

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2025/0002

BETWEEN:

INFINITY PARTICLES LIMITED

Appellant

and

C2 CAPITAL LIMITED

Respondent

Before:

The Hon. Mr. Gerard St. C. Farara	Justice of Appeal [Ag.]
The Hon. Mde. Cadie St. Rose-Albertini	Justice of Appeal [Ag.]
The Hon. Mr. Peter A. Foster	Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Moverley Smith, KC with him Mr. James Noble, Ms. Amelia Tan and Mr. Ryan Chong for the Appellant
Mr. Paul Chaisty, KC with him Mr. Adam Hinks and Mr. Renell Benjamin for the Respondent

2025: November 10,11;
2026: June 3.

Commercial Appeal – Contract law – Breach of contract – Construction of contractual terms – Statutory interpretation – Interest – Securities and Investment Act 2010 – Implied agreements – Partnerships – Consideration – Illegality – Whether the learned judge erred in law by departing from C2 Capital’s pleaded case to find that there was an implied agreement between the parties that would have been concluded either at the date of each letter agreement was signed by Jenkin or the date of the investment being made by the injection of funds – Whether the learned judge erred in law by finding that the term financial advisor as set out in the letter agreements should be construed to bear the special meaning contended for by C2 Capital – Whether the learned judge erred in law in finding that C2 Capital had provided the services that it would have been required to provide under the terms of the letter agreements – Whether the learned judge erred in finding that the investment opportunities amounted to consideration – Whether the learned judge erred in

finding that the letter agreements were not illegal and could be enforced under the laws of the BVI – Whether the learned judge erred in finding that the letter agreements were not illegal under the laws of Taiwan – Whether the learned judge erred in ordering that the interest on the amount claimed should run from 31st December 2021 at a rate of 5%

By a judgment and Order dated 8th November 2024 a judge of the Commercial Division of the High court of Justice in the British Virgin Islands (“BVI”) gave judgment in favour of C2 Capital Limited (“the claimant”) on its Claim for the Amount Claim, that is, the sum of US\$9,159,564.74 plus interest in the sum of US\$1,333,783.19 in respect of the period from 31st December 2021 to 28th November 2024 and thereafter at the rate of 5% in respect of the total of the two sums, namely, US\$1,437.44 per day until payment.

The parties to this appeal, C2 Capital and Infinity Particles Limited (“Infinity Particles”) are companies incorporated and existing under and by virtue of the laws of the BVI. The shares in C2 Capital are owned entirely by Amy Hsu Jing-Yea. She is the wife of Cheung Chih Tin (“Chih”) and the sole director of C2 Capital. While Chih is not de jure a director of C2 Capital, the learned judge held ‘there is little doubt that, in the context of the activities of [C2 Capital] in connection with the Disputed Investments (as defined) at any rate, he acted as its de facto director.’ The appellant company, Infinity Particles, is directly owned and controlled by CHIANG, Wei-Ta (“Jenkin”) who is a successful businessman who founded Joy Textile Limited (“Joy Textile”), a textile trading and manufacturing company based in Taiwan. JAMM Group Limited (“JAMM Group”) is a company incorporated under the laws of the Cayman Islands for the purpose of taking the textile business of Joy Textile public by way of an IPO. JAMM Active is a company incorporated in Hong Kong as the managing entity for JAMM Group and its related companies. Chih was employed as co-chairman of JAMM Active under the terms of an employment contract dated 1st August 2016 (“the Chih Employment Contract”) and paid a monthly salary of US\$10,000.00. Additionally, Chih was also appointed director of the JAMM Group and given a 12.5% equity stake in JAMM Group. In July 2020, Chih requested that his monthly salary be paid to C2 Capital and not directly to him. This led on 1st August 2020 to JAMM Active entering into a Consultancy Services Agreement with C2 Capital whereby, inter alia, C2 Capital was obliged to seek investment opportunities and provide monthly consulting services to JAMM Active. After the IPO did not materialize, Chih stopped working for JAMM Active in or around February 2022.

By its Claim Form and Amended Statement of Claim, C2 Capital sought judgment against Infinity Particles for the sum of US\$9,159,564.74, interest and costs. This sum represents the sum total of C2 Capital’s alleged entitlement to a 50% share of the net profits derived by Infinity Particles from 6 named investment opportunities (“the Disputed Investments”). These are 6 of what is said to be over 50 such investment opportunities allegedly introduced by Chih to Jenkin during the period 2015 to 2021 (“the Investment Period”) and taken up and acted upon by Infinity Particles under and pursuant to the terms of an alleged oral agreement entered into in 2015 between Chih and Jenkin to explore joint investment opportunities (referred to as “the Overarching Agreement” or “the Co-Investment Arrangement”); and the terms of 6 individual “Letter Agreements” or “side letters” entered into between C2 Capital and Infinity Particles, each concerning one of the Disputed Investments introduced by Chih acting as C2 Capital.

It is C2 Capital's pleaded case that Infinity Particles, in breach of the Co-Investment Arrangement and the terms of each respective Letter Agreement, refused to pay to [C2 Capital] its share of the net profits from the Disputed Investments, in the total or aggregate amount of US\$9,159,564.74 or any part thereof. Further, C2 Capital pleaded that in relation to the 'other investments', that is, the over 50 investments, not including the 6 Disputed Investments, Infinity Particles has taken certain specific steps to exclude C2 Capital as a co-investor and to not comply with its 'contractual obligations' pursuant to the [Co-Investment Arrangement] and the relevant Letter Agreements. C2 Capital therefore claimed that as a result of such breaches, it has suffered loss and damage and is entitled to an award of interest on the sums awarded by the court in relation to its share of the net profits realized by Infinity Particles in relation to each of the Disputed Investments.

In its Amended Defence and Counterclaim filed 6th September 2024, Infinity Particles, in summary, denied that it had agreed to the Co-Investment Arrangement or that it entered into any of the alleged Letter Agreements with [C2 Capital]', and puts C2 Capital to strict proof of these allegations. More specifically, Infinity Particles asserted that in relation to the Letter Agreements concerning the Disputed Investments (as pleaded and relied on by C2 Capital,) it has never 'seen any of them, save for the one in relation to the Warby Parker Investment which was provided to [Infinity Particles'] legal practitioners, Carey Olsen, by [C2 Capital's] legal practitioners, Walkers, on 10th November 2022'. With regard to the alleged signature of Jenkin on each of the Letter Agreements, it was pleaded that while they 'appear to have been signed by Jenkin as an authorized representative for and on behalf of [Infinity Particles], it is averred that neither [Infinity Particles] and/or Jenkin had previously ever seen the Alleged Letter Agreements nor has [Infinity Particles] and/or Jenkin signed or agreed to affixing Jenkin's signature on these documents.' The learned judge found as a fact that Jenkin had indeed signed the 6 Letter Agreements, and that he had done so for and on behalf of Infinity Particles. He also found that Jenkin (and by extension Infinity Particles) had failed to bring any evidence to show that the signature was not his or that it was a forgery. These findings have not been appealed by Infinity Particles and therefore stand.

The factual position therefore as it stood at the appeal stage is that all 6 Letter Agreements were signed by Jenkin for and on behalf of Infinity Particles as a party to the said Letter Agreements. This notwithstanding, the question remains whether by Jenkin having signed the Letter Agreements, Infinity Particles had entered into 6 legally binding and enforceable contracts with C2 Capital, whereby C2 Capital contracted to introduce investment opportunities to Infinity Particles and in turn Infinity Particles agreed to share or to pay over to C2 Capital a 50% share of the net profits which it derived from each of the Disputed Investments, all of which opportunities were taken up and acted upon by Infinity Particles. Infinity Particles pleaded and relied on certain defences. In brief they are: (i) C2 Capital and Chih 'are not qualified financial advisors and/or licensed to act as such in any jurisdiction'; (ii) such activities are prohibited under the Securities and Investment Business Act 2010 ("SIBA 2010") of the BVI if carried out without a licence, and any contract relating to such unauthorized financial services are unenforceable under the Financial Services Commission Act; (iii) the place of performance of the alleged Co-Investment Arrangement and Letter Agreements is Taiwan, and under Article 4 of the Securities Investment Trust and Consulting Act of Taiwan ("SITCA") these activities would constitute the carrying out of a "securities

investment consulting enterprise” for which permission of the Financial Supervisory Commission would be required, and therefore such activities are illegal under the SITCA; (iv) further, any agreement or arrangement for the sharing of gains or losses from a securities investment consulting enterprise with a customer, is illegal pursuant to Article 13(3) of the Securities Investment Consulting Business Management Regulations (“the Regulations”) of the laws of Taiwan; and (v) the Letter Agreements are invalid and unenforceable as they do not comply with the formality requirements under Article 10(2) of the Regulations and are not signed by both parties.

The learned judge, having examined the pleaded cases and briefly summarized the background facts, formulated the dispute between the parties to the Claim as whether the Claimant [C2 Capital] is entitled to recover the Amount Claimed (US\$9,159,564.74), based on the six investment opportunities that it (through Chih) introduced to Jenkin and into which Jenkin (through the Defendant [Infinity Particles]) had made investments.

The judge identified eight issues arising in the Claim for his determination. These are:

- (i) Did the parties enter into or conclude an overarching agreement in the terms, or substantially the terms, of an oral agreement between the Parties referred to in the proceedings as the “Overarching Agreement” or the “Co-Investment Arrangement” (**“the Overarching Agreement Issue”**)?
- (ii) Were the Letter Agreements signed by Jenkin or by some other person on behalf of Infinity Particles/Defendant (**“the Defendant’s Signature Issue”**)?
- (iii) Does the failure of Chih or some other person on behalf of C2 Capital (the Claimant) to sign a Letter Agreement mean that there was no, or no valid, agreement between the Parties for the making of the investment referred to in that Letter Agreement (**“the Claimant’s Signature Issue”**)?
- (iv) Was consideration provided by C2 Capital (Claimant) for the work allegedly performed under the Agreements and/or was the consideration past consideration (**“the Consideration Issue”**)?
- (v) Did C2 Capital (Claimant) fail to perform its obligations under the terms of the Agreements (**“the Performance Issue”**)?
- (vi) Were Chih and/or C2 Capital (Claimant) remunerated for the work done on the Disputed Investments by JAMM Active (**“the Remuneration Issue”**)?
- (vii) Were the investment opportunities that relate to the Disputed Investments introduced by Chih? If they were, was it on account of the friendship between Chih and Jenkin (**“the Legal Relations Issue”**)?
- (viii) Are the Agreements illegal and/or unenforceable under BVI Law and/or Taiwanese Law and, if so, what are the consequences of such illegality (**“the Illegality Issue”**)?

The learned judge found that the pleaded Overarching Agreement was not a binding contract between the parties. This finding has not been appealed and therefore stands. However, the judge held that the discussions between the parties culminated in an “agreement in principle” whereby C2 Capital would introduce investment opportunities to Infinity Particles and the parties would share equally in any profits or losses arising from those investments. The learned judge held that a binding agreement arose either upon the execution of a Letter Agreement by Jenkin or, where no Letter Agreement was signed, upon Infinity Particles investing funds into the relevant investment opportunity, thereby giving rise to an implied agreement on the terms contained in the relevant Letter Agreement.

The learned judge also held that Jenkin had in fact signed the Letter Agreements and rejected as untruthful the assertion that he was unaware of them. Having referred to and considered the several WeChat emails in evidence passing between Mark Mi and Chih concerning draft side letters and/or draft Letters of Agreements the learned judge held ‘Given the foregoing, it is incomprehensible how Jenkin could allege that he was unaware of the Letter Agreements. He knew full well what they were and why they needed to be signed by him.’

The learned judge found that since there is a Letter Agreement representing each investment, the agreement between Chih and Jenkin became binding when Jenkin signed the Letter Agreement or, if earlier, when the injection of funds was made into an investment by Jenkin. Chih’s signature on the Letter Agreement was not necessary. If it became necessary for Jenkin to enforce the Agreement, he could simply point to his signature on the Letter Agreement and his injection of funds to demonstrate that a valid and binding agreement was concluded between them. On the issue of ‘consideration’, the judge rejected the appellant’s arguments of total failure of consideration and past consideration. The learned judge held that C2 Capital continued to facilitate and monitor the investments after introductions were made and that the introductions and subsequent conduct formed part of one continuing transaction. The learned judge also found that all disputed investment opportunities had been introduced by Chih on behalf of C2 Capital and rejected the contention that he acted solely in his personal capacity or as an employee of JAMM Active. Neither Chih nor C2 Capital had been remunerated for the disputed investment work under any consultancy arrangement with JAMM Active. The judge rejected that the arrangements arose merely from friendship and held that there was an intention to create legal relations between the parties.

Dissatisfied, Infinity Particles filed a notice of appeal on 7th January 2025 containing seven grounds of appeal:

Held: allowing the appeal, setting aside the judgment and order of the Commercial Division of the High Court of Justice in the British Virgin Islands dated 28th November 2024, dismissing C2 Capital’s Claim No. BVIC(COM) 2023/0040, and awarding costs of the proceedings in the High Court and Court of Appeal to the appellant to be paid by the respondent to be assessed if not agreed within 30 days of the date of this judgment, that:

1. It is clear from the Amended Statement of Claim that C2 Capital's pleaded case for recovery of the Amount Claimed was based on an alleged breach or breaches of both the Co-Investment Arrangement (also called the Co-Investment Agreement), and/or the 6 individual Letter Agreements as binding and enforceable contracts between C2 Capital and Infinity Particles. This was acknowledged and accepted by Infinity Particles in its Amended Defence when responding specifically to the case in relation to both the Co-Investment Arrangement and the Letter Agreements, its assertion that none of them were binding and enforceable agreements and, in any event, they were illegal and unenforceable by reason of certain pleaded defences, including total failure of consideration, past consideration and illegality. Moreover, the extract from the Amended Defence relied on by the respondent in its submissions clearly demonstrates that Infinity Particles knew and accepted that C2 Capital had pleaded its case on the basis of the Co-Investment Agreement and the Letter Agreements each constituting a separate and independent contract enforceable as such. It therefore follows that it was open to the learned judge, on the pleaded case and defence and in the manner in which the parties conducted their respective case at trial, to determine, firstly, whether the Co-Investment Arrangement constituted a binding agreement, and if so, who were the parties to it; and secondly, whether each of the Letter Agreements constituted separate free standing and binding agreements between the parties thereto, namely, C2 Capital and Infinity Particles.
2. In considering and determining the issue of whether the Letter Agreements each constituted a binding agreement in law between C2 Capital and Infinity Particles, the learned judge did not go outside or contrary to C2 Capital's pleaded case of breach of contract in the Amended Statement of Claim. This issue and cause of action was addressed, denied and joined by Infinity Particles at paragraphs 5,6,25 and 66 of the Amended Defence. This position on the pleaded cases lead to a consideration of the question of who the parties to each of the Letter Agreements are and how many of the Letter Agreements were signed by Jenkin on behalf of Infinity Particles. In relation to those of the six Letter Agreements signed by Jenkin on behalf of Infinity Particles, the judge was correct in holding that they purported to be binding agreements between C2 Capital and Infinity Particles in accordance with their terms, subject to the further issues of total failure of consideration, past consideration and illegality. It is therefore only those Letter Agreements not signed by Jenkin on behalf of Infinity Particles or not signed for and on behalf of either party, which would fall to be considered within the ambit of the judge's finding of an "implied agreement", subject to any finding hereafter with regard to the said issues and defences.
3. All of the six Letter Agreements, which each purport to be between C2 Capital and Infinity Particles as the parties thereto, were signed by Jenkin on behalf of Infinity Particles. It follows that with respect to the six investments which are the subject of the Claim, there are none which were not the subject of a Letter Agreement or an unsigned Letter Agreement by Jenkin. The judge's finding is that each of the signatures affixed to the Letter Agreements were that of Jenkin, which finding was not pursued on appeal. Accordingly, the circumstances identified by the learned

judge as giving rise to an “implied agreement” involving a situation where Jenkin had not signed a Letter Agreement, does not arise on the indisputable documentary evidence in this case. Therefore, the central issue raised by the appellant in ground 1 of its appeal that the learned judge erred in finding that there was a valid “implied agreement” does not, strictly speaking, properly arise on the indisputable facts of this case. It also renders otiose the issue of whether, in making a finding of an “implied agreement”, the learned judge went outside C2 Capital’s pleaded case, since this issue is only of significance if the predicate circumstances which would give rise to an “implied agreement” were present on the documentary evidence of the Letter Agreements. In any event, with C2 Capital having pleaded and clearly relied on the Letter Agreements as individual binding agreements between itself and Infinity Particles, providing expressly for the equal sharing of net profits and losses derived by Infinity Particles from the specific named investment opportunity the subject of each Letter Agreement, it was open to the learned judge to consider and to hold that where Jenkin had signed a Letter Agreement (on behalf of Infinity Particles), the latter was *prima facie* (subject to any finding by this Court on the issues of consideration and illegality) bound by its terms, it having expended its capital in making or taking-up the said investment.

4. The plain and ordinary meaning of the term “financial advisor” used in the Letter Agreements is clear and unambiguous. In the context of the instant matter and the evidence, the said term would extend to “providing advice on investments” to another person or entity in their capacity as a “potential investor”; and is concerned with the merits of that potential investor buying, subscribing or underwriting the particular investment with respect to which that person has received investment advice. Construed in this way, that is, using the plain and ordinary meaning of the term “investment advisor” as elucidated by the meaning given to the expression ‘providing investment advice’ at paragraph 4 of Part A of Schedule 2 to the SIBA 2010, it is difficult to see how the term “financial advisor” in the Letter Agreements would not be accorded the same plain and ordinary meaning.

Securities and Investment Business Act No.2 of 2010, Revised Laws of the Territory of the Virgin Islands applied.

5. The services to be provided or discharged as “consideration” moving under the Letter Agreements from C2 Capital to Infinity Particles, falls squarely within the kind of services stated to constitute “providing investment advice” under paragraph 4 of Part A of Sch. 2 of the SIBA 2010, as requiring a licence to be applied for and issued under the SIBA 2010. Further, as C2 Capital’s own evidence makes clear, Jenkin or Infinity Particles was in every instance a “potential investor” within the use and meaning of that expression at paragraph 4, Part A Sch. 2 of SIBA 2010. In short, the evidence discloses that Chih would identify or source an investment or investment opportunity, do what was necessary for him to form his own opinion on its viability, provide this opinion on its viability to Jenkin who, would then, on behalf of Infinity Particles as a “potential investor”, “decide” whether to go forward with the investment and to have Infinity Particles commit to and invest its capital in the said investment. This role or service to be provided by C2 Capital under the Letter

Agreements as described by Chih at paragraph [24] of his witness statement and accepted by the learned judge, is of added significance and importance as C2 Capital would be entitled, having performed its end of the bargain under each Letter Agreement, to share equally with Infinity Particles in any profits or to bear equally any losses from such investment.

Securities and Investment Business Act No.2 of 2010, Revised Laws of the Territory of the Virgin Islands applied.

6. C2 Capital was, on the evidence from Chih accepted by the learned judge, not just introducing investment opportunities to Jenkin, but acting as a financial advisor to Jenkin and/or Infinity Particles in relation to each such investment the subject of the Claim, and by providing to Jenkin his opinion on the viability of the investment, all part and parcel of persuading Jenkin to decide whether to have Infinity Particles invest its capital in each such investment. By doing so, Chih and/or C2 Capital were carrying on an unauthorized investment business and facilitating such unauthorized business through the means of the Letter Agreements. However, the learned judge failed to properly analyse and appreciate the full significance of Chih's evidence as to his understanding of what was meant by the term "financial advisor" in the Letter Agreements, and the services C2 Capital had thereby contracted to perform and did perform for Infinity Particles thereunder and in relation to each of the six Disputed Investments. In failing to do so, the learned judge erred and his reasoning based on such a flawed premise is clearly incorrect and an error of principle and judgment. This leads to the question whether there was a total failure of consideration on the part of C2 Capital under the Letter Agreements, as contended by Infinity Particles.
7. Based on the interpretation and scope of the expression "financial advisor" and the activities in that role which Chih testified he performed on behalf of C2 Capital, the appellant's submission that the learned judge erred in finding at paragraph [276] of the judgment that C2 Capital was not or could not be said to have been "arranging deals in investments" within the meaning of that expression at Paragraph 2 of Part A of Schedule 2 to the SIBA 2010 must be accepted. On C2 Capital's own case, Chih on its behalf was clearly "making arrangements" with a view to having Infinity Particles, as a potential investor, to invest its capital in investment opportunities introduced to it by Chih on behalf of C2 Capital. This was clearly being done with the objective of bringing about the "buying" of shares in the identified funds by Infinity Particles the subject of each Letter Agreement. Further, on his own evidence, the activities carried out by Chih satisfies the requirement of paragraph 2(a) of Part A of Schedule 2 to the SIBA 2010. Further, to conclude that the advice or opinion given by Chih to Jenkin on the "viability of the investment" is not investment advice within the meaning or of the type contemplated by paragraph 4 of Part A of Schedule 2 of the SIBA 2010, because it is not "formal advice" is clearly wrong.
8. In light of the conclusion reached on the meaning of the term "financial advisor" in the Letter Agreements and that the learned judge was wrong to reach the conclusion which he did – to provide investment opportunities only, nothing more, nothing less - was there a total failure of consideration on the part of C2 Capital under the Letter

Agreements? The answer to this question is, presumptively, no, subject to a determination of the issues raised in ground 4 of the notice of appeal concerning, more broadly, the issues of consideration, including past consideration. On C2 Capital's pleaded case and evidence, the services to be provided by it and/or Chih under the Letter Agreements is the sourcing and introducing of investment opportunities to Infinity Particles/Jenkin as a "potential investor" and the rendering by Chih to Jenkin for and on behalf of Infinity Particles, of his opinion on the subject investment's viability. The learned judge found as a fact that Chih did introduce Jenkin/Infinity Particles to the six investment opportunities the subject of Disputed Investments in the Claim. This leads to the conclusion that prima facie there was no 'total failure' of consideration on the part of C2 Capital under the Letter Agreements.

9. The learned judge, at paragraph [189] of the judgment in the court below incorrectly found that C2 Capital was to "introduce investment opportunities not more, no less" and thus was not acting as a "financial advisor" in the sense of acting as a professional financial advisor providing financial advice. Nevertheless, the learned judge went on to find that C2 Capital/Chih's obligations under the Letter Agreements to discharge its contractual obligation to act as the "financial advisor" to Infinity Particles in relation to each of the specific investments, was not confined to and did not stop at the mere "introducing" of investment opportunities, but also involved and included Chih doing "work", over a considerable period thereafter, to facilitate and to monitor each investment the subject of a Letter Agreement so as to ensure it makes a profit and not a loss. These two approaches and disparate findings are clearly contradictory and inconsistent and cannot be reconciled on any proper or objective basis, nor can it be reconciled on the basis of C2 Capital's pleaded case and Chih's evidence. Further, none of the Letter Agreements, including the 'standard' letter Agreement, states that C2 Capital is responsible for or obligated to "introduce investment opportunities" to Infinity Particles. What each Letter Agreement does is to "confirm" that C2 Capital will serve as the "financial advisor" to Infinity Particles "related to (the specified investment)", and that Infinity Particles 'will promptly execute all necessary documents and fund the investment amount on a timely basis. In this way, each Letter Agreement would have been entered into by C2 Capital and Infinity Particles after C2 Capital had made the "introducing" of the investment opportunity, which "introduction" is neither mentioned nor confirmed by the wording of the terms of the Letter Agreements.
10. As the 'introducing of investment opportunities' by C2 Capital to Infinity Particles, is not a contractual obligation nor does it constitute valuable "consideration" under the Letter Agreements it would be incorrect to say or to find, as the learned judge did, that the 'introducing of investment opportunities' by C2 Capital is what constitutes consideration passing from C2 Capital to Infinity Particles under the Letter Agreements. This finding is clearly wrong on the proper reading of the terms of the Letter Agreements which, as the matter unfolded, were held by the learned judge to be the 'contractual' basis of the Claim, the judge having determined that reliance by C2 Capital in its pleaded case on the existence of an Overarching Agreement/Co-Investment Arrangement as the principal contractual basis on which the Claim is rooted, was entirely misplaced and incorrect as the so-called agreement was merely

an “agreement in principle”. In finding such an obligation to “introduce investment opportunities” as consideration under the Letter Agreements, the learned judge erred in his reasoning and erroneously held that this was the meaning to be attributed to the term “financial advisor” in the Letter Agreements based on the background facts and his finding as to what the parties must have understood and intended when entering into the Letter Agreements. This finding is fundamentally flawed since (1) the plain and ordinary meaning of the said expression was pellucid on any objective and reasonable approach to construing the said term; (2) and most importantly, such a finding is wholly inconsistent with and not borne out by the actual provisions and terms of the Letter Agreements themselves; and (3) in any event, the Letter Agreements were, by their language, “forward-looking” from a point after any “introduction” of the specific investment opportunity would, in any scenario, have occurred and, also, after the decision would have been made by Jenkin, allegedly on behalf of Infinity Particles, to commit the said company to making the investment by an injection of capital therein.

11. The consideration for a promise must be given in return for the promise. If the act or forbearance alleged to constitute the consideration has already been done before, and independently of, the giving of the promise, it is said to amount to “past consideration”, and such past acts or forbearance do not in law amount to consideration for the promise. Applying these principles to the instant case, in relation to four of the six Letter Agreements, that is those applicable to the investments in CRCM, Warby Parker, Loyal Valley and Appier, where the expression “has served” is used in relation to “financial advisor”, is clearly past consideration which is not good consideration. On this basis the Letter Agreements applicable to these four investments fail as binding contracts enforceable as such. Accordingly, the sums claimed in the proceedings below based on these four investments having made a net profit for Infinity Particles must fail. This is so irrespective of the findings at paragraph [197] of the judgment as to certain “work” being done by Chih and C2 Capital after the investment had been made by Infinity Particles. In relation to the two remaining investments, Kayak and Cotopaxi, and the applicable Letter Agreements (3 in the case of Kayak and 2 in the case of Cotopaxi), each of which uses the expression “will serve” pointing to the future discharge by C2 Capital of the obligation to act as “financial advisor” to Infinity Particles in relation to those investments, the “consideration”, as stated, is not past consideration. However, on Chih’s own evidence, the so-called additional work done by him post the making of the investment was solely in protection of his/C2 Capital’s interest in the investment, as the learned judge found and not part of the ‘consideration’ or contractual obligation of C2 Capital under and pursuant to the terms of the Letter Agreements, including its role as “financial advisor” to Infinity Particles thereunder. For these reasons any claim based on these two investments, Kayak and Cotopaxi, must also fail on the basis of a total failure of consideration.
12. Looked at in its proper context, the parties’ relationship was not a “partnership” in the true sense of a “common investment”. It was clearly a business relationship whereby C2 Capital acted as the “financial advisor” to Infinity Particles in relation to each of the investments which, presumably, were introduced by C2 Capital/Chih to

Jenkin, Chih provided his “opinion as to the viability” of the proposed investment, and the “client” Infinity Particles (by Jenkin) making its decision as the “potential investor” whether to invest or not. It was Infinity Particles’ funds which were at risk once it made the decision to go forward and make the investment. Further, the provision whereby C2 Capital would assume or share 50% of any loss, was not one where C2 Capital’s money was actually at risk when the investment was made. It is only Infinity Particles’ funds that were at such risk. C2 Capital share of any “loss” on the investment, was merely an accounting exercise, whereby its equal sharing of profits would, from time to time, be adjusted downwards to take proper account of the obligation to share equally in the losses made on any such investments. The learned judge’s finding and conclusions as to the meaning of the expression “by way of business” and his finding that the activities which C2 Capital were conducting were not being done “as a business” or “by way of business” were therefore flawed and incorrect.

The Financial Services Authority v Anderson & Ors [2010] EWHC 599 applied.

13. The question of whether the partnership exclusion issue was applicable in the circumstances, albeit not pleaded by C2 Capital, clearly arose in the judge’s mind during the course of the trial, as the more likely of the exclusions to be applicable in the circumstances of this matter, as he saw it. He brought it to the attention of counsel for Infinity Particles and, by extension, counsel for C2 Capital. It was then open to counsel for the parties to address the court on the ‘partnership’ exclusion or to seek time to put in written submissions on it. It is therefore not correct to submit, as did Infinity Particles, that this issue never arose during the trial and Infinity Particles was not afforded an opportunity by the judge to respond to it. Turning to the substantive issue of whether the partnership exclusion applies, no partnership in law arose under the Letter Agreements. As previously stated, the relationship between the parties was clearly “financial advisor” and “client” on the face of the Letter Agreements and not one of a partnership simply because they were to share equally in net profits and losses. This position does not propel or transform what is clear from their roles under the terms of the Letter Agreements into a “joint investment” or “partnership in law”. The decision as to whether to make the investment rested solely with Infinity Particles and was made by it prior to entering into each of the Letter Agreements. It is Infinity Particles’ capital alone which is at risk if the investment does not turn a profit. Whereas, C2 Capital does not stand, in that scenario, to suffer any loss by the investment making a loss. Moreover, there can be no partnership in law where the alleged “agreement” the basis of the alleged “partnership”, is not a binding contract, as the Court has held on the basis of lack of consideration, total failure of consideration, and past consideration. It therefore follows that there was no partnership in law founded on the Letter Agreements and the learned judge’s finding as such ought to be set aside and the Claim ought to have been dismissed.
14. In deciding what is the appropriate interest rate to impose on the award of a judgment sum, the court clearly has a discretion. However, that discretion must be exercised judicially, and the judge is required to provide reasons for the way in which

he exercised such discretion in arriving at a particular rate of interest. In exercising such discretion, the judge ought to be cognizant of any agreed rate of interest which the contracting parties had stipulated in their documents, especially any binding agreement or contract. In those circumstances, a judge would be hard-pressed to impose or to order a higher rate of interest than that stipulated by the parties and may only do so in exceptional cases and for very good reason. This Court has not been made aware of any record of the learned judge's reasons in imposing a 5% interest rate on the award of the judgment for the Amount Claimed. In the circumstances, it appears that the learned judge having found that the Letter Agreements constituted a valid contract between the Parties (albeit erroneously as held above) , the exercise of his discretion in awarding interest on the Amount Claimed and determining the appropriate rate of interest ought properly to have taken into account the 2% return on capital expressly provided in the Letter Agreements found by the judge to have been the contracts between the parties . Had he done so, he would have imposed a rate of interest of 2% rather than the substantially higher rate of 5% stipulated in the Order. In this respect the learned judge erred in the exercise of his discretion and the 5% rate of interest in the Order also falls to be set aside and a rate of 2% per annum substituted in its stead, had the judgment for the Amount Claim remained undisturbed. If the Letter Agreements were binding contracts as the judge found, it is clear the profits derived from each of the Disputed Investments were realized by Infinity Particles at dates prior to the filing of C2 Capital's Claim Form on 7th March 2023. While it is correct that the Letter Agreements do not specify a date by which C2 Capital is to be paid its equal share of the profits on each individual investment the subject of the particular Letter Agreement, it is clear that C2 Capital would have been out of pocket in relation to the Disputed Investments, the subject of the Claim, well before the date of 31st December 2021 imposed by the judge in the Order as the date from which interest on the Principal Sum awarded would begin to run. Accordingly, there would have been no basis to disturb the date imposed in the Order by the learned judge.

JUDGMENT

- [1] **FARARA JA [AG]:** This is an appeal from the judgment of a learned judge (Mithani J) of the Commercial Division of the High Court of Justice in the Territory of the Virgin Islands ("BVI") delivered on 28th November 2024 in Claim No. BVIHC (COM) 2023/0040 ("the Claim") after a trial lasting 9 days in February 2024; and from the consequential orders of the court dated 28th November 2024 (entered 10th December 2024) settling the quantum of compensation and interest to be paid by Infinity Particles Limited ("Infinity Particles") to C2 Capital Limited ("C2 Capital"). The learned judge having in the judgment found Infinity Particles liable for the "Amount Claimed" and interest in the Claim, ordered Infinity Particles to pay compensation to

C2 Capital in the principal sum of US\$9,159,564.74 plus interest and legal costs. There was no ruling by the learned judge on Infinity Particles' counterclaim, it having decided on the first day of the trial, not to proceed with it.

[2] The precise terms of the orders made and entered by the judge are:

- (1) Infinity Particles, within 14 days from 28 November 2024, shall pay to C2 Capital the sum of US\$9,159,564.74 plus interest in the sum of US\$41,333,783.19 in respect of the period from 31 December 2021 to 28 November 2024 and thereafter at the rate of 5% in respect of the total of the two sums, namely US\$1,437.44 per day, until payment.
- (2) Infinity Particles [shall] pay C2 Capital's costs of the Action (including for the avoidance of doubt in respect of all previous orders providing for costs in the case) to be assessed if not agreed and shall pay within 14 days from 28 November 2024, the sum of US\$900,000 as an interim payment on account of such costs.

[3] The judgment of the lower court is detailed and thorough. It is commendable that the learned judge, a very experienced commercial judge, was able to deliver such a detailed and lengthy judgment consisting of 413 paragraphs a mere 37 days after conclusion of the trial on 22nd October 2024.

The Parties and Dramatis Personae

[4] Both C2 Capital and Infinity Particles are companies incorporated and existing under and by virtue of the laws of the BVI. The shares in C2 Capital are owned entirely by Amy Hsu Jing-Yea. She is the wife of Cheung Chih Tin ("Chih") and the sole director of C2 Capital. Chih is a graduate of Harvard Business School and Harvard Law School. While Chih is not de jure a director of C2 Capital, the learned judge held 'there is little doubt that, in the context of the activities of [C2 Capital] in connection with the Disputed Investments [as defined] at any rate, he acted as its

de facto director.’ The appellant company, Infinity Particles, is directly owned and controlled by CHIANG, Wei-Ta (“Jenkin”) who is said to be a successful businessman who founded Joy Textile Limited (“Joy Textile”), a very successful and prosperous textile trading and manufacturing company based in Taiwan. JAMM Group Limited (“JAMM Group”) is a company incorporated under the laws of the Cayman Islands for the purpose of taking the textile business of Joy Textile public by way of an IPO. JAMM Active is a company incorporated in Hong Kong as the managing entity for JAMM Group and its related companies. Chih was employed as co-chairman of JAMM Active under the terms of an employment contract dated 1st August 2016 (“the Chih Employment Contract”) and paid a monthly salary of US\$10,000.00. Additionally, Chih was also appointed director of the JAMM Group and given a 12.5% equity stake in JAMM Group. In July 2020, Chih requested that his monthly salary be paid to C2 Capital and not directly to him. This led on 1st August 2020 to JAMM Active entering into a Consultancy Services Agreement with C2 Capital whereby, inter alia, C2 Capital was obliged to seek investment opportunities and provide monthly consulting services to JAMM Active. After the IPO did not materialize, Chih stopped working for JAMM Active in or around February 2022.

Approach to be Adopted in this Judgment

- [5] The submissions, written and oral, of the parties are detailed and generally of considerable assistance. They serve to elucidate the important issues and pivotal points of contention between the parties. However, the issues in the appeal are not, in the grand scheme of things, issues of great complexity, nor are the applicable legal principles difficult, controversial, or uncertain.
- [6] With that in mind, the general approach to be adopted in this judgment will be to summarize the various grounds of appeal as briefly and as succinctly as possible and, in doing so, to identify the main issues for consideration, analysis and conclusion; to encapsulate the main and/or important arguments, points and counter-points relied on by the parties in relation to each issue and ground of appeal;

to determine the merits of each issue or ground and provide this Court's reasoning and conclusion thereon and ultimately the success or failure of the appeal.

[7] I hasten to add that in adopting this approach, we have read and given our full consideration to each and every point and submission made by the parties, whether in their written or oral submissions. An omission to mention or to address specifically a particular point or submission is therefore not indicative of it having been overlooked or not considered by the Court in reasoning to and reaching its conclusions and decision in the appeal.

[8] Further, in seeking to adopt the approach outlined above, I will first briefly summarize the bases of the Claim as set out in the Amended Statement of Claim dated and filed 27th August 2024, and the points of defence as pleaded by Infinity Particles in its Amended Defence and Counterclaim filed on 6th September 2024. This is of some importance as, in certain of the grounds of appeal, the appellant complains that the learned judge made findings and reached important conclusions which were either not pleaded by C2 Capital in their Amended Statement of Claim or which were averse to their pleaded case, and therefore inappropriate and impermissible. Further, I do not intend, as I do not consider it necessary, to indulge in a detailed summary of the background facts. Instead, I adopt, almost wholesale, the judge's short summary of the pertinent and uncontroversial facts at paragraphs [12] to [25] of the judgment.

[9] In relation to the evidence given by each of the factual witnesses at trial, which evidence the learned judge summarized and analysed in some detail at paragraphs [36] to [74] of the judgment, and made adverse findings in relation to the failure by the appellant to call two witnesses of fact at paragraphs [75] to [90], I intend, on well-established principles of appellate restraint, to deal only with those aspects or findings which are the subject of criticism by the appellant in the appeal. In this respect, criticisms of the judge's findings as to the truthfulness of certain witnesses and the veracity of their evidence or aspects of their evidence, will be approached

with the appropriate level of caution and with the necessary measure of appellate restraint which accords with established and uncontroversial guiding principles from the decided cases of this Court and His Majesty's Judicial Committee of the Privy Council. Several of these leading authorities have been helpfully cited and referred to by the respondent at paragraphs 104 of its written appeal submissions filed 22nd April 2025, which guidance I unreservedly adopt.

The Pleadings Cases

The Claim

[10] By its Claim and Amended Statement of Claim, C2 Capital (as claimant) sought judgment against Infinity Particles (as defendant) for the sum of US\$9,159,564.74, interest and costs. This sum represents the sum total of C2 Capital's alleged entitlement to a 50% share of the net profits derived by Infinity Particles from 6 named investment opportunities ("the Disputed Investments"). These are 6 of what is said to be over 50 such investment opportunities allegedly introduced by Chih to Jenkin during the period 2015 to 2021 ("the Investment Period") and taken up and acted upon by Infinity Particles under and pursuant the terms of an alleged oral agreement entered into in 2015 between Chih and Jenkin to explore joint investment opportunities (referred to as "the Overarching Agreement" or "the Co-Investment Arrangement"); and the terms of 6 individual "Letter Agreements" or "side letters" entered into between C2 Capital and Infinity Particles, each concerning one of the Disputed Investments introduced by Chih acted as C2 Capital.

[11] Particulars of each of the Disputed Investments are set out at paragraph [20] and detailed at paragraphs [21] to [72] of the Amended Statement of Claim. They are helpfully summarized by the judge at paragraph [8] of the judgment as follows:

- (a) Kayak Investment Partners Fund Ltd ("**Kayak**"), made on or about 3rd March 2016, in which a total sum of US\$5,000,000 was invested by the Defendant [Infinity Particles]. The net profit from the investment was US\$744,341.63 of which the Claimant' [C2 Capital's] share was US\$372,170.82.

- (b) Global Uprising, PBC ("**Cotopaxi**"), made on or about 13th February 2017, in which the total sum of US\$500,000.53 was invested by the Defendant (Infinity Particles). The net profit from the investment was US\$460,280.33 of which the Claimant's [C2 Capital's] share was US\$230,140.17.
- (c) Appier Holdings Inc ("**Appier**"), made on or about 17th August 2017, in which a total sum of US\$250,017.00 was invested by the Defendant. The net profit from the investment was US\$579,453.56, of which the Claimant's [C2 Capital's] share was US\$289,726.78.
- (d) Loyal Valley Capital Advantage Fund LP1 ("**Loyal Valley**"), made on or about 29th December 2017, in which a total sum of US\$5,000,000.00 was invested. The net profit from the investment was US\$10,452,393.88, of which the Claimant's [C2 Capital's] share was US\$5,266,196.94.
- (e) JAND Inc ("**Warby Parker**"), made on or about 19th December 2019, in which a total sum of US\$1,101,169 was invested. The net profit from the investment was US\$2,596,465.20, of which the Claimant's [C2 Capital's] share was US\$1,298,232.60.
- (f) CRCM Fintech Fund, LP ("**CRCM**"), made on or about 29th July 2020, in which a total sum of US\$1,250,000 was invested. The net profit from the investment was US\$3,486,195.87, of which the Claimant's [C2 Capital's] share was US\$1,743,097.43.

[12] C2 Capital pleaded that prior to Chih and Jenkin entering into the Co-Investment Arrangement in 2015, these two men had decided to restructure Jenkin's family business. This led to the incorporation of the company JAMM Active Limited ("JAMM Active") under the laws of the BVI on 22nd July 2015. The shares in JAMM Active

were held by the JAMM Group which consisted of various entities controlled by Chih who held a 20% of the shares in JAMM Group in consideration for a US\$1 million investment and entities controlled by Jenkin who held 80% of the shares in JAMM Group in consideration of an investment of US\$4 million¹. It is pleaded by C2 Capital that pursuant to the terms of the said restructuring, Jenkin was fully in charge of the operations of JAMM Active and Chih “assisted with strategy to lead an intended IPO of JAMM Active’s shares”, which IPO never materialized.

- [13] It is C2 Capital’s pleaded case that JAMM Active played an important role in carrying out the terms of the Co-Investment Arrangement. During the period 2015 to 2018 JAMM Active ‘was responsible for performing quarterly portfolio reviews of the investments made pursuant to the Co-Investment Arrangement. However, in 2018 Chih and Jenkin decided that JAMM Active would employ individuals whose sole function would be to assist with the Co-Investment Arrangement (together with Chih (on behalf of the Claimant) and Jenkin (on behalf of Infinity), the Co-Investment Team’), beginning with Mark Mi (“Mr. Mi”) in September of that year.’
- [14] It was also pleaded that references in the Amended Statement of Claim to actions carried out by Chih shall mean actions carried out by him on behalf of C2 Capital ‘in its capacity as financial advisor and co-investor under the Co-Investment Arrangement and the Letter Agreements’; and, likewise, references to the actions carried out by Jenkin shall mean actions carried out by him “on behalf of Infinity in its capacity as co-investor under the Co-Investment Arrangement and Letter Agreements.” It was pleaded also that the term “financial advisor” in the Letter Agreements “is to be understood as further detailed below and as referred to in the Amended Reply.”
- [15] At paragraph 9 of the Amended Statement of Claim, C2 Capital pleaded that Chih and Jenkin had agreed under the terms of the Co-Investment Arrangement and the Letter Agreements which followed, that C2 Capital would act as “financial advisor”

¹ See page 432 of the Core Bundle.

to Infinity Particles. Much argument has ensued, both in the court below and before this Court, as to what is the correct meaning or interpretation of that expression as used in those documents. More specifically, whether by undertaking to and so ‘acting’ or providing such services to Infinity Particles, C2 Capital was conducting or agreeing to conduct “investment business” within the definition or meaning of that term under the **Securities and Investment Business Act 2010**² (“SIBA 2010”) of the laws of the BVI and/or the **Securities Investment Trust and Consulting Act** (“SITCA”) of the laws of Taiwan, without the necessary licence or permission obtained from the proper authority in each of these jurisdictions; and whether, accordingly, by undertaking to and providing such activities or advice, C2 Capital acted illegally rendering the Letter Agreements invalid and unenforceable as a matter of law in either or both jurisdictions.

- [16] It is C2 Capital’s pleaded case that Infinity Particles, in breach of the Co-Investment Arrangement and the terms of each respective Letter Agreements, refused to pay to C2 Capital, its share of the net profits from the Disputed Investments, in total or aggregate amount of US\$9,159,564.74 or any part thereof. Further, at paragraph 74, C2 Capital pleads that in relation to the “other investments”, that is, the over 50 investments, not including the 6 Disputed Investments, Infinity Particles has taken certain specific steps to exclude C2 Capital as a co-investor and to not comply with its contractual obligations pursuant to the Co-Investment Arrangement and the relevant Letter Agreement. C2 Capital therefore claimed that as a result of such breaches, it has suffered loss and damage and is entitled to an award of interest on the sums awarded by the court in relation to its share of the net profits realized by Infinity Particles in relation to each of the Disputed Investments.

Defence and Counterclaim

- [17] In its Amended Defence and Counterclaim filed 6th September 2024, Infinity Particles, in summary, denied ‘that it had agreed to the Co-Investment Arrangement or that it entered into any of the alleged Letter Agreements with C2 Capital’, and

² No. 2 of 2010 of the Revised Laws of the Territory of the Virgin Islands.

puts C2 Capital to strict proof of these allegations. More specifically, Infinity Particles asserted that in relation to the Letter Agreements concerning the Disputed Investments (as pleaded and relied on by C2 Capital,) it has never 'seen any of them, save for the one in relation to the Warby Parker Investment which was provided to [Infinity Particles'] legal practitioners, Carey Olsen, by [C2 Capital's] legal practitioners, Walkers, on 10th November 2022.' With regard to the alleged signature of Jenkin on each of the Letter Agreements, it was pleaded that while they 'appear to have been signed by Jenkin as an authorized representative for and on behalf of [Infinity Particles], it is averred that neither [Infinity Particles] and/or Jenkin had previously ever seen the Alleged Letter Agreements nor has [Infinity Particles] and/or Jenkin signed or agreed to affixing Jenkin's signature on these documents.'

[18] As will be made clear below, the learned judge found as a fact that Jenkin had indeed signed the 6 Letter Agreements, and that he had done so for and on behalf of Infinity Particles. He also found that Jenkin (and by extension Infinity Particles) had failed to bring any evidence to show that the signature was not his or that it was a forgery. These findings have not been appealed by Infinity Particles and therefore stand.

[19] The factual position therefore as it stood at the appeal stage is that all 6 Letter Agreements were signed by Jenkin for and on behalf of Infinity Particles as a party to the said Letter Agreements. This notwithstanding, the question remains whether by Jenkin having signed the Letter Agreements, Infinity Particles had entered into 6 legally binding and enforceable contracts with C2 Capital, whereby C2 Capital contracted to introduce investment opportunities to Infinity Particles and in turn Infinity Particles agreed to share or to pay over to C2 Capital a 50% share of the net profits which it derived from each of the Disputed Investments, all of which opportunities were taken up and acted upon by Infinity Particles.

[20] Infinity Particles pleaded and relied on other defences (paras. 5.3.1 to 5.3.4 of the Amended Defence and Counterclaim). In brief they are: (i) C2 Capital and Chih 'are

not qualified financial advisors and/or licensed to act as such in any jurisdiction'; (ii) such activities are prohibited under the SIBA 2010 if carried out without a licence, and any contract relating to such unauthorized financial services unenforceable under the **Financial Services Commission Act**;³ (iii) the place of performance of the alleged Co-Investment Arrangement and Letter Agreements is Taiwan, and under Article 4 of the SITCA, these activities would constitute the carrying out of a "securities investment consulting enterprise" for which permission of the Financial Supervisory Commission would be required, and therefore such activities are illegal under the SITCA; (iv) further, any agreement or arrangement for the sharing of gains or losses from a securities investment consulting enterprise with a customer, is illegal pursuant to Article 13(3) of the **Securities Investment Consulting Business Management Regulations ("the Regulations") of the laws of Taiwan**; and (v) the Letter Agreements are invalid and unenforceable as they do not comply with the formality requirements under Article 10(2) of the Regulations and are not signed by both parties.

[21] Infinity Particles in its defence also contended that even if the Letter Agreements are binding and enforceable, C2 Capital 'did not perform its role as a financial advisor and there has been a total failure of consideration.' In this respect, Infinity Particles pleaded specifically 'past consideration' as a defence to the Claim in these terms: 'any work allegedly done by C2 Capital in "sourcing" the investments 'was done before the relevant Letter Agreement was purportedly entered into.' It was also pleaded that Jenkin managed his own investments, Chih was at the material time a director of JAMM Group and 'was well remunerated in his role' and to the extent that he was involved in each of the Disputed Investments, 'Chih was acting in his capacity as a director of JAMM Group and/or informally on a personal basis and on account of his friendship with Jenkin.'

[22] Finally, Infinity Particles pleaded that if the Letter Agreements are valid and enforceable, Chih has not accounted for any losses suffered in the other

³ Act No. 12 of 2001 of the Revised Laws of the Territory of the Virgin Islands.

investments. Accordingly, Infinity Particles ‘reserves its right to set off against the present claim [C2 Capital’s] share of the losses arising from the “over 50 investments”; and Infinity Particles also puts C2 Capital to strict proof of the alleged “over 50 investments” as pleaded in the Statement of Claim.’ Accordingly, Infinity Particles counterclaimed for ‘the value amounting to 50% of the losses arising from each of the alleged “over 50 investments”, to be quantified’, interest and costs. As mentioned above, this claim was not pursued by Infinity Particles at the trial.

Reply and Defence to Counterclaim

[23] C2 Capital filed an Amended Reply and Defence to Counterclaim on 14th August 2024 in which it denied and joined issue in relation to each and every one of the ‘defences’ relied on by Infinity Particles, and denied its entitlement to any relief sought in the counterclaim. More specifically, C2 Capital denied that the Co-Investment Agreement and/or Letter Agreements are illegal and/or unenforceable either under the laws of the BVI or the laws of Taiwan. It denied carrying on an “investment business” as defined in Schedule 2, Part A of SIBA 2010. It also relied on the “Excluded Activities” in Part B of Schedule 2 as far as may be necessary. It denied dealing with “investments” or arranging deals or managing investments or providing investment advice within the meaning of those terms in Part A.

[24] C2 Capital also relied on the provisions of paragraph 2(5) of Part B and paragraph 4 of Part C of Schedule 2. C2 Capital also pleaded and relied on the discretionary power granted to a court by section 50G of SIBA 2010, if satisfied that it is just and equitable in the circumstances of the case, to allow the enforcement of an agreement to carry on unauthorized financial services business or for the money and property paid or transferred under the said agreement to be retained by the person carrying on an unauthorized financial services business. In this vein, it was pleaded at paragraph 6C(2)(b) of the Reply that –

“The Claimant and Chih at all times reasonably believed that no unauthorized financial services business was being carried on when entering into the agreements and arrangements the subject of the claims. In the circumstances. It is just and equitable that the agreements should be enforced in any event.”

[25] In relation to the defence of alleged illegality of the Co-Investment Agreement and the Letter Agreements under Taiwanese law, C2 Capital in their Reply denied that Taiwanese law applied or has any application thereto.

[26] Specifically, it is denied that either C2 Capital or Chih were acting as a ‘financial advisor’ ‘in its literal sense’; that pursuant to both the Co-Investment Agreement and the Letter Agreements “the Disputed Investments constituted a joint enterprise with (Infinity Particles as set out in the (statement of claim) and below. As a matter of BVI law C2 Capital and Chih are “excluded persons” pursuant to paragraph 4 of Schedule 2 Part C of Siba [2010].” It was also pleaded at paragraph 17.3: –

“The Claimant and the Defendant [i.e. C2 Capital and Infinity Particles] used the term “financial advisor” in the Letter Agreements as a term of art to characterize the Claimant and Chih’s role to source deals and make investment decisions for the joint enterprise between them. Chih and Jenkin were good friends and business partners. The fact that the Claimant and the Defendant entered into over 50 investments together evidences the investment arrangement that was agreed.”

[27] It was also pleaded by C2 Capital that as a matter of law the general prohibition on unauthorized investment business under section 4(1) of SIBA 2010 does not apply to investment activities “in relation to joint investments”; and as matter of Taiwanese law, C2 Capital “is not a Securities Investment Consulting Enterprise” under SITCA.

The Issues Considered and Judgment of the Lower Court

[28] The learned judge, having examined the pleaded cases and briefly summarized the background facts, formulated the dispute between the parties to the Claim in these terms:

“...whether the Claimant [C2 Capital] is entitled to recover the Amount Claimed [US\$9,159,564.74], based on the six investment opportunities that it (through Chih) introduced to Jenkin and into which Jenkin (through the Defendant [Infinity Particles]) had made investments.” (para. [25])

[29] At paragraph [8] of the judgment, the learned judge observed that the evidence discloses that between 2015 and 2021 (“the Investment Period”), fifty (50) investment opportunities were allegedly made by Infinity Particles in investments

alleged to have been introduced by C2 Capital to Infinity Particles. These investments were said to have been introduced under and pursuant to the framework and terms agreed upon orally between Chih and Jenkin in what is referred to as “the Overarching Agreement” or “the Co-Investment Agreement” entered in or around 2015. However, the Claim in these proceedings is concerned with only six such investments (“the Disputed Investments”). There is no claim in these and acted upon proceedings relating to any of the other 44 or so alleged investments said to have been introduced by C2 Capital during the said period to, and taken up by Infinity Particles. Further, each of the investments introduced and acted upon under the Overarching Agreement, were to be the subject of and documented by a “Letter Agreement” essentially in the terms of the standard “Letter Agreement”, set out at paragraph [7] of the judgment.

[30] Fundamentally, the case for C2 Capital’s, as pleaded in its amended statement of claim, rests on certain principal facts and documents. The first is C2 Capital’s reliance on a series of oral discussions which are alleged to have occurred in or around 2015 between Chih and Jenkin to explore investment opportunities, which discussions led to what is referred to as the “Overarching Agreement” or the “Co-Investment Arrangement”. By the Overarching Agreement it was alleged that Chih and Jenkin agreed that –

- (a) C2 Capital, through Chih, would look for suitable financial opportunities for Infinity Particles, through Jenkin, to invest in;
- (b) C2 Capital would act as “financial adviser” to Infinity Particles, which expression was, according to Chih’s evidence, used not in a technical sense but to denote that he would look out for financial opportunities for Infinity Particles to invest in;
- (c) C2 Capital and Infinity Particles would share equally in any net profits from the investments (introduced by C2 Capital) , after payment to

Infinity Particles of a return on the capital it invested, in the sum of 2% per annum of the amount invested;

- (d) if any investment made a loss, the net loss made on the investment would be shared equally by Infinity Particles and C2 Capital; and
- (e) each investment would be the subject of separate and distinct letters ("the Letters of Agreements") to be signed by C2 Capital and Infinity Particles to reflect the Overarching Agreement and provide a record of the terms upon which each relevant investment was made.

[31] The second primary bases of the Claim, flowing from the terms of the Overarching Agreement, are the "Letter Agreements" or, as sometimes referred to, the "side letters". The "standard" Letter Agreement (or "side letter") is in these terms:

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

[32] However, the learned judge records at paragraph [10] of the judgment this important concession by C2 Capital in the proceedings below:

"[10] As already mentioned, there were several other investments made by [Infinity Particles] as a result of investment opportunities alleged to have been introduced to it by [C2 Capital]. The Claimant [C2 Capital] accepts that although most of the investments made significant, or even substantial, profit, some made losses. **It accepts, therefore, that [Infinity Particles] is entitled to credit for those investments that made losses, i.e., that those losses should be taken into account in calculating the final amount that is due to [C2 Capital].** However, [C2 Capital] states that it does not have enough information about those other investments (whether profit-making or loss-making) to include them in the Claim. **The Claim does**

not seek an account of the net profit alleged to be due to it concerning those other investments. **This means that if the Claim is successful, there can be expected to be more litigation between the Parties about what further amounts, if any, may be due to the Claimant [C2 Capital].** As Chih pointedly observed, in the course of his evidence on the third day of the trial:

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

Further, at footnote 3 on page 8 of the Judgment, the learned judge records:

“The Claimant’s [C2 Capital’s] position is that even taking into account the loss-making projects, there will still be a **substantial amount** due to it.”

- [33] There is no issue or controversy that the judge’s summary and footnote (above) at paragraph [10] of the judgment accurately reflects Chih’s evidence on behalf of C2 Capital. However, this evidence and concession gives rise to a number of questions relative to the correctness and finality of the principal sum of US\$9,159,564.74 awarded to C2 Capital in the Order, as representing C2 Capital’s 50% share of the net profits derived by Infinity Particles from the Disputed Investments, absent any claim for or accounting in relation to the losses admitted incurred by Infinity Particles in relation to certain of the “other” 44 or so investments Chih said were introduced to and acted upon by Infinity Particles during the stated period. Admittedly, these investments were not the subject of the Claim in these proceedings and Chih has indicated an intention to bring other claims on behalf of C2 Capital on the basis of these or some of these other investments. Moreover, there was no evidence of any losses or the extent of any losses incurred by Infinity Particles in relation to any of the other investments, which losses and the extent thereof are, on C2 Capital’s case, to be taken into account “in calculating the final amount due to C2 Capital”. This notwithstanding, the learned judge made an order for the payment by Infinity Particles to C2 Capital of the Amount Claimed, that is, the sum of US\$9,159,564.74 plus interest, without any provision for accounting or set off now or in the future.

Issues Identified by Judge for Determination

[34] The judge identified (at para. [28]) eight issues arising in the Claim for his determination. These are:

- (a) Did the parties enter into or conclude an overarching agreement in the terms, or substantially the terms, of an oral agreement between the Parties referred to in the proceedings as the “Overarching Agreement” or the “Co-Investment Arrangement” (**“the Overarching Agreement Issue”**)?
- (b) Were the Letter Agreements signed by Jenkin or by some other person on behalf of Infinity Particles/Defendant (**“the Defendant’s Signature Issue”**)?
- (c) Does the failure of Chih or some other person on behalf of C2 Capital (the Claimant) to sign a Letter Agreement mean that there was no, or no valid, agreement between the Parties for the making of the investment referred to in that Letter Agreement (**“the Claimant’s Signature Issue”**)?
- (d) Was consideration provided by C2 Capital (Claimant) for the work allegedly performed under the Agreements and/or was the consideration past consideration (**“the Consideration Issue”**)?
- (e) Did C2 Capital (Claimant) fail to perform its obligation under the terms of the Agreements (**“the Performance Issue”**)?
- (f) Were Chih and/or C2 Capital (Claimant) remunerated for the work done on the Disputed Investments by JAMM Active (**“the Remuneration Issue”**)?

- (g) Were the investment opportunities that relate to the Disputed Investments introduced by Chih? If they were, was it on account of the friendship between Chih and Jenkin (**“the Legal Relations Issue”**)?
- (h) Are the Agreements illegal and/or unenforceable under BVI Law and/or Taiwanese Law and, if so, what are the consequences of such illegality (**“the Illegality Issue”**)?

[35] Before embarking upon a consideration of each of the eight issues which he identified as arising in the Claim, the learned judge considered the burden and standard of proof and conducted an assessment of the evidence of each of the seven witnesses of fact who gave evidence at the trial. These witnesses are: Chih, Chi, Shen-Tien (“Jerry”), Mr. Neil Blumenthal (“Blumenthal”), Nowell Chemick (“Chemick”), Brooke Harley (“Harley”) and Chou Ying (“Vivian”) for the claimant/C2 Capital; and Jenkin as the sole witness of fact for the defendant/Infinity Particles. As mentioned above, the judge also considered whether he ought to make adverse inferences against the defendant/Infinity Particles for failing to call Ms. Annie Chen and Mr. Mark Mi as witnesses to give factual evidence at the trial.

Burden and Standard of Proof

[36] With respect to the burden and standard of proof, the learned judge having exposed the fundamental principle in civil litigation that the legal and evidential burden rests with the claimant/C2 Capital to prove its Claim on a balance of probabilities, recognized, correctly, that during a trial there might be circumstances where the evidential burden or onus of proof may rest on the other party to prove certain facts relied on by that party, also to the civil standard.⁴

[37] On the basis of this principle, the learned judge was led to conclude: ‘In the present case, therefore, on the basis that the Claimant has been able to establish that the

⁴ (see Halsbury Laws of England, 5th ed, Reissue Vol.12, 2020 at paras 699 and 700, cited by the judge).

Letter Agreements appear to have been signed by Jenkin, it is for Jenkin to establish that the signatures appearing on the Letter Agreements were not his.’ This extract would be correct as a matter of principle, but for one misstatement. It is that Jenkin is not a “party” (a defendant) in the proceeding. The defendant is Infinity Particles. Jenkin is the beneficial owner of Infinity Particles and was its sole witness at the trial. Thus, the onus and burden to prove that the signatures to the Letter Agreements relied on by C2 Capital in relation to each of the Disputed Investments are not that of Jenkin, or that they were forged, rest, with the company, Infinity Particles. However, nothing in this appeal turns on the authenticity of Jenkin’s signature to the Letter Agreements relied on by C2 Capital at the trial and this issue was not the subject of any ground of appeal.

- [38] In relation to the burden of proof and where it lies in the proceedings, the learned judge observed at paragraph [33] of the judgment: -

“... However, for the reasons that are referred to below, my factual findings are not based on the niceties of where the burden of proof lies. I am clear that wherever the burden lies, the evidence supporting the findings that I have made is clear.”

Assessment of the Evidence at Trial

- [39] In his approach to assessing the evidence in relation to the issues arising in the Claim, the judge was guided by the dicta of Legatt J (as he then was) in **Gestmin SGPS SA v Credit Suisse (UK)**.⁵ He observed at paragraph [34] –

“[34] ... while Jenkin maintains that the Defendant has not agreed to pay the Claimant any of the net profits of an investment, the contemporaneous documents generated by and on behalf of the Parties (unless they were forged or created without the authority or knowledge of Jenkin) show a completely different picture.”

- [40] Specifically as it is related to whether the evidence establishes that an oral contract had been concluded, such as the “Overarching Agreement”, the judge was guided in his approach to the evidence by the dicta of Eyre J in **Mansion Place Ltd v Fox**

⁵ [2013] EWHC 3560 (Comm).

Industrial Services Ltd⁶ at paragraph [55] where it is stated (in part): ‘In determining whether there is an enforceable contract, the court must look at the witnesses’ evidence through the prism of the contemporaneous documents; of their subsequent actions; of those events which are accepted or clearly demonstrated to have happened; and of inherent likelihood.’

[41] As to his assessment and evaluation of the evidence of each of the eight witnesses (paras. 36] to [74], it suffices to recount here some of the judge’s important observations and conclusions in relation to each of them:

“**Jenkin** (the sole witness for the defendant/Infinity Particles): The judge found his evidence to be generally both poor and unsatisfactory, with large parts of it being “simply untruthful”. He regarded him as an “extremely intelligent individual” and “a very impressive businessman”, who was “polite” when answering questions from the bench, “but less so when Mr. Chaisty asked him questions’ in cross-examination, where he was “unnecessarily confrontational and hostile”, and “refused to answer simple questions put to him”. In making this assessment, the judge referred to a few examples from his evidence. He held that Jenkin has given “a completely distorted picture of his relationship with Chih, both in his written and oral evidence”, and “sought to portray himself as the victim of Chih’s machinations”.

Chih (the main witness for C2 Capital): The judge assessed Mr. Chih as “for the most part, ... a straightforward, honest, and reliable witness” who gave “spontaneous answers” to the questions asked of him. The judge also considered Mr. Chih’s evidence to be “fair”; he took no false points and was prepared “to make concessions whenever that was appropriate.” There was no indication that the judge found “every aspect of his evidence satisfactory”, as there were parts “which were not convincing”.

Jerry (an inhouse financial analyst employed by JAMM Active Limited (“JAMM Active” from June 2021 to October 2022, and who resigned to be employed by Jowett from October 2021 to October 2022): According to Jerry’s evidence in his witness statement (para. 30), JAMM Active had hired Mark Mi in September 2018 and himself, Chih and Vivian Chou in June 2021 and together they “formed the co-investment team”. The way this worked, as he explained in his witness statement, is –

“I would ,make a decision on whether an investment was viable or not, Jenkin would decide on behalf of Infinity whether to proceed or not, the team

⁶ [2021] EWHC 2972 (TCC).

would liaise with the team from the invested entity regarding the documents required, Jenkin would execute the investment on behalf of Infinity and the team would track the investment and perform quarterly reviews for Jenkin and me”

The judge concluded that “the oral evidence of Jerry fully supports his written account” (in his witness statement); it withstood cross-examination scrutiny; and nothing he said, “cast doubt on the veracity of the account that he gave both in his witness statements and during his oral evidence.” In concluding, the judge found Jerry’s evidence to be “compelling” and “entirely supportive of the Claimant’s allegations”. Accordingly, he accepted the substance of it.

Neil Blumenthal (one of the founders of Warby Parker or JAND Inc, one of the six “investments” the subject of the Claim): The judge found “nothing controversial about the written and oral evidence” of this witness. The judge surmised at paragraph [65]: ‘Like the other witnesses who provided evidence to support the Claim, Mr. Blumenthal’s evidence provided powerful support for the position advanced by Chih in the Claim. He was clear, without Chih, there would have been no deal. There can be no doubt that the involvement of Chih was the most crucial factor in closing the deal with Warby Parker.’

Neil Chernick (co-founder and managing director of Kayak, another of the six investments the subject of the Claim): The judge found that his evidence also “supported the account given by Chih”. He observed that this witness “appeared to think that the investment [in Kayak] was being made by Chih or, at any rate, Chih was the lead player in the proposed investment”, and he was unaware, until he was cross-examined at the trial, “that Jenkin owned Infinity and that Chih had no legal or beneficial interest in that company.”

Brook Harley (co-founder of Campfire Capital Partnership (“Campfire Capital”), a joint venture firm based in Vancouver, Canada which focused on early-stage investments in technology and retail; she was also employed as director of Business Development at Lululemon Athletica Inc (“Lululemon”) an athletic apparel company listed on the NASDAQ and was, between 2011 and 2015 its Director of International Operations): In short, her evidence was that she had no involvement with Chih or Jenkin’s proposed investment in Cotopaxi and had little or no knowledge of what investment Chih, Jenkin, or any of their companies made in Cotopaxi: and had not heard of or come across, Jenkin.” (para.[73])

Drawing Adverse Inferences

[42] In considering whether he ought to draw adverse inferences for Infinity Particles' failure to call Annie Chen and Mark Mi as witnesses at the trial, the judge agrees that both of them "could (and should) have been called" as witnesses. He considered Annie's evidence as "central to the relationship between Chih and Jenkin and their respective companies." He accepted that "a deliberate decision was made by [Infinity Particles] not to call them"; and had they been called it was "more likely" that their evidence "would have supported C2 Capital's position in the Claim and substantially undermined Jenkin's evidence." The judge was also convinced that Jenkin could have secured Annie's attendance at court for the trial. He mused that to say that the 'explanation offered by Jenkin in cross-examination for her non-attendance (see para. [81]) was "bizarre" is an understatement, and a "disingenuous attempt by Jenkin to avoid witnesses giving evidence who are likely to have completely undermined his evidence in the Claim.'

[43] Having cited several authorities including an extract from the judgment of **Waller LJ in Jaffray v Society of Lloyds**⁷ and Brooke LJ (at para. [88]) in **Wisniewski v Central Manchester Health Authority**⁸ at page 340, the learned judge concluded, at paragraph [90]: -

"I consider that it is entirely appropriate for me to make an adverse inference about the failure of the Defendant [Infinity Particles] to call Annie and Mark to give evidence.... That said, it is important that I point out that I would have come to the same factual findings even if I had decided not to make adverse findings of any sort against the Defendant as a result of its failure to call those witnesses."

Overarching Agreement Issue

[44] The learned judge acknowledged that the question of whether the "Overarching Agreement" pleaded and relied on in the Claim as the foundational contract between C2 Capital and Infinity Particles as to the terms under which C2 Capital would be entitled to a 50% share of the net profits derived by Infinity Particles for each of the

⁷ [2002] EWCA Civ 1101 at para. [406].

⁸ [1998] Lloyd's Rep Med 223.

investments introduced by C2 Capital, is primarily a question of fact and the onus to establish that a contract had been concluded on those terms lies with C2 Capital, as the claimant in the proceedings. On this issue, the learned judge was “unable to accept” that Chih thought the Overarching Agreement was a binding agreement between C2 Capital and Infinity Particles (para. [97]). His finding was based on four reasons (set out at paragraphs [98] to [101] of the judgment). These need not be recited here, as this issue is not the subject of a ground of appeal and the learned judge’s conclusion in law, stands. The judge also held that even if he was wrong about whether Chih genuinely held that belief “looking at the facts objectively, I cannot see, based on the matters referred to in paras. 97-101 of this judgment, how I could come to that conclusion.”

[45] However, at paragraph [106], the learned judge was satisfied that the discussions between Chih and Jenkin about potential investment opportunities being introduced by Chih had taken place and that these discussions had ‘culminated in an “agreement in principle” being reached between the Parties [C2 Capital and Infinity Particles] that Chih, on behalf of the Claimant, would provide investment opportunities from time to time to Jenkin and that they would share equally in the net profit realized (after the payment of the sum of 2% per annum by way of return on the capital invested by Jenkin) or loss made by the investment.’

[46] This finding of an “agreement in principle” is stoutly challenged by Infinity Particles in the appeal, on the basis that such a finding was not open to the learned judge since the claimant, C2 Capital, has not pleaded or relied on such a finding and, in any event, such finding was of no legal or contractual force since an “agreement in principle” is not a binding or enforceable contract which created or led to the creation of legal relations between the parties.

[47] However, the judge went further in his analysis of the contractual position in law between C2 Capital and Infinity Particles with regard to the Disputed Investments. At paragraph [109], the learned judge encapsulated his conclusion on this important

issue. He held that notwithstanding the Overarching Agreement was not a finally concluded agreement between the Claimant and the Defendant, “**a valid agreement was only concluded at the point when the Letter Agreement was signed or, if no Letter Agreement was signed, when Jenkin invested funds in an investment opportunity that was afforded to him.** So, for the point at which the agreement between the Parties was concluded, this has to be on **the date when the Letter Agreement was signed by Jenkin or the date of the investment being made by the injection of the funds by Jenkin in relation to an investment opportunity introduced by Chih, whichever date was earlier.**” (emphasis added)

[48] The judge was satisfied that his conclusion as to the two circumstances which gave rise to a binding agreement between the Parties [C2 Capital and Infinity Particles] was supported by the express terms of the Letter Agreement that Infinity Particles will “promptly execute all necessary documents and fund the investment amount (in relation to the investment specified in the Letter Agreement) on a timely basis.” He posited that the only proper interpretation of those words is that the parties were entering into an agreement for the investment specified in the Letter Agreement, when the Letter Agreement was signed by Jenkin or, if no Letter Agreement was signed by Jenkin for the particular investment, when he made the injection of funds in that investment opportunity introduced to him by Chih. Also, that thereupon “the Defendant became liable to pay 50% of the net profit (or, as the case may be, the Claimant became liable to pay half of the loss) made by the investment on the basis that, **once that injection of funds was made, there had to be an implied agreement between the Parties. In either case, the terms were those as set out in the relevant Letter Agreement.**” (emphasis added) (para. [110])

[49] The judge’s finding as to an “implied agreement” at paragraph [110] of the judgment is the subject of challenge in ground 1 of the appeal whereby it is contended by the appellant that the learned judge “erred in law by departing from [C2 Capital’s] pleaded case.” Likewise, the question of what the proper meaning and effect of the judge’s conclusions at paragraph [110] is has been the subject of much contention

between the appellant and the respondent, each attributing a somewhat different meaning to the judge's words during the hearing of the appeal.

- [50] In this vein, the findings and conclusions of the learned judge at paragraphs [111], [112] and [113] on this issue are also of significance. These I will set out in full later in this judgment. I therefore set them out below in full:

Defendant's Signature Issue

- [51] The judge's findings on this issue were not appealed by Infinity Particles and hence did not feature in any way in the appeal. However, this notwithstanding, the judge's findings are nevertheless of some relevance in relation to other issues canvassed in the appeal and in giving proper context to them. Therefore, I will briefly summarize the judge's primary findings on this issue.

- [52] This issue concerns whether Jenkin had signed the Letter Agreements relied on in the Claim or whether they had been signed by some other person on behalf of Infinity Particles. The judge found that the assertion that Jenkin had not signed the Letter Agreement "is a palpable untruth." He also found that none of the Letter Agreements had been signed electronically and so the signatures on them "were all Jenkin's, written in his handwriting." He concluded on this Issue at paragraphs [123] and [124] as follows:

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

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

- [53] At paragraph [129], having referred to and considered the several WeChat emails in evidence passing between Mark Mi and Chih concerning draft side letters and/or draft Letter of Agreements (see para.[127]), the learned judge held, at paragraph [129]: 'Given the foregoing, it is incomprehensible how Jenkin could allege that he

was unaware of the Letter Agreements. **He knew full well what they were and why they needed to be signed by him.**' (emphasis added)

The Claimant's Signature Issue

- [54] This Issue, as posited by the learned judge at paragraph [146], concerns the following question: Does the failure of Chih or some other person on behalf of [C2 Capital] to sign a Letter Agreement mean that there was no or no valid agreement between the Parties for the making of the investment referred to in the Letter Agreement? The judge's answer to this question relates back to his basic findings in relation to the first Issue. Accordingly, at paragraph [149] he reiterates –

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

- [55] Further, on the basis of the learning from Chitty on Contracts, Vol.1 at para. 4-035 as to the existence of a binding contract being implied from the conduct of the parties, the learned judge held –

"[151] Once the investment was made, **there was no conceivable basis for Jenkin to argue that an agreement between the Parties had not been reached**, even where the Letter Agreement relating to that investment was not signed by Chih or someone on behalf of [C2 Capital]." (emphasis added)

The Consideration Issue

Meaning of "financial advisor"

- [56] This is an issue of some importance in the appeal particularly in relation to the meaning of the expression "financial advisor" in the Letter Agreements, whether the learned judge was correct in the meaning which he gave to it and in reaching that meaning by accepting the pleaded meaning in the ASOC and as given by Chih in

his evidence at Trial, and whether he ought to have found that C2 Capital had not performed any such role as “financial advisor” and there was therefore a total failure of consideration rendering each Letter Agreement unenforceable as a binding contract between C2 Capital and Infinity Particles. The “past consideration issue” is another important limb of the “Consideration Issue”, as dealt with by the learned judge. His conclusion on this issue was that none of the Letter Agreements suffered from “past consideration” rendering them unenforceable as binding agreements. A determination of the first limb of the “Consideration Issue” involved a consideration and interpretation of the meaning of the expression “financial advisor” as used in the Letter Agreements.

Total Failure of Consideration

- [57] More specifically to the issue of ‘consideration’, the judge held that there was no failure of consideration as there has been no consideration provided by Infinity Particles to C2 Capital which can be said to have failed. This is for the reason that there has been no payment to C2 Capital of any amounts of their share of the net profit from the Disputed Investments under the Letter Agreements, and no performance by Infinity Particles of any of the terms of the Letter Agreements.

Past Consideration

- [58] The learned judge deals with the issue of ‘past consideration’ at paragraphs [191] to [202] of the judgment. His reasoning and conclusion on this important issue or defence raised by Infinity Particles must be examined closely in determining whether he was correct in his ruling. The gravamen of this defence to the Claim is that where C2 Capital had already performed the services (introduced the relevant investment opportunity) prior to the pertinent Letter Agreement being signed or purportedly signed by Jenkin, that would be “past consideration”, which is not capable of supporting the Letter Agreement as a binding contract in law.
- [59] The judge having cited a passage on “past consideration” from **Chitty on Contracts** at para 6-029, formed the view that “this proposition [of Infinity Particles’ lead

counsel] is simply not sustainable on the facts of this case”, and the argument based on past consideration is “without substance”. In so concluding the learned judge reasoned that –

- (1) having already found that each Letter Agreement constituted a separate contract between C2 Capital and Infinity Particles to undertake the investment referred to in it and that the agreement was made when Jenkin “decided to invest” in the particular investment by injecting funds into the investment or when he signed the Letter Agreement, whichever was earlier”, the consideration cannot be past consideration.
- (2) even if one takes the date when Jenkin signed the Letter Agreement as the operative date when that agreement was concluded, this argument by Infinity Particles “simply does not get off the ground.”
- (3) the argument based on past consideration “can only proceed on the premise that once an introduction was made by Chih, his and his company’s role came to an end, and he did no other work to facilitate the conclusion of the agreement.” However, this is not correct, as in relation to every investment, **“work on the part of the Claimant continued for a substantial period of time to enable the investment made by the Defendant to come to fruition. This facilitation and monitoring of what was happening with the investment was necessary from Chih’s point of view as much to ensure that the investment did not make a loss (for which the Claimant would be responsible for half) as to ensure that the investment turned a profit in which case, he stood to obtain 50% of the net profits from it.”** (emphasis added)
- (4) The extract from Chitty on Contracts, Vol.1, at 6-030 (cited fully at para. [198] of the judgment) “demonstrates the fallacy of the type of

argument that [Infinity Particles] is running.” This passage is to the effect that in determining whether consideration is past the courts **“are not bound to apply a strict chronological test. If the giving of the consideration and the making of the promise are substantially one transaction, the exact order in which these events occur is not decisive.”** (emphasis added)

- (5) In any event, “arguments of this type can usually be avoided by an alternative claim being made by a claimant against a defendant in “quantum merit” (Chitty on Contracts, Vol.1, at 6-033), and he was not in doubt that the reason why C2 Capital, as claimant, did not run such an alternative claim, was because “the position advanced by [Infinity Particles] on this issue...was spurious. It was never likely to succeed.”

The Performance Issue

[60] The “Performance Issue” concerns the question whether C2 Capital had failed to perform its obligations under the terms of the Letter Agreements. The learned judge confessed some failure to understand or to grasp Infinity Particles’ case in relation to this issue. However, having examined what may have been their contentions, such as Chih having performed services either because of his friendship with Jenkin or in his capacity as an employee or officer of JAMM Active, or as a result of a consultancy agreement between JAMM Active and Infinity Particles, or that he did not make any of the introductions for which C2 Capital seeks payment in the Claim, the judge concluded that there is “no substance in any of this.”

[61] The learned judge also considered the Table produced by Jenkin’s counsel Ms. Amelia Tan at paragraph 8 of her affidavit sworn on 5th July 2023 dealing with each of the Disputed Investments, and the basis upon which Jenkin asserts that the investment introductions were not made by Chih. He observed that these statements are bare statements unsupported by any evidence. He concludes that,

to the contrary, the evidence “entirely supports Chih’s case” that he introduced each investment opportunity to Jenkin. He buttresses this conclusion with examples of the evidence of witnesses supportive of it, including evidence from Mr. Blumenthal and Mr. Chemick, and from Jerry and Vivian. Accordingly, at paragraph [220], the learned judge rejected Jenkin’s evidence to the effect that none of the introductions were made by Chih. He found as a fact that “all of the introductions relating to the Disputed Investments were made by Chih on behalf of the Claimant [C2 Capital].”

- [62] I merely observe at this juncture, that the appellant has at ground 3(d) challenged the judge’s findings of fact on this Issue. They contend that the learned judge ought to have found that, to the extent that Chih had introduced investment opportunities to Jenkin, he was doing so in his capacity as an employee of JAMM Active and/or personally.

The Remuneration Issue

- [63] The Remuneration Issue concerns the question whether Chih or C2 Capital was remunerated for the work done on the Disputed Investments by JAMM Active. The judge answered that question with a resounding “NO”. He found that Chih had not been remunerated for the work he had done on the Disputed Investments by JAMM Active. He found Infinity Particles’ case on the Remuneration Issue to be “flawed” having regard to the terms of the Letter Agreements and an employment or consultancy agreement between C2 Capital and Infinity Particles. Further, the judge concluded, “seen in its proper context, it was [Infinity Particles], not JAMM Active, that made the investments and this is reflected by the terms of the Letter Agreements reached between the Parties.”

- [64] As to the effect of the Letter Agreement, the judge held:

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

[65] The judge considered clause 1 of the consultancy agreement which provides that C2 Capital's role is 'to perform services on fabric market research, customer development, maintaining customer relationships, seeking opportunities, and to assist from time to time on such other matters as the Client may request.' He also considered Infinity Particles' contention that clause 1 meant that 'the investment opportunities that Chih introduced to Jenkin fell within the scope of clause 1 for which Chih (through the Claimant) was fully remunerated by JAMM Active.' He concluded that this proposition could not be correct, for the reason that Infinity Particles 'has a separate existence, and was a different type of business, from JAMM Active. There is nothing in the consultancy agreement that suggests that investment opportunities introduced by Chih to Infinity, a distinct and separate company from JAMM Active (that also did a different type of business from JAMM Active) were included in the description of the services that the Claimant had contracted to provide to JAMM Active in clause 1.'

[66] The judge, however, considered that although there might be some support for Jenkin's case based on the fact that some of Chih's expenses for facilitating the investments were paid by JAMM Active, "Chih had a perfectly good explanation for this", which explanation the judge accepted. Chih's explanation, given in evidence, was that it was agreed between Chih and Jenkin that these expenses could be put through JAMM Active's books; and Chih also had a "direct or indirect interest in JAMM Active, albeit a minority one" so it could be said that it was Jenkin who was solely responsible for "paying" those expenses."

The Legal Relations Issue

[67] The judge's findings/conclusion on this issue has not been appealed. Put simply, this issue concerned the question: Were the investment opportunities allegedly passed by Chih to Jenkin because of their friendship such that Chih had neither an entitlement nor expectation to be paid for the work that the Claimant [C2 Capital] did? The determination of this question involved a consideration of whether there was "an intention to create legal relation" between Chih and Jenkin, or C2 Capital

and Infinity Particles. The conclusion arrived at by the learned judge was to decide this issue in favour of C2 Capital, having mused that Infinity Particles' case (based on Jenkin's evidence) was so weak that it would not have survived an application to strike it out as a defence on the basis that 'it did not disclose a reasonable case to defend the Claim.'

The Illegality Issue

- [68] The judge's conclusion on this issue is the subject of challenge at ground 5 of the appellant's notice of appeal. As the argument goes, it is that even if the judge was correct to have found that Chih had introduced investment opportunities arising from each of the Disputed Investments on behalf of C2 Capital to Jenkin or to Infinity Particles, he ought to have found, as a matter of law, that the provision of those services was illegal under the laws of the BVI.
- [69] The learned judge considered separately and, *in extenso*, this question in relation to both BVI law and Taiwanese law. His ruling on both fronts is the subject of challenge by the appellant at ground 6 of the notice of appeal. I do not consider it useful, at this stage in the judgment, to set out in any detail, the judge's reasoning on both aspects, as these will be dealt with in depth when ground 6 is considered in light of the submissions by the parties.
- [70] On the question of the illegality of the Letter Agreements under BVI Law leading to them being unenforceable, the learned judge considered the gravamen of the argument by Infinity Particles to be that these agreements provided for C2 Capital to serve as "financial advisor" to Infinity Particles in relation to the particular investment the subject of each Letter Agreement; and whether, in so acting, C2 Capital would have been carrying on an "investment business" without proper licence or authorization from BVI, that is, without an appropriate licence issued by the competent authority in BVI covering or permitting that activity or business. The judge considered the provisions of section 4 of SIBA 2010 which prohibits any person from carrying on or holding himself out as carrying on "investment business

of any kind in or from the Virgin Islands”, unless he/she has a licence so authorizing them to do. The judge also considered section 3 of SIBA 2010 and paragraphs 2,3 and 4 of Part A of Schedule 2 of SIBA.

[71] It was common ground between the parties, that C2 Capital, as a BVI registered company, is governed by and subject to the licensing requirement and regime of SIBA 2010. However, at paragraph [267], the learned judge reasoned that if C2 Capital was carrying on investment activities, it was not doing so “by way of business”, still less that those activities constituted the carrying on of a “business investment.” He remarked that the expression “business”, though not defined in the SIBA 2010, has a “wide” meaning “and may, in an appropriate case, even include an isolated transaction, as has been made clear in many cases, particularly those involving fiscal legislation.” He reasoned, however, that, in the context of the instant matter, the only activities that C2 Capital carried out “were to introduce investment opportunities to a single client (i.e., [Infinity Particles]) with whom it had a contractual relationship, rather than to a third party”. This type of activity does not appear to me to be “by way of business” involving the Claimant [C2 Capital] and the Defendant [Infinity Particles] in the conventional manner in which that expression is understood.”

[72] At paragraphs [284] and [291], the learned judge, having considered the definition of “providing investment advice” in paragraph 4 of Schedule 2 to SIBA 2010, held:

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

[73] The learned judge reasoned further that C2 Capital –

“[285]... did little more than identify investments that it thought might be worth the Defendant investing in so that they could both benefit from any investment that the Defendant undertook. This was done on the basis of Chih’s inquiries and contracts which were entirely personal to him. There was no formal advice of the type encompassed by the section. The due diligence carried out was by the “Co-Investment Team” that included Jenkin and other personnel of JAMM Active, so, even if investment advice was given by the Claimant to the Defendant, it was neither given by the Claimant

in a professional or business capacity nor was it relied upon, or intended to be relied upon, by the Defendant, directly or indirectly, without the Defendant undertaking its own due diligence and obtaining its own advice on the viability of the investment.”

“[291] Whatever complaints are made by the Defendant to the form in which the Disputed Investments took, in substance the agreement between the Claimant [and the Defendant] was straightforward. In short, the Claimant would introduce investment opportunities to the Defendant, it remained for the Defendant to decide, after it had done its due diligence, whether to proceed with it. If it did, the Claimant and the Defendant would be entitled to share in the net profits (or be responsible for the losses) equally. If it did not, that was the end of the matter.”

[74] The learned judge considered next the question whether, assuming the activities under the Letter Agreements are prohibited under SIBA 2010, do any of the exceptions in Part B of Schedule 2 of SIBA 2010 apply? Having considered this question at some length, the judge declared his satisfaction that there is a powerful case that the ‘partnership’ exclusion in paragraph 5 of Part C to Schedule 2, applies. In so opining, he was also of the view that the relationship between C2 Capital and Infinity Particles, “supports the classic hallmarks” of a partnership between them. Further, he opined that he could not see any reason why “the Claimant and the Defendant could not be said, in the present case, to have acted as partners.” Accordingly, the learned judge held that “the agreement [the Letter Agreements] between the Parties did not involve any breach of the SIBA 2010.”

[75] The next related question considered by the judge was whether, even if he was wrong about these matters, does a breach of the SIBA 2010 render the Letter Agreements unenforceable? This led to a consideration of section 50F of the SIBA 2010 which in subsection (1) provides that any agreement ‘to which this section applies’ made by a person in the course of carrying on unauthorized financial services business is unenforceable ‘against the other party to the agreement.’ Accordingly, the learned judge held that ‘prima facie’ the Letter Agreements are not enforceable.

- [76] Next the judge considered section 50G(2) of SIBA 2010 which gives the court a discretion to allow an agreement that does not comply with the licensing requirements of the SIBA 2010 to be enforced if it is 'just and equitable' to do so. In considering whether it is just and equitable to allow its enforcement against the other party to the agreement, the section requires the court 'to have regard to whether the person carrying on unauthorized financial services business **reasonably believed** that he or she was not carrying on unauthorized financial services business by making the agreement.' The judge concluded first that Chih 'had no idea that the involvement of the Claimant in the Disputed Investments might be unlawful', as is, in the judge's opinion, well borne out at paragraphs 24 and 111 of Chih's witness statement.
- [77] As to whether that belief was 'reasonable', the learned judge, having considered the guidance from Lord Neuberger MR in **Charles Cleland Helden v Strathmore Limited**⁹ at paras. [46] – [48], opined that he was not in any doubt that the belief held by Chin was reasonable. His reasons for so concluding are set out at paragraphs [326] and [333] (a) to (k). These will be considered in some detail when addressing ground 5 of the appeal.
- [78] As to the issue of whether the Letter Agreements were illegal under Taiwanese Law, the learned judge alluded to the expert evidence of the parties and exclaimed that he found both the evidence of C2 Capital's expert, Ms. Lui, and Infinity Particles expert, Mr. Yeh, "very difficult to understand". However, perhaps on margin, he preferred the evidence of Mr. Yeh. He went on to consider the question whether, if it is that C2 Capital was providing financial advice, can they be said to have been performing those services wholly or partly in Taiwan? In considering this question, the learned judge posited and rejected, in a reasoned way, the factors, arguments and grounds put forward by Infinity Particles, before concluding:
- "...neither any individual factor nor all factors combined lead to the conclusion that the services were performed by the Claimant in Taiwan. Indeed, it would be surprising that the slight or incidental connection to

⁹ [2011] EWCA Civ 542.

Taiwan could have the consequence of rendering the performance of the Agreements illegal.” (para. [362])

[79] The judge also rejected Infinity Particles’ various contentions as to the possible or likely consequences of such illegality under Taiwanese Law on the performance of the Letter Agreements. He opined-

“[387] It is difficult to understand how illegal conduct under domestic law which a court decides is insufficient to warrant a promisee being deprived of his ability to enforce a contract either under SIBA 2010, or some other basis (such as *Patel v Mirza*), can then found a sufficient basis, on the same facts, to make it inappropriate for the promise to enforce it because of the laws of another country...”

[80] At paragraph [394], the learned judge came to the “unhesitating” conclusion that he should not prevent the Letter Agreements from being enforced in full. Accordingly, he decided the Illegality Issue in C2 Capital’s favour.

[81] For the reasons given in the judgment, the learned judge concluded as follows in relation to the Claim:

- (a) None of the grounds upon which the Claim has been defended are valid.
- (b) It follows that the Claimant is entitled to recover the Amount Claimed in full together with interest.
- (c) Judgment will, therefore, be entered for the Claimant for the Amount Claimed and interest.

[82] In this respect, the learned judge “requested” the parties to agree the precise amount payable to the Claimant including interest. The Order entered 10th December 2024 sets out the principal sum awarded, the amount of interest accrued as of the said date and continuing, as well as an award of costs to C2 Capital, to be agreed or if not, assessed, and an order that Infinity Particles pay an interim payment of US900,000 toward such costs.

Grounds of Appeal

- [83] By notice of appeal filed 7th January 2025, Infinity Particles appealed the Judgment and Order. It seeks to have this Court set aside 7 findings of fact and law. By way of relief, it seeks a decision of this Court allowing the appeal, setting aside the award of compensation to C2 Capital with interest and costs, and awarding it costs in the appeal and in the court below.
- [84] The appellant relies on 7 grounds of appeal 6 of which are unnecessarily lengthy consisting of a main ground followed by several sub-grounds or points of challenge. Because of their considerable length, they will each, conveniently, be set out below at the beginning of each section dealing with that particular ground of appeal. Further, the grounds of appeal are not in strict conformity with rule 62.5(5) of the **Civil Procedure Rules (Revised Edition) 2023** ("CPR") which provides that grounds of appeal must be set out 'concisely' and without any argument or narrative. Of the 7 grounds of appeal, the first six are not concise and trespass into the realm of being 'argument' in support of the substantive ground, and not strictly concise grounds of appeal. They are a naked attempt to posit or to foreshadow the various points of arguments to be made by the appellant in favour of each substantive ground. These points of argument are more befitting inclusion in the appellant's skeleton argument or written submissions, and wholly inappropriate as parts of the grounds of appeal.
- [85] Unfortunately, the practice of putting forward lengthy and at times cumbersome grounds of appeal pregnant with several or many points of argument in support thereof has been growing in frequency. It has become almost commonplace in commercial appeals, appeals involving administrative law including judicial review and constitutional issues under Part 56 of the CPR. This practice is one which this Court deprecates. It is our hope, therefore, that legal practitioners responsible for drafting grounds of appeal will take appropriate note and adopt, in future appeals, a more succinct and concise approach to the drafting of grounds of appeal focusing

the Court's attention on the substantive issue or decision being challenged and leaving this to be further developed and substantiated in the appellant's written and oral submissions.

Ground 1: The Implied Agreement and Pleading Issue

The learned judge erred in law by departing from C2 Capital's pleaded case to find that there was an "implied agreement" between the Parties [C2 Capital and Infinity Particles] that would have been concluded either on the date when each Letter Agreement was signed by Jenkin or the date of the investment being made by the injection of funds by Jenkin, whichever was earlier

Points in Support of Ground 1

- (1) First, it was never C2 Capital's pleaded case that there would have been an "implied agreement".
 - (a) C2 Capital's pleaded claim [of breach of contract] was based primarily on an "Overarching Agreement" [or "Co-Investment Arrangement"] (at para. 5). The judge ultimately found that this was a non-binding and unenforceable "agreement in principle" (para. [111]).
 - (b) In the alternative, C2 Capital relies on the Letter Agreements. However, C2 Capital's pleadings made clear that the Letter Agreements were not intended to be binding agreements. They were simply "records" of the aforementioned non-binding Overarching Agreement (at para. 5).

The judge therefore erred in law by finding that the Claim succeed even if there was no binding Overarching Agreement, and "even without a (Letter Agreement)". Both of C2 Capital's pleaded grounds have failed. It was not open to the judge to enforce C2 Capital's claim on the basis that there would have been an "implied agreement between the Parties" that was concluded on an ad hoc basis. This was never pleaded, and the parties were not given a chance to make any submissions on it.

- (2) Second, and in any event, C2 Capital and Infinity Particles could not have been parties to any “implied agreement”.
- (a) It is trite law that a company is a separate and distinct legal entity from its controller. The affairs of C2 Capital and Infinity Particles are not the affairs of its controllers which are Chih and Jenkin respectively (at paras. [13] and [14]).
 - (b) The judge failed to appreciate this fundamental distinction between the separate legal entities. Tellingly, the Judgment appears to repeatedly conflate and use the terms Infinity Particles/Jenkin and C2 Capital/Chih interchangeably.
 - (c) The judge accordingly erred in law. He ought to have held that any “implied agreement” would have been between Chih and Jenkin and not C2 Capital and Infinity Particles.
- (i) It is C2 Capital's pleaded case that the Overarching Agreement (i.e. the agreement in principle) was between Chih and Jenkin (para 8 of the ASC) This appears to have been accepted in the Judgment [at 108]).
 - (ii) Since any “implied agreement” would be derived from the Overarching Agreement, it follows that the parties to such an “implied agreement” would be the same as the parties to the Overarching Agreement, namely, Chih and Jenkin.
 - (iii) That must be the case, as different investment vehicles (apart from Infinity Particles) were used for various investments. As the Judgment notes, “in each case, the [investment] entities would be those that Chih and Jenkin had agreed to” (at para. [58])
 - (iv) Indeed, and at the time the First Kayak Investment was concluded (in the first quarter of 2015), Infinity Particles

was not even in contemplation as an investment vehicle (and only assumed that role in mid-2016) and could not have been a party to any “implied agreement”.

- (3) Third, and to the extent there was an “implied agreement” between C2 Capital and Infinity Particles, the judge ought to have found that any such agreement was not legally binding. Like the Overarching Agreement, any “implied agreement” would simply have been an agreement in principle. The Judge ought to have found that the C2 Capital Letter Agreements were entered into as part of Chih’s aspirations to ultimately become a financial advisor and operate a family office for Jenkin (see at para. [43]). However, these aspirations never materialized, and Chih and Jenkin ultimately decided to part company in or around February 2022. It follows that there was no binding agreement between Chih and Jenkin, on the terms set out in the C2 Capital Letter Agreements.

Appellant’s Submissions – Ground 1

- [86] The appellant relies on its written submissions filed 22nd May 2025, reply submissions filed 7th May 2025 and on the oral submissions of lead counsel, Mr. Moverley Smith, KC. The appellant posited that the crux of its appeal is whether, during the course of the close personal friendship between Chih and Jenkin, C2 Capital had acquired any ‘enforceable contractual rights against Infinity [Particles] in relation to the Disputed Investments.’
- [87] In arguing ground 1 of its appeal Infinity Particles contends that C2 Capital’s pleaded case of breach of contract was entirely premises on the Overarching Agreement, which the judge found is not a binding agreement or contract in law and is therefore unenforceable as such. Infinity Particles submits that on this basis alone, C2 Capital’s pleaded claim must fail. This submission stands or falls on two reasons relied on by Infinity Particles. First, while it is correct that C2 Capital’s pleaded case

of breach of contract also relied, in the alternative, on the Letter Agreements, it was clarified during the trial that its case is that the Letter Agreements did not have any independent binding legal effect. In support of this contention, Infinity Particles points to the evidence of Chih, the principal witness for C2 Capital, that the Letter Agreements were nothing more than “records” of the Overarching Agreement. In seeking to make this contention good, Infinity Particles relies on Chih’s evidence on Day 2 of the Trial. Infinity Particles also argues that that this explains why the Letter Agreements were only entered into “after the fact” of the actual investments having been made.

[88] The second bases relied on by Infinity Particles is that, in any event, the learned judge departed from C2 Capital’s pleaded case when he found that there would have been, in certain circumstances, various ‘implied agreements’ between C2 Capital and Infinity Particles concluded on an ad hoc basis under which Infinity Particles would be liable to C2 Capital for 50% of the net profits derived from those investments, on the same terms as in the standard Letter Agreement, which “implied agreements” would be independent of the Overarching Agreement and the signed Letter Agreements, as found by the judge at paragraph [111]. The gravamen of this submission is that C2 Capital’s pleaded case was not based on any “implied agreement” coming into existence, absent any signed Letter Agreement applicable to that investment or in circumstances and at the time when Infinity Particles or Jenkin had invested its funds in the investment opportunity purportedly introduced to Jenkin by Chih.

[89] Infinity Particles next substantive point in support of ground 1, is that in any event, C2 Capital and Infinity particles could not, as a matter of law, have been parties to any “implied agreement”, even if C2 Capital’s pleaded case can be interpreted to include a reliance on some “implied agreement”. This line of argument is based upon the fundamental principle of company law that a company is a separate legal entity from its members/shareholders, and its property, assets, interests and affairs are not those of its controllers/shareholders, in this instance, Chih and Jenkin, as it

relates, respectively, to C2 Capital and Infinity Particles. They argue that this fundamental legal distinction the learned judge failed to appreciate or to refer or give any consideration to, when reasoning at paragraph [111] of the judgment to a finding of the existence of an “implied agreement” between C2 Capital and Infinity Particles. This, they say is evident from paragraph [111] itself where the learned judge conflated and/or used interchangeably the terms Infinity Particles/Jenkin and C2 Capital/Chih.

[90] It is also submitted that had the learned judge addressed his mind to this fundamental distinction, he ought to have concluded (assuming reliance on an implied agreement had been pleaded or was otherwise permissible) that such “implied agreements” were between Jenkin and Chih in their personal capacities, and not between C2 Capital and Infinity Particles. In support of this submission, it is argued that:

- (1) the judge having found that the Overarching Agreement as an “agreement in principle” was between Chih and Jenkin, it follows that any “implied agreement” would likewise be between Chih and Jenkin;
- (2) Chih’s evidence supports this conclusion, since, by his account, he was dealing personally with Jenkin, and the corporate entities (to wit C2 Capital and Infinity Particles) were unimportant. Chih testified: “I think they all mean the same thing. And ultimately it means whether you’re CC [a reference to an entity CC Partners], C2 [Capital], it really means it’s basically me and Jenkin.”
- (3) Infinity Particles was not the only investment vehicle used by Jenkin. The evidence at trial was that other corporate entities, such as CC Partners and Rich Keypoint Limited, were also used, at the discretion of Chih and Jenkin.

(4) Also, Infinity Particles was not even in contemplation as an “investment vehicle” at the time one of the Disputed Investments (Kayak Investment) was made during the first quarter of 2015, Infinity Particles having only assumed that role in mid- 2016. In this instance, Kayak Investment was initially held by CC Partners, another Jenkin controlled corporate entity before being subsequently transferred to Infinity Particles. It follows, argues Infinity Particles, that it could not have been a party to any “implied agreement” in relation to this Kayak Investment, on the basis upon which the learned judge at paragraph [111] held that such an “implied agreement” would have come into existence, that is, at the time when the funds were actually invested.

(5) Finally, as the judge noted at paragraph [231] of the judgment, Chih was prepared to accept that any agreements were between himself and Jenkin, and not C2 Capital and Infinity Particles. There the learned judge stated: -

‘In fact, Chih can be forgiven for thinking that, at some stage, it might even have been suggested to him by the Defendant [Infinity Particles] that if there were any binding agreements, they were not between the Parties [i.e. C2 Capital and Infinity Particles] but between Chih and Jenkin personally, **between Chih and Infinity [Particles], or between Chih and the Defendant [Infinity Particles]** – see the following response to a question put to him by Mr. Moverley Smith on Day 2 of the Trial

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

[91] Of these 5 points relied on by Infinity Particles at paragraph 25 of its written submissions, the one at subparagraph (e) above is, in my view, the weakest. I say this because fundamentally it does not amount to any admission by Chih (and hence C2 Capital) that the Letter Agreements or any implied agreement as found by the judge were between himself and Jenkin personally. This is so either because of

what the learned judge said at paragraph [231] or the excerpt of Chih's evidence quoted therein. First, upon close scrutiny, the extract of paragraph [231] quoted at paragraph 25 of the appellant's written submissions, is somewhat incomplete. The omitted words are those shown in bold above. From that it can be seen that Chih was not limiting his answer to Mr. Moverley Smith KC's question to only one scenario, that is, that any binding agreement was between himself and Jenkin personally. He also posited another scenario wherein the agreement is between himself (Chih) and Infinity Particles.

[92] Second, the judge made clear at paragraph [231] that this might even have been something suggested to Chih by Mr. Smith KC on behalf of Infinity Particles, and the extract from Chih's evidence quoted does not support a suggestion or thinking, on the part of Chih, that any binding agreement was between himself and Jenkin. This response was clearly and simply a retort by Chih saying to Mr. Smith KC, if you are suggesting to me that Jenkin and not Infinity Particles owes me personally the money claimed and he is willing to pay it over to me personally, I would be happy to take it "too". In short, what is set out at paragraph [231] is of no real evidential value in establishing between which persons, individual or corporate, any binding agreement or agreements, explicit or implied, were made concerning the recommendation of investment opportunities and the sharing equally of the net profits derived therefrom.

[93] Further, in relation to the "implied agreement" issue, Infinity Particles submits that if, contrary to its primary submission on this, there was an implied agreement between C2 Capital and Infinity Particles, such agreement would not be binding in law for the reasons that (i) the existence of such a contract is not lightly implied (see **Modahl v British Athletic Federation**);¹⁰ (ii) it is not necessary to imply a contract in circumstances where Chih and/or C2 Capital had existing obligations under Chih's Employment Contract with JAMM Active and the Consultancy Service Agreement between JAMM Active and C2 Capital for the purposes of the intended

¹⁰ [2001] EWCA Civ 1447.

IPO of Joy Textile; (iii) the legal requirement of offer and acceptance had not been met in relation to any such “implied agreement”, as it is entirely unclear from the judge’s findings at paragraph [109] when the purported “offer” if any would have been extended to C2 Capital, the contents or terms of such offer, and how long it was open for acceptance; and (iv) the judge ought to have found that, put at its highest, any “implied agreement” would fall the way of the Overarching Agreement, as simply an “agreement in principle”. and not a binding contract as between C2 Capital and Infinity Particles.

[94] To buttress this last point, Infinity Particles argues that the evidence by Chih discloses that the Letter Agreements were “nothing more than aspirational”. They refer to the Transcript where Chih stated that his “aspiration with Jenkin was to create a great platform where we both benefit. One was JAMM Active ... because I was hoping that we would do an IPO... and, of course on [Infinity Particles’] side, these joint investments that we do....”

[95] I comment at this juncture (as I did above in relation to a different point), that not much traction can be made from this point, based, as the argument is, on the fact that these aspirations never materialized since no IPO of Joy Textiles had in fact occurred, and Chih’s plans to create a “great platform” using JAMM Active and Infinity Particles never came to fruition. The telling point here is that C2 Capital’s pleaded case of breach of contract, based as it was on the Overarching Agreement being a valid and binding agreement, which it was found not to be; and, in the alternative, upon the Letter Agreements, stands or falls on the existence of a valid, binding and enforceable contract whether on the basis of each Letter Agreement, signed by Jenkin on behalf of Infinity Particles, constituting a binding agreement in relation to the particular investment opportunity, and/or on the basis of an “implied agreement” in the same or very similar terms coming into existence at the point where Jenkin makes the investment by an injection of funds, in circumstances where either there was no Letter Agreement relating to that investment or no signed Letter Agreement by Jenkin pertaining thereto. This issue does not turn on Chih’s evidence

as to his aspirations and that of Jenkin relative to JAMM Active or the intended IPO of Joy Textiles which never materialized or came to fruition.

Respondent's Submissions – Ground 1

[96] The respondent, C2 Capital, relies on its written submissions filed 22nd April 2025, and the oral arguments made by its lead counsel during the hearing of this appeal. First, by way of updating the Court, C2 Capital stated that since the making of the order for payment of the Sum Claimed, interest and costs, Infinity Particles has not made any payment in satisfaction of the judgment sum. Further, having obtained judgment in its favour, C2 Capital applied for and obtained a freezing order against Infinity Particles and JJC Capital Limited, a Chabra Defendant. Infinity Particles' application to discharge the freezing order and to stay the disclosure of assets obligation therein was dismissed and Infinity Particles ordered to pay the costs applicable to its said failed application. However, no payment has been made toward settling the said cost order. Subsequently, Infinity Particles withdrew its discharge application and entered into a Consent Order whereby it also agreed to pay C2 Capital's costs, but to date of the filing of said written submissions Infinity Particles had not made any payment towards satisfying that obligation as well. The upshot of all of this, says C2 Capital, is that Infinity Particles has ignored all orders for payment of the sums awarded after trial and the costs orders made in favour of C2 Capital post-trial.

[97] All this, argues C2 Capital, points to the deployment of deliberate delaying tactics in the proceedings by Infinity Particles and Jenkin. In this regard, they point to the comment by the learned judge at paragraph [413] as to the length of the judgment reflecting 'the intransigence of Jenkin to deal satisfactorily with any questions put to him (other than to refer to his written evidence) which has necessarily resulted in my having to put together the pieces of a large jigsaw.' In my view, the learned judge there was expressing his thoughts and perhaps frustration with Jenkin who he found to be an untruthful witness, which goes to the assessment of his conduct as a witness of fact and the evidential value or lack thereof attributed to his evidence in

the judgment. However, as far as this appeal is concerned, nothing turns on the post-judgment occurrences and failures identified by C2 Capital in their written submissions as surmised above.

[98] Second, by way of general points, C2 Capital, encapsulated its assessment of the quality, thoroughness and correctness of the judgment in these terms: “The judgment, from a highly experienced Judge, runs to 116 pages and 413 paragraphs. It contains a highly detailed analysis of the issues and evidence. It is an excellent example of a first instance Judgment which identifies the issues for determination, addresses the evidence (both oral and written) in considerable detail and arrives as a highly reasoned decision.” They also point to the judge’s further statement at paragraph [413] of the judgment which seems to lay some of the ‘blame’ for the length of the judgment on the ‘many technical arguments advanced by lead counsel for Infinity Particles, Mr. Moverley Smith KC, advanced with his customary great erudition. Again, this does not impact in the slightest this Court’s evaluation of the arguments and submissions made by the appellant in support of the grounds of appeal. The only statement in that paragraph of the judgment which is of some relevance is where the learned judge stated his agreement with lead counsel for C2 Capital, Mr. Chaisty, that he ‘found the determination of the claim straightforward.’ However, even that statement must be considered and evaluated in the context of the grounds of appeal and the points and counterpoints made or raised by the parties leading ultimately to this Court coming to its own evaluation as to the merits or lack thereof of the appeal itself.

[99] Likewise, I do not attribute any weight when considering the grounds of appeal and issues, to the respondent’s remark that this appeal itself is part of a ‘wider strategy of Jenkin to take any and every conceivable point with a view to avoiding having to face Infinity [Particles’] obligations and to pay C2 [Capital] what is due.’ Whether this is true or not has no real bearing on the veracity or correctness of any of the bases upon which the appellant seeks by this appeal to challenge and to have set aside by this Court, the liability judgment and quantum order made by the learned judge

in the proceedings below. These issues will either stand or fall on their own merit, and this position remains unaltered even where, as complained by the respondent, there is a repetition by Infinity Particles of many of the points and arguments made before and rejected by the learned judge at the trial. Put simply, the learned judge either came to the correct conclusions and findings on the various issues of importance or significance or he did not, with the requisite outcome for the appeal itself.

[100] However, where the ‘rubber hits the road’ as far as C2 Capital’s more general arguments and submissions are concerned, is its submission that in the appeal Infinity Particles is pursuing grounds which amount to attacks on findings of fact and the exercise of judicial discretion and, in doing so, it has failed to address or to properly address “the insurmountable problems which such attacks face.” The relevant principles applicable to appellate restraint when considering attacks or challenges to a trial judge’s evaluation of evidence and his/her exercise of a discretion, are well-settled.

[101] These principles have been thoroughly considered and applied by this Court in many reported and unreported decisions, and most authoritatively by the Privy Council as the apex court. The respondent has dealt with this issue of appellate restraint and treated with some of the pertinent authorities and authoritative dictum to be derived therefrom, at paragraphs 103 to 104 of its written submissions. The cases relied on are: **Piglowska v Piglowski**¹¹; **Chen v Ng**¹² at paras. [49]-[56]; **Assicurazioni Generali Spa v Arab Insurance**¹³ at paras. [6]-[23]; **Cook v Thomas**¹⁴ at para. [48]; **Re Sprintroom**¹⁵ at para. [76]; **Sancus Financial Holdings v Chad Holm**¹⁶ at para. [18]; and **Tanfern v Cameron-MacDonald**¹⁷ at para. [32]

¹¹ [1999] 1 WLR 1360 at 1372.

¹² [2017] UKPC 27.

¹³ [2002] EWCA Civ 1642.

¹⁴ [2010] EWCA Civ 227.

¹⁵ [2019] EWCA Civ 932

¹⁶ BVIHCMAP2019/0002 (delivered 30th March 2020 and re-issued on 15th April 2020, unreported).

¹⁷ [2000] 1 WLR 1311.

referring to the decision in **G v G**. These principles are uncontroversial. I therefore approach the judge's evaluation of the evidence and his findings of fact and his exercise of judicial discretion, with these salient and salutary principles of appellate restraint foremost in mind.

[102] On the central issue in this appeal of whether C2 Capital had acquired any binding and enforceable contractual rights against Infinity Particles concerning investment opportunities and the equal sharing of net profits derived or realized by Infinity Particles from the Disputed Investments, C2 Capital's overarching submission is that the learned judge was correct in finding that it had acquired such contractual rights on the bases of both the signed Letter Agreement and "implied agreement" in the same terms as the standard Letter Agreement, and his analysis and reasoning on this issue was extensive, detailed, highly impressive and his conclusions of fact and law unassailable.

[103] Regarding the issue of whether in finding that such binding contractual rights had been created, the learned judge went outside or beyond C2 Capital's pleaded case, C2 Capital argues that what is contended at paragraph [23] of Infinity Particles written submissions is entirely wrong. Its response to this submission it relies on three principal points. The first point is that the judge did not depart from C2 Capital's pleaded case, which was based first on the Co-Investment Arrangement and also on the Letter Agreements, as the learned judge fully recognized. Second, and in any event, Infinity Particles position as expressed during the trial was that it was not taking "pleading points" and, therefore, it cannot now seek to do the very opposite to that stated position in the appeal. Third, all relevant points dealt with by the learned judge in reasoning to his conclusions on this issue, including the bases upon which he made a finding of "implied agreements", had been fully canvassed, explored and addressed in argument, written and oral, by the Parties at the trial. Accordingly, Infinity Particles has suffered from no inability to advance all points and arguments in opposition or in defence of the Claim. Indeed, it took every conceivable point (as the judge commented) which could have been imagined or addressed, and

did so regardless of “pleading issues”, which it expressly said it was not taking. Each of these points were further developed.

- [104] Taking these points in turn, in relation to the first point - the pleading point simpliciter - C2 Capital referred to paragraphs 8 and 9 of its Amended Statement of Claim (“ASOC”) which relies on the “Co-Investment Arrangement” as the “agreement” of the understanding reached between Chih and Jenkin as to how the said joint investment arrangement would be structured. Reference is also made to paragraph 10 of the ASOC which sets out the terms of the standard Letter Agreement which is pleaded as having been ‘prepared and agreed between the Claimant [C2 Capital] and the Defendant [Infinity Particles] which was to be used by them in all relevant investment transactions.’ Further, C2 Capital points to paragraph 11 of the ASOC, which states that the standard Letter Agreement ‘makes provision for future applicable Letter Agreements to be entered into on behalf of the Claimant [C2 Capital] and Infinity Particles.’ Reference in the submissions was also made to paragraph 12 which provides - “Each investment was the subject of a Letter Agreement in the terms set out above and entered into on behalf of the Claimant [C2 Capital] and Infinity [Particles]”; and, importantly, paragraph 20 (which identifies and provides brief particulars of the 6 Dispute Investments the subject of the Claim), and states ‘... the following investments ... each being the subject of Letter Agreements.’ C2 Capital also relies on this pleading at paragraph 73 of its ASOC under the rubric Particulars of Breach:

“In breach of the Co-Investment Arrangement **and the terms of each respective Letter Agreement**, Infinity [Particles] has refused to pay to the Claimant its share of the profits from the Disputed Investments, a total amount of US\$9,159,564.74 or any part thereof.’ (emphasis added)”

- [105] C2 Capital also points out that in its Amended Defence, Infinity Particles expressly engages with its case advanced in reliance on the Letter Agreements at paragraphs 4, 5 and 6. The first line of paragraph 4 states: ‘In summary, the entire Statement of Claim is premised on an alleged Co-Investment Arrangement **and various Letter Agreements** which are said to support it.’(emphasis added) The appellant then goes on to deny having agreed to the Co-Investment Arrangement and having

entered into the Letter Agreements. Paragraph 5, opens with these words: 'Further and/or in the alternative, if the Court finds that the Defendant had entered into the alleged Co-Investment Arrangement **and the alleged Letter Agreements**, the Defendant avers that the Co-Investment Arrangement and the Letter Agreements are illegal and/or unenforceable.' (emphasis added) Paragraph 6 is in similar vein. It states, in part: 'Without Prejudice to the position set out earlier in this Defence, even if the alleged **Letter Agreements are binding and enforceable**, the scope of alleged services to be provided by the Claimant [C2 Capital] were not performed.' (emphasis added)

[106] In relation to the second and third primary points submitted by C2 Capital in response to ground 1, Infinity Particles expressly made clear during the trial that they would not be taking any "pleading points"; and, in any event, they had fully availed themselves of and did in fact take all possible or conceivable points, which points, so far as relevant, were all addressed by the judge in reasoning to his conclusions on the "crux" or central pleaded issue of the Letter Agreements being individually binding and enforceable contracts between C2 Capital and Infinity Particles. C2 Capital sets out at paragraphs 16 and 17 of its written submissions, several references to the transcript of the trial. In my considered view, it is not necessary or useful for present purposes for me to replicate these extracts or exchanges in this judgment. Suffice it to be said that I have read them all and have given consideration to them in determining the issues raised under ground 1 of the notice of appeal.

[107] The second set of extracts are from Infinity Particles Opening Submissions and Closing Submissions. These citations are intended to show conclusively that Infinity Particles and those representing them at the trial were in no doubt at any time what C2 Capital's pleaded case of breach of contract was, in particular its reliance on the Letter Agreements as individually binding and enforceable agreements between C2 Capital and Infinity Particles.

[108] The relevant citations from Infinity Particles' Opening Submissions relied on by C2 Capital are from paragraphs 4, 5, 6 and 17:

At paragraph [4] it is stated:

"C2 [Capital's] claim is based on a series of alleged contracts between C2 [Capital] and Infinity [Particles] (the letter Agreements)."

At paragraph [5]:

"C2 [Capital] is not suing Infinity [Particles], under the Letter Agreements, for a sum equivalent to 50% of the profits from six investments."

At paragraph [6]:

"Infinity [Particles'] defence to C2 [Capital's] claim is straightforward:

- (a) It disputes that the Letter Agreements are valid and binding agreements: Jenkin has no recollection of signing them.
- (b) In any case, C2 [Capital] is not entitled to claim under the Letter Agreements because its own case is that it has never performed its role as financial adviser. C2 [Capital] has accordingly not provided any considerations under the Letter Agreements."

At paragraph [17]:

"As noted above, C2 [Capital] is now suing Infinity [Particles] under various Letter Agreements..."

And at paragraph [7](b) of its Closing Submissions it is said that Infinity Particles acknowledged that an issue (for determination) is whether the Letter Agreements were "independent and valid contracts"; and went on to address arguments based on that premise.

[109] C2 Capital also relies on the judge's findings at paragraphs [106], [109], [110] and [114] to [116] of the judgment. It is stated that what the judge found at paragraph [112] was that there was a binding agreement 'on the alternative basis on which the claim is made (i.e. under the Letter Agreements'. C2 Capital submits that the judge's reasoning is clear, correct and there is no basis upon which it can be overturned. The judge was entirely correct in finding that a binding agreement was reached when the relevant Letter Agreement was signed by Jenkin, and having found that

the signature on the Letter Agreements on behalf of Infinity Particles was that of Jenkin (which finding has not been appealed), his primary finding of a contract coming into existence is unassailable.

[110] In submitting that there is no substance to ground 1 of the appeal, C2 Capital addressed head on and summarized, at paragraphs 24 and 25 of its written submissions, its arguments and counterarguments in response to the specific points and submissions made by Infinity Particles on ground 1 at paragraphs 23 to 26 of its written submissions in the appeal. I can do no better than reproduce them in full here:

“24. C2 [Capital’s] case was pleaded [in its Amended Statement of Claim]. It was met in the Amended Defence of Infinity [Particles]. It was addressed in Written Opening and Closing Submissions and was addressed extensively in oral submissions. As to [paragraph] [24], the record demonstrates no such thing as contended by Infinity [Particles]. There was no submission that the [Letter of Agreements] had no independent effect. Comments from Chih in evidence are not relevant to the issue of how the case was presented, that Infinity [Particles] knew the case it had to meet and that Infinity [Particles] sought unsuccessfully to meet that case. The evidence of Chih at Day 2, 149 ...addressed a number of points as to administrative issues in the context of answering a differing point about the term “financial adviser”. It is grossly unfair to seek in some way to attribute to him or that piece of evidence some kind of position which prevented the Judge from fairly and properly reaching the conclusion he did. There is no challenge to the fundamental elements relied on by the Judge in his ultimate conclusion. The same points apply in respect of Day 2, 79 ... A Court does not make determinations based on points made by a witness and treat such as if they are legal submissions and concessions.”

“25. As to 24(b) in the case of the six investments the subject of the claim the point referenced in paragraph [111] ... of the Judgment is irrelevant to this appeal because it was found as a fact, and not the subject of this appeal, that Jenkin did sign the Letter Agreements. The analysis at [25] of the Skeleton Argument is irrelevant **because six investments were the subject of signed Letter Agreements**. In any event, the arguments as to contractual agreements being between individuals personally have no substance. Further parts of the analysis, e.g. [25a], are somewhat desperate attempts to attribute far greater significance to terminology used by the Judge than is fair and appropriate. The point at [25e] again is unfair insofar as it seeks to rely on some irrelevant conclusion which should influence the Court. The points at [26] are again wholly irrelevant. The argument misses the point made at [110] and the distinction drawn by the

Judge and importantly does not attempt to address the basis on which he did find in favour of C2 [Capital]. As noted in the Judgment (sic) at [113], “each Disputed Investment is represented by a Letter Agreement.” Reference is also made to [129] ... and the finding of fact “it is incomprehensible how Jenkin could allege that he was unaware of the Letter Agreements. He knew full well what they were and why they needed to be signed by him.” At [142] the Judge expresses his conclusions as to which he says there is “no doubt” in his mind.”

Analysis and Conclusion – Ground 1

[111] Ground 1 of the appeal concerns the correctness of the judge’s finding of an “implied agreement” having found that the Co-Investment Arrangement relied on by C2 Capital as being a binding contract between it and Infinity Particles was an “agreement in principle” and whether the learned judge erred in nevertheless finding and “implied agreement” in the terms of the Letter Agreements.

[112] Essentially, this ground of appeal is concerned with whether the learned judge was correct to find, as a matter of fact and law, the coming into existence, in certain specified circumstances or scenarios, of an “implied agreement” between C2 Capital’s and Infinity Particles, for the introducing by Chih of investment opportunities to Jenkin, the taking up of such investment opportunities by an injection of funds by Jenkin, and on the basis of the equal sharing of any net profits(or losses) derived from such investment by Infinity Particles and C2 Capital. Further, whether on C2 Capital’s pleaded contractual case it was open to the learned judge to find the coming into existence of an “implied agreement”. Additionally, if such an implied agreement came into existence, who are the parties to it – was it Chih and Jenkin in their personal capacities or C2 Capital and Infinity Particles; and, whether in any event the judge ought to have found that any such “implied agreement” was as a matter of law an “agreement in principle” and not a binding contract between C2 Capital and Infinity Particles.

[113] The issue of an “implied agreement” is not the same as whether the Letter Agreements themselves constituted separate and independent binding and enforceable contracts between C2 Capital and Infinity Particles. There can be no

doubt that C2 Capital pleaded and relied on the Letter Agreements as one of two bases upon which the Claim was brought. This was fully recognized and accepted as correct by the learned judge when he referred the Letter Agreements as the 'alternative basis' upon which C2 Capital pleaded case of breach of contract rests. The issue of an "implied agreement" is also separate from the issue of whether any such binding agreement, be it the Letter Agreements or the "implied agreements" themselves, were tainted with illegality, whether under the laws of BVI or Taiwan, and thereby rendered unenforceable.

[114] As mentioned above, ground 1 is a challenge to the finding of an "implied agreement" on several bases, including lack of such a pleaded case. It is whether the learned judge, in making the finding of an "implied agreement" at paragraph [110] of the judgment, went outside C2 Capital's pleaded case of breach of contract and, by doing so, erred in giving judgment for C2 Capital on its Claim. Further, if an "implied agreement" was not pleaded or relied on by C2 Capital in its Claim, was it impermissible for the judge to go on to consider and to make such a finding on a basis not specifically pleaded, and whether such finding was therefore hopelessly flawed and ought to be set aside by this Court. Ground 1 also concerns whether, in circumstances where the learned judge found that the Co-Investment Arrangement was not a binding contract, C2 Capital in fact did not rely on the Letter Agreements as being formal agreements, he ought to have held, as a matter of law, that C2 Capital had failed to establish the existence of a binding agreement between it and Infinity Particles concerning the introducing by the former of investment opportunities to the latter and the equal sharing by the said parties of the net profits derived by Infinity Particles from each of the Disputed Investments, and dismissed the Claim.

[115] These issues under ground 1 necessarily engage the finding and conclusion of the learned judge at paragraph [106] of the judgment that the Co-Investment Arrangement was an "agreement in principle" and not a binding and enforceable agreement. There the judge, having been satisfied that 'several discussions

between the Parties, about potential investment opportunities being introduced by Chih to Jenkin took place', was also satisfied that those discussions culminated in an "agreement in principle" being reached between the parties [i.e. C2 Capital and Infinity Particles] and not a binding agreement.

'[106] Chih, on behalf of C2 Capital, would provide investment opportunities from time to time to Jenkin and that they [presumptively C2 Capital and Jenkin] would share equally in the net profit realized (after the payment of the sum of 2% per annum by way of return on the capital invested by Jenkin) or loss made by the investment. This would be on an ad hoc basis, as and when Chih became aware of an investment opportunity that he thought Jenkin might wish to invest in. It would then be up to Jenkin to decide whether to proceed with that investment opportunity. A binding agreement was only reached by the Parties [i.e. C2 Capital and Infinity Particles] once Jenkin signed the Letter Agreement relating to that investment or injected funds into it.'

[116] In this respect, it is not in dispute that an "agreement in principle" is not a binding contract. It is merely an 'agreement' on certain essential matters of principle which leaves other important matters unsettled or not agreed, or fundamental matters unresolved, and is therefore not binding. This is what was held by the learned judge relying, *inter alia*, on an extract from **Chitty on Contracts**, Vol. 1. at 4-146. This finding has not been appealed.

[117] I observe that the learned judge at paragraph [106] of the judgment when addressing the legal status of the Overarching Agreement/Co-Investment Arrangement and concluding that it is an "agreement in principle", refers to the individuals "Chih" and "Jenkin" as synonymous with, respectively, C2 Capital and Infinity Particles. For example, when he stated that the several discussions were "between the Parties", the latter term having been defined in the judgment to mean "the Claimant and the Defendant", when the evidence discloses that these discussions were between Chih and Jenkin. The judge also gave a sweeping definition/pronouncement at the beginning of the judgment, by which he expressly conflated references in the judgment to Chih and to Jenkin, as references either to them individually or to the respondent and appellant or any other company owned or controlled by each of them: -

“... in this judgment, unless otherwise stated or the context otherwise requires –

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

[118] Ground 1 is particularly concerned with the judge’s findings at paragraph [109] of the judgment –

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

[119] In my view, the judge’s statements and findings of fact and law at paragraph [109] are clear. There is no uncertainty, ambiguity or confusion as to the judge’s thinking and reasoning. There he makes the following principal findings of law. First, the Overarching Agreement is not a binding contract but merely an agreement in principle, which has no legal force as a binding contract between the parties. The judge seems to have concluded that the “agreement in principle” was between, not Chih and Jenkin as individuals, but C2 Capital and Infinity Particles. I say this from the language used by the judge at paragraphs [106] and [109] (above), and from his definition of “the Overarching Agreement” or “the Co-Investment Arrangement” to mean ‘the agreement allegedly reached between the Parties [C2 Capital and Infinity Particles] (or between Chih and Jenkin in their personal capacity) to explore joint investment opportunities between the Claimant and the Defendant or between Chih and Jenkin.’ While this definition appears to leave open the possibility that the

Overarching Agreement/Co-Investment Arrangement was between the individuals Chih and Jenkin, the judge seems to have put this issue to rest at paragraphs [106] and [109] by his positive findings that the said “agreement in principle” was between the Parties, that is, C2 Capital and Infinity Particles.

[120] This finding as to the parties to the Overarching Agreement (an “agreement in principle”) is certainly open to criticism. It is difficult to see how the said pronouncement can be correct, both as a matter of fact and as a matter of applicable principles of contract law. What is clear is that the discussions in 2015 leading to the Overarching Agreement took place between Chih and Jenkin. There is no evidence that in these negotiations, which the judge found did take place, these two men were acting for and on behalf of, respectively, C2 Capital and Infinity Particles. However, this issue is of limited, if any, significance in this appeal since the judge found that the Overarching Agreement is not a binding and enforceable agreement in law. The only significance seems to be the evidential value of the judge’s finding that Chih and Jenkin did have these discussions leading to the understanding reflected by the so-called Overarching Agreement/Co-Investment Arrangement and the importance of this to the issue of the correctness of his finding of an “implied agreement” and whether the Letter Agreements themselves ought to have been also found to be “agreements in principle.”

[121] The second finding of importance by the learned judge at paragraph [109] of the judgment is that a binding agreement would come into existence in two factual scenarios. The first is where a binding written contract exists and the second is where a binding agreement is implied from certain conduct. These two factual scenarios are: (i) when Jenkin signed the Letter Agreement applicable to a specific investment opportunity introduced by Chih (or C2 Capital); and (ii) if there is no signed Letter Agreement or no Letter Agreement at all, when Jenkin (presumptively by or through or on behalf of Infinity Particles) made an injection of capital in the particular investment introduced by Chih thereby bringing into existence an “implied agreement”.

[122] The essential issues, therefore, to be considered under ground 1 of the appeal in relation to paragraph [109] are whether in making the findings which he did as to the existence of a binding agreement the learned judge erred by (i) departing from C2 Capital's pleaded case of breach of contract; and (ii) even if it was open to him to make that finding on C2 Capital's pleaded case his conclusion of a binding written contract and an implied agreement was wrong in law and/or not supported by the evidence and C2 Capital's case at trial.

[123] Ground 1 also concerns, importantly, the judge's findings and conclusions of law of an "implied agreement" between C2 Capital and Infinity Particles at paragraph [110] of the judgment, which reads: -

'[110] I consider that this is supported by the express terms of the letter Agreement, which states that Infinity would "promptly execute all necessary documents and fund the investment amount [in relation to the investment specified in the Letter Agreement] on a timely basis." The only proper interpretation that can be given to this provision is that the Parties were entering into an agreement for the investment specified in the Letter Agreement when the Letter Agreement was signed by Jenkin. Accordingly, if at that stage, no investment of funds had been made by Jenkin, it became necessary for him to do so "on a timely basis" (disregarding, for this purpose, whether those words are certain enough to be enforced). **If no Letter Agreement was signed by Jenkin, but an injection of funds was made by him in an investment opportunity introduced to him by Chih,** the Defendant [Infinity Particles] became liable to pay 50% of the net profit (or, as the case may be, the Claimant [C2 Capital] became liable to pay half the loss) made on the investment on the basis that, once that injection of funds was made, **there had to be an implied agreement between the Parties.** In either case, the terms were those set out in the relevant Letter Agreement. I do not know whether the difference in the wording of the Letter Agreements referred to in para. 26(e) of this judgment is intended to reflect this distinction. I have not checked this because of the findings I have made. However, if it does, it provides further support for Chih's position in the Claim.' (emphasis added)

[124] In my considered view, as with the preceding paragraphs [106] and 109] of the judgment, the learned judge's statements and findings at paragraph [110] are clear. The essential issue is whether these findings and conclusions as to the two scenarios in which a binding agreement would come into existence between C2

Capital and Infinity Particles, were permissible under C2 Capital's pleaded case and, if so, whether such findings are correct as a matter of law and supported by the facts and circumstances, as found by the learned judge.

[125] The judge considered that his finding of the two scenarios under which a binding agreement came into existence at paragraph [109] is supported by the express provisions of the agreed upon by Chih and Jenkin standard form of Letter Agreement, which included an obligation on the part of Infinity Particles to “fund the investment amount” promptly and to execute all documents necessary to make or to conclude said investment. Second, the learned judge clearly stated that a binding agreement would only come into force as and when Jenkin signed the Letter Agreement corresponding to a particular investment opportunity introduced to him by Chih; or, where no Letter Agreement was signed by Jenkin, Infinity Particles made an injection of funds in relation to an investment opportunity introduced by Chih. In the latter scenario this would give rise to an “implied agreement” on the same terms as in the standard Letter Agreement, including the entitlement of C2 Capital to share equally in any net profits derived from that investment or equally in any net loss.

[126] In considering the issues raised by the appellant in ground 1 of its appeal the findings of the learned judge at paragraphs [111], [112] and [113] of the judgment are also of some importance. I therefore set them out in full below:

“[111] While, therefore, I come to the conclusion that there was no binding Overarching Agreement, I am satisfied that **even without a Letter Agreement**, once the investment was made by Jenkin, a binding agreement **between the Parties** was concluded under which the Defendant [Infinity Particles] became obliged to pay 50% of the net profit in relation to the Investment to the Claimant [C2 Capital]. Likewise, if the Investment made a loss, the Claimant became liable to pay half the amount of that loss to the Defendant. (emphasis added)

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

[113] (in material part) The Overarching Agreement Issue must, therefore, be decided against the Claimant, though, as I have said, **this does not have any significant bearing on the Claim because each Disputed Investment is represented by a Letter Agreement.**”

[127] These findings by the learned judge, therefore, sets the stage for a full consideration of the issues raised by ground 1 of the appeal, and the points and counter points of the parties in support and in opposition thereto.

Letter Agreements as Binding Contracts

[128] It is clear from the Amended Statement of Claim (ASOC) that C2 Capital’s pleaded case for recovery of the Amount Claimed was based on an alleged breach or breaches of both the Co-Investment Arrangement (also called the Co-Investment Agreement), and/or the 6 individual Letter Agreements as binding and enforceable contracts between C2 Capital and Infinity Particles. This was acknowledged and accepted by Infinity Particles in its Amended Defence when responding specifically to the case in relation to both the Co-Investment Arrangement and the Letter Agreements, its assertion that none of them were binding and enforceable agreements and, in any event, they were illegal and unenforceable by reason of certain pleaded defences, including total failure of consideration, past consideration and illegality. Moreover, the extract from the Amended Defence relied on by the respondent in its submissions clearly demonstrates that Infinity Particles knew and accepted that C2 Capital had pleaded its case on the basis of these two agreements, the Co-Investment Agreement and the Letter Agreements each constituting a separate and independent contract enforceable as such.

[129] It therefore follows inexorably that it was open to the learned judge, on the pleaded case and defence and in the manner in which the parties conducted their respective case at trial, to determine, firstly, whether the Co-Investment Arrangement constituted a binding agreement, and if so, who were the parties to it; and secondly, whether each of the Letter Agreements constituted separate free standing and binding agreements between the parties thereto, namely, C2 Capital and Infinity

Particles. The judge held that the Co-Investment Arrangement was not a binding agreement but an “agreement in principle” and as such is unenforceable as a contract. This finding is not the subject of appeal and therefore stands.

[130] In considering and determining the issue of whether the Letter Agreements each constituted a binding agreement in law between C2 Capital and Infinity Particles (subject to any defences, such as total failure of consideration, past consideration or illegality), the learned judge did not go outside or contrary to C2 Capital’s pleaded case of breach of contract at paragraphs 20 and 73 of the Amended Statement of Claim. This issue and cause of action was addressed, denied and joined by Infinity Particles at paragraphs 5,6,25 and 66 of the Amended Defence. This position on the pleaded cases leads to a consideration of the question of who the parties to each of the Letter Agreements are and how many of the Letter Agreements were signed by Jenkin on behalf of Infinity Particles. In relation to those of the six Letter Agreements signed by Jenkin on behalf of Infinity Particles, the judge was correct in holding that they were or purported to be binding agreements between C2 Capital and Infinity Particles in accordance with their terms, subject to the further issues of total failure of consideration, past consideration and illegality. It is therefore only those Letter Agreements not signed by Jenkin on behalf of Infinity Particles or not signed for and on behalf of either party, which would fall to be considered within the ambit of the judge’s finding of an “implied agreement.”

[131] I have examined each of the six pertinent Letter Agreements in the Claim. The Letter Agreement relating to the **Kayak Investment Partners Offshore Fund** is dated 3rd March 2016. It is signed by Chih on behalf of C2 Capital and by Jenkin on behalf of Infinity Particles as, respectively, the parties thereto, as is the Letter Agreements for **Global Uprising, PBC** dated 14th February 2017. The Letter Agreement relating individually to **Appier Holdings, Inc** dated 20th September 2019, **Loyal Valley Capital Advantage Fund LP** dated 20th September 2019, **JAND Inc.** dated 19th December 2019, and **CRCM Fintech Fund, LP** dated 29th July 2020 are not signed on behalf of C2 Capital but are signed by Jenkin on behalf of Infinity Particles. In

summary, therefore, all 6 Letter Agreements are the subject of the Claim purport to be between C2 Capital and Infinity Particles, not Chih and Jenkin. Of these 2 were signed respectively by Chih on behalf of C2 Capital and by Jenkin on behalf of Infinity Particles; and the remaining 4 only by Jenkin on behalf of Infinity Particles.

[132] The upshot of this is that all 6 Letter Agreements, which each purport to be between C2 Capital and Infinity Particles as the parties thereto, are signed by Jenkin on behalf of Infinity Particles. It follows that of the six Letter Agreements there are none which were not signed by Jenkin. It also follows that with respect to the six investments which are the subject of the Claim, there are none which were not the subject of a Letter Agreement or an unsigned Letter Agreement by Jenkin. The judge's finding is that each of the signatures affixed to the Letter Agreements were that of Jenkin. This finding has not been appealed by Infinity Particles and therefore stands.

[133] It follows, therefore, that the second scenario or circumstances identified by the learned judge at paragraphs [109] and [110] of the judgment as giving rise to an "implied agreement" involving a situation where Jenkin had not signed a Letter Agreement, does not arise on the indisputable documentary evidence in this case. Accordingly, the central issue raised by the appellant in ground 1 of its appeal that the learned judge erred in finding that there was a valid "implied agreement" does not, strictly speaking, properly arise on the indisputable facts of this case. It also renders otiose the issue of whether, in making a finding of an "implied agreement", the learned judge went outside C2 Capital's the pleaded case, since this issue is only of significance if the predicate circumstances which would give rise to an "implied agreement" were present on the documentary evidence of the Letter Agreements. This notwithstanding, and for the sake of completeness, I will consider briefly the pleading issue.

[134] It is correct that nowhere in the ASOC did C2 Capital expressly plead or rely on an "implied agreement" as a further or alternative contractual basis upon which its

breach of contract claim against Infinity Particles is grounded. What is clear from its pleaded case, as has been mentioned above, is that the Claim is based, first, on the Overarching Agreement/Co-Investment Agreement, which the learned judge found to be an “agreement in principle” and not a binding contract; and second, on the Letter Agreements themselves. In my judgment C2 Capital having pleaded and clearly relied on the Letter Agreements as individual binding agreements between itself and Infinity Particles, providing expressly for the equal sharing of net profits and losses derived by Infinity Particles from the specific named investment opportunity the subject of each Letter Agreement, it was open to the learned judge to consider and to hold that where Jenkin had signed a Letter Agreement (on behalf of Infinity Particles), the latter was prima facie bound by its terms, it having expended its capital in making or taking-up the said investment. It was also open to the judge to consider the alternative scenario, that is, where Jenkin had not sign a Letter Agreement, but the actual investment was made by Infinity Particles by an injection of funds by Jenkin; and to conclude and to find, as a matter of law, an “implied agreement” on the same terms or usual terms as provided for in the standard letter Agreement document agreed upon by Chih and Jenkin at the start of their Co-Investment Arrangement, in principle.

- [135] For these reasons, there is no merit in the appellant’s pleading point. This point may have had far more cogency and merit in circumstances where C2 Capital had not, as part of its pleaded case, relied on the Letter Agreements themselves as a contractual basis upon which to ground its breach of contract claim. In reaching this conclusion, I am mindful that the record of the trial makes clear that Infinity Particles had, on more than one occasion, expressly disavowed any attempt by it to rely on pleading points and, further, they had a full opportunity to raise and did raise a plethora of points, issues and defences to the Claim. In my considered view, C2 Capital’s pleaded case on the Letter Agreements was in no way compromised or rendered impotent by any responses by Chih to questions in cross-examination, as relied on by the appellant. These responses, which are open to more than one interpretation, were not concessions undermining C2 Capital’s pleaded case, which

remained unaltered by any such statements. Furthermore, the judge embarking on a consideration of the “implied agreement” issue was, in the circumstances, more with the objective of thoroughness and completeness when dealing with the myriad of issues, factual and legal, which had arisen during the trial and in the submissions.

The Letter Agreements

[136] This leads directly to an issue also called into question by ground 1. It is whether the Letter Agreements themselves are valid contracts between C2 Capital and Infinity Particles with regard to the six investments the subject of the Claim. This was the primary finding of the learned judge upon which a finding of liability was based. It is beyond question that each Letter Agreement, being a separate agreement on which the Claim is founded, was between C2 Capital and Infinity Particles. This is clear from the Letter Agreements themselves.

[137] The correctness of this factual and legal position is unaffected by any question that the Co-Investment Arrangement was between Chih and Jenkin. It is not unusual for two individuals to negotiate and enter into an “agreement in principle” or a “framework agreement” which, at that stage, was not intended to create legal relations between themselves, and to subsequently carry out or implement the agreed upon framework through their respective corporate legal entities as the primary contracting parties/vehicles. In such circumstances, the signed documentation (if any) would, if between the respective corporate vehicles, give rise to a clear intention to create legal relations and to enter into a binding contract or agreement between these entities. In such circumstances, it is the corporate vehicles which are prima facie the contracting parties, and hence potentially liable to each other thereunder in relation to the subject matter transaction or investment.

[138] In the instant matter, the Letter Agreements the subject of the Disputed Investments, each pertaining to a specific investment opportunity referred or to be referred by Chih to Jenkin was, on the face of each document, between C2 Capital (controlled by Chih) and Infinity Particles (controlled by Jenkin). Moreover, and of significance,

it is not in dispute between the parties that Infinity Particles did invest in each of the Disputed Investments and reaped the profits derived therefrom. This factual position is subject to a singular exception in the case of the first Kayak Investment Partners Offshore Fund, Ltd. investment which, on the evidence adduced, was made initially by CC Partners (not Infinity Particles), but later transferred to Infinity Particles on 26th June 2017, with the latter also subsequently investing in a second Kayak Investment between 30th June and 1st July 2017. I therefore find that all six Letter Agreements were between C2 Capital and Infinity Particles.

[139] As to whether the Letter Agreements are, prima facie, binding agreements between C2 Capital and Infinity Particles, this question must preliminarily and tentatively be answered in the positive. Within the four corners of each Letter Agreement are the key elements of a binding contract. The parties are named, and the intended consideration moving from one party to the other and vice versa, is clear. C2 Capital is to serve as “financial advisor” to Infinity Particles related to the particular investment. Infinity Particles is obligated to “promptly execute all necessary documents and fund the investment amount on a timely basis.” Both parties performing their contractual obligations, C2 Capital in return for its services, is to share equally the net profits or losses derived or realized by Infinity Particles from making the said investment by way of an injection of the funds. I therefore find that each Letter Agreement is prima facie a binding contract between C2 Capital and Infinity Particles, as held by the learned judge. I say prima facie because, this conclusion may be affected by a consideration of the issues raised by grounds 2 to 6 in the notice of appeal, including the issues of consideration, total failure of consideration, past consideration and illegality under the laws of the BVI and/or Taiwan. Therefore, subject to the determination of the issues/defences (and corresponding grounds of appeal) of the meaning of the term “financial advisor” in the Letter Agreements, as to the services which C2 Capital contracted to performed for Infinity Particles thereunder, whether there has been a total failure of consideration on the part of C2 Capital by not performing its role as “financial

advisor”, the issue of illegality of the Letter Agreements under BVI law and/or Taiwanese law, and to the issue of past consideration, ground 1 fails.

Ground 2 - The Meaning of “financial advisor” Issue

The learned judge erred in law by finding that the term “financial advisor”, as set out in the Letter Agreements, should be construed to bear the ‘special’ meaning contended for by C2 Capital (at [189]) and Chih in his evidence, and not the plain and ordinary meaning as contended by Infinity Particles and by Jenkin in his evidence (paras. [183], [185] and [189]).

Additional Points

- (1) The Judge erred and proceeded from an entirely mistaken premise, namely, that it was Infinity Particles case that a “technical meaning” should be ascribed to the expression “financial advisor” (at [175]).
 - (a) Infinity Particles’ position is that the term “financial advisor” should be given its plain and ordinary meaning (at [161] and [164]).
 - (b) Rather, it was C2 Capital that was contending that the term “financial advisor” should have a technical meaning and that it could not be understood “in the literal sense” (at [157]). That is consistent with Chih’s evidence that he could have used “more appropriate terminology” and that the C2 Capital Letter Agreements had “used inappropriate language by referring to the Claimant [C2 Capital] providing financial advice” (at [160]).
- (2) On any view, the meaning of the term “financial advisor”, which is contended for by C2 Capital, is not the plain and ordinary meaning:
 - (a) In its pleaded case C2 Capital had asserted that [the] expression “financial advisor” could not be read “in the literal sense” (at [157]), and that it should be

construed to mean that the Respondent [C2 Capital] was “providing investment opportunities” (at [160]).

- (b) Moreover, the dictionary definition of the term “financial advisor”, as cited in the Judgment (at [169] and [170]), makes clear that it is the provision of advice that is critical: that is entirely consistent with C2 Capital’s contended meaning.
 - (c) While the Judge accepted Chih’s evidence that the expression “financial advisor” means that Chih would provide investment opportunities to Infinity Particles, he proceeded to state that the profit and loss sharing arrangement was not one where “a financial advisor, properly called, would be willing to enter into with a client” (at [172]). Implicit in this statement is the acknowledgement that the expression relied on by C2 Capital is not the plain and ordinary meaning of the term “financial advisor”.
- (3) The Judge therefore erred in finding that the term “financial advisor” should be construed to bear the special meaning which C2 Capital contended for, and/or that the term “financial advisor” could bear anything other than its plain and ordinary meaning.
- (4) Further, in reaching that erroneous conclusion the Judge erred in law: The Judge accepted that it was a well-established legal principle that a contract should be construed objectively, within its four corners (at [167]), and that express terms should be given their plain and ordinary meaning (at [166]).

- (5) However, in construing the term “financial advisor”, in the manner contended for by C2 Capital, the Judge wrongly departed from this principle:
- (a) A departure from the plain and ordinary meaning of words used in a contract is only warranted if there is ambiguity in the terms used. The Judge found that there was no such ambiguity (at [174])
 - (b) Even if there were any ambiguity, the terms must then be construed against C2 Capital, pursuant to the contra proferentum rule. The Judge failed to apply this rule (at [174]).
 - (c) The Judge also departed from the four corners, and interpreted the contract based solely on Chih’s evidence of “how he and Jenkin understood that expression to mean” (at [172]). That is plainly wrong. Even if the Judge was entitled to depart from the four corners of the contract, he was not entitled to find that the terms have the special meaning that C2 Capital contends for, unless there is evidence that Jenkin also understood the terms to bear that same meaning. But this was never put to Jenkin and is not in evidence. The Judge’s finding is accordingly inherently unsustainable.
- (6) By construing the term “financial advisor” to mean that C2 Capital was required “simply to provide investment opportunities to [Infinity Particles]” (at [183]), the judge had effectively rewritten the express terms of the contract. He was not entitled to do so. If the C2 Letter Agreements had used the wrong nomenclature, or if something other than the plain and ordinary meaning of the term “financial advisor” was meant, then C2 Capital should have applied to rectify the C2

Capital Letter Agreements. The fact that no application was made to rectify the C2 Capital Letter Agreements was entirely and erroneously overlooked in the Judgment (at [164c])

[140] In summary, as stated above, the learned judge found that the Co-Investment Arrangement was not a binding contract. We have also held that the judge was correct to find, in keeping with C2 Capital's pleaded case (in the alternative), that each Letter Agreement constituted, *prima facie*, a binding contract between C2 Capital and Infinity Particles with regard to the introduction of investment opportunities and the sharing equally of the net profits (and losses) derived therefrom. In reaching this conclusion, I examined each of the six Letter Agreements the subject of the Claim in the court below, and concluded that they were all stated to be between C2 Capital and Infinity Particles as the parties thereto, that every one of them was signed by Jenkin for and on behalf of Infinity Particles and, therefore, as none of the Letter Agreements were not signed by Jenkin, the learned judge's predicate or operative evidential bases for his finding of an 'implied agreement' was not present. Therefore, the pleading point regarding an "implied agreement" and substantive issue of the correctness of the judge's finding as to how and when an "implied agreement" would come into existence as a binding contract does not arise for determination in the appeal. The net effect of these findings is that any breach of contract claim between C2 Capital and Infinity Particles rests squarely on the basis of the Letter Agreements only as each constituting a separate written agreement.

[141] Ground 2, notwithstanding its inordinate length, is concerned, in the main, if not exclusively, with the correct meaning to be accorded to the term "financial advisor" as used in the Letter Agreements, and whether, in coming to the meaning which he reached or accepted, the learned judge erred in not applying the 'plain and ordinary' meaning of the words used, incorrectly departed from the said rule of contractual interpretation in circumstances where there was no inherent ambiguity in the words used, and wrongly attributed to the term "financial advisor" the "special" meaning

ascribed to it by the appellant in its pleaded case and by Chih in oral evidence at trial.

[142] Each of the Letter Agreements the subject of the Claim is, essentially, in identical terms. It is stated therein: ‘... C2 Capital Limited (“Advisor”) will serve as the financial advisor to Infinity Particles Limited (“Infinity”) related to US\$ “X” million for the investment in [named entity]. (“Investment”).’ The learned judge grappled with the issue as the proper meaning of the expression “**financial advisor**” used in the said sentence, as the first of three issues under the “Consideration Issue”. He did so at paragraphs [154] to [189] of the judgment, certain paragraphs of which will be set out in full below.

[143] The second “Consideration Issue”, which flows from the first, is whether C2 Capital had wholly failed to provide such services or to perform the role as “financial advisor” to Infinity Particles, leading to a total failure of consideration. This second “consideration” issue falls to be considered at ground 3 in the notice of appeal. However, its determination is directly linked to and consequent upon the determination of ground 2. This is so because Infinity Particles’ total failure of consideration argument thereon is concerned with and will succeed or fail based upon what is the correct meaning to the expression “financial advisor” in the Letter Agreements, and whether had the learned judge applied the ‘plain and ordinary’ meaning of that term used in the extract above, he would have been compelled to hold that C2 Capital had admittedly not acted as “financial advisor” to Infinity Particles under the Letter Agreement and there was, therefore, a total failure of consideration, rendering any claim for breach of contract bound to fail.

[144] The first and second “consideration” issues arose from Infinity Particles’ pleaded defence at paragraph 6 of the Amended Defence. There it is averred that C2 Capital had not performed any services for Infinity Particles akin to its stated contractual role of “financial advisor”, as that expression is to be understood in the plain and

ordinary meaning of the words, and there has been a total failure of consideration.

Paragraph 6 of the Amended Defence states: -

“6. Without prejudice to the position set out earlier in this Defence, even if the alleged Letter Agreements are binding and enforceable, the scope of alleged services to be provided by the Claimant [C2 Capital] were not performed. The Claimant **did not perform its role as a financial advisor** and there has been a total failure of consideration....” (emphasis added)

[145] The third ‘consideration issue’ is that of ‘past consideration’. This issue was considered by the learned judge and decided in favour of C2 Capital at paragraphs [191] to [201] of the judgment. It is as a matter of principle different to and not dependent upon a determination of the first and second ‘consideration’ issues. Based on the judge’s conclusions on each of the three ‘consideration’ issues, he decided the ‘Consideration Issue’ in favour of C2 Capital at paragraph [202].

Meaning of “financial advisor” in the Letter Agreements

Appellant’s submissions

[146] The appellant dealt with ground 2 at paragraphs 27 to 34 of its appeal submissions and at paragraphs 13 to 17 of its reply submissions in the appeal. In brief, it is the appellant’s submission that there is nothing complex about this ground. The respondent having premised its entire contract claim on the assertion that it had performed its obligation to act as a “financial advisor” to Infinity Particles, whether under the Co-Investment Arrangement and/or the Letter Agreements, C2 Capital cannot now take the position, as it has at paragraph 28 of its appeal submissions, that “nothing flows from this” for the purposes of the appeal. Further, it is C2 Capital’s case that the use of the term “financial advisor” in the Letter Agreements was not “appropriate” and neither it or Chih was acting as financial advisor in the literal sense of that expression. This, argues Infinity Particles, is a clear admission that C2 Capital did not provide the services of a financial advisor to Infinity Particles as contracted under the Letter Agreements and for these reasons alone, its Claim must fail and ought to have been dismissed by the learned judge.

[147] In support of this principal point, Infinity Particles reiterates much of its arguments on this issue made in the court below. It contends that the term “financial advisor” ought to have been given its plain and ordinary meaning by the judge. However, he failed to do so and erred by giving the term a “special” meaning or a meaning clearly not its plain and ordinary meaning. It is submitted, this conclusion was reached by the learned judge on the flawed basis that the expression “financial advisor” cannot be read in its “literal sense”, but was used by the parties to the Letter Agreements as a “term of art” to describe what they understood C2 Capital was being required to do under the Letter Agreements, which is, simply, to introduce to Infinity Particles investment opportunities, nothing more nothing less.

[148] Furthermore, argues Infinity Particles, the learned judge’s reasoning proceeded on a patently flawed basis when he misdirected himself as to where the burden of proof lies in establishing or proving a meaning to be ascribed to the term “financial advisor” other than what was clearly the “plain and ordinary” meaning of the words used. This burden, contends Infinity Particles, lay squarely on C2 Capital as claimant, and not on the defendant, Infinity Particles. Moreover, and in any event, it was Infinity Particles’ pleaded case that the term “financial advisor” ought to be given its plain and ordinary meaning and cannot be construed in the manner contended by C2 Capital.

[149] Infinity Particles argues that the judge’s finding on this issue was also flawed as he erred in law by accepting the meaning contended for by Chih in his evidence as to the way in which he, Chih (the maker of the letter Agreements) and Jenkin understood the term “financial advisor” to mean. First, because the meaning contended by Chih was a “special” meaning and not the “plain and ordinary” meaning of the term, as admitted by Chih at paragraph 24 of his witness statement when he testified that the said expression was not used and was not to be understood in its “literal sense”. Second, the so-called “understanding” shared by Chih and Jenkin, as stated by Chih at paragraph 24, was not put to Jenkin who was never given the opportunity to fairly respond to it. It was therefore impermissible for

the learned judge to simply “accept” Chih’s evidence as to what he says he and Jenkin understood the term to mean, as was done by the judge at paragraph [172] of the judgment.

[150] Infinity Particles also argues that Chih’s evidence was that, with hindsight, the term “financial advisor” was “inappropriate” and a mistake on his part. The only conclusion from this admission is that the “special” meaning contended for by Chih at Trial could not have been a shared meaning understood by Chih and Jenkin or C2 Capital on the one hand and Infinity Particles and Jenkin on the other at the time of entering into the Letter Agreements. Chih’s evidence on this issue is, therefore, in no way supportive of the “special” meaning contended for by C2 Capital and Chih and said to have been understood by himself and Jenkin. Taken at its highest, Chih’s evidence is only that Chih, as the maker of the Letter Agreements, mistakenly used the wrong term, at least with hindsight.

[151] Furthermore, C2 Capital contends that the learned judge having found that the term “financial advisor” is not defined or used in the SIBA 2010 and the said Act cannot be used to support a finding as to the “plain and ordinary meaning” of the term (at paras [165] and [168], and having held at paragraphs [169] and [170] that the “plain and ordinary meaning” of the said term was not the same as the ‘technical’ meaning, erred when, at paragraph [171] of the judgment, he found that since the term did not have the “technical” meaning ascribed in the SIBA 2010, it must have the “special” meaning contended for by the respondent/Chih). Instead, the learned judge ought to have considered whether the term “financial advisor” would or could have the special meaning contended for by Chih/C2 Capital.

[152] I pause here to state that this last submission does not fully represent or reflect the learned judge’s reasoning and findings at paragraph [171] of the judgment. There the judge deals with a hypothetical scenario posited to him by learned Kings Counsel for Infinity Particles as a means of illustrating the point which he is making and to buttress his line of reasoning on this issue. At paragraph [171] the judge is

plainly stating “had” the Letter Agreements used any of the terms “professional financial advisor”, “authorized financial advisor”, “independent financial advisor”, or simply “authorized person” (the latter term having been used in section 31 of the FSMA 2000), he would have been more understanding of Infinity Particles case being made out as to the meaning to be ascribed to the term “financial advisor” contended for by it. This is because, as the judge’s reasoned, each of these terms or expressions are used in a “technical sense” or may have been understood by the parties to have a technical meaning. The short point here is that the judge considered the meaning which Infinity Particles contended for was a “technical” meaning where the functions and services of “financial advisor” would relate either to the person discharging or performing such services for a client as a “professional” or as a person “authorised” to act as financial advisor (presumably according to law). Indeed, the judge went on to state categorically that he was satisfied that ‘by simply using “financial advisor”, Chih and Jenkin were not seeking to ascribe the technical meaning to that expression that the Defendant [Infinity Particles] contends for.’ By so holding the judge seemed to have been satisfied that the meaning of the term “financial advisor” contended for by Infinity Particles is not the “plain and ordinary” meaning of the term but a “technical” meaning would have been more plausible had the expression used contained the prefix “professional” or “authorized”.

[153] In objection to this line of reasoning and conclusion by the judge, it is Infinity Particles’ case that the learned judge erred when he proceeded on the basis that it was advocating or contending for a “technical” meaning to be ascribed to the term “financial advisor”, when, to the contrary, it was contending only for the term to be ascribed its “plain and ordinary” meaning, that is, its “literal meaning”, which meaning is clear and unambiguous.

[154] The appellant submits further that the meaning ascribed to the term by C2 Capital and accepted by the judge, that is, the mere introducing of investment opportunities, could not on any reasonable view, be regarded as the “plain and ordinary” meaning of the term, as it does not comport, by way of example, within the **Oxford English**

Dictionary definition of “financial advisor” set out at paragraph [169] of the judgment. Further, as the judge acknowledged at paragraph [172], the arrangement contended for by C2 Capital was not ‘the sort of deal that a financial advisor, properly called, would be willing to enter into with a client’. These submissions appear, at face value, to be somewhat contradictory. I say this because Infinity Particles in arguing for the “plain and ordinary” meaning of the term “financial advisor” as used in the Letter Agreements, which is the giving of financial or investment advice, seems to be also saying that the arrangement for sharing of net profits and losses as stipulated in each of the Letter Agreements is unusual or not inimical to the relationship of financial advisor and client/prospective investor.

[155] Infinity Particles argues that for all these reasons the learned judge should have rejected the meaning contended for by C2 Capital and Chih, construe the “contract” objectively within its “four corners”, and that express terms, such as “financial advisor” should be given their plain and ordinary meaning. In support of this submission, Infinity Particles relies on of the following authorities: **Shore v Wilson**¹⁸ for the proposition that it is well-established that a contract should generally be construed according to the “strict, plain, common meaning of the words themselves”. It is also submitted that a court should only depart from the plain and ordinary meaning of the words used in a contract in exceptional circumstances (**Chartbrook Ltd v Persimmon Homes Ltd**¹⁹ at paras. [14] and [15]). Moreover, since, as the judge correctly found, there is nothing ambiguous about the term “financial advisor”, the obligation undertaken by C2 Capital under the Letter Agreements is expressed in clear words and there were no exceptional circumstances warranting the judge departing from the plain and ordinary meaning of the term.

[156] Further, even if there had been some ambiguity in the words used (and this, contends Infinity Particles, was not such a case), such ambiguity must, in

¹⁸ [1842] 8 E.R. 450 at 532.

¹⁹ [2009] 1 AC 1101.

accordance with the contra proferentem rule, be resolved against the party who created the document whether as the drafter or maker of the contract, in this case the Letter Agreements drafted by Chih/C2 Capital. (**Chitty on Contracts** (35th Ed) para. 18-012). In departing from the plain and ordinary meaning of the term “financial advisor”, the learned judge erred and compounded this error by departing from the ‘four corners’ of the alleged contract (the Letter Agreements), and also by reaching an interpretation based solely on Chih’s evidence of “how he and Jenkin understood that term to mean” (para. [172]). This was plainly wrong as there is no evidence that Jenkin also shared the same alleged understanding of the term and Chih’s ‘special’ meaning was never put to Jenkin, therefore C2 Capital cannot establish that Jenkin also shared the alleged understanding, and the judge’s finding that Jenkin did is inherently unsustainable.

[157] Furthermore, the special meaning contended by Chih and put forward by C2 Capital is “simply illogical when viewed in context”. This, argues Infinity Particles, is because an investment can only be introduced once, whereas, in some instances, more than one Letter Agreements have been entered into, at different dates, with respect to the same investment. For example, three Letter Agreements in relation to the Kayak Investment and two Letter Agreements in relation to the Cotopaxi Investment. These examples make clear, argues Infinity Particles, exactly what the term “financial advisor” meant in the Letter Agreements. It could not have meant simply “introducing” investment opportunities, no more no less. Further, the terms of the Letter Agreements are “forward looking”, that C2 Capital “will serve” as financial advisor for the investment, which role would not have been intended to incorporate the “introduction” of investment opportunities which, perforce, must have been carried out “before” the investment was entered into. These latter points, while illustrative or supportive of the issue as to the ‘plain and ordinary’ meaning of the term “financial advisor” in the Letter Agreements, also go (perhaps more so) to the issue of ‘past consideration’.

[158] Infinity Particles submits that the upshot of the judge's approach to construing the term "financial advisor" in the Letter Agreements, amounted to him "impermissibly rewriting the express terms of the alleged contract(s)". In doing just that, they argue, the judge plainly exceeded his mandate and did so in circumstances where, C2 Capital, had not applied to the court below to "rectify" the Letter Agreements, Chih having admitted, in essence, that the term used was inappropriate and a mistake on his part. This argument and issue, contends Infinity Particles, was overlooked by the learned judge leading him into grave error.

Respondent's Submissions

[159] The respondent addressed ground 2 at paragraphs 28 to 37 of its appeal skeleton. It is the respondent's submission that whether or not the learned judge was wrong to accept the meaning of the term "financial advisor" contended for by C2 Capital, "nothing flows from this by itself for the purpose of the appeal", in that it would not result in the setting aside of the judgment and order made by the learned judge giving judgment for C2 Capital on its Claim. In short, ground 2 is merely a stepping-stone or platform for advancing some of the other grounds in the notice of appeal filed by Infinity Particles. Furthermore, in seeking to advance its appeal beyond the issue posited by ground 2, Infinity Particles' position "becomes increasingly complex as it is forced to adopt often inconsistent positions and also positions on later arguments which have to assume that its earlier arguments are correct." (para. 28 C2 Capital's skeleton)

[160] Specifically, to the merits of ground 2, C2 Capital submits this is a bad point as Infinity is seeking to pursue an "impermissible challenge on what are essentially findings of fact." With respect to this submission, I am not entirely in agreement. In my view, ground 2 rises issues both as to the correctness of the judge's interpretation of a contractual term which necessarily involve issues of law and legal principles, and the correctness of the judge's findings of fact as to the way in which the parties to the Letter Agreements understood their respective obligations thereunder. With that said, C2 Capital's substantive or principal point in opposition

to ground 2 is that Infinity Particles is seeking to apply a highly complex meaning to the phrase “financial advisor” and is ignoring, in its submissions, the context and evidence, both of which were taken into account by the learned judge when reasoning to his conclusion on this the first limb of the ‘consideration’ issue.

[161] In attempting to make good this principal submission in answer to ground 2 of the appeal C2 Capital referred, in 10 numbered subparagraphs, to certain points from the judgment below which, it argues, Infinity Particles has not analysed or addressed at all or in any proper detail, in its skeleton argument in the appeal. These 10 “points” are set out in paragraph 32 of C2 Capital’s appeal skeleton argument. I will take them in turn offering, in brief, my view as to the merits of each of them. They are:

a. **At paragraph [157] the reference by the judge to Chih’s evidence at paragraph 24 of his witness statement and the context in which the term “financial advisor” was raised and used.**

In my view, what is said at paragraph 24 by Chih is not evidence solely supportive of the meaning of the term which he posited or contended for on behalf of C2 Capital and which the learned judge found. This point will be developed further below. However, suffice it to say at this stage, that Chih’s use at paragraph 24 of the words, “I would identify **and give my opinion on the viability** of any proposed investment”, in describing his understanding of the contractual obligation of C2 Capital under and in relation to each Letter Agreement, is not, on any reasonable view, evidence purely in “introducing” investment opportunities to Jenkin or Infinity Particles or of not undertaking to carry-out certain important functions or to provide certain important services of a “financial advisor”, in the plain and ordinary meaning of that term, to Infinity Particles/Jenkin, as the “potential” investor in the introduced investment opportunities. Of equal concern is Chih’s use of the words (at para. 24): “which Jenkin

would **determine** on behalf of Infinity [Particles] whether to proceed with the investment or not”.

This description or explanation of what Chih understood the term “financial advisor” to mean is, objectively, more in step with the plain and ordinary meaning of the said expression, and not the ‘different’ or ‘special’ meaning attributed to it by Chih/C2 Capital and accepted as correct by the learned judge, which finding was based, to a large extent, if not exclusively, on his acceptance of the evidence of Chih.

- b. **At paragraph [158] reference is made by the judge to Chih’s acknowledgement as to how better language might have been used and this is noted at paragraph [160].**

This sentence is a reference to Chih’s evidence in cross-examination where, among other things, he testified that the Letter Agreements were “for **record keeping, just acknowledged the fact that these agreements exist** in case there is a misunderstanding or something happened to one of us, that there’s a **record that these things exist** and I’m liable but also benefit when we make money, and I’m liable if we lose money.”

There, Chih is testifying that the Letter Agreements were merely for recordkeeping or as a record of what the prior existing agreement was between the parties. He is clearly not putting forward or referring to the Letter Agreements as “the” binding contracts, but really as part of the documentary “record” supportive of or evidencing what had been previously agreed in the Co-Investment Arrangement/Overarching Agreement, as he understood it. This is a point on which the appellant relies to say that although C2 Capital’s had pleaded the Letter Agreements in its alternative breach of

contract case, the evidence from Chih was that none of the Letter Agreements were being treated or relied on as binding agreements between C2 Capital and Infinity Particles, but merely to “record” what had already been agreed by the prior Co-Investment Arrangement/Overarching Agreement (which ‘agreement’ the learned judge went on to find was not a binding contract).

In my considered view, the above extract from Chih’s evidence and the way in which he, as a lay witness, approached the respondent’s case as claimant in the proceeding below, does not serve to in any way nullify or to seriously undermine C2 Capital’s pleaded case of breach of contract based, in the alternative, on the Letter Agreement as having contractual force and effect.

However, the reference to what the learned judge said at paragraph [158] of the judgment as noting Chih’s admission that better language could have been used than the expression “financial advisor” to describe C2 Capital’s role and obligations under the Letter Agreements, is of little, if any, assistance to the respondent in responding to ground 2 of the appeal and the point made by the appellant challenging the learned judge’s finding as to the meaning of the said term. If Chih’s admission is of any value evidentially, it is not supportive of or neutral to the meaning which Chih contended for and was accepted by the learned judge.

- c. **Reference to paragraph [160] where the judge found that “inappropriate language” had been used [by Chih] in describing what the position was, and his finding that both Chih and Jenkin “well knew what that expression meant”, that is, that C2 Capital would provide investment opportunities to Infinity Particles and**

it was for the latter to decide whether it should accept those opportunities.

In my respectful view, there are some concerns or questions with what the learned judge found at paragraph [160], which the respondent relies on as unassailable findings of fact. In short, the respondent's position is not helped or assisted, in my view, by what the learned judge recorded at paragraph [160].

First, the judge records that Chih testified that "in hindsight, he might have used more appropriate terminology". This smacks of or is tantamount to a concession by Chih that, with hindsight, he used an inappropriate phrase to encapsulate C2 Capital's obligations under the Letter Agreements to Infinity Particles, when construed against the 'plain and ordinary meaning' of expression "financial advisor". The effect of this is evidence confirmatory of Chih/C2 Capital's meaning contended for and accepted by the learned judge at trial not being the 'plain and ordinary' meaning of the said term. It is evident, if believed, that the parties could not have been and were not *ad idem* on the meaning of this term rather than evidence of the opposite, as held by the judge.

Second, in light of this state of affairs evidentially, it is difficult to see how the learned judge could have progressed in his reasoning to find that both Chih and Jenkin well knew what the term meant, absent any evidence of Jenkin to that effect and especially when Chih's meaning was not put to Jenkin for him to respond.

- d. **This fourth point set out by C2 Capital is not really a reference to what the judge said or held and Infinity Particles' failure to address a finding of fact made by the judge. It is more akin to a**

recounting of the two limbs upon which Infinity Particles had pegged its first 'consideration' issue. In my view, it does not advance the matter any further.

- e. The judge's finding at paragraph [165] that it was "highly unlikely" that either party [to the Letter Agreements] gave the expression/phrase "financial advisor" the meaning contended for by Infinity Particles.

The simple point is that even If this were a correct deduction or inference by the judge, it does not get C2 Capital across the line as it must prove that the meaning contended by it was the common meaning or mutually understood meaning or intention of the parties when they entered into the various Letter Agreements. This issue is not answered simply by the learned judge preferring the evidence of Chih and extrapolating that into a finding that Chih's 'understanding' must have been that of Jenkin, when no such meaning was put to Jenkin at trial.

- f. Refence at paragraph [166] where the judge correctly identified the relevant principles of construction of a contract.

These principles are not in controversy in the appeal. The more pertinent issue is whether the learned judge applied them correctly.

- g. At paragraph [168] where the judge identifies as "fanciful" the notion that the "plain and ordinary meaning" of the phrase "investment advisor" is to be taken from the SIBA 2010 Act, when the Act provides no definition and the meaning attributed to it by Infinity Particles, the judge correctly found could not be described as "plain and ordinary".

As I understand it, the point which Infinity Particles was making to the judge was not that the SIBA 2010 had defined the expression “investment advisor”. It was simply that objectively the plain and ordinary meaning of the said term is clear from the words used, which is further elucidated and buttressed by and may be synonymous with, the meaning of ‘**providing investment advice**’ at paragraph 4, Part A, Sch. 2 of SIBA 2010. In short, “providing investment advice” in the manner defined and illustrated by paragraph 4 of Part A, is akin to a person acting as a “financial advisor” to another in relation to the investments or prospective investment opportunities. This point the learned judge did not properly grapple with and analyse, and for this reason, argues Infinity Particles, he erred and was wrong to have dismissed it as not indicative of the ‘plain and ordinary’ meaning of the expression “financial advisor”. More will be said of this below.

- h. **At paragraphs [169] and [170] the judge commented that the dictionary meaning cannot be said to carry with it any “plain and ordinary” meaning.**

The extract from the Oxford English Dictionary at paragraph [169] of the judgment is of no real assistance in determining the ‘plain and ordinary’ meaning of the expression “financial advisor”. It does not seek to define the term “financial advisor”. It merely gives a few example sentences where the phrase was or can be used.

- i. **At paragraph [171] where the judge draws the obvious and fair conclusion that the parties did not intend the “technical” meaning contended for by Infinity Particles, and his analysis at paragraphs [172] to [174] which is completely rational and should not be overturned.**

Infinity Particles' point was that it argued for the "plain and ordinary" meaning of the phrase, not a technical meaning, and the "plain and ordinary" meaning is clear and obvious without having to resort to some 'technical' meaning or the 'special' meaning contended for by C2 Capital and Chih. What the judge found was not the 'plain and ordinary' meaning of the said expression, but a different or special meaning which he found as the meaning in which both Chih and Jenkin understand that term to be used in the Letter Agreement. The difficulty is that there are issues and with the judge's reasoning and conclusion not least that the so-called mutual understanding of its meaning was not put to Jenkin at the trial for his response and, most importantly, the meaning given by Chih at paragraph 24 of his witness statement upon which the learned judge accepted and relied in coming to his conclusion, is more akin or tantamount to the 'plain and ordinary' meaning of the expression "financial advisor" and in step with the description in paragraph 4 of Part A of Schedule 2 of SIBA 2010 of "providing financial advice".

- j. The correct principles of construction were applied by the judge at paragraphs [175] to [183] as to why no reasonable person would construe the phrase in the way contended for by Infinity Particles; and the judge considered the context and factual matrix and correctly reached the conclusion he did at paragraph [185] and [189], which findings are unassailable.***

This is, in general terms, the issue which this Court has to decide in the appeal in relation to the first 'consideration' issue in determining whether the learned judge erred. It goes to the meaning of the term "financial advisor"; the meaning of the said term as used in the Letter Agreements; and whether the learned judge was correct in accepting

the 'special' meaning contended for by C2 Capital/Chih especially in light of his evidence at paragraph 24 of Chih's witness statement.

[162] In summary, it is C2 Capital's contention in response to ground 2 that it was clear from Infinity Particles case at the trial that it was contending, not for the "plain and ordinary" meaning, but for a "technical" meaning to be applied to the term "financial advisor" in the Letter Agreements, and its deliberate purpose in so doing was to facilitate its further argument/defence based on a total failure of consideration. This is how the learned judge understood and summarized Infinity Particles' argument on this issue at paragraphs [162] to [163] of the judgment, and this is the way in which Infinity Particles posited its argument at paragraph 28 of its Opening Skeleton Argument, its reliance on the dictionary "references" which the judge observed were 'fully of difficulties' (para, [169]- [170]), and its reliance on the provisions of SIBA 2010 in attempting to support its "misguided" case of the "plain and ordinary" meaning of the term.

[163] C2 Capital also submits that in any event it matters not who may have argued or contended for a "technical" meaning or for the "plain and ordinary" meaning, as the learned judge construed the term used in the context of the relationship, overall background and factual matrix, as he was entitled to do on relevant authority. They submit also that in adopting this approach the learned judge did not depart from relevant principles of construction of agreements, and his conduct of that exercise was legitimate and proper. He was correct also to observe that the interpretation contended for by Infinity Particles was, in all the circumstances, "absurd" (para. [175]) Further, in arguing this point on appeal Infinity Particles has not identified what it says the term "investment advisor" means. Instead, it has resorted in vague and broad terms to arguing that its meaning is a 'plain and ordinary' one. C2 Capital therefore concludes that nothing which Infinity Particles has submitted in the appeal detracts from the conclusions reached by the learned judge as to the meaning of the term "financial advisor", which findings ought to be upheld, as there is no

legitimate bases upon which this Court can or ought to interfere. Accordingly, C2 Capital submits that ground 2 must fail.

Analysis and Conclusions on Ground 2 – Meaning of “financial advisor”

[164] The first “consideration” issue raised by Infinity Particles as a defence to the Claim is that C2 Capital had agreed under the Letter Agreements to serve or to perform the functions of “financial advisor” to it on the “plain and ordinary” meaning of that expression. Further, on Chih’s own admission, [C2 Capital] had not provided the services that it had contracted to provide under the terms of the Letter Agreements, which cannot be binding. This argument was disputed by Chih who contended for a different or ‘special’ interpretation of the expression “financial advisor” at paragraph 24 of his witness statement (at para. [157] of the judgment), and in his oral evidence on Day 2 of the trial in response to questions posed to him in cross-examination by Infinity Particles lead counsel (extract from Transcript at para. [158]).

[165] The essence of the meaning of this term contended for by C2 Capital and Chih, which was accepted by the judge, is captured at paragraph 24 of Chih’s witness statement. There he testifies that although the expression “financial advisor” was used in the Letter Agreements to describe the role of C2 Capital, neither he or C2 Capital ‘was acting as a financial advisor in the literal sense.’ Instead, the said term was used ‘to characterize my role through C2 [Capital] to share investment opportunities with Jenkin as part of the Co-Investment Arrangement. I was sharing my private investment opportunities with my friend and business partner [Jenkin] such that we would share in any subsequent profits or losses.’ Chih, who went on to say that with hindsight he might have used more appropriate terminology. He also stated, importantly, at paragraph 24: -

“As such, no thought was given as to whether this arrangement might require regulatory approval in the BVI or elsewhere. The way the process worked would be that, in accordance with the arrangement, I would identify **and give my opinion on the viability of any proposed investment following which Jenkin would determine on behalf of Infinity [Particles] whether to proceed with the investment or not.** It was very much a co-investment arrangement with a business partner and friend as opposed to a financial advisor relationship.” (emphasis added)

[166] The judge found that the Letter Agreements constituted binding contract or agreements between C2 Capital and Infinity Particles. These Letter Agreements, the subject of these proceedings, merely state that C2 Capital “will serve as the financial advisor to Infinity Particles”. Nowhere in the Letter Agreements is the term “financial advisor” defined. It therefore, fell to the court below to construe the said term, to do so in the context of the four corners of the Letter Agreements themselves reading and construing the document or contract as a whole, and taking into account any cogent evidence as to what the parties understood or accepted the said term or expression to mean in their contractual relations.

[167] The meaning of the term “financial advisor” as used in the Letter Agreements contended for by Jenkin and Infinity Particles is simply what is the ‘plain and ordinary’ meaning of the said expression. It is submitted that the ‘plain and ordinary’ meaning was clear and is further illustrated and elucidated by the meaning of the expression “providing financial advice” at paragraph 4, Part A, Sch 2 of the SIBA 2010. It was submitted on Chih’s own admission in evidence (see para. 24 Chih’s witness statement). C2 Capital did not provide any financial advice to Infinity Particles with regard to any of the six Disputed Investments, leading to the conclusion that none of the Letter Agreements were supported by consideration flowing from C2 Capital to Infinity Particles, and were therefore unenforceable against Infinity Particles (para. [159]). C2 Capital, on the other hand, contended for a different meaning. This was on the basis that the expression “financial advisor” was not used in its literal sense. That being the case, the meaning argued for by C2 Capital (through Chih) is that it was to simply introduce investment opportunities to Infinity Particles which then, by Jenkin, must decide whether to invest its own capital.

[168] These are, in brief, the two contending positions of the parties as to the meaning of the expression “financial advisor” in the Letter Agreements. In deciding this first ‘consideration’ issue, the judge observed that ‘it is highly unlikely that either party had thought that the expression “financial advisor” would have the meaning

contended for by [Infinity Particles]'; and he was unable to accept that either party "intended it to mean what Jenkin asserts it means."

[169] As the learned judge noted, Chih's position was that the Parties had used an inappropriate expression to describe the services to be provided by C2 Capital to Infinity Particles under the Letter Agreements. However, this did not mean that no services were in fact provided by C2 Capital leading to a total failure of consideration. It meant that –

"the Letter Agreements had used inappropriate language by referring to the Claimant [C2 Capital] providing financial advice. In reality, both parties well knew that what that expression meant was that the Claimant [C2 Capital] would provide investment opportunities to the Defendant [Infinity Particles], and it was for the defendant to decide whether it should accept those opportunities. If it did, the Claimant was entitled to be paid half of the net profit of any investment that made a profit and to pay half of the losses if an investment made a loss." (para. [160])

[170] The judge went on to consider, in some detail, paragraph 4 of Part A of Schedule 2 to SIBA 2010 in the context of whether it provided some bases as to the 'plain and ordinary' meaning of the expression "financial advisor" contended for by Infinity Particles. He observed that this Act does not define the expression "financial advisor". Paragraph 4 states (in part) –

'4. Providing Investment Advice

1. Advising a person on investments (other than as the **investment adviser** of a mutual fund) where the advice:
 - a. is given to the person in his capacity as an investor, or a **potential investor**, or in his capacity as agent for an investor or potential investor; and
 - b. concerns the merits of the investor, or a potential investor, doing any of the following (whether as principal or agent):
 1. **Buying**, selling, **subscribing** for or underwriting a particular investment; or
 2. Exercising any right conferred by an investment to acquire, sell, subscribe for, underwrite or convert and investment.'

[171] Paragraph 4 of Part C above is expressed in broad terms. This is not unusual for financial services legislation dealing with certain types of activities and the need for persons conducting them to apply for and be licensed to do so. While the SIBA 2010 does not define the term “investment advisor”, it is difficult to see how its meaning would be materially different from, if not identical with, the expression in paragraph 4 of what is meant by ‘providing investment advice’. In fact, the plain and ordinary meaning of the term “investment advisor” is to ‘provide investment advice’ in the manner and ways contemplated or akin to those prescribed under paragraph 4.

[172] In my considered view, the plain and ordinary meaning of the term “financial advisor” in the Letter Agreements is clear and unambiguous. In the context of the instant matter, it would extend to providing advice on investments or “investment advice” to another person or entity in their capacity as a “potential investor”; and is concerned with the merits of that potential investor buying, subscribing or underwriting the particular investment with respect to which that person has received investment advice. Construed in this way, that is, using the plain and ordinary meaning of the term “investment advisor” as further elucidated by the meaning given to the expression ‘providing investment advice’ at paragraph 4 of Part A of Schedule 2 to the SIBA 2010, it is difficult to see how the term “financial advisor” in the Letter Agreements would not be accorded the same plain and ordinary meaning. This is unless another or different meaning ought to be accorded to the use of that expression in the Letter Agreements based on the ‘four corners’ rule of contractual interpretation or some other established rule evidencing a different or ‘special’ meaning, from the plain and ordinary meaning of the expression.

[173] The judge did not accept that the meaning ascribed to the expression “financial advisor” by Jenkin in his evidence is its “plain and ordinary” meaning. He pointed out that it was “highly unlikely” that either Chih or Jenkin would have thought that the expression “financial advisor” would have the meaning contended for by Jenkin and Infinity Particles, referring to the meaning posited by Infinity Particles as “absurd”. Accordingly, he refused to accept that meaning as the meaning which

these two persons, Chih and Jenkin, had in mind when they signed the Letter Agreements. He was also unsure as to whether Chih or Jenkin knew that the Letter Agreements would be 'potentially illegal, still less what the SIBA 2010 was and how it might apply to their relationship' (para. [165]). This latter point speaks also to the issue of illegality which the judge decided in favour of C2 Capital and will be dealt with under grounds 5 and 6.

[174] The learned judge noted that the 'starting point' in construing a contractual term is to look at the express terms of the agreement to ascertain what was agreed upon between the parties'. In this regard, he considered the relevant dicta of this Court in **Ocean Conversion BVI Limited v Attorney General**²⁰ at para. [17] where the dictum of Lord Diplock in **Bahamas International Trust Company Limited and another v Threadgold**²¹ was cited approvingly. He also considered the guidance of this Court in **Bon Bank Ltd v General Business Company Limited**²² where it was stated (in part):

'... It is for the court to determine the meaning of the words within the four corners of the agreement and the context in which the agreement was made. Likewise, it falls to the court to construe or to interpret a document to determine whether it is an offer and if so, its terms or proposals.'

[175] It is this formulation of the "four corners" rule of construction which the learned judge sought to apply when construing the meaning of the term "financial advisor" in the Letter Agreements. He also considered the dictionary meaning of the said expression, which he concluded was "not straightforward". He posited that the definition of "financial adviser" from the Oxford English Dictionary as an example and concluded that it suggests that the "ordinary usage" of the term 'does not connote the meaning which Infinity Particles (Jenkin) invited the court to accept.'

²⁰ Territory of the Virgin Islands HCVAP 2009/019 (delivered 18th April 2012 and re-issued on 30th July 2012, unreported).

²¹ [1974] 3 All E. R 881, at 884d.

²² NEVHCVAP2019/001 (delivered 29th July 2022, unreported).

[176] With respect, I disagree with these observations of the learned judge. As stated above, the so-called “definition” from the Oxford English Dictionary quoted by the learned judge at paragraph [170] of the judgment, is not an actual “definition” of the term or expression “financial adviser”. It merely sets out in quotation marks various sentences in which the term has or may be used. This, in my view, is not an actual definition of the term and is of little use in determining the ‘plain and ordinary’ meaning of the expression. It is also puzzling to me how the judge could have treated it as an example of a “definition” of the term, and even more puzzling how the judge could have categorized the “ordinary” dictionary meaning of the term as “not straightforward”. To the contrary, as expressed above, the plain and ordinary meaning of the term “financial advisor” or “financial adviser” is quite straightforward. Its ‘plain and ordinary’ meaning is further elucidated by the meaning ascribed to the expression “providing investment advice” at paragraph 4 of Part A, Sch. 2 of the SIBA. Indeed, these two expressions are not only similar, but have the same ‘plain’ meaning.

[177] The learned judge posited that he would have been more inclined to accept Infinity Particles’ (Jenkin’s) contended meaning of the expression, were it “professional financial advisor” or “authorized financial advisor” or “independent financial advisor” or simply “authorized person”, as these expressions are all used in a “technical sense” or may have been understood by the parties to have a technical meaning”. However, he concludes that ‘Chih and Jenkin were not seeking to ascribe the technical meaning to that expression that the Defendant [Infinity Particles] contends for’ (para. [171]). Infinity Particles takes issue with this finding on the basis that the judge was mistaken in thinking that it was contending for some “technical meaning” to the expression “financial advisor”, when, in fact, it was contending only for the term to be given its ‘plain and ordinary’ meaning, buttressed by paragraph 4. Part A Schedule 2 of the SIBA 2010. Furthermore, it was C2 Capital and Chih who were contending for a ‘technical meaning’ or some ‘special’ meaning and not the plain and ordinary meaning of the words used.

[178] With respect, the learned judge's reliance on the use of the prefixes "professional" and "authorized" before "financial advisor" to seek to ascribe to Infinity Particles some 'technical meaning' is misplaced. I say this for several reasons. First, it merely confuses the issue of construction which the court below was required to make. The judge was required to construe what was meant by the parties to the Letter Agreements when the expression "financial advisor" was used to describe what services Chih, on behalf of C2 Capital, was obligated to provide to Infinity Particles, through Jenkin, in relation to investments sourced by Chih and recommended to Jenkin as "viable" opportunities for Infinity Particles to invest its money in.

[179] Indeed, it is Chih himself who, at paragraph 24 of his witness statement, described what he (and hence C2 Capital) would be obligated to do under the term "financial advisor" as used and understood by him in the Letter Agreements. What he stated or described therein is of much importance to this issue, as this explanation was accepted as true by the learned judge and it is a relevant indicator, evidentially, of the way in which Chih, and hence C2 Capital, understood the term "financial advisor" to have been used, and what services C2 Capital was contractually obligated to perform thereunder, as consideration moving from C2 Capital to Infinity Particles. It is also of importance in determining whether under the Letter Agreements C2 Capital had contracted to provide financial advisory services in breach the SIBA 2010.

[180] At paragraph 24 of his witness statement, Chih put it this way:

"The way the process worked would be that, in accordance with the arrangement, I would **identify and give my opinion on the viability** of any proposed investment following which Jenkin would determine on behalf of Infinity [Particles] whether **to proceed with the investment or not.**"
(emphasis added)

[181] In my judgment, what Chih described is a classic case of acting as a "financial advisor" in the plain and ordinary meaning of the term to Jenkin and Infinity Particles under the Letter Agreements. By his evidence, he, Chih, would "identify" an investment opportunity and, most importantly, "give his opinion" on the identified

investment opportunity to Jenkin, and the latter would be the one ultimately to “determine” whether to have Infinity Particles take up the introduced investment opportunity. Moreover, what Chih described at paragraph 24 conflates materially with what is described or defined at paragraph 4, Part A, Sch.2 of the SIBA 2010 as ‘providing investment advice’. This calls into question the correctness of the learned judge decision on the proper meaning of the term “financial advisor” in the Letter Agreements. In reaching his conclusion the judge did not, in my respectful view, give a full or proper consideration to the gravamen and import of the evidence of Chih at paragraph 24 of his witness statement or to what is the plain and ordinary meaning of the said term. In failing to do so, he erred.

[182] Furthermore, the judge at paragraph [171] of the judgment is, effectively, excusing Chih as the maker of the Letter Agreements and who is a graduate of Harvard Law School and Harvard Business School among other distinguished academic and business qualifications and experience, as a person who ‘could not have intended to give the expression a technical meaning.’ In my opinion, this approach and finding rings hollow, as does the other points of a similar nature at paragraph [171] of the judgment. These matters or characteristics point, on any reasonable view, to a conclusion or inference opposite to that which the learned judge arrived at paragraph [171]. They point to an expectation that Chih, an investor, businessman and graduate of one of the most prestigious law schools in the world would have been very knowledgeable and fully appreciate the “plain and ordinary meaning” of the expression “financial advisor” and the context and circumstances within which such expression or term ought to be used, especially in the context of a purported binding contract or agreement. Further, it points to Chih knowing and being appreciative of the types and kind of services which a person in the role of “financial advisor” is or is likely to be required to perform or discharge. It therefore, points to Chih being careful, deliberate and precise in the use of the term “financial advisor” in the Letter Agreement which is being relied on as encapsulating C2 Capital’s primary contractual obligations or as he put it during his testimony, as a “record” of what had been agreed between himself and Jenkin during their discussions leading

to the so-called Overarching Agreement/Co-Investment Arrangement. Instead, regrettably, the learned judge did not see it that way but sought to excuse the use of the said expression by Chih, on the basis of hindsight, admitting that he could have used “more appropriate terminology” when drafting such an important provision in the Letter Agreement. This is to be compared and contrasted with the judge’s approach at paragraph [99] of the judgment dealing with the ‘Overarching Agreement Issue’. There the learned judge went the other way according to Chih, as a law graduate of Harvard Law School, the requisite obvious knowledge and discernment: -

“Second, it must have been obvious to Chih – a law graduate from the Harvard Law School – that there was a difference between an “understanding” and an “agreement”. He was quick to point out, for example, that as a general rule, no formalities were required for an agreement to be concluded, so must also have known that the expression “understanding” was markedly different from “agreement”, even one that was concluded orally....”

[183] At paragraph [172], the learned judge accepted Chih’s evidence of what he and Jenkin understood the expression “financial advisor” to mean, that is, that Chih would provide investment opportunities to Infinity Particles, which Infinity Particles was free to accept. The appellant criticism of this finding is that it was impermissible as a matter of principle for the learned judge to accept Chih’s version of what he and Jenkin understood the term to mean, in circumstances where his evidence of this was not put to Jenkin in cross-examination as to what he and Chih understood the term to mean. I agree with and accept this submission by the appellant. I would also point out that the outline by the learned judge at paragraph [172] of what Chih’s evidence was on this issue, suffers from the important deficiency that it is not a full and granular account of what he actually described at paragraph 24 of his witness statement, as dealt with above.

[184] The learned judge summarily concluded that the “contra proferentem” rule of interpretation has no application when construing the proper meaning of the expression “financial advisor” in the Letter Agreements. He did so on the basis that there was no ambiguity about what was intended by the Parties by the use of that

expression (para. [174]). He also opined that neither the “four corner rule” or the “contra proferentem rule” are inflexible (para. [177]).

[185] The learned judge also considered the guidance given by Sir Kim Lewison, Lord Justice of Appeal of England in **The Interpretation of Contracts**, 8th Edn, 2023 Sweet and Maxwell in the preamble to section 17 of Chapter 3; and in **Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd**²³ per Coulson J at para. [12]; **Investors Compensation Scheme v West Bromwich Building Society**,²⁴ per Lord Hoffman; and **BCCI v Ali [2002]**²⁵ at para. [39], per Lord Hoffman, in reaching the following conclusions: -

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

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

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

²³ [2008] EWHC 2379.

²⁴ [1998] 1 W.L.R 896 at 912-3.

²⁵ UKHL 8, [2002] A.C. 251.

[186] C2 Capital referenced what the judge said or observed at paragraph [175] of the judgment: -

“However, even if the expression “financial advisor” has the technical meaning contended for by the Defendant, I am unable to accept that it was ever agreed that the Claimant was supposed to provide financial services or advice **in a way that a professional financial advisor, needing a licence or authorization, would be expected to provide.**” (emphasis added)

[187] In my considered view, this conclusion reached by the learned judge is, with respect, misguided. I have reached this conclusion for the following reasons. First, it does not accord with what Chih himself stated or described at paragraph 24 of his witness statement. There he expressly stated that the role to be performed or the services to be provided by C2 Capital to Infinity Particles under the term “financial advisor” in the Letter Agreements (and the Co-Investment Arrangement) was that he, Chih, was not only to “identify” a potential investment opportunity, but to give his “**opinion on the viability of any proposed investment**” opportunity. The giving of an opinion to a potential investor, such as Infinity Particles was, on the viability of an investment or investment opportunity, is plainly akin to the plain and ordinary meaning of the expression “investment advisor”; and squarely within the meaning and parameters of the expression “providing investment advice” in section 4, Part A, Sch.2 to the SIBA 2010. In my opinion, it matters not whether the sourcing of the investment opportunity and/or the giver of the opinion to the potential investor as to its “viability” is or is not clothed with or has taken on the cloak or mantle of a “professional” investment advisor or an “authorized” investment advisor.

[188] Second, and most importantly, the services to be provided or discharged as “consideration” (whether to be performed by Chih or C2 Capital) moving under the Letter Agreements from C2 Capital to Infinity Particles, falls squarely within the kind of services stated to constitute “providing investment advice” under paragraph 4 of Part A of Sch. 2 of the SIBA 2010, as requiring a licence to be applied for and issued under the SIBA 2010. Third, as C2 Capital’s own evidence makes clear including Chih’s evidence at paragraph 24 of his witness statement, Jenkin or Infinity Particles

was in every instance a “potential investor” within the use and meaning of that expression at paragraph 4, Part A Schedule 2 of SIBA 2010.

[189] In short, the evidence discloses that Chih would identify or source an investment or investment opportunity, do what was necessary for him to form his own opinion on its viability, provide his formed or considered opinion on its viability to Jenkin who, would then, on behalf of Infinity Particles as a “potential investor”, “decide” whether to go forward with the investment and to have Infinity Particles commit to and invest its capital in the said investment. This role or service to be provided by C2 Capital under the Letter Agreements as described by Chih at paragraph 24 of his witness statement and accepted by the learned judge, is of added significance and importance as C2 Capital would be entitled, having performed its end of the bargain under each Letter Agreement, to share equally with Infinity Particles in any profits or to bear equally any losses from such investment.

[190] For these reasons ground 2 succeeds.

Ground 3 - In finding that C2 Capital had provided the services that it would have been required to provide under the terms of the Letter Agreements, the judge erred in law. The judge (i) wrongly departed from C2 Capital’s pleaded case, and (ii) erroneously attributed the acts done by Chih to C2 Capital.

Points under ground 3:

(1) C2 Capital’s pleaded case is that it had never provided any financial advice or arranged deals in investments (at [156] and [157]). More specifically, C2 Capital’s Amended Reply to Defence states, at paragraph 6C(c):

- (a) *it is denied that [C2 Capital] dealt in investments.*
- (b) *it is denied that [C2 Capital] arranged deals and in any event the activities of [C2 Capital] fall within Paragraph 2(5) of Part B of, which is denied, [C2 Capital] arranged deals within the meaning of Part A.*
- (c) *it is denied that [C2 Capital] managed investments.*

(d) it is denied that [C2 Capital] provided investment advice within the meaning of Part A.

- (2) Infinity Particles accepted this. It was (and is) therefore common ground that C2 Capital never provided financial advice or arranged deals in investments within the meaning of Part A of the Second Schedule to SIBA 2010, which provides as follows:

“2. Arranging Deals in Investments

Making arrangements with a view to –

- (i) Another person (whether as a principal or agent) buying, selling, subscribing for or underwriting a particular investment, being arrangements which bring about, or would bring about, the transaction in question; or
 - (ii) A person who participates in the arrangements buying, selling, subscribing for or underwriting investments.”
- (3) The judge therefore erred in law by making findings that were contrary to the Parties’ pleaded case. The judge should have found that the introduction of such opportunities constituted “arranging deals in investments” within the meaning of paragraph 2 in Part A of the Second Schedule to the SIBA 2010. C2 Capital has expressly denied that it carried out such acts, and it was accordingly not open to the judge, in the circumstances, to find that (i) C2 Capital had acted as a “financial advisor” or that (ii) C2 Capital had introduced investment opportunities.
- (4) The judge ought to have found instead that, to the extent that Chih had introduced investment opportunities to Jenkin, Chih was doing so in his capacity as an employee of JAMM Active and/or personally. The judge again erred in law by attributing these acts to C2 Capital (at [120]):

- (a) Chih was employed by JAMM Active (at [122]). The terms of Chih's employment contract with JAMM Active make clear that his role was to "see(k) investment opportunities" for JAMM Active (at [233]). There was a clear rationale for this.
- (i) JAMM Active Limited was incorporated as the managing entity to spearhead the intended IPO of Jenkin's textile business (at [191]).
 - (ii) The intended IPO was predicated on a partnership-based business model, with the idea of investing in promising new strategic ventures, with a view towards eventually integrating their operations (at [18]).
 - (iii) In the interim, and pending the intended IPO, the strategic investments would be held by Infinity Particles, which was Jenkin's holding entity (at [18]).
 - (iv) Chih was hired to lead this aspect of the intended IPO, and to source for suitable investment opportunities.
- (b) Any investment opportunities, which were introduced by Chih, would evidently have been done so in his capacity as an employee of JAMM Active and/or in his personal capacity. That must be so, because C2 Capital's pleaded case is that it did not arrange deals in investments, which means that C2 Capital could not have been introducing investment opportunities.

(c) The judge plainly erred in finding that there was a distinction made between the services performed by Chih under his employment contract for JAMM Active, and the investment opportunities allegedly introduced by Chih to Infinity Particles (at [230]).

(i) The investments held by Infinity Particles were the very same investments that were managed by JAMM Active. In particular, the undisputed evidence is that Appier and Cotopaxi Investments (which were held by Infinity) were strategic investments that were entered into as part of the intended IPO.

(ii) Infinity Particles is a pure holding entity with no operations. Its investments were entirely managed by JAMM Active. Jenkin was also the controller of both Infinity Particles and JAMM Active. As the judgment rightly notes:

(1) Due diligence for the investments were carried out by a Co-Investment Team, and by personnel from JAMM Active (at [285]);

(2) The members of the Co-Investment Team were employed by JAMM Active Limited (at [51]); and

(3) AMM Active email accounts were used to monitor the investments (at [52]).

(iii) The evidence also shows that Chih was of the view that such investments were being introduced to JAMM Active, and in his capacity as an employee of JAMM Active. That explains why the expenses incurred by Chih, in relation to these investments, were invoiced to JAMM Active, and duly reimbursed to Chih (at [234]).

(iv) The judge was wrong to find that Chih was not remunerated for the work done on the Disputed Investments by JAMM Active (at [222] and [223]). Chih was fully remunerated for his role with JAMM Active. He was paid a monthly salary of US\$10,000.00 (at [20]). Chih was also appointed as a director of JAMM Group, which was the intended IPO entity, and given a significant interest in JAMM Group (at [22]). Had an IPO materialized, these shares in JAMM Group would have been extremely valuable, and it was expected that they would be worth more than US\$100 million.

[191] Ground 3 challenges the learned judge's finding that C2 Capital had provided the services that it was required to provide under the terms of the Letter Agreements entitling it to a monetary award of 50 percent of net profits derived by Infinity Particles from each of the Disputed Investments. Ground 3 consists of several bases or points of challenge, as is clear from the above. These bases of challenge include a pleading point. They also include arguments grounded on C2 Capital's obligation

under the Letter Agreements to serve as “financial advisor” to Infinity Particles, the finding by the judge that C2 Capital did not provide financial advice to Infinity Particles, and his finding that C2 Capital had performed its obligations under the Letter Agreements by introducing investment opportunities to Infinity Particles. Ground 3 also concerns the issue of whether the introduction of investment opportunities were services which Chih was obligated to carry out under an employment contract with JAMM Active in relation to each of the Disputed Investments and not services which C2 Capital was contracted to perform for Infinity Particles under the Letter Agreements.

[192] Accordingly, the merits of ground 3 are substantially dependent on the merits of ground 2 dealing with the correctness of the judge’s finding as to the meaning of the term “financial advisor” in each Letter Agreement, and whether, properly construed, there was a total failure of consideration on the part of C2 Capital under each Letter Agreement. Ground 3 is also interlinked with ground 4 dealing primarily with the issue of past consideration.

Appellant’s Submissions

[193] Infinity Particles relies on the “plain and ordinary” meaning of the term “financial advisor” in the Letter Agreements. I have at ground 2 (above) found for Infinity Particles on this issue. Infinity Particles submits that the judge, having found that C2 Capital had not provided financial advice to Infinity Particles as required of it by the Letter Agreements, the learned judge ought to held that C2 Capital did not fulfil its obligations under the Letter Agreement, leading to a total failure of consideration and the claim ought to have been dismissed. It is submitted that C2 Capital’s non-performance of its said contracted obligation under the Letter Agreements to provide financial advice to Infinity Particles is also entirely consistent with its pleaded case and with Chih’s evidence at Trial. However, the judge failed to reach this “obvious” conclusion and, instead, held, on some “contrived” basis, that C2 Capital had performed its obligation to serve as a “financial advisor” to Infinity Particles, even

though it never provided financial advice and it was its own case that it never provided such advice to Infinity Particles.

[194] This submission is a direct attack on the reasoning of the learned judge at paragraphs [203] to [221] dealing with the 'Performance issue', and his findings at paragraphs [215], [216], [220], [221] and [234] of the judgment. The appellant submits also that the learned judge ought to have found that Chih was introducing investment opportunities not under the Letter Agreements, but instead in his capacity as an employee of JAMM Active. Their reasoning on this point is multipronged.

[195] First, the terms of Chih's Employment Contract with JAMM Active expressly provided that his role was to "seek investment opportunities". Second, it is submitted that the objective evidence demonstrates that the Disputed Investments were part of the investment opportunities which Chih had introduced to JAMM Active. Illustrative of this second point, argues C2 Capital, is an extract from the cross-examination of Chih.²⁶ However, that extract is not a full reproduction of Chih's evidence. It omits certain parts. Set out below is the full text, with the omitted portions shown in bold and the portions emphasized by the appellant in the quoted extract underlined. I set it out in full so as to properly and fully put Chih's evidence in context:

'Well, I am the co-chairman of JAMM Active and I was doing these co-investment transaction. As part of that duty, I need to travel and meet with people and build relationships. As you can tell, some of the investment that we made, like Warby Parker, like Appier, it wasn't through one meeting, it was a series of relationships. Like, for example, Warby Parker, it was one of the hottest company in 2019. That's when, you know, director consumer company was, you know, being created. Everybody wants to invest. So I met Neil in 2018. He did not give me the right to invest until 2019, his relationship (unclear).'

²⁶ (Transcript Day 3 page 119 line 21 to page 120 line 2 – ROA Part 7 Vol. 1 pages 407-408) at paragraph 41(b)(i) of its written submissions in the appeal.

[196] Of some significant to the point submission sought to be made by Infinity Particles, is the exchange (at page 120 of the Transcript) which immediately followed the above response by Chih:

Q. What I was focusing upon was the fact that the JAMM Active was in effect or actually paying those expenses. What was the arrangement and understanding between you and Jenkin about doing it that way?

A. because we own JAMM Active and so there is a chairman's office, so this is our co-investment partnership and he is okay with it. Remember he approved all the expenses and I feel like I have been quite frugal with the expenses. If you notice all the item that we went through, I mean there was nothing extraordinary, I don't believe.

[197] Also, in relation to this second point, the appellant argues that it is a "pure holding company" which at that time was being used to hold investments which would be eventually integrated in the intended IPO of the Jamm Group (para. [18]). Jamm Active was the managing entity of the intended IPO and oversaw all the investments held by Infinity Particles, including the Disputed Investments. As a result, the due diligence and monitoring of the Disputed Investments using email accounts registered to the JAMM Active domain were carried out by the members of the "Co-Investment Team" all of whom were employed by JAMM Active and whom C2 Capital had disavowed any suggestion that they were acting on its behalf.²⁷

[198] Infinity Particles also argues that Chih had acted in a manner consistent with the fact that the investment opportunities were being introduced to JAMM Active and not Jenkin or Infinity Particles itself. In support of this point, it cites paragraph 14 of the ASOC whereby Chih admitted at trial that Chih attended a lunch on 13th August 2019 to source the Warby Parker Investment and he had been invoiced the expense for the lunch to JAMM Active²⁸; and paragraph 66 of the ASOC where Chih admitted

²⁷ Transcript Day 7, page 86 lines 12 -16 (page 476 Vol 2 Part 7.

²⁸ Transcript Day 2, page 119 lines 1-14 Part & (Vol. 1) page 232.

at trial that the expenses of his trip to San Francisco for the CRCM Investment were invoiced to JAMM Active.²⁹

[199] Infinity Particles also point to the admitted fact that Chih was remunerated by JAMM Active for these services and he was awarded a significant interest in JAMM Group (the IPO entity, which shares would have been extremely valuable estimated at almost US\$100 million had the IPO gone through.

[200] Furthermore, Infinity Particles argues that the judge should have found, in the alternative, that the services were provided by Chih in his personal capacity and not on behalf of C2 Capital. Accordingly, and for all these reasons, the learned judge ought to have held that C2 Capital could not have provided to Infinity Particles the services which it was required to provide under the Letter Agreements.

Respondent's Submissions

[201] The respondent has addressed ground 3 at paragraphs 38 to 52 of its written appeal submissions. In response to ground 3, C2 Capital argue that any assertion that the learned judge found that it did not provide financial advice under the Letter Agreements is directly dependent upon what is meant by "financial advice" which is the subject of ground 2 and is a regurgitation of the appellant's points on the 'consideration' issue as summarized by the judge at paragraph [159] of the judgment. That ground 3 hinges on the determination of ground 2 has been mentioned above and cannot seriously be disputed.

[202] The respondent relies on the judge's finding on this issue at paragraph [173] and the summary of his reasoning at paragraphs [183] and [185] of the judgment. In these paragraphs the learned judge stated: -

"[173] It follows the even if one applies the "four-corner" rule of construction, in my judgment, there is no ambiguity about what the Parties had agreed: the obligation of [C2 Capital] was **simply to provide investment opportunities** to [Infinity Particles], rather than the financial services of the

²⁹ Transcript, Day 2, page 109 line 21 Part 7, Vol. 1 page 215.

type contended for by Jenkin that would have required a licence.’(emphasis added)

‘[183] Based on the above cases, this Court is perfectly entitled to take into account the background circumstances in this case. This is especially so as the evidence of Jenkin about the inclusion of the words “financial advisor”, and what he believed was meant by it, was simply wrong. He could never have thought, not could any reasonable person, that it was being used in any technical sense.’

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

[203] Also of some significance is paragraph [189] of the judgment: -

“[189] In those circumstances, the contention of [Infinity Particles] that [C2 Capital] did not provide financial services of the type purportedly agreed between the Parties is simply not tenable. [C2 Capital] did provide those services. I come to this conclusion, whether it is based on the application of the plain and ordinary meaning of the expression “financial advisor” or the premise, given the background facts and circumstances, that it is the only proper conclusion for me to come to as representing the objective intention of the Parties. I am satisfied, therefore, that what was agreed between them, looking at matters objectively through the lens of a reasonable person, was that **the service to be provided by Chih was to introduce investment opportunities to Jenkin, nothing more, nothing less.**” (emphasis added)

[204] It is C2 Capital’s submission that this analysis of the learned judge is clear and cannot be set aside by this Court for the following reasons. First, the terms of the Letter Agreements themselves. At paragraph [225] the learned judge observed: ‘One only has to look at the Letter Agreements to know that the case of [Infinity Particles] on the Remuneration Issue is flawed’. The ‘Remuneration Issue’ as coned by the judge is: ‘Were Chih and/or [C2 Capital] remunerated for the work done on the Disputed Investment by JAMM Active’. Second, the judge’s finding that any consultancy agreement was between C2 Capital and JAMM Active and not C2 Capital and Infinity Particles (para. [228]). Third, it was Infinity Particles and not JAMM Active that made investments and therefore derived the profits (para. [229])

At paragraph [229] the learned judge observed that there is no suggestion in the documentary evidence that investment opportunities were being provided by JAMM Active rather than C2 Capital/Chih personally. He quotes, in particular, an extract from Day 5 of the trial, in which Jenkin, in response to a question in cross-examination stated: 'His [Chih] job is to be hired by JAMM Active **and then he helped me with some investment personally as a friend which he did since I know him.**' (emphasis added).

[205] Fourth, the judge's analysis at paragraph [230] concerning the relationship between the Letter Agreements, employment contract and consultancy agreement and the relevant chronology, which analysis C2 Capital argues is "unimpeachable". I agree with this characterization of the learned judge's analysis at paragraph [230]. Nothing which the appellant has submitted on this issue has exposed any flaws in his analysis and reasoning. The learned judge concluded in these terms:

"It is difficult to see how one can extrapolate from the mere existence of a company controlled by Jenkin (JAMM Active) that the services provided by Chih of introducing investment opportunities must have been provided on behalf of JAMM Active and not [C2 Capital]. The fact is that JAMM Active and [Infinity Particles] were different companies and carried on different types of business. In addition, the relationship of Chih and, subsequently, [C2 Capital] with JAMM Active was governed under a different agreement or agreements from the relationship that existed between [C2 Capital] and [Infinity Particles]."

[206] Fifth, the judgment makes clear that a central finding was made as to the "contractual relationships" (at para.[232]) This refers to the finding of the learned judge that it is the Letter Agreements which form in law the contractual basis of the relationship between C2 Capital and Infinity Particles, and the consequence which therefore flows from that primary finding as it relates to the contractual terms including whose responsibility it is for introducing each particular investment opportunity to Infinity Particles,. At [232] the judge stated: -

'On the basis that I have found that the contractual relationship between the Parties was represented by the terms of the Letter Agreements, there can be no basis for contending that the Parties to the Disputed Investments were anyone other than [C2 Capital] and [Infinity Particles].'

[207] Sixth, the judge at paragraph [233] carried out a clear and rational analysis as to Infinity Particles' arguments as to terms of the consultancy agreement. Seventh, the judge at paragraph [234] addressed Infinity Particles argument that some of Chih's expenses for "facilitating the investments were paid by JAMM Active" and found as a fact that Chih and Jenkin had agreed that these expenses "could be put through JAMM Active's books." It is also submitted that the fact that Chih was paid a monthly salary is irrelevant since that salary was for services provided by him to a different legal entity (JAMM Active) and related to services which are distinct from providing investment opportunities.

[208] In my view nothing turns on this aspect of the evidence or the arguments relative thereto by the appellant and the learned judge was entitled to come to the conclusions which he did at paragraph [230]. The primary finding of fact as to the basis of C2 Capital contractual claim is the Letter Agreements. Their case succeeds or fails thereon.

Analysis and Conclusion - Ground 3

[209] In dealing with the 'Performance Issue' ('did C2 Capital perform its obligations under the terms of the Letter Agreements?'), the learned judge held that there was no substance in any suggestion that Chih performed services either because of his friendship with Jenkin or in his capacity as an employee or officer of JAMM Active or as a result of the consultancy agreement between JAMM Active and Infinity Particles. The learned judge also rejected any contention that the introduction of investment opportunities relating to the Disputed Investments the subject of the Claim, were not made by Chih but by others or by members of staff of Jenkin's various companies. He found that the evidence "entirely supports Chih's case" on this issue of who made the introductions. In support of this finding the learned judge conducted (at paragraphs [211] to [219] of the judgment), an analysis of the evidence given at trial by the witnesses for C2 Capital. At paragraph [220] he rejected Jenkin's evidence "about introductions not having been made by Chih"; and

declared his satisfaction that “all introductions relating to the Disputed Investments were made by Chih on behalf of [C2 Capital].

[210] On this discreet issue of who made the introductions, I am not persuaded by the argument of the appellant that the learned judge committed any error in his analysis of the evidence adduced at Trial and in reaching his conclusion at paragraph [220] where he rejected Jenkin’s evidence about the introductions not having been made by Chih and declared his satisfaction that all introductions relating to the Disputed Investments had been made by Chih. I am not satisfied that the appellant has put forward any proper basis for appellate intervention to set aside that finding.

[211] I would add also that the Letter Agreements relating to the introduction of each of the six investment opportunities the subject of the Claim were all between C2 Capital and Infinity Particles as parties and were all signed by Jenkin for and on behalf of Infinity Particles. These documents, taken at face value and subject to the other issues of past consideration and illegality and lack of enforceability, point to and are supportive of the judge’s finding at paragraph [220] that it was Chih who for and on behalf of C2 Capital which was obligated to and did make each and every one of the said six introductions of the Disputed Investments the subject of the Claim. Accordingly, the learned judge’s finding at paragraph [220] stands.

[212] However, the appellant goes one step further in its submissions. It is submitted that even if the judge was correct to find that Chih had introduced the investment opportunities the subject of the Claim, he ought to have held that those acts cannot be attributed to C2 Capital “because that would be inconsistent with C2 [Capital’s] pleaded case”, which the judge accepted, that it has not acted as a “financial advisor”. Further, if C2 Capital and/or Chih had introduced the subject investment opportunities, such services would have been provided to JAMM Active and not Infinity Particles pursuant to Chih’s Employment Contract and/or the Consulting Services Agreement (para. 38 appellant’s skeleton). In relation to this submission, I am also of the opinion that the Letter Agreements, all signed by Jenkin on behalf of

Infinity Particles, do not point to nor are they evidence of introductions emanating from Chih to JAMM Active which is not a party to any of them, or as an employee of JAMM Active or under the Consultancy Agreement. In fact, as the judge mused, these documents make no mention of JAMM Active or the JAMM Group or of Chih's employment contract with JAMM Active or his Consultancy Agreement.

[213] Infinity Particles stressed that it was C2 Capital's pleaded case at paragraph 6C of its Amended Reply that it had never arranged any deals in investments. What is pleaded at paragraph 6C of the Reply is in response to what was pleaded by Infinity Particles at paragraph 5.2 of its Amended Defence. At paragraph 5.2 it is pleaded, inter alia, that the SIBA 2010 prohibits C2 Capital "from carrying on, or holding out itself as carrying on, investment business of any kind in, or from within the BVI unless it holds a licence to carry on that investment business." Infinity particles also prayed in aid the **Financial Services Commission Act 2001** as providing that any contract entered into by an unauthorized party in the course of carrying on an unauthorized financial services business carried on by that unauthorized party, is unenforceable.

[214] This is the essence of the illegality defence under BVI law pleaded and relied on by Infinity Particles and will be dealt with substantively at ground 5. However, in relation to the main issue at ground 3, C2 Capital at paragraph 6C of its Reply (which paragraph is quite lengthy and do not need to be reproduced in full here), it is denied at subparagraph (1)(a) and (b) that C2 Capital carried on an "investment business" as defined in the SIBA 2010 or engaged in any activities which fall within Schedule 2, Part A of the said Act. Furthermore, C2 Capital relies, so far as is necessary, on the provisions of Schedule 2, Part B of the SIBA and what constitutes "Excluded Activities". At 6C(1)(c), C2 Capital expressly denies that it "dealt with investments"; "arranged deals" within the meaning of Part A and relied on paragraph 2(5) of Part B; "managed investments"; and "provided investment advice within the meaning of Part A."

[215] At paragraph 6C(2)(a) of the Reply, C2 Capital also pleaded, in the alternative, that if it carried on an investment business within Part A of the Act, “the relationship between the Parties was one of joint enterprise within the meaning of the Act at paragraph 4 of Part C. Also, in response to the reliance on section 50F of the Financial Services Commission Act 2001, C2 Capital prays in aid the provisions of section 50G which grant to the court a discretion to allow an agreement or contract caught by the provisions of section 50F to be enforced by the person carrying on the unauthorized financial services business if it is “satisfied that it is just and equitable in the circumstances of the case” to allow it. Further, in exercising that discretion, the court “shall have regard to whether the person carrying on the unauthorized financial services business “reasonably believed that he or she was not carrying on unauthorized financial services business by making the agreement.”

[216] It is important to state at this juncture, that the learned judge did find that C2 Capital was carrying on an unauthorized financial services business rendering the Letter Agreements potentially unenforceable. However, the judge went on to apply the “partnership” exception and, if necessary, to exercise the discretion granted to the court under section 50G to allow the Letter Agreements to be enforced on the principal basis that Chih was unaware that C2 Capital, by entering into the Letter Agreements, was carrying on an unauthorized financial services business.

[217] In my judgment, C2 Capital was clearly, on the evidence from Chih accepted by the learned judge, not just introducing investment opportunities to Jenkin, but acting as a financial advisor to Jenkin and/or Infinity Particles in relation to each such investment the subject of the Claim, and by providing to Jenkin his opinion on the viability of the investment, all part and parcel of persuading Jenkin to decide whether to have Infinity Particles invest its capital in each such investment. This is clear from any proper reading of paragraph 24 of Chih’s witness statement. By doing so, Chih and/or C2 Capital were carrying on an unauthorized investment business and facilitating such unauthorized business through the means of the Letter Agreements. However, the learned judge failed to properly analyse and appreciate

the full significance of Chih's evidence as to his understanding of what was meant by the term "financial advisor" in the Letter Agreements, and the services C2 Capital had thereby contracted to perform and did perform for Infinity Particles thereunder and in relation to each of the six Disputed Investments. In failing to do so, the learned judge erred and his reasoning based on such a flawed premise clearly incorrect and an error of principle and judgment.

[218] Reliance is placed by C2 Capital on the finding at paragraph [189] of the judgment that C2 Capital/Chih 'did provide those services', that is, 'to provide investment opportunities'. In fact, at paragraph [189] the learned judge was even more definitive. He stated that the service to be provided by Chih '**was to introduce investment opportunities to Jenkin, nothing more, nothing less.**' This statement is clearly an incorrect or flawed assessment of the full scope and import of Chih's evidence at paragraph 24 of his witness statement, which evidence and description were accepted as truthful wholesale by the learned judge. Accordingly, the judge's reasoning based on this false assessment or premise was fundamentally flawed. Chih, at paragraph 24, in describing his understanding of what was meant by the expression "financial advisor" in the Letter Agreements and "**the way the process worked**" did not stop at "the provision of investment opportunities". Most importantly, he was more expansive in his description and included his obligation (on behalf of C2 Capital) to give to Jenkin, when introducing an investment opportunity, his "**opinion on the viability of any proposed investment**". Armed with Chih's introduction of the investment and his "opinion" as to its viability, Jenkin would by and through Infinity Particles, as a "potential investor" decide whether to invest its funds in the introduced investment opportunity. If he did and Infinity Particle did make the investment both parties would share in any net profits or new losses. In this way Chih and C2 Capital, on their own case, would stand to receive a financial benefit for discharging its side of the bargain.

[219] In my opinion, this clearly takes C2 Capital's pleaded and evidential case on this issue into the realm of "providing investment advice" to Jenkin/Infinity Particles, on

any reasonable and objective view of Chih's evidence. Chih on behalf of C2 Capital was clearly providing the services (or some of the services) of an "investment advisor", be they a "professional" or "authorized" investment advisor or not. The result was the carrying on of an unauthorized "investment business" by C2 Capital/Jenkin within the meaning of paragraph 4, Schedule 2 Part A of the SIBA 2010 without the requisite licence to do so. It is the very absence of proper authorization by having the requisite licence to conduct investment business as a BVI registered company, that has put C2 Capital on a collision course with paragraph 4 of Part A of Schedule 2 of the SIBA 2010 and with section 50F of the Financial Services Regulatory Act, but that is a matter for grounds 5 and 6.

[220] This leads to the question whether, in light of this conclusion, there was a total failure of consideration on the part of C2 Capital under the Letter Agreements, as contended by Infinity Particles.

[221] It is C2 Capital's submission that the judge having been correct in finding that "the obligation of [C2 Capital] was simply to provide investment opportunities", it follows that there was no total failure of consideration on the part of C2 Capital under the Letter Agreements as the judge found that C2 Capital did provide those services, that is investment opportunities (para. [173]). Any argument to the contrary by Infinity Particles, based on the false premise that the judge accepted that C2 Capital did not act as "financial advisor", as contended by C2 Capital, is disingenuous. Further, C2 Capital relies also on the learned judge's finding that it did not act in the sense or meaning contended for by Infinity Particles, but in the sense and meaning contended for by C2 Capital itself at trial. In support of this C2 Capital relies on its pleading at paragraphs 17.3 and 20 of the Reply where it is asserted that –

'17.3 The Claimant and the Defendant used the terms "financial adviser" in the Letter Agreements as a term of art to characterize the Claimant and Chih's role to source deals and make investment decisions for the joint enterprise between them.'

'20. Chih sourced the deal, analysed the opportunity and investment decisions were based on his analysis.'

[222] In light of the conclusion reached above on the meaning of the term “financial advisor” in the Letter Agreements and that the learned judge was wrong to reach the conclusion which he did – to provide investment opportunities only, nothing more, nothing less - has there been a total failure of consideration on the part of C2 Capital under the Letter Agreements? In my view, the answer to this question is, presumptively, no. I say this because this preliminary conclusion is subject to the matters and issues raised in ground 4 of the notice of appeal concerning, more broadly, the issue of consideration, including past consideration.

[223] I reach this preliminary conclusion purely on the basis that the services to be provided by C2 Capital/Chih under the Letter Agreements is the sourcing and introducing of investment opportunities to Infinity Particles/Jenkin as a “potential investor” and the rendering by Chih to Jenkin for and on behalf of Infinity Particles, of his opinion on the subject investment’s viability. The learned judge found as a fact that Chih did introduce Jenkin/Infinity Particles to the six investment opportunities the subject of Disputed Investments in the Claim. While the learned judge failed to also find as a fact on the evidence of Chih (which he accepted as true), that part of the services to be provided by Chih and C2 Capital under the Letter Agreements was for Chih to provide to Jenkin/Infinity Particles his opinion/assessment as to the viability of each “introduced” investment opportunity, both of which sets of services were on Chih’s evidence provided, this leads to the conclusion that prima facie there was no ‘total failure’ of consideration on the part of C2 Capital under the Letter Agreements.

[224] This conclusion is subject to the issues raised in ground 4 and the ultimate question of illegality raised in grounds 4, 5 and 6 as to whether, in contracting to and performing these services, C2 Capital acted without the requisite statutory approval or licence contrary to the laws of the BVI and/or the laws of Taiwan or whether the consideration was past consideration which is no consideration at all. In relation to the total failure of consideration issue raised by ground 3, Infinity Particles cannot have it both ways. They cannot, on the one hand, contend for the ‘plain and ordinary’

meaning of the expression “financial advisor”, which meaning would encompass both limbs of what was described by Chih at paragraph 24 of his witness statement as the services to be provided by C2 Capital to Infinity Particles, and which also constitute the ‘consideration’ moving from the former to the latter, and on the other hand argue that to the extent that Chih or C2 Capital say they introduced investment opportunities to Jenkin and Infinity Particles, which the learned judge found as a fact, they were not, by doing so, acting as a “financial advisor” to Infinity Particles within the proper or correct meaning of that term in the Letter Agreements leading to a total failure of consideration.

Ground 4 – The learned judge erred in finding that the introduction of investment opportunities did amount to consideration (at [201]).

Points under ground 4:

- (1) First, an introduction can only be made once. It is illogical to suggest that C2 Capital could have made multiple introductions to the same investment fund. However, that is the necessary (and erroneous) conclusion reached in the judgment.
 - (a) There were multiple Letter Agreements that had been entered into in relation to the same investment, for different tranches of this investment. In particular, there were multiple tranches of investments (and multiple Letter Agreements) for Kayak and Cotopaxi investments.
 - (b) The Respondent therefore could not have provided any valid consideration in relation to the subsequent subscriptions to those investments (i.e. the Second and Third Kayak Investment, and the Second Cotopaxi Investment). The introductions had already been made, and any such consideration would have been past consideration.

- (2) Second, the judge's finding that the consideration was not past consideration also erroneously overlooks the fact that four of the Letter Agreements which are the subject of the claim record that C2 Capital "has served" instead of "will serve" as a financial advisor (at [7], see footnote 2)
- (a) Footnote 2 of the judgment acknowledges Infinity Particles's contention that this is indicative of the fact that the consideration under these Letter Agreements would already have been provided, and therefore amount to past consideration.
 - (b) Footnote 2 of the judgment also states that, if C2 Capital had successfully established the existence of the "Overarching Agreement" then that might be an answer to the past consideration argument.
 - (c) However, the judge ultimately found that the "Overarching Agreement" was not binding, and nothing more than an "agreement in principle". There is accordingly no answer to the point that the express wording of the Letter Agreements themselves suggests that any consideration provided would have been past consideration.
- (3) Third, no consideration could have been provided in respect of the remaining two Letter Agreements the subject of the claim which record that C2 Capital "will serve" as a financial advisor in relation to the specific investment identified in each Letter Agreement.
- (a) The expression "will serve" makes clear that the consideration to be provided by C2 Capital, namely serving as financial advisor, was to be provided in the future at a date after the alleged agreements were concluded.

- (b) However, the judge found that the agreements would have been concluded either when the Letter Agreements were signed, or when Jenkin injected the funds into the investment. Any alleged introduction of an investment opportunity would have preceded both events. It therefore cannot amount to valid consideration under any such agreement.
- (4) Finally, the judge's reasoning for rejecting the past consideration argument is also flawed and contradictory.
 - (a) The judge rejected the past consideration argument on the basis that C2 Capital's role was not limited to simply introducing the investments. The judge held that "[in] relation to every investment, work on the part of [Infinity Particles] continued for a substantial period of time" (at [197]).
 - (b) That is plainly contradicted by, and incompatible with his earlier finding that C2 Capital's role was to "introduce investment opportunities to Jenkin, nothing more, nothing less" (at [189]).
 - (c) The judge ought to have found that, if the respondent had provided additional work, over and above the introduction of the investment opportunities, then that ought to properly be the subject of a claim in quantum meruit (which C2 Capital did not pursue) (at [199] and [200]). Such additional work, does not, as a matter of law, amount to valid consideration for the contracted obligations.

[225] Ground 4 raises a number different but related ‘consideration’ issues. These are:

- (1) multiple letter agreements with respect to the 2nd and 3rd Kayak Investments and the 2nd Cotopaxi Investment;
- (2) with respect to four of the Disputed Investments, the use of the past tense “has served” as financial advisor, and the significance of the judge’s comments at footnote 2 to paragraph [7] of the judgment and his ultimate finding that the Co-Investment Arrangement/Overarching Agreement is an “agreement in principle” and not a binding contract;
- (3) in relation to the remaining two Disputed Investments, the use of the future tense “will serve” as financial advisor being indicative of no consideration having been provided and any consideration to be provided being after conclusion of the articular investment the subject of these two Letter agreements; and
- (4) the alleged flawed, inconsistent and contradictory findings of the judge at paragraphs [189] and [197] of the judgment regarding the services to be and provided by C2 Capital in its role as “financial advisor” to Infinity Particles and significance to a determination of the issue of “past consideration”.

Appellant’s Submissions

[226] In relation to ground 4 and the issues identified above, Infinity Particles submits that the learned judge erred in finding that the act of introducing investment opportunities would not have amounted to past consideration. The starting point in their submissions on these issues is the apparent contradictory, inconsistent and flawed findings of the judge at paragraphs [189] and [197] of the judgment with regard to the services to be provided by Chih, on behalf of C2 Capital, in its role and as “financial advisor” to Infinity Particles under the Letter Agreements.

[227] It is also submitted by Infinity Particles, that it is illogical to suggest that C2 Capital could have made multiple “introductions” of the same investment fund to Infinity Particles. As this argument goes, an “introduction” can only be made once and it is equally absurd, says Infinity Particles, to suggest that each subsequent “introduction” to the same fund would have constituted valid consideration. This is a more nuanced point which the appellant attempts to illustrate this by specific reference to the second and third Kayak Investments and the second Cotopaxi Investment. It is submitted that the “introduction” to each of these investments having already been made at the time of the first Kayak and Cotopaxi investments respectively, that ‘consideration’ would be past consideration in relation to the Letter Agreement pertaining to the subsequent or later investments in those funds. Accordingly, no further ‘consideration’ in the form of an ‘introduction’ of each of these two investments could have been provided in relation to the Letter Agreements applicable to the second and third Kayak and the second Cotopaxi investments.

[228] This is a more nuanced point and one which requires careful consideration and analysis in light of the passage above and other authoritative statements of the principles applicable to ‘past consideration’ issues at 6-030 of **Chitty on Contracts** cited and relied on by the learned judge at paragraphs [198] of the judgment in reasoning to his conclusions on this issue.

[229] C2 Capital also notes that four of the Letter Agreements the subject of the Claim, do not accord or are not strictly in the “standard form” Letter Agreement said to have been settled on by the parties. This is a reference to the use in these four Letter Agreements of the phrase “has served” as financial advisor which speaks to services already performed by C2 Capital (that is, past consideration), and not the phrase “will serve”, in conformity with the “standard form” letter agreement, which speaks to services as financial advisor to be performed or rendered by C2 Capital *in futuro*. This point relates specifically to the Letter Agreements pertaining to **CRCM Investment, Warby Parker Investment, Loyal Valley Investment**, and the **Appier Investment**. C2 Capital argues that the use of the past tense by the expression “has

served” in these specific Letter Agreements suggests that any ‘consideration’ provided by C2 Capital had been provided in the past, and is therefore, as the argument goes, no consideration.

[230] The next primary submission relied on by the appellant under ground 4, is that, importantly, the standard form of Letter Agreement records that C2 Capital “will serve” as financial advisor to Infinity Particles and in return for such services it would be compensated “in consideration for the advisory role”. The precise wording of the ‘standard’ Letter Agreement is set out at paragraph [7] of the judgment and characterized as ‘a typical or standard Letter Agreement’. It is C2 Capital submission that the language of the “standard” Letter Agreement is “forward looking” in having regard to the use of the expressions “will serve” and “in consideration for the advisory role”. This standard Letter Agreement was, on the evidence, the work of Chih. This means, submits Infinity Particles, that C2 Capital’s obligation was to act as “financial advisor” in the future at a date after the alleged Letter Agreements were concluded. Thus, any alleged “introduction” of an investment opportunity would have preceded in time the entering into of the alleged Letter Agreement contract. Further, as a matter of principle, the “introduction” of the investment could not have amounted in law to valid consideration, rendering the Letter Agreements which were “forward looking” invalid and unenforceable as binding contracts.

[231] The appellant also takes some issue with the learned judge’s musings at paragraph [199] of the judgment, where he dealt with the possibility of an alternative claim in quantum meruit in circumstances where the Letter Agreement was lacking in any consideration. There the learned judge, having cited a passage from **Chitty on Contracts** Vol. 1 at 6-033, dealing with the three conditions necessary to be satisfied in order that an act done before the promise was made to amount to consideration for the promise, and the corresponding entitlement of the promisee to bring a quantum meruit claim against the promisor. The point advanced by the appellant at paragraph 49 of its written appeal submissions, is that while in that scenario C2 Capital could have been compensated for the value of its services on

a quantum meruit basis, such compensation would not be what it allegedly had contracted for because no valid consideration had been provided rendering such agreement not a binding contract. However, the appellant has not cited any authority in support of this proposition.

Respondents' Submissions

[232] In relation to ground 4 and the issue of past consideration, C2 Capital argues that the points being raised by Infinity Particles in support of this ground of appeal are essentially a repetition of its arguments made in the court below which were properly and correctly rejected by the learned judge. In this respect, they point to paragraph [191] of the judgment where the learned judge states: 'The 'past consideration' point is also without substance'; and at paragraph [193] –

“There is little to support this proposition either in the Amended Defence and Counterclaim or Jenkin’s witness statement. **There appears to be good reason for this. It is that this proposition is simply not sustainable on the facts of this case.**’ (emphasis added)

[233] The respondent argues that the appellant is seeking on appeal to challenge the judge’s findings of fact relating to his determination of this issue of past consideration. However, on close analysis, I am not entirely in agreement with this latter point. The statements or observations made by the learned judge at paragraphs [191] and [193] (above) are not truly findings of fact. They are really statements or conclusions expressed or reached by the learned judge having conducted or in the course of conducting his assessment of the ‘past consideration’ issue and forming a view as to the relative strength or weakness of the appellant’s defence and arguments on the said issue. His characterizations were made after he had considered both the factual basis and legal basis of this issue being relied on by the appellant as his statements at paragraphs [191] to [201] clearly show. The judge’s reasoning and findings on past consideration are really to be found at paragraphs [193] to [197] of the judgment. In these paragraphs, he considered Infinity Particles arguments and factual bases upon which they had asserted the defence of ‘past consideration’ and held that the facts relied on do not accord with

the relevant legal principles applicable to past consideration and concluded that such defence was “not sustainable”.

[234] The respondent submits that the learned judge’s reasoning in dismissing the defence of past consideration was clear, rational and unimpeachable. In support of this submission, they make three principal points. First, the Letter Agreements each constitute separate contracts (paras. [195] and [196]). Second, the judge analysed and rejected at paragraph [197] the factual basis advanced by the appellant in support of its defence of ‘past consideration’. There the respondent relies essentially on the judge’s findings that C2 Capital/Chih’s work in relation to the investments did not end with the introducing of them to Jenkin but continued thereafter to enable the investment to come to fruition. This is the very basis upon which the appellant argues that the judge’s findings on this issue at paragraphs [189] and 197] of the judgment are contradictory. Third, it is said that the judge properly cited and relied on the passage from **Chitty on Contracts** Vol.1 at 6-030; and fourth, C2 Capital against the court applying a ‘strictly chronological test’ when seeking to determine an issue of past consideration.

[235] The respondent also stressed that the appellant’s arguments on past consideration amount to “cherry-picking”, taking too narrow an analysis of what the learned judge actually said and found, placing too much reliance on a “turn of phrase” and in circumstances where the judge had to deal with numerous arguments by Infinity Particles - some inconsistent and some overlapping- with the result that secondary arguments advanced by Infinity Particles depended on the success of primary arguments advanced by them. It cannot be gainsaid that Infinity Particles did advance at trial, as they have on appeal, several arguments and points, some inconsistent and some points and grounds of appeal being dependent upon the outcome of principal points or grounds.

[236] Specifically with respect to the judge’s findings at paragraph [197] of the judgment of further work being carried out by C2 Capital and Chih in ‘facilitating and

monitoring' of the investment to ensure it made a profit and not a loss, C2 Capital contends that this finding is well-supported by "a mass of documentation before the court which showed the monitoring carried out in respect of investments" (para. 60 respondent's written appeal submissions), and also by the evidence of Chi, Shen-Tai ("Jerry") at paragraph 7 of his witness statement, regarding the reporting and exchange of WeChat messages. The evidence as to monitoring of the investments, was, argues the respondent, correctly summarized by the learned judge at paragraph [197] of the judgment where he found as a fact that this work continued for a "substantial period of time". This finding of fact, it is submitted, is similarly unimpeachable.

[237] With regard to the alleged contradictory findings of the judge at paragraphs [189] and [197] of the judgment, C2 Capital argues that there is no real contradiction because the finding at paragraph [197] "was expressed in order to address the "past" consideration point", and the judgment must be read as a whole.

[238] On the pleading point, C2 Capital submits that the judge did not commit impermissible trespass. It is reiterated that Infinity Particles had stated at the trial that it was not or would not be taking any "pleading points". This much is certainly correct and any view of this 'pleading point' must take this into account. C2 Capital also submits that, additionally, the issue as to its pleading that its responsibility was limited to simply introducing investment opportunities was fully canvassed and analyzed by the learned judge, and Infinity Particles has not suffered any prejudice in dealing with the issue itself. This latter point is expanded upon at paragraph 63(3) of the respondent's skeleton argument. However, suffice it to be said, that I agree with and accept the submissions of C2 Capital on the pleading point, except to say that what is clear from C2 Capital's pleaded case is that it only was required under the Letter Agreements and the meaning of the term "financial advisor" to introduce investment opportunities to Jenkin/Infinity Particles, which it did and was therefore entitled to a monetary award of the Amount Claimed. This puts into context the very finding of the judge of 'no more, no less' at paragraph [189] of the judgment.

[239] Regarding the substantive issue of 'past consideration' itself, the respondent relies on the learned judge's findings of fact and application of the law and his reasons for holding that this defence is unsustainable. They also rely on the principles from **Chitty on Contracts** at 6-030 cited by the judge at paragraph [198]. There it is stated: 'If the giving of the consideration and the making of the promise are substantially one transaction, the exact order in which these events occur is not decisive.' However, in my judgment, this is not an answer or a complete answer, in the circumstances of this case, to the issue of 'past consideration' and the various points relied on by the appellant, as the very example given in the said passage demonstrates, which example has no application to the facts of this matter.

[240] At paragraph 64 of the respondent's written appeal submission, it challenges the submission made by the appellant at paragraph 48(e) of its written submissions (dealt with at para. [243] above). However, what is said in response does not actually address the submission or proposition by the appellant. It merely states the respondent's "understanding" of the appellant submission without saying why it is wrong as a matter of law or fact, leaving the reader to make an assumption as to the point being contended for therein by the respondent.

[241] As to the point sought to be made by the appellant at paragraph 49 of its written submission in response to the quantum meruit point at paragraph [200] of the judgment, the respondent submits that it is irrelevant and relies on what the judge said at paragraph [200].

Analysis and Conclusions - Ground 4

[242] The learned judge considered the 'past consideration issue' at paragraphs [191] to [201] of the judgment. He determined that this point/defence was "without substance" (para. [191]), "not sustainable" (para. 193]), "a fallacy" (para. 198]), "spurious" and "never likely to succeed" (para. [200]).

[243] The judge held in the judgment that the Letter Agreements, the subject of the Disputed Investments and this Claim, constituted the contract between C2 Capital and Infinity Particles with regard to the introducing of investment opportunities and the equal sharing of any net profits or losses derived by Infinity Particles therefrom. The meaning of the term “financial advisor” in the Letter Agreements is dealt with at ground 2 of the appeal. There I have found that the judge erred in the meaning which he attributed to the expression “financial advisor” and he ought to have applied to ‘plain and ordinary’ meaning of the term which was to “provide investment advice”, which is consistent with Chih’s own description of the services to be provided by C2 Capital/Chih at paragraph 24 of his witness statement (which the learned judge had accepted as truthful) which description also included, importantly, Chih giving his opinion on the viability of the proposed investment. It follows, therefore, that in considering the issue of ‘past consideration’, the learned judge ought to have approached that issue bearing in mind the full evidential description given by Chih and not the mere “introducing” of an investment opportunity. On the basis of Chih’s evidence the question for the judge’s determination on the issue of past consideration (as it is also on the issue of a total failure of consideration) is whether on this description of the meaning of the expression “financial advisor” and of the ‘consideration’ moving from C2 Capital to Infinity Particles, the consideration was ‘past’, on the basis of any of the reasons advanced by Infinity Particles.

[244] Pursuant to the terms of the Letter Agreements, Infinity Particles is the “investor” or “potential investor”. Each of the Letter Agreements describe C2 Capital’s role and services to be that of “financial advisor” to Infinity Particles with regard to the subject investment. On any view, acting as or performing the functions of an “financial advisor” is the consideration moving from C2 Capital to Infinity Particles. This is made pellucid by this provision in the Letter Agreements themselves which state: “In consideration of this advisory role.” However, the term “financial advisor” is not defined in the Letter Agreements and there are no provisions thereof which in any way address or serve to elucidate what the parties meant by the said expression or what particular or specific services were to be provided by C2 Capital in its role and

capacity as “financial advisor” to Infinity Particles. Further, and of some significance, and strikingly, nowhere in the Letter Agreements does it provide that C2 Capital is obligated to “introduce” investment opportunities to Infinity Particles, as the learned judge found. This has been gleaned by the judge and applied from the evidence of the ‘background circumstances’ and oral and documentary evidence at trial and his findings as to the existence of the Co-Investment Arrangement/Overarching Agreement, which he held was not a binding contract but an “agreement in principle”.

[245] At paragraph [189], the learned judge, in dealing with ‘The Consideration Issue’ and in construing the meaning of the expression “financial advisor” in the Letter Agreements, concluded: -

‘[189]... I am satisfied, therefore, that what was agreed between them [Chih and Jenkin], looking at matters objectively through the lens of a reasonable person, was that the service to be provided by Chih **was to introduce investment opportunities to Jenkin, nothing more, nothing less.**’
(emphasis added)

[246] At paragraph [189] is a definitive finding by the learned judge as to the meaning of “financial advisor” and the service or services which C2 Capital was contractually obligated to perform as its end of the bargain. This is clearly and expressly limited to Chih (presumptively on behalf of C2 Capital) *simpliciter* introducing investment opportunities to Jenkin/Infinity Particles.

[247] However, when the judge came to deal with the issue of ‘past consideration’ he adopted a somewhat different and wider view of the services which Chih/C2 Capital was obligated to provide to Infinity Particles under the meaning of the term “financial advisor” in the Letter Agreements. The kernel of his reasoning on this issue is at paragraph [197], which reads as follows: -

‘[197] The argument relating to consideration being past can only proceed on the premise that once an introduction was made by Chih, his and his company’s [C2 Capital’s] role came to an end, and he did no other work to facilitate the conclusion of the agreement. That is simply incorrect. **In relation to every investment, work on the part of [C2 Capital] continued for a substantial period of time to enable the investment**

made by [Infinity Particles] to come to fruition. This facilitation or monitoring of what was happening with the investment was necessary from Chih's point of view as much to ensure that the investment did not make a loss (for which [C2 Capital] would be responsible for half) as to ensure that the investment turned a profit in which case, he stood to obtain 50% of the net profits from it.' (emphasis added)

[248] The appellant stoutly criticizes the learned judge approach, findings and reasoning at paragraphs [197], particularly in light of his finding at paragraph [189] of the judgment. They do so on three principal bases. First, it argues that what is said by the judge in both paragraphs is obviously contradictory. Second, the judge appears to have impermissibly gone beyond C2 Capital's pleaded case that its role was entirely limited to "the introduction of investment opportunities" and failed to approach and to consider the 'past consideration' argument on this basis only. This second or "pleading issue", I have already dealt with and disposed of at paragraph 244 above. Third, had the judge properly considered these matters he ought to have found that any act of introducing investment opportunities could only have amounted to past consideration, which is no consideration, rendering each of the six Letter Agreements unenforceable as binding contracts.

[249] The respondent did not address the inconsistency relating to the judge's findings at paragraphs [189] and [197] directly. Instead, they sought to brush any apparent inconsistency or contradiction aside as meaningless or of little or no moment but explicable on the basis that the learned judge had to deal with a myriad of issues and points, at paragraph [197] he was doing what was necessary to deal specifically with the issue of 'past consideration', and in any event the judgment must be read as a whole.

[250] I am not persuaded by this argument or purported explanation of what is obviously and patently inconsistent or contradictory findings by the learned judge. These contradictory findings are, in my considered view, wholly inexplicable on the basis that the learned judge held what he said at paragraph [197] as he was there dealing specifically with the issue of past consideration and the oral and documentary

evidence supports the acts of facilitation and of monitoring on the part of Chih/C2 Capital well after the particular investment opportunity had been introduced by Chih to Jenkin.

[251] Likewise, these contradictory findings are equally inexplicable on the basis that at paragraph [189] the judge was dealing with the meaning of the term “financial advisor”, whereas at paragraph [197] he was dealing with the issue of “past consideration”. Such argument is, with respect, illogical, and adopts a ‘shut eye’ approach to what is patently obvious. It is wholly illogical to make one specific finding when dealing with the meaning of the term “financial advisor” and its implications for the question of illegality under BVI law, which term encapsulates the “consideration” to be provided by C2 Capital, and to come to a materially different finding on the same issue of the meaning of “financial advisor” when that finding has important implications for the determination of whether that very ‘consideration’ was past. This ‘consideration’ issue also goes directly to the issues of total failure of consideration.

[252] In my judgment, there is considerable force in the criticisms and submissions of the appellant in relation to the judge’s findings at paragraphs [189] and [197] of the judgment. They call into question the correctness and soundness of the learned judge’s findings and reasoning on the consideration issue, in light of C2 Capital’s pleaded case and paragraph 24 of Chih’s witness statement. Additionally, the findings at paragraph [189], which clearly go beyond the finding in paragraph [197], serve also to buttress, to some extent, the appellant’s contention for and reliance on the ‘plain and ordinary’ meaning of the term “financial advisor” in the Letter Agreements, and calls into question the correctness of the learned judge’s approach to and construing of the said term.

[253] What is clear is that the learned judge, having found at paragraph [189] that C2 Capital was to “introduce investment opportunities not more, no less” and thus was not acting as a “financial advisor” in the sense of acting as a professional financial

advisor providing financial advice, went on to find that C2 Capital/Chih's obligations under the Letter Agreements to discharge its contractual obligation to act as the "financial advisor" to Infinity Particles in relation to each of the specific investments, was not confined to and did not stop at the mere "introducing" of investment opportunities, but also involved and included Chih doing "work", over a considerable period thereafter, to facilitate and to monitor each the investment the subject of a Letter Agreement so as to ensure it makes a profit and not a loss. These two approaches and disparate findings are clearly contradictory and inconsistent and cannot be reconciled on any proper or objective basis, nor can it be reconciled on the basis of C2 Capital's pleaded case and Chih's evidence at paragraph 24 of his witness statement.

[254] The net effect of this is that the various 'consideration' issues, including the issue of whether the consideration under the Letter Agreements was 'past' raised by ground 4, must be approached and considered on the basis that C2 Capital's case was that under the Letter Agreements it was obligated to act as the "financial advisor" to Infinity Particles, which meant that it was required by Chih to introduce investment opportunities to Infinity Particles. Further, Chih's evidence, accepted by the judge, was this process of "introducing" an investment opportunity also involved Chih providing to Jenkin his "opinion as to the viability of any proposed investment".

[255] It follows, therefore, that the "additional" services or "work" identified by the judge from the evidence and found by him to be also part of what C2 Capital and Chih was obligated to do under the Letter Agreements, was not, on C2 Capital's pleaded case, part of the role and function of "financial advisor", and therefore not part of the services which constituted the "consideration" under the Letter Agreements moving from C2 Capital to Infinity Particles. Additionally, and most importantly, to the extent that C2 Capital and/or Chih did this "work" to or with the intent of facilitating or monitoring the investment the subject of any or all of the six Letter Agreements, all such "work" or services were either done gratuitously by Chih or for the benefit of Chih and/or C2 Capital. The said monitoring and facilitating as found by the judge,

were clearly not part of the services or 'consideration' which, if performed or carried out by Chih/C2 Capital, would entitle it, under the Letter Agreements, to the financial benefit ('consideration' moving from Infinity Particles) of sharing equally with Infinity Particles in any profits derived by Infinity Particles from its investment in the introduced investment opportunity under and pursuant to the terms of the Letter Agreements.

[256] This was clearly stated and made pellucid by the judge's finding of why and for what purpose and in whose interest, Chih did this additional "work" post the investment:

"This facilitation and monitoring of what was happening with the investment **was necessary from Chih's point of view** as much to ensure that the investment did not make a loss (**for which the Claimant [C2 Capital] would be responsible for** half) as to ensure that the investment turned a profit in which case, he stood to obtain 50% of the net profits from it."(emphasis added)

[257] All six Letter Agreements pertain to the appellant's investment in a fund. The argument is that both the Kayak Investment and, Cotopaxi Investments were the subject of more than one investment and more than one Letter Agreement. In the case of Kayak three Letter Agreements and two in the case of Cotopaxi, each successive letter agreement dated subsequent to the former. Even if the "consideration" from C2 Capital was the "introducing" of each of these two investment opportunities by Chih to Jenkin, that "introducing" would only be applicable to the first time Infinity Particles invested its money in either of these two Funds. It follows logically that any subsequent investment in either of these two Funds cannot be for the same "consideration" as you can only introduce someone to an investment opportunity once. Accordingly, with respect to each subsequent investment made in either of these two Funds, the consideration was 'past consideration' and therefore no valid consideration in law.

[258] The Letter Agreements at Appeal Record Part 6 contains 57 Letter Agreements and associated documents. These documents disclose that there were three separate Letter Agreements pertaining individually to each of the three investments in Kayak.

However, these documents only disclose one investment in Cotopaxi. If this is correct, then this first issue relates only to the Kayak investment.

[259] The Letter Agreement relating to the first Kayak Investment is dated 3rd March 2016; the second is dated 1st July 2017, and the third dated 8th August 2018. The Overarching Agreement/Co-Investment Arrangement was found by the judge to have been made in 2015. However, it was not intended to be and was not a binding agreement in law, but merely an ‘agreement in principle reached between the Parties that Chih, on behalf of C2 Capital, would provide investment opportunities from time to time to Jenkin and that they would share equally in the net profits realized...’ (para. [106]). From this brief chronology, it can be seen that the first Kayak investment, the subject of the Claim, was made and entered into before even the discussions and negotiations between Chih and Jenkin, as then friends, and the arriving at the “agreement in principle” in 2015 for Chih to introduce investment opportunities to Jenkin.

[260] As observed above, none of these Letter Agreements, including the ‘standard’ letter Agreement, states that C2 Capital is responsible for or obligated to “introduce investment opportunities” to Infinity Particles. What each Letter Agreement does is to “confirm” that C2 Capital will serve as the “financial advisor” to Infinity Particles “related to [the specified investment]”, and that Infinity Particles “will promptly execute all necessary documents and fund the investment amount on a timely basis.” From the explicit wording of the Letter Agreements, they were executed and entered into prior to the actual investment having been made, but after the particular investment opportunity had been introduced to Jenkin by Chih and the opinion of Chih as to its viability provided, and after Jenkin has caused Infinity Particles to “decide” to go forward and make the investments of Infinity Particles’s capital therein. In this way, each Letter Agreement would have been entered into by C2 Capital and Infinity Particles after C2 Capital has made the “introducing” of the investment opportunity, which “introduction” is neither mention or confirmed by the wording of the terms of the Letter Agreements.

[261] This explains why, as observed above, none of the Letter Agreements mention or even allude to an obligation by C2 Capital to introduce investment opportunities to Infinity Particles, nor do they “confirm” that any such “introducing” has taken place prior to the entering into and execution of each Letter Agreement, or that such “introducing” is part of the ‘consideration’ under the Letter Agreement moving from C2 Capital to Infinity Particles. In short, none of the Letter Agreements place an obligation C2 Capital to introduce the investment opportunity to Infinity Particles or even records as a prior fact or occurrence the introducing of the subject investment opportunity, or that such introducing is part of the “consideration” for entering into the Letter Agreement. Furthermore, none of the Letter Agreements make the discharge of any such “introducing” obligation by C2 Capital a precondition for or “consideration” passing from C2 Capital which having been discharged or performed would entitle C2 Capital to an equal share of any net profit or loss made by Infinity Particles on the respective investment. Indeed, the only stipulation as to what constitutes ‘consideration’ under the Letter Agreements moving from C2 Capital to Infinity Particles, is that C2 Capital will serve as “**financial advisor**” to Infinity particles “related” to the particular named investment (“the advisory role”), and that ‘**in consideration of the advisory role**’, C2 Capital ‘**will be responsible for 50% of any losses and will share 50% of any gains beyond 2% IRR resulting from the Investment.**’

[262] Looked at in this way, the “introducing of investment opportunities” by C2 Capital to Infinity Particles, is not a contractual obligation nor does it constitute valuable ‘consideration’ under the Letter Agreements. Accordingly, it is incorrect to say or to find, as the learned judge did, that the “introducing of investment opportunities” by C2 Capital is what constitutes consideration passing from C2 Capital to Infinity Particles under the Letter Agreements. This finding is clearly wrong on the proper reading of the terms of the Letter Agreements which, as the matter unfolded, were held by the learned judge to be the ‘contractual’ basis of the Claim, the judge having determined that reliance by C2 Capital in its pleaded case on the existence of an

Overarching Agreement/Co-Investment Arrangement as the principal contractual basis on which the Claim is rooted, was entirely misplaced and incorrect as the so-called agreement was merely an “agreement in principle”.

[263] The consequence of this Court’s finding as to the issue of consideration has profound consequences for certain key issues, in particular, the meaning of the term “financial advisor”, whether there was a total failure of consideration, and the issue of whether any consideration under the Letter Agreements was past consideration. It means that the judge’s finding that C2 Capital by Chih had an obligation under the Letter Agreements to “introduce investment opportunities” (no more no less) to Infinity Particles by Jenkin is wholly incorrect having regard to the express terms and conditions of the Letter Agreements which say no such thing as each Letter Agreement is looking forward from the time or date when the particular investment was introduced and the decision taken to make the said investment. Put simply, the Letter Agreements, as the only purported ‘contractual’ documents upon which the respondent’s Claim below rests, are forward looking, including Infinity Particles’ obligation to ‘promptly execute all necessary documents and fund the investment amount on a timely basis.’

[264] One explanation for the forward-looking wording and effect of the Letter Agreements is that, as Chih testified, the Letter Agreements were there merely to “record” what had already been agreed. This was clearly a reference back to and reliance by C2 Capital in its pleaded case on the Overarching Agreement/Co-Investment Arrangement having contractual force and effect, which the learned judge rejected and held that it was an “agreement in principle”. As the judge observed correctly, the Letter Agreements do not refer to or mention the existence of an Overarching Agreement/Co-Investment Arrangement. However, the learned judge did find that this was an “agreement in principle” that Chih, on behalf of C2 Capital, ‘would provide investment opportunities from time to time to Jenkin and that they would share equally in the net profit realized ... or loss made by that investment.’ Therefore, the reference to an obligation on the part of C2 Capital/Chih to “provide investment

opportunities” or to “introduce investment opportunities” to Jenkin is part and parcel of the “agreement in principle” and not part of or ‘consideration’ under the Letter agreement moving from C2 Capital to Infinity Particles. It follows, that in resorting to the “alternative claim’ based on the Letter Agreements themselves as binding contracts, the learned judge effectively attempted to fit a square peg into a round hole.

[265] In doing so, the learned judge, with respect, erred fundamentally, in finding that the ‘consideration’ under the Letter Agreements moving from C2 Capital to Infinity Particles was the introducing of investment opportunities, nothing more nothing less, when, in fact, no such obligation or ‘consideration’ was set out or specified under or within the ‘four corners’ of any of the Letter Agreements the subject matter of the Claim. In doing so, the learned judge misconstrued the terms and provisions of the Letter Agreements and failed to appreciate that any such ‘undertaking’ to introduce investment opportunities to Jenkin existed or could only have existed under the alleged Overarching Agreement/Co-Investment Arrangement, which ‘agreement’ the learned judge held, correctly, was an “agreement in principle” and not a binding contract, and that Chih could never have thought it to be binding as such.

[266] In attempting to ‘find’ such an obligation to “introduce investment opportunities” as ‘consideration’ under the Letter Agreements, the learned judge erred in his reasoning and erroneously held that this was the meaning to be attributed to the term “financial advisor” in the Letter Agreements based on the background facts and his finding as to what the parties must have understood and intended when entering into the Letter Agreements. This finding is fundamentally flawed on several bases. First, the ‘plain and ordinary’ meaning of the said expression was pellucid on any objective and reasonable approach to construing the said term. Second, and most importantly, such a finding is wholly inconsistent and not borne out by the actual provisions and terms of the Letter Agreements themselves, as analysed above, third, and in any event, the Letter Agreements were, by their language, “forward-looking” from a point **after** any “introduction” of the specific investment opportunity

would have, on any scenario, have occurred and, also, **after** the decision would have been made by Jenkin, allegedly on behalf of Infinity Particles, to commit the said company to making the investment by an injection of capital therein.

[267] That the “introducing of the investment opportunity” is not consideration under the Letter Agreements is further underscored by the fact that with respect to the investments in Kayak and Cotopaxi, there was more than one investment made at different times and subject to different Letter Agreements, as submitted by the appellant, none of which refer to or specify any initial “introducing” on the investment opportunity as consideration provided by Chih and/or C2 Capital. In the case of Kayak, there were three such ‘investments’ made by Infinity Particles, and in the case of Cotopaxi two. The appellant’s point is that each of these two investments could only have been “introduced” once. In my considered view, this submission has merit. However, each applicable Letter Agreement to the Kayak and Cotopaxi investments, suffer from the same factor that the “introducing” of the investment, be it initially or subsequently, is not ‘consideration’ under the Letter Agreement applicable to that investment or any of them. Secondly, this point made by the appellant raised the fundamental issue of any consideration being ‘past’ consideration, which issue will be considered in more detail below.

[268] Further, that the Letter Agreements the subject of the Claim are “forward-looking” is further illustrated by the use of the expression “had served” with respect to the investments in CRCM, Warby Parker, Loyal Valley and Appier in relation to the clear obligation (consideration) to act as “financial advisor” to Infinity Particles.

[269] This is to be contrasted with the Letter Agreements applicable to the other two investments, that is, Kayak and Cotopaxi, where, instead, the expression “will serve” is used in relation to the obligation to act as “financial advisor” to Infinity Particles. In relation to these two investments (Kayak and Cotopaxi) and the applicable Letter Agreements, apart from the issue of multiple Letter Agreements at different times and dates dealt with above, the appellant submits that these applicable Letter

Agreements (all 5 of them) are clearly forward-looking in the stated 'consideration' or obligation undertaken by C2 Capital to act as "financial advisor" to Infinity Particles, which obligation is to be discharged in the future at a date after the alleged agreements were concluded. If this is correct, as it seems to be the correct meaning from the relevant Letter Agreements, the fact that the services as "financial advisor" are to be performed in the future in relation to each such investment, after the Letter Agreements were entered into by the Parties, would be, in my judgment, good consideration as the role to be performed after the investments have actually been made. This would also lend support to the 'plain and ordinary' meaning of the term "financial advisor" and what services that would entail or would be required of C2 Capital to perform with regard to the actual investment in these funds.

Past Consideration

[270] This brings me to the issue of past consideration and the findings of the learned judge at paragraph [197] of the judgment. An obligation to act as "financial advisor" going forward or in the future in relation to these two investments (Kayak and Cotopaxi), clearly does not run fowl of the principle that the past consideration is not good consideration. The extract cited by the appellant from **Chitty on Contracts** 35th ed at 6-029 states: -

"Past consideration is no consideration

The consideration for a promise must be given in return for the promise. If the act or forbearance alleged to constitute the consideration has **already been done before, and independently of, the giving of the promise**, it is said to amount to "past consideration", and such past acts or forbearance do not in law amount to consideration for the promise..." (emphasis added)

[271] The learned judge also cited and relied on the principles at **Chitty on Contracts** 35th ed Vol.1, 6-030 as demonstrative of the "fallacy" if the appellant's argument on past consideration and of the cautionary principles that a court ought not to adopt when considering such an issue a 'strict chronological test'. At 6-030 the learned authors states: -

"In determining whether consideration is past, the courts are not, it is submitted, bound to apply a strict chronological test. If the **giving of the consideration and the making of the promise are substantially one**

transaction, the exact order in which these events occur is not decisive. Where, for example, a contract of affreightment (COA) had been made between A and B on 13 August 2008, and a guarantee was given by C to A of B's performance on 28 August in pursuance of B's obligation under the COA to procure such a guarantee (though not from C but D), it was held that the consideration for the guarantee was not past as the guarantee formed "part and parcel of the single transaction [**Classic Maritime Inc v Lion Diversified Holdings Behad** [2009] EWHC 1142 (Comm), [2010] 1 Lloyd's rep 59]."

[272] I accept as correct the cautionary statement of principle in the above extract from **Chitty on Contracts**. However, there are two problems with its application to the instant matter. The first is that here, the judge having found erroneously that the giving of the consideration and hence the making of the promise by C2 Capital under the Letter agreements was to introduce investment opportunities to Jenkin for Infinity Particles to invest when no such 'consideration' is stated in the Letter Agreements themselves, it follows that any such 'promise' would have been made outside the terms of and prior to entering into the Letter Agreements. It follows, therefore, that the making of the promise and the true 'consideration' under the Letter Agreements to act as "financial advisor" to Infinity Particles in relation to the specified investment are not one and the same and were not "substantially part of one transaction", the making of the promise having been done as part of the Overarching Agreement/Co-Investment Arrangement, which 'agreement' is not a binding contract between C2 Capital and Infinity Particles. Secondly, the "example" given in the passage above as illustrative of the cautionary principle that a court is not bound when considering an issue of 'past consideration' to apply a "strictly chronological test", does not assist in any proper consideration of the issue of 'past consideration' in this case. Third, from this extract, the cautionary principles do not rule out, in an appropriate case, 'past consideration' by applying a strictly chronological approach to the accepted facts.

[273] Applying these principles to the instant case, in relation to four of the Letter Agreements, that is those applicable to the investments in CRCM, Warby Parker, Loyal Valley and Appier, where the expression "has served" is used in relation to

“financial advisor”, the stated consideration being having acted in this “advisory role” , is clearly past consideration which is not good consideration. On this basis the Letter Agreements applicable to these four investments fail as binding contracts enforceable as such. Accordingly, the sums claimed in the proceedings below based on these four investments having made a net profit for Infinity Particles must fail. This is so irrespective of the findings at paragraph [197] of the judgment which speak to certain “work” being done by Chih and C2 Capital after the investment had been made by Infinity Particles.

[274] In relation to the two remaining investments, Kayak and Cotopaxi, and the applicable Letter Agreements (3 in the case of Kayak and 2 in the case of Cotopaxi), each of which uses the expression “will serve” pointing to the future discharge by C2 Capital of the obligation to act as “financial advisor” to Infinity Particles in relation to those investments, the ‘consideration’, as stated above, is not past consideration. They also do not suffer from the issue of multiple Letter Agreements at different dates in relation to the same investment. This leads to a consideration of the issue of whether C2 Capital did discharge its role to act as “financial advisor” to Infinity Particles in futuro in relation to these two investments and the issues raised in relation to the judge’s findings at paragraph [197] of the judgment.

[275] Paragraph [197] of the judgment is set out in full at paragraph [247] above. The difficulties with the judge’s findings in that paragraph of the judgment have been addressed above. Based on the findings and conclusions reached at paragraphs [251] and [252] with regard to the judge’s findings at paragraph [197] of the judgment, any argument based upon Chih “facilitating and monitoring” the investment post the injection of capital by Infinity Particles must fail. This so-called additional “work” was clearly gratuitous and done by Chih solely in protection of the interest of Chih and C2 Capital, as the learned judge found, and not part of the ‘consideration’ or contractual obligation of C2 Capital under and pursuant to the terms of the Letter Agreements, including its role as “financial advisor” to Infinity Particles thereunder. It was also not part of C2 Capital’s pleaded case in the

alternative based on the Letter Agreements, which as the judge found at paragraph [189] was to ‘introduce investment opportunities, nothing more, nothing less’ or as Chih evidence at paragraph 24 of his witness statement clearly described. For these reasons any claim based on these two investments, Kayak and Cotopaxi, must fail on the basis of a total failure of consideration.

[276] For the above reasons ground 4 succeeds.

Ground 5 – Illegality under BVI Law

If, contrary to Infinity Particles’ primary case, the judge was otherwise correct in finding that the Letter Agreements constituted binding contracts between C2 Capital and Infinity Particles, then the judge would have erred in law by finding that the Letter Agreements were not illegal and could be enforced under the laws of the BVI.

Points:

- (1) Even if (contrary to Infinity Particles’ primary case) the Judge was correct to find that Chih had been introducing investments on behalf of C2 Capital, to Infinity Particles, he ought to have gone on and found that the provision of such services was illegal under the laws of the BVI. In failing to do so, the judge erred in law for the following reasons.
- (2) First, the judge erred by finding that the SIBA 2010 should be read to impose a requirement that the Parties “carry out a common business together” (at [273]). The judge’s interpretation of the expression “by way of business” in the SIBA 2010 is wrong and not supported by principle or authority (at [274]). The Judge therefore erred by holding that C2 Capital would not have been conducting its activities “by way of business” (at [275]). It was not open for the Judge to make such a finding in view of Chih’s evidence that there would have been over

100 Letter Agreements (at [49]), and that his role was to “professionalize the investment process” (at [51]).

- (3) Second, the judge erred in finding that Chih would not have been “arranging deals in investments” within the meaning of the SIBA 2010 (at [276]). Chih’s evidence is that he had introduced the investment contacts, arranged for meetings with them, obtained copies of the relevant financing agreements, and arranged for the necessary paperwork. These are all matters which plainly would qualify as “arranging deals in investments”. If (and contrary to Infinity {articles’ primary case) the Judge was correct in finding that Chih was acting on behalf of C2 Capital, he should have concluded that C2 Capital would have been arranging deals in investments.
- (4) Third, the judge erred in finding that the “partnership” exclusion in paragraph 5 Part C to Schedule 2 of the SIBA 2010 would apply (at [304]). That provision was never pleaded or relied upon by C2 Capital. No submissions were made by the Parties on this point. The finding by the Judge, that the (parties would have been in a partnership relationship. Within the meaning of Section 3 of the BVI Partnership Act is plainly wrong (at [307]). It overlooks Section 4(c) Of the BVI Partnership Act which expressly provides that the sharing of gross returns “does not itself create a partnership”.
- (5) Finally, the judge was wrong to rely on section 50G of the SIBA 2010 (at [334]), and the Judge’s conclusion that C2 Capital should be entitled to enforce the Letter Agreements in any event was a flawed exercise of discretion carried out on an erroneous basis (at [335]). In particular:
 - (a) The judge erred in finding that Chih had a reasonable belief that no license would be required (at [326]). The unchallenged evidence from Chih is

that he was fully aware that a license would be required to act as a financial advisor.

- (b) The Judge erred in finding that there would have been no “unfair advantage” in the negotiations that led to the Letter Agreements (at [333(b)]). Chih’s evidence is that the Letter Agreements were entirely drafted by him and using language that he had chosen. There is no evidence about any negotiations between Chih and Jenkin, or about what Jenkin understood the terms of the Letter Agreements to mean. It is also not disputed that Jenkin never took legal advice on the Letter Agreements.
- (c) The judge erred in finding that it would have been “wholly unfair” to refuse the Letter Agreements to be enforced “given the huge overall profit” (at [333(c)]). The Letter Agreements allegedly provide for an equal share of profits and losses. The fact that there would have been a profit is entirely fortuitous.
- (d) The judge erred in finding that Infinity Particles was “unlikely to have invested in other investments” (at [333(d)]). The Court had accepted that Jenkin had also made “hugely prosperous” investments on his own (at [16]), and the finding that Jenkin would not have caused Infinity Particles to otherwise make investments is unwarranted.
- (e) The judge should have found that there were no grounds to exercise his discretion under s. 50G of

the SIBA 2010 in favour of permitting C2 Capital to enforce the Letter Agreements.

[277] Again, this is another unnecessarily lengthy ground of appeal. The points and issues raised in the above paragraphs are really points/issues subsumed under the main ground and more fittingly addressed in the supporting written submissions of the appellant. The issue arose from Infinity Particles' pleading, in the alternative, at paragraph 5.2 of its Amended Defence, the illegality of the Co-Investment Arrangement and the Letter Agreements under BVI law pursuant to the provisions of the SIBA 2010 and their unenforceability by virtue of the provisions of the Financial Services Commission Act 2001. C2 Capital responded to the illegality and unenforceability defence paragraph 6C of its Amended reply to Defence filed 14th August 2024 and relied on the "Excluded Activities" at Schedule 2 Part B to the SIBA 2010 and on section 50F and 50G of the Financial Services Commission Act 2001.

[278] The learned judge considered the illegality issue under BVI law at paragraphs [256] to [336] of the judgment. He accepted, correctly, at paragraph [251] that deciding whether an agreement is affected by illegality involving domestic law and foreign law involves a two-stage process. The first stage is for the court to determine whether the agreement is illegal under domestic law, in this instance, BVI law, and if it is, the consequences of the finding of illegality under that law including whether the particular matter (or aspect of it) satisfies the requirements of any statutory exclusionary provision or permissible discretionary power granted to the courts under domestic law. If the conclusion reached is that the court cannot or should not permit enforcement of the particular agreement tainted with illegality or any specific part or parts of it under domestic law, that would be the end of the matter and any claim founded on such agreement (or part thereof) must be dismissed. On the other hand, if the conclusion reached is that the agreement is not illegal and is otherwise not unenforceable under domestic law, the court will only then go on to consider the issue of its illegality under the foreign law, which is the second stage. The learned judge also made the pertinent observation that no issue as to the illegality of certain

parts or provisions of the 'agreement' (as opposed to the entirety of the agreement) arises for consideration in the instant matter. It is the enforceability of the entire agreement or not at all (para. [253]).

[279] In dealing with the "First Stage" (illegality and enforceability under BVI law), the learned judge noted that the appellant's case is that the Letter Agreements, if held to be "binding" agreements, are illegal since they expressly provide for C2 Capital to serve as the "financial advisor" to Infinity Particles in relation to the particular investment the subject of each Letter Agreement. Further, in discharging the contractual obligations of "financial advisor". C2 Capital would be carrying on "investment business" without proper authorization in breach of the prohibition in section 4 of the SIBA 2010. The line of argument, and the appellant's case in the appeal immediately calls into question the correctness of the learned judge's conclusion as to the meaning of the term "financial advisor" in the Letter Agreements, his understanding and appreciation of the kind of services which C2 Capital had agreed to carry out for Infinity Particles thereunder, and what is the 'plain and ordinary' meaning of the term in the context of the Letter Agreements themselves. These issues are all canvassed under ground 2 of the appeal and this Court's decision on the correctness or lack thereof of the learned judge's decision thereon and his finding that "financial advisor" in this context meant the introduction of investment opportunities, nothing more, nothing less was set aside. Therefore, this Court's consideration of the ground 5 of the appeal and the issue of whether the Letter Agreements and the activities which C2 Capital had undertaken in that role and capacity and which services on their own evidence they did carry out were illegal under BVI law, starts from the position that by undertaking to act as "financial advisor" C2 Capital was to perform services and activities in relation to each of the Disputed Investments which amounted to the carrying on of "investment business".

[280] In dealing with the issue of illegality of the Letter Agreements under BVI law, the learned judge first considered the provisions of section 4 of SIBA 2010 prohibition the carrying on "investment business" of any kind within in or from the BVI without

first obtaining the appropriate license from the appropriate authority (in BVI, the Financial Services Commission) authorizing that person to carry on that kind of business. Section 4 of the SIBA Act 2010 states:

- (1) Subject to subsections (2) and (3), no person shall carry on or hold himself or herself out as carrying on **investment business of any kind** in or from within the Virgin Islands unless he or she holds a licence authorizing him or her to carry on that kind of investment business.
- (2) For the purposes of, but without limiting, subsection (1) –
 - (a) A person carries on investment business in the Virgin Islands if –
 - (i) [intentionally left blank]; and
 - (b) a BVI business company that carries on, or hold itself out as carrying on, investment business outside the Virgin Islands is deemed to carry on, or hold itself out as carrying on, investment business from within the Virgin Islands.
- (3) Subsection (1) does not apply to any person excluded under Schedule 2, Part C in such circumstances and to such extent as may be specified.

[281] The judge next considered the provisions of section 3 of the SIBA 2010. This section defines what is meant by carrying on “investment business” as, being where ‘by way of business’ a person engages in an activity that:

- (a) is of a kind specified in Schedule 2, Part A [of the Act]; and
- (b) is not excluded by Schedule 2, Part B.

[282] Section 3 (like section 4) is an important provision. It defines what is meant by carrying on “investment business” under the Act as the kind of activities specified in Schedule 2 Part A. It also provides that such specified activities or any of them, must be carried out “by way of business”. If not carried out “by way of business”, within the accepted meaning of that expression which is not defined in the Act, then the activity is not to be construed as carrying on “investment business” without a license prohibited by section 4 of the Act. Section 3, also importantly, incorporates by reference the categories of “exclusions” in Schedule 2 Part B (“the exclusion provisions”) whereby activities constituting investment business which are carried on “by way of business” are nevertheless excluded from the operation of the prohibition in section 4. Where the activity properly construed falls within one or more of the exclusion provisions, such activity is not caught by the prohibition under section 4 and therefore not rendered potentially illegal.

[283] The learned judge held at paragraph [264] (and this is uncontroversial), that C2 Capital as a BVI incorporated and registered company is governed by the provisions of sections 2, 3 and 4 and paragraph 2 of Part A of Schedule 2 of the Act. He also noted that C2 Capital accepts that ‘if it is subject to the licensing requirements of the SIBA 2010, it did not obtain, and did not at any material time have, a licence to carry out that business.’

[284] The judge next considered the issue whether C2 Capital, based on its pleaded and evidential case, was or would have been operating an “investment business” within the meaning of that expression in section 3 of the SIBA 2010. In particular, he considered the reliance by Infinity Particles on the evidence at paragraphs 34,44 and 69 of Chih’s witness statement, as demonstrating that the acts which Chih described that C2 Capital had carried out in relation to each of the Disputed Investments, amount to C2 Capital “arranging deals in investments”, and “dealing in, or managing, investments”, which would be caught by the provisions of paragraph 2 of Part A of Schedule 2 to the SIBA 2010. The key points which he

extracted (at para. [265]) from the said paragraphs of Chih's witness statement are that Chih had:

- (a) shared investment opportunities with Jenkin, and organized deals with Chih's investment contacts;
- (b) arranged the execution of legal investments documents and the wiring of funds for [Infinity Particles] to enter into the transactions; and
- (c) gave instructions regarding the sale of shares for an investment.

[285] The findings ultimately made by the learned judge on the issue of the Letter Agreements being illegal under BVI law are, in summary form:

- (1) C2 Capital was not conducting its activities 'by way of business';
- (2) Chih/C2 Capital was not by such activities "arranging deals in investments" within the meaning of that expression in Schedule 2 Part A of the SIBA 2010;
- (3) The Letter Agreements were in law a partnership under the BVI Partnership Act;
- (4) Accordingly, in any event, the 'partnership' exclusion at paragraph 5 of Part C of Schedule 2 of the SIBA 2010 would apply;
- (5) The activities of C2 Capital under the Letter Agreements were not illegal under BVI law, specifically the prohibition in section 4 of the SIBA 2010;
- (6) If these activities were illegal the provision of section 50F of the Financial Service Regulatory Act would apply and the Letter Agreements would presumptively be unenforceable; and

- (7) If section 50F applied, it was correct and proper, taking into account certain factors, to exercise the court's discretion granted by section 50G to permit C2 Capital to enforce the Letter Agreements.

I shall deal with these findings seriatim and the points raised against them by the appellant, Infinity Particles.

Meaning of 'By Way of Business'

[286] As to the meaning of the expression 'by way of business' in section 3 of the SIBA 2010, the appellant submits the learned judge erred in his interpretation and application of the said expression when he found that the term imposed a requirement that the parties "carry out a common business together".

[287] In response, the respondent submits that the learned judge, having considered the dicta of Lewison J (as he then was) in **Financial Services Authority v Anderson and others**³⁰ at paras. [49]-[51], was correct to observe, at paragraph [269] of the judgment, that the meaning of the expression "by way of business" will vary depending on the context in which they are used and the facts and circumstances of an individual case in which that context arises'. It is also submitted by the respondent that whether a person is carrying on investment business "by way of business" is a question of mixed fact and law. With this point I am entirely in agreement.

[288] It was further submitted that the learned judge, at paragraph [273] of the judgment, properly and correctly considered the question in the context in which it arises in the instant matter and the circumstances of the present case, in coming to his conclusion. This included, importantly, the relationship between C2 Capital and Infinity Particles, when determining whether what C2 Capital had agreed to do or the activities which it was carrying out were done "by way of business".

³⁰ [2010] EWHC 599.

[289] It is submitted by the respondent that the learned judge having considered the context, the relationship between the Parties, the underlying circumstances of this case, and the position of Infinity Particles as well, adopted the correct approach to this issue when giving meaning to the words “by way of business”. Accordingly, the respondent submits that the learned judge’s reasoning at paragraph [273] is “flawless” and ought not to be disturbed by this Court; and it is unfair and incorrect to say, as the appellant contends, that the judge in his reasoning imposed a “requirement” that there should be a “common business” being carried out together.

[290] I observe, at this juncture, that this is precisely what the learned judge appears to have stipulated as a “**requirement**” in the last sentence of paragraph [273]: ‘**What appears to be required here is for the Parties to carry out a common business together.**’ (emphasis added)

Analysis and Conclusion on Meaning of ‘By Way of Business’

[291] In my considered view, the learned judge correctly interpreted section 3 of the SIBA 2010 in holding that the carrying on of investment business must be “by way of business”. While rejecting the argument that the activities which C2 Capital had undertaken to carry-out for Infinity Particles under the Letter Agreements in relation each investment was ‘by way of business’ within the meaning of that expression under section 3 of the SIBA 2010, the learned judge nevertheless went on to state that he ‘accept the force of the counterargument that the Parties were carrying on their activities by way of business.’

[292] However, on C2 Capital’s case and on the wording of the Letter Agreements themselves, the investments the subject of the Letter Agreements, were not C2 Capital’s investments, but those of Infinity Particles (qua “potential” and later the actual investor). The Letter Agreements, which are supposed to be the ‘contractual’ documents upon which the Claim is made, do not describe C2 Capital as a co-investor which Infinity Particles. Instead, C2 Capital is described in all the Letter

Agreements as the “financial advisor to Infinity Particles” with respect to the particular investment. Furthermore, under the Letter Agreements it is Infinity Particles which is bound and obligated, as the learned judge pointed out, to make and to conclude the “investment” the subject of each Letter Agreement by “executing all necessary documents’ and by “funding the investment amount on a timely basis.”

[293] Thus, the services being offered or performed by C2 Capital were not to itself as an investor or co-investor, but to Infinity Particles as the “client”, as the judge poignantly described or categorized Infinity Particles at paragraph [268]. In short, nowhere in the Letter Agreements is C2 Capital described as an investor, co-investor or anything other than “financial advisor” to Infinity Particles. In return for performing the role of “financial advisor” carrying out the activities attendant to that role as set out in the evidence of Chih in particular, C2 Capital’s would receive compensation under the terms of the Letter Agreements (assuming they were binding and enforceable agreements, which they were not), of a 50% of the net profits of the investment, if it made a profit. However, if a particular investment did not return a profit, then C2 Capital’s share of the profits from all other investments would be adjusted to take account of its agreement to share equally in any losses. This is made clear by the learned judge at paragraph [10] of the judgment: -

‘[10] ...The Claimant accepts that although most of the investments made significant, or even substantial, profit, some made losses. It accepts, therefore, that the Defendant is entitled to credit for those investments that made losses, i.e., that those losses should be taken into account in calculating the final amount that is due to the Claimant...’

[294] The learned judge (at para. [267]) considered that it was not obvious to him that, if C2 Capital was carrying on “investment activities”, it was doing so “by way of business”, still less that those activities constituted the carrying on of a “business investment”. (para.[267]) While appreciating that the expression “business” carried a wide meaning (albeit not defined in the SIBA 2010) and may also include an ‘isolated transaction’ (as made clear in certain UK decided cases involving a consideration of UK fiscal legislation), he nevertheless was of the opinion (at [268])–

“However, in the context of the present situation the **only** activities that [C2 Capital] carried out **were to introduce investment opportunities** to a single client (i.e., the Defendant [Infinity Particles]) with whom it had a **contractual relationship**, rather than to a third party. This type of activity does not appeal to me to be “by way of business” involving [C2 Capital] and [Infinity Particles] in the **conventional manner** in which that expression is understood.”

[295] With respect, this statement or opinion of the learned judge at paragraph [268], several issues arise. First, in the instant matter, the court was concerned with a “relationship” said to involve, over the Investment Period, a very large number of Letter Agreements relating to many “introduced” investments by Chih to Jenkin. On the evidence of Chih, as observed by the learned judge, the number of these “introduced” investments and corresponding Letter Agreement could be as much as 100, but certainly at least 50, albeit the Claim brought by C2 Capital in the instant matter concerned only six Disputed Investments and nine Letter Agreements. If correct (and there are not reasons to doubt that it is) these Letter Agreements would be indicative of the large volume of instances in which C2 Capital is said to have acted as and performed the services of “financial advisor” to Infinity Particles over the so-called Investment Period. Furthermore, to put matters in their proper context, the Amount Claimed by C2 Capital in these proceedings in relation to just six of the Disputed Investments, amounted to over US\$9.1 million, a very substantial sum.

[296] Second, the learned judge, at paragraph [268], referred to Infinity Particles as a single “client”. Indeed, Infinity Particles was just that, a “client” of C2 Capital under the Letter Agreements, and a “potential investor” with respect to each Letter Agreement (of which there were 50 to 100) within the meaning of that term or expression in paragraph 4 of Part A of Schedule 2 to the SIBA 2010. The characterization or description of Infinity Particles as a “client” of C2 Capital belies to error in the learned judge’s subsequent analysis and ruling on the issue of whether C2 Capital was carrying on “investment business” and whether it was doing so “by way of business”. It carried with and connoted certain obvious and specific factual and legal implications. Put briefly, Infinity Particles could not be said to be a “client” of C2 Capital in relation to each of the “introduced” investment opportunities,

and at the same time it is said that both Parties were in a “joint enterprise” or “partnership” or in a “common business together” to make investments for their mutual gains.

[297] Fourth, if the judge’s description of Infinity Particles as a “client” of C2 Capital (the “financial advisor” under the Letter Agreements) is correct (and there has been no appeal or cross appeal challenging this), it was not open to the learned judge to state (at para. [273]) that he cannot accept that ‘as between themselves, they were conducting a business in the sense in which that expression is understood to mean. What appears to be required here is for the Parties to carry on a common business together.’

[298] Fifth, on Chih’s own evidence, he not only was referring investment opportunities (again 50-100 of them) to Jenkin but also provided to Jenkin his “opinion on the viability” of each such investment. This is nothing short of rendering investment advice and doing in consideration of the payment of 50% of any net profits derived therefrom. Furthermore, the learned judge held that Chih was also facilitating and monitoring each investment for a substantial period after the funds had been injected by Infinity Particles. All these activities lend credence to the conclusion that the activities of C2 Capital were “by way of business” within the meaning of that expression in section 3 of the SIBA 2010, and is the kind of investment activities specified in Part A of Schedule 2 to the SIBA 2010.

[299] Sixth, the fact that Chih and C2 Capital were dealing here with only one “client”, as the learned judge observed, is, with respect, not material or of little importance to a determination of whether C2 Capital was, by doing all that Chih said it did in the role of “financial advisor”, was not carrying on investment business and doing so “by way of business”. These activities including “introducing” a very large number of investments to Jenkin for Infinity Particles to invest in, providing Chih’s opinion as to the viability of each such introduced investment, introducing Jenkin to the contact person or persons with the proposed investment fund, seeing to the conclusion and

execution of all paper work and documents necessary for Infinity Particles to make the investment including the transfer of the funds to be injected therein and the monitoring of the investment once it had been made by Infinity Particles. All these activities performed by C2 Capital point, on the pleaded and evidential case of C2 Capital, to the inescapable conclusion that it was conducting what essentially and fundamentally an investment business or investment activities “by way of business.” This position is not altered by the fact that in all these instances, Chih and C2 Capital were dealing with one “client” namely Infinity Particles via Jenkin. In today’s world of business, it is not unusual to find situations where people or entities are focused on one single, large or very substantially wealthy client.

[300] Seventh, the fact that Chih and C2 Capital were not generally offering investment services to the general public again does not, in my view, detract from the gravamen and import of what they were in fact doing, which was carrying on investment business “by way of business”, and doing so without a licence in breach of section 4 of the SIBA 2010.

[301] Eighth, C2 Capital’s pleaded case and what was described by Chih at paragraphs 24, 34,44 and 69 of his witness statement as the various activities and services allegedly performed for Infinity Particles, were not being offered or done gratuitously, but obviously for financial reward, based on the success or failure of the various investments, which reward, having regard to the amount claimed on the basis of only six such investments, was potentially very substantial.

[302] Ninth, it is of little significance, in my view that the “business” investment activities were not being carried out into in what the judge described as the ‘conventional’ way. This characterization is essentially a matter of opinion as what was considered “unconventional” a few years ago in the business world, may be considered quite “conventional” or another accepted way of doing business today. In any event, in my view, this point raised by the learned judge does not detract from the essence

of what was being done, the provision of investment services and advice by way of business.

[303] Tenth, in my respectful view, the learned judge failed to properly analyse what C2 Capital's case was on this issue and the pertinent facts and circumstances pointing to this being the carrying on of investment business "by way of business". He also failed to appreciate that the wording of the various provisions of the SIBC Act did not support his interpretation of what is meant by the expression "by way of business" in the particular facts and circumstances of this case.

[304] The learned judge also considered at paragraph [269] of the judgment the decision and useful dicta of Lewison J (as he then was) in **Financial Services Authority v Anderson** and others. In **Anderson** the judge had to consider the provisions of section 22 of the **Financial Services and Market Act** and articles 5 and 6 of the **Financial Services and Markets Act**. The issue was whether the defendants, who had taken money from individuals with an obligation to repay that money with interest on a particular date, had done so "by way of a business" in breach of the said statutory provisions. The learned judge found as a fact that they had. At paragraph [50] of his decision, Lewison J opined:

"[50] The word "business" is an etymological chameleon: **it suits its meaning to the context in which it is found**: see *Town Investments Ltd v Department of Environment* [1978] AC 359, 383. At its **broadest**, it may mean anything that is not done for pleasure (*Rolls v Miller* (1884) 27 Ch D 71, 53 LJ Ch 682, 32 WR 806.....), In some contexts, the performance of regulatory activities may not count as business activities (*Institute of Chartered Accountants v Customs & Excise Commissioners* [1999] 2 All ER 449, [1999] STC 398, [1999] 1 WLR 701) but in other contexts it will. I do not think that I can or should try to define what the expression means in the context of s. 22."

[305] The learned judge opined at paragraph [275] of the judgment, that the facts in the instant matter can be distinguished from those in the **Anderson** case. In my judgment, the learning at paragraph [50] of the judgment of Lewison J above is useful and supports the conclusions which I have reached on this issue in the immediately preceding paragraphs of this judgment. While the learned judge at

paragraph [271] correctly observed that the meaning of the words 'by way of business' in section 3 of the SIBA 2010 'will vary depending on the context in which they are used and the facts and circumstances on an individual case in which that context arises', he erred in his assessment of the evidence and context of the instant matter when concluding on this issue at paragraphs [272] and [273]: -

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

[273] The Claimant [C2 Capital] and the Defendant [Infinity Particles] undoubtedly had a **business relationship** and so far as each company's relationship with third parties was concerned, their activities were carried out by way of business with those parties. But **I do not accept that, as between themselves**, they were conducting a business in the sense in which that expression is understood to mean. **What appears to be required here is for the Parties to carry out a common business together.**" (emphasis added)

[306] With respect, the fallacy in this line of reasoning, in my opinion, is that the learned judge is equating the meaning of the expression 'by way of business' in section 3 of the SIBA Act 2010, with the offering or provision of investment services to third parties, and doing so by carrying out a common business together. Second, the learned judge was incorrect in seemingly concluding that while each company were conducting their own business with third parties, in so far as the introduction of investments to Infinity Particles/Jenkin was concerned, C2 Capital was not conducting "by way of business" investment business with Infinity Particles as the "client", as the learned judge so categorized Infinity at paragraph [268]. In short, A cannot be the "client" of B in relation to activities accepted as carrying on a business, but at the same time and in relation to the same business activities be not the "client", but a person conducting said business in partnership or by way of joint enterprise, with A.

[307] Thirdly, and moreover, one must not lose sight of fact that this issue concerns the enforcement of a statutory regulatory scheme and provisions which govern BVI business companies and the activities which companies registered in BVI are prohibited from conducting or engaging in, either within and outside BVI, without a

license approved by the competent regulatory authority in BVI. This point was posited and considered, briefly, by the learned judge at paragraph [274] of the judgment. However, in interpreting the expression “by way of business” in section 3 of the Act, a court must, in addition to considering the context and surrounding circumstances of the particular matter, also consider the meaning of the expression being construed in the context of the Act itself and the scheme and provisions of the SIBA 2010 (an important regulatory piece of legislation). In this regard the wording of section 4 which prohibits anyone from carrying on or holding themselves out to be carrying on “investment business” of any kind in or from the BVI is very wide. Furthermore, by subsection 2(b), a BVI business company, such as C2 Capital, carrying on investment business outside the BVI, is deemed to be carrying on such investment business from within the BVI.

[308] Looked at in its proper context, this was not a “partnership” in the true sense of a “common investment”. It was clearly a business relationship whereby C2 Capital acted as the “financial advisor” to Infinity Particles in relation to each of the investments which, presumably, were introduced by C2 Capital/Chih to Jenkin, Chih provided his “opinion as to the viability” of the proposed investment, and the “client” Infinity Particles (by Jenkin) made its decision at the “potential investor” whether to invest or not. It was Infinity Particles’ funds which were at risk once they made the decision to go forward and make the investment. Further, the provision whereby C2 Capital would assume or share 50% of any loss, was not one where C2 Capital’s money was actually at risk when the investment was made. It is only Infinity Particles’ funds that were at such risk. C2 Capital share of any “loss” on the investment, was merely an accounting exercise, whereby its equal sharing of profits would, from time to time, be adjusted downwards to take proper account of the obligation to share equally in the losses made on any such investments.

[309] For all these reasons the reasoning of the learned judge at paragraph [268] is fundamentally flawed. His conclusion at paragraphs [268] and [273] as to the meaning of the expression “by way of business” and his finding that the activities

which C2 Capital were conducting were not being done “as a business” or “by way of business”, were also flawed and incorrect.

Meaning of ‘Arranging Deals in Investments’

[310] The learned judge also considered the provisions of paragraph 2 of Part A of Schedule 2 of the SIBA 2010 dealing with the types of “activities” which will be considered “investment business”. The first issue considered is whether the activities to be carried on or carried on by C2 Capital under the Letter Agreements constitutes “arranging deals on investments”. This provisions states: -

“Arranging Deals in Investments

Making arrangements with a view to:

- (a) Another person (whether as a principal or an agent) **buying**, selling, subscribing for or underwriting a particular investment, being arrangements which bring about, or would bring about, **the transaction in question**; or
- (b) A person who **participates** in the arrangements **buying**, selling, subscribing for or underwriting investments.” (emphasis added)

[311] The learned judge also harboured some uncertainty that C2 Capital’s role in “the introduction of the Disputed Investments” to Infinity Particles amounted to the “making of arrangements” for the investment into various enterprises by C2 Capital, within the meaning of that expression in paragraph 2 of Part A of Schedule 2 to the SIBA 2010 (para. [276]). This is because, as the learned judge found, C2 Capital’s role “involves little more than introducing investments” to Infinity Particles and making the initial introduction between Infinity Particles and the proposed investment entity. At paragraph [276] in relation to the question of whether C2 Capital’s activities under the Letter Agreements could be said to be “arranging deals in investments” as defined in paragraph 2 of Part A of Schedule 2, the learned judge states:

‘In any event, **it is not obvious to me** that [C2 Capital’s] role in the introduction of the Disputed Investments to [Infinity Particles] amounted to the making of arrangements for the investment into the various enterprises by **the Claimant [C2 Capital]** within the meaning of the expression “making

arrangements” in para. 2 of Part A of Sch. 2. [C2 Capital’s] role involved little more than introducing investments to [Infinity Particles] in which it could invest and making the introduction between [Infinity Particles] and the proposed investment entity. Undoubtedly, **[C2 Capital] undertook work to enable [Infinity Particles] to decide whether it should invest in a particular enterprise.** However, the decision to do so **was made entirely by [Infinity Particles]** once the investment opportunity was introduced by Chih to Jenkin. If [Infinity Particles] made the decision to do so, the arrangements for the making of the investment were entirely down to [Infinity Particles], though **[C2 Capital] retained some “monitoring”** role, as part of the Co-Investment Team, as much to ensure that of the investment made a profit, **he could receive his percentage of the net profit immediately or at least in good time, or that the investment did not make a loss.**’ (emphasis added)

[312] The reference in paragraph [276] to “the Claimant” (see underlined and in bold above) seems to have been a typing mistake by the judge and should clearly have said “the Defendant” as the entity making the actual investments.

[313] Paragraph [276] above contains finding which are, to some extent, clearly inconsistent with the findings made by the learned judge at paragraph [189] (“nothing more, nothing less”) of the judgment, as to the import of C2 Capital’s role as “financial advisor” under the Letter Agreements. At paragraph [276] the learned judge seems again to have expand or to further expand, the role and type of activities performed or provided by C2 Capital in discharging its obligation as the “financial advisor” to Infinity Particles under the Letter Agreements, leading to inconsistent findings on such a crucial issue. Also, at paragraph [276], the learned judge refers to Chih and to C2 Capital interchangeably, leading to further confusion as to who exactly is or was intended to be the “contracting” party. The learned judge also expresses some uncertainty at paragraph [277] as to whether C2 Capital had some role “subsequent” to the introducing of the investment opportunity. He also therein seems to “confuse” the purported contractual role by referring interchangeably to “C2 Capital” and to “his” interests and “his” share of profits, which can only be construed as a reference to Chih himself. Paragraph [277] states:

‘[277] Accordingly, if [C2 Capital] had any **subsequent** role, it was to ensure that once the decision to invest had been made by [Infinity Particles], his interest in his share of the profits was protected.’ (emphasis added)

[314] For the reasons given above and based on the interpretation and scope of the expression “financial advisor” and the activities in that role which Chih testified he performed on behalf of C2 Capital, I accept the appellant’s submission that the learned judge erred in finding at paragraph [276] that C2 Capital was not or could not be said to have been “arranging deals in investments” within the meaning of that expression at Paragraph 2 of Part A of Schedule 2 to the SIBA 2010. On C2 Capital’s own case, Chih on its behalf was clearly “making arrangements” with a view to having Infinity Particles, as a potential investor, to invest its capital in investment opportunities introduced to it by Chih on behalf of C2 Capital. This was clearly being done with the objective of bringing about the “buying” of shares in the identified funds the subject of each Letter Agreement by Infinity Particles. In my judgment, the activities carried out by Chih on his own evidence satisfies the requirement of paragraph 2(a) of Part A of Schedule 2 to the SIBA 2010.

Managing Investments

[315] The judge considered the provisions of paragraph 3 of Part A, Schedule 2 of the SIBA 2010 and concluded that it cannot be gainsaid that C2 Capital was “managing any investments” the subject of the Claim. He concluded that ‘the making of the investment and how it was secured, protected, and managed was entirely down to the Defendant [Infinity Particles]’. In doing so, he accepted the evidence of Chih in cross-examination on Day 2 of the Trial (see para. [281]), where Chih stated that he did not manage the investments. Interestingly, in his response to the question posed, Chih testified: “... so this was not a **financial advisory agreement** where I have discretion.” (emphasis added)

[316] Infinity Particles has not in ground 5 challenged this conclusion.

Meaning of ‘Providing Investment Advice’

[317] The full text of paragraph 4 of Part A of Schedule 2 of the SIBA 2010 was set out at paragraph [170] above when dealing with ground 2. The learned judge considered

the definition of “Providing Investment Advice” in paragraph 4. He concluded that there can be no conceivable basis upon which C2 Capital can be said to have been providing “investment advice” (para. [284]).

[318] As held earlier in this judgment in relation to ground 2, the learned judge erred in so finding as the explicit and accepted evidence of Chih at paragraph 24 of his witness statement would, in my opinion, place the activities which he described squarely within the ambit of the definition of “providing investment advice” in paragraph 4. By Chih’s own description and explanation he was not just “introducing” investment opportunities to Jenkin but also rendering his opinion on the viability of each such investment. This was clearly advice being given after Chih had done whatever research of inquiries he considered necessary or appropriate to enable him to form a sound view or opinion as to the viability of the particular investment or fund and the opportunity for Jenkin/ Infinity Particles to participate in it by making an injection of capital. This function and Chih’s settled opinion as to the viability of the particular fund would be of importance not just to Chih or C2 Capital but also Jenkin as it would naturally have been done with the intention of helping to persuade Jenkin to have Infinity Particles decide to invest in the proposed investment and to enter into the corresponding Letter Agreement thereby cementing that particular investment opportunity, out of which C2 Capital would have the potential to benefit by sharing equally in any profits derived or realized therefrom.

[319] It is passing strange when, at paragraph [285], the learned judge stated:

“[285] ... There was **no formal advice** of the type encompassed by the section. The due diligence carried out was by the “Co-Investment Team” that included Jenkin and other personnel of JAMM Active, so, even if investment advice was given by [C2 Capital] to [Infinity Particles], it was neither given by [C2 Capital] **in a professional or business capacity nor was relied upon, or intended to be relied upon by [Infinity Particles], directly or indirectly, without [Infinity Particles] undertaking its own due diligence and obtaining its own advice on the viability of the investment.**”

[320] To say or to conclude that the advice or opinion given by Chih to Jenkin on the “viability of the investment” is not investment advice within the meaning or of the type contemplated by paragraph 4 of Part A of Schedule 2 of the SIBA 2010, because it is not “formal advice” is, with respect, wrong but fanciful. At paragraph [285] above, the learned judge also appears to excuse the operation of paragraph 4 on the basis that it was not given in a “professional” or “business” capacity is equally wrong. Paragraph 4 does not speak to any specific manner in which the investment advice must be provided to a “potential investor”, in order for that “advice” to be caught by the paragraph. Investment advice given orally, for example, is no less “investment advice” than if it was given in writing or in a strictly “professional” setting by an established or known investment firm. Furthermore, at paragraph [51] of the judgment the learned judge sets out what Chih said at paragraph 30 of his witness statement. The extract quoted commences with these words: ‘in or around 2018, Jenkin and I decided to **professionalize** the investment process.’ Moreover, whether advice given on the viability of an investment is accepted or whether it is only accepted after the potential investor has sought and received other advice on the merits of the investment brought to their attention, does not detract from the conclusion that C2 Capital by providing through Chih to Jenkin his opinion on the viability of the investment being proposed, whether Jenkin chose to accept his opinion without more or not.

[321] Accordingly, and for these reasons, I respectfully disagree with the learned judge’s analysis and conclusions on this issue, including those at paragraph [291] of the judgment on the matter of ‘form over substance’. In my judgment the learned judge’s reasoning proceeded from an incorrect premise as to the role of and the services which C2 Capital was, on its own evidence, to perform under the Letter Agreements. These activities clearly brought C2 Capital within the provisions of section 3 and 4 of the SIBA 2010 and paragraphs 3 and 4 of Part A of the Schedule 2 to the SIBA 2010.

[322] However, as the learned judge observed at paragraph [292], this is not the end of the issue of illegality. There is still the question of whether, if prohibited and therefore prima facie illegal, the activities which C2 Capital was carrying out fall within any of the statutory exclusions in Part C of Schedule 2 of the SIBA 2010. The learned judge considered this issue and found that the exception at paragraph 2(5) 'enabling the parties to communicate' does not apply. There has been no cross-appeal of this ruling. The learned judge also considered whether the activities by C2 Capital would be covered by the "joint enterprise" provisions of paragraph 4 of Part C of Schedule 2 to the SIBA 2010. Having considered the definition of "joint enterprise" in section 2(1) of the SIBA 2010, the learned judge concluded at paragraph [303] of the judgment that the activities of C2 Capital do not fall within that definition.

The "Partnership" Exclusion

[323] The learned judge next considered the "partnership" exclusion provision at paragraph 5 of Part C of Schedule 2 of the SIBA 2010. Paragraph 5 states:

"A person who is a partner in a partnership is an excluded person where he or she undertakes an activity that constitutes investment business –

(a) With or for **another partner** in the **same partnership**; and

(b) for the purpose or, or in connection with, the partnership."

[324] The learned judge held that, in the instant matter, C2 Capital and Infinity Particle could be said to have acted as partners (para. [309]). His analysis and reasoning on this issue is at paragraphs [307] and [308] which state: -

"[307] If the activities in which the Parties were involved constituted an "investment business", it is arguable that the exclusion in para. 5 applies as the activity was carried out by the Parties in partnership within the meaning of s. 3 of the BVI Partnership Act, which defines that expression in the same terms as s.1 of the UK Partnership Act 1890 as "the relation which subsists between persons **carrying on a business in common** with a view of profit..." (emphasis added)

[308] The relationship between the **Parties supports the classic hallmarks of a partnership between them**. The business activities that the Parties agreed to carry out with third-party investors **were to be carried out together for their common benefit**. The Claimant [C2 Capital] was to recommend business opportunities to the Defendant [infinity Particles] in

return for which they were to share the net profits equally and (importantly) bear any losses also equally: see the exposition of the law on the subject provided in *Patel v Barlows* [2020] EWHC 2753 (Ch), [2021] 4 WLR 6, at [100]-[127] by the English Court of Appeal in *Sotheby's v Mark Weiss Limited and others* [2020] EWCA Civ 1570, at [84], per Carr LJ (as she then was)."

[325] The appellant submissions in relation to the 'partnership issue' are at paragraph 57 of its appeal skeleton and at paragraph 32(c) of its Reply submissions. It is submitted that the learned judge erred when he unilaterally invoked the "partnership" exclusion in paragraph 5 of Part C to Schedule 2 of the SIBA 2020. This exclusion was not pleaded or relied on by C2 Capital, and no submissions were made by the Parties on this point. It was therefore not open to the learned judge to consider the "partnership" exclusion when considering his judgment and find that said exclusion applied in the instant matter, without, at least, inviting submissions on it from the Parties.

[326] However, the respondent countered by pointing out (once again) that the appellant had repeatedly assured the judge at the trial that it was not taking any pleading points. Second, and in any event, on Day 9 of the Trial, the judge himself raised the issue of the "partnership" exclusion with Infinity Particles' counsel, when he said: "It seems to me that the partnership exclusion is more likely in a case like this." Moreover, it was for Infinity Particles, which first relied in its pleading case on the SIBA 2010, to establish that the Act applies without any of the exclusion provisions being applicable. In this respect, Infinity Particles merely offered in its Closing Submissions on Day 9, that "the only partnership you heard about is between Chih and Jenkin."

[327] On the pleading point relating to the 'partnership' exclusion, Infinity Particles points out that C2 Capital has, in the exchange quote above, not set out fully the exchange between the judge and their counsel, and therefore has not put what was said in its proper context. The full text from the transcript (set out at paragraph 32(c) of Infinity Particles Reply skeleton argument) is as follows: -

“THE COURT: And the other is the partnership exception.
[Infinity’s Counsel]: Well, I think the partnership exception isn’t relied on.
The Court: I thought I saw something in the skeleton argument that suggest that. It seems to me that the partnership exception is more likely to apply in a case like this...

[Infinity Counsel]: Well, I think one obviously needs to get within the statutory definition of “joint enterprise”. And I think the problem for C2 and Infinity is that the only joint enterprise is the one you’ve hear about, or the only partnership you heard about is between Chih and Jenkin, and not between C2 and Infinity, so none of those exceptions apply in the theoretical situation we’re looking at.”

[328] Indeed, the full extract from the transcript provided by the appellant above has served to not only enabled the Court to see fully the exchanges between counsel and the court below and, in particular, the responses by counsel to the learned judge having raised with him the ‘partnership’ exclusion and expressing a preliminary view thereon.

[329] With that said, I will mention a few observations about this exchange. First, it is clear that the ‘partnership’ exclusion (at paragraph 5 of Part C of Schedule 2 to the SIBA 2010) was not pleaded by C2 Capital in response to Infinity Particles’ reliance on certain provisions of the SIBA 2010 in its Amended Defence. Second, the judge raised the ‘partnership’ exclusion and provided his preliminary view as to the likeliness of it being applicable in this matter with counsel for Infinity Particles, who then responded in the way in which he did, as shown from the extract above. Third, in response, counsel for Infinity Particles took the position or submitted that, on the evidence, the only ‘partnership’ which the court has heard about is not one between C2 Capital and Infinity Particles, but between Chih and Jenkin, and that none of the exceptions or exclusions apply in this scenario and in the way in which the court ought to look at in this matter.

[330] Fourth, by his responses to the judge, learned counsel for the appellant was clearly engaging with the issue and putting forward Infinity Particles’ submissions on the question of whether the ‘partnership’ exclusion applied or could apply in the context

of this matter where, as they saw it, the evidence did not disclose and could not amount to evidence of a partnership or “joint enterprise” between C2 Capital and Infinity Particles. Fifth, the upshot of all this is that although not specifically pleaded and apparently not definitively relied on by C2 Capital at Trial, the appellant was not taken entirely by surprise by the judge who was careful to raise the point with counsel for Infinity Particles and who was afforded an opportunity to put his client case in opposition to the applicability of any exclusion or exception, including the ‘partnership’ exclusion.

[331] It is well-established that a judge ought not to treat with an issue not part of the parties pleaded case or canvassed in submissions. Where the trial judge considers that an issue not arising on the pleaded cases or not arising in the submissions of the Parties in relation to each other pleaded and/or argued case at trial, ought nevertheless to be considered in the interest of justice, the judge ought first to bring that point or issue to the attention of the Parties through their respective counsel and invite submissions, written or oral or both from each of them on or with respect to the specific issue or point, before deciding to consider it and to rule on it as part of determining the claim.

[332] In my judgment, there is no merit in this pleading point as precluding the judge from dealing with it in the judgment. Once the appellant in its pleaded case relied on the applicability of the prohibitive provisions in section 4 of the SIBA 2010, and other provisions of the said Act, including section 3 (as to the meaning of “investment business”) and paragraphs 3 and 4 of Part A of Schedule 2 to the said Act, the issue of the applicability of the prohibition on carrying on “investment business” arose and was squarely before the learned judge in all its parameters. These include the related issues under the Act of whether, in the event that the court was to conclude that C2 Capital’s activities amounted to doing “investment business”, any of the statutory exclusions, including the ‘partnership’ exclusion applied.

[333] This is the position as a matter of procedural law, whether the respondent had specifically pleaded or relied on the “partnership exclusion”. The partnership exclusion issue clearly arose in the judge’s mind during the course of the trial, as the more likely of the exclusions to be applicable in the circumstances of this matter, as he saw it. He brought it to the attention of counsel for Infinity Particles and, by extension, counsel for C2 Capital. It was then open to counsel for the Parties to address the court on the “partnership” exclusion or to seek time to put in written submissions on it. It is therefore not correct to submit, as did Infinity Particles, that this issue never arose during the trial and Infinity Particles was not afforded an opportunity by the judge to respond to it. Furthermore, I accept the point raised by the respondent that the burden was on the appellant to establish the application of the SIBA 2010 as a defence to the Claim, having pleaded and relied on it. In doing so, it behoved the appellant to demonstrate, to the satisfaction of the learned judge at the trial, why none of the statutory exclusions, including the “partnership” exception, applied. The judge having raised the “partnership” exclusion with counsel for Infinity Particles and him having responded to it, as the above exchange demonstrates, it was open to the judge to consider whether the “partnership” exclusion applied on the facts and the law, and to rule on it as part of his decision in this matter.

[334] The appellant also submits that the judge’s finding that C2 Capital and Infinity Particles would have been acting as partners is based on the flawed premise that “all that was required would be an agreement to share profits.” Reliance was placed on section 4(c) of the BVI Partnership Act which expressly provides that the sharing of gross returns ‘does not itself create a partnership’. This point is stoutly refuted by C2 Capital. It submits that the learned judge did not base his decision on the issue as to the applicability of the ‘partnership’ exclusion on any agreement in the Letter Agreements for the “sharing of profits”. The respondent relies on the various bases identified by the judge at paragraph [308] of his judgment. At paragraph [303], the judge expressly found that the C2 Capital and Infinity Particles agreed to carry out business activities with third party investors which activities “were to be carried out

together for their common benefit”. He also found that they were to share the net profits equally as well as any losses. His findings on this issue are at paragraph [308] which reads: -

“[308] The relationship between the Parties supports the classic hallmarks of a partnership between them. The business activities that the Parties agreed to carry out with third -party investors were to be carried out together for their common benefit. The Claimant [C2 Capital] was to recommend business opportunities to the Defendant [Infinity Particles] in return for which they were to share the net profits equally and (importantly) bear any losses equally: see the exposition of the law on the subject provided in *Patel v Barlows* [2020] EWHC 2753 (ch), [2021] 4 W.L.R/ 6 at [100]-127] by the English Court of Appeal in *Sotheby’s v Mark Weiss Limited* and others [2020] EWCA Civ 1570, at [84], per Carr LJ (as she then was).”

Analysis and Conclusion on the “Partnership” Exclusion

[335] It is important to note that the judge’s consideration of the application of any of the exclusion provisions in the SIBA 2010, is in the context of having held that C2 Capital was not providing “investment advice” or carrying on “investment business” by way of business. Therefore, the prohibition in section 4 of the SIBA 2010 did not apply and the statutory exclusions would only come into play if the prohibition applied. His consideration of the exclusions was only in the alternative and on the assumption that he was wrong on his primary findings that the prohibition did apply.

[336] This Court having found above that the learned judge erred in holding that the prohibition did not apply for the reasons given above, it brings into question the soundness and correctness of the judge’s finding on the partnership exclusion at paragraph [308]. Did the purported contractual relationship between C2 Capital and Infinity Particles under the Letter Agreements amount to a ‘partnership’ in law under the BVI Partnership Act. In my judgment, the answer is no, for the reason that the relationship was, on the face of the Letter Agreements, clearly that of “financial advisor” and “client”, and not one of a partnership because, ultimately, they were to share equally in the net profits and losses. This position of fact and law is not altered in any way on the ground that, pursuant to the Letter Agreements (if valid) C2 Capital’s reward for acting as “financial advisor” was to be paid 50% share of the profits derived or realized by Infinity Particles from any such investment. Likewise,

the obligation to share in 50% of the losses, which would then be applied to its 50% share of the profits from other investments, also does not, in my view, propel or transform which is clear from their roles and the terms of the Letter Agreements, into “joint investment” or partnership in law. The decision as to whether to make the investment rests solely with Infinity Particles and is made by it prior to entering into each of the Letter Agreements. It is Infinity Particles’ capital alone which is at risk if the investment does not turn a profit. Whereas, C2 Capital does not stand, in that scenario, to suffer any loss by the investment making a loss. The amount ultimately to be paid over to C2 Capital is effectively a set off between its entitlement to share equally in all profits from all introduced investments (not just the Disputed Investments) against its obligation to share equally in the losses across all such “introduced” investments. This is clear from the learned judge’s statements at paragraph [10] of the judgment.

[337] Moreover, there can be no partnership in law where the alleged ‘agreement’ the basis of the alleged ‘partnership’, is not a binding contract. I have found above that the learned judge erred in finding that the Letter Agreements were binding contracts. This decision rests on the basis of lack of consideration, total failure of consideration, and past consideration. It therefore follows that there is no partnership in law founded on the Letter Agreements and the learned judge’s finding ought to be set aside and the Claim ought to have been dismissed.

[338] Absent the Letter Agreements being binding contracts, no question or issue as to their illegality under section 4 of the SIBA 2010 arises. C2 Capital’s principal case is that it had introduced investment opportunities to Infinity Particles, which included providing Chih’s opinion as to the viability of each such introduced investment the subject of the Claim. Furthermore, the extraterritorial deeming provision of section 4(2)(b) of the SIBA 2010 only applies to where the “person” conducting an investment business outside the jurisdiction, is a BVI business company. It has no application to where such “investment business” is being conducted by an individual (be it Chih and Jenkin) or a foreign company. Accordingly, if, as a matter of fact,

the parties to any 'agreement' whereby Chih undertook to introduce investment opportunities to Jenkin and for which they would share equally in the net profits and losses (not being the Letter Agreements themselves, which do not contain any such obligation to "introduce" investment opportunities), the prohibition at section 4(1) of the SIBA 2010 would have no application, no finding of any such activities being illegal or unauthorized can be made, and the jurisdiction of the BVI Financial Services Authority does not arise. In that scenario Chih's investment business activities would be governed by the laws of some other country, if applicable.

[339] The learned judge's principal findings on which a finding of liability is based are that the Overarching Agreement/Co-Investment Arrangement is not a binding contract in law, and each Letter Agreement the subject of the Claim constitutes a binding agreement between C2 Capital and Infinity Particles, entitling C2 Capital to an award of compensation on its Claim. However, apart from the alleged "oral" Overarching Agreement/Co-Investment Arrangement (an agreement in principle), upon which, as a matter of law, no 'partnership' could have come into existence, the existence of some other "oral" agreement was not pleaded by C2 Capital, and no such finding was made by the judge. Therefore, the only "agreements" upon which a finding of the existence of a "partnership" can be based are the nine Letter Agreements the subject of the Claim (3 with respect to the Kayak Investment and 2 with respect to the Cotopaxi Investment) and the judge's findings as to an "implied agreement" in certain circumstances.

[340] In this respect, the learned judge at paragraph [110] (as dealt with above) made a finding of the coming into existence of an "implied Agreement" in circumstances where Jenkin had not signed a Letter Agreement, but Jenkin/Infinity Particles had constituted the investment by an injection of funds. This "implied agreement" would be on the same terms as set out in the fully executed Letter Agreements. I have already found that all of the Letter Agreements the subject of the Claim had been signed by Jenkin and, therefore, the prerequisite for the finding of an "implied agreement" does not actually arise in this matter. However, even if it did, the judge's

finding of an “implied agreement” coming into existence by the injection of funds by Infinity Particles, it would still follow that the finding of the existence of a “partnership” in law is based solely on the Letter Agreements or implied agreements, and for the reasons given above no “partnership” in law arises thereon or therefrom.

[341] Moreover, the judge’s finding of a partnership agreement is in part based on the ‘consideration’ moving from C2 Capital being the “introducing” of investment opportunities to Jenkin or Infinity Particles which ‘consideration’ is not mentioned in the Letter Agreements themselves. That this was C2 Capital’s ‘contractual’ obligation is drawn by the judge from what is saw as the terms of the Overarching Agreement/Co-Investment Agreement, which ‘agreement’ he found not to be a binding contract. If this was the consideration to be provided by C2 Capital under the Letter Agreements, then the Letter Agreements ought to have stated so or at minimum confirm that this is the case and that C2 Capital had in fact introduced the particular investment to Infinity Particles for which they are to share equally in any profits or losses. None of this was captured or provided for in the Letter Agreements. It follows that a finding of the existence of a ‘partnership’ in law pursuant to section 3 of the BVI Partnership Act could not and cannot properly be made on the basis of the ‘existence’ of the Overarching Agreement/Co-Investment Arrangement, which are mere “agreements in principle” not giving rise to an intention by the parties to create legal relations.

[342] The judge’s finding of the existence in law of a partnership entitling C2 Capital to rely on the ‘partnership’ exclusion at paragraph 5 of Part A of Schedule 2 to the SIBA 2010, rests on two factors, However, only one of these two factors is actually a term or provision of the Letter Agreements (or “implied agreements, if any). The first factor is that C2 Capital was to “recommend business opportunities” to Infinity Particles. This is not a term of the Letter Agreements. It could only have been drawn from the alleged terms of the Overarching Agreement/ Co-Investment Arrangements, which agreement and hence any of its alleged terms, is not a binding agreement in law between the Parties and is accordingly unenforceable as such.

The second factor is that the appellant and the respondent were “to share the net profits equally” and bear any losses equally. This is a provision of the Letter Agreements. It is therefore clear that the learned judge based his finding on the existence of a partnership evidenced by the Letter Agreements, on a factor -the obligation for C2 Capital to “introduce” investment opportunities to Infinity Particles- which is not a term of the Letter Agreements themselves, but was found to have been a “term” of the non-binding “agreement in principle”.

[343] This unfortunate state of affairs leads to another interesting but related question. It is whether the learned judge’s finding at paragraph [308] of the existence in law of a ‘partnership’ between the appellant and the respondent is, in effect, a finding of multiple ‘partnerships’ corresponding to the nine Letter Agreements (and any “implied agreement”). The judge’s finding of a ‘partnership’ at paragraph [308] of the judgment does not address this question. There is, therefore, no direct finding of ‘multiple’ individual partnerships, each corresponding to the nine Letter Agreements and, potentially, another 50 to 100 of them. This seems to point to the judge basing his finding of a ‘partnership’ not so much on the terms of the Letter Agreements but on the terms, as he saw them, of the non-binding Overarching Agreement/Co-Investment Arrangement which is where the finding of an obligation on the part of Chih to “introduce” investment opportunities to Jenkin emanated, but which does not form part of the terms of the Letter Agreements. If this is correct, then it follows that the learned judge’s finding of a ‘partnership’ arising out of the Letter Agreements would be fundamentally flawed and must be set aside.

[344] For the reasons given above, the judge’s finding of a ‘partnership’ between C2 Capital and Infinity Particles under the Letter Agreements is wrong in law and is accordingly set aside. It follows that the Letter Agreements, even if valid, do not constitute a partnership in law and the respondent is not entitled to rely on the ‘partnership exclusion’ at Paragraph 5 of Part C of Schedule 2 to the SIBA 2010.

Application of sections 50F and 50G of the Financial Services Commission Act

[345] However, if the Letter Agreements are binding contracts and the 'partnership' exclusion does not apply, then the provisions of section 50F(1) of the **Financial Services Commission Act 2001** comes into play rendering the Letter Agreements prima facie unenforceable. Section 50F(1) and (3)(b) states:

- (1) An agreement to which this section applies, that is made by a person in the course of carrying on unauthorized financial services business is unenforceable against the other party to the agreement.
- (2) [intentionally omitted].
- (3) This section applies to an agreement –
 - (a) [intentionally omitted]
 - (b) The making or performance of which constitutes, or is part of, the unauthorized financial services business being carried on.

[346] The learned judge found that in the event section 50F(1) is applicable, there existed grounds for the court to exercise its discretion under section 50G(3) to permit enforcement by C2 Capital of the Letter Agreements. Section 50G(2) and (3) states:

- “(2) Notwithstanding section 50F, if the Court is satisfied that it is **just and equitable in the circumstances of the case**, it may allow –
 - (a) the agreement to be enforced, or
 - (b) money and property paid or transferred under the agreement to be retained,
by the person carrying on unauthorized financial services business.
- (3) In considering whether to allow the **agreement to be enforced** or the money or property paid or transferred under the agreement to be retained, the Court shall have regard to **whether the person carrying on unauthorized financial services business reasonably believed that he or she was not carrying on**

unauthorized financial services business by making the agreement.” (emphasis added)

[347] In reaching his decision to exercise his discretion under section 50G in the event that he was wrong and the Letter Agreements were a breach of section 4 of the SIBA 2010 and not saved by the ‘partnership’ exclusion at Paragraph 5 of Part C of Schedule 2 of the said Act rendering them prima facie illegal and unenforceable by section 50F of the Financial Services Commission Act, he made certain preliminary findings of fact. He was satisfied that Chih had no idea that the involvement of C2 Capital in the Disputed Investments might be unlawful (at para. [317]). He based this finding on what Chih said at paragraphs 24 and 111 of his witness statement, which does not need to be restated here.

[348] At paragraph [319] of the judgment, the learned judge came to this conclusion on the evidence: -

“[319] On this issue of the belief of Chih, I take the unhesitating view that Chih believed that [C2 Capital] was not carrying on unauthorized financial services business by making the **Agreements which are recorded by the terms of the Letter Agreements**. Nor do I consider that any member of the Co-Investment Team believed that what Chih and Jenkin were doing required a licence or other form of authorization. If any of them thought that they did, I have no doubt that they would have raised it with Chih and Jenkin.” (emphasis added)

[349] The learned judge then moved on to consider and determine whether that belief by Chih as he found was “reasonably” held. The judge considered certain authoritative statements of principles and guidance by Lord Neuberger MR of the English Court of Appeal in **Charles Cleland Helden v Strathmore Limited**³¹. At paragraphs [46] and [47] the learned Master of the Rolls (as he then was) opined (in part) as follows:

“... However, there is a powerful argument for saying that a person cannot contend that he ‘reasonably believed’ that he was not contravening the general prohibition by making [an] agreement, if he was wholly unaware of the existence of the prohibition at the time of the agreement.”

³¹ [2011] EWCA Civ 542.

‘It seems to me that there is considerable force in the simple linguistic point that a person cannot believe that he is not contravening a rule, if he is wholly unaware of the rule...’

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

[350] The learned judge, also considered the statements by Lord Neuberger at paragraphs [49]-[52] of the decision in **Helden** and the fact that the Court of Appeal nevertheless refused to interfere the first instance judge’s exercise of the discretion in favour of what is ‘just and equitable’ in allowing the subject agreement to be enforced. At paragraph [325] the judge opined:

“[325] In my judgment, whether a belief is reasonably held cannot be decided by compartmentalizing the belief of the person concerned under one or the other scenario considered by the Court of Appeal [in **Helden**]. Each case will be fact specific, and the question has to be decided at the point when the agreement is made, based on all the circumstances of the case. In other words, the court should take a holistic approach to the issue. It is appropriate, in my view, to seek to set out which scenario should be applied to the facts. The Court should, in every case, hold to the strict words of the statute and look at all the circumstances.”

[351] The learned judge then stated that he was in no doubt that the belief held by Chih was reasonable. The reasons given for reaching this view are detailed at paragraph [326] of the judgment. I set them out below and deal with each in turn: -

“First, it would not have been obvious to many – even a qualified “non-specialist” legal practitioner – that entering into the Disputed Investments might contravene the requirements of SIBA 2010.

With respect, it is difficult to see how the learned judge could come to this assumption and make this observation. It is not the making of the investments which might contravene the SIBA 2010. It is the conducting of “investment business”, doing so “by way of business” for gain, and importantly to obvious giving of “investment advice” as to the viability of each investment which was sourced and introduced by Chih. The reference

to this not being “obvious” to even a “non-specialist” legal practitioner is misplaced. It suggests, at minimum, that it might be obvious to some legal practitioner. This begs the question why Chih and C2 Capital did not seek legal advice in the BVI which the company is incorporated as to whether these activities being contemplated or agreed to be done would run afoul of any relevant provision of the cadre of financial services statutes and regulations or could be so construed. There is no evidence from Chih or any other witness that such legal advice was sought or the obtaining of it considered. This ‘inertia’ might be explicable on the basis that Chih is a graduate of Harvard Law School who was admittedly responsible for drafting the Letter Agreements.

Second, Chih and Jenkin had been friends for a substantial time and not unnaturally, neither thought a formal agreement, drawn up through lawyers was necessary, particularly if it jeopardized any investment opportunity that needed to be proceeded with quickly.

With respect, this is not a good reason. If of any value it works against the conclusion reached by the learned judge. It smacks of two irresponsible “friends” who avoided seeking and obtaining legal advice as to whether what may be the legal implications of what they may have agreed “informally” in the form of the Overarching Agreement/Co-Investment Arrangement and being mindful that, according to Chih’s evidence it would not just involve him finding suitable investment opportunities for Jenkin by Infinity Particles to invest in, but he, Chih actively providing what is essentially “investment advice” in the form of opinions as to the viability of each recommended investment to his ‘friend’ Jenkin.

Third, while appreciating that professional lawyers might, out of an **abundance of caution**, have thought it necessary to apply for a licence to avoid issues of this type arising, **I am not sure** that this would have been necessary for the reasons I have already given.

Again, with respect, it is difficult to understand the point being made here by the learned judge and how it has any bearing on the question of the “reasonableness” of Chih’s belief. The simple fact is that Chih sought no legal advice on the intended Overarching Agreement. This leads only to a conclusion that he acted as his own legal adviser in reaching that ‘agreement’ and in drafting the Letter agreement to record what, according to him, he had agreed with Jenkin. Moreover, the fact that Jenkin himself did not seek legal advice on whether the activities to be engaged in by Chih and C2 Capital, an ordinary BVI company, in sourcing investment opportunities and advising of the viability of each one may require approval from the BVI Financial Services Authority is not the point. It is the actions or inactions of C2 Capital which are under scrutiny as to whether those activities would have required authorization under the laws of the BVI.

Finally, even if one accepts the arguments advanced by the appellant to the court in **Helden**, referred to above as more compelling, there is a distinction to be derived between that case and the present one. In that case, there were several factors (eight in all) that would (or should) have made it obvious that the licensing provisions of the FSMA 2000 might be breached. In the present case, it would not have been obvious to Chih that this could be the case; of course, the thought never entered Jenkin's mind, so both Chih and Jenkin were oblivious to the possibility that the licensing provisions of the SIBA might apply to the Agreements.

Put simply, it ought, on any reasonable view and independent assessment, to have been obvious to Chih that in sourcing investments to recommend to Jenkin for investment in funds and put their capital at risk in, and in providing to Jenkin his opinion as to the viability of such recommended investments, and to use a company incorporated under the laws of the BVI as the vehicle through which to enter into a profit sharing and loss sharing arrangement, that such activities could or may require approval and licensing under the laws of BVI to enable C2 Capital to carry out these activities. It is the reasonableness of Chih 'belief' which is under scrutiny, not that of Jenkin and/or Infinity Particles."

[352] In seeking to apply the discretionary power granted by section 50G, the learned judge accepted (correctly) that the factor at sub-paragraph (3) is not the only factor which the court can consider and take into account; nor does that factor impose a "threshold" requirement which must be satisfied before a court goes on to consider any other relevant factor (at para. [328]). The judge also considered that the present case was not dissimilar to the position applied in **Helden**. However, whereas in **Helden** the court was concerned with a loan agreement and charge document, in this case 'it is concerned with the legality (or otherwise) of **several investment opportunities** introduced by [C2 Capital] to [Infinity Particles], resulting in [Infinity Particles] investing funds in the Disputed Investments.' With respect, it is not the legality of the investments introduced which are in issue as to legality. It is the activities of a BVI company, C2 Capital, which according to its case, it agreed to perform and to discharge in relation to the introduction of investment opportunities to Jenkin/ Infinity Particles on the basis of the Letter Agreements which C2 Capital contends for and the learned judge found to be the only contractual and binding agreements between C2 Capital and Infinity Particles.

[353] The learned judge set out some 13 factors (at [para. 333]) which he considered to be appropriate for him to take into account in deciding whether Chih's belief was reasonable and whether he ought to exercise his discretion and permit C2 Capital to enforce the Letter Agreements against Infinity Particles if it is that they were caught by the prohibition in section 4 of the SIBA 2010 and the activities were not 'excluded' under any of the statutory exclusion provisions, including the 'partnership' exclusion. Having set out and considered each of the 13 factors identified by him, the learned judge concluded that he was satisfied that C2 Capital "has amply demonstrated" that the discretion of the court under section 50G should be exercised in their favour (at para.[334]). Accordingly, if he had come to the conclusion (which he had not) that the "Agreements" were illegal, he would have exercised his discretion in favour of allowing C2 Capital to enforce all the Letter Agreements relating to the Disputed Investments against Infinity Particles (at paras.[335] & [336]).

[354] On the issue of the judge's exercise of his discretion under section 50G of the SIBA 2010, the appellant submits that had the learned judge approached this issue correctly he ought to have found that there were no ground to exercise his discretion under that provision, and to do so in favour of the enforcement by C2 Capital of the Letter Agreements. It is submitted that the "key" consideration under section 50F(3) had not been satisfied on the facts of this case. This is because, argues the appellant, the "unchallenged evidence from Chih is that he was fully aware that a license would be required for [C2 Capital] to act as financial advisor." This being the case, the judge plainly erred in finding that Chih would have had a reasonable belief that no license would be required (para. 60(b) Infinity's written appeal submissions).

[355] This is a reference to the cross-examination of Chih on Day 2 at page 148 of the Transcript (Part 7, Vol.1). The relevant recorded exchange between counsel for Infinity Particles and Chih is as follows:

Q. And in terms of financial advisors, you knew at the time, didn't you, that if you were a financial advisor you would need to be licensed?

A. If I was a financial advisor in the traditional sense, like at Goldman, yes, of course.

[356] The appellant also submits that the learned judge was wrong in taking the 11 factors which he identified into account in exercising his discretion under section 50F(3). In support of this submission, the appellant argues that –

- (1) The judge erred in finding that there had been no “unfair advantage” in the negotiations leading to the Letter Agreement, when they had been drafted entirely by Chih on his unchallenged evidence.

In my view, this is a non-point, which seeks to invoke the contra profrendum rule, already addressed above.

- (2) The judge erred in finding that it would be “wholly unfair” to refuse to enforce the Letter agreements given the “huge overall profit”.

In my view, while amount involved in the Claim and the consequences of the unenforceability of the Letter Agreements on the respondent’s ability to be aid what it considered to be is just and agreed remuneration for services rendered, is certainly a factor for consideration when exercising the court’s discretion to permit the enforcement, it is far from being a decisive. This is so for the obvious reason that those who by their agreements run afoul of financial services prohibitions on certain types of activities without applying for and satisfying the requirements of a license, run that very risk of not being able or permitted to recover any monies under the illegal agreement, and sometimes at a huge ‘loss’. The consequences of illegality is the disentitlement of those who acted illegally from recovering the “fruits” of such illegality, be it money, property or otherwise. Where this not so, these provisions would lack “teeth” and the necessary sanction intended to discourage such illegal activities in relation to financial services. Moreover, this justification accords

with the very consequences of illegality under sections 50F and 50G of the Financial Services Commission Act.

- (3) The judge erred in finding that Infinity Particles was “unlikely to have invested in other investments”, the judge having found that Jenkin was making “hugely prosperous” investments of his own (at para.[16])

I am not sure of the relevance of this ‘factor’. In my view, this is not a proper or relevant factor to the determination of the court’s discretion under section 50G. and ought not to have been considered by the learned judge in reasoning to his decision to exercise his discretion in favour of C2 Capital enforcing the illegal Letter Agreements. In any event, it does not seem to be supported by the true facts as to the investment and success of Jenkin.

[357] On the issue of the judge’s exercise of his discretion under section 50G of the SIBA 2010, the respondent submits that “the decision based on the judge’s exercise of his discretion is unappealable”. I do not agree with this submission. The more accurate point is that any appeal for the court’s exercise of discretion has a high threshold for reversal.

[358] As to the 13 factors identified and relied on by the learned judge, the respondent relies on the relevance of each of these factors and on the conclusion arrived at by the learned judge that C2 Capital had “amply demonstrated that his discretion would be exercised in favour of permitting enforcement of the Letter Agreements. C2 Capital also argues that the judge gave “a full reasoned judgment” demonstrating how he exercised his discretion and this Court ought not to interfere.

[359] As to the “key” consideration or factor under section 50G(3), that is, the court in considering how to exercise its discretion ‘should have regard to whether the person

carrying on an unauthorized financial services business reasonably believed that he or she was not carrying on an unauthorized financial services business', C2 Capital submits that this is but "one matter to consider", and is not "the key"; it does not preclude consideration of other relevant factors.

Analysis and conclusions on exercise of the court's discretion under section 50G (3)

[360] In my considered view, while I agree that the factor or consideration specified in section 50G(3) is not the only factor which a court can consider when deciding on which way to exercise its discretion, and that the court may consider other or additional relevant factors having regard to the particular circumstances of each case, the factor expressly set out in section 50G(3) is the primary factor to be considered along with other relevant factors. Further, if the party seeking the court's discretion in its favour is unable to show, as the person carrying on the unauthorized investment business or unauthorized financial services business, that he or she or it could not have reasonably believed that they were not, by their activities, carrying on an unauthorized financial services business, such party would have a very steep hill to climb in persuading the court to exercise the discretion in its favour, and would have to put before the court cogent evidence of other strong and pertinent factors to achieve such end result in its favour.

[361] Upon a close reading of the extract at paragraph [362] above from the transcript of the cross-examination of Chih, I am satisfied that it amounts to an admission by Chih that he knew, as a person admittedly experienced in financial services matters dealing with banks and other financial institutions, and as a graduate of Harvard Law School among other distinguished academic qualifications, that to operate or to say you will act as a "financial advisor" C2 Capital/Jenkin, would require a licence or authorization from the relevant authority in BVI whether under the SIBA 2010 or some other financial services legislation. Chih's response to the question from counsel for Infinity Particles in the said extract, clearly belies his knowledge that anyone operating as a 'financial advisor' would require, in most jurisdictions, a

licence or authorization to do so. What Chih seems to be saying is that he did not consider that C2 Capital would need to first obtain such authorization in the circumstances of what C2 Capital was undertaking to do for Infinity Particles under the Overarching Agreement/Co-Investment Arrangement and the Letter Agreements to be entered into by C2 Capital and Infinity Particles.

[362] This position and Chih's is circular. It comes right back to the proper meaning to be according to the term "financial advisor" in the Letter Agreements, which 'plain and ordinary' meaning is clear and obvious for the reasons given under ground 2. In this respect, Chih's answer to a question from counsel for Infinity Particles (at page 147 of Part 7 of Vol.1) on why he used the term "financial advisor" in the Letter Agreements prepared by him, is pertinent and, in my view, speaks volumes:

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

A. I can't explain that except for the fact that, you know, it was just words that I used because it was just easier. It's just a couple of words as opposed to the sentence that you mentioned. And again, you know, again I didn't mean it as in a financial advisor, Because Jenkin and I have seen a lot of financial agreements, right, for example, we work with private bankers, we work with OC, we work with Greyhawk. This is not what it is."

[363] This response by Chih in cross-examination was not considered by the learned judge, either when construing the term "financial advisor" in the Letter Agreements, or determining the "consideration" issues raised as defences to the Claim by Infinity Particles, nor was this considered and weighed by the learned judge in determining whether to exercise his discretion to permit C2 Capital to enforce the Letter Agreement, in the event that they were not binding or illegal under BVI law.

[364] This brings us back to the guidance in the judgment of Lord Neuberger MR at paragraphs [46] and [47] in **Helden**, et out at paragraph [357] above. I agree with the reasoning of the Master of the Rolls, as he then was. There is no evidence that Chih knew of the existence of the SIBA 2010 or that he was aware of the general 'prohibition' therein at section 4. If this is correct, then Chih was totally unaware of

the existence of the prohibition. On the reasoning of the Master of the Rolls, this would be a “powerful argument” to say that any “belief” which Chih held that C2 Capital would be contravening the general prohibition could not be one which he reasonably held. Moreover, as the Master of the Rolls reasoned, there is “some force” in the argument that ‘parliament could not have intended when its passed the SIBA 2010 that someone who wrongly, but reasonably, believes that he is not contravening the said Act, should be better off than a person who was, reasonably, unaware that the statute applied.’

[365] In my judgment, the learned judge erred in the exercise of his discretion and in finding that Chih and hence C2 Capital reasonably believed that it was not carrying on an unauthorized financial services business by way of the Letter Agreements. The judge erred in finding that this belief was “reasonably” held by Chih, when the extract from his cross-examination demonstrates that he must have realized that any business company registered under the laws of the BVI, such as C2 Capital, performing the services of introducing and advising on the viability of investments in funds, would require the appropriate authorization or licence to do so. Instead, he simply concluded for himself, without seeking or having the benefit of legal advice, that any such authorization or license was not necessary or not required. These factors from the evidence of Chih himself do not, reasonably and objectively, lead one to conclude that he held such belief reasonably.

[366] In this respect, and for the reasons set out above, the learned judge committed errors of judgment when seeking to exercise his discretion in determining whether Chih held such belief reasonably. He failed to take into account relevant factors and took into account irrelevant factors in coming to his decision. Accordingly, the conclusion which he reached to permit C2 Capital to enforce the Letter Agreement (assuming they were binding agreements) was wrong and must be set aside. Ground 5 therefore succeeds.

Ground 6: If, contrary to Infinity Particles' primary case, the Judge was otherwise correct in finding that the Letter Agreements constituted binding contracts between C2 Capital and Infinity Particles, he erred in law by finding that the Letter Agreements were not illegal under the laws of Taiwan, and by finding that the Letter Agreements would have been enforced in the BVI.

[367] This ground challenges the learned judge's finding on the "second stage" of the issue of illegality of the letter Agreements. The learned judge considered this issue in some detail at paragraphs [337] to [407] of the judgment. His decision not to prevent the Letter Agreements from being enforced in full is at paragraphs [394] and [405] of the judgment. At paragraph [394] the judge states: -

'[394] ...I come to the unhesitating conclusion that I should not prevent the Agreements from being enforced in full.'

[368] In light of the conclusions on the first stage above that the Letter Agreement, if binding contracts, would be illegal under BVI law and not subject to any of the exclusion provisions and that the learned judge wrongly exercised his discretion to nevertheless permit C2 Capital to enforce the letter Agreements, there is no need to go on to consider whether the Letter Agreements were illegal under the laws of the foreign state, namely Taiwan. I therefore make no decision on ground 6.

Ground 7: The Judge erred in ordering that the interest on the Amount Claimed should run from 31st December 2021 onward, and at a rate of 5% (see the Order).

Points under ground 7:

- (1) The Respondent's entitlement to pre-judgment interest must be based on the date at which the Amount Claimed became due to it. There is no evidence whatsoever that the Respondent had any entitlement to the Amount Claimed as of 31 December 2021. In particular, the terms of the Letter Agreements do not stipulate when any profits from the investment ought to have been paid to the Respondent. The Judge ought to have found instead that interest

only ran from the date the Claim Form was filed, which would be 7th March 2023.

- (2) There is also no basis to award interest at a rate of 5%. The rate of interest should have been fixed at 2%, as that was the rate consistently applied by the Parties, which was agreed to be the cost of capital, and which is reflected in the express terms of the Letter Agreements) at [7]).

[369] The respective submissions of the Parties on ground 7 are brief. The appellant's offerings in that regard are at paragraphs 70 to 73 of its appeal written submissions and 42 and 43 of its Reply submissions. As to the 5% rate of interest in the Order, the appellant stressed that the learned judge erred in adopting the 5% rate and ought to have imposed a 2% rate being the annual rate of interest stipulated in the Letter Agreements, as the costs of capital. This is a reference to the provision in the letter Agreements which state: 'Thus, any distribution from Investment will go 100% to Infinity until the cumulative amount (taking into account all prior distributions made or deemed made to Infinity) distributed **would provide Infinity with an Internal Rate of Return of 2%.**' (emphasis added)

[370] In response to this point regarding the 5% rate of interest in the Order versus the return rate in the Letter Agreements of 2%, the respondent submits, on the authority of this Court's decision in **Steadroy Matthews v Garna O'Neal**³², that the court had the power to order interest and in that case the court ordered interest to be paid on the damages at the rate of 5% per annum, the same rate ordered by the judge below in the instant matter. This, it is submitted, was an exercise of the judge's discretion, which rate is fair and well within the area of what is reasonable. In those circumstances, this Court ought not to interfere.

³² BVIHCVAP 2015/0019 (delivered 16th January 2018, unreported).

[371] In its reply skeleton argument, the appellant counters that the judge did not properly exercise his discretion. No discernible reason was given by the judge for settling on a 5% interest rate, and having found (in the appellant's view incorrectly) that there was an existing agreement between C2 Capital and Infinity Particles in the terms of the letter Agreements, he ought to have applied with equal force the interest rate of 2% specified in each Letter Agreement relating to the Disputed Investments.

[372] In deciding on what is the appropriate interest rate to impose on the award of a judgment sum, the court clearly has a discretion. However, that discretion must be exercised judicially, and the judge is required to provide reasons for the way in which he exercised such discretion and in arriving at a particular rate of interest. In exercising such discretion, the judge ought to be cognizant of any agreed rate of interest which the contracting parties had stipulated in their documents, especially any binding agreement or contract. In those circumstances, a judge would be hard-pressed to impose or to order a higher rate of interest than that stipulated by the parties and may only do so in exceptional cases and for very good reasons.

[373] No transcript pertaining to the making of the Order dated 28th November 2024 (same date as the delivery of the judgment) has been provided to this Court as part of the Record of Appeal. Therefore, we have not been made aware of any record of the learned judge's reasons in imposing a 5% interest rate on the award of the Amount Claimed. Doing our best in the circumstances, I am persuaded by the appellant's argument that the learned judge having found that the Letter Agreements constituted the contract between the Parties and the basis for the award in the Order of the full Amount Claimed, he ought to have taken into account in the exercise of his discretion as to the appropriate rate of interest to be imposed in the circumstances, the 2% rate of return on capital specified in the very same 'contractual' Letter Agreements. Had he done so, he would have imposed a rate of interest of 2% rather than the substantially higher rate of 5% stipulated in the Order. In this respect the learned judge erred in the exercise of his discretion and the 5%

rate of interest in the Order is set aside and a rate of 2% per annum substituted in its stead.

[374] However, having regard to this Court's ruling that the letter agreements are not binding contracts or agreements in law and the activities which C2 Capital, on its own case, had undertaken to perform under the proposed binding Letter Agreement, would be illegal, if they were in fact binding, this decision on the rate of interest will prove to be academic, as the resulting order dated 28th November 2024 must be set aside in its entirety.

[375] The other issue raised by ground 7 relates to the date from which interest ought to run on the principal amount of US\$9,159,564.74 awarded by the judge in the Order. The appellant argues that the date of "31 December 2021" selected and imposed by the learned judge was arbitrary. Infinity Particles contends for the date when the Claim was filed, that is 7th March 2023 as the date from which interest should run. Furthermore, the Letter Agreements themselves do not stipulate a date at which C2 Capital should be paid its 50% share of any net profits derived by Infinity particles from the subject investment.

[376] The respondent submits that the date of 31st December 2021 was in fact "generous" to Infinity Particles since the "profits" had been realized earlier between 2018 and 2021 and C2 Capital was content to rely on the date when a "spreadsheet" had been prepared showing the various introduced investments and the profits derived therefrom.

[377] I am not minded to disturb the date of '31 December 2021' specified in the Order as the date from which interest on the principal judgment sum ordered is to run. If the letter Agreements were binding contracts (as the judge found) it is clear the profits derived from each of the Disputed Investments were realized by Infinity Particles at dates prior to the filing of C2 Capital's Claim Form on 7th March 2023. While it is correct that the Letter Agreements do not specify a date by which C2

Capital is to be paid its equal share of the profits on each individual investment the subject of the particular Letter Agreement, and while, as I understand it, the approach adopted was to provide, from time to time, an accounting of profits and any losses on investments the subject of Letter Agreements executed by C2 Capital and Infinity Particles, it is clear that C2 Capital would have been out of pocket in relation to the Disputed Investments the subject of the Claim well before the date of 31st December 2021 imposed by the judge in the Order as the date from which interest on the Principal Sum awarded would begin to run. Approaching this aspect in that way, I am not persuaded by the appellant's arguments on this issue and find that there is no basis upon which this Court ought to disturb the date imposed in the Order.

[378] Ground 7 therefore succeeds in part.

Summary and Disposition

[379] In summary, this Court has held that ground 1 ultimately succeeds on the basis that the Letter Agreement are not binding and enforceable contracts between C2 Capital and Infinity Particles. Grounds 2,3,4 and 5 also succeed. Ground 6 (illegality under Taiwanese law) was not dealt with having upheld ground 5 (illegality under BVI law); and ground 7 was allowed in part. On the issue of costs, the appellant is entitled, based on the usual principle that costs is awarded to the successful party, to its costs of the proceedings in the High Court of Justice and these proceeding in the Court of Appeal.

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

- (1) The appeal is allowed.
- (2) The judgment and Order of the Commercial Division of the High Court of Justice in the British Virgin Islands both dated 28th November 2024 giving judgment in favour of C2 Capital on its Claim No. BVIHC (COM) 2023/0040 is set aside.

- (3) The respondent, C2 Capital Limited's Claim in Claim No. BVIHC (COM) 2023/0040 is dismissed.
- (4) Costs of the proceedings in the High Court and Court of Appeal are awarded to the appellant Infinity Particles Limited to be paid by the respondent C2 Capital Limited, such costs to be assessed by a judge of the Commercial Division or a Master, if not agreed by the parties within 30 days of the date of delivery of this judgment.

[381] This judgment is very long, in substantial part because of the many issues raised by the appellant in the appeal (which is its right) to be considered and addressed. On behalf of the Court, I express our collective appreciation to lead counsel and their respective teams for their generally helpful written and oral submissions.

I concur.
Cadie St. Rose-Albertini
Justice of Appeal [Ag.]

I concur.
Peter A. Foster
Justice of Appeal [Ag.]

By the Court

Chief Registrar