

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

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

Claim No. BVIHC(COM) 2022/0137

BETWEEN

- [1] STRONG FORT GLOBAL LIMITED (acting by LAU WING YI
AND JAMES DRURY as agent and joint and several
receivers of the shares of Solar Achiever Limited without
personal liability)**
- [2] SOLAR ACHIEVER LIMITED (acting by LAU WING YI AND
JAMES DRURY as agent and joint and several receivers of
the shares of Concept Pioneer Limited without personal
liability)**

CLAIMANTS/DEFENDANTS TO COUNTERCLAIM

[1] SOLAR ACHIEVER LIMITED

[2] CONCEPT PIONEER LIMITED

DEFENDANTS/COUNTERCLAIMANTS

[3] HARCOM CORPORATE SERVICES LIMITED

DEFENDANT

[4] STRONG FORT GLOBAL LIMITED

DEFENDANT/COUNTERCLAIMANT

AND

CNCB (HONG KONG) INVESTMENT LIMITED

ADDITIONAL DEFENDANT TO COUNTERCLAIM

IN OPEN COURT-VIRTUALLY

**Appearances: Richard Hacker KC, Peter Ferrer, and Edoardo Lupi for the Claimants and the
Additional Defendant to Counterclaim
Andrew Westwood KC and Bhavesh Patel for the Defendants and Counterclaimants**

**2023: April 24th, 25th and 26th,
May 17th,
November 23rd and 30th**

JUDGMENT

Introduction

- [1] **Mangatal J:** This claim started out as a Fixed Date Claim Form, but by Order dated 6 December 2022 made by Small-Davis KC J (Ag.), it was converted to a Form 1 Claim Form, pursuant to the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000 (“**the CPR**”), Rule 8.1(4).
- [2] The trial took place over 3 days in April, with Closing Submissions made in writing and orally in May 2023. Learned Counsel also provided the Court with their Speaking Notes utilized in May at Closing Addresses. Cross-examination took place with the assistance of Interpreters expert in versions of the Chinese dialect. There were numerous Bundles, and documentation to which reference was made. The written Opening and Closing Submissions taken together number nearly 250 pages. This is my Judgment arising out of the trial.
- [3] The First Claimant Strong Fort Global Limited (“**Strong Fort**”), the Second Claimant Solar Achiever Limited (joined also as the First Defendant) (“**Solar Achiever**”) and the Second Defendant Concept Pioneer Limited (“**Concept Pioneer**”) are each companies limited by shares incorporated in the British Virgin Islands (“**BVI**”) pursuant to the BVI Business Companies Act, 2004 (“**the BC Act**”) They will be referred to together as “**the Companies**”.
- [4] Solar Achiever has in issue one ordinary share which is registered in the name of Strong Fort as its sole member.
- [5] Concept Pioneer has in issue one hundred ordinary shares which are registered in the name of Solar Achiever as its sole member.

- [6] The Third Defendant Harkom Corporate Services Limited ("**Harkom**") is a company incorporated in the BVI which is currently appointed as the registered agent of each of Strong Fort, Solar Achiever and Concept Pioneer.
- [7] The register of directors of Solar Achiever records that:
- (a) Mr. Pan Sutong ("**Mr. Pan**") was a director of the company from 23 May 2018 until 11 April 2022;
 - (b) Hu Zhe was a director of the company appointed on 25 June 2018; and
 - (c) Ka Yan Cheng and Qin Hou (referred to in the Statement of Claim as "**the Purported Directors**") were purportedly appointed as directors on 11 April 2022. There are disputes about the Resolutions under which the Purported Directors were appointed, discussed below.
- [8] The register of directors of Concept Pioneer records that:
- (a) Mr. Pan was a director of the company from 28 June 2018 until 1 March 2022; and
 - (b) the Purported Directors were purportedly appointed as directors of the company on 10 January 2022.
- [9] On 2 June 2022 James Drury of Interpath (BVI) Limited and Ms. Lau Wing Yi of Perun Consultants Limited (together "**the Receivers**") were appointed by CNCB (Hong Kong) Investment Limited ("**CNCB**") as the joint and several receivers of:
- (a) all the issued shares of Solar Achiever registered in the name of Strong Fort; and
 - (b) all the issued shares of Concept Pioneer registered in the name of Solar Achiever (together "**the Shares**"), in the exercise of the powers conferred upon it by Equitable Mortgages granted by each of Strong Fort and Solar Achiever, both dated 2 June 2020 ("**the Mortgages**").
- [10] At paragraph [8] of the Statement of Claim it is pleaded that pursuant to Section 126 of the *Insolvency Act, 2003* ("**the Insolvency Act**"), the Receivers are deemed the agent of Strong Fort and Solar Achiever, in respect of whose assets (i.e. the Shares) the Receivers were appointed.

Broad Overview of the Factual Context and Background leading up to the disputed Documents and Events

- [11] Concept Pioneer holds 16.5% of the issued shares in a Hong Kong (“**HK**”) registered company, Gold Brilliant Investment Ltd (“**GB**”). GB holds the economic rights in respect of a large development project in HK known as “**the HMT Project**”, in co-operation with MTR Corporation Ltd. (“**MTR**”). Mr. Pan is the ultimate beneficial owner of Concept Pioneer, through his indirect 100% interest in Strong Fort and Solar Achiever. CNCB, along with a co-investor, provided HK\$2 Billion (approximately US\$230Million) to finance the HMT Project pursuant to an Equity Participation Agreement dated 25 June 2018 (“**the EPA**”). On the same day as entering into the EPA, Mr. Pan, Solar Achiever and CNCB entered into a Deed of Undertakings and Personal Guarantee (“**DoU**”), pursuant to which, Mr. Pan and Solar Achiever provided certain undertakings and Mr. Pan gave a personal guarantee to CNCB. The EPA and DoU are governed by HK law. They were later amended (in respects which the Claimants say are largely immaterial, save for the introduction of Strong Fort into the ownership structure) and re-stated on 21 August 2019.
- [12] In addition to creating liabilities in respect of the HMT Project, the DoU also imposed obligations on Mr. Pan for the satisfaction of his guarantee liability for a substantial loan advanced to Goldin by lenders connected with CNCB, used to finance a separate series of transactions (“**Privatisation Loan**”).
- [13] Mr. Pan was already in breach of significant payment obligations under the DoU at the end of 2019. Further defaults occurred during 2020, none of which have been cured. In consequence, discussions took place in 2020 between Goldin/ Mr. Pan and CNCB in which Goldin/Mr. Pan made promises about remedying the defaults. Mr. Pan raises no disputes as to the existence of defaults that arose prior to June 2020.

The Claimants’ Case

- [14] On 2 June 2020 the Mortgages were given pursuant to a requirement by CNCB that Mr. Pan provide further collateral, to reinforce the pre-existing rights held by CNCB in respect of the shares in Solar Achiever.
- [15] Also on the same date 2 June 2020, Mr. Pan entered into a further agreement (“**Confirmation Deed**”) under which he agreed to pay CNCB HK \$206 M (US\$23.6M) by 28 June 2020, whilst acknowledging that the full balance under the DoU would remain immediately due and payable. He failed to make the payment required by the Confirmation Deed.
- [16] The Receivers were appointed on 2 June 2022 pursuant to the powers contained in the Mortgages.
- [17] The Claimants say that following their appointment, and due to Harkom’s failure to co-operate with them, the Receivers took steps to pass resolutions on 12 July 2022 (“**the 12 July Res**”), removing the incumbent directors from each of Solar Achiever and Concept Pioneer, in order to appoint a new director, Zorya Limited (“**Zorya**”). The validity of the 12 July Res is challenged by the Defendants.
- [18] Shortly after, the Receivers learnt that by purported resolutions bearing date 27 May 2022 (therefore apparently dated very shortly before the Receivers’ appointment), Strong Fort and Solar Achiever (by written resolutions as sole members of Solar Achiever and Concept Pioneer respectively) had purportedly made substantive amendments to the Memorandum and Articles (“**M&A**”) of each respective company (“**May Res**” and “**Amended M&A**”). The Claimants characterize the May Res as concentrating power in the directors’ hands and securing entrenchment of their positions by preventing their removal save at a physical meeting, which itself may only be convened in the directors’ absolute discretion. The Claimants challenge the validity of the May Res on a number of grounds. They also assert that the May Res were filed on the same 2 June 2022, the day when the Receivers were appointed, but only after the Defendants had been put on notice of the intended appointment.
- [19] After learning of the May Res, the Receivers obtained an order on 22 July 2022 made by Jack J (Ag) on an *ex parte* application on short notice to the Defendants, sought pursuant to section 86 of the BCA, empowering them to convene meetings of the members of Solar Achiever and Concept Pioneer

for the purpose of passing resolutions intended to (i) reverse the effect of the May Res and (ii) secure Zorya's position as the sole director of Solar Achiever and Concept Pioneer. The 26 July 2022 meetings of the Subject Companies took place in accordance with the July Order. At those meetings resolutions were passed ("**the 26 July Res**"). In summary, the 26 July Res: (i) revoked the May Res and restored the M&A to the position pre-dating the M&A Amendments; (ii) ratified the 12 July Res; and (iii) ratified the appointment of Zorya and removal of the incumbent directors.

- [20] The validity of the 26 July Res is challenged by the Defendants on the basis that there was no jurisdiction to make the July Order. The Claimants contend that whether or not the Court had jurisdiction to make the July Order, and whether or not it is set aside at this trial, acts undertaken pursuant to the order-including the passing of the 26 July Res are nonetheless effective.

Summary of Relief Sought

- [21] The Claimants are seeking a variety of types of relief stretching over 7 pages. I am grateful to learned Counsel Mr. Hacker K.C., for the summary provided in the Claimants' written Opening Submissions ("**Claimants' Opening**") as follows:

"The relief sought Is set out in the prayer to the SoC ...[t] falls under the following heads:

- (a) Stemming from the challenge to the validity of the Receivers' Appointment ("**the Validity Relief**"), a declaration that the Receivers were validly appointed on 2 June 2022, or the alternative declarations as to the power to appoint at Prayer [2] and [3]. Together with further ancillary relief, namely, orders to ensure that the Receivers' sole control of SA and CP is correctly recorded (Prayer [4] and [5] and directions to their registered agent, Harkom, stemming from the other relief granted: Prayer [8(a)], [8(c)], 9[a], 9[c], [10],[12] and [13].*
- (b) In relation to the [Company] Law Issues, a declaration that the May [Resolutions "**Res**"] are void and of no effect (Prayer [14]), and relief consequential thereon (Prayer [11]), including a declaration that Zorya is the current and only director of [Solar Achiever and Concept Pioneer] pursuant to the 12 July Res (Prayer [6] to [7], and other consequential*

relief to, inter alia, rectify the records of Solar Achiever and Concept Pioneer (Prayer [8(b)] and [9(b)] and [17] and [18]).

(c) If the relief in (b) is not granted (e.g. because it is found that the Court did not have the jurisdiction to make the July Order, fresh s.86 relief replicating the July Order, giving the Receivers the power to take steps (i) to procure the ratification of the 12 July Res, and (ii) to restore the M&A to the position they were in prior to the May Res. (Prayer [15] and [16]).

(d) Insofar as necessary, relief pursuant to BCA Section 184I in relation to the May Res and the 12 July Res (Prayer [17] to [18]).

The Defendants/ Counterclaimants' Case

[22] As more particularly set out in their Defence, the Defendants/Counterclaimants contend that CNCB was not able to appoint the Receivers and they seek a declaration to that effect for two principal reasons:

(1) The Mortgages were not enforceable at all because they were only signed by Mr. Pan (on behalf of Strong Fort and Solar Achiever) following and in reliance upon oral assurances from CNCB (through its representative Mr. Lin), given at a meeting on or around 1 June 2020 ("**1 June Meeting**") to the effect that the Mortgages would not be enforceable and/or would be of no effect unless and until an extension of time for payment of sums due to CNCB under the DOU was granted by CNCB. It is common ground that CNCB did not and has never granted an extension of time for payment (although there were negotiations concerning an extension of time for repayment under the DoU). The Defendants argue that the assurances given to Mr. Pan can be analysed in four ways (which are not mutually exclusive), as follows:

(i) A collateral contract arose to the effect that the Mortgages would be provided in validly composed form to demonstrate sincerity, negotiations over an extension (which had started) would continue, but the Mortgages would not become enforceable unless and until such an extension was agreed.

- (ii) An estoppel by convention arose such that CNCB is estopped from denying that the Mortgages are not enforceable unless an extension is agreed because (a) CNCB assumed responsibility for the common understanding that the Mortgages would not be so enforceable and (b) The Defendants relied on that assumption to their detriment such that (c) it is now unconscionable for CNCB (and those deriving title from CNCB) to act contrary to the assumption.
 - (iii) The Mortgages were on their proper construction subject to a condition precedent that an extension of time would be granted by CNCB, or a condition subsequent that the Mortgages would not be of any effect if no extension was granted.
 - (iv) The Mortgages were delivered only as an escrow pending an extension of time for payment under the DoU.
- (2) The Claimants/CNCB's response is to say that the 1 June 2020 meeting is a fiction. Further, they rely on Clause 17 of the Mortgages as precluding the defences alleged. However, the Defendants' position is that such reliance on Clause 17(which is not an *entire agreement* clause), is misguided.
- (3) The Defendants argue that the Claimants' claim fails in any event because no "*Enforcement Event*" has occurred under the Mortgages. An Enforcement Event is defined under the Mortgages as arising "*where a Mr. Pan Event of Default has occurred under the [DoU] which is continuing.*" A Mr. Pan Event of Default ("**PED**") is defined in Clause 9.1 of the DoU. In brief summary, the Defendants say, clause 9.1 provides that notice is to be given to Mr. Pan of certain events listed in the DoU, and if after a remedy period has elapsed the situation remains, a PED is deemed to have occurred. The Defendants contend (broadly) that on a proper construction of the Mortgages any alleged PEDs that arose prior to the Mortgages cannot be relied on by CNCB. Consistent with that interpretation, events occurring prior to the signing of the Mortgages were not relied on as an "Enforcement Event" when CNCB purportedly appointed the Receivers. In relation to events post the signing of the Mortgages, the notification requirements for a PED were not complied with by CNCB such that no PED (and therefore no Enforcement Event) has arisen.

(4) Further, Notices that postdate the appointment of the Receivers cannot be relied on to cure what were otherwise invalid appointments. If those notices were to be relied upon, the Receivers or other receivers would have to be (re-) appointed, in which case, the Defendants say that the Claimants' claims would have to be dismissed in any event, with a costs award in favour of the Defendants.

[23] The Defendants refer to the Claimants prayer for relief ancillary to the purported appointment of the Receivers, and posit that those claims turn on the central question of the validity of the appointment. Accordingly, it was submitted, if they were not validly appointed, they lack standing to seek such relief.

[24] The Defendants seek declarations in effect undoing any steps taken by the Receivers since their purported appointment and an injunction preventing CNCB from enforcing the Mortgages.

[25] The Defendants point out that Harkom, the registered agent of the two Claimant companies has adopted a neutral position in these proceedings.

The Main Issues

[26] There are three main issues in this case. These are:

(1) The Enforceability Issue;

(2) The Notification Issue; and

(3) The Company Law Issues.

[27] As learned Counsel Mr. Hacker KC, who appeared for the Claimants describes in the Claimants' Written Closing Submissions ("**the Claimants' Closing**") at paragraph 3, the central issue in these proceedings is the Enforceability Issue, i.e. whether or not the Mortgages are enforceable in accordance with their terms (as contended by the Claimants), or are not enforceable as a result of

an oral agreement which is contended by the Defendants, was entered into at the alleged 1 June Meeting.

[28] Further (paragraph 4 of Claimant's Closing), that gives rise to two overarching questions that arise for the Court's determination in this connection:

- (a) did the alleged 1 June Meeting take place at all, and was the oral agreement entered into at that meeting? And
- (b) even if the oral agreement was entered into, does it override the express terms of the Mortgages?

The Witnesses in Summary

The Claimants' Witnesses

[29] The Claimants have filed evidence from three factual witnesses: (1) Mr. Zhang Dijang (Peter), Zhang 1, Zhang 2 and Zhang 3; (2) Mr. James Drury, Drury 1, Drury 2 and Drury 3; and (3) Ms. Hu Ze. The Claimants have indicated that they are relying at trial only on the evidence of Mr. Zhang and Mr. Drury.

[30] Mr. Drury is a BVI Insolvency Practitioner and one of the Receivers. His evidence relates primarily to the Company law issues and is not challenged by the Defendants.

[31] Mr. Peter Zhang worked in CNCB's Investment and Financing Department during the relevant period as a director-grade supervisor in connection with the HMT Project. Mr. Zhang claims to have first-hand knowledge of matters relating to both the Enforceability and Notification Issues, having attended key meetings with Mr. Pan and his Associates, and having been copied in to key correspondence passing between CNCB and Mr. Pan/Goldin. Mr. Zhang is also the supervisor of Mr. Derek Lin ("**Mr. Lin**"), a former employee of CNCB, who features in the Defendants' oral agreement case.

[32] Ms. Hu, (whose evidence the Claimants say they are not relying on at this trial), is an employee of CNCB, who the Claimants say only addresses a specific point that was advanced in the Defendants' first round of substantive evidence (this was before the hearing in December 2022 and before the

FDCF was converted to a Form 1 Claim Form). The Claimants point out that the Statements of Case/Pleadings followed the filing of multiple rounds of witness evidence by the parties at earlier stages of the proceedings. In the first round of the Defendants' evidence Ms. Hu was identified as the person with whom a previous iteration of an oral agreement was concluded. In the first round of evidence, amongst other stark differences, the Defendants had alleged that CNCB had agreed to extend time for performance of obligations under the EPA and DoU until completion of the HMT Project, and that, because the DoU and the EPA had been extended in this way, CNCB were precluded from enforcing the Mortgages. However, the Defendants' oral agreement case has changed quite radically. The Claimants point out that the Defendants are now relying on a different oral agreement said to have been entered into with a different individual (Mr. Lin), and as a result, the Claimants' position is that Ms. Hu's previous evidence has no relevance to the issues to be determined at trial (The Claimants' emphasis). In the Claimants' Opening, it was commented that the defences pleaded in the Defendants' Defence and Counterclaim bear little or no relation to the witness evidence that the Defendants had filed before service of this Statement of Case.

The Defendants' Witnesses

- [33] The Defendants have filed factual statements made by: (1) Mr. Pan, Pan 1 , Pan 2 and on the morning of trial, Pan 3 ; (2) Mr. Henry Huang, Huang 1 and Huang 2; (3) Ms. Eila Cheng, Cheng 1; and (4) Mr. Bhavesh Patel, one of the Defendants' legal practitioners, Patel 1 and Patel 2; and (v) Mr. Zhe Min Jin, Jin 1 and Jin 2. The Defendants are not relying on the evidence of Mr. Patel or Mr. Jin at trial. The Defendants have indicated that at trial they rely only on the evidence of Mr. Pan, Mr. Huang and Ms. Cheng.
- [34] Mr. Pan has at all material times been the beneficial owner and controller of Goldin as well as being the ultimate beneficial owner of each of the Chargor and Subject Companies. Mr. Pan is an experienced and once successful businessman and property developer. However, by December 2019 Mr. Pan had defaulted on a series of obligations owed to CNCB, as well as to other financial lenders. Bankruptcy proceedings were commenced against him by lenders other than CNCB and he was adjudged bankrupt on 8 July 2022. Mr. Pan's evidence was mainly as to the conversations and

meetings with representatives from CNCB in the lead up to the signing of the Mortgages on behalf of Strong Fort and Solar Achiever. His evidence deals mainly with the Enforceability Issues.

[35] Mr. Huang was a Corporate Developer of Goldin Group. He was a close associate of Mr. Pan at all relevant times. His evidence relates to his interactions with representatives of CNCB prior to the Mortgages being signed.

[36] Ms. Cheng was (it seems, say the Claimants) appointed a director of Concept Pioneer on 10 January 2022, and of Strong Fort on 1 March 2022. Ms. Cheng was instrumental in the adoption of the May Res which are challenged by the Claimants. She gives evidence as to the changes to the Articles of Solar Achiever and Concept Pioneer. She was not involved in the conversations with CNCB surrounding the Mortgages. In the Claimants' Opening they comment that oddly, although she does not claim to have any first-hand knowledge of the circumstances in which the Mortgages were entered into, her Witness Statement gives evidence in relation to this, and this was then adopted by Mr. Pan (who does claim to have personal knowledge about these matters) in Pan 1.

Evidence and Cross-Examination

[37] Mr. Drury's affidavit evidence was presented at trial. As stated before, he is one of the Receivers and, as the Defendants do not challenge his evidence, he was not called to give oral evidence at trial. Mr. Zhang was called by the Claimants and was cross-examined. Mr. Pan, Mr. Huang and Ms. Cheng gave evidence on behalf of the Defendants and were also cross-examined.

Interpreters

[38] All of the witnesses gave evidence through/ with the assistance of an interpreter; the necessity was for two different interpreters, one who specialized in Cantonese, and the other in another Chinese dialect. Although in the case of the Claimants' witness Mr. Zhang, learned Counsel Mr. Hacker KC indicated that Mr. Zhang had a reasonable command of the English language, but was not fluent. He therefore answered some questions in English, and some others he was assisted by the Interpreter.

The Claimants' Witnesses

Mr. Drury

- [39] In Drury 1, Mr. Drury gives evidence on affidavit of causing searches to be conducted at the Registrar of Corporate Affairs in relation to the records of the Companies. On one of the updated searches, which Mr. Drury reviewed on 18 July 2022, it came to his attention that Strong Fort and Solar Achiever had passed the May Res, apparently acting on the instructions of the now removed directors, to substantively amend the M & A of each of the Companies.
- [40] He gave evidence that from a high-level review of the May Res, it appears that the purported amendments have among other things, the following effect:
- (1) Shareholders can only pass resolutions at physical meetings and not by way of written resolutions;
 - (2) The registered agent can only recognize and accept resolutions for the appointment and removal of directors that are duly passed at physical shareholder meetings;
 - (3) Directors have absolute discretion to refuse or delay registration of share transfers;
 - (4) Directors have absolute discretion to convene a meeting of shareholders;
 - (5) Any further amendments to the memorandum and articles can only be made by shareholders' resolutions passed at physical meetings, and the ability of directors to make amendments is removed.
- [41] It is also Mr. Drury's evidence that, as confirmed by CNCB:
- (1) The May Res purporting to amend the Articles of Solar Achiever and Concept Pioneer were passed without the prior written consent of CNCB, and this constitutes a breach of Clause 5.4 of the Equitable Mortgages.

(2) The purported amendments to the Articles fall foul of Clause 7.1 of the Equitable Mortgages, which before an Enforcement Event was notified to the chargors, allows Strong Fort and Solar Achiever as the respective chargors to exercise voting rights and powers pertaining to the Shares only for the purposes not prohibited by, among other agreements, the Equitable Mortgages.

(3) Clause 8 of the Equitable Mortgages stipulates that, before an Enforcement Event was notified, the chargors may only exercise voting rights pertaining to the Shares in a manner that would not have a material adverse effect on the value of the Shares and would not otherwise prejudice the interests of CNCB as chargee.

[42] In Mr. Drury's opinion it is clear that the purported amendments are designed to eliminate the rights of CNCB and any receivers appointed upon enforcement of the Equitable Mortgages to fully exercise their rights over the Shares, including the ability of the chargee to make use of "self-help" documents such as the pre-signed instruments of transfer of shares and pre-signed resignation letters from the incumbent directors, and the ability of the Receivers to pass written resolutions to remove and appoint directors.

[43] Importantly, Mr. Drury further notes that the May Res were filed with the Registry of Corporate Affairs at or around 11:49 a.m. and 11:50 a.m. BVI time respectively on 2 June 2022, just around 2 hours before the notices of appointment of the Receivers were filed with the Registry but after Strong Fort and Solar Achiever, as chargors, were notified by CNCB of the occurrence of an Enforcement Event earlier that day and the intention of CNCB to enforce the Equitable Mortgages. Mr. Drury indicates that at the time of their appointment the Receivers were unaware of the May Res.

[44] On this issue, Mr. Drury concludes that, from the timing of the filings, and having regard to the terms of the May Res, it is apparent that this was a move on the part of those purporting to control the Companies to frustrate any enforcement steps that CNCB, and any receivers it appoints, may take after the enforcement notices were sent to the chargors.

Mr. Zhang

- [45] Mr. Zhang gave extensive and wide-ranging evidence, including describing CNCB's strict internal processes and controls. At paragraphs 120-134 of Zhang 2, Mr. Zhang discusses the defences raised in the Defence and Counterclaim, in particular, the Alleged Oral Agreement, the Alleged Condition Precedent and the Alleged Collateral Contract.
- [46] Mr. Zhang comments, (at paragraph 128), that the Alleged Defences are remarkable, and states that none of them is in any way backed up by (i) the contemporaneous records of CNCB, (ii) by the conduct of Mr. Pan and those acting on his behalf at the time of the defaults; nor (iii) the documents disclosed or put in evidence by the Defendants in these proceedings.
- [47] At paragraphs 130 – 132, Mr. Zhang's evidence is as follows:
- “130. Due to CNCB's strict internal processes and controls, which I explained earlier, any such contemplated agreement would require detailed internal reporting, consideration, review and approval, including final review and approval by CITIC Bank as its parent company. It would be wholly contrary to CNCB's policies to enter into any oral agreement as alleged or at all. For CNCB to even consider the Alleged Oral Agreement, the deal team handling the account for CNCB would have had to prepare and submit extensive due diligence, undertake further modelling as to the likely market conditions and forward-looking projections for Mr. Pan, the Goldin Group and their projects, so as to assess the full extension period. Further CNCB would have had to seek and obtain approval from CITIC Bank. None of this occurred as no time extension beyond the proposed 1 year was ever applied for; by October 2020 the discussions on the possible extension were rendered futile by Mr. Pan's dire financial position and after October 2020 no further time extension was ever raised by any party.

131. The Alleged Defences are inconsistent with the parties' dealings as shown from the contemporaneous records, and email communications maintained and produced by CNCB and as recorded in this witness statement.

132. There was simply no suggestion from any party at any relevant time or prior to CNCB taking enforcement steps, or prior, that the provision of the Mortgages were [sic] subject to the Alleged Oral Agreement or the Alleged Collateral Contract. The terms of any such Alleged Oral Agreement or Alleged Collateral Contract are inconsistent with the express terms of the documents executed at the relevant time. Due to CNCB's strict internal procedure, any individual employees simply would not have the authority to reach any binding agreement with CNCB's counterparties. Further, due to the nature and amount at stake of the HMT Project, CNCB itself also did not have any authority to reach any such agreement (whether oral or in writing) in the absence of any approval from Citic Bank."

[48] At paragraphs 133 and 134 Mr. Zhang exhibited an excel spreadsheet (and its English translation), which indicated that it was a running record of all meetings and other communications that occurred between representatives of CNCB, Mr. Pan and representatives of the Goldin Group from May 2018 to January 2021, with the last entry being made on 31 December 2020. Mr. Zhang stated that this record was prepared by Mr. Derek Lin, who was his subordinate at CNCB's Investment and Financing Department at the time. From his supervision of Mr. Lin, Mr. Zhang said that he understood it to be Mr. Lin's practice to keep this log of all communications and from his review, it appeared to be a comprehensive and complete record. Mr. Zhang further said that he believed that the meeting minutes produced by CNCB represent a true and accurate record of the relevant meetings and substance of the discussions at the meeting held with Mr. Pan and/or Goldin Group's representatives.

[49] At paragraphs 6 – 8 of Zhang 3, Mr. Zhang asserts that Mr. Lin had no authorization to agree terms of any transaction, or variation of such terms, as alleged by the Defendants. Further, Mr. Lin was not authorized to attend any meetings with counterparties on his own and nor did he report any such meeting to Mr. Zhang. Mr. Zhang indicated that Mr. Lin has left the employment of CNCB and when contacted about giving evidence indicated that he was unwilling to give evidence in these proceedings. As a consequence, Mr. Zhang indicates, (in paragraph 9), that he sent an e-mail to Mr.

Lin with a list of questions regarding the meetings, to which Mr. Lin responded in a manner entirely consistent with the contemporary records of CNCB.

[50] At paragraphs 8-13 of Zhang 3, Mr. Zhang discusses these matters as follows:

“8. Mr. Lin left the employment of CNCB on 27 February 2021, and now works as a finance practitioner at another company. I am informed by Angela Li, CNCB’s Head of Legal, and verily believe that following receipt of Pan 2 and Huang 2, she contacted Mr. Lin by telephone to ascertain his willingness to give evidence in response. I am further informed by Ms. Li, and verily believe that Mr. Lin informed her that he is unwilling to give evidence in these proceedings. As Mr. Lin is no longer in CNCB’s employment, CNCB cannot compel him to give evidence in these proceedings.

9. Therefore on 13 March 2023, I caused an email to be sent to Mr. Lin with a list of questions regarding the Alleged Meetings. Copies of Pan 2 and Huang 2 were also sent to Mr. Lin with the same email. Mr. Lin provided his written response by email on 14 March 2023, a copy of which is at pages [3] and [4] of Exhibit DZ-3. As can be seen from Mr. Lin’s response, and entirely consistent with the contemporaneous records of CNCB (as to which, see below), Mr. Lin:

- (a) denies that he attended the Alleged Meetings on 1 June 2020, or at all,*
- (b) denies that he had any conversation with Mr. Pan, Mr. Chum and/or Mr. Huang in the terms described, or at all; or*
- (c) denies that he attended execution of the Mortgages by Mr. Pan on 1 June 2020, or at all.*

10. Further, the allegations advanced by Mr. Pan and Mr. Huang in respect of the Alleged Meetings does not correspond with the contemporaneous records which have been produced by CNCB in these proceedings or my recollection of events. As mentioned in paragraph 7 above, Mr. Lin did not inform me of any request made of him to attend a meeting at the offices of the Goldin Group on 1 June 2020, and Mr. Lin was not authorized to attend any such meeting on his own.

11. *In this connection, I refer to the excel spreadsheet.... The Project Log reflects that I was present at each of the in-person meetings attended by Mr. Lin with Mr. Pan and/or other representatives of Goldin Group, such as Mr. Huang or Mr. Chum.*

12. ***There is no record in the Project Log of any meeting with Mr. Pan and/or any representative of the Goldin Group that corresponds with the Alleged Meetings, either on 1 June 2020, or at all. In broader terms, there was no in-person signing meeting for the execution of the suite of documents, including the Mortgages, on or about 1 June 2020. Rather the suite of documents were executed by Mr. Pan and circulated to Clifford Chance, as is evidenced by the emails exchanged between Clifford Chance and representatives of the Goldin Group at that time. I refer to these communications below.***

13. *I refer to the email from Clifford Chance, CNCB's Hong Kong legal advisor in respect of the Mortgages, to Mr. Chum dated 2 June 2020 at 2:27 p.m. Hong Kong time (page [311] of Exhibit DZ-2). As is recorded in that email, to which I was copied, Clifford Chance requested that scanned copies and the originals of the executed Mortgages and ancillary documents be returned to Clifford Chance on the same day. Clifford Chance received scanned copies of the executed Mortgages and other documents from Sara Lee of Goldin Group via email on the same day, a copy of the email from Sara Lee of Goldin Group timed at 3:03 p.m. on 2 June 2020 and the attachments are at pages [5] and [104] of Exhibit DZ-3. ..."*

(My emphasis)

[51] At the commencement of his examination-in-chief, Mr. Zhang sought to clarify/modify paragraph 11 of Zhang 3. In his oral evidence he said that although in paragraph 11 it was stated that he was present at each meeting, he wanted to clarify that before or after each and every meeting, people who worked for him would report to him either before or after. Therefore that he was aware of the content of such meetings.

[52] In my view, Mr. Zhang presented as a straight-forward witness who had come to Court to share his recollection of events. In cross-examination, leading Counsel for the Defendants sought to test Mr.

Zhang's understanding of certain English words used in his Statement. At the end of the day I did not form the view that any inroads of substance had been made into the issue of his credibility.

[53] However, at the end of extensive cross-examination, in my view Mr. Zhang stood his ground, and importantly, although Mr. Zhang was cross-examined extensively in relation to the Communications Spreadsheet, it was not put to him that any meeting had taken place which was omitted or not recorded in the Communications Spreadsheet. As the Claimants put it in their Closing, the Defendants' case appears to be that the alleged 1 June Meeting was the only meeting attended by Mr. Lin on his own, and this meeting also happens not to have been recorded in the Communications Spreadsheet.

[54] When cross-examined in detail about the alleged 1 June Meeting, Mr. Zhang gave responses which were quite plain and cogent. He stated as follows:

"Lin is my subordinate, without pre-authorisation he could not possibly attend a meeting with somebody as important as Mr. Pan. Had there been such a meeting, there must have been records internally because it was such a meeting if it had happened. As mentioned that we have emailed Mr. Lin about this specific meeting and Lin has replied and said there was no such meeting."

The Defendants' Witnesses

Mr. Pan

[55] In his first Witness Statement, Pan 1, Mr. Pan indicated that his native language is Cantonese, a dialect of Chinese, but that he can read and write English, as he lived in the U.S.A. for several years when he was younger. He stated that an in-house Counsel of Goldin Group explained the contents of his Witness Statement and the exhibited documents to him in his native language, and that he fully understood the contents. In Pan 1, essentially, all that Mr. Pan did was to say that he had read Ms. Cheng's Witness Statement and agreed with the contents.

[56] However, in Pan 2, at paragraph 2, Mr. Pan stated that he can neither speak or read English and that what was stated in Pan 1 in this regard was erroneous. At paragraph 2, Mr. Pan stated as follows:

“2. My native language is Cantonese Chinese, and I can also speak Mandarin Chinese. I am given to understand that my first witness statement erroneously states that I can read and speak English. As a matter of fact, although it is true that I have lived in the United States, I do not speak or read English. This statement has been translated by professional translators from English to simplified Chinese so that I fully understand the contents of this statement.”

[57] In Pan 2, Mr. Pan indicates that as far as he was concerned, and had made clear at the 5 May 2020 meeting, and during subsequent discussions, he would only agree to execute the mortgages over the shares in the companies in exchange for and only on condition that the extension of time to the completion of the project was granted. At paragraphs 36 – 40, Mr. Pan states as follows:

36. I recall being told in late May, from recollection it was likely the evening of 28 May 2020, by Henry Huang that CNCB wanted me to provide signed execution pages of the draft mortgages in order to progress their internal approval of the request for an extension of time at CNCB. I was initially reluctant to do this because CNCB had not formally given the time extension. However, Mr. Huang explained to me that CNCB told him they needed something since otherwise nothing would progress and there would be a deadlock.

37. I recall that Mr. Huang brought me signature pages on 29 May 2020 and I signed them. It was my intention when signing the execution pages that this was to show good faith on my part. It was, at that point, not my intention that this meant that the documents would be binding and enforceable. Mr. Huang took the signed pages and provided them to Mr. Chum so that they could be shown to CNCB.

38. I understand that on 29 May 2020 Mr. Chum sent to CNCB's lawyers the electronic copies of the draft mortgages signed by myself. The witness block was left blank, which was intentional as my understanding was that this was simply to show sincerity and to send a signal of willingness to CNCN to progress the request for an extension of time to pay.

39. Mr. Chum emphasized in his covering email attaching the signature pages that he was seeking confirmation that the documents were acceptable, and he specifically asked whether CNCB would agree that the mortgages not be dated earlier than 29 June 2020.

40. At the time I understood that approval for the time extension would take around a month, as such I instructed Mr. Huang and Mr. Chum to ask that the Mortgages not be dated before 29 June 2020. I understand that the request was declined and [Mr Lin] came to meet with me on 1 June 2020.....”

[58] At paragraphs 42 – 49, Mr. Pan deals with what he claims happened at and around the 1 June Meeting, and at 42 – 45 and 48 – 49, gave evidence as follows:

“1 June Meeting

42. On 1 June Mr. Lin Jiong [Mr. Lin] from CNCB came to the Goldin Group’s office to meet with me, Mr. Huang and Mr. Chum. Before he met with me, Mr. Lin first met with Mr. Chum and Mr. Huang and I understand that Mr. Lin told them that he had to obtain the physical hard copy signed execution pages in order to commence the official extension approval process, and that this could not happen without these documents being provided.

43. Then I had a meeting with Mr. Lin. Mr. Lin again asked for these signed execution pages to be provided. I told Mr. Lin I was not comfortable providing them in this way, **and that I was only doing so on the strict condition that they would only be binding and enforceable once the extension was granted. I said emphatically that if the extension was not granted for whatever reason, the mortgages would be of no effect. Mr. Lin replied “Of course, of course”.**

44. Then we discussed how long the approval would take to come through. Mr. Lin said that he expected the latest would be around early July. On that basis I told him CNCB must not register the mortgages before 10 July 2020.

45. **I pause to say that at this time, it was clear that what was requested was not just the signing pages with my signature to show my sincerity and willingness to sign, but that the mortgages had to be properly executed.** Therefore in my mind, I no longer had the protection of no witness signature and that the documents were undated, and only electronic copies were provided. **My only remaining bargaining chips were (i)**

specifically stipulating that the mortgages would be of no effect if ultimately an extension was not granted; and (ii) requesting that the mortgages not be registered before 10 July 2020. Because this was important, I have a vivid recollection of stipulating the condition and making sure Mr. Lin agreed, and making the request regarding the registration date.

....

48. I am given to understand that there appears to have been a change during negotiations between CNCB and Goldin that the mortgages would not be registered before 29 June 2020 (which was the original date by which we may have thought that the extension would be approved). I understand that on 2 June 2020 the lawyers for CNCB provided revised drafts of the mortgages with the earliest date for registration being 29 June 2020.

49. I only ever agreed to the signed mortgages being provided to CNCB on condition that they were not to be enforceable unless and until an extension of time for payment was granted. I was not involved in the practicalities of how the documents were then dealt with, although I can now see that the signed copies were provided by Mr. Chum on 2 June 2020.”
(My emphasis)

[59] Mr. Pan was cross-examined extensively. I did not find him to be a satisfactory or convincing witness. At times it seemed that when he was being pressed on specific points, he would launch into speeches. For example, when he was asked whether the extension agreement referred to by Ms. Cheng was actually entered into, Mr. Pan responded expansively as follows:

“It’s similar to, for example, that a woman wants to marry the guy and then the guy wants to marry the woman then we went towards each other willingly.”

[60] In cross-examination, Mr. Pan made some important concessions as follows:

- (1) He accepted that there had been no discussion as to a mortgage over the Solar Achiever and Concept Pioneer shares at the 5 May Meeting.
- (2) In cross-examination he said that, when questioned about the alleged conditionality of the Mortgages, he said “*Mr. Huang told me that there is a mutual understanding. I did not participate in that.*”
- (3) Mr. Pan’s evidence at times was that he thought that an extension had been agreed, stating that “If they took my mortgage then there was an extension agreement and if it didn’t take the mortgage then there wasn’t an extension agreement.”
- (4) When further pressed, Mr. Pan said at one point “So at the time the lawyers took all the documents and then I said we had an oral agreement about extension, but the lawyers says according to the papers and in writing there isn’t an extension so we need to follow that.”

[61] During the Claimants’ Opening, certain Hong Kong judgments involving Mr. Pan and/ or Goldin were shown to the Court *de bene esse*. The Claimants sought to rely on them to show that Mr. Pan has a propensity to rely upon fictitious oral agreements to prevent lenders enforcing their rights. Mr. Westwood KC in the Defendants’ Closing, points out that they were not really explored with Mr. Pan in the witness box. I agree with learned Counsel that those judgments are inadmissible because, in the absence of an estoppel per rem judicatum, the findings of one judge are inadmissible in another case. Further, the evidence cannot properly be said to fit within the description of “similar fact evidence”. In the further alternative, I have decided that the judgments should not in any event be admitted as their prejudicial value outweighs their probative value.

Mr. Huang

[62] I must say, the Defendants' evidence in this case is quite confusing. In his First Witness Statement, which as far as I recall, was never withdrawn officially, Mr. Huang gave evidence in Huang 1 that the extension of time was granted. At paragraphs 14 and 16 Mr. Huang states as follows:

*"14. To the best of my knowledge and understanding, the Equitable Mortgages were given to CNCB in exchange for the Extension Agreement, and getting an extension of time to the completion of the HMT Project was a condition to those Equitable Mortgages. It was always understood by me (and, I believe, the Goldin Group), **that the extension had been granted because no enforcement action was taken after the meetings referred to above in the Cheng WS and Zhang Aff.** The meetings that happened subsequently were to provide an update on that project and were a way of keeping CNCB informed. In other words:*

- a. The Equitable Mortgages were given as a condition for getting the Extension; and*
- b. The Extension ends when the HMT Project finishes.*

.....

16. Due to the shortage of time, I am not able to address all the issues raised by the Zhang Aff, I will, however, address the following points to the best of my understanding:

- a. CNCB was informed of the progress of the HMT Project through the Meetings, and CNCB has sent their employees to inspection [sic] the construction site.*
- b. In the Zhang Aff it was said at paragraph 80(a) that it defied commercial common sense and security would be worthless if a creditor agreed not to enforce its security during the period while the secured indebtedness remains outstanding. That fails to appreciate that the Equitable Mortgages were given in exchange for the extension of time. It would make no commercial common sense for the Goldin Group to have given security if it was not receiving anything in return. Further, once the HMT Project finishes, it will bring about a win-win outcome for both CNCB and the Goldin Group.*
- c. CNCB did not take enforcement action for a long period of time because of the extension that was granted in exchange for the Equitable Mortgages.*

- d. *The Meetings provided an update on the HMT Project and they all occurred on the understanding that the extension had been agreed and was in place.*
- e. *The enhanced securities were only provided by the Defendants and Mr. Pan as consideration for the Extension Agreement.”*

[63] At paragraphs 23, 24, 26 and 35, Mr. Huang now states the position differently, and says that the Mortgages were only provided on condition that they would only be binding and enforceable if the extension was granted. I note that Mr. Huang does not seek to explain the different positions taken by him in his witness statements. His evidence reads as follows:

“23. Around 2 weeks later (after 12 May 2020), CNCB had insisted that Goldin provide signed execution pages of the draft mortgages for their internal approval process and had sent me and Mr. Chum execution versions via their lawyers. This was also communicated to Mr. Pan around 28 May 2020. Whilst Mr. Pan was reluctant to provide the signed execution pages, I explained to him that CNCB said they Needed something since otherwise nothing would progress and there would be a deadlock.

24. I provided Mr. Pan with his signature pages on 29 May 2020 and he signed them. I took the signed pages and gave them to Mr. Chum in order that he could show them to CNCB. Mr. Pan signing the execution pages and providing them to CNCB was to show good faith on Goldin’s part but always on the understanding that the extension would be granted and the mortgages would not be binding and enforceable until the extension is formally granted.

.....

26. After that correspondence, a further meeting was arranged directly with CNCB for Monday 1 June 2020. Mr. Chum refers to this in his email of the evening of 29 May 2020. On 1 June 2020, Mr. Chum refers to this email of the evening of 29 May 2020. On 1 June Mr. Lin from CNCB came to the Goldin Group’s office. Mr. Lin told me and Mr. Chum that he had to take away the physical hard copy signed execution pages in order to kickstart the official extension approval. He said that this could not happen without these documents being provided. This happened before the formal meeting, which Mr. Pan also attended,

actually began. Mr. Lin again asked during the meeting that the signed execution pages to be taken away, but Mr. Pan was uncomfortable in doing so and therefore told Mr. Lin that they were only being provided on condition that they would only be binding or enforceable if the extension was granted. Mr. Pan made it very clear that if the extension was not granted for whatever reason, the mortgages would be of no effect. Mr. Lin replied: 'of course, or course'.

.....

Conclusion

35. I wish to emphasize that all along CNCB never, formally or informally, declined our request for a time extension, nor did they threaten to enforce the mortgages. It was for these reasons, as well as the agreement or mutual understanding that the mortgages were provided to CNCB on condition that an extension would be granted, that we had not insisted on the cancellation of the registration and the avoidance of the mortgages.”

(My emphasis)

[64] In cross-examination, I found Mr. Huang's evidence to be contradictory and it was rife with internal inconsistency, particularly to do with whether an extension had or had not in fact been agreed. It was also obvious that Mr. Pan was very much considered by Mr. Huang to be his superior whom he wished to please, speaking of Mr. Pan as *“the boss”* and describing him as having a *“very open heart”*.

[65] Although the Court became aware that Mr. Huang had in fact been online and listening to the evidence of Mr. Pan I do not attach any significance to that in terms of his credibility, as it was not put to Mr. Huang that he was influenced by having heard Mr. Pan's evidence. Importantly, there had not been an application by the Claimants to exclude witnesses from the hearing.

Ms. Cheng

[66] It is plain from Ms. Cheng's Witness Statement that she did not have personal or first-hand knowledge about the circumstances surrounding the equitable mortgages as she claims to have obtained her information from Mr. Pan.

[67] At paragraphs 37 – 40, Ms. Cheng tells the Court the following:

"The Equitable Mortgages and the Extension Agreement"

37. Solar Achiever and Concept Pioneer do not dispute that on 2 June 2020 the Equitable Mortgages were entered in favour of CNCB, and that those documents are governed by BVI law.

38. However, at around the same time when the Equitable Mortgages were entered into I understand from Mr. Pan that there was an oral agreement reached between Mr. Pan, Mr. Henry Huang... and Mr. Chum....on behalf of Solar Achiever and Strong Fort on one hand and Hu Zhe and other representatives of CNCB on the other hand, that in consideration of the Equitable Mortgages granted in favour of CNCB, CNCB agreed to extend time for performance of the payment obligations under the EPA and Deed of Undertakings and Personal Guarantee, and not to enforce the Equitable Mortgages, until completion of the HMT Project (the 'Extension Agreement'). In other words, Mr. Pan's obligations under the EPA and the Deed of Undertakings... were postponed and could be enforced by CNCB (including the Equitable Mortgages) only when the HMT Project is completed (if they did not receive the finds as agreed before then).

39. The Extension Agreement was an oral agreement made in Hong Kong. This was a variation of the EPA and the Deed of Undertakings..., or a collateral agreement postponing the obligations under them. In the alternative, I believe that the statements that gave rise to the Extension Agreement were representations upon which Solar Achiever and Strong Fort (and therefore Concept Pioneer) relied when entering into the Equitable Mortgage(s).

40. In so far as the Extension Agreement is concerned:

- a. Notably, the Equitable Mortgages were dated 2 June 2020, whereas the alleged default in question concern payment obligation in 2019, and the notice of default was given by CNCB to Mr. Pan on or around 2 January 2020;
- b. In other words, if there had indeed been a default (which is denied), the Equitable Mortgages might have been said to be immediately enforceable when they were entered into. That would fall foul of common commercial sense;
- c. Instead, the Equitable Mortgages were the consideration for not enforcing any prior defaults, and extending the time for performance of the relevant obligations;
- d. The Extension Agreement also explains why CNCB had not taken any enforcement action before starting the present action in 2022 (i.e. for more than 2 years after the default relied upon). I do not know why CNCB has suddenly decided to start the present action (in breach of the Extension Agreement), but my guess is because Mr. Pan has been facing other claims recently, and hence CNCB may wish to start a claim to “secure” their interest or pressurize for a settlement in their favour.

[68] Under cross-examination, Miss Cheng accepted that she had no direct knowledge of the HMT Project or the Mortgages. She admitted quite candidly that she took her directions from Goldin’s Compliance Department.

[69] I do think that the Claimants are correct in characterizing Ms. Cheng as having been put in a difficult position. Further, I agree with the submission that what little Ms. Cheng was told by the individuals giving her instructions, and which she revealed in cross-examination, was inconsistent with, and undermined the rationale for the May Res which the Defendants had advanced to date.

Adverse Inferences

[70] The Defendants have made various complaints about the fact that the Claimants only called one witness of fact, Mr. Zhang.

[71] As regards Mr. Lin, the Defendants say that on their case Mr. Lin is the individual who confirmed at the 1 June Meeting on behalf of CNCB that the Mortgages would not be enforceable unless the extension of time under consideration was granted. Thus, Mr. Lin, they submit, has always been a key witness. Learned Counsel Mr. Westwood KC referred to the fact that Mr. Lin, who worked under Mr. Zhang, and who no longer works for CNCB, is according to Mr. Zhang not compellable to give evidence, and has refused to act as a witness of CNCB. The argument continues by saying that instead, the Claimants have put in hearsay evidence in the form of responses sent from an email address allegedly belonging to Mr. Lin. It was argued that the questions posed by an unnamed member of CNCB's internal legal department were leading. There were numerous criticisms of both the questions and answers, set out in paragraph 34 of the Defendants' Closing. At paragraph 35 the Defendants submit that no weight at all can be placed on such evidence in circumstances in which (a) the Defendants have been denied the opportunity to test such evidence by cross-examination and to ask Mr. Lin about the answers he is said to have given, (b) Mr. Lin has not only refused to appear as a witness but has refused to corroborate the alleged answers in the form of sworn evidence, and (c) even if the answers were from Mr. Lin, he would naturally be concerned if he had exceeded his authority at the 1 June Meeting. Rather, it was posited, that it should be inferred from Mr. Lin's refusal to give evidence and the absence of any sworn statement affirming the correctness of the alleged answers that he would be unable to corroborate those answers under oath.

[72] As regards Ms. Hu, the Defendants posit that it is surprising that she has not been called to give evidence since, they say, she was involved in the events leading up to the signing of the Mortgages, and she is understood to still work for CNCB.

[73] Mr. Westwood KC invites the Court to draw adverse inferences, *Wisniewski* inferences, named after the case of the same name, *Wisniewski v Central Manchester Health Authority*¹, where at 340, Brooke LJ gave guidance as follows:

1. In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

¹ [1998] EWCA Civ 598, [1998] PIQR 324

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

[74] Reference was made to two BVI decisions where the application of the **Wisniewski** inference was discussed, i.e. **Zhao Long et al v Endushantum Investments Co Ltd. et al**², and **Bernice Freeman v The Attorney General et al**³.

[75] In response, in their Closing, the Claimants assert that this submission by the Defendants amounts to a transparent tactic to deflect attention from the Defendants' own failure to produce any documentary evidence in support of their case on the Enforceability Issue and their failure to call key individuals whom they have sought to keep away from these proceedings, without explanation.

[76] Learned Counsel Mr. Hacker KC acknowledged the Defendants' reliance on **Wisniewski**. However, in the Claimants' Closing, he submitted that more up to date guidance has been provided by Lord Leggatt in **Royal Mail Group v Efobi**⁴ as follows:

"The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewsky is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible,

² BVIHC(COM) 2017/0151 at [109]

³ [BIVHCV 2008/0383 at [87] to [94]

⁴ [2021] UKSC 33, at [41]

tribunals should be free to draw, or decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.”

(Mr. Hacker KC’s emphasis)

[77] I accept the Claimants’ reasons advanced for the absence of the witnesses as regards Ms. Hu. I accept that originally when the Claimants put in Hu 1, it was to deal with rebutting the first oral agreement case advanced by Cheng 1. Thus in Hu 1, Ms. Hu denied the “Extension Agreement”, (i.e. the 1st oral agreement described by Ms. Cheng) was ever entered into by her on behalf of CNCB. As the Claimants aptly describe it, “*That case was subsequently jettisoned by the Defendants*”. The case subsequently advanced by the Defendants focused squarely on Mr. Lin and the alleged entry into the 2nd oral agreement. Thus I accept that there was a clear reason for the Claimants not to call Ms. Hu.

[78] In the Defendants’ Opening it was stated that Ms. Hu should have been called because she attended the 5 May Meeting. However, as Mr. Hacker KC points out in the Claimants’ Closing, the Defendants advanced no case in reliance on the 5 May Meeting in either their pleadings or their written evidence prior to the trial. It does seem as if the first time that this was raised was at the trial. All told, in my judgment the Claimants have provided a satisfactory explanation for Ms. Hu not being called to give evidence.

[79] As regards Mr. Lin, I accept the Claimants’ explanation that it was only late in the proceedings that the Defendants now sought to mention Mr. Lin in connection with a different oral agreement. Further,

Mr. Lin no longer works with CNCB, and he is overseas, and therefore not compellable to give evidence in the BVI.

Documentary Evidence

- [80] I readily accept the Claimants' submission that in a commercial dispute, whilst the Court will take a holistic approach to the evidence, the importance of contemporaneous documents is the important starting point. As discussed by Leggatt J (as he then was), in the oft-cited decision **Gestmin SGPS SPA v Credit Suisse (UK) Ltd**⁵:

"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose-though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls or particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide as to the truth."

- [81] These observations were applied by Jack J in **Zhao Long et al v Endusham Investments Co Ltd**.⁶ The Claimants submit that these observations apply with particular force to the parties' internal documents, which *"tend to be the documents where a witness' guard is down and their true thoughts are plain to see"*; **Simetra Global Assets Ltd. v Ikon Finance**⁷.

- [82] The Claimants assert moreover, in circumstances where there is a wealth of documents contradicting the oral agreement (s) that the Defendants have alleged, Males LJ's remarks in **Simetra**, at [49], are a salutary reminder as follows:

⁵ [2013] EWHC 3560 (Comm) at [22]

⁶ BVIHC 2017/0125 at [107] – [108]

⁷ [2019] 4 W.L.R. 112 at [48]

“It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations....”

- [83] The Claimants further argue that in addition, the absence of documents which might be expected to exist if the Defendants’ contentions were true should be taken into account. In that regard, reference was made to the judgment in **Wetton v Ahmed**⁸ at paragraph [14], where Arden LJ (as she then was), commented as follows:

“Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.”

- [84] The Claimants say that they have repeatedly drawn the Defendants’ attention to deficiencies in their disclosure in this litigation, without avail. They observe that it is notable that (i) virtually no internal communications between Mr. Pan and his associates have been disclosed and (ii) none of the sort of messages (whether in the form of emails, WhatsApp, texts or other electronic messages) that one would reasonably expect to have been created referencing the existence of the alleged oral agreement -had it existed- have been disclosed by the Defendants. The Claimants invite this Court to draw an inevitable inference that no such documentation has been adduced because no such oral agreement was entered into.

The Enforceability Issue

- [85] In *Cheng 1* and *Huang 1*, it had been suggested that an extension had in fact been agreed. However, the Defence and Counterclaim that was filed relies on the premise that no extension had been agreed. Although *Huang 1* has never been corrected, or modified, the Defendants have abandoned

⁸ [2011] EWCA Civ 610

any reliance on the case advanced in it that there was an extension agreement and have unequivocally confirmed that that they are no longer contending that an extension was agreed.

- [86] There are significant lacunae in the Defendants' pleaded case as to central terms of the Oral Agreement. Thus, as the Claimants point out in their Closing, the pleaded case fails to identify whether the extension to which it is alleged that the grant of the security was to be subject was an extension until the HMT Project was completed (i.e. as initially requested by Mr. Pan) or the limited 1-year extension which was the subject of the subsequent formal extension application. I agree with the Claimants that this is plainly a central and fundamental term of the oral agreement, as to which there is no precision at all.
- [87] The Defendants appear to allege that the rationale for the alleged 1 June Meeting was that Mr. Lin came to meet Mr. Pan and his associates because "*he had to take away the physical hard copy signed execution pages in order to kickstart the official extension approval*" (Huang 2 – [26]) and that he then "*allowed the signed pages to be provided to Mr. Lin on this basis, with the witness section completed by Mr. Chum*" (Pan2 [46] and Huang 2 [27]). I accept the Claimants' submission that this account is wholly inconsistent with the contemporaneous documents, which show that personal delivery was neither necessary nor the method by which delivery of the finalized documents was ultimately effected. E-mail exchanges show that the final executed version of the Mortgages, including Mr. Pan's signatures, were provided by Goldin to Clifford Chance by email on 2 June 2020.
- [88] I also find that the words by which the alleged oral agreement was concluded, including the alleged "of course, of course" from Mr. Lin are extremely vague.
- [89] The burden is plainly on the Defendants to satisfy the Court, on a balance of probabilities, that an oral agreement was entered into before the Mortgages were executed on 2 June 2020. It is further for the Defendants to satisfy that this alleged oral agreement satisfies the legal requirements for there to be a binding contract between the parties
- [90] For the following reasons, advanced by the Claimants legal team, this Court cannot be satisfied that any such oral agreement came into being, or that if it did, it satisfies the required legal requirements:

- [91] In circumstances where the parties to the Mortgages instructed lawyers to draft detailed agreements between them, the starting point is that their bargain is presumed to be reflected in those carefully drafted agreements, not those in any prior or contemporaneous oral conversation: ***Edgeworth Capital***.
- [92] The correspondence from the Defendants' lawyers in relation to the Claims was silent as to any alleged agreement in relation to the enforceability of the Mortgages. What was raised was that an "Enforcement Event" had not taken place under the Mortgages. Further, right up to 1 December 2022 when Huang 1 was filed, the oral agreement upon which the Defendants rely in the Defence and Counterclaim (which involves claims that the extension was not granted) was not mentioned in any evidence filed by the Defendants. Even then, when Huang 1 was filed, the evidence was that an extension had been agreed. It is not credible that the Defendants would not have raised the existence of this oral agreement in their initial response to the claims or in their witness statements, and it is even less credible because the oral agreement that was initially alleged was to opposite effect, that the extension had been agreed.
- [93] In none of the contemporaneous communications produced by the parties is there any individual referring to or summarizing the terms of the oral agreement.
- [94] The oral agreement is wholly inconsistent with the Confirmation Deed (of course, the Defendants now say that Mr. Pan had no recollection of signing it.)
- [95] As a matter of rationality, the terms of the alleged oral agreement make no commercial sense in the circumstances of the case. Why, indeed, as the Claimants ask rhetorically in their Closing, would CNCB instruct specialist solicitors to draft the Mortgages and the suite of documents surrounding them, only to agree in an unrecorded side-agreement that they would be unenforceable unless and until an ill-defined extension of time was first agreed? I accept that in contrast, the case advanced by the Claimants does accord with commercial sense: that the Mortgages were not conditional at all. Rather, they, along with payment under the Confirmation Deed, constituted minimum requirements for even having a discussion about the potential extension of time requested in consequence of Mr.

Pan's significant and ongoing defaults in respect of his very substantial obligations. In my judgment, Mr. Pan had no option but to acquiesce to CNCB's requests. The sums under the Confirmation Deed were not paid in full and, thus, no extension was ever agreed.

[96] I did not find the evidence of Mr. Pan to be credible at all. He rarely answered the question that was being asked, and refused to give straightforward answers to the most basic questions posed, launching off into speeches, that did seem prepared instead. Mr. Huang also gave his evidence in a way that demonstrated his plain subordination and also did not answer the questions he was being asked in a straightforward way. I deal with this issue in the section of this judgment dealing with the Defendants' witnesses. On this key issue of the oral agreement, Mr. Pan's evidence and Mr. Huang's evidence as to the nature of the 1 June Meeting was itself inconsistent. Whilst Mr. Huang had described the meeting between Mr. Lin and Mr. Pan as "formal", Mr. Pan's oral evidence is that it was a very short, ad hoc meeting, at which no one sat down. Mr Huang attempted to explain this away by saying "*I understand what you mean, but I want to say that is how I and him describe it from our different perspective, me a staff, him as boss.*"

[97] This is a case where, in the event of a conflict between the unsatisfactory evidence of Mr. Pan and Mr. Huang, the documentary evidence is clearly to be preferred.

[98] I accept the Claimants' submission at paragraph 104 that there is no contemporaneous documentary evidence of the alleged 1 June Meeting taking place at all. As there stated:

"...Rather, the relevant documents are inconsistent with such a meeting having taken place:

(a) Mr. Chum's email of 1 June 2020 is wholly at odds with the Defendants' case that any meeting with CNCB took place on same date.

(b) Further, the Communications Spreadsheet shows no relevant meeting having taken place on that date. The Defendants did not suggest that any other meetings between Goldin and CNCB was omitted from the Communications Spreadsheet. Accordingly, the Defendants' case turns on the implausible suggestion that the Alleged 1 June Meeting is the one meeting that the Communications Record fails to record.

(c) *The best the Defendants can do is refer to “echoes” in the documents. But those documents are explicable on their own terms, without resorting to the fiction that a collateral oral agreement has been entered into.”*

Effect of Clause 17 of the Mortgages

[99] The Claimants submit that even if the Court were to find that the oral agreement was entered into as a binding contract, Clause 17 of the Mortgages would nevertheless, on its true construction, prevent it from having any effect on the enforceability of the security created thereunder.

[100] The Claimants’ case is set out in detail in the Opening [110] – [115]. In summary, the parties agreed pursuant to the Mortgages that the rights created thereunder needed to be specifically waived in writing, in order for a waiver to be effective. The relevant rights included CNCB’s rights of enforcement pursuant to Clause 9.1 and 10.2. The effect of the oral agreement would be for CNCB to have waived its rights of enforcement until some indeterminate extension was agreed by the parties. That amounted to a waiver of substantive rights, which needed to be in writing. No writing is relied upon and so any waiver, would in my view, be ineffective.

[101] Clauses 17.2, headed “*Waiver of defences*” 17.6 “*Waivers and remedies cumulative*” 17.8 “*Amendments*” and 17.9 “*Waiver*” are quite plain and standard in documentation of this sort, and read as follows:

“17.2 Waiver of defence

The obligations of the Chargor under this Mortgage will not be affected by any circumstance, act, omission, matter or thing which, but for this Clause, would reduce release or prejudice any of its obligations under this Mortgage and this Security and whether or not known to the Chargor or Chargee including:

(a) *Any time, waiver or consent granted to, or composition with an Obligor or other person;*

.....

(e) any amendment (however fundamental) or replacement of the Equity Participation Agreement, the Deed of Undertakings and Personal Guarantee or other document....

.....i) any insolvency or similar proceedings

.....

17.6 Waivers and remedies cumulative

(a) *The rights of the Chargee under this Mortgage:*

(i) *may be exercised as often as necessary;*

(ii) *are cumulative and not exclusive of its rights under general law; and*

(iii) *may be waived only in writing and specifically.*

(b) *Dealy in exercising or non-exercise of any such right is not a waiver of that right.*

.....

17.8 Amendments

This Mortgage may only be amended by an instrument in writing signed by each party to this Mortgage.

17.9 Waiver

(a) *No waiver of any right or rights arising under this Mortgage shall be effective unless such waiver is in writing and signed by the party whose rights are being waived.*

No waiver by a party of a failure by the other party to perform any provision of this Mortgage shall operate or be construed as a waiver in respect of any other failure whether of a like or different character

(b) *."*

[102] Ordinary principles of construction of contracts applies to the Mortgages. Such clauses are enforceable as a matter of BVI Law-see ***Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)***⁹.

[103] The effect of these clauses is that a failure to comply with stipulated requirements for waiver or variation results in the waiver or variation being invalid. As Lord Sumption teaches in ***Rock***

⁹ [2021] UKSC 48 at [56]

Advertising Ltd. v MWB Business Exchange Centres Ltd.¹⁰, there are at least three reasons for the parties to include such clauses in their agreements:

“The first is that it prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment. Secondly, in circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but also about its exact terms. Thirdly, a measure of formality in recording variations make it easier for corporations to police internal rules restricting the authority to agree them.”

The Defendants ‘Four Legal Avenues’

[104] The Claimants have termed the defences “avenues”. I accept the Claimants’ primary case that these defences fail on the evidence and/or because of the effect of Clause 17 of the Mortgages.

Existence of a Collateral Contract

[105] I am satisfied that there was no oral agreement as alleged by the Defendants. Even if such an agreement had come into being, it would have been invalid by virtue of Clauses 17.2 and 17.6 of the Mortgages.

Conditions Precedent or Subsequent

[106] As an alternative, it is said that the Mortgages contained conditions precedent or conditions subsequent, to the effect that the Mortgages would be of no effect unless an extension were granted. Plainly the Mortgages contained no such express terms. I have already rejected the Defendants’ assertions of a factual basis underpinning the oral agreement.

The Escrow Defence

¹⁰ [2018] UKSC 24 at [12]

[107] The Defendants say that a validly composed deed does not take effect unless and until it is unconditionally delivered to the party intended to benefit under it. Mr. Westwood KC argues that the facts support the inference that the Mortgages were only ever delivered conditionally, in escrow, that is, subject to the irrevocable condition that the extension agreement was concluded, which has not been satisfied.

[108] In my judgment, it is clear on the face of the Mortgages themselves and the context surrounding them that they were delivered unconditionally. The following are the relevant considerations:

- (a) Clifford Chance's email of 2 June at 14:27 (for CNCB) made unequivocal the consequences of the Goldin Group returning executed documents, noting that:

"the party on whose behalf that a document [sic] was executed agrees to be bound by the terms of that document"; and (ii) "we are authorized to hold each executed copy of each document to the order of that executing party on the basis that such executed document will be released from being held to the order of that executing party (2 June 2020), and that such release will constitute delivery of that document by that executing party." (emphasis added)

- (b) Shortly after that, Ms. Lee of Goldin emailed the executed versions of the Mortgages without demurring from the statement that those documents would be released and duly delivered on 2 June 2020.
- (c) CNCB specifically rejected Mr. Chum's request that the Mortgages be put forward dated a month ahead. Clearly, the intention in rejecting that request was for the Mortgages to be correctly dated and then to be immediately effective from the date of execution.
- (d) The parties were plainly familiar with the concept of a formal escrow arrangement, since one is provided for in Clause 12 of the EPA. I agree with the Claimants' submission that the fact that no such provision is to be found in the Mortgages militates against the suggestion that the same parties intended the Mortgages to be delivered conditionally.
- (e) In addition, the Mortgages themselves recite the parties' intentions in the following terms:

“It is intended that this document takes effect as a deed notwithstanding the fact that a party may only execute this document under hand”.

Estoppel By Convention

[109] The parties agree that the law is as stated in ***Tinkler v Revenue and Customs Commissioners***¹¹. In particular, it is common ground that the particular understanding must “*cross the line*” between the parties. In ***Tinkler***, at paragraphs [51] – [52], Lord Burrows explained as follows:

“The person raising the estoppel (who I shall refer to as “C”) must know that the person against whom the estoppel is raised (who I shall refer to as “D”) shares the common assumption and must be strengthened, or influenced in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C’s reliance on the common assumption...It will be apparent from that explanation of the ideas underpinning the first three Bench dollar principles that C must rely to some extent on D’s affirmation of the common assumption and D must (objectively) intend or expect that reliance.”

[110] I accept the Claimants’ submissions that the legal requirements for estoppel by convention are not made out in this case. Firstly, the Defendants cannot rely on an estoppel in these terms because of the contractual representations made in the Mortgages: by Cl 4.3(b), the Chargor Companies expressly represented that “*The obligations expressed to be assumed by it in this Mortgage are its legal, valid, binding and enforceable obligations*” and by Cl. 4.15, the Chargor Companies also acknowledged and agreed that the representations in Cl 4 were made by way of a deed, and that they would be “*estopped from subsequently arguing that any representation was untrue when made or repeated.*” Accordingly, the Claimants cannot be taken to have strengthened any assumption as to the Mortgages’ unenforceability, when the parties assumed and represented to each other in clear, unequivocal and express terms that the Mortgages were fully enforceable in accordance with their terms.

¹¹ [2021] UKSC 39

[111] I have already indicated that the Defendants allegation of the Oral Agreement has failed. That being the case it is difficult to see how they could nevertheless establish sufficient conduct 'crossing the line' as to manifest assent to the alleged assumption. The Claimants rely upon the point made by Robin Vos (sitting as a Deputy High Court Judge) in **Asher v Jaywing Plc**¹², where he stated:

"It would be difficult to establish such an estoppel in circumstances where the Claimants had failed to establish a new agreement or a valid variation to the existing agreement and where the estoppel contended for would, in substance, have the same effect".

[112] Further, it plainly cannot be said that there was a shared common assumption that the Mortgages were unenforceable. CNCB certainly did not consider the Mortgages to be conditional - see Internal Report dated 17 July 2020. Nor indeed, did Mr. Pan or Mr. Huang mention any such conditional status until Pan 2 and Huang 2, which were only filed on 8 March 2023. CNCB did not assume any responsibility for Mr. Pan's reliance (if there was such reliance) on a common assumption (if there was such a common assumption) as to the enforceability of the Mortgages being subject to the agreement of an extension of time. There is no evidence of any communication or conduct to that effect, still less a communication "crossing the line".

Conclusion on the Enforceability Issue

[113] I therefore find that the Mortgages were enforceable in accordance with their express terms when they were entered into on 2 June 2020 and remain enforceable. I accept the Claimants' submissions that the legal avenues that the Defendants rely on in relation to the Enforceability Issue have no foundation either in fact or in law.

The Notification Issues

[114] The Defendants say that even if the Mortgages were enforceable in accordance with their terms, the Receivers were not validly appointed because no "*Enforcement Event*" which CNCB was entitled to rely on had occurred by 2 June 2022 when it appointed the Receivers.

¹² [2022] EWHC 893 (Ch)

- [115] The Claimants say that that if the technical approach advocated by the Defendants is to be adopted, a consequence must attach to the breaches by Mr. Pan of the express obligations imposed on him in Clause 9.1 of the DoU, i.e. where Mr. Pan knew of a default he fell under an obligation immediately to inform CNCB of the event. The Claimants' case is that the consequence of Mr. Pan's failure to do so is that CNCB was not required to notify Mr. Pan of the same event in order for a PED to be deemed to occur.
- [116] Alternatively, if Clause 9.1 did (notwithstanding Mr. Pan's breaches of his own Clause 9.1 notification obligation) nonetheless impose a notification requirement on CNCB in order for a PED to arise, some one or more of the notices described below satisfied the relevant contractual requirements. The Claimants submit that they need only show that a single PED occurred, for the Receivers to have been validly appointed.
- [117] It was the Claimants' position that Notices delivered by CNCB both prior to and following entry into the Mortgages, gave rise to PEDs. They argue that the Defendants' contention that a PED pre-dating entry into the Mortgages, cannot be relied upon to found an "Enforcement Event" is wrong. It was submitted that that interpretation is not available on the clear wording of the Mortgages and further is also fundamentally inconsistent with the understanding of both parties when they entered into the Mortgages.

Summary of Mr. Pan Defaults and CNCB Notices

- (i) The Privatisation Loan Prepayment Sum It is not disputed that on 31 December 2019, the Privatisation Loan Prepayment Sum fell due for payment, that Pan breached his obligation under Cl. 6.4 of the DoU to pay that sum, or that Mr. Pan failed to notify CNCB of his default. The breach constituted a specified event under Cl. 9.1.1(h) of the DoU. CNCB provided Mr. Pan with a written notification in respect of this default on 2 January 2020 ("**2 January Notice**").
- (ii) The 3 April Demand On 3 April 2020, Clifford Chance served the April Demand on Mr. Pan. That was a "Default Notice" in respect of the Privatisation Loan Prepayment Sum.

It also constituted a demand for payment of the Prepayment Default Sum, which was never satisfied.

- (iii) The Compulsory Payment Sum. On 28 June 2020, following entry into the Mortgages on 2 June 2020, Mr. Pan failed to pay the Compulsory Payment Sum on the Maturity Date. That was a breach of Clause 5.1 of the DoU. A number of written notifications followed: (1) on 29 June 2020 a written notification of Mr. Pan's failure to pay the Compulsory Payment was sent to the Pan Associates ("**the 29 June Notice**"), (2) on 19 October 2020 a further written notification of Mr. Pan's failure to pay the Compulsory Payment Sum was sent to him ("**the 19 October Notice**"), (iii) on 20 November 2020, the CNCB SD (Statutory Demand) provided Mr. Pan with a further notification of his failure to pay the Compulsory Payment Sum

Insolvency Event

- [118] The Claimants say that service of the CNCB SD constituted an "*Insolvency Event*" for the purposes of the DoU. The service of other SDs on Mr. Pan by other creditors also constituted an "*Insolvency Event*" for the purposes of the DoU.
- [119] The Claimants also put forward a further alternative case that CNCB was entitled to rely on PEDs which occurred following the execution of the Mortgages to appoint the Receivers.
- [120] As the Claimants point out in their Closing, the Defendants' case on the Notification Issues did develop significantly at trial. It was conceded, at paragraph [102] of the Defendants' Opening, that (i) the 2 January Notice was a Qualifying Notice and (ii) insofar as relevant, that the April Demand was a Default Notice. Both of those concessions represented a departure from the Defendants' pleaded case, notably paragraphs [16] – [17].
- [121] The Claimants argue that when coupled with Mr. Pan's oral evidence that the Mortgages were not subject to any condition requiring an extension in relation to the Privatisation Loan Prepayment Sum in order to be enforceable, it follows that even if the Court finds that the oral agreement was entered into, a PED in respect of the Privatisation Loan Agreement Sum would nevertheless have entitled the Claimants to appoint the Receivers.

[122] Clause 9.1 needs to be considered by reason of the definition of “*Enforcement Event*” under the Mortgages. That is because that definition required (i) a PED to have occurred under the EPA and DoU, which is (ii) continuing at the time of enforcement of the security. It reads as follows:

“If any of the following events occurs and is not remedied to the satisfaction of CNCB within seven (7) calendar days from the date on which CNCB notifies Pan of its occurrence (provided that Pan shall immediately notify CNCB upon becoming aware of any occurrence of such events), an event of default in respect of Pan is deemed to have occurred (a “Pan Event of Default”) and CNCB may notify Pan of such Pan Event of Default (“Default Notice”)” (emphasis provided)

[123] Thus, the Claimants’ primary case requires the Court to have regard to the proviso in parentheses. The Claimants submit that on their true construction, the effect of the underlined words is that CNCB was not required to notify Mr. Pan of an event stipulated in Clause 9.1 if Mr. Pan knew of it but had failed to notify CNCB of the event’s occurrence in breach of his notification obligation.

[124] The Claimants assert that significantly, the Defendants have conceded that the proviso must be given some meaning. However, the Claimants say that the Defendants go on to misconstrue those words, arguing that the proviso covers only those defaults “*of which CNCB is not aware and/or could not reasonably have been aware such that it could not notify Mr. Pan of their occurrence in accordance with the clause*”-Def’s Opening at [97].

[125] The Claimants submit that the Defendants’ construction of the proviso should be rejected because:

(1) The Defendants’ construction is untethered to the wording of Clause 9.1. The Defendants’ construction focuses on CNCB’s state of knowledge. But the proviso imposes an express obligation on Mr. Pan (“*shall immediately notify*”) and proceeds by reference to Mr. Pan’s state of mind: the words “*becoming aware*” are linked to Mr. Pan, not CNCB. The touchstone is Mr. Pan’s state of knowledge in relation to a particular default at a given time.

- (2) Further, it makes no commercial sense to read the proviso as only covering defaults of which CNCB was not aware. A situation could well have arisen where Mr. Pan also did not know about the relevant default. In that scenario, on the Defendants' case, there would be no requirement for CNCB to give any notice to Mr. Pan, and a PED would still arise.
- (3) The only commercially sensible construction of the proviso is that Mr. Pan was not required to give notice of the default where it was not known to him, in which he would not have been in breach of the Pan Notification Obligation. That placed the onus on CNCB to give notice to him in that specific scenario in order for a PED to be deemed to have occurred. The Claimants give as an example, if a default based on 'unlawfulness' took place (Clause 9.1.3 of the DoU) by reason of some change in the regulatory environment in which the parties operated which was not known to Mr. Pan, CNCB would have been required to give notice to Mr. Pan to trigger a PED.

[126] The Claimants say that it is common ground that Mr. Pan was aware of all the relevant defaults which took place in this case, as they related to his own payment obligations of which he was a primary obligor. On Day 2 of the trial, whilst being cross-examined, Mr. Pan's evidence was that he understood that he was in default by 31 December 2019. Accordingly, argue the Claimants, the effect of the proviso was that CNCB was not required to give notice under Clause 9.1 in order for a PED to occur.

[127] The Claimants say that if they are wrong in relation to their primary case, they rely on the Relevant Notices as having given rise to the PEDs.

PEDS pre-dating the Execution of the Mortgages

[128] As previously stated, the Defendants accept that the 2 January Notice gave rise to a PED. At trial, the Defendants' grounds for resisting enforcement based on the 2 January Notice turned on three points, two of which were new:

- (a) First, the Timing Defence. This was addressed by both the Defendants and the Claimants in their respective Openings.

- (b) Second, a new pleading point to the effect that the Claimants are precluded from relying on the 2 January Notice.
- (c) An argument that certain formal documents appointing the Receivers did not refer to, or perhaps did not refer with sufficient specificity to, the 2 January Notice.

The Timing Defence The Defendants' Case

- [129] The Defendants contend that on their proper construction, the Mortgages do not permit enforcement on the basis of a Mr. Pan Event of Default that had already crystallised before the Mortgages were entered into. Thus, the Defendants argue that whilst they may stand as security for the future performance of obligations previously entered into, their enforceability depends on the occurrence of an Enforcement Event after they were entered into.
- [130] The Defendants submit that it would make no commercial sense to agree to provide security that was already and without more immediately enforceable. Indeed, they continue, if it were immediately enforceable, it would not be “security” for the discharge of any obligations at all. It was submitted that this is consistent with the natural and ordinary meaning of the words used in the Mortgages: Clause 7.1 of the Mortgages provides that the Chargor is entitled to exercise all voting and consensual powers pertaining to the Security Assets (i.e. the shares) and retain dividends etc. “*unless and until the occurrence of an Enforcement Event*”. It was submitted that the clear inference to be drawn from the parties’ choice of language is that they did not consider that an Enforcement Event had occurred as at 2 June 2020, otherwise the entire clause would be rendered surplusage, which is inherently unlikely.
- [131] Similarly, they argue, that Clause 9.1 provides that the security “*will become immediately enforceable if an Enforcement Event occurs*” (Defendants’ emphasis). Such a clause, it was argued, is inconsistent with the parties considering that an Enforcement Event had already occurred as at 2 June 2020 such as to make the security immediately enforceable upon the execution of the Mortgages.

[132] Accordingly, the Defendants posit that the Claimants/CNCB cannot rely on the so-called Privatisation Loan Prepayment PED” or the “*Prepayment Default PED*” resulting from the 2 January 2000 email and the 3 April 2020 letter respectively.

[133] Without prejudice to the foregoing, Defendants aver that even if an Enforcement Event could have existed prior to the signing of the Mortgages, neither alleged Mr. Pan Event Default arose.

[134] **The 2 January 2000 email and the alleged “Privatisation Loan Prepayment PED.”** Mr. Westwood KC considered it instructive to look at the 2 January 2020 email as the document:

- (1) Was in writing and in English (as per clauses 17.1.1 and 17.1.2 of the EPA).
- (2) Was sent to the recipients identified for Mr. Pan in clause 17.3.
- (3) Was addressed to Mr. Pan.
- (4) Was stated to be a “*notice under Clause 9.1 of the Deed*”.
- (5) Explained that an event of default had occurred and gave a 7- day remedy period.

[135] Learned Counsel submits that the email was consistent with Defendants’ construction of the requirements of Clause 9.1 and is inconsistent with the Claimants rival contention set out in paragraph 14 of the SOC. It is said that the email must also be contrasted with subsequent “notices” that the Claimants now seek to rely on. It was noted that the Deeds of Appointment did not seek to rely on the 2 January 2020 email or the alleged Mr. Pan Event of default as the basis for the appointment of the Receivers.

The April 3 2020 letter and the alleged “Prepayment Default PED”.

[136] The Defendants take the position that the 3 April 2020 letter is obviously a Default Notice (i.e. a notification in respect of an earlier alleged Mr. Pan Event of Default as per clause 9.1), served in respect of the alleged Privatisation Loan Prepayment PED. In other words, this was a notice that the event the subject of the 2 January 2020 notice was now being treated as Mr. Pan Event of Default. Further, the purpose of the Default Notice is that it would have meant that Mr. Pan was obliged to make a payment under Clause 9.2.2.

[137] As to the alleged Mr. Pan Event of Default resulting from the failure to pay the clause 9.2.2. sum, it would have been necessary for CNCB to have served a further notice of a breach of the obligation to pay the clause 9.2.2 sum before that could amount to a Mr. Pan Event of Default. No such notice was served, and the Claimants do not claim that any such notice was served. Further, the Deeds of Appointment did not rely on the 3 April letter or the Mr. Pan Event of Default as the basis for the appointment of the Receivers.

[138] As is reflected, the Defendants say, in paragraph 33 of the Statement of Claim, the Claimants do not rely on any notification prior to the signing of the mortgages as providing a basis for the appointment of the Receivers.

Alleged Mr. Pan Events of Defaults following non-payment of the Compulsory Payment Sum
Legal Principles

[139] Both the Claimants and the Defendants have referred to the well-known case of **Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co Ltd.**¹³ The Defendants say that the words in a notice are interpreted in the way in which a reasonable commercial person would construe them. Further, that the overall effect of a notice once construed must leave the reasonable recipient in no doubt about what right is being exercised.

[140] The Defendants for their part accept that Mr. Pan did not pay the Compulsory Payment Sum that fell due under Clause 5.1 of the DoU. They say, however, that although none was referenced in the deeds of appointment, the Claimants now rely on 3 notices served in respect of that default. It was submitted that none satisfies the requirements of Clause 9.1. And that none leaves the reasonable recipient in no doubt about what right is being exercised. CNCB was obviously aware of the default.

[141] **First**, the Claimants rely on an email from Mr. Lin dated 29 June 2020, the so-called “Compulsory Payment Sum Default Notice”. Mr. Lin emailed Mr. Huang and Mr. Chum (and others at CNCB) in Chinese. The English translation reads as follows:

¹³ [1997] A.C. 749, at 767 – 768

“Subject: Notification regarding Project Subway

Dear Mr. Huang, Stanley,

According to our agreement for the project, Mr. Pan is required to complete the repurchase of our HK42 billion stake at an annual return rate of 15.5% by 28 June 2020. Now that Mr. Pan has not completed the repurchase as per the agreement, we hereby write to request that Mr. Pan performs his obligations as soon as possible. Please be informed that we reserve all our rights under the agreement.

Derek Lin”

[142] The Defendants make the following observations about the email:

- (1) It was not written in English as required under Clause 17.1.2 of the EPA.
- (2) It was not sent to all of the recipients specified under Clause 17.3 of the EPA.
- (3) It was not addressed to Mr. Pan.
- (4) It did not refer to Clause 5.1 of the DoU specifically, did not purport to be a notice sent under clause 9.1, and importantly did not specify any 7-day remedy period. The email simply requested that Mr. Pan perform his obligations “as soon as possible”.
- (5) It would not have left the reasonable recipient in no doubt that CNCB was giving notice under clause 9.1 requiring remediation in 7 days. On the contrary, the reasonable recipient would have understood this to have been a general reservation of rights in the context of an ongoing negotiation over the proposed extension.
- (6) It shows a marked contrast to the email dated 2 January 2020.
- (7) It was not referenced at all in the Deeds of the Appointment of the Receivers dated 2 June 2022.

[143] Accordingly, proffer the Defendants, no Mr. Pan Event of Default arose following the expiry of an unidentified remedy period.

[144] **Second**, the Claimants rely on an oral notification given at the meeting on 6 August 2020, the so-called “August Demand”. However, Mr. Pan was not present at that meeting and CNCB’s own internal minute of the meeting makes no reference to any demand being made of Mr. Huang.

[145] The Defendants say that it will be noted that the alleged “demand”:

- (1) Is not referred to at all in the contemporaneous minute of the meeting prepared by CNCB.
- (2) Would not have been in writing contrary to clause 17.1 of the EPA. It would also have unlikely been made in English.
- (3) Was not sent to any of the recipients specified under Clause 17.3 of the EPA.
- (4) Was not addressed to Mr. Pan.
- (5) Did not refer to Clause 5.1 of the DoU specifically, did not purport to be a notice given under Clause 9.1, and importantly did not specify any 7-day remedial period.
- (6) Would not have left the reasonable recipient in no doubt that CNCB was giving notice under Clause 9.1 requiring remediation in 7-days.
- (7) Was not referenced at all in the Deed of Appointment of the Receivers dated 2 June 2022.

[146] Accordingly, declare the Defendants, no Mr. Pan Event of Default arose following the expiry of an unidentified remedy period after the 6 August meeting.

[147] **Third**, the Claimants rely on an email from Mr. Lin dated 19 October 2020, the so-called “October Demand”. Mr. Lin emailed Mr. Huang and Mr. Chum (and others at CNCB in Chinese). The English translation is as follows:

“Dear Stanley and Mr. Huang,

You should be aware that, in relation to Project Subway, the relevant payments have been delayed for over 3 months. According to the relevant

management practice, our company will adjust the credit risk rating in relation to this project, and it is possible for our company to be instructed to take further legal action. We therefore write to repeat our reminder to Mr. Pan to fulfill his obligations under the agreements to repay the relevant funds.

Meanwhile, please can you also provide the repayment plan, any important progress and timetable of the plan for our company's evaluation. Thank you!

Derek Lin”

[148] The Defendants say that it should be noted that the email:

- (1) Was not in English as required under clause 17.1.2 of the EPA.
- (2) Was not sent to all of the recipients specified under clause 17.3 of the EPA.
- (3) Was not addressed to Mr. Pan.
- (4) Did not refer to Clause 5.1 of the DoU specifically or purport to be a notice sent under Clause 9.1, and importantly did not specify any 7-day remedy period.
- (5) Would not have left the reasonable recipient in no doubt that CNCB was giving notice under Clause 9.1 requiring remediation in 7-days. Indeed, the email did not specify any specific period for remediation but rather asked Mr. Huang and Mr. Chum to provide a repayment plan and a time table for CNCB's evaluation.
- (6) Shows a marked contrast to the email dated 2 January 2020.
- (7) Was not referenced at all in the deed of appointment of the Receivers dated 2 June 2022.

[149] Accordingly, say the Defendants, no Mr. Pan Event of Default arose following the expiry of an unidentified remedy period following the email.

Alleged Mr. Pan Events of Default Following Statutory Demand

- [150] The Claimants rely on the fact that CNCB issued a statutory demand dated 20 November 2020 against Mr. Pan. The statutory demand was for the sum of HK\$136 million, not the Compulsory Payment Sum, which the Defendants say was consistent with the ongoing negotiations over an extension of time for payment of that sum under the DoU.
- [151] However, argue the Defendants, in order to constitute a Mr. Pan Event of Default, CNCB was required to serve a notice under Clause 9.1 in respect of the statutory demand notifying a remedy period and it did not do so.
- [152] The Defendants say that the Claimants cannot rely on the statutory demand itself as a notice for the purposes of Clause 9.1 as:
- (1) It was (and stated to be) a demand served under the HK Bankruptcy Ordinance, which required to be dealt with within 21 days failing which Mr. Pan was exposed to the risk of being made bankrupt, not the 7 days referred to in Clause 9.1 of the DoU. Further, it did not purport to be serving the further and separate purpose of also triggering CNCB's contractual rights under Clause 9.1 of the DoU to which it made no reference at all.
 - (2) The purpose of a notice under Clause 9.1 is to inform Mr. Pan that CNCB has elected to treat one of the specified events as something that will (absent remedy within 7 days) constitute a "Mr. Pan Event of Default", and to provide Mr. Pan with an opportunity to remedy the event to CNCB's satisfaction within that time, in the knowledge that absent remedy within that time CNCB could invoke the contractual rights attendant on a Mr. Pan Event of Default having occurred.
 - (3) A valid notice under Clause 9.1. must therefore, at a minimum, inform Mr. Pan of the occurrence of an "event" under Clause 9.1 as such and the statutory demand did not do that.

- (4) The position is to be contrasted with those notices in relation to “insolvency events (including the Statutory Demand)” which CNCB has served with a view to triggering Mr. Pan Events of Default, which have satisfied those requirements; see those served on 12 August 2022 (which, for different reasons, the Defendants say cannot assist the Claimants’ case in any event).

Alleged Mr. Pan Events of Default following 12 August 2022 notices

- [153] The Claimants also rely on notices dated 12 August 2022, which refer to 4 insolvency events: (a) the statutory demand of 20 November 2020, (b) a statutory demand served 16 February 2021 served by CNCB’s parent company Citic on Mr. Pan, (c) a statutory demand served on 17 June 2021 served by Bank of China on Mr. Pan, and (d) the bankruptcy order made against Mr. Pan on 8 July 2022.
- [154] The Defendants say, that in contrast to the notices set out above (save for that dated 2 January 2020), the 12 August 2022 notices were in English, addressed to the correct addresses, expressed to be given under Clause 9.1 of the DoU and expressly warned that absent remedy within 7 days, Mr. Pan events of Default would be deemed to have occurred.
- [155] However, according to the Defendants these insolvency events and the August 2022 notices do not assist the Claimants for the following reasons:
- (1) The alleged insolvency events were not the subject of any notice that could trigger a Mr. Pan Event of Default, and thus an Enforcement Event, prior to the appointment of the Receivers on 2 June 2022. Indeed, say the Defendants, the last event even postdates the appointment of the Receivers.
- (2) Thus, whilst they were the subject of purported notices under clause 9.1 on 12 August 2022, if the appointment made on 2 June 2022 was defective for the above reasons, it cannot be cured by reason of a subsequent notice that might justify a fresh appointment. It was submitted that it is clear that an appointment under the Mortgages can only be made after an Enforcement Event has occurred.

- (3) Where a purported appointment of a receiver is invalid for lack of the required prior formality (eg. a notice or demand), service of a later notice will not validate the appointment. Reference was made to ***Kerr & Hunter on Receivership and Administration***¹⁴.

[156] The Defendants refer to the fact that the Claimants have sought a declaration that CNCB would be entitled forthwith to appoint receivers under the Mortgages. The Defendants classify that as a desperate attempt to circumvent losing this claim. They submit that the Court should dismiss the claim and declare that the Receivers were not validly appointed on 2 June 2022 (or at any point since). Further that if and when CNCB elects to make a further appointment of receivers pursuant to the 12 August 2022 notices, the validity of the subsequent appointments will have to be considered in fresh proceedings.

The Claimants' Position on PEDs Pre-Dating the Execution of the Mortgages

[157] The Claimants say that there is no principle of general application that the Defendants identify to explain why enforcement on the basis of an existing default known to the parties, which pre-dates the creation of a security is impermissible. As a matter of law, it was submitted that there is nothing objectionable in an existing default forming the basis for enforcement of security. Reference was made to ***Chandrasekaran v Fisher***¹⁵.

[158] Rather, the Claimants submit, that the Defendants' Timing Defence appears to be based primarily on a misconceived invocation of the commercial context in which the Mortgages were entered into:

- (a) Plainly, the existing commercial arrangements between the parties to the Mortgages are admissible for the purpose of construing the Mortgages when determining whether a PED pre-dating the Mortgages may be relied on by the Claimants.

¹⁴ 21st Ed. at [16-3 and 16-9]

¹⁵ [2023] EWHC 522 (Ch) [27] – [28]

- (b) There can be no question that the admissible factual matrix can include evidence of the 'genesis' and objectively the 'aim' of the transaction (*Prenn v Simmonds*¹⁶, per Lord Wilberforce.
- (c) The admissible background in this case therefore includes, at a minimum the following:
- (i) Mr. Pan's agreement under the DoU and EPA to transfer the 'Economic rights' to the SA Shares to CNCB (subject only to the exercise of the Call Option);
 - (ii) that Pan had given CNCB the signed but undated share transfer form;
 - (iii) that he had caused the Chargor Companies to grant negative pledges in respect of the shares they owned; and
 - (iv) as now appears to be common ground, that a default in relation to the Privatisation Loan Prepayment Sum had occurred by the time the mortgages were entered into.
- (d) CNCB was, therefore, already entitled to transfer Mr. Pan's 16.5% interests in the HMT Project to itself by simply dating the share transfer form. Against that backdrop, it would have made no commercial sense for CNCB or Pan to agree to carve out the default in respect of the Privatisation Loan Prepayment Sum from its enforcement rights under the Mortgages; CNCB could enforce that default under the DoU and the share transfer form mechanism in any event.
- (e) Further, contrary to what the Defendants assert, granting additional immediately enforceable security over and beyond the security that CNCB already held which was itself already enforceable as a result of the pre-existing defaults, over shares (i) to which CNCB already owned the economic rights and (ii) which CNCB could already transfer to itself, was by no means commercially remarkable. As Mr. Pan conceded during cross-examination, there was no material prejudice to him if the charged shares were disposed

¹⁶ [1971] 1 WLR 1381

of by receivers appointed under the Mortgages rather than by CNCB directly under its existing powers.

[159] The Claimants say that as a matter of textual interpretation, the Defendants' case has no regard to the definition of "Enforcement Event". The Claimants' case, by contrast, they claim is straight-forward; 'Enforcement Event' is defined to mean where a PED "*has occurred*" (past tense) and "*which is continuing*". On a natural meaning of 'Enforcement Event', a PED referable to the 2 January Notice "*had occurred*" and was "*continuing*" as at 2 June 2022. The Claimants submit that there is no remit in the language of the Mortgages to re-write the definition of 'Enforcement Event' to exclude defaults which "*had occurred*" prior to entry into the Mortgages and which were continuing.

[160] The Claimants assert that the words and the commercial context of the Mortgages are clear, so they do not need to rely on the 14 May 2020 exchanges and Goldin's comments on the draft Mortgages to overcome the Timing Defence. However, insofar as it may be necessary for them to do so, they aver that Goldin's 14 May comments illustrate exactly how a reasonable person would go about construing the Mortgages to ascertain whether pre-existing PEDs could be relied upon to enforce the security conferred under them: the Claimants say Goldin realized that the 'Enforcement Event' definition was critical. That is why they sought a "carve-out" to that definition to exclude enforcement of a PED referable to the Privatisation Loan Prepayment Sum. Below are further details of Goldin's comments.

Goldin's 14 May 2020 comments on the drafts

[161] After drafts of the Mortgages and the Deed of Confirmation were circulated by Clifford Chance to Goldin on 13 May 2020, Goldin provided its comments on those documents via Mr. Chum on 14 May.

[162] At paragraph 73 of the Claimants' Closing, they say, that as to the draft Mortgages:

- (1) Goldin's principal comment was in relation to the definition of 'Enforcement Event'. The comment in red stated "To CNCB: Clause 6.4 of the Deed should be curved out here [sic.] Otherwise, based on CC Letter dated 3 April 2020 the securities under this mortgage can be enforeced immediately after execution." [sic.] The same comment was repeated in relation to the SA Mortgage.
- (2) Two inferences can be drawn from this comment (i) Goldin plainly understood that the mortgages were not "*conditional*" in any sense; otherwise, they would not have assumed that the mortgages could be enforced "*immediately*" after execution; and (ii) Goldin understood that, based on the existing drafting, the Mortgages could be enforced on the basis of the existing PED referable to the Privatisation Loan Prepayment Sum payable under Clause 6.4 of the DoU.
- (3) Clifford Chance replied almost immediately, accepting Goldin's other minor changes but rejecting its request in relation to the definition of 'Enforcement Event'. Two further inferences can be drawn from CNCB's response: (i) CNCB wanted the Mortgages to be immediately enforceable after execution; and (ii) it expected the Mortgages to be enforceable based on the existing PED referable to the Privatisation Loan Prepayment Sum.

[163] The Claimants argue that the Defendants are wrong to say that, as a blanket rule, anything said by the parties by way of a pre-contractual statement may not be taken into account by the Court. Reference was made to the decision of the English Court of Appeal in ***Union of Shop, Distributive and Allied Workers v Tesco Stores Ltd.***¹⁷ where Bean LJ stated as follows:

"There is a great deal of learning, including several decisions of the House of Lords and the Supreme Court, on the circumstances in which pre-contractual statements may be taken into account as aids to interpretation. It is unnecessary to go through the familiar list of authorities. In some circumstances pre-contractual statements which demonstrate the

¹⁷ [2022] EWCA Civ 978 at [35]

mutual intentions of both parties may be admissible, but it must be clear that both parties have the same intention.”

- [164] The Claimants say that in this case, if the Court finds it necessary to rely on the 14 May exchanges, it is clear that both sides had the same intention as regards CNCB’s ability to enforce the security based on a pre-existing default. Clifford Chance clearly rejected the suggested carve-out to the “Enforcement Event” definition proposed by Goldin on 14 May, and Goldin did not demur from that rejection. ‘Enforcement Event’ was defined in its original form in the executed versions of the Mortgages.

The Pleading Point

- [165] The Defendants took the pleading point in their written and oral openings. The Claimants say that it is surprising that they should be taking such a point when the Defendants have relied on the Timing Defence in this case for some time, with that defence being specifically aimed at the default referable to the 2 January Notice, i.e. the Privatisation Loan Prepayment Sum (“**the PL PED**”). There can therefore be little doubt that the Defendants have understood the Claimants’ case to be that the Mortgages were enforceable based on, amongst other things, a PED referable to the 2 January Notice.
- [166] The Claimants’ primary response was that the SOC does not require any amendment. However, ultimately at trial during the Closing Submissions, the Claimants did make an application for an amendment to paragraph 33 of the SOC, which was not opposed by the Defendants. The amendment was made so that paragraph 33 now reads as follows:

“33. To the extent that, contrary to the Claimants’ primary case, CNCB was under any obligation to give Notification in respect of any of the Default Events all, alternatively some or more of the Privatisation Loan Default Notice pleaded in paragraph 16 above, the Compulsory Payment Sum Default Notice, the August Demand the October Demand, and/or the Statutory Demand (together the **Notifications**) constituted a notification sufficient for the purpose of Clause 9.1 of the DoU; such that the underlying Default Event became a PED

upon Mr. Pan not remedying the relevant default to CNCB's satisfaction within 7 calendar days of any of the Notifications."

The Defendants' Further Point

- [167] The Claimants say that it is unclear what, if any, legal consequences the Defendants are inviting the Court to draw in relation to the Notices appointing the Receivers. Nor, they say, is it clear which provision of the Mortgages the Defendants say required CNCB to set out which continuing PED they were relying on in order for the Receivers to be validly appointed. In any event, as a matter of fact, the notices and/or deeds appointing the Receivers do all refer to the PL PED. Further, Drury 1, the evidence of one of the Receivers, at paragraph [23] states that the PL PED was relied on as an Enforcement Event in appointing him, and the Defendants have accepted his evidence without challenge.
- [168] Further, and in any event, Mr. Hacker KC submits that a charge may rely on circumstances existing at the time of the appointment of the receivers which would justify their appointment, notwithstanding that it had not been expressly relied upon by the charge at the time the appointment was made. A number of cases were cited as well as ***Lightman & Moss, The Law of Administrators and Receivers of Companies***, paragraph 7-025, where it is opined: "*An appointment for the wrong reason will be valid if a correct ground existed at the time of the appointment.*" Thus, in ***Byblos Bank SAL v Al Khudhairy***¹⁸ Nicholls LJ permitted the bank to rely on a ground for accelerating the debt and appointing a receiver (the borrower's inability to pay its debts) which had not been invoked prior to appointment.
- [169] Accordingly, if, as appears to be common ground, the PL PED occurred and was continuing at 2 June 2022, CNCB was entitled to rely on it even if it was not set out in the notices and/or deeds appointing the Receivers.

PEDs Post-dating the Execution of the Mortgages

¹⁸ (1986) 2 BCC 99549

[170] Alternatively, the Claimants also rely on the Relevant Notices post-dating the Mortgages as giving rise to PEDs entitling CNCB to appoint the Receivers.

[171] As to the law, the parties are agreed that the leading case as to unilateral notices is ***Mannai Investments***. The Claimants' position as to the Relevant Notices post-dating the Mortgages follows.

The CNCB SD

[172] The CNCB SD was served in respect of part of the Compulsory Payment Sum. The relevant contractual context in which the CNCB SD was served on and received by Mr. Pan included : (i) the terms of the DoU and the EPA, and by that stage, the terms of the Mortgages and the Confirmation Deed; (ii) The 2 January Notice, the April Demand, the 29 June Notice and the 19 October Notice; and (iii) Mr. Pan's failure to make payment of the Compulsory Payment pursuant to Clause 5.1 of the DoU by the 28 June 2020, save for the partial payment of 3 August 2020.

[173] In those circumstances, the Claimants say:

- (1) The words used in the CNCB SD would have unambiguously conveyed to the reasonable recipient the "*occurrence*" of a breach of Clause 5.1 of the DoU, thus fulfilling the core purpose of a Qualifying Notice: (i) the CNCB SD made express reference to the terms of the DoU; (ii) it specifically stated that the amount being demanded was referable to the "Compulsory Payment Sum" which fell due on 28 June 2020 "*being the Maturity Date*"; (iii) it stated unequivocally that "*The Guarantor breached his obligation under clauses 5.1 and 5.1.1 of the Deed and has failed to pay the Compulsory Sum*".
- (2) There was no requirement for the CNCB SD to stipulate a 7-day grace period, or for a further Default Notice to be served after the grace period to remedy the default elapsed, in order for a PED to be deemed to occur.
- (3) In addition, the CNCB SD was (i) in writing; (ii) in English and (iii) served personally on Mr. Pan.

[174] The Claimants point out that the Defendants make two main points as against this at paragraph 120 of the Defendants' Opening:

- (1) The Defendants contend that a Qualifying Notice must "inform Mr. Pan of the occurrence of an 'event' under clause 9.1 as such". However, this takes them nowhere as, on a proper application of **Mannai Investment**, there can be no doubt that Pan was notified of an event of default under Clause 9.1; namely, the failure to pay the Compulsory Payment Sum.
- (2) It is also said that the CNCB SD referred to the period of 21 days for payment, not the 7 days stipulated under Clause 9.1 of the DoU. However, the Claimants submit that there was no requirement that Mr. Pan be informed of the 7-day period for remedying a default. That was information well known to the reasonable recipient of the CNCB SD.
- (3) The Claimants also argue that it is irrelevant that the CNCB SD performed the dual function of entitling CNCB to present a bankruptcy petition in due course: it would have been obvious to the reasonable recipient that CNCB was conveying the "occurrence" of a default in respect of the Compulsory Payment Sum, which is the touchstone of a Qualifying Notice.

[175] The Claimants also say that, in so far as may be necessary, they also rely on the 29 June Notice and the 19 October Notice.

29 June Notice

[176] The contractual context in which the 29 June Notice was sent and received included: (i) the terms of the DoU and the EPA and, by that stage, the terms of the Mortgages and the Confirmation Deed; (ii) the 2 January 2020 Notice and the April Demand delivered to Mr. Pan; (iii) Mr. Pan's failure to make payment of the Compulsory Payment Sum pursuant to Clause 5.1 of the DoU on 28 June 2020. In those circumstances:

- (1) The words used in the 29 June Notice would have unambiguously conveyed to the reasonable recipient the “*occurrence*” of a breach of Clause 5.1 of the DoU, fulfilling the core purpose of a Qualifying Notice, because , amongst other things, (i) The 29 June Notice made reference to the DoU and the words “*According to our agreement for the project*” would have been understood as such; (ii) The statement that Mr. Pan had been required “*to complete the repurchase of our HK\$2 billion stake at an annual return rate of 15.5% by 28 June 2020*” would have been understood unequivocally to refer to his failure to comply with Clause 5.1 of the DoU which required the payment of the Compulsory Payment Sum (being HK \$2 billion plus 15.5% x HK\$2 billion) on 28 June 2020; and (iii) The 29 June Notice went on to state that Mr. Pan was in default of that obligation, requesting that he remedy that state of affairs.
- (2) The 29 June Notice did not need to refer to the 7-day grace period. However, insofar as this was a requirement of a Qualifying Notice, a reasonable recipient would unambiguously have understood the request for Mr. Pan to remedy the breach (“*we hereby request that Mr. Pan performs his obligations as soon as possible*”) to be a reference to the 7-day period under Clause 9.1. There was also no requirement for a further Default Notice to be served after the grace period in order for a PED to be deemed to occur.

[177] Accordingly, say the Claimants, the 29 June Notice was a Qualifying Notice for the purposes of the DoU. The failure to pay the Compulsory Payment Sum was not remedied within 7 days or at all, and therefore the PED was deemed to have occurred 7 days following delivery of the 29 June Notice. In this connection, the 29 June Notice was received, understood and acted upon: just over an hour after the 29 June Notice was sent, Mr. Chum emailed CNCB formally requesting variations to Mr. Pan’s contractual obligations.

The 19 October Notice

[178] The contractual context in which the Claimants say the 19 October Notice was received included: (i) The terms of the DoU and the EPA and, by that stage, the terms of the Mortgages and the

Confirmation Deed; (ii) The 2 January Notice, the April Demand and the 29 June Notice; and (iii) Pan's failure to make payment of the Compulsory Payment Sum pursuant to Clause 5.1 of the DoU by the 28 June 2020, save that a partial payment of HK\$50 million payment was received on 3 August 2020 as part only of the sum Mr. Pan had undertaken to pay under the Confirmation Deed. In those circumstances, the words used in the 19 October Notice:

- (1) Would have unambiguously conveyed to the reasonable recipient the "*occurrence*" of a breach of Clause 5.1, thus fulfilling the core purpose of a Qualifying Notice: (i) it was headed "*Regarding unpaid funds of Project Subway*"; (ii) the reasonable recipient would unequivocally have understood the words "*in relation to Project Subway, the relevant payments have been delayed for over 3 months*" to be a reference to the continuing default under Clause 5.1 of the DoU, which they would have known had not been satisfied for 3 months; (iii) the 19 October Notice gave Mr. Pan the opportunity to remedy the default and "*fulfill his obligations under the agreements*".
- (2) There was no requirement for the 19 October Notice to refer to the 7-day grace period, nor for a further Default Notice to be served after the grace period in order for a PED to be deemed to occur.

[179] Accordingly, insofar as the CNCB SD or the 29 June Notice were not Qualifying Notices in respect of the Compulsory Payment Sum for the purposes of the DoU for any reason, the 19 October Notice did constitute such a Qualifying Notice. The failure to pay the Compulsory Payment Sum was not remedied within 7 days or at all, and therefore a PED was deemed to have occurred 7 days following the delivery of the 19 October Notice.

The Company Law Issues

[180] These issues relate to the validity of corporate actions taken (i) by the Pan Associates prior to the Receivers' appointments and (ii) by the Receivers following their own appointments. The Company law issues ultimately arise out of the May Res signed by Ms. Cheng, who was their sole signatory.

[181] The Claimants contend that the Court did have jurisdiction to grant s. 86 relief when it did so at the July Hearing (“**the S.86 Jurisdiction Issue**”), whereas the Defendants contend that the Court did not.

[182] If the Claimants are right, the status quo following the passing of the 26 July Res would subsist; Zorya would be the sole director of the Companies, the 12 July Res would have been ratified, and the M&A Amendments would have been validly revoked, subject to filing of the extract of the July Res with the Registry of Corporate Affairs. If that is the case, then the Claimants say that the remaining Company law issues will, in consequence, fall away.

[183] On the other hand, if the S. 86 Jurisdiction Issue is decided against the Claimants and the July Order is set aside as having been made without jurisdiction, the Claimants argue that the reversal of the May Res, is nonetheless to be reached by three alternative avenues:

(1) First, even if the Court were now to hold that there was no jurisdiction to make the July Order, the 26 July Res were passed at meetings convened in accordance with an order of the Court which, at the time of the meetings, stood as a valid and binding order. The meetings were therefore validly convened and held and the resolutions passed at the meetings are likewise valid and enforceable in accordance with their terms, even if the Court were now retrospectively to set aside the July Order.

(2) The May Res, and/or the M&A Amendments that they purport to effect fall to be set aside for one or more of the following reasons:

(i) They are not genuine resolutions and/or amendments but are shams.

(ii) They are not bona fide for the benefit of the companies as a whole but were effected for the purpose of seeking to frustrate or obstruct the exercise by third parties with an interest in the Charged Shares and/or the property of Solar Achiever and Concept Pioneer, of their rights thereunder (“**Improper Purpose**”); e.g. by prejudicing CNCB’s ability to enforce the security interest

conferred on it by the Mortgages and/or the Control Documents, by preventing the Receivers from taking control of the Subject Companies and their property.

(iii) The terms of the May Res are inconsistent with the intention of the BCA to ensure that the rights of the members to amend the Articles should not be restricted (BCA S12 (5)) and any such resolution of the directors is void and of no effect.

(iv) The Defendants have failed to produce any evidence that the passing of the May Res followed due corporate process. There is no board meeting/resolution by Strong Fort to approve its passing of the members resolutions to amend the articles of Solar Achiever or empowering any director to sign such member resolutions on behalf of Strong Fort. Similarly there is no board meeting/resolution by Solar Achiever to approve its passing of the members written resolutions to amend the articles of Concept Pioneer or empowering any director to sign such member resolutions on behalf of Solar Achiever. At the time the May Res were purportedly passed there were two directors of Strong Fort and three directors of Solar Achiever. The Claimants' request for production of such documents was included in the Request for Specific Disclosure served on the Defendants, but no documents were forthcoming.

(3) Third, if contrary to (b) above the May Res are of continuing effect and Zorya has not replaced the incumbent directors, it remains impracticable for a meeting of their shareholders to be held, such that s.86 relief should now be granted afresh. This will, in practice, lead to the 26 July Res being passed afresh.

The Court did have Jurisdiction to make the July Order

[184] The Defendants challenge in relation to the July Order is based on jurisdiction. The Claimants say that this is because, although they reserved the right to argue that the Court did not have jurisdiction to grant s.86 Relief at an interlocutory hearing, they have not appealed the Order. The Claimants say

that as a result the Defendants do not (and cannot) therefore challenge the Court's exercise of its discretion in granting the July Order.

[185] Section 86 provides as follows:

(1) The Court may order a meeting of members to be held and to be conducted in such manner as the Court orders if it is of the opinion that-

(a) It is impracticable to call or conduct a meeting of the members of a company in the manner specified in this Act or in the memorandum and articles of the company;

(b) Where directors are required to call a meeting of members pursuant to section 82(2), the directors have failed to do so; or

(c) It is in the interests of the members of the company that a meeting of members is held.

(2) An application for an order under this section (1) may be made by a member or director of the company.

(3) The Court may make an order under subsection 91) on such terms, including as to costs of conducting the meeting and as to the provision of security for those costs, as it considers appropriate.”

[186] The Claimants submit that the purpose behind s. 86(1)(a) is “*identical*” to its English counterparts (Section 371 of the UK Companies Act 1985, now section 306 of the UK Companies Act 2006): per Bannister J in **Chong Ko Kwok David v Winbless Inc**¹⁹.

[187] As regards the English counterparts to section 86, it has been held that the Court's power to summon a meeting is primarily procedural in nature, and intended to represent a swifter alternative remedy to

¹⁹ (BVIHC (Com) No. 149 of 2013 at [25]

that available on an unfair prejudice petition. Thus, in **Smith v Butler**²⁰, the party resisting the summoning of the meeting argued at [109] that:

“the Court should refuse to order a meeting in the exercise of its discretion or at least should not order a meeting at this stage. It should defer a decision until after the proceedings are concluded. In their submission the case cried out for a speedy trial.”

However, the judge rejected that submission, at [112(c)] as follows:

“I agree with Mr. Berragan that there is no reason to defer the decision pending a trial-whether speedy or otherwise. An application under section 306 is designed to be a relatively speedy procedure and to postpone a decision in effect gives control of the Company to Mr. Butler pending a trial which (as the voluminous evidence filed indicates) might be lengthy”

The Court of Appeal²¹ upheld the judge’s decision.

[188] It was submitted that, as a general proposition, in awarding relief under the companies legislation, the Court plainly has jurisdiction to grant an order in terms of the final relief sought at an interlocutory stage of the proceedings. In **Chantry House Developments Plc**²², Scott J distinguished **In re Heathstar Properties Ltd.**²³, a case upon which the Defendants rely, and held that, where the Court could be satisfied of the requisite matters at an interlocutory stage, there was jurisdiction to make an order:

“I hold that in a case where the court can be satisfied of the requisite matters at the interlocutory hearing the court can properly make the order.”

[189] The Claimants submit that, as is clear from the Court of Appeal’s decision in **Smith v Butler**, the *only* jurisdictional requirement under s.86(1)(a) is that it is impracticable to convene and hold a meeting (per Arden LJ at [49]: “*The jurisdictional requirement of section 306 was fulfilled.*”

²⁰ [2011] EWHC 2301 (Ch)

²¹ [2012] EWCA Civ 314

²² [1990] BCC, 646

²³ [1966] 1 WLR 993

[190] The Claimants submit that at the time when the July Order was made by Jack J the sole jurisdictional component of s.86(1) was satisfied in that it was plainly impracticable to call or conduct a meeting of shareholders: that was the purpose behind the May Res.

[191] In covering all of their bases, the Claimants submit that even if they are wrong and the Court did not have jurisdiction to grant the s.86 Relief, the Court has a discretion whether or not to set aside the July Order and should be slow to do so in the circumstances of this case. Reference was made to the decision of the Privy Council in **PwC v SAAD**²⁴, it was held that a winding up order had been made by a lower court without jurisdiction:

“In many cases, it may be that a court could be persuaded that it was too late for a winding up to be stayed even if it was plainly granted without jurisdiction. The liquidation may often have proceeded too far for matters to be satisfactorily capable of being restored or otherwise reorganized, as would be required if there was a stay, or third party rights may have been created or varied in such a way as would render it unjust to stay the winding up (or more unjust to stay than not to stay) (Claimants’ emphasis).

[192] The Claimants argue that if the July Order was made without jurisdiction, it would be unjust to set it aside in circumstances where there is a risk of affecting corporate actions taken in relation to GB (an HK incorporated third party company), and the Receivers would nevertheless be entitled to materially the same s.86 Relief in any event at this final hearing.

[193] The Claimants assert that if, contrary to the above, the Court concludes that the July Order was made without jurisdiction and is minded to exercise its jurisdiction to set aside the order, the 26 July Meetings were nevertheless validly convened and held and the Court should so declare. The July Order was made by a court of unlimited jurisdiction and is therefore effective unless and until set aside or reversed on appeal -see **Price Waterhouse v Saad** at [25]:

“the short and well established ground that an order made by a court of unlimited jurisdiction must be obeyed unless and until it has been set aside by the court.”

²⁴ [2014] UKPC 35 at [44]

- [194] If contrary to all of those submissions, the 26 July Res are to be set aside by a route hitherto unspecified by the Defendants, the Claimants say that the May Res were void and should be set aside. In that event, it follows that the 12 July Res will have been validly passed and no s.86 Relief would then be required.

Challenges to the May Res

- [195] The Claimants challenge the May Res on a number of bases. Their first submission concerns the evidence on these issues. In relation to the documentary evidence, the Claimants comment that no board minutes were produced by the Defendants to demonstrate that either signatory company has approved the entry into of the May Res nor that Ms. Cheng was authorized by the Board of either signatory company to pass the May Res. The Claimants invite the Court to draw adverse inferences that such documents were not produced because they would have revealed the May Res to be sham documents, or documents that had as their object thwarting the Receivers' appointments.

The Witness evidence

- [196] The Defendants called a single witness to explain the May Res, namely Miss Cheng. I agree with the Claimants that it became clear from Ms. Cheng's evidence that her understanding of the M & A Amendments came from "Brenda", who explained them to her, and that she signed the May Res because her boss "Shirley Hu", told her to do so. Ms. Cheng definitely came across as someone having no independent knowledge about matters that she was being asked to address in relation to the May Res and the M & A Amendments.
- [197] Somewhat confusingly there was a reference in Cheng 1 adopting the evidence given by Mr. Patel in Patel 1, but where Mr. Patel in turn said he had understood the position from Miss Cheng.
- [198] In any event, Ms. Cheng's evidence was not to the effect of what was stated in the Defendants' Opening. At the trial, Ms. Cheng's evidence was that she did not have any direct communication with Mr. Patel, but only via an unnamed lawyer.

- [199] Ms. Cheng's evidence was not to the effect that the May Res were supposed to bring about some corporate "*benefit*" to the Subject Companies such as enabling them to properly conduct their business. Rather, her evidence was that she was told by "Brenda" that the intention was to "protect" the Subject Companies from what had happened to RR (Rich Region), i.e. from the appointment of receivers.
- [200] Ms. Cheng further accepted that she did not understand the effect of the individual M & A Amendments made by the May Res. Indeed, she was not even aware that they constituted breaches of restrictive provisions under the Mortgages. Her evidence was that the decision to pass the May Res was made by "Shirley" and she merely actioned the decisions made by the Goldin compliance department.
- [201] Ms. Cheng admitted that she was not aware of the constitution of the board of Solar Achiever and Concept Pioneer until "recently" and only became aware of the EPA and DoU from "these two days of trial". Ms. Cheng was unable to shed any light as to the date when the May Res were passed, and as to the timing of the filings, occurring as they did after CNCB had communicated its intention to appoint the Receivers. Ms. Cheng was unable to recall exactly when she signed the May Res, and nor could she recall whether the 27 May rubber stamp on the face of the document was there when she signed it. The Claimants submit that if they are incorrect as to the application of the Allen principle to the May Res, the May Res should be declared void or struck down as sham devices.

Application of the Allen Principle

- [202] The Claimants referred to the Allen principle both in their Opening and Closing. They refer to the decision of Sir Terence Etherton C in ***Re Charterhouse Capital Ltd.***²⁵ where it was pointed out that it is ordinarily for the shareholders, and not the Court, to say whether an alteration of the articles is

²⁵ [2015] 2 BCLC 627 at 90(3)

for the benefit of the company; however, it will not be for the benefit of the company if no reasonable person would consider it such.

[203] Further, if it is shown that in passing the amending resolution the shareholder was actuated by bad faith or improper motive, the alteration will be invalid even if it was considered to be of benefit to the company as a whole and/or was objectively reasonable: **Sidebottom v Kershaw, Leese and Co Ltd.**²⁶; and **Charterhouse Capital** at [97].

[204] The Claimants submit that in most cases, there will be evidence from the shareholder that it believed that the amendments in question were for the benefit of the company as a whole. However, here there was no evidence that the sole shareholder (Strong Fort in relation to Solar Achiever, and Solar Achiever in relation to Concept Pioneer) was of that view:

(1) Mr. Pan disavowed himself of all knowledge of the May Res-Day 3.

(2) Ms. Cheng plainly did not apply her mind to whether the M & A Amendments benefitted the Subject Companies. The understanding she gleaned from her superiors was that the May Res “protected” the subject companies, though she could not say in what way they did so.

[205] Ms. Cheng instead revealed the purpose “Brenda” had described to her which showed that the May Res were passed with a view to preventing a repeat of the appointment of the RR Receivers over RR. The Claimants argue that it is to be inferred that Goldin had in mind impeding or thwarting the rights of third parties to enforce their security rights, including the rights to appoint receivers. It was submitted that in this connection, it cannot have been a coincidence that the May Res specifically empowered the directors to refuse to register a share transfer, which was the other form of security right which CNCB had negotiated under the DoA and EPA. None of this, it was submitted, was in any real sense for the benefit of the Subject Companies, but was motivated by an improper purpose, namely “protection” of Goldin’s/Mr. Pan’s perceived commercial interests by thwarting third parties

²⁶ [1920] 1 Ch. 154, at 163, 166, 171 – 172

from effectively enforcing their security rights. That, it was submitted, suffices to engage the Allen Principle and invalidate the May Res.

- [206] It was submitted that in any event, even if Miss Cheng did actually consider the May Res to be to the benefit of the Subject Companies (which was not expressly her evidence; she insisted ‘protected’ over “benefitted”), that view was one which no reasonable person could hold. In this regard, the M&A Amendments made unusual and uncommercial changes to the way the Subject Companies were operated for no discernible purpose other than to entrench the control of Mr. Pan as the companies’ ultimate beneficial owner.

The Defendants Submissions on the S.86 Jurisdiction Issue and whether there is a Basis for Granting Relief Afresh

- [207] The Defendants submit that on its proper construction, section 86 does not provide for substantive relief altering disputed legal rights (i.e. which are disputed on serious and substantial grounds) to be granted under that section on an interim basis. There is no jurisdiction to make an order under section 86 on an interim basis. The making of an order under s. 86 requires the Court to have formed the “opinion” that one or more of the matters specified in subsection (a) to (c) are satisfied. The Court cannot be so satisfied until it has considered the totality of the evidence and submissions from all relevant parties. It was submitted that the position is analogous to that under the English statutory jurisdictions to grant relief for unfairly prejudicial conduct and to extend time for the registration of a company charge, under both of which it has been held that the court does not have jurisdiction to grant relief on an interim basis: see in *re Heathstar Properties Ltd.*²⁷ and *In re a Company*²⁸.
- [208] As for the Claimants’ reliance on the decision in *Re Chantry House*, the Defendants say that the reason why Scott J distinguished in *re Heathstar Properties* was, however, because the application before him was for final, not interim relief, albeit ahead of a full trial -see 818 a – h. Further, the application in *Re Chantry House* was not opposed (one respondent consented and the other did not oppose) and the court had before it all of the evidence and submissions going to the relevant

²⁷ [1966] 1 WLR 993

²⁸ (No. 004175 of 1986) [1987] 1 WLR 585

question. There was therefore no reason why the court could not make a final order, if satisfied that the jurisdictional requirements were met.

[209] Mr. Westwood KC argues that the position is to be contrasted with that in the present case at the hearing on 22 July 2022. At that hearing, the submission continues:

- (1) The court was not asked to make a final order under s.86. On the contrary, the Court was expressly invited to make an interim order.
- (2) The hearing was *ex parte*, on very short notice to the Defendants. The Defendants had only been served with the application the evening before the hearing. It was not an inter partes hearing on proper notice, at which the Defendants had had a proper opportunity (and time) to put before the Court evidence and submissions on the question of whether an order should be made under s.86.
- (3) As such, the Court was not asked to, was in any event not in a position to and did not purport finally to determine whether the statutory gateways for s. 86 had been met and its discretion should be exercised in favour of ordering a meeting of members. Further, Jack J could not possibly have decided at the hearing-and did not purport to decide-whether the Receivers were authorized to act for the companies and could therefore vote the shares. It was submitted that this was fundamentally different to that in a case such as **Chantry House**.
- (4) As such, in this case, the Court lacked jurisdiction to make the section 86 Orders at the 21 July 2022 hearing.

[210] The Defendants say that, accordingly, the Claimants' attempt in its Opening to suggest that Jack J's order was a final order (notwithstanding its own express invitation to the Judge to make an interim order) bears no scrutiny and is an attempt to rewrite history in an effort to save the meeting. The Court was further asked to note that at the hearing on 23 August 2022, Jack J expressly recognized that the Defendants had reserved their position on this issue and it was open to them to pursue the argument in due course.

[211] The Defendants refer to the Claimants' fallback, which was to argue on the basis of **PwC v SAAD** that even if the Section 86 Orders were made without jurisdiction, it would be unjust to set them aside. However, the Defendants submit that in this case no relevant steps have been taken, and they say nor has there been any evidence adduced by the Claimants to demonstrate that the "risk" of which they complain, has eventuated.

[212] The Defendants further argue that there is no basis for ordering a meeting under section 86 now.

CONCLUSIONS ON THE ENFORCEABILITY ISSUE AND THE NOTIFICATION ISSUE

[213] As stated earlier, I have found in favour of the Claimants in relation to the Enforceability Issue. I also find in favour of the Claimants in relation to the Notification Issue. It therefore follows that the Claimants are entitled to the Validity Relief claimed.

[214] I accept the Claimants' submission that even if this Court were to find in favour of the Defendants in relation to the Enforceability Issue, (which I have not), but were to find in favour of the Claimants in relation to the 2 January 2020 Notice, CNCB was in those circumstances entitled to appoint the Receivers on the grounds of the PL PED having occurred and continuing as at 2 June 2022. This is because, in cross-examination Mr. Pan was clear that, in his understanding, CNCB was not required to extend time to pay the Privatisation Loan Prepayment Sum-Day 2.

[215] Even if I am wrong on these points, and the Receivers have not been validly appointed, the Defendants appear to have conceded that the August Enforcement Notices were valid. In those circumstances CNCB seek declaratory relief to clarify that (i) CNCB is presently entitled to appoint receivers in reliance on the August Enforcement Notice and/or the PEDs therein referred to and/or (ii) that CNCB would be entitled to do so on taking some other steps.

[216] I entirely agree with Mr. Hacker KC that in those circumstances, it would be wholly contrary to the overriding objective to require CNCB to commence fresh proceedings to seek a declaration in relation to August Enforcement Notices. And if necessary, in my view, such declarations can, and should be made in these proceedings.

CONCLUSION ON THE COMPANY LAW ISSUES

- [217] In my judgment, the Defendants ought to have applied to set aside or to have appealed the July Order. The Claimants are in my view correct in contending that the Court did have jurisdiction to grant s. 86 relief when it did so at the July Hearing for the reasons set out in the Claimants arguments referred to by me in above paragraphs. It seems to me that no question of a want of jurisdiction arises. The Defendants real complaint was with how the power and jurisdiction were exercised, and it is in my view now too late to make this complaint, and in this manner. This Court cannot now set aside an order made by a judge of concurrent jurisdiction and cannot act as an appellate court in respect of jurisdiction exercised.
- [218] In any event, even if I am wrong in so finding and the Court did not have jurisdiction to grant the s.86 Relief, I accept the Claimants' submission that the Court has a discretion whether or not to set aside the July Order and should be slow to do so in the circumstances of this case. The world did not stand still after the making of the July Order or the holding of the July Meetings and passing of Resolutions and I find that there are third party rights affected. Further or in the alternative, I find that the meetings were validly convened and held and the resolutions passed at the meetings are likewise valid and enforceable in accordance with their terms, even if the Court were now retrospectively to set aside the July Order.
- [219] It is not strictly necessary now to decide about the May Res. However, I am of the view that by their nature (they are very unusual), and timing, and analyzing as a whole the evidence given from the sole witness called by the Defendant on this point, Ms. Cheng, the May Res were passed for improper purposes, aimed at thwarting CNCB from exercising its security rights. I accept Mr. Hacker KC's assertion that it cannot have been a coincidence, in any event, it is very unlikely to have been a coincidence, that the May Res specifically empowered the directors to refuse to register a share transfer, which was the other form of security right which CNCB had negotiated under the DoA and EPA.
- [220] The Claimants having succeeded on those points, the status quo following the passing of the 26 July Res would therefore subsist; Zorya would be the sole director of the Companies, the 12 July Res

would have been ratified, and the M & A Amendments would have been validly revoked, subject to filing of the extract of the July Res with the Registry of Corporate Affairs. The Claimants therefore succeed on the Company law issues also.

DISPOSITION

[221] There will therefore be judgment for the Claimants on the Claim and for the Claimants and the Additional Defendant to the Counterclaim CNCB on the Counterclaim.

[222] In terms of the relief sought in the prayer in the SOC, the claims here are very convoluted and long. However, based upon my findings I grant the relief sought at paragraphs (1), (2), (4) – (14) (inclusive), (17) – (22) inclusive, and (24). Order (24) grants the Claimants liberty to apply in relation to the working out and the implementation of the Orders made herein. If necessary, this ought to assist in bringing clarity.

[223] It simply remains for me to thank Counsel and the teams on both sides for the thorough and detailed preparation. This was quite a complicated case, with wide-ranging issues, numerous documents, and extensive cross-examination. The Court was greatly assisted by the comprehensive coverage of all relevant considerations. It is fair to say that there were not many stones left unturned at this Trial.

**Ingrid Mangatal
High Court Judge**

**By the Court
Registrar**