

**IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

**CICA (CIVIL) APPEAL No. 26 of 2021
(Formerly FSD 52 of 2016 (RMJ))**

**IN THE MATTER OF CHINA BRANDING GROUP LIMITED (IN OFFICIAL
LIQUIDATION)**

BETWEEN

TONY BOBULINSKI

Appellant

-and-

CHINA BRANDING GROUP LIMITED (IN OFFICIAL LIQUIDATION)

Respondent

BEFORE:

**The Rt Hon. Sir John Goldring (President)
The Hon John Martin JA
The Hon Sir Richard Field JA**

**Appearances: Ben Tonner KC and Sally Bowler of McGrath Tonner on behalf of the
Appellant**

**Matthew Goucke, Peter Kendall and Chaowei Fan of Walkers on behalf
of the Respondent**

Date of hearing: 5 December 2022

**Date draft judgment
circulated: 27 March 2023**

Judgment delivered: 31 March 2023

JUDGMENT

Sir Richard Field JA

Introduction

1. This is an appeal from the order of Justice McMillan (“the judge”) dated 4 February 2019 (“the Grand Court Order”) dismissing the appellant’s appeal (“the appeal”) against the rejection by the Joint Official Liquidators (“the JOLs”) of China Branding Group Limited (“CBG”) of that part of the appellant’s proof of debt in CBG’s liquidation in which he claimed that he was a secured creditor in respect of the total sum of \$1,625,000. (The currency referred to throughout this judgment is US Dollars).

2. In finding that the appellant had not established that he was a secured creditor, the judge accepted the contention advanced by the JOLs that there was no evidence that at any relevant time CBG had any assets, including in particular US media content licenses, that fell within the operative part of the definition of “Collateral” in a Pledge Agreement over which CBG, as pledgor, granted the appellant security in respect of its obligations under two Senior Secured Convertible Promissory Notes (“the Notes”) to repay two loans totalling \$650,000 made by the appellant to CBG. Instead, according to the JOLs, any such licenses had been owned by subsidiaries of CBG, not CBG itself.
3. After the dismissal of his appeal by the judge the appellant brought proceedings in California (“the Californian proceedings”) against the former CEO of CBG, Mr Adam Roseman, in the course of which he came into possession of documents by way of discovery that clearly demonstrated that, unknown to the appellant and undisclosed to the Grand Court: (a) CBG had owned until some point during 20 September 2016 certain US media content licenses as to which there was a good arguable case that they fell within the definition of “Collateral”; and (b) on 20 September 2016 these licenses, unknown to the appellant, had been transferred to RAAD Productions LLC (“RAAD”) under an Assignment and Assumption Agreement (“the AAA”) completed by CBG acting by the JOLs.
4. The appellant’s principal ground of appeal is that the Grand Court Order should be set aside in the light of the new evidence obtained in the California proceedings (“the further evidence”) on the basis that it is manifest that the following three requirements for the admission of such evidence laid down by the Court of Appeal in *Ladd v Marshal* [1954] 1 WLR 1489 are satisfied:
 - (1) The evidence could not have been obtained with reasonable diligence for use at trial.
 - (2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.
 - (3) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

The factual background

The nature of CBG’s business

5. CBG was the parent company of a group of subsidiaries through which it carried on the business of providing US based media content to the Chinese market utilising licenses granted to it and other members of the group by US celebrities and events companies.

CBG’s financial difficulties and attempts to sell the business

6. In 2015 and 2016 CBG was beginning to get into financial difficulties and it set about finding a buyer of its business. In the course of so doing a Confidential Information Memorandum (the “CIM”), prepared by Houlihan Lokey Capital, Inc (“Houlihan Lokey”) was sent out to potential purchasers in November 2015. This contained, inter alia, a “pie chart” of CBG’s revenue by composition which showed 11% came from “Live Events” and 82% from “Produced and Partnered Content” which was composed of video production content, branded celebrity content such as Coca Cola, live events streaming and third-party partnered content with a variety of blue-chip American and European content creation and production companies. Negotiations then began with a company called Remark Media, Inc (“Remark”), the Chief Executive of which was Mr Shing Tao, an acquaintance of the appellant. Houlihan Lokey was the merchant bank engaged by CBG to advise on and to promote the sale of its assets and business.
7. On 15 April 2015 and in March 2016, the appellant and seven others made loans to CBG governed by materially identical Senior Secured Convertible Promissory Notes (“the Notes”) and Pledge Agreements with a maturity date of one year, that is 15 April 2016. The first Note issued to the appellant was in respect of a loan of \$500,000 and the second Note was in respect of a later loan of \$150,000.
8. The Pledge Agreement (“the Pledge”) is governed by the laws of California. Pursuant to its terms, CBG: (i) secured by Clause 2 its promise to pay recorded in the Notes by “granting security over “Collateral” defined in Clause 2 (a) as “all assets (including intangible assets) of CBG in the US, including without limitation its content library, license agreements, and physical assets, such as production equipment (the Collateral)”; and (ii) covenanted in Clause 7 not to sell or dispose of any of the “Collateral” except with the prior written consent of the appellant.
9. On 28 February 2016, Remark sent a Letter of Intent to CBG’s CEO, Mr Adam Roseman, setting out the principal terms of a proposed sale by which Remark and/or an affiliate company would acquire CBG’s business and that of its subsidiaries in return for a cash payment of \$7.5 million at closing and securities (warrants) worth \$15 million. However, this transaction did not proceed because CBG’s B preferred Shareholder, SIG China Investments Master Fund III LLLP, exercised a right of veto.

CBG goes into liquidation

10. Following a declaration by CBG's management on 24 April 2016 that the company was unable to pay its debts as they fell due, CBG's largest creditor presented a petition to wind up the company and on CBG's application made on 19 May 2016, Mr Hugh Dickson and Mr David Bennett of Grant Thornton were appointed joint provisional liquidators ("the JPLs") on 2 June 2016.
11. In his sworn statement of the affairs of CBG dated 7 July 2016, Mr Roseman left blank that part of the statement in which secured creditors would be identified, if there were any, and he listed the Note holders as unsecured creditors. The JPLs were also informed that CBG's US lawyers, Sheppard Mullin, had advised that under California law, as drafted the Pledge was incapable of conferring security over any of the Collateral as defined in Clause 2 (a).

The sale of CBG's business and assets to Remark and an affiliate thereof

12. On 7 July 2016 the JPLs applied to the Grand Court to sanction the acquisition by CBG of 100% of the equity securities of RAAD and the sale by CBG of all of its assets, including its shares in its subsidiaries concluding an agreement under which CBG's business and its subsidiaries, including RAAD, were to be sold to Remark. On 18 September 2016 the Court granted the sanction applied for and the JPLs were appointed Joint Official Liquidators.
13. On 14 September 2016, the appellant was asked by Mr Roseman to sign an agreement ("the Distribution Agreement") to comply with a condition precedent insisted on by Remark that all of the eight Note holders had to agree that their claims would be subordinated to other unsecured creditors including CBG staff members. The appellant refused to sign the agreement in the belief that he was a secured creditor.
14. In the event, Remark waived the need for the appellant to sign the Distribution Agreement and as recorded above the sanctioned sale of CBG's business was completed on 20 September 2016, the shares constituting the share capital of RAAD having been transferred to CBG for \$10.00 the previous day, 19 September 2016.
15. The agreement was styled the "Second Amended and Restated Asset and Securities Purchase Agreement" and is referred to hereinafter as "the APA". Under this agreement CBG sold: (a) its right, title and interest in its Chinese subsidiaries, China SNS Group Limited ("CSNS") and Fanstang (Shanghai) Entertainment Information Consulting Co Ltd ("FansTang") to KanKan Ltd ("KanKan") one of Remark's subsidiaries (Section 2.01 (i)); (b) its right title and interest

in RAAD¹ to Remark (Section 2.01 (ii)); and (c) all its other assets held at the date of Closing to KanKan including, inter alia, all rights and benefits of CBG in the “Material Contracts” (Section 2.01 (iii)). The consideration payable for the assets sold under Section 2.01 (i) and (ii) was in the form of cash totalling \$6,835,096. The consideration payable for the assets sold under Section 2.01 (iii) consisted of warrants in respect of quantities of Remark’s Common Stock.

16. The “Material Contracts” are defined in Section 4.10 of the APA in generic terms in subparagraphs (a) to (p). Sub-paragraph (o) reads: “*Any Contract not otherwise described above which involves the expenditure or receipt by any Target Company of more than US\$25,000 in the aggregate.*” The particular contracts falling within (o) are listed in the Disclosure Schedule. They include six licenses granted to CBG and it is now known (see [36]-[37] below) that five of these licenses were transferred by CBG to RAAD on 20 September 2016 under the AAA.
17. The version of the APA put before the Court for the sanction application did not include the Disclosure Schedule and nor did the copies of the APA that were available to the appellant and provided to the judge or deployed by the JOLs in the appeal to the Grand Court. Indeed, the Disclosure Schedule was only produced when Mr Dickson exhibited the full version of the APA to his Third Affidavit served in these appeal proceedings.

The appellant’s first proof of debt

18. On 6 October 2016, the appellant sought to prove in CBG’s liquidation as a secured creditor under the Pledge for a total of \$1,625,000 on the basis of two claims, one for \$650,000 and the other for \$975,000. The \$650,000 was claimed under the two Notes referred to above. It is common ground that the declaration of insolvency made on 24 April 2016 amounted to an event of default under Section 9 of the Notes resulting in the full amount of the loans having become due and the triggering of the attachment of the Pledge to those of CBG’s assets that fell within the meaning of “Collateral”.
19. The remaining \$975,000 was claimed to be due under an assurance in the nature of a promissory estoppel given to the appellant by CBG’s CEO, Mr Adam Roseman, that he would be paid 2.5 times the Principal Loan amount as provided for in Clause 3.2 of the Notes (“the 2.5 multiplier claim”).
20. The appellant also claimed a sum in respect of the legal fees he had incurred in proving his claims. Copies of the Notes and the Pledge were attached to the appellant’s proof of debt.

¹ Each of CSNS, FansTang and RAAD were “Target Entities”, see Schedule 1 to the APA. *CICA (Civil) Appeal 26 of 2021 – Tony Bobulinski v China Branding – Judgment – Final*

21. On 17 February 2017, the JOLs admitted the appellant’s claim for \$650,000 but rejected his claim to be a secured creditor and his 2.5x multiplier claim.

The appellant’s revised proof of debt

22. On 18 April 2017, by which time he had changed his legal representation, the appellant, with the concurrence of the JOLs, submitted a revised proof of debt for \$1,625,000. Appendix C to the proof of debt set out detailed submissions on the appellant’s claim to be a secured creditor under the Pledge pursuant to the law of California, including his case that the lack of registration of the Pledge did not invalidate the security granted therein. However, the JOLs’ decision was the same as their decision given on the first proof of debt, although this time the JOLs gave their reasons for deciding that the appellant was unsecured, namely, that the Pledge had not been perfected and the UCC filing cited the incorrect name “*China Branding Global Limited*”, rather than the correct name “*China Branding Group Limited*”.

The initiation of the appeal

23. Undaunted, the appellant issued a summons on 5 July 2017 exercising his right under Ord 16, r 17 of the Companies Winding Up Rules (“CWR”) to appeal the partial rejection of his proof of debt to the Grand Court by way of a de novo hearing (“the appeal”). Exhibited to the appellant’s affidavit served in support of his appeal was a report by Mr Jeff Valle, a Californian attorney, which essentially supported the views expressed by the appellant’s then attorneys in Appendix C of his proof of debt submitted on 18 April 2017.
24. In response, Mr Dickson exhibited to his fifth affidavit a report dated 1 September 2017 by Mr Mark Dosker of Squire Patton Boggs (“SPB”) which, whilst it disavowed the reasons the JOLs had given for finding that the appellant was not a secured creditor under the Pledge, expressed the view:

“A court applying California law would not view Mr Bobulinski as a secured creditor as to any portion of the Principal Loan Amount of \$650,000. His only potential security interest would have been as to the identifiable proceeds (if any) of the sale of the following assets (if any) of CBG which were located “in the United States” when CBG entered liquidation: “content library“, “license agreements”, and “production equipment.” But a court applying California law would conclude that there are no such identifiable proceeds; and in the alternative that Mr Bobulinski has not met the requirements of California law to show the existence of any such identifiable proceeds.”

25. In the part of a second report dated 1 October 2018 that deals with the issue whether the appellant was a secured creditor, Mr Dosker stated:

“... here the Pledge Agreement clearly states that what is pledged are assets of CBG – not assets of any subsidiary of CBG. And paragraph 4 of the First Affidavit of Shing Tao, dated September 24, 2018, confirms that, as of the closing date of the APA transaction, CBG did not own any license agreements or media content (which Shing Tao thinks are synonymous with the phrases “content library” and “license agreements” used in the Pledge Agreement). Since CBG did not own those, they are not within the scope of the pledge in the Pledge Agreement.”

The disclosure summons

26. In anticipation of the hearing of the appeal, the appellant filed a summons (“the disclosure summons”) on or about 28 September 2017 seeking discovery of documents relating to a wide range of issues identified in sub-paragraphs (a) – (f), and also leave to cross-examine a number of individuals including Messrs Dickson, Roseman, Valle and Dosker. Sub-paragraph (d) of the summons sought disclosure of: *“information about the assets (both tangible and intangible) held by the Company and their locations, and about the proceeds of sale of the Company, relevant to the issue of security of the Appellant under the Pledge Agreement”*.
27. In the affidavit sworn by the appellant in support of the disclosure summons he drew attention to the disadvantage he was under by reason of having no access to the information in the hands of CBG and the JOLs which he needed to prove that “Collateral” under the Pledge existed that could be traced into the proceeds of sale under the APA. As was to be expected, this point was repeated in paragraph 31 of the opening written submissions authored by the appellant’s counsel.
28. The JOLs flatly opposed the disclosure summons. They submitted that the disclosure was unnecessary and would serve no useful purpose and, in any event, the Court had no jurisdiction to make the disclosure orders sought: the appeal should be decided on the basis of the evidence before the Court. In the course of oral argument, Mr Goucke for the JOLs observed that in his sixth affidavit Mr Dickson *“had set out his stall, he says there is no further material”*, to which the judge responded, *“if there is no further material then there is no further material.”*
29. Whilst the judge granted the application for cross-examination, he declined to order any of the disclosure sought by the appellant because he *“did not consider the scheme which we have been examining allows, at large, for the kind of comprehensive discovery which has been sought.”* However, in the course of argument the judge said that he would expect as a matter of course that any material upon which the JOLs made their decision to reject the appellant’s secured creditor claim should be made available to the Court: whatever the JOLs saw, the appellant and the Court should see.

The hearing of the appeal

30. The appellant's appeal was heard in October 2018. By now, the claim for legal fees was in the sum of \$ 140,000.00. There was an agreed list of issues and sub-issues. The three principal issues were: (1) Waiver: did CBG and the appellant agree to waive the Maturity under Clause 3.1 of the Notes with the consequence that the appellant acquired an additional freestanding claim to a liquidation preference? (2) Promissory Estoppel: did CBG make a promise giving rise to a promissory estoppel under Californian law that the appellant would receive 2.5 x of the principal loan amount of the Notes or the full amount due under the Notes? (3) Security: (i) whether as a matter of Californian law the Pledge reasonably identifies the "Collateral" and, if so, to what extent; (ii) whether there is evidence of assets falling within the "Collateral" reasonably identified by the Pledge; (iii) whether any security created by the Pledge attaches to any part of the consideration under the APA, whether the cash proceeds, or warrants, or a combination thereof (and, if so, to which part of such consideration).
31. On principal issue (3), the JOLs relied on Mr Dosker's reports and submitted, inter alia, that there was no evidence that the Company had any assets falling within the operative part of the definition of "Collateral" i.e. content library, license agreements, and physical assets such as production equipment in the US. Paragraph 171 of their closing submissions reads:
- "As noted above, in fact, there is no evidence that the pledge attached to any assets of the company, but, even if it had attached to any "content library, license agreement, and physical assets, such as production equipment" of the Company in the United States, there is nothing to suggest that the proceeds of sale received under the APA are the identifiable proceeds of such assets. On the contrary, the proceeds of sale received under the APA were, if anything, attributable to the shares in the subsidiary companies being sold under the APA. As explained above, these assets were never located in the United States and, on any view, fall outside the scope of the Pledge."*
32. In his judgment delivered on 23 January 2019, the judge found against the appellant on all three principal issues.
33. On issue (3), having summarised the JOLs' first submission that the Pledge did not reasonably identify the pledged Collateral security, the judge observed at [221]:
- "The second point is that there is no evidence that the Company had any assets falling within the operative part of the definition of Collateral in the Pledge, i.e. content library, license agreements, and physical assets such as production equipment in the United States. Instead, the JOLs maintain that*

the Company carries on business as an investment company. It was a parent company for the Group. As such, the Company had few assets.”

34. At [230], the judge noted the JOLs’ submission referred to in [31] above.

35. Finally, at [232], the judge said:

“On all matters which address whether Mr Bobulinski’s continuing claim as a creditor is secured or not, the Court prefers and accepts what it considers to be the impartial and objective evidence of Mr Dosker over that of Mr Valle.”

The documents provided by way of discovery in the Californian proceedings (the further evidence)

36. As stated in [3] above, in the course of the Californian proceedings brought by the appellant against Mr Roseman documents produced by way of discovery after conclusion of the appeal came into the appellant’s possession that demonstrated that in fact CBG had owned certain US media content licenses which it could be reasonably argued fell within the definition of “Collateral” and which had been included in the sale of CBG’s assets to Remark under the APA. These documents fall into three distinct categories:

(1) A chain of emails sent and received on 17 August 2016 (the night before the JOLs applied to the Court for its sanction to enter into the sale of CBG’s assets to Remark under the APA) between: (a) Mr Roseman and Mr Dickson and Mr Saville of Grant Thornton; and (b) Mr Roseman and Mr John Harris of Higgs Johnson who acted for the petitioning creditor.

(2) The AAA, entered into the day after CBG acquired RAAD, transferring certain media licenses from CBG to RAAD post-commencement of the liquidation but prior to the sale of CBG’s subsidiaries to Remark under the APA.

(3) Copies of license agreements between CBG and Dick Clark Productions executed in 2014 and 2015 which had not expired at the time of the sale to Remark;

37. The emails referred to in (1) (a) and (b) above read as follows:

(1) *From: Daniel Gan*

Date: August 17, 2016 at 2.51pm

To: Adam Roseman

Subject: 2016 People’s Choice Awards License Fee

“Hi Adam,

I am forwarding the attached invoice for the 2016 People’s Choice Awards License Fee that was due in January. I’ve sent it along to accounting and Rebecca as MGM have

followed up, but have not heard back, and now MGM will take it up to their business affairs department if there is no word by the end of the week.”

- (2) *From: Adam Roseman
Sent: Wednesday, August 17, 2016 5.44pm
To: Mike Saville; Hugh Dickson
“Dear All,
We now have received this communication from MGM concerning the People’s Choice Awards and run the risk of losing this license. The judge needs to approve the sanction tomorrow or we run much greater risk that Remark pulls the plug. This goes along with Rock in Rio, Jukin Media and Dick Clark Agreements all at risk of termination any day without sanction.”*
- (3) *From: Mike Saville
Date: Wednesday, August 17, 2016 at 4.49 pm
To: Adam Mr. Roseman
“I’ve not opened PDF, so apologies if that explains. Could you give me some more detail, what company needs to do, turnover/profit at risk, any other cash flow issues so Walkers can consider using if they have to. And explain why Remark might walk as a consequence of this and if no approval tomorrow.”*
- (4) *From: Adam Mr Roseman.
Sent: Wednesday, August 17, 2016 7.20 pm
To: Mike Saville
“Dear Mike,
Thank you for the note. Our USD\$ 27, 500, due to People’s Choice (owned by MGM) is being escalated to MGM’s business affairs (legal) department, which could lead to an immediate termination given that they have the right to choose to terminate based on non-payment. If I cannot give certainty of payment in the next 30 days, my fear is they will choose to immediately terminate this below market license agreement. I am seeing a very big snowball rolling down the hill by the day.”*
- (5) *From: Mike, Savile.
Date: Wednesday, August 17, 2016, at 5.54 pm
To: Adam, Mr Roseman.
“Adam,
Can you estimate the annual profit contribution this adds to the business and therefore potentially its value to Remark?”*
- (6) *From: Adam Mr Roseman.
Sent: 8/17/2016 8:56 23 pm
To: Mike Savile.
“Dear Mike,
I would estimate this adds approximately \$ 100K of annual gross profit, Dick Clark represents approximately USD 500 K of annual gross profit and Rock in Rio represents approximately USD 200K of annual gross profit. In their aggregate, the 3 would account for around 20-25% of annualized gross profit.”*
- (7) *From: Adam Mr Roseman
Sent 8/17/2016 6.41.25pm
To: John Harris
“Dear John, In addition to the Rock in Rio and Fail Army licenses that are well past due and nearing potential termination (thus harming the value of the business to Remark), we*

now have received this communication from MGM concerning the People's Choice Awards. The judge NEEDS to approve tomorrow or we run much greater risk that Remark pulls the plug"

38. Under the AAA, CBG, acting by Messrs Dickson and Bennett in their capacity as JOLs, assigned to RAAD five license agreements granted to it by Dick Clark Productions Inc ("DCP"), all of which were executed on 3 June 2014 – 2016 AMERICAN MUSIC AWARDS, 2016 HOLLYWOOD FILM AWARDS, 2016 NEW YEAR'S ROCKIN EVE - save for one which was executed on 7 May 2014 – 2016 BILLBOARD MUSIC AWARDS and another which was executed on 3 June 2015 – 2017 GOLDEN GLOBE AWARDS. As the appellant's counsel Mr Tonner KC pointed out, these were the self-same licenses that Mr Roseman was referring to in email (6) to Mr Savile of Grant Thornton who was assisting the JOLs which Mr Roseman says were worth \$500,000.
39. Copies of these DCP licenses were also provided by Mr Roseman to the appellant by way of discovery together with copies of two additional CBG owned licenses which were not referred to in the AAA, namely 2014, 2015, 2016 PEOPLE MAGAZINE AWARDS and THE 2016 GOLDEN GLOBE AWARDS. The copies of licenses provided in discovery did not include the People's Choice Awards mentioned in email (6) which assigned to it a value of \$100,000.
40. The appellant also contends that a license agreement known as the "Bart Baker Contract" or the "Maker Studios Contract" belonged to CBG before completion of the APA and that a license agreement known as the "Fail Army Contract" or the "Jukin Media Contract" was assigned to CBG prior to the commencement of the liquidation. Neither of these licenses was a Material Contract for the purposes of the APA but they are referred to in an undated spreadsheet that was part of a document headed "Fans Tang, Financial Summary Model" ("the Fans Tang FSM") that was located by the JOLs after the conclusion of the appeal and was exhibited to Mr Dickson's Third Affidavit sworn in September 2022. As recorded above, prior to the APA, CBG had a wholly owned subsidiary referred to above as "FansTang". Mr Tonner invited us to proceed on the basis that the appellation "FansTang" on this document meant "CBG". Mr Goucke for the JOLs disagreed. In my view, this difference between the parties does not much matter. The document was produced to provide information to prospective buyers of CBG's business and assets in June 2015 and its cover page bears the name Houlihan Lokey. The estimated gross profit for 2015 stated in the spreadsheet was as follows for the following licenses: (i) Golden Globe Awards -- \$193,000; (ii) People's Choice -- \$193,629; (iii) Billboard Awards, -- \$124,314; (iv) Dick Clark's New Year Rockin' Eve, \$45,000; (v) American Music Awards -- \$98,327, these being figures that chime pretty closely with the figures provided by Mr Roseman to Grant Thornton in email (6).

41. The estimated projected revenue and gross profit figures in the FansTang FSM spreadsheet for the Bart Baker Contract are respectively: \$10,000/\$4800 in Q3 of 2015; \$10,000/\$4800 in Q4 of 2015; \$25,000/\$12,000 in 2016; and \$30,000/\$14,400 in 2017.
42. The estimated projected revenue and gross profit figures in the spreadsheet for the Fail Army Contract are: \$20,000/\$6,200 for Q3 of 2015; \$35,000/\$16,800 for Q4 of 2015; \$100,00/\$48,000 for 2016; and \$200,000/\$96,000 in 2017.
43. In his affidavit sworn for deployment in the appeal, Mr Shing Tao (Remark's CEO) deposed that as reflected in Remark's 2016 10-K CBG allocated \$9,206,000 of the purchase price for CBG to "media, content and broadcast rights" (\$2.1 million), "customer relationships" (\$3.2 million), "acquired technology" (\$.2 million) and "trade names" (\$3.7 million).
44. In his First Affidavit sworn on 14 October 2022, Mr Peter Bigwood, an insolvency Principal with Grant Thornton Specialist Services Ltd, deposes that following a disclosure order made by this Court, a number of searches were undertaken of the JOLs' case file for CBG's liquidation which included a copy of CBG's data room and the email inboxes of Mr Dickson, Mr Mike Saville and Mr Phillip Tyrell to find documents falling within five categories (A- E). Category A included contracts to which CBG was a party relating to Social Media Profile Management effective in the period 2 June 2016 to 20 September 2016. Category B included contracts to which CBG was a party relating to "Produced and Partnered Content" identified in the Fans Tang FSM effective in the period 2 June 2016 to 20 September 2016.
45. In paragraph 13 of this affidavit, Mr Bigwood notes in relation to categories A and B that, inter alia, the majority of contracts located from the searches did not belong to CBG but to other entities such as RAAD and FansTang. He also states in paragraph 18 that as a result of the searches that were undertaken and a review in which the JOLs' attorneys, Walkers, assisted, 60 documents were identified for discovery that he lists in his exhibit PB-1.
46. In paragraphs 12 – 15 of his Second Affidavit, Mr Bigwood deposes that he obtained the Civil Docket and the Second Amended Complaint relating to the Californian proceedings and on the basis thereof he summarises the key terms on which the proceedings were settled as follows:

“(a) Mr Roseman was required to pay Mr Bobulinski US\$ 350,000 by no later than five business days after the “Effective Date” of the Settlement Agreement (clause 1a):

(b) Mr Roseman may be required to pay Mr Bobulinski a further amount in the event that Mr Roseman and/or certain related individuals sell or

otherwise dispose of any stock or equity interest that they have in Steady Platform, Inc (a company of which Mr Roseman is CEO) by way of a stipulated mechanism, until Mr Bobulinski, receives US\$ 1,500,000, total from Mr Roseman (clause 1b);

- (c) Mr Bobulinski may use a “declaration agreed upon by the parties“ that Mr Roseman executed in these proceedings in the Cayman Islands (clause 2 a);*
- (d) Mr Roseman agrees to “cooperate with Mr. Bobulinski with regard to Bobulinski’s litigation against the JOLs, and/or to challenge the Cayman Judgment.” (clause 2 a); and*
- (e) Mr Bobulinski shall dismiss the Bobulinski/Roseman Litigation with prejudice within five days of the initial settlement payment of \$ 350,000 (clause 3).”*

The latest expert evidence

47. The appellant also relies on two reports produced by an expert on California law, Ms Melanie Mansfield of Wilkie Farr & Gallagher LLP. In her first report, Ms Mansfield opines that the license agreements provided to her consisting of DCP license agreements acquired by CBG on 3 June 2015 and 4 December 2015; five other DCP license agreements; and a Content Social Media Agreement which she was instructed is identical to 95 Social Media Contracts, all of which she understands were acquired by CBG before the AAA and the APA were executed, are all assets within the definition of “Collateral” in the Pledge Agreement and to which the appellant’s security interest therein attached following the event of default on 24 April 2016. In stating this conclusion, Ms Mansfield goes out of her way to say that all of the agreements are “located in the United States” because each agreement “licenses to CBG registered copyrights, from a United States entity enforceable solely within the United States, under United States Law” and relief under each agreement is grantable only under California law by a California court located in Los Angeles by the terms of the agreements themselves. She also expresses the view that the appellant is entitled to his legal costs incurred in enforcing his security interest.
48. Ms Mansfield further states in her first report that the appellant’s security interest can be traced into the cash proceeds received by CBG under the APA in respect of that part of the Collateral for which cash was paid and into the warrants in respect of that part of the Collateral which was to be paid for by the issue of warrants. She states that where funds have become co-mingled, a secured party can trace into those funds that he can show are attributable to the sale of property over which he has a secured interest. Where: (a) the debtor is in breach of duty arising from selling part of the Collateral so as to create confusion preventing the proof ordinarily required
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of the secured party; and (b) the true facts lie peculiarly within the knowledge of the party in breach, the burden of proof will shift to the debtor.

49. Ms Mansfield also notes that the APA specifies the number of Warrants each Warrant Recipient received for the sale of the applicable part of the Collateral. In her opinion, upon the exercise of the Warrants by the Warrant Recipients or Mr Roseman, the appellant's security interest will automatically attach to the Parent Common Stock that constitutes proceeds of such Warrants. To the extent that the Parent Common Stock is more valuable than the Warrants, the appellant can enforce an equitable lien for his proportionate share of such profit.
50. In paragraph 65 of her first report, Ms Mansfield states that the appellant can use the following resources to calculate the value of the part of the Collateral that was sold and the identifiable cash proceeds attributable thereto: ("the Relevant Collateral"): (a) Email No. 6; (b) the First Affidavit of Mr Shing Tao; (c) all other true facts relating to the value of the Relevant Collateral and all transfers thereof that due to CBG's lack of good faith and contravention of the Pledge Agreement, lie peculiarly within the knowledge of CBG.
51. Mr Dosker in his responsive third report dated 2 September 2022 adheres to his earlier view that the words "*all assets (including intangible assets) of CBG*" do not sufficiently identify the assets that are subject to the Pledge and states that only licenses owned by CBG that were "*in the United States*" and had not expired before the date that substantially all of CBG's assets were sold on 20 September 2016 would qualify as "Collateral". On the question whether the licenses were "*in the United States*", he says that he will assume that the identified licenses satisfied this condition in order to conserve the resources of the Courts of the Cayman Islands, given that a court applying California law would rule that the great majority of the licenses in question had expired before the date that substantially all of CBG's assets were sold and for that reason were not "Collateral". Mr Dosker also states that in a court applying Californian law the appellant would be held not to be able to trace into the proceeds from the sale of the assets under the APA because it will be impossible to identify the proportion of those proceeds which represent proceeds from the sale of what constitutes Collateral. He goes on to opine that, if contrary to that view, the court were to rule that there were identifiable proceeds from the unexpired portions of the licenses, such a court would rule that the appellant would be entitled to a security interest in the warrants payable under the APA in respect of the unexpired portions of the licenses. However, the appellant would not be entitled as a pledgee to his legal costs incurred in enforcing his security interest.
52. Responding to Mr Dosker's report and his view that licenses that had expired before 20 September 2016 were not Collateral for the purposes of the Pledge, Ms Mansfield states in her *CICA (Civil) Appeal 26 of 2021 – Tony Bobulinski v China Branding – Judgment – Final*

second report that whether an asset has value is a factual economic issue, not a legal issue and therefore falls outside her and Mr Dosker's legal expertise. She also disagrees with Mr Dosker's view that the appellant can only rely on the value of the unexpired portion of licenses as at the time of the APA. In her view, the Collateral pledged was of real value, of which the appellant has been denied, whether or not the APA separately valued the Collateral. The appellant is entitled to the full value of the license agreements in whatever manner they are valued: the terms of the license agreements affect valuation of such agreements, not the scope of the pledge to the appellant.

The evidence the appellant applied very late to have admitted in the appeal

53. The evidence in question was a sixth affidavit sworn by the appellant on 5 December 2022, just the day before the hearing of the appeal started. The Court ruled that it would accept this evidence purely on a *de bene esse* basis and each side made some reference to it recognising that the JOLs had not had an opportunity to consider it in detail and were accordingly in no position to provide a full response to it.
54. In this affidavit the appellant deposes that he found in the discovery provided in the Californian proceedings a document called "*Fanstang – Draft Data Room Index*" which showed that one Rebecca Holzman was responsible for CBG's key contracts with celebrities. Knowing that Ms Holzman was working with Mr Roseman at his new company, the appellant asked Mr Roseman to ask Ms Holzman to locate any agreements with celebrities. This she did and Mr Roseman sent the appellant copies of eight contracts with different celebrities which the appellant states appear to give CBG the right to use the celebrity's brand and social media profile page. The appellant exhibits all eight contracts. The agreements open with the words "Welcome to www.FansTang.com and thank you for entrusting China Branding Group Ltd ("FansTang", "we" "us" or "our") with your social media branding in the Territory "(defined below.)" This led the appellant to revisit the CIM produced by Houlihan and Lokey where he found at pages 45 -47 mention of 95 "*Managed Celebrity Accounts*" which he believes refer to the type of contracts copies of which were provided by Ms Holzman.
55. The appellant also states that he believes that CBG held current contracts with all the celebrities named in pages 45 -47 of the CIM and that six of the aforementioned eight contracts were also current in 2015 since they are mentioned by name in the CIM. In support of this belief he deposes that Mr Roseman was still using these social media contracts to persuade persons to lend money to CBG and he refers to an email dated 25 January 2016 in which Mr Roseman is telling a number of persons that the Dick Clark licenses and all the social media contracts were held at the CBG level.

56. It was not made clear in the course of the hearing what revenue/gross profit was earned by CBG on the back of Social Media Contracts. I note that on page 42 of the CIM it is stated that “Fans Tang owns and has the right to sell all of the data it collects on managed celebrity accounts and that on page 47 it is stated that the Company does not charge its celebrity clients for managing their accounts; rather, in exchange for its social media account management services, Fans Tang secures the rights of placement of Fans Tang logo on each of their images and the ability to proactively send out two sponsored posts per month.
57. The appellant exhibited to his sixth affidavit an affidavit sworn by Ms Mansfield on 2 December 2022 exhibiting an addendum to her reports that addresses: (a) a covering letter enclosing one document bearing the heading “FansTang Profile Page and Talent Terms of Use and another document headed “Rider to Fanstang Profile Page and Talent Terms of Use” relating to celebrity Stephen Amell; (b) Five documents bearing the heading “Fans Tang Profile Page and Talent Terms of Use” relating to five different celebrities, Paul George, Chloe Bennet, Claire Holt, Elizabeth Behrs and Paul Walker; and (c) One document headed “FansTang Talent Terms of Use” apparently relating to celebrity Scott Eastwood.
58. In this addendum, Ms Mansfield states that in her opinion the documents at (a) and (b) are license agreements under the Uniform Commercial Code as in effect on the present date in California because they are contracts whereby one party grants to the counterparty the right to use their property and are assets of CBG as the Pledgor because CBG is a party to the license as licensee. To determine whether these documents are documents “in the United States” she would need to see the “Talent Terms of Use” referred to in the second paragraph of each of these documents but she has not been able to do so. If the “Talent Terms of Use” are in the same terms as document (c), then they appear to be assets “in the United States” because paragraph 6.3 in document (c) states that the documents and services are to be governed and construed under California law. The (a) and (b) documents all appear to have been executed in 2013 and Ms Mansfield has no information to opine on whether they continued to be effective in April 2016 through September 2016. If these documents were still in force at the date of the sale to Remark, they would be CBG assets bought by KanKan for cash and the appellant would be able to trace the value of these assets (and any other assets of the same kind) into the cash proceeds paid for those assets.

The appellant’s case

59. It is not disputed that the appellant came into possession of the documents referred to in [36] above only after the conclusion of the appeal and it cannot be seriously suggested that he had
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been aware of their existence beforehand. It follows that the first *Ladd v Marshal* requirement - *the evidence could not have been obtained with reasonable diligence for use at trial* – is satisfied.

60. It is also not disputed that none of these documents, including in particular the AAA, was disclosed to the appellant or to the Grand Court when, at least as concerns the AAA, a copy of this agreement was sitting in Grant Thornton’s files. It is common ground that the JOLs were officers of the Court and it is indisputable that, as such, they were duty bound in respect of the appeal to have conducted a thorough search of the principal documents in their possession relating to the liquidation of CBG, including the very few agreements they executed on behalf of CBG. In *In re Contract Corporation, sub nom. Gooch’s Case* (1871) L.R. 7 Ch App 207 James LJ said:

“In truth, it is of the utmost importance that the liquidator should, as an officer of the Court, maintain an even and impartial hand between all the individuals whose interests are involved in a winding-up. It is his duty to the whole body of the shareholders, and to the whole body of the creditors, and to the Court, to make himself thoroughly acquainted with the affairs of the company, and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court. And it is for the Judge to see that he does his duty in this respect.” [Emphasis supplied]

61. If the JOLs had conducted such a search: (i) they would inevitably have scrutinised the AAA and thereby have been reminded that, at least at the time following the event of default precipitated by the declaration of insolvency on 24 April 2016, CBG owned the five DCP media content licenses assigned to RAAD under the AAA; and (ii) accordingly, they would and should have disclosed the AAA in the appeal proceedings.
62. The evidence of CBG’s ownership of the 5 DCP licenses assigned under the AAA and the additional licenses referred to in [36] and [37] above was vitally relevant to Issue 3 in the appeal. It contradicted the JOLs’ case that at no relevant time did CBG own any assets falling within the definition of “Collateral”, including any media content licenses, all such licenses having been owned by subsidiary companies, and provided a good arguable foundation for the appellant’s case that he was a secured creditor for \$650,000 entitling him to trace into the proceeds of the sale of CBG’s business and assets under the APA. The judge would therefore have had to find that CBG owned media content licenses at least from the time when there was an event of default on 24 April 2016. The evidence would also have assisted the appellant in his case that he could trace into the proceeds of sale under the APA because he would be able to identify particular assets on which the tracing enquiry should focus.

63. It follows that the second *Ladd v Marshal* requirement - *the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive* – is undoubtedly satisfied.
64. Finally, the JOLs do not dispute that the evidence acquired by way of discovery in the Californian proceedings is such as is presumably to be believed i.e. that it is apparently credible. Thus the third *Ladd v Marshall* requirement is plainly satisfied. It follows that the Court should exercise the discretion conferred by Rule 17 (2) of the Court of Appeal Rules and (i) admit the further evidence relied on; (ii) set aside the Grand Court Order; and (iii) remit the appeal to the Grand Court for fresh consideration.

The Respondent's case

65. The JOLs drew the attention of the Court to Rule 17 (2) of the Court of Appeal Rules (2014 Revision) that confers on this Court a full discretionary power to receive further evidence. Citing *Scully Royalty Ltd & Anor v Raiffeisen Bank International (CICA (Civil) Appeal No. 21 of 2020)*, the JOLs correctly submit that when exercising that power the Court must take into account the Overriding Objective stated in the Grand Court Rules and should also consider the three conditions laid down in *Ladd v Marshall*. In the JOLs' submission, on the facts of this case the appellant has not complied with at least one of the *Ladd v Marshall* requirements and therefore, quite apart from Overriding Objective considerations that also strongly militate against the appellant, the appeal should be dismissed.
66. I observe that nowhere in the evidence provided by Mr Dickson, or in the JOLs' written or oral submissions was there a frank acknowledgement by the JOLs that they did not, but ought to have, disclosed the AAA to the appellant and the Grand Court for the purpose of the appeal proceedings. Instead, the JOLs go out of their way to present a case that any failure by them to disclose this document which was sitting in their files from 20 September 2016 was understandable and excusable on the grounds that: (i) the APA largely followed the form of agreement previously negotiated by CBG and Remark with Sheppard Mullin acting as legal counsel to CBG; (ii) the JOLs had been obliged to rely heavily on Mr Roseman's Statement of Affairs because of the poor state of CBG's records; (iii) the JOLs had retained and relied on advice provided by Sheppard Mullin who advised that the Pledge was ineffective to secure the Note holders because none of them had perfected their interests; (iv) the JOLs had had to work under great pressure and at speed to avoid the risk that Remark would walk away from the proposed agreement; (v) everyone, including the appellant at the appeal hearing was proceeding on the assumption that the relevant licenses were held at the right level, rather than

at the CBG level; (vi) the JOLs' statements throughout the appeal that there was no evidence of Collateral were made because the appellant had not adduced any; and (vii) the appellant's appeal to this Court is vexatious and abusive because the value of the licenses belonging to CBG when they were assigned to RAAD under the AAA and thereafter to Remark under the APA, and the value of the present warrants due in respect thereof under the APA is so low that another trial would not be worth the candle.

67. Turning to the *Ladd v Marshall* requirements, the JOLs submit that in the light of: (i) a number of the allegations made by the appellant in his Second Amended Complaint ("the Complaint") in the California proceedings; (ii) what Mr Roseman states in his Fourth Affirmation; and (iii) Mr Roseman's Answer to Interrogatory 17 administered in the Californian proceedings, it is plain that at the time of the appeal the appellant knew of the existence of the license agreements now relied on and could have obtained them with reasonable diligence for the use at trial. He therefore falls at the first of the three *Ladd v Marshal* hurdles.

68. The allegations in the Complaint relied on by the JOLs are:

- (i) Mr Roseman made "*a series of material misrepresentations*" in order to convince Mr Bobulinski to invest \$650,000 in the Company "*by pledging various assets as security for Bobulinski's loan*";
- (ii) "*On or about March 5, 2015, Roseman sent an email to Bobulinski... The email also stated the following: 'Senior secured bridge loan, secured by all our assets (content licenses, our production library...)...'* Roseman represented in that email that CBG's assets included '*long-term exclusive China (all forms of media) licenses to many of the world's major events including American Music Awards, Billboards Music Awards, Golden Globes, People's Choice Awards, Coachella, Rock in Rio, Dick Clark's New Year's Rockin' Eve, Heart Music Festival.*'"; and
- (iii) "*Roseman assured Bobulinski that any loan he provided would be senior secured by all of CBG's assets through a pledge agreement. Roseman outlined CBG's purported assets, including certain studio operations and the license agreements he had discussed in his March 5, 2015 email. Roseman stated that those assets were owned by CBG and would secure Bobulinski's loan.*"

69. The passages relied on in Mr Roseman's Fourth Affirmation:

- (i) Mr Roseman deposed that: he "*personally negotiated the Note and Pledge with Mr. Bobulinski*";
- (ii) "*[a]t the time that CBG and Mr. Bobulinski entered into the Pledge and Note, as the CEO of CBG, it was [Mr Roseman's] intent and [his] understanding that [Mr Bobulinski's] loan was secured against CBG owned media licenses (for events such as the American Music Awards, Billboard Music Awards and so forth), CBG's production equipment, and its content library.*"; and
- (iii) he "*shared that intention and understanding with Mr. Bobulinski prior to his execution of the Note and Pledge*" both "*[i]n writing and orally*".

70. Interrogatory 17 asked Mr Roseman: "*Identify all witnesses with knowledge in support of your responses to Interrogatory Nos. 12 – 16*".

71. In those responses Mr Roseman stated, inter alia, that the Dick Clark licenses were owned by CBG and not by any of its subsidiaries until the APA was completed.

72. In his response to Interrogatory 17, Mr Roseman stated, subject to the General Objections previously made and all other objections made in responding to Interrogatories Nos. 12 - 16 and reserving the right to supplement this response as additional information becomes available, that:

"... at least Roseman and Dick Clark Productions (including signatory, Mark Rafalowski) are knowledgeable about the responses to Interrogatories Nos.12-16, which each concern the DICK CLARK LICENSES. In addition, Roseman states that various investors in CBG, including BOBULINSKI, are aware of CBG's relationship with Dick Clark Productions, and the DICK CLARK LICENSES due to their involvement in negotiations for investment in CBG and/or the sale of CBGs assets".

73. Referring to that part of the settlement agreement between the appellant and Mr Roseman set out in [46 (c) & (d)], the JOLs submit:

"The Appellant's approval of the contents of Roseman 4 lead to the indisputable conclusion that he knew of the existence of the Licenses from as early as 5 March 2015 ... The Appellant's own evidence confirms that he had knowledge of the Licenses that now form the basis of his appeal and that he was under the belief he was secured by them well before the POD Appeal (the appeal). Whilst the Appellant could have obtained the Licenses (or at least the 5 March 2025 email) with reasonable diligence, he chose not to do

so. His failure to deploy the Licenses at the POD Appeal despite this knowledge is fatal to his current appeal”.

74. The JOLs then go on to submit that it is clear that the further evidence acquired by way of discovery in the Californian proceedings would **probably not** have an important influence on the case because: (i) the license agreements are of nil or *de minimis* value; (ii) the DCP licenses can only be traced to the Warrants provided for in the APA and these warrants are currently worthless, although the Bart Baker Contract can arguably be traced to the cash proceeds under the APA; (iii) any damages the appellant would otherwise be entitled to as a result of asserting his security interest have already been extinguished as a result of the significant proceeds paid to him under the settlement agreement with Mr Roseman; and (iv) the appeal canvassed a number of contentious issues of which security was only one, the primary claim advanced having been the 2.5 x 2 multiplier claim.
75. As to (i) in [74] above, Mr Roseman’s estimate in email (6) of an annual gross profit of approximately \$800,000 is difficult to square with the apparent business model adopted by CBG *viz* granting sub-licenses to Chinese media companies for a single fee. In addition, Mr Roseman (whose credibility is in serious doubt since it contradicts his sworn statement of affairs) and the appellant have taken the superficial view that the entirety of the profit is attributable to the DCP license agreements.
76. In respect of the DCP licenses, CBG’s balance sheet exhibited to the Disclosure Schedule to the APA records the company and its subsidiaries having net tangible assets with a book value of only \$128,521 and the consideration payable to CBG under the APA did not materially change during the course of negotiations after the inclusion of the DCP license agreements into the Disclosure Schedule.
77. As to the Bart Baker Contract: (a) it was not listed in CBG’s financial statements or as a Material Contract in the Disclosure Schedule which recorded contracts the expenditure as to which or the receipt therefrom exceeded \$25,000; (b) it contemplated a 50/50 share of gross revenue between CBG and Maker Studios; and (c) it had a remaining term of approximately 7.5 months as at 20 September 2016 (expiring on 6 May 2017).
78. The contention that the warrants are of no material value is founded on paragraphs 26 – 37 of Mr Dickson’s Third Affidavit. Here, Mr Dickson begins by setting out the details of that part of the consideration under the APA that was payable by Remark in warrants, namely:
- (a) Warrants for 5,750,000 shares of Remark, common stock; and up to 500,000 shares of Remark common stock to management of the Target Entities (as defined in the APA).

- (b) **Exercise price:** US\$10.00 per share;
- (c) **Expiration date:** 18 December 2024, being seven years from the expected issuance date;
- (d) **Warrant type:** American, can be exercised any time after issuance;
- (e) **Exchange option:** If, during the four year period from the Closing Date (as defined in the APA), the closing price of Remark's, common stock does not exceed US\$10.70 (the Exercise Price plus the assumed warrant value of US\$0.70) for any 15 individual trading days (which may be non-consecutive) in any consecutive thirty day period, then in exchange for the Warrants, Remark will issue to the holder of the Warrant such number of shares of Remark's common stock equal to:
 - (i) the number of Warrant Shares issuable upon exercise of the Warrant and payment of the Exercise Price per Warrant Share (US\$10.00); multiplied by
 - (ii) fifty percent (50%) of the Assumed Warrant Value (US\$0.70); divided by
 - (iii) the volume weighted average price of Remark's common stock for the thirty (30) trading days ending on the fourth anniversary of the Closing Date.

79. Accordingly, Warrant holders could exercise the warrants in two ways:

- (a) If Remark's share price is greater than US\$10.70 any time (in order for there to be a positive payoff after accounting for the Exercise Price and the Assumed Warrant Value), then by exercising the Warrant by paying the Exercise Price of US\$10.00 per share; or
- (b) if Remark's share price is lower than US\$10.70 for the requisite period, then by exchanging the Warrant for Remark's shares at the end of the four year period from the Closing Date.

80. Mr Dickson then goes on to state as follows. In around 2017/2018, the JOLs had considered various options for the potential realisation of the Warrants for the benefit of creditors, and therefore sought the following valuation advice on the fair market value of these warrants: (a) a draft Grant Thornton, Boston report dated 21 December 2017 which valued the Warrants at

US\$3.192 to US\$4.51 per warrant; and (b) a final BDO USA report dated 8 October 2018 which valued the warrants at US\$0.75 per warrant.

81. Due to litigation begun in February 2018 in Nevada in which Remark and KanKan sued the JOLs and Mr Roseman alleging that the revenue for the Target Companies for 2016 stated in the APA was fraudulently and intentionally overstated by US\$9.3 million (approx) (the “Nevada Claim”) Remark did not issue the Warrants to CBG (apart from the right to buy up to 312,500 of Remark’s common stock held in escrow) until 31 August 2021 pursuant to a settlement agreement concluded in July 2021². CBG therefore did not actually have possession of the Warrants during that period of six months or so when for a brief period in early 2018 Remark’s share price exceeded \$10.70 and the warrants were “in the money”. Since August 2018, Remark’s share price has dropped significantly.
82. Whilst Remark has issued the Amended Warrants to the Company, Remark has not filed the necessary registration statement with the SEC. As of August 2022, Remark no longer meets the eligibility requirements to file a universal shelf registration statement with the SEC. In the meantime, the JOLs are currently considering what further steps CBG can take in respect of the Amended Warrants. However, given that the strike price is US\$6.00 and Remark’s current share price is US\$0.39, there appears to be no prospect of realising the Amended Warrants for any material value.
83. Further and in the alternative, the JOLs submit that in exercising the discretion conferred by Rule 17 (2) of the Court of Appeal Rules, this Court should decline to admit the further evidence in light of the following public interest factors:
 - (a) It is inherently contrary to public interest and unfair on CBG that the appellant should be able to adduce this evidence of which he had knowledge at the time of the appeal almost four years after the Grand Court Order.
 - (b) CBG will face significant prejudice by being deprived of a longstanding judgment as well as the additional costs and delays of having to deal with further evidence and a new hearing, contrary to the Overriding Objective.

² Under the settlement, it was agreed that: (i) the Nevada Claim and CBG’s counterclaim would be settled in full; (ii) Remark would release to CBG US\$375,000 currently held in escrow and would issue to CBG 5,710,000 amended warrants (without any Exchange Option) at a strike price of US\$6.00 per share (the “Amended Warrants”); and (iii) Remark may continue any claims against Mr Roseman and the JOLs will co-operate with Remark in providing evidence in respect of this claim.

- (c) The costs incurred to date (let alone a re-trial) amount to several million Dollars and are wholly disproportionate to the quantum at issue.
- (d) The appellant faces issue estoppel pursuant to the principle enunciated in *Henderson v Henderson* (1843) 3 Hare 100
- (e) The burden rested solely on the appellant to prove his debt claim in the appeal and the appellant having failed to discharge that burden no legal obligation would arise to admit the proof of debt.
- (f) The Court should be cautious to admit further evidence without the benefit of the knowledge of the trial Judge (who has since retired), several years after the fact, the latter of whom would be better equipped to know the effect the further evidence would have on the original decision (if any).
- (g) Any re-trial in front a new Grand Court Judge would be an unfair and inefficient allocation of the limited resources of the Financial Services Division of the Grand Court to the prejudice of the need for justice to other litigants.

Discussion and decision

84. It is not disputed that the JOLs failed to disclose the AAA in the appeal proceedings which would have led to the disclosure of the Disclosure Schedule and the license agreements assigned under the AAA to RAAD. The appellant implicitly alleges that the JOLs deliberately suppressed the existence of the AAA and the licenses. In my judgment the evidence before the Court (none of which was live testimony) falls well short of establishing this serious allegation. Accordingly, for the purposes of this appeal, I find that at all material times the AAA and the licenses assigned thereunder were forgotten by Mr Dickson until he was presented with a copy of the agreement by the appellant's US counsel when being deposed in the Californian proceedings, as he states in paragraph 23 of his First Affidavit. That said, I have no hesitation in finding that the JOLs, as officers of the Court, were seriously amiss in failing to disclose the AAA and the Disclosure Schedule in the appeal proceedings. I accept the appellant's submission founded on their citation from the judgment of James LJ in *Gooch's Case* that it was incumbent on the JOLs to review the few copies of the agreements they had signed dealing with the sale of CBG's business and assets to Remark to satisfy themselves that there was nothing therein that suggested that any assets destined to be sold under the APA had belonged to CBG as at 24 April 2016 and thereafter down to 20 September 2016. Undoubtedly, had such a simple step been taken they would have scrutinised the AAA that was there in their files and

seen that the DCP licenses identified therein had belonged to CBG immediately prior to the AAA and the APA.

85. I turn to the submission advanced by the JOLs that the appellant knew of the DCP licenses before the appeal proceedings were instituted and therefore could have obtained them with reasonable diligence for use in those proceedings. In my judgment this submission is without merit and should be rejected. The evidence relied on in support of the submission is derived from events occurring in the Californian proceedings that post-dated the appeal, including: (a) the allegation in the Complaint that on about 5 March 2015 Mr Roseman sent the appellant the email referred to in [68 (ii)] above ; and (b) the statement in Mr Roseman's Fourth Affirmation sworn in the instant appeal proceedings that his understanding was that [Mr Bobulinski's] loan was secured against CBG owned media licenses and he "shared that intention and understanding with Mr. Bobulinski prior to his execution of the Note and Pledge."
86. In the Californian proceedings the appellant was alleging that statements made to him by Mr Roseman to the effect that the loans he advanced to CBG were secured on named license agreements, including those named in the email dated 5 March 2015, were untrue and fraudulently made. Thus, the appellant was asserting in these later proceedings the opposite to what he had asserted in the appeal, namely, that CBG had been the owner of such licenses at the time of the event of default. This meant that in the appeal, the appellant needed to prove that CBG had indeed owned such assets as licenses that were caught by the Pledge at least from the time when the event of default occurred. The appellant had no documents showing what assets CBG had from 24 April 2016 until 20 September 2016. Such documents could be expected to be in the possession of the JOLs. Exercising at least reasonable diligence in pursuit of proving his case, the appellant issued the Disclosure Summons for an order in the terms, inter alia, of sub-paragraph [d] thereof³ but this strategy came to grief on the rocks of the JOLs' unwavering false assertion that there was no evidence that CBG had at any relevant time owned assets within the definition of "Collateral" in the Pledge. It therefore in my judgment ill behoves the JOLs now to contend that if the appellant had used reasonable diligence he would have obtained the licenses for the appeal.
87. It follows that I find that the appellant could not with reasonable diligence have produced in the appeal the further evidence obtained in the Californian proceedings and he has therefore satisfied the first requirement laid down in *Ladd v Marshall*.

³ See [26] above

88. I am also of the opinion that the further evidence relied on by the appellant in this appeal is apparently credible and accordingly I find that the appellant has satisfied the third *Ladd v Marshall* requirement.
89. I turn then to consider the real contest in this appeal, namely, whether the second *Ladd v Marshall* requirement is satisfied and whether any of the other discretionary matters prayed in aid by the JOLs is fatal to the appellant in this appeal.
90. As Mr Tonner properly conceded this appeal arises within the liquidation of CBG and accordingly what is potentially in prospect if the appeal succeeds is a retrial of the appeal in which the principal question will be whether the appellant as pledgee can trace into the warrants issued by Remark under Section 2.02 (b) of the APA attributable to the licensees he can show were owned by CBG immediately before the APA. Whether the appellant has a cause of action against the JOLs for any breach of duty owed to him as officers of the Court is therefore not a matter with which this Court is concerned.
91. In my opinion, on the evidence before the Court, including the expert evidence of Ms Mansfield contained in her first two reports, the appellant has a reasonably arguable case that under the Pledge he can trace into that part of the warrants that are attributable to the five DCP licenses assigned under the AAA and the licenses for PEOPLE MAGAZINE AWARDS, GOLDEN GLOBES AWARDS 2016, PEOPLES CHOICE AWARDS and the Fail Army Contract. I am also of the view that the appellant has a reasonably arguable case that he can trace into the cash proceeds of sale in respect of the Bart Baker Contract.
92. The values of these licenses in terms of estimated gross profit specified in email (6) and the Fans Tang FSM are a rough starting point for determining the proportion of the warrants consideration that is attributable to each of the relevant licenses. As to the Bart Baker Contract, the estimated revenue and gross profit figures in the Fans Tang FSM for this license are also a rough starting point, subject to the comments made by the JOLs noted in [77] above.
93. The appellant is eager to advance a claim to trace into proceeds received under the APA that are attributable to the 95 Social Media Contracts he refers to in his Sixth Affidavit. In my judgment there is insufficient evidence before the Court to determine whether such a claim is sufficiently arguable to go into the balance when deciding whether it is just and appropriate to allow the appellant to argue in a fresh appeal that he is a secured creditor with a right to trace into the proceeds of sale.

94. I turn to consider the evidence of the current value of the Warrants. As noted above, this consists of paragraphs 26 – 37 of Mr Dickson’s Third Affidavit sworn on 8 September 2022, the contents of which are summarised in some detail in [78] – [82] above, including Mr Dickson’s conclusion that there appears to be no prospect of realising the Amended Warrants for any material value.
95. Mr Dickson’s assessment of the value of the Amended Warrants strikes me as being considered, thoughtful and measured. No detailed response of any sort, let alone one by a suitably qualified expert, was put before the Court by the appellant, which I think is understandable given the time it would have taken to find and instruct an expert or experts to opine on Mr Dickson’s evidence and to provide an analysis of Remark’s commercial prospects and the likely future price of its shares in the mid-term.
96. The question is whether, notwithstanding Mr Dickson’s evidence, justice requires that the Grand Court Order be set aside and the appellant permitted to mount a case in a fresh appeal that he is entitled as a secured creditor to trace into determined proportions of the Warrants and the cash consideration attributable to the licenses sold under the APA that had been previously owned by CBG from at least the time of the event of default.
97. In my opinion this question is to be answered in the affirmative. The appellant has satisfied the three *Ladd v Marshal* requirements and the further evidence relied on in this appeal reveals that, as a result of the culpable failure of the JOLs to disclose the AAA and the Disclosure Schedule, Issue 3 in the appeal below was decided against the appellant on a fundamentally false basis. On the evidence before this Court, he has in my opinion a reasonably arguable case that he is a secured creditor with a right to trace into the sale proceeds under the APA that are attributable to the licenses identified in [91] above. The JOLs continue to refuse to accept that he is a secured creditor. In my view, in these circumstances he should be entitled to bring a fresh appeal in which he will have the opportunity to establish his status as a secured creditor and the consequences that flow therefrom. The JOLs contention there should not be a second appeal because any damages the appellant would otherwise be entitled to as a result of asserting his security interest have already been extinguished as a result of the \$350,000 paid to him under the settlement with Mr Roseman, is misconceived. The contention might have some traction in an action for damages against the JOLs for breach of duty, but it has no traction at all in a proceeding concerned with the validity of the appellant’s proof of debt.
98. We do not know what the final evidence will be at a fresh appeal as to the value of the warrants. Although unlikely, it may be that come the appeal, the warrants will be in the money. If there is conclusive evidence that they are not, but there is a reasonable prospect that they will be

within a reasonable period of time, it would be open to the Grand Court to declare, if the evidence permits, that the appellant can trace into the portion of the warrants found to be attributable to the relevant licenses and to give the appellant a reasonable time to take the traceable value of those warrants depending on the price of Remark's shares.

99. In reaching the conclusion expressed in [97] above I have considered the public interest and Overriding Objective factors listed in [83] above and have concluded that none of them in the circumstances of this case tips the balance against setting aside the Grand Court Order and granting leave for a fresh appeal against the JOLs' rejection of the appellant's proof of debt.

100. For the reasons given above, I would make the following orders:

- (1) The appeal is allowed with costs.
- (2) The appellant has leave to bring a fresh appeal in the Grand Court in which he claims he is a secured creditor with a right to trace into the proceeds of the APA in the realisation of his security interest.
- (3) The sum paid into court by the appellant to stand as security for the costs of this appeal should forthwith be paid out to him together with any interest that has accrued thereon.

101. The preliminary view of the Court is that:

- (a) Having regard to the JOLs' failure to disclose the AAA in the appeal, the costs order made by the Grand Court below should be varied so as to order (1) that the JOLs be paid 70% of their costs (reflecting their success on Issues 1 and 2) and the appellant be awarded 30% of his costs (reflecting the failure of the JOLs to disclose the AAA); and (2) that the JOLs must restore to the appellant 30% of the costs he has paid to the JOLs under the Grand Court Order.
- (b) In light of the failure to disclose the AAA in the appeal below, the following costs shall be met from the JOLs' own resources and not from the insolvent estate:
 - (i) The costs incurred by the JOLs in resisting this appeal;
 - (ii) 30% of the costs incurred by the JOLs in the appeal below;
 - (iii) The costs ordered to be paid to the appellant in [100(1)] above;
 - (iv) The reimbursement to the appellant of 30% of the costs he has paid to the JOLs under the costs order made below as contemplated in (a) above; and
 - (v) The order that the JOLs pay 30% of the costs incurred by the appellant below as contemplated in (a) above.

102. The JOLs shall have liberty to seek to persuade the Court to depart from its preliminary view expressed in [102] on condition that they serve their submissions within 14 days of the handing down of this judgment, to which the appellant may reply within the following 10 days, with the JOLs having a right to reply to the appellant's submissions within the following 10 days.

The Hon. John Martin JA

103. I agree.

The Rt. Hon. Sir John Goldring (President)

104. I also agree.

