judgment dated 22nd February 2022, and Borelli Cayman 3 do not satisfy the **Ladd v Marshall** criteria for admission as fresh evidence in the appeals, and I would decline to so admit them. The English Claim claim form is not evidence. It is a document by which proceedings were commenced on 1st September 2022 in England by the JPLs against M. Otaibi, and various Floreat entities, including FRE (Jersey), the respondent in both appeals. It did not exist at the time of the hearings in February 2022 on the three applications. In my judgment, this claim form cannot in any reasonable sense be said to likely have an important influence on the outcome of the three applications

[47] (unreported), 17th July 2000; Court of Appeal (Civil Division) Transcript No. 1476 of 2000, C.A. (cited with approval by Hale LJ in Hertfordshire Investments Ltd v Bubb and Another [2000] 1 WLR 2318.
[48] See WWRT Limited v Carosan Trading Limited et al BVIHCMAP2022/0002 (delivered 20th July 2022, unreported) at paras 80-81.
[49] See Adam Bilzerian et al v Terrence Byron et al SKBHCVAP2019/0032 (delivered 21st July 2020, unreported) per Farara JA at para 33; and Staray Capital Limited et al v Cha, Yang (also known as Stanley) BVIHCMAP2013/0009 (delivered 14th July 2014, unreported) per Thom JA at para. 25.

before the learned judge or the appeals from his orders. Further, there are no exceptional circumstances which would warrant permission being granted for this document to be admitted or adduced as fresh evidence in the appeals.

[81] The English Judgment was available at the time of the hearing of the applications in February 2022. Notably, even if, as the appellants intimate, the English Judgment could not have been adduced with reasonable diligence prior to the first instance hearings, the appellants sought, impermissibly, to draw the judgment to the judge's attention after the hearing via a letter from Appleby (BVI), which permission was ultimately and rightfully refused by the judge. This refusal did not precipitate a formal application by the appellants to the learned judge to rely on the English Judgment before rendering his decision on the three applications. Accordingly, the learned judge could not properly consider the English Judgment when rendering his said decision, the subject of these appeals. Accordingly, the appellants do not satisfy the first criteria on the **Ladd v Marshall** test in relation to the English Judgment. Moreover, I am not satisfied that the English Judgment which is a judgment of another court, between different parties, is important evidence or evidence of anything that can further advance or have an important influence on the issues in and the outcome on the appeals or the three applications.

[82] The letter dated 20th September 2022 from Carey Olsen fails on all three limbs of the **Ladd v Marshall** test. Importantly, it is not in any sense evidence, but the product of lawyers representing a party to litigation. It cannot properly be taken into account by a court, it has no probative or evidential value whether on its own or together with the English Claim and will have no influence whatsoever on the court's determination of the three applications and the appeals.

[83] As to Borelli Cayman 3, this affirmation was filed on 16th March 2022 in the Cayman Island proceedings, after the conclusion of the hearings in February 2022 before the judge below. No application was made subsequently to rely on this affirmation as further evidence in these proceedings as to the alleged misconduct said to be the foundation of Mr. Wang's loss of trust in the

management of his investments in RAGOF and the Cayman Funds. In my judgment, Borelli Cayman 3 does not satisfy, in particular, the second **Ladd v Marshall** criteria. It does not, in any material way, advance or add to the important issues dealt with by the learned judge in his judgment, including breaches of the duty of full and frank disclosure, the conflicting statements as to Mr. Wang's purpose in proceeding *ex parte*, and whether it is just and convenient to continue or to regrant the Receivership Order and the JPL Order.

[84] The appellants/applicants point to what they describe as a new allegation of misconduct and wrongdoing - the investment in the Aviation Notes by GFIF (one of the Cayman Funds). However, I simply note that in Borelli Cayman 3, Mr. Borelli confirms: 'The JPLs do not take issue with the initial investment in the Aviation Notes and acknowledge that the COVID-19 pandemic and subsequent downturn in the aviation industry was an unforeseen event'. The JPLs' issue is with GFIF (not RAGOF) continuing to purchase Aviation Notes (over US$30 million of purchases) at par value or close to par after 21st April 2020.

[85] I am satisfied that Ford 1, explaining the origin and reasons for the usage of the filename 'Project Ninja', ought to be admitted and relied on as new evidence in the appeals. This evidence goes to the judge's inconsequential treatment of the said expression, particularly the word 'ninja', in his judgment. These were matters which were not dealt with during argument before the learned judge in January and February 2022, but arose or came to the judge's attention when, after the hearing had concluded on 28th February 2022, he requested counsel on both sides to assist him by providing electronic copies of their respective 'speaking notes'. Upon receiving the speaking notes of lead counsel for the appellants, it was headed 'Project Ninja'.

[86] In my respectful view, were the judge intending to consider this title or filename in his judgment, and to engage in extensive research and analysis of the meaning and negative connotations of the word 'ninja', fairness and justice required him to invite, at minimum, short written evidence and

submissions from the appellants, and, if necessary, short submissions from FRE on or about its use, and whether he was entitled or ought properly to draw any inferences (adverse or otherwise) from the appellants' use of it when determining any of the issues which were raised on the three applications. This, regrettably, the learned judge did not do, albeit he made clear that 'nothing turns upon the actual use of this title [by the appellants] here'.[50] However, the judge did devote a substantial sub-paragraph to it when dealing, importantly, with the factors which led him to conclude that 'this is an instance where Mr. Wang and his legal team had determined upon a goal – to have RAGOF wound up – and then to arrange the display of pieces, including the convoluted and unusual procedural steps required, to achieve it.'[51]

[87] The JPL 4th Report is dated 14th March 2022 and the 5th Report, 14th August 2022, both after the conclusion of the hearing on 28th February 2022. While these reports were filed in the proceedings below by court appointed officers, the JPLs, neither appellant sought permission to rely on them or any of them in relation to the judge's determination of the three applications, prior to delivery of the judgment. It is not for a judge to simply assume that a party is or will be relying on reports filed by court appointed officers, as a basis for determining pending applications upon which the judge has heard full argument. Likewise, it is not for a judge to take it upon himself to rely on reports filed by the court appointed officers after the conclusion of the hearing, as a basis upon which to determine the applications dealt with at that hearing, unless he invites the parties to address him on certain aspects of such reports.

[88] However, it behoves a party seeking to rely on any evidence coming into existence after the hearing (and before judgment is given), to make the appropriate application to the court to be able to do so. Upon making such an application, the judge may be propelled to invite submissions and determine whether the application should be determined on paper or whether

[50] See the judgment in the court below at para 134(2).
[51] See the judgment in the court below at para 133.

he should take oral submissions, and whether his proper course is to grant or dismiss the said application.

[89] In my judgment, the reports do not satisfy either the first or the second limb/criteria of the **Ladd v Marshall** test. They were not in existence at the time of the hearing and therefore do not satisfy the first criteria. Likewise, they do not give rise to any exceptional circumstances, and the appellants/ applicants have not relied on or demonstrated any exceptional circumstances, warranting this Court admitting them as fresh evidence. These two reports set out the results of continuing investigations by the JPLs of the major issues and allegations, and the conclusions which they have reached, some or most of which must be preliminary. These findings are not conclusive and are matters for trial. In that sense, they may be seen to not add further to the evidential basis upon which the appellants sought and obtained *ex parte* the Receivership Order and JPL Order as all these allegations were before the learned judge at both the *ex parte* and inter partes hearings of the three applications which are the subject of these appeals.

[90] However, in my view, these two reports do not address the important issue in these appeals as to the correctness of the judge's findings of material non-disclosure and fairness of presentation at the *ex parte* stage of these proceedings. Likewise, they do not address and cannot advance the findings made by the learned judge as to the purpose and strategy of Mr. Wang in applying *ex parte* for the Receivership Order. They do not advance the question of whether Mr. Wang's counsel, in an exchange with the learned judge at the *ex parte* Receivership Application hearing had, perhaps unwittingly, divulged or admitted Mr. Wang's real purpose of proceeding *ex parte* to have receivers appointed over the shares held by XYZ as his nominee in RAGOF, and whether in doing so for that purpose or objective, constituted an improper use or invoking of the court's jurisdiction to make receivership orders.

[91] These two reports, likewise, do not touch and concern the appropriateness of the subsequent *ex parte* application by the joint receivers for the appointment of JPLs, and the commencement of proceedings for the winding up of RAGOF in circumstances where it was, apparently, not Mr. Wang's intention to actually wind up RAGOF. For these reasons I am not satisfied that the 4th and 5th JPL Reports (or either of them) would probably have an important influence on the result of these appeals, so as to warrant them being adduced as evidence. For these reasons, I would, therefore, decline the application to admit them as fresh evidence in the appeals.

Second application

[92] As to the appellants' second fresh evidence application, in my view the evidence sought to be admitted – the Amended Claim Form and Particulars of Claim in the English Claim – do not satisfy all three limbs of the test in **Ladd v Marshall** and should not be admitted as evidence in the appeals. These documents were not in existence at the time of the hearing of the applications to discharge the Receivership Order and the JPL Order in February 2022. Moreover, they are not evidence of wrongdoing. They are the work product of lawyers representing the JPLs and the causes of action and allegations of facts are all matters for trial. The first limb of **Ladd v Marshall** applies to documents which though already in existence could not have been obtained by the applicant with reasonable diligence. In certain limited circumstances, an appellate court may, in its discretion, admit as new evidence documents which were not in existence at the time of the hearing of the application below.

[93] The original claim form in the English Claim was filed on 1st September 2022. I have already determined that it cannot be relied on as fresh evidence in the appeals. The Amended Claim Form in the said proceedings was filed on 14th November 2022 and the Particulars of Claim on 13th December 2022. While they allege claims of serious dishonesty and wrongdoing in relation to the management of RAGOF and the Cayman Funds, these are (as far as concerns RAGOF) allegations which were made and put before the learned judge below on the *ex parte* applications for the Receivership Order and JPL Orders.

[94] Arguably these documents (not being actual evidence of wrongdoing) do not take matters much further; and the new allegations in the Amended Claim Form and Particulars of Claim concerning the Aviation Notes, go not to the legitimacy of the initial investment in the Aviation Notes and the effect on them and their value by the COVID-19 pandemic and other factors, but to the continued purchase of these notes thereafter. These are all matters for trial which will not, in my view, have an important influence on the result of the appeals. For these reasons, the Amended Claim Form and the Particulars of Claim in the English Claim do not satisfy the first and second **Ladd v Marshall** criteria. There are no exceptional circumstances or factors warranting their admission as new or fresh evidence in the appeals and I decline to so admit them.

Third Application

[95] Likewise, the third fresh evidence application is dismissed. In my view, the new evidence sought to be adduced in the appeals by this third application did not exist either at the time of the hearing of the three applications before the judge below or the hearing and full argument on the appeals. There are no exceptional circumstances warranting the admission of the said affidavit and documents as new evidence in these appeals and the Court is not satisfied that they or any of them would have an important influence on the outcome of the three applications or the appeals.

[96] I turn now to the five broad issues at paragraph 31 above and the related grounds of appeal in each of these two appeals.

Category 1 - General observations – Improper purpose and artificiality of the applications
Appellants' submissions

[97] This category of 'errors' relates to grounds 8 to 13 of the Receivership Appeal and grounds 8 to 12 of the PL Appeal. The appellants criticised the 'general observations' made by the learned judge at paragraphs 118 to 130, his findings on artificiality at paragraphs 131 to 135, and his further observations and conclusions at paragraph 192 of the judgment. It is the appellants' argument

that these ‘general observations’ conveyed a central but misconceived sentiment and conclusion by the judge, which was that the Receivership and JPL (*ex parte*) Applications were ‘artificial’ and a ‘device’, which he stigmatised as being ‘convoluted’ and as representing a ‘pre-meditated solution in search of a sufficient portrayal of a problem to justify it’. They complain that the judge incorrectly saw the applications as an ‘exit mechanism’ deployed ‘to allow Mr. Wang to unwind [RAGOF] more quickly and cheaply than would be possible under a staged redemption in accordance with [RAGOF’s] governing documents’.[52]

[98] At section 15.5 of the judgment under the rubric ‘Artificiality’, the learned judge stated:

> “[131] The patent artificiality of the Receivership Application is a feature of this case. It raises questions whether or not the Court should have acceded to it. Mr. Wardell, QC, [counsel for Mr. Wang] anticipated this potential difficulty. He stated:
>
> > “There is an element of **artificiality** about this application, but it is the only route that we can see available to us to protect [Mr. Wang’s] interest.” (emphasis mine)
>
> [132] Floreat Intervenor’s [c]ounsel called the Receivership Application a ‘device’. This is a succinct and apt description. A receivership is generally a form of direct interim remedy to an actual or anticipated problem, rather than, as here, as a stepping-stone to a different form of interim relief.
>
> [133] Standing back, in my respectful reckoning, this is an instance where Mr. Wang and his legal team had determined upon a goal – to have RAGOF wound up – and then to arrange the display of pieces, including the convoluted and unusual procedural steps required, to achieve it.
>
> [134] A number of factors have led me to this conclusion.
>
> (1) One of these is the presentation of the alleged catalogue of wrongdoing on the part of Floreat and its principals. It was not presented in an overall financial context. The Court was not told that the assets which the allegations of wrongdoing concerned were arguably only a small proportion of the total assets under management and that there were different ways of viewing the significance or otherwise of the alleged wrongdoing, or whether there had been wrongdoing at all. The Court was also not told

[52] See Appellants’ Skeleton Argument at para 44.

that Mr. Wang had no complaint about the performance of a great part of assets under management. The Court was also not told, or at least not with sufficient detail, that Mr. Wang and Floreat had a major dispute about Floreat's unpaid fees. At the discharge hearing Mr. Wardell QC, submitted that gravity of wrongdoing is not relative to the value of the assets involved. At one level, that is of course correct. Wrongdoing vitiates trust in all things. At another level, and in particular where a tribunal has to apply a just and convenient remedy, the Court needs to have an overview of the entire context. It is not each and every wrongdoing that warrants a receivership or provisional liquidation order. Here, at the *ex parte* Receivership Application hearing, the Court was given a carefully prepared presentation which narrowly showcased the alleged wrongdoing, but which omitted significant surrounding circumstances. That was wrong. I will address this further below in the context of full and frank disclosure.

(2) The artificiality of the Receivership Application, and indeed Mr. Wang's entire scheme, was brought home in an unexpected way. At the end of the discharge hearing, I asked Counsel for all parties to provide the Court with their speaking notes to assist with preparation of the judgment. One of Mr. Wardell, QC's speaking notes came headed with a telling title: 'Project Ninja'. I can take judicial notice of what the terms 'project' and 'ninja' connote. The latter evokes a certain image in popular culture and is described by Wikipedia as 'a covert agent or mercenary in feudal Japan', whose functions 'included reconnaissance, espionage, infiltration, deception, ambush, bodyguarding and their fighting skills in martial arts, including ninjutsu'. The description goes on to say that ninjas engaged in 'covert methods of waging irregular warfare'. The title of 'Project Ninja' encapsulates Mr. Wang's entire scheme, including the desire for speed, stealth, aggression, surprise, infiltration, information gathering and an unusual degree of agility to surmount the legal obstacle course facing Mr. Wang. Nothing turns upon the actual use of this title here: it merely describes what the Court had already seen with the benefit of evidence and submissions from both sides.

(3) Equally, the success of the scheme depended upon Mr. Wang retaining control of the narrative. In my respectful judgment, it was more the desire to do so than any significant risk to assets or destruction of documents which lay behind Mr. Wang's insistence upon proceeding *ex parte*.

[135] It is unusual to think of receivership as a device, rather than as a remedy. In my respectful judgment, this was not so much of a case of a problem in search of a solution, as a pre-meditated solution in search of a sufficient portrayal of a problem to justify it. Thus, the alleged

> wrongdoing was given a magnified emphasis whilst surrounding circumstances were left out of the picture. This only became apparent to me when Floreat was given an opportunity to put its own side of the matter."

[99] In support of their arguments under this first category of 'errors', the appellants also refer to certain statements by the learned judge at paragraph 192. In particular, where he opined, inter alia, that if he had understood Mr. Wang's present scheme 'merely to be what it appears to be (namely the quickest and cheapest way to Mr. Wang's desired result of unwinding the whole structure and abstracting the value of his investment), then I would have been considerably more reluctant to grant the Receivership Order sought and indeed I would probably have refused it'. I would comment at this stage that the judge was, at that section of his judgment, dealing specifically with the allegations of breach of the duty of full and frank disclosure in relation to the *ex parte* Receivership Application hearing. He prefaced the statement above by referring to his 'recapitulation that Mr. Wang was making the applications in circumstances where he had no clear exit mechanism from the structure', but he (the judge) was now 'persuaded that that was an incorrect understanding, since a staged redemption process was possible or arguably possible, and there were very probably other ways in which Mr. Wang or his agents or nominees could get themselves into a position where they would have standing to apply for the appointment of liquidators over RAGOF if other remedies should not have been reasonably available.'

[100] The appellants contend that the judge was wrong to have formed that view of the purpose and motive of Mr. Wang in implementing the strategy and steps which he did by first obtaining the Receivership Order over the shares held by XYZ in RAGOF. They argue that, to the contrary, 'Mr. Wang's ultimate objective was to bring proceedings for the just and equitable winding up of RAGOF, owing to the complete breakdown of trust and confidence that had resulted from the evidence of serious wrongdoing in relation to the Fund… securing the appointment of Court officers who could investigate and seek redress for that wrongdoing'. In relation to standing, it was conceded by Mr. Wang that, as the beneficial owner of the shares in RAGOF (97%), he arguably lacked the standing necessary to bring

proceedings for the just and equitable winding up RAGOF, and contractually, XYZ, had the right to decline to sue and was not willing to do so. In those circumstances he commenced Claim No. BVIHC(COM)2021/0144 against XYZ, 'for the transfer of shares into his [Mr. Wang's] own name'.[53] Further, because of what he perceived as a real risk that the value of his investment in RAGOF would be diminished before he could secure the transfer of the shares and prosecute the winding up proceedings, and so as not to tip of FRE, he sought urgent *ex parte* relief. This included the appointment of receivers who would be authorised 'to take steps necessary to preserve the value of [his] interest in the shares', and to launch the just and equitable winding up proceedings and apply for the appointment of the JPLs 'to secure the preservation of the assets of [RAGOF]'.[54] Accordingly, contrary to the judge's observations, it is argued that there was nothing artificial or impermissibly convoluted about these steps.

[101] However, (and this featured much in the appeals) at the root of these 'observations' is the learned judge's treatment of the exchange between him and Mr. Wardell, KC, which had taken place close to the end of the *ex parte* hearing of the Receivership Application on 26th August 2021. This exchange, and how Mr. Wardell, KC dealt with it at the *ex parte* hearing, was considered by the judge at section 15.3 of the judgment. This is the exchange:

> "THE COURT: Let's just go back to the beginning so that I fully understand the structure. In essence, what you are doing is applying on an *ex parte* basis for the appointment of receivers and you are not doing it on a return date basis. You are doing it basically until further order, isn't that right?
>
> [MR. WARDELL, [KC]]: Yes
>
> THE COURT: And one of the reasons why you are doing that is obviously you are concerned to be able to – to get to the point of it basically, you have identified an exit mechanism for your client out of this very large investment structure that he has, to use [an] Americanism, gotten himself into in circumstances where really there isn't really a clear exit mechanism at all. And the first part of this exit mechanism involves obtaining a receivership over shares which are being held by, in essence, a nominee. There is no real interest in the pleadings ['pleadings' should have been 'proceedings'].

[53] See Appellants' Skeleton Argument at para 45(b).
[54] Ibid, at para 45(c) and (d).

So that basically is simply the supporter, as it were, and none of this really matters for the nominee whatsoever, one would simply assume that he would obey the orders of the Court.

[MR. WARDELL, [KC]]: Exactly."[55]

[102] While accepting, to some extent, Mr. Wardell KC's stated position that his response 'Exactly' was to the very last proposition which he the judge had posited with regard to the nominee position, (and was not directed to the entirety of what the judge had said during the second part of his intervention and exchange), the difficulty which the learned judge had is that, 'despite being presented with the opportunity to correct the [c]ourt's understanding, Mr. Wardell QC, did not do so.' In other words, the judge was concerned that Mr. Wardell KC, on behalf of Mr. Wang, had not taken the opportunity at the *ex parte* hearing to correct the substance and gravamen of the judge's declared understanding as to the reasons why Mr. Wang was proceeding in the way he was, and doing so *ex parte*, with the ultimate aim of achieving an exit mechanism out of his investments in the Funds, when there was no clear exit mechanism at all. This concern was made clear by the judge who said at paragraph 128:

> "…This has a particular significance since Mr. Wardell, [KC], had a duty of full and frank disclosure and fair presentation when presenting the application *ex parte*. Floreat's Counsel had been entirely reasonable in his assumption that Mr. Wardell, [KC], had confirmed the exactitude of the entire attempted recapitulation that had preceded his answer. Indeed, that had been my understanding too, and not being corrected, I proceeded on that basis to make the Receivership Order sought."

[103] This led the learned judge to retort that since Mr. Wang, at the discharge hearing, had disavowed the idea that he had brought the Receivership and JPL Applications as an exit mechanism, it meant that 'the Court had been allowed by Mr. Wardell, QC, to make the *ex parte* Receivership Order on an erroneous basis.'

[104] Before this Court, Mr. Mumford KC, in discharging his duty as lead counsel for the appellants, and faced with this concern by the judge, sought to explain it

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[55] See the judgment in the court below at para 127.

away on the basis that there was ample other evidence as to the correct purpose and reason for the way in which Mr. Wang proceeded, which purpose was not impermissible, artificial or convoluted, and which was necessary in circumstances where Mr. Wang, as the ultimate beneficial owner of the shares in RAGOF, could not contractually have the shares transferred to him by XYZ, and did not have the necessary standing himself to bring the application to wind up RAGOF and to appoint provisional liquidators.

[105] As concerns the said 'exchange' between the judge and Mr. Wardell KC at the *ex parte* hearing, the appellants make three specific observations. The first is that it is obvious that the response 'Exactly' by their counsel, was only to the proposition being put to Mr. Wardell KC by the judge that the nominee (XYZ) had no real interest in the proceedings. This seems to have been accepted, at least tentatively, by the judge as arguable. The second, is that it was correct that Mr. Wang was seeking to 'exit' RAGOF in order to extricate himself from the situation he had been placed in by the Floreat Principals' 'wrongdoing', and while his 'exit' from RAGOF 'was in that limited sense one of the purposes of the applications – it was the obvious corollary of the ultimate remedy, being the just and equitable winding up of the entire Fund'- it was not 'an end in itself, independent of the wrongdoing'. This the appellants say was because important other aspects of the relief ultimately sought were that there would be an independent investigation into the wrongdoing and redress could be sought on behalf of the RAGOF; and there was no other exit mechanism that would achieve that. Third, the appellants contend that it could not sensibly be supposed that the appellants' counsel was accepting as correct the proposition that the sole purpose of the applications 'was to achieve an easier, cheaper or clearer route to an exit, as an end in itself.'

[106] In my view, the difficulty with these three points is what the learned judge pointed out in his judgment. Mr. Wardell, KC did not disavow the rest of the proposition put to him by the judge at the *ex parte* Receivership Application hearing when he had the opportunity to do so. This related to the substantive part of the judge's summary of his understanding of Mr. Wang's 'exit mechanism'. Also, and importantly, the appellants' said three points do not sit

well with the suggestion by Mr. Wang in his submissions made at the hearing of the application to set aside the Receivership Order, that the purpose of the Receivership Order was to 'effect the transfer of the shares to himself with the consequence that the receivership … would then fall away', and 'the transfer of the shares into Mr. Wang's own name is of course the very purpose of the proceedings in which the Receivership Order was made.'[56]

[107] Nevertheless, the appellants underscored in their skeleton argument at paragraph 49, that Mr. Wang's only reason for seeking an 'exit' from RAGOF was his discovery of serious wrongdoing involving the misuse of his investments by those to whom he had entrusted with their management, 'in order to feather their own nests and pass themselves off to other clients as the owners of an extensive English estate [Springs Farm], and an impressive collection of modern art [the Shanti Artwork]'. This led to a loss of trust and confidence in the Floreat Principals. They contended also that, in the circumstances, the winding up of RAGOF was a 'perfectly proper relief to seek'. Looked at in that way, there was nothing, in the appellants' view, artificial about seeking interim relief of a receivership order and provisional liquidation.

[108] The appellants take particular issue with the judge's use, at various points in the judgment, of the epithets 'artificial', a 'device', 'convoluted' and 'predetermined'. They argue that if, as appears to be the case, what was meant by them was that the appellants were seeking relief for an improper purpose or in a manner which was outside the usual principles on which the court acts when granting a receivership, this was a finding that was both unexplained and unjustified. They say that 'it was perfectly proper and consistent with established principles, for a receivership to be sought in tandem with other relief, in order to allow rights to be exercised (whether for the purpose of enforcement or asset preservation) that the applicant could not himself exercise'.

[56] See the judgment in the court below at para 117(19).

[109] The appellants also levy complaint regarding statements of the learned judge at paragraphs 119 – 122 of the judgment. The judge's observations are premised on Mr. Wang's submission regarding his 'collateral purpose' in obtaining the Receivership Order, and his introduction of the said application at paragraph 5 of his skeleton argument at the *ex parte* hearing, which the judge considered to be 'instructive'. The pertinent part of that paragraph 5 (quoted in full at paragraph 119) reads:

> "The Receiver Application … particularly seeks an Order that receivers be appointed over the relevant shares in RAGOF and empowered to pursue, in the name of XYZ, just and equitable winding up and provisional liquidation applications in respect of RAGOF. Such an Order is crucial if serious issues (described below) regarding the mismanagement of RAGOF and the need for a winding up are to be brought before this Honourable Court and properly addressed…"

[110] The judge then stressed that 'the transfer of the shares in RAGOF into Mr. Wang's own name' was not stated as being the purpose, let alone 'the very purpose of the Receivership Application' and 'Mr. Wang did express an intention that the shares might be transferred to him, at which point the Receivership would fall away'. This apparent difference in the stated purpose and objective for the *ex parte* Receivership Application, concerned the judge, particularly in the context of the court's assessment of whether it was just and convenient to grant the application for the purpose for which it was brought. In response to the apparent concern by the judge that the appellants had changed their position as to the purpose of the Receivership Application, and he had been misled by them on the *ex parte* application, the appellants argued (respectfully) that the judge had become confused, and that such a conclusion was unjustified. They argued that the judge had confused the purpose of the substantive share transfer proceedings (to obtain a transfer of the shares) with that of the Receivership Application, which was to enable the winding up of RAGOF to be commenced and to secure interim relief to preserve the value of the shares pending their transfer. It is their submission, therefore, that there was no inconsistency or anything improper in this.

[111] In my considered view, this does not sufficiently answer the judge's understandable concern, that the appellants seemed, from Mr. Wang's various

statements at the *ex parte* hearing and subsequently, to be giving at least two different purposes or objectives for his application for the Receivership Order - one being ultimately to wind up RAGOF under the just and equitable ground, and the other being to transfer the shares in RAGOF to Mr. Wang or a third party nominated by him and to then disband the winding up of RAGOF. In my judgment, these are material considerations which go to the exercise by a court of its power and discretion to appoint receivers over shares in a company and to do so, having been satisfied that in all the circumstances, it is just or convenient. When such a draconian order, with far reaching implications and effects, is sought by an applicant on an *ex parte* basis, the applicant and its counsel are both under a clear and profound duty of full and frank material disclosure and to present the said application fairly. This duty goes no less, in the case of an application for a receivership order, to full and honest disclosure to the court of the real purpose or purposes (including collateral purposes) for which such an order is being sought.

[112] With regard to the way in which the judge dealt at paragraph 134(2) of the judgment with the 'Project Ninja' filename on the appellants' counsel's speaking notes sent to him after the conclusion of the hearings on the three applications, the appellants characterise this as the 'starkest example' of where the judge unjustifiably 'presumed against Mr. Wang'. The gravamen of their complaint is that the judge's comments about this were made without first inviting submissions or evidence on the point whatsoever, and had he done so, it would have been made clear to him that the use of this term was unrelated to the appellants' litigation strategy.

[113] It is correct that the learned judge cited this as one of the three reasons which led him to conclude that 'this was an instance where Mr. Wang and his legal team had determined upon a goal – to have RAGOF wound up – and then to arrange the display of pieces, including the convoluted and unusual procedural steps required, to achieve it'. It is also correct, in my judgment, that the judge, having become aware of the use of this heading or filename after he had reserved his decision, ought, if he considered it to be of any evidential value or that it may be supportive of a conclusion or finding which he was considering

(especially one adverse to Mr. Wang), to have invited short written submissions and/or affidavit evidence on it from the appellants, with reply submissions from FRE. This he did not do, albeit he stated that nothing turned on the actual use of this title. In the end the judge treated it (as understood by him based on the various definitions of the term 'ninja', most of which were concerning) as merely describing 'what [he] had already seen with the benefit of evidence and submissions from both sides'.

[114] Mr. Andrew Ford, an English solicitor representing the Floreat parties, has, in Ford 1, explained the origin and use of this name as the filename, and that it had nothing to do with Mr. Wang's litigation strategy. This is the kind of evidence which the learned judge ought to have invited before making any comments whatsoever in his judgment about the filename 'Project Ninja'. In failing to do so he clearly erred. However, this was but one of three reasons given at paragraph 134 for his conclusion in which he characterised the 'display pieces' conceived to achieve Mr. Wang's and his legal teams' predetermined goal – to have RAGOF wound up – as 'convoluted and unusual procedural steps'. In order to properly assess the correctness of this conclusion, it is necessary, in my view, to consider the correctness of each of the three reasons relied on by the learned judge, including his treatment of, and any reliance upon, the 'Project Ninja' filename.

[115] However, the appellants point to another consequence of the judge's statement at paragraph 170: 'Project Ninja had a lot of moving parts, and a very narrow window for possible success'. They argue that this 'wholly misplaced criticism of Mr. Wang's motives and approach in turn led the learned judge impermissibly to downplay the significance of the wrongdoing that had been identified' and led him to take an entirely wrong view of the risk of dissipation of assets which justified the appointment (and continuation or regrant) of provisional liquidators. In particular, they argue that this led the judge to accede to a submission made by FRE that the wrongdoing alleged related to only a 'small proportion' of RAGOF's assets, and that there was no complaint about the performance of 'a great part' of the assets. They submit that this submission

ought to have been roundly rejected by the judge and, in not doing so, he fell into error.

[116] To debunk the judge's assessment, the appellants, in their skeleton argument, point specifically to the wrongdoing alleged in relation to Springs Farm as being 19% of the net asset value under management and, in addition, to the strong evidence of impermissible fees being taken to the tune of US$12 million. These they contend, aggregate to 'over a quarter of the value of RAGOF' which, on any reasonable view, is a significant and not a small portion. Further, discounting the loans used to acquire the residential properties occupied by Mr. Wang's family members, the Springs Farm wrongdoing concerns over 35% of RAGOF's available assets under management. Furthermore, more wrongdoing beyond that of which Mr. Wang was aware at the *ex parte* stage, has been discovered as a result of the JPLs investigations as set out in their various reports, which the appellants submit, the judge wrongly disregarded. This was one of the three factors which the judge said led him to his conclusion at paragraph 133 and it is set out in paragraph 134(1) of the judgment which is quoted in full at paragraph 98 above.

[117] In my view, there is some merit in the appellants' criticism of the judge's characterisation of the assets concerning which Mr. Wang had made allegations of serious wrongdoing and misconduct at the *ex parte* stage, as 'a small proportion of the total assets' under management. There is also merit in their point that misconduct and wrongdoing with respect to some assets, leads to a breakdown of trust and confidence in the management of all the assets, as the judge himself accepted. In my opinion, on any reasonable view, the assets of RAGOF said then to be the subject of misconduct and wrongdoing by the Floreat Principals, were 'substantial' or significant.

[118] The main asset mentioned is Springs Farm, a 300 acre estate in Berkshire, England acquired in April 2014 by RAGOF for 15 million pounds sterling and the significant amounts expended subsequently on its redevelopment, upkeep, operation and furnishing; and the alleged areas of rent (£509,140) owed by H. Otaibi who occupies it; and the alleged unpermitted management fees (said to

amount to US$12 million) charged to RAGOF alleged to be in contravention of the governing documents. The other assets alluded to in some detail (the Shanti Artwork), and the alleged unpermitted fees paid to the Floreat Parties by the Cayman Funds - in contravention of the governing documents, totalling US$6.2 million, are not assets of RAGOF.

[119] However, the judge's statements at paragraph 134(1) above also speak to the alleged breaches of the duty of full and frank disclosure and fair presentation at the *ex parte* stage of the proceedings. In short, the learned judge made a plausible connection between the deficiencies and inadequacies of Mr. Wang's *ex parte* application, evidence and presentation at the hearing before him, concerning the range and values of the assets of RAGOF under management (not just Springs Farm), the absence of complaints by Mr. Wang regarding the management of some or most of those assets, and the failure to mention that there was a major dispute over Floreat's fees with Mr. Wang, as pointing, on the one hand, to breaches of the duty of full and frank disclosure, with, on the other hand, the predetermined goal or purpose of Mr. Wang's litigation scheme, as encapsulated by the judge at paragraph 133. This is clear from the judge's conclusion at paragraph 134(3), also quoted in full at paragraph 98 above.

FRE's submissions

[120] This first category of alleged errors by the judge concerning his findings as to the true purpose of the Receivership Application made by Mr. Wang *ex parte* was dealt with by FRE at section G.1 of its skeleton argument. Firstly, they point out that Mr. Wang, in his appeal skeleton argument, does not challenge the judge's conclusion that the true purpose of the Receivership Application was that identified by the judge. FRE also points out that in his skeleton argument, Mr. Wang accepts that this was the purpose at paragraph 45. Paragraph 5 of Mr. Wang's skeleton argument in support of the *ex parte* Receivership Application, which the judge found to be 'instructive', states, in material part, that the said application:

> "5. … seeks an Order that receivers be appointed over the relevant shares in RAGOF and empowered to pursue, in the name of XYZ, just and equitable winding up and provisional liquidation applications in respect of RAGOF. Such an Order is crucial if serious issues (described

below) regarding the mismanagement of RAGOF and the need for a winding up are to be brought before this Honourable Court and properly addressed…"

[121] Instead, FRE argues, that section C1 of the appellants' skeleton argument focuses on the judge purportedly 'stigmatising' the Receivership Application as 'artificial' and 'a device', which criticisms, it submits, are baseless, for the reasons identified at paragraph 116 of FRE's skeleton argument. They point first to the judge not being alone in using the term 'artificial' to describe the said application, since this term was also used by Mr. Wang's counsel in his description of it. Secondly, by calling it 'a device', what the judge meant was that it was 'a stepping-stone to some different form of interim relief' and is an apt description since it was a device to by-pass the statutory requirement in BVI that only a registered shareholder could apply for winding up or JPL relief. Thirdly, Mr. Wang could not 'quibble' about the judge's finding at paragraph 133 that he had determined the goal of winding up and had conceived the Receivership Application as a means of achieving it, in circumstances where he had no standing to apply for such relief himself.

[122] As to the 'Project Ninja' issue, FRE categorises what the judge said at paragraph 134(2) as 'a relatively peripheral observation'. He made no finding that this was the reason for the use of that phrase, and expressly stated that nothing turns on its use. I have already dealt with this, the manner and timing in which it came to the judge's attention, and his error in not inviting evidence and submissions on it from Mr. Wang and FRE, before dealing with it in the manner in which he did at paragraph 134(2).

[123] FRE disagrees with the appellants' contention that these observations and findings complained of by them led the learned judge to 'downplay' the wrongdoing alleged by Mr. Wang against the Floreat Parties. Instead, FRE argues, the judge put these allegations in their correct context, as mere allegations which are vigorously disputed by Floreat, and the determination of which are matters for trial.[57] It was not the role of the judge to conduct a mini

[57] See the judgment in the court below at paras 134(1) and 187.

trial of these heavily contested allegations, and it would have been wrong for him to do so. The correct approach, which he did adopt, was to take into account that serious allegations had been made. Accordingly, FRE submits, that there is no merit in any of the appellants' criticisms at section C1 (and the respective grounds of appeal) of the judge's analysis of the true purpose of the Receivership Application.

Analysis and Conclusion: General Observations - Improper purpose and artificiality of the Applications

[124] This first category of alleged errors relates to grounds 8 to 13 and 8 to 12 of the notices of appeal in, respectively, the Receivership Appeal and the PL Appeal. These grounds are identical in their criticisms of the judge's 'general observations', with ground 10 being an additional ground in the Receivership Appeal only. By ground 10, Mr. Wang contends that the learned judge confused the purpose of the Receivership Application (which was to preserve the shares pending transfer by enabling urgent relief to be obtained), with the purpose of the share transfer proceedings in which the application was brought to obtain a transfer of shares; and, in doing so, he drew the false adverse conclusions as to the artificiality and improper purpose of the *ex parte* applications. As such, these grounds in both appeals may, conveniently, be dealt with together, and with ground 10 being given separate consideration.

[125] The starting point, in my judgment, is the purpose and characteristics of each of these interim reliefs, and the requirements for obtaining them, especially when proceeding *ex parte*. The appointment of a receiver is considered one of the court's 'nuclear weapons' – a draconian relief. As such, it is not to be proceeded with or deployed lightly, but only after careful consideration of the scope of the court's statutory jurisdiction and the principles which underpin and guide the court's exercise of discretion and its determination of whether it is just or convenient to make such an order.

[126] The jurisdiction vested in the High Court or a judge thereof to appoint a receiver by interlocutory order is found at section 24 of the **Eastern Caribbean**

Supreme Court (Virgin Islands) Act ("**Supreme Court Act**").[58] A receivership order may be made in all cases in which it appears to the court to be 'just or convenient' that it should be made, and the order may be made either unconditionally or on such terms and conditions as the court thinks just. Section 24 confers a wide discretion on the court to appoint receivers and to do so over an undefined or unspecified range or types of properties or powers. The power to make a receivership order and on what terms, is delimited only by what the judge considers or is satisfied is 'just or convenient' in the particular circumstances of the matter. Procedurally, the power is to be exercised pursuant to the requirements of Part 51 of the CPR. Part 51 deals with the appointment of receivers generally and includes an application to appoint a receiver to obtain payment of the judgment debt from the income or capital assets of the judgment debtor.

[127] By CPR 51.2(1) and (2), an application to appoint a receiver must be supported by evidence on affidavit. It may be paired with an application for an immediate injunction preventing the respondent from dealing with any property identified in the application. CPR 51.2(3) provides: 'If an application for an immediate injunction is made, the application for the appointment of a receiver and for an injunction may be made without notice.' There is no provision in Part 51 which permits an application to appoint receivers simpliciter to be made without notice. Mr. Wang's Receivership Application filed on 20th August 2021 was for the appointment of receivers over the shares held by XYZ in RAGOF, and for certain other orders including an order for service out on XY and XYZ of the claim and other documents to be filed in what was referred to in the said application as the 'Transfer Proceedings' (Claim No. BVIHC(COM)2021/0144). The application to appoint receivers was not coupled with an application for injunctive relief. Accordingly, pursuant to CPR 51.2(3), it was technically impermissible for the said application to be heard *ex parte*.

[128] However, this point was not taken by FRE either at the discharge hearing or in the appeals. FRE's objection to jurisdiction to make the Receivership Order

[58] Cap. 80 of the Laws of the Virgin Islands.

rested on issues of standing and on an impermissible use of this jurisdiction by Mr. Wang. These objections were roundly rejected by the learned judge at paragraph 141 of the judgment, and at paragraph 136, the judge agreed with Mr. Wang that the court has the jurisdiction to make the Receivership Order. Moreover, the CPR 51.2(3) issue was not raised during the hearing of the appeals and cannot be relied as a ground or basis upon which to uphold the judge's setting aside of the Receivership Order obtained *ex parte*. In any event, this is procedural. It does not go to the jurisdiction of the court under section 24(1) to make a receivership order, but to the manner in which the court is to exercise its undoubted power under that section to appoint receivers. Suffice it to be said that the learned judge did not consider the provisions of CPR 51.2(3) either at the *ex parte* hearing or in reasoning to this conclusion on jurisdiction at paragraph 136. His focus was on the court's broad power under section 24 of the **Supreme Court Act** to make such order on the basis that it is just or convenient to do so, and whether to grant the receivership sought would be impermissibly relieving Mr. Wang of 'the consequences of his choice not to own the shares directly'.

[129] The power to appoint provisional liquidators is vested in the High Court by section 170 of the **Insolvency Act**. It provides that the court may, upon application by, inter alia, the company, a creditor or a member, and in circumstances where there is an extant application before the court to appoint liquidators of the company, appoint either the Official Receiver or an eligible insolvency practitioner as provisional liquidator of the said company. Mr. Wang, as the beneficial owner of the shares in RAGOF, had no standing to apply either to wind up RAGOF under section 167 or to appoint provisional liquidators over RAGOF pursuant to section 170 of the **Insolvency Act**. He could only have the requisite standing if the shares were transferred to him by the nominee. This never occurred and so his disqualifications in these two regards remained operative.

[130] By sub-section (3) of section 170, an application by a member to appoint provisional liquidators may only be made with the leave of the court. This provision applies to where, as in the instant matter, XYZ (the nominee of the

shares in RAGOF) by the joint receivers commenced proceedings pursuant to section 167 to wind up RAGOF under the just and equitable ground, and pursuant to section 170 to appoint themselves as provisional liquidators of the said company. In the instant matter, the joint receivers were expressly authorised by the order appointing them as such, to commence proceedings for the winding up of RAGOF, and proceedings for the appointment of provisional liquidators pending the hearing and determination of the winding up application.

[131] By section 170(4) of the **Insolvency Act**, the court may make an order appointing provisional liquidators of a company if: (a) the company itself consents; or (b) the court is satisfied that the appointment: (i) is necessary for the purpose of maintaining the value of assets owned or managed by the company; or (ii) it is in the public interest. Also, by section 171, a provisional liquidator has all the rights and powers of liquidators 'to the extent necessary to maintain the value of the assets owned or managed by the company, or to carry out the functions for which he was appointed'. As with the power under section 162 of the **Insolvency Act** governing the court's power to appoint liquidators of a company, the power in section 170 to appoint provisional liquidators is discretionary, as the court 'may' make such an order.

[132] Accordingly, assuming (without deciding) that it was right and proper for the judge below to proceed *ex parte* to hear and determine the Receivership Application, and assuming also (but not deciding) that Mr. Wang had the standing necessary to bring such an application under section 24 of the **Supreme Court Act**, the judge was tasked with deciding whether, on the materials before him at the *ex parte* hearing, it was just or convenient to make the order which he did appointing receivers over the shares held by XYZ in RAGOF. In making the application *ex parte*, Mr. Wang had the onus of satisfying the judge that it was just or convenient in all the circumstances to make the order sought. Importantly, he also had the duty, in common with all litigants/parties proceeding without notice to the other parties, to make full and frank disclosure of all material facts and to make a fair presentation of the application. This duty includes disclosing to the presiding judge any possible

or likely defences or arguments, legal or factual, against making the order, and to disclose all material facts known to him and which he and his lawyers could have discovered with reasonable diligence. These issues are at the core of the judge's decision to discharge both the Receivership Order and the JPL Order. That said, the duty to give full and frank disclosure is not limitless. It relates to matters relevant to the application being heard *ex parte* and to its proper determination by the judge. However, it is not for the applicant or their lawyers to determine what is material. That ultimately is a matter for the court and the judge dealing with the application.

[133] In my judgment, a Receivership Order, being a discretionary draconian interim remedy, it behooved Mr. Wang to disclose and to make clear to the judge the 'purpose' of seeking such an order, and to ensure that the presiding judge at the *ex parte* hearing did not have an incorrect understanding of or was left to misunderstand what was Mr. Wang's real purpose for making the Receivership Application, and in doing so without notice. The proper discharge of this fundamental duty of full and frank disclosure and fairness in presentation, was of critical importance in circumstances where, as here, Mr. Wang was not a direct member or shareholder in RAGOF, and thus had no standing to move the court to put RAGOF into compulsory liquidation, and/or to have provisional liquidators appointed over RAGOF and its assets as an interim measure. It was also of critical importance for the judge to understand clearly why Mr. Wang, as the ultimate beneficial owner of the shares in RAGOF, could not or did not have the shares transferred from his nominee XYZ into his name, thereby gaining full control of the shares and giving him the requisite standing under sections 167 and 170 of the **Insolvency Act** to wind up RAGOF under the just and equitable ground and to appoint provisional liquidators of the said Fund.

[134] It was no less critical for the judge to have a full understanding and appreciation as to why the nominee holder of the said shares was not itself applying to wind up RAGOF and to have joint provisional liquidators appointed, as a means of wrestling control of RAGOF away from the Floreat Principals who, it is alleged by Mr. Wang, had committed serious misconduct and wrongdoing in their management of the assets of RAGOF (as well as the Cayman Funds). These

issues not only go to the duty of full and frank disclosure which Mr. Wang had in making the Receivership Application *ex parte*, but were also material considerations in the judge's proper assessment as to whether it was just or convenient for him to make the Receivership Order.

[135] With that said, I now turn to consider the appellants' alleged specific errors and mischaracterisations by the judge in his general observations about Mr. Wang's real or improper purpose in seeking to have receivers appointed over the shares held by XYZ in RAGOF and in empowering such receivers to move the court to wind up RAGOF and to have provisional liquidators appointed over the said company as an interim measure; and as to the artificiality of the *ex parte* applications.

[136] In my considered view, there is no merit in this first category of alleged errors by the judge in making general observations concerning the purpose of Mr. Wang's Receivership Application and the artificiality of him proceeding on an *ex parte* basis to obtain such an order. These observations were made at paragraphs 118 to 135 of the judgment. The judge first compared what Mr. Wang had said at the discharge hearing with what he had said in presenting his application at the *ex parte* hearing, as his purpose for making the *ex parte* Receivership Application. He mused that the transfer of the shares into his own name was not stated as being a purpose, 'let alone 'the very purpose' of the Receivership Application.'[59] Next, the judge considered that contrary to Mr. Wang's submissions at the discharge hearing, there was no evidence of any such attempt to transfer the shares to Mr. Wang, nor of any obstruction thereof by FRE, before the court at the *ex parte* hearing of the Receivership Application. The matter had been put entirely speculatively upon that occasion.

[137] On this aspect, the learned judge concluded at paragraph 125 that the impression given was that Mr. Wang had made no prior attempts to have the shares transferred into his name and any such alleged transfer and alleged obstruction or blocking of such transfer by FRE 'were not within the

[59] See the judgment in the court below at para 121.

contemplation of the court at that *ex parte* hearing.' In my considered view, these were reasonable and proper conclusions which were open to the learned judge on the evidence before him. Accordingly, there is no proper basis upon which this court can find that the learned judge was incorrect in to draw such conclusions or that his said conclusions were blatantly wrong.

[138] Next, the learned judge considered the matter of Mr. Wardell, KC's response 'Exactly' during his exchange at the *ex parte* hearing with the court as to what was the purpose, as the judge understood it, for Mr. Wang bringing the Receivership Application and doing so *ex parte*. I have already dealt with this in some detail at paragraphs 97 to 101 above. In short, the learned judge was correct in his observations and in the conclusion on this aspect which he reached at paragraph 128 of his judgment.

[139] Also, in my considered view, the judge's conclusion at paragraph 129 that if the assertion at the discharge hearing by counsel for Mr. Wang that he had not brought the Receivership Application and the JPL Application 'as an exit mechanism' was correct, 'then this means the Court had been allowed by Mr. Wardell, KC, to make the *ex parte* Receivership Application on an erroneous basis', cannot be assailed. This view of the matter as an exit mechanism is fortified by the differing and to some extent conflicting statements by Mr. Wang as to the purpose and objective of the Receivership and JPL Applications. In particular, that upon the transfer of the shares in RAGOF from XYZ to himself or to his third-party nominee being achieved by the provisional liquidators, the receivership will fall away as ultimately would the winding up of RAGOF.

[140] The use by the judge of the terms 'artificial' or 'artificiality' to describe the Receivership Application as a feature of this case, is bolstered by the use of that very term by Mr. Wardell KC, during the *ex parte* hearing of the Receivership Application. In those circumstances the learned judge cannot be faulted for viewing the said application in that light. Here, the Receivership Application was for receivers to be appointed over the shares held not by Mr. Wang (the applicant for the Receivership Order) but by XYZ, the registered

owner of the said shares, and in circumstances where XYZ had standing to move the court to wind up RAGOF and to have provisional liquidators appointed as an interim measure to take control of the assets of RAGOF.

[141] However, the judge while accepting Mr. Wardell, KC's characterisation of the said application as having 'an element of artificiality', accepted FRE's counsel's characterisation of the Receivership Application as a 'device' as 'a succinct and apt description' for the reasons which he gave at paragraph 132. The real question in my view, is not whether the said application was aptly described and accepted by the judge as a 'device', but whether it being a stepping-stone to another or different form of interim relief, namely, an application to appoint provisional liquidators over the assets of RAGOF, rendered the Receivership Application impermissible or rendered it not just or convenient to appoint JPLs. This is an issue central to the determination of the major issues in the appeals, including whether the judge was wrong to conclude in the judgment that it was not just or convenient to make the Receivership Order, or if the said order ought to be set aside for material non-disclosures, it was a proper exercise of his discretion not to regrant it.

[142] The appellants took particular aim at the statement by the learned judge at paragraph 133 as to Mr. Wang's predetermined goal being to have RAGOF wound up and then prearranging the pieces, including convoluted and unusual procedural steps required to achieve that goal. They also take aim at the three 'factors' which the judge gave at paragraph 134 as leading him to this conclusion. As to the second of these factors – 'Project Ninja' – I have already dealt with this at paragraphs 112 to 115 above, and I have allowed in as new evidence in the appeals Ford 1 which addresses the use of the filename 'Project Ninja' and avers that it has nothing to do with Mr. Wang's litigation strategy or his real purpose for making the Receivership and JPL Applications. In my judgment the learned judge erred in not seeking, after the hearing, an explanation from Mr. Wang with regard to this filename, and it was inappropriate for him to place so much emphasis on the word 'Ninja' at paragraph 134(2) of the judgment.

[143] Further, even though the learned judge made clear that nothing turns upon the actual use of this title or filename, he did go on to state that 'it merely describes what the Court had already seen with the benefit of evidence and submissions from both sides'. The imputation of this statement is that the use of the said title or filename by Mr. Wang was, in the judge's mind, a factor confirmatory of his conclusion at paragraph 133 as to Mr. Wang's purpose for bringing the Receivership and JPL Applications and for doing so *ex parte*. In this limited sense the learned judge erred and this second of his three stated factors for reaching that conclusion was without any proper evidential basis, as Ford 1 demonstrates, and as learned counsel for FRE seems to have accepted at the appeal hearing before this Court.

[144] That brings us to the correctness and cogency of the two other factors relied on by the judge. This first factor goes to the apparent acceptance by the judge of FRE's criticism at the discharge hearing of Mr. Wang's treatment of the 'alleged catalogue of wrongdoing' by the Floreat Principals during the *ex parte* hearing, and not presenting such alleged wrongdoing 'in an overall financial context'. At paragraph 134, the learned judge identifies several matters which the court had not been told about at the *ex parte* hearing, which matters the judge clearly considered to be material. The first such omission was that 'the assets which the allegations of wrongdoing concerned were arguably only a small portion of the total assets under management'. At paragraphs 116 to 118 above, I accepted that there was some merit in the appellants' criticism of the judge's treatment of the assets of RAGOF under management by the Floreat Principals as 'small' and that they were, on any reasonable view, significant.

[145] However, as also pointed out at paragraph 119 above, this matter, as do the other matters identified by the learned judge at paragraph 134(1), go not just to the proper characterisation of the assets under management with RAGOF at the *ex parte* hearing and the appellants' criticism of the judge's treatment of it in the judgment, but to the issue of material non-disclosure at the *ex parte* hearing. Viewed through that prism, the cogency and correctness of the judge's treatment with these matters of omission at paragraph 134(1) are more conveniently considered under the general heading of material non-disclosure

and fair presentation to be dealt with at the appellants' categories 3 and 4 of the categories of errors allegedly made by the judge.

[146] The third factor identified by the learned judge for his conclusion at paragraph 134, is set out in paragraph 98 above. This statement speaks to the learned judge's conclusions as to Mr. Wang's reasons for proceeding *ex parte* to obtain the Receivership Order. Putting aside for the time being the issue of whether it was permissible for the judge below to consider a receivership application *ex parte* in light of the provisions of CPR 51.2(3) referred to above, an applicant for such an order (as with applications for injunctive relief) is required to satisfy the presiding judge that the said application can and ought to be proceeded with without notice to the other party or person who will be affected by such an order.

[147] The relevant considerations necessary to displace the general rule that applications or notice of them must be served on the defendant or other party, go to the urgency in obtaining such interim relief making no notice possible, or to the likely dangers or pitfalls of giving prior notice, such as to the preservation or dissipation of assets, which would have the effect of defeating the purpose of the application. These are the factors identified at CPR 17.4(4) which deals with the bases upon which a court ought to proceed without notice and, if appropriate, to grant an application for interim remedies.

[148] Specifically, as to the characterisation of Mr. Wang's *ex parte* Receivership Application as a 'device', the learned judge mused that it was unusual to think of such an application as a device rather than as a remedy. Paragraph 135, set out in paragraph 98 above, encapsulates the judge's view of these applications.

[149] In my judgment, the use of the term 'device' as opposed to being used as a 'remedy' may be just a matter of semantics. Put differently, it is a difference without any real consequence in the context of this matter. I say this because the more important question is not whether the judge considered these *ex parte* applications to be a 'device' (Mr. Wang's counsel having himself clarified the

Receivership Application as having some measure of 'artificiality') or even 'artificial', but whether the applications and the steps taken *ex parte* by Mr. Wang to appoint joint receivers over the shares held by XYZ in RAGOF, and by the joint receivers to appoint provisional liquidators of RAGOF having applied to have the RAGOF wound up under the just and equitable ground, not just strained the purpose of receivership as a remedy, but was an impermissible invoking of the court's receivership jurisdiction and an improper exercise of the court's powers to grant such a draconian remedy in the circumstances of this matter, rendering it neither just or convenient to do so.

[150] Considerations of the artificiality and predetermined nature of the Receivership Order and the JPL Order also falls also to be considered when assessing the judge's decision at paragraph 200 of the judgment not to regrant the said two orders, having concluded that both orders ought properly to be discharged for material non-disclosure. These are all live issues which fall to be considered under the other broad areas of alleged errors identified by the appellants.

[151] For these reasons I am not satisfied that this first broad area of alleged errors and criticisms of the learned judge's general observations as to Mr. Wang's real purpose for bringing the applications for the Receivership Order and subsequent JPL Order, are justified or were made out to my satisfaction so as to undermine the learned judge's conclusions and to render them patently wrong. These matters must be considered alongside his other key conclusions in discharging and not regranting the Receivership Order and JPL Order. Only then will we be able to properly assess the correctness of the judge's conclusions as to Mr. Wang's real purpose in making these *ex parte* applications, and, if he got it wrong, the extent which such errors infected his reasoning and conclusion as to material non-disclosures, the seriousness of the allegations of misconduct underlying such purpose and the *ex parte* applications, and his decision to discharge the said orders and not regrant them.

Category 2: Jurisdiction to appoint receivers

[152] This category deals with grounds 14 to 20 of the Receivership Appeal. At paragraph 136 of the judgment, the learned judge agreed with Mr. Wang's contention that the court has jurisdiction to make the Receivership Order under section 24(1) of the **Supreme Court Act**, and the only limitations to the exercise of the court's power to make a receivership order is that it should be 'just or convenient' to do so. He opined at paragraph 137 that this conclusion is also reached on the basis that receivership orders are regarded as a 'flexible' remedy.[60] Accordingly, the learned judge saw:

> "… no difficulty, as a matter of established principle, with the possibility of using a receivership order, as one type of draconian remedy, alongside another draconian remedy as a composite remedy in a complex situation."

[153] The judge saw this issue of jurisdiction as ultimately one of statutory interpretation of section 24(1). He opined that the terms of section 24(1) are not ambiguous in their meaning, and the strict application of words of that sub-section would not lead to a perverse result. Importantly, the learned judge observed that the words 'just or convenient' therein contains no express limitation. With these expressions of principle, I entirely agree and gratefully adopt. The learned judge, as a means of underscoring these declarations of applicable principles and interpretation, cited, extensively, the dicta of Sir Elliott Mottley President of the Turks and Caicos Court of Appeal in **Attorney General of the Turks and Caicos Islands v Misick and others**[61] at paragraphs 21 to 30 as to the court's approach to statutory interpretation.

[154] In my view, respectfully, these passages, which borrow heavily from the authoritative pronouncements of leading English judges in a number of important decisions of the English House of Lords and Supreme Court on statutory interpretation, while generally helpful jurisprudence and invaluable guidance to courts on this important subject, added little to the correct conclusions already reached by the learned judge as to the jurisdiction and

[60] See Attorney General v Schonfeld and others [1980] 1 WLR 1182 per Megarry V.-C. at 1187.
[61] (2020) 97 WIR 431.

power of the court under section 24(1) to appoint receivers. Indeed, the judge recognised this at paragraph 141:

> "Here, the Court is not being called upon to ascertain the meaning, as such, of 'just or convenient' (nor any other term in section 24(1) of the Supreme Court Act), as the meaning of these words is plain enough. Instead, the Court is required to apply this most general and fact-sensitive of phrases. This is a crucial, albeit subtle, distinction."

[155] The learned judge did not accept FRE's submission that he ought to find that the court has no jurisdiction to grant the Receivership Order, because the BVI legislature has consistently denied conferring standing to sue for certain types of relief upon indirect shareholders. The judge considered this argument to be flawed, 'because he thereby elides the distinction between construing the meaning of statutory terms and applying them'. This avoidance by Parliament to confer standing to sue on indirect shareholders, the judge saw as but one, amongst other factors in the judicial exercise of discretion whether to grant some form of relief calculated to by-pass that limitation.

[156] One of the other factors to be weighed when exercising the discretion whether it is just or convenient to make a receivership order, as identified and relied on by the judge in the instant matter, was the fact that Mr. Wang had chosen to arrange his financial affairs in the way in which he did by placing his assets and investments in and through RAGOF, not under his direct ownership and control but under the control of others. The judge considered that in such a situation, Mr. Wang must provide good reasons why he should be 'relieved of negative consequences':

> "It is not in principle unjust, nor unfair, to leave a party exposed to the consequences of his choices. On the other hand, it may be unduly harsh, and indeed unjust, to deny such a person the protective remedies of the Court in the face of wrongdoing against him. There is a reasonable balance to be struck."[62]

[157] The judge did not accept that Mr. Wang was as 'financially inexperienced as he emphasises himself to be' or that he was an 'unworldly aesthete' as he portrays himself to be. He also considered that Mr. Wang was not 'incapable

[62] See the judgment in the court below at para 143.

of taking fully independent legal advice in relation to the implications of the ownership structure'.

Appellants' submissions

[158] The main focus of the appellants' criticism of the judge under this second category of alleged errors, concerns his statements and findings at paragraph 145 of the judgment:

> "[145] I am persuaded that the real reason Mr. Wang wanted a receivership was to undo the consequences of his earlier choice: he wanted to obtain standing to apply for the appointment of provisional liquidators and then liquidators, either for himself, or for insolvency practitioners who would be in agreement to do so on his behalf or for his benefit. **In my respectful judgment, he wanted to use the receivership remedy, not for its historically primary purpose of safeguarding assets, but for the sake of using one of its ancillary powers.** It was, in my respectful judgment, to that end that he was so keen to advance a narrative that he lacked financial acumen, knowing that any degree of sophistication in this regard would quite possibly disincline the Court to assist him, given his choice to give up direct ownership rights. **To my mind, since Mr. Wang has a number of other potential ways of maneuvering himself into a position for applying for various kinds of relief from the alleged wrongdoing (such as having the shares transferred to a different nominee), and since there would appear to be potentially more proportionate, less draconian and less peremptory remedies available instead of a just and equitable winding up, it would not be appropriate to relieve Mr. Wang of the consequences of his choice not to own the shares directly.**" (emphasis mine)

[159] The appellants argue that the judge, having correctly not accepted the erroneous submission of FRE that there was no jurisdiction in the strict sense, of power to appoint receivers in this case, because the BVI legislature had not provided that beneficial owners of shares could petition for the just and equitable winding up of companies, went on to reintroduce that same erroneous concept as a reason why the appointment of receivers was, in this case, contrary to established principles on which courts act or which are relevant to the exercise by the courts of their discretion. They argue that the correct position in law is as follows:

(a) the power to appoint receivers is, perfectly conventionally, exercised for the purpose of preserving the value of an asset which is in jeopardy. In my view, this is correct as a pure statement of principle and conventional purpose for the exercise of the courts' power to appoint receivers.

(b) for that purpose, receivers are commonly and properly given a power to bring proceedings. They cite in aid an extract from the judgment of Balcombe J in **Levermore v Levermore.**[63] At page 1282 the judge opined-

> "…. it is not uncommon as a matter of practice when a receiver is appointed, whether by way of equitable execution or for the interim preservation of property, to authorize the receiver in an appropriate case to bring any necessary proceedings in the name of the estate owner of the property of which he has been appointed receiver."

(c) when doing so, a receiver obviously acts in the name of the legal owner of the asset and exercises a power that the legal owner has.

(d) just as obviously, when doing so the receiver is doing something that his appointor cannot (for whatever reason) do. That is the whole point of the receivership. If the appointor could sue, the receivership would be unnecessary.

[160] **Levermore** is a first instance decision of the English Family Division. It concerned an application by the wife to appoint a receiver to enforce an order of the court for the husband to pay her a lump sum of £2,000 by way of equitable execution over the husband's interest in property, the former matrimonial home, held under a trust for sale as a tenant in common with his brother, the brother having refused to agree to a sale of the said property. The application to appoint a receiver was coupled with the power to the receiver, in the name of the husband, to commence such proceedings as might be necessary to enforce a sale of the property. The application was resisted by the husband on the ground that to appoint a receiver would be stretching beyond permissible limits the appointment of a receiver by way of equitable execution.

[63] [1979] 1 WLR 1277.

[161] Applying the principles found in the decision of the English Court of Appeal in **In re Shepard, Atkins v Shepard**[64] that equitable execution is not legal execution; it is equitable relief given by a court in circumstances where execution at law is not possible, the judge rejected this ground. In making the order sought by the wife, appointing a receiver by way of equitable execution over the husband's interest in the property coupled with the power to the receiver, in the name of the husband, to bring any necessary proceedings to enforce the sale of the property, the judge found that in the case before him execution at law is impossible, and:

> "[i]t would be, in my judgment, a blot on our jurisprudence if the wife in this case had to take a sledgehammer to crack a nut …. either by making the husband bankrupt or by seeking to commit him to prison as an indirect way of making him bring proceedings against his brother, when there is a form of machinery which ought to be ready and available to her and, in my judgment, is so available."[65]

[162] The appellants argue that there are good precedents for receivers being appointed over shares and being vested with the power to bring claims that only the shareholder can bring. They cite the decision of the Hong Kong High Court in **Asean Resources Ltd v Ka Wah International Merchant Finance Ltd**[66] as such an example. **Asean Resources Ltd** concerned an action brought by a lending bank in Hong Kong to recover money loaned to the company Asean in connection with a building development in Singapore. The only asset of Asean was its shareholding owned directly in a Singapore company involved in the said development. Nazareth J granted the bank an *ex parte* Mareva injunction restraining Asean from disposing of its shares in the said company; and the next day, he made an order appointing receivers with power to manage those shares.

[163] Asean subsequently applied to discharge both orders on the ground that the judge had no jurisdiction to make them, since the shares in question were foreign assets. Sears J held that undoubtedly the court had jurisdiction to grant the injunction against Asean, as a defendant within the jurisdiction, restraining

64 (1889) 43 Ch. D 131.
65 Ibid at 1282.
66 [1987] LRC (Comm) 835.

it from disposing of its foreign asset, the shares in the Singapore company. The judge also found that it was necessary to appoint receivers in order to control the shares and preserve their value. This power to take necessary steps to preserve the value of the share would permit the receivers, armed with the order of the Hong Kong court, to go to the courts in Singapore and make applications as though they were defendants.

[164] In my considered view, there are several distinguishing features between the instant matter and the factual and legal situation in **Asean Resources Ltd**. Firstly, the shares in the Singaporean company in **Asean Resources Ltd** were directly the property of Asean, which owed a loan debt to the Hong Kong bank seeking to enforce recovery of the loan debt by taking control over Asean's sole asset (the shares), and putting them in the control of receivers. By contrast, the shares in RAGOF are not held by Mr. Wang directly, but through a nominee appointed as such by him, who is in a position to facilitate the transfer of the shares to Mr. Wang or his third-party nominee.

[165] Secondly, the power granted to the receivers in **Asean Resources Ltd** to enable them to take steps, including commencing applications in proceedings in Singapore to preserve the value of the shares in the Singaporean company, did not include or did not go so far as to take steps to place the said company into liquidation, as were the express powers granted to the JPLs in the *ex parte* Receivership Order. Thirdly, in **Asean Resources Ltd**, the steps that may be taken by the court appointed receivers are to preserve the property (the shares) owned directly by Asean, for the purposes of execution of any money judgment obtained against it by the bank. However, in the instant matter, the steps which the joint receivers were expressly empowered by the Receivership Order to do, that is, to wind up RAGOF and to appoint provisional liquidators as an interim remedy, cannot be said to be steps in the preservation of the value of the shares in RAGOF beneficially owned by Mr. Wang.

[166] The appellants cite the decision of the Deputy Bailiff of the Royal Court (Samedi Division) in Jersey in **Mubarak v Mubarak and others**,[67] as a precedent where receivers were appointed at the suit of the beneficial owner of shares, for the purpose of bringing an application for provisional liquidation. This case concerned an application by the wife (the representor) for an order enforcing or giving effect to an order made by a judge of the Family Division of the High Court of England under section 24(1)(c) of the Matrimonial Causes Act 1973, which provided for varying a Jersey discretionary rust created by the husband and wife as settlors by a deed in 1997, so as to require the trustees of the Trust to pay the wife all sums owing to her under the provisions of an order of another judge of the Family Division. The beneficiaries of the Trust were the settlors (husband and wife), their children and any other children or remoter issue. The property of the Trust included shares held separately by the husband and wife in a holding company incorporated in 1994 in Bermuda, which had been transferred to the Trust. The other assets of the Trust comprised a group of companies incorporated in and operating various jewellery stores and businesses in several major capitals of the world, known collectively as the Dianoor Group. The Trust was under the control of the husband.

[167] The reports from and evidence of certain KPMG officers specialising in insolvency was to the effect that if the alterations in the Trust were made, there would be valid grounds for the appointment of provisional liquidators of the various companies. The provisional liquidators would then seek to realise liquidity from the combination of the reduction in stock and a gathering in of trade receivables. By taking this course of action, and provided the directors were cooperative, sufficient liquidity could be raised to pay the required amount to the Bermuda holding company, which could in turn pay the wife the amount due under the English order. It was also advised that save for the initial application to the Hong Kong court for the appointment of provisional liquidators of the various companies, all subsequent costs would be payable out of the assets of the relevant companies. The Royal Court concluded that there were reasonable prospects of KPMG being able to realise liquidity from

[67] [2008] JRC 136.

the underlying group structure sufficient to pay the amount due to the wife under the English payment order without doing irretrievable damage to the Group. In the circumstances, the court determined that it would be for the benefit of the minor and unborn beneficiaries for the Trust to be altered in accordance with the English order so that KPMG can seek to realise liquidity which can be used to pay the wife and thereby benefit the children.

[168] The Deputy Bailiff,[68] had no difficulty in concluding that the court had the power under its inherent jurisdiction to appoint a receiver of a trust. He considered that such a power ought to be exercised sparingly. In the said case, the Royal Court accepted that it would be unreasonable to expect the trustees of the Trust to embark upon the course of action suggested by one Advocate to realise the necessary liquidity from the underlying assets in order to satisfy the payments due to the wife under the order of the Family Division and to benefit the children, as this would involve speculative and contentious litigation in a number of jurisdictions, and the Trust did not have the resources necessary to do so. These courses of action would include taking steps to gain control of the underlying companies of the Bermuda holding company, whose shares were vested in the Trust. Having regard to the difficulties attendant with the trustees of the Trust embarking on this involved course of action, the court took the alternative course of appointing KPMG (partners) as receivers of the Trust to undertake the necessary actions and spelled out in the order the powers conferred upon them in the Act of the Court.

[169] The decision in **Mubarak** is an example of the breadth and flexibility of a court's statutory or inherent jurisdiction to appoint receivers, in appropriate circumstances, in order do justice, whether to preserve assets or to take effective control of assets for the purpose of enforcing an order or judgment of a court, including a foreign court, in circumstances where resort to the usual or ordinary remedies such as injunctions is not possible or would be ineffectual. In the BVI, this jurisdiction and wide discretionary power is circumscribed only by the statutory requirement that it must be just or convenient to make the order

[68] In relying on Lewin on Trusts at paragraphs 28-39 and the cases there cited.

being sought, and by the appreciation that such orders are a draconian remedy which ought not be deployed lightly or where there are other available effective interim remedies.[69]

[170] It is notable that in **Mubarak** the resort to the court's jurisdiction and power to appoint receivers of the Jersey Trust was made only after the court was satisfied that the more conventional course of action which would involve the trustee taking the necessary steps in relation to the underlying assets and companies, was impractical and costly. The alternative method of appointing receivers over the Trust involved, essentially, the receivers assuming the power of the trustee over the shares held by the Trust in the Bermuda holding company and, successively, moving the Hong Kong court to appoint provisional liquidators in relation to the subsidiary companies, and to thereby to convert certain realisable assets of the subsidiaries into sufficient liquid assets, which may then be paid to the holding company, and by the holding company to the Trust, for payment out to beneficiaries, including payment of the judgment sums owed to the wife under the order of the English court.

[171] The appellants pointed out that although this case was cited to the learned judge, he did not reference it in the judgment. The implication is that this case and the court's approach to the exercise of the power to appoint receivers in the particular circumstances, was relevant to the judge's determination of the issue as to whether it was just and convenient to make the Receivership Order and the JPL order. In my view, there is some merit in this argument.

[172] The appellants also submit that the learned judge erred at paragraph 142 in concluding that the fact that the BVI legislature had not conferred standing on an indirect owner was a relevant factor in the exercise of the jurisdiction to appoint receivers, and at paragraph 143 that Mr. Wang had some higher burden to surmount to obtain a receivership order, because he had chosen to hold his shares through nominees. In my judgment there is some merit in the

[69] See also Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd and others [2011] UKPC 17 where the Privy Council approved the appointment of receivers over a power to be exercised by trustees, in circumstances where they were refusing to exercise that power.

first of these two submissions, but none in the second. As to the first, the learned judge erred at paragraph 142 by equating the absence of a provision in section 24 dealing with standing to a factor to be considered in the exercise of the court's discretion as to whether it is just or convenient to make a receivership order. The absence from section 24 of the **Supreme Court Act** (unlike sections 162(3) and 170(2) of the **Insolvency Act** dealing, respectively, with the appointment of liquidators and provisional liquidators) of provisions listing the categories of persons who may apply for the appointment of receivers does not go to the discretion of the court to make such an order. It may go to the standing to apply for such an order. In the case of the latter, an applicant either had the requisite standing or they do not. The relevance of the absence from section 24 of a provision listing those who have standing, is relevant only to the question of who indeed has standing and the court's approach to the determination of that discrete issue. It is completely irrelevant to the exercise of discretion whether to make a receivership order, which issue falls for consideration only after it is determined or accepted that the applicant for the order has the requisite standing.

[173] There is no merit in the second of these submissions for the simple reason that at paragraph 143 the learned judge did not impose or seek to impose any higher burden on Mr. Wang as the applicant for the receivership order. The genesis of paragraph 143 is that a related factor to the court's exercise of discretion is the peculiarity of the circumstances as evidenced before the court, in which or because of which the court is being asked to exercise its discretion and to find that it is or is not just or convenient to make the receivership order being sought by the applicant. Here the judge correctly identified the indisputable fact that Mr. Wang had chosen to order his affairs regarding the shares in RAGOF and his investment in that fund in a certain way, the effect of which was to place total legal control of the shares, and hence of his investment, in the hands of a nominee and the Floreat Principals responsible for the management of RAGOF and its assets and investments. These were material and relevant considerations to be factored into the exercise of the court's discretion as to whether: (i) Mr. Wang's objective of gaining control of the shares could not be achieved by some other method or means not involving the draconian remedy of a

receivership; and (ii) absent any evidence that Mr. Wang had initiated any of those alternative steps, the court ought to conclude that it was just or convenient in all the circumstances to make and to continue the Receivership Order and consequently the JPL Order.

[174] Indeed, while the learned judge considered that it may not be unjust or unfair to leave a party exposed to the consequences of his choices – the scheme which he had elected to have put in place to control independent of him the shares in RAGOF and his investment therein, on the other hand, 'it may be unduly harsh, and indeed unjust, to deny such a person the protective remedies of the Court in the face of wrongdoing against him. There is a reasonable balance to be struck.' For these reasons, I cannot discern any error of principle or reasoning in the statements of the learned judge at paragraph 143.

[175] The gravamen of the appellants' criticism under this second category of alleged errors is with paragraph 145 and 146 of the judgment. The latter relates to the judge's finding (for the reasons advanced before him by FRE) that 'the circumstances of the present case are such that justice and convenience does not render a receivership order appropriate'. The appellants' criticisms of the judge in relation to these two paragraphs of the judgment are set out at paragraphs 62 to 67 of their skeleton argument.

[176] The appellants submitted that the learned judge erroneously found and took into account that Mr. Wang's purpose in asking for the receivership was to undo the consequences of his earlier choice, and that the receivership was not being used for its historically primary purpose of asset protection but for the sake of having resort to and using one of its ancillary powers. I understand the reference to such ancillary powers to be to the power to move the court to wind up RAGOF and to have provisional liquidators appointed pending such an order. They submit that 'there was nothing unprincipled or even unusual about a beneficial owner seeking a receivership in order that powers which he had chosen to vest in a nominee could be exercised.'[70]

[70] See Appellants' skeleton argument at paras 62-67.

[177] The appellants also submit: 'likewise, the safeguarding of assets and the use of the receivers' ancillary powers are not two mutually exclusive things…' I accept this latter submission as a correct statement of principle. The purpose of giving receivers ancillary powers is so they can, where they deem it necessary, take steps, including bringing legal action, to either gain control of assets which they are by the receivership order charged with protecting, or to obtain control of underlying assets to protect the value of the assets which are under their charge.

FRE's submissions

[178] The main planks of FRE's submissions under this second category of errors, are to be found at paragraphs 123 to 128 of its skeleton argument. FRE argues that in considering whether it was just or convenient to make the Receivership Order, the judge was entitled to take into account that Mr. Wang was seeking to do something, that is, issue a just and equitable winding up application against RAGOF, which the BVI legislature did not permit him to do in his name (since he was not the registered shareholder), together with the related factor that this was an arrangement or structure to which he had agreed and had put in place. They submit that these circumstances plainly bear on what is 'just' or 'convenient' as the court was, in effect, being asked to sanction the bypassing of an express statutory prohibition by using a mechanism which Mr. Wang's leading counsel had himself described as 'artificial'; and to do so at the behest of Mr. Wang who had agreed to a structure which led to the application of that prohibition, and in circumstances where the entity which did have statutory standing (XYZ) was able to bring the winding up petition, but was unwilling to do so.

Analysis and conclusion: Jurisdiction to appoint receivers

[179] In my considered judgment, there is much force in FRE's arguments on this second category of alleged errors. The crucial issue here is not whether the court had the jurisdiction to make the Receivership Order. The judge found positively that he did as a matter of law and statutory interpretation. There has been no challenge to this conclusion by either party in the appeals. As to the

court's jurisdiction under section 24(1), when viewed in its proper perspective as a flexible remedy, there is nothing wrong in principle for an order to be put in place appointing receivers over shares in a company which empowers the receivers to use the voting power of the shares to apply to wind up the company under just and equitable grounds, in order to effectively wrestle control of the management of the company and its underlying assets from the alleged wrongdoers who have effective legal control, and place them under the control of liquidators appointed by the court who, as officers of the court are accountable to the court for the exercise of their functions and the discharge of their powers; and, as an interim measure and in tandem with the steps to gain control of the company whose shares are under the control of the receivers, to move the court to appoint provisional liquidators in circumstances where it is necessary for the purpose of maintaining the value of the assets owned or managed by the company.

[180] In substance nothing which the learned judge has said derogates from these principles and the fundamental purpose for which court appointed receivers under section 24. The learned judge did not find as a matter of law that it was impermissible to appoint receivers over shares in a company and to invest the receivers with the power to move to wind up and to investigate the affairs of the said company, or to bring any other legal proceedings necessary to protect the value of the said shares.

[181] The tenor of paragraph 145 is the judge's findings and concerns regarding the real purpose for which Mr. Wang invoked the court's receivership and winding up/provisional liquidator jurisdictions. This goes not to jurisdiction but to the discretionary exercise of the court's power to make a receivership order in the circumstances of this case. The judge doubted that Mr. Wang's real purpose was to safeguard the assets of RAGOF; he found it was 'to undo the consequences of his earlier choice: he wanted to obtain standing to apply for the appointment of provisional liquidators and then liquidators…'. In his judgment, Mr. Wang 'wanted to use the receivership remedy, not for its historically primary purpose of safeguarding assets, but for the sake of using one of its ancillary powers'.

[182] The difficulty with that finding of purpose is two-fold. First, there is nothing impermissible or wrong in the ultimate aim being to wind up RAGOF under the just and equitable ground by exercising the majority voting power of the shares in RAGOF held beneficially by Mr. Wang, particularly in circumstances where Mr. Wang considers (and this is a matter for trial) that the assets of RAGOF had been and were being mismanaged, and that those in control had committed serious misconduct in relation to RAGOF and its assets. Secondly, there is also nothing impermissible or wrong in principle for receivers being appointed to be imbued by the order of appointment with certain ancillary powers, including the power to petition the court to wind up RAGOF and to appoint provisional liquidators in the interim. It follows logically that in principle there is nothing inherently wrong with an applicant choosing to resort to a receivership order with such ancillary powers, in order to achieve his end of taking control of RAGOF away from those then responsible for its management and that of its assets, where it is being alleged that serious mismanagement and wrongdoing has been committed by them.

[183] However, it is also a material factor to the exercise of the court's discretion, that Mr. Wang seems to have given at least two somewhat different versions or explanations as to his real purpose in applying *ex parte* to appoint receivers and to have them imbued with the power to move a court to wind up RAGOF and to appoint, as an interim measure, provisional liquidators. In one of these scenarios, Mr. Wang's declared intention was to not only achieve a transfer of the shares to himself or a new nominee, but to then have the winding up discontinued. This scenario would seem to lend some support to the judge's conclusion that Mr. Wang had concocted the means to achieve his end of having the shares transferred to him or a new nominee, in other words as an exit mechanism from the arrangement or structure which he had voluntarily put in place grounded on him not having direct ownership of the shares in RAGOF and the management of this fund and of its assets being placed in the hands and control of the Floreat Principals.

[184] At paragraph 145, the learned judge referenced Mr. Wang seeking to advance a narrative that he was lacking in financial acumen (which the judge did not accept as correct) so as to paint an inaccurate picture of himself and not the true picture which may disincline the court to assist him, 'given his choice to give up direct ownership rights' to the shares and hence to the ultimate control of RAGOF. In my view, there is again nothing wrong in principle with a person who has chosen to arrange his investment in the way that Mr. Wang did, seeking the aid of the court's equitable remedies with the objective of by-passing the direct control of those who he had put in legal control of the instruments of the scheme, in circumstances where there is some cogent evidence to suggest that his investment is in jeopardy either of being lost or devalued through the wrongful acts or gross negligence of those in charge.

[185] This of course does not excuse an applicant for such relief, whether applying *ex parte* or inter partes, misrepresenting important facts, whether about himself or otherwise, to the court in his evidence in aid of persuading the court to exercise its discretion to grant the remedy being sought. This again touches squarely on the important duty of full and frank disclosure. To the extent that Mr. Wang has understated his financial acumen as found by the court, the judge was entitled to take that into account when determining which way to exercise his discretion but, in doing so, that factor and its relative significance to other factors, must be properly weighed by the judge.

[186] At paragraph 145 the learned judge also relied on what he saw as 'other potential ways' by which Mr. Wang could have gotten himself into position for applying for various kinds of relief from the alleged wrongdoing. An example of this, as the judge saw it, was having the shares transferred to a different nominee; and I would add also, to himself. The appellants submit that this option was not a reasonably available alternative to an *ex parte* receivership. (They do not explain why this is so, but reference paragraph 98 of their skeleton argument. This paragraph falls under section C3 of their skeleton dealing with the third category of identified errors – 'Full and Frank Disclosure on the JPL Application'. There the appellant seeks to proffer an excuse for why this or

other alternatives were not brought to the judge's attention at the *ex parte* hearing. These go more to the issue of material non-disclosure and regrant).

[187] At paragraph 145, the judge also considered the alternative remedies as factors to be weighed in the exercise of his discretion, not as a bar to a receivership order being granted, continued, or regranted in the face of material non-disclosures. This was certainly correct as a matter of principle. The availability to an applicant for a receivership order of effective alternatives and less draconian remedies, is a most material consideration in the exercise of the discretion whether to make the order sought, and in determining whether it is just or convenient to do so. In this respect, the learned judge did not err.

[188] The next question is whether the alternative of a transfer of the shares to himself or to his new nominee was available to Mr. Wang. The appellants make a bald statement that it was not and also that such transfer and its registration at the registered office of RAGOF in BVI would involve the directors of the company, and Mr. Wang was concerned as to tipping-off and of the directors frustrating and unnecessarily delaying the process. These concerns may have some credibility, but the simple fact is that there was no evidence before the court to suggest that his request would not have been complied with, except the provision in the agreement with XY which absolved it of no liability for refusing to effect such a transfer.

[189] There was no evidence before the court either at the *ex parte* hearing or at the discharge hearing, that Mr. Wang had indeed approached XY about having XYZ transfer the shares in RAGOF to him or some other nominee. The upshot of all this is that the transfer of the shares from XYZ to Mr. Wang or a new nominee who would be prepared to do his bidding and abide by his dictates, was a reasonably available alternative to the appointment of a receiver, and the judge did not err in considering it as one of the factors to weigh in the exercise of his discretion and in determining that it was not just or convenient to grant or to continue or to regrant the Receivership Order.

[190] The conclusion reached by the judge at paragraph 146 that the circumstances of this case 'are such that justice and convenience does not render a receivership order appropriate', is said to be based on his adoption of the reasons advanced to him by FRE. The appellants are correct that this paragraph does not indicate or state which particular contentions by FRE the learned judge was moved to adopt as his own when reaching this important conclusion. They argue further that this rendered the judge's conclusion a bare one unsupported by any reasoning, and accordingly, that conclusion is fatally flawed. For this reason alone, they contend, this Court ought to set aside the judgment.

[191] In support of this argument, the appellants rely on the well-known decision of the English Court of Appeal in **English v Emery Reimbold and Strick Ltd**[71] dealing with the duty of a judge or court to give reasons for its decision. These principles which undergird our system of justice and the rule of law, have been applied by this Court in a number of appeals. The salient principles are captured in the headnote. It reads:

> "... a judicial decision which affected the substantive rights of the parties should be reasoned, although some judicial decisions, e.g. interlocutory case management decisions, did not require reasons;…while a judge was not obliged to deal with every argument or identify or explain every factor which weighed with him, the issues the resolution of which were vital to his conclusion should be identified and the manner in which he resolved them briefly but clearly explained, so that his judgment enabled the parties and any appellate tribunal readily to analyse the reasoning essential to his decision".

[192] It is instructive that in **English**, the Court of Appeal found that although there were certain shortcomings with the judgments under review in the two cases, it was satisfied that it could follow the reasoning of the judges, when considered in the light of the evidence and the submissions at trial. In the instant matter, the judge at paragraph 146 clearly was attracted to and adopted the contentions advanced to him by FRE in arriving at his conclusion on just or convenient. The judge actually wrote 'justice and convenience', however, in my view, nothing really turns on this since the judge was clearly considering

[71] [2002] 1 WLR 2409.

whether the justice and convenience of the case required appropriately the making of a receivership order.

[193] Moreover, there are several other parts of the judgment where he used the expression found in section 24 of the **Supreme Court Act**. The appellants argue that it is wholly unclear what contentions or circumstances the judge was referring to and adopting as his own at paragraph 146. It is also unclear to me which of FRE's contentions (whether in the written and/or oral submissions) the judge was relying on. He did not identify any of them either specifically or in general terms. This is certainly unsatisfactory and does not, on its face, accord with the duty and principles identified in **English**. However, it is clear to me that the learned judge dealt with the issue of whether it was just or convenient to make or to continue the Receivership Order, not just at paragraph 146, but from paragraphs 142 to 146 of the judgment. It is these five paragraphs which fall to be considered and assessed by this Court in determining whether the learned judge's reasons given therein are flawed on the issue of 'just or convenient'.

[194] Indeed, much of this has already be traversed above. It is therefore incorrect to state, as the appellants do, and I do not accept, that the judge gave no reasons for his decision that justice and convenience does not render a receivership order appropriate in the circumstances of this case. In my judgment, while there is some basis for criticism of a lack of reasons at paragraph 146, this is not the full picture, and it does not inexorably lead to the appeal being allowed purely on the ground of a lack of reasons at paragraph 146 in relation to the judge's conclusion on whether it was 'just or convenient' to grant the Receivership Order.

[195] For the reasons given under this section, this second category of alleged errors has not been established. The learned judge was entitled to consider the matters which he did in determining whether it was just or convenient not to grant the Receivership Order.

Category 3: Full and frank disclosure on the JPL Application

[196] This category of alleged errors relates to grounds 13 to 24 of the PL Appeal and is addressed by the appellants at section C3 of their skeleton argument. The learned judge dealt with the principles applicable to full and frank disclosure and fair presentation, and the parties' submissions/perspectives thereon, from paragraphs 147 to 165 of his judgment. At paragraph 165, he found guidance in the dicta of Flaux J in **Congentra AG v Sixteen Thirteen Marine SA**,[72] in seeking to establish the right balance in his application of the relevant principles applicable to the duty of full and frank disclosure and fair presentation. The issues of breaches of full and frank disclosure and fair presentation at the *ex parte* JPL Application hearing on 1st September 2021, were considered by the learned judge at paragraphs 166 to 190 of the judgment.

Judge's Findings

[197] Dealing with what transpired at the *ex parte* hearing of the JPL Application, the learned judge first observed[73] that the Core Bundle comprised 136 pdf pages, the exhibit bundle- 4000 pages, the skeleton argument- 45 pages, and the authorities bundle- 376 pages with 25 authorities – all filed on 31st August 2021 (less than 24 hours before the application was heard). He also observed that the actual hearing lasted some 27 minutes.

[198] Important to the issue of full and frank disclosure and fair presentation, the learned judge traversed[74] what had transpired at the said hearing in the various exchanges between Jack J and Mr. Wardell, KC. This included the judge immediately raising with Mr. Wardell, KC his concern with proceeding to hear the JPL Application *ex parte* and whether the hearing should proceed on an inter partes basis a few days later; and Mr. Wardell, KC's response pointing to the risks to the Funds if notice was given to FRE and its Principals. In particular, counsel's submission was that his client had 'no protection at the moment', to which the judge's responded that unless he (Mr. Wardell) could persuade him

[72] [2008] EWHC 1615 (Comm) at paras 62 to 64.
[73] See the judgment in the court below at paras 60-63.
[74] Ibid at paras 64 -68.

that something disastrous was likely to happen in the ensuing week, the application would have to be heard on an inter partes basis.

[199] Most significant to the issue of breach of full and frank disclosure at the *ex parte* hearing is this submission/representation by Mr. Wardell, KC which had the effect of persuading Jack J to continue with the application *ex parte*:

> "The background of all of this, there is a real risk that they will seek the forced redemption of his shares so that he cannot proceed with this application. Under the Articles, under the Memorandum and Articles of Association there is a right to have a forced redemption of the shares in the event of one of the members no longer being a professional investor. **Now, Mr. Wang isn't a professional investor, so they now have an absolute right under the Articles to proceed by way of forced redemption. That puts Mr. Wang in real jeopardy if relief isn't granted at this stage today**."[75] (emphasis mine)

[200] At paragraph 190, the learned judge, having considered in detail the various submissions of the parties, concluded on the issue of whether the breaches of the duty of full and frank disclosure and fair presentation had been deliberate or innocent:

> "Moreover, the failure here was not innocent. The unexceptional result of revoking the JPL Order and not regranting it is, in my respectful judgment, the appropriate result here."

[201] At paragraph 166 of the judgment, the learned judge observed that the main focus by the parties before him had been the representations by Mr. Wardell, KC at the *ex parte* JPL Application hearing that FRE had an absolute right to redeem the RAGOF shares, and thus that Mr. Wang had no protection. The judge accepted that both parts of Mr. Wardell, KC's explanation 'were very arguably wrong'; were put in different and stronger terms at the *ex parte* hearing; lacked any meaningful attempt to explain or support them with reference to underlying documents; were not accompanied by any meaningful attempt to lay out the contrary position; and were the key and only expressly made points which persuaded Jack J to consider the JPL Application on an *ex parte* basis. The learned judge also accepted the soundness of the principles advanced by FRE's counsel that the duty of fairness of presentation at an *ex*

[75] Ibid at para 68.

parte hearing, is more so because an order appointing provisional liquidators is one of the law's 'nuclear weapons'.

[202] To put the 'representations' by Mr. Wardell, KC at the *ex parte* hearing into its proper perspective, the judge considered what actually transpired before Jack J at the said hearing as borne out by the relevant transcript. He observed that Jack J had indicated five times that he was minded to adjourn the JPL Application for a short time to enable it to be heard on an inter partes basis. On each occasion Mr. Wardell, KC had tried but failed to persuade him otherwise with a variety of reasons. The representation in issue however caused Jack J to change his mind. The learned judge concluded that 'proceeding *ex parte* was a vital part of Mr. Wang's strategy', that he wanted to present FRE and its Principals with a fait-accompli, and it was important to this strategy for Mr. Wang to 'retain tight control of the timing and the narrative'. The judge concluded that the real reason for Mr. Wang proceeding *ex parte* was not the risk that the Floreat Principals would be tipped-off and dissipate assets or destroy documents in the short time before an inter partes hearing, which possibility he viewed as unlikely as a matter of practical possibility given the real estate and accounts receivable nature of much of the assets and that both RAGOF and FRE are regulated entities. The learned judge therefore considered it as being 'entirely understandable' that when Mr. Wang's lead counsel was met with Jack J's 'repeated resistance' to proceeding *ex parte*, that he 'should seek to increase the strength of his submissions to overcome this blockage'.

[203] At paragraph 170 of the judgment, the learned judge encapsulated this issue in these terms: -

> "Unfortunately, not only did Mr. Wardell, [KC], very arguably over-state the facts, but he omitted to use any of the three and a half hours or so that Justice Jack had indicated were available to explain properly the forced redemption and lack of protection points."

[204] The learned judge did not accept Mr. Wardell, KC's explanation which he saw as an attempt to minimise the failures which he (the judge) identified. He saw king's counsel's explanation as assuming that 'holding an inter partes hearing

would have made no difference to the order granted. It is obvious that it is precisely because an inter partes hearing might make a difference that Jack J was desirous of having one'.[76]

[205] The judge also opined that 'in obtaining an *ex parte* hearing by means of Mr. Wardell, KC's representations, FRE had been deprived of the opportunity to put their side of the matter, which is a fundamental right of natural justice. This included FRE's contentions regarding the availability of 'alternative, less draconian, remedies'. In this context, the learned judge saw the representations made to Jack J by Mr. Wardell, KC as having 'a serious effect upon the administration of justice in relation to the JPL Application'. Moreover, the judge considered that the 'representations' did not go merely to a procedural issue. More fundamentally, he opined: '[t]he submission that Mr. Wang had 'no protection' directly fed Mr. Wang's narrative that it would be 'necessary', within the meaning of that word used in section 170(4)(b)(i) of the Insolvency Act 2003 to appoint provisional liquidators'[77]; it was highly material to the substantive issues for determination in the JPL Application; and would have to be taken into account by the judge in deciding whether to grant the application.

[206] Next the learned judge considered whether the 'representations' were innocent or not. He concluded that they were not in strong terms at paragraph 175 of the judgment where he said:

> "In my respectful judgment it was not innocent. Faced with Justice Jack's resistance against continuing with the hearing on an *ex parte* basis, Mr. Wardell, QC, conceived a submission which he hoped would persuade Justice Jack to keep the matter *ex parte*. Mr. Wardell, QC, must have deliberated interiorly, albeit perhaps for a split-second, whether or not to make that submission and he decided to do so. Mr. Wardell, QC, afterwards, with the benefit of more mature reflection, has stood by that submission. The submission can thus be said to have been deliberate and intentional and not accidental. That Mr. Wardell, QC, stood by that submission is also significant in another respect. He thereby tied the Court's hands. The Court could then only treat any breach or omission as intentional, thus generally excluding a continuation or regrant. Had Mr. Wardell, QC, however, acknowledged

[76] See the judgment in the court below at para. 171.
[77] See the judgment in the court below at para 173.

that he had mistakenly overstated his client's position in the heat of the moment (such that the Court could properly conclude that the error had not been intentional), then the Court would have had greater latitude in relation to the possibility of assisting a litigant with a continuation or regrant of the relief in question. As matters stood however, the Court was in effect given a binary choice by Mr. Wardell, QC: either to agree with him that he had not breached his duty of full and frank disclosure and fair presentation in one or more material respects, or to rule that he had breached that duty; whereupon, in the case of the latter, absent other considerations of justice, the interim relief obtained in consequence would ordinarily be discharged without a regrant."

[207] The judge also considered whether the failure or omission by Mr. Wardell, KC to take Jack J, at the *ex parte* hearing, to the underlying documents concerning his representation that FRE had an absolute right to redeem the RAGOF shares beneficially owned by Mr. Wang and as such Mr. Wang had no protection, was innocent or not. He indicated that he would like to think it was an 'oversight' - thus innocent, but it was possible that it was deliberate for the reasons which he gave at paragraph 176. Principal of these reasons is this: had Mr. Wardell, KC done so, 'he would inevitably have been put to the quite lengthy and intricate task of explaining the right of forced redemption, and that would quite probably have reinforced Jack J's sense that the application should be adjourned to continue on an inter partes basis. At the inter partes hearing, quite considerable time was taken up with arguments on this by both sides. This itself highlights the gravity of Mr. Wardell, KC's omission, because there was clearly a lot to be said on the point by both sides.' The learned judge concluded:

"It suffices to say that no good explanation has been given for the omission and further, that with Mr. Wang being represented by experienced Senior Counsel, there was simply no excuse for the omission. These was no excuse for allowing Justice Jack to proceed under the impression that, in unqualified terms, Mr. Wang 'had no protection' and that an absolute right of forced redemption had accrued."

[208] Again, the learned judge did not accept Mr. Wardell, KC's explanation that Jack J would have understood what he (Mr. Wardell) was trying to say. The judge saw this submission as an attempt to 'rewrite history in a manner that does not tally with the facts' and was not borne out by the *ex parte* hearing transcript which shows three or four instances in the space of a few minutes where

Mr. Wardell 'sought to correct Justice Jack's understanding, as well as several points on which Justice Jack sought clarification. The judge concluded that Mr. Wardell's explanation was not persuasive and did not absolve him from having failed to give full and frank disclosure and a fair representation. Accordingly, he held that, Mr. Wang's failures in these respects were, in his judgment, not innocent. He found that the consequence of these non-innocent failures is that 'the Court proceeded to make the JPL Order without the benefit of a sufficient consideration of possible counterarguments and alternative remedies'.

[209] At paragraph 180, the judge identified the three alternative remedies to a JPL Order and/or winding up of RAGOF which were submitted to him by FRE at the discharge hearing. These are: (i) a staged redemption of the RAGOF shares; (ii) an unfair prejudice action, if necessary, supported by an injunction and/or Stop Order; or (iii) legal proceedings for breach of duty and/or conspiracy – as Mr. Wang had indeed begun to prepare for in England. The judge accepted FRE's submission that Mr. Wang had failed to disclose to the Court that XYZ (through the Receiver) and/or Mr. Wang arguably could and should not have pursued reasonable and proportionate alternative remedies instead of seeking to appoint JPLs, and as an alternative to a winding up. Importantly, the judge was satisfied that that such alternative remedies are at 'least arguably available'; and that a proper and fair presentation on alternative remedies ought to have been made by Mr. Wang and his counsel at the *ex parte* hearing.

[210] As to the eventual winding up of RAGOF on the just and equitable ground, the learned judge was satisfied that, as a remedy, this was 'disproportionately harsh' for the suite of reasons given at paragraph 182 of his judgment. This conclusion and the reasons given therefore, will be assessed when dealing with the submissions of the parties under this third category of alleged errors.

[211] Central to the issue of whether Mr. Wardell, KC had misrepresented to Jack J at the *ex parte* hearing that there was an 'absolute right' to a forced redemption of the shares held by XYZ in RAGOF, and whether there had also been a failure by omission to take Jack J to the underlying documents concerning the

compulsory redemption of shares[78] in breach of Mr. Wang's (and his counsel's) duty of full and frank disclosure and fair presentation, is the question of whether Mr. Wang was or is to be treated as a 'Qualifying Investor' within the meaning of that term in Regulation 20.1 of the RAGOF Articles. By Regulation 20.1 the directors were empowered compulsorily to redeem a shareholder's shares only if that shareholder is not a 'Qualifying Investor' within the meaning and definition of that term.

[212] As defined in Regulation 1.1, a 'Qualifying Investor' means, inter alia, a person who warrants that he/it: (1) has the financial knowledge, expertise and experience to evaluate the risks of investing in RAGOF; (ii) is aware of the risks inherent in investing in RAGOF; (iii) can bear the risk of losing its entire investment; and (iv) is a Professional Investor. The latter term is defined to mean any person: (i) whose ordinary business involves, whether personally on behalf of others, acquiring or disposing of property of the same type as RAGOF's property ("Institutional Professional Investor'); or (ii) who has signed a declaration that she/he has a net worth of over US$1 million (or its equivalent) and that she/he consents to being treated as a Professional Investor ("Private Professional Investor').

[213] At the discharge hearing before Wallbank J, FRE's position[79] was multipronged: (i) at all relevant times XYZ was both an Institutional Investor and Qualified Investor, a position which XYZ had confirmed in documents when it made its second investment in RAGOF; (ii) the true position (contrary to the false representation made to Jack J at the *ex parte* hearing) was that RAGOF's directors had no contractual right to redeem the shares at all; (iii) at the *ex parte* hearing of the Receivership Application, Mr. Wardell KC had put the position in less categorical terms, that a right to forced redemption had arguably arisen; (iv) the relevant question at the *ex parte* hearing was not whether Mr. Wang was a Qualified Investor (as incorrectly presented by his counsel Mr. Wardell, KC), but whether XYZ as the registered holder of the shares fit that definition;

[78] In particular, the Articles of RAGOF and paragraphs 205 and 206 of Wang 1.
[79] Recorded by the learned judge at paragraph 83 of his judgment.

and (v) there was, in fact, no real risk of a forced redemption of the shares in RAGOF taking place.

[214] When treating with this important issue under alleged breaches of duty of full and frank disclosure at the *ex parte* hearing of the JPL Application, the learned judge observed at paragraph 182 of his judgment that, despite Mr. Wang's protestations that he was not a 'Professional Investor', there was 'ample evidence', and indeed 'it was common ground', that Mr. Wang 'had agreed to be treated as such'. The learned judge reasoned:

> "The objective reality is that the designation of 'Professional Investor' was a specific contractually defined term that Mr. Wang had signed up to. This term was not entirely pegged to the ordinary meaning of those words and concerned the degree of risk Mr. Wang was prepared to assume and the breadth of his consent to the manner in which his investments would be managed. His acceptance thereof necessarily has a bearing on whether the Court should, applying principles of justice and equity, accede to an application made by him or for his benefit to wind up RAGOF."

[215] Accordingly, this led the judge to be satisfied that a winding up of RAGOF on the just and equitable ground may well be a disproportionately harsh remedy. He concluded that the JPL Order obtained *ex parte* ought to be 'set aside, not regranted, and Mr. Wang deprived of the benefits he has gained thereby'. In reaching the conclusion not to regrant, the learned judge was:

> "…not persuaded that the interest of justice, and indeed 'necessity', reasonably required the JPL Order to be regranted. I am satisfied that Mr. Wang very probably has alternative remedies. They may be potentially more costly, and take longer to obtain, and be more uncertain to achieve, but I am satisfied that it is not the case that Mr. Wang is now left as a remedy-less victim if he does not retain the JPL Order."[80]

[216] The judge was also not persuaded that the JPLs' reports, which had been prayed in aid before him by Mr. Wardell, KC on behalf of Mr. Wang, more specifically the 1st, 2nd and 3rd reports dated 11th October 2021, 13th December 2021, and 31st January 2022 respectively, 'tilt the balance in favour of continuing the JPL Order or a regrant'. The judge stated:

[80] See the judgment in the court below at para 185.

> "The reason I was not persuaded by their reports to continue the JPL Order or regrant it is because, as Floreat Intervenor's Counsel observed, they contain no findings, and their investigations are still ongoing. I am satisfied that although Mr. Wang might have valid and legitimate criticisms of Floreat and its Principals' conduct, significant dissipation which could not be compensated through an award of damages, is unlikely."[81]

[217] Also, on the issue of regrant and taking into account the alleged serious wrongdoing on the part of the Floreat Principals, the judge observed that Mr. Wang's evidence for the *ex parte* Receivership Application, 'was replete with references to what 'appears' to have been wrongdoing', and the court should be circumspect before making such potentially devastating orders on the basis of 'appearances'. Finally, the judge observed that, in the instant matter 'it is not pellucid that justice reasonably requires a regrant'; moreover, the failure here was not innocent; and, in his judgment, the 'unexceptional result of revoking the JPL Order and not regranting it is …the appropriate result here.'

[218] Before turning to the submissions by the parties before this Court on these important issues, it is useful to set out at this stage some of the salient principles applicable to *ex parte* hearings, material non-disclosure and fair presentation, and regrant.

The Law: Principles applicable to *ex parte* hearings, the duty of full and frank disclosure and fair presentation, and regrant

[219] The principles to be applied by a court when dealing with allegations of breaches of the duty of full and frank disclosure and fair representation applicable to a party proceeding with an application for interim relief without notice and to issues of discharge and regrant of an order obtained in the face of such breaches, have been helpfully summarised in a number of authorities.

[81] See the judgment in the court below at para 187.

[220] In **Alexander Tugushev v Vitaly Orlov and Others (No 2)**[82] Carr J helpfully distilled thirteen principles from the authorities. These principles are not controversial. They are (with my emphasis added), as follows:

> "i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
>
> ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;
>
> iii) Full disclosure must be linked with fair presentation. The judge must be able to have **complete confidence in the thoroughness and objectivity of those presenting the case for the applicant**. Thus, for example, it is not sufficient merely to exhibit numerous documents;
>
> iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;
>
> v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;
>
> vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the

[82] [2019] EWHC 2031 Comm at para. 7.

benefit of hindsight). **The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect**;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that **it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged**;

xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;

xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, **the overriding consideration will always be the interests of justice**. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, **although a strong case on the merits will never be a good excuse for a failure to disclose material facts**;

xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. **The court thus has at its disposal a range of options in the event of non-disclosure.**"

[221] These principles are echoed, to a large extent, in decisions of this Court. One such case is **Commercial Bank - Cameroun v Nixon Financial Group Limited**[83] where Bennett JA [Ag.], at paragraph 20, restated some seven applicable principles. In particular, the Court emphasised that a distinction must be drawn between non-disclosure which amounts to an attempt to deceive the court (deliberate or not innocent non-disclosure), which will likely carry with it the consequence that the order obtained be discharged; and innocent or negligent disclosure (not amounting to gross negligence) which need not lead to the consequence that the order is discharged, it being a matter of weight and proportionality and whether some other penalty, other than discharging the order, is justified in the interest of justice.

[222] Another pertinent decision of this Court is **Thelma Paraskevaides et al v Citco Trust Corporation Limited et al**.[84] That case dealt with the principles applicable to an appellate court's review of the exercise of the court's jurisdiction and discretion under section 24(1) of the **Supreme Court Act**. The important considerations and role of a judge in hearing or deciding whether to hear an application made without notice, and considerations applicable to a court's determination of material non-disclosure and the possible or likely consequences of such a finding, were considered and discussed. The relevant extracts per Carrington JA [Ag.] are:

> "[30] …An appeal from the exercise of [the court's] discretion [under section 24(1) of the Supreme Court Act] is by way of review to determine whether there is some proper juridical basis for the Learned Judge's decision. This Court is required to examine whether the Judge considered all relevant matters, took into consideration irrelevant matters or erred in principle or law, so as to render his overall decision blatantly wrong and outside the reasonably available scope for the exercise of his discretion in the matter at hand.
>
> [31] …. even an innocent non-disclosure on account of a party not being aware of the fact or not realizing its materiality <u>may</u> be a factor against him whereas a deliberate non-disclosure will always be a factor against him.

[83] BVIHCVAP 2011/005 (delivered 6th June 2011, unreported).

[84] BVIHCMAP2018/0046 (delivered 30th March 2020, unreported) at paras. 30 to 36, 39 44 and 45.

[32] A distinction may perhaps be made here between material that is known and material that ought to have been known by an applicant. The extent of the obligation differs between the two categories of material. With respect to the former, the duty appears understandably to be more absolute. Whereas for the latter, the duty is to make proper inquiries as to the existence of further material facts...

[33] Once it has been established that there has been non-disclosure of a material fact, and the duty is in relation to facts,[85] the Court must ensure that the party who failed to disclose is stripped of any advantage that he gained from that breach of his duty. This may not always result in the discharge of the *ex parte* order but, even if it does, the Court may nevertheless grant a fresh order if the non-disclosure was innocent only and the balance of convenience in light of the material facts of which the court is aware demands that a new injunction should be granted…

[34] …. Further, the materiality of evidence should not be confused with the volume of evidence and should instead be elided with relevance. The emphasis must be on the overall picture given to the court which as a result of presentation of the evidence and argument in a fair and even-handed manner in all material aspects…

[36] The hearing of an *ex parte* application involves three considerations which are relevant to the role of the judge. Firstly, per rule 17.4(4) of the Civil Procedure Rules 2000…, the judge should be satisfied that it is appropriate for the matter to proceed *ex parte*. If he is not satisfied, the hearing should be stopped and be continued only on notice to the respondent… Justice cannot be sacrificed on the altar of expediency. Secondly, an *ex parte* order has a limited life span…. Thirdly, the court in considering whether to discharge an *ex parte* order must bear in mind the principle of proportionality. The duty to disclose is meant to operate as an instrument of justice rather than of injustice. In exercising the discretion whether to set aside an *ex parte* order, a judge must therefore give consideration to all the circumstances of the matter including the public interest in ensuring that the duty of disclosure is observed...

[39]….In Brink's-Mat, Ralph Gibson LJ stated that a non-disclosure would be innocent if the fact was not known to the applicant or its relevance was not perceived by them. The onus is on the applicant to explain the non-disclosure. In Banca Turco Romana S.A. (in Liquidation v Cortuk and others it was held that "the very least that can be said is that no innocent explanation has been put forward, and if an applicant who is guilty of non-disclosure wishes the court to treat it as innocent, it is incumbent upon it to explain how it came about…

[85] See Brink's Mat Ltd v Elcombe and others [1988] 1 WLR 1350 at page 1356F, et seq per Ralph Gibson LJ and adopted by this Court in Edy Gay Addari v Enzo Addari BVIHCVAP2005/0002 (delivered 27th June 2005, unreported) at paragraph 7.

[44] The Learned Judge clearly had the discretion to refuse to renew the injunction and in the exercise of this discretion, he considered correctly that the overriding question was where the interests of justice lay... I find that he nevertheless failed to weigh in the balance other factors that were material to his decision. In particular, the Judge did not consider that the risk of asset disposal was only one element of the possible prejudice…

[45] This Court can therefore consider afresh the question of whether it is in the interests of justice to regrant the injunction. Lord Hoffman in National Commercial Bank Jamaica Ltd v Olint Corporation Ltd reminded us of the basis principles that:

"[t]he purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result."

Lord Hoffman further states that "the underlying principle is … that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."

[223] In **Congentra**,[86] a case dealing, inter alia, with failure to make full and frank disclosure where it was not alleged that such failures were deliberate, Flaux J (as he then was) stated:-

"[61] The importance of making full and frank disclosure to the court of all matters material to the court's decision on an *ex parte* application for relief cannot be emphasized too strongly, particularly in the case of an application for a freezing order which may cause substantial prejudice to the Defendant. The matters which are "material" are all matters relevant to the court's assessment of the application, including matters which may be adverse to the application."

[62] … However, even if there has been material non-disclosure, the court has a discretion whether or not to discharge an order obtained *ex parte* and whether or not to grant fresh injunctive relief. Discharge of the order is not automatic on any non-disclosure being established of any fact known to the Applicant which is found by the court to have been material, **although it would only be in exceptional circumstances that a court would not discharge an order where there had been deliberate non-disclosure or misrepresentation**. (emphasis mine)

[63] In exercising that discretion, the overriding question for the court is what is in the interest of justice…"

[86] Supra note 69 at paras. 61 to 63.

The competing submissions, discussion and conclusions

[224] The appellants' written submissions were made under two broad headings. These are: (1) the risk of forced redemption; and (2) alternative remedies. In relation to risk of forced redemption, the appellants addressed six issues and drew certain conclusions. These are: (i) the way the issue arose *ex parte* and its relevance; (ii) the risk of forced redemption explained; (iii) the lack of reasons; (iv) the legal issue – was Mr. Wang's status relevant at all; (v) the factual issue – was there a risk of the redemption point being misused against Mr. Wang; (vi) a deliberate misstatement; and (vii) conclusion on the risk of redemption. I will set out in turn and address the submissions of the appellants and FRE in relation to (1) the risk of forced redemption, addressing them under each of the appellants' six broad headings; and then in relation to (2) alternative remedies.

Risk of Forced Redemption
(i) The way the issue arose *ex parte* and its relevance

[225] The appellants dealt first with the way in which the risk of forced redemption arose at the *ex parte* hearing of the JPL Application. They argue that the transcript of this *ex parte* hearing reveals that the issue with which Jack J was concerned and to which Mr. Wardell, KC responded in oral submissions raising the risk of redemption, was 'why it was necessary for the Court to grant the JPL Order *ex parte* rather than adjourning for a short period for an inter partes hearing.'[87] They contend that before that concern was raised, Jack J had already said that he had 'no difficulty' and that the submissions on the substantive wrongdoing against FRE demonstrated a sufficient risk 'to justify the grant of the JPL relief'. The appellants sought to make good these points by reference to the sequence of exchanges in which the issue arose before Jack J. This included Jack J commenting that he had read the skeleton arguments and looked at the witness statements, and it was for the appellants to make out a good case for 'making the order *ex parte* today rather than [him] listing it say next Tuesday inter partes'; and stating that 'I've got no difficulty with any of this, but what's the harm in delaying this for a week?'.

[87] See Appellants' skeleton argument at para 69.

[226] The judge continued not to be persuaded to proceed *ex parte*, and the appellants go on to cite fully the extract from the transcript of what Mr. Wardell, KC subsequently represented to the learned judge on the right to forced redemption and risk of dissipation of Mr. Wang's shares in RAGOF, which had the effect of persuading the judge.[88] In making this representation, Mr. Wardell, KC stated unequivocally that Mr. Wang is not a Qualifying Investor, and so this gives rise to an 'absolute right under the Articles to proceed by way of forced redemption', which puts Mr. Wang 'in real jeopardy' if relief is not granted today. The appellants also refer to this extract from the oral submission by Mr. Wardell, KC to Jack J where he said: 'there is nothing to suggest that they are prepared to behave honourably. And if we are forced to give them notice of any hearing, we think there is a real risk that they will go down the forced redemption route'.

[227] The appellants also point out that the risk of redemption had been identified by Mr. Wang at paragraphs 199 to 201 in his affidavit 'Wang 1', where he averred: 'I am concerned that the Floreat Management will use their control of RAGOF to try and sell or redeem my shareholding in RAGOF in an attempt to block the J&E Proceedings and any other shareholder claims I might bring.'

[228] With respect, I do not find any of these arguments by the appellants persuasive on this issue. The simple matter is, the representation by Mr. Wardell, KC, the subject of the complaint and the finding by the learned judge of a serious breach of the duty of full and frank disclosure and fair presentation, served two clear purposes. The first was to persuade the learned judge that, in addition to the allegations of wrongdoing by the Floreat Principals in their management of RAGOF and its assets being serious, there was a real, imminent, and absolute threat to Mr. Wang's shares in RAGOF, which threat was that of an absolute right to a forced redemption of those shares having arisen in circumstances where Mr. Wang was not a Qualifying Investor. The second was to persuade the judge not to adjourn the JPL Application and give FRE notice of it for appearance at an inter partes hearing a week later.

[88] See para 199 above.

[229] With respect to either or both matters, the appellants, as applicants for the JPL Order, had the burden of satisfying the presiding judge. This was so whether the judge raised them or not. This duty was part and parcel of the overarching duty on the appellants, as applicants for that kind of relief, and in circumstances where they were seeking to obtain it *ex parte* and not in the usual way in relation to proceedings before the court. It was therefore a duty of much primacy which the appellants had the obligation to discharge and to do so making full, frank, and correct statements or representations of both fact and law and fair representation.

[230] This duty extends not only to the accuracy of statements or representations made to the court, whether in writing or orally, whether by the applicants or their counsel, but to disclosing all material facts known to the applicants and which they could have discovered exercising reasonable diligence and inquiries. Importantly, this duty also extended to an obligation, which particularly rests with counsel, to direct and to take the court to the relevant documents and provisions which concern pertinent issues and matters, and to disclose the possible or likely defences, interpretations and counter-interpretations, and the counter-reasons or counter- arguments against the grant of the relief sought.

[231] In my considered view, the statement by Mr. Wardell, KC quoted at the end of paragraph 226 above only served to buttress or to underscore in the judge's mind the prior statement by him at the *ex parte* hearing (quoted at paragraph 199 above), that Mr. Wang not being a 'Qualifying Investor' by definition under the Articles of RAGOF, the company had an absolute right to redeem his shares in the said fund. I also observe that the way Mr. Wang put the redemption issue in that passage was not the same as the way his lead counsel put it to Jack J at the *ex parte* hearing, in response to the concern which had been expressed by Jack J about proceeding to hear the JPL Application *ex parte*. Mr. Wardell, KC put the position in more forceful and absolute terms, putting it beyond doubt that a right to force redemption of the shares had arisen and his client's (Mr. Wang) shares were therefore in immediate jeopardy.

[232] As the judge found correctly, this was done by counsel with the obvious intention and objective of dissuading Jack J from adjourning the JPL Application for a short period for Mr. Wang to serve FRE and to entertain the said application at an inter partes hearing with submissions and evidence from both sides. In short, Mr. Wardell, KC put the position of his client Mr. Wang in more absolute terms, and with a much higher degree of certainty and immediacy of risk of a forced redemption of the shares. Whereas the way Mr. Wang put it, while seeking to convey the reality and immediacy of the risk of redemption of his shares, did not quite rise to the level of an absolute right to forced redemption. This also begs the question why the difference in these two ways of putting the risk of forced redemption of the shares was not explained by Mr. Wardell, KC to Jack J. It is not enough to come afterwards and to seek to explain the appellants' omissions by citing a passage from Mr. Wang's evidence before the judge which may have put the position on the likely exercise of the right to redeem the shares on a less absolute or more accurate basis.

[233] It is not Mr. Wang's averment, but the submissions of his counsel Mr. Wardell, KC which convinced the judge that there was such an absolute right to forced redemption of the XYZ shares owned beneficially by Mr. Wang and, accordingly, those shares were in jeopardy or at risk of immediate forfeiture/redemption. It was Mr. Wardell KC's representations which dissuaded Jack J from his already declared course of action of adjourning the JPL Application to facilitate an inter partes hearing. Furthermore, the reference by Mr. Wang to Article 20 in the Articles of RAGOF dealing with 'Qualifying Investor', did nothing more than give a reference. It did not go far enough in discharging his duty of full and frank disclosure and fair presentation, especially on such important issues as the risk of dissipation, and why he was justified in proceeding *ex parte*.

[234] Neither Mr. Wang in his affidavit or his counsel in written submissions set out the provisions of Regulation 20 (or any other relevant article) for the judge's consideration. Mr. Wardell, KC did not take Jack J to Regulation 20 during his short oral presentation of the application, to interpret its provisions, or to

demonstrate to the judge why Mr. Wang or XYZ were not Qualifying Investors thereby giving rise to an absolute right of forced redemption. This was wholly unsatisfactory and did not satisfy the duty of full and frank disclosure which rested on Mr. Wang and the joint receivers.

[235] The appellants also submit that, put in its proper context, the concern which Jack J had about the submission by Mr. Wardell, KC about the risk of redemption, was whether to make the order sought *ex parte* or after a short adjournment at an inter partes hearing. Accordingly, contrary to the learned judge's finding in the judgment, the risk of redemption was being relied upon by the appellants not as an aspect of the risk to RAGOF's assets that substantially justified the grant of the JPL Order; but rather as an aspect of the 'orchestrated attack' that justified proceeding *ex parte*.

[236] As I understand it, the distinction being made by the appellants is that the risk of redemption was not a risk to the assets of RAGOF (since RAGOF did not own the shares), but a risk to Mr. Wang's standing to bring the application. While I do not dispute this distinction, in my judgment this is another convenient argument being advanced to get around the judge's clear finding of breach of the duty of full and frank disclosure at the *ex parte* hearing to obtain one of the laws 'nuclear weapons', in circumstances where Jack J had clear concerns with proceeding to hear the JPL Application *ex parte*, and where he was not initially convinced that there was any immediate risk to XYZ's shares in RAGOF (then being controlled by the joint receivers). This issue arose in circumstances where, as observed above, Mr. Wang himself had in his evidence in support of the JPL Application alluded to a real risk that 'his' shares in RAGOF would be either redeemed or sold if notice of the application was given. In short, this line of argument made in the context of an issue and finding of material non-disclosure and unfair presentation, does not, in my judgment, advance the appellants' complaint under this third category of alleged errors in the judgment.

(ii) The risk of forced redemption explained – Regulations 1.1, 4.4 and 20

[237] While the appellants accepted in their skeleton argument that for the purpose of Regulation 20 of the Articles of RAGOF, XYZ is the member or shareholder in RAGOF, not Mr. Wang, this is fundamentally different from the way Mr. Wardell, KC made his submissions to Jack J where he rooted his representation of forced redemption on there being an absolute right to redeem Mr. Wang's shares in RAGOF.

[238] However, the appellants cited, in aid of their interpretation of the Articles as to whether or in what circumstances a right to a forced redemption of shares can arise, Regulations 1.1 and 4.4 of the Articles. Neither of these provisions were cited or brought to the attention of Jack J by Mr. Wardell, KC either at the *ex parte* hearing or the discharge hearing. In fact, Mr. Wardell, KC did not take Jack J to the Articles of RAGOF in support of his submission that there was a real and present risk of a compulsory redemption of the shares held by XYZ in RAGOF, and it would not meet the ends of justice for the hearing to be adjourned to facilitate service on FRE and a subsequent inter partes hearing.

[239] Regulations 4.3 and 4.4 of the Articles of RAGOF provide:

> "A holder of Ordinary Shares **shall**, upon becoming aware that he is, or is holding **for the benefit of**, an Ineligible Investor, promptly either deliver to the Company a written request for the redemption of Ordinary Shares so held by him in accordance with these Articles or transfer such Ordinary Shares to a person who is not, and would not as a result of such transfer become, an Ineligible Investor."
>
> If any Ordinary Shares are held by **or for the benefit of** an Ineligible Investor, the Directors may, by written notice require the redemption or transfer of such Ordinary Shares **in accordance with these Articles**." (emphasis mine)

[240] The appellants rely on the provisions of Regulations 4.4 and 1.1 of RAGOF's Articles. They submit that it is 'at least strongly arguable' that the directors of RAGOF have a power to bring about a forced redemption, not just under Regulation 20, 'with respect to a legal owner of shares which fails to satisfy the requirements of being a Qualifying Investor, but also, under Regulation 4, with respect to a beneficial owner of shares [such as Mr. Wang] which/[who] is an

Ineligible Investor.'[89] An 'Ineligible Investor' is defined in the Articles as a person holding shares in the company in breach of the restrictions as to who may invest in the company as set out in the Offering Memorandum or contained in or pursuant to Regulation 4.

[241] The appellants say that, in turn, Regulation 4, engages the concept of a 'Qualifying Investor', and accordingly, it would seem that an Ineligible Investor includes someone who is not a Qualifying Investor. The point sought to be made by the appellants in relation to this issue is that FRE's submission that only the status of XYZ matters for the purposes of determining whether there is a risk of redemption of the shares in RAGOF owned beneficially by Mr. Wang, was wrong. They counter that whether or not Article 20 is concerned only with the status of a registered legal owner of shares, Regulation 4.4 on its face also appears to confer a power on the directors to require a redemption or transfer of shares in the event that a beneficial owner fails to meet the requirement of being a Qualifying Investor.

[242] This is a new argument being advanced by the appellants for the first time at the appeal stage. It had not been advanced by Mr. Wardell, KC before Jack J at the *ex parte* hearing of the JPL Application or at the discharge hearing, as a justification or arguable interpretation or construction. With respect, I find the construction now advanced by the appellants to be misconceived, and the submissions by FRE[90] more persuasive and correct. A simple reading of Regulation 4.3 demonstrates that Regulations 4.3 and 4.4 are concerned with a situation where a holder of Ordinary Shares in the company subsequently becomes aware that he or she is holding them for the benefit of an Ineligible Investor. Pursuant to 4.3, such a person must either request the company in writing to redeem the shares or transfer them to a person who is not and who will not by virtue of such transfer become an Ineligible Investor.

[243] Additionally, by 4.4 the company may by written notice require the redemption of the Ordinary Shares 'in accordance with' the Articles. The short answer to

[89] See Appellants' skeleton argument at para 72(e).
[90] See FRE's skeleton argument at paras 68.2- 68.4 and 69.

the appellants' construction point is that it has no application to Mr. Wang or XYZ. Furthermore, even if this new argument based on Regulations 1.1 and 4.4, which the appellants contend arguably includes a provision for forced redemption of shares held to the benefit of a beneficial owner, has some merit, this does not excuse or explain away the representation by Mr. Wardell, KC at the *ex parte* hearing being put in such absolute terms, and without bringing to Jack J's attention the relevant documents and provisions and any other interpretations or counter- arguments.

[244] The appellants argue further that it is because of these various provisions in the Articles of RAGOF that Mr. Wang, in his evidence in support of the *ex parte* JPL Application, 'apprehended that there was a substantial risk that RAGOF's de jure directors could seek to use these provisions against him at the instigation of the Floreat Principals'. In the end, the appellants make clear that it was never Mr. Wang's case that the power of compulsory redemption could properly be exercised against him.

[245] In my view, the obvious reason why an existing right to compulsory redemption may not be exercised by the directors against Mr. Wang is, as the appellants themselves observed, Mr. Wang is not a shareholder of RAGOF, thus any exercise of an absolute right to redeem the shares held in RAGOF by XYZ as the registered shareholder would have to be based on XYZ ceasing to be a Qualifying Investor, as defined in the Articles. Further, Mr. Wang is a Qualifying Investor as he represented himself to be. In any event, in my judgment it was not a necessary predicate to the judge's conclusions on material non-disclosure and fair representation in relation to the representation by Mr. Wardell, KC at the *ex parte* hearing on forced redemption, for either the learned judge or this Court to come to a definitive view or interpretation of these provisions in the Articles. These provisions, and the possible different interpretations and constructions, were simply ignored and never brought to the attention of Jack J at the *ex parte* hearing.

[246] The appellants also place much emphasis on what Mr. Wang called an 'orchestrated attack' on him by the Floreat Principals (or some of them)

following his application for pre-action disclosure in England on 23rd March 2021. In this context, the appellants argue that Mr. Wang's concern 'was reinforced by the fact that from the moment he had started to question the management of his investments and seek information about the same from the Otaibis, he had been the subject of an 'orchestrated attack''. The evidence of this 'orchestrated attack' and threats said to have been made to Mr. Wang are set out in various affidavits and documentary evidence. The genesis of this alleged attack is said to include the threat of litigation against him, his family and related companies on several fronts.

[247] Mr. Wang referred specifically to the contents of a letter dated 22nd April 2021 from H. Otaibi which stated: 'If you wish to pursue matters in the courts, we will protect our interests and pursue you, companies you control and your family members under the various obligations to us'.[91] The appellants see this 'orchestrated attack' as 'an intimidation tactic, designed to deter Mr. Wang from seeking to protect his interests through the Courts'. They also go on to contend that FRE had sought to prevent a transfer of the shares from XYZ to Mr. Wang from taking place by putting the transfer banks on notice of a purported security interest in favour of a subsidiary of one of the Cayman Funds.

[248] The judge considered the allegation by Mr. Wang of obstruction by the Floreat Principals to the transfer of the shares in RAGOF from XYZ to him at section 15.2 of the judgment. The judge observed that there was no evidence of any attempt to transfer the shares nor of any obstruction to such a transfer before the court at the *ex parte* hearing of the Receivership Application. The judge considered that what was said by Mr. Wang at paragraphs 138 and 139 of his affidavit in support of the said *ex parte* application, was 'put entirely speculatively'. It is not necessary for me to recite these two paragraphs here. Suffice it to be said that having read them, I do not disagree with the judge's classification of this evidence as 'speculative'. Mr. Wang uses the expression 'highly unlikely' in relation to obtaining the approval of the directors for such a transfer. His characterisation of the risk in relation to XY as being a 'likelihood',

[91] See Appellants' skeleton argument at para 34.

is said to be grounded on Article 15 of the agreement with XY which provides: 'the Bank accepts no responsibility for any refusal by the Issuer to execute the transfer of units to the Client or to a designated third party'.

[249] In my considered view, the provisions of Article 15 are clear. They do not lead to the conclusion that XY or XYZ will block or refuse a transfer of the said shares from XYZ to Mr. Wang or his nominated third party. It simply indemnifies or seeks to absolve XY contractually, from any liability for a refusal by the issuer to execute a transfer of the shares to Mr. Wang or his designated third-party nominee. In short, Article 15 is not evidence of a likelihood that the shares would not have been transferred to Mr. Wang (or his nominee) by XYZ, if Mr. Wang had actually requested it. As the learned judge surmised correctly in my view:

> "[125] The impression given by this evidence is that Mr. Wang had not yet tried to have the shares transferred into his own name by the time he had applied for the Receivership Order. Such alleged attempted transfer and alleged obstruction were not within the contemplation of the Court at that *ex parte* hearing."[92]

[250] I would add that no evidence of such an attempt and/or obstruction subsequent to the *ex parte* hearing was put before the judge below or this Court by the appellants. In fact, this Court was left with the clear understanding that Mr. Wang had not made and did not intend to seek the transfer of the shares in RAGOF to himself, which would then provide him with standing to wind up RAGOF and to appoint provisional liquidators. This must be considered in the context of a finding by the learned judge below, and by this Court, that his accounts of his purpose for seeking a Receivership Order and to have receivers seek the winding up of RAGOF and to appoint provisional liquidators in the interim, has varied and, on one scenario, even included the Receivership Order and winding up action falling away at a certain stage.

[251] In addition to the 'orchestrated attack' argument, the appellants rely on a telephone call Mr. Wang had on 22nd August 2020 with H. Otaibi and Mr. Wilcox during which, according to Mr. Wang, he had expressed the view that he was

[92] See the judgment in the court below at para 125.

‘not an experienced investor’; and, secondly, a letter from the investment manager of one of the Cayman Funds (a Floreat company) in April 2021, to say that he reasonably apprehended that there was a substantial risk that RAGOF’s de jure directors could seek to use these various provisions of the Articles of RAGOF against him at the instigation of the Floreat Principals, and to create obstacles to him prosecuting or causing the joint receivers to prosecute the just and equitable winding up of RAGOF and the interim provisional liquidator relief. The point taken in the April 2021 letter is that Mr. Wang’s allegations about his wrongful classification as a Qualifying Investor put one of his companies in breach of contract.[93]

[252] In my considered view, while Mr. Wang may legitimately have apprehended some risk that his allegations of wrongdoing against the Floreat Principals would and may have led to some pushback from them in defence of their own position, this is some distance away from concluding that a request by him to XYZ and XY for the transfer of the shares to himself or his nominee would not have been honoured or would have been blocked by the directors or the Floreat Principals or that the directors would have acted on some trumped-up or erroneous basis that RAGOF had an absolute right to compulsorily redeem the said shares.

[253] Moreover, there was a clear representation to Jack J by Mr. Wardell, KC at the *ex parte* hearing that such an absolute right had arisen or did exist when, as a matter of construction this was either not the case or arguably not the case. In any event, Jack J was not taken to any of the documents which underpin this issue such as the Articles of RAGOF and, in particular, Regulations 1.1 ,4.4 and 20. Importantly as well to the duty of full and frank disclosure and fair representation, no counter-argument to an absolute right to compulsory redemption of the shares was put before the learned judge at the *ex parte* hearing of the JPL Application by Mr. Wang or his counsel.

[93] See Appellants’ skeleton argument at para 73.

(iv) **Lack of Reasons**

[254] At paragraph 166(1) of the judgment, the learned judge found both parts of the representation by Mr. Wardell, KC at the *ex parte* hearing that FRE had an absolute right to redeem the RAGOF shares and thus Mr. Wang had no protection, to be 'arguably very wrong'. He also concluded that both parts of the explanation were put in different and stronger terms than at the Receivership Application hearing, lacked any meaningful attempt to explain or support them with relevant underlying documents, were not accompanied by any meaningful attempt to lay out the contrary position, and were the key and only expressly made points which persuaded Jack J to consider the JPL Application on an *ex parte* basis. The appellants argue that the learned judge offered no reasons or explanations as to why he reached any of these conclusions. There is no analysis whatsoever of what was wrong or 'very arguably wrong'. They argue that on this basis only the judgment ought to be set aside. In aid of this point they cite the case of **English v Emery Reimbold and Strick Ltd**.[94]

[255] FRE in its submissions, contended that the appellants' argument that the judge's findings that their arguments were 'very arguably wrong', is untenable. FRE points to the second sentence which begins 'I accept that both parts of this explanation', as indicative of the learned judge having accepted its submissions, recorded at paragraphs 83 and 89 of the judgment, that this representation was very arguably wrong. FRE also contends that the appellants have on appeal effectively pegged their analysis of RAGOF's Articles submissions on the basis that Mr. Wardell, KC's submissions on forced redemption were indeed wrong or at least very arguably wrong, and that the unarguably correct position is that there was indeed an absolute right to forced redemption under Regulation 4.4.

[256] It is to be noted that the appellants make clear at paragraph 75 of their skeleton argument that it has never been Mr. Wang's case that the power of compulsory redemption in the Articles could properly be exercised against him. Their

[94] Supra note 68.

position based on an analysis of Regulation 4.4, is that there is a power to redeem the shares beneficially owned by another, but that such a power cannot properly be exercised against Mr. Wang in the circumstances of this case.

[257] In my judgment, the appellants' contention that the judge offered no explanation or analysis as to why he reached these conclusions, is wrong and is, accordingly, rejected. The bases given by the judge are well supported on any proper and full reading of the judgment, including that Mr. Wardell, KC's representation as to a forced redemption was 'very arguably wrong'. I say this taking into account the provisions of Regulations 4.3, 4.4 and 1.1 of RAGOF's Articles and the new construction being now relied on by the appellants.

(iv) The legal issue: was Mr. Wang's status relevant at all?

[258] This issue concerns the question of whether XYZ, as the legal holder of the shares in RAGOF, and not Mr. Wang as the beneficial owner, mattered to any risk of a forced redemption. The appellants argue that this is simply wrong as 'Regulation 4.4 on its face also appears to confer a power on the directors to require a redemption or transfer of shares in the event that a beneficial owner fails to meet the requirement of being a 'Qualifying Investor''. I have already rejected this argument.

[259] The appellants next argue that there was no reason for them to anticipate that it would be suggested by FRE that Mr. Wang's status was not relevant to the redemption question, having regard to Regulation 4.4 and their construction of it to include beneficial owners. Again, this point cannot take flight for the same reason that the appellants' argument based on Regulation 4.4 was in the first place never put to Jack J at the *ex parte* hearing and it is in any event wrong. Moreover, as applicants proceeding *ex parte*, arguments and counter-arguments based on Regulations 4.4 and 20 of the Articles were issues well within the appellants' contemplation or ought to have been, and ought to have been put before Jack J for his proper consideration. This was a clear breach or breaches of the duty of full and frank disclosure and fair presentation by the appellants and their counsel. It is not simply that the judge was misled.

Likewise, the appellants erroneously argued that it is just a construction point, the onus to raise it being for the respondent at the discharge hearing.

(v)The factual issue: was there a risk of the redemption point being misused against Mr. Wang?

[260] In the appeal skeleton, counsel for the appellants proffered a number of reasons and explanations as to why the 'overstatement' by Mr. Wardell, KC at the *ex parte* hearing in representing that there was an 'absolute right' of forced redemption (which they accept could have been better phrased) could not have misled Jack J. They posit that what was really being conveyed by Mr. Wardell, KC was that, in the context of the evidence, there was a 'risk' of a forced redemption being attempted (not that one would be justified). Apart from the several reasons advanced at paragraph 86 of the appellants' submissions, they also contend that the evidence before the court at the *ex parte* hearing, which had been read by Jack J, pointed against there being an unqualified right to redeem the shares. In this regard, the appellants refer to the evidence in Mr. Wang's affidavit in support of the JPL Application where he referred explicitly to the fact that he had 'certified himself as being an experienced investor' which counted against the risk of a forced redemption.

[261] On the other hand, FRE submits that none of these points accord with what Mr. Wardell, KC represented to Jack J in his submission. His submission was unequivocal and to the effect that there was an immediate risk of a justified compelled redemption.

[262] I find no merit whatsoever in any point made by the appellants in this section. They are nothing more than an attempt to craft an argument now to try to both minimise and explain away the tenor, force and unequivocal terms and seriousness of the misrepresentation made by Mr. Wardell, KC to Jack J at the *ex parte* hearing on the right to forced redemption, conveying the immediacy of a risk of a forced and justified or absolute right to redemption of the shares.

(vi) Was it a deliberate misstatement?

[263] The appellants argue that in making this finding the learned judge committed two 'misdirections of law'. The first is that it is only where a misstatement or non-disclosure was deliberate that the principle that an *ex parte* order should only be maintained in exceptional circumstances applies; it does not apply where the misstatement or non-disclosure was negligent. The second 'misdirection' posited by the appellants, is that what must be deliberate is the misleading of the court not merely the making of the statement – it must be a statement made with the intention of misleading the court to be classified as deliberate. It is the appellants submission that the learned judge, at paragraph 175 of his judgment, wrongly equated the two.

[264] In support of this submission, the appellant cited the decision of this Court in **Cameroun**.[95] This case concerned an application to set aside an order for service out of the jurisdiction obtained *ex parte* on the ground of material non-disclosure. In setting out the relevant principles at paragraph 20, Bennett JA [Ag.] surmised at sub-paragraphs (5) to (7) –

> "(5) A distinction should be drawn between non-disclosure which amounts to an attempt to deceive the Court, and a negligent failure to state certain facts which should have been stated.
>
> (6) If the Court is satisfied that there was a deliberate intention to deceive the Court, the order is likely to be discharged.
>
> (7) Even if there is no deliberate intention to deceive the Court "… the question, as I see it, is essentially one of degree. The negligence may be so serious as to justify the Court in discharging the order even though it is satisfied that the deponent had no intention to deceive the Court. On the other hand, if the judge is satisfied that there was no intention to deceive and that the misstatement is not grossly negligent, he may think it better not to visit it with a penalty which may fall as heavily on the Defendants as the Plaintiffs, since the Plaintiffs can, ex hypothesi, make a fresh application which will succeed…"

[265] In my opinion the above principles are clear from the authorities. In relation to the *ex parte* hearing on the JPL Application, the judge's finding was that the representation by Mr. Wardell, KC was 'not innocent', that is, it was deliberate

[95] Supra note 80.

having not been made accidentally or negligently. The difference as a matter of principle is that a 'deliberate' or not innocent non-disclosure amounting, implicitly, to an intention to deceive the court or to mislead the court will, except in exceptional circumstances, be visited with an order discharging the order obtained in breach of the duty of full and frank disclosure and fair presentation and in it not being renewed. Whereas, where the non-disclosure is innocent and material, the order obtained may be discharged and, if discharged, may be renewed or regranted.

[266] In my considered view, it is not correct to say, as the appellants do, that the learned judge conflated the principles of deliberate and innocent non-disclosure at paragraph 175 of the judgment. To the contrary, it is the application of these principles which led the judge to find that Mr. Wardell, KC's submission was deliberate and that the consequence of such misrepresentation was that the JPL Order ought to be discharged. Firstly, the judge's clear and unequivocal finding at paragraph 175 was that Mr. Wardell, KC's representation of an absolute right to forced redemption of the shares in RAGOF was not innocent. He followed this with a statement: '[t]he submission can thus be said to have been deliberate and intentional and not accidental'. There was no finding that it was innocent or either accidental or negligent.

[267] In response, FRE stressed that the judge's approach to 'culpability' was correct. He addressed himself at paragraphs 156 and 157 to the test of a non-innocent breach referring to the relevant passages in **Banca Turco Romȃna S.A. (in liquidation) (acting through its liquidator Fondul De Garantare a Depozitelor Bancare) v Çörtük and others**[96] and **Hu Lan v Sundale International Limited et al**.[97] These cases put the onus on an *ex parte* applicant to explain at the inter partes hearing how a material non-disclosure came about, and absent an explanation or proper explanation, there is a strong inference that it was not innocent. FRE submits, therefore, that the learned judge was clearly entitled to reach the conclusion that the breach was not innocent.

[96] [2018] EWHC 662 (Comm).
[97] BVIHCM 2019/0167 (delivered 6th July 2020, unreported).

[268] I agree with FRE on this issue. I can find no fault in the judge's analysis and reasoning in reaching the conclusion that Mr. Wardell, KC's submission/representation at the *ex parte* hearing had not been innocent. An applicant bears the onus of explaining its non-disclosure. If an applicant who is guilty of non-disclosure wishes the court to treat it as innocent, the applicant must explain how the non-disclosure came about. The absence of any explanation gives rise to a strong inference that the applicant cannot put forward an innocent one.

[269] The learned judge's finding is indicative of counsel making the decision to elevate the position of risk to Mr. Wang's shares by putting the issue of forced redemption not as a threat made or likely possibility, but as an absolute right, and to ground it on Mr. Wang being an Ineligible Investor, when neither part of that submission was correct. While it is 'human to err', and counsel, including imminent senior counsel, can overstate or misstate their client's position or case in the heat of the moment, it is for counsel, at the earliest opportunity, to correct or withdraw (wholly or partially) any such misstatement or representation made to the court, especially one made during an *ex parte* hearing. It is impermissible to allow a judge at an *ex parte* hearing to proceed to grant the relief sought on the basis of a false, incorrect, or material overstatement or misrepresentation of their client's case. This duty is made more onerous in circumstances where the *ex parte* application is for one of the law's 'nuclear weapons'.

[270] Regrettably, Mr. Wardell, KC did not avail himself of this opportunity either during the *ex parte* hearing, or even at the discharge hearing, after this issue of his serious misrepresentation had been raised by FRE in their discharge application. Instead, he attempted to explain and to put in context what he meant by the submission of an absolute right to forced redemption, and to proffer the reason why Justice Jack would have understood what he was trying to say. This attempted justification was addressed head on by the learned judge at paragraph 177 of the judgment. There he saw this, correctly in my view, as

'once again, an attempt to re-write history in a manner that does not tally fully with the facts.'

[271] The learned judge's reasons[98] for concluding that the representation was 'not innocent', speak for themselves, and do not bear repeating in any further detail. These reasons are, in my judgment, clear, sound and cogent. Further, at paragraph 179, the learned judge concluded, again correctly in my judgment, that the consequences of the misrepresentations, and of not taking Jack J to the underlying documents or positing before the judge obvious counterarguments to a right of forced redemption of the shares, that Jack J 'proceeded to make the JPL Order without the benefit of a sufficient consideration of possible counterarguments and of alternative remedies.' Accordingly, I do not agree with or accept any of the points being put forward at sub-paragraphs a. to e. of paragraph 86 of the appellants' skeleton argument.

[272] This state of affairs led the learned judge to find, as stated above, that the submission or representation was 'not innocent'. The learned judge came to this conclusion with obvious regret, as is clear from a reading of paragraphs 177 and 178 of the judgment. It is not a light matter for a court to find that counsel, particularly senior counsel, appearing before it on an *ex parte* application had not only committed breaches of the duty of full and frank disclosure and fair presentation, but that such representations had not been innocent. The gist of this is that Mr. Wardell left the judge at the discharge hearing with no other option than to conclude that his representation made at the *ex parte* hearing of the JPL Application as to an absolute right to forced redemption of Mr. Wang's shares in RAGOF, leading to an imminent and serious risk to him of irreparable loss of his shares and to his ability to seek certain interim remedies, including applying, through the Joint Receivers, for the winding up of RAGOF and for the appointment of provisional liquidators, was not innocent. The immediate effect of this representation by Mr. Wardell, KC was that the judge was persuaded to proceed with the JPL Application on

[98] See the judgment in the court below at paras 175 - 178.

an *ex parte* basis and in the total absence of any counterarguments or counterpoints on the issue of forced redemption and an immediate risk of loss to Mr. Wang, as the beneficial owner of the shares in RAGOF.

[273] The finding that this representation was not innocent, is a serious one for a judge to make in relation to legal counsel, in particular, senior counsel at the Bar as the appellants state at paragraph 88 of their skeleton argument. The judge found at paragraph 175 that Mr. Wardell's representations had been conceived to persuade Justice Jack not to adjourn the JPL Applications to an inter partes hearing. I would also add, that the other but related effect of that submission/representation was to further persuade the learned judge to make the order sought for the appointment of provisional liquidators, since the assertion, in strong terms, of such an absolute right to forced redemption was coupled with the risk of losses or continuing losses or devaluation of the assets of RAGOF, issues which go directly to the grant of the order appointing provisional liquidators. Moreover, the representation of a right of forced redemption was, as a submission, not correct or 'arguably wrong', as the judge found at paragraph 166. It was put in stronger and more 'absolute' terms by Mr. Wardell, KC at the *ex parte* hearing, as a means of persuading Jack J to allow the JPL Application for a 'nuclear weapon' to proceed *ex parte*, a matter which procedurally was clearly of serious concern to the learned judge, as is clearly borne out by the transcript of the hearing.

[274] The learned judge considered it significant that Mr. Wardell, at the discharge hearing, stood by his submission when given an opportunity to explain that it was or might have been a misstatement or overstatement or was made accidentally or negligently. This, according to the judge, had the effect of putting him in a 'binary choice' either to agree that Mr. Wardell had not committed a breach of full and frank disclosure and fair presentation, or to rule that he had breached that duty and that, inferentially, it was made with the intention to mislead the court into being convinced that Mr. Wang's shares were in immediate jeopardy of being redeemed, disentitling him to any relief by way of winding up and provisional liquidation.

[275] By comparison, on the issue of whether the omission by Mr. Wardell, KC to take Jack J to the underlying documents and to allude to FRE's likely counter-arguments at the *ex parte* hearing was deliberate, the learned judge found this to be 'less easy' to see. He remarked that he would like to think this was an 'oversight', albeit it was possibly deliberate. After considering the matter, he declined to ascribe to Mr. Wardell, KC a 'premeditated intent' to avoid further scrutiny by Jack J of the contention at the *ex parte* hearing. It sufficed that no explanation had been given and, accordingly, there was no excuse for the omission. There was no excuse for allowing Jack J to proceed on the basis that Mr. Wang had no protection and that such an absolute right to forced redemption of the shares had arisen.

(2) Alternative Remedies

[276] On the issue of alternative remedies,[99] the appellants submit that the learned judge did not make a positive finding that the position on alternative remedies had actually been 'misstated' at the *ex parte* hearing before Jack J; he only went so far as to find that alternative remedies were 'at least arguably available'.[100] They argue that in doing so the judge fell into error. The first error is that the mere fact of argument at the inter partes stage being 'arguable', does not, without more, demonstrate a breach of the duty of full and frank disclosure at the *ex parte* stage, as the duty extends only to the identification of opposing points that should reasonably be anticipated, but does not extend to 'requiring the advocate to develop his opponent's arguments to the length that they are later developed at the inter partes hearing'.

[277] The appellants went so far as to submit that the learned judge could and should have determined whether the alternatives proposed by FRE were actually available. Their arguability was not enough. FRE counters by arguing that these submissions are both confused and without merit. They miss the point that the learned judge found that the breach of full and frank disclosure regarding forced redemption was 'aggravated' in its seriousness by the

99 See Appellants' skeleton argument at paras 92-98.

100 See the judgment in the court below at para 181.

appellants' omission to bring to Justice Jack's attention that there were arguable alternative remedies. This they contend was a conclusion open to the judge and one which was correctly made.

[278] With respect, I find this argument of the appellants to be misconceived. The onus was on the appellants at the *ex parte* stage to address the judge on possible defences and counterarguments to a winding-up and to the appointment of provisional liquidators. This included, most importantly, any alternative remedies. It is not permissible for the judge to conduct a mini trial at either stage on the issue of alternative remedies. What the judge must satisfy himself is whether at the *ex parte* stage these remedies or some of them were 'available' to FRE, in the sense of being at least arguable and not specious, fanciful, or wholly immaterial. The starting point in this exercise was whether any alternative remedies were actually brought to the judge's attention at the *ex parte* hearing, in fulfilment of the appellants' duty of full and frank disclosure and fair presentation.

[279] Moreover, as a matter of principle, it is not for the applicant proceeding *ex parte* for interim relief, in this instance draconian interim relief, to determine what is material and whether to disclose or to address possible alternative remedies to a winding up and the appointment of provisional liquidators of RAGOF, or for that matter to determine whether any such alternative remedies are likely to succeed if argued. These are matters squarely for the court and the court alone to form a preliminary view.

[280] In the instant matter, the question of alternative remedies to a winding up and/or the appointment of provisional liquidators, are obviously issues which any applicant for such draconian relief ought to put before the court on an *ex parte* application in discharging their duty. In doing so, it is always open to the applicant to indicate or to submit to the court why they say any possible alternative remedy or none of them are relevant, or are indeed totally unavailable to the respondent. This the appellants wholly failed to do at the *ex parte* stage. In so doing, the appellant committed a serious breach of the duty

of full and frank disclosure and fair presentation, as the learned judge correctly found in my judgment.

[281] However, the appellants also submit that by section 167(3)(b) of the **Insolvency Act** the question which the learned judge ought to have asked himself is not whether alternative remedies were 'arguably available', but whether the appellants were acting unreasonably in pursuing a winding up rather than an alternative remedy. In making this submission, the appellants have confused the test for the grant of a winding up (appointment of liquidators) with the test for the appointment of provisional liquidators applicable under section 170. Section 167 deals with an Originating Application to wind-up a company. The provision which the learned judge was considering at the *ex parte* hearing is section 170(4)(b) dealing with what the court must be satisfied about in order to exercise its discretion to appoint provisional liquidators, in circumstances where the applicant has applied to wind up the company. In deciding which way to exercise his discretion to appoint provisional liquidators, the question of potential alternative remedies to a winding up is most relevant.[101]

[282] The importance of considerations of alternative remedies in winding up and in provisional liquidation proceedings, is clear from the statute and from the applicable principles. Section 167(3)(b) on which the appellants rely for their submission, itself stipulates that the court must consider whether 'in the absence of any other remedy' it would be just and equitable to appoint a liquidators; that the court shall appoint a liquidators 'unless it is also of the opinion that some other remedy is available to the applicant'; and whether the applicant is acting unreasonably in seeking to have a liquidator appointed 'instead of pursuing that other remedy'.

[283] The applicable section 170(4)(b) provides for the court to be satisfied that the appointment of liquidators is necessary for maintaining the value of the assets 'owned or managed' by the company or in the public interest. The latter is not

[101] See para. 92.2 of FRE's skeleton argument.

applicable here. As to the former, it is certainly arguably applicable that the Joint Receivers, by virtue of their appointment over the shares in RAGOF, had the necessary standing to apply to wind up RAGOF, and to apply to appoint provisional liquidators. It is arguable that such an order is necessary to maintain the value of the assets of RAGOF, which in turn may have some positive effect on maintaining the value of the shares themselves. Most importantly, and this is the death knell of this argument by the appellants, there is no requirement under section 170(4)(b) for the court to determine whether it was unreasonable for the appellants to be seeking to wind-up of RAGOF instead of seeking some other available remedy. That issue ultimately goes to the court's exercise of its discretion whether to make a winding up order - a matter for the hearing and determination of the Originating Application.

[284] The appellants argue at paragraph 95 of their skeleton argument, three points in relation to each alternative remedy posed by FRE to the judge at the discharge hearing. These are: a staged redemption of the RAGOF shares; an unfair prejudice action, if necessary supported by an injunction and/or Stop Order; and legal proceedings for breach of duty and/or conspiracy – as Mr. Wang had indeed begun to prepare for in England. One other alternative remedy which was clearly available to Mr. Wang was to seek a transfer of the shares in RAGOF to himself or another third-party nominee. It is important to note, however, that at paragraph 58 of the judgment, the learned judge summarized the matters which Mr. Wang had identified and addressed in his affidavit in support of the *ex parte* JPL Application. None of these matters pertained to or concerned alternative remedies. The appointment of JPLs was put at the *ex parte* hearing as the only available option, not one of several other options with provisional liquidators being the most practicable or the most necessary or effective remedy in all the circumstances.

[285] The first point which the appellants make at paragraph 95, is that the possibility of unfair prejudice proceedings was canvassed in their *ex parte* hearing skeleton argument, but the learned judge did not explain in his judgment why that was inadequate in satisfying their duty of full and frank disclosure and, in any event, there having been a complete breakdown of trust and confidence in

the Floreat Principals' management of RAGOF, it was not unreasonable to pursue winding-up instead of unfair prejudice. The simple answer to this point is that the mere mention of unfair prejudice in the skeleton argument was not a fulfilment of the duty. An applicant in proceedings *ex parte* has a duty to bring these matters to the attention of the judge and to show why any such available remedy, even if considered, ought not to lead to the judge refusing the application to appoint provisional liquidators. This the appellants clearly failed to do, and it is no answer to say, as they do, that Justice Jack had read the papers.

[286] The second of the appellants' three points is that a staged redemption of RAGOF shares was not an alternative to the appointment of liquidators that rendered the pursuit of that remedy unreasonable. The main reason for so submitting is because a staged redemption would not have addressed the wrongdoing alleged and prevented any further interventions or actions (presumably by the Floreat Principals) to prejudice the assets of RAGOF. While this position is well arguable, the simple fact is that this alternative remedy was not brought to the judge's attention at the *ex parte* hearing for his consideration and assessment of its relevance and materiality.

[287] The third point is that a personal claim for breach of duty or conspiracy was similarly not an alternative to the appointment of liquidators that rendered the pursuit of that remedy unreasonable. Again, the appellants may have a good argument as to why this is not a reasonable alternative remedy in the circumstances, but they did not bring this remedy or its merits to the judge's attention at the *ex parte* hearing.

[288] The learned judge was satisfied that a winding up of RAGOF on the just and equitable ground 'may well be a disproportionately harsh remedy', for the reasons which he identified at paragraph 182. He was at pains to say that this is not to be taken as an indication of the court's likely view upon the presentation of an application to appoint liquidators, as he had not yet formed a view. That was clearly a matter for the hearing of the originating application to appoint liquidators of RAGOF. Specifically concerning the appointment of

provisional liquidators, the judge considered that the potential availability of alternative remedies and the issues in relation to an intended application to wind RAGOF up on the just and equitable ground are of such great importance that the court would have significantly benefitted from hearing both sides, not just the applicant, as natural justice would ordinarily require. It is not correct to say, as do the appellants, that the judge in doing so 'reached a final view on whether there should be a winding up.' He expressly did no such thing.

[289] This clear conclusion reached by the learned judge speaks to two matters of primacy. The first is the appropriateness of dealing with the JPL Application at an inter partes hearing. This was Jack J's strongly stated position at the *ex parte* hearing, which prompted Mr. Wardell, KC, in opposing an adjournment, to represent that a right to forced redemption of Mr. Wang's shares had arisen, and there was a real risk of forced redemption. Secondly, but also importantly, it harkens back to the appellants failure to identify and bring to the attention of Jack J any of the identified available alternative remedies to a winding up order and to the appointment of provisional liquidators at the *ex parte* hearing,

[290] Curiously, the appellants also argue that Jack J at the *ex parte* hearing would have been well aware that there may be arguments against the winding up, and they (the appellants) never suggested to him that winding-up was 'unanswerable'. In my view, there is nothing to this point as well. Whatever the judge at the *ex parte* hearing thought were possible alternative remedies to the winding-up is unknown as Jack J did not address any alternative remedy during the hearing, not surprisingly because the appellants had not disclosed alternative remedies in presenting their application, except for mentioning unfair prejudice, but going no further.

[291] It is not for an applicant proceeding *ex parte* to proceed with their application on the assumption that the presiding judge, however experienced he or she may be in such matters, would figure out for themselves what are possible alternative remedies to a winding up and appointment of provisional liquidators. It is for the applicant to discharge the duty and onus which rests exclusively with them, to make full and frank disclosure and fair presentation of the

application, including disclosing and addressing possible defences and alternative remedies to the interim relief being sought.

[292] The conclusions reached by the learned judge as dealt with above, led him to also conclude, for the reasons given at paragraphs 185 to 190 of the judgment, that the JPL Order ought to be set aside and not regranted. The appellants challenge the judge's decision both to discharge the JPL Order and, if so, not to regrant it. The issue of regrant, in relation to both the Receivership Order and JPL Order are matters to be dealt with under category 5.

Category 4: Full and frank disclosure on the Receivership Application

[293] This category deals with grounds 21 to 29 of the Receivership Appeal. The learned judge dealt with the breach of the duty of full and frank disclosure and fair presentation at the *ex parte* Receivership Application from paragraphs 191 to 199 of his judgment. He pointed out that he had not presented Mr. Wardell, KC at that hearing with a preliminary challenge to proceeding on an *ex parte* basis, but had made the Receivership Order having been persuaded to do so by his submissions and explanations of the matter. He observed that it 'included, or rather omitted any attempt to correct my recapitulation that Mr. Wang was making the applications in circumstances where he had no clear exit mechanism from the structure.' However, the learned judge was now persuaded that 'that was an incorrect understanding, since a staged redemption process was possible or arguably possible, and there were very probably other ways in which Mr. Wang or his agents or nominees could get themselves in a position to have standing to apply for the appointment of liquidators over RAGOF if other remedies should not have been reasonably available.'

[294] Importantly, the learned judge says at paragraph 192:

> "That omission was material, because if I had understood Mr. Wang's present scheme merely to be what it appears to be (namely the quickest and cheapest way to Mr. Wang's desired result of unwinding the whole structure and abstracting the value of his investment), then I would have been considerably more reluctant to grant the Receivership Order sought and indeed I would probably have refused it."

[295] As to other findings of breaches of the duty of full and frank disclosure and fair presentation at this *ex parte* hearing, the learned judge accepted three such breaches identified by FRE. These are: (i) potentially available alternative remedies to the appointment both of receivers (transfer of the shares to another nominee) and JPLs (unfair prejudice and potentially other proceedings, including injunctive type relief); (ii) the alleged right of forced redemption; and (iii) the overall context in which Mr. Wang had engaged Floreat and its Principals to provide him with a financial solution to his liquidity problems caused by overseas court orders. The judge was satisfied that these matters 'were material to the Court's consideration whether or not to accede to the appointment of receivers, particularly where the appointment of receivers was clearly intended to be the first part of a two-part strike strategy.' He concluded on this aspect:

> "I am also satisfied that had the Court been presented with the fuller picture that emerged at the inter partes discharge application stage, then I would have been considerably more reluctant to make the Receivership Order than I had been. In particular, the potential and apparent availability of alternative remedies to both the Receivership and JPL appointment would have inclined me to conclude that such other relief should have been sought instead of these most extreme of interim remedies."

[296] With regard to whether these breaches were innocent or not, the learned judge concluded that they were not innocent. He found that while Mr. Wardell, KC had sought to present matters at the *ex parte* hearing in accordance with the duty of full and frank disclosure, 'at the same time they wished to present their narrative in such a way as would pre-empt any concern on the court's part that the relief being sought was disproportionate. Hence, for example, the Court was told, with undue emphasis, that no other viable remedies would avail Mr. Wang. That was arguably not correct. The word 'arguably' is important here. Again, the quite considerable time spent by counsel at the inter partes hearing arguing over the availability or otherwise of alternative remedies proves its own point: the issue was by no means as clear cut and in Mr. Wang's favour as his counsel had presented at the *ex parte* Receivership Application hearing. The judge therefore, reached the conclusion that the Receivership Order ought to be revoked. He noted that the potential, and indeed apparent, availability of

other remedies alternative to a receivership, and the unlikelihood of significant asset dissipation within RAGOF and/or Floreat, persuaded him that the interests of justice are not likely to be prejudiced by not continuing or not regranting the Receivership Order.

[297] The learned judge mused that it would be highly unusual for the alleged victim of wrongdoing not to have other legal remedies available to him than a just and equitable winding up. He was satisfied that such potential available remedies had been identified at the inter partes discharge hearing by FRE. He also considered that despite it being the position that Mr. Wang's shares represented 97+% of the shares in RAGOF, there were other minority shareholder interests, and Floreat and the Floreat Principals also have interests that the court needs to take into account. 'Such interests include not just financial damage inflicted primarily or collaterally by the grant of draconian orders such as the appointment of receivers and liquidators, but also potential massive and irreparable reputational damage'. Accordingly, 'the court is bound to take a more measured, proportionate and balanced approach to the deployment of what, at the end of the analysis, are the court's most destructive weapons'.[102]

[298] The appellants repeat under this category a number of submissions made and already dealt with under the preceding three categories of errors identified by them. I do not intend here to traverse that landscape again but rely on the assessment of the merits of these points given earlier in this judgment. In relation to the issue of alternative remedies, the appellants repeat that the learned judge applied the wrong test, it being whether Mr. Wang was acting unreasonably in not pursuing them in preference to the receivership, and not whether they were 'potentially available'. Again this point was dealt with under category 3 above.

[299] As to the alternative of a transfer of the shares another nominee, the appellants contended that this had certain inherent difficulties, not least of which was that

[102] See the judgment in the court below at para 198.

the new nominee would have to have been willing to prosecute the proceedings. In my view, respectfully, there is nothing to this point since such willingness in a chosen nominee of Mr. Wang is to be presumed, as there would be no point in Mr. Wang having the shares transferred from one unwilling nominee to another. Moreover, the simple but profound answer to this is that Mr. Wang could have had the shares transferred to himself, if he was unable to find or secure a willing nominee, but he made no attempt to do so.

[300] The appellants also stress that Mr. Wang had always made clear in the various applications that he was seeking a transfer of the shares to himself. If this is indeed his intent and objective, then he ought to have requested that the shares be first transferred to himself by XYZ, thereby giving him the necessary standing to move the court to wind up RAGOF and to appoint provisional liquidators. That step would have the obvious effect of obviating any resort to the court's jurisdiction to appoint receivers. The gravamen of the omission at the *ex parte* Receivership Application hearing, is that no alternative remedies were disclosed to the learned judge including, and especially, the transfer of the shares to Mr. Wang or to a willing nominee. These alternatives also included those identified and accepted by the judge at the inter partes discharge hearing. They are: unfair prejudice claim, personal claim and injunctive relief.

[301] As to Mr. Wardell, KC's presentation of the risk of forced redemption as a breach of the duty of full and frank disclosure at paragraph 193(2) of the judgment, the appellants repeat their earlier points made under category 3 above, but add that it is notable that the presentation of this issue at the *ex parte* Receivership Application hearing (unlike at the *ex parte* JPL Application hearing) was not about an absolute right of redemption and, also, the court was taken by Mr. Wardell, KC to the definition of 'Qualifying Investor' in the Articles of RAGOF and was told that those in control of the fund 'may well have ammunition on this ground to insist on a forced redemption'. Likewise, the court was told that if the Floreat Principals were to apprehend the threat of winding up proceedings then in order to thwart them, the directors of RAGOF will be

encouraged or coerced into purportedly exercising powers to sell or compulsorily redeem these shares.

[302] In response to the appellants' submissions on this aspect, FRE makes a number of points at paragraphs 140 to 144 dealing with the issue of alternative remedies. I do not consider it necessary to repeat them here. However, FRE also submits that in considering the Receivership Application which was the first stage and which was intended to lead to the joint receivers having the power and standing to apply for the winding up of RAGOF and appointment of provisional liquidators, which powers were expressly granted by the Receivership Order itself, it was appropriate and necessary for the learned judge to consider the alternative remedies not just to appointing receivers, but to a winding up and appointment of provisional liquidators.

[303] This is the approach which the learned judge adopted. In my considered view it is the correct approach. This is especially so since this was all part of Mr. Wang's two-stage strategy to obtain control of the shares by first having receivers appointed – a step which was necessary not to protect the shares as his assets which would be the usual use of the court's jurisdiction to appoint receivers, but as a stepping stone to the second and more important stage of winding up RAGOF as a means to appointing provisional liquidators to effectively wrestle control of RAGOF and its management from Floreat and its Principals. In this regard, a transfer of the shares to Mr. Wang would have completely obviated any resort to appointing receivers over the said shares.

[304] As to the issue of forced redemption, FRE accepts as correct that Mr. Wardell, KC had put this somewhat differently at the *ex parte* Receivership Application hearing, but argued that his presentation was also a seriously unfair one. They also accept that at that *ex parte* hearing Mr. Wardell, KC took Wallbank J to some of the relevant documentation, that is, Regulation 20. At paragraph 146.2 of its skeleton argument, FRE provides an extract from the transcript of Mr. Wardell KC's submissions at the *ex parte* hearing. I need not for present purposes repeat it here. FRE argues that Mr. Wardell, KC failed to draw the court's attention to the fact that XYZ was the shareholder and not Mr. Wang;

neither Mr. Wang nor Mr. Wardell, KC disclosed to the judge the XYZ subscription documents in which XYZ warranted that it was a 'Qualifying Investor'; and Mr. Wardell, KC had wrongly stated that Mr. Wang was not a 'Qualifying Investor' because he did not view himself as being a 'Sophisticated Investor', when, under the terms of the Articles, an investor's financial sophistication had nothing to do with it, and Mr. Wang had signed the subscription documents (not disclosed) warranting that he was a 'Qualifying Investor'.

Analysis and Conclusions – Category 4

[305] In my view this category of criticisms of the judge's findings of breaches of the duty of full and frank disclosure and fair presentations, leading to his finding that such breaches or omissions were not innocent, and that the Receivership Order ought to be discharged, fails. Mr. Wang and his counsel clearly failed to properly and fully disclose to the learned judge at the *ex parte* hearing the various alternative remedies, most significantly the transfer of the shares to Mr. Wang or a willing nominee. Likewise, on the issue of forced redemption, while Mr. Wardell, KC had pointed the judge to Regulation 20 this was primarily to show that Mr. Wang did not fit the definition of 'Qualifying Investor' and this may lead those in charge of RAGOF to conclude that the fund could force the redemption of his shares.

[306] The clear imputation being left with the judge was that Mr. Wang's shares needed to be protected by having them put in the hands of court appointed receivers as they were in imminent damage of a forced redemption, when in fact that was not the case on any proper reading of Regulation 20. Furthermore, Mr. Wardell, KC did not take the judge to these provisions and it was not sufficient to assume that the judge had read Regulation 20 and understood it. Likewise, Mr. Wardell, KC did not take the judge to the provision in the Offering Memorandum and it was never explained to the judge that the transfer of the shares to Mr. Wang or another willing nominee was an option to appointing receivers and was one which he had not pursued.

Category 5: Refusal to regrant the Receivership Order and JPL Order

[307] This category deals with grounds 20-38 of the Receivership Appeal and grounds 25-32 of the PL Appeal. As mentioned above, the learned judge, having found in each instance that the breaches of the duty of full and frank disclosure and fair presentation were serious and not innocent, decided to discharge and not regrant either the Receivership Order or the JPL Order.

Appellants' submissions on regrant – JPL Order

[308] The appellants submit that the errors in the judgment which they have identified under categories 1 to 4 vitiated the judge's overall conclusion at paragraph 184 that the JPL Order be set aside and not regranted. In addition, they advance two other reasons why they say the judge's conclusion of no regrant was erroneous. The first of these concerns the ongoing wrongdoing contained in the JPLs' reports. They challenge the judge's apparent 'discounting' of this evidence entirely, and for no other reason than that the reports did not contain 'findings'. The JPLs' investigations were ongoing and the evidence of Mr. Wang's wrongdoing amounted to no more than 'appearances'.

[309] The appellants saw the judge's treatment of this evidence as 'a perverse view' and wrong in principle. They argue that something does not have to be the product of a concluded investigation to constitute evidence upon which a court can rely to determine that it ought not to exercise its discretion to discharge the JPL Order, or if to discharge, to regrant the said order in the interest of justice. The appellants underscore that the 'evidence' in the JPLs' reports is evidence from court appointed officers acting independently and in good faith, and their conclusions 'were the product of detailed investigations and were supported by documentary evidence.' The JPLs' confidence in their investigations and in the conclusions they have drawn therefrom, is further evinced by the fact that they have issued proceedings against the Floreat Principals and Floreat entities in England expressly relying on their reports in the claim form.

[310] The second additional reason favouring regrant, say the appellants, concerns the underlying risk of dissipation which the learned judge classified as 'unlikely'. This finding was based on the judge's passing observation at paragraph 170

of the judgment, that the assets of RAGOF comprised largely real estate and accounts receivable.

[311] The appellants submit that the judge's reasoning on the issue of risk of dissipation failed to take into account a number of factors. These are: (i) the risk with which the court was concerned on an application to appoint provisional liquidators is not the same as that required for the purposes of a freezing order application. The important distinction is that pursuant to section 170(4)(b) of the **Insolvency Act**, what the court is concerned with on an application to appoint provisional liquidators is whether the relief sought is necessary for the purpose of 'maintaining the value of assets owned or managed by the company'; (ii) the correct question is not whether harm to the value of the assets is 'likely', but whether there is a real or serious risk of it; (iii) the RAGOF assets, in particular its real estate holdings, in fact largely comprise shares in property holding companies, which could more readily be dealt with than the properties themselves; (iv) there was cogent evidence to show that RAGOF's liquid funds were being expended purely for the benefit of the Otaibi family, and further that the value of its assets was being diminished on an ongoing basis by being exploited for the benefit of the Otaibi family without proper recompense; (v) the JPLs' investigations indicated that substantial fees (running into millions of pounds) had been improperly paid to Floreat entities, and that this was ongoing - that was very strong evidence of risk of diminution of the fund's assets absent officers of the court stepping in; (vi) the JPLs had themselves expressed the conclusion (in their Third Report) that, following their investigations, 'there is also a real risk of further dissipation, absent the protection afforded by the appointment of the JPLs'; (vii) there was no evidence from which it could be concluded (contrary to the learned judge's apparent assumption) that the respondents would be able to compensate the fund's losses; (viii) there was also a significant risk of document destruction or falsification, and real questions as to the integrity of the fund's management, such that the appointment of provisional liquidators was necessary or appropriate to ensure that records could be preserved and investigations undertaken. These risks were addressed in Mr. Wang's evidence and

submissions, but the learned judge appears to have simply disregarded them (or gave no reasons for rejecting them).

[312] The appellants' primary submission is that in all the circumstances 'justice plainly required (and still requires) that the JPL Order should be continued pending the trial of the just and equitable winding up application. They surmise that if there were misstatements or non-disclosures at the *ex parte* hearing they were not, on any proper analysis, deliberate, culpable, or of a seriousness or materiality that warranted the discharge and refusal to regrant the JPL Order. Any misstatement went to the question of whether the court should grant the JPL Order *ex parte* or adjourn for a week; it did not go to the question of whether, had there been such an adjournment, the JPL Order should have been made. In any event, the risk of redemption did not go to the risk to the RAGOF assets that justified relief, with which Jack J had made it quite clear he had 'no difficulty'.

[313] Additionally, the non-disclosures did not detract from there being a strong prima facie case of wrongdoing and of breakdown of trust and confidence, sufficient to justify the winding up of RAGOF on the just and equitable ground, nor on proper analysis, is there reasonably available an alternative to that final relief available to Mr. Wang and XYZ. Also, RAGOF not being a trading company, the appointment of JPLs was not and would not be prejudicial to its business of holding and managing investments. Finally, there was before the judge clear and compelling prima facie evidence that the de jure directors of RAGOF have not operated as any sort of brake on the ongoing misuse of the company's assets for the benefit of the Floreat Principals and there is therefore a significant risk that the assets will not be maintained pending trial.

Appellants' submissions on regrant – Receivership Order

[314] The appellants submit that the judge's conclusion at paragraph 196 to revoke and not regrant the Receivership Order was plainly wrong and ought to be set aside. In addition to the points already traversed with regard to the alleged errors relating to the supposed 'artificiality' of the receivership and the 'predetermined' nature of the applications; Mr. Wang's supposed 'scheme'; and

to the judge's alleged errors as to non-disclosures at the *ex parte* Receivership Application hearing and their culpability, the appellants argue that any non-disclosure in relation to the Receivership Order obtained *ex parte* was not 'materially sufficient' to warrant the setting aside and refusal to regrant the said order. To the contrary, fuller disclosure on counter- arguments to the risk of forced redemption would not have resulted in a different view of whether it was just or convenient to make the Receivership Order.

[315] They rely also on their arguments with regard to alleged errors as to the risk of asset dissipation, arguing further that the learned judge was wrong to treat the 'unlikelihood' of asset dissipation as being a significant consideration bearing on whether to set aside or regrant the receivership. They submit that 'the receivership was required to initiate and prosecute the winding up proceedings pending the transfer of shares to Mr. Wang';[103] it was not only required to prevent asset dissipation through the appointment of the JPLs. With regard to the issues concerning the interest of minority shareholders dealt with by the judge at paragraph 198 of his judgment as relevant considerations to be taken into account in the exercise of the court's discretion whether to grant the Receivership Order and the JPL Order, the appellants submit that the learned judge erred in doing so as 'there was no evidence before the learned judge one way or the other as to their attitude (save for that of Floreat, whose self interest in opposing relief should obviously have been discounted.' In short, they submit that the only sensible inference would be that independent minority shareholders 'would support the grant of relief intended to preserve the value of the Fund and secure redress for wrongs done to it.'

[316] The appellants also contend that the judge failed to give proper weight to certain facts, including that the receivership (unlike the appointment of JPLs) was not 'nuclear' relief. They argue that it was 'of very limited consequences' which only directly affected Mr. Wang and XYZ, and only concerned who should exercise the powers attached to the shares in RAGOF, in circumstances where XYZ was unwilling to do so and did not oppose the application.[104] Accordingly,

[103] See Appellants' skeleton argument at para 116(e).
[104] See Appellants' skeleton argument at para 117 (a) to (c).

they argue, the refusal to regrant the Receivership Order, deprived the appellants of standing to prosecute the just and equitable winding up of RAGOF at all and was a 'grossly disproportionate sanction for such defaults as may properly have been found'. In their view, the interests of justice clearly favoured the continuation of the receivership.

FRE's submissions on discharge and non regrant of the JPL Order

[317] The grounds of appeal on the discharge and non-regrant of the JPL Order are addressed at paragraphs 108 to 113 of its skeleton argument. In relation to the JPL Order, FRE submits that the learned judge clearly identified the law relating to the discharge and regrant of an order obtained *ex parte*, properly directed himself to and applied those principles, and came to the correct conclusions having identified three factors relevant to the exercise of his discretion in addition to his findings on materiality and culpability. Accordingly, the appellants' attacks on the judge's conclusions are devoid of merit. Likewise, FRE submits that the judge's conclusion at paragraph 190 that the appropriate response was to apply the 'unexceptional' response to a non-innocent breach of the duty of full and frank disclosure and to discharge the JPL Order without regranting it, is unimpeachable on appeal.

[318] In reaching this conclusion, they judge applied the guidance set out in the authorities, and it 'was plainly an appropriate and reasonable exercise of the judge's discretion given the circumstances as he found them to be.' They go on to submit:

> "This type of evaluation of the facts and exercise of discretion as to the appropriate exercise of the Court's interlocutory powers to place RAGOF in provisional liquidation pending determination of any underlying winding up petition was plainly one which the Court below was entitled to undertake, was best equipped to undertake and which this Court has been shown no grounds with which to interfere with on appeal (still less given the high degree of appellate deference to a first instance Judge's assessment of such evaluative and discretionary case management decisions)"[105]

[105] See FRE's skeleton argument at para 112.

FRE's submission on discharge and non regrant of the Receivership Order

[319] FRE submitted that the judge's findings of breaches of the duty of full and frank disclosure at the *ex parte* receivership hearing and his decision to discharge the order were plainly open to him on the material before him and were correct. Having concluded that a Receivership Order was not just and convenient, 'discharge and no regrant was the only appropriate conclusion.' Moreover, FRE submits, the appellants have not identified any grounds to call those findings into question on appeal. The judge correctly directed himself to the law and applicable test and took account of the appropriate factors reflecting his findings which are unassailable. Accordingly, they classify the points made by Mr. Wang at paragraphs 116 to 119 of the appellants' skeleton as 'impermissible attempts to rerun arguments which failed to persuade the judge and to ask this Court to substitute its own evaluation for the judge's.'[106]

[320] As to Mr. Wang's specific point at paragraph 116(g), that the judge in considering that the interests of the minority shareholders was a factor to be weighed in the balance when considering whether to appoint receivers and JPLs, he ought to have assumed that these shareholders would be supportive of the continuation of the receivership. FRE argues that Mr. Wang produced no evidence of this and the judge had before him evidence in opposition from at least one minority shareholder, FRE Jersey itself. For these various reasons, FRE submits that Mr. Wang has advanced no sustainable basis for this Court to interfere with the decision of the judge below that the appropriate consequence of the material and culpable breaches of the duty of full and frank disclosure was the discharge of the Receivership Order without regrant.[107]

Analysis and conclusions on discharge and regrant

[321] The principles on discharge and regrant of an order obtained *ex parte* in the face of non-innocent material breaches of the duty of full and frank disclosure and fair presentation are uncontroversial and are set out in the section on the law above. The general principle is that where material non-disclosure has

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[106] See FRE's skeleton argument at para 158.
[107] See FRE's skeleton argument at para 160.

been established, the court will be astute to ensure that the party in breach is deprived of any advantage which he has received as a result of the material breach of duty. Furthermore, where it has been established that the breach was non-innocent, that is, deliberate, it would be exceptional circumstances where the order or relief obtained is not discharged. The court will discharge the order even where it would have granted it if the misrepresentations or omissions in breach of the duty had not taken place. The question of regrant is a matter of discretion in which the court weighs up a number of factors including the breaches of the duty and the strength of the applicant's case in the substantive proceedings in determining the ultimate question of what is in the interest of justice. In short, the guiding principle is what is just or convenient.

[322] The learned judge found that the breaches of the duty in relation to the *ex parte* hearing of the Receivership Application and the JPL Application were not innocent. I have already concluded that these findings are correct and were properly made by the learned judge. I have also concluded on the issues of materiality and culpability that these breaches were sufficiently serious and culpable to warrant the immediate discharge of the Receivership Order and the JPL Order. In light of these breaches of the duty, including the duty of fair presentation at the *ex parte* hearings, the appellants ought to be deprived of any advantage which they have gained as a result of obtaining the said orders in the circumstances in which they did.

[323] On the important issue of regrant of the JPL Order, the learned judge was not persuaded that the interest of justice required its regrant and he declined to do so for the reasons which he gave at paragraphs 185 to 190 of his judgment. There the learned judge considered whether the JPLs' reports tilt the balance in favour of continuing the JPL Order or a regrant. He was not persuaded that they did. He considered these reports which were before him and came to the conclusion that they contained no findings and their investigations were still ongoing.

[324] While he was satisfied that 'Mr. Wang might have valid and legitimate criticisms of Floreat and its Principals' conduct, significant dissipation which could not be

compensated through an award of damages, is unlikely'.[108] This is a sweeping statement and one which has come in for heavy critique by the appellants in their written and oral submissions. They go on to say that other reports by the JPLs and the fact of them having instituted proceedings in England based in large measure on the results of their further investigations, which, as the argument goes, takes matters (or some matters) beyond the realm of mere ongoing investigations and into the realm of findings of wrongdoing, culpability, mismanagement and loss, actual and potential, paint a very different picture and ought to justify this Court exercising the discretion afresh to regrant the JPL Order.

[325] With respect, I do not consider that the learned judge committed any error of principle when he refused to regrant the JPL Order. On the evidence before him and having regard to the conclusions on the breaches of the duty of full and frank disclosure and fair presentations which he came to, he was entitled to apply the principles applicable to non-innocent breaches and to discharge and not regrant the JPL Order. In that respect the judge was entitled to take a view, albeit a preliminary one, as to the findings or lack of findings in the JPLs' reports before him. Furthermore, no exceptional circumstances were shown by the appellants before this Court or the court below as to why the general principle and consequence of discharge and no regrant ought not be applied.

[326] With regard to the discharge and non-regrant of the Receivership Order, I reach the same conclusion as with the JPL Order. The breaches of the duty of full and frank disclosure were clearly sufficiently material and serious as to warrant the immediate discharge of the Receivership Order. There were clearly other alternative remedies to a receivership, not least of which was the transfer of the shares in RAGOF from XYZ to Mr. Wang or to his willing nominee. This was never pursued by Mr. Wang. A receivership order is an inappropriate remedy in this situation. It is neither just or convenient in the circumstances of this matter that such relief ought to be granted. Accordingly, this leads inextricably

[108] See the judgment in the court below at para 187.

to discharging and not regranting the Receivership Order, as the learned judge correctly found.

Disposition

[327] For the reasons given above, all grounds of appeal in both the Receivership Appeal No. BVIHCMAP2022/0055 and the PL Appeal No. BVIHCMAP2022/0056 are dismissed. The various matters and criticisms of the judgment in the court below under the five broad categories of alleged errors advanced by the appellants fail and are rejected. The judgment and orders made by the learned judge below discharging and not regranting the Receivership Order and the JPL Order are upheld.

Orders

[328] Accordingly, I would make the following orders:

(a) Appeal No. BVIHCMAP2022/0055 is dismissed;

(b) Appeal No. BVIHCMAP2022/0056 is also dismissed;

(c) The orders made by the judge below discharging the Receivership Order made on 26th August 2021 and the JPL Order dated 1st September 2021 are confirmed;

(d) The appellants' first, second and third fresh evidence applications are dismissed except to the limited extent permitted under this judgment.

(e) The stay of the judge's discharge of the Receivership Order and the JPL Order granted pending the determination of these appeals is discharged with immediate effect;

(f) Floreat Real Estate Limited, the respondent in both appeals, shall have its costs in the court below, in the appeals, and in relation to the three fresh evidence applications, such costs to be assessed by a judge of the Commercial Division, if not agreed by the parties within 21 days of the date of delivery of this judgment.

[329] I take this opportunity to express our appreciation for the helpful assistance of counsel for both parties in these appeals.

[330] The uncustomary delay in the delivery of the judgment in these appeals is regretted. This judgment has been drafted and approved by the panel for several weeks now. However, the internal processes of review, vetting, formatting etcetera have regrettably taken longer than usual due to the heavy workload of the Court's staff dealing with many prepared judgments and other unexpected matters resulting in further delays.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar