

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHCM2021/0150

BETWEEN:

**(1) XYZ
(2) CHIA HSING WANG**

Applicants

and

**(1) REAL ASSETS (RA) GLOBAL OPPORTUNITY FUND
(2) FLOREAT REAL ESTATE LTD**

Respondents

CLAIM NO. BVIHCM2021/0144

BETWEEN:

CHIA HSING WANG

Applicant

and

**(1) XY
(2) XYZ**

Respondents

Appearances:

Mr. John Wardell, KC, Mr. David Mumford, KC, and with them Ms. Tamara Cameron for XY, XYZ and Mr. Chia Hsing Wang
Mr. Andrew Hunter, KC, with him Mr. Tom Mountford, Mr. Carmine Conte and Mr. William Hare for Floreat Real Estate Ltd
Mr. Brian Child, with him Ms. Laura Gunn and Ms. Natasha Partos for Real Assets (RA) Global Opportunity Fund (on a watching brief only)
Mr. Ben Valentin, KC, with him Mr. Usman Roohani and Ms. Sara Malik for the Joint Provisional Liquidators of Real Assets (RA) Global Opportunity Fund

2022: January 17, 18;
February 25, 28;
August 19.

JUDGMENT

Introduction

- [1] **WALLBANK, J. (Ag.):** This is the Judgment of the Court in relation to the following matters:
- (1) An application to continue an Order made on 1st September 2021 on an *ex parte* basis for the appointment of Joint Provisional Liquidators ('the JPL Order') over Real Assets (RA) Global Opportunity Fund ('RAGOF'), in Claim No. BVIHC (Com) 0150 of 2021 ('the Continuation Application');
 - (2) An application to discharge the JPL Order ('the JPL Order Discharge Application');
 - (3) An application seeking the setting aside of an *ex parte* Order made on 26th August 2021 appointing receivers over shares in RAGOF in Claim No. BVIHC (Com) 0144 of 2021 ('the Receivership Order' and 'the Receivership Order Set Aside Application' respectively).
- [2] For the reasons set out below, the Continuation Application fails and the JPL Order Discharge Application and the Receivership Order Set Aside Application succeed.
- [3] The Continuation Application and the JPL Order Discharge Applications were essentially opposite sides of the same coin, such that if one failed the other ought to succeed.
- [4] Names of two of the parties have been anonymized. No wrongdoing is alleged against those parties. Their names are anonymized merely to protect their reputations from any harm, through any supposition, which would be entirely misplaced, that they are somehow to be criticized with regard to any of the matters or circumstances herein. I should further stress that this judgment does not seek to pronounce judgment upon the allegations of wrongdoing concerning other parties. Those are matters for another day, if ever. Equally, this judgment should not be taken as an exoneration, or vindication, from such allegations. They are potentially serious, and not hopeless at first sight.

Background

1. These proceedings

- [5] On 20th August 2021 a certain self-styled businessman, Mr. Chia Hsing Wang, filed an application seeking receivership orders and permission to serve the proceeding outside of the

jurisdiction upon a company that will be referred to as XY ('XY') and upon a company related to this, which will be referred to as XYZ ('XYZ'), as Respondents. Mr. Wang sought an *ex parte* in private hearing of his receivership application ('Receivership Application') under a Certificate of Urgency. The application was heard *ex parte* and in private by this Court, before me, on 26th August 2021. I granted the orders sought.

- [6] The receivership orders sought and granted were for the appointment of receivers over shares in RAGOF. Mr. Wang explained that RAGOF is a 'Professional Fund' investing in global real estate regulated by the BVI Financial Services Commission. According to Mr. Wang, those shares in RAGOF were held by XYZ as nominee for Mr. Wang, pursuant to nominee shareholding arrangements between Mr. Wang and XY (a company related to XYZ).
- [7] A further provision sought and granted as part of the receivership orders gave the Receivers the power to commence winding up proceedings in respect of RAGOF on the just and equitable ground and to apply for the appointment of joint provisional liquidators over RAGOF.
- [8] The background evidence for the Receivership Application was supplied by a First Affidavit of Mr. Wang and a First Affidavit of a certain Dr. Nicolas Herzog.
- [9] Mr. Wang opened his First Affidavit with what appeared at first sight to be a casual observation, but which later on showed itself to have much significance:
- "I am not particularly experienced or knowledgeable in financial matters."
- [10] In short, Mr. Wang gave evidence that the individuals controlling RAGOF have given inconsistent explanations for financial matters, such that they cannot be relied upon for truthful information, have serious conflicts of interest and have skewed the management of assets contributed by Mr. Wang, including fees charged by them, heavily in their own favour, for their own personal benefit and enjoyment, and contrary to the best interests of RAGOF. Mr. Wang urged that this combination of circumstances renders the appointment of provisional liquidators over RAGOF necessary for the purpose of maintaining the value of assets owned or managed by it, before liquidation of RAGOF is sought. Mr. Wang explained that he could only achieve this if receivers would be appointed first over the shares in RAGOF, in the hands of his nominees, as he himself would have no standing to apply for the appointment of liquidators over RAGOF, since he himself was not a shareholder. A transfer of the shares to himself could

then also be a possibility, with appropriate legal proceedings being brought to achieve this, at which point the receivership could be brought to an end.

2. The origins of the investment in RAGOF

- [11] Mr. Wang recounted that his father had been a financially very successful businessman. In 2000 Mr. Wang's father was diagnosed with cancer and gifted his portfolio of assets to Mr. Wang. He died some five years later at an advanced age.
- [12] Mr. Wang explained that a large portion of the portfolio is held by banks in a certain onshore/offshore jurisdiction.
- [13] Mr. Wang recounted how, whilst pursuing his interest in 'energy healing' and 'mindfulness', he met one Mr. James Wilcox, who was an investment advisor from London, at 'group healing seminars' run by a Brazilian 'faith healer' in 2013 and 2014. Mr. Wang was soon introduced to Mr. Wilcox's business, the Floreat Group, and Mr. Wilcox's colleague, Mr. Hussam Otaibi. The Floreat Group is a UK-based asset management, private office and investment business which provides services to ultra-high net worth families. It is organised through a number of corporate vehicles, which are ultimately owned by Mr. Hussam Otaibi, Mr. Mutaz Otaibi, and Mr. Wilcox. For the purposes of this judgment, I will refer to the business and its principals as 'Floreat' and 'the Floreat Principals', respectively.
- [14] Mr. Wang said that Floreat persuaded him that they could manage the portfolio 'much better' than the banks. Mr. Wang then, in December 2014, executed an Investment Advisory Agreement with a Floreat related entity and a Supply of Services Agreement with another Floreat related entity. Mr. Wang stated that Floreat is a 'regulated financial institution'.
- [15] Mr. Wang explained that whilst the portfolio managers within the banks managed the assets held by the banks, Floreat closely controlled the relationships with the banks and soon Mr. Hussam Otaibi and Floreat had substantially assumed control of all aspects of his financial affairs; as a result, Mr. Wang said, he became very dependent upon them. This led to Mr. Wang entering into a second Investment Advisory Agreement with another Floreat related entity in 2016 and a second Supply of Services Agreement in 2018. Mr. Wang entered into this

second suite of agreements indirectly, using Cayman companies ultimately beneficially owned by him.

- [16] Mr. Wang explained that Floreat persuaded him to invest in a number of funds managed ultimately by Floreat, including in RAGOF. Mr. Wang says he invested about US\$500 million in these funds, with about US\$200 million invested in RAGOF.

3. Questions arising

- [17] Mr. Wang stated that in or around June 2020, he raised questions with Floreat about the Floreat funds ('Floreat Funds') and Mr. Wang's investments in them. Mr. Wang received evasive responses (he said), and Floreat substantively failed to provide requested documents. Mr. Wang stated that this caused him to become concerned that some problem with the Floreat Funds and his investments in them was being concealed. Mr. Wang thus engaged forensic accountants and advisors, FFP (Cayman) Limited ('FFP'), to conduct a review of his relationship with Floreat
- [18] According to Mr. Wang, FFP's report, given to Mr. Wang in March 2021, identified numerous related-party transactions and apparent conflicts of interest which suggested that Floreat, the Floreat Principals and those involved in the management of the Floreat Funds might have engaged in serious wrongdoing.
- [19] Mr. Wang stated that he also obtained a third-party disclosure ('Norwich Pharmacal') order in the Cayman Islands against the fund administrator of the Floreat Funds. The resulting documentary disclosure was provided to FFP, who found further instances of serious apparent wrongdoing.

4. The Farm

- [20] Matters of particular concern to Mr. Wang relate to a 300-acre farm ('Springs Farm') situated in England. Amongst information that came to light, FFP's review showed that Springs Farm was owned by RAGOF through a wholly owned subsidiary. Mr. Wang stated that he had, inconsistently with this information, been told by Mr. Hussam Otaibi that Springs Farm is owned

by his family (the 'Otaibi Family'), with documents showing that the local parish council had also thus been informed, and had also been told by Mr. Hussam Otaibi that Springs Farm had been gifted to Mr. Hussam Otaibi by a very wealthy middle eastern client, a Sheikh Shaker, out of gratitude for Mr. Hussam Otaibi's hard work. Mr. Wang stated that he believed Springs Farm to be occupied by Mr. Hussam Otaibi, his brother Mr. Mutaz Otaibi, their respective wives and children, as he had visited them there. FFP reported that this occupancy was rent-free. This, and the following further circumstances, suggested the existence of conflicts of interest. This was of particular concern to Mr. Wang, as he believed that it was his assets which were being used to fund RAGOF. Mr. Wang believed that he was the sole substantial funder of RAGOF. In 2015 he had paid some US\$110 million for his shares in RAGOF, in which he (indirectly) holds some 97.2% of the issued share capital.

- [21] Moreover, a RAGOF financial statement indicated that RAGOF will only receive 50% of any profit on any sale of Springs Farm with the remainder being split between a disclosed Floreat related party and another related but undisclosed party. FFP noted that this is an 'unusual' basis for a fund to have acquired an asset and that it therefore needed to be established whether the acquisition was properly in the interests of the fund.

- [22] Also, Springs Farm holding company appears to have borrowed GBP5 million from a bank for unparticularised 'redevelopment' purposes, secured against Springs Farm and in part by the fund, all the while that the Otaibi Family enjoy the benefit of Springs Farm, again suggesting a conflict of interest.

- [23] Furthermore, RAGOF appears to have extended an interest free 'short-term' loan of over GBP5.7 million to Springs Farm holding vehicle, with the terms being unparticularised.

- [24] Also, RAGOF has reportedly extended further interest-free loans in respect of Springs Farm to related parties in the form of sums owed to RAGOF under a deed of indemnity dated 7th April 2014 (the 'Deed of Indemnity') (i.e., some eight months before Mr. Wang signed his first Investment Advisory Agreement and Supply of Services Agreement with Floreat entities). As at 31st December 2019, GBP3.8 million was owed to RAGOF by those related parties, pursuant to the Deed of Indemnity, and this had been owed for some time with no payment by the related parties made, nor had interest been charged. FFP, therefore, considered this to be a further

related party transaction which needed to be investigated in order to determine whether it was properly in the interests of the fund.

[25] Moreover, Springs Farm holding vehicle has engaged a design company in respect of 'project works' and paid them fees (in full), totaling GBP560,000, in circumstances where the design company was F Co's 'in-house' designer. FFP stated that this is another related-party transaction which needed further investigation in order to determine whether it was properly in the interests of the fund.

[26] The documentation disclosed pursuant to the Cayman Norwich Pharmacal order indicates that certain Floreat Principals and individuals involved in managing RAGOF approved a development and operational cost budget of GBP3 million for Springs Farm, while they also held positions of *de facto* control over the corporate vehicle that owned Springs Farm, but with RAGOF's *de jure* directors not being involved.

5. The Deed of Indemnity

[27] A particular vulnerability, or potential vulnerability, of note was identified by FFP in relation to the terms of the Deed of Indemnity. Mr. Wang explained that the effect of its clauses 3.2 and 3.3 appears to be such that, in the first three years after the Deed of Indemnity was entered into, the Indemnifiers were able to block any sale by RAGOF; and since that time the Indemnifiers have been able to take all of the benefit of any planned sale by transferring the property to themselves at cost price (being the acquisition amount plus sums spent on development). As a result, said Mr. Wang, FFP consider that it appears that, throughout RAGOF's ownership of Springs Farm, the Indemnifiers have had economic control over the asset and have had the ability to deny the fund any profit on its investment. FFP concluded that the way in which the Deed of Indemnity has operated is that RAGOF has provided the funding to maintain and develop Springs Farm and has thereby in effect extended an interest free loan to the Indemnifiers, which RAGOF has never called in.

6. The New High-End Offices

- [28] Mr. Wang stated a further area of concern in relation to the affairs of RAGOF. When he was first introduced to Floreat, Floreat operated out of small offices in noisy premises in Mayfair, London. A year or so later, after Mr. Wang had contributed significant funds to the equity of RAGOF, Floreat acquired a long lease over spacious premises at a prestigious address, in a different part of Mayfair, for a price of GBP33.75 million (plus VAT). Floreat bought this property using a special purpose vehicle company, which itself was a subsidiary of RAGOF. RAGOF, or its special purpose vehicle, then sub-let the premises to Floreat. Whilst Mr. Wang and FFP did not know if steps had been taken to ensure that this transaction was at arm's length, they remarked that Floreat benefited from an apparent sub-lease rent reduction of over GBP1 million.
- [29] At the back of the premises, Mr. Wang stated that there were four or five luxury apartments, expensively fitted out and designed by Floreat's 'in-house' design company, leased to Floreat but not through RAGOF. Mr. Wang stated that these apartments, or at least two of them, were used by Floreat Principals as London '*pieds à terre*'. Mr. Wang stated that he is concerned that he in effect exclusively funded Floreat's acquisition of its own offices and the expensive decoration of the office premises and apartments for the Floreat Principals' personal enjoyment.
- [30] A further area identified by FFP as giving rise to an apparent serious conflict of interest concerns the fees paid to the RAGOF Investment Manager, Investment Adviser and any other Floreat entity. The same individuals are the directors of RAGOF and the RAGOF Investment Manager, giving rise to a substantial conflict of interest.

7. The Allegedly Inappropriate Fees

- [31] Then there is a question surrounding the fees themselves. It appears that in November 2018 the directors of RAGOF approved a change to the management fee structure to replace a 'performance fee' with a new 'asset promote fee'. The 'performance fee' had been calculated upon an increase in market value of the assets under management. The 'asset promote fee', however, was calculated with references to actual disposals or other realisations of assets held by RAGOF. Mr. Wang had concerns that this was a change made without consultation with investors (such as himself), to a system known to be less investor friendly than the previous

system and made during the term of the fund. This, Mr. Wang said he had been informed by FFP, was out of line with standard market practice.

- [32] Worse still, the 'asset promote fee' was introduced with retrospective effect, to apply to the disposal by RAGOF on 31st August 2018 of two subsidiaries, earning the RAGOF Investment Manager an 'asset promote fee' of over Euros 3 million that it would otherwise not have received, benefiting Floreat and/or its Principals at the expense of investors.

8. The Art Collection

- [33] Another area of concern to Mr. Wang pertained to works of art. Collecting art, in particular by Chinese and Asian artists, is one of Mr. Wang's personal and business interests. Following discussions between Mr. Wang and Mr. Hussam Otaibi, a Cayman company was set up by Floreat, through which Mr. Wang would (he says he understood) own the various works. Mr. Wang recounted his surprise and alarm to discover that Mr. Hussam Otaibi had apparently used that same company, and apparently Mr. Wang's money, to buy some 90 items of other art works totaling around US\$10 million in value, which adorned Floreat's offices, the Floreat Principals' residences, Springs Farm and a number of other properties.

9. The Alleged Lack of appropriate corporate governance practices and procedures

- [34] Mr. Wang also complained that RAGOF appears to have been operated without appropriate corporate governance practice and procedures, including by lending very substantial amounts of money on the basis of oral agreements which are only recorded in formal loan documents long after the loans were made. Also, Mr. Wang remarks that RAGOF has failed to provide the shareholders of RAGOF and other Floreat Funds with appropriately regular net asset valuations for the funds.

10. The Alleged Need for Receivership Application on *ex parte* basis

- [35] Mr. Wang explained that the Receivership Application was necessary because it was unlikely that Floreat and its Principals would cooperate voluntarily in any attempt to obtain a transfer of

the legal ownership in the RAGOF shares from Mr. Wang's nominee companies to Mr. Wang himself. Moreover, the Receivership Application should be heard *ex parte* because there would otherwise be a risk of adverse steps by Floreat and the Floreat Principals, particularly in circumstances where they had a close working relationship with the bank which supplied the shareholding nominee company and the other banks involved in holding/managing Mr. Wang's assets.

- [36] Mr. Wang narrated that when he had previously contacted one of the banks to seek information in the summer of 2020, Mr. Hussam Otaibi had clearly been given word of this. Mr. Wang said that Mr. Hussam Otaibi telephoned him in a very aggressive and verbally abusive, vulgar, manner, screaming at Mr. Wang that he should not have asked for information from the bank when Mr. Wang had agreed to do everything through Mr. Hussam Otaibi. Mr. Wang said Mr. Hussam Otaibi claimed Mr. Wang was questioning Mr. Hussam Otaibi's integrity by asking for documents from the banks. Mr. Wang said that Mr. Hussam Otaibi threatened him with serious financial consequences if Mr. Wang went behind Mr. Hussam Otaibi's back in this manner again, including that he would cut Mr. Wang off from access to funds.

11. Dr. Herzog's evidence

- [37] Dr. Herzog provided evidence in relation to the laws of the jurisdiction in which the various banks are situated that hold Mr. Wang's assets.
- [38] Dr. Herzog opined that the law of that jurisdiction would consider it permissible for someone in Mr. Wang's position to apply for receivership orders outside that jurisdiction over a company incorporated inside it, but that the courts of that jurisdiction would not themselves have the power to make such receivership orders. Nor, in Dr. Herzog's opinion, could the courts of that jurisdiction wind up RAGOF.
- [39] In relation to service, that jurisdiction is a Hague Convention country and so service would need to be effected in accordance therewith.

12. The Receivership Application Hearing

- [40] When the Receivership Application came on for hearing, learned Queen's Counsel for Mr. Wang, Mr. John Wardell, QC, argued that Mr. Wang had no viable alternative to the appointment of receivers over the shares he beneficially owns in RAGOF, with the powers proposed by the Receiver Application, if he is to be able to safeguard his very substantial economic interests therein and if the necessary just and equitable winding up and provisional liquidation applications are to be pursued.
- [41] Mr. Wardell, QC, argued that the jurisdiction and discretion which this Court is asked to exercise in making the Order sought by the Receiver Application is conferred in the broadest possible terms. It is not confined to the circumstances in which a *Mareva* injunction would be granted, where a receiver would be appointed to prevent dissipation which might occur or continue in spite of the *Mareva* injunction. Being purely equitable in origin, the overriding consideration is the demands of justice, and the relief is to be moulded to the needs of the situation. He submitted that preserving the value of the participating shares in RAGOF, which were in jeopardy, is an appropriate and sufficient basis for appointing receivers on the terms sought.
- [42] By way of express full and frank disclosure in relation to the Receivership application, Mr. Wardell, QC, referred to the following:
- (1) The Respondents could argue that granting receivership orders in a situation such as the present is 'novel', but, argued Mr. Wardell, QC, the Court plainly had jurisdiction to make such orders as part of the Court's equitable jurisdiction;
 - (2) Mr. Wang is the underlying beneficial owner of over 97% of the non-voting participating shares in RAGOF, but the registered owner of none of them;
 - (3) Mr. Wang expected the Floreat Principals to make every effort to use his assets to fund defence of Mr. Wang's legal proceedings and to argue that the allegations of wrongdoing do not surmount the threshold for a winding up on the just and equitable ground;
 - (4) The Floreat Principals may argue that Sheikh Shaker contributed Springs Farm to RAGOF and that Mr. Wang knew about this;
 - (5) There might be argument about whether alternative remedies to a receivership were available.
- [43] I was ultimately persuaded by Mr. Wardell, QC's advocacy to make the 'novel' Receivership Orders sought, mindful that Mr. Wang's real opponents (Floreat and its Principals) might have a

side to the story which could cause me to change my mind radically upon the substantive return date. Mr. Wardell, QC, explained and stressed that no wrongdoing was being alleged against the Respondents in this case, XY and XYZ. The order made on 26th August 2021 reflected this point. This was itself an unusual course, since, normally, the grounds for a receivership involve some kind of alleged wrongdoing, or risk thereof, on the part of the respondent.

13. The Provisional Liquidation Application

- [44] The newly appointed Receivers over the RAGOF shares wasted no time in applying for the appointment of Joint Provisional Liquidators over RAGOF ('the JPL Application'). They, together with Mr. Wang as a Second Applicant, filed an application seeking such an order on an *ex parte* basis on 30th August 2021. They also applied for RAGOF to be wound up on the just and equitable ground, citing a 'justifiable and irretrievable loss of confidence in the management of [RAGOF], due to serious wrongdoing on the part of those managing [RAGOF]'.
- [45] The JPL Application was supported by a First Affidavit of Mr. Wang and an affidavit by one of the Receivers.
- [46] Mr. Wang's affidavit was more detailed than his affidavit in the Receivership Application, providing information that he had not laid before the Court upon his Receivership Application.
- [47] Mr. Wang explained that the assets which were held by a number of banks in the Hague Convention country I have mentioned above had been subject to freezing orders, in light of cross-border investigations and proceedings that had been ongoing into the origin of the assets.
- [48] Mr. Wang explained that during his father's lifetime, allegations had been levelled that these assets, or part of them, had derived from bribes allegedly received by his father and had been subjected to money laundering. Mr. Wang explained that it had not only been his father who had been placed under scrutiny as part of this investigation, but other family members, and Mr. Wang too, although he had only been a college student at the time of the transaction in question.

- [49] Mr. Wang explained that the freezing orders in that particular country have been lifted and the assets released to him, although legal proceedings in a different country still continue.
- [50] Mr. Wang stressed again, and with further particularity, that he was not financially minded, nor experienced, and had never worked in the financial services industry.
- [51] Mr. Wang explained that whilst his assets were frozen, he had been permitted to invest and manage his funds held with the banks in that country in all asset classes, as long as such funds remained seized and the management was conservative. Mr. Wang stated that at the time when his dealings with Floreat commenced, he 'was facing substantial issues in managing my wealth'. He described these issues as pertaining to the disparate spread of the assets over some 16 banks, all with different relationship managers and portfolio managers. Mr. Wang explained that soon after his introduction to Floreat, Floreat came to take over virtually every aspect of the management of his wealth and financial affairs, including the administration of the payment of substantially all his personal expenses.
- [52] Mr. Wang explained that in signing agreements with Floreat he had not understood what he was doing. He also explained that Floreat had him change lawyers to lawyers that they themselves recommended, and Floreat paid them on his behalf.
- [53] Mr. Wang explained that Floreat had provided a company through which Mr. Wang could hire domestic and other staff and make expense payments, after various banks had frozen his and his extended family's assets and cancelled their credit cards. Mr. Wang explained that his investments in the Floreat Funds were intended to finance him and his family through loans, totaling over US\$100 million, which could be repaid, or liquidated or off-set at the conclusion of the foreign freezing order proceedings. Mr. Wang said that Mr. Hussam Otaibi had told him that his interests in all the funds could be liquidated within two weeks.
- [54] Mr. Wang stated that his relationship with Floreat has broken down, largely as a result of his attempts to obtain a proper account and information about his financial affairs from Floreat, and he says he has discovered evidence of very significant wrongdoing by Floreat and the Floreat Principals.

- [55] Mr. Wang also stated that the Floreat Principals have expressly threatened to use their control of RAGOF to take action to prejudice his position and have begun to do so in an orchestrated attack (which Mr. Wang styled 'the Orchestrated Attack') against him. In so doing, said Mr. Wang, they are wrongly using the resources of RAGOF and are thereby wrongly diminishing the value of its assets.
- [56] Elaborating upon this, Mr. Wang stated that on 22nd April 2021, Mr. Hussam Otaibi sent a letter to Mr. Wang's personal email address. The letter referred to the dispute between the Floreat Principals and Mr. Wang and threatened a long list of serious consequences for Mr. Wang and a multiplicity of legal proceedings if he did not agree to an 'amicable separation'. Mr. Wang says that the Floreat Principals have already started their threatened litigation campaign.
- [57] Mr. Wang stated that the JPL Application was being brought *ex parte* since, were the Floreat management to have prior knowledge of the winding up and the JPL proceedings, there is a very substantial risk that they would seek to dissipate the assets of RAGOF and would in any event cause that effect by escalating the Orchestrated Attack.
- [58] In terms of specific full and frank disclosure, Mr. Wang suggested:
- (1) Floreat might assert that there are innocent explanations for the various areas of apparent wrongdoing;
 - (2) Floreat might assert that proper disclosure had been made to Mr. Wang about Springs Farm;
 - (3) There are legal proceedings afoot in England seeking pre-action disclosure ('English Pre-Action Disclosure Application'), in which Floreat Principals have filed evidence (including a first and second witness statement of Mr. Hussam Otaibi which were duly put into the evidence before this Court) and a large volume of documents. Some of this evidence and/or material concerns the facts presently before this Court, and puts forward various exculpatory explanations for Mr. Wang's allegations of wrongdoing;
 - (4) Mr. Wang was designated by Floreat as a 'professional client', and Mr. Wang signed various documents acknowledging this, and he was treated by the banks as such. Mr. Wang suggested that Floreat might argue that Mr. Wang should therefore be taken to have understood the risks with these investments. Mr. Wang says he did not take legal advice in relation to that designation. He suggests that Floreat may argue (as it has in the English proceedings), that Mr. Wang chose to be designated as such at his election,

but Mr. Wang denies this. Mr. Wang stressed his lack of financial knowledge and experience;

- (5) There is a dispute between him and Floreat about fees which Floreat claims he owes them but which he has withheld;
- (6) Legal agreements Mr. Wang has with Floreat and related entities contain arbitration agreements. Mr. Wang suggests that Floreat might argue that these proceedings have been brought to frustrate references of disputes to arbitration;
- (7) Floreat may argue that the appointment of JPLs is not necessary to preserve the assets and their value;
- (8) RAGOF may seek to assert there was no proper need to apply *ex parte* for the appointment of provisional liquidators. In particular RAGOF may seek to assert that, as Floreat and the Floreat Principals are aware of Mr. Wang's concerns in respect of some of the apparent wrongdoing which underlies these proceedings as a result of the English Pre-Action Disclosure Application, any risk that the Floreat management would take action to dissipate the funds of RAGOF and/or to use their control of RAGOF otherwise to prejudice Mr. Wang would have arisen at that time, and that there would therefore be no additional risk in Mr. Wang seeking the appointment of provisional liquidators on notice to them. In response, Mr. Wang says the English Pre-action Disclosure Application sought documents on the basis of his initial concerns which arose solely from those materials provided to him by Floreat. It did not refer to, nor was it based on, the Cayman Norwich Pharmacal Order documents which Mr. Wang says contain clear evidence of substantial wrongdoing - including the Deed of Indemnity which FFP consider demonstrates a real risk that the acquisition of Springs Farm was a sham transaction that was not in the best interests of RAGOF. Accordingly, rather than being based on initial concerns, these proceedings are based on evidence of much more serious apparent wrongdoing, and as such are much more likely to trigger action from the Floreat management to dissipate the funds of RAGOF and/or to use their control of RAGOF to otherwise prejudice him;
- (9) RAGOF may seek to assert that there is some uncertainty in respect of Mr. Wang's beneficial ownership of the shares and/or his other nominee shareholdings in RAGOF (e.g., that Mr. Wang holds them as a nominee for others) and use this as some purported basis on which to challenge these proceedings and the appointment of provisional liquidators;
- (10) RAGOF might allege that appointment of JPLs would cause it loss.

- [59] The affidavit of one of the Receivers adopted in its entirety the First Affidavit of Mr. Wang in the JPL Application. It was otherwise purely procedural in nature.
- [60] The Applicants in the JPL Application filed a 45-page skeleton argument ahead of the hearing. This very largely followed the matters stated in Mr. Wang's First Affidavit in support of the JPL Application, although it extended beyond that.
- [61] The Core Bundle for the JPL Application hearing comprised 136 .pdf pages. It was filed on 31st August 2021 at 3.31 p.m. There was also an exhibit bundle comprising approximately 4000 pages submitted at 17:58 hours on 31st August 2021 and an authorities bundle comprising some 376 .pdf pages and 25 authorities, submitted at 6.26 p.m. on 31st August 2021.
- [62] The JPL Application was heard the following day, on 1st September 2021, before Justice Jack, who granted the orders sought.
- [63] According to the official Transcript, the hearing commenced at 12.30 p.m. and ended 27 minutes later at 12.57 p.m.
- [64] The learned Judge stated at the start that he had read the Applicants' skeleton argument and had 'looked at' the witness statements. He immediately challenged learned Queen's Counsel for the Applicants on whether the hearing should, as requested, proceed on an *ex parte* basis or a few days later on an *inter partes* basis. In what follows, I shall refer to this Counsel simply as Mr. Wardell, QC, for ease of reference, although this designation is not strictly complete nor always accurate – he was the same Queen's Counsel¹ who presented the advocacy at the *ex parte* Receivership hearing.
- [65] Mr. Wardell, QC, is recorded in the Transcript to have submitted that proceeding in an *ex parte* manner was needed on account of the risk to the funds if notice of the application was given to Floreat and its Principals. He submitted that the latter had been using the funds as 'their own personal piggy-bank' and they had Springs Farm, which had ongoing expenses. Mr. Wardell, QC, is recorded as having started explaining some of the matrix of facts, which, as presented

¹ Mr. Mumford, QC did not appear at the hearing of any of the *ex parte* applications.

by the Applicants, indicated that Floreat and its Principals could not be trusted and had arranged the funds' affairs in such a way that they would benefit financially from them. The learned Judge was not so easily convinced of the need for proceeding on an *ex parte* basis. He is recorded to have said:²

"I've got no difficulty with any of this, but what's the harm in delaying this for a week?"

[66] Mr. Wardell, QC's reply was:³

"Well, we've got no protection at the moment. All we've got is Receivers appointed over, Receivers appointed over the shares. That doesn't give my client any protection at all. And –"

[67] The learned Judge queried that submission, and in the ensuing exchange, observed that Mr. Wardell, QC, for the Applicants had until 4 p.m. that day in order to present their application.⁴ The learned Judge also said that he had read the papers.⁵ He indicated that unless Mr. Wardell, QC, could persuade him that something 'disastrous' was likely to happen in the ensuing week, then the application would have to be heard on an *inter partes* basis.

[68] Mr. Wardell, QC, then explained what he urged was 'the problem'.⁶ He said:⁷

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

[69] This point had been made in a little more detail at paragraphs 200 and 201 of Mr. Wang's First Affidavit in support of the JPL Application. Mr. Wang there stated:

"200. I understand from my discussions with Appleby that the [Floreat] Management, through their control of RAGOF, could take actions which in addition to wrongly expending the assets of the fund would be aimed at stymying any shareholder claims by me against RAGOF. In particular, I understand that the RAGOF Articles of Association give the directors of RAGOF broad powers which could be used to remove my shareholder rights, including: (a) pursuant to Regulation 12, a lien over shares arises in respect of all debts and liabilities owed by a shareholder to RAGOF with the directors of

² At page 8, lines 15 to 17 of the Transcript.

³ Page 8, lines 18 to 22 of the Transcript.

⁴ Page 9, lines 12 and 13 of the Transcript.

⁵ Page 9, lines 21 and 22 of the Transcript.

⁶ Page 12, lines 1 and 2 of the Transcript.

⁷ Page 11, lines 13 to 24 of the Transcript.

RAGOF having a wide discretion to sell the shareholder's shares in such manner as they think fit in order to satisfy that liability [2092]; and (b) pursuant to Regulation 20, a power to effect the compulsory redemption of a shareholder's shares where the shareholder ceases to be a 'Qualifying Investor' for no value or such other amount as the RAGOF Directors decide

201. I am concerned that the [Floreat] Management will use their control of RAGOF to try and sell or redeem my shareholding in RAGOF in an attempt to block [the just and equitable winding up] Proceedings and any other shareholder claims which I might bring."

[70] This reason did not, however, feature amongst the reasons for making the application *ex parte*, which had been stated at paragraphs 205 to 206 of that Affidavit.

[71] It also did not feature in the part of Mr. Wang's First Affidavit devoted to full and frank disclosure.

[72] The Transcript does not record Mr. Wardell, QC, taking the learned Judge to paragraphs 205 to 206 of Mr. Wang's First Affidavit, nor to the underlying Articles of Association there referred to.

[73] Then, in short submissions spanning just some 20 lines in the Transcript,⁸ Mr. Wardell, QC, urged that the Floreat Principals had behaved so outrageously and brazenly, with time being of the essence, and their behaviour would likely be dishonourable if they received notice of the application, with a real risk that they would go down the forced redemption route, that the Applicants needed the Court's relief that same day.

[74] The learned Judge recorded that he had been persuaded by these various arguments.⁹ He proceeded to grant the relief sought (the JPL Order).

14. Set aside applications

14.1 Application to set aside JPL Order

[75] On 9th November 2021 the Floreat entity (other than RAGOF) which had been the Second Respondent to the JPL Application, filed an application to have the *ex parte* order discharged

⁸ Page 12, line 15, to page 13, line 8 of the Transcript.

⁹ Page 13, line 10 of the Transcript.

and for consequential relief. For ease of reference, but not strictly accurately, I will simply refer to this JPL Order discharge Applicant as Floreat.

- [76] There had been some, indeed quite considerable, interlocutory matters before the Court before this, but they are largely irrelevant for present purposes.
- [77] Floreat primarily focused upon seeking a discharge of the JPL Order and secondarily upon discharge of the Receivership Order. The Court can conveniently do the same.

14.1.1 Floreat's perspective

- [78] The grounds for discharge of the JPL Order were stated to be that the Applicants had breached their duty to give full and frank disclosure and to present the application fairly and that there was in fact no risk to the assets.
- [79] The discharge application was supported by voluminous evidence and it was met with equally firm opposition.
- [80] Floreat argued that there had been several areas in which the JPL Application Applicants had breached their duty of full and frank disclosure and fair presentation. These concerned alleged:
- (1) imminent risks and urgency;
 - (2) document destruction;
 - (3) risk of dissipation of RAGOF's assets;
 - (4) Mr. Wang's status as alleged underlying beneficial owner of RAGOF shares;
 - (5) risk of director misconduct.
- [81] The point that Floreat concentrated most on, concerned the alleged risk of a forced redemption, under the first category of 'imminent risks and urgency'.
- [82] Floreat's learned Queen's Counsel, Mr. Andrew Hunter, QC, submitted that there was no proper foundation, and no cogent evidence, for Mr. Wardell, QC's submission that there was 'an absolute right under the Articles to proceed by way of forced redemption' because '[Mr. Wang] isn't a professional investor' and that there was a 'real risk' that the directors would exercise this alleged right.

[83] Mr. Hunter, QC, explained that the RAGOF Articles did not provide the directors with any compulsory redemption power at all because XYZ – the registered shareholder – was at all times a ‘Qualifying Investor’ as defined, and had warranted itself to be so. In that regard, the true position (none of which was explained to the Court at the *ex parte* hearing), said Mr. Hunter, QC, is as follows.

- (1) Pursuant to Article 20.1 of the RAGOF Articles (which had not been drawn to the Court’s attention), RAGOF directors are empowered compulsorily to redeem a shareholder’s shares only if that **‘Shareholder is not a Qualifying Investor’**.
- (2) The term ‘Qualifying Investor’ was defined. In summary, pursuant to Article 1.1: A ‘Qualifying Investor’ relevantly means any person who expressly warrants that it: (i) has the financial knowledge, expertise and experience to evaluate the risks of investing in RAGOF; (ii) is aware of the risks inherent in investing in RAGOF; (iii) can bear the risk of losing its entire investment; and (iv) is a ‘Professional Investor’. A ‘Professional Investor’ means any person: (i) whose ordinary business involves, whether personally on behalf of others, acquiring or disposing of property of the same type as RAGOF’s property (‘Institutional Professional Investor’); **or (ii) who has signed a declaration that s/he has a net worth of over US\$1 million (or its equivalent) and that s/he consents to being treated as a Professional Investor** (‘Private Professional Investor’) (My emphasis added.)
- (3) At all relevant times, XYZ has been both an Institutional Professional Investor and a Qualifying Investor in accordance with these definitions. XYZ confirmed in documents which were not shown to the Court that it satisfied both definitions when it made its second investment in RAGOF.
- (4) Accordingly, contrary to the unqualified representation to the Court that there was ‘an absolute right’ to redeem, the true position was that RAGOF’s directors had no contractual right to redeem the shares at all. The wholly unqualified submission made by the JPL Applicants to the Court that the directors had the ‘absolute right under the Articles to proceed by way of forced redemption’ was false.
- (5) It is common ground that, as at the JPL Application hearing date, XYZ was the relevant registered Shareholder. **Accordingly, the relevant question was whether XYZ, and**

not Mr. Wang, was a Qualifying Investor at the time. However, this point was simply not explained to the Court at the provisional liquidator appointment hearing. Rather, Mr. Wardell, QC, wrongly presented the case on the basis that it was Mr. Wang's status – and not XYZ's – that mattered, submitting that: '[Mr. Wang] isn't a professional investor, so they now have an absolute right under the Articles to proceed by way of forced redemption'. This presentation was misleading: the Applicants should have identified for the Judge that the correct issue was (or at the very least arguably was) whether XYZ was a Qualifying Investor, but they did not.

- [84] Mr. Hunter, QC, stressed that the alleged risk of a forced redemption had been the only reason pressed by Mr. Wardell, QC, for the JPL Application to be heard on an *ex parte* basis. Since that reason had been incorrect, it follows that the Court had been misled into hearing the JPL Application on an *ex parte* basis.
- [85] Mr. Hunter, QC, also pointed out that when Mr. Wardell, QC, had presented the Receivership Application prior to this before me, the risk of a forced redemption had been put in less central and less categorical terms, on a basis that a right of forced redemption had arguably arisen. Mr. Wardell, QC, had then also taken the Court to certain terms in RAGOF's Articles of Association to explain at least part of the workings of the relevant terms (but not the XY subscription agreement in which XY warranted that it was a Qualifying Investor). At the JPL Application hearing, however, Mr. Wardell, QC, stated the matter in unqualified terms, that '...they now have an absolute right under the Articles to proceed by way of forced redemption'. Mr. Hunter, QC, submitted that here, unusually, was a clear record of a submission that had made all the difference to the way in which the Court had decided to proceed.
- [86] He contended further that because there was no right of forced redemption, there was no real risk of this taking place.
- [87] Mr. Hunter, QC, observed that Mr. Wardell, QC, did not take the judge to the underlying documents to show him how the right of forced redemption worked. Nor did he attempt to present any counter arguments. Nor did Mr. Wardell, QC, suggest that Mr. Wang or XYZ might have any defence to an attempted forced redemption.

- [88] Mr. Hunter, QC, urged the Court to treat this as a substantial failure to give full and frank disclosure on a critical issue, namely whether the JPL Application should be heard *inter partes* in the usual way or exceptionally on an *ex parte* basis. Mr. Hunter, QC, submitted that this failure to give full and frank disclosure had no good explanation despite every opportunity afforded to the JPL Applicants to do so, that it was not innocent, or at least it was reckless; it warrants discharge of the *ex parte* order without a regrant.
- [89] Mr. Hunter, QC, also argued that there had been a related, but separate, failure to give full and frank disclosure, in that Mr. Wardell, QC, did not mention that Mr. Wang had easily available alternative remedies to avert any threat of forced redemption, such as to apply for a Stop Order to allow notice of the JPL Application to be given, or to seek a transfer of the shares in RAGOF to a nominee who warranted that it was a Qualifying Investor. In respect of concerns about any dealings with assets, such as the payment of questionable fees, an injunction might lie pending resolution of any dispute. The issue of potentially available alternative remedies was important, said Mr. Hunter, QC, because the appointment of provisional liquidators is a ‘nuclear weapon’ remedy of last resort. But potential available alternative remedies were simply not mentioned at the *ex parte* JPL Application. The appointment of JPLs was presented as the only option.
- [90] Mr. Hunter, QC, addressed other areas of alleged breach of the duty of full and frank disclosure and fair presentation with somewhat less emphasis but at some length. The thrust of these submissions was that, with RAGOF and Floreat being heavily regulated entities, and the assets being predominantly real estate and accounts receivable from Mr. Wang himself, the suggestion that document destruction, asset dissipation and director misconduct might occur at all or in the short time elapsing before the JPL Application could be heard on an *inter partes* basis was unrealistic and evidentially baseless. Moreover, in relation to Mr. Wang’s status as alleged underlying beneficial owner of all the shares he claimed beneficially to own in RAGOF, this was not at all uncontroversial upon the documentary evidence. Indeed, Mr. Hunter, QC, submitted that Mr. Wang had omitted to disclose a highly material security agreement, by which Mr. Wang had given one of the Floreat Principals a security interest over his RAGOF shares. Mr. Hunter, QC, urged that these non-disclosures, if accepted by the Court, are obviously highly material to the central issue in the JPL Application, namely whether JPLs should be appointed at all. Concerning the failure to disclose the Security Agreement, Mr. Hunter, QC, submitted that if it had been disclosed, the Court would have been alerted to the possibility that

what was being done here was a means to try to evade that security faced with demands made on the loan by Floreat to Mr. Wang.

[91] Mr. Hunter, QC, also portrayed Mr. Wardell, QC's submissions concerning alleged wrongdoing, in particular concerning Springs Farm, as exaggerated and alarmist, in circumstances where the assets concerned accounted for only a small fraction in value of the total value of Mr. Wang's investment with Floreat, the performance in respect of which was not subject to any complaint. Mr. Hunter, QC, remarked that Springs Farm was one of approximately 15 real estate properties owned by RAGOF, including some much larger investments than Springs Farm, and that Springs Farm had been purchased before Mr. Wang had invested any monies with Floreat, thus none of his monies had been used to buy it.

[92] Moreover, argued Mr. Hunter, QC, the JPLs had themselves not made any findings, let alone any findings of bad faith, and their investigations were still ongoing.

14.1.2 Mr. Wang's perspective

[93] In defence of the *ex parte* JPL Order, the strategy of Mr. Wang's side was to stress the Floreat parties' alleged wrongdoing. Their motive for this strategy was obvious; that even if the Court should find that there had been a breach of the duty to give full and frank disclose and fair presentation, the gravity of the alleged wrongdoing would weigh against discharge of the JPL Order or in favour of a regrant.

[94] Mr. Wardell, QC, observed that the evidence showed clear examples of the Floreat Principals using assets invested by Mr. Wang for their own benefit and failing to manage the conflicts inherent in their control over the funds.

[95] Mr. Wardell, QC, also submitted that the scale in value of the apparent wrongdoing was certainly not insignificant – he submitted that for RAGOF alone, unpermitted fees run to over US\$12 million, or about 7.3% of the value of the fund.

[96] Mr. Wardell, QC, added that the Floreat Principals have also spent over GBP10 million on the upkeep of Springs Farm with no resulting benefit to the RAGOF fund.

- [97] Mr. Wardell, QC, prayed in aid two reports the JPLs had filed on 11th October 2021 and 13th December 2021 respectively. The second report, submitted Mr. Wardell, QC, demonstrates to a high standard of proof that the concerns about serious financial irregularities which had prompted the original *ex parte* orders have been vindicated. Moreover, the second report raised new issues of which Mr. Wang was unaware when he first issued these proceedings.
- [98] Mr. Wardell, QC, highlighted that the JPLs had identified a further dubious transaction, namely that RAGOF records appeared to show that Springs Farm had been bought from Sheikh Shaker for a price of about GBP15 million, around US\$5 million more than its fair market value of about GBP10 million at the time of purchase (in April 2014). Thus, Springs Farm had been acquired at a price 50% higher than its fair market value. Mr. Wardell, QC, suggested that a possible motive for RAGOF to have done so, at the behest of the Floreat Principals, was to induce Sheikh Shaker to invest more money with Floreat, Mr. Wardell, QC, argued that whether or not that was right, it was contrary to Mr. Wang's interests for his money to have been invested in this inflated price asset.
- [99] The JPLs also reported that their work was being impeded by information not being made available to them by Floreat Principals. Whilst considerable amounts of documents had been made available, substantial documentation and documentation remained to be provided.
- [100] The JPLs reported also that they considered it likely that a significant amount of assets, by value, had been over-valued by the Floreat Principals, compared to their actual market value.
- [101] The JPLs filed a third report on 31st January 2021, in which the JPLs elaborated on these points. There, they postulated that the overvaluation approximates to between US\$76.74 million and US\$114.01 million across a number of the funds in which Mr. Wang's assets were invested.
- [102] These assets included a collection of artworks. Mr. Hussam Otaibi had given evidence that art acquisitions had been subject to a purchase assessment process, with reports ('Pre-Acquisition Proposals' or 'PAPs') being drawn up in respect of individual items to assess their suitability for purchase. Mr. Wardell, QC, however, took the Court to evidence filed by Mr. Wang (Mr. Wang's Sixth Affidavit) in which Mr. Wang gave evidence with reference to specific items, that the reports had been drawn up *after* the items had been purchased and that they were devoid

of a proper financial analysis, consisting largely of vacuous generalities, padding and presentational packaging. Mr. Wang's contention was that Mr. Hussam Otaibi's story, delivered with gravitas, that serious financial and investment considerations were carefully weighed before art purchases were made, was in fact bogus. The PAPs, said Mr. Wardell, QC, were demonstrably just fictions designed to paper transactions of a very different character. Rather, explained Mr. Wang, in practice, he bought art simply because he thought it was beautiful and wanted to collect it. The invoice would then be sent to the Floreat art holding company concerned, that company would pay the bill. In reality, the process was no more sophisticated than that. I do note here however, that, somewhat inconsistent with this most recent explanation, in earlier evidence Mr. Wang had also purported to give a financial investment motive for his art purchases. It appears that he forgot he had done so here.

[103] Then, Mr. Wardell, QC, argued that his submissions made at the *ex parte* hearing in relation to the risk of forced redemption were not material to the substantive issues before the Court: he submitted that they only concerned the issue whether the JPL Application should be heard on an *ex parte* basis. Mr. Wardell, QC, submitted that in relation to the substantive issues, 'Justice Jack had of course read all of the evidence and submissions', including specifically 'of course...paragraph 201' of Mr. Wang's First Affidavit. Mr. Wardell, QC, submitted that Justice Jack had been satisfied on the strength of that evidence that it had been appropriate to appoint JPLs.

[104] Mr. Wardell, QC, then embarked upon a detailed argument, with reference to certain other provisions of RAGOF's Articles of Association (Articles 4.3 and 4.4) to contend that Mr. Hunter, QC's, contentions in relation to the right of forced redemption had been wrong, as Mr. Wang would still be caught by the definition there of an 'Ineligible Investor' as the beneficial owner of the shares in RAGOF. Mr. Wardell, QC, argued that Mr. Wang had properly disclosed in his evidence that he had acknowledged he was a 'Professional Investor', that Justice Jack had read this evidence, and that if he (Mr. Wardell, QC) had misspoken during his presentation, Justice Jack would have understood what he had been trying to say.

[105] Mr. Wardell, QC, did not address in any depth the arguments made by Mr. Hunter, QC, that XY had warranted in a subscription agreement that it was a 'Qualifying Investor' and that the right to force redemption concerned the status of XYZ rather than that of Mr. Wang.

[106] Mr. Wardell, QC, made lengthy submissions to counter Floreat's allegations of other breaches of the duty of full and frank disclosure and fair presentation. The overall impression given thereby is that Mr. Wardell, QC, had something to say about almost everything Mr. Hunter, QC, had raised. The net effect of both sides' arguments was that what would in principle have been a straight-forward and relatively brief discharge application became more of a mini-trial, regardless of who is right or wrong on each of the many individual points taken. If one overarching point is to be drawn from this lengthy argumentation on both sides, it is that a great deal more could have been said by the JPL Applicants at the *ex parte* hearing by way of full and frank disclosure and fair presentation, than was in fact done.

14.2 The Receivership set aside application

[107] On 15th September 2021, Mr. Wang applied to continue the receivership order that he had obtained on an *ex parte* basis on 26th August 2021. On 22nd December 2021, Floreat Real Estate Ltd applied to have the receivership order set aside (the Receivership Set Aside Application) as an intervenor (for convenience only, the 'Floreat Intervenor') in the receivership proceedings (which had been between Mr. Wang and XYZ and XY).

14.2.1 The Floreat Intervenor's perspective

[108] The grounds for the Receivership Set Aside Application were stated as follows:

- (1) Mr. Wang had failed to give full and frank disclosure and make a fair presentation at the *ex parte* hearing;
- (2) the Court had no power to authorise receivers to bring proceedings to seek the winding up of RAGOF in the name of XYZ, alternatively should not have exercised any discretionary power it is found to have had, in circumstances where, *inter alia*:
 - (i) XYZ has not consented to being represented by receivers;
 - (ii) XYZ was not prevented contractually or otherwise from bringing the JPL Application in its own name (if it so decided);
 - (iii) There was no appropriate basis (even if such power existed, which is denied) for the Court to exercise any discretion to appoint receivers and/or further, to exercise its discretion to appoint receivers to litigate in XYZ's name at Mr. Wang's behest;

- (iv) Neither XYZ nor XY were served with the *ex parte* receivership order when the JPL Application was commenced;
 - (iv) Empowering (or purporting to do so) the receivers to bring the winding up proceedings in XYZ's name placed XYZ in breach of (or arguably in breach of) relevant warranties and indemnities to RAGOF;
 - (v) The BVI legislature has legislated on several occasions in connection with the identity and representation of shareholder litigants, and it has never chosen to provide a device of a court-appointed receiver to litigate in the name of a legal shareholder in circumstances such as presented by this case, where the grant of the receivership order is wholly novel and unorthodox and beyond any permissible or appropriate extension of the Court's statutory or common law powers to appoint receivers; and
 - (vi) Other remedies were available to Mr. Wang.
- (3) There was no proper basis for contending that the *ex parte* receivership order was necessary to avoid giving advance notice to Floreat of the intention of Mr. Wang to seek the appointment of provisional liquidators over RAGOF.
- (4) The hearing on 26th August 2021 should have proceeded on an *inter partes* basis to the Floreat Intervenor and RAGOF, who should have been named as parties and served with the proceedings. The Floreat Intervenor should have been named as a party to these proceedings at the outset.
- (5) The *ex parte* receivership order was motivated by the improper collateral purpose of Mr. Wang to obtain, through the device of a provisional liquidator, advance and early disclosure of documents (prior to the issue of proceedings and disclosure in the usual course thereafter) that he had applied for (and was ultimately denied) by the English High Court.
- (6) The *ex parte* receivership order was motivated by the improper collateral purpose of Mr. Wang to avoid and/or vary and/or delay payment or repayment obligations owed by him and related persons and entities under loans and services received by him or such related persons or entities.

- (7) The *ex parte* receivership order was motivated by the improper collateral purpose of Mr. Wang to effect the transfer of the shares to himself with consequence that the receivership would then fall away. Mr. Wang has admitted as much in a letter from Appleby Cayman dated 20th December 2021.

[109] The Floreat Intervenor argued as follows, in support of its Receivership Set Aside Application:

- (1) In its Receivership Set Aside Application, the Floreat Intervenor seeks an order discharging the receivership order (and all subsequent orders premised upon it) on the basis that Mr. Wang obtained the order following serious breaches of the duty to give full and frank disclosure. It also contends that, given the nature of the breaches, the general rule applies such the Court should set aside the receivership order and not regrant it. Alternatively, the Floreat Intervenor seeks an order setting aside the receivership order (and all its progeny) based on the Court's lack of jurisdiction to make the order, or its inappropriate exercised of its discretion in doing so.
- (2) Focusing on the discharge aspect, the Floreat Intervenor's case can be summarised as follows:
 - (i) In obtaining the order, Mr. Wang made several serious, non-innocent non-disclosures and unfair presentations, especially as to the risk of various facts existing or events occurring.
 - (ii) The Court should discharge the receivership order and not regrant it, as the breaches were serious and non-innocent and the general rule against regrant thus applies.
 - (iii) Additionally, the receivership order should not be regranted because the purported risks to the assets simply do not exist.
- (3) In the Receivership Application, Mr. Wang breached his duty of full and frank disclosure by committing all but one of the same breaches that the Applicants committed in the JPL Application. In several instances Mr. Wang's breaches in the Receivership Application were more serious, as his non-disclosures were more culpable and his presentation to the Court was more one-sided. In short, in respect of many of these overlapping matters, Mr. Wang's breaches of his duty to the Court present an *a fortiori* case for relief. Many examples may be given. Six are set out below.

- (4) In Mr. Wang's Skeleton Argument for the hearing of the Receivership Application, he submitted that there was a real risk that Floreat would exercise its control over the RAGOF directors and procure them to redeem compulsorily the shares in RAGOF, with a view to thwarting any JPL Application and any winding up petition. In this regard, Mr. Wang's supporting evidence went yet further than his evidence in support of the JPL Application. Specifically, Mr. Wang both deposed that there existed a 'very substantial risk' (rather than real risk) of a compulsory redemption, and he did not make even a fleeting reference to the allegedly relevant parts of the RAGOF Articles (as he did in the JPL Application, albeit wholly inadequately as explained above).
- (5) Unlike at the JPL Application, where the Court was not taken to any of the documents at all, at the Receivership Hearing, Mr. Wardell, QC, took the Court to *some* of the relevant documentation. However, in doing so, he misled the Court. As to this, Mr. Wardell, QC, submitted that the RAGOF directors' 'ability to force redemption' created a 'problem', and he then stated the following (emphasis added):
- "Then we need to **look at Article 20.1** ... [which] says: **"In the event that any Shareholder is not a Qualifying Investor**, then the Directors shall be entitled in respect of all the Ordinary Shares held by that Shareholder to effect the compulsory redemption of the Affected Holding in accordance with the following provisions of these Articles." And the definition of a Qualifying Investor can be found at 669 in this bundle. And perhaps to **look first of all at the definition of Professional Investor, just know it's there, because [Mr. Wang] says he's not**. And the "Qualifying Investor means, unless the Directors otherwise determine, someone," over page 1776 (c), "someone who warrants he is a professional investor." Now, **[Mr. Wang] has now made it clear to them he doesn't regard himself as a sophisticated investor** and they will no doubt **feel they may well have ammunition on this ground** to insist on a forced redemption of the shares, thereby preventing a winding up. And you can just see **how easy it would be for them (1) to refuse to register and (2), to muddy the waters by a forced redemption.**"
- (6) Thus, unlike at the JPL Application hearing, Mr. Wardell, QC, took the Court to one of the relevant underlying documents. However, Mr. Wardell, QC (on behalf of his client):
- (i) failed to draw the Court's attention to the relevant arguments (applied *mutatis mutandis*) outlined at above, despite the fact that in his oral submissions he expressly referred to Article 20.1 and the definitions of 'Qualified Investor' and 'Professional Investor';
 - (ii) did not place any of the additional pertinent documents (such as the Subscription Agreement) before the Court;

- (iii) did not explain that the real question was whether XYZ was a Qualifying Investor rather than Mr. Wang;
 - (iv) wrongly stated that Mr. Wang was not a Professional Investor because he did not view himself as being '*sophisticated*', when under the Article 1.1 definition of the term – which his Counsel did not read out – an investor's financial '*sophistication*' (and his own assessment of such sophistication) is neither here nor there;
 - (v) failed to explain the nature of the 'ammunition' upon which Mr. Wang relied, and the obvious problem that the Floreat Principals were highly unlikely to, and legally prohibited from, using such 'ammunition'; and
 - (vi) gave the misleading impression that the RAGOF directors had the power compulsorily to redeem 'easily', and that the only use of putative power would be for the improper purpose of 'muddying the waters'.
- (7) Mr. Wang's submissions in support of the Receivership Application went further than the Applicants' submissions in support of the JPL Application. Both sets of submissions described the directors as 'purportedly' independent and alluded to their having committed various breaches of duty. However, at the Receivership Application hearing, Mr. Wardell, QC, also stated there was (emphasis added):
- “clear evidence that [Floreat] and the [Floreat Principals] effectively control RAGOF. And that the **purportedly independent directors appear willing to do their bidding** even when the conflicts of duty and interest should be blindingly obvious... the independent directors have effectively **allowed the [Floreat Principals] to treat RAGOF as their own fund** and to prefer their own interest to those of [Mr. Wang]...”¹⁰
- (8) The additional express allegation put, then, was that RAGOF's independent directors were not simply involved in the alleged – and incredible – widespread fraudulent conspiracy, but that they were also mere puppets, who knowingly permitted the Floreat Principals to act wrongly. There was (and is) no proper evidential basis for that submission. In addition, Mr. Wang did not even hint at any of the contradictory points that the Floreat Principals – and the RAGOF directors – might obviously have been expected to raise. That was a serious breach of duty.

¹⁰ Page 42, lines 9 to 19 of the Transcript.

- (9) In presenting this case, Mr. Wang contended that there was ‘no viable alternative’ to appointing receivers over the shares. He identified only one possible alternative to appointing the Receivers, being XYZ’s transfer of the shares to Mr. Wang. In particular, in his skeleton argument, Mr. Wang submitted that it was ‘extremely unlikely’ that the ‘wrongdoers controlling RAGOF’ or the RAGOF directors would allow any transfer of RAGOF shares to Mr. Wang to be registered, because they would wish to thwart him applying to wind up RAGOF. Similarly, at the Receivership Hearing, Mr. Wardell, QC, submitted that:

“the [Floreat] Principals would almost certainly infer that the transfer was being sought so [that Mr. Wang would] have standing to bring proceedings in respect of RAGOF, particularly winding up proceedings and perhaps also the appointment of provisional liquidators. And therefore, we expect that they will prevail on the directors of RAGOF to refuse or to seek to delay registration for the longest possible time, including by relying on the powers conferred by [RAGOF’s Articles].”¹¹

- (10) As regards this submission, Mr. Wang breached his material disclosure duty in (at least) two ways:
- (i) Mr. Wang failed to point out that it was open to him to instruct XYZ to effect a transfer to a **new nominee** who was not prevented from taking any legal action in connection with the shares. This would have avoided Mr. Wang’s alleged (but wholly contrived) issue that a transfer to him would have ‘tipped off’ the Floreat Principals about his intentions. Thus, it was wrong for Mr. Wang to assert that a Receivership Order was ‘necessary’ because it is to be ‘readily... inferred’ that Floreat ‘would have taken steps to prevent [Mr. Wang] obtaining the legal title to this [shareholding]’. Aside from the fact that the proposed inference is flawed, the argument is inadequate, as it does not cater for the (alternative remedy) of a transfer to another nominee.
 - (ii) Mr. Wang submitted he had ‘a clearly established right to the transfer of the [shares],’¹² but that the Floreat Principals and/or RAGOF directors would wrongly deny him that right. This submission was flawed and unsustainable on Mr. Wang’s own case, but the Court was not informed of this. Specifically:

¹¹ Page 13, lines 9 to 18 of the Transcript.

¹² Page 73, lines 21 to 22 of the Transcript.

- (a) The effect of the definition of 'Ineligible Investor' in Article 1.1 and Articles 4.2.1 and 4.3 of the RAGOF Articles is that: (1) only a Qualifying Investor may hold RAGOF shares; (2) a person who is not a Qualifying Investor is an Ineligible Investor; and (3) an Ineligible Investor cannot hold RAGOF shares.
 - (b) On Mr. Wang's own case, he was not a Qualifying Investor (as he now claims that he was not a Professional Investor). In the premises, if XYZ had sought to transfer the shares to him, it would, on Mr. Wang's own case, have constituted a 'Prohibited Transfer' under Article 18.1.
 - (c) The only real reason that Mr. Wang could not transfer shares to himself was the position which he himself was adopting. It was nothing to do with the directors. It was wrong for Mr. Wang to represent that it was.
 - (d) In fact, the only basis on which Mr. Wang could have sought to effect a transfer to himself would have been to change his position and accept that he was a Qualifying Shareholder. It was open to him to do that. If he had done so, and sought a transfer on that basis, then there was no evidence at all that the RAGOF directors would have refused to register it. On the contrary, it would – on Mr. Wang's own case – not have involved any exercise of discretion at all; the RAGOF Articles would have *mandated* the outcome.
 - (e) Mr. Wang failed to draw any of these points to the Court's attention.
- (11) In addition, Mr. Wang also submitted that there was 'no viable alternative' to a just and equitable winding up of RAGOF. He did not explain why, on the instant facts, it would have been unreasonable for XYZ/Mr. Wang to seek an unfair prejudice remedy. Nor did Mr. Wang substantiate that a transfer of the shares coupled with an injunction or Stop Order preventing redemption would cause 'significant delay' and create 'an unacceptable risk of tipping off [Floreat]'.
- (12) At the Receivership Hearing, I (as the Judge) had summarised what I had perceived to be the core of Mr. Wang's case as follows: Mr. Wang had 'identified an exit mechanism' to extract himself from RAGOF 'in circumstances where ... there [was not] really a clear exit mechanism at all', with the first part of that exit mechanism involving obtaining a

receivership over the shares.¹³ Mr. Wardell, QC, replied 'Exactly'. However, it should have been obvious – let alone reasonably anticipatable – that a staged redemption constituted a clear (and routine) exit mechanism. The Judge having raised the specific point, it was incumbent on Mr. Wardell, QC, to draw the Judge's attention to the point, take him to the relevant provisions of the RAGOF Articles and ensure that the Judge correctly appreciated the significance of those provisions as an alternative 'exit mechanism' and hence alternative remedy. However, Mr. Wardell, QC, did no such thing.

- (13) In Mr. Wang's affidavit in support of the Receivership Application, he dealt with the putative background to the application in two sections. But, as with his evidence in support of the JPL Application, Mr. Wang did not outline critical (and unique) features. Mr. Wang mentioned no economic restraints upon himself at all. He made no mention of a certain overseas freezing order or a certain overseas attachment order that there had been made over his assets at all, let alone the paralysing financial effect that each was having on him and his family. He made no mention of the fact that the arrangements he had made with Floreat were tailored to give him access to liquid funds but with limits on his ability to redeem his investment to avoid the risk of confiscation, as a consequence of those orders.
- (14) It follows that, even more egregiously than in the JPL Application, Mr. Wang unfairly presented himself as an ordinary high-net wealth investor; a businessman with easy access to liquidity, focusing solely on investments which would maximise his returns. That picture was wholly distorted, resulting in a clear breach of (at least) Mr. Wang's duty to make a fair presentation.
- (15) In the Receivership Application, Mr. Wang made several statements about his purpose. For instance, at the Receivership Application hearing, Mr. Wardell, QC, stated that the receivership's 'sole purpose' was to allow Mr. Wang to 'protect his economic interest' by applying to appoint the JPLs to, and then wind up, RAGOF. Further, Mr. Wang's skeleton stated that his 'ultimate purpose' was to bring allegedly serious issues before the Court concerning RAGOF's management and administration.

¹³ Page 94, lines 11 to 15 of the Transcript.

- (16) However, at no stage in the Receivership Application did Mr. Wang mention that, if the RAGOF directors and/or Floreat Intervenor had been present at the hearing, they would have contended that he was making the application for various ulterior motives. This is despite the fact that in an Affidavit Mr. Wang swore only 10 days later, Mr. Wang mentioned (in passing) that it might be contended that he was bringing the JPL Application and Winding Up Petition ‘for the collateral purpose of avoiding or delaying payment of [unpaid fees owing under the Services Agreements]’.
- (17) Mr. Wang’s case for proceeding *ex parte* centred on the alleged urgent need to protect RAGOF’s assets and a putative need for secrecy. That was defective in two ways, over and above the failure discussed in relation to the JPL Application, but neither of which was put before Court:
- (i) Mr. Wang failed to present the case for and against proceeding without notice, including drawing the Court’s attention to any weaknesses in the case for proceeding *ex parte*. In that regard, Mr. Wang should have explained that the Floreat Intervenor should properly have been named as a party, and it would have contended – if present – that Mr. Wang’s urgency and secrecy concerns were unfounded;
 - (ii) At the Receivership Application hearing, Mr. Wardell, QC, submitted that Mr. Wang’s full and frank disclosure duty at that hearing did not extend to points ‘that might be argued in due course against the appointment of provisional liquidator and/or a joint and equitable winding up.’¹⁴ But that is clearly wrong in principle, given that: (1) according to Mr. Wang, the entire purpose of the Receivership Application was to enable the Receivers to seek the appointment of the JPLs and then a winding up; and (2) the Court’s decision whether or not to appoint any receivers was discretionary, and that discretion was to be exercised with Mr. Wang’s alleged ultimate purposes in mind.
- (18) Mr. Wang’s case is that if the Court were to discharge the Receivership Order, then Mr. Wang would ‘maintain that the Receivership Order should in any event be continued to protect RAGOF’s assets’, based on all the circumstances now known. That assertion does not make sense. If, in the premise, the Court has discharged the Order, it cannot

¹⁴ Page 76, lines 2 to 5 of the Transcript.

be continued: *ex nihil nil fit* (nothing can come of nothing). It is only open to Mr. Wang to contend that the Court should consider whether to reimpose a fresh Receivership Order, based on the facts that were before the Court at the Receivership Application hearing. However, such a discretion should be exercised sparingly, and the needs of justice require the Court not to reinstate the Order.

- (19) The Receivership Order which Mr. Wang obtained *ex parte* (and on the basis of mere assertion as to his beneficial interest) was, as Mr. Wang was forced to accept, without legal precedent.
- (20) Although Mr. Wang has relied in his skeleton upon the dicta of Megarry V-C in a case four decades earlier in **Attorney General v Schonfield**¹⁵ – that the remedy of the appointment of a receiver ‘is one to be moulded to the needs of the situation; within proper limits, a receiver may be given such powers as the court considers to be appropriate to the particular case’ – it is the Floreat Intervenor’s case that the appointment of the Receivers in the circumstances of this case exceeded any proper limit on the exercise of the jurisdiction. This is shown by the fact that the Applicants are unable to point to any authority in this Court, or any Court in another jurisdiction, granting a receivership order in analogous circumstances.
- (21) Although the law is occasionally incrementally developed, in this case there was no question that a receivership order of this nature was not a proper extension. In particular, it has allowed a purported beneficial owner (who on his own case was never entitled to be an investor in RAGOF at all) to litigate through receivers (appointed at his behest) over the shares of a separate legal shareholder who had neither initiated any proceedings, nor consented to its legal status as the registered shareholder being used in this way. The BVI legislature has legislated on several occasions in connection with the identity and representation of shareholder litigants, and it has *never* chosen to include provisions permitting a court-appointed receiver to litigate in the name of a legal shareholder in such circumstances. To permit this is anathema to the prevailing legislative policy in this jurisdiction. It follows that the grant of a receivership order in this case was wholly novel and unorthodox, and beyond any permissible or appropriate extension of the categories of situation warranting the appointment of receivers.

¹⁵ [1980] 1 WLR 1182 (Ch) 1187.

- (22) Alternatively, a number of discretionary factors militated against making the appointment. In particular:
- (i) Alternative remedies were arguably available, including seeking an injunction against XYZ in support of a claim for delivery up of the shares, or applying for a Stop Order in relation to the shares based on of Mr. Wang's alleged beneficial interest in them.
 - (ii) XYZ has a conflict of interest, in that XYZ also holds shareholdings in RAGOF on behalf of the Floreat Intervenor as *its* nominee. XYZ could thus in principle have been both the Applicant and Respondent in the JPL Application. Mr. Wang conceded this in his Affidavit in support of the Receivership Application.
 - (iii) Empowering the Receivers to bring winding up proceedings in XYZ's name also placed (or arguably placed) XYZ in breach of relevant warranties and indemnities it gave to RAGOF. In clauses 3.3 and 3.4 of the Subscription Agreement, XYZ warranted that it was a Professional Investor *and* that it is not acting for any person who was not a Professional Investor. Yet in the JPL proceedings which the Receivers have now brought in XYZ's name, they have caused XYZ to assert that Mr. Wang does not fall within the 'Professional Investor' definition. This places XYZ in a position of conflict, and in breach of its own warranty to RAGOF.

14.2.2 Mr. Wang's perspective

- [110] Mr. Wang's response was to disagree fundamentally with the attempt to discharge the Receivership and JPL Orders.
- [111] Mr. Wang submitted that the real question is whether, standing back from the detail, the applications for the Receivership Order and the JPL Order were presented fairly. Mr. Wang submitted that it is obvious from a dispassionate reading of the material put before the Court when these Orders were obtained that the Applicants were bending over backwards to ensure that points that might be taken against the application were addressed.
- [112] Mr. Wang submitted that it would be nothing short of an outrage if the Floreat Principals should be allowed to regain control of RAGOF (and the other, Cayman funds). That would merely permit them to continue to extract monies to which they are not entitled at the expense of Mr.

Wang, who is the ultimate beneficial owner of 97.2% of RAGOF (and owns all, or almost all, of two of the three Cayman funds). In this regard, if Floreat and the Floreat Principals had acted honestly throughout (as they contend), it is difficult to understand why they would not simply agree to a Court supervised winding up of the Funds which are solely or predominantly owned by Mr. Wang as their relationship with him has plainly come to an end.

[113] Descending to detail, Mr. Wardell, QC, contended that his reply of 'Exactly' had not been to confirm my understanding that the Receivership Application was being used as a first stage of an exit mechanism from the investment structure. He contended that his 'Exactly' merely confirmed the immediately preceding stated point of summary, which was that the nominee shareholder of the RAGOF shares had no real interest in the receivership and intended liquidation proceedings.

[114] Mr. Wardell, QC, argued that his submissions concerning the (according to him) absolute right of redemption only concerned the question of whether the JPL Application should proceed on an *ex parte* or *inter partes* basis, as Justice Jack had already indicated that he was satisfied that the Court should make the JPL order on the merits of the application.

[115] Mr. Wardell, QC, also argued that 'Justice Jack would have well understood what [Mr. Wardell, QC] was trying to say' because 'he had read the evidence'.

[116] Mr. Wang argued further as follows.

(1) By its set aside Application, the Floreat Intervenor seeks the discharge of the Receivership Order on broadly two grounds, that: i) Mr. Wang failed to give full and frank disclosure or make a fair presentation; and ii) the Receivership Order should not have been made or continued, since the Court lacked the power to authorise receivers to bring the winding up proceedings in the name of XYZ, or should for various reasons not in its discretion have exercised any such power.

(2) The second ground is plainly devoid of any merit. The Court had the power to make the Receiver Order and was right to exercise that power in all the circumstances.

(3) It cannot seriously be contended that the Court lacked the power to make the Receivership Order. Permission to serve both respondents out of the jurisdiction was

rightly given (so there is no question about the Court having the territorial jurisdiction to act) and the Court had the power to make an order against them under section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act 1969 (the 'Supreme Court Act')¹⁶.

- (4) The Floreat Intervenor's complaint appears to be that the Court went beyond the settled principles or practices according to which that power is to be exercised. This is demonstrably wrong as: (a) the making of an order appointing receivers with power to commence proceedings in the name of XYZ was well within the bounds of established practice; and (b) in any event, the power to appoint interim receivers is a broad and adaptable one (see Kerr & Hunter on Receivers and Administrators (21st edn., Sweet & Maxwell 2020), at [9-0]; **Attorney General v Schonfield**,¹⁷ per Megarry V-C at 1187), and there was no error of principle in its incremental extension in the present circumstances.
- (5) The purposes for which a receiver can be appointed conventionally include obtaining the benefit of rights over property where legal remedies are insufficient, and the protection and preservation of property which is at risk of dissipation or under other threat (see Kerr & Hunter on Receivers and Administrators (21st edn., Sweet & Maxwell 2020) at [2-23]-[2-24]):
- (6) In furtherance of those purposes a receiver can have conferred on him such powers as the owner of the asset would have, including, conventionally, the power to bring proceedings in that owner's name (see Kerr & Hunter on Receivers and Administrators (21st edn., Sweet & Maxwell 2020) at [9-14]; **In re Sartoris's Estate**¹⁸). This convention is well established in the authorities. See **Levermore v Levermore**,¹⁹ **Bourne v Colodense**,²⁰ **Allied Irish Bank v Ashford Hotels Ltd**²¹ and **Shaw v Breish**.²² The practice predates the Judicature Acts - see **Dacie v John**.²³

¹⁶ Cap. 80.

¹⁷ [1980] 1 WLR 1182.

¹⁸ [1892] 1 Ch 11, at 14-15.

¹⁹ [1979] 1 WLR 1277.

²⁰ [1985] 1 ICR.

²¹ [1998] BCC 440.

- (7) In the Hong Kong case of **Asean Resources Ltd v Ka Wah International Merchant Finance Ltd**²⁴ receivers were appointed over shares on a protective basis and it was accepted that they would have the power to sue in respect of the shares in the name of the legal owners.
- (8) It is beyond serious doubt, therefore, that according to settled principles and practices:
- (i) A receiver can be appointed over an asset that comprises or has associated with it a right of action (e.g., shares) where the interests of justice demand, including to preserve the value of that asset.
 - (ii) A receiver can be empowered to bring proceedings in respect of that asset, to enforce the rights that an owner would have and when doing so, the receiver should be empowered to sue in the name of the legal owner of the asset rather than his own name.
- (9) The Receivership Order made in the present case is on this analysis perfectly conventional:
- (i) Mr. Wang is the beneficial owner of the relevant shares in RAGOF and has a clear right as against XYZ (which holds as nominee only) to have them transferred into his name.
 - (ii) There is, however, an ongoing and immediate threat posed to the value of those shares.
 - (iii) Pending transfer of legal title to the shares to him, Mr. Wang is not able to protect the value of the shares, including by enforcing the rights associated with them to sue for the just and equitable winding up of RAGOF and the appointment of provisional liquidators.
 - (iv) The resulting jeopardy to the assets can only adequately be addressed by appointing receivers over the shares and empowering to enforce those rights.

²² [2017] EWHC 2927 (Comm).

²³ (1824) M'Clelland 575.

²⁴ [1987] LRC (Comm) 835.

- (10) It is of course right that (unlike in the execution cases) XYZ as respondent to the Receivership Order is not itself a wrongdoer against which a claim is asserted by Mr. Wang. But that is neither here nor there: there is no requirement that an applicant for a receivership should have a cause of action against the party which holds the relevant asset: see *Gee: Commercial Injunctions* (7th edn., Sweet & Maxwell 2022), at [16-009].
- (11) Nor is it to the point that the BVI legislature has not provided expressly for receivers to be able to exercise the rights of a legal owner of shares to petition for just and equitable winding up or the appointment of provisional liquidators. The very purpose of the appointment of receivers is to enable (in an appropriate case) the rights of the legal owner of an asset to be enforced in circumstances where the applicant is not able to bring that about himself. The use of a receiver to secure the exercise of the legal owner's right to petition is no different in this regard than the use (in the cases cited above) of a receiver to secure the exercise of the legal owner's right to sue under an indemnity or claim in debt. It is no objection in such cases that the receiver or applicant does not have a present right to sue (be it under the statute or under the relevant contract); quite the contrary, that is the very thing that makes the appointment of a receiver necessary.
- (12) There is, therefore, nothing 'novel and unorthodox' about the Receivership Order. But even if there were, it would represent no more than an incremental development of the jurisdiction by the application of the established underlying principles to a new circumstance. As observed by Megarry V-C in **Schonfield**,²⁵ (a case that involved more novelty than the present):
- 'If that means that I am extending the ambit of a receiver's functions beyond their existing bounds, then I would say that this is only part of the process of moulding the functions of a receiver to the needs of the case which has been going on in equity for centuries.'
- (13) As it was put more recently, the Court should be 'unconstrained by rigid expressions of principle and responsive to the demands of justice in the contemporary context': see **Cruz City 1 Mauritius Holdings v Unitech Ltd and others (No. 2)**.²⁶

²⁵ [1980] 1 WLR 1182.

²⁶ [2014] EWHC 3131 (Comm) at [47(b)] (Males J).

(14) The question, therefore, is not whether the Court had the power to make the Receivership Order in the terms that it did (in either sense in which that expression is used): clearly it did. Instead, the real thrust of Floreat's challenge to the Receivership Order is that it was on the particular facts of this case inappropriate to exercise that power; but that objection too is flawed, for the reasons that follow.

[117] It is convenient therefore to turn to the points taken in the Floreat Intervenor's Notice of Application as to why the power should not have been exercised. These fall broadly into three categories:

- (i) First, points about the position of XYZ: the Floreat Intervenor contends that XYZ had not consented to being represented by receivers; that it had not been served with the *ex parte* order when the JPL Proceedings were commenced; and that the relief placed XYZ in breach of warranties and indemnities to RAGOF.
- (ii) Secondly, points about the necessity of the relief, and obtaining it *ex parte*: the Floreat Intervenor contends that XYZ was not prevented from bringing the JPL Proceedings in its own name; that there was no appropriate basis for the Court to exercise its discretion; that other remedies were available to Mr. Wang; that the *ex parte* order was not necessary to avoid giving notice to the Floreat Intervenor; and that the hearing should have proceeded *inter partes*.
- (iii) Thirdly, points about Mr. Wang's alleged collateral purposes in obtaining the Receivership Order: the Floreat Intervenor contends that it was intended as a means to obtain disclosure; as a means to avoid alleged payment obligations owed by Mr. Wang; and as a means to secure a transfer of the shares.

(16) As to the first group of points, concerning XYZ's position:

- (i) It is correct that XYZ has not consented to the Receivership Order. Equally, it has been served and has raised no objection to the Receivership Order (and, as Mr. Wang's evidence discloses, XY was informally on notice before the order was made). But it is not understood how this bears on the question of whether the

Receivership Order should have been made: in none of the cases considered above had the party in whose name receivers were appointed to sue consented to the receivers suing; indeed, if they had, the relief would presumably have been unnecessary.

- (ii) It is also correct that XYZ had not been served with the Receivership Order at the point when the JPL Proceedings were commenced; but, again, it is wholly unclear where this takes the Floreat Intervenor. The authority of the Receivers to commence the JPL Proceedings in XYZ's name derives from the making of the Receivership Order, not from its service.
 - (iii) The correctness or otherwise of warranties given about XYZ's and Mr. Wang's status as a Professional Investor is a point in favour of the making of the Receivership Order rather than against it. But, even if that is wrong, and even if XYZ was in breach of warranty, it would not be the making of the Receivership Order or the commencement of the JPL Proceedings that would make it so; the warranties were true or not irrespective of the making of the Receivership Order and commencement of the JPL Proceedings.
- (17) The only other recourse theoretically available to Mr. Wang was to seek a transfer of the shares into his own name so that he could bring the JPL Proceedings himself. However, Floreat has successfully sought to block the transfer. It is very difficult indeed to see how it can lie in Floreat's mouth to maintain that Mr. Wang could and should have procured a transfer of his shares into his own name rather than moved swiftly to secure the position by the appointment of receivers, and at the same time assert that Mr. Wang has no right to have the shares transferred to him.
- (18) As to the second group of points, concerning the necessity for obtaining the Receivership Order *ex parte*:
- (i) Whilst it may well be the case that XYZ was not contractually (or otherwise) prevented from bringing the JPL Proceedings itself, nevertheless the contractual terms between Mr. Wang and XY provided that 'the Bank will not engage in any legal action in connection with disputes concerning [RAGOF]'; and in a call with Mr. Wang's legal advisers on 23rd August 2021, before the *ex parte* hearing, senior litigation counsel at XY made it clear that, whilst XY was 'in principle always keen to assist its clients', it 'also sought to avoid being involved in legal

proceedings'. XYZ was thus unwilling to bring the JPL Proceedings itself; that, coupled with the other circumstances relied upon by Mr. Wang, sufficed to make the intervention of receivers necessary. Moreover, even if XYZ might have been prepared to change their position in this regard, it is clear that it would have taken a significant amount of time and engagement between the parties' respective legal advisers to achieve this. That would have left Mr. Wang's shares at the mercy of the continued control of RAGOF by the Floreat Principals and so exposed them to the risks identified above.

- (ii) In any event, any share transfer would have required the approval of the RAGOF board to be effective, which would likely not have been forthcoming, necessitating further applications and satellite litigation; and have tipped off Floreat to what Mr. Wang was proposing to do.
- (iii) On that last point regarding whether it was necessary to proceed without notice to the Floreat Intervenor, whilst the Court has found that Floreat has a sufficient interest to be joined in the proceedings, it does not follow that it should have been served at the outset.
- (iv) In any event, the risks associated with tipping the Floreat Intervenor off (whatever its interest in the application may have been) were real and more than sufficient to justify proceeding *ex parte*.

- (19) Finally, as to Mr. Wang's alleged collateral purposes in obtaining the Receivership Order, the idea that it was thought up as a convoluted way of getting more documents in frankly absurd. As a further suggestion that the purpose of the Receivership Order was to 'effect the transfer of the Shares to himself with the consequence that the receivership...would then fall away', this complaint is not understood: **'the transfer of the shares into Mr. Wang's own name is of course the very purpose of the proceedings in which the Receivership Order was made.'** (My emphasis added.)

15 Discussion

[118] It is apt, at this point, to begin with a number of general observations.

15.1 Stated purpose(s) of the Receivership Application

[119] Mr. Wang's submission, which I have just related, made at the hearing of the application to have the Receivership Order set aside, that 'the transfer of the shares into Mr. Wang's own name is of course the very purpose of the proceedings in which the Receivership Order was made' begged the question what, if anything, Mr. Wang had said about the purpose of the Receivership Application in his skeleton argument at the *ex parte* hearing. The answer is instructive. The application was introduced thus:

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

[120] Orally, that was also how the Receivership Application was presented at the *ex parte* hearing.

[121] Transfer of the shares into Mr. Wang's own name was not stated as being a purpose, let alone 'the very purpose' of the Receivership Application. It is correct that Mr. Wang expressed an intention that the shares might be transferred to himself, at which point the Receivership would fall away, but the purpose of the Receivership Application was explained to be to enable the Receivers to apply to wind up RAGOF, after having joint provisional liquidators appointed over RAGOF. It is important for the Court to keep in mind what the purpose of the Receivership Application was, as that goes directly to the manner in which the Court had to exercise its discretion when the Receivership Application was heard. A re-writing of history, in the context of a review of whether or not an *ex parte* receivership order should be set aside on grounds (*inter alia*) that the Court had exercised its discretion incorrectly, is something to be guarded against. This is so, because in exercising its discretion, the Court must assess whether it is just and convenient to accede to the order sought for the purposes the application has been brought.

[122] This submission, which did not tally fully with the facts, right at the end of Mr. Wang's (skeleton argument) presentation, was not isolated. There are a number of other such instances.

15.2 Alleged obstruction of transfer of shares

[123] Mr. Wang submitted at the discharge hearing that Floreat has successfully sought to block the transfer of RAGOF shares to Mr. Wang.

[124] There was however no evidence of any such attempt to transfer the shares, nor of any obstruction thereof, before the Court at the *ex parte* hearing of the Receivership Application. The matter had been put entirely speculatively upon that occasion. This is what Mr. Wang said in his evidence in support of the *ex parte* Receivership Application:

“138. I understand from my discussions with Appleby that in order to complete a transfer of any of the Nominee Shareholding to me such that I would have standing to commence the J&E Proceedings and PL Application, that transfer would need to be entered into the register of members of RAGOF and that this would require the approval and assistance of the RAGOF Directors and the Floreat Management, which I believe is highly unlikely to be forthcoming. Indeed, it is notable that this risk appears to be expressly envisaged as a likelihood by [XY] as, in relation to disputes concerning the investments, the [XY] Agreement at Article 15 specifically provides that: “The Bank accepts no responsibility for any refusal by the Issuer to execute the transfer of units to the Client or to a designated third party.”

139. In any event, if the RAGOF Directors and/or the Floreat Management were to become aware of the planned actions, I consider that there is a very substantial risk that they will take some action to dissipate funds and/or otherwise prejudice my position (including potentially by the compulsory redemption or forced sale of the shares which I beneficially own in RAGOF). Accordingly, the approach of transferring any of the Nominee Shareholdings to me is not possible in this case.”

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

[126] If any such attempt to have the shares transferred to himself occurred subsequently, and was blocked, then this is a factor that the Court would need to consider in deciding whether the Receivership Order should be continued or regranted. But, for the other reasons I will go on to explain, this is a case where the Receivership Order should be set aside and not regranted.

15.3 ‘Exactly’

[127] There was an apparently minor disagreement over what it precisely was that Mr. Wardell, QC, had replied to with ‘Exactly’. The context of this reply was the *ex parte* hearing of the Receivership Application on 26th August 2021. This hearing went on for some 3 hours and 4 minutes according to the official Transcript. The Transcript ran to 108 pages. The reply of

'Exactly', is situated on page 94, line 23 of the Transcript; thus came towards the end of the hearing. It came part way through a recapitulation I had embarked upon, beginning on page 93, line 24:

"THE COURT: Let's just go back to the beginning so that I fully understand the structure.

In essence, what you are doing is applying on an *ex parte* basis for the appointment of receivers and you are not doing it on a return date basis. You are doing it basically until further order, isn't that right?

[MR. WARDELL, QC]: Yes

THE COURT: And one of the reasons why you are doing that is obviously you are concerned to be able to – to get to the point of it basically, you have identified an exit mechanism for your client out of this very large investment structure that he has, to use [an] Americanism, gotten himself into in circumstances where really there isn't really a clear exit mechanism at all. And the first part of this exit mechanism involves obtaining a receivership over shares which are being held by, in essence, a nominee. There is no real interest in the pleadings ['pleadings' should have been 'proceedings'].

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

[MR. WARDELL, QC]: Exactly."

[128] What then followed was that I recapitulated my understanding of what the nominee's limited interest in the proceedings were, and the discussion moved on to other matters. Whilst Mr. Wardell, QC's argument might narrowly be correct that he was replying 'Exactly' to the proposition I had related concerning the nominee's position, this explanation overlooks a significant omission. Despite being presented with the opportunity to correct the Court's understanding, Mr. Wardell, QC, *did not do so*. This has a particular significance since Mr. Wardell, QC, had a duty of full and frank disclosure and fair presentation when presenting the application *ex parte*. Floreat's Counsel had been entirely reasonable in his assumption that Mr. Wardell, QC, had confirmed the exactitude of the entire attempted recapitulation that had preceded his answer. Indeed, that had been my understanding too, and not being corrected, I proceeded on that basis to make the Receivership Order sought.

[129] Mr. Wang's case at the discharge hearing was that the Receivership and JPL Applications had *not* been brought as an exit mechanism. If that is right, then this means the Court had been allowed by Mr. Wardell, QC, to make the *ex parte* Receivership Order on an erroneous basis.

15.4 'Justice Jack had of course read all of the evidence and submissions'

[130] Another submission by Mr. Wardell, QC, at the discharge hearing, which I found impossible to accept, came in the context of defending their conduct of the *ex parte* JPL Application hearing before Justice Jack. In an effort to contend that they had not failed in their duty of full and frank disclosure and fair presentation during that short (27 minutes' duration) hearing, Mr. Wardell, QC, submitted that 'Justice Jack had of course read all of the evidence and submissions'. Leaving aside that this assertion went further than what Justice Jack had said he read, it is a submission made without due reflection. This is because it is unreal to suppose that Justice Jack, or indeed any merely human Judge, could have read, remembered and understood the significance and implications of every fact and point contained in a 45-page skeleton argument, plus some 376 pages comprising 25 authorities and over 4100 pages of documentary evidence, all within **less than 24 hours**. Even if Mr. Wardell, QC, meant the affidavit/witness statement evidence, and not the documentary evidence, this would still be a physical and mental impossibility.

15.5 Artificiality

[131] The patent artificiality of the Receivership Application is a feature of this case. It raises questions whether or not the Court should have acceded to it. Mr. Wardell, QC, anticipated this potential difficulty. He stated:²⁷

"There is an element of artificiality about this application but it is the only route that we can see available to us to protect [Mr. Wang's] interest."

[132] Floreat Intervenor's Counsel called the Receivership Application a 'device'. This is a succinct and apt description. A receivership is generally a form of direct interim remedy to an actual or anticipated problem, rather than, as here, as a stepping-stone to a different form of interim relief.

²⁷ At page 98, lines 8 and 9 of the Transcript.

[133] Standing back, in my respectful reckoning, this is an instance where Mr. Wang and his legal team had determined upon a goal – to have RAGOF wound up – and then to arrange the display of pieces, including the convoluted and unusual procedural steps required, to achieve it.

[134] A number of factors have led me to this conclusion.

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

(2) The artificiality of the Receivership Application, and indeed Mr. Wang's entire scheme, was brought home in an unexpected way. At the end of the discharge hearing, I asked Counsel for all parties to provide the Court with their speaking notes to assist with preparation of the judgment. One of Mr. Wardell, QC's speaking notes came headed with a telling title: 'Project Ninja'. I can take judicial notice of what the terms 'project' and 'ninja' connote. The latter evokes a certain image in popular culture and is described by Wikipedia as 'a covert agent or mercenary in feudal Japan', whose functions 'included reconnaissance, espionage, infiltration, deception, ambush, bodyguarding and their fighting skills in martial arts, including ninjutsu'. The description goes on to say that

ninjas engaged in 'covert methods of waging irregular warfare'.²⁸ The title of 'Project Ninja' encapsulates Mr. Wang's entire scheme, including the desire for speed, stealth, aggression, surprise, infiltration, information gathering and an unusual degree of agility to surmount the legal obstacle course facing Mr. Wang. Nothing turns upon the actual use of this title here: it merely describes what the Court had already seen with the benefit of evidence and submissions from both sides.

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

[135] It is unusual to think of receivership as a device, rather than as a remedy. In my respectful judgment, this was not so much of a case of a problem in search of a solution, as a pre-meditated solution in search of a sufficient portrayal of a problem to justify it. Thus, the alleged wrongdoing was given a magnified emphasis whilst surrounding circumstances were left out of the picture. This only became apparent to me when Floreat was given an opportunity to put its own side of the matter.

15.6 Jurisdiction to make a receivership order

[136] I agree with Mr. Wang that the Court has the jurisdiction to make the Receivership Order. I reach this conclusion in light of the broad, open-ended, power conferred upon the Court to appoint receivers under section 24(1) of the Supreme Court Act. Where the basic jurisdictional prerequisites are satisfied, then the only limitation placed upon the Court's power to make a receivership order is that it should appear 'just or convenient' to do so. I agree with Mr. Wang that the question then is whether the Court had exercised its power correctly in this case.

[137] I also reach this conclusion on the basis that receivership orders have been regarded for a long time as a flexible remedy.²⁹ I see no difficulty, as a matter of established principle, with the

²⁸ <https://en.wikipedia.org/wiki/Ninja>.

²⁹ See e.g., *Attorney General v Schonfield* [1980] 1 WLR 1182, per Megarry V-C at 1187.

possibility of using a receivership order, as one type of draconian remedy, alongside another draconian remedy as a composite remedy in a complex situation. We see this in other situations, for example, with the use of ‘seal and gag’ orders in tandem with ‘Norwich Pharmacal’ orders.

[138] Ultimately, the existence or otherwise of the Court’s jurisdiction, or power, to make a receivership order is a question of statutory interpretation of section 24(1) of the Supreme Court Act. In this case, we are not dealing with statutory terms that have an ambiguous meaning, nor a situation where strict application of the words written would yield a perverse result. We are here concerned with the fact that the statute contains no express limitation upon the words ‘just or convenient’.

[139] How a Court is to construe the meaning of an unclear statutory term is well-settled. For that task, considering the term which needs to be construed in its wider statutory, legal and historical context is important. The relevant principles have been succinctly summarised in the Turks and Caicos Court of Appeal case of **Attorney General v Misick et al.**³⁰ with reference to leading English law authorities. There, a question arose whether or not a COVID-19 Emergency Regulation enabled judges to hear matters virtually from physical locations not necessarily with the jurisdiction. I can do no better than to quote the (extremely important and excellently summarised) relevant parts of that judgment (pronounced by Sir Elliott Mottley, President) verbatim:

“21. It is stated in the most recent edition of Bennion on Statutory Interpretation (7th Ed.), section 22.1 that:

“(1) The starting point in statutory interpretation is to consider the ordinary meaning of a word or phrase, that is its proper and most known signification.”

However, it is stated that the context may require an alternative meaning to be adopted. In **R (The Good Law Project) v Electoral Commission** [2017] EWHC 2414 at [33], Leggatt LJ said:

"The basic principles are that the words of the statute should be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation."

22. The rule relating to the purposive construction is set out in Bennion on Statutory Interpretation at section 11.1 where it is stated:

³⁰ CL-AP 6/20 and CL-AP 7/20 delivered 31st August 2020.

“Presumption that enactment to be given a purposive construction

(1) In construing an enactment the court should aim to give effect to the legislative purpose.

(2) A purposive construction of an enactment is a construction that interprets the enactment's language, so far as possible, in a way which best gives effect to the enactment's purpose.

(3) A purposive construction may accord with a grammatical construction, or may require a strained construction.”

23. In **DPP v Schildkamp** [1969] 3 All ER 1640, [1971] AC 1, Lord Upjohn observed that:

“The task of the court is to ascertain the intention of Parliament; one cannot look at a section, still less a subsection, in isolation, to ascertain that intention; one must look at all the admissible surrounding circumstances before starting to construe the Act. The principle was stated by Viscount Simonds in A-G v H R H Prince Ernest Augustus of Hanover ([1957] 1 All ER 49 at p 53; [1957] AC 436 at p 461):

“For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.”

24. Lord Nicholls stated in **R v Secretary of State for the Environment, Transport and the Regions and another, ex parte Spath Holme Ltd** [2001] 1 All ER 195:

“Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810 at 814, [1975] AC 591 at 613: 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.'

In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that

language is to be taken to bear its ordinary meaning in the general context of the statute.”

25. Further, Lord Nicholls stated:

“...the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission (with or without a draft Bill attached), and a statute's legislative antecedents.

Use of non-statutory materials as an aid to interpretation is not a new development. As long ago as 1584 the Barons of the Exchequer enunciated the so-called mischief rule. In interpreting statutes courts should take into account, among other matters, 'the mischief and defect for which the common law did not provide' (see Heydon's Case (1584) 3 Co Rep 7a at 7b, 76 ER 637 at 638).

Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure.

In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool.

This is subject to an important caveat. External aids differ significantly from internal aids. Unlike internal aids, external aids are not found within the statute in which Parliament has expressed its intention in the words in question.”

26. Lord Nicholls made it clear that the judge was required to identify the meaning of the words contained in Regulation 4(6) in the context of the Emergency Order. In order to do this, it was necessary to look at the intention of Parliament (in this case the Governor). His Lordship pointed out, this meant “the intention which the court reasonably imputes to Parliament” (the Governor) in respect to the words contained in Regulation 4(6).

27. In constructing Regulation 4(6) the judge was required to examine all the provisions of the Emergency Regulations which would also shed light on what was the intention of the Governor at the time he made the Regulation. Lord Nicholls also indicated that a judge should look at aids external to Regulation 4(6) “such as its background setting and its legislative history”.

28. In **Regina (Quintavalle) v Secretary of State for Health** [2003] 2 AC 687, Lord Bingham at para 8 stated:

[8] The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every

contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

29. Lord Bingham went on to point out that the dissenting opinion of Lord Wilberforce in the **Royal College of Nursing of the United Kingdom v Department of Health and Social Security** [1981] AC 800 may now be treated as authoritative. Lord Wilberforce stated at p. 822:

In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question "What would Parliament have done in this current case - not being one in contemplation - if the facts had been before it?" attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.

30. Lord Bingham later stated:

"On the other hand, the adoption of a purposive approach to construction of statutes generally, and the 1990 Act in particular, is amply justified on wider grounds. In Cabell v Markham (1945) 148 F 2d 737, 739 Learned Hand J explained the merits of purposive interpretation:

"Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

The pendulum has swung towards purposive methods of construction.”

- [140] It can be seen from this statement of principle that this concerns discernment of what the legislature meant, or, conversely, did not mean, when it adopted a certain term or phrase.
- [141] Here, the Court is not being called upon to **ascertain the meaning**, as such, of ‘just or convenient’ (nor any other term in section 24(1) of the Supreme Court Act), as the meaning of these words is plain enough. Instead, the Court is required to **apply** this most general and fact-sensitive of phrases. This is a crucial, albeit subtle, distinction. The Floreat Intervenor’s Counsel’s submission that the Court should find that the Court has no jurisdiction to grant a receivership order, because the BVI legislature has studiously avoided conferring standing to sue for certain types of relief upon indirect shareholders, seems to me to be flawed, because he thereby elides the distinction between construing the meaning of statutory terms and applying them.
- [142] I do accept, however, that the overall historical legislative context of a statutory provision can provide indications as to how the legislature considers that a discretion should in general be exercised, recognising, of course, that there might well be exceptions. The fact that the BVI legislature has avoided conferring standing to sue upon indirect owners of shares is one factor amongst many that should inform the exercise of discretion whether or not to grant some form of relief calculated to by-pass that limitation.
- [143] A related factor going to the exercise of the Court’s discretion must be that where a party has chosen or consented to arrange his financial affairs in such a way as to have the benefit of assets but not the burden and risks of owing them directly, then there would have to be good reason why that party should be relieved of negative consequences. It is not in principle unjust, nor unfair, to leave a party exposed to the consequences of his choices. On the other hand, it may be unduly harsh, and indeed unjust, to deny such a person the protective remedies of the Court in the face of wrongdoing against him. There is a reasonable balance to be struck.
- [144] In this regard, I do not accept that Mr. Wang was as financially inexperienced as he emphasises himself to be. That is, I think, highly unlikely, given his history of uncommonly numerous banking relationships, his ultra-high net worth, and the long-running international litigation that he has been embroiled in. Whilst he portrays himself as an unworldly aesthete,

he also describes himself as a ‘businessman’. He seeks to blame Floreat for the structure of his arrangements and for having subjected him to Floreat’s influence in all things financial, but there is no evidence that Mr. Wang was incapable of taking fully independent legal advice in relation to the implications of the ownership structure – as he has indeed subsequently done with the engagement of his lawyers and FFP in relation to the present proceedings.

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

[146] I also accept the Floreat Intervenor’s contentions that the circumstances of the present case are such that justice and convenience does not render a receivership order appropriate, for the reasons advanced by the Floreat Intervenor.

15.7 Full and frank disclosure and fair presentation

[147] The principles to be applied by the Court pertaining to the duty of full and frank disclosure and fair presentation, and the consequences of breach of that duty were largely not in dispute between the parties. What was mainly in dispute was the emphasis they should be given.

[148] One area of disagreement, though, was whether Mr. Wang had had a duty of full and frank disclosure at the *ex parte* Receivership Application hearing to give full and frank disclosure and make a fair presentation of the intended, but separate and subsequent JPL Application. Mr. Wang argued that he had no such duty, precisely because the JPL Application would be separate and subsequent, but the Floreat Intervenor argued that Mr. Wang did have such a duty.

[149] I agree with the Floreat Intervenor on this point. Where, as here, a receivership is to be the first part of a two- or multi-part remedy, then it makes perfect sense that the Court should be given as full and as balanced a view as possible of the merits of both or all parts of the remedy sought. That is because there would be no point, and indeed it would be contrary to principle, to grant one part of the remedy if another part has insufficient merit. This must be so where, as here, the remedies sought are interdependent. The Court refrains from granting useless remedies. Put in more classical legal language – the Court does not act in vain. It is highly artificial and technical for a litigant in Mr. Wang’s position to say: ‘Ah ha! The application for the second part of the remedy is not currently before the Court, so I need not address the Court on it. You can ignore that future application for now, and I can be economical with what I have to say about it.’ Where, as here, an applicant has made it abundantly clear that he wishes to deploy a double-, or multiple- strike strategy using the Court’s weapons, he comes under a duty to give full and frank disclosure and fair presentation of the whole plan.

[150] It behooves me to give a brief synopsis of the particularly relevant principles concerning the duty itself. I can do no better than to quote from the Court of Appeal decision in **Commercial Bank – Cameroun v Nixon Financial Group Limited**:³¹

“[17] The principles underlying the duty to make full and frank disclosure in applications made without notice may be summarized as follows –

- (1) A person applying for relief upon an application made *ex-parte* must make full and frank disclosure of all material matters relevant to the decision whether or not to grant the application. (R. v Kensington Income Tax Commissioners Ex p. Princess Edmond de Polignac [1917] 1 K.B. 486.)
- (2) The test of materiality is “...whether the matter might reasonably be taken into account by the judge in deciding whether or not to grant the application...” (MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm) per Toulson J at [30].)

³¹ BVI HCVAP 2011/005 (Unreported, delivered 6th June 2011) (Bennett, QC, JA (Ag)).

- (3) Materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers. (*Brink's-MAT Ltd v Elcombe* [1988] 1 W.L.R. 1350 per Ralph Gibson LJ at 1356G.)
- (4) The duty of candour is a heavy one. (*Brink's-MAT Ltd v Elcombe* [1988] 1 W.L.R. 1350 per Slade LJ at 1359C.) The duty of disclosure extends not only to material facts known to the applicant, but to additional facts that he would have known had he made proper inquiries. (*Brink's-MAT Ltd v Elcombe* [1988] 1 W.L.R. 1350 per Ralph Gibson LJ at 1356H.) Moreover, the applicant is under a duty to present fairly the facts so disclosed. (*Lloyds Bowmaker v Britannia Arrow Holdings Plc* [1988] 1 W.L.R. 1337 at 1343 per Dillon LJ at 1348E-F.) The rationale for the duty is that the court is being asked to grant relief in the absence of the Defendant and is wholly reliant on the information provided by the Claimant. Other parties do not have the opportunity to collect or supplement the evidence which has been put before the Court. (*Ghafoor v Cliff* [2006] 1 W.L.R. 3020 at [46].) Observance of the duty is essential to secure the integrity of the Court process and to protect the interest of those potentially affected by whatever order the Court is invited to make.”

15.7.1 Floreat Intervenor's perspective

- [151] The Floreat Intervenor predictably emphasised that the duty of candour is a heavy burden and a high duty. Moreover, it urged that where the relief obtained had been one of the Court's 'nuclear weapons', such as a freezing order, the 'fullest and frankest' disclosure is required, failing which, the order obtained should be revoked.³²
- [152] The Floreat Intervenor also stressed the well settled principle that it is not enough to include material in a bundle, but that the judge at an *ex parte* hearing should be taken to the material and be given a fair explanation for what the material entails.³³
- [153] The Floreat Intervenor referred to the following cases: **Blue Cap Enterprises Ltd v Meyer**;³⁴ **Tugushev**;³⁵ **Brink's Mat Ltd v Elcombe**;³⁶ **Mitsuji Konoshita v JTrust Asia Pte Ltd**.³⁷

³² *Bank Mellat v Nikpour* [1985] FSR 87 (CA) 92 (Donaldson LJ).

³³ *National Bank of Sharjah v Dellborg* (EWCA, 9 November 1992) 7; *Mei-Huan v Victory Success Holdings Limited* BVIHMAP 2020/0028 (unreported, delivered 22 September 2021) at paragraph [102] (Morrison JA. (Ag.)); *Behbehani v Salem* [1989] 1 WLR 723 (EWCA) 729; *Hu Lan* at paragraph [63] (Wallbank J. (Ag.)).

³⁴ ANUHCv 2017/0272 (unreported, delivered 21 August 2017) at paragraph [23] (Wilkinson J.).

³⁵ At paragraph [7(i)] and [7(ii)].

³⁶ [1988] 1 WLR 1350 (CA) 1359.

³⁷ BVIHMAP 2018/0047 (unreported, delivered 18 December 2018) at paragraph [22(iv)] (Thom JA.).

HMRC v Winnington Networks Ltd.³⁸ **Bank Mellat v Nikpour**;³⁹ **Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)**;⁴⁰ **Hu Lan**.⁴¹

[154] Concerning the consequence of a breach of the duty of full and frank disclosure, the Floreat Intervenor stressed the policy of revoking an order so obtained and the reluctance that the Court should have in granting it, especially where the failure was not innocent.

[155] The Floreat Intervenor urged that if the duty is breached, the Court will ensure that a claimant who wrongly obtained relief is deprived of any advantage it may have derived from it: **Tugushev**;⁴² **Hu Lan**.⁴³ Thus, where the applicant has breached that duty, the general rule is that the Court will discharge the order, and not renew it: **Arena Corp Ltd v Schroeder**;⁴⁴ **Mei-Huan**.⁴⁵ Notably: if the applicant has committed a substantial breach of its material disclosure duty, the court ‘inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent’: **Banca Turco Romana SA v Cortuk**.⁴⁶

[156] The Floreat Intervenor urged that if the Applicant’s non-disclosure was deliberate, it will ‘almost always’ be appropriate to apply the general rule; the court will not discharge the order only in ‘exceptional circumstances’: **Banca Turco**;⁴⁷ **Lan**.⁴⁸ In that regard: a failure to disclose is ‘innocent’ if the applicant did not:

- (1) know the fact in question;
- (2) understand its relevance; or
- (3) intend to omit or withhold information thought to be material (for example, the applicant did not fail to investigate for fear of discovering facts which would have to be disclosed): **NBT**;⁴⁹ **Mei-Huan**.⁵⁰

³⁸ [2014] BCC 675 (Ch) paragraph [7] (Norris J.).

³⁹ [1985] FSR 87 (CA).

⁴⁰ [2009] 1 All ER (Comm) 479 paragraph [61] (Flaux J.).

⁴¹ At paragraph [63].

⁴² At paragraph [7(ix)].

⁴³ At paragraphs [63], [65].

⁴⁴ [2003] EWHC 1089 (Ch) at paragraph [213(1)] (Mr. Alan Boyle, QC).

⁴⁵ At paragraph [90].

⁴⁶ [2018] EWHC 662 (Comm) [45] (Popplewell J.).

⁴⁷ At paragraph [45].

⁴⁸ At paragraph [63].

⁴⁹ At paragraph [84].

⁵⁰ At paragraph [100].

[157] The Floreat Intervenor urged that the Applicant bears the onus of explaining its non-disclosure. If an Applicant who is guilty of non-disclosure wishes the Court to treat it as innocent, the Applicant must explain how the non-disclosure came about: **Banca Turco**,⁵¹ **Hu Lan**.⁵² The absence of any explanation gives rise to a strong inference that the applicant cannot put forward an innocent one: **Banca Turco**.⁵³

[158] The Floreat Intervenor submitted that the Court will discharge the order even if, had the Applicant brought the relevant matter(s) to the court's attention at the without notice hearing, it would have made the order at the time. This is intentionally penal, urged the Floreat Intervenor, to deter any future breach of duties: **Tugushev**.⁵⁴

[159] Nevertheless, urged the Floreat Intervenor, the Court has a discretion to continue the order, or impose a new order to the same effect, despite a breach of the duty: **NBT v Yurov**,⁵⁵ **Hu Lan**.⁵⁶ But, urged the Floreat Intervenor:

- (1) The Court will exercise that discretion 'sparingly'; the overriding consideration will always be the interests of justice: **Tugushev**,⁵⁷ **Hu Lan**.⁵⁸
- (2) As regards the duty, a court should consider:
 - (i) the importance of the facts not disclosed to the issues;
 - (ii) the need to encourage proper compliance with the duty and to deter non-compliance;
 - (iii) whether or not the applicant was at fault, and to what extent; and
 - (iv) the injustice to a claimant which may occur if an order is discharged and not imposed, although a strong case on the merits will never be a good excuse for a failure to disclose material facts: **Tugushev**,⁵⁹ **Hu Lan**.⁶⁰

⁵¹ At paragraph [34(1)].

⁵² At paragraph [65].

⁵³ At paragraph [34(1)].

⁵⁴ At paragraph [7(xi)].

⁵⁵ At paragraph [18(c)], [77].

⁵⁶ At paragraph [64].

⁵⁷ At paragraph [7(xii)].

⁵⁸ At paragraph [64].

⁵⁹ At paragraph [7(xii)].

⁶⁰ At paragraph [64].

- (3) The court will not regrant the order merely because it would be justified if the applicant had disclosed all material matters and made a fair presentation. This is because the penal element is an important factor in weighing the interests of justice: **Fundo Soberano**.⁶¹

15.7.2 Mr. Wang's perspective

[160] Mr. Wang's emphasis was, equally predictably, upon the principle that discharge of an order for failure to give full and frank disclosure is not automatic, and the need for the Court to weigh the interests of justice in considering either to revoke the order or to regrant it.

[161] Mr. Wang accused the Floreat Intervenor of rushing to allege material non-disclosure in circumstances where they have little hope of succeeding on the substantial merits, an approach which Mr. Wang submitted was criticised in **Brink's Mat Ltd v Elcombe**.⁶²

[162] Mr. Wang attempted to have the issue of alleged breach of the duty of full and frank disclosure put off until an eventual trial. Mr. Wang argued that in **Dormeuil Freres S.A. v Nicolian International (Textiles) Ltd**,⁶³ Sir Nicolas Browne-Wilkinson VC cited Slade LJ in **Brink's Mat Ltd** with approval and went on to state that the

"...question whether the earlier ex parte order should be set aside is not an urgent matter and is only relevant to the cross-undertaking in damages. Similar considerations apply in the case of ordinary ex parte injunctions." and that

"...therefore, in the ordinary case it is wrong on the hearing of an inter partes motion to go into the huge complexities involved in seeking to disentangle at that stage whether there was full disclosure when the ex parte order was obtained. The matter should normally be dealt with at trial..."

[163] Mr. Wang also stressed that the duty of full and frank disclosure and fair presentation

"...only extends to those issues which can be said to be material to the decision which the judge had to make on the application. Materiality depends in every case on the

⁶¹ At paragraph [82].

⁶² [1988] 1 WLR 1350 per Slade LJ at 1359B-E.

⁶³ [1988] 1 WLR 1362, at 1369.

nature of the application and the matters relevant to be known by the judge when hearing that application.”⁶⁴

- [164] Mr. Wang sought to use and rely upon information he has obtained as a result of the *ex parte* JPL Order. Mr. Wang argued that in **WEA Records Ltd v Visions Channel 4 Ltd**⁶⁵ Sir John Donaldson MR (at 727-728) described as absurd the defendants’ suggestion that the evidence obtained by way of an *ex-parte* order should be ignored when considering whether to set aside that order, making clear that the ‘courts are concerned with the administration of justice, not with playing a game of snakes and ladders’.

15.7.3 Discussion on full and frank disclosure and fair presentation

- [165] It is important that the Court should apply a right balance in its application of the principles pertaining to the duty of full and frank disclosure and fair presentation. In this regard, the Court can take guidance from the English Commercial Court case of **Congentra AG v Sixteen Thirteen Marine SA**⁶⁶, where Flaux J (as he then was) stated the following (with my emphases):

- “62. As the Court of Appeal stated in *Brink’s Mat Ltd v Elcombe* [1988] 1 WLR 1350 and as has been repeated in subsequent cases, **the purpose of this rule is to deprive a wrongdoer of an advantage improperly obtained and to serve as a deterrent to others to ensure that they comply with their duty to make full and frank disclosure on ex parte applications.** However, even if there has been material non-disclosure, **the Court has a discretion whether or not to discharge an order obtained ex parte and whether or not to grant fresh injunctive relief. Discharge of the order is not automatic** on any non-disclosure being established of any fact known to the applicant which is found by the Court to have been material, **although it would only be in exceptional circumstances that a Court would not discharge an order where there had been deliberate non-disclosure or misrepresentation.** It is not alleged in the present case that any of the alleged non-disclosures or misrepresentations was deliberate. Whilst it is no answer to a complaint of non-disclosure to say that even if the relevant matters had been placed before the Court, the result would have been the same, that is a relevant consideration in the exercise of the Court’s discretion.
63. **In exercising that discretion, the overriding question for the Court is what is in the interests of justice.** This is very clear from all three judgments in the Court of Appeal in *Brink’s Mat*. Ralph Gibson LJ was prepared to continue the order on the basis that he had no doubt that even if the additional information had

⁶⁴ Citing Gee: Commercial Injunctions at 9-003.

⁶⁵ [1983] 1 WLR 721.

⁶⁶ [2008] EWHC 1615 (Comm).

been disclosed, the judge at the *ex parte* hearing would have made the same order on the same terms. Balcombe LJ at 1358E said this:

"Nevertheless, this judge made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original *ex parte* injunction was obtained."

64. Slade LJ at 1359C made the point that in heavy commercial cases, the borderline between material facts and non-material facts may be an uncertain one. He continued:

"In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom *ex parte* injunctions have been granted, or of their legal advisers, to rush to the *R v Kensington Income Tax Comrs* principle as a *tabula in naufragio*, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.

Though in the present case I agree that there was some material, albeit innocent, non-disclosure on the application to Roch J, I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such non-disclosure, to refuse to continue the injunction granted by Roch J on 9 December 1986."

15.7.3.1 Breach of the duty at the JPL Application *ex parte* hearing

[166] The parties' main focus in the present case had been the representations by Mr. Wardell, QC, at the *ex parte* JPL Application hearing that Floreat had an absolute right to redeem the RAGOF shares, and thus that Mr. Wang had no protection. I accept that both parts of this explanation:

- (1) were very arguably wrong;
- (2) were put in different, stronger, terms than at the *ex parte* Receivership Application hearing;
- (3) lacked any meaningful attempt to explain or support them with reference to underlying documents;
- (4) were not accompanied by any meaningful attempt to lay out the contrary position;
- (5) were the key, and indeed only expressly made, points which persuaded Justice Jack to consider the JPL Application on an *ex parte* basis.

[167] The Floreat Intervenor stressed the exceptional nature of proceeding *ex parte*. The Floreat Intervenor submitted that it is a basic principle of fairness that a court will hear both sides before reaching a decision or granting relief: **Tugushev v Orlov (No.2)**;⁶⁷ **Hu Lan v Sundale International Ltd**;⁶⁸ thus derogation from that principle is to be truly exceptional. That is all the more so, said the Floreat Intervenor's Counsel, where the relief being sought is one of the law's 'nuclear weapons', such as the appointment of a provisional liquidator. I accept that this is a correct statement of principle.

[168] The Floreat Intervenor also referred to the following cases: **Alliance Bank JSC v Abdullayevich Zhunus**;⁶⁹ **Tethyan Copper Co Pty Ltd v Islamic Republic of Pakistan**;⁷⁰ **Siporex Trade SA v Comdel Commodities Ltd**;⁷¹ **Mitsuji**;⁷² **Rugby Borough Council v Tayton**;⁷³ **National Bank of Sharjah v Dellborg**;⁷⁴ **Mei-Huan v Victory Success Holdings Limited**;⁷⁵ **R (on the application of Lawer) v Restormel BC**;⁷⁶ **Behbehani v Salem**;⁷⁷ **Hu Lan**;⁷⁸ **Arena Corp Ltd v Schroeder**;⁷⁹ **Fundo Soberano De Angola v dos Santos**;⁸⁰ **JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev**;⁸¹ **United Kingdom Independence Party Ltd v Braine**;⁸² **Alliance Bank**;⁸³ **Dar Al Arkan Real Estate Development Co v Al-Refai**.⁸⁴

[169] The circumstances of the representations in question merit scrutiny. The hearing Transcript records that the representations were made after Justice Jack had indicated **five times** that he was minded to adjourn the JPL Application for a short time to enable it to be heard on an *inter*

⁶⁷ [2019] EWHC 2031 (Comm) at paragraph [7(ii)] (Carr J.)

⁶⁸ BVIHCM 2019/0167, (unreported, delivered 6 July 2020) at paragraph [61] (Wallbank J. (Ag.)).

⁶⁹ [2015] EWHC 714 (Comm) at paragraph [65] (Cooke J.)

⁷⁰ BVIHC (COM) 2020/0196 (unreported, delivered 25 May 2021) at paragraph [96] (Wallbank J. (Ag.)).

⁷¹ [1986] 2 Lloyd's Rep 428 (Comm) 437.

⁷² At paragraph [22(ii)].

⁷³ [2020] EWHC 898 (QB) at paragraph [29].

⁷⁴ CA, 9 November 1992 at paragraph 7.

⁷⁵ BVIHCMAP 2020/0028, (unreported, delivered 22 September 2021) at paragraph [102] (Morrison JA. (Ag.)).

⁷⁶ [2008] HLR 20 (QB) at paragraph [69].

⁷⁷ [1989] 1 WLR 723 (CA) 729.

⁷⁸ At paragraph [61], [63].

⁷⁹ [2003] EWHC 1089 (Ch) at paragraph [117].

⁸⁰ [2018] EWHC 2199 (Comm) at paragraph [52].

⁸¹ [2016] EWHC 248 (Ch) at paragraph [40].

⁸² [2019] EWHC 3527 (QB) at paragraph [67].

⁸³ At paragraph [66(7)].

⁸⁴ [2012] EWHC 3539 (Comm) at paragraph [133].

partes basis. On each occasion Mr. Wardell, QC, had tried but failed to persuade Justice Jack otherwise with a variety of reasons. The representation in issue however caused Justice Jack to change his mind.

[170] It is also clear that proceeding *ex parte* was a vital part of Mr. Wang's strategy. I am persuaded that the real reason for this was not the risk that Floreat Principals would be tipped off and dissipate assets or destroy documents in the short time before an *inter partes* hearing (those being unlikely as a matter of practical possibility given the real estate and accounts receivable nature of much of the assets and that both RAGOF and Floreat are regulated entities, despite the crude and indeed vulgar threats of financial retribution Mr. Wang had received from Floreat and one of its Principals), but because Mr. Wang wished to present Floreat and its Principals with a *fait-accomplis*. It was also important for Mr. Wang's strategy to retain tight control of the timing and the narrative. 'Project Ninja' had a lot of moving parts, and a very narrow window for possible success, in light of the high bars to be overcome for obtaining receivership and provisional liquidation orders and the pitfalls of the full and frank disclosure and fair presentation obligation. Thus, it is entirely understandable that when met with Justice Jack's repeated resistance against proceeding on an *ex parte* basis, Mr. Wardell, QC, should seek to increase the strength of his submissions to overcome this blockage. Unfortunately, not only did Mr. Wardell, QC, very arguably over-state the facts, but he omitted to use any of the three and a half hours or so that Justice Jack had indicated were available to explain properly the forced redemption and lack of protection points.

[171] Mr. Wardell, QC, tried to minimize these failures. He argued that his submissions concerning the right of redemption only concerned the question of whether the JPL Application should proceed on an *ex parte* or *inter partes* basis with Justice Jack otherwise satisfied that the Court should make the JPL order on the substantive merits of the application. I am afraid I cannot accept this argument. It assumes that holding an *inter partes* hearing would have made no difference to the order granted. It is obvious that it is precisely because an *inter partes* hearing might make a difference that Justice Jack was desirous of having one.

[172] In obtaining an *ex parte* hearing by means of those representations, Floreat's side were deprived of a fundamental right of natural justice; they were deprived of the opportunity to put their side of the matter, and Mr. Wang had ensured that all Floreat eventually had to say on the matter was excluded before a JPL Order was made. This included, but was not limited to,

Floreat's contentions about the availability of alternative, less draconian, remedies. The representations thus had a very serious effect upon the administration of justice in relation to the JPL Application.

[173] The representations did not go merely to a procedural issue, although that was their immediate effect. The submission that Mr. Wang had 'no protection' directly fed Mr. Wang's narrative that it would be 'necessary', within the meaning of that word used in section 170(4)(b)(i) of the Insolvency Act 2003⁸⁵ to appoint provisional liquidators. That representation was highly material to the substantive issues for determination in the JPL Application, in that it would reasonably need to be taken into account by the Judge in deciding whether or not to grant the JPL Application.

[174] I also need to consider whether the failure to give full and frank disclosure and/or to make a fair presentation was innocent or not innocent.

[175] In my respectful judgment it was not innocent. Faced with Justice Jack's resistance against continuing with the hearing on an *ex parte* basis, Mr. Wardell, QC, conceived a submission which he hoped would persuade Justice Jack to keep the matter *ex parte*. Mr. Wardell, QC, must have deliberated interiorly, albeit perhaps for a split-second, whether or not to make that submission and he decided to do so. Mr. Wardell, QC, afterwards, with the benefit of more mature reflection, has stood by that submission. The submission can thus be said to have been deliberate and intentional and not accidental. That Mr. Wardell, QC, stood by that submission is also significant in another respect. He thereby tied the Court's hands. The Court could then only treat any breach or omission as intentional, thus generally excluding a continuation or regrant. Had Mr. Wardell, QC, however, acknowledged that he had mistakenly overstated his client's position in the heat of the moment (such that the Court could properly conclude that the error had not been intentional), then the Court would have had greater latitude in relation to the possibility of assisting a litigant with a continuation or regrant of the relief in question. As matters stood however, the Court was in effect given a binary choice by Mr. Wardell, QC: either to agree with him that he had not breached his duty of full and frank disclosure and fair presentation in one or more material respects, or to rule that he had

⁸⁵ No.5 of 2003.

breached that duty; whereupon, in the case of the latter, absent other considerations of justice, the interim relief obtained in consequence would ordinarily be discharged without a regrant.

[176] It is less easy to see whether or not the omission to take the Judge to the underlying documents, and to anticipate the other side's eventual counterarguments, was deliberate or accidental. I would like to think that this was an oversight. But it is possible that this was deliberate, because if Mr. Wardell, QC, had done so, he would inevitably have been put to the quite lengthy and intricate task of explaining the right of forced redemption, and that would quite probably have reinforced Justice Jack's sense that the application should be adjourned to continue on an *inter partes* basis. At the *inter partes* hearing, quite considerable time was taken up with arguments on this by both sides. This itself highlights the gravity of Mr. Wardell, QC's omission, because there was clearly a lot to be said on the point by both sides. But I do not, and do not need to, ascribe any premeditated intent on the part of Mr. Wardell, QC, to avoid such judicial scrutiny of the contention at the *ex parte* hearing. It suffices to say that no good explanation has been given for the omission and further, that with Mr. Wang being represented by experienced Senior Counsel, there was simply no excuse for the omission. There was no excuse for allowing Justice Jack to proceed under the impression that, in unqualified terms, Mr. Wang 'had no protection' and that an absolute right of forced redemption had accrued.

[177] Mr. Wardell, QC, tried to extract himself from these difficulties by arguing that 'Justice Jack would have well understood what [Mr. Wardell, QC] was trying to say' because 'he had read the evidence'. This submission is, once again, an attempt to re-write history in a manner that does not tally fully with the facts. This alleged universal knowledge and comprehension of the part of Justice Jack, which formed part of Mr. Wang's case concept at the discharge hearing, is not borne out by the *ex parte* hearing Transcript. This shows some three or four instances, all within the space of a few minutes, in which Mr. Wardell, QC, sought to correct Justice Jack's understanding, as well as several points on which Justice Jack sought clarification. The suggestion that, against that background, the Court can assume that Justice Jack otherwise 'well understood' what Mr. Wardell, QC, would or should have said (but did not), is not persuasive. It does not absolve Mr. Wardell, QC, from having failed to give full and frank disclosure and made a fair presentation.

- [178] For these reasons, Mr. Wang's failures in these respects were, in my respectful judgment, not innocent.
- [179] The consequences were that the Court proceeded to make the JPL Order without the benefit of a sufficient consideration of possible counterarguments and of alternative remedies.
- [180] The Floreat Intervenor has submitted that there were at least three alternative remedies to a JPL order and/or winding up: a staged redemption of the RAGOF shares, an unfair prejudice action, if necessary supported by an injunction and/or Stop Order, or legal proceedings for breach of duty and/or conspiracy – as Mr. Wang had indeed begun to prepare for in England.
- [181] The Floreat Intervenor submitted, and I accept, that Mr. Wang failed to disclose to the Court that XYZ (through the Receiver) and/or Mr. Wang arguably could and should have pursued reasonable and proportionate alternative remedies instead of seeking to appoint JPLs, and as an alternative to a winding up. I am satisfied that such alternative remedies are at least arguably available. A proper and fair presentation on potential alternative remedies should have been made.
- [182] Concerning an eventual winding up, I am also satisfied that a winding up of RAGOF on the just and equitable ground may well be a disproportionately harsh remedy. I reach this view on the basis that whilst Mr. Wang has a good arguable case in respect of a number of apparent conflicts of interest on the part of the Floreat Principals, the overall performance of RAGOF's assets appears to be satisfactory; there appears to have been no suggestions of any regulatory breaches in respect of RAGOF or Floreat; and the arrangements between Mr. Wang and Floreat, including fees, appear to have arisen out of a tailor-made scheme intended to assist Mr. Wang with liquidity whilst his assets were subject to freezing orders and other relief granted by overseas courts, and thus the complaints need to be considered in their proper and unique context. Some of the alleged wrongdoings, or contractual arrangements that might facilitate wrongdoing, appear moreover to be historic, pre-dating Mr. Wang's investment, such as some of those in relation to Springs Farm, including its purchase and the deed of indemnity executed in respect thereof. Additionally, despite Mr. Wang's current protestations that he is not a 'Professional Investor', there is ample evidence, and it is indeed common ground, that Mr. Wang had agreed to be treated as such. The Court must be astute not to be beguiled into vacillation according to the whims or convenience of self-characterisations litigants decide to

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

[183] This is not to be taken as an indication of the Court's likely view upon the presentation of an application to appoint liquidators. The Court has not yet formed a view. But in relation to the appointment of JPLs, the potential availability of alternative remedies and the issues in relation to an intended application to wind RAGOF up on the just and equitable ground are of such great importance that the Court would have significantly benefitted from hearing both sides, not just the applicant, as natural justice would ordinarily require.

[184] Where this leaves the matter, is that this is, in my respectful judgment, a situation where the JPL Order ought to be set aside, not regranted, and Mr. Wang deprived of the benefits he has gained thereby.

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

[186] I am also not persuaded by Mr. Wang's submission that breach of the duty of full and frank disclosure and fair presentation is an issue for trial or thereafter. It is common, and indeed almost invariable, that challenges to draconian interim relief granted *ex parte* are founded upon alleged breaches of this duty. It would of course be most convenient for a litigant in Mr. Wang's position for such relief, improperly obtained, to remain in place until trial or thereafter, but if that were the law then it would reward breaches of the duty. Such a notion also runs diametrically contrary to the purpose of the rule, which is to deprive a wrongdoer of an advantage improperly obtained and to serve as a deterrent to others to ensure that they comply with their duty to make full and frank disclosure on *ex parte* applications.

[187] I am also not persuaded that the JPLs' reports tilt the balance in favour of continuing the JPL Order or a regrant. Mr. Wang has clearly been hoping that the alleged wrongdoing revealed or corroborated by the JPLs once inside the structure would save the *ex parte* orders made. For that reason, doubtlessly, Mr. Wardell, QC, opened his defence of the *ex parte* orders not with explanations for, or submissions about, his side's own conduct, but with a repetition of their already well-worn narrative about Floreat's alleged wrongdoings. The reason I was not persuaded by their reports to continue the JPL Order or regrant it is because, as Floreat Intervenor's Counsel observed, they contain no findings, and their investigations are still ongoing. I am satisfied that although Mr. Wang might have valid and legitimate criticisms of Floreat and its Principals' conduct, significant dissipation which could not be compensated through an award of damages, is unlikely.

[188] That said, Mr. Wang's own evidence for the *ex parte* Receivership Application was replete with references to what 'appears' to have been wrongdoing, or possible wrongdoing on the part of Floreat and the Floreat Principles. Appearances may, on due closer examination, prove to be deceptive. The Court should of course be circumspect before making potentially devastating orders on the basis of 'appearances'.

[189] I would say further that usually where an order is continued or regranted despite a failure to give full and frank disclosure and fair presentation, the potential injustice and/or harm in revoking the protective order is clear. It is usually pellucid that but for the error(s) in respect of full and frank disclosure and fair presentation, the situation calls for the interim relief in question if justice is to be done. A regrant can then follow. Here, it is not at all pellucid that justice reasonably requires a regrant.

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

15.7.3.2 Breach of the duty at the Receivership Application *ex parte* hearing

[191] The circumstances concerning the *ex parte* Receivership Application were slightly different. That hearing went on for some 3 hours. In conducting that hearing, I did not present Mr. Wardell, QC, with a preliminary challenge to it proceeding on an *ex parte* basis. I made the

order sought, having been persuaded to do so by Mr. Wardell, QC's submissions and explanation of the matter.

[192] That included, or rather omitted, any attempt to correct my recapitulation that Mr. Wang was making the applications in circumstances where he had no clear exit mechanism from the structure. I am now persuaded that that was an incorrect understanding, since a staged redemption process was possible or arguably possible, and there were very probably other ways in which Mr. Wang or his agents or nominees could get themselves in a position to have standing to apply for the appointment of liquidators over RAGOF if other remedies should not have been reasonably available. That omission was material, because if I had understood Mr. Wang's present scheme merely to be what it appears to be (namely the quickest and cheapest way to Mr. Wang's desired result of unwinding the whole structure and abstracting the value of his investment), then I would have been considerably more reluctant to grant the Receivership Order sought and indeed I would probably have refused it.

[193] I accept the Floreat Intervenor's contentions, and their reasons therefore, that Mr. Wardell, QC, had also failed to give full and frank disclosure and a fair presentation at the *ex parte* Receivership Application, in particular of:

- (1) potentially available alternative remedies to the appointment both of Receivers (transfer of the shares to another nominee) and JPLs (unfair prejudice and potentially other proceedings, including injunctive type relief);
- (2) the alleged right of forced redemption;
- (3) the overall context in which Mr. Wang had engaged Floreat and its Principals to provide him with a financial solution to his liquidity problems caused by overseas court orders.

[194] I am satisfied that these aspects were material to the Court's consideration whether or not to accede to the appointment of receivers, particularly where the appointment of receivers was clearly intended to be the first part of a two-part strike strategy. I am also satisfied that had the Court been presented with the fuller picture that emerged at the *inter partes* discharge application stage, then I would have been considerably more reluctant to make the Receivership Order than I had been. In particular, the potential and apparent availability of alternative remedies to both the Receivership and JPL appointment would have inclined me to conclude that such other relief should have been sought instead of these most extreme of interim remedies.

- [195] I am likewise persuaded that these breaches were not innocent. Whilst Mr. Wardell, QC, sought to present matters in accordance with their duty of full and frank disclosure, and to that extent clearly took their duty seriously, at the same time they wished to present their narrative in such a way as would pre-empt any concern on the Court's part that the relief being sought was disproportionate. Hence, for example, the Court was told, with undue emphasis, that no other viable remedies would avail Mr. Wang. That was arguably not correct. The word 'arguably' is important here. Again, the quite considerable time spent by Counsel at the *inter partes* hearing arguing over the availability or otherwise of alternative remedies proves its own point: the issue was by no means as clear cut and in Mr. Wang's favour as his Counsel had presented at the *ex parte* Receivership Application hearing.
- [196] The Receivership Order ought thus to be revoked. The potential, and indeed apparent, availability of other remedies alternative to a receivership, and unlikelihood of significant asset dissipation within RAGOF and/or Floreat, persuade me that the interests of justice are not likely to be prejudiced by not continuing or not regranting the receivership order.
- [197] I say that alternative remedies are apparently available not least because it would be highly unusual for the alleged victim of wrongdoing to have no other legal remedy available to him than a just and equitable winding up. More usually, there is a range of remedial options available. The Floreat Intervenor has identified such potential available alternative remedies.
- [198] Although Mr. Wang might see only his interests as being at stake here, that is not correct (despite Mr. Wang's stressed and oft repeated mantra that he is the 97+% shareholder in RAGOF and sole substantial investor in it). The other minority shareholders in RAGOF and Floreat and the Floreat Principals clearly also have interests that the Court needs to take into account. Such interests include not just financial damage inflicted primarily or collaterally by the grant of draconian orders such as the appointment of receivers and liquidators, but also potential massive and irreparable reputational damage. Mr. Wang might be content to use a nuclear weapon – indeed three nuclear weapons (a receivership, a provisional liquidation order and a just and equitable winding up) - to get what he wants, but the Court is bound to take a more measured, proportionate and balanced approach to the deployment of what, at the end of the analysis, are the Court's most destructive weapons.

- [199] In coming to these conclusions, I am conscious that I have not ruled on the other allegations of the duty of full and frank disclosure and fair presentation contended for by the Floreat Intervenor. Some carry more weight than others. Also, in a complex matter such as this it is always possible to argue that such and such a point has not been fully or properly presented. The reasons I have highlighted above are enough to determine the matter.
- [200] A further factor militates, in my respectful judgment, against continuation or regrant of the Receivership and JPL orders. This is the artificial and predetermined nature of orders sought. As I have observed above, here, there appeared to be not so much a problem in search of a solution, but a predetermined solution in search of a sufficient portrayal of a problem to justify it.

15. Disposition

- [201] For all these reasons the Court's judgment is that the Continuation Application fails and the JPL Order Discharge Application and the Receivership Order Set Aside Application succeed, and Mr. Wang should be deprived of the benefits he derived from them.
- [202] The Court will hear the parties further in relation to the precise terms of the order to be made and upon costs. The Court will also hear the parties on the directions needed to ensure an orderly relinquishment of the Receivership and JPL functions, including for the cessation of work by the officeholders, and handover of documents and materials in their possession.
- [203] I take this opportunity to thank the parties' learned Counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar