THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0010

BETWEEN:

NAM TAI PROPERTY INC

Appellant/1st Defendant

and

IsZo CAPITAL LP

Respondent/Claimant

and

GREATER SAIL LIMITED

2nd Defendant

WEST RIDGE INVESTMENT COMPANY LIMITED

3rd Defendant

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C. Farara	Justice of Appeal [Ag.]

Appearances:

Mr. Matthew Hardwick, QC, with him, Ms. Rosalind Nicholson and Mr. Renell Benjamin for the Appellant
Mr. Martin Moore, QC, and Mr. Edward Davies, QC, with them Mr. Ben Griffiths and Mr. Nicholas Burkill for the Respondent
Mr. Vernon Flynn, QC, and with him, Mr. Gerard Clarke, Mr. Andrew Emery and Ms. Gurprit Mattu for the 2nd Defendant

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2021: June 14, 15 and 16;
October 4;
Re-issued: October 6.

Commercial appeal – Proper purpose – Section 121 of Business Companies Act – Duty of directors to exercise powers for a proper purpose – Section 120(1) of Business Companies Act – Duty of directors to act honestly and in good faith and in the best interests of the company – Whether allotment of shares by directors was for improper purpose in breach of section 121 of the Business Companies Act – Whether Private Investment in Public Equity (PIPE) was for purpose of capital raising to deal with an urgent liquidity crisis – Whether purpose of the PIPE was board entrenchment rather than raising capital – Approach of trial court in determining purpose – Approach by trial court in determining the subjective intention of the directors when voting to approve the PIPE – Whether NTP was facing an urgent liquidity crisis – Whether the directors were genuinely concerned that lender banks were entitled to and would call in their loans leading to an urgent liquidity crisis in NTP – Appellate interference with trial judge's findings of fact and inferences from the evidence – Rule 62.4 of the Civil Procedure Rules 2000 – Whether NTP appealed against the trial judge's finding on breach of the section 120(1) duty – Fresh evidence – Principles in Ladd v Marshall – Principles in R (Iran) v Secretary of State for the Home Department — Whether banks' post judgment demands provides compelling evidence that undermine judge's finding of no urgent liquidity crisis – Whether judge failed to assess evidence of urgent liquidity crisis against NTP's pleaded case – Whether judge erred in his evaluation and analysis of chronology of events in relation to the liquidity crisis – Whether judge failed to take into account the relevant timeline in his evaluation of the liquidity crisis - Whether judge erred in finding the evidence of NTP's witnesses including the four directors who voted for the PIPE unreliable – Whether judge erred in finding of improper purpose by four directors who voted to approve the PIPE – Whether judge failed to take into account the written note of Dr. Tam in evaluating evidence of urgent liquidity crisis and purpose – Whether judge's finding of no urgent liquidity crisis was plainly wrong and ought to be set aside and appellate court decide on purpose afresh in all the circumstances

The appellant, Nam Tai Property Inc ("NTP"), is a property development and management company incorporated in the Territory of the Virgin Islands ("BVI"). The respondent, IsZo Capital LP ("IsZo"), is an investment fund and a limited partnership formed under the laws of the State of Delaware, United States of America ("US"). Kaisa Group Holdings Limited ("Kaisa") is an investment holding company, principally engaged in property development, property investment and property management, through its subsidiaries, in the People's Republic of China ("the PRC"). Initially, Kaisa owned 1,000 ordinary shares in NTP and held beneficially through Greater Sail Limited ("GSL"), a further 3,891,385 shares. In 2019 and 2020 various subsidiaries of NTP took out various loans and credit facilities with six banks in the People's Republic of China, namely, Bank of Beijing ("BOB"), China Everbright Bank ("CEB"), Industrial Bank ("IB"), Bank of China ("BOC"), Shenzhen Rural Commercial Bank ("SRCB") and Xiamen International Bank ("XIB") (collectively referred to as the "lender banks"). NTP owed no legal obligation, either as borrower or as guarantor or otherwise, to any of the lender banks for the repayment of these loans and credit facilities.

On 11th September 2020, IsZo and other investor/shareholders representing at least 40 percent of the issued shares in NTP served a requisition on NTP ("the requisition"). By the requisition, they requested the Board of Directors of NTP ("the Board") to convene a meeting of the shareholders to remove and replace five directors on the Board. Shortly thereafter, Dr. Lai Ling Tam ("Dr. Tam") was appointed as Executive Chairman of the Board of NTP. The Board, however, did not convene a meeting of the shareholders to consider passing the resolutions foreshadowed by the requisition.

Subsequently, on 5th October 2020, the Board approved a private investment in public equity ("the PIPE") and allotted 16,051,219 newly issued shares in NTP to GSL and 2,603,366 newly issued shares to West Ridge Investment Company Limited ("West Ridge"), a Hong Kong company. Through the PIPE, NTP raised a total of US$175 million consisting of US$150 million from Kaisa for the shares allotted to its subsidiary GSL, and US$25 million for the shares allotted to West Ridge. As a result of the PIPE, the shares held by Kaisa beneficially in NTP increased from about 23.9% to about 43.9% and West Ridge held about 4.5%.

On 13th October 2020, IsZo issued proceedings in the Commercial Court challenging the validity of the PIPE and the allotment of shares to GSL and West Ridge. The central issue for determination by the court below was whether the four directors who voted to approve the PIPE did so for the purpose of raising capital in order to save NTP from an urgent liquidity crisis in late September 2020 triggered by the requisition or, alternatively, whether the said directors voted for the PIPE for the purpose of giving *de facto* control of NTP to Kaisa and defeating the requisition.

The judge found that NTP was not facing an urgent liquidity crisis at the time of approval of the PIPE, and that the four directors who had voted to approve the PIPE did so for the improper purpose of giving Kaisa *de facto* control of NTP and defeating the requisition, in breach of section 121 of the Business Companies Act 2004 ("the Act"). He also found that the four directors who voted to approve the PIPE did not act *bona fide* to save NTP for the benefit of all the shareholders in breach of their duty under section 120(1) of the Act. The judge held that the approval of the PIPE and the allotment of the new shares to GSL and West Ridge were ineffective and void. He accordingly set aside the allotment of shares and ordered rectification of the register of members of NTP so as to delete all entries in respect of the said allotments. The judge also directed, among other things: (i) that NTP convene a meeting, pursuant section 86(1) of the Act, of the members of the company at 9:00 am on 26th April 2021, for the purpose of considering the passage of the resolutions set out in the requisition; and (ii) enjoined NTP and its directors from counting, at any meeting of NTP, any votes in respect of the shares invalidly allotted by virtue of the PIPE; or (iii) from passing resolutions either changing the registered office of the company or amending its memorandum and articles of association. Additionally, the learned judge ordered NTP and GSL, jointly and severally, to pay to IsZo its costs of the claim, and to make a partial payment of US$1,900,000, which costs were to be assessed if not agreed within 21 days. The judge also refused NTP's application for a stay of certain of his orders.

Shortly after delivery of the judgment in the court below, four of the lender banks issued letters to the subsidiaries of NTP demanding repayment of their loans. NTP made an application to have these four post-judgment demand letters admitted as fresh or new evidence on the basis that they undermine the judge's primary conclusions of no urgent liquidity crisis and improper purpose. In opposing NTP's fresh evidence application, IsZo exhibited a copy of NTP's annual report for its fiscal year ending 31st December 2020 – US Sec Form 20-F.

NTP appealed the judgment and orders made by the learned judge, except the order for convening the requisitioned meeting. By way of counter notice of appeal, IsZo invites this Court, if necessary, to uphold the judge's decision on additional grounds. The issues which arise for determination are: (i) whether NTP has appealed against, and the Court of Appeal can consider any challenge to, the judge's finding of a breach of the section 120(1) of the Act; (ii) whether the fresh evidence would probably have an important influence on the result of the appeal if admitted; (iii) whether the judge erred in finding that the ostensible justification for the PIPE, the urgent liquidity crisis, was not made out; (iv) whether the judge erred in his evaluation and analysis of whether the liquidity crisis had been made out by omitting relevant events from the factual chronology; (v) whether the judge erred in failing to take into account the contemporaneous evidence of Dr. Tam's late September 2020 note relating to the various alternatives or options to the PIPE which were considered; (vi) whether the judge's assessment of the evidence of Dr. Tam's and each of the four directors was flawed; and (vii) whether the four directors who voted for the PIPE acted for an improper purpose and/or in breach of their statutory duty to act honestly and in good faith and in the best interest of NTP.

Held: dismissing the appeal, affirming the judgment and orders of the court below; and ordering that NTP and GSL pay IsZo's costs of NTP's appeal in proportions of 80 percent by NTP and 20 percent by GSL, such costs being no more than two-thirds of IsZo's costs in the court below; dismissing the counter-appeal and making no order as to costs; making the orders set out at paragraphs 285-288; and granting the fresh evidence application in the terms set out at paragraph 73, that:

1. An appellate court ought not to interfere with findings of fact made by a trial judge, unless compelled to do so. This is because a trial judge, having seen and heard the witnesses give their evidence and being cross-examined, enjoys a distinct advantage over an appellate court when it comes to assessing the credibility of witnesses and the reliability of aspects of their evidence given at the trial, and in making findings of fact and drawing reasonable and appropriate inferences from such findings. However, where a trial judge has not properly exercised his or her unique position and has either failed to evaluate or to properly take into account important evidence or has reached findings in reliance on an incorrect evaluation of the evidence, or omitted to take into account important relevant evidence, or his conclusion on the evidence is erroneous or plainly wrong, an appellate court ought not to hesitate to intervene and to set aside such findings.

   Group Seven Ltd v Nasir [2019] EWCA Civ 614 applied; **Fage UK Ltd v Chobani UK Ltd** [2014] EWCA Civ 5 applied; **Henderson v Foxworth Investments Ltd [2014]** UKSC 41 considered; **Pleshakov v Sky Stream Corporation and others** [2021] UKPC 15 considered; **Watt (or Thomas) v Thomas** [1947] AC 484 considered.

2. An appellate court must be mindful of the important and laudable principle that cases are to be decided on the evidence led at trial so as to bring finality to litigation. Therefore, the **Ladd v Marshall** principles must be applied with rigour and the appellate court must be satisfied that the three limbs of the test are met before a fresh evidence application, in an appeal, can be granted. In this case, the evidence sought to be adduced by the appellant, comprising of four bank demand letters issued after delivery of the judgment below, were not in existence and thus not available for use at the trial. Such evidence can only be admitted on appeal in exceptional circumstances, examples of which are set out in **R (Iran) and Ors v Secretary of State for the Home Department**. While not strictly satisfying the first of the **Ladd v Marshall** principles, the four post-judgment demand letters do satisfy the second and third limbs of these principles. Furthermore, the four post-judgment bank demand letters may be admitted as new evidence, as they could arguably be said to undermine the judge's primary findings that the lender banks were not entitled to call-in their respective loans and that no urgent liquidity crisis existed with NTP when the PIPE was approved by the Board on 5th October 2020. Moreover, it is also arguable that these four bank demand letters could support the judge's findings on this important issue which would equally also be a good reason for this Court exercising its discretion to admit them. Therefore, in the interest of justice, the four post-judgment bank demand letters are admitted as new evidence together with a copy of NTP's annual report for fiscal year ending 31st December 2020 - US SEC Form 20-F.

   Ladd v Marshall [1954] 1 WLR 1489 applied; **R (Iran) and Ors v Secretary of State for the Home Department** [2005] EWCA Civ 982 considered; **Hadmor Productions Ltd v Hamilton** [1983] AC 191, 220D considered.

3. A notice of appeal which does not specify, as challenged, each and every finding of fact or of law does not offend rule 62.4(1)(b) of the Civil Procedure Rules 2000 and, accordingly, does not exclude or prevent a challenge by an appellant to any other findings of fact or law not expressly challenged in the notice of appeal. What is crucial is that the notice of appeal must give details of the decision which is being appealed, identifying so far as practicable, any finding of fact and of law, which the appellant seeks to challenge. NTP, in its notice of appeal, did expressly challenge the judge's conclusion in paragraph 166 of a breach of section 120(1) of the Act. The judge's conclusion at paragraph 166 of a breach of duty by the four directors under section 120(1) of the Act was, to a large extent, parasitic upon his earlier primary finding of no urgent liquidity crisis and his conclusion of improper purpose in breach of section 121. Accordingly, NTP's appeal challenges the judge's findings of breach of duty by the four directors in approving the PIPE in relation to both section 121 and section 120(1). Further, in light of the broad powers under section 31(2) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**, the Court is empowered to make any order which it thinks just to ensure the determination on the merits of the real question in controversy between the parties, notwithstanding that any finding of fact or of law or ground for allowing

or for affirming or for varying any decision of the lower court is not specified in the notice of appeal or in the respondent's notice.

Rule 62.4 of the **Civil Procedure Rules 2000** applied; **Sheikh Mohamed Ali M Alhamrani et al v Sheikh Absullah Ali M Alhamrani** BVIHCMAP2016/0030 (delivered 24th November 2017, unreported) applied; Section 31(2) of **Eastern Caribbean Supreme Court (Virgin Islands) Act** Cap. 80, Revised Laws of the Virgin Islands applied.

4. In order to find that the directors had, in voting to approve the PIPE, breached their duty under section 120(1) of Act to act honestly and in good faith and in what they believe to be in the best interest of the company, IsZo must first have pleaded each of these three elements, and must have conducted their case at trial on the basis that these directors were acting dishonestly, without good faith and not in the best interests of NTP and its shareholders, when they so voted. IsZo's case as pleaded was not based upon all three limbs of section 120(1). Further, IsZo's case at trial, as the judge correctly observed, was not conducted or based upon allegations of dishonesty by the four directors or that they were lying, but principally, if not exclusively, (the "paired down" case) on the basis that the real purpose in voting to approve the PIPE was not capital raising, but ensuring Kaisa's effective control of NTP and defeating the requisition. It was therefore not open to the court to find any breach of duty under section 120(1) and the judge was wrong in law to do so. Accordingly, the judge's finding of a breach of section 120(1) duty is set aside.

Section 120(1) of **Business Companies Act 2004** Act No. 4 of 2004 applied.

5. The test for whether directors acted for an improper purpose under section 121 of the **Business Companies Act 2004** is the dominant or substantial purpose test.

Antow Holdings Limited v Best Nation Investments Limited and Others [2018] ECSCJ No. 253 (delivered 18th September 2018).

6. In determining what was the subjective intention or purpose of those making a particular decision which is within their statutory powers, a judge must apply an objective approach to the assessment of the evidence before him. This exercise involves a careful examination of all the relevant surrounding circumstances and reliable evidence, oral or documentary, which point to or may assist in a proper determination of their subjective intention or purpose when they made the decision being impugned. An important piece of evidence in this evaluative process, though not conclusive, is the evidence of the directors themselves as to their intentions when they so voted. This evidence must be weighed against other contemporaneous actions, statements, documents and surrounding circumstances which, individually or collectively, shed some light on the true intention of the directors. In conducting this exercise, a judge must also caution himself that management and commercial

decisions are matters for the directors, and it is not for the court to substitute its own assessment or view of the risk, prudence or reasonableness of the decision itself.

Howard Smith Ltd v Ampol Petroleum Ltd [1972] 2 NSWLR 850 considered; **Hindle v John Cotton Ltd** (1919) 56 SCLR applied; **Independent Asset Management Company Limited v Swiss Forfaiting Ltd** [2017] ECSCJ No. 271 (delivered 24th November 2017) considered; **Antow Holdings Limited v Best Nation and Others** [2018] ECSCJ No. 253 (delivered 21st September 2018) considered.

7. While, in relation to the judge's first basis for finding that an urgent liquidity crisis had not been made out, he was entitled to consider and to reject the evidence adduced on behalf of NTP as to the existence or likelihood that NTP was facing an urgent liquidity crisis. The judge erred in not specifically identifying and evaluating evidentially whether, the directors had a 'real concern' that the lender banks were entitled to demand repayment of their loans, and that they would do so imminently, as pleaded by NTP in its defence. The judge was not satisfied on the evidence from the letters of concern issued by each of the lender banks in late September 2020 that any of them were entitled to call in their loans. The judge also rejected the evidence of Dr. Tam that such an entitlement arose from the letters of concern issued by the lender banks in which they expressly reserved their right to do so. The judge correctly concluded that an express reservation of such rights does not, without more, give rise to an actual entitlement to do so or that the said banks were in fact going to call in their loans. In light of the judge's failure, in his evaluation of the evidence, to address his mind as to whether the directors of NTP had a real concern that the lender banks were entitled to call-in their loans, it is open to this Court to reach its own conclusion on this issue.

8. The learned judge's conclusion that XIB had not raised any issues about its loan facilities with NTP and accordingly such concerns about a change in effective control of NTP were not universal (his second basis), was incorrect on the evidence before him. However, having a concern (the level and seriousness of which is also a matter for assessment) and acting upon it, are two different matters. The evidence disclosed that there was universal concern among the five lending banks (including XIB) in mid to late September 2020 regarding the public activism of IsZo and the requisition, and what impact these events could or may have for NTP going forward, and for the timely repayment of the banks' respective loans. It follows that the judge was wrong to find that such concern was not universally held among the five lending banks.

9. The judge found, as his third basis, that the loans by BOB, CEB and IB were comparatively trivial loans and, if necessary, could easily be paid off from

NTP's cash reserves, therefore these could not contribute to a cash crisis. It is clear that NTP had, in late September 2020, cash reserves sufficient to pay in full the loans from these three banks should it have become necessary for it to do so. While the judge ought not to have described these loans as 'trivial', each being for quite substantial sums, he clearly did so by way of comparison with the much larger loan sums owed to BOC and SRCB. It is also clear, that even after NTP had repaid the SRCB loan in full, it had the cash reserves to pay in full the three smaller BOB, CEB and IB loans if it became necessary to do so. This would leave only the much larger BOC loan, which itself was reduced substantially by the part payment made on 12th November 2020. Accordingly, NTP's challenge to the judge's third reason for not accepting that NTP was facing an urgent liquidity crisis in late September 2020 is misconceived.

10. The judge's fourth basis for his finding of no urgent liquidity crisis, is that BOC, the largest lender, was the best secured as the Inno Park project was nearing completion. In giving this fourth reason, the judge ought to have exercised some caution. This is because the question of which of the legal steps or recourses available to a lender bank it may elect to take or put into action at any given point in time to secure repayment of its loan, including realisation of its security, is a matter for the particular lender bank to assess and to determine, taking its own best interest into account. These are not issues for a court to speculate about, but are matters best suited for BOC as the lender bank, and for the directors and management of NTP to negotiate for itself. However, the judge in this fourth reason for his finding of no urgent liquidity crisis, put it no higher than that BOC's position, as a secured creditor, made it 'less likely' that it would be disturbed by a change in management of NTP. In putting it this way, the judge did not usurp or trespass upon the purview, judgment and authority of the directors of NTP.

11. The judge's fifth basis for finding that no urgent liquidity crisis had been made out is one which is correct as a matter of applicable banking law and is not in dispute. It is common ground that NTP had no legal obligation, whether as a borrower or a guarantor, or as the provider of security for any of the bank loans, to repay the sums borrowed by its wholly owned subsidiaries. The important question is whether it was open to the judge to rely on this lack of legal recourse by the lender banks against NTP itself, as a basis for finding that NTP was not faced with an urgent liquidity crisis in late September 2020. This finding was not immaterial to the question of whether NTP itself was faced in late September 2020 with an urgent liquidity crisis, absent any legal obligation to repay any of these loans. However, implicit in the judge's characterisation of this 'immunity' from direct recourse as giving NTP a 'significant bargaining power' with the lender banks, is the practical and commercial reality that were the loans to be called in to the subsidiaries and not paid, NTP, while not being

legally obligated to repay them, would be faced with making payment in order to prevent a financial crisis with its subsidiaries and adverse consequences to the value of its traded stock. In this fifth reason, the judge did not allude to or consider these practical and commercial realities in his reasoning and analysis. Nor did he take into account that on the evidence it was NTP which had repaid, from its cash reserves, the SRCB loan in September 2020 and had made a substantial partial payment to BOC in November 2020.

Howard Smith Ltd v Ampol Petroleum Ltd [1972] 2 NSWLR 850 considered.

12. The conclusions reached on NTP's challenges to each of the judge's five bases or reasons for finding no urgent liquidity crisis had been made out, and whether, on the evidence adduced, the directors had a real concern that the lender banks were entitled to call-in their loans, are not dispositive of the issue of whether the judge's finding of no urgent liquidity crisis was erroneous or plainly wrong, such that its ought to be set aside and a finding of an urgent liquidity crisis or the reasonable likelihood of such a crisis substituted. The final determination as to NTP's challenges to the judge's finding and conclusion of no urgent liquidity crisis and improper purpose, hinges also on a determination of whether the judge failed or omitted to consider and to take into account certain key events in the factual chronology and timeline in his evaluation of the liquidity crisis and its urgency; and also on the alleged failure by the judge to take into account the so-called contemporaneous late September 2020 written note of Dr. Tam relating to the various alternatives or options to the PIPE considered at that time.

Co-Operative Group (CWS) Ltd v International Computers Ltd [2003] EWCA Civ 1955 considered.

13. Where a trial judge is giving judgment or a decision in a matter, particularly after a trial in which there were witnesses of fact, fairness and the demands of justice require that the trial judge must produce a well-reasoned judgment addressing all the relevant issues, factual and legal, which fall for the court's determination. However, it is not a requirement that a judgment must deal with each and every point raised by the parties, whether of law or of fact, or with every argument or submission relied on by counsel for the parties. What is of critical importance is that the judgment must demonstrate that care was taken by the judge in his assessment and evaluation of the admitted evidence as to its cogency, reliability, and relevance. In this case, the judge adequately conducted an assessment and evaluation of the evidence, particularly as it relates to the issues of an urgent liquidity crisis facing NTP and the purpose of the directors in approving the PIPE and allotment of shares.

Simetra Global Assets Limited & others v Ikon Finance Limited & others [2019] EWCA Civ 1413 applied.

14. Having reviewed the totality of the evidence and the applicable principles which ought to guide a court when determining the subjective intentions of directors in making a decision on behalf of a company, this Court is not satisfied that Dr. Tam and or the four directors who voted to approve the PIPE and allotment of shares, had a real or reasonable concern, at that time, that the lender banks were entitled to and were very likely going to demand immediate repayment of their loans, causing NTP to face an urgent liquidity crisis in late September or on 5th October 2020 when the PIPE was approved, plunging NTP into financial crisis and insolvency. From all the surrounding circumstances, including the failure by the directors, in breach of their duty under the company's articles of association, to act on the validly issued requisition by IsZo and the other shareholders, the judge's conclusion that an urgent liquidity crisis had not been made out by NTP is a conclusion which was open to him on the totality of the evidence, having seen and heard the witnesses.

15. The judge's approach to the timeline and chronology of events in the judgment cannot be assailed. The judge did consider much of the relevant evidence in the chronology which predates the requisition. The judge was correct to consider, in greater depth and to attach more importance evidentially, to the events occurring in late September after the requisition, which was NTP's pleaded case as to when the urgent liquidity crisis is said to have arisen. This the judge did both by examining the reliability and credibility of each of the witnesses for NTP, particularly as to when the urgent liquidity crisis is said to have arisen such as to warrant consideration of capital raising and a PIPE. The judge evaluated the events of the second half of September, including the notices from each of the lender banks expressing their concerns, and the demand for repayment by SRCB on 23rd September 2020. He also took into account the demand for and receipt of a partial repayment on the BOC loan in November 2020 after approval of the PIPE. Accordingly, NTP's challenges based upon the alleged omitted events fails.

    Simetra Global Assets Limited & others v Ikon Finance Limited & others [2019] EWCA Civ 1413 applied.

16. In assessing and evaluating the cogency and seriousness of the alleged purpose for which the four directors voted to approve the PIPE, the judge was required to assess the nature and quality of the evidence led by NTP's witnesses, including Dr. Tam and the four directors, as to the existence, seriousness and urgency of the liquidity crisis, so as to determine objectively what was the subjective intention of each of the said four directors. It follows, therefore, that the judge, as the trier of fact, did not err in his approach to the evidence of Dr. Tam as to the risk or seriousness of the liquidity crisis, and in determining that, in all the circumstances, he had exaggerated the risk of the alleged liquidity crisis and, in doing so, his evidence was open to question and was therefore unreliable on this critical issue of fact.

17. There is no discernible error in the judge's assessment of the evidence, credibility and reliability of the four directors who voted to approve the PIPE. In relation to the evidence of three of the four directors, the judge concluded that their subjective intention or purpose was to ensure that Kaisa would have de facto control of NTP and to defeat the requisition. He concluded that, based on their experience as directors and the obvious practical effect of the PIPE on the voting power of Kaisa which effect they had either denied or avoided answering, their lack of forthrightness and candour undermined their credibility and reliability as witnesses, and consequently, the value and cogency of their evidence as to the genuine purpose for which they voted to approve the PIPE. In so far as it relates to the fourth director Dr. Lo, whom the judge found to be somewhat credible, the judge concluded, correctly, that his admitted purpose was to ensure that the change in the Board proposed by the requisitionists failed. These findings were open to the judge on the evidence. Therefore, there is no basis upon which this Court can or ought to interfere with these findings.

18. In relation to the Dr. Tam's September 2020 written note, there is no evidence that the note was written immediately or very shortly after the meeting at which he and Mr. Wan had discussed and rejected three options to a PIPE. Accordingly, Dr. Tam's September note was not a contemporaneous note in the true sense. The evidence was that Dr. Tam used this note as an aide-memoire or speaking note during the meetings of the audit committee and of the Board on 5th October 2020, of which meetings there are minutes admitted into evidence before the judge. It follows, therefore, that Dr. Tam's September note does not add anything to the question of what was in fact discussed at the said meetings leading to approval of the PIPE. Also, Dr. Tam's written note does not add anything to the evidence he gave in his witness statement as to the three options he had discussed with Mr. Wan and their rejection of them on the basis of lack of time. Accordingly, the omission by the judge to refer to this note and to treat it as a contemporaneous document was of no consequence.

JUDGMENT

Overview

[1] **FARARA JA [AG.]**: This matter concerns whether the Board of Directors ("the Board") of Nam Tai Property Inc ("NTP"), a company incorporated under the laws of the Territory of the Virgin Islands ("the BVI") and listed on the New York Stock Exchange ("NYSE"), acted for an improper purpose contrary to section 121 of the **Business Companies Act, 2004**[1] ("the Act") when, on 5th October 2020, it

[1] Act No. 4 of 2004.

approved a private investment in public equity ("the PIPE"), and allotted 16,051,219 newly issued shares in NTP to Greater Sail Limited ("GSL"), a wholly owned subsidiary of Kaisa Group Holdings Ltd ("Kaisa"), and 2,603,366 newly issued shares to West Ridge Investment Company Limited ("West Ridge"). This matter also concerns whether the four directors who voted to approve the PIPE did so in breach of their fiduciary duty under section 120(1) of the Act, to act honestly and in good faith and in what they believed to be in the best interest of NTP.

[2] The central issue for determination by the court below, which was one of mixed fact and law, was whether the four directors who voted to approve the PIPE did so for the purpose, or for the dominant purpose, of raising capital in order to save NTP from an urgent liquidity crisis, triggered by a requisition served on NTP on 11th September 2020 by IsZo Capital LP ("IsZo") and other investor/shareholders representing at least 40 percent of the issued shares in NTP ("the Requisition") (as pleaded by NTP) or, alternatively, whether the said directors voted for the PIPE for the purpose of defeating the Requisition and giving *de facto* control of NTP to Kaisa (as pleaded by IsZo). By the Requisition, the requisitionists sought to have the directors convene a meeting of shareholders of the company to pass resolutions for the removal of five directors and the appointment of new directors in their stead. As a result of the PIPE, NTP raised a total of US$175 million consisting of US$150 million from Kaisa for the shares allotted to its subsidiary GSL, and US$25 million for the shares allotted to West Ridge.

Background

[3] NTP (originally named Nam Tai Electronics Inc.) was incorporated on 12th August 1987 under the **International Business Companies Act 1984**[2] ("IBC Act"). It was re-registered under the Act on 1st January 2007. In 1988, NTP was floated on the National Association of Securities Dealers ("NASDAQ")[3] stock exchange. In 2003,

[2] Cap. 291, Revised Laws of the Virgin Islands, 1991.
[3] Now: Financial Industry Regulatory Authority ("FINRA").

this listing was moved to the NYSE. Many of its existing shareholders, including IsZo, are US investors.

[4] Kaisa is an investment holding company registered on the NYSE with the assigned number 1638. Through its subsidiaries (of which there are several), Kaisa is principally engaged in property development, property investment and property management in the People's Republic of China ("the PRC"). Accordingly, Kaisa has much experience in property management and development in Asia and, specifically, in the PRC.

[5] For some years NTP operated an electronics business based in Shenzhen in the PRC and had acquired land at attractive prices and built its factories. In 2014, there was a decline in the electronics business, accordingly, NTP changed its business focus to that of property development and management. By then its land in Shenzhen was very valuable. However, NTP lacked experience in the property development sector. This led to Kaisa, which is reputed to have much relevant experience in property development, becoming a shareholder of NTP, acquiring by July 2017 25% of its issued shares (reduced to 23.9% subsequently). Through its wholly owned subsidiaries, NTP subsequently acquired and owns various tracks of land in Guangdong, Hong Kong, Macao and Wusi.

[6] IsZo is a limited partnership formed under the laws of the State of Delaware in the United States of America. Its general partner is IsZo Capital GP LLC. IsZo is an investment fund run by Dr. Brian Sheehy ("Dr. Sheehy"), who gave evidence at the trial. Immediately prior to the PIPE, IsZo was the registered owner of 1,000 ordinary shares in NTP and the beneficial owner of a further 3,891,385 shares. By March 2019, IsZo held 8.8% of the shares in NTP. In 2019 and 2020, Dr. Sheehy became concerned with NTP's business direction and management. NTP had used some of its very substantial cash reserves to acquire additional and more expensive tracks of land, instead of developing its existing land which had been acquired quite cheaply and was now of considerable value. In particular, NTP had purchased, at

RMB 705.48 million (just over US$100 million), a substantial piece of land in Dongguan City in Guangdong (the "Dongguan land") sold at public auction. It has not been disputed that the purchase of the Dongguan land was made by NTP without board discussion or approval. It is these and other concerns on the part of Dr. Sheehy which led to what has been described, during the trial, as IsZo's public activism.

[7] GSL has been a shareholder of NTP since about August 2017, at which time it held 6,504,355 shares in NTP or 17.7% of its issued share capital. Its interest was subsequently increased to a total of 9,371,703 shares or 23.9% prior to the PIPE. As a result of the PIPE, GSL purportedly acquired and was allotted a further 16,051,219 shares in NTP. This equates to 43.9% of the issued shares in NTP. GSL is a wholly owned subsidiary of Kaisa and the entity through which Kaisa holds its shares beneficially in NTP.

[8] West Ridge is a Hong Kong registered company. It (purportedly) became a shareholder of NTP as a result of the PIPE and the allotment to it of 2,603,366 shares in NTP which equates to 4.5% of its issued shares.

[9] IsZo brought a claim in the Commercial Court on 13th October 2020 challenging the validity of the PIPE and the allotments of shares to GSL and West Ridge. The learned judge found for IsZo on its claim (as amended) and held that the PIPE had been made for an improper purpose in breach of section 121 of the Act, and that the directors who voted to approve the PIPE did not act *bona fide* in order to save NTP for the benefit of all shareholders in breach of their duty under section 120(1) of the Act. Accordingly, the learned judge declared that the approval of the PIPE and the allotment of the new shares to GSL and West Ridge were ineffective and void.

[10] Further, the learned judge made orders setting aside the allotment of shares to both GSL and West Ridge issued as a direct result of the PIPE and ordered that the

register of members of NTP be rectified to delete all entries in respect of the said allotments. The judge also made an order pursuant to section 86(1) of the Act for NTP to convene a meeting of the members of the company at 9:00am on 26th April 2021, to be held virtually, for the purpose of considering the passage of the resolutions set out in the Requisition. Detailed directions for convening the said meeting were set out at Schedule 1 to the court's said order.[4]

[11] In addition, the learned judge ordered NTP and GSL, jointly and severally, to pay to IsZo its costs of the claim, and to make a partial payment of US$1,900,000 on account of such costs, which were to be assessed if not agreed within 21 days. The judge also refused NTP's application for a stay of certain of his orders. Furthermore, after hearing counsel for the parties, the learned judge made further orders, inter alia, enjoining NTP and its directors from counting, at any meeting of NTP, any votes in respect of the shares invalidly allotted by virtue of the PIPE; or to pass resolutions either changing the registered office of the company or amending its memorandum and articles of association. However, on 20th April 2021, on the application of NTP, a single judge of this Court stayed paragraph 3 of the order of the learned judge requiring NTP to convene a meeting of its members at 9:00 am on 26th April 2021, which said meeting was, accordingly, adjourned pending the determination of this appeal.[5]

NTP's Board

[12] It was the case for IsZo, at trial, that by June 2019, Kaisa had procured the appointment of five Kaisa connected persons (out of the 8 directors) to the board of directors of NTP. These 5 directors were:

(i) Ying Chi Kwok ("YC Kwok"), who held his directorship since October 2017, was the Chief Executive Officer (since February 2018) and Chairman (since June 2018) of NTP. He is the brother of Ying Shing Kwok ("YS Kwok") who is the chairman and co-founder of Kaisa.

[4] Core appeal bundle, Tab 24, e-page 764.
[5] Core appeal bundle, Tab. 14, e-page 483.

(ii) Hao Xu ("Mr. Xu"), who was a director since August 2018, serves as Vice President of Kaisa and President of its subsidiary, Kaisa Financial Group Holdings Limited, General Manager in Kaisa's group investment bank department, and was formerly a director of Kaisa Health Group Holdings Limited ("Kaisa Health") in which Kaisa has a 43% shareholding.

(iii) Vincent Fok ("Mr. Fok") who has been a director of NTP since June 2018 and a director of Kaisa Health. He and was brought on to NTP's Board at the suggestion of Kaisa.

(iv) Professor Aiping Lyu ("Prof. Lyu") who is a director of NTP since June 2019 and is a director of Kaisa Health. He was brought on to NTP's Board at the suggestion of Kaisa; and

(v) Professor Si Zong Wu ("Prof. Wu") who has been a director of NTP since June 2019 and was also brought on to the Board of NTP at the suggestion of Kaisa.

[13] The other three non-Kaisa connected directors on the Board were Mr. Peter R. Kellogg appointed since June 2000, Professor Si Zong Xu appointed on 7th July 2019, and Mr. Mark Waslen appointed since July 2003.

[14] It is also not in dispute that at the annual general meeting of NTP held on 5th June 2020 ("the AGM"), seven of the existing directors were re-elected to the Board. However, the proposal to elect to the Board Mr. Aaron Kwok, a jeweler by trade with no apparent experience in property management and development, and the son of the then Chairman of the Board and Chief Executive Officer of NTP, YC Kwok was defeated.

[15] It is also common ground that on 14th September 2020, three days after the Requisition was served on NTP, YC Kwok resigned as Chairman and CEO of NTP.

On 21st September 2020, some 10 days after the Requisition, NTP announced that Dr. Lai Ling Tam ("Dr. Tam") was appointed to the role of Executive Chairman of the Board of NTP. Dr. Tam gave evidence at the trial. With the resignation of YC Kwok, the Requisition seeks, *inter alia*, the removal of the remaining four so-called Kaisa connected directors, that is, Dr. Wing Yan "William" ("Dr. Lo"), Mr. Fok, Prof. Lyu and Prof. Wu, all of whom voted to approve the PIPE.

The Bank Loans

[16] It is not in dispute that in 2019 and 2020, in response to significant demands on its cash flow to finance its ongoing construction projects, NTP took out six loans or credit facilities with Bank of Beijing ("BOB"), China Everbright Bank ("CEB"), Industrial Bank ("IB"), Bank of China ("BOC"), Shenzhen Rural Commercial Bank ("SCRB") and Xiamen International Bank ("XIB"). It was said that these loans would permit NTP to use its cash reserves (which were then quite substantial) to finance the acquisition of additional land for future development. One property acquired with a bank loan is the Dongguan land. An uncontroversial summary of the six bank loans or credit facilities, and the purpose for which each were obtained, is set out at paragraphs 20 to 33 of the witness statement of Mr. Fei Peng Jiang ("Mr. Jiang"), NTP's financial director.

[17] Each of these loan agreements and credit facilities contained default and cross-default provisions. By the cross-default provisions, a default under one agreement could trigger a default under the other loan agreements, with the result (worst case scenario) that the early repayment of all six bank loans could be demanded. I shall return to the cross-default provisions and their significance when I come to deal with NTP's first ground of appeal, which challenges the judge's conclusion that NTP had failed to establish to his satisfaction, that it was facing an urgent liquidity crisis in late September 2020. Suffice it to be noted at this stage, that although accepting that elements of what Dr. Tam testified as to Chinese banking practices were no doubt true, the judge did not accept his evidence in relation to the banks calling in their respective loans and the borrowers being in a weak position.

[18] It is also notable that the BOC and SRCB loans were for significantly larger principal sums than the other four loans. Most importantly, NTP itself had no liability or legal obligation to any of the Lending Banks to repay their loan or credit facility taken out by the subsidiaries, as it had not entered into any borrowing, credit or guarantee agreement with any of the Lending Banks.

IsZo's Public Activism, NTP's reaction and the Requisition

[19] In May and July 2020, IsZo made public its dissatisfaction with the management and Board of NTP, the business decisions they had made, and the detrimental effect (as Dr. Sheehy of IsZo saw it) which these decisions had on the company's share value. This was done by way of two letters published by IsZo, severely critical of the current management and the 'Kaisa controlled Board', and by a joint public filing by IsZo and other dissident shareholders with the Securities and Exchange Commission ("SEC").

[20] On 27th May 2020, prior to the AGM, IsZo published a lengthy open letter to shareholders of NTP ("IsZo's first open letter") in which it made scathing allegations against the current management of NTP and the Board. Details of the letter are set out at paragraph 14 of the judgment below and do not necessitate reproduction in full here. In summary, by this first open letter, IsZo charged management and the Board with certain actions which, in their assessment, had resulted in a 70% decline in the traded share price of NTP since Kaisa had, on 29th January 2018, replaced NTP's former CEO with YC Kwok. IsZo posited that this change resulted in 'ruinous leadership', an 'abrogation of corporate governance', and a 'haphazard capital allocation strategy under the direction of a Kaisa-controlled management team and Board.' It also charged the Board with making no effort 'to realise the true value of [NTP's] real estate assets for the benefit of shareholders', and with dangerous capital allocation decisions, the most recent example of which was using 80% of NTP's cash reserves to acquire the Dongguan land for US$101 million; and with jeopardizing NTP's intrinsic value by ignoring opportunities to 'monetize existing assets'.

[21] IsZo's first open letter was discussed by IsZo's then General Manager and Chief Financial Officer in a WeChat exchange on 29th May 2020 (see paragraph 318 below). IsZo's first open letter was also discussed at a board meeting of NTP held on 2nd June 2020. At that meeting, the two independent directors (Mr. Kellogg and Mr. Waslen) commented that IsZo's first open letter reflected the sentiments of many US investors and, that if the matter came to a meeting of shareholders, the current board might well lose. This seems to have prompted a bilingual 'internal' document drafted by Mr. Wan on 9th June 2020, in which he summarised the issues arising from IsZo's first open letter and the 'major options' being considered as: (i) talk with potential board seat(s) to IsZo – suggested by Mr. Kellogg; and (ii) 'asset injection from Kaisa to boost shareholding %'. On 16th July 2020 IsZo along with various other dissident shareholders, made a joint filing and solicitation agreement to support the making of a requisition to NTP for the convening of a shareholders' meeting with the objective of replacing the Board. This agreement was filed with the SEC making it a public document. <u>On 20th July 2020, IsZo published another letter critical of the Board of NTP ("IsZo's second open letter").</u>

[22] On 5th August 2020, NTP published its own letter defending its business strategy and responding to each of the points made by IsZo in its two open letters. NTP also commenced discussions with Houlihan Lokey Capital, Inc. ("Houlihan Lokey"), an investment bank, to provide financial advice in relation to a possible equity financing transaction and other financing alternatives.

IsZo's Amended Statement of Claim

[23] In its claim before the Commercial Court, IsZo relied on Articles 2, 22 and 23 of the memorandum and articles of association of NTP. By Article 2, the unissued shares of the company 'shall be at the disposal of the directors who may offer, allot, grant options over or otherwise dispose of them to such persons and for such consideration and upon such terms and conditions as the directors may determine'. Article 22 provides for the directors to convene meetings of members of the

company. It mandates that they 'shall convene such a meeting upon the written request of members holding more than 30 percent of the votes of the outstanding voting shares in the Company'. It was not seriously in dispute before the learned judge that the Requisition satisfied the requirements under Article 22 and that the Board did not act to convene a meeting of the shareholders of NTP as required under the said article.

[24] IsZo averred that in procuring the allotment of new shares to GSL and West Ridge, the directors who were responsible for the PIPE acted for an improper purpose and had breached their statutory duty under sections 120(1) and 121 of the Act. The main thrust of IsZo's case on improper purpose and breach of section 121 of the Act, in the court below, was that the sole or substantial purpose of the directors in approving the PIPE, without IsZo or the other shareholders having an opportunity to participate, was not to raise capital, but to ensure the de facto control of NTP by Kaisa, and to be assured that any resolution to remove or to appoint new directors of the company will be defeated. IsZo pleaded that by acting for the improper purpose the directors breached their fiduciary duty and also Article 2 to allot shares for a proper purpose under section 121. IsZo also averred that in approving the PIPE, the directors breached their duty under section 120(1) of the Act to act honestly and in good faith and in what they believed to be in the best interests of NTP, in particular, by failing to act fairly as between the different members of NTP.

[25] IsZo sought a declaration to the effect that the purported allotment of shares to GSL and West Ridge in consequence of the PIPE were void and ineffective, an order for rectification of the share register of NTP, and an order under section 86(1) of the Act requiring the directors to convene a meeting of the members of NTP for the purpose of considering and voting upon the proposed resolutions set out in the Requisition.

NTP's Defence

[26] In its defence, NTP pleaded that the directors approved the PIPE and the resulting allotment of newly issued shares to GSL and West Ridge for the purpose of raising funds in response to an urgent liquidity crisis which had arisen following the Requisition, in that the Requisition resulted in telephone calls from officers of each of the Lending Banks, seeking information and expressing their bank's concerns about the Requisition.[6] NTP also pleaded that, on 23rd September 2020, SRCB, gave written notice to NTP's subsidiary, in relation to an outstanding loan of US$29.5 million, plus penalty interest of $1.2 million and required an authorised representative of the company to attend a meeting for a discussion. The sum of US$30,700,000.00, was subsequently repaid by NTP on 29th September 2020 out of its then cash reserves. Further, NTP pleaded that between 25th and 27th September 2020, the pertinent borrower subsidiaries of NTP, received notices from four of the Lending Banks (BOC, BOB, IB and CEB) threatening demands for repayment of their respective loan. These four loans amounted, in aggregate, to US$147.5 million. Accordingly, the Board of NTP became concerned that these banks would demand early repayment, as SRCB had done.

[27] NTP pleaded that this gave rise to concerns on the part of the Board (or certain members of the Board) that the Lending Banks might demand, and might be entitled to require, repayment of their respective loans and the accompanying interest, and penalties.[7] NTP pleaded that, in light of its then cash reserves, its solvency was uncertain in that if the remaining four banks had demanded early payment in full of their loans, it would not be in a position to do so. Accordingly, the Board regarded this as, and had good reason to believe there was, a significant risk that the Lender Banks would act imminently, and there was an urgent need for NTP to find an alternative source of finance which would enable it to repay the Lender Banks immediately, should such repayment be required. NTP in denying the allegation of improper purpose pleaded by IsZo, averred that the offer to

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[6] See Bundle A of the Record of appeal, pgs. 25- 46.
[7] See record of appeal, Bundle A, Tab 3, paras. 7.2 to 7.2 of NTP's defence.

participate in the PIPE having been made only to GSL and West Ridge, the effect of the PIPE, which was to increase the Kaisa controlled issued capital in NTP and to enable Kaisa to defeat the resolutions proposed in the Requisition, was an incidental and causal effect, respectively, of the PIPE, and not its purpose.

[28] NTP denied any breach of section 120(1) of the Act and averred that each director who voted to approve the PIPE acted honestly and in good faith and in what he believed were in the best interests of NTP and its creditors' and intended it to serve the purpose of raising funds in response to a liquidity crisis which arose in the circumstances. As regards the Requisition and the obligation to convene a meeting of the members of NTP to consider and vote on the proposed resolutions, NTP stated that it 'is and always has been prepared to comply with its statutory obligation to convene a validly requisitioned special meeting of its members in accordance with Regulation 22 of the Articles'.[8] In the premises, NTP denied that IsZo was entitled to any of the reliefs claimed.

IsZo's Reply to NTP's Defence

[29] This can be taken fairly shortly. IsZo denied the assertion of a 'liquidity crisis' and that the directors of NTP had any real or substantial concern that the Lending Banks might or were entitled to require repayment of loan sums.[9] IsZo also denied that the directors of NTP were concerned in approving the PIPE in order to defeat any resolutions or to 'otherwise thereby to entrench the directors of [NTP] with a connection to Kaisa on the Board of Directors of NTP'. <u>IsZo denied the existence of a 'liquidity crisis' including the averment made by NTP that the demand by SRCB for payment of the aggregate sum of US$30.7 million was met from NTP's then cash reserves of US$103.8 million, after which payment there remained cash reserves of US$72.1 million; and no further demands for repayment were made of NTP by the other Lending Banks prior to the PIPE itself.[10]</u>

[8] See record of appeal, Bundle A, Tab 3, See para. 8.23 of NTP's defence.
[9] See record of appeal, Bundle A, Tab 3, e-pages 25-46 at paragraphs 7.2, 7.11, 8.7 and 8.11 of NTP's Defence.
[10] See para. 12.2 of IsZo's reply.

The Judgment

[30] As stated earlier, the learned judge correctly identified the two issues for his determination and found for IsZo on its claim on the basis that the PIPE (and allotment of new shares to GSL and West Ridge) was approved by the Board of NTP for an improper purpose contrary to section 121, and in breach of the duty of directors under section 120(1) of the Act. The two issues identified by the learned judge, with which there has been no demur, are:

> (a) " What was the purpose for which the board of directors approved the PIPE? IsZo says the purpose was to give Kaisa *de facto* control of [NTP] and defeat the Requisition. [NTP] says the purpose was saving the company from a liquidity crisis.
>
> (b) Did the directors act in the best interests of [NTP]? [NTP] say they acted in order to save [NTP] for the benefit of all shareholders. IsZo say the directors wrongfully ignored material factors, prejudicing non-Kaisa shareholders".

I merely observe that the issues posited at (a) and (b) are, respectively, a section 121 – proper purpose - and a section 120(1) – honestly, in good faith and in the best interest of the company- question. I also observe that the judge's formulation at (b) did not include whether the directors of NTP (in approving the PIPE) acted honestly and in good faith. I observe further, as IsZo submitted before this Court, that the duty to act honestly and in good faith and in what the directors believe to be in the best interest of the company, applied to directors exercising any of their 'powers' or performing any of their 'duties. As such this obligation would also apply to directors when exercising their powers under section 121 to act for a proper purpose.

[31] The learned judge assessed the credibility and reliability of each of the witnesses who gave evidence at the trial. This was the first 'route' by which he sought to determine the subjective purpose for which each of the four directors voted to

approve the PIPE. He found Dr. Sheehy, the sole witness for IsZo to be a credible witness. However, unsurprisingly, the judge concluded that Dr. Sheehy could not give very much evidence of relevance to the issues which the judge had to determine. By contrast, the judge found all witnesses for NTP (except Dr. Lo) to be unreliable and/or not credible. I shall return to these matters when considering the judge's approach to the evidence, his findings on credibility and his findings of fact, when dealing with the various grounds of appeal.

[32] In the judgment, the learned judge considered what, if any, adverse inferences he could or ought properly to draw in relation to the parties and their professional advisors. However, he declined to make any adverse inference against GSL from their failure to call certain witnesses, albeit the judge stated that were it necessary for him to do so for the purpose of his decision, he would have drawn adverse inference against GSL from its failure to call either Ms. Gigi Lee or Mr. Mai Fan, as no explanation for such failure was provided. Accordingly, the judge drew no adverse inferences from the late production of documents by NTP.

[33] However, the learned judge did not exercise similar restraint when he came to consider the evidence as it related to the lawyers (Kirkland & Ellis, Latham & Watkins and Walkers in the BVI and Hong Kong and Fangda Partners) who had acted for NTP in the lead-up to the PIPE being approved. None of these lawyers gave evidence at the trial and, accordingly, did not have an opportunity to explain their actions or to defend themselves against the possibility of adverse inferences being drawn as to their professional conduct.[11] The learned judge at paragraph 178, described as more troubling 'the deliberate decision by [NTP's] New York and BVI lawyers to generate no paper trail of the conferences with the client [NTP] and the advice given'. At paragraph 181 the learned judge states cryptically and pointedly: "I would have drawn inferences against [NTP] from the decision of its advisors deliberately to suppress the creation of any paper trail. In any event,

[11] See para. 180 of the judgment below.

however, I have been able to determine the matter without having to rely on inference."

[34] Finally, on this aspect, the learned judge saw it fitting to specifically direct that a copy of his judgment be sent to the senior partners of Kirkland & Ellis, Latham & Watkins, Walkers in the BVI and Hong Kong, and Fangda Partners 'so that they consider the ethical issues which I have highlighted.' The judge's adverse comments of unethical conduct on the part of the professional lawyers of these international firms, is one of the matters which was roundly criticised by lead counsel for both NTP and GSL.

[35] The critical findings and conclusions of the learned judge as to what was the subjective purpose of the four directors when they approved the PIPE, are set out at paragraphs 156 to 166 of the judgment. The judge distilled two possibilities from the pleaded cases and evidence before him. These were: (i) saving NTP from a liquidity crisis, or (ii) giving Kaisa *de facto* control of NTP and defeating the Requisition. The judge found that the subjective intent of Dr. Lo was more to be gleaned from his answer to certain questions put to him in cross-examination by counsel for IsZo, and not from his answer to a question about it from NTP's counsel in re-examination.[12] Accordingly, he found that Dr. Lo's primary purpose in approving the PIPE 'was to ensure that the change in the Board proposed by the requisitionists failed.'

[36] The judge posited that the subjective motives of the other three directors (Prof. Wu, Prof. Lyu and Mr. Fok) could be found by two routes. The first based upon his findings as to the unreliability of these witnesses, and the second based upon 'the factual matrix surrounding their decision to approve the PIPE.' There was no disagreement, before this Court, as to the soundness of these two routes in leading to the determination of the subjective purpose of these three directors in voting to approve the PIPE. Suffice it to be said that the point of departure by the parties

[12] See para. 153 of the judgment below.

relate to the judge's analysis and conclusions reached as to the credibility of the witnesses under his first route and to whether, in relation to the second route (liquidity crisis versus defeating the Requisition and giving Kaisa *de facto* control of NTP) the judge, having set out the correct test, applied the a wrong or incorrect interpretation of the test when he came to consider the question of the existence of an urgent liquidity crisis and whether, in giving the five bases for concluding that it had not been made out, the judge improperly trespassed upon or usurped what is the role, function and sole purview of the directors and not that of the courts.

[37] As to the first route (unreliability of the witnesses for NTP), the judge gave particular focus to what he saw as the refusal of each of the other three Kaisa connected directors (excluding Dr. Lo) 'to accept that Kaisa would have control of [NTP] if the PIPE was approved.'[13] This can be gleaned from his analysis at paragraphs 158 and 159 of the judgment.

[38] The bases upon which the judge concluded that the ostensible justification for the PIPE, the urgent liquidity crisis, was not made out, are set out at paragraph 160 to 163 of the judgment. It is important to set out these paragraphs in full:

> "[160] the second is based on the factual matrix surrounding their decision to approve the PIPE. The ostensible justification for the PIPE, the urgent liquidity crisis, is in my judgment not made out. Firstly, I have not accepted the evidence adduced by [NTP] that any of the banks were in fact entitled to call in their loans. I have rejected the suggestion that a bank serving a notice reserving its rights was going to call in its loans. Secondly, XIB were not raising any issues about the facilities offered to [NTP], so such concerns as there were about a change in effective control of [NTP] were not universal. Thirdly, the loans from BOB, CEB and Industrial Bank were comparatively trivial. If necessary, they could have been easily paid off from [NTP]'s cash reserves. Their existence could not contribute to a cash crisis. Fourthly, BOC, who were the largest lender, were also the best secured, because the Inno Park project was nearly finished. That made it less likely they would be disturbed by a change of management at [NTP]. In the event, we know terms for repayment of the BOC loans were fairly easily arranged shortly after the PIPE. Fifthly, even in a worst case scenario, [NTP] itself

[13] See paras. 157-159 of the judgment below.

owned (sic) no obligations to the banks at all. All the security interests over land and the cross-guarantees were given at subsidiary level. [NTP's] cash holdings were safe from the banks. That gave [NTP] significant bargaining power in dealing with its banks.

[161] It is not credible that the four directors would have had no knowledge of any of this. As experienced directors they had a duty to know at least the substance of these points. At the board meeting on 5th October, no more than a few desultory questions were posed. There was nothing of the penetrating discussion which could have been expected of a proposal for a PIPE in the sum of $175 million. The reason for the absence of discussion was, I hold, because the true intention of the four directors was to ensure the continuing control of [NTP] by Kaisa.

[162] I am reinforced in this conclusion by the consideration of the manifest unfairness of the PIPE to other shareholders. They were being denied the majority control they would have had at a shareholders' meeting (assuming one had been called promptly, as it should have been). Moreover, they were being denied any premium for the loss of control. Houlihan Lokey gave no detailed consideration to any alternative possibilities for raising funds. They merely provided a high level overview of other options which it is said management had considered. The change in the corporate governance provisions from New York rules to home country rules was egregiously unfair to other shareholders, since it was effected the day the PIPE was made.

[163] Possibilities of a rights issue (which had already been considered by management back on 9th June), including a rights issue underwritten by Kaisa, were never discussed. Nor was any claw-back provision in the PIPE, in the event existing shareholders wanted to buy shares which had been placed with Kaisa. Obtaining a loan from Kaisa was not considered (apart from what I found to be the "window dressing" discussion between Dr. Tam and Mr. Khuong). Not even obtaining a comfort letter from Kaisa was discussed, which would say that they would support [NTP] even if new directors were installed. The reason none of these options were considered, it can in my judgment fairly be inferred, is that none of these alternatives would give Kaisa *de facto* control of [NTP]".

[39] Having conducted the assessment and analysis of the evidence and made the findings of fact, the learned judge reached the following conclusions as to purpose,

lack of *bona fides*, and consequential breaches of sections 121 and 120 of the Act, at paragraphs 164 to 166. He stated:

> "[164] Accordingly, looking at all the evidence in the round, I find as a fact that the purpose of the four directors in approving the PIPE was to give Kaisa *de facto* control of [NTP] and defeat the requisition. That was an improper purpose within the meaning of section 121 of the **BVI Business Companies Act 2004**.
>
> [165] If I am wrong in that conclusion in respect of any or all of the four directors, I would find that this case came squarely within the scenario depicted by Mr. Rosen QC in para. [137] of **Re Last Lion Holdings Ltd**. Dr. Tam would have led the four directors into thinking that there was a proper purpose for the PIPE, namely a liquidity crisis which did not in fact exist.
>
> [166] In addition, it follows that the directors did not act *bona fide* in order to save [NTP] for the benefit of all the shareholders. On the contrary they acted for the benefit of Kaisa. That is in my judgment a breach of section 120(1) of the Act".

NTP's Appeal

[40] NTP appealed the judgment and orders of the learned judge on five grounds. These grounds may be restated as follows:

(1) The judge's rejection of the NTP's case of an urgent liquidity crisis on the five bases or points stated at paragraph 160 of the judgment, was erroneous and cannot stand ("the liquidity Crisis issue.

(2) The judge failed to take into account, or to properly take into account, in his evaluation of the evidence of an urgent liquidity crisis facing NTP in late September 2020, the relevant events in the timeline and chronological developments from late May to the 5th October 2020 Board meeting at which the PIPE was approved ("the Relevant Timeline and Chronology Issue".

(3) The judge failed to take into account or to make any reference to Dr. Tam's late September 2020 Note, as an important unchallenged contemporaneous document, and is directly contrary to the judge's conclusions of no urgent liquidity crisis and no capital raising purpose ("the Dr. Tam September 2020 Note Issue").

(4) The judge's assessment of Dr. Tam, who he correctly identified as a key witness, as an unsatisfactory witness was flawed and his primary reason for doing so wrong ("the Dr. Tam Evidence Issue"); and

(5) The judge's assessment of the four directors' (Mr. Fok, Prof. Lyu, Prof. Wu and Dr. Lo) evidence and his finding that each of them were unreliable witnesses was erroneous, he failed to properly deal with and to explain away their compelling evidence that the substantial purpose they each voted for the PIPE was Capital Raising (not Board entrenchment), and his findings in relation to each of them cannot be reasonably explained or justified ("the Four Directors Evidence of Purpose Issue")

[41] Before delving further into this matter, I note that IsZo's counter-notice and skeleton argument, having been filed out of time, are deemed to be timely filed as NTP has consented to these matters being regularised. In its counter-notice, IsZo invites this Court, if necessary, to uphold the judge's decision on certain additional grounds. It should also be noted that West Ridge did not participate in the trial before the learned judge, and the hearing of this appeal. This was as a result of an agreement reached between NTP and West Ridge prior to the commencement of the trial, as reflected in a Tomlin order made 14th December 2020.[14]

[42] GSL is also dissatisfied with the judgment and has filed a notice of appeal. However, its appeal was not ready for hearing and determination at the time this matter came on for hearing. Notwithstanding, GSL was granted an extension of time to file a skeleton argument in support of NTP's appeal, and their skeleton argument filed in the matter was deemed properly filed. This therefore enabled GSL to make submissions in support of and within the ambit and scope of NTP's grounds of appeal. This permission was granted on the basis that the grounds relied on by NTP in their notice of appeal would not be reargued by GSL when their appeal comes on for hearing. I pause here to observe that should NTP be

[14] Record of appeal, Vol. A, Tab 21 e-pages, 215-217.

successful in its appeal before this Court and the judgment and orders made by the learned judge are set aside, it would no longer be necessary for GSL to pursue its separate appeal.

[43] In making their submissions, both NTP and IsZo dealt with each of NTP's grounds in turn. In my view, the challenge by NTP to the judge's assessment and findings as to the credibility of each of NTP's witnesses, which is the first route by which the learned judge sought to determine the subjective motives of the four directors in approving the PIPE, are directly relevant to an assessment as to the correctness of his approach to and evaluation of the evidence, leading to a finding of no urgent liquidity crisis and improper motive. Therefore grounds 4 and 5 ought, more conveniently and logically, to be considered first before moving on to consider grounds 1, 2 and 3 which challenge the judge's assessment of the factual matrix and surrounding circumstances leading to his conclusion of there being no urgent liquidity crisis, the second route by which the judge determined the subjective motives of three of the four directors who voted to approve the PIPE.

[44] Importantly, NTP and GSL contend that in applying the wrong test when he came to evaluate the evidence as to an urgent liquidity crisis and purpose, the judge effectively trespassed upon what he had correctly reminded himself was exclusively within the purview and domain of the directors, and not of the courts. If correct, NTP is, in my judgment, seeking to set aside the judge's finding of 'no urgent liquidity crisis', on the basis of an error of principle or of law, and is not simpliciter seeking to challenge the judge's findings of fact and assessment of the credibility of witnesses. It cannot be gainsaid that NTP's appeal challenges primarily, if not exclusively, the trial judge's findings of fact and the credibility of witnesses. Before considering any of the grounds of appeal, I must, therefore, treat with the principles applicable to appellate restraint when dealing with an appeal against findings of fact and a trial judge's assessment of the credibility of witnesses. These principles are trite and uncontroversial. They have been stated and restated in decisions of this Court, and other courts in the region and in England.

[45] With that said, I move first to consider IsZo's threshold point that NTP has not appealed against the judge's findings and conclusion of a breach by the directors of their duty under section 120(1) of the Act and, accordingly, its appeal must fail. This will be followed by a consideration of NTP's fresh evidence application, and next the principles applicable to appellate caution and restraint when determining appeals from findings of fact and credibility of witnesses by a trial judge. Thereafter, I shall embark upon a detailed consideration of NTP's grounds of appeal in the order indicated above, starting with grounds 4 and 5.

IsZo's Threshold Point – no appeal against finding of breach of section 120(1)

[46] In its written skeleton argument, IsZo raised frontally that NTP has not appealed against the judge's conclusion of a breach of duty by the directors under section 120(1) and, accordingly, its appeal cannot succeed.[15] This is an important point raised by IsZo in response to NTP's appeal and one which must be addressed early in this judgment as, whichever way it is decided, it will have a material effect on the approach of this Court to its consideration of NTP's various grounds of appeal, and to the outcome of its appeal.

[47] IsZo's submitted that its case at trial rested on two main pillars of breach, sections 120(1) and 121, and the learned judge found for it on both breaches. IsZo argued that NTP having appealed against only the judge's conclusion or finding of a breach of section 121 – improper purpose, its appeal is bound to fail, even if it was successful in overturning the judge's conclusion on purpose under section 121. Mr. Moore submits that the judge's findings at paragraph 162-163 were not challenged in NTP's appeal and this failure is fatal to overturning the judge's conclusion that 'the directors did not act bona fide in order to save NTP for the benefit of all the shareholders', in breach of section 120(1) of the Act. Counsel for IsZo relies on the findings by the learned judge at paragraph 163 to the effect that certain possibilities and options had not been discussed or considered by the

[15] See paras. 11 and 12 of IsZo's skeleton arguments.

Board before approving the PIPE. These possibilities include a rights issue (including one underwritten by Kaisa); any claw-back provision in the PIPE itself permitting other shareholders to buy shares which had been placed with (or allotted to) Kaisa as a result of the PIPE; obtaining a loan from Kaisa; or obtaining a 'comfort letter' from Kaisa stating that it would support NTP even if new directors were installed.

[48] Mr. Hardwick QC, learned counsel for NTP, stoutly rejects IsZo's threshold or preliminary point, as being misconceived. His argument is that the learned judge's finding of a breach of section 120(1) was parasitic and entirely dependent upon his primary findings of no urgent liquidity crisis and improper purpose. He submitted that the judge made no findings of dishonesty or lack of good faith, and IsZo's case was not grounded on any such allegation or finding being made, as the judge himself correctly observed. Accordingly, such a finding was not open to the judge who expressly declined to do so. NTP submits that having challenged the judge's finding of no urgent liquidity crisis and his conclusion as to improper purpose in its appeal, it did not need to directly challenge the section 120 (1) breach as, should this Court agree with NTP on the improper purpose finding, the conclusion of breach of directors' duty under section 120 (1) reached by the judge at paragraph 166, cannot be sustained and must fall away.

IsZo's Threshold Point - Discussion and Conclusion

[49] In my judgment, this preliminary or threshold point taken by IsZo, while of some merit, is not sustainable. The stipulated contents of a notice of appeal are set out by rule 62.4 of the **Civil Procedure Rules 2000** (the "CPR"). By rule 62.4(1) an appellant must use Form 23 when filing a notice of appeal, and must give details of - (a) any power which the appellant wishes the court to exercise; (b) the decision which is being appealed, identifying **so far as practicable** any finding of – (i) fact; and (ii) law which the appellant seeks to challenge; (c) the grounds of appeal; and (d) the order the appellant seeks. Accordingly, a notice of appeal which does not specify each and every finding of fact or of law that is being challenged does not

offend rule 62.4(1)(b) or, put differently, does not exclude or prevent a challenge by an appellant to any such finding (fact or law) or render any such challenge impotent.

[50] The mandatory requirements of rule 62.4(1) is that an appellant must state the 'decision' which is being appealed, the grounds of appeal, and the order which he or she is inviting the Court of Appeal to make if the appeal is successful. Once the mandatory requirements of rule 62.4(1) are satisfied, the notice of appeal effectively puts in issue, the decision or orders being appealed, upon the grounds stated in the notice of appeal. This is so even where some or not all of the findings and conclusions of law or fact which underpin the decisions appealed against have not been expressly identified in the notice of appeal as 'challenged'.

[51] In my view, by the use of the words "so far as practicable" in rule 64.2(1)(b), the rule-makers foreshadowed that, while it is desirable that as much detail or specificity of the factual findings and errors of law to be challenged on appeal ought to be given in a notice of appeal, there may be circumstances where it may not be practicable (for example where a fully reasoned judgment is not immediately available), to specify in the notice of appeal all of the challenged findings of fact and law upon which the decision-maker relied. The omission of a specific finding of fact in a notice of appeal, whether through inadvertence or oversight, does not necessarily lead inextricably to the conclusion that those unspecified findings cannot be challenged in the appeal. This is particularly so where the unspecified findings are clearly relevant or pertinent to the judge's reasoning and decision in the court below, which decision or part of the decision has been expressly appealed against in the notice of appeal as filed. It is clear therefore, that appellant must set out concisely in their notice of appeal, the decision(s) or orders of the court below that are being appealed, the grounds of appeal, and the order which the appellant invites the appellate court to make upon the hearing of his/her appeal.[16]

[16] See Margaret Blackburn v James Al Bristol GDAHCVAP2012/0019 (delivered 12th October 2015, unreported) and David Carol Bristol v Dr. Richardson St. Rose Civil Appeal No.16 of 2005 (delivered 20th February 2006, unreported).

[52] An appellant will not be permitted to challenge any decision of the court below which he has not appealed, or to advance a ground of appeal which he has not relied on in his notice of appeal against a decision which he has challenged, unless he applies for an has obtained from the court's permission to appropriately amend his or her notice of appeal. Once the mandatory requirements specified in rule 62.4(1) have been met in the notice of appeal and the notice of appeal has been timely filed, the appellant, in my view, should be permitted to invite the appellate court, in his/her skeleton argument in support of the appeal, to set aside and to revisit afresh findings of fact and law said to have been reached by error, or to be plainly wrong, or to have been made or arrived at erroneously by the trial judge in coming to the decision(s) appealed against. This approach to and interpretation of Rule 62.4(1)(b) and its full import, finds support in the decision in **Sheikh Mohamed Ali M Alhamrani et al v Sheikh Absullah Ali M Alhamrani**[17] where Webster JA stated:

> "Part 62.4 of the Civil Procedure Rules states that the notice of appeal must give details of the decision being appealed, the grounds of appeal and the orders sought. The grounds of appeal must be set out concisely under distinct heads without any argument or narrative".

[53] Further, I am of the view that, in light of the broad powers under section 31(2) **Eastern Caribbean Supreme Court (Virgin Islands) Act**[18] (the "Supreme Court Act"), IsZo would suffer no prejudice in considering NTP's appeal against the judge's findings and conclusions of a breach by the directors of their duty under section 120(1) of the Act. Section 31(2) provides as follows :-

> "31. …
>
> (2) **The powers of the Court of Appeal under this section may be exercised although no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court by any particular party to the proceedings in court or that any ground for allowing the appeal or for affirming or varying the decision of the High Court is not specified in such notice; and the Court of**

[17] BVIHCMAP2016/0030 (delivered 24th November 2017, unreported).
[18] Cap. 80, Revised Laws of the Virgin Islands, 1991.

Appeal may make an order in such terms as the Court of Appeal thinks just to ensure the determination on the merits of the real question in controversy between the parties". (Emphasis added")

[54] In its notice of appeal, NTP has appealed, as mentioned above, against the decision of the judge contained in the order dated 3rd March 2021, specifically paragraphs 1,2, 7 and 9. These include the orders that the purported allotment of shares (the PIPE) by NTP to GSL and West Ridge on 5th October 2020 be set aside, and for rectification of the register of shareholders by the deletion of all entries in respect of the PIPE. At part II paragraph 3 of its notice of appeal, NTP challenges '**the findings of fact that led the learned judge to conclude**, at paragraph[s] 164 **to** 166 of the judgment, that the four directors approved the PIPE for an improper purpose, and therefore the PIPE was void and should be set aside'. Thus, on the face of its notice of appeal, NTP has challenged the various findings of fact which the learned judge made leading to his conclusions, of breaches of sections 121 (improper purpose) and section 120(1) (directors' duty).

[55] Further, at paragraph 4 of its notice of appeal, NTP challenges, 'in particular', the findings of fact made by the learned judge at paragraphs 107 to 114, 125, 156, 157, 160 and 164. Notably, the findings at paragraphs 161, 162 and 163 of the judgment are not specifically identified as part of that list of 'particular' paragraphs of the judgment being challenged. However, the way in which paragraph 4 is drafted (albeit inelegantly), being prefaced with the words "*in particular*", suggests that the listed paragraphs which follow, are not intended to be or are not necessarily exhaustive of the findings of fact being challenged by NTP, in support of its appeal against the judge's conclusions of breaches of both sections 120(1) and 121 of the Act.

[56] In my view, the learned judge, at paragraph 166, clearly grounded his finding of a breach of duty under section 120(1) on his primary finding of no urgent liquidity crisis at paragraph 160 and his conclusion of improper purpose under section 121 at paragraphs 164 and 165. In doing so, the judge, correctly, did not consider that IsZo's case was based on allegations of lack of honesty or good faith on the part of

the four directors of NTP who approved the PIPE. This much is manifest from the judge's observations about IsZo's 'paired down' case at paragraph 84 of the Judgment. Furthermore, what the learned judge states at paragraph 161 is clearly a follow-on to his conclusion at paragraph 160 of no urgent liquidity crisis and is not a consideration of a new issue or whether the four directors acted dishonestly when voting to approve the PIPE. This much is obvious from the first sentence of paragraph 161. Further, the learned judge at paragraphs 162 and 163 reached certain conclusions regarding the unfairness of the PIPE to the other shareholders and, inferentially, as to what was the true reason why none of the other possibilities or options for obtaining capital had been pursued by the four directors. While these findings at paragraph 162, if correct, could also support a conclusion that the directors did not act bona fide to save NTP for the benefit of all the shareholders, the learned judge seems to be using them to further buttress or reinforce his finding of no urgent liquidity crisis and improper purpose, as he stated clearly, and not to ground a finding that they acted dishonestly in breach of their section 120(1) duty.

[57] In my view, the judge's conclusion at paragraph 166 of a breach of duty by the four directors under section 120(1) was, to a large extent (if not wholly), parasitic upon these primary findings. Furthermore, in its notice of appeal, at paragraph 3, NTP expressly 'challenges the findings of fact that led to the judge's conclusions at paragraphs 164 to 166 of the judgment that the four directors approved the PIPE for an improper purpose, and therefore the PIPE was void and should be set aside.' In my judgment, while IsZo's threshold or preliminary point has been made unnecessarily difficult by the way in which NTP has drafted its notice of appeal, the findings of no liquidity crisis at the relevant time and of improper purpose in breach of section 121, were the primary findings or conclusions reached by the judge on IsZo's pleaded. Therefore, I am of the view, this is a clear challenge to or appeal from the decision or conclusion of breaches of both a section 121 and section 120(1) duty by the four directors in approving the PIPE. Accordingly, NTP has specifically appealed and challenged the conclusion at paragraph 166 that the directors did not act *bona fide* in order to save NTP for the benefit of all the shareholders.

[58] In my view, central to the judge's conclusions on both section 121 and 120(1) of the Act, is his finding that there was no urgent liquidity crisis and that the four directors acted not for a proper purpose in approving the PIPE but, for 'the benefit of Kaisa', as the judge stated at paragraph 166. This finding is in sync with his earlier findings at paragraphs 164 and 165 that these directors acted not to save NTP from an urgent liquidity crisis but, instead, to give Kaisa *de facto* control of NTP and to defeat the Requisition. Further, it is apparent that all five grounds of appeal challenge or, in some way, pertain to the judge's finding of no liquidity crisis and improper purpose. Indeed, it cannot be seriously argued that the judge's conclusion of a breach of section 120(1) of the Act is not substantially hinged upon his finding of no liquidity crisis and improper purpose. In my judgment and having regard to settled principles and the court's powers under section 31(2) of the Supreme Court Act, NTP's appeal ought to be considered by this Court as a challenge to the judge's conclusions of breaches of both section 120(1) and 121 of the Act, and to the findings of fact based on an assessment of the evidence, as set out in NTP's notice of appeal and skeleton argument. These include the findings and conclusions at paragraphs 160 to and 166 of the judgment. I therefore respectfully disagree with and reject this threshold point raised by IsZo in its skeleton argument.

[59] That said, I am also of the view that considerations of what findings of fact (and of law) were indeed challenged or not challenged by NTP in its appeal (whether in its grounds of appeal or in its skeleton argument) are of some importance to the proper determination of NTP's appeal, as are the issues raised in the grounds of appeal concerning the judge's approach to and assessment of the credibility of NTP's witnesses, the correctness of the primary findings of fact upon which he grounded his conclusions of no urgent liquidity crisis and improper purpose, and breaches of both sections 120(1) and 121 of the Act. At this juncture, I turn to NTP's application to admit as fresh evidence the four bank demand letters issued after delivery of the judgment.

NTP's Fresh Evidence Application

[60] On 6th April 2021, NTP applied, pursuant to CPR 26.1(2)(w) and/or the court's inherent jurisdiction, for permission to adduce as new or fresh evidence in its appeal, four demand letters - one each from the Lending Banks BOC, BOB, XIB and IB – issued to the individual borrower subsidiaries of NTP soon after delivery of the judgment (the "demand letters").[19] The demand letters sought to be adduced as new or fresh evidence are:

(a) demand letter dated 5th March 2021 from BOC to Zastron stating that due to the significant uncertainty relating to the share ownership and decision-making management of NTP, BOC is demanding repayment of all sums due under the BOC Loan Agreement, which sums total RMB 621,808, 910 (approximately US$96 million) and accrued interest hereon within 5 days;

(b) demand letter dated 9th March 2021 from BOB to Nam Tai SZ in which BOB refers to the risk in change of NTP's management and that this risk would have a material adverse effect on its creditor rights. BOB demanded the repayment of all outstanding amounts due under the BOB Loan Agreement totaling RMB 44.9 million (approximately US$6.8 million);

(c) demand letter dated 10th March 2021 from XIB to Zastron alleging that the business prospects of the company were unclear because the PIPE has been set aside [by the BVI court], and there is a risk of change of composition of NTP which constitutes a breach of the XIB Loan Agreement. XIB demanded early repayment of the outstanding principal sum of RMB 103.4 million (approximately US$15.9 million) and accrued interest within 5 days; and

[19] 2 to 12 days after; The demand letters are exhibited to the third affidavit of Dr. Tam.

(d) demand letter dated 15th March 2021 from IB to Nam Tai Management expressing IB's concerns about the possibility of a change in the constitution of NTP's board of directors which would have a material adverse effect on its lending. IB demanded payment in full of amounts due under the IB Loan Agreement consisting of the principal sum of RMB 27.5 million (approximately US$4.2 million) and accrued interest within 3 days.

[61] The basis given by NTP for this Court admitting the demand letters as new or fresh evidence in its appeal, is that these letters 'further reinforces the reality and seriousness of the liquidity crisis (and the related error of the lower court in rejecting the Capital Raising purpose)'.[20] NTP contends that their application satisfies all three limbs of the test formulated by Lord Denning in **Ladd v Marshall**.[21] This test has been consistently applied by this Court in a number of cases, including **Angel Wise Limited v Stark Moly Limited**.[22] The three limbs of the **Ladd v Marshall** test are: (i) the evidence could not have been obtained with reasonable diligence for use at the trial; (ii) the evidence is such that, if allowed, it would probably have an important influence on the result of the case (through it need not be decisive); and (iii) the evidence must be apparently credible, that is, such as is presumably to be believed (though it need not be incontrovertible).

[62] IsZo opposes NTP's application to adduce the four, post-judgment, bank demand letters as fresh evidence. The main thrust of IsZo's objections to the admission of the four, post-judgment, bank demand letters, rests on what they see as a failure by NTP to satisfy both the second and third limbs of the **Ladd v Marshall** principles. It contends that this being an appeal from a judgment after a full trial, the **Ladd v Marshall** principles are to be applied with full rigour when determining the NTP fresh evidence application. They submit that there having been a full trial with

[20] Core appeal bundle, Tab 15, e-page 491 at para.1).
[21] [1954] 1 WLR 1489.
[22] [2012] ECSCJ No. 39 (delivered 13th February 2012) and see also the core appeal bundle, Tab 2, NTP's skeleton e-page 21 at paras. 28 & 29.

cross-examination of witnesses, the appeal from the judge's decision ought to proceed on the basis of the facts as they were at the time of the trial, and not by reference to facts or matters which occurred after the trial or post judgment.[23] As to the second of these principles, IsZo submits that the new evidence would not have been likely to have an important influence on the result of the trial. Specifically, the fresh evidence would have no effect on the findings by the judge as to the state of affairs which existed with NTP as of September 2020.

[63] IsZo submits that the fact that, many months later, after highly public and hard-fought proceedings, in which the BVI Commercial Court found that the four directors had breached their fiduciary duties and acted for an improper purpose and without regard to the interest of shareholders, and to have given unsatisfactory evidence at trial, the four banks having served demand notices, does not undermine the judge's conclusions or advance the point being made by NTP in its appeal. To the contrary, the fact that the demands are made 5.5 months later supports the judge's findings, and 'compellingly demonstrates that there was no urgent liquidity crisis in September 2020 at all.' There is certainly some force in these arguments made by IsZo. IsZo also refers to a copy of NTP's published SEC Form 20-F - NTP's annual report as of the year ending 2020 (Exhibit "JM-3") which states that NTP is presently negotiating with the banks and seeking alternative sources of financing.

[64] In **R (Iran) and Ors v Secretary of State for the Home Department**,[24] cited by IsZo in support of that submission, Brooke LJ, at paragraph 34, underscored the fundamental principle that ordinarily in litigation before courts of law, the legal rights of the parties are to be decided on the facts as they appear to the first instance judge, and there is little room for the admission of evidence of changed circumstances at the hearing of an appeal. Brooke LJ went on to identify four circumstances in which, from time to time, evidence of changed circumstances has

[23] See Respondent's skeleton argument, core bundle Tab 19, e-page 525 at para.8.
[24] [2005] EWCA Civ 982 at para. 34.

been admitted by courts. The first relates to changed circumstances after the grant of an interlocutory injunction where, had the changed circumstances been before the judge, they would have justified a variation in the terms of the injunction (as in **Hadmor Productions Ltd v Hamilton**).[25] The second is where the changed circumstances since the trial 'has falsified the basis on which discretionary relief was granted'; the third is where 'the passage of time since a trial has falsified a conclusion of the trial court based on complaints of delay'; and the fourth is where the court ought not to speculate, but ought more properly to base an assessment of damages 'on the facts as they appear at the date of the appeal hearing.' These four 'examples' of exceptions to the general rule are by no means exhaustive of the exceptional circumstances in which an appellate court ought to, in the exercise of its discretion, admit evidence of changed circumstances or new evidence occurring post trial or post-delivery of the judgment by the first instance court.

[65] The application of the **Ladd v Marshall** principles was recently considered by this Court in **Bilzerian & Ors v Byron & Ors**.[26] Having recognised that a court will adopt a more relaxed approach to the application of these principles when dealing with appeals from interlocutory orders, with regard to appeals from decisions after a trial, I opined at paragraph 26: "[w]here there has been a trial on the merits with witnesses, a more stringent approach is warranted by the appellate court … In such circumstances, an appellate court ought to apply the **Ladd v Marshall** principles with their full import and vigour …".

[66] It is clear that the **Ladd v Marshall** principles applicable to the admissibility of fresh evidence post a trial and first instance judgment, are to be even more stringently applied in circumstances where the new evidence did not exist at all at the time of the trial. In such a case, the new evidence ought only to be admitted in special or exceptional circumstances, and where such evidence has or could seriously undermine the trial judge's approach to and evaluation of the evidence which was

[25] [1983] AC 191, 220D.
[26] [2020] ECSCJ No. 249 (delivered 21st July 2020).

before him at trial and falsify the conclusions which he arrived at based upon such evaluations. I am fortified in this statement of principle by the dicta of Lord Justice Brooke in **R (Iran) v Secretary of State**. In this regard, an appellate court must be ever mindful of the important and laudable principle that cases are to be decided on the evidence led at trial so as to bring finality to litigation. Accordingly, an appellate court ought sparingly to exercise its discretion to admit fresh or new evidence on appeal from such a decision and, in doing so, apply the **Ladd v Marshall** principles with even more rigour.

[67] In my judgment, the fresh or new evidence sought to be admitted by NTP, while not strictly satisfying the first of the **Ladd v Marshall** principles, can be admitted if falling, broadly speaking, within one of or the 'specie' of special or exceptional circumstances identified by Brooke LJ in **R (Iran) v Secretary of State**. Clearly the demand letters could not have been obtained prior to the trial as none of them had yet been issued and therefore did not exist at the time. Accordingly, their admissibility should only be permitted where the bases for their admission in this appeal satisfies the requirement of special or exceptional circumstances. The fact that these bank letters did not exist at the time of the trial (and delivery of the judgment) does not, in my view, render them evidence wholly incapable of being admitted on the hearing of the appeal.

[68] The important consideration is whether these four letters constitute evidence which could, on any reasonably arguable basis, undermine, falsify, or seriously call into question the important findings and conclusions of the judge below, that: (i) the Lender Banks were not in fact entitled to demand repayment of their respective loans or that there was no satisfactory evidence that an urgent liquidity crisis existed; or (ii) the directors were reasonably concerned that such a financial crisis was imminent with NTP, necessitating the raising of capital. In my judgment, it is at least arguable that the demand letters could be of evidential value in this court's consideration of those factual issues and the conclusions arrived at by the learned judge, which led to him to reject NTP's case that there was an urgent liquidity crisis

necessitating the raising of a substantial capital sum. The issue of an urgent liquidity crisis and/or whether the four directors were reasonably concerned that the Lender Banks would demand their loans leading to an urgent liquidity crisis, was fundamental to the judge's conclusion on purpose, and breaches of sections 120(1) and 121 of the Act.

[69] I agree with IsZo's point that NTP's latest annual return dated 14th April 2021 (as of the year ending 31st December 2020) would on one view be of some evidential value in support, at least in part, of the judge's conclusion that in late September 2020 NTP was not facing an urgent liquidity crisis or that such a crisis was imminent, as four of the five banks had not then or very soon thereafter, proceeded to demand repayment of the loans made to the NTP subsidiaries. In this sense, it can be said that the four demand letters are evidence which, (if available at the time), would probably have an important influence on the judge's finding as to whether the banks had taken a decision to demand repayment of the loans or were likely to do so as a result of the Requisition, the IsZo activism, and the uncertainty surrounding the management of NTP and its Board. In my judgment, NTP's said annual report provides some evidential context in relation to the issuance of these four demand letters by the banks and their approach to the repayment of the sums demanded. It is also my view that should this Court find that NTP has satisfied all three limbs of the **Ladd v Marshall** test or that they ought exceptionally to be admitted at this stage, justice, fairness and the overriding objective would demand that the four demand letters should only be admitted with NTP's SEC filing. [27]

[70] In my considered judgment, the second limb in **Ladd v Marshall**, properly construed and understood, does not limit or restrict the 'important influence on the result of the case', to only the case for the applicant seeking to have the fresh evidence admitted on appeal. The real question to be answered by this Court in considering whether this second limb has been satisfied, is whether the fresh evidence would have an important influence on the case or any important issue in

[27] Core appeal bundle, Tab 19, e-page 536-679.

the case whichever way that issue had been determined by the trial judge. I am of the view that the four demand letters and NTP's published SEC Form 20-F, considered separately and together, would probably have had an important influence on the judge's consideration and determination of the core question of whether NTP was in fact facing an urgent liquidity crisis in late September 2020 or whether the Lender Banks were likely to have called in their loans leading to such a crisis, albeit they may not have been decisive. Accordingly, I so find that NTP has satisfied the second limb.

[71] The third limb can be disposed of briefly. It begs the question, are the demand letters (collectively or individually), the authenticity of which has not been questioned, credible? This means that they are presumed to be believed, albeit they need not be incontrovertible. In my view, it cannot be seriously argued that these demand letters are not apparently credible. There is nothing before this Court to suggest they are not or that they are of questionable authenticity, such that they ought therefore not to be admitted into evidence in the appeal. In arguing that the third limb of the test has not been satisfied, IsZo advances two points expressed as 'concerns'. The first is that the demand letters are devoid of any evidential underpinning or context surrounding the making of the demands and what has transpired between NTP and the individual banks since the issuance of the respective demand letters. I have already addressed this point under the second limb concluding that there is some force in this argument, but that some of that context is to be gleamed from the 2021 NTP published SEC Form 20-F. The second concern raised by IsZo is that the person who is seeking to put forward the fresh evidence on behalf of NTP, Dr. Tam, was found by the judge to have given unsatisfactory and unreliable evidence.

[72] In my view, this second concern or basis of objection is not sustainable. The issue of the veracity and cogency of the evidence of Dr. Tam is a ground of appeal, and this Court will have to consider and make a determination as to whether there is any basis upon which the judge's finding as to his credibility or the unreliability of

his evidence, can or ought to be overturned. Further, Dr. Tam merely makes the perfunctory statement that the demand letters were issued post judgment. He exhibits them and gives NTP's short statement of the reasons why it says this Court ought to give permission to adduce them as fresh evidence in the appeal. The cogency and reliability of Dr. Tam's evidence in his affidavit in support[28] is therefore not really in issue and does not go to the question of whether the notices themselves, as documents and as demand notice by and from these four banks, are 'apparently credible'. Accordingly, I find that NTP has satisfied this third limb.

Conclusion on NTP's fresh evidence application

[73] For the reasons set out above, I find that NTP's fresh evidence application has satisfied at least two of the three limbs of the test in **Ladd v Marshall**. I am also satisfied that exceptionally, and for the reasons also stated, they ought to be admitted as new evidence in this appeal along with NTP's Annual Report. Accordingly, NTP's application to admit the four demand letters, is granted and the said letters are admitted into evidence; along with NTP's Annual Report, pursuant to section 13 or 15(d) of the **United States Securities Exchange Act 1934** - Form 20-F dated 14th April 2021. Cost of NTP's fresh evidence application shall be in the appeal.

Appellate restraint – appeal against trial judge's findings

[74] The principles which guide an appellate court when considering an appeal which challenges a trial judge's evaluation of the evidence and findings, his assessment of the credibility of witnesses and inferences drawn from findings of primary facts, are well-established. These principles have been thoroughly canvassed and are helpfully set out in IsZo's appeal skeleton argument.[29] From the decided cases, I distil the following important principles:

(i) An appellant who seeks to overturn findings of fact and inferences drawn from such findings by a trial judge has a high hurdle on appeal.

[28] Core Bundle, Tab 16, e-pages 488-494.
[29] Core appeal bundle, Tab 5, e-pages 70-75, at paras. 17 to 28.

(ii) Such an appellant must satisfy the appellate court that the trial judge got it plainly wrong, in that no reasonable judge could have reached such a conclusion.

(iii) The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached. Per Lord Reed in **Henderson v Foxworth Investments Ltd and another**.[30]

(iv) An appellate court ought not to interfere with findings of fact made by a trial judge unless 'compelled to do so'. This applies equally so to both findings of primary facts and to the evaluation of those facts and to inferences drawn from them. Per Lewison LJ in **Fage UK Ltd and another v Chobani UK Ltd and another**.[31]

(v) An appellate court can only interfere with findings of fact made by a trial judge, where it is satisfied that 'there is no evidence to support the finding or where the finding was based on a misunderstanding on the part of the trial judge of the evidence or where the finding is one which no reasonable judge could reach'. Per Lord Sales in **Alexander Pleshakov v Sky Stream Corporation and others**.[32]

(vi) In the review exercise to be carried out by the appellate court, it is immaterial whether the appeal judge would have reached a

[30] [2014] UKSC 41 at 62.
[31] [2014] EWCA Civ 5 at 114 and 115.
[32] [2021] UKPC 15 at para 32, citing Lord Neuberger in re B (A Child (Care Proceedings: Threshold Criteria) [2013] UKSC 33; [2013] 1WLR 1911 at para 53.

different conclusion or finding had they been faced with the same decision.

(vii) Where a question of fact has been decided by a judge at a trial without a jury, and the appellate court is disposed to come to a different conclusion than the judge, absent any misdirection by the judge of himself, it should only do so where it is satisfied that 'any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion'. Per Lord Thankerton in **Watt (or Thomas) v Thomas**;[33] and **Central Bank of Ecuador v Conticorp SA**.[34] In short, this refers to a scenario where the trial judge has clearly failed to take full advantage of or has forfeited any advantage which he had by virtue of his preeminent position as the presiding trial judge.

(viii) Where an appellate court forms the view that without having seen and heard the witnesses it is unable, on the printed evidence to come to any satisfactory conclusion, it ought not to interfere with the trial judge's finding of fact. Per Lord Thankerton in **Watt (or Thomas) v Thomas**. [35]

(ix) Where the appellate court is satisfied, either because the reasons given by the trial judge are unsatisfactory or because it unmistakably appears so from the evidence, it is entitled to conclude that the judge did not take proper advantage of his having seen and heard the witnesses, and in such circumstances the question becomes at large for the appellate court to decide based upon the printed evidence. Per Lord Thankerton in **Watt (or Thomas) v Thomas**.

[33] [1947] AC 484 at 487-488
[34] [2015] UKPC 11.
[35] Supra fn. 33.

(x) An appellate court 'is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness'. Per Lord Mance in **Central Bank of Ecuador v Conticorp SA and others**.[36] There are important reasons for the exercise of caution in such a case. Per Lord Sumption in **Mutual Holdings (Bermuda) Limited & Ors v Diane Hendricks & Ors**.[37]

(xi) It is a question of law whether there is no evidence to support a particular finding or conclusion by the trial judge, and in such circumstances, an appellate court will not hesitate to so decide. However, if the evidence, taken as a whole, can reasonably support the judge's conclusion arrived at the trial, and especially where that conclusion was reached upon an evaluation of conflicting testimony from the witnesses presented at trial and the weight to be accorded to such testimony, the view of the trial judge as to credibility is entitled to be accorded 'great weight' by the appellate court. This is so because in the administration of justice it is manifest that the trial judge 'when estimating the value of verbal testimony, has the advantage (which is denied of the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given'. Per Viscount Simon in **Watt (or Thomas) v Thomas**.[38]

(xii) However, this approach to appellate restraint when reviewing findings of fact made by a trial judge, especially primary findings, is rather different where the trial in the court below was conducted and the findings of the court below based principally upon documentation and not on oral evidence. In such circumstances the distinct advantage enjoyed by a trial judge in having seen and

[36] [2015] UKPC 11 at [7].
[37] [2013] UKPC 13 at para. 28.
[38] Supra at page 486.

heard the witnesses give their oral testimony, is of less significance, and the appellate court is on a similar or equal footing to the trial judge in evaluating the evidence and reaching conclusions on the facts.[39] This does not mean that the findings of the trial judge is not to be accorded much weight and ought not to be lightly overturned or set aside on appeal.

[75] Further, there are several sound public policy and other reasons for the need for appellate restraint when considering findings arrived at by a trial judge.[40]

[76] The true essence of the contrasting roles and functions of a trial judge and that of an appellate court, when reviewing findings by a trial judge in a case involving a substantial body of oral evidence, is that appeals are, by their very nature, 'telescopic', focusing on the specific issues raised by the notice of appeal and written submissions for consideration. This is to be contrasted with the role and position of the trier of fact in undertaking a comprehensive review of the evidence and an overview of the entire case, including details of the evidence and the manner in which such evidence was given. This function is quintessentially and uniquely the role of the trial judge. It is one which cannot be replicated by an appellate court when hearing an appeal, however experienced the presiding judges may be, in which they deal purely with the documents constituting the appeal record, including the transcripts of the evidence.

[77] This difference in role and approach, and its significance to the qualitative evaluation of the witnesses and assessment of the evidence during the revered atmosphere of a trial, was helpfully explained in **Group Seven Ltd and others v Nasir and others**,[41] citing from **JSC BTA Bank v Ablyazov**[42] per Leggatt LJ:

> "41. Those reasons are by no means limited to the advantage enjoyed by the trial judge **in a case in which oral testimony plays a significant part**

[39] Beacon Insurance v Maharaj Bookstores [2014] UKPC 21, see headnote and para. 17.
[40] Per Lewison LJ in Fage UK Ltd v Chobani Ltd at paras. 114-115.
[41] [2019] EWCA Civ 614 at 23.
[42] [2018] EWCA Civ 1176 at 40-43.

of having seen and heard the witnesses give evidence. The reasons also include recognition that the judge who presides over the trial is immersed in the evidence in a way that an appeal court cannot replicate. As it was put in the majority judgment of the Supreme Court of Canada in Housen v Nikolaisen [2002] 2 SCR, para 14 (quoted by Lord Reid JSC in McGraddie v McGraddie [2013] 1WLR 2477, para 33): "**appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole**.' In elaborating this point, the Canadian Supreme Court adopted the observations of a commentator that:

"The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged."

…Furthermore, **not every detail of the relevant evidence need or can be captured in the reasons given by the judge**. As Lord Hoffman said in Piglowska v Piglowski [1999] 1 WLR 1360, 1372:

> "[The judge's] expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."
>
> 42. Even where it could in principle be done, for an appellate court **in a case involving a substantial body of evidence** to attempt to acquire the same absorption in the detail of the case as the judge of first instance would be a disproportionate use of judicial resources and would hugely increase the length, cost and delay of litigation in return for little likely improvement in decision-making." (emphasis added)

[78] The requirement for appellate caution when invited to reverse findings of fact made by a trial judge, rests upon more solid grounds than mere professional courtesy.[43] Moreover, it extends not only to the primary findings of fact, but importantly, also to inferences drawn by the trial judge from such findings. However, where a trial judge has not properly exercised his unique position and has either failed to

[43] Per Lord Hoffmann in Biogen Inc v Medeva Plc [1997] RPC 1 at 45, quoted by the Privy Council in Mutual Holdings (Bermuda) Ltd and others v Diane Hendricks [2013] UKPC 13 per Lord Sumption, and by Pereira CJ in Marie Makhoul v Cicely Foster et al [2015] ECSCJ No. 34 (delivered 23rd February 2015).

evaluate or to properly take into account important evidence or has reached his findings in reliance on an incorrect interpretation of the evidence, or omitted to take into account important relevant evidence, or his conclusion on the evidence is erroneous or plainly wrong, an appellate court ought not to hesitate to intervene and to set aside such findings.

[79] I turn now to consider NTP's five grounds of appeal, starting with ground 4.

Ground 4 – Dr. Tam an unsatisfactory witness who exaggerated the risks
NTP's Submissions on Ground 4

[80] NTP argues that the judge's assessment of Dr. Tam as an unsatisfactory witness was flawed because his conclusion was arrived at solely on the basis that Dr. Tam had refused to accept, as 'absolutely obvious', that a 45 percent shareholder, bearing in mind the level of abstentions and non-votes, would be pretty sure to have the votes to ensure that the resolutions he wanted passed would be passed. NTP argues that this proposition by the judge was wrong on two bases. Firstly, that pursuant to article 10 of the memorandum of association, a vote of over 50 percent of all the issued shares in NTP is required in order to remove a director; and secondly, as to other types of resolutions which require a lower threshold of over 50% of the shares voted at the relevant meeting, Innisfree in its report had projected, prior to the PIPE, that 80% of the voting shares could be expected to vote at a general meeting. NTP argues that once the further 18,654,585 shares allotted post the PIPE were taken into account, 'Innisfree's projection produces the higher percentage of '86.6% of voting shares being voted'. Accordingly, NTP argues, Kaisa's 43.9% "would give Kaisa the narrowest of majorities – capable of being defeated if just 1% of additional shareholders were to turn up and vote against'.[44]

[81] NTP asserts that Dr. Tam was in fact correct in not accepting the premise in the judge's question that it was 'absolutely obvious' that Kaisa's level of shareholding

[44] Core appeal bundle, Tab 2, e-page 39 at paras. 133-134 of NTP's skeleton.

after the PIPE was sufficient to ensure that it could pass the resolutions it wanted passed and, in the alternative, ensure the resolutions it wanted defeated were in fact defeated.[45] Accordingly, the judge committed a material error in his process of reasoning. Further, NTP contends that the passage which the judge relied on in arriving at his conclusion that Dr. Tam's evidence was unsatisfactory and unsafe to rely on, merely serves to demonstrate that notwithstanding the intense pressure of cross-examination, 'Dr. Tam, in respect of a concession which would have done his case no real harm, insisted on providing accurate evidence'.[46]

[82] NTP also argues that the judge by expressing his view of and disagreement with the degree of risk and finding that Dr. Tam was 'exaggerating the risks' of the liquidity crisis, was trespassing upon Dr. Tam's judgment as to matters of management, and substituting his own views for those of the directors, contrary to the correct approach set out in **Howard Smith Ltd v Ampol Petroleum Ltd**[47] and **Harlowe's Nominees v Woodside (Lakes Entrance) Oil Co**.[48] NTP also submits that, in any event, the judge was wrong in his assessment as to the gravity of the liquidity crisis, as is NTP's case under ground 1 of its appeal. This submission is supported, NTP asserts, by the errors of analysis and reasoning as to the urgent liquidity crisis at paragraphs 113, 114 and 160 of the judgment; and also by the post-judgment demand letters from the four banks (admitted as fresh evidence), which demonstrate that Dr. Tam was correct in his assessment of the seriousness of the Lender Banks concerns, and the scale of the said liquidity crisis.[49]

[83] In summary, NTP contends that once the judge's primary reason for finding Dr. Tam to be an unsatisfactory witness (the 'absolutely obvious' assumption question and Dr. Tam's answer) is found to have been wrong as a matter of fact, this finding falls away, as well as the finding that Dr. Tam had exaggerated the risk

[45] Core appeal bundle, Tab 2, e-pages 39-40 at para. 135-136 of NTP's skeleton arguments.
[46] (1968) 121 CLR 483 at 499-500.
[47] [1972] 2 NSWLR 850 at page 835G-H
[48] Core appeal bundle, Tab 2, e-page 40 at para. 139 of NTP's skeleton arguments.
[49] Core appeal bundle, Tab 2, e-page 40 at paras. 140.1 and 140.2 of NTP's skeleton arguments.

of an urgent liquidity crisis. They submit that there is no good or sound basis upon which to support these findings, which ought to be set aside and Dr. Tam found to have been a truthful witness who gave 'centrally important evidence', as amplified in cross-examination. Furthermore, NTP contends that "in the course of the 5th October 2020 board meeting Dr. Tam explained (i) the liquidity crisis; and (ii) the nature of the PIPE and (iii) why alternative means of Capital Raising were not viable".[50]

IsZo's Submissions on Ground 4

[84] IsZo submits that any one of the bases upon which the judge found Dr. Tam to be an unreliable witness would have been sufficient to sustain such a finding. IsZo also argues that in its appeal, NTP has challenged only some, but not all, of these bases. The challenged bases are: (i) Dr. Tam's unwillingness to concede points which might harm NTP – the Kaisa 45% shareholding being "pretty sure" to give it *de facto* control of NTP to pass the resolutions it wants passed; (ii) Dr. Tam 'knowingly exaggerating' the vulnerability of NTP to the Lender Banks demanding repayment of their loans and the risks of a liquidity crisis; and (iii) the apparent unexplained discrepancy in Dr. Tam's evidential timeline as to when he had commenced investigation into the possibility of issuing new shares to Kaisa to stave off an urgent liquidity crisis, when in fact that option had been commenced by NTP before Dr. Tam had been informed on 22nd September 2020 of such a likelihood.

[85] As to the first of NTP's 'challenged' bases, IsZo argues that the concession eventually made by Dr. Tam in his evidence (relied on by NTP), that there was a "high chance" of the Kaisa's 43.9% voting power being able to pass resolutions, came only after much cross-examination on this issue, and does not support a finding that he was a witness giving candid testimony intended to assist the court.[51] Furthermore, the case now being advanced by NTP that a 45% shareholding was

[50] Core appeal bundle, Tab 2, e-page 38 at para. 128 of NTP's skeleton argument.
[51] Core appeal bundle, Tab 5, e-page 102 para. 104.1.

not sufficient to ensure the passage of resolutions which Kaisa wanted passed, including resolutions to remove or appoint directors, was not advanced by NTP before the judge; and NTP had not submitted in the court below that the factual premise of the contention that the effect of the PIPE would be to give effective control of NTP to Kaisa, had been wrong based on any analysis by Innisfree in its report.

[86] IsZo also submits that NTP's argument in reliance on article 10 of its memorandum of association, was not made to the judge below and is, in any event, without merit, since the reality is that the majority of the existing Board was pro Kaisa, and the question of Kaisa removing directors from the Board was therefore not a relevant consideration. The relevant context and consideration was the Requisition and the attempt by the requisitionists (including IsZo) to remove the Kaisa directors from office.[52] IsZo argues that article 10 does not buttress, but instead undermines, NTP's argument on this issue, since in order to remove the pro-Kaisa directors a vote of more than 50% of all shareholders would be needed, giving added weight to the power of a 43.9% shareholder in opposing such a resolution. Given Kaisa's new percentage, IsZo and the other requisitionists would have needed more than 89% of all other shareholders to vote in favour of a removal resolution; and when West Ridge's 4.5% shareholding is taken into account, the other shareholders would need almost 97% of all other shareholders to vote and to vote in favour of a removal resolution.[53]

[87] IsZo also submits that NTP's analysis based upon the figures produced by the proxy agent Innisfree, is a new point not raised in the court below and is plainly wrong. It argues that, in fact, the Innisfree analysis shows that, excluding the Kaisa votes, the proportion of shares expected to be voted after the PIPE, would be approximately 73.0% and not 86% as contended by NTP in its argument. Assuming (albeit unrealistic) that all shareholders (excluding Kaisa) expected to vote were to

[52] Core appeal bundle, Tab 5, e-page 103 para. 104.3.
[53] Core appeal bundle, Tab 5, e-page 103 para. 104.4.

vote against Kaisa on a resolution, this would result in 41% of NTP's shareholders voting which would be defeated by Kaisa's 43.9%.[54] Moreover, IsZo argues that NTP's analysis is unrealistic as it overlooks: (i) the fact that in a public company like NTP with a large number of shareholders, not all shareholders can be expected to vote the same way on every resolution (as the Innisfree analysis illustrates); and (ii) that it would be unrealistic to assume that the West Ridge shareholding of 4.5% would vote other than to maintain the current Board, having been selected as an allottee for the PIPE.[55]

[88] In summary, on this first challenged bases, IsZo submits that post the PIPE, "the prospect of any resolutions proposed by IsZo and the requisitionists, including resolutions to replace NTP's Board, succeeding would have been extremely remote". This conclusion is one which ought to have been obvious to Dr. Tam, and any suggestion or analysis by NTP to the contrary is "unreal and uncommercial to shareholder voting in publicly listed companies", such as NTP. Accordingly, the judge was not plainly wrong on this first challenged basis. His conclusion and finding was one which a reasonable judge could have made on the evidence before him, that it was '*pretty sure*' that post the PIPE, Kaisa's percentage shareholding and vote would ensure that resolutions of NTP were passed or not passed; and that Dr. Tam's refusal to accept this position was unsatisfactory.[56]

[89] As to NTP's second challenged bases (Dr. Tam exaggerated the risks to NTP), IsZo submits, firstly, that to the extent that NTP relies on its arguments and submissions under ground 1 of its appeal, it relies upon its submissions in response to the effect that NTP's case is without merit and the judge's finding of no urgent liquidity crisis was not plainly wrong. However, in response to NTP's legal submission that the judge, in expressing his view as to the degree of the risk, trespassed upon the judgment of Dr. Tam and the four directors as to matters of management which, on the authorities is not permissible, IsZo submits that this

[54] Core appeal bundle, Tab 5, e-page 104, at para, 104.5(b).
[55] Core appeal bundle, Tab 5, e-pages 104-105, at paras. 104.5(c) & (d).
[56] Core appeal bundle, Tab 5, e-page 105, para. 104.5(f).

point is misconceived. They contend, strongly, that a court is not precluded from, but is required to, make relevant findings of fact from the surrounding circumstances when determining what was the subjective intention of the directors, and hence their true purpose in approving the PIPE.

[90] This includes making findings as to the nature, seriousness and degree of risk of an urgent liquidity crisis being faced by NTP at the relevant time, and whether there were other capital raising options open to NTP to respond to any such crisis. The role and function of the court also includes making findings as to the credibility of witnesses, especially the directors who voted for the PIPE; whether the directors acted honestly and in good faith and in what they genuinely believed to be in the best interest of NTP; and ultimately, whether the directors acted for a proper purpose in approving the PIPE. Furthermore, IsZo submits, the judge was not making any commercial judgment himself nor was he purporting to determine whether any commercial judgments made by Dr. Tam and or the four directors, was the judgment which the court itself would have made in the circumstances.

[91] IsZo asserts that there are other bases upon which the judge found Dr. Tam not to be a credible witness, which finding NTP has not challenged on any basis. They argue that these unchallenged findings provide a sound basis upon which the judge reached his conclusion that Dr. Tam was an unreliable witness.[57] These include, the judge's conclusions on (i) Dr. Tam's evidence as to Chinese banking practices to be '*not* credible', '*a caricature*', and '*inherently improbable*'; (ii) Dr. Tam preferring to demonize IsZo's - Dr. Sheehy's – position as one of extortion), (iii) Dr. Tam's account of his conversations with YS Kwok of Kaisa and Mr. Khuong of GSL on 23rd and 24th September 2020 which the judge characterised as 'improbable', and the whole tale as 'window-dressing', IsZo emphasizes that these findings have also not been challenged in NTP's appeal and are a sound basis upon which the judge found Dr. Tam to be an unreliable witness. IsZo submits that NTP has mischaracterised the judge's findings which did not merely relate to

[57] Core appeal bundle, Tab 5, e-page 101 at para. 102.1.

'antipathy' by Dr. Tam towards IsZo, but that Dr. Tam was prepared to make these allegations, well-knowing them to be inaccurate or untrue.[58]

Judge's assessment of Dr. Tam's evidence

[92] The judge noted that Dr. Tam, a key witness for NTP, had an impressive background, having, among other things, obtained various academic degrees, being a chartered financial analyst, and had worked at senior positions in investment banks in Hong Kong and in Chinese property development companies. The judge noted however, that he was clearly not someone who was independent of Kaisa given that between 2010 and 2014, Dr. Tam had been the vice-chairman and an executive director of Kaisa, and since then as a senior advisor to Kaisa. The judge assessed Dr. Tam's evidence, on several bases, and concluded that his evidence, in several important aspects, was unsatisfactory, and that he had exaggerated the risk of an urgent liquidity crisis. In coming to this conclusion, the judge found that 'it would be unsafe to place reliance [on Dr. Tam] unless his evidence was corroborated by other reliable evidence. The judge stated that Dr. Tam was unwilling to concede anything which might in his eyes harm [NTP]'s case'. For instance, Dr. Tam's response (recorded at paragraph 107 of the judgment) to a certain question posed by Mr. Moore, QC in cross-examination.[59]

[93] It was not in dispute, that Dr. Tam's first knowledge of IsZo's activist campaign in relation to NTP was in August 2020 and he first learnt of the Requisition on or about 13th September 2020, some 2 days after it had been served on NTP. He had been asked by YS Kwok, if he was willing to 'solve the problem'. In response to the judge's question as to what YS Kwok meant by 'the problem', Dr. Tam stated that his understanding was that IsZo, put up 'a smear campaign' and 'I think it's more like extortion to Kaisa. So that is the impression I had. So that's why I described them as the activist shareholders. So to us, I think to him maybe he was briefed

[58] Core appeal bundle, Tab 5, e-page 101 at para. 102.2.
[59] See para. 107 of the judgment below.

that these are activist shareholders. They just want to buy their own shares, just like extortion'.

[94] At paragraph 106 of the judgment, Dr. Tam, in response to whether he was worried as to what the activist shareholders would do, said in part: ' my duty is to make sure the company continue to run in the way that it should be… that is my duty for all shareholders … I just have to focus on the liquidity issues because I believe [that] it is in the best interest of all shareholders'. Further, the learned judge quoted extensively from Dr. Tam's evidence in cross-examination in relation to Chinese banks calling in their loans, which position the judge characterised as putting borrowers 'in an extremely weak position', a position which the judge found as 'not credible' for the reasons which he gave at paragraph 109. However, the judge found some elements of his account to be 'no doubt true'. Specifically, the judge found that the evidence presented by Dr. Tam, in relation to Chinese banking practices and the legal avenues which are available to banks in China in order to obtain ex parte injunctive relief where they have issued a letter of demand to a borrower, as 'a caricature'.

[95] Further, the judge compared and contrasted Dr. Tam's evidence with the evidence of Mr. Jiang ("very serious and pressing"); Mr. Fok (the banks had been "patient" with NTP for 4 or 5 months since IsZo's open letters); and Mr. Wan ("the overall situation was rather urgent and serious"). The judge observed that none of these witnesses went as far as Dr. Tam 'in saying that [NTP] had no defences whatsoever'. The judge also observed that while the PRC is a communist state, all of the Lender Banks except for BOC were privately owned; and that China has 'a functioning judicial system, which decides disputes in accordance with law'. Accordingly, the judge did not accept that 'a borrower like [NTP] is as completely at the mercy of its private banking lenders as Dr. Tam would have [the judge] believe'.[60]

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[60] See para. 112 of the judgment below.

[96] Further, the judge found Dr. Sheehy to have an 'impressive background', and was of the view that there had been nothing improper about Dr. Sheehy's open letters critical of the existing management of NTP, which letters the judge observed 'were and are a common part of rumbustious American capitalism as played out on American stock exchanges.[61] The judge placed some reliance on the evidence of Dr. Sheehy, who he found to be an honest witness, to the effect that the loans from each of the Lender Banks were 'in individual silos'; none were charged against NTP itself; and even after paying off the SRCB loan in full, NTP had 'some US$70 million in cash.' He concluded, on this point, by observing that Dr. Tam was 'exaggerating the risks'. The judge found that Dr. Tam had 'exaggerat[ed] the situation' in that NTP had enough cash reserves to pay off the three smaller loans with BOB, CEB and IB; that XIB had 'never raised any issues at all with [NTP] about its borrowings, or made anything which might be construed as threats to call its loans in'; and the SRCB Loan having been paid off, that only left BOC with whom, even after completion of the PIPE, a repayment schedule had been negotiated and agreed- a fact which the judge found unsurprising since BOC's security, the Inno Park project, was almost complete.

[97] The learned judge concluded that PIPE was for an excessive amount since the original sum sought by Dr. Tam was US$200 (million being 'the worst-case scenario' of the sums owed by the end of 2021), whereas the amount needed at the end of 2020 (as forecasted by Mr. Wan on 22nd September 2020), was US$82 million. The judge found that figure to be 'vastly less than $200 million originally proposed or the $175 million ultimately raised by the PIPE'. Further, the learned judge opined that the presentations made by 'the professionals' to the Board at its 5th October 2020 meeting at which the PIPE was approved, were 'incomplete and unsatisfactory'. However, he refrained from making any findings as to Dr. Tam's involvement in that, since how the presentations came to be in that form had not been explored in cross-examination.[62]

[61] See para. 103 of the judgment below.
[62] See para. 116 of the judgment below.

[98] The judge pointed to what he saw as a discrepancy in Dr. Tam's evidence as to when the liquidity crisis was said to have arisen or manifested itself. He reasoned that since the SRCB demand for repayment had occurred on 23rd September 2020, the evidence given by Dr. Tam on this issue must have post-dated that demand. However, the judge deduced that the difficulty with Dr. Tam's evidence on this important aspect was that 'discussion of a share placement predates' the SRCB demand. In support of this deduction, the judge pointed to a number of matters which, from the evidence, had occurred prior to the SRCB demand, which supported his observation as to the difficulty with accepting Dr. Tam's evidence on this matter.

Analysis and Conclusion on Ground 4

[99] In my judgment, there is no sound basis advanced by NTP in its submissions upon which to disturb the judge's finding of Dr. Tam as an unsatisfactory or unreliable witness, on whose evidence it would be unsafe to place reliance on 'unless his evidence was corroborated by other reliable evidence.'[63] I agree with IsZo's submissions to the effect that the judge was not wrong in using, as an 'example', the exchange in cross-examination between Mr. Moore QC for IsZo and Dr. Tam, concerning the practical effect of the voting power of a 45 percent shareholder being 'pretty sure' to ensure the passage or non-passage of resolutions, and to do so in the context of a publicly listed company with a fairly large number of diverse shareholders. As to the concession ultimately made by Dr. Tam in cross-examination that there was a 'high chance' of Kaisa's votes being able to pass resolutions, the judge noted that what followed from his initial exchange with counsel for IsZo (and prior to this concession), was 'several pages of transcript in which Dr. Tam sought to defend his answer, which in the case of **a listed company with US retail investors** was plainly indefensible.' While it is correct that the judge did not refer to Dr. Tam's later 'concession' during cross-examination in his analysis on this aspect of his evidence, the judge did make clear that Dr. Tam

[63] See para. 107 of the judgment below.

persisted, for some considerable time, in not accepting what the judge plainly saw as, and what on any reasonable view was, accepted as the correct practical position in a publicly listed company like NTP, a position which Dr. Tam himself eventually accepted.

[100] Furthermore, it is apparent that this was not a matter which NTP seriously disputed during the trial or relied upon in its submissions before the judge. They had not sought to present a contrary view or argument as to the practical effect of the allotment of new shares to Kaisa (through its subsidiary GSL) as a direct result of the PIPE. NTP's reliance on this point on appeal, apparently for the first time, must be considered in the context where it is pellucid that the ultimate issue for the court's determination below, was whether the PIPE was approved by the directors so as to give Kaisa *de facto* control of NTP (in circumstances where, prior to the PIPE and the consequential allotments, they did not have such control) and to defeat the Requisition; or whether it's approval was in response to or to prevent an urgent liquidity crisis in NTP at the relevant time. If it was NTP's contention that the PIPE, in any event, did not or could not, in light of article 10 and the analysis in the Innisfree report or otherwise, have the effect of Kaisa obtaining *de facto* control of NTP, then it behoved NTP to plead and to mount such a case and, if necessary, to buttress it by the evidence of its witnesses. This NTP did not do. In any event, I am satisfied, for the reasons advanced by IsZo, that this line of argument, based upon article 10, as a means of undermining the judge's finding that Dr. Tam was not a credible witness, is without merit and cannot be sustained.

[101] As to the other arguments relied on by NTP in seeking to challenge certain of the bases upon which the learned judge found Dr. Tam to be an unreliable witness, I agree with IsZo that only some of these bases have been challenged by NTP in its appeal. One such basis which NTP does challenge is the judge's finding that Dr. Tam in his evidence knowingly exaggerated the vulnerability of NTP and the risk to it of an urgent liquidity crisis at the relevant time. In my view, this is fatal to this ground of appeal challenging the judge's assessment of Dr. Tam as an

unreliable witness. Furthermore, of the other bases which have been challenged, I am not satisfied that NTP's points have any merit, albeit I acknowledge that certain of NTP's arguments are hinged upon its submissions and grounds of challenge on ground 1 of its appeal. A more in-depth consideration will be given to the soundness of the judge's evaluation of the evidence and his conclusion of no urgent liquidity crisis when I come to consider both grounds 1 and 2.

[102] In my considered judgment, there is no merit in NTP's point that the judge, in assessing Dr. Tam's evidence as to the degree of risk faced by NTP of an urgent liquidity crisis, and his findings that Dr. Tam had exaggerated the risks of such a crisis and was therefore an unreliable witness. The judge did not exceed his role, function and authority nor did he trespass into the arena of commercial or management decisions when he evaluated Dr. Tam's evidence as to the immediacy and seriousness of the risk of an urgent liquidity crisis facing NTP at the relevant time. To the contrary, it was, on the authorities, incumbent upon the judge to assess and evaluate the nature and seriousness of the alleged urgent liquidity crisis from all the surrounding circumstances in coming to his conclusion on purpose. This included assessing the nature and quality of the evidence led by NTP's witnesses as to the existence, seriousness and urgency of such a crisis, so as to determine objectively what was the subjective intention of the directors when approving the PIPE. Any such exercise must necessarily involve an evaluation of the reliability or unreliability of the evidence of each such witness, including Dr. Tam. Accordingly, I am not satisfied that the judge erred in his approach to the evidence of Dr. Tam as to the risk or seriousness of the liquidity crisis, and in determining that, in all the circumstances, Dr. Tam had, in his evidence, exaggerated the risk of the alleged liquidity crisis and, in doing so, his evidence was open to question and was therefore unreliable on this critical issue of fact.

[103] NTP has challenged what the judge concluded was a discrepancy or contradiction in Dr. Tam's evidence as to the important issue of the date on which the alleged liquidity crisis manifested itself, and his attempt at explaining that discrepancy in

cross-examination.[64] The judge arrived at his conclusion as to the unreliability of Dr. Tam's evidence on this aspect, having taken a number of important facts and dates into account. I do not intend to rehash them here. In my view, the judge's analysis and reasoning is generally sound. He was quite correct to find that there was a discrepancy in Dr. Tam's evidence on this, considering that his explanation under cross-examination had not met the judge's satisfaction.

[104] The short point is that discussions about issuing shares to Kaisa had been had well-before Dr. Tam became involved and before the Lender Banks had discussions with Mr. Jiang on 16th September 2020 expressing various concerns on the operations and stability of NTP and whether members of the Board would be replaced, thus affecting the relationship between Kaisa and NTP. Further, it came out during cross-examination that Dr. Tam had learnt for the first time on 22nd September 2020, from Mr. Jiang (who is the person that had the conversations with the banks at which they expressed their concerns), and not from Mr. Wan, as Dr. Tam had testified in cross examination, of the banks calling in their loans, which risk Mr. Jiang described to Dr. Tam as 'real and imminent'. This discrepancy, in the judge's view, was serious enough for him to find as a fact that the reason for reviving the proposal for the issuance of shares to Kaisa on 16th September 2020, was the service of the Requisition a few days earlier on 11th September 2020. The judge also found that, in doing so, Dr. Tam 'wished to prevent a change in the board by the issuance of shares to keep *de facto* control with Kaisa', and not to avert an urgent liquidity crisis which threatened the financial collapse of NTP.[65] This was an inference reasonably open to the learned judge based on the evidence.

[105] In my judgment, the judge's reasoning in finding Dr. Tam was an unreliable witness is unassailable. It is certainly within the ambit of what a reasonable judge could have concluded. Accordingly, the judge cannot be faulted in concluding, having

[64] See paras. 120-125 of the judgment below.
[65] See para. 125 of the judgment below.

seen and heard Dr. Tam give his evidence and being cross-examined, that he was a witness who showed a willingness not to concede matters which may not necessarily be supportive of or which he perceived might harm NTP's case; and as a witness who was not entirely candid but prone to exaggerating aspects of his evidence in an attempt to buttress NTP's case about an urgent liquidity crisis and its vulnerability to the Lender Banks.

[106] As to NTP's complaints concerning the judge's finding that Dr. Tam's narrative of his conversations with YC Kwok of Kaisa and Mr. Khuong of GSL on 23rd and 24th September 2020, concerning either a loan proposal for US$200 million or an investment in equity, was 'improbable', and the whole tale as 'window-dressing', a finding which was not specifically challenged by NTP in its appeal, I am of the view that the judge was entitled, on his analysis, to entertain some significant doubt as to the veracity of this aspect of Dr. Tam's evidence. The judge came to this view having looked at this testimony in the context of all of the relevant evidence and having adopted a holistic view. I say this, mindful that this account by Dr. Tam of his conversations with both YC Kwok and Mr. Khuong, is one of the evidential factors upon which NTP relies to say that the judge erred in concluding that there was insufficient evidence adduced upon which he could be satisfied that an urgent liquidity crisis had been established – NTP's grounds 1 and 2.

[107] Finally, on this ground of appeal, in my view the judge was entitled to take a very dim view of, and to reject wholesale, Dr. Tam's allegations, made for the first-time during cross-examination, that Dr. Sheehy and IsZo were, by their activism against the current Board and management of NTP, extortionist, guilty of 'dirty tricks' and found Dr. Tam's view of Dr. Sheehy as an 'extortionist' to have been unjustified for the reasons he gave at paragraph 118. The judge was similarly dismissive of Dr. Tam's allegation that IsZo was guilty of 'dirty tricks'. These allegations were clearly mean-spirited and without any factual or logical basis, a fact which Dr. Tam, as a highly intelligent man with extensive knowledge of the capital markets (as the judge

observed), ought to have known were not so. There is simply no merit or sound basis upon which the judge's observations and reasoning could be faulted.

[108] In the premises, and for the reasons set out above, I would dismiss this ground of appeal.

Ground 5 – Judge's assessment of the evidence of the four directors

[109] In its submissions, NTP took issue with the accuracy of the judge's analysis of the evidence in cross-examination and re-examination of Dr. Lo. NTP also challenges the judge's finding of lack of credibility of the evidence of the other three directors who voted to approve the PIPE – Mr. Fok, Prof. Lyu, Prof. Wu, and as to his findings of concealment and lack of reliability.[66] The judge first assessed their independence concluding that none of them were truly independent of Kaisa. In fact, the judge found that in giving their evidence, the four Kaisa connected directors who voted for the PIPE, Prof. Wu, Prof. Lyu, Mr. Fok and Dr. Lo, were gushing in their praise of Kaisa, that they were heavily committed to supporting Kaisa's de facto control of NTP. The judge also assessed the evidence of these directors and concluded that each had 'serious deficiencies'.

[110] As to Mr. Fok and Prof. Lyu, the judge observed that neither of them had revealed their share options in Kaisa Health until they had been cross-examined on the point; and Prof. Lyu in his witness statement had stated that he was paid a director's fee but was 'not otherwise remunerated' by Kaisa Health. The judge records that Mr. Fok had said in his witness statement that his interests are not aligned with those of Kaisa or Kaisa Health. The judge concluded that: 'the existence of each man's options for six million shares in Kaisa Health was material to their true independence from Kaisa. That must have been obvious to them. Their witness statements were in my judgment, even if literally true, deliberately misleading in this respect'.[67]

[66] See paras. 157-159 of the judgment below.
[67] See para. 146 of the judgment below.

[111] The judge also noted that Mr. Fok had refused to answer several questions in cross-examination on the ground that any answer he gave would be "speculation", and this he did even in relation to certain obvious suggestions put to him, such as, increasing Kaisa's shares in NTP to 43.9% meant "that the chances of there being a change in the board would thereby be reduced very substantially". To this Mr. Fok had responded: "as I said, I cannot speculate on the outcome of a shareholders' meeting". This response prompted the judge to conclude that Mr. Fok 'was being disingenuous in his answers and was not seeking to assist the court'. However, the judge went on to observe that Mr. Fok did accept 'that the effect of the allotment [of shares to Kaisa] would be to very substantially increase Kaisa's voting power at any general meeting'. 'Yes that's the outcome of the PIPE, yes'.[68]

[112] As to Prof. Lyu, the judge having reproduced an extensive extract from the transcript of his answers to certain questions put to him by counsel for IsZo and by the judge himself, concluded that it was not credible that he 'did not think about the effect of the PIPE on the voting at the meeting which was requisitioned'. The judge recounted that instead, Prof. Lyu had tried to avoid or evade answering the question. Accordingly, he found him to be an unreliable witness, and that 'he knew that the PIPE would mean any resolution to remove the five allegedly Kaisa-related directors would fail'.[69]

[113] Likewise, the judge found Prof. Wu to be a witness who 'refused to give straight answers to obvious questions'. He found his evidence to lack candor. The judge concluded that 'it is not credible that [Prof. Wu] was unaware of the power dynamics on the board of [NTP]'.[70] This conclusion was reached against his background as an experienced director who had been a director of 6 non-Kaisa-related listed

[68] See para. 147 of the judgment below.
[69] See para. 149 of the judgment below.
[70] See para. 151 of the judgment below.

companies.[71] In the end, the judge found as a fact that Prof. Wu 'knew a vote for the PIPE would give *de facto* control of [NTP] to Kaisa.'

[114] As to the fourth director, Dr. Lo, the judge found that he gave his evidence in '*a direct fashion*'. The judge cited an exchange in the transcript of his evidence in cross-examination where Dr. Lo accepted that, as NTP's relationship with Kaisa was strategic and valuable to it, a solution which preserved the existing situation on the board could only be of benefit to NTP. There then followed this exchange between counsel for IsZo and Dr. Lo:

> "Q: So you averted the liquidity crisis by ensuring that the alleged concern of the banks that the board would change would never come to pass. That is right, isn't it?
> A: As the logic goes.
> Q: And that's what you intended?
> A: Yes."

[115] The judge went on from paragraph 155 to assess and evaluate the subjective purpose for which each of these four directors approved the PIPE. He determined Dr. Lo's purpose based upon the above response which he gave in cross-examination, having found that response 'more likely to be true than the gloss put on them in re-examination'. Accordingly, the judge found that 'Dr. Lo's primary purpose in approving the PIPE was to ensure that the change in the board proposed by the requisitionists failed'.[72] This finding as to Dr. Lo's subjective purpose was clearly and distinctly more consistent with his answers given in cross-examination to the effect that, in voting for the PIPE, he voted to avoid the liquidity crisis with the banks by ensuring that their alleged concern that the Board of NTP would change would never come to pass. However, this still left open the important question of whether an urgent liquidity crisis did exist at the time or whether Dr. Lo and the other three directors who voted to approve the PIPE had a reasonable basis at that time for being concerned that the Lender Banks would all call in their

[71] See para. 150 of the judgment below.
[72] See para. 156 of the judgment below.

loans and plunge NTP into an urgent liquidity crisis necessitating the urgent raising of a large capital sum.

[116] As to the first route, which is the subject of NTP's ground 5, the judge correctly recognised that his findings as to the unreliability of Mr. Fok, Prof. Lyn and Prof. Wu as witnesses and his 'rejection of their denials that they intended Kaisa to gain control' of NTP, do not prove that they in fact did intend Kaisa to gain control of NTP. However, he noted, while emphasising that all three directors had 'refused to accept that Kaisa would have control of [NTP] if the PIPE was approved'.

[117] The judge mused that had these three directors accepted, in their evidence, that this would have been the effect of approving the PIPE, 'they would be on the short slope down which Dr. Lo slid' in his concession during cross-examination. In his judgment, 'the reason for their denials was in order to avoid cross-examination on how that knowledge interacted with their approval of the PIPE. In other words, they averred ignorance of the effect of the PIPE on the voting outcome of a shareholders' meeting, because they knew that an admission of knowledge of the effect of the PIPE would tend to reveal that they intended Kaisa to retain control as a result of the PIPE'.

[118] The clear point of reason which the learned judge was making was that these three directors had stoutly denied or avoided admitting or giving a truthful response to an important question, the answer to which was obvious. Moreover, the judge considered that as experienced directors and men experienced in commercial and corporate matters and decision-making, the answer to that question ought to have been obvious to them, that the practical effect of the PIPE would be to give effective control of NTP to Kaisa at the shareholders' level. This was a matter of importance which the judge saw, correctly in my view, as obvious. Accordingly, it was open to the learned judge and he was entitled to draw certain inferences as to the candour of these witnesses and the reliability of their evidence. In the judge's assessment, their responses or non-responses or lack of forthrightness, undermined their

credibility and reliability as witnesses, and the value and cogency of their evidence as to the genuine purpose for which they voted to approve the PIPE. Accordingly, the judge found that the concealment of their knowledge of the effect of the PIPE, and their intention or purpose in voting to approve it, 'was to preserve Kaisa's *de facto* control of [NTP].'

Mr. Fok – submissions and conclusions

[119] As to the findings of unreliability in relation to Mr. Fok, NTP submits that the judge's first reason – Mr. Fok's failure to disclose his share options in Kaisa Health and that his witness statement was misleading in what it did state, are not conclusions which can reasonably be justified in the proper context of this dispute and in view of the evidence adduced at trial.[73] In support of this contention, NTP relied on six points.[74]The first is to the effect that, on a true reading of Mr. Fok's witness statement,[75] he was explaining the position as it stood in 'early 2018' and not in 2021, when he stated that his "interests were not aligned with those of Kaisa Health in anyway." The judge accordingly was incorrect, NTP submits, to place reliance on this statement as being deliberately misleading, since the Kaisa Health share options were not granted until 22nd July 2020,[76] some 2.5 years later.

[120] NTP's second point was that any criticism of Mr. Fok as to why he had not disclosed the fact of the 2020 share options in his 2021 witness statement, must be viewed in the context of an expedited trial of this matter, in which the witness statements were prepared on 13th and 14th January 2021, just 10 weeks after the filing of the claim form; and where there was a compressed case management timetable which, inevitably, leads to the omission of some details from witness statements.[77]

73 Core appeal bundle, Tab 2 e-page 42 at para. 151 of NTP's skeleton arguments.
74 Core appeal bundle, Tab 2 e-pages 42-43 at paras. 152 to 158 NTP's skeleton arguments.
75 See paras. 11 & 12 of Mr. Fok's witness statement.
76 Record of appeal, Bundle E, Vol. E17, e-page 14 at p. 8128.
77 Core appeal bundle, Tab 2 e-page 42 at para. 154 of NTP's skeleton arguments.

[121] In my view, while this may be a material consideration, it is difficult to accept that, in a matter where the motive or intention of each director is pivotal to a determination of what was their subjective purpose, and where the core allegation in relation to the approval of the PIPE was that its purpose was to ensure the *de facto* control of NTP by Kaisa and to defeat the Requisition (to effect a change in the Board and management of NTP away from Kaisa's control), a matter such as the grant by Kaisa of share options in Kaisa Health to Mr. Fok in 2020, would have been inadvertently omitted from Mr. Fok from his witness statement. This is particularly so since Mr. Fok did address his interest and that of Kaisa Health in his said witness statement, stating that they were not aligned.

[122] NTP's third point is that share options were not pleaded by either party and the only matter canvassed was that Mr. Fok was also a director of Kaisa Health. In my view, this point gets NTP nowhere. In fact, on one view, it reinforces the counterpoint that, it having been expressly pleaded in IsZo's amended statement of claim that Mr. Fok is a director of Kaisa Health, it behoved NTP, in response to that pleading, to plead that, in addition, he held the share options in Kaisa Health. This also underscores why Mr. Fok, in any event, ought to have addressed the share options in his witness statement and why NTP ought to have sought permission at trial to add to or to clarify or to correct the statement in his witness statement.

[123] NTP's fourth point is that consequently Mr. Fok's ownership of the share options in Kaisa Health was not the subject of disclosure, and no question was raised at trial as to whether or not he owned them. In my view, this is an equally bad point which does not accord with the duty of a party to litigation under the CPR 28.2 and 28.3 to give disclosure of all relevant documents under its control, and which 'are directly relevant to the matters in question in the proceedings'. On any view, the share options in Kaisa Health issued by Kaisa to certain directors on the Board of NTP, whose independence of Kaisa and purpose for voting for the PIPE were being called into question in the proceedings, warranted voluntary disclosure by NTP of

the share options or, at minimum, some stipulation as to their existence in its defence and/or in the witness statements themselves of each of these three directors or to the court at the commencement of the trial. To leave this matter to be unearthed during cross-examination is not only imprudent but risks an adverse finding of credibility and unreliability being made against the witnesses by the trial judge.

[124] NTP's fifth point is that, in any event, the information concerning the share options were contained in the Kaisa Group's published announcement of 'Grant of Share Option Scheme' on 22nd July 2020, which document[78]was requested by Ogier on behalf of IsZo and placed in the trial bundle before the court below on 28th January 2021, one day before the commencement of the trial.[79] This indicates that at a point just before the commencement of the trial, this document which sets out the share options, was made part of the trial bundles and therefore one of the documents in evidence at the trial.

[125] In my view, the request for and production of this document and its inclusion in the trial bundles, would have alerted NTP and its counsel to the likelihood that some relevance or significance would or may be attached by IsZo during the trial to the ownership by these three directors who approved the PIPE, including Mr. Fok, of share options issued by Kaisa in Kaisa Health. CPR 29.9 expressly contemplates a situation where a witness who wishes to amplify evidence in their witness statement, or to give evidence in relation to new matters which have arisen since the witness statement was served on the other parties, or to comment on evidence given by other witnesses, to do so with the permission of the court. In practice this is done prior to the witness being cross-examined. In the circumstances, it was open to NTP to have sought the permission of the court to have Mr. Fok amplify or correct the statement in his witness statement to the effect that he did not own any shares in Kaisa Health and his interests were not aligned with Kaisa. This was

[78] Record of appeal, Bundle E, Vol. E17, e-page 14 at p. 8128.
[79] Core appeal bundle, Tab 2, e-page 42 at para. 157

regrettably not taken up, leaving the judge to draw such reasonable inferences as to why Mr. Fok had not disclosed his ownership of the share options in Kaisa Health in his witness statement and only when he was cross-examined about it.

[126] NTP's sixth point is perhaps its best one. It argues that in response to an 'open' question during cross-examination, Mr. Fok disclosed that he did hold the share options, and went on to explain that they were "unintentionally omitted from my witness statement".[80] This admission then prompted Mr. Moore QC, lead counsel for IsZo, to say "thank you for that clarification and I felt sure it was an omission…".[81] NTP submits that, in these circumstances where Mr. Fok readily disclosed his share options when asked about them, and testified that the omission to do so in his witness statement had been unintentional, which evidence was not challenged by IsZo but accepted by its lead counsel as an unintentional omission, it was not reasonably open to the judge to find that, by reason of the omission, Mr. Fok's statement in his witness statement was 'deliberately misleading'.[82]

[127] In my view, while there is some force in this submission by NTP, it does not completely undermine the reasonableness of the judge's finding as to the statements which were in Mr. Fok's witness statement about or concerning his relationship with or connections to Kaisa being 'deliberately misleading'. I say this for the reasons I have given in relation to NTP's points 1 to 5 above. The fact remains that it is only during the course of cross-examination that Mr. Fok disclosed his ownership of the share options in Kaisa Health. This disclosure came at an advanced stage in his evidence in the proceedings and does not explain away why it had not been made before at an earlier stage. Furthermore, it does not completely explain why, having addressed his relationship or lack thereof with Kaisa in his witness statement, Mr. Fok did not avert to his apparently valuable Kaisa Health share options. It also does not explain or address at what stage Mr. Fok realised this omission, which clearly was of significance, as he then recognised that he

[80] Record of appeal, Bundle G2, Tab 9, Transcript Day 9, e-page 342, line 10.
[81] Record of appeal, Bundle G2, Tab 9 Transcript Day 9, e-page 342, lines 18-20.
[82] Core appeal bundle, Tab 2 e-page 43 at para. 159.3 of NTP's skeleton arguments.

ought to make the disclosure. Moreover, it is notable, as IsZo stressed, that the finding by the judge was in fact that Mr. Fok's statement was "even if literally true, deliberately misleading", which could have meant that even if his statement was, as NTP argued, correctly referring to the position as it stood in 2018, it may nevertheless be seen reasonably as misleading.

[128] I also find it rather peculiar that NTP did not seek to challenge directly in this appeal, the findings by the judge that Mr. Fok had refused to answer several questions in cross-examination because his answers would be 'speculation', or that Mr. Fok was being "disingenuous in his answers" and was "not seeking to assist the court." These are all important findings upon which the judge reached his conclusion that Mr. Fok was an unreliable witness and led, along with his other findings, to his assessment of Mr. Fok's as an unreliable witness and that his real purpose in approving the PIPE was to ensure Kaisa's *de facto* control of NTP and to defeat the Requisition.

[129] Accordingly, for the reasons stated above in relation to each of the six points relied on by NTP in challenging the judge's finding that Mr. Fok was an unreliable witness, I hold that NTP has failed to establish that the judge's said assessment and finding was erroneous or perverse or so plainly wrong as to warrant appellate interference. Accordingly, I would uphold the judge's finding that Mr. Fok was an unreliable witness whose evidence was not credible as to why he voted to approve the PIPE.

Prof. Lyu – submissions and conclusions

[130] In challenging the judge's finding that Prof. Lyu was an unreliable witness, NTP makes the same six points which they made and relied upon in relation to a similar finding concerning Mr. Fok. Like Mr. Fok, the judge found that Prof. Lyu had not revealed in his witness statement that he held share options in Kaisa Health, until he was cross-examined on the point.[83] What Prof. Lyu did reveal in his witness statement was that he does "not hold any shares in Kaisa Health or Kaisa." While

[83] Record of appeal, Bundle G2, Tab 8, Transcript Day 8, e-page 274, lines 3-14.

that statement is technically correct, again it underscores that, in preparing his witness statement for filing by NTP in this matter, where the allegation was that he and the other three directors had voted to approve the PIPE so as to ensure Kaisa's *de facto* control of NTP and not for the purpose of capital raising to avert an urgent liquidity crisis, Prof. Lyu did appreciate that it was necessary to address any relationship or connection which he had or may have had with Kaisa Health and the Kaisa Group of companies. This notwithstanding, he failed to mention his ownership of the share options in Kaisa Health, electing instead to paint a picture of no or minimum connection to Kaisa and its companies. This is precisely what the learned judge found to have been 'deliberately misleading' in this respect, even if the statements in Prof. Lyu's witness statement were literally true. Accordingly, and for the same reasons given above in relation to the judge's finding concerning Mr. Fok on this aspect, I reject the six points made by NTP concerning the finding that Prof. Lyu was an unreliable witness.

[131] Likewise, I can find no merit in NTP's challenge to the judge's finding that "it was not credible that Prof. Lyu did not think about the effect of the PIPE on the voting at the meeting which was requisitioned"; and his avoidance answering questions about this by saying "I wasn't focused on that." The judge reached these conclusions as to his credibility and reliability as a witness, having cited *in extensio* a section of Prof. Lyu's evidence in cross-examination.[84] This led the judge to find that he was not a reliable witness and that he "knew that the PIPE would mean any resolution to remove the five allegedly Kaisa-related directors would fail." In my view, the judge was clearly not swayed by Prof. Lyu's apparent avoidance of what was plainly obvious, and in not being frank or candid with the court. These conclusions were formed by the judge after seeing and hearing Prof. Lyu being cross-examined and are, in my judgment, unassailable. To say, as NTP argues, that the judge's reasoning was "circular and self-fulfilling" is, in my respectful opinion, of no moment and without merit.

[84] See para. 148 of the judgment below.

[132] The question here was not whether Prof. Lyu was focused on capital raising as he testified, but whether in considering voting to approve the PIPE, he knew or would have appreciated that the consequence of it being approved and the shares being allotted, would be to ensure the defeat of the resolutions foreshadowed in the Requisition, and the giving of *de facto* control of NTP to Kaisa. His avoidance in giving a straight answer to this question, clearly undermined his credibility with the judge, and the quality and reliability of his evidence with the court. In my judgment, NTP has not made out a case on appeal that these findings and conclusions by the learned judge as to the credibility and unreliability of the evidence of Prof. Lyu, were plainly wrong or erroneous. Accordingly, I would reject NTP's challenge to this finding.

[133] Accordingly, for the reasons set out above, I would uphold. the judge's findings at paragraphs 157 to 159 relating to the subjective intentions or motives of Prof. Lyu in voting to approve the PIPE.

Prof. Wu – submissions and conclusions

[134] The judge found that Prof. Wu, whom he noted had been a director of six non-Kaisa companies and a director of NTP and chairman of its audit committee since July 2019, had 'refused to give straight answers to obvious questions'.[85] Having cited an exchange between Prof. Wu and counsel for IsZo during his cross-examination, the judge concluded that he 'was not being candid in this passage', giving his reasons for arriving at this conclusion.[86] The judge also found that as an experienced director, Prof. Wu would have known or appreciated that Dr. Tam was expecting him to vote for the PIPE and that, in fact, he 'knew a vote for the PIPE would give de facto control of [NTP] to Kaisa.'[87] In my view, these were all findings which were reasonable for the judge to make on the evidence before him and for the reasons which he gave.

[85] See para. 150 of the judgment below.
[86] See para. 151 of the judgment below.
[87] See para. 152 of the judgment below.

[135] NTP stressed that Prof. Wu had no connections to Kaisa and was a totally independent director of NTP. However, the judge found, at paragraph 145, that all four directors were in fact not independent of Kaisa and whatever their formal governing status was 'in reality they were heavily committed to supporting Kaisa's de facto control of [NTP]. I find that the four directors were not, as a matter of fact, independent of Kaisa.' These findings, which are obviously based upon their evidence, both in their witness statements and oral evidence, and on the judge's own assessment as to the manner in which they gave their evidence before him, seem to find some support in the references with respect to the evidence of each of them at footnote 57 on page 59 of the Judgment. Furthermore, NTP has not specifically appealed against these findings, at paragraph 145, of lack of independence from Kaisa.

[136] However, it must be noted that, unlike his other three fellow directors of NTP who voted to approve the PIPE, Prof. Wu had no share options in Kaisa Health or in any other Kaisa related company. Also, notably, Prof. Wu was then a professor and doctoral tutor at Tongji University and held directorships of eight major PRC companies.[88] Accordingly, NTP submits (contrary to the judge's finding at paragraph 145) that Prof. Wu was truly independent of and had no relations with Kaisa. This was his evidence during cross-examination.[89] As NTP submits, in any event, this testimony from Prof. Wu of having no relations with Kaisa remained unchallenged, as was his response 'I don't know the relations between the four directors with Kaisa, so I cannot comment on that…'. NTP submits, therefore, that these two short responses by Prof. Wu, both of which remained unchallenged, 'could not provide an appropriate evidential basis for the judge's wholesale rejection of [him] as a reliable witness'.[90]

[137] In my view, while Prof. Wu appears to have little, if any, connection with Kaisa or its group of companies at the relevant time, the simple fact is that he had by then

[88] Record of appeal, Bundle C1, Tab 7, e-page 87, at paras. 6 and 9 of Wu's witness statement.
[89] Record of appeal, Bundle G2, Tab 8, Transcript Day 8, e-pages 275-276.
[90] Core appeal bundle, Tab 2 e-page 47 at para. 192 of NTP's skeleton arguments.

been a member of the Board of NTP for 18 months, and it would be passing strange for him not to know that his other three fellow members of the Board were Kaisa connected persons. In my view, it would be strange if he did not by then know of the strategic connection between Kaisa, with experience in the property development market, and NTP or of Kaisa's apparent control of the Board or its influence on decision-making at the Board level of NTP. Moreover, it would also be very strange, that Prof. Wu would not have been aware that the requisitionists led by IsZo were in fact seeking to remove the 'Kaisa connected' directors from the Board. It is no wonder, faced with Prof. Wu's responses in cross-examination, that the judge found he was not being candid with the court and 'it is not credible that he was unaware of the 'power dynamics on the board of [NTP]'.

[138] In my judgment, NTP's challenge to these findings fall somewhat short of the standard necessary for an appellate court to intervene. They were not plainly wrong or erroneous. In the circumstances, this challenge to the judge's finding that Prof. Wu was not a reliable witness is not made out, and accordingly, should stand. As to the judge's finding of the subjective intention of Prof. Wu, to the extent that it is based upon his first route (Prof. Wu's unreliability as a witness), NTP's challenge to the judge's assessment of Prof. Wu as a witness has not been made out. Like the other three directors, this conclusion is subject to my consideration of NTP's grounds of appeal dealing with the judge's second route – no urgent liquidity crisis being made out.

Dr. Lo – submissions and conclusions

[139] In essence, the judge found Dr. Lo to be, for the most part, a credible witness. This is confirmed by his finding that Dr. Lo gave his evidence 'in a direct fashion', a finding which the judge illustrated by citing the exchange during his cross-examination in which Dr. Lo admitted that he had averted the liquidity crisis with NTP by 'ensuring that the alleged concern of the banks that the board would change would never come to pass.' In coming to his finding on the credibility of Dr. Lo, the judge did not attach much, if any, credence to his evidence about this

in re-examination. There, in answer to a question from NTP's counsel about whether "the real purpose of the PIPE was to stop the requisition in its tracks and to keep the board of [NTP] in place", Dr. Lo responded: "I will say if that is the case that is a by-product, not aim of the PIPE." The judge regarded his answer in cross-examinations as more likely to be true and posited that the question in re-examination had 'tipped him off that he had made a concession during cross-examination…which he should not have made', and that his response was a 'gloss' put on his previous truthful answer.

[140] Having assessed Dr. Lo's purpose for voting to approve the PIPE, the judge concluded: 'I find as a fact that Dr. Lo's primary purpose in approving the PIPE was to ensure that the change in the board proposed by the requisitionists failed.' Dr. Lo having made the concessions which he did in cross-examination, which evidence the judge accepted as being truthful, it was open to him, in my judgment, to make this finding as to Dr. Lo's primary purpose for voting to approve the PIPE.

[141] However, NTP specifically appealed these findings at paragraph 156 of the Judgment. NTP argues that the judge did not take into account Dr. Lo's clear evidence as to his purpose for approving the PIPE as given in his witness statement.[91] In his evidence in chief, Dr. Lo attests that he had concluded that "the PIPE was the most effective and quickest method of raising finance to allow [NTP] to repay its loans and continue funding the construction projects **if** the banks demanded repayment. That was the reason I voted for the PIPE." (emphasis added) He goes on to state that the suggestion that the directors voted for the PIPE "for the purpose or substantially for the purpose" of increasing Kaisa's shareholding in NTP to defeat the Requisition aimed at removing and replacing members of the Board and entrenching the existing directors, "**is a ridiculous allegation and I do not think there is any basis for it. This played no part in my decision-making.**" (emphasis added)

[91] Record of appeal, Vol. C1, Tab 6, e-page 83 at paras. 54 & 55.

[142] NTP submits that this was clear evidence that Dr. Lo's purpose in voting for the PIPE was capital raising. NTP also argued that it was not surprising that Dr. Lo would have responded in the way in which he did, to the question in cross-examination about voting to ensure that the bank's concern that the board would change would never come to pass. They stress that the question which solicited that response from Dr. Lo, was premised on there being a 'liquidity crisis', that the Lender Banks did have concerns that the Board would change, and it suggested to the witness that the means of averting the liquidity crisis and allaying the banks' concerns was by "ensuring" that the concern would never happen. NTP also contended that this was a 'rolled-up' question, and it was unclear to which part of the rolled-up question Dr. Lo was responding. They also submitted that there was therefore a need for some clarification by way of re-examination, and the question posed by counsel for NTP in re-examination was the first time the question on this issue had been put clearly and openly to Dr. Lo.[92] NTP submitted that the judge's description of this clarification as an attempt to 'row back' and as an untrue 'gloss' in response to a 'tip off' as to an unwise concession, has no evidential basis at all and his reasoning is flawed.

[143] I must confess to having a measure of sympathy with NTP's submissions. However, in my judgment they ultimately do not stand up to proper scrutiny. While it may be a fair criticism that the question asked during cross-examination which solicited the concession answer from Dr. Lo was somewhat rolled up, referring as it did to a liquidity crisis and concerns of the banks over a possible change in the Board of NTP, it is pellucid that Dr. Lo, whom the judge regarded as 'a highly intelligent man'[93] gave a clear response to it. He accepted that the logic of and the reason for voting for the PIPE, was to allay the concerns of the Banks as to a change in the Board, by ensuring that such a change would "never come to pass". It was not Dr. Lo's response that this was not the primary purpose, or not his primary purpose, for voting for the PIPE, and that the primary purpose was in fact

[92] Core appeal bundle, Tab 2, e-page 49, at paras. 200-206 of NTP's skeleton argument.
[93] See para. 156 of the judgment below.

capital raising to avert an urgent liquidity crisis. It was certainly open to him to give that kind of response, but he did not, a response which would have been more consistent with his evidence at paragraphs 54 and 55 of his witness statement.

[144] It is important to bear in mind, that what a witness states in his or her witness statement constituting their evidence in chief, is usually tested by cross-examination. The witness' responses in cross-examination and re-examination are evidence in the case upon which a trial judge must access the credibility and reliability of the witness and make appropriate findings of fact. It was, therefore, open to the judge, who had seen and heard Dr. Lo give his oral evidence, to evaluate his responses to questions during cross-examination and re-examination, and to determine which responses or evidence to believe or to accept as truthful. This is quintessentially the role and function of the trial judge. Furthermore, a judge, as the trier of fact, is not bound to accept what a witness states in chief, whether orally or by his or her witness statement, but to evaluate that evidence against the other evidence in the case, including the documentary evidence. It was therefore open to the judge to accept Dr. Lo's response and concession during cross-examination as truthful, and to not accept his response to the question posed in re-examination as his truthful answer to such a question dealing with such an important aspect of the evidence and the case. Furthermore, the response during re-examination, at minimum, accepts that stopping the Requisition and maintaining the board of NTP in place, may have been a "by-product" of the PIPE, which was not a matter pleaded by NTP.

[145] In my judgment and for the reasons stated above, NTP's challenges to the judge's finding as to the subjective purpose for which Dr. Lo voted to approve the PIPE – to ensure that the change in the board proposed by the requisitionists failed- is without merit. It has not been demonstrated that this finding is erroneous or plainly wrong so as to warrant this Court setting it aside.

Conclusion on Ground 5

[146] In the premises, ground 5 of NTP's appeal has not been made out. NTP has failed to demonstrate that the judge erred in his assessment of the credibility and reliability of the four directors – Mr. Fok, Prof. Lyu, Prof. Wu and Dr. Lo – or that any of these findings were erroneous or plainly wrong and ought to be set aside. There is no sound basis upon which this Court ought to interfere with any of these findings. Accordingly, I would dismiss ground 5 of the appeal. I now turn to ground 1 of NTP's appeal which, along with ground 2, are its primary grounds.

Ground 1 – Finding of no liquidity crisis and improper purpose

[147] In my view, grounds 1 and 2 of NTP's notice of appeal challenges directly the correctness and soundness of the judge's finding at paragraph 160 that the "ostensible justification for the PIPE, the urgent liquidity crisis, is ….not made out". By ground 1, NTP challenges as erroneous the five bases or reasons used by the judge at paragraph 160 in grounding his finding of no urgent liquidity crisis. By ground 2, NTP contends that, in evaluating the evidence as to the existence or non-existence of an urgent liquidity crisis, the judge failed to take into account or to have regard to the relevant timeline and chronology of events from May 2020 to 5th October 2020. NTP contends that by not taking in account these 'omitted events', the judge's findings and conclusions of no urgent liquidity crisis and improper purpose was erroneous, plainly wrong, and cannot stand. The finding of no urgent liquidity crisis led to the judge's primary finding and conclusion at paragraph 164 that the four directors who approved the PIPE, did so for the improper purpose of giving Kaisa *de facto* control of NTP and to defeat the Requisition in breach of section 121 of the Act. These two grounds of appeal are therefore interrelated and overlap to some significant extent.

[148] However, grounds 1 and 2 of NTP's appeal have been addressed individually by counsel for NTP and IsZo in their submissions since each ground approaches the judge's finding of no urgent liquidity crisis from two different but inter-related avenues. Both parties have, in their oral submissions before this Court, heavily

relied on and underscored the timeline and chronology of relevant events. They have each, helpfully, provided the Court with a written chronology of the events which they rely on to undergird their submissions on these two grounds of appeal. Accordingly, as a matter of consistency and convenience, I will consider each of these two grounds of appeal *seriatim*, bearing in mind that the fullest consideration of grounds 1 and 2 is necessary before reaching a determination on the correctness of the judge's conclusion of no liquidity crisis and improper purpose. However, before doing so, I must consider what is the legal test to be applied by a court in determining the subjective intention of directors when making a decision in the exercise of their statutory duty, and a determination of the legal question and factual issue of 'purpose'.

Court's approach to determining director's intention and purpose

[149] In the instant matter, central to the determination of IsZo's claim that in approving the PIPE the four directors acted for an improper purpose in breach of section 121 of the Act, is a finding by the trial judge as to what was their subjective intention when they so acted on 5th October 2020. This exercise involved the judge evaluating, assessing, and weighing all the relevant evidence, oral and documentary, which point or could point to what the true intention of the directors were in approving the PIPE. A determination as to 'intention' is by its very nature not a precise science. It is never possible to determine with absolute precision what was the subjective intention of a person when making the decision sought to be impugned. Therefore, in the determination of a director's intention, the judge, utilising his experience as a judge and evaluator of evidence, must take into account a number of relevant factors, including an examination all the surrounding circumstances and reliable evidence, oral or documentary, which point to or may assist in a proper determination of their intention or purpose when they made the decision being challenged.

[150] Importantly, these factors include, but are not limited to, the statement in evidence by each of the directors as to their intention or purpose when they made the

decision. While this evidence, if credible, it is an important and powerful consideration, it is not necessarily decisive, and must be weighed against other contemporaneous actions, statements, documents and surrounding circumstances which individually or collectively shed some light on the true intention of the directors. The trial judge must also consider and weigh the extent of their involvement in and knowledge of the matter under consideration, their approach to decision-making, and the factors which they took into account or failed to take into account in reaching the kind of decision which they made. This list is by no means intended to be exhaustive. In short, the court must examine all the relevant surrounding circumstances and reliable evidence, oral or documentary, which point to or may assist in a proper determination of purpose. However, in the end the trial judge must take a holistic and objective view of the evidence when reaching his finding as to intention or purpose. The judge must, in carrying out this exercise to determine what was the subjective intention or 'purpose' of the directors in making the decision, which is sought to be impugned, caution himself that management and commercial decisions are matters for the directors, and it is not for the court to substitute its own assessment or view of the risk, prudence or reasonableness of the decision itself.

[151] In the New Zealand Court of Appeal case of **Howard Smith Ltd**[94] Street J stated:

> "There are inevitably uncertainties that enter into deciding the nature of a particular intention at a particular point of time. **The person whose intention is in question can give oral evidence on the point, and this is always a powerful source from which to judge of intention. Considerable weight must also, however, be given to contemporaneous actions and statements.** There is inevitably a risk of reconstruction and perhaps self-justification clouding the reliability of subsequent oral evidence of a particular intention. A further difficulty is the ultimate impossibility of demonstrating definitively what was or what was not a particular intention. The question is one which involves inference as distinct from confident recognition of an objective fact. **The demeanour of the witness, his involvement in the matter under consideration, and the extent of his reliability and understanding are all factors which must be weighed.** These are amongst the considerations that I have

[94] [1972] 2 NSWLR 850.

> taken into account in weighing and evaluating the evidence given by these four directors."(emphasis added)

[152] A trier of fact, in deciding what was the real intention or purpose of those making a particular decision which is within the ambit of the authority given to them, whether by statute or by a valid and binding legal document such as the memorandum and articles of association of a company, must apply an objective approach to and assessment of the evidence before him. In some circumstances, this may involve considerations of whether the action taken or decision made by them was urgent or critical at the relevant time, or unusual, extreme or fanciful. The object of such an exercise is to determine whether the decision-makers were acting honestly or in the proper discharge of their powers and duties, taking into account the interest of those whose interest they were duty bound to have account of; or whether, in making the decision or acting as they did, they were motivated by some other illegitimate or extraneous or perverse purpose or reason, such as self-gain or self-interest or, in the case of company directors, with the objective of stymieing or preventing the exercise of control by the majority of shareholders or in seeking to maintain their position on the board.

[153] In the Privy Council case of **Howard Smith Ltd**, Lord Wilberforce addressed the court's approach to an assessment of how critical or urgent a reason may have been, where that reason on the evidence, does exist. The Law Lord stated:

> "[T]he court … is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have been. **If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme**." (emphasis added)

[154] Lord Wilberforce also addressed **Howard Smith Ltd**, quoting from **Hindle v John Cotton Ltd**[95] the importance to a determination of what was the genuine intention

[95] (1919) 56 SCLR.

or purpose for which directors acted, of the court taking into account all relevant materials from the surrounding circumstances which genuinely throw light on the state of mind of the directors at the relevant time:

> "Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason".

[155] This Court had occasion in two appeals from the BVI where the question was one of abuse of power, to consider the proper approach to determining the genuine intention of directors when issuing shares in exercise or purported exercise of their powers to do so under section 45 of the Act and the applicable provision(s) of the company's memorandum and articles of association. In **Independent Asset Management Company Limited v Swiss Forfaiting Ltd**[96] Webster JA in delivered the judgment of the of the Court opined:

> "The foundation of the proper purpose rule lies in the fact that a company is divided into two basic organs: the board of directors and the shareholders. Directors are responsible for the managing the business and affairs of the company and have the power to issue the shares as a part of that responsibility. In doing so, they must ensure that a proper balance is maintained between the two organs of the company…" .

[156] In **Antow Holdings Limited v Best Nation and Ors**[97] Pereira CJ, in dealing with what is the proper approach by a court to determining whether the directors had, in the exercise of their fiduciary duty in reaching the decision under scrutiny, acted for a proper purpose, stated: '[b]efore one can say that a fiduciary power has been exercised for the proper purpose for which it was conferred, a wider investigation may have to be made'. The learned Chief Justice also stated that 'the test to be applied at present is the "substantial purpose" test derived from the Howard Smith

[96] [2017] ECSCJ No. 271 (delivered 24th November 2017).
[97] [2018] ECSCJ No. 253 (delivered 21st September 2018).

case'. Accordingly, the test applicable in BVI is the dominant or substantial purpose test.

[157] The Chief Justice went on to refer approvingly to the oft cited passage from the decision in **Hindle v John Cotton**:

> "Where the question is one of abuse of powers, the **state of mind of those who acted, and the motive on which they acted**, are all important , and you may go into the question of what their intention was, **collecting from the surrounding circumstances all the materials which genuinely throw light upon the question of the state of mind of the directors** so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason".

[158] In **Howard Smith Ltd** Lord Wilberforce opined:

> "In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question….Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the **substantial purpose** for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the **bona fide opinion of the directors**, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be to the side of a fairly broad line on which the case falls." (emphasis added)

[159] Once the court determines that the directors acted for a purpose which was 'objectively proper, not improper', the court will not go on to review the decision as to its reasonableness or unreasonableness, and potentially substitute its own view 'as to the judgment the directors should have reached in managing the company'.[98] This is so even where the judge forms the view that the opinions of the directors as to the then financial needs (capital raising) of the company when exercising the power to issue new shares, 'was imprecise, probably intuitive and maybe erroneous…'.

[98] See Gower's Principles of Modern Company Law at 16-26, 4th edn. at 614-615.

[160] There are good and sound juridical bases for this principle, rooted as it is in the role, function and powers accorded to directors by statute and by the memorandum and articles of association of a company. Accordingly, in the exercise of the power given to them, directors may take into account a range of factors and other practical considerations applicable to the company and its business. In the discharge of their duties, they may factor into their assessment of what is in the best interest of the company, the fact that their intended action or decision may frustrate the ambitions of some shareholders or group of shareholders, including their ability to enlarge their interest in or control over the company. However, so long as they discharge their duty honestly, in good faith and in what they decide to be in the best interest of the company and its shareholders, their decisions are not open to review by the courts. While capital raising is, *prima facie*, a proper purpose for the issuance or allotment of shares, it has been consistently held that the exercise by directors of their undoubted power to issue shares in order to or for the purpose of maintaining control of the company, or to favour or aid one set of shareholders in maintaining or securing control of the company, is not a proper or valid exercise of their power and will be struck down as voidable and ineffective.

[161] These important or bedrock company law principles, find much support in the oft cited decision of the Australian High Court in **Harlowe's Nominees Pty Ltd. v Woodside (Lakes Entrance) Oil Co**:[99]

> "The principle is that although primarily the power is given to enable capital to be raised when required for the purposes of the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, so long as those reasons relate to a purpose of benefiting the company as a whole, **as distinguished from a purpose, for example, of maintaining control of the company in the hands of the directors themselves or their friends**. An inquiry as to whether additional capital was **presently required** is often most relevant to the ultimate question upon which the validity or invalidity of the issue depends; but that ultimate question must always be whether in truth the issue was made honestly in the interests of the company… **Directors in whom are vested the right**

[99] (1968) 121 CLR 483 at 499-500.

> **and the duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts.** Thus in the present case it is not a matter for judicial concern, if it be the fact, that the allotment to Burmah would frustrate the ambitions of someone who was buying up shares as opportunity offered with a view to obtaining increased influence in the control of the company, or even that the directors realized that the allotment would have that result and found it agreeable to their personal wishes: Mills v Mills (1938) 60 CLR 150. But if, in making the allotment, the directors had an actual purpose of thereby creating an advantage for themselves otherwise than as members of the general body of shareholders, as for instance by buttressing their directorships against an apprehended attack from such as Harlowe, the allotment would plainly be voidable as an abuse of the fiduciary power, unless Burmah had no notice of the facts."

[162] In the instant matter, the judge was required to determine what was the subjective intention of the four majority directors when they approved the PIPE. In conducting this exercise, the evidence of the four directors of NTP, if found to be genuine or credible, as to what was their sole, dominant or substantial intention when approving the PIPE, was important and powerful evidence of their subjective intention at the relevant time, although not decisive of this issue. In coming to his decision on this factual and legal question, the judge was required to consider all the relevant surrounding circumstances. In particular, he was entitled to objectively evaluate the evidence of each of the four directors and that of Dr. Tam as to whether, at the relevant time, NTP was facing, or they reasonably believed that NTP was likely to be faced with an urgent liquidity crisis, by the Lending Banks calling-in their respective loans; and that was their real or genuine motive in approving the PIPE. In conducting this exercise, the judge had to take care not to substitute or impose his own views as to the reasonableness or unreasonableness of the decision of the directors to approve the PIPE. The judge was also entitled to assess the cogency of the evidence of Mr. Khuong, on behalf of GSL, as to his conversation with Dr. Tam regarding the possibility of either a loan or investment by way of a PIPE, and the evidence from Dr. Tam as to the consideration of other options for obtaining or raising capital. The judge did not accept the evidence of Mr. Khuong, who he found to be an unreliable witness. He found certain aspects

of his evidence to be 'farfetched' and did not accept that 'Kaisa had entrusted any real decision-making power to Mr. Khuong in relation to this very significant investment in [NTP].' in reaching his conclusions, the judge would have been required to assess the credibility of each of the witnesses, and in the end, to consider all the evidence and take a holistic view.

[163] I shall address the correctness of the judge's approach to and his evaluation of the evidence at trial, documentary and oral, touching on the question of whether NTP was facing an urgent liquidity crisis in late September 2020. Having already assessed NTP's challenges to the judge's findings on credibility, I must in the end consider whether the judge's critical finding that there was, on the evidence adduced, no urgent liquidity crisis made out to his satisfaction, was erroneous or plainly wrong so that no reasonable judge could have made it and, therefore, it ought to be overturned by this Court, and a finding of an urgent liquidity crisis as the purpose, or the dominant purpose, for the approval of the PIPE, substituted. Likewise, I must consider whether on the evidence the learned judge's conclusion on 'purpose' and that the four directors acted for an improper purpose in approving the PIPE and allotting the new shares to GSL and West Ridge, ought to be set aside, and the PIPE and consequential allotment of shares held to be valid and binding on NTP.

[164] In the event that the judge's finding of no urgent liquidity crisis stands, it is accepted that his finding on purpose must also be upheld and confirmed by this Court, as the four directors would have acted for an improper purpose in breach of section 121 of the Act. On the other hand, it is also accepted that should the judge's finding of no urgent liquidity crisis be set aside, his finding or conclusion of an improper purpose in breach of section 121 must also fall.

[165] However, Mr. Moore QC on behalf of IsZo, argued that even if this Court were to set aside the judge's conclusions on urgent liquidity crisis and purpose, it does not follow inextricably that his conclusion of a breach of duty by the directors under

section 120(1) of the Act falls away. In short, it is IsZo's case, for the reasons which counsel advanced in argument, that it was open to the judge to have found that in approving the PIPE the four directors did not act in the best interest of NTP and all its shareholders, in that they failed to consider that the PIPE was, as the judge found, manifestly unfair to the other shareholders; and that the said four directors had failed to consider or to properly consider capital raising options other than a PIPE *simpliciter*, as the judge also found at paragraphs 162 and 163 of the Judgment. Furthermore, counsel for IsZo argued that when certain important and unchallenged findings of fact made by the trial judge in the Judgment are considered, this Court cannot come to any conclusion other than that NTP's appeal against the finding at paragraph 166 of a breach of section 120(1) duty must fail, and the judge's finding and conclusion sustained.

NTP's Submissions on finding of no urgent liquidity crisis

[166] As mentioned above, the judge approached the issue of determining the subjective motives or intention of the four directors who voted to approve the PIPE from two routes. The first is his assessment of the credibility of the witnesses and his finding that NTP's witnesses were all unreliable in material particulars. The second route deployed by the judge 'is based on the factual matrix surrounding their decision to approve the PIPE'.[100] Ground 1 of NTP's appeal challenges all five reasons set out by the judge at paragraph 160 upon which he grounded his finding that an urgent liquidity crisis had not been made out. NTP's pleaded case was that the four directors approved the PIPE on 5th October 2020 "for the purpose of raising funds in response to a liquidity crisis which arose in the circumstances … [the] events occurring in late September 2020 between the service of the Requisition on 11th September 2020 and the approval of the PIPE on 5th October 2020.

[167] In its skeleton argument, NTP argued that the finding of no urgent liquidity crisis was extreme and the result of 'a demonstrable failure [by the judge] to consider relevant evidence'. It submits that there was ample evidence from the witnesses

[100] See para. 160 of the judgment below.

and the documents as to the 'reality and seriousness of the [Lender] Banks' concerns'. These include: (i) the calls and meetings with the Banks between 27th May 2020 to 11th September 2020; (ii) further calls to senior personnel from each of the Lender Banks to officers of NTP, from 15th September to 22nd September 2020; (iii) the written notices from of SRCB, IB, CEB, BOB and BOC immediately preceding the 5th October 2020 Board meeting expressing their individual concerns and reserving their rights to demand repayment of their loan; (iv) that 5 days before the 5th October 2020 Board meeting, SRCB had required and was repaid the sum of US$30.5 million; and (v) the fact that on 9th November 2020, a month after the 5th October 2020 Board meeting, BOC issued a further notice requiring early repayment approximately US$15.1 million by 31st December 2020, and a total repayment of approximately US$45.3 million by 31st May 2021.[101]

[168] NTP also relies on the fact that in the 12 days following delivery of the Judgment in this matter on 3rd March 2021, each of the Lender Banks BOC, BOB, XIB and IB made formal demands for repayment of their respective loan facilities ("the new evidence"), which actions or steps, they contend, undermine the judge's conclusion and support or reinforce the reality of the existence and seriousness of the liquidity crisis (which the judge rejected) when the PIPE was approved. NTP submits, as a corollary to this, that if the judge was wrong to reject the evidence of the existence of a liquidity crisis (as it contends), it follows that his rejection of NTP's case that the capital raising purpose was in response to the liquidity crisis and his finding that the evidence of Mr. Fok, Prof. Lyn and Prof, Wu on this issue was 'unreliable', are equally unsound and ought to be set aside.[102]

[169] I now turn to consider each of the five reasons or bases at paragraph [160] relied on by the judge in concluding that the ostensible justification for the PIPE, the urgent liquidity crisis, was not made out.

[101] Core appeal bundle, Tab 2, e-page 18, at para. 12 of NTP's skeleton arguments.
[102] Core appeal bundle, Tab 2, e-page 19 at para.15 of NTP's skeleton argument.

[170] The learned judge's first basis for his conclusion of no liquidity crisis being made out, is that he did 'not accept the evidence adduced by [NTP] that any of the banks were in fact entitled to call in their loans. I have rejected the suggestion that a bank serving a notice reserving its rights was going to call in its loans.' NTP contends that the learned judge, in making this finding, dealt with two separate points. The first, the 'bank entitlement issue', which is a legal issue, that is, whether as a matter of Chinese Banking Law, the Lender Banks were entitled to request repayment of their respective loans. The second, the 'bank intention issue', is a factual question, that is, whether by expressly reserving their rights in the notices which had been served, the Lender Banks had an intention to call in their loans.[103]

[171] In relation to the question as to whether the directors had a real concern that the banks were entitled to demand repayment of their loans, NTP submits that there was reliable and unchallenged evidence from the documents and the witnesses called by it at the trial, from which the judge could properly assess and ascertain the concerns of the directors at the relevant time. It points specifically to: (i) the notices served on the borrower subsidiaries of NTP by IB, CEB and BOB in late September 2020 expressly claiming or asserting such an entitlement to repayment. In these notices the banks assert an 'entitlement to terminate' their loan facility, and 'reserve[d] the right to demand immediate repayment'; or words of similar effect.[104] NTP submits that, in the face of these clear statements from the said three banks, had the learned judge asked himself the correct question, he would have had no difficulty in finding that NTP's pleaded case on this aspect had been made out that the four directors had a real concern in late September 2020 that the Lender Banks 'might be entitled to require' repayment of their respective loans.[105]

[172] Specifically, NTP referred to the extensive extract from Fangda's first opinion quoted at paragraph 86 of the Judgment. In that extract, Fangda, referenced Article

[103] Core appeal bundle, Tab 2, e-page 20 at para. 24 of NTP's skeleton argument.
[104] See notice from IB dated 25 September 2020 – E14/7111; notice from BOB dated 27th September 2020 - E14/7110; and notice from CEB dated 27 September 2020 – E14/7110.
[105] Core appeal bundle, Tab 2, e-page 22 at para. 35 of NTP's skeleton argument.

33(5)(g) of the SRCB Credit Agreement which provides that "any situations that may affect the Obligors' ability to repay the debt or to enforce the security interests, or may threaten the Lender's recovery of its loans, **shall constitute a material adverse change** …".(emphasis added) Reference was also made to Article 41 of the SRCB Credit Agreement which stipulates that 'any credit deterioration or financial condition deterioration' shall constitute an 'event of default'. This first opinion letter concluded that:

> "While the Material Adverse Change and Event of Default as mentioned above are drafted in a comparatively broad way and act as a catch-all clause, **they are easy to be triggered.** If the aforesaid incident **is considered as and proved to be Material Adverse Change or Event of Default in accordance with [the] Credit Agreement and Maximum Pledge Agreement, the Borrower may have to repay the outstanding debts to the Lender immediately**." (emphasis added)

[173] NTP took issue with the judge's conclusion, at paragraph 87, that Fangda did not express a view as to whether there was in fact at the time a 'material adverse change' or an event of default. NTP points to the very broad terms of the 'material adverse change' provision, which Fangda opined was 'easy to be triggered'. They also point to the observations by Fangda to the effect that the risk of changes in management meant that the Borrower's prospect and future development "are uncertain and downbeat" and jeopardized Kaisa's support, which was a significant factor in the lender's evaluation of the Borrower's credit.[106] NTP submits that what Fangda had to say, 'was consistent with NTP's position that the Board had a real concern that the Banks 'might be entitled to require repayment'.[107]

[174] NTP summed up its position on Point 1, by submitting that the judge had identified and addressed the wrong issue (the bank entitlement issue). Had he addressed the correct issue (the Board concern issue), there was ample evidence upon which he could reach a different conclusion that the Board of NTP did have a real concern

[106] Core appeal bundle, Tab 2, e-page 24 at para. 44.2 of NTP's skeleton argument.
[107] Core appeal bundle, Tab 2, e-page 24 at para. 45 of NTP's skeleton argument.

that some or all of the Lender Banks “might be entitled to require” repayment.[108]

[175] Having noted that Fangda, in its first report, had not expressed a view on whether there was in fact a ‘material adverse change or an event of default’,[109] the judge continued:

> “This is particularly striking, because SRCB sought penalty interest of over [US]$1 million. No advice is sought or given on whether [NTP] in fact had such a liability. The same failure to express a view is a feature of the subsequent letter of advice [opinion] which deals with the BOB, CEB, Industrial Bank and BOC loans. The [second] opinion copies, nearly word for word, the last two sentences of (v) in the SRCB advice letter which I have quoted**. In none of these cases do Fangda Partners give an opinion as to whether there is in truth any substance to [the] banks’ threats. Nor is any commercial advice given as to what the litigation risks might be**.” (emphasis added)

[176] In my view, it cannot be gainsaid that the Fangda first opinion did not express any view, one way or another, as to whether the SRCB notice of 23rd September 2020 had given rise to a ‘material adverse change’ under Article 33(5)(g) or to an ‘event of default’ under article 41 of the SRCB Credit Agreement, such as to trigger an entitlement by SRCB to request or demand immediate repayment of its loan. Fangda was clearly not prepared, (and may not have been required by NTP), to give such a definitive opinion on that factual and legal issue under PRC law. Instead, Fangda posited that ‘if’ the events mentioned in the SRCB notice is ‘considered and proved’ to be a ‘material adverse change’ under the applicable credit agreements with SRCB, ‘the Borrower may have to repay the outstanding debts to the Lender immediately.” (emphasis added) The reference there to ‘the Borrower’ was clearly a reference to Nam Tai SZ who on 31st October 2019 had entered into the SRCB Credit Agreement. It was not a reference to NTP which, it is accepted, was not under a legal obligation to repay the SRCB loan either as

[108] Core appeal bundle, Tab 2, e-page 24 at para. 46 of NTP’s skeleton argument.
[109] See para. 87 of the judgment below.

borrower or as guarantor. The legal obligation rests with its subsidiary borrowers in relation to each of the five bank loans.

[177] Further, Fangda did not opine that should a 'material adverse change' or 'event of default' be proved, the Borrower will have to repay the outstanding amounts under the SRCB loan, but only that they 'may' have to do so immediately. It seems to me that implicit in that statement is that they may be required to repay the said loan immediately or they may not. Moreover, Fangda did not, in either of their two written opinions, set out or opine as to the legal process under the laws of the PRC by which a lender PRC bank would be entitled, in circumstances where a material adverse change or an event of default had occurred under a loan agreement, to proceed to enforce its right to be repaid in full or to realise any security for the repayment of that loan.

[178] On the second of the two issues raised by NTP in relation to the judge's first reason at paragraph 160, 'the bank intention issue', NTP submits that there was cogent and indisputable documentary evidence at trial that: (i) not only had the Lender banks SRCB and BOC by their notices dated, respectively, 23rd and 27th September 2020, reserved their rights to call-in their loan, but (ii) SRCB and BOC did on 27th September and 10th November 2020 respectively demand repayments.[110] In this regard, NTP relies upon the 27th September 2020 meeting in the 'Governor's Office' at SRCB's Baoan Branch, at which Governor Mai of SRCB requested NTP to make immediate payment of its loan, which resulted in payment of the sum of US$30.5 million from NTP's cash reserves.[111] NTP also points to a 'Notice of Early Repayment of Part of the Loan' dated 10th November 2020 served by BOC, requiring Zastron to make early repayment of RMB 100 million (US$15.1 million) by 31st December 2020, and a total repayment of RMB 300 million by 31st May 2021.[112] Reliance is also placed by NTP on the post-

[110] Core appeal bundle, Tab 2, e-page 20 at para. 25 of NTP's skeleton argument.
[111] Record of appeal, Bundle E, Volume E13, e-pages 589-589 at 6818-6819.
[112] Record of appeal, Bundle E, Volume E14, e-pages 305 at 7201.

judgment demand letters from BOC, BOB, XIB and IB, as evidence of the lender banks' clear intention to request early repayment of their loans.[113]

[179] NTP submits that this unchallenged evidence (documentary and oral) is directly contrary to the second limb of the judge's first reason for concluding that an urgent liquidity crisis had not been made out on the evidence adduced by NTP, in rejecting the suggestion that by each of the Lender Banks serving a notice reserving their rights, were going to call in their loans. It is NTP's case on the 'bank intention issue' that each of SRCB, BOC, XIB and IB have in fact called in their loans and demanded repayment amounting, in aggregate, to US$161.8 million, well in excess of NTP's cash reserves at the relevant time.[114]

[180] The second basis on which the learned judge at paragraph 160 determined that NTP had failed to establish an urgent liquidity crisis in late September 2020, was that XIB had not raised any issues about the facilities they had offered to NTP, 'so such concerns as there were about a change in effective control of [NTP] were not universal'.[115] NTP submits that this observation by the judge was clearly wrong having regard to the chronology of events (to be dealt with beneath ground 2).

[181] The learned judge's third reason for not finding that an urgent liquidity crisis had been made out, was that the BOB, CEB and IB loans were comparatively trivial in amount (compared to the BOC and SRCB loans), they could have been paid-off from NTP's cash reserves, and their existence could not contribute to a cash crisis. NTP accepts on appeal that it is correct that, at the relevant time, it had US$70 million in cash reserves, enough to pay-off these three smaller loans amounting in aggregate to the sum of $US 14.1 million. However, it submits that in assessing the nature and urgency of a liquidity crisis, the judge ought also to have taken into account the two larger loans (BOC $111.3 million and SRCB US$30.8 million)

[113] Core appeal bundle, Tab 2, e-page 21 at para. 26 of NTP's skeleton argument.
[114] Core appeal bundle, Tab 2, e-page 21 at para. 27 of NTP's skeleton argument.
[115] See also para. 114 of the judgment below lines 5-7.

which aggregate at US$142.1 million. NTP submits that it is common ground that at the time it did not have sufficient cash reserves to pay off these loans.[116]

[182] Additionally, NTP argues, there was cogent evidence as to the dangers of cross-default under the cross-default provisions in the loan agreements, which provisions were standard in PRC bank loan agreements.[117] Dr. Tam had explained in his testimony that, in the event of a demand for repayment by one of the Lender Banks, NDP would be in cross default potentially causing the collapse of NTP.[118] This evidence was corroborated by a statement at page 9 Section D "Risk Factors" in NTP's Annual Report for 2018 filed 25th March 2020, to the effect that if a default occurs, all the Lender Banks would be entitled to accelerate payment of all or part of the loan under their agreement with the relevant NTP subsidiary company, and/or to enforce their security for such loans. Further evidence of the effect of the cross-default provisions in the loan agreements can be had from the second Fangda opinion.[119] The specific provisions referred to there are Article 46(6) of the CEB loan; Article 12(1)(8) of the IB loan; and Article 13(5) of the BOC loan.[120]

[183] NTP also prays in aid its chronology of events which, in their view, corroborates the fact that the Lender Banks were materially influenced by the actions of one another, in that notices were sent by each of SRCB, IB, CEB, BOC and BOB within a 4-day period from 23rd to 27th September 2020; and the demand letters were issued by BOC, XIB, BOB and IB over a period of 10 days from 5th to 15th March 2021 following delivery of the Judgment in this matter. NTP submits that each of these matters provide compelling support for Dr. Tam's evidence (at paragraphs 104 and 111 of his witness statement) that the SRCB demand for repayment raised serious concerns that the other Lending Banks would follow suit or might do the same.[121] NTP encapsulates its argument on this point, by submitting that, against

[116] Core appeal bundle, Tab 2, e-page 25 at para. 52 of NTP's skeleton argument.
[117] Dr. Tam's witness statement at para. 26.
[118] Record of appeal, Bundle G2, Tab 6, e-page 100 lines 7-19.
[119] Record of appeal, Bundle E, Volume E9, e-pages 532-538 at 4763-4766.
[120] Record of appeal, Bundle E, Vol. E14, e-pages 220 at 7116.
[121] Core appeal bundle, Tab 2, e-page 26 at para. 55 of NTP's skeleton argument.

this background of evidence, the judge was therefore wrong to describe the three smaller loans as 'comparatively trivial', and to conclude that they could not have contributed to a cash crisis at NTP.[122]

[184] The judge's fourth reason for finding that an urgent liquidity crisis had not been made out on the evidence, is that "BOC, who is the largest lender, were also the best secured, because the Inno Park project was nearly finished. That made it less likely that they would be disturbed by a change of management of [NTP]. In the event, we know terms of repayment of the BOC loans were fairly easily arranged shortly after the PIPE".

[185] It is not in dispute that BOC was the largest lender bank which held security over the Inno Park project for its loan. Also, it is incontrovertible that BOC, in its letter dated 27th September 2020 conveyed or sought to convey that BOC had a high level of concern about what it described as frequent shareholder disputes and the public letters issued by IsZo critical of the operation and management of NTP, leading to negative impacts on the stability of the Nam Tai Group. What NTP does not address is the judge's reasoning that the Inno Park project was nearing completion and BOC's loan was well secured. This however does not lead to the conclusion that BOC, as a lender bank, was not concerned or that it would not demand repayment of its loan sum, even before taking steps to realise any of its security. BOC eventually did so, the first demand for early repayment coming on 10th November 2020 in the sum of US$45.3 million (which sum was paid by NTP from its cash reserves at that time). However, BOC's demand for full repayment of the outstanding balance of US$96.1 million was not made until 5th March 2021 (2 days after delivery of the Judgment). This Court has not been provided with any evidence that NTP has repaid that sum in full or in part. What limited evidence we do have (from NTP's SEC filing of its annual report – "JM-1") suggest that the repayment of this sum is the subject of negotiations between BOC and NTP.

122 Core appeal bundle, Tab 2, e-page 26 at para. 56 of NTP's skeleton argument.

[186] The learned judge's fifth reason is that 'even in a worst-case scenario', NTP owed no obligations to the banks in that 'all security interests over land and the cross-guarantees were given at subsidiary level. [NTP]'s cash holdings were safe from the banks. That gave [NTP] significant bargaining power in dealing with its banks'.

[187] It is indisputable that NTP owed no legal obligations as a borrower or as a guarantor or otherwise to the Lender Banks under their respective loan agreements. Accordingly, the Lender Banks had no direct recourse to NTP's cash reserves.[123] However, NTP argues that the commercial reality is that each of the borrower and guarantor companies are wholly owned subsidiaries of NTP, and were the NTP vehicles 'for the purpose of funding and executing and profiting from specific projects'. This is no doubt the commercial reality. However, the legal reality as it relates to the obligations to the Lender Banks and the ring-fencing of NTP's cash reserves from direct recourse by any of the Lender Banks, cannot be disputed. This notwithstanding, NTP argues that in the event the subsidiaries faced calls for repayment of their loans, the success or failure of NTP itself depends upon its ability to make payment and to ensure ongoing payments to its suppliers.[124] Accordingly, NTP argues, what really mattered is that the survival of NTP as a successful property development company (and its traded share value) depended upon its ability to repay the bank loans and to pay suppliers from its cash reserves. In this regard, NTP points to the cash flow forecast conducted by Mr. Wan on 22nd September 2020[125] which revealed a funding deficit by the end of 2021 of US$205 million.[126]

[188] There is some force in NTP's point regarding the practical and commercial realities of the loan debts owed to the Lender Banks by its subsidiaries. In essence, NTP has obtained capital to develop its properties and construct its projects through the vehicle of its various subsidiaries. It is also clear from the evidence that NTP has

[123] Core appeal bundle, Tab 2, e-page 27 at para. 63-64 of NTP's skeleton argument.
[124] Core appeal bundle, Tab 2, e-page 27 at para. 65 of NTP's skeleton argument.
[125] Record of appeal, Bundle E7 e-page 443 at 3498.
[126] See para. 96 NTP's skeleton argument.

been the entity which has made repayments to SRCB and BOC when such payments have been requested. In my view, this does not mean that any practical and objective consideration of whether NTP was facing or about to face an urgent liquidity crisis can ignore considerations of its cash reserves and its financial ability to meet any early demands for repayment of these loans made on its subsidiaries on the legal basis that NTP itself has no legal obligation to repay the said loans to each of the Lender Banks. Therefore, the point which the learned judge made as to the security for the BOC loan, cannot be ignored or brushed aside as irrelevant. The question, however, is whether the learned judge trespassed into the domain of the directors who are responsible for the management of NTP and its business affairs carried on through its wholly owned subsidiaries, and are duty bound to act for a proper purpose and in the best interests of NTP and its shareholders.

GSL's Submissions on findings of no urgent liquidity crisis and improper purpose

[189] In its submissions in support of NTP's appeal, GSL adopted all the challenges and submissions made by NTP in its appeal against the judge's findings and conclusions of no urgent liquidity crisis being made out and of improper purpose. However, Mr. Flynn QC on behalf of GSL, did not pursue its submissions which are grounded on the fairly recent decision of the English Supreme Court in the case of **Eclairs Group Ltd v JKX Oil & Gas plc**.[127] This point concerned what GSL asserted was an alleged error of law in the judge's approach to his assessment of the evidence and his determination of purpose, premised upon an entanglement of purpose and motive. This is a point not made or relied upon by NTP in its appeal and, accordingly, rightly not pursued by GSL when arguing in support of NTP's appeal the grounds in the latter's notice of appeal. However, GSL did rely on the points addressed in the other sections of its skeleton argument.

[190] GSL argued that the judge erred in finding improper purpose when IsZo's case on purpose had not been put by it to the directors who gave evidence on behalf of

[127] [2015] UKSC 71.

NTP as their real purpose in voting to approve the PIPE. They submit that, in doing so, the judge failed to apply the principles in **Browne v Dunn**[128], and in **Chen v Ng**.[129] Furthermore, GSL submitted that the judge failed to give reasons for his findings which offends against the well-established principle that justice will only be done if it is apparent to the parties why one or the other has lost.[130] The question as to whether the judge failed to give reasons for arriving at the conclusions of no urgent liquidity crisis and improper purpose, and whether the reasons given in the Judgment clearly inform NTP as to why it lost and IsZo succeeded, will be considered later in relation to ground 1.

[191] In its skeleton argument, GSL submits that in analysing the evidence the judge 'overstated the relevance of what he considered to be unsatisfactory evidence from the directors of NTP about the background to [the PIPE] and/or links with Kaisa'.[131] In doing so, GSL contends, the judge failed to give himself, as the trier of fact, a direction as to how to properly evaluate whether a lie told in or out of court could be capable of amounting to corroboration. In this regard, they rely on the test enunciated by Lord Lane CJ in **R v Lucas**[132] (known as the 'Lucas Direction'). In **Lucas**, which was a criminal case, the learned Chief Justice identified four factors to be considered. He concluded:

> "As a matter of good sense it is difficult to see why, subject to the same safeguards, lies proved to have been told in court by a defendant should not be equally capable of providing corroboration. In other common law jurisdictions they are so treated."

[192] This point, while not abandoned, was not pursued before us with any vigour. I must confess some difficulty in understanding the relevance of the **Lucas** principles to IsZo's case in the court below, and to the judge's approach to and evaluation of the evidence of Dr. Tam and the four directors who voted for the PIPE. I say this

[128] (1893) 6 R 67 at 71
[129] [2017] UKPC 27 at 53
[130] See GSL skeleton argument at paras. 23 & 24; and English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409 at paras. 15-26; and Simetra Global Assets Limited and another v Ikon Finance Ltd and others [2019] EWCA 1413 per Males LJ at paras. 46 and 47.
[131] Paras. 24 & 24.1, e-page 7 of GSL's skeleton arguments.
[132] [1981] QB 720.

for the simple reason that it was common ground (as the judge found under the section of the Judgment titled 'Putting the case'), that IsZo's case was not based upon the contention that the evidence given at trial by Dr. Tam and the four directors as to the purpose of the PIPE, was a lie. Instead, IsZo's 'pared-down' case 'concentrated solely on the purpose for which the four directors voted for the PIPE', which case was put squarely to these witnesses who each had an opportunity to respond to it.[133] Specifically, the judge observed that it was not put to them that they were lying, which was not necessary to a determination that they had in fact acted, not for the purpose which they articulated in their evidence, but for the entirely 'different' and improper purpose of ensuring or effectuating Kaisa's *de facto* control of NTP and defeating the Requisition.

[193] I say rhetorically that a director may genuinely feel and testify under oath that he or she, in voting a certain way, had a certain intention. However, that stated intention, albeit not a lie, may not stand up to objective scrutiny when examined under the bright light of forensic cross-examination and against the totality of the relevant background, surrounding circumstances and other oral and documentary evidence in the case pointing to what was indeed their genuine purpose when they voted. A clear example of this was the evidence of Dr. Lo in cross-examination as to his real or genuine purpose in voting for the PIPE, which evidence the learned judge accepted as truthful of his motive and purpose. Furthermore, the judge's first approach to determining the real purpose, of Dr. Tam and the four directors, was to assess the reliability of their evidence. In doing so, he made no findings that any of them had lied when they testified as to their subjective purpose or intention or that they had acted dishonestly when recommending or approving the PIPE. I have already addressed the soundness of the judge's finding on credibility of these witnesses. Accordingly, in my considered judgment, there is no merit in this point sought to be made by GSL.

[133] See para. 84 of the judgment below.

IsZo's Submissions on findings of no urgent liquidity crisis and improper purpose

[194] IsZo submits that all of NTP's points in support of its submissions on the judge's first bases or reason for this finding, are without merit. With regard to what NTP termed 'the bank intention issue', IsZo submits that the judge rightly rejected it "as being directly contrary to the wording of the notices". They stress that the assertion that the mere service of these notices by the five Lender Banks (SRCB, IB, CEB, BOC and BOB) during the period 23rd to 27th September 2020 on the subsidiaries of NTP, referring directly or indirectly to the possibility of a change in NTP's Board and reserving their right to demand early repayment of their loan, was not pleaded by NTP, but was made for the first time by Mr. Jiang during cross examination at the trial.

[195] As to NTP's reliance upon the demand letters issued by four of the lending Banks shortly after delivery of the judgment (the fresh evidence), IsZo submits that they do not in any event demonstrate that the judge was plainly wrong in his first reason for concluding that there was no urgent liquidity crisis facing NTP at the relevant time.[134] IsZo submits that the fact that it took 5.5 months for these four Lender Banks to make demand for repayment of the respective loan, supports the judge's conclusion that there was no urgent liquidity crisis facing NTP in late September 2020 or when the PIPE was approved on 5th October 2020.[135] IsZo also submits that these four demand notices issued in March 2021 are of no probative value in the absence of any other evidence from Dr. Tam or otherwise from NTP as to any relevant context in which they were issued and what has transpired before and after their issuance. I have already addressed these points when dealing with and ruling on NTP's fresh evidence application.

[196] IsZo also argues that NTP's submission that the judge's rejection of its evidence that the Lender Banks were in fact entitled to call in their respective loans was

[134] Core appeal bundle, Tab 5, e-pages 80-82 at para. 44 of IsZo's skeleton argument.
[135] Core appeal bundle, Tab 5, e-page 81 at para. 44.2 of IsZo's skeleton argument.

based upon his consideration of the incorrect issue, is flawed.[136] They argue that, in determining the subjective intention of the directors as to the purpose in approving and implementing the PIPE, the judge was required to consider all the relevant surrounding circumstances and to assess whether the threat of a liquidity crisis was real and immediate. This exercise included assessing, on the evidence, the risk that the Lender Banks could require NTP, on an urgent or short basis, to repay their respective loans. Germane to that issue was whether the banks were entitled to call for early repayment. They point out that, in any event, the distinction which NTP seeks to make on appeal between whether the banks were in fact entitled to call in their loans and whether the directors had a genuine concern about their entitlement to do so, is not one which they relied upon before the judge. This they say is clear from any reading of the evidence of Dr. Tam who sought to establish that the Lender Banks were actually entitled to demand repayment of their loans, in the face of the uncertainties regarding the management and the composition of the Board of NTP caused by IsZo's activism and the Requisition.[137] Accordingly, IsZo submits, the judge was justified, at paragraph 160, in rejecting NTP's evidence as to the Lender Banks being entitled to call in their loans.

[197] In my judgment, there is some force in IsZo's argument that the judge was entitled to consider and to reject the evidence led by NTP that the Lender Banks were 'entitled' to call in their loans in late September 2020. However, as I understand it, NTP's argument goes one step further. They argue that their pleaded case at trial was not that the Lender Banks had a legal entitlement to call in their loans, but that the directors had a real concern that they might be entitled to require repayment by NTP; and this was the case which IsZo responded to in their reply submissions. The judge, in positing his first reason or basis at paragraph 160, did not focus, as he ought to have done, on whether a case of 'real concern' had been made out to his satisfaction on the evidence adduced by NTP, but instead, incorrectly, focused primarily if not exclusively on whether NTP had satisfied him that the Lender Banks

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[136] Core appeal bundle, Tab 5, e-page 82 at paras. 45-46 of IsZo's skeleton argument.
[137] Core appeal bundle, Tab 5, e-page 82 at para. 48 of IsZo's skeleton argument.

‘were in fact entitled’ to call in their loans; and, accordingly, rejected the contention that the fact of service in late September 2020 of the notices reserving their rights to do so, meant that they were ‘going to’ call in their respective loans.

Conclusions on NTP’s First Point

[198] In my judgment, while the learned judge was entitled and ought to consider (as he did) and to reject the evidence from Mr. Jiang and Dr. Tam on behalf of NTP, to the effect that the Lender Banks were by virtue of the demand letters issued between 23rd and 27th September reserving their right to call in their respective loans, entitled to demand repayment of their loans, he erred in not specifically identifying and evaluating evidentially whether, as pleaded by NTP, the directors had at that time a ‘real concern’ that the banks would have been entitled to demand repayment of their loans, and whether this concern was that they would do so imminently. A consideration of this important plank of NTP’s pleaded case as to the existence of an urgent liquidity crisis, does not appear in the Judgment. Instead, the judge focused in his first reason, on not being satisfied on the evidence adduced, that any of the Lender Banks ‘were in fact entitled to call in their loans’, having rejected the evidence suggesting that such an entitlement arose from the wording of the letters issued expressly reserving their right to do so, and having correctly concluded, in my view, that an express reservation of such rights does not, without more, give rise to an actual entitlement to do so or that the said banks were in fact ‘going to call in their loans’.

[199] Based on the foregoing, it follows that this Court will have to reach its own conclusions as to whether, on the totality of the evidence, the four directors and Dr. Tam genuinely held such a concern, and whether that concern was reasonably held by them after the four banks had issued their letters of concern during the period 23rd to 27th September 2020 and representatives of some of these banks had, in conversations with Mr. Jiang, expressed their bank’s concern with regard to a possible change in the management of NTP as a result of the Requisition. However, it must be born in mind that this was but one of five bases upon which

the judge came to a finding and conclusion that no urgent liquidity crisis had been made out on the evidence to his satisfaction. Furthermore, the judge also came to that conclusion based upon his finding that the four directors and Dr. Tam were unreliable witnesses, and that their purpose in voting to approve the PIPE was to give Kaisa *de facto* control of NTP and to defeat the Requisition.[138]

NTP Second Point – XIB not raising any issues-concerns not universal

[200] The judge's second reason for rejecting NTP's case of an urgent liquidity crisis, was that XIB had not raised any concerns about its 'facilities offered to [NTP]' and, accordingly, such concerns were not universal. IsZo points out that at paragraph 124, the judge referred to the evidence of Mr. Jiang where, at paragraph 38 of his witness statement, he expressly referred to a telephone call which he received on or around 15th September 2020 from Mr. Zhuang Gei Tong, branch head of XIB (among others he had received from officers of SRCB and IB), 'in relation to the Requisition'. Also, that the officials of these three banks expressed individually "concerns as to whether the dispute with IsZo would affect the operations and stability of [NTP], whether members of the Board would be replaced, whether the strategic relationship between Kaisa and [NTP] would be affected, and why Mr. YC Kwok had resigned" as chairman of NTP's Board. IsZo asserts that this evidence from Mr. Jiang, whom the judge found to be an unreliable witness, about his call from Mr. Zhuang of XIB, is not at variance with or contrary to what the judge in fact found in his second reason. They argue that his account of what transpired during the call raised no issue or concerns about the facilities XIB had offered to NTP as the judge found, but instead, were expressions of XIB's concern as to what was "occurring in relation to NTP's dispute with IsZo."[139]

Conclusions on NTP's Second Point

[201] In my view, these points by IsZo are not well-founded and are tantamount to 'hair-splitting'. The judge did not reject the evidence of Mr. Jiang at paragraph 38 of his

[138] See para. 164 of the judgment below.
[139] Core appeal bundle, Tab 5, e-page 85, at para. 55.2 of IsZo's skeleton arguments.

witness statement as being unreliable. In fact, the judge relied upon the extract from paragraphs 38 to 43 of Mr. Jiang's witness statements (quoted by him in full at paragraph 124), to illustrate his point that Mr. Wan 'had no personal knowledge of banks calling in loans, because direct dealings with the banks were conducted by Mr. Jiang. He could only report what Mr. Jiang was telling him.' Secondly, at paragraph 39, Mr. Jiang summarises the four points or positions he had agreed with "management in Shenzhen" and with Mr. Wan, to be used in response to the concerns expressed by these three banks during the calls on or about 15th September 2020. The second such numbered response was that '[NTP] would remain able to make the required **repayments under the loans**'. (emphasis added)

[202] It would be passing strange in the face of that evidence to imply that XIB (as with the other two banks) were during their call to Mr. Jiang not concerned about their loan facilities with NTP (through their wholly owned subsidiary) but were merely concerned about what would happen in relation to NTP's dispute with IsZo. Moreover, while XIB did not go on to make a formal demand for repayment of their loan (albeit they had expressly reserved their rights in an earlier letter) SRCB, one of the three banks with whom Mr. Jiang had a telephone call on or around 15th September 2020, did so a few days later, and its loan was paid off by NTP on or about 29th September 2020. Again, I ask rhetorically, can it similarly be said of SRCB that they had not in their call to Mr. Jiang raised 'any issues about the [loan] facilities [they] offered to NTP'?

[203] In my judgment, the learned judge's conclusion that XIB had not raised any issues about its loan facilities with NTP was incorrect on the evidence before him. However, having a concern (the level and seriousness of which is also a matter for assessment) and acting upon it, are two different matters. That said, it would seem to me that, on the evidence, there was universal concern among the five Lending Banks (including XIB) in mid to late September 2020 with regard to the public activism of IsZo and the Requisition, and what impact these events could or may

have for NTP going forward, and for the timely repayment of the banks' respective loans. It follows that I am satisfied that the judge was wrong to find or to observe that such concern was not universally held among the four Lending Banks.

NTP's Third Point – the smaller BOB, CEB and IB loans were comparatively trivial

[204] The judge's third reason for his rejection of an urgent liquidity crisis was that the loans by BOB (US$7.1m), CEB (US$2.8m) and IB (US$4.2m) were 'comparatively trivial' and, if necessary, could easily be paid off from NTP's cash reserves. Accordingly, he found as a fact that these loans 'could not contribute to a cash crisis.'

[205] It is not in dispute that these three loans amounted in aggregate to US$14.1 million. It is not seriously disputed either that, as at the end of September 2020, NTP's cash reserves after paying off the US$30.5 million SRCB loan, was US$70 million. Thus, the reality was that NTP was in a position, if required or if it considered it prudent to do so, to completely liquidate these three loans.

[206] However, NTP says that this analysis does not factor into the equation the two much larger BOC and SRCB loans. IsZo's short answer to this is that the judge did address the position with regard to BOC and its loan in his fourth reason for finding that there was no urgent liquidity crisis, and the SRCB loan was repaid in full on 29th September 2020 leaving a cash reserve balance of US$70 million. IsZo also argues that, in any event, NTP's assets at the time far exceeded the amounts owed to the Lender Banks. They buttress this point by referring to NTP's Form 6K dated 29th January 2021 (recorded as at 31st December 2020) which shows NTP's real estate properties held for sale or lease at US$31.5 million and US$92.2 million

(totaling US$123.7 million), and real estate properties under development at US$312 million.[140]

[207] As to NTP's point concerning the effect of the default and cross-default provisions in the various bank loan agreements which they say was not factored by the judge into assessment, IsZo submits that the judge was well-aware of these clauses and points to paragraphs 22 & 23. They also argue that since the three smaller loans could easily have been repaid by NTP from its cash reserves at the time, no question of default on those loans so as to trigger the cross-default provisions in the BOC loan could, as a matter of practical common-sense, arise. They also submit that the reality of what transpired is that none of the banks sought to invoke (even assuming they could validly do so) the cross-default provision in the face of the demand made by SRCB for repayment of their loan; and XIB did not serve a demand notice on NTP until March 2021, a few days after delivery of the Judgment.[141]

Conclusions on NTP's Third Point

[208] In my view, it cannot be gainsaid that NTP had at the relevant time in late September 2020, cash reserves more than sufficient to pay in full the loans from BOB, CEB and IB, should it have become necessary for it to do so. This much was conceded by NTP.[142] While it may have been somewhat unwise or unfortunate for the judge to describe these loans as 'trivial', each being for quite substantial sums, he clearly did so by way of comparison with the much larger loan sums owed to BOC (US$111.3m) and SRCB (US$30.8m), which aggregated to US142.5 million. However, it is also correct, as IsZo noted, that by 30th September 2020 repayment of the SRCB US$30.5 million loan had been made in full by NTP, leaving only the BOC loan and these three considerably smaller loans. The sum total of this evidence is that from 30th September 2020, NTP had the cash reserves to pay in full the three smaller BOB, CEB and IB loans which, if it became necessary to do

[140] Record of appeal, Bundle E, Vo. E18, e-page 377 at 9151.
[141] Core appeal bundle, Tab 5, e-pages 87-88 at paras. 62 & 63 of IsZo's skeleton arguments.
[142] Core appeal bundle, Tab 2, e-page 25 at para. 52 of NTP's skeleton arguments.

so, would leave only the much larger BOC loan, which itself was reduced substantially by the part payment on 12th November 2020. Accordingly, in my judgment, NTP's challenge to the judge's third reason for not accepting that NTP was facing an urgent liquidity crisis in late September 2020 is misplaced and misconceived.

NTP's Fourth Point – BOC was best secured lender and less likely to be disturbed

[209] The judge's fourth basis for his finding of no urgent liquidity crisis, is that BOC, the largest lender, was the best secured as the Inno Park project was nearing completion. The judge reasoned that this 'made it less likely they [BOC] would be disturbed by a change of management of [NTP].' The judge also considered it important to stress that the evidence disclosed that 'terms for repayment of the BOC loans were fairly easily arranged shortly after the PIPE.' This is clearly a reference to the BOC October demand and the NTP part payment on 12th November 2020.

[210] IsZo submits that this fourth reason relied upon by the learned judge is beyond reproach, and there is no basis upon which it could be said to be plainly wrong. Accordingly, NTP's challenge to this reason ought to be rejected.

Conclusions on NTP's Fourth Point

[211] I am entirely in agreement with IsZo's submissions in response to NTP's challenge to the judge's fourth reason. Further, it was not until March 2021, after delivery of the judgment, that BOC demanded payment of the balance of its loan, and the evidence discloses (as already traversed) that NTP has been negotiating with these four banks after receiving their demand notices. There is no evidence from NTP or otherwise that any of these four banks have taken any further steps to realize repayment of the respective loans not demanded or that any of them have moved to realize its security. The question of whether BOC was the best secured

of the lending banks having regard to the Inno Park project being in an advanced stage of completion (a finding or observation which NTP has not challenged or disputed), is of some relevance to any consideration of whether NTP was facing or was likely to be faced with an urgent liquidity crisis. This is so especially mindful that NTP had the cash reserves from which to pay the smaller loans of the other three banks in full.

[212] However, in my view, some caution needed to be exercised by the learned judge when making such a statement about the position BOC was in, and its ability to realize its valuable security – the Inno Park project. I so conclude, respectfully, because the question of which of the steps or recourses available to a lender bank it may elect to take or put into action to ensure repayment of its loan at any given point in time, including pursuing realization of its security, is a matter for the lender bank to assess and to judge, taking its own best interest into account. It is common banking practice, that in many instances lender banks would have its borrowers enter into more than one type of security document, each giving rise to separate rights or steps in order to secure repayment of the loan sums owed to it. In making a decision in its best interest, BOC would have been entitled to consider a number of factors, including its historical relationship with NTP, and may decide to adopt a more reserved or cautious position, especially in the face of strong security assets, including real estate and development projects. These are not issues for a court to prognosticate or to speculate about, but are matters best suited for and within the ambit and authority of BOC as the lender bank, and to the directors and management of NTP to negotiate for itself. Indeed, the learned judge in this fourth reason for his finding of no urgent liquidity crisis, put it no higher than that BOC position as a secured creditor made it 'less likely' that it would be disturbed by a change in management of NTP. In pitching it this way, the judge did not in my view usurp or attempt to usurp what the authorities clearly establish is the purview and power of the directors.

NTP's Fifth Point – NTP's cash reserves were safe

[213] The judge's fifth basis is one which is certainly correct as a matter of applicable banking law. As already stated, NTP had no legal obligation, whether as a borrower or a guarantor or as the provider of security for any of the five loans, to repay the sums borrowed by its wholly owned subsidiaries. This much NTP has accepted as correct in its submissions. Nevertheless, NTP asserts that this fifth reason ignores the practical and business realities of NTP as the parent company which, prudently and in keeping with the practice in the PRC of banks not lending directly to property development companies, has purchased properties in the PRC through its subsidiaries for development, and has in fact repaid from its cash reserves the SRCB loan and made a partial payment on the BOC loan. In response to this, IsZo argues that the judge was obviously correct to find that the Lender Banks had no direct recourse to NTP's cash holdings for the reasons which he gave. They reject the suggestion that the judge's approach in putting weight on this factor was irrational, since the judge did consider that this lack of direct recourse by the Lender Banks against NTP directly, would give it a 'significant bargaining power in dealing with its banks'.

Conclusions on NTP's Fifth Point

[214] In my view, the learned judge correctly relied on the lack of legal compulsion and recourse by the Lender Banks to NTP's cash reserves, as one of the reasons for or considerations to be taken into account when assessing whether NTP itself was faced with an urgent liquidity crisis. However, this fifth reason completely ignored the practical or commercial reality of the business relationship between NTP and the Lending Banks, and that NTP is seemingly the entity to which these banks will first look for repay, in full or in part. This is the practical reality borne out by the evidence, even though each of the letters of concern and the demand letters were addressed to the subsidiaries and not to NTP.

[215] The important question in relation to this aspect, is whether it was open to the judge to rely on this lack of recourse as a basis for finding that NTP was not faced with

an urgent liquidity crisis in late September 2020. In my judgment, on any objective view, the judge was quite correct in doing so. To that extent I do not accept NTP's submission that this was entirely immaterial to the reality of the liquidity crisis. However, implicit in the judge's characterization of this 'immunity' from direct recourse as giving NTP a 'significant bargaining power' with the lender banks, is the practical and commercial reality that were the loans to be called in to the subsidiaries and not paid, NTP may have some leverage in its negotiations with each of the Lender Banks before they proceeded to exercise their default and cross rights against the subsidiaries, and recourse against any security which they have for the repayment of their loan. However, that approach must be balanced against the practical considerations that a default by the subsidiaries would clearly have a detrimental effect on NTP's finances and, ultimately, on its share value and, possibly, its continuing survival as a company. This is the practical and commercial reality which the learned judge ought properly to have embraced fully in his reasoning and analysis with respect to this fifth basis for finding no urgent liquidity crisis existed with NTP in late September 2020.

Summary of Conclusions on NTP's Ground 1

[216] Having regard to the above assessment of the merits of NTP's challenge to the judge's finding of no urgent liquidity crisis and to each of the five bases or reasons relied upon by the judge at paragraph 160, two matters are clear at this juncture. The first is that I have found that some, but not all of those challenges have been made out, and then only in part or to a certain degree. The challenge of most concern is clearly to the judge's first reason and his failure to assess the evidence before him in relation to NTP's pleaded case that the directors had a real concern that the Lender Banks might be entitled to call in their loans; and whether, if that did occur, it would cause NTP to face an urgent liquidity crisis.

[217] The second matter is that the above conclusions on NTP's challenges to each of the judge's five reasons at paragraph 160, are not dispositive of the issue of whether the judge's finding of no urgent liquidity crisis was erroneous or plainly

wrong, such that its ought to be set aside and a finding of proof of an urgent liquidity crisis or the reasonable likelihood of such a crisis substituted. The final determination as to NTP's challenges to the judge's findings of no urgent liquidity crisis and improper purpose, hinges also on a determination of ground 2 which deals with the judge's alleged failure or omission to consider and to take into account the timeline and key events in his evaluation of the liquidity crisis and its urgency; and on ground 3 which addresses the alleged failure by the judge to take into account the so-called contemporaneous late September 2020 written note of Dr. Tam relating to the various alternatives or options to the PIPE considered at that time.

NTP's Ground No. 2 – judge's alleged failure to take into account key timeline of events from May 2020 to 5th October 2020 ("omitted events") in deciding urgent liquidity crisis Issue

[218] NTP's primary submission on ground 2 is that the learned judge failed to take account of the key timeline of events from May 2020 to 5th October 2020, which gave rise to the liquidity crisis. NTP provided a written chronology of events.[143] During his oral submissions, counsel for NTP, Mr. Hardwick, QC traversed, in detail, the events listed in NTP's chronology, with the clear objective of demonstrating: (i) that there was ample and cogent evidence of the existence of an urgent liquidity crisis or a genuine concern on the part of the directors in relation to the Lender Banks being entitled to call in their respective loans leading to an urgent liquidity crisis; (ii) the alleged failures by the trial judge to consider relevant and unchallenged evidence from the timetable, particularly during the period late May to mid-September 2020, led him into error and his evaluation of the evidence of an urgent liquidity crisis and hence purpose, was fatally flawed; and (iii) had the judge taken these omitted events into account, along with the other compelling and unchallenged evidence of an urgent liquidity crisis in late September 2020, it ought to have led him to find that NTP had established, to the civil standard of proof, that

[143] Core appeal bundle, Tab 7, e-pages 128-134.

an urgent liquidity crisis or the reasonable likelihood of one, existed in late September 2020.

[219] The gravamen of NTP's submissions in relation to ground 2 is that, notwithstanding its repeated reliance upon the May to September 2020 timeline of events (as taken from the contemporaneous documents, witness statements and its two skeleton arguments in the court below) these were omitted from the judge's otherwise comprehensive chronology of events at paragraphs 11 to 34 of the judgment. NTP's submits that these omitted events were all relevant to the judge's proper consideration and evaluation of the issues of urgent liquidity crisis and purpose. Accordingly, by their omission, the judge did not consider them at all and, therefore, erred in the discharge of his duty to properly consider all relevant evidence, and to marshal all such evidence when reasoning to his conclusions on the two critical issues which fell for his determination. NTP submits, this failure to consider the 'omitted events' seriously or fatally undermines the soundness of the judge's finding of no urgent liquidity crisis and his conclusion of improper purpose. Accordingly, these findings and conclusions in the judgment ought to be set aside, and this Court should exercise its discretion afresh, conduct its own evaluation of all the relevant evidence and surrounding circumstances and come to its own findings and conclusions on these critical factual and legal issues. In my view, in properly considering this ground of appeal, some of the so-called 'omitted events' are either irrelevant or of marginal relevance to a determination of the two critical issues of an urgent liquidity crisis and purpose.

[220] In its written submissions, NTP places much emphasis on what they see as the failure by the judge to refer to and to evaluate the events commencing in late May 2020, identified and addressed by Mr. Jiang in his witness statement. Mr. Jiang had been instrumental in obtaining the loans from the Lender Banks, including negotiating the terms of each loan.[144] Mr. Jiang explained that, in negotiating these bank loans, he stressed the importance to NTP of its connection with Kaisa. He

[144] See record of appeal, Bundle C, Vol. C1, Tab 4, paras 34 to 43, e-pages 52-54.

had done this so as to satisfy the banks that NTP '… had links with an experienced real estate developer in the PRC…'.[145] Furthermore, on the evidence, it was to Mr. Jiang that the Lender Banks turned to express their concerns arising from the IsZo activism and open letters and, after the Requisition, the possible change in the Board of NTP. NTP contends that the judge entirely omits the earlier paragraphs 34 to 43, and absent from his analysis is any reference to or evaluation of the events covered therein by Mr. Jiang. NTP complains further that the judge, at paragraph 124 of the judgment, only sets out paragraphs 38 to 43 of Mr. Jiang's witness statement and did so only when dealing with a different issue, that is, the nature and extent of Mr. Wan's knowledge.

[221] These 'omitted events' are helpfully summarised in NTP's skeleton argument under various subheadings. They are: (a) the late May 2020 SRCB call; (b) the June 2020 NTP Management Report; (c) 23rd July 2020 CEB call; (d) 27th May 2020 to 11th September 2020 concerns of all of the Banks; (e) 15th September 2020 SRCB, IB and XIB call & Mr. Jiang/Mr. Wan discussion; (f) 16th September 2020 BOB call & Mr. Wan/Dr. Tam conversation; (g) 21st September 2020 calls from two banks in respect of the Dongguan project; (h) 22nd September 2020 calls from the BOC and SRCB; (i) 22nd September 2020 noon call from Mr. Jiang to Dr. Tam; (j) 22nd September 2020 Dr .Tam and Mr. Wan discussions & Dr. Tam's September 2020 note; (k) 23rd September 2020 SRCB notice and Mr. Jiang conversation with Mr. Zheng Liu of SRCB; and (l) 25th – 27th September 2020 Banks' notices. [146]

[222] Similarly, at the behest of the Court, IsZo provided, after the hearing of the appeal, its written chronology of material or relevant events leading to the approval of the PIPE by the four directors. These events, and the way in which the learned judge treated with such evidence, were relied on by Mr. Moore QC during his oral presentation in response to grounds 1 and 2 of NTP's appeal, and in support of IsZo's submission that the learned judge's conclusions on the primary issues,

[145] See record of appeal, Bundle C, Vol. C1, Tab 4, e-pages 49-50 at paras. 15-18

[146] Core appeal bundle, Tab 2, NTP's skeleton arguments at paras. 75 to 100, e-pages 29-33.

including his findings of no urgent liquidity crisis, the unreliability of the evidence of NTP's witnesses, and on the subjective 'purpose' of the four directors for approving the PIPE, were unimpeachable and ought to be upheld.

[223] In my view, these two approaches to and treatment with the relevant events and evidence in the timeline chronologies, differ greatly as to: (i) the correctness of the judge's approach to and evaluation of the evidence of an urgent liquidity crisis in late September 2020; (ii) his approach to and determination of what was the genuine subjective purpose of the four directors in approving the PIPE; and (iii) the veracity, cogency and reliability of the evidence of the witnesses who gave evidence on NTP's behalf. These differences between NTP and IsZo were, broadly speaking, also shared by GSL who made submissions in support of NTP's appeal and, most notably, as to the correctness, as a matter of law, of the judge's conclusions of a breach of director's duty under section 120(1).

[224] I do not propose to rehash the 108 events listed in NTP's chronology covering the period 31st July 2017 to 15th March 2021 since no injustice will be caused to NTP, given that the period most critical to the submissions by NTP, on the issue of an urgent liquidity crisis and purpose, is the period from 27th May 2020 when IsZo published its first open letter critical of the management and Board of NTP, to 5th October 2020 when the PIPE was approved by the Board. Also, of significance to NTP's appeal, is the post PIPE demand by and partial payment to BOC, and the four post judgment demand letters, along with the document NTP's SEC, which have been admitted as fresh evidence. Also, some of the more salient and important events occurring during the period May to October 2020, are the BOC notice of early repayment and part of its loan on 10th November 2020, the four post-judgment bank demand letters and NTP's SEC annual report filing.

[225] IsZo also disputes NTP's contention that the judge ought to have 'marshalled the full chronology of events from late May 2020 to 5 October 2020'. They argue that the judge was neither required to do so as a matter of principle, nor was it

necessary for him to do so. Further, it was not plainly wrong for the judge not to have included in the judgment reference to each and every contact between NTP and the Lender Banks over the said period.[147] Fundamentally, IsZo relies on the principle that it is not necessary for a judgment to 'recite laboriously' each and every event in the chronology of a dispute. IsZo also submits that in light of the factual chronology in the judgment, including the full extract of that part of Mr. Jiang's witness statement concerning his communications with the Lender Banks from 15th to 22nd September 2020, 'it is impossible to understand how it could be said that the judge had 'plainly failed to take into account' the evidence of the timeline of the dealings between NTP and its Banks'.[148]

[226] IsZo argues that NTP's contention that, in any event, the omission of certain events or details from the chronological account in the judgment, somehow undermines the judge's conclusion as to purpose in approving the PIPE is misconceived.[149] IsZo submits further that the judge identified the relevant 'building blocks' for his judgment by setting out the issues that needed to be decided, he accurately identified the parties' rival positions as to the purpose of the PIPE and highlighted the importance of the timeline issue as regards the dates on which the liquidity crisis is said to have manifested itself.[150] IsZo reasoned that it is axiomatic that if the matters indicative of a liquidity crisis only happened after advice or steps in relation to a PIPE had been taken, that timeline of events seriously undermines any contention that 'the PIPE was instigated for the purpose of dealing with a liquidity crisis'.[151]

[227] The important question of what matters were relevant and necessary for a judge to refer to and to include in his reasoning and analysis in giving the judgment of the court, itself requires the careful exercise of judicial skill and judgment on the part

[147] Core appeal bundle, Tab 5, IsZo's skeleton arguments at para. 78, e-page 93.
[148] Core appeal bundle, Tab 5, IsZo's skeleton arguments at para. 83, e-page 92.
[149] Core appeal bundle, Tab 5, IsZo's skeleton arguments at para. 84, e-page 93.
[150] See para 120-125 of the judgment below.
[151] Core appeal bundle, Tab 5, IsZo's skeleton arguments at para. 87, e-page 97.

of the trial judge, which skill and judgment must be exercised having regard to the issues that fall for determination in the case. This raises an issue as to whether the trial judge failed to refer to or to take properly into account in his analysis as to the existence of an urgent liquidity crisis in NTP, and important evidence in the chronology and timeline of events leading to the approval of the PIPE.

Court's duty to take relevant evidence into account

[228] It is well-established that, in giving judgment or a decision in a matter, particularly after a trial in which there were witnesses of fact, fairness and the demands of justice require that the judge must produce a well-reasoned judgment addressing all the relevant issues, factual and legal, which fall for the court's determination. It is also authoritatively stated that while in the preparation of a judgment, succinctness is desirable, every judgment, however short, must be careful, clear and thorough. However, it is not a requirement that a judgment must deal with each and every point raised by the parties, whether of law or of fact, or with every argument or submission relied on by counsel for the parties. What is of critical importance is that the judgment must demonstrate on its face, that care was taken by the judge in his assessment and evaluation of the admitted evidence as to its cogency, reliability, and relevance. This places a duty on the judge to ensure that the accepted evidence is well-marshalled in relation to the important issues in the case.

[229] Moreover, the judge's findings and conclusions on the evidence and on the issues in the case, must be well-reasoned and clearly stated so that the parties to the litigation can understand the reasons for and bases upon which they either won or lost. In reaching his conclusions, the judge must consider apparently compelling evidence, if it exists, which is contrary or may appear to be contrary to the findings and conclusions which he proposes to reach and give his reasons for not accepting

such evidence or why he says that such evidence does not lead to a contrary conclusion.

[230] In **Simetra Global Assets Limited & others v Ikon Finance Limited & others**[152] Males LJ formulated from the authorities four key requirements which ought to inform and guide a first instance judge's consideration and evaluation of the evidence and the preparation of his judgment. The learned Lord Justice, at paragraphs 46 and 47, opined:

> "46. Without attempting to be comprehensive or prescriptive, not least because it has been said many times that what is required will depend on the nature of the case and that no universal template is possible. I would make four points which appear from the authorities and which are particularly relevant in this case. First, succinctness is as desirable in a judgment as it is in counsel's submissions, but short judgments must be careful judgments. Second, it is not necessary to deal with every point, but a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. Third, the best way to demonstrate the exercise of the necessary care is to make use of the "building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable. Fourth, and in particular, **fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it**.
> 47. I would not go so far as to say that a judgment which fails to follow these requirements will necessarily be inadequately reasoned, but if these requirements are not followed the reasoning of the judgment will need to be particularly cogent if it is to satisfy the demands of justice. **Otherwise, there will be a risk that an appellate court will conclude that the judge has "plainly failed to take the evidence into account**." (emphasis added)

[231] I adopt, and I am guided by these principles in my assessment of NTP's criticisms of the judgment under this ground of appeal, and the judge's assessment and evaluation of the evidence, particularly as it relates to the issues of an urgent

[152] [2019] EWCA Civ 1413.

liquidity crisis facing NTP, and the purpose of the directors in approving the PIPE and allotment of shares.

Discussion on Ground 2

[232] It is important to note at this juncture, that NTP's pleaded case is that the liquidity crisis which warranted the approval of the PIPE and the raising of capital to avert it, occurred in 'late September 2020 after SRCB had demanded repayment of its loan'... The circumstances pleaded at paragraphs 7.3 to 7.5 of its defence do not include any events occurring prior to service of the Requisition, that is, no events occurring between 27th May and 10th September 2020 which comprises most, if not all, of NTP's 'omitted events' relied on in support of this ground of appeal.

[233] As stated above, NTP pleaded in its defence that its solvency was uncertain, primarily because in the event that the other Lender Banks pursued their threat to terminate NTP's facilities, as SRCB had done, it would not have been able to pay those debts as they fell due.[153] Thus, NTP's case as pleaded, was that the urgent liquidity crisis occurred following the service and publication of the Requisition and fully materialised when SRCB demanded early repayment of its loan, which loan NTP repaid in full subsequently. I accept counsels submissions that it is not NTP's pleaded case that the liquidity crisis existed prior to service of the Requisition, or that it was caused or effectuated by events which occurred between 27th May and 10th September 2020. I now turn to consider each of the so-called 'Omitted Events' relied on by NTP in its submissions.

(a) The late May 2020 SRCB call

[234] Mr. Jiang's evidence was that in late May 2020, after IsZo's first open letter dated 27th May 2020, Mr. Liu Zheng, general manager of SRCB, telephoned him and informed him of IsZo's first open letter and "expressed concerns [of SRCB] about the stability of the management of [NTP]". This prompted Mr. Jiang to report the tenor of Mr. Zheng's call to Mr. Wang Jiabao at NTP. NTP contends that while this

[153] See record of appeal, Bundle A, Tab 3, e-pages 25-28 at paragraph 7.3 p-q.

was the first evidence of any link between IsZo's activism via its first open letter severely critical of the management of NTP and the concerns of the Lender Banks, no mention was made of it in the judgment. Of course, taken at its highest, this would be evidence of SRCB's concerns at the time and not evidence of the concerns of the other four Lender Banks.

[235] In my judgment, the omission by the judge to refer specifically to this aspect of Mr. Jiang's evidence was neither wrong or fatal to his consideration and evaluation of whether, in later September 2020, after the Requisition had been served and the repayment upon demand of the SRCB loan had occurred, an urgent liquidity crisis had arisen or there was a real risk of such a crisis occurring imminently. This evidence of a telephone call to Mr. Jiang by Mr. Zheng of SRCB as far back as late May 2020 (some 4 months prior), during which Mr. Zheng merely expressed SRCB's concern following the very damming open letter by IsZo, was of little if any evidential value in evaluating whether, in later September to early October 2020, the four Lender Banks would demand or were likely to demand early repayment of their loans. Furthermore, in its defence NTP did not rely on that telephone conversation in late May 2020 as a matter making it more likely, in late September 2020, that the banks would call in their loans leading to an urgent liquidity crisis in NTP, such that it could face serious uncertainty as to its solvency and continuing viability as a company.

[236] The events occurring in late May 2020 which the learned judge, referred to at paragraph 16, are the reactions and steps taken by NTP to IsZo's first open letter dated 27th May 2020. These are: (i) Mr. Wan, Deputy General Manager of NTP, with the agreement of Ms. Zhang its Chief financial Officer, sought legal advice on an allotment of shares by NTP. Specific reference is made to a WeChat exchange of 29th May 2020 between them, in which Mr. Wan said "if they [IsZo] have got enough votes, they're going to change the board. Prosecution [i.e. the institution of proceedings] would come later. Our status is very dangerous now." Ms. Zhang

replied: "Don't worry. The Chairman has his solution [or strategy]".[154]The statements by Mr. Wan in this WeChat exchange which preceded the above exchange were:

> "[D]o you think it would be better to invite Kaisa's legal staff and senior executives with investment banking background to discuss defensive countermeasures together ASAP?"
> "Kaisa [h]ires professional lawyers from K&L Gates/Sidley, and can also issue an open letter to support [NTP] as the largest shareholder."
> "We need to contact 1638 [Kaisa] for a professional lawyer, at least what he can offer us is one more reference."[155]

[237] These WeChat exchanges between Mr. Wan and Ms. Zhang, reproduced in part in the judgment, is evidence as to NTP's reaction to and concern about IsZo's first open letter. But they serve another purpose. They show, firstly, that as early as 29th May 2020, well prior to any possible liquidity crisis, NTP and its management were aware that IsZo could have the majority votes and take control of NTP and change its board; and, secondly, the planned response to that possibility or likelihood involved Kaisa as the largest shareholder. I am of the view that if it was relevant for the judge to have taken into account the telephone call from Mr. Zheng of SRCB to Mr. Jiang in late May 2020, it was also relevant for the judge to consider NTP's reaction and planning of a response to what Mr. Wan and Ms. Zhang clearly saw as a danger that IsZo may have the votes to exercise control of NTP, and what role or involvement they saw Kaisa having in any 'defensive countermeasures'. All this before any alleged liquidity crisis in late September 2020.

(b) NTP's June 2020 Management Report

[238] NTP relies upon its June 2020 Management Report which states that IsZo's first open letter had 'brought negative influence" to NTP, and that "banks consider whether to withdraw the financing for the unstable factors existing in the Company'.[156] This was some 3.5 months prior to the PIPE and could not have been

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[154] See para. 16 of the judgment below and fns. 2- 4 at pg. 6 of the judgment below.

[155] Record of appeal, Bundle E2, e-page 47 at 639.1.

[156] Record of appeal, Bundle E, Vol. E2 at 784.

a cause for the alleged urgent liquidity crisis which, according to NTP's pleaded case, existed in late September 2020 after the Requisition and repayment of the SRCB loan. In my view, the fact that no specific reference was made to this report in the judgment is of little or no moment. Certainly, the only solid evidence at the time of concerns by the Lender Banks, was the evidence from Mr. Jiang of his telephone call from Mr. Zheng in late May 2020 concerning the SRCB loan. Accordingly, this statement, if true, is a clear overstatement of the position at the time with the four Lender Banks since, up to that point, SRCB was the only one of the Lender Banks which had expressed any such concerns. There was certainly no evidence of any threat either from SRCB or any of the other banks to call in their loans.[157]

(c) The 23rd July 2020 CEB call

[239] On 22nd July 2020 Mr. Jiang received an email from Zou He Jun a representative of CEB.[158] Also on 23rd July 2020 there was a telephone call between Mr. Jiang and Mr. Zou He Jun.[159] At paragraph 30, the judge in fact sets out verbatim the contents of that email in the judgment. In that email, CEB refers to the IsZo open letters and says: 'This matter has attracted our attention and we hope to maintain close communication with your company'. They remind NTP of certain provisions of the General Facility Agreement signed 21st October 2019 which provides that 'in the event any major instability in your company, you need to inform our bank in advance, so that our bank can reconsider the feasibility of the line of credit **and we will reserve the right to recover the principal and interest of the loan in advance according to the agreement**". (emphasis added) This email was essentially a notification that the open letters had 'attracted' the attention of CEB who would maintain close communication going forward with NTP's subsidiary; and

[157] See core appeal bundle, Tab 7, e-page 129, NTP's Chronology, events 26 & 27.
[158] Record of appeal, Bundle E, Vol. E2 at 1100.
[159] See appellant's Chronology.

who was reserving what it saw as its rights under the General Facility Agreement to recover its principal and interest in advance.

[240] In his chronology of events, the judge does not refer to Mr. Jiang's follow up call with Mr. Zou of CEB. This is the extent of the complaint or criticism by NTP. The extent of Mr. Jiang's evidence of this call was that he had sought to reassure Mr. Zou and to provide him with further information regarding NTP's 'current situation'. NTP submits that this call, coming the day after the email from Mr. Zou, underscores the link between IsZo's actions and the concerns of the Lender Banks, and corroborates Mr. Jiang's evidence that receipt of such an email 'means the matter is quite serious'.

[241] In my view, while CEB was clearly expressing its concern about IsZo activism at that time, the position which they adopted was to remind NTP of their duty to keep CEB informed of any 'major instability' and to do so in advance. The email and presumably the follow up call, did not go beyond reserving its rights as lender. Indeed, there was no express threat to demand immediate repayment of their loan. Accordingly, the judge having quoted from the email and there being no evidence that the follow-up call took the concern of CEB any further than had been expressed in the email, cannot be faulted for not expressly referring to the follow-up call or to Mr. Jiang's opinion of its seriousness. This was really Mr. Jiang's personal opinion, and one which the judge was not bound to agree with or to accept. Furthermore, the indisputable evidence is that CEB did not make a demand for repayment of its loan until March 2021, shortly after delivery of the judgment. In my respectful opinion, this latter fact speaks volumes and is not inherently supportive of NTP's criticism of the judgment and of the position being taken in its appeal.

(d) 27th May to 11th September 2020 - concerns of all of the Lender Banks

[242] NTP complains that Mr. Jiang's evidence that during the period 23rd July to 11th September 2020 'many banks through their personal meetings with me or through

phone calls expressed their grave concern, concern with respect to the IsZo dispute',[160] was unchallenged evidence which was not taken into account by the judge. In my view, these were bald, unsubstantiated, and to some extent 'self-serving' statements by Mr. Jiang, statements which IsZo was not in any position to refute by direct evidence. There was not an iota of documentary evidence which either recorded or supported these statements. Furthermore, it would be passing strange, to say the least, for banks, some of which were major banks, to express that level of concern at that time and to not have documented it to NTP or to its borrower subsidiaries. It is no wonder that the learned judge did not refer to it in his chronology of events as the evidential value of that bit of evidence from Mr. Jiang is uncertain, if not questionable. It certainly does not provide any cogent evidence of an urgent liquidity crisis, even on NTP's own case. The simple fact is that from 23rd July 2020 call from CEB to Mr. Jiang, there is no cogent evidence that CEB or any of the other lender banks had expressed any concern about IsZo's activism or regarding any possible changes in the management of NTP, nor did any of them threaten to demand early repayment of their loan.

(e) 15th September 2020 SRCB, IB and XIB calls and Mr. Jiang/Mr. Wan discussion

[243] NTP complains that the judgment made no reference to the evidence which Mr. Jiang gave, in relation to the telephone calls which he had received on or around 15th September 2020 from officers of SRCB, IB and XIB, expressing their bank's concerns 'as to whether the dispute with IsZo would affect the operations and stability of NTP, and whether members of the Board would be replaced, whether the strategic relationship between Kaisa and [NTP] would be affected, and why Mr. Kwok had resigned'. NTP also refers to the unchallenged evidence of Mr. Jiang in cross-examination that these concerns extended to the potential loss of support of Kaisa[161] and the banks' unfamiliarity with IsZo's nominees to the

[160] (Jiang/27 & Day 7/8/12-22).

[161] Record of appeal, Bundle G2, Tab 7 e-page 189 lines 13-16

Board.[162] Reference was also made to Mr. Jiang's evidence at paragraph 39 of his witness statement, to the effect that the Lender Banks were concerned 'with the management in Shenzhen and Mr. Wan in Hong Kong'. They assert that none of these unchallenged pieces of evidence were referenced in the Judgment.[163]

[244] It was Mr. Jiang evidence that these discussions with the three lender Banks, occurred, chronologically, after the Requisition was served and before the SRCB demand for early repayment. However, it is not correct to say that the judge omitted Mr. Jiang's account of these matters from the judgment. In fact, at paragraph 124 the judge sets out verbatim paragraphs 38 to 43 of Mr. Jiang's witness statement. At that stage in the judgment, the judge was dealing with the evidence as to the existence of a cash crisis in NTP and the likelihood that the Lender Banks would demand repayment of their loan. In doing so, he considered Mr. Wan's email on 22nd September to Latham & Watkins as to the possibility of all the banks calling in their loans.[164] The judge found that direct dealings with the banks were conducted by Mr. Jiang therefore Mr. Wan 'had no personal knowledge of banks calling in loans and that he could only report what Mr. Jiang was telling him.

[245] Implicit in this finding is the judge's conclusion that he found Mr. Jiang's evidence of these telephone calls and discussions with the banks expressing their concerns, more reliable than Mr. Wan's evidence of them, who had no such dealings with the banks. Accordingly, the judge set out at length the evidence in paragraphs 38 to 43 of Mr. Jiang's witness statement wherein he gives his first-hand account of such conversations and discussions. It is interesting to note that at paragraph 39, Mr. Jiang states that having discussed these calls and conversations with the three named banks with management in Shenzhen and Mr. Wan, their agreed response to the banks was: (i) NTP's operations 'remain normal and stable'; (ii) NTP would

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[162] Core appeal bundle, Tab 2, NTP's skeleton arguments, e-page 30 at para. 84.
[163] See paras. 38-41 of the judgment below.

[164] See para. 122 of the judgment below.

‘remain able to make the required repayments under the loans’; (iii) **NTP thought it would be able to resolve the shareholder dispute**; and (iv) Mr. Kwok’s resignation was for personal reasons. (emphasis added) This was not an expression of grave concern over the likelihood of an imminent liquidity crisis resulting or having the potential to cause the financial collapse of NTP. Instead, it was a clear strategy to placate the Lender Banks and to assure them that NTP was and remains a stable company with the ability and resources to meet and to continue to meet its obligations with the Lender Banks.

[246] None of these ‘agreed’ responses spoke to any concern or any real concern on the part of NTP that the Lender Banks were going to demand immediate repayment of their respective loans and plunge NTP into an urgent liquidity crisis. As the judge rightly found at paragraph 125, the agreed responses were intended to allay any concerns which the Lender Banks may have as to a change in the Board/management and NTP’s ability to repay the loans. Furthermore, the ‘concerns’ expressed by SRCB, IB and XIB, which all, according to Mr. Jiang, were connected to or flowed from the Requisition (and not the prior events from late May 2020 to 11th September 2020), were just that, ‘concerns’, which any bank would be expected to have about the continued stability and financial soundness of its customer or borrower in light of a possibility of a change in its management. Furthermore, in this analysis one must not lose sight of the legal position that these loans were all with NTP subsidiaries, and the Lender Banks had no recourse to NTP or its cash reserves. There was not then any threat to demand early repayment of the loans. In my view, there is no merit in this criticism of the judge’s handling of Mr. Jiang’s evidence of what transpired on 15th September 2020 in his telephone calls and discussions with SRCB, IB and XIB.

(f) The 16th September 2020 BOB call and Mr. Wan/Dr. Tam conversation

[247] At paragraph 40 of his witness statement (reproduced in the judgment), Mr. Jiang gives evidence about a call from the branch head at BOB, Mr. Zhou Ying Ming on or around 16th September 2020 requesting more information the Requisition .

Mr. Jiang, in cross-examination, explained that this conversation with Mr. Zhou was a "request that we make early repayments of them [its loan]". NTP relies on this as unchallenged evidence. NTP also relies on Dr. Tam's evidence that on the said date, in a meeting with Mr. Wan, the latter had informed him that the banks were 'calling [the] loans', and warned that 'this time it's for real'. And, further, that he had 'already been told on 16th [September] that banks are, starting to call in to express their grave concern'.[165] NTP's complaint is that the judgment makes no reference to the call from Mr. Ming or Mr. Wan's conversation with Dr. Tam on 16th September 2020. However, as recounted by Dr. Tam himself, he explains that what Mr. Wan was in fact telling him was that 'there was this possibility' that the banks were going to call in their loans, not that 'this time it is for real' that they will do so. This point is without merit.

(g) The 21st September 2020 calls from Bank of Dongguan ("BOD") and the China Construction Bank Machong ("CCMB")

[248] The evidence of calls to Mr. Jiang from BOD and CCMB was given at paragraph 41 of Mr. Jiang's witness statement, which is set out at paragraph 124 of the judgment. It was to the effect that both of these banks had informed Mr. Jiang that they had '… decided to put the loan applications for the Dongguan project …' on hold pending the resolution of the dispute with IsZo. This communication was from two prospective lenders for the Dongguan project, not any of the five Lending Banks, and did not relate to any existing loan or financial obligation either of NTP or any of its subsidiaries. They were not demands for early payment of bank loans or facilities extended which, if acted upon, would put NTP in a liquidity crisis. It was simply an indication that these banks will await the resolution of the Requisition before deciding whether to proceed with the financing, which Requisition, the Board, in breach of the articles of association, has not acted upon since it was served on NTP on 11th September 2020, some 10 days prior to the calls received by Mr. Jiang from these two prospective lender banks on 21st September 2020.

[165] Tam/25; Wan/33; Day 3/87/14 to 88/5.

This failure by the Board to call a meeting of the shareholders of NTP in response to the valid Requisition is patently wrong, a breach of duty by the directors, and wholly inexcusable. Effectively, the Board's delay or refusal to act on the Requisition has put NTP in the position whereby these two banks decided to pause before deciding whether to proceed further with the planned financing for the said new project. There is to my mind no merit in this complaint.

(h) The 22nd September 2020 calls from BOC and SRCB

[249] From Mr. Jiang's evidence, it was not until 22nd September 2020 that SRCB, , Mr. Jiang informed that the said bank had decided to issue a notice to NTP, and that SRCB 'reserved the right to demand immediate repayment… given the uncertainties faced by [NTP]'. It was also Dr. Tam's evidence, that during his noon conversation that day with Mr. Jiang, he confirmed that SRCB had threatened to 'demand immediate repayment'. [166] Mr. Jiang also testified that he had that day received a call from Mr. Huang Mi, the deputy branch head of BOC, expressing his bank's concerns about the Requisition. NTP's criticism of the judgment chronology is that it includes no reference to these calls from BOC and SRCB.[167]

[250] Dealing with events occurring on 22nd September 2020, the learned judge at paragraphs 46 to 49 of the judgment, recounts that Dr. Tam had requested Mr. Wan to prepare a cash-flow forecast for NTP; and Mr. Wan had sent an email to Latham & Watkins which conveyed their assumption that: '**[U]nder extreme circumstances**, in the event of a change of control, all bank loans will be called immediately, and [NTP] will not be able to secure new loans from the bank…According to the forecast, we will have a cash deficit of over US$200 million….by the end of 2001'. (emphasis added).

[166] Record of appeal, Bundle G1 Tab 4, e-page 545 lines 2-7.

[167] Core appeal bundle, Tab 2, NTP's skeleton arguments, e-page 31 at para. 92.

[251] This narrative also included WeChat messages between Mr. Wan and Mr. Wen in which he said: "No bargain if [Latham & Watkins] must complete PIPE within 7 days. The subsequent bills will come later". Additionally, in relation to a retainer with Houlihan Lokey, 'if there is not unexpected delay, the PIPE will be done in just a week or a bit longer'. These WeChat exchanges about completion of the PIPE, show clearly that the PIPE was being considered and worked on prior to the demand from SRCB on 23rd September 2020, which NTP pleaded brought on the liquidity crisis and gave rise to its concern that the Lender Banks would demand repayment of their loans.

[252] The judge also recounted a long email of 22nd September 2020 from Kirkland & Ellis and Walkers in response to questions raised by Ms. Olivia Tan, NTP's legal officer in their Hong Kong office. In that email, after stating their understanding of 'privilege and discovery obligations in the BVI and the work product of both Walkers and K&E may ultimately be discoverable', it cautions – 'We suggest parties discussing live regarding certain of your questions'. In that email, in response to NTP's request for advice on making a - 'Private placement to independent third party or to Kaisa – If to Kaisa, how to minimize the risk?'- Kirkland (who were replaced that day by Latham & Watkins) noted that NTP 'should follow the appropriate corporate governance processes, including approval by the independent audit committee'; and Walkers advised: 'as mentioned above, there are a range of factors to be considered, which would include the source of funding and the identity of the counterparty'.

[253] The simple fact is that Mr. Jiang's evidence at paragraph 42 of his witness statement recounting his telephone call with Mr. Hung Mi of BOC and his calls from Lui Zheng of SRCB on 22nd September 2020, were set out verbatim in the judgment at paragraph 124. While it is correct, as NTP asserts, that the judge did not allude to Mr. Jiang's cross-examination on these calls during which he expanded on what he had stated in his witness statement, this 'omission' does not, in my view, render the judge's analysis as to whether an urgent liquidity crisis had

been made out flawed or unsustainable. As mentioned, a judge does not have to include in his judgment every single piece of evidence, especially where the witness' main evidence on the particular event or issue has been included in the judgment. In this regard, a judge is entitled to take a holistic view of the evidence when reasoning to his findings and conclusions, as was clearly done in the instant matter. In my judgment, there is no merit in this criticism of the judge's timeline and chronology of events.

[254] It is also notable, that NTP and those acting on its behalf to obtain legal advice about a private placement - whether to third parties or to Kaisa, never sought advice from the company's legal advisers, including Walkers or Latham & Watkins or Kirkland & Ellis, as to the fairness and legal implications of approving the PIPE prior to and acting on the Requisition; and to do so in the face of the directors duty and obligations to act of the Requisition , and in circumstances where the proposed resolutions for removal of certain of the directors from the Board of NTP were likely to pass and Kaisa would not have *de facto* control of the Board or of NTP. Apparently, none of those representing NTP including Dr. Tam, Mr. Jiang and Mr. Wan sought the advice of NTP's legal advisers as to whether it was permissible or prudent for the directors to delay or postpone acting on the Requisition, in breach of the memorandum and articles of association of NTP, proceed to approve a PIPE raising the very large sum of US$175 million, and to allot to one shareholder, Kaisa, a large amount of new shares, the effect of which would be to increase its percentage shareholding from 23% to 43% and to thereby secure or ensure Kaisa's *de facto* control of NTP.

[255] The simple point is that, whether the Lender Banks could or would imminently or at some time later, demand repayment of their loans, and NTP could or would be faced with an urgent liquidity crisis, was not a justifiable or proper reason for the Board's gross dereliction of duty in not acting upon the Requisition and convening a meeting of the current shareholders of NTP to consider removing the four directors and appointing new directors to the Board. These actions smack of

directors acting to preserve themselves on the Board, and to do so by ensuring that Kaisa maintains or achieves *de facto* control of NTP and to defeat the requisitionists. This was especially egregious, in circumstances where, as the directors must have been aware, the practical and commercial effect of the PIPE would be to give one shareholder, Kaisa, *de facto* control of NTP, which it apparently did not then have, and to do so without payment of a premium.

(i) The 22nd September 2020 noon call from Mr. Jiang to Dr. Tam

[256] It was also on 22nd September 2020 that Mr. Jiang, in a long call with NTP's new chairman Dr. Tam, reported to him his recent conversations with the Lending Banks, and that repayment in full of the SRCB loan was inevitable. In response to a question from Dr. Tam, Mr. Jiang told him that the risk that the Lending Banks would cancel their credit facilities 'was real and imminent'. That was clearly Mr. Jiang's assessment of the situation at that time. In cross examination, Mr. Jiang stated that SRCB had asked NTP 'to prepare for funds, to make repayments immediately, to make immediate repayments'.[168] Furthermore, NTP refers to the evidence of Dr. Tam during cross-examination as to what Mr. Jiang reported to him during their noon conversation that day.[169] In part, his account was that Mr. Jiang told him that the banks were "serious" and 'there was a significant risk that [the banks] would call in their loans'. NTP stressed that this unchallenged evidence of the noon call between Mr. Jiang and Dr. Tam was omitted from the judgment chronology.

[257] While the judge did not refer to the evidence of Mr. Jiang and Dr. Tam given in cross-examination, which evidence further expanded on what they had both recounted in their witness statement, in my view this omission, when assessed in light of the judge's quite full account of their primary evidence of this noon call, at paragraphs 124 and 124, and his holistic approach to and evaluation of all the evidence, is without merit. In my view, the judge clearly took account of all the

[168] Record of appeal, Bundle G2 Tab 7, e-page 192 lines 20-23.
[169] Record of appeal, Bundle G1 Tab 4, e-pages 543 lines3-7 and 545 lines 1-14.

evidence as to what transpired in the 22nd September 2020 calls and, specifically considered the veracity of Mr. Jiang's evidence as to when he informed Dr. Tam about the risks of the banks calling in their loans, whether NTP was at a major risk at the time of financial collapse, and whether there was a need for emergency funding or capital raising. The judge also analysed when the PIPE was first considered and that it predated the demand from SRCB; and that the long email of 22nd September 2020 'shows that consideration of a "private placement or other equity finance" was fairly far advanced, by the time SRCB issued its demand letter on 27th September 2020.[170] The judge also considered what was the real reason for the PIPE - was it in response to the service of the Requisition and to prevent a change in the Board to keep *de facto* control of NTP with Kaisa or was it to avert an urgent liquidity crisis. The judge held that the real purpose was the former and rejected the latter.

(j) 22nd September 2020 Dr. Tam and Mr. Wan discussions and Dr. Tam's September note

[258] This criticism concerns the alleged omission from the judgment chronology of Dr. Tam's oral evidence concerning another part of his noon conversation with Mr. Wan on 22nd September 2020. Dr. Tam testified that he and Mr. Wan discussed possible ways in which NTP could raise finance.[171] These included commercial loans, a bond issue and raising equity finance, but they came to the "initial view" that, because of the limited time, the PIPE was "… the only commercially viable way to raise financing…". Also, on the same day Mr. Wan, at his request, prepared a cash flow forecast for NTP, which identified a funding deficit of US$205.4 million (at the end of 2021), for loan repayment and ongoing funding.[172] They also refer to a written note produced by Dr. Tam at "some point in late September "summarizing" his and Mr. Wan's thinking, identifying a "total financing need" of about US$200 million, and explained why the other two financing options as alternatives to the

[170] See para. 121 of the judgment below.
[171] Record of appeal, Bundle G1 Tab 4, e-pages 549 lines 23-25.

[172] See para. 96 NTP's skeleton argument.

PIPE, were not commercially viable. This note is the subject of ground 3 of NTP's appeal.

[259] While the judgment chronology does not include details of the evidence of Dr. Tam as to what other financing options were discussed between himself and Mr. Wan during this conversation on 22nd September 2020, it is to be noted that in the joint email on 22nd September 2020 from Walkers BVI and Kirkland, in response to questions posed by Dr. Tam of NTP, Walkers BVI advised that, in addition to the need for additional funding for NTP, other factors which the BVI court would consider would be 'the funding options investigated by and available to [NTP] at the time, the precise terms of the funding option actually pursued by [NTP], including the identity of the counterparty, and whether the terms were market and/or commercial terms and were entered into with the directors' fiduciary duties in the best interest of [NTP]'. This was, in my opinion, sound legal advice.

[260] What the judge did address in the judgment was that no options or alternative means of financing were put to the Board or were considered by the Board at its meeting at which the PIPE was approved. As the judge noted, at the meeting of the audit committee of NTP on 5th October 2020, the PIPE was approved by four directors of the six directors, with directors Mr. Kellogg and Mr. Waslen abstaining. At the Board meeting which followed immediately and was chaired by Dr. Tam, after very little discussion, the PIPE was approved, with Mr. Kellogg, Mr. Waslen and Dr. Tam abstaining. At this Board meeting, a joint presentation was made by Latham & Watkins and Walkers.[173] The first part of the presentation focused on the Requisition, attempting to cast some doubt as to its validity. The judge found that this presentation amounted to a *suggestio* falsi, and that the lawyers well knew that the Requisition was valid. He also noted that it had not been submitted to him that there was any reasonable argument casting doubt as to its validity.[174] Before this

[173] See para. 63 of the judgment below.

[174] See para. 90 of the judgment below.

Court, there has been no demur from the position that the Requisition is valid and binding.

[261] The second part of the joint presentation concerned the PIPE. The judge observed that this presentation fails to flag up certain issues. He stated, at paragraph 93:

> '[It] does not discuss any issues concerning the fairness of the PIPE to the shareholders who had not been invited to participate. It did not comment on the fact that Kaisa were obtaining de facto control of [NTP] without paying any premium. It downplayed the "home country rules" issue. It did not point out that [NTP] had elected to be governed by New York governance rules. By changing to home country rules without notice, shareholders had no opportunity to consider their position. These issues of fairness are ones to which the board's attention should in my judgment have been drawn as part of the directors' fiduciary duties to shareholders'.

[262] In my judgment, this is a powerful analysis and statement of the unfairness inherent in the way in which Dr. Tam and the other directors who voted to approve the PIPE, proceeded with obtaining the approval of the PIPE. It also speaks inferentially as to the manner in which these directors discharged their fiduciary duties and to the question of what was their subjective purpose in voting for the PIPE. Moreover, it demonstrates clearly that the other options of obtaining finance and why they were rejected by Dr. Tam and Mr. Wan during their 22nd September 2020 meeting as given during Dr. Tam's cross-examination, were not put to the Board, as the decision-making organ whose members owed fiduciary duties to NTP and all its shareholders. It was not for Dr. Tam or Mr. Wan to make those decisions, but for the directors (as advised by Walkers BVI) who owed fiduciary duties to NTP and all its shareholders. Accordingly, when put in its proper context, the omission of Dr. Tam's evidence as to his noon meeting with Mr. Wan was of little or no moment.

[263] The approval of the PIPE was followed quickly by the allotment of new shares to GSL and West Ridge and payment of their respective consideration. On 6th October 2020, after approval and completion of the PIPE, Dr. Tam wrote to the requisitionists for the first time concerning the validity of the Requisition. On 7th October 2020, Mr. Jiang wrote to each of the banks which had by then served

notices of concern, notifying them that Kaisa had increased its shares to 43.9 percent and the situation was now "stable". There was no mention of the US$175 million raised by the PIPE.

(k) 23rd September SRCB notice and Mr. Jiang conversation with Mr. Liu of SRCB

[264] This complaint is not that the judge did not consider in the judgment chronology the notice sent by SRCB on 23rd September 2020 to Mr. Jiang at NTP requesting a meeting within 3 days.[175] The terms of the notice is set out at paragraph 51 and ends with this statement: 'We shall closely monitor the development of the incident', a reference to NTP being involved recently in "investor disputes" which may result in the board of directors being 'reformed with substantial uncertainties casted upon [its] operation and management'. The complaint by NTP is that the judge did not refer to Mr. Jiang's evidence in cross-examination that Mr. Lui of SRCB, who handed him the notice, had told him that "… the meeting was going to be about repayment…".[176] In my view, the omission of this bit of evidence, which is an embellishment on what Mr. Jiang had set out in his witness statement when recounting the said event, does not demonstrate that the judge failed to take into account relevant evidence as to the existence or likelihood of an urgent liquidity crisis. The fact is that the judge not only referred to the SRCB notice but also to the subsequent demand for repayment of its loan and penalty interest, which sums were repaid in full by NTP.

(l) 25th to 27th September 2020 Bank notices

[265] NTP admits the obvious. The judge did refer to the notices from IB, CEB, BOC, and BOB during the period 25th to 29th September 2020, each expressing their concerns and reserving their right to call for the repayment of their respective loans.[177] NTP submits that the judge's reference to each of these notices "renders

[175] Record of appeal, Bundle E, Vol 9, e-page 328 at 4561.
[176] Record of appeal, Bundle G2 Tab 7, e-page 194 lines 21-25 and e-page 195 lines 1-5.

[177] See paras. 55 to 57 of the judgment below.

his omission to record and evaluate the earlier events (a) to (i) …("the Omitted Events") all the more unbalanced – yet is entirely consistent with IsZo's strategy of emphasizing the late September 2020 Bank Notices whilst overlooking the May – September Timeline." With respect, I find this submission difficult to understand and see no merit in it whatsoever. It is NTP which, in its pleadings, focused its case of an urgent liquidity crisis on the events of the latter part of September 2020, from service of the Requisition on NTP. This approach was one which obviously found favour with the judge. It was the relevant period for assessing the crucial evidence and making a determination as to whether the evidence led by NTP, taken in a holistic manner, satisfied the judge that NTP was or was likely to be faced with an urgent liquidity crisis brought on by its Lender Banks calling in their loans or threatening to do so imminently.

[266] It is also not a sound argument to say, as NTP submits, that the judge's failure to refer to and to evaluate the alleged omitted events alongside NTP's internal discussions with its legal advisers Kirkland, Walkers and Latham & Watkins "had the immediate and necessary consequence that the judge focused on the PIPE discussions with his eyes shut to the developing liquidity crisis. He deprived himself of the critical context in which to evaluate whether the PIPE proposal was a response to the liquidity crisis or an ex post facto pretext for the same".[178]

Conclusion on Ground 2

[267] I am of the view that the judge did consider much of the evidence which predates the Requisition, and was correct to consider in greater depth and to attach more importance evidentially, to the events occurring post the Requisition. This he did both in the context of examining the reliability and credibility of each of the witnesses for NTP, particularly as to when the urgent liquidity crisis is said to have arisen such as to warrant consideration of capital raising and a PIPE. The judge also examined the events of the second half of September, including the notices

[178] Core appeal bundle, Tab 2, e-page 34 at para. 106 of NTP's skeleton arguments.

from each of the Lender Banks expressing their concerns, and the demand for payment by SRCB on 23rd September. He also took into account the demand for partial repayment of the BOC loan coming after approval of the PIPE. This approach to the timeline and chronology in the judgment, while not perfect, cannot in my judgment be assailed, and NTP's challenges thereto, under ground 2, based upon the alleged 'omitted events', accordingly fails.

NTP's Ground 3 – Dr. Tam's September 2020 Note

[268] This is a short ground. NTP contends, that Dr. Tam's Note, made sometime in late September 2020, is an unchallenged contemporaneous document which provided compelling evidence that was directly contrary to the judge's findings that there was no liquidity crisis and no capital raising purpose.[179] NTP submits that this note was material evidence before the judge which he omitted entirely from the judgment and failed to take into account in his assessment and evaluation of the evidence as to these two important issues. It was 'apparently compelling evidence' within the meaning of that expression by Males LJ in **Simetra** and a remarkable omission in the judgment.[180]

[269] As to the evidential importance of Dr. Tam's September note, NTP submits that it: (i) provided direct contemporaneous corroboration of what Dr. Tam had stated in his witness statement, that he had evaluated alternative financing options to the PIPE for NTP and, hence, evidence of a capital raising purpose; (ii) it contains material that was highly relevant to the central issues in the case of liquidity crisis and capital raising purpose, and corroborated Dr. Tam's belief that NTP did face a liquidity crisis and therefore the capital raising purpose; (iii) while Dr. Tam had been cross-examined on his note at some length, he had not been challenged on the fact that he had prepared the note,[181] that he had used it to present to the Board at its 5th October 2020 at which the PIPE was approved, and that Dr. Tam had genuinely held the view at the time that it was not viable in the time remaining to

[179] Record of appeal, Bundle E, Vol. E10, e-pages 409-410.
[180] Core appeal bundle, Tab 2, e-page 36 at para. 114 of NTP's skeleton arguments.
[181] Record of appeal, Bundle G2, Tab 6, e-page 112 lines 22-25; and e-page 114 lines 12-17.

pursue any of the three identified alternative means of obtaining finance; and (iv) in view of its importance as to Dr. Tam's genuine views at the time, the note had been referred to repeatedly and prominently in NTP's written closing submissions.[182]

[270] NTP submits, therefore, that in a case such as this, where the question was what was the subjective motivation of Dr. Tam and the four directors, Dr. Tam's note was a key contemporaneous document which was of importance as a means of getting to the truth 'not only of what was going on, but also as to the motivation and state of mind of those concerned'.[183] It provided compelling evidence as to Dr. Tam's belief as to the reality of the liquidity crisis and the fact of the capital raising purpose. Accordingly, fairness required that the judge should have dealt with it as 'apparently compelling evidence', and evidence which was 'contrary to the conclusion which he proposed to reach', explaining why he did not accept it.[184] Accordingly, there was a 'demonstrable failure to consider relevant evidence' on the part of the judge, which failure undermines the soundness of his analysis and reasoning on the two important questions of liquidity crisis and capital raising purpose.

[271] IsZo, on the other hand, submits that in fact Dr. Tam's Note 'is not evidence contrary to any of the conclusions reached by the judge and does not have anything like the "central importance" which NTP seeks to attribute to it'.[185] They say that NTP now seeks to give Dr. Tam's note much greater prominence and importance than they attributed to it in their closing submissions before the judge, where they presented the note as a "speaking note" prepared by Dr. Tam in advance of the audit meeting and Board meeting on 5th October 2020; and in reality, that is precisely what it is.

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[182] See paras. 115 to 121 of the judgment below.
[183] Per Males LJ in Simetra Global Assets Limited and others v Ikon Finance Limited and others citing Goff LJ in Armagas Ltd v Mundogas SA (The Ocean Frost) [1985] 1 Lloyd's Rep 1 at 57
[184] Core appeal bundle, Tab 2, e-page 38 at paras. 125-126 of NTP's skeleton arguments.
[185] Core appeal bundle, Tab 5, e-page 98 at para. 94 of IsZo's skeleton arguments.

[272] Further, IsZo submits, Dr. Tam's speaking note recording consideration of three other financing options is not inconsistent with their case and the judge's finding that Dr. Tam, in late September, decided to carry out the PIPE and that it would be justified by reference to a liquidity crisis being faced by NTP. They argue that Dr. Tam would by then have been well aware of the need for there to have been a record of the Board having considered potential alternative ways of raising finance, 'not least because Latham & Watkins had advised him that Houlihan Lokey should 'look at least at a high level at potential alternatives to the [PIPE] so the board has a record of having considered those potential alternatives'.[186]

[273] IsZo also argues that even if the three options had been mentioned by Dr. Tam at the 5th October 2020 Board meeting, the important point, as the judge found, is that there are other obvious options such as rights issue (including a rights issue underwritten by Kaisa), a claw-back provision in the PIPE, and a loan from Kaisa, which would have been fairer to NTP's other shareholders.[187]

Conclusion on Ground 3

[274] I find the arguments made by IsZo on this ground more persuasive. Firstly, the question of these three other options having been raised by Dr. Tam prior to the 5th October 2020 board meeting has already been canvassed. The simple fact is that there is no evidence of these options having been considered at the Board meeting or of any other options having been put before the Board of Directors for their consideration. Certainly, none of the options mentioned by the judge, at paragraph 163, were put by Dr. Tam to the Board. Secondly, Dr. Tam's note was treated as a speaking note and the record of the 5th October 2020 Board meeting is the contemporaneous document of what transpired at the said meeting and what options, if any, were presented to the Board for their consideration and in what form. In my judgment, Dr. Tam's note was confirmatory of the evidence he had

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[186]Core appeal bundle, Tab 5, e-page 99 at para. 98 of IsZo's skeleton arguments.
[187] See para. 163 of the judgment below.

given in his witness statement as to the three options he had discussed with Mr. Wan and their rejection of them on the basis of lack of time. The note was therefore not a contemporaneous document in the true sense, as there is no evidence that it was made by Dr. Tam immediately or shortly after his meeting with Mr. Wan, at which they discussed and rejected these three options. In the premises, ground 3 fails.

Disposition of NTP's Appeal

[275] For the reasons given above and given the totality of circumstances, I am not satisfied that NTP was facing or there was a genuine concern by the directors and Dr. Tam that NTP would be faced with an urgent liquidity crisis requiring the raising of a very large amount of capital to save NTP from financial collapse. The judge's findings and conclusions on the unreliability of Dr. Tam and the four directors/witnesses who voted to approve the PIPE (grounds 4 and 5 of NTP's appeal) are upheld. There is no sound basis or principle upon which to set aside any such findings going to the credibility of these witnesses and the unreliability of the evidence of Dr. Tam and the four directors, particularly as it relates to what was the genuine purpose of the PIPE and the subjective intention of the four directors in voting to approve the PIPE and to allot shares to GSL and West Ridge. On the totality of the evidence adduced, including the timeline as set out in the chronologies provided to the Court, I am not satisfied to the civil standard that Dr. Tam and or the four directors, Mr. Fok, Prof. Wu, Prof. Lyu and Dr. Lo, who voted to approve the PIPE and allotment of shares had a real or reasonable concern at that time that the Lender Banks were entitled to and were very likely to demand immediate repayment of their loans and that, if this occurred, NTP would not be in a position to properly meet those obligations of its subsidiaries and to avert its own financial ruin. The judge's conclusion of an urgent liquidity crisis not having been made out by NTP is, in my judgment, a conclusion which he was entitled to make on the evidence before him having seen and heard the witnesses.

[276] While (as found above) there is some merit in NTP's ground 1, particularly in relation to the first basis set out by the learned judge at paragraph 160 of the judgment, and the judge ought to have considered whether the directors had a genuine concern which was reasonably held that the Lender Banks were entitled to and would call in their loans, and not just whether any of the banks where in fact entitled to do so, in my assessment such a concern is not made out on the evidence taken as a whole. I am satisfied, as the judge found, that NTP had failed to make out a case of an urgent liquidity crisis in late September 2020 or when the PIPE was approved on 5th October 2020. Accordingly, the judge was correct when he found that the four directors who voted to approve the PIPE did so not for the purpose of raising capital to avert an urgent liquidity crisis, but for the purpose, or principally for the purpose, of ensuring that Kaisa, by the allotment of new shares to GSL (its wholly owned subsidiary) would have *de facto* control of NTP and to defeat the Requisition and the requisitionists (including IsZo).

[277] In my view, the evidence is sufficiently clear that the dominant purpose was to defeat the Requisition, to give Kaisa control of NTP both at the Board and shareholder level. This was, on the authorities, an improper exercise by these four directors of their powers under section 121 of the Act. The evidence is compelling that these directors did not act on the Requisition because, were they to do so, the outcome was clear, that the Kaisa-connected directors and hence Kaisa would no longer control the Board, and effectively control of NTP. It is clear that in order to ensure that this did not occur, their approach was clearly to delay any action on the Requisition, in breach of NTP's articles, while undertaking steps to put in place and have approved by the Board as then constituted, a PIPE which would give Kaisa *de facto* control of NTP in circumstances where they did not have such control.

[278] Further, the learned judge is presumed to have considered, as he was obliged to do, all the relevant surrounding circumstances when arriving at his conclusions on the issue of the liquidity crisis and of proper purpose. In my view, the learned judge, in his judgment dealt fairly with most of the pertinent evidence in his reasoning of

no urgent liquidity crisis and of improper purpose in breach of section 121 of the Act. However, as stated earlier, the conclusion by the judge at paragraph 166 that, by approving the PIPE for an improper purpose the four directors had also breached their statutory duty under section 120(1) of the Act to act honestly and in good faith and in what they believed to be in the best interest of NTP, was not made out on IsZo's case as pleaded and as conducted. Accordingly, I would set aside the judge's finding of a section 120(1) breach.

[279] In my judgment, the judge was correct to conclude that NTP was, at the material time, in a financial position to pay, in full, from its cash reserves not only the SRCB loan (which it did), but the other loans from IB, CEB, XIB and BOB. In relation to the BOC loan, demand for repayment was only made after approval of the PIPE and allotment of the new shares. NTP was able to successfully negotiate and did make a substantial partial payment to BOC from its cash reserves. BOC did not make demand for repayment of the balance of its loan until after judgment was delivered in this matter on 3rd March 2021, as did the other four then unpaid Lender Banks, IB, CEB, XIB and BOB, a period of over 5 months after approval of the PIPE. Moreover, NTP's annual report , adduced as fresh evidence along with the four-post judgment bank demand letters, shows that terms for repayment of these loans were being negotiated by NTP with these Lender Banks. There is no evidence produced by NTP to demonstrate that any of these four Lender Banks have taken any further steps to collect or to obtain repayment of their loans from the NTP subsidiary companies responsible as borrower or guarantor for their repayment.

[280] This is so even in the face of an adverse ruling by the Commercial Court in this matter in which the judge found that the four directors who voted to approve the PIPE had done so for an improper purpose and in breach of their statutory duties and, most importantly, that consequentially, the PIPE and the allotment of shares, including to Kaisa's subsidiary GSL, were void and invalid and orders were made setting them aside and to rectify the register of members to reflect the position pre

the PIPE. The effect of this ruling would be that the capital sum of US$175 million raised by NTP ostensibly to avert such a scenario or crisis of all the Lender Banks calling in their loans, would have to be returned, leaving NTP in essentially the same financial and liquidity position it was in when the PIPE was approved.

[281] Accordingly, for the reasons given above, I would dismiss grounds 1, 2 and 3 of NTP's appeal.

[282] I would also dismiss grounds 4 and 5 of NTP's appeal for the reasons set out above.

IsZo's Counter-appeal

[283] In the circumstances, NTP having failed in its appeal, there is no need to consider the merits of IsZo's counternotice which I would, accordingly, dismiss and make no order as to costs.

Costs

[284] NTP has failed in its appeal. Accordingly, on the principle that 'costs follow the cause' I would order NTP to pay IsZo's cost on its appeal to the extent hereafter stated. GSL appeared and presented substantial arguments in support of NTP's appeal, particularly on grounds 1 and 2, which have failed. Accordingly, in my view, GSL ought, on the same principle, to also bear with NTP, some of IsZo's costs of the NTP appeal. I would apportion such costs at 80 percent to NTP and 20 percent to GSL.

Orders

[285] I note that in its appeal NTP does not seek to set aside the declaration made by the learned judge that, the PIPE having been made for an improper purpose, the allotment of shares to GSL and West Ridge is ineffective and void. Accordingly, I would dismiss NTP's appeal except to the extent that the appeal against the

conclusion that the directors acted in breach of section 120(1) of the **BVI Business Companies Act 2004** is allowed. I would affirm the orders, including the cost order, made by the judge in the court below and order that NTP pays IsZo's costs in the appeal, at no more than two-thirds of IsZo's costs in the court below, 80 percent of such costs to be paid by NTP and 20 percent by GSL. Such costs are to be assessed by a judge of the Commercial Court if not agreed within 21 days of the date of this judgment.

[286] I would also order that NTP shall convene and hold a meeting of its shareholders to consider the passing of the resolutions proposed in and by the Requisition, such meeting to be held at 9:00am Eastern Time on Tuesday 30th November 2021. For the purposes of this meeting, NTP shall comply with the directions set out in Schedule 1 to the Order of Jack J of the Commercial court dated 3rd March 2021 and entered 10th March 2021.

[287] I would further order that the stay of proceedings granted by the Court on 20th April 2021 is lifted.

[288] I would also dismiss IsZo's counter-notice of appeal with no order as to costs.

Postscript

[289] I record our appreciation to counsel for the parties and their teams for their very helpful and thorough submissions.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

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

By the Court

Chief Registrar