IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO.108 OF 2022 (IKJ)

IN THE MATTER OF SECTION 92 OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF GLOBAL CORD BLOOD CORPORATION

Appearances:	Mr Tom Lowe QC instructed by Ms Joanne Verbiesen, Mr Jamie McGee and Mr Jonathan Stroud of Bedell Cristin, on behalf of Blue Ocean Structure Investment Company Limited (the "**Petitioner**")
	Mr Vernon Flynn QC instructed by Mr Denis Olarou and Mr Jason Mbakwe of Carey Olsen for the Company
Before:	The Hon. Justice Kawaley
Heard:	In Court
Date of hearing:	13-14 July 2022
Draft Judgment circulated:	22 July 2022
Judgment Delivered:	29 July 2022

HEADNOTE

Just and equitable winding-up petition-validity of Board-approved transaction resulting in substantial dilution of existing shareholders' shares-whether ex parte injunction restraining completion of part-performed contract should be continued until trial-validity of convening of and resolutions at extraordinary general meeting changing composition of board-implications of challenge to standing of petitioner in BVI for further conduct of Cayman proceedings-legal effect of non-compliance with statutory and corporate constitutional requirements for maintaining share

register-whether validation order should be made permitting completion of impugned transaction-Companies Act (2022 Revision) sections 40, 48 and 99

JUDGMENT

Factual and procedural background

1. The present proceedings arise from the decision of the Company's Board of Directors to enter into a commercial transaction which involved the allotment of new shares equivalent to the Company's entire issued share capital, diluting existing shareholders' stake by some 50%, and expending some 2/3^{rds} of the Company's cash without shareholder approval. The Company is listed on the New York Stock Exchange ("**NYSE**") and its entry into the transaction (the "Cellenkos Transaction"/ the "Transaction") was announced through a Form 6-K filing on April 29, 2022. The Press Release attached to the filing revealed that "*at closing, the Company will issue approximately 125 million new shares … and pay US$664 million in cash consideration*" for a 100% interest in Cellenkos, Inc., a biotechnology company. Closing and Closing Conditions were explained in Articles 7 and 8 of exhibits 4.1 through 4.6 of the Company's filing without identifying when closing was expected or required to take place. After writing a letter of concern on May 2, 2022 demanding termination of the Cellenkos Transaction, the Beijing branch of the Petitioner's international attorneys DLA Piper LLP on May 3, 2022 wrote the Board requiring it to convene an extraordinary general meeting ("EGM"). The Company's international attorneys, Cleary Gottlieb Steen & Hamilton LLP ("Cleary"), promised to respond substantively in 48 hours. Cleary responded substantively on May 5, 2022 defending the integrity of the Transaction without indicating that Closing Conditions had been waived, that cash consideration of US$664 million had been paid and that 12,363,636 new shares had been allotted.

2. The Petition (dated May 3, 2022) seeking a winding-up of the Company on just and equitable grounds and a Summons for Directions (dated May 4, 2022) and a Verifying Affirmation of Xiaoyang Chen affirmed on May 5, 2022 were filed and/or processed by this Court on May 5, 2022. By an *ex parte* Summons dated May 9, 2022 filed and/or processed by the Court on May 10, 2022, the Petitioner sought an *ex parte* injunction restraining the Company from, *inter alia*, closing the Transaction or issuing any new shares. That application was primarily supported by the Second Affirmation of Xiaoyang Chen ("Chen 2"), the deponent being a director of the Petitioner and lawyer qualified in both Beijing and New York. That application was heard by Justice Cheryll Richards and granted on May 12, 2022 (the "Injunction Order"). By a Summons dated May 16, 2022,

the Petitioner sought the continuation of the Injunction Order. The Injunction Order was varied by a Consent Order filed in Court on May 30, 2022 and subsequently further amended and varied by a Consent Order filed in Court on June 23, 2022. The Company argued at the present hearing that the Injunction Order ought to be set aside as the balance of convenience clearly favoured permitting the Company to complete a part-performed contract. In addition, it was contended (based on the Company's June 7, 2022 Summons, that the Court ought also to validate the implementation of the Cellenkos Transaction under section 99 of the Companies Act (2022 Revision) (the "Act"). Mr Flynn QC accepted that this would be explicitly without prejudice to the right of the Petitioner to subsequently seek to unwind the Transaction if it was set aside.

3. The main complaints about the Cellenkos Transaction may be briefly summarised as follows. Firstly it was said that the transaction required shareholder approval under the Articles and/or the NYSE Listing Rules. Secondly the Transaction was said to be not in the best interests of the Company. Thirdly it was said that the Transaction was a related party transaction, most notably because it indirectly benefitted the Company's Chairperson, Ms Ting Zheng, through her romantic relationship with the principal of one of the Transaction counterparties, Mr Yuen Kam, believed to be the beneficial owner of Golden Meditech Precision Medicine (BVI) Limited ("GMPM BVI"). Only the first complaint was capable of being articulated with crispness and clarity and appeared at first blush to have merit to it although on further scrutiny seemed less clear. The second point was difficult to evaluate and seemed likely to be a difficult point to vindicate at trial. The related party complaint seemed convincing from a high level general standpoint, but its merit as a freestanding point was difficult to evaluate in technical legal terms.

4. On May 9, 2022, the Petitioner filed a Schedule 13D/A filing with the Securities and Exchange Commission ("SEC") exhibiting a copy of the Petition and published a press release soliciting support for an EGM. On May 13, 2022, a press release was published in relation to the Injunction Order. On May 23, 2022, Golden Meditech Stem Cells (BVI) Company Limited ("GMSC") made a Schedule 13D SEC filing asserting that it held a charge over the Petitioner's shares in the Company. As explained in the Third Affidavit of Paul Schulman of Morrow Sodali LLC, who was retained to solicit support for an EGM, sworn on July 5, 2022 ("Schulman 3"), on June 3, 2022 it was ascertained that the Petitioner and supporters had reached the 75% threshold. The Company's total shareholding was based on the December 31, 2022 position as stated in the Company's February 28, 2022 SEC Form 6-K filing because there was no "*full and complete Register of Members*". Mr Schulman refers to his First Affidavit in which he set out his belief that if any new shares had been issued since then, this ought to have been the subject of filings with the SEC

within 10 days after they were issued. On June 3, 2022, an EGM was purported to be convened by the Petitioner and a Section 13D filing was made with the SEC.

5. The Company's Summons dated June 7, 2022, filed or processed by the Court on June 8, 2022 sought declarations under section 99 of the Act in relation to the Cellenkos Transaction. This Summons was supported by the First Affidavit of Chen Bing Chuen Albert, an executive director and Chief Financial Officer of the Company, sworn on June 7, 2022 ("Albert 1"). This Affidavit robustly refuted the Petitioner's main criticisms of the Transaction and explained that the cash consideration of US$664 million was paid on April 29, 2022 and that on "*4 May 2022, 17.00 NY time 12,363,636 new shares were issued*". It exhibits a "*copy of the Company's Register of Members, updated further to the completion of Stage 1 of the Transaction*". The issuance of this large tranche of shares had still not been publically announced by the Company nor previously notified to the Petitioner. At the present hearing, the Company invited the Court, in addition to discharging the Injunction Order, to grant the Validation Orders sought. Albert 1 also supported the Company's case for fortification of the Petitioner's undertaking given in relation to the Injunction Order. The Fourth Affidavit of Chen Bing Chuen Albert was sworn in reply to the Petitioner's evidence on these and other issues ("4").

6. The Petitioner on June 8, 2022 issued a Writ of Summons against the Company and 10 other Defendants seeking primarily declarations that the Transaction and Framework Agreement were void. The purported convening of the EGM for June 16, 2022 gave rise to two further applications on the Company's part. Firstly a June 14, 2022 *ex parte* on notice Summons seeking to restrain the holding of the EGM, or alternatively to restrain implementation of any resolutions purportedly passed at the EGM. I heard this urgent application, as Richards J had other judicial commitments, which was primarily supported by Albert 1, on June 15, 2022 and granted the Company's alternative head of relief ("EGM Injunction Order"). Thereafter the two matters commenced by the Petitioner were assigned to me.

7. At the EGM on June 16, 2022, resolutions were purportedly passed removing the existing directors and appointing a new slate nominated by shareholders claiming to represent a dissenting majority of more than 75% of the Company's shareholders. This prompted the Company to issue its Summons dated June 17, 2022 seeking a declaration that the EGM was invalidly convened and that all business conducted and resolutions purportedly passed thereat are of no effect. This Summons was substantively heard at the present hearing and was primarily supported by the Second Affidavit of Chen Bing Chuen Albert sworn on June 24, 2022 ("Albert 2"). Conflicting evidence was filed in relation to "argy bargy" shortly prior to the EGM which resulted in Jennifer Weng and Mark Chen, directors of the

Company, being refused entry to the meeting room by lawyers for the Petitioner, Bianca LaCaille and Andrew Ledbetter. Each side accused the other of inappropriate conduct, a dispute which seemed inappropriate to resolve without oral evidence and cross-examination. However, the Company's real complaint was that their admitted exclusion materially undermined the validity of the voting results.

8. These *contretemps* are only worthy of mention to illustrate that the present litigation, like the underlying commercial dispute, is being contested almost at "*fever pitch*". Other illustrations are the Court being required to resolve a dispute about the form of the EGM Injunction and the form of an Order the Company obtained to compel the Petitioner to correct a misleadingly triumphant press release about the outcome of the EGM. The British Virgin Islands battlefront is also an important part of the picture because it involves a pivotal dispute about whether the Petitioner is in legal terms a shareholder at all.

9. Albert 2 complained that the Petitioner was guilty of material non-disclosure because it obtained the Injunction Order without disclosing that its shareholding was subject to challenge in BVI proceedings commenced by the Petitioner itself, Claim No. BVIHCV (COM) 2022/0101 (the "BVI Proceedings"). It was deposed in paragraph 129 (b):

> "*By way of a Charge Over Shares dated 30 March 2018 (the 'Share Charge') entered into between the Petitioner and GMSC, the Petitioner charged its 78, 874, 106 Shares in the Company to GMSC as a continuing security for the payment and/or discharge obligations under a loan agreement between GMSC and Nanjing Ying Peng. The Share Charge was registered in the Company's register of charges pursuant to a request from GMSC.*"

10. On May 2, 2022, the Petitioner served a Stop Notice on the Company in respect its shares in the Company. On May 12, 2022, Walkers wrote the Company on behalf of GMSC (copying the Petitioner) advising that an event of default had occurred under the Share Charge and instructing Conyers to update the share register to show GMSC as the owner of the shares. The Petitioner's evidential response to this non-disclosure complaint was set out in the Third Affirmation of Xiaoyang Chen ("Chen 3"). Most importantly he deposed that he first saw the alleged loan agreements dated March 29 and March 30 2018 and the Share Charge when GMSC filed a Stop Notice in October 2020 and that the Petitioner's director alleged to have signed the Share Charge had sworn in the BVI Proceedings that he had not signed the crucial document. In or about December 2020, the Petitioner's BVI lawyers wrote to GMSC's lawyers alleging that the Share Charge was a fraud. No further

reliance was placed on the Share Charge until May 12, 2022, but the May 12, 2022 Walkers letter was not received by the Petitioner's directors until May 13, 2022. The Company replied to this evidence, primarily through the Third Affidavit of Chen Bing Chuen Albert sworn on July 1, 2022 ("Albert 3").

11. Because the Petitioner seeks to cast doubt on the validity of the Company's share register and the authenticity of the Share Charge, it bears noting at the outset that the Company seeks to rely on documents which appeared to me at first blush to be in one instance eyebrow raising and in another instance to be highly suspicious on its face. The validity of the share register relied upon the Company is properly a matter for this Court's adjudication. The validity of the Share Charge issue I accept is properly before the BVI Court, but in my judgment it does have some relevance to my assessment of the share register issue for the purposes of the issues requiring determination by this Court. Of particular relevance to the Company's application for a declaration that the EGM was invalidly convened is the question of whether the Company's share register was validly altered on May 4, 2022 to issue more than 12 million new shares, before the Petition herein was filed the following day. By a Summons dated June 24, 2022, purportedly supported by the Fourth Affirmation of Xiaoyang Chen dated June 25, 2022 ("Chen 4), the Petitioner sought fortification of the undertaking given by the Company for the EGM Injunction Order. I say purportedly because although Chen 4 was supposedly only affirmed in support of the Petitioner's Fortification Summons, no meaningful attempt was made to explain what measure of irrecoverable loss was likely to be suffered by the Petitioner if it turned out that the EGM Injunction was wrongly granted. None of the matters described in paragraph 8 ("Summary") directly addressed the issue of fortification[1].

12. The Company filed a Summons on or about July 6, 2022 seeking to strike-out or prevent the Petitioner from relying on two expert reports filed without leave. After hearing argument at the beginning of the hearing, I ruled that the Petitioner was not permitted to rely upon that evidence. The parties hoped to agree the editing of affidavits sworn by shareholders supporting the Petition which contained criticisms of management which the Company could not respond to. The First Affidavit of William Jeffrey Neal ("Neal 1") was re-filed in a redacted form the Company objected to shortly before a draft of this Judgment was circulated. For the avoidance of doubt I have not read Neal 1 and merely rely upon the supporting shareholders' evidence to the following general extent. I take note of the fact that the Petitioner's complaints have some support as tending to suggest that it is advancing grievances it considers to be genuine and which are not the product of some idiosyncratic personal agenda.

[1] The draft version of this judgment circulated for editorial comments omitted to deal with this Summons which I did not appreciate was being seriously pursued. I deal with the Summons briefly below.

13. The parties to the Transaction initially had a "longstop date" of June 28, 2022. An extension was agreed until July 28, 2022 (the "Longstop Date") in the expectation that this Judgment would be delivered before then. I have attempted to meet those expectations appreciating that justice delayed is often justice denied.

The Petitioner's Summons to continue/the Company's application to discharge the Injunction Order

Governing legal principles

14. Mr Flynn QC submitted that the critical legal consideration in the present case in deciding whether to continue or discharge the Injunction Order was where the balance of convenience lay. He did not concede that there was a serious question to be tried on the merits of the Petitioner's claims but elected not to orally address the Court on that limb of the test for granting interlocutory relief accepting that the threshold was a low one. The Court should seek as far as possible to preserve the status quo in circumstances where the Cellenkos Transaction was part-performed contract when the Injunction Order was obtained on May 12, 2022.

15. He referred the Court to *National Commercial Bank Jamaica Ltd.-v-Olint Corpn Ltd.* [2009] 1 WLR 1405 and the following passages of Lord Hoffman's opinion on behalf of the Privy Council Board:

> "*16…It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result …*
>
> *17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that*

the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other...

19….What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1971] Ch 340, 351, 'a high degree of assurance that at the trial it will appear that the injunction was rightly granted.'..." [Emphasis added]

16. The general merits of these principles were not disputed.

Findings: serious question to be tried on the merits

17. In my judgment there is most clearly a serious issue or question to be tried on the merits of the Petitioner's case that shareholder approval was required for the Transaction. Although Mr Lowe QC submitted that the main complaint was self-dealing, I found that complaint to have more obvious force in a tabloid journalistic sense rather than a technical legal sense. Having said that, the connections which clearly did exist between the Company's management and entities on the other side of the Transaction suggest that it would be a very odd way of a listed company to operate if both (1) the majority shareholders' stakes can be substantially diluted without their approval and (2) a 'minority management' is also unconstrained by strict self-dealing prohibitions.

18. It must be seriously arguable that a company listed on the NYSE has a governance structure which is not entirely at odds with mainstream commercial expectations. The Company's Articles make it explicit that the shareholders' ability to influence the course of management is less than is often the case by providing that an EGM can only be convened by 75% of the members. In light of that somewhat surprising diminution of the level of influence shareholders typically have, it seems doubly surprising to contend that the Company's constitution further conferred on the Board untrammelled authority to dilute existing shareholders' shares.

19. The Petitioner's contention that a new share allotment of more than 20% of the Company's existing issued capital would require shareholder approval in conformity with the standard NYSE rule (which could have been but seemingly had not been explicitly dis-applied), seemed commercially to be fundamentally plausible. Article 12 of the Articles empowered the Board to allot shares without any limitation. However, Article 61 identifies as one of

several items of non-special business to be dealt with at a general meeting which are not considered special business:

> "*(f) the granting of any mandate or authority to the Directors to offer, allot, grant options over or otherwise dispose of the unissued shares in the capital of the Company representing not more than twenty per cent (20%) in nominal value of its existing issued share capital.*"

20. Articles 12 and 61(f) can potentially be read to mean that the shareholders can only confer a general mandate on the Board to issue up to 20% of the Company's existing capital so that a massive allotment of roughly 100% would require shareholder approval. However, I find it extremely difficult to accurately evaluate the strength of this argument, based on a reading of the bare language of the Articles without a full appreciation of the surrounding commercial context in which the Company's constitution was drafted.

21. However, if the Injunction Order was viewed as a freezing order and the Petitioner required to establish the higher threshold of a good arguable case, I would find that its case on the need for shareholder approval does reach that threshold.

Findings: balance of convenience

22. When the Injunction Order was obtained, the *status quo* now appears to have been that the Cellenkos Transaction had already closed shortly after April 29, 2022 and was a partly performed contract in that consideration of US$664 million had been paid before the Injunction Order was obtained. The status of the Transaction only emerged through the Company's evidence in these proceedings, not (as one might have expected) through NYSE filings or a relatively contemporaneous press release. But that is immaterial for the purposes of the present analysis. Discharging the Injunction Order is more likely to maintain the *status quo* because it would in principle permit the Transaction to be implemented subject to the Petitioner's ability to seek to unwind it if it succeeds at the Trial of the present Petition and/or the Writ. As the Company submitted (Skeleton, paragraph 93), this conclusion is consistent with the approach I adopted in *Olalekan Akinyanmi-v-Lekoil Ltd*., FSD 382/2022 (IKJ), Judgment dated April 14, 2022 (unreported).

23. I say "in principle", because I ignore for present purposes the implications of the filing of the Petition and the conclusion I reach below that relief should not be granted to the Company under section 99 of the Act and the disputed validity of the May 4, 2022 share allotment.

24. The Company would in my judgment suffer more irremediable prejudice if legally restrained from completing the Transaction pending trial on the hypothesis that the Company succeeds at trial. It would assume the risk that the Petitioner in fact succeeds and the Petitioner would have the potential ability to set aside the Transaction if it succeeds at trial. As regards the relative merits of the respective cases, I do not have, in the above-cited words of Megarry J, "*a high degree of assurance that at the trial it will appear that the injunction was rightly granted.*" I accordingly find that the Injunction Order should be discharged. For completeness I should add that although it is not necessary for me to decide the material non-disclosure issue, I would have concluded that the Petitioner was guilty of material non-disclosure though not sufficiently serious to warrant discharging the Injunction Order on that ground alone.

25. My provisional views as to the costs of the Injunction Order application, viewed as a discrete application, are as follows:

(a) the Company misled the Petitioner, if not the market generally, by its April 29, 2022 6-K filing (and press release) which incorrectly represented that (1) closing would occur on some future date and (2) the consideration would be paid on some future date when in fact closing had already effectively occurred and the US$664 million had been or was being paid on the same date as the filing; and/or

(b) the Company misled the Petitioner, if not the market generally, by failing to promptly correct the misleading impression conveyed by the April 29 filing (and press release) and further failed to promptly disclose that over 12 million new shares had been issued on May 4, 2022 by way of consummating Stage 1 of the Transaction;

(c) the Company first seemingly disclosed that Stage 1 of the Transaction had been completed in Section F of Albert 1, sworn and filed on June 7, 2022, despite being served with (1) the Petition herein on May 5, 2022 and (2) with the Injunction Order on or about May 12, 2022;

(d) the Petitioner's costs in relation to its *ex parte* Summons dated May 9, 2022, up to and including June 7, 2022, should in my provisional view be the Petitioner's costs in the cause, to be taxed if not agreed on the standard basis. The Petitioner should in my provisional view pay the Company's costs in relation to the Injunction Order after June 7, 2022.

26. There is accordingly no need to determine the Company's application for fortification of the Petitioner's cross-undertaking. My provisional view is that any discrete costs attributable to that issue should be in the cause.

The Company's EGM Summons

The relief sought

27. The Company's EGM Summons sought the following substantive relief:

> "*1. A declaration that the extraordinary general meeting of the Respondent purportedly convened by notice of extraordinary general meeting published by the Petitioner on 3 June 2022 and purportedly held on 16 June 2022 (the 'EGM') has been invalidly convened.*
>
> *2. Further or alternatively, a declaration that all proceedings at the EGM are invalid and any resolutions purported to be passed at the EGM are of no effect.*"

The central issues in controversy

28. The Company's case in essence was that even if the Petitioner's disputed shareholding was validly held, the EGM was invalidly convened because on June 3, 2022, the 75% threshold was clearly not met by the supporting shareholders if the May 4, 2022 allotment was taken into account. The further and alternative complaint about the wrongful exclusion of two directors invalidating the EGM itself I summarily reject on the basis that the shares actually voted at the EGM were too small for any presentation which might have been made to have affected the result.

29. Mr Vernon Flynn QC submitted in the Company's Skeleton Argument:

> "*26. The very short point is that Blue Ocean admits that the Convening Shareholders did not meet the 75% Threshold unless the Stage 1 Share Issue is disregarded….*
>
> *30. The Company has produced its register of members as at 3 June 2022, which records as shareholders the entities to which shares were issued on 4 May 2022. The Company has also produced those shareholders' share certificates.*

31. Blue Ocean has belatedly criticised the Company for failing to comply fully with the requirements for the format of shareholder register set out in s.40 of the Companies Act, but it has not impugned the register as being false. Nor could it do so. In the absence of any compelling evidence to the contrary, the register and the share certificates conclusively establish that the 4 May 2022 share issuance did occur."

30. Mr Lowe QC responded that the register relied upon by the Company was non-compliant with section 40 of the Act and so it could not be *prima facie* evidence of its contents pursuant to section 48 of the Act. More importantly still it was argued in the Petitioner's Skeleton Argument:

> "*57. In fact, it seems highly unlikely that any shares were issued before the Injunction of 12 May 2022:*
>
> *(a) There was no Form 6K filing as there ought to have been…if the 12,363,636 new shares had been issued on 4 May 2022 then that information should have formed the basis of a Form 6K Filing it being equivalent to 10.2% of the outstanding shares of the Company.*
>
> *(b) Kam filed a form 13D on 23 May 2022…which reported beneficial ownership of the equity consideration to be paid to him under the bogus share charge arrangement… The fact Kam completed form 13D was significant [in] that Kam (a) knew to declare a share interest for US listed securities; and (b) made no mention of the alleged ownership of shares purportedly transferred to him on 4 May 2022…*"

The initial evidence

31. In the course of the hearing I observed that it was necessary to scrutinise the evidence about the alleged May 4, 2022 share issue with care to ensure that no breach of the Injunction Order had occurred. It seemed to me to be quite suspicious that no contemporaneous evidence supporting the proposition that the names of the now shareholders were entered in the share register, however formally imperfect that register might be, on May 4, 2022 or on any date prior to May 12, 2022. The critical pieces of evidence showed:

(a) on April 29, 2022, the Board resolved that:

"*Conyers Trust Company (Cayman) Limited ('CCS') be and hereby is instructed to record the allotment and issue of any Ordinary Shares pursuant to the terms of the Transaction Documents…in the Register of Members of the Company and that a share certificate be issued to any holder who requests the same, with full power and authority hereby granted to any one director to (a) prepare and deliver any such share certificate…and (b) to give any and all such instructions to CCS in respect of the foregoing*";

(b) Albert 1 exhibited (Exhibit "AC-1" at page 221) what the deponent described as a "*copy of the Company's Register of Members, updated further to the completion of Stage 1 of the Transaction*" (paragraph 113). The document exhibited was simply a copy of an electronic list of shareholders under the heading "*GLOBAL CORD BLOOD CORPORATION as of 05/31/22*" with no indication of who created the list. What appears to be the same document with an additional shareholder listed on a separate page was subsequently exhibited as "JM-1" to the First Affidavit of attorney Jason Mbakwe sworn on June 9, 2022, described by the deponent as "*the complete ROM*" (paragraph 4). Another version of the 'share register' the Company relied upon listed the shareholding position as at June 3, 2022 (Exhibit "JM-2" to the Second Mbakwe Affidavit, pages 87-88). It is still unclear who prepared the list of shareholders and there is no suggestion on the face of the document that this list constitutes or forms part of a "register of members";

(c) Albert 1, supporting the material non-disclosure point, also exhibited a copy of an entry supposedly confirming the existence of the Share Charge in relation to the Petitioner's shares in the Company "*registered in the Company's register of charges pursuant to a request from GMSC*" (paragraph 129(b)/Exhibit "AC1" page 336-340). At first blush, this document led credence to the Petitioner's complaint that the Share Charge which is the subject of the BVI Proceedings was a concocted document. Not because the document lacked authenticity on its face, but rather because it was obvious from its terms that it had not been prepared by anybody with even a fleeting acquaintance with corporate law. It was in legal terms simply nonsensical for a charge against assets belonging to the Petitioner to have been registered by the charge in the Company's register of charges. It seemed in factual terms highly improbable that if the Petitioner had genuinely executed the Share Charge in respect of so valuable an asset as its majority shareholding in the Company, the putative chargee (GMSC) would have failed to secure genuine liabilities in a more legally coherent and effective manner;

(d) an entirely new format appears in a document apparently produced by Michael Mullings of Continental Stock Transfer and Trust Co ("Continental") (Exhibit "JM-3", to the Third Mbakwe Affidavit sworn on June 15, 2022, at pages 2-8). This document is headed "*LIST OF SHAREHOLDERS*" and crucially states "*Effective: 05/18/2022*". There is still no suggestion on the face of the document that this document forms part of or is an extract from an official corporate "register of members"[2];

(e) Albert 3 exhibits (Exhibit "AC-3" pages 1-5) two share certificates each dated May 4, 2022 and signed by the Treasurer and Chief Executive Officer of the Company, one for 2,863,636 shares owned by GMPM BVI and the other for 9,500,000 shares owned by PAGAC III Holding VII Limited ("PAG"). These documents clearly provide some direct support to the averments the deponent made in paragraphs 113 of Albert 1 and paragraph 8 (d) of Albert 3 that these shares were issued on May 4, 2022 at "*17.00 NY time*". The precision of these averments about the issuing of the new shares is in stark contrast to the evidential vacuity surrounding when the legal precondition for the share issuance, adjusting the register, occurred;

(f) Albert 4 at paragraph 74 explained that Continental had historically maintained the Company's share register before the Company re-domiciled from Delaware in 2009 and had continued to do so. This was the reason why the register did not comply with section 40 of the Act. Correspondence was exhibited ("Exhibit AC-4" at pages 1187-1202) which indicated that:

(1) the Petitioner had been aware of the Continental form of register since 2018; and

(2) Carey Olsen had advised Bedell Cristin by letter dated June 29, 2022 that they were "*instructed that the reference to Conyers Trust in the minutes of the Board meeting on 29 April 2022 was an administrative/typographical error*".

32. The following preliminary conclusions emerge from a straightforward analysis of the documentary evidence relied upon by the Company in seeking to persuade this Court that the Company's register of members was altered on May 4, 2022 to add the names of the Transaction Stage 1 new shareholders:

[2] Mr Mbakwe also points out that the June 3, 2022 version of the "ROM" failed to note that 0.1% of the issued shares are in fact treasury shares, so the correct total of shares to be counted for the EGM threshold is slightly lower.

(a) although Continental has no formally documented authority to administer the Company's register of members, it appears to have *de facto* longstanding authority to do so and this potentially explains the deficiencies in its form and contents;

(b) in any event, Continental has failed to produce a document confirming that the register of members was adjusted to include the names of GMPM BVI and PAG on any identifiable date before May 12, 2022 (the earliest effective date indicated on one version of the share register is May 18, 2022);

(c) the bare assertion in Albert 1 that the share register of the Company was altered on May 4, 2022, and that the Stage 1 shares were issued well before the Injunction Order started to bite on May 12, 2022 and the day before the Petition was presented or filed on May 5, 2022, was unsupported by any directly relevant documentary evidence;

(d) the averments in Albert 1 and Albert 3 to the effect that and that the Stage 1 shares were issued on May 4, 2022 are directly supported by the share certificates bearing that date. However, this evidence provides only indirect and extremely weak support for an inference that the share register must already have been adjusted on that date so as to justify the further conclusion that the share certificates were validly issued on that or any other date.

33. In the course of the hearing I made it clear that I was concerned about the lack of any contemporaneous evidence showing that the register of members was in fact altered to reflect the new allotment before May 12, 2022. I did not doubt that the Company would have wanted to implement Stage 1 at "warp speed", having been put on notice soon after April 29, 2022 that the Petitioner was girding its loins for a major corporate assault. Whether the Company's corporate administrators, who would be presumably concerned to comply with corporate and legal formalities, could have accelerated their usual processes to such an unusual extent was far from clear. The Company's counsel, receiving instructions from afar, sought an opportunity to file supplementary contemporaneous evidence. I gave directions for supplementary evidence to be filed by July 15, 2022 on behalf of the Company and for responsive submissions to be filed by the Petitioner by July 18, 2022.

The Company's supplementary evidence

34. On July 15, 2022, the Company placed before the Court a signed but unsworn and undated version of the Fifth Affidavit of Chen Bing Chuen Albert ("Albert 5") and Exhibit "AC-5". Commenting on the exhibited email chain, the deponent avers that it shows that:

"*(a) On 29 April 2022 at 1:58pm Hong Kong time, I emailed Conyers copies of the signed Transaction documents to Richard Hall of Conyers.*

(b) On 29 April 2022 at 6:35pm Hong Kong time, in my email to Continental and Loeb, I stated that it 'looks like we can first complete the GM Precision Medicine (BVI) Limited transaction on May 2. And the other transaction on May 4.' My reference in this email to 'GM Precision Medicine (BVI) Limited transaction on May 2' refers to the Stage 1 share issuances to both GM Precision Medicine (BVI) Limited ('GM-PM BVI') and PAGAC III Holding VII Limited ('PAG'). The Company originally targeted to complete the Stage 1 share issuances to GM-PM BVI and PAG on 2 May 2022 and the rest on 4 May 2022 (tentatively). However, due to administrative delay, the Stage 1 share issuances were carried out on 4 May 2022. After Stage 1 was completed on 4 May 2022 (New York time), the Company received the Petition which put Stage 2 on hold.

(c) On 4 May 2022 at 3:29pm New York time, Loeb emailed to Continental (with copy to me and Conyers) the deliverables in connection with the share issuance that day i.e. 4 May 2022. This included the letter of instruction dated 4 May 2022 from the Company to Continental ('Instruction Letter') to issue 2,863,636 shares to GM-PM BVI and 9,500,000 shares to PAG, which is exhibited at [pages 8-9 of AC-5].

(d) On 4 May 2022 at 3:38pm New York time, I emailed Continental instructing it to send us the updated register of members of the Company recording the issuance of shares to PAG and GM-PM BVI.

(e) Also, on 4 May 2022 at 4:32pm New York time, Continental replied to my request enclosing the Company's share register which recorded PAG and GM-PM BVI's shares. The share register enclosed to Continental's email is exhibited at [pages 10-11 of AC-5]. I note that in this share register, the 136,899 shares held by China Cord Blood Group should have been marked as treasury shares, and this oversight was subsequently corrected in versions of the share register which have been exhibited in these proceedings.

(f) Following that, on 4 May 2022 at 4:53pm New York time, Continental emailed me copies of both share certificates of PAG and GM-PM BVI. The share certificates enclosed to Continental's email are at [pages 12-15 of AC-5]. At paragraph 113 of Albert 1, I stated that the shares were issued to PAG and GM-PM BVI at 17:00 NY time on 4 May 2022. This was an approximation since I received the share certificates from Continental at 4:53pm."

35. The relevant email chain appears on its face to be the best available evidence that the Company's share register (assuming its non-compliance with section 40 of the Act and Article 43 of its Articles are not fatal to its validity) was indeed updated to add the Stage 1 new shareholders on May 4, 2022. No explanation is proffered in Albert 5 as to why this seemingly conclusive contemporaneous documentation was not made available at an earlier stage. Instead Albert 3 purported to make good the May 4 date of the changes to the share register (paragraph 8(e), Exhibit "AC-3" page 1-4) by exhibiting documents which failed to substantiate the point. Lawyers drafting Albert 3 may simply have been unaware of the contemporaneous correspondence and the deponent may simply have failed to appreciate the forensic value of contemporaneous correspondence. In the Petitioner's Supplementary Skeleton Argument, the following arguments are made:

"*5…the evidence that the Petitioner had received up to and including the hearing plainly indicated that no share issue had taken place on 4 May 2022:*

(a) Following the filing of the Petition on 5 May 2022 and the obtaining of an Injunction on 12 May 2022 blocking the Transaction, the Company and its attorneys never once indicated either in public announcements (including as required by the relevant SEC rules), correspondence with the court or correspondence with the Petitioner that the shares had been issued until it filed evidence over one month later on 7 June 2022. That evidence contained no proof that shares had been issued or transferred other than the spreadsheet referred to above.

(b) The Company's public announcement regarding the Transaction on 29 April 2022 indicated that closing of the Transaction would take place at a date in the future after various conditions had been met and there was no indication that any of the conditions had been met. (See C1/2/p.329-330):

'HONG KONG, China, April, 29, 2022 – Global Cord Blood Corporation (NYSE: CO, 'GCBC' or the 'Company'), China's leading provider of cord blood collection, laboratory testing, hematopoietic stem cell processing and stem cell storage

services, announced today that the Company will acquire 100% of Cellenkos, Inc ("CLNK") and the rights to develop and commercialize all of its existing and future products worldwide except those related to CLNK's existing collaboration with Incyte Corporation (Nasdaq: INCY, 'Incyte'). As of the date hereof, the Company has entered into agreements with the holders of approximately 95% of CLNK outstanding equity interest and GM Precision Medicine (BVI) Limited ('GMPM'). Following the entry into an agreement at substantially the same terms with the remaining 5% holder, at closing, the Company will issue approximately 125 million new shares (on an as-converted and fully diluted basis) valued at US$11 per share and pay US$664 million in cash as total consideration.'

(c) *One of the recipients of the newly issued shares, PAGAC, never made a filing announcing the acquisition of 9.5m shares in the Company, notwithstanding that it is required to do so within 10 days of the acquisition due to the substantial interest acquired (well in excess of 5%). Given that PAGAC is a licensed and regulated fund it seemed highly improbable that it would fail to comply with this obligation. PAGAC also did not attend or vote at the EGM. (see Ledbetter 1, B/19/pp.4-7 at [11]-[21]).*

(d) *Kam filed a 13D notice on 23 May 2022 in respect of the Petitioner's own shares in the Company but in that 13D notice failed to disclose the purported acquisition of newly issued shares by GMPM BVI (of which he is the beneficial owner and so would have been required to disclose) and stated that his percentage of interest in the Company was calculated based on the outstanding shares in the Company having been 121,551,075, being the number of shares outstanding prior to the purported share issuance and not the increased number of shares the Company now purported to have outstanding. (see C4/25/p152-161).*

(e) *The Company's own website stock page continued to state (until at least 7 July 2022) that the number of shares outstanding in the Company is 121,551,075 and not the increased amount. (see Chen 5 at B/33/p.21 at [56])*

(f) *The Company refused to provide (and has still not provided) any actual evidence of the share issue or transfers having taken place such as letters of allotment, board resolutions, executed instruments of transfer or correspondence with the transferees indicating their acceptance of the shares.*

(g) *The Company's own documents and its correspondence with the Petitioner indicated that the issue of shares could only be completed by Conyers Trust as the Registered Office. This includes the Board Minutes from the meeting on 29 April*

2022 which authorised Conyers Trust to deal with, inter alia, the share issuance/allotments (see AC1 at C2/8/p.202 at [5.7]) and a letter to the Petitioner's attorneys dated 31 May 2022 in which the Company's attorneys confirmed that they had requested the Register from Conyers Trust and that it would be provided in a few days (which was of course never received) (see pages 22-23 of JS3).

6 AC5 now shows that correspondence exists for 4 May 2022 which suggests that Continental followed instructions to record a share issue to GMPM (BVI) and PAGAC. Had these documents been made available when they should have been then the Petitioner would not have wasted time and effort in challenging this. In any event, AC5 raises further issues and leaves a number of questions unanswered."

36. The Petitioner's alternative responsive arguments[3] may be summarised as follows (I ignore (b) as an entirely new point):

(a) as a matter of law there is no register;

(b) it would be inequitable for the Court to take into account the new shares;

(c) the Board only authorised Conyers Trust to alter the share register, not Continental.

37. The suggestion in correspondence that the reference to Conyers in the Board Minute ("*Conyers Trust Company (Cayman) Limited ('CCS') be and hereby is instructed to record the allotment and issue of any Ordinary Shares pursuant to the terms of the Transaction Documents… in the Register of Members of the Company…*") was a clerical error is only partially made plausible by the oddity acronym assigned. "CCS" is a mismatch for both the named Conyers entity and the supposedly intended Continental entity, based on the name which consistently appears on what the Company insists is the share register. Does the Minute contain two clerical errors: an incorrectly named custodian for the share register and an incorrectly expressed acronym?

38. The Company's attorneys elected not to make any other further submissions on the May 4, 2022 share register point unless invited to by the Court because the Petitioner had effectively abandoned its challenge. I did not identify any further submissions which

[3] Carey Olsen shortly before this Judgment was being finalized for circulation for editorial comments complained that the Petitioner's Supplementary Skeleton went beyond the scope of what had been directed and sought an opportunity to respond. I declined to permit any response on the grounds that I would not take into account any "new" matters. Point (a) was addressed in oral argument at the hearing and in the Petitioner's Skeleton Argument and point (c) was addressed in oral argument.

would in the circumstances assist the Court because the authority point had previously been addressed at the hearing.

Walkers' July 20, 2022 Letter

39. Walkers wrote the Court after the hearing to address concerns I expressed in the course of the hearing, which they observed but did not actively participate in, about the authenticity of the 2018 Cayman Share Charge and the related extract from the Company's Register of Charges. The July 20, 2022 letter, whilst unsolicited, was justified in light of the concerns I expressed at the hearing. I was invited to consider exhibits to the First Affidavit of Leong Kim Chuan sworn on June 13, 2022 on behalf of GMSC in the BVI Proceedings to which no direct reference was made at the hearing when I was taken briefly to the relevant Affidavit. I acknowledge that these documents potentially provide contemporaneous support for the GMSC case in the BVI Proceedings that a loan transaction was negotiated with Mr Xu Ping in March 2018.

Legal findings: the consequences of a defective share register

40. Section 40 of the Act provides as follows:

"***Register of members***

40. *(1) Every company shall cause to be kept in writing, a register of its members and there shall be entered therein —*

(a) the names and addresses of the members of the company, with the addition of, in the case of a company having a capital divided into shares, a statement of the shares held by each member, and the statement shall —

(i) distinguish each share by its number (so long as the share has a number);
(ii) confirm the amount paid, or agreed to be considered as paid on the shares of each member;
(iii) confirm the number and category of shares held by each member; and
(iv) confirm whether each relevant category of shares held by a member carries voting rights under the articles of association of the company, and if so, whether such voting rights are conditional;

(b) the date on which the name of any person was entered on the register as a member; and

(c) the date on which any person ceased to be a member.

(2) Any company making default in complying with this section shall incur a penalty of five thousand dollars; and every director or manager of the company who knowingly and wilfully authorises or permits such default shall incur the like penalty.

*(3) For the purpose of subsection (1), "**voting rights**" means, —*

(a) rights conferred on shareholders in respect of their shares or, in the case of an entity not having a share capital, on members, to vote at general meetings of the entity on all or substantially all matters; and

(b) in relation to a legal entity that does not have general meetings at which matters are decided by the exercise of voting rights, the rights conferred upon shareholders or members, as applicable, that are equivalent to those of a person entitled to exercise voting rights in a company.

(4) A voting right is conditional where the voting right arises only in certain circumstances."

41. The non-compliance with section 40 which is most significant in the present case is the failure to record in what is treated as the share register the dates on which members became and ceased to become members as required by section 40(1)(b) and (c) of the Act. The Company's lackadaisical approach to its statutory obligations in this regard is demonstrated by the fact the "register" on its face does not appear to be anything more significant than a list of shareholders from time to time. Despite being a listed company, the Company's website's identification of its issued share capital is not kept up to date and no regulatory filings seem to be made in a timely fashion about even massive issues of new shares. There is no reason to believe that Continental was ever instructed by the Company to create and maintain a register of members conforming to the requirements of Cayman Islands law.

42. The share register is for essentially the same reasons not compliant with Article 43 (1) on its face and is not being administered in accordance with the spirit, at least, of Articles 43(2) and 44. Article 43 provides:

"*(1) The Company shall keep in one or more books a Register of its Members and shall enter therein the following particulars, that is to say:*

(a) *the name and address of each Member, the number and class of shares held by him and the amount paid or agreed to be considered as paid on such shares;*

(b) *the date on which each person was entered on the Register; and*

(c) *the date on which any person ceased to be a Member.*

(2) *The Company may keep an overseas or local or other branch register of Members resident in any place, and the Board may make and vary such regulations as it determines in respect of the keeping of any such register and maintaining a Registration Office in connection therewith.*"

43. Article 44 primarily provides that the "*Register and branch register of Members, as the case may be, shall be open to inspection for such times and on such days as the Board shall determine by Members without charge…at the Office or such other place at which the Register is kept in accordance with the* [Act]…" The difficulties that the Petitioner and this Court have experienced over the course of these proceedings in ascertaining if and when any new shareholders had been added to the Company's register of members altering the status quo reflected in the Company's published position demonstrates substantial non-compliance with the above provisions of the Act and the Company's own Articles. What consequences flow from this?

44. Section 48 of the Act provides:

"**Register to be evidence**

48. The register of members shall be prima facie evidence of any matters by this Act directed or authorised to be inserted therein."

45. Mr Lowe QC commended the following legal principles to the Court. In *Portal-v-Emmens* (1875) 1 C.P.D. 201 at 213, Lindley J (as he then was) held, considering a broadly similar statutory provision, as follows:

"*1. If a proper register is kept, that register is prima facie evidence that a person whose name is on it is a shareholder…2. If in addition, it be proved that that the person has become… entitled to a share in the company, the evidence that he is a shareholder is conclusive. 3. If there be no register, or if the register is so defective as to be inadmissible in evidence, other evidence must be adduced to prove that a*

person is a shareholder. But to exclude all such evidence is not in my opinion required by the Act, and would lead to consequences which are really absurd…"

46. Section 48 of the Act appears to me to give effect to this decision. It is implicit in section 48 of the Act that a register will only constitute *prima facie* evidence of its contents if it substantially complies with section 40.

Findings: should a declaration be granted that the EGM was not validly convened?

47. I find that the "List of Shareholders" treated by the Company as its register for many years is not sufficiently statutorily compliant to constitute *prima facie* evidence of the various matters "*directed or authorised to be inserted therein*", having regard to the specific matters which were in dispute in the present case.

48. By the end of the July 13-14, 2022 hearing, the Company had failed to produce sufficient evidence to prove that GMPM BVI and PAG had validly been added to the register of members before any changes to the register were prospectively invalidated by the Petition on May 5, 2022 or actually prohibited by the Injunction Order on May 12, 2022. I would have found based on the material then before the Court that the Company had failed to establish that the 75% threshold had not been reached by the Petitioner for validly convening the EGM based on the higher total outstanding shares figure relied upon by the Company.

49. Having regard to the further evidence filed after the conclusion of the hearing in the form of Albert 5, there is a far clearer basis for finding that the total number of shares in the Company on June 2, 2022, the Record Date[4], was 133,914,711. On this basis, as Mr Flynn QC correctly submitted at the hearing, it is clear that the Petitioner and valid supporting shareholders could not validly have convened the EGM at the material time. The bizarre way in which this evidence has been produced still leaves a sense of anxiety about relying upon it without oral evidence and cross-examination, no matter what concessions the Petitioner feels compelled to make. However, in my judgment there is no basis in the context of an application to be determined on the basis of affidavit evidence rejecting documentary evidence unless it is palpably unreliable on its face.

[4] Although the Company's evidence suggested the date of the convening notice was the relevant date, Mr Lowe QC pointed out in oral argument that the day before that date is the Record Date according to the Memorandum and Article 45. In the event, nothing turns on this point.

50. It is far less clear that Continental can properly be viewed as having been validly authorised by the Board to add the new shareholders to the register and issue their shares. Instinctively I am inclined to feel, appreciating the ease with which clerical errors can be made when copying and pasting standard wording from other documents, the Company's explanation on this issue. However, it is the Company that has sought to persuade the Court to declare that the EGM was invalidly convened because it had validly issued new shares on May 4, 2022 and the only matters I have been satisfied of at this stage may be summarised as follows:

(a) the Company does not maintain a share register which complies with the Act or its own Articles which makes it impossible to determine with the ease the law requires when changes have been made to the share register;

(b) the Company has inexplicably failed to produce contemporaneous evidence of the May 4, 2022 share register until several weeks after being challenged about the existence of such documents and after the end of the hearing scheduled to adjudicate the issue;

(c) the Company has adduced no direct evidence that the Board authorised Continental to record the new shareholders in the share register and issue the new shares.

51. Accordingly, I find that the Company should not be granted a declaration in terms of paragraph 1 of its EGM Summons at this interlocutory stage and would adjourn this Summons with liberty to apply so that Company can adduce direct evidence on the authority issue. Subject of course to hearing counsel, I would potentially be willing to determine such renewed application on the papers because I am concerned to afford the Board the comfort of legal clarity as soon as practicable if this is consistent with the needs of substantial justice as I suspect the case to be. There is in any event no present practical need for the declarations sought in light of my decision to continue the EGM Injunction Order explained below. My strong provisional view is that the Company should be required to pay the Petitioner's costs of the EGM Summons to be taxed if not agreed on the indemnity basis because of the sheer weight of the various ways in which the Company's conduct of this application was unreasonable to an almost dizzying extent.

The EGM Injunction Order

52. It seems obvious that the EGM Injunction Order should for good order be continued until further Order. It is possible that the Petitioner will be held not to own its large tranche of shares in the Company at all if the Share Charge purportedly granted over its shares is held

to be valid in the BVI Proceedings. In these circumstances the Petitioner cannot credibly seek to convene another EGM in any event. In my judgment the basis for the Petitioner's application for fortification of the Company's undertaking by the "Guarantors" (Petitioner's Skeleton dated June 27, 2022 largely falls away in light of the combined effect of (a) doubts about the Petitioner's standing, (b) the post-hearing evidence filed in connection with the May 4, 2022 purported alterations to the share register (despite the absence of satisfactory evidence on the authority issue, and (c) my dismissal (below) of the Company's Validation Summons. Further and in in any event, the Petitioner adduced no or no direct evidence making the case for fortification in specific financial terms. The principle that if the EGM was found to be valid the Company should not bear the costs of litigation against the Petitioner was relied upon together with what appeared to me to be the bare assertion that the Company had no assets within the jurisdiction. As this Summons did not to my mind receive the benefit of full argument, I would adjourn the Petitioner's Fortification Summons with liberty to apply and reserve the related costs.

The Company's Validation Summons

Relief sought

53. The Company's section 99 Summons sought the following contentious Validation Orders:

> "*1. A declaration that section 99 of the Companies Act (2022 Revision) (the 'Act') does not apply to any disposition of the Company's property and any transfer of shares made prior to the commencement of the winding up including the issuance of shares pursuant to the Company's acquisition of 100% of the equity interest of Cellenkos Inc. ('Cellenkos') announced by the Company on 29 April 2022;*
>
> *2. Further or alternatively, no disposition of the Company's property or other transaction by the Company effected pursuant to the Company's acquisition of the assets of Golden Meditech Precision Medicine Limited and 100% of the equity interest of Cellenkos announced by the Company on 29 April 2022 (collectively referred to as the 'Transaction') shall be void by reason of section 99 of the Act.*
>
> *3. Pursuant to section 99 of the Act and/or the inherent jurisdiction of the Court, the Company be permitted to effect the transactions contemplated in the Transaction and, accordingly, any disposition of the Company's property and transfer of shares or alteration of the status of the Company's members shall not be void…*"

Factual matrix

54. The Company's central thesis was set out as follows in its Skeleton Argument:

"*112. In practice, the s. 99 Application for validation of the Transaction is inextricably linked with the Injunction Summons and the issue of whether the 12 May Injunction ought to be continued…The two issues go hand in hand*."

55. The Petitioner's counsel contended that it would be inconsistent with the statutory scheme of just and equitable petitions and the purpose of section 99 to prospectively validate the impugned transaction itself. Mr Flynn QC in oral argument offered to modify the terms of the proposed Validation Order to make it clear that the Order was without prejudice to the Petitioner's right to seek to unwind the Transaction if it succeeded at trial. He expressed the plausible concern that with the threat of an automatic voiding of the next stages of the Transaction hanging over their heads, the Transaction counterparties might simply decide to exercise their termination rights. I observed that if the Petition was not liable to be struck-out, the Company and the counterparties should be left to form their own commercial judgment as to the risks of a winding-up order ultimately being made.

56. This exchange helps to distil what the key factual matrix is. The Transaction has only partially been completed on terms that permit the counterparties to walk away in the event of developments occurring before Stages 2 and 3 are completed, such as those represented by the Petitioner's present legal challenge. It is also important to bear in mind what the commercial character of the Transaction is. It is essentially a strategic business development partnership or alliance with long-term potential (and necessarily uncertain) returns rather than a transaction needed to generate quick cash to meet vital current operating expenses. As the Company's April 29, 2022 press release stated:

> "*…Upon completion of all transactions, the Company will own 100% of CLNK equity, the global rights for most of its products, and the laboratory assets under GMPM. The Company will fully support all of CLNK's on-going and outstanding clinical and R & D projects…*
>
> *'As a biotech company focused on innovative cellular therapies, CLNK is honoured to join the GCBC family. This union represents an important milestone for CLNK and I believe GCBC's current business, extensive network and sales and marketing resources in Asia will help expedite CLNK's R & D activities and future commercialization and expansion,' said Dr. Simrit Parmar, MD, Founder of CLNK. 'Looking ahead, the CLNK team will continue to focus on the R & D and manufacturing for breakthrough T-reg cell therapies, co-operate with GCBC's existing team to expand CLNK's pipeline and prepare for the commercialization of our products on a global scale to benefit patients who are in dire need of better treatment options.'*"

57. The Transaction reflects a potentially heady mix of financial speculation on the potentially lucrative returns from ongoing and future research development and morally unambiguous passion to create life-saving and enhancing new medical technologies. However, the Transaction could not be further removed from an ordinary course of business transaction, with Mr Lowe QC rhetorically characterising it as equivalent to a merger without the protections of section 238 of the Act. On any view it is impossible at this stage to discern any easily comprehensible commercial rationale for the Company, especially being a listed company, consummating and implementing an arrangement which was so financially and strategically significant with such a breath-taking combination of speed and stealth, particularly in circumstances where the Company was (as at April 29, 2022) under 'minority'[5] rather than majority shareholder control[6].

58. The Petition primarily seeks a winding-up order on just and equitable grounds in reliance on the following key averments:

> "*42. In relation to the Transaction:*
>
> *42.1 The Board failed to obtain approval from the shareholders of the Company for the Transaction notwithstanding that the Transaction constitutes a major transaction for the Company on any definition;*
>
> *42.2 The Board failed to call an EGM notwithstanding the Petitioner's request in its capacity as majority shareholder of the Company;*
>
> *42.3 The Board approved the Transaction within 62 hours of the Transaction first disclosed to the Board and after only one Board meeting, for which the Minutes were pre-drafted;*
>
> *42.4 The Board approved the Transaction without shareholder approval notwithstanding the Transaction would result in a 50% dilution of the Petitioner's interest in the Company, causing it to become a minority shareholder;*

[5] The Petitioner when pointing out factual errors in the draft Judgment asserted that the management does not represent any shareholder interests at all, so the minority control framing may be an overstatement of the extent to which shareholders influence the Company's management

[6] I do not overlook the suggestion that the forthcoming Labour Day holiday, lockdowns and office closures resulted in a waiver of certain formalities being obtained, which presumably smoothed the path to an expedited closing.

42.5 The Board approved the Transaction without shareholder approval notwithstanding that it clearly involves a related party transaction given the close connection between GMHL and the Company;

42.6 The Board approved the Transaction notwithstanding the Transaction involves the acquisition of an unproven , loss-making early start-up with no marketable product line for total consideration manifestly in excess of the value of the target."

59. Of the six grounds relied upon, the first four are grounded on facts which are substantially agreed or uncontroversial. The merits of the no shareholder approval arguments turn on a legal analysis of the Company's constitution as to which I have found (in relation to the Injunction Order) the Petitioner has a good arguable case (it being accepted that there is a serious question to be tried).

60. The fifth point (whether the Transaction qualifies in technically as a "related party transaction" and what implications that legally has) I find impossible to meaningfully evaluate at this stage. The fact that Ms Ting Zheng and Mr Kam Yuen (the father of her two children) signed the April 29, 2022 Framework Agreement on behalf of the Company and GMPM BVI respectively (pursuant to which the Company paid that same day US$664 million to GMPM BVI) is only impressive in terms of optics from the Petitioner's point of view. The sixth complaint cannot meaningfully be assessed without expert evidence which I have ruled cannot fairly be adduced at this stage.

61. Finally, the first prayer of the Petition is expressed in the following terms which confirm the centrality of the Transaction to the grounds for seeking relief alternative to a winding-up order:

"*44.1 An order that the Company refrain from proceeding with the Transaction…*"

62. Other relief (including requiring the Company to convene an EGM and amending the Articles to insert shareholder protective provisions) are sought before a winding-up order is sought as alternative relief. So the Petition expressly seeks to prevent the Company from further proceeding with the Transaction.

63. Albert 1 was sworn in support of the Company's Validation Summons. Stages 2 and 3 are described as involving primarily (a) the acquisition of 52.8% of Cellenkos and being assigned warrants for further shares (Stage 2), and (b) establishing Cellenkos GP in

Delaware and contributing the Cellenkos shares the Company would acquire under Stage 2 (Stage 3). It was most pertinently deposed as follows:

> "*174. It is critical for the Company to complete Stages 2 and 3 of the Transaction to achieve the full effects and benefits of the acquisition of Cellenkos. As stated above, the status quo at the time of this affidavit is that Stage 1 of the Transaction has been entered into and completed. The Company currently holds the Asia Rights that it acquired from GM-PM BVI, and it has paid the consideration in the form of cash and shares to GM-PM BVI in exchange for those rights.*
>
> *175. I believe that this Honourable Court should preserve the current status quo by granting a validation order for the Company to complete the outstanding parts of the Transaction pending the Court's determination of the Petitioner's winding up Petition.*
>
> *176. If the Company were not allowed to complete the Transaction, it could face potential claims for substantial damages of US$2.67 billion (as elaborated at paragraph 152 above).*"

64. The Company's evidence in support of its fortification application about the potential damage flowing from continuing the Injunction Order was addressed in oral argument and was largely incredible on its face. US$2.28 billion was estimated to be the "*potential net loss in economic benefit that the Company may suffer without completing the Transaction* [by way of] *potential loss of business opportunities*" (paragraph 152(b)). This estimated loss was wholly speculative (dependent on various new potential products being found to be sufficiently viable to be taken through an 'assault course' and surmounting various regulatory hurdles) and not in my judgment capable of being compensated for by way of damages. The alleged loss of US$389,643,170 seemed equally lacking in commercial reality. The Company did not point to any liquidated penalty fee it would be liable to pay for failing to complete Stages 2 and 3 by the Longstop Date. Instead Albert 1 posited breach of contract claim which Cellenkos shareholders could bring based on the value of shares in the Company they had obtained. The Transaction appears to be structured in such a way as permit the Company's counterparties to exercise termination rights if the Company cannot complete all aspects of the agreements by the Longstop Date, such termination rights being designed to enable them to mitigate their loss. It is difficult to see what breach of contract the Company would have committed if the Validation Order is refused and the counterparties either exercise or elect to waive and not exercise their termination rights.

Findings: legal principles governing applications under section 99 of the Companies Act

65. Having summarised the factual context, the relevant legal principles which were substantially agreed may now be considered. Section 99 of the Act provides:

> "***Avoidance of property dispositions, etc.***
>
> *99. When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void.*"

66. Although there was a fundamental disagreement as to how the statutory power to validate transactions under section 99 should actually be applied (the Company said by analogy with an interim injunction and the Petitioner contended for a more sui generis approach), it could only be sensibly agreed that this Court was bound by the leading Cayman Islands Court of Appeal decision on section 99. In *Tianrui (International) Holding Company Limited-v-China Shansui Cement Group Limited* [2020(1) CILR 417], Sir Alan Moses JA delivered the Court's leading Judgment with which Field JA and Rix JA concurred. At the outset he noted that the "*relevant part of the Validation Order concerns share issues which the Appellant Tianrui seeks to impugn as part of the conspiracy to dilute Tianrui's own shareholding*" (paragraph 4). In that case the purpose of the Petition, presented after the impugned issue of new shares had already to Tianrui's knowledge been made (with shareholder approval) was to unwind the impugned allotment. The application for a validation order by the respondent in that case related to consequential transactions which Tianrui complained would it make it more difficult to unwind the share issues which had already occurred.

67. There is in general terms an analogy between the factual matrix in *Tianrui* and that in the present case. In both cases the respondent to a just and equitable petition which has partially completed an impugned transaction is seeking permission, in effect, to take further legal steps consequential to that portion of the impugned transaction which was completed before the petition was presented. The *status quo* analysis is similar in rough and ready terms. Moses JA opined as follows:

> "*14. It is fundamental to this appeal to identify the purpose of this section. Its purpose is to preserve the status quo; it has what Palmer's Company Law, vol. 4, at 15.526 describes as a "conservational" function. The*

retrospective effect of s.99 derives from the legislative scheme for insolvency which treats the commencement of a winding up as the date when the winding up was initiated, normally the date when the petition was presented, rather than the date when a winding-up order is made and the real winding up begins (see s.100(2) Companies Law (2018 Revision)…

16. *However, during this twilight period, it is important that the deleterious effect of the very fact of the presentation of the petition, possibly long before its merits are determined, may be ameliorated by the process of validation. Validation may prevent the risk of paralysis once a petition is presented. All companies are vulnerable to the damaging effect the presentation of a petition may have; the ability to validate transactions during the period between presentation and the hearing of the petition enables companies to continue to operate in the ordinary course of their business prior to the hearing. As the editors of Palmer put it (op. cit., at 15.527):*

    'A company is not by law required to cease trading merely because a winding-up petition is presented against it. Pending the determination of the petition it is permissible for the company to continue to trade, provided that it does so in a bona fide and regular manner and with necessary regard to the implications for all interested parties (including the potential liability of the directors) if a winding up order is made by the court when the petition is heard.'

17. *The purpose and importance of validation may most clearly be seen in relation to trading companies. They are not prevented from continuing to trade once a winding-up petition is presented; a validation order provides commercial certainty for those trading with the company, and for the company, that their transactions will not be avoided.*

18. *The rationale for validation of transactions by a trading company in the ordinary course of business was explained by Lord Cairns in Re Wiltshire Iron Co. (12) in relation to a predecessor of s.127, s.153 of the Companies Act 1862 (3 Ch. App. at 446):*

    'The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up, shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision, to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis. But where a company actually trading, which it is the interest of everyone to preserve, and ultimately to sell, as a going concern, is made the object of a winding-up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary

course of its current trade, bona fide entered into and completed, would be avoided, and would not, in the discretion given to the court, be maintained, the result would be that the presentation of a petition, groundless or well-founded, would, ipso facto, paralyse the trade of the company, and great injury, without any counter-balance of advantage, would be done to those interested in the assets of the company."

See also Romer, J. in Re Park Ward & Co. Ltd. (9).

19. *Thus validation itself may be seen as preserving the status quo by permitting a company to conduct its business in a manner which enables it to survive notwithstanding the depressing effects which flow from the presentation of a petition. It enables the company to keep 'ticking over.'*

20. *It ought hardly to need emphasis that the power of the court to make a validation order must not be exercised in a way which undermines the essential purpose of s.99, namely to preserve the status quo pending resolution of the petition. Any assessment of an application for a validation order must always have, at the forefront of consideration, the need not to impede, undermine or preclude fulfilment of that purpose…*" [Emphasis added]

68. I am bound to find that section 99's main purpose is to maintain the *status quo* by permitting the Company to enter into transactions in the ordinary course of its business, which will generally not include further implementing the necessarily exceptional impugned transaction which the Petitioner is seeking to unwind. Further valuable guidance as to how these principles should be applied, necessarily shaped by the specific factual considerations of the relevant case, from the following pivotal legal conclusions reached by Sir Alan Moses in *Tianrui*:

"*46.* *For these reasons I adopt the submission of Mr. Lowe, Q.C. in his written argument:*

'Just as in the case of a creditors' petition validation will not be allowed to undermine the purpose of a winding up (i.e. pari passu distribution), in a just and equitable petition a validation order should not undermine the objective of stopping or reversing oppressive conduct.'

47. *Careful scrutiny is needed not just to protect creditors in an insolvency petition but also contributories at a stage when no one can say whether the petition in respect of a solvent company will succeed or not. Validation*

orders should only be made if they are consistent with the purposes of s.99 and of the power to make such orders." [Emphasis added]

69. I accordingly reject the submission of Mr Flynn QC that the issue of whether or not (1) a Validation Order, and (2) an interim injunction, should be granted or refused "*go hand in hand*". It would be allowing the tail to wag the dog to infer from the mere fact that similar practical consequences may flow from granting a Validation Order and discharging an interim injunction that the governing legal principles for exercising the Court's discretion are essentially the same. Moses JA expressly rejected the submission in *Tianrui* that section 99 relief could not be imposed in circumstances where the petitioner was unwilling to comply with the strict requirements of obtaining an injunction:

> "*70. Nor do I accept the company's repeated complaint that Tianrui is seeking to impose an injunction on the deposit without fulfilling the stringent requirements that would be necessary for such an application, particularly a cross-undertaking in damages. Section 99 and the power to make a validation order have the purpose and effect I have identified. Tianrui had the right to oppose the making of the order and s.99 requires the respondent to make its application good. Tianrui had no obligation or need to seek an injunction, when the merits of the application were to be considered under s.99.*"

70. The Cayman Islands Court of Appeal expressly rejected the proposition that section 99 relief could be refused in circumstances where the petitioner was unwilling (or, implicitly, unable) to obtain an interlocutory injunction to restrain implementation of an impugned transaction which had to some extent been completed pre-petition. And its ultimate conclusion was expressed in the following terms:

> "*72 At the end of yet another stage in this bitterly fought dispute, there remains the fact that no answer has been advanced as to why the court, in response to the application, should make an order which runs the risk of impeding or obstructing the unwinding effect of s.99, in relation to transactions which are the subject-matter of the petition. In those circumstances I would reverse the order made by the judge and refuse to make a validation order in respect of the proposed CCASS deposit.*"

Findings: merits of Validation Summons

71. I have little difficulty in concluding that the Company's application for a Validation Order to permit it to consummate a partially completed transaction which the Petitioner has a good arguable case for setting aside at trial should be refused. The main purpose of section 99 is to enable the Court to support a respondent's need to enter into ordinary course of business transactions designed to keep the company "*ticking over*". There is no convincing basis for extracting from the Company's evidence a basis for concluding that Stages 2 and 3 fall into that category of transaction.

72. While some weight must be given to preserving the status quo, the facts here are that a major transaction designed to create a long-term commercial collaboration has only been partially completed. That the Petitioner presented the Petition after Stage 1 of three Stages had been completed was not because it was 'sleeping on its rights', but because the Company's approach to the Transaction made it impossible for any of the majority shareholders to challenge the Transaction before it was partially completed. Here the status quo before the Petition was presented on May 5, 2022 was that Stage 1 had been completed only on the previous day. Not only did the Company deliberately proceed to complete Stage 1, despite being asked by the Petitioner not to proceed on May 2, 2022. The Company instructed its lawyers, on or about May 3, 2022, to ask the Petitioner's lawyers to postpone taking any legal action for two days, while the purported share issuance was pushed (seemingly rushed) through the next day.

73. The Company, like a rugby player, managed to desperately dive over the try line just before being tackled by the Petitioner. 'All is fair in love and commercial litigation', the Company's lawyers may well be entitled to say. However, where a potential litigant uses corporate stratagem to tilt the playing field in its favour in the manner which has occurred in the present case, the Court must be entitled to adopt a somewhat modified view of the status quo preservation issue. In any event, the goal of preserving the status quo in the context of the pursuit of a statutory remedy designed to protect shareholders from oppressive conduct is in any event quite different to the goal of the principle in the injunction context. And the legislative policy underlying section 99 of the Act in my judgment will generally not justify validating the completion of a partly consummated transaction which a petition has been presented to invalidate.

74. Being guided by the Cayman Islands Court of Appeal's decision in *Tianrui*, I find no sound legal or factual basis has been advanced to justify granting the Validation Order sought. The first head of relief sought in the Petition is an Order restraining the Company from completing the Transaction. To the extent that paragraph 1 of the Validation Summons

seeks merely a declaration that nothing done before the Petition is void, any such declaration would appear to me to be legally vacuous.

75. My provisional view is that the Company should pay the costs of the Validation Summons to be taxed if not agreed on the standard basis.

Summary

76. In summary, I find that the Injunction Order obtained by the Petitioner on May 12, 2022 should be discharged on balance of convenience grounds, the relief sought on the Company's EGM Summons should be refused at this stage and that Summons adjourned generally with liberty to apply, the EGM Injunction Order should be continued and the Company's Validation Summons should be dismissed. I have set out my provisional views as to costs above. The result I fully appreciate is neither commercially nor legally elegant and might fairly be described as "a bit of a mess":

(a) the validity of the EGM and the resolutions purporting to change the composition of the Company's Board remains undecided. This is largely because the Company has failed to maintain a statutorily compliant share register and appears to have rushed through the impugned allotment of new shares at great speed on the day before the present Petition was filed. In the result there is no satisfactory evidence before the Court to demonstrate that the alterations to the *de facto* share register were carried out by persons validly authorised by the Board and no discernible explanation as to why the clearest documentary support for the long controversial proposition that the new shareholders were indeed recorded in the 'register' on May 4, 2022 was first produced on July 18, 2022 after the hearing. Nonetheless, the Company has liberty to apply to renew its application based on fresh evidence on the authority issue so the Board's position can be clarified as soon as possible, if agreed on the papers without a need for a further oral hearing;

(b) the Company cannot proceed with Stages 2 and 3 of the Transaction before the Longstop Date because this is the very transaction that the Petition seeks to prevent being consummated. It is unclear that the Company will suffer any significant financial harm if the Transaction counterparties exercise contractual termination rights as a result. The Petitioner has a good arguable case for succeeding in establishing that the Transaction was unlawful because it required shareholder approval;

(c) the Petitioner cannot technically proceed with its Petition on an expedited basis because its standing as a member of the Company is subject to challenge in the BVI

Proceedings where the validity of a BVI Share Charge and (most pertinently) the Cayman Share Charge are being adjudicated at a hearing currently scheduled for October 2022. This problem may well be academic if supporting shareholders whose standing is not subject to challenge seek to be substituted as petitioner.

77. My provisional view is that the question which turns on a construction of the Company's Articles, whether the Transaction (and in particular the allotment of new shares in excess of 20% of the existing issued share capital) required shareholder approval is a potentially dispositive issue at the heart of the present commercial dispute which could be tried as a preliminary issue on an expedited basis. I will hear counsel if required as to the terms of the Order to give effect to this Judgment, costs and any further directions which may be required in relation to these proceedings. After a draft of this Judgment was circulated, the Petitioner requested that delivery of the present Judgment be deferred until it had filed an application for leave to appeal. In my judgment a better of dealing with that concern is to direct of my own motion that the final Order should, if necessary, take effect from the date it is perfected so as to preserve any appeal rights which might otherwise be affected.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT