Neutral Citation Number: [2025] CIGC (FSD) 49

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 64 OF 2019 (NSJ)

BETWEEN:

BEF ENTERPRISES INC.

Plaintiff

and

WEXFORD OFFSHORE SPECTRUM FUND

First Defendant

and

WEXFORD OFFSHORE CREDIT OPPORTUNITIES FUND LIMITED

Second Defendant

JUDGMENT ON APPLICATION FOR SUMMARY JUDGMENT

Introduction

1. This is an application (the ***Application***) for summary judgment made by a summons (the ***Summons***) dated 30 October 2024 filed by BEF Enterprises Inc (the ***Plaintiff***) in respect of the Plaintiff's claim for payment of the sums due on and following the redemption of its shares in Wexford Offshore Spectrum Fund (***Spectrum Fund***) and Wexford Offshore Credit Opportunities Fund Limited (formerly known as Wexford Offshore Distressed Fund) (***Credit Fund***, together with the Spectrum Fund, the ***Defendants***). The amount claimed comprises an admitted sum of US$2,236,550 (the ***Admitted Debt***) and a disputed sum of US$3,000,000 (the ***Disputed Debt***).

2. The Summons was heard in a remote hearing on 14 April 2025. Mr Hector Robinson KC of Mourant Ozannes (Cayman LLP) (***Mourant***) appeared for the Plaintiff and Mr Christian La-Roda Thomas of Maples and Calder (Cayman) LLP appeared for the Defendants. This judgment sets out my decision on the Application (which is summarised below) and my reasons for that decision.

3. The Plaintiff is an international business company incorporated in the Commonwealth of the Bahamas. The Defendants are both exempted companies incorporated and regulated as mutual funds in this jurisdiction. Wexford Capital LP (***Capital***) is the sub-adviser to the Defendants.

4. The Plaintiff's claim was made by way of a writ and statement of claim (the ***Writ***) dated 12 April 2019. The Defendants filed a defence on 17 June 2019 (the ***Defence***).

5. Mr Anthony Inder Rieden and Ms Deirdre McCoy claim to be directors of the Plaintiff and authorised to act and bring these proceedings on its behalf.

6. An affidavit in support of the Application was sworn by Mr Inder Rieden (***Inder Rieden 1***). In addition, the Plaintiff filed two affidavits sworn by Mr Charles Paton (***Paton 1*** and ***Paton 2***), a Bahamian barrister, in which Mr Paton gave evidence as to Bahamian law, as an expert instructed by the Plaintiff's attorneys. Affidavits in opposition to the Application were sworn by Mr Arthur Amron (***Amron 1***), a director of the Defendants, and by Mr Bernhard Fritsch (***Mr Fritsch***). Mr Fritsch claims to remain a director of the Plaintiff despite Mr Inder Rieden's evidence that he was removed, and to remain the person on whose behalf the 5000 shares (the ***Shares***) in the Plaintiff are held on trust. The Defendants also filed an affidavit sworn by Ms Tara Cooper Burnside KC (***Burnside 1***), who is a partner in Higgs & Johnson, a Bahamian law firm, who also gave evidence as to Bahamian law, as an expert instructed by the Defendants' attorneys. The parties also filed an agreed chronology (the ***Chronology***) to be used for the purpose of the Application.

7. As regards the Disputed Debt, the Defendants said that it had been paid in full pursuant to agreements with the Plaintiff previously made on its behalf by Mr Fritsch. The Defendants said that Capital had made loans to the Plaintiff (documented as two loan notes) in February and March 2018, that Capital had paid the loan advances in accordance with proper payment instructions issued by Mr Fritsch and that it was agreed at that time that the Defendants would apply the sums owing to the Plaintiff in respect of the Disputed Debt in reduction and discharge of the Plaintiff's liability to Capital to repay the loans.

8. Mr Inder Rieden in response said that Mr Fritsch had been removed as a director and that the Shares were no longer held on trust for Mr Fritsch by and at the time that the loans were agreed and made by Capital, and Mr Fritsch had given the new payment instructions. Mr Inder Rieden's evidence was that on 16 August 2017 Mr Fritsch had been removed as a director and president of the Plaintiff and the Shares had ceased to be held on trust for Mr Fritsch. Mr Inder Rieden said that the Defendants and Capital were on notice from 16 February 2018 that they were only permitted to deal with the duly appointed directors of the Plaintiff and that they had

failed thereafter to check that Mr Fritsch was properly authorised to act for the Plaintiff. Mr Inder Rieden said that, furthermore, the second loan had been agreed and made by Capital after copies of the amended registers of directors and officers had been sent to it showing that Mr Fritsch was no longer a director or president of the Plaintiff.

9. Mr Inder Rieden therefore argued that he and Ms McCoy were properly authorised to act for the Plaintiff and that Mr Fritsch had no authority (actual or ostensible) to act for and bind the Plaintiff at the time that the loan notes were entered into and the loans made, so that no proper discharge had been given for the Disputed Debt which remained unpaid and due and owing to the Plaintiff. He also argued that the Defendants had no defence to or basis on which to refuse to pay the Admitted Debt.

10. The Defendants have countered, in reliance on Mr Fritsch's evidence, by saying that Mr Fritsch had actual authority to cause the Plaintiff to enter into the loan notes, borrow the loans, to give the new payment instructions regarding payment of the loan advances and to agree to authorise the Defendants to apply the sums owing in respect of the Disputed Debt to the discharge of the loans owed to Capital. They also argued that even if Mr Fritsch did not have actual authority, he had, and that they could rely on his, apparent or ostensible authority to bind the Plaintiff.

11. In his evidence, filed in support of the Defendants' opposition to the Application, Mr Fritsch said that on 1 October 2017 the trustee that had previously held the Shares had been removed and replaced by a new trustee, which had then removed Mr Inder Rieden and Ms McCoy as directors on 31 March 2019. In these circumstances, the Defendants said that since they were now aware of a dispute between Mr Fritsch and Mr Inder Rieden regarding who was properly authorised to act for the Plaintiff and give a good receipt for the payment of sums owing to it, they should not be required to pay over the Admitted Debt until that dispute has been resolved.

The relief sought in the Summons

12. By way of the Summons, the Plaintiff seeks (a) summary judgment pursuant to GCR O.14 on the basis that the Defendants are unable to show that there are any issues or questions in dispute which ought to be tried and that their defence has no realistic prospect of success and (b) as regards the Admitted Debt, judgment pursuant to GCR O.27, r.3 on the basis that the Defendants have admitted that they owe the Admitted Debt to the Plaintiff in [13] of the Defence.

A summary of my decision

13. I have decided that:

(a). as regards the Admitted Debt, the Defendants must pay a sum equal to the Admitted Debt into Court (or to an account opened by suitable attorneys if the Plaintiff prefers and subject to approval by the Court) within a period to be agreed by the parties or as directed by the Court after hearing the parties' proposed dates together with interest thereon as agreed or as ordered by the Court (the determination of the amount of interest shall not delay the payment of the Admitted Debt into Court or to the account with the designated attorneys). Furthermore, a proper procedure needs to be put in place to establish whether Mr Fritsch or anyone else intends to challenge Mr Inder Rieden's and Ms McCoy's right to act for the Plaintiff and withdraw these sums and the parties should seek to agree such a process for approval by the Court failing which they should file submissions within 14 days of this judgment being handed down setting out their respective positions and the Court will then determine what orders to make without the need for a further hearing. I expect that a short period will need to be allowed after the funds have been paid into Court (or an account opened by attorneys) in which those claiming to represent the Plaintiff will be required to file their claim and if only Mr Inder Rieden and Ms McCoy as the persons entered on the Plaintiff's

register of directors do so then provision can be made for payment out of the funds to them. If there are competing claims to the funds then provision will need to be made for the determination of the issue of who is entitled to receive the funds on behalf of the Plaintiff.

(b). as regards the Disputed Debt, the Application is dismissed.

(c). I have concluded that the Defendants' defence based on Mr Fritsch having had ostensible authority to cause the Plaintiff to enter into the loan notes, to borrow the loans and to agree that the sums owing in respect of the Disputed Debt would be applied and used to repay the loans owed to Capital, has a realistic prospect of success and raises issues in dispute which ought to be tried. In particular, Mr Fritsch's role and status as a director and president of the Plaintiff for many years and the extensive dealings between the Plaintiff and the Defendants (and Capital) provide a basis on which the Defendants can claim that there was a representation and holding out by the Plaintiff to them (and Capital) as to Mr Fritsch's authority to act for the Plaintiff in connection with its investments in the Defendants and the evidence they have adduced, albeit disputed, establishes a more than arguable basis for concluding that they (and Capital as lender) behaved reasonably, or did not behave unreasonably, in continuing to rely on such a representation and holding out when Capital made the loans and it was agreed that the sums owing by the Defendants in respect of the Disputed Debt would be applied and paid to Capital to discharge both the Plaintiff's liability in respect of the loans and the Defendants' liability in respect of the Disputed Debt. There are clearly a wide range of significant factual disputes as to what Capital, the Defendants and the Defendants' administrator were alerted to and knew or should have known as to the purported removal of Mr Fritsch as a director and president of the Plaintiff and the removal of the Shares as an asset of The Richmountain Trust, what steps they took at the relevant times and the extent to which they acted reasonably (including whether they relied and should reasonably have relied on the

purported directors' resolution produced by Mr Fritsch). Indeed, there are factual disputes as to what were the relevant times including as to when the loans were actually advanced. In addition, there are disputes as to the applicable foreign law. The ostensible authority defence is fact-sensitive and can only properly and fairly be determined after further evidence is adduced and a trial with cross-examination of relevant witnesses.

(d). I have further concluded, albeit with greater hesitation, that the Defendants' defence based on Mr Fritsch having had actual authority (as a continuing director who had not been removed or as a beneficiary of the trust on which Euro-Dutch at the relevant times held the Shares) to approve on behalf of the Plaintiff its entry into (and to act for the Plaintiff in entering into) the loan notes, to borrow the loans and to agree that the sums owing in respect of the Disputed Debt would be applied and used to repay the loans owed to Capital, by reason of the assignment agreement dated 16 August 2017, which Mr Inder Rieden procured to be executed on behalf of Euro-Dutch being void, also has a realistic prospect of success and raises issues in dispute which ought to be tried. This defence raises a number of challenging and complex legal issues (which have yet to be fully developed in the expert evidence) in particular as to the proper interpretation, characterisation and effect of the assignment agreement under applicable law and depends on establishing fraudulent conduct by Mr Inder Rieden. The Defendants are entirely dependent on the evidence of Mr Fritsch for this defence and their ability to maintain it will depend on his continuing participation in the proceedings (including probably by giving discovery). While the Defendants clearly have a high hurdle to overcome in establishing the relevant fraud, that the assignment agreement was void, that the subsequent removal of Mr Fritsch as a director of the Plaintiff was also void and of no effect or that Mr Fritsch remained in law able to bind the Plaintiff, I have concluded that the Defendants have done enough to raise more than barely arguable triable issues in relation to this defence. The dispute which gives rise to these proceedings is ultimately between Mr Inder

Rieden and Mr Fritsch who each accuse the other of serious misconduct and fraud and the circumstances surrounding the removal of the Shares from The Richmountain Trust, the payment of the redemption proceeds to an account not in the name of the Plaintiff but controlled by Mr Fritsch and Mr Fritsch's arrest all raise concerns and disputes that need to be addressed in further evidence and considered at a trial.

(e). I have also concluded that the order made by the court in the Bahamas in respect of related proceedings commenced by a new trustee of The Richmountain Trust (no doubt for the benefit of Mr Fritsch) does not preclude the Defendants relying on these defences in these proceedings.

(f). the parties should discuss and seek to agree the appropriate order as to the costs of the Application and if they are unable to agree they should file, also within 14 days of this judgment being handed down, short written submissions (of no more than 5 pages) setting out their respective positions as to the costs order to be made.

The background – the dispute between Mr Inder Rieden and Mr Fritsch

14. The background to and context of these proceedings is a dispute between Mr Inder Rieden and Mr Fritsch.

15. The registered holder of the Shares was originally Euro-Dutch Trust Company (Bahamas) Limited (***Euro-Dutch***). It originally held the Shares as trustee of The Richmountain Trust. The Richmountain Trust is a Bahamian law governed trust and Mr Fritsch claims that at all material times he was its sole beneficiary (which is not disputed by Mr Inder Rieden). Mr Fritsch claimed that as a result he was at the relevant time the ultimate beneficial owner of the Shares.

16. The Plaintiff's register of shares, adduced in evidence by Mr Inder Rieden, but challenged by Mr Fritsch in his evidence, shows that the Shares in the Plaintiff originally registered in the name of Euro-Dutch "*as Trustee for the Richmountain Trust*" were transferred on 16 August 2017 to Euro-Dutch "*as Trustee for the Inder Rieden Family Trust*" and then on 4 July 2018 from Euro-Dutch as Trustee for the Inder Rieden Family Trust to Mr Inder Rieden and his wife, Maud Inder Rieden.

17. Mr Fritsch in his evidence said that on 1 October 2017 Euro-Dutch was removed as the trustee of The Richmountain Trust by Dr Clemens Fritsch, the protector of The Richmountain Trust and that Green Capital Management Limited (***GCM***), a Bahamian company, was appointed as the new trustee. He further claimed that on 31 March 2019 Mr Inder Rieden and Ms McCoy were removed as directors of the Plaintiff. He said that subsequently GCM changed its name to Aron Capital Limited (***Aron***). Mr Fritsch asserted that Mr Inder Rieden had improperly procured the removal of the Shares from The Richmountain Trust and that the new trustee of that trust remained entitled to the Shares and to have them transferred to it.

18. Mr Fritsch is not a party to these proceedings, but he has given evidence on behalf of the Defendants, on which the Defendants rely, at least for the purpose of their defence that Mr Fritsch had actual authority to act for and bind the Plaintiff when the loan notes were entered into.

The Bahamian Proceedings and the earlier stay of these proceedings

19. In June 2017 the dispute between Mr Fritsch and Mr Inder Rieden resulted in proceedings being commenced in the Supreme Court (the ***Bahamian Court***) of the Bahamas (the ***Bahamian Proceedings***) by GCM as the new trustee of The Richmountain Trust.

20. GCM issued an originating summons dated 17 June 2019 against *inter alia* the Plaintiff, Mr Inder Rieden and Mrs Inder Rieden seeking a declaration that Euro-

Dutch had acted in fraudulent breach of trust by transferring the Shares out of The Richmountain Trust and then to Mr Inder Rieden and Mrs Inder Rieden, and other consequential relief.

21. By a consent order dated 28 August 2019 these (Cayman) proceedings were stayed pending the conclusion of the Bahamian Proceedings.

22. GCM claimed that the Shares were held by Mr Inder Rieden and his wife on constructive trust for it (GCM) as the new trustee of The Richmountain Trust and GCM sought an order for the transfer of the Shares to it. The originating summons sought *inter alia* (a) a declaration that GCM was the trustee of the Richmountain Trust; (b) a declaration that Euro-Dutch had acted in fraudulent breach of trust by transferring the Shares to Mr Inder Rieden and his wife; (c) an order that Mr Inder Rieden and his wife held the Shares on trust for GCM as trustee of the Richmountain Trust; (d) an order that Mr Inder Rieden and his wife transfer the Shares to GCM as trustee of the Richmountain Trust and (e) an order that the Plaintiff's register of members be rectified by striking out Mr Inder Rieden's name and his wife's name and inserting in their place GCM as the member and owner of the Shares.

23. After a notice of appearance was filed on behalf of Euro-Dutch and Mr and Mrs Inder Rieden no affidavit evidence in support of the originating summons was filed or served in the Bahaman Proceedings and no further step was taken by GCM to advance the Bahamian Proceedings. By a summons dated 1 June 2022, the defendants applied to have the Bahamian Proceedings dismissed for want of prosecution. By a summons dated 14 November 2022, GCM's counsel applied for leave to withdraw as counsel to GCM in the proceedings, which leave was subsequently granted.

24. By a consent order dated 25 April 2023, the Bahamian Court ordered that the defendants' summons to dismiss the proceedings for want of prosecution be withdrawn, with costs to be paid by GCM; that the claimant's name be amended to

Aron; that the claimant's action against Euro-Dutch be discontinued; that the proceedings commenced by originating summons should continue as if the matter had begun by a standard claim form; that Aron should file and serve a standard claim form on or before 31 July 2023; that the defendants should file and serve upon Aron a defence by 15 September 2023 and that a case management conference should take place on 23 October 2023. By an application dated 23 January 2024, Aron's attorneys applied to be removed from the record.

25. Since the claimant had taken no further steps in the proceedings in compliance with the 25 April 2023 consent order, the defendants subsequently applied by a notice of application dated 6 February 2024 for an order that the originating summons be struck out and that the action be dismissed with costs.

26. By an order made on 22 February 2024 the Bahamian Court adjourned the defendants' application to strike out to 17 April 2024, gave leave to the claimant to file and serve a notice of change of attorneys, gave leave to the claimant to file and serve any interlocutory application on the defendants by 15 March 2024, gave leave to the defendants to respond to any interlocutory application filed by the claimant and gave directions for the lodging and exchange of written submissions and authorities.

27. However, the claimant failed to file any interlocutory application in accordance with that order or to take any further steps in the Bahamian Proceedings. By an order dated the 17 April 2024 (the ***Bahamian Court Order***) the Bahamian Court ordered that the originating summons be struck out.

28. By a consent order dated 21 August 2024, this Court lifted the stay in relation to these proceedings.

The Plaintiff's evidence in support of the Application

29. In Inder Rieden 1, Mr Inder Rieden explained the background to and gave details of the action that had resulted in the transfers of the Shares as follows (my underlining):

> *"10. BEF is an International Business Company incorporated under the laws of the Commonwealth of the Bahamas on 10 August 2000 (company number 112617 B). A certified copy of BEF's certificate of incorporation is at page 25. BEF's registered office is at P.O. Box N9204, Templeton Building, West Bay Street, Nassau, Bahamas.*
>
> *11. As shown in BEF's Memorandum of Association (page 27), BEF's authorised share capital comprises US$5,000.00 divided into 5,000 ordinary shares of par value of US$1 each. Upon incorporation on 10 August 2000, all 5,000 shares in BEF's share capital were allotted to Euro-Dutch Bahamas as trustee of the Richmountain Trust.*
>
> *12. The Richmountain Trust refers to a trust governed by the laws of the Bahamas, created by a Deed of Settlement dated 31 July 2000 between Sibylle Fritsch and Providence Trust Limited (pages 50 - 91). Sibylle Fritsch was the mother of Bernhard Fritsch. Although Sibylle Fritsch was named as the Settlor of the Richmountain Trust, the entire trust fund was derived from assets contributed by Bernhard Fritsch. Bernhard Fritsch was also the primary beneficiary of the Richmountain Trust.*
>
> *13. At the time of BEF's incorporation, Bernhard Fritsch was therefore the ultimate beneficial owner of BEF.*
>
> *……*
>
> *15. BEF's directors upon incorporation were Bernhard Fritsch and me. BEF's officers appointed immediately on incorporation were Bernhard Fritsch, as President, and Deirdre McCoy as Secretary. Deirdre McCoy was at the time, a Vice-President of Euro-Dutch Bahamas.*
>
> *16. On 12 January 2006, Deirdre McCoy was appointed as a director of BEF.*
>
> *17. On 2 August 2017, Bernhard Fritsch was arrested by the United States Federal Bureau of Investigation on criminal charges of securities fraud and money laundering.*
>
> *18. In partial discharge of a debt of in excess of US$15 million, due from the Richmountain Trust to the Inder Rieden Trust, by a share transfer dated 16 August 2017, Euro-Dutch Bahamas, in its capacity as trustee of the*

Richmountain Trust, transferred the entire 5,000 shares in the share capital of BEF to Euro-Dutch Bahamas in its capacity as trustee of the Inder Rieden Trust (pages 93 - 94).

19. Pursuant to a resolution made by Euro-Dutch Bahamas in its capacity as Trustee of the Inder Rieden Trust, the sole shareholder of BEF, Bernhard Fritsch was removed as a director of BEF on 16 August 2017 (pages 95 - 96). Also on 16 August 2017, by resolution of the remaining directors of BEF, Deirdre McCoy and myself, Bernhard Fritsch was removed as President of BEF (page 97).

20. On 4 July 2018, Euro-Dutch Bahamas, in its capacity as trustee of the Inder Rieden Trust, distributed all 5,000 shares in BEF to me and my wife, Maud Heufke, as beneficiaries of the Inder Rieden Trust (pages 98 - 99).

21. The changes in BEF's membership were duly recorded in BEF's Register of Members, which is kept at BEF's registered office. A certified copy of the Register of Members showing the effective date of each change is produced at page 100.

22. The changes in BEF's directors were duly recorded in BEF's Register of Directors, a copy of which was filed with the Registrar General's Department (the Bahamas), within twelve months of each change, as is required under Bahamian law. A certified copy of the Register of Directors showing the effective date of each change of directors is produced at page 101.

23. The changes in BEF's officers were duly recorded in BEF's Register of Officers, a copy of which was filed with the Registrar General's Department (the Bahamas). A certified copy of the Register of Officers showing the effective date of each change of officers is produced at page 102."

30. Mr Inder Rieden asserted that Euro-Dutch *qua* trustee of The Richmountain Trust owed Euro-Dutch *qua* trustee of the Inder Rieden Family Trust a debt in excess of US$15 million. He said that in order to discharge part of that debt he had procured that (in my words) Euro-Dutch remove the Shares from The Richmountain Trust and settle them on the Inder Rieden Family Trust. Euro-Dutch then held the Shares on trust for the beneficiaries of the Inder Rieden Family Trust. Mr Inder Rieden exhibited to Inder Rieden 1 an assignment agreement dated 16 August 2017 (the ***Assignment Agreement***) between "*The Richmountain Trust*" and "*the Inder Rieden*

Family Trust." The attestation clause in the Assignment Agreement stated that the trustee of The Richmountain Trust (Euro-Dutch) and the trustee of the Inder Rieden Family Trust (Euro-Dutch) had caused the agreement to be executed on behalf of each trust. Thus Euro-Dutch executed the Assignment Agreement as trustee of both The Richmountain Trust and the Inder Rieden Family Trust. The Assignment Agreement stated that "*The Richmountain Trust hereby assigns and transfers to the Inder Rieden Family Trust … [all] right title and interest in [the Shares]*."

31. The recitals to the Assignment Agreement stated that "*The Richmountain Trust … is indebted to the Inder Rieden Family Trust… on account of advances made over many years (beginning in 2009) by [the Inder Rieden Family Trust] to or for the account or for the benefit of The Richmountain Trust and its beneficiaries including [Mr Fritsch]*", that neither The Richmountain Trust nor Mr Fritsch was able to repay the advances, that the Inder Rieden Family Trust "*is requesting an assignment of assets in partial satisfaction of [the Inder Rieden Family Trust's] claims against [The Richmountain Trust]*" and that The Richmountain Trust was prepared to "*concede such request*." The Assignment Agreement was signed by Ms McCoy on behalf of Euro-Dutch as trustee of The Richmountain Trust. The signature on behalf of Euro-Dutch as trustee of the Inder Rieden Family Trust is illegible but I assume that it is Mr Inder Rieden's signature.

32. Mr Inder Rieden also exhibited a copy of the document pursuant to which Euro-Dutch as trustee of the Inder Rieden Family Trust had distributed the Shares to himself and his wife as beneficiaries of the Inder Rieden Family Trust. This was the deed of distribution (the ***Deed of Distribution***) dated 4 July 2018 which recited that the distribution was made pursuant to clause 4(i) of the deed of settlement by which the Inder Rieden Family Trust was created which stated that the trustee may pay or apply the whole or part of the trust fund as the trustee shall think fit to or for the benefit of one or more of the beneficiaries as the trustee in its uncontrolled discretion thought fit.

33. Further, Mr Inder Rieden exhibited a copy of the document pursuant to which Mr Fritsch had, according to Mr Inder Rieden, been removed as a director of the Plaintiff. The "*Resolution of Sole Shareholder*" dated 16 August 2017 (the ***Removal Resolution***) stated that it was resolved that Mr Fritsch be removed as a director with immediate effect and was signed in the name of *"[Euro-Dutch] as Trustee of the Inder Rieden Family Trust*" by Mr Inder Rieden. Mr Inder Rieden also exhibited a written resolution of the directors of the Plaintiff (the ***President Resolution***), signed by himself and Ms McCoy, also dated 16 August 2017, removing Mr Fritsch as President of the Company. The copy of the updated registers of directors and officers exhibited to Inder Rieden 1 and showing the dates on which Mr Fritsch ceased to be a director and president contain stamps of the Bahamian Registrar General's Department dated 21 August 2017.

34. Mr Inder Rieden also dealt in Inder Rieden 1 with the steps taken by Euro-Dutch to redeem the Plaintiff's investments in the Defendants and to seek payment of the redemption price payable upon redemption. He said this (my underlining):

> *43. On 8 August 2017, I completed redemption requests for the redemption of all of BEF's shares in the Funds [the Defendants] for the next available redemption date (pages 315 - 319). Each redemption request was executed by me, in my capacity as a director of BEF, and requested that the redemption proceeds be transferred to a specific account at Union Bancaire Privee Bank, Nassau Branch in the Bahamas, in the name Euro-Dutch Bahamas for the benefit of BEF.*
>
> *44. The redemption requests were hand delivered by FedEx courier to the office of SS&C Funds Services, the Funds' administrator (the Administrator), located in Connecticut, USA on 9 August 2017 (page 319). They were received and signed for by S. Spadaro.*
>
> *45. In accordance with the terms of the Amended and Restated Articles of Association of each of the Funds (the Articles of Association) (pages 320 - 393), the 'Redemption Date' in respect of each redemption request was 29 December 2017.*
>
> *46. According to the Statements of Shareholders' Capital produced by the Administrator, as at the month ended 31 December 2017 (pages 285 &*

288): (a) The Net Asset Value of BEF's shares in the Spectrum Fund was US$1,284,465; and (b) The Net Asset Value of BEF's shares in the Credit Fund was US$3,952,085.

47. *According to each of the Funds' Articles of Association, 90% of the estimated redemption proceeds would be paid within 45 business days of the Redemption Date, with the balance paid no later than the date of the finalisation of the Net Asset Value per share on completion of the independent audit of the accounts of the respective Fund for the fiscal year in which the redemption occurs (pages 336 & 375).*

48. *The Funds failed to pay any portion of the redemption proceeds in accordance with the redemption requests submitted by me on behalf of BEF. 90% of the redemption proceeds were payable by 14 February 2018, that is, 45 days after the Redemption Date.*

49. *By email dated 13 February 2018 (page 395), Eric Strachan (Eric), an Account Officer at Euro-Dutch Bahamas, at my request, wrote to the Administrator, following up on BEF's redemption requests, as follows:*

> *'...I am following up on our redemption requests that was [sic] submitted on August 8, 2017. The documents were delivered on August 9, 2017 and signed by S. Spadaro. We would like to know when we can expect payment to the attach [sic] wire instructions. We also attach proof of delivery for the documents that were send [sic] on the aforementioned date.'*

50. *By email elated 16 February 2018, sent at 4:20pm (page 395), Brian McDermott responded to Eric on behalf of the Administrator, asking Eric to call him. By a further email dated 16 February 2018, sent at 4:29pm (pages 394 - 395), Eric wrote to Brian McDermott confirming their conversation after Brian McDermott's earlier email. In that email Eric stated: 'Hi Brian, as per our conversation, please follow up with Wexford to ensure that the funds are paid as per the wire instructions. Only the authorized persons, which are the directors of BEE Enterprises, Inc., should authorize this transaction.' (Emphasis added.)*

51. *Very shortly after sending the email to Brian McDermott at 4:29pm, Eric sent me an email at 4:37pm on 16 February 2018 (page 396), stating as follows: 'Hi Tony, as you can see from the email I blind copied you on, I finally made contact with the fund administrator. Their chain of communication is very poor: No one knew of the redemption request package or my email this week until I called today. Anyway, this Brian fellow said BF made contact and is working with Wexford to initiate the redemption of the funds. 1 told him there should be a redemption and the funds need to be sent to the wire instructions stated in the documents. I will*

make sure 1 follow up on Monday because it is obvious that this situation needs some "elbow grease" to get moving.'

52. *I understood the reference in Eric's email to 'BF' to be a reference to Bernhard Fritsch.*

53. *Eric again emailed Brian McDermott at 8:55am on 22 February 2018 (page 394) asking for an update on the redemptions. At11:01am that same morning, Brian McDermott responded by email to Eric requesting that Eric send the 'corporate documents for BEF Enterprises' and stating that the Administrator would like to send them to Wexford for its review (page 394).*

54. *At 11:32am on 22 February 2018, (page 394) Eric emailed to Brian McDermott copies of: (a) BEF's Certificate of Incorporation (page 397). (b) BEF's Register of Officers, stamped by the Registrar General's Department on 21 August 2017 (page 398); (c) BEF's Register of Directors, stamped by the Registrar General's Department on 21 August 2017 (page 399); and (d) A resolution stamped by the Registrar General's Department on 11 May 2001 attaching Amended and Restated Memorandum of Association and Articles of Association (pages 400 - 424).*

55. *On 26 February 2018, Eric sent me an email providing an update on BEF's redemption process. In the email, Eric stated: 'As you know I sent them the corporate docs, but the administrator seems to want to wash [their] hands of the issues had told me today via phone that they will direct my inquiry to the investment advisor who will contact me directly. I know Bernhard is in direct contact with the IA so there may be delay with them reaching out to me or there may be some other stall tactic, but at this point it looks like funds have not been released to either us or Bernhard. I have avoided taking Bernhard's calls and responding to his emails because he wants me to give him supporting docs to help him. He has even offered me financial inducements. He does not appreciate that I was not raised with that kind of mindset; no matter the sum my principles [do] not allow it...' (page 425).*

56. *Since no portion of the redemption proceeds had been transferred into BEF's account stated in the redemption requests, I wrote to the Funds by email dated 26 March 2018 (pages 426 - 431), demanding payment of the redemption proceeds in accordance with the redemption requests. I stated in the letter that it had come to my attention that Bernhard Fritsch had sought to intervene in the redemption process. I pointed out to the Funds that Bernhard Fritsch had been arrested on criminal fraud charges and was awaiting trial. I further pointed out, as the corporate documents provided to the Administrator showed, that Bernhard Fritsch was neither a director nor officer of BEF and had no authority to act for or to give*

instructions on behalf of BEF. I enclosed copies of the redemption requests and proof of delivery.

57. *On 2 April 2018, I received an email from Marc Leferman on behalf of the Funds (page 432). The email was addressed to me, Bernhard Fritsch and one, Frank Dominick. The email confirmed receipt of the redemption notices I submitted on behalf of BEF and confirmed that BEF's investments in the Funds were being redeemed as at 31 March 2018.*

58. *The email then states that, 'Pursuant to the terms of two loan note agreements previously entered into between BEF and Wexford Capital LP, $3 million of the redemption proceeds are being directed to repay the principal balance of the loan notes'. The email further states that the balance of the redemption proceeds was being placed in an interest-bearing account.*

59. *Provided with that email was, among other documents, a purported resolution dated 10 November 2017, said to have been sent to the Funds by Bernhard Fritsch, which purported that Bernhard Fritsch and Frank Dominick were appointed by BEF as authorised persons to act on behalf of BEF. The purported resolution, which is a fraudulent document, was purportedly signed by me, Deirdre McCoy, David C. Stocker and Anna Marie Lowe, all named as directors of BEF ...*

60. *As I pointed out in my email dated 3 April 2018 to Marc Leferman (page 439), neither I, nor Deirdre McCoy, had signed any such resolution; neither David C. Stocker nor Anna Marie Lowe were, or ever were, directors of BEF; BEF had never entered into any loan agreement with Wexford Capital; and, effectively, Wexford Capital had been defrauded by Bernhard Fritsch by the use of fraudulent documents.*

61. *Marc Leferman, in his email response dated 5 April 2018... stated, among other things that, 'In the well over a decade that BEF was invested in Wexford's funds, Mr Bernhard Fritsch was often the point of contact between BEF and Wexford.'*

62. *That statement is false. As set out above in this affidavit, and as is evident from the multiple documents I have referred to above, Bernhard Fritsch was never named, and never was at any time, a point of contact on behalf of BEF with respect to BEF's subscriptions into the Funds.*

63. *I was the person named in the subscription documents and confirmed by the Funds as the authorised contact for BEF. The Funds, in turn, directed all communications with respect to BEF's investments to me at my Euro-Dutch fax number and email address, and in each case, I responded to the Funds' communication on behalf of BEF."*

35. The key elements of Mr Inder Rieden's evidence were as follows.

36. He asserted that on 8 August 2017 he had signed redemption requests as a director of the Plaintiff which had requested that the redemption proceeds be transferred to an account at "*Union Bancaire Privee Bank, Nassau Branch in the Bahamas, in the name Euro-Dutch Bahamas for the benefit of BEF*" (the ***Wire Instructions***). The requests were delivered on 9 August 2017 to the Defendants' administrator, SS&C Funds Services (the ***Administrator***). Mr Inder Rieden said that the redemption proceeds were payable by 14 February 2018 and that colleagues of his at Euro-Dutch had chased for payment. On 16 February 2018 Mr Strachan of Euro-Dutch had emailed Mr McDermott of the Administrator confirming their earlier conversation asking him to follow up with Capital to ensure that payment was made in accordance with the Wire Instructions and stating that "*Only the authorized persons, which are the directors of BEE Enterprises, Inc., should authorize this transaction*."

37. On the same day Mr Strachan had told Mr Inder Rieden that in a conversation with Mr McDermott, Mr McDermott had said that "*BF [had] made contact and is working with Wexford [Capital] to initiate the redemption of the funds*" and that he, Mr Strachan, had told Mr McDermott that "*there should be a redemption and the funds need to be sent to the wire instructions stated in the documents.*" Mr Inder Rieden said that he had understood the reference to BF to be a reference to Mr Fritsch.

38. On 22 February 2018 Mr McDermott had emailed Mr Strachan asking for the corporate documents for the Plaintiff to be sent to him as the Administrator wished to send them to Capital for its review and on 22 February 2018 Mr Strachan had sent by email to Mr McDermott copies of the Plaintiff's documents including its certificate of incorporation, its register of officers and its register of directors.

39. Mr Inder Rieden said that Mr Strachan had reported to him by email on 26 February 2018 expressing concern that the Administrator was not being helpful and that he (Mr Strachan) was aware that Mr Fritch was "*in direct contact with the IA [the investment advisor] so there may be delay with them reaching out to me or there may be some other stall tactic...*" Mr

Strachan had also said he had avoided taking calls from Mr Fritsch and responding to emails from him "*because he wants me to give him supporting docs to help him. He has even offered me financial inducements….*"

40. Mr Inder Rieden then wrote to the Defendants by email on 26 March 2018 demanding payment of the redemption proceeds in accordance with the redemption requests and stating that it had come to his attention that Mr Fritsch had sought to intervene in the redemption process, that Mr Fritsch had been arrested on criminal fraud charges and was awaiting trial and that as the Plaintiff's corporate documents provided to the Administrator showed, Mr Fritsch was neither a director nor officer of BEF and had no authority to act for or to give instructions on behalf of the Plaintiff. On 2 April 2018, Mr Inder Rieden received an email from Mr Marc Leferman of Capital addressed to Mr Inder Rieden, Mr Fritsch and Mr Frank Dominick confirming receipt of the redemption notices and stating that the Plaintiff's investments in the Defendants "*are being redeemed effective March 31, 2018*." That email had then referred to the terms of two loan note agreements previously entered into between the Plaintiff and Capital and stated that the redemption proceeds were being applied to repay ("*directed to repay"*) the US$3 million principal balance of the loan notes. Mr Leferman had said that since Capital had received "*inconsistent requests regarding [the Plaintiff's] investments in the [Defendants]…the [remaining] balance of the redemption proceeds [was] placed in an interest-bearing account*..."

41. Mr Leferman had attached various documents to his email including in Mr Inder Rieden's words "*a purported resolution dated 10 November 2017, said to have been sent to the [Defendants] Funds by [Mr Fritsch], which purported [to state] that [Mr Fritsch], and Frank Dominick were appointed by [the Plaintiff] as authorised persons to act on behalf of [the Plaintiff].*" This document (the ***November Resolution***) recorded various written resolutions of the Plaintiff's board of directors. It recited that the Plaintiff may from time to time need to open accounts with funds, banks or other and enter into "*other contractual transactions or relationships with counterparties*" ("*Transactions*") and execute various types of agreements ("*Agreements*"). It then recorded resolutions of the board that such Accounts may be opened and Transactions entered into as may be deemed necessary or

advisable by Mr Fritsch or Mr Dominick, that such Agreements may be approved by them, that Mr Fritsch or Mr Dominick were appointed and authorised to execute deeds, documents and agreements on behalf of the Plaintiff and were authorised to take delivery of cash or securities and operate relevant accounts on behalf of the Plaintiff. It was also resolved that third parties were authorised and requested to act upon any written instruction or notice signed by Mr Fritsch or Mr Dominick. The document was (appeared to be) signed by Mr Inder Rieden, Ms McCoy, Mr David C. Stocker and Ms Anna Marie Lowe as directors of the Plaintiff. On 3 April 2018 Mr Inder Rieden had emailed Mr Leferman to confirm that neither he nor Ms McCoy had signed any resolution; that neither Mr Stocker nor Ms Lowe was, or had ever been, directors of the Plaintiff; that the Plaintiff had never entered into any loan agreement with Capital and that Capital had been defrauded by Mr Fritsch by the use of fraudulent documents. On 5 April 2018 Mr Leferman had responded by email and stated that "*In the well over a decade that [the Plaintiff] was invested in Wexford's funds, Mr Bernhard Fritsch was often the point of contact between BEF and Wexford*." Mr Inder Rieden denied that this was the case.

The Defendants' defence

The Admitted Debt

42. In the Defence the Defendants state as follows:

> *"13.1 The Defendants admit that they (severally) owe the plaintiff a total of US$2,236,550, comprised as follows: (a) Spectrum Fund owes the Plaintiff US$548,599.79; and (b) Credit Fund owes the Plaintiff US$1,687,950.22 (the "Admitted Debt")*
>
> *13.2 The Defendants have not previously paid the Admitted Debt to the Plaintiff, due to having received inconsistent instructions, both purportedly on behalf of the Plaintiff, as to how to pay the Admitted Debt.*
>
> *13.3 The Defendants intend now to pay the Admitted Debt into Court, at or shortly following the filing of this Defence."*

43. Despite the stay of these proceedings having been lifted on 21 August 2024 the Defendants have not yet done what they said in the Defence they would do. No sums have been paid into Court. In their written submissions for the Application, the Defendants now argue, and their position is, that they should not be required to pay the Admitted Debt to the Plaintiff until after the trial in these proceedings and until the issue of who is properly authorised to act for and give a good discharge for payments made to the Plaintiff (see [3] of the Defendants' written submissions).

The Disputed Debt

44. In the Defence the Defendants plead that (my underlining):

> *"13.4….*
>
> *(b). At all material times [Mr Fritsch] had actual, alternatively apparent authority to execute the Loan Notes and to provide the Payment Instruction [given in the Loan Notes] to the Defendants on behalf of the Plaintiff.*
>
> *(c). In accordance with the Payment Instruction on or about 2 April 2018 the Defendants paid US$3 million as directed by the Plaintiff.*
>
> *(d), The abovementioned payment amounted to a good partial discharge and satisfaction of the debt due to the Plaintiff in respect of the Redemption Requests as to the amount of US$ 3 million."*

45. I note that the Defendants do not challenge in the Defence Mr Inder Rieden' authority to act for and bring these proceedings on behalf of the Plaintiff.

46. The Defence does not plead the facts upon which the Defendants rely or give particulars of the facts and matters which they say supports the averment of actual and apparent authority. For the purpose of resisting the Plaintiff's application for summary judgment the Defendants rely on the evidence adduced in opposition to the Application. They note that GCR O.14, r.4 states that "*A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court*" and that GCR O.14, r.2(2) applies to affidavit

evidence relied on to defend a summary judgment application so that such an affidavit "*may contain statements of information or belief with the sources and grounds thereof*."

47. [13.4(c)] of the Defence states that the Defendants paid (advanced) the loans on or about 2 April 2018. However, in response to a request made by me at the hearing for confirmation of the exact dates on which Capital advanced funds to the Plaintiff, the Defendants gave a different account. Maples on behalf of the Defendants confirmed the following by email to the Court dated 15 April 2025 (my underlining):

> *"During yesterday's hearing His Lordship requested that the Defendants confirm: (i) the date that the loan monies were paid by Wexford Capital LP under the two Loan Notes entered into on behalf of BEF Enterprises Inc on 22 February 2018 and 6 March 2018 respectively; and (ii) the details of the bank account to which those loan payments were made.*
>
> *We are instructed that the payment under the First Loan was made by wire transfer initiated on 22 February 2018 with a value date of 23 February 2018, and the Second Loan payment was made by wire transfer initiated on 6 March 2018 with a value date of 6 March 2018.*
>
> *We are further instructed that the loan monies were paid to a bank account in accordance with the attached Wire Instructions. These provide for payment to an account in the name of Green Capital Management Limited for further credit to BEF Enterprises Inc. Mr Fritsch's Affidavit states that "On 1 October 2017, Euro-Dutch Bahamas was removed as the trustee of the Richmountain Trust by Dr Clemens Fritsch, the Protector of the Richmountain Trust, and Green Capital Management Limited ("GCM") was appointed as the new Trustee." (Core Bundle, Tab 6, page 72, paragraph 26).*
>
> *The Wire Instructions were attached to the email from Bernhard Fritsch to Marc Leferman dated 22 February 2018."*

Actual authority

48. As regards actual authority, the Defendants relied on Mr Fritsch' evidence. The key parts of Fritsch 1 are as follows:

"8. I continue to be the ultimate beneficial owner of the Plaintiff, and I deny that Mr Inder Rieden and/or any other persons instructing Mourant Ozannes are the true owners of the Plaintiff or have any authority to act on its behalf.

9. In relation to paragraph 18 and 20 of the Inder Rieden affidavit, I was not aware of the alleged over US$15 million debt or the purported assignment on 16 August 2017 of the Richmountain Trust's entire shareholding in the Plaintiff to the Inder Rieden Family Trust by Euro-Dutch, the trustee at that time. I did not consent to any assignment, nor to my purported subsequent removal as Director and President of the Plaintiff, and I was not included in, nor am I aware of, any court proceedings in Bahamas that authorised these things.

10. The first time I was made aware of the debt purportedly owing from the Plaintiff to Mr Inder Rieden (which according to Mr Inder Rieden is the basis on which he apparently caused the beneficial interest in the shares in BEF to be transferred away from me to himself and his wife) was when I read the Inder Rieden affidavit filed on 30 October 2024. I did not approve, and I was not aware of any dealings between BEF and Mr Inder Rieden which would give rise to such a significant obligation, neither did I approve BEF's shares being used to discharge it. I still do not know (a) what the supposed basis of that over $15 million debt is; or (b) how, if at all BEF's shares were supposedly valued in the course of Mr Inder Rieden deciding to take the BEF shares for himself, apparently in discharge of that debt

11. This is not the only instance in which Mr. Inder Rieden has sought to misuse his fiduciary position in order to misappropriate property of mine by claiming ownership in my assets and companies. In California he falsely imposed a lien on my home, and I had to commence litigation against Euro-Dutch Holdings Ltd to remove the lien. True copies of the claim Bernhard Fritsch v. Euro-Dutch Holdings Ltd, LA Superior Court Case 22SMCV00606 and the default judgment are at pages 1 to 41 of BEF-1. In the default judgment, the Court declared the Deed of Trust in favour of Euro-Dutch Holdings Ltd to be void and cancelled. I was therefore able to get the lien void and cancelled. In a second lawsuit I had to commence litigation against Euro-Dutch for an order declaring that Euro-Dutch is not an officer, director and shareholder in my California corporation that owned my house where Mr Inder Rieden (the Managing Director of Euro-Dutch) placed himself without my permission and where he also had no interest. This was filed 26 September 2018, see Bernhard Fritsch v. Michael Ravin, Euro-Dutch Trust Company, LA Superior Court Case BC685196 which is at pages 42 to 49 of BEF-1.

12 I realized that Mr Inder Rieden as my Trustee was seeking to take advantage of me "in broad day light" and trying to steal the asset. The law firm Cohen Williams & Williams LLP in Los Angeles investigated the situation, and it was confirmed that Mr. Inder Rieden sought to transfer the shares of the Real Estate property holding Rambla Pacifico Inc. without my consent to the name of one of Mr Inder Rieden's Companies. This was the subject matter of the LA Superior Court Case BC685196 referred to in paragraph 11 above. I obtained a default judgment that I am the sole shareholder of 3229 Rambla Pacific, Inc which owns the property in question and that (among other things) Euro-Dutch has never been and is not an officer, director or shareholder of 3229 Rambla Pacific Inc …

13. As founder and CEO of a NASDAQ-listed stock exchange company I contributed most of the proceeds of sale of my stock to my mother's family trust, the Richmountain Trust, in 2000. Prior to that time, in and around 2000, I met Charles Davidson, the founder of Wexford Capital LP ('Wexford") and one of the most trusted hedge fund managers of our time. Charles Davidson and I met regularly and many times to analyse the global tech markets. Later on, I also met Charles Davidson's partner Joey Jacobs and regularly attended Wexford's investors meetings. All parties hosted and attended together well over 50 business meetings including formal and casual luncheons and business dinners between 2000 and 2017. By March 2018, I had been in contact with Wexford for approximately 18 years and on behalf of the Plaintiff for almost 16 years. During that time, it was certainly more than well-known by Wexford that I am and always have been the ultimate beneficial owner of the Plaintiff and act for it and continue to act for it at all times. I directed the placing of the Plaintiffs investment with Wexford in 2003 and have been manging and monitoring it since then. Besides that, I also had personal investments with Wexford as well. Over the years I communicated with Wexford on behalf of the Plaintiff on a number of occasions, including instances in which I was the sole representative of the Plaintiff…

13.4 <u>In and around the years 2003 to 2005 I also invested personally with Wexford</u>.

13.5 On 30 January 2018, I notified Wexford that the Plaintiff's August redemption had not been processed. This is further described in paragraph 17 below.

13.6 <u>On 15 February 2018, I instructed Wexford to "send all related paperwork and correspondence regarding my investment holding [in] BEF Enterprises Inc directly to me (and no longer to the administrator Euro-Dutch Trust)</u>" A copy of my email to Wexford dated 15 February 2018 is exhibited at page 54 of BEF-1<u>. This was triggered after it came to my attention that Mr. Inder Rieden had purported to unlawfully change the</u>

directors and officers of the Plaintiff without notice or my consent. In the Inder Rieden Exhibits, I note that Mr. Inder Rieden exhibits a Register of Shareholders, Register of Officers and Register of Directors. I also subsequently learned that Mr Inder Rieden had transferred on 16 August 2017 the ownership of the shares of the Plaintiff from the contracted and licensed trust management firm Euro Dutch to the Inder Rieden Family Trust. Neither the Richmountain Trust nor I were ever given notice about these purported changes, and I wish to be absolutely clear that I have never given any consent to such a purported transfer of legal or beneficial ownership. Had I been given any such notice, I wish to be very clear that I would have never agreed to any such purported transfer of ownership or control.

14 *I would further like to point out that Mr. Inder Rieden closed down his trust management business Euro Dutch without giving notice to me as a client and the Richmountain Trust. The Richmountain Trust did not only have the Plaintiff serviced by Euro Dutch as a trust management firm but also several other entities. A copy of the email dated 28 February 2017 and attachment from Ms Deidre McCoy which contains a list of the entities for 2017 annual renewal, and which are owned by me but managed by Euro-Dutch as professional trust and fiduciary service provider is at pages 55 to 56 of BEF-1. Those assets have still not been turned over by Mr. Inder Rieden.*

15 *On 4 July 2018, according to Mr. Inder Rieden he caused Euro-Dutch to transfer the ownership of the Plaintiff at that time from the Inder Rieden Trust to himself and his wife Maud Inder Rieden or Maud Heufke. This (if true) would be a further step to attempt to remove me the original and the true ultimate beneficial owner of the shares of the Plaintiff. Further to that:*

15.1 *On 16 August 2017 Mr. Inder Rieden entered in his registers of Officers and of Directors for the Plaintiff fraudulent "resignation" documents purportedly for me as Director and President. I wish to be clear, that I have never resigned as Director or President of the Plaintiff. I was never asked to resign as Director or President, nor would I give any such notice. I never consented to such a fraudulent purported resignation as Director or President, neither was I made aware of any of those procedures at the time they took place.*

15.2 *Please note that Mr. Inder Rieden has never submitted any relevant Board papers for such a relevant meeting, approved minutes of any such purported Board meeting or indeed any purported signed or witnessed Board Resolution from 16 August 2017 with respect to the Register of Directors or Officers of the Plaintiff.*

15.3 The content of the Register of shareholders, the Register of Directors and the Register of Officers of the Plaintiff have been fabricated at Mr Inder Rieden's office. The truth is that Mr Inder Rieden knows that I have been the owner and in control of the Plaintiff at all times. The Plaintiff is listed in the email from 29 February 2017 from Deidre McCoy from the Euro-Dutch office to me as one of the International Business Corporations ("IBCs") that I incorporated, own and control in the Bahamas. The Plaintiff is listed there as the second company from the top in the attachment of the same email which was mentioned at paragraph 14 above.

Redemption requests

16 On and around August 2017 I decided to redeem the remaining investment balance at Wexford and requested the trustee Euro-Dutch to liquidate both positions. Nothing happened for months, and I followed up with Wexford in January 2018 in relation to the redemption requests.

17 I was in fact the first person to follow-up with Wexford on the redemption requests. As noted above, on 30 January 2018, I emailed Marc Leferman of Wexford requesting an update on the redemption requested by the Plaintiff in August 2017. On 31 January 2018, Mr Leferman replied to my email stating that the email had been forwarded to Wexford's administrator because he did not recall seeing any correspondence relating to a redemption. On the 31 January 2018, I told Mr Leferman that the redemption documents were sent by FedEx. I followed up on the redemption requests again on 1 February 2018 and on the 2 February 2018, Mr Leferman requested that I send him a copy of the redemption request. On 5 February 2018 I informed Mr Leferman that I was travelling and did not have access to the documents. On the 7 February 2018, I again emailed Mr Leferman and informed him that we were trying to find the redemption and FedEx receipt. I copied Eric Strachan, the Account Officer for Euro-Dutch Bahamas on the said email. A copy of the email thread dated 30 January 2018 to 7 February 2018 is exhibited at pages 57 to 59 of BEF-1.

18 The fact that I copied Eric Strachan from Euro-Dutch clearly demonstrates that I was not acting in a clandestine manner in dealing with the redemptions for the Plaintiff, and I had the authority as the President, Director and ultimate beneficial owner of the Plaintiff to act on behalf of the Plaintiff. If it were true as Mr Inder Rieden now alleges (which it is not) that I had no authority to act on behalf of the Plaintiff, Euro-Dutch had an opportunity to assert same immediately and put Wexford and myself on notice.

19 Since there had been a delay by Wexford in processing the redemption requests and Wexford was unable to pay the redemption proceeds before

the next redemption cycle, I spoke to Mr Leferman and it was agreed that Wexford will provide an initial bridge loan of US$1.5million and then a subsequent loan for an additional US$1.5miilion to the Plaintiff. I signed two Loan Notes for the sum of US$1,500,000.00 each (together US$3 million) on behalf of the Plaintiff and the loan amounts were to be set-off against or subtracted from the proceeds of the Plaintiff's August 2017 redemption (which would be available later that year). The Loan Notes, which were effective 21 February 2018 (the "First Loan") and 6 March 2018 (the "Second Loan"), were made by Wexford to the Plaintiff and not to me personally, albeit I was and remain the ultimate beneficial owner—this was well understood by all concerned. This is clearly shown in each of the Loan Notes which states: "SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS AND FOR VALUE RECEIVED, this loan note (the "Note") sets forth the promise by BEF ENTERPRISES, INC. (the Borrower) to pay to WEXFORD CAPITAL LP (the "Lender") the principal sum of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS..."

20 *The First Loan and the Second Loan were signed by me on behalf of the Plaintiff. The form of the loans was the same and it clearly was understood by both parties to have been signed by me on behalf of the Plaintiff and along with my signature, I presented Wexford with a resolution that showed I was an authorized signatory of the Plaintiff. At no point during the negotiation and signing of the Loan Notes was it agreed, or even suggested, that Wexford was making a personal loan to me. This would have been inconsistent with the commercial terms of the loans and intended set-off of the loan amounts as against the outstanding redemption proceeds.*

21 *In connection with the loans, Wexford was provided by me with a Written Resolution of the Plaintiff dated 10 November 2017 (the "BEF November 2017 Resolution"), which authorised me and Frank Dominick to open accounts for the purpose of, among other things, redemption, investments and loans and authorising Mr Dominick and I as signatories of the Plaintiff.*

22 *I believed that in any of my BEF capacities, including as President of BEF, sole and ultimate beneficial owner and representative in prior communications (of which Euro-Dutch was aware), I had complete and absolute lawful authority to sign for the Plaintiff even apart from the BEF November 2017 Resolution. In the said BEF November 2017 Resolution, Mr Frank Dominick and I were appointed as signatories on behalf of the Plaintiff.*

…….

> *26. On 1 October 2017, Euro-Dutch Bahamas was removed as the trustee of the Richmountain Trust by Dr Clemens Fritsch, the Protector of the Richmountain Trust, and Green Capital Management Limited ("GCM") was appointed as the new Trustee. Notice of the removal was served on the required parties, including Mr Inder Rieden. On 31 March 2019, Mr Inder Rieden and Ms Deidre McCoy were removed as Directors of BEF. Copies of the documents showing the removal of Euro-Dutch Bahamas and the removal of Mr Inder Rieden and Ms Deidre McCoy as Directors of BEF are exhibited at pages 60 to 62 of BEF-1.*
>
> *27 Thereafter GCM became Aron Capital Limited and later was duly and properly replaced by BEF Asset Management, Inc as the Trustee of BEF. As a foreign entity based in the United States and not doing business in the Bahamas BEF Asset Management, Inc. is not required to have a license to act as a Trustee."*

49. In his email dated 22 February 2018 to Mr Leferman Mr Fritsch had said that the earlier payment instructions (referring to the Plaintiff's account ending 9704) was "*no longer valid*" and had provided to Mr Leferman, as an attachment to his email, new payment instructions (the ***New Wire Instructions***). These were headed with the Plaintiff's name and stated as follows:

"Bank Name:	*The Hongkong and Shanghai Banking Corporation Limited*
Bank Address:	*HSBC Main Building, 1 Queen's Road, Central Hong Kong SAR*
Swift Code:	*HSBCHKHHHKH*
Account No.:	*848-621637-838*
Account name:	*Green Capital Management Limited*
For Further Credit:	*BEF Enterprises, Inc"*

50. Copies of the two loan note documents were adduced in evidence. The loan notes were purportedly executed by the Plaintiff and governed by New York law. The first loan note was stated as having "*an effective date of 21 February 2018*" and Mr Fritsch's signature was notarised and witnessed on the same day. The second loan note was stated as having "*an effective date of 6 March 2018*" and Mr Fritsch's signature was once again notarised and

witnessed on the same day. On Mr Fritsch's evidence the critical dates are therefore 21 February 2018 and 6 March 2018 being the dates on which he purported to bind the Plaintiff to borrow the loans and agree that the Defendants' liability in respect of redemption payments (the Disputed Debt) could be discharged by applying the sums so owed in repayment of the loans owed by the Plaintiff to Capital.

51. The clauses in the loan notes (the ***Repayment Clause***) which dealt with repayment of the loans was clause 1 in each loan note. It stated as follows:

> *"Manner of repayment: [Plaintiff] hereby directs [the Defendants] to directly pay [Capital] the [principal amount of the loans] out of the redemption proceeds [Plaintiff] will receive in connection with [the Plaintiff's redemption request dated 8 August 2017] (the "Borrower Redemption Proceeds") prior to such Borrower Redemption Proceeds being paid to [Plaintiff]. For clarity, [Plaintiff] shall only receive that portion of the Borrower Redemption Proceeds that exceeds the dollar amount of the Principal."*

52. According to Mr Inder Rieden, as I have noted, Mr Fritsch had been removed before 21 February 2018 as a director by reason of the Removal Resolution and as president by reason of President Resolution. In his evidence ([15.1] - [15.3] of Fritsch 1) Mr Fritsch referred to "*fraudulent "resignation" documents*" and stated that he *"never resigned as Director or President of the Plaintiff…, was never asked to resign as Director or President, …. never consented to such a fraudulent purported resignation as Director or President, [and was not made aware of any of those procedures at the time they took place.*" He further stated that Mr. Inder Rieden had never submitted any relevant board papers, approved minutes of any purported board meeting or any purported signed or witnessed board Resolution from 16 August 2017. He claimed that the register of shareholders, the register of directors and the register of officers of the Plaintiff had been fabricated.

53. But, as I have just explained, Mr Inder Rieden relied on a shareholder and not a board resolution to remove Mr Fritsch and had adduced copies of the relevant written resolution as well as of the board resolution to remove Mr Fritsch as president.

Apparent authority

54. As regards apparent authority, Mr Amron gave evidence of the Defendants' dealings with the Plaintiff. He relied in particular on correspondence from the Defendants sent by and conversations he had had with a former employee of the Defendants, Mr Marc Leferman (who he said might be available to give evidence at a later stage of these proceedings).

55. Mr Amron said that the Defendants had a course of dealings over many years (over sixteen years) with the Plaintiff in which Mr Fritsch had acted and been held out as having authority to act for the Plaintiff. Mr Fritsch had always acted and been held out as the President and a director of the Plaintiff and had said that he was the beneficial owner of the Plaintiff (as the beneficial owner of its shares).

56. Mr Amron said that the Defendants had long understood that Mr Fritsch was the ultimate beneficial owner of the Plaintiff. The name of the plaintiff, BEF Enterprises Inc, denoted Mr Fritsch's initials. He said that he understood from Mr Charles Davidson, one of Capital's founding partners and its chairman and chief investment officer, that BEF's investment in the Defendants was the result of Mr Davidson and Mr Fritsch having made each other's acquaintance and had nothing to do with any initiative on the part of Euro-Dutch or Mr. Inder Rieden. Communications with Capital regarding the opening the Plaintiff's investment accounts were with Mr Fritsch (although the Defendants had been unable to retrieve the emails from approximately 22 years ago). While the subscription agreements had been signed by Euro-Dutch this was ministerial from Capital's perspective and did not affect Capital's (and the Defendants') understanding that Mr Fritsch, who was the ultimate beneficial owner of the Plaintiff's shares, as being authorised to instruct Capital on behalf of the Plaintiff with respect to the Plaintiff's investments. Mr Amron noted that the Credit Fund's subscription document dated 15 December 2003 stated that: "*If the investor is a natural person, indicate the occupation and business affiliation of the investor. If the Investor is a private corporation … indicate the name(s), occupation(s) and business affiliations of all person(s) having a beneficial interest in the Investor*" and that in response Mr Inder Rieden when completing the form wrote in the name "*Bernhard E. Fritsch – Entrepreneur.*"

57. Mr Amron gave as an example of the holding out of Mr Fritsch in a letter dated 14 November 2002 written to the Defendants on the Plaintiff's letterhead from Mr Inder Rieden in connection with a share redemption in respect of the Spectrum Fund in which Mr Inder Rieden had said that "*With reference to the telephone conversation between our Bernhard Fritsch and your Mr Marc Leferman we hereby request the redemption as of 31 December 2002 of our entire investment in [the Spectrum Fund]*."

58. Mr Amron noted that despite it being a term of the Credit Fund's subscription document that "*The Investor hereby agrees to promptly notify the Fund should there be any change in the information set forth in this response*" the Plaintiff had not notified the Defendants of the purported removal of Mr Fritsch as a director until 26 March 2018 and his ceasing to be the beneficial owner of the Shares until after this dispute arose in mid- 2018.

59. Mr Amron said that the Plaintiff had first sought to redeem its investments on 8 August 2017, but the redemption requests had not been brought to the attention of Capital until 30 January 2018 when it received an email from Mr Fritsch, who was chasing for an update. Mr Leferman had replied the following day saying that Mr Fritsch's email had been passed to the Administrator as he had not seen any previous request. Mr Fritsch had replied on 31 January to say that the redemption documents had been sent by FedEx to Capital's office in Connecticut, but it became apparent that Mr Fritsch was having difficulty locating copies of what had been sent. On 7 February 2018 Mr Fritsch had again emailed Mr Leferman copying Mr Strachan to say that he was still trying to find the documentation.

60. On 13 February 2018 Mr Strachan had sent an email to the following up on the Plaintiff's redemption requests and confirming that the documents had been delivered on 8 August 2017 and attaching proof of delivery.

61. On 16 February 2018 Mr Strachan sent a further email stating that "*only the authorized persons which are the directors of [the Plaintiff] should authorize this transaction*" and after a further exchange of emails on 22 February 2018 Mr Strachan had emailed Mr McDermott

of the Administrator and provided him *inter alia* with a copy of the Plaintiff's register of directors and officers, stamped 21 August 2017 (showing that Mr Fritsch had been removed as a director on 16 August).

62. Mr Amron said that it was surprising and material that even though Mr Strachan had been copied on Mr Fritsch's email dated 7 February 2018 he had never told Mr Leferman or formally notified the Defendants or the Administrator that Mr Fritsch no longer had authority to act for the Plaintiff. In addition, the email of 22 February 2018 had also failed to bring to the Administrator's attention that the ultimate beneficial owner (i.e. Mr. Fritsch) purportedly had (according to Mr Inder Rieden's present position) changed, such that this service provider's director Mr Inder Rieden and his wife were now the beneficial owner of the Shares. Mr Amron said that, assuming that the change of beneficial ownership was valid (which the Defendants did not accept), this failure would constitute a breach of the Credit Fund's subscription document.

The summary judgment application

The law

63. GCR O. 14, r.3(1) provides (my underlining and emphasis):

> *"Unless on the hearing of an application under rule 1 either the Court dismisses the application or the **defendant satisfies** the Court with respect to the claim, or that part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried, the Court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.*"

64. The Plaintiff cited and relied on the judgment in *Bradley and Another v Frye-Chaikin* (Unreported, 4 September 2024), at [26] Asif J cited with approval and accepted as representing the law and practice in the Cayman Islands, the following statement by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (***Easyair***), at [15] of the principles

applicable to an application for summary judgment by a defendant as being applicable to an application made by a plaintiff:

i *The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 913;*

ii *A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED&F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*

iii *In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;*

iv *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the factual assertions made, particularly if contradicted by contemporaneous documents: ED&F Man Liquid Products v Patel at [10];*

v *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*

vi *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*

vii *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be*

> *allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725*

65. The issue in this jurisdiction is whether there is (and whether the Court on the evidence adduced is satisfied that there is) an issue or question in dispute which ought to be tried. The GCR do not include the additional criterion that was incorporated into RSC O.14 r.3(1) "*that there ought for some other reason to be a trial of [the claim]*."

66. The burden of proof is on the applicant. The defendant may show cause "*by affidavit or otherwise to the satisfaction of the Court*" (GCR O.14, r.4(1)). The defendant's evidence must state clearly and concisely what its defence is, and the facts which are relied on to support it. If the defence relied on is fraud the affidavit should state the particulars of the fraud. In all cases, sufficient facts and particulars must be given to show that there is a triable issue (see the 1999 White Book, [14/4/5]).

The Plaintiff's submissions

The Plaintiff's position

67. The Plaintiff submitted that the question for the Court on the Application was whether the Defendants had shown a fair or reasonable probability that they had a real, or *bona fide* defence on the basis that (a) there was a genuine dispute as to the persons authorised to act on behalf of the Plaintiff which justifiably permitted the Defendants to refuse to pay over the Admitted Debt on the instructions of the current registered directors of the Plaintiff and (b) the Plaintiff was bound by the actions of Mr Fritsch because he had the Plaintiff's actual or apparent authority when he executed the loan notes and gave the payment instructions, so that Mr Fritsch (or GCM) received the loan advances on behalf of the Plaintiff and the Plaintiff was bound by the set-off arrangement agreed by Mr Fritsch.

68. The Plaintiff's position was, in summary:

(a). that Mr Fritsch clearly did not, as a matter of Bahamian law, have actual authority at the time that the loan notes were entered into and the loans made. The evidence showed that at that time the Shares were no longer held on trust for The Richmountain Trust (so that Mr Fritsch no longer had an interest in the Shares as a beneficiary of that trust) and that Mr Fritsch had been removed by a shareholder resolution as a director and by a board resolution as president of the Plaintiff.

(b). the Plaintiff submitted that the Defendants had not challenged and indeed did not have standing to challenge that corporate action. Since Mr Fritsch was not a party and had not sought to be joined to these proceedings, his assertions in evidence did not, for the purpose of the Application, amount to a challenge to the validity of the steps taken by Euro-Dutch to remove the Shares from The Richmountain Trust or to his removal as a director and president. The Plaintiff had given him the opportunity to pursue such a challenge by consenting to the stay of these proceedings while Mr Fritsch, through the new trustee of The Richmountain Trust, prosecuted the Bahamian Proceedings. But Mr Fritsch and GCM (Aron) had failed to take this opportunity and had instead dragged their feet in relation to, delayed and refused to progress the Bahamian Proceedings which had resulted in those proceedings being dismissed. It was too late now, the Plaintiff argued, for Mr Fritsch and GCM (Aron) directly (and for the Defendants indirectly) to challenge the steps taken by Euro-Dutch and the Plaintiff's other directors.

(c). the Defendants could not rely on ostensible authority (as a matter of Bahamian law) because either Mr Fritsch was not held out by the Plaintiff as having authority to bind the Plaintiff to the loan notes and the set-off agreement or because the Defendants were on notice before the loan notes were entered into and the loans advanced that Mr Fritsch was not so authorised or that there was a doubt as to whether he was so authorised.

The applicable law

69. The Plaintiff also relied on the following *dicta*:

(a). "*… the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants having a real or bona fide defence*" per Ackner LJ in *Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray* [1984] 1 Lloyd's Rep 21 (as cited with approval by Vos JA in *Merren v Cayman National Bank* [2008] CILR 428 at [5], [6] and [8]):

(b). the Court "*is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents…*" per Lady Justice Asplin in relation to an application to amend pleadings in *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204, at [42].

(c). where the defendant relied on points of law, the Court ought to order summary judgment if the case was bad in law (*Easyair Ltd v Opal Telecom Ltd*) or the point was "*clearly misconceived*" (*Hampshire Cosmetic Labs. Ltd. v. Mutschmann, Cayman National Bank Ltd., Duffell and Belcher*, unreported, Smellie, CJ, 18 October 1999).

70. The Plaintiff submitted that under Cayman Islands conflict of laws rules the question as to whether directors of a corporation are authorised to act for a corporation is governed by the law of the place of incorporation: *Dicey, Morris & Collins on the Conflict of Laws*, 16th ed. (***Dicey & Morris***), Rule 187, [30R-020] and [30-030]. The question as to the persons currently authorised to receive payment of the Admitted Debt was therefore a matter of Bahamian law. The Plaintiff submitted that on this question, the expert evidence showed that Cayman Islands law was the same as Bahamian law (see [54] of Burnside 1).

71. The Plaintiff also submitted that under Cayman Islands conflict of laws rules, the law which governed the issue of whether an agent had apparent or ostensible authority to bind a principal was the law which governed the contract if the agent's authority were established: *Dicey & Morris* Rule 223, [32R-318] to [32-323] (also citing *Presentaciones Musicales S.A. v Secunda* [1994] Ch. 271, per Roch LJ at p.283). The Plaintiff said that once again, based on the expert evidence, Cayman Islands law on this issue was the same as Bahamian law (see [54] – [57] of Burnside 1).

72. Furthermore, the Plaintiff submitted that *Dicey & Morris* Rule 187 also confirmed that all questions regarding subscriptions to and redemptions of shares in a Cayman Islands company were governed by Cayman Islands law.

73. The Plaintiff submitted that the Defendants had not challenged the validity of the Plaintiff's current and filed registers of directors and shareholders, that under Bahamian law those registers were determinative as to who was to be treated as a director and shareholder of the Plaintiff and authorised to act on its behalf and the effect of the Bahamian Court Order was that there could no longer be any such challenge.

Mr Fritsch's actual authority derived from his position as the beneficial owner of the Shares

74. The effect of the share register is governed by section 29 of the Bahamian International Business Corporations Act (the ***IBC Act***), which is in the following terms (my underlining):

> *"29(1) A company shall cause to be kept at its registered office one or more registers to be known as Share Registers containing — (a) the names and addresses of the persons who hold registered shares in the company; (b) the number of each class and series of registered shares held by each person; (c) the date on which the name of each person was entered in the Share Register; and (d) the date on which any person ceased to be a member.*
>
> *(2) The Share Register may be in such form as the directors may approve but if it is magnetic, electronic or other data storage form, the company shall be able to produce legible evidence of its contents.*

> *(3) The Share Register shall be prima facie evidence of any matters directed or authorised by this Act to be contained therein."*

75. In reliance on Mr Paton's evidence, the Plaintiff argued that the identity of the shareholder in the Plaintiff at the time that the loan notes were entered into was to be determined by reference to who was recorded as the shareholder in the Plaintiff's share register at the relevant time. That was Euro-Dutch as trustee for the Inder Rieden Family Trust. It was irrelevant that Aron might have a claim to set aside the removal of the Shares from The Richmountain Trust, and to seek the rectification of the share register, even if it remained open to Aron (and Mr Fritsch) to pursue such a claim.

76. Mr Paton's evidence as to the effect of entries on the share register was set out at [12] – [14] of Paton 1 (my underlining):

> *"12. Under s.29(3) of the IBC Act (page 54), the Share Register constitutes 'prima facie evidence of any matters directed or authorised by this Act to be contained therein'. The equivalent provision in the United Kingdom is s.127 of the Companies Act 2006... In Enviroco Ltd v Farstad Supply A/S [2011]1WLR 921 (page 127), Lord Collins stated that it is 'a fundamental principle of United Kingdom company law that except where express provision is made to the contrary, the person on the register of the members is the member to the exclusion of any other person, unless and until the register is rectified'. Unless the IBC Act provides otherwise, therefore, the fact that a person is entered on the Share Register is conclusive proof that they are legal owner of the relevant shares. Thus, if a person is removed from the Share Register, as a matter of law, they are no longer a member of that company, even if that removal occurred as a result of a forged Share Transfer, or the Share Transfer was submitted without authority from the person who has been removed (see Re JDK Construction Ltd [2024] EWCA Civ 934, (page145)).*
>
> *13. This is consistent with other sections of the IBC Act. Section 31(3) (page 55), for example, provides that 'A company shall not be required to treat a transferee of a registered share in the company as a member until the transferee's name has been entered in the Share Register'. Section 56 (page 69) provides that 'Every director, officer, agent and liquidator of a company, in performing his functions, is entitled to rely upon the Share Register kept under section 29 ...'. Similarly, under s.61 (page 71), the*

directors are only obliged to give notice of a meeting of members to the persons who appear as members in the Share Register.

14. In Re JDK Construction at [48]-[50] (page 156), Snowden LJ provided two examples of where the Companies Act 2006 does provide otherwise, such that the register of members will not constitute conclusive proof. The first was s.112(1), which provides that a subscriber to a company's memorandum of association will be a member of the company from incorporation, regardless of whether they are entered on the register of members. This is to cater for the fact that there may be a gap in time between the incorporation of the company and the compiling of the register (or a mistake when that occurs). The second was s.112(2), which provides that to become a member, a person must agree to do so. If a person has not so agreed, he is not a member, even if he has been entered on the register. These sections are not reproduced in the IBC Act and would not be pertinent to this case in any event."

77. *Re JDK Construction* is instructive because it was a case in which a person whose name had been properly entered on the register of members was removed from the register without her consent. It is important, in order to appreciate Lord Justice Snowden's decision and reasoning, to see precisely what he said in *Re JDK Construction*. The following extract from his judgment makes the position clear:

"40. I agree with Mr Doyle KC that the starting point in defining the concept of a member is section 112 of the Companies Act. That provides, in relevant part:

"112 The members of a company

"(1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members. "(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company."

41. The requirement of a company to maintain a register of members is set out in section 113:

"113 Register of members "(1) Every company must keep a register of its members. "(2) There must be entered in the register— (a) the names and addresses of the members, (b) the date on which each person was registered as a member, and (c) the date at which any person ceased to be a member.

"(3) In the case of a company having a share capital, there must be entered in the register, with the names and addresses of the members, a statement of— (a) the shares held by each member, distinguishing each share— (i) by its number (so long as the share has a number), and (ii) where the company has more than one class of issued shares, by its class, and (b) the amount paid or agreed to be considered as paid on the shares of each member."

42. *On a straightforward reading of section 112, it is apparent that a person may be a member of a company either as a result of subscribing to its memorandum (section 112(1)), or (if they are not a subscriber) by agreeing to become a member and being entered as a member on the register of members (section 112(2)).*

…….

45. *The Supreme Court held that [Enviroco Ltd v Farstad Supply A/S [2011] Bus LR 1108] had not remained a subsidiary of ASCO because ASCO did not appear as a member in Enviroco's register of members and so what is now section 1159(1)(c) was not satisfied. In giving the leading judgment, with which the other members of the Supreme Court agreed, Lord Collins of Mapesbury JSC stated*

"37. The starting point is that the definition of 'member' in what is now section 112 of the [Companies Act 2006] ... reflects a fundamental principle of United Kingdom company law, namely that, except where express provision is made to the contrary, the person on the register of the members is the member to the exclusion of any other person, unless and until the register is rectified: in In re Sussex Brick Co [1904] 1 Ch 598 (retrospective rectification of register did not invalidate notices).

38. Ever since the Companies Clauses Consolidation Act 1845 (8 & 9 Vict c 16) and the Companies Act 1862 (25 & 26 Vict c 89) membership has been determined by entry on the register of members. The companies legislation proceeds on that basis and would be unworkable if that were not so….

39. For those and other purposes the legislation makes it clear that the member is the person on the register, and where it is necessary to apply the legislation to persons who are not on the register, special provision is made. Thus where the shares are bearer shares, special provision is made to allow the bearer to be deemed to be a member: section 122(3). So also the right of a member to bring a derivative claim or present an unfair prejudice petition is expressly extended 'to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law': sections 260(5) and 994(2)."

46. Lord Collins JSC's explanation at para 37 of the "fundamental principle of United Kingdom company law" that "except where express provision is made to the contrary, the person on the register of the members is the member to the exclusion of any other person, unless and until the register is rectified", coupled with his observations at para 38 that the provisions of the Companies Act (including those as regards voting by members) would be unworkable were that not so, clearly support the reasoning of the Judge at paras 49–50. 47. However, Lord Collins JSC did not go as far as the Judge. Lord Collins JSC did not say that the register of members was conclusive as to the identity of the members of a company. He acknowledged that the general principle that the identity of the members of a company is to be determined by reference to the entries on the register of members at the relevant time is subject to "express provision ... to the contrary".

...

51. Both these examples illustrate why, as section 127 of the Companies Act expressly provides, and as Mr Fennell submitted, the register can only ever be prima facie evidence as to who the members of the company are. But neither example concerns a situation in which a person whose name has been properly entered on the register of members is removed from the register without her consent.

52. I also accept Mr Fennell's submission that because Enviroco ... concerned the operation of the Companies Act in a conventional business transaction, and was not a case of wrongful removal of a person from the register, it is not a binding authority on the question of whether the removal of a member's name from the register of members as the result of forgery or fraud operates as a further exception to the general principle outlined by Lord Collins JSC.

53. In that latter regard, Mr Fennell argued that the deletion of Jeanette from the Company's register of members should be regarded as a nullity, and that she should be regarded as still on the register for voting purposes because the Stock Transfer Form upon which such deletion was based was a forgery, and would have been known to be a forgery by Julie who authorised such deletion as sole director of the Company. Mr Fennell relied upon Ruben v Great Fingall Consolidated [1906] AC 439 ("Ruben") in that regard.

54. In Ruben, the secretary of a company asked his stockbrokers to arrange a personal loan for him from a bank, which was to be secured on 5,000 shares in the company. The secretary forged a stock transfer form for 5,000 shares in favour of nominees for the bank and thereafter also caused a forged share certificate to be issued to the bank's nominees. When the secretary did not repay the loan and absconded, the company refused to register the bank as

holder of the shares represented by the forged certificate. The stockbrokers then repaid the bank, took an assignment of the bank's rights against the company, and sued the company for damages, either for refusing to register it as a shareholder or on the basis that the company was vicariously liable for the fraud of the secretary.

55. *The trial judge held the company liable, but that decision was reversed by the Court of Appeal, whose decision was affirmed by the House of Lords. The reason was shortly stated by Lord Loreburn LC at p 443:*

"I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery……

56. *The ratio of Ruben was very simply that the company could not be made liable for a refusal to register the bank's nominees as the holders of shares, because the forged share certificate was a nullity and had not been issued with the authority of the company. The House of Lords held that the company had rightly refused to act on the basis of forged documents and the third party could not rely upon the "indoor management" rule to bind the company. Ruben did not, however, involve the wrongful removal of anyone from the register of members on the basis of a forged document. I therefore do not see that it can have any relevance to the instant case beyond the uncontroversial proposition that a forged document is a nullity. Specifically, Ruben does not assist in analysing, for the purposes of voting on members' resolutions, the status of a person whose name is wrongly removed from a company's register of members as a result of a forged stock transfer.*

57. *Apart from relying upon Ruben and other cases that have followed it in similar circumstances such as South London Greyhound Racecourses Ltd v Wake [1931] Ch 496 , Mr Fennell did not cite any authority to us in support of the proposition that a person whose name is wrongly removed from the register of members as a consequence of a forged transfer still retains the status of a member for voting purposes.*

58. *In my judgment, in the absence of such authority, the general principle explained by Lord Collins JSC in Enviroco Ltd v Farstad Supply A/S [2011] Bus LR 1108, para 37 should apply for the purposes of determining the validity of members' resolutions, even in a case where a member's name has been wrongly removed from the register as a result of forgery or fraud. The law does not simply disregard the entries on the register. Instead, the*

> *entries on the register of members are presumptively valid and the members of a company are taken to be those shown on the register "unless and until the register is rectified".*
>
> *59. A company cannot simply alter its register of members to remove the name of a registered holder of shares without a court order: In re Derham and Allen Ltd [1946] Ch 31, 36 . Accordingly, as occurred in the instant case, it is necessary for a person who contends that their name has wrongly been taken off the register to apply to the court for an order that the register be rectified, putting them back onto the register in place of the person whose name wrongly appears on the register. The application to the court can be made under section 125 of the Companies Act (which provides a summary jurisdiction for simple cases) or in an ordinary CPR Pt 7 claim (for other cases): see Nilon Ltd v Royal Westminster Investments SA [2015] 3 All ER 372."*

78. The Plaintiff's position therefore was that in the present case the position as described in the share register should be relied on for the purpose of deciding who was the shareholder as at the date on which the loan notes were entered into, and in particular as to whether at that date the shares were held on trust for the Richmountain Trust. As Lord Justice Snowden had said in *Re JDK Construction* a person whose name has wrongly been removed from the register of members as a consequence of a forged transfer or other fraud does not retain the status of a member for voting purposes but the entries on the register of members are presumptively valid and the members of a company are taken to be those shown on the register unless and until the register is rectified. Mr Fritsch had asserted in his affidavit evidence that the removal of Euro-Dutch *qua* trustee of The Richmountain Trust as shareholder was the result of fraudulent action taken by Mr Inder Rieden and that there were grounds for setting aside the Assignment Agreement (and the Deed of Distribution) and for rectification of the share register. But Mr Fritsch's remedy was to obtain rectification of the share register and until an order for rectification the entries on the register as to who held the Shares at the date the loan notes were entered into was determinative. Even if actual rectification was not needed and a challenge to the validity of the entries was sufficient, since no claim for rectification had been made or was outstanding there was currently no basis on which the Court could or should refuse to rely on and give effect to the entries in the Plaintiff's share register. The claim for rectification made in the Bahamian Proceedings had

been dismissed. The Plaintiff argued that Aron was no longer able to maintain such a claim in the Bahamas. In any event, no claim for rectification was outstanding and Mr Fritsch had not been joined to these proceedings to make his claims.

79. As regards the impact of the Bahamian Court Order, the Plaintiff relied on the evidence of Mr Paton to the effect that the defendants' application to the Bahamian Court was for an order that the originating summons be struck out due to the claimant's failure to comply with the Bahamian Court's order "and/or that the conduct of the Claimant is likely to obstruct the just disposal of the proceedings." The Plaintiff argued that as a matter of Cayman Islands law, which governed as the *lex fori*, (as well as Bahamian law) this was the classic formulation of an application for a striking out on the grounds of abuse of process and that the claimant would be barred from instituting fresh proceedings before the Bahamian Court seeking the same or substantially the same relief. The Plaintiff relied on the judgment of Chief Justice Smellie in *TMSF v Wisteria Bay Ltd* [2008 CILR 231] at [66] – [75] where he held that an order striking out a defence for abuse of process, as distinct from an order dismissing a claim for want of prosecution, gave rise to an estoppel and the issue raised in the proceedings was *res judicata* between the parties to those proceedings. But, in any event, the Plaintiff said, since no party to the Bahamian Proceedings was a party to these proceedings and no party to the Bahamian Proceedings had sought or was seeking to relitigate the issue before the Bahamas Court, this Court should proceed on the basis that there was no longer an outstanding challenge made by parties with standing to make such a challenge to the Assignment Agreement, the Deed of Distribution or the Removal Resolution.

Mr Fritsch's actual authority derived from his position as a director and president of the Plaintiff

80. The effect of the directors' register was governed by section 44 of the IBCA which states as follows (my underlining):

> *"44(1) A company shall keep a register to be known as a register of directors and officers containing — (a) the names and addresses of*

the persons who are directors and officers of the company; (b) the date on which each person whose name is entered in the register was appointed as a director or officer of the company; and (c) the date on which each person as a director or officer ceased to be a director or officer of the company.

(2) The register of directors and officers may be in such form as the directors approve, but if it is in magnetic, electronic or other data storage form, the company must be able to produce legible evidence of its contents.

(3) The register of directors and officers, commencing from the date of the registration of the company, shall be kept at the registered office of the company referred to in section

(4) A copy of the register of directors and officers shall be filed with the Registrar and shall be open to inspection by members of the public during official hours.

(5) <u>The register of directors and officers is prima facie evidence of any matters directed or authorised by this Act to be contained therein</u>.

…….”

81. The Plaintiff submitted that under Bahamian law, the Plaintiff's registers of directors and officers were determinative as to the persons who were to be treated as its directors and officers, at least in the absence of a proper challenge to the appointment of the relevant director or officer. The Plaintiff submitted that there was no such challenge, and the evidence established that the Plaintiff's directors at the time the loan notes were entered into, and the payment instructions were given, were Mr Inder Rieden and Ms McCoy.

82. Mr Paton’s evidence on this issue was set out at Paton 1 [16] – [17] (my underlining):

“16. Under s.44(5) of the IBC Act (page 66), 'The register of directors and officers is prima facie evidence of any matters directed or authorised by this Act to be contained therein'. Re Finethic Limited [2022] 1BHS J No 179 at [18] (page 167) was an application by the sole director of a company to set aside the appointment of provisional liquidators. A challenge was made to the director's standing on the basis that he had been appointed in breach of the company's Articles. <u>The Supreme Court held that 'while there may be grounds on which the petitioner might properly challenge the status of the</u>

> *company's officers, registered office and agent, the persons and /or entities indicated on the statutorily required records of the company are prima facie the current office holders and /or service providers. In fact, maintaining a registered office and agent are mandatory requirements of an IBC under the IBC Act. Therefore, until a proper application is made to challenge these appointments, the court is constrained to accept that Mr. Moss is a director and therefore entitled to make the application'.*
>
> *17. It appears, therefore, that the register of directors is similarly regarded as conclusive proof of who the directors and officers of the company are."*

The apparent authority defence and the November Resolution

83. The Plaintiff alleged that the Defendants and Capital had acted negligently. The Plaintiff submitted that by extraordinary negligence, either on the part of the Administrator or the Defendants, the redemption requests were not brought to the attention of the Defendants for several months and that the Defendants had failed to act in accordance with or to take notice of the communications from Mr Strachan on 13, 16 and 22 February 2018. The Plaintiff argued that either these documents were not provided to the Defendants by the Administrator, or the Defendants had chosen to ignore them.

84. The Plaintiff argued that it was clear that Capital and the Defendants were on notice at least by the time of the second loan note dated 5 March 2018 that Mr Frisch's right and authority to act for the Plaintiff's was in doubt. The Administrator had been sent on 22 February 2018 the Plaintiff's directors' register which recorded that Mr Fritsch was no longer a director and the Plaintiff's officers' register which recorded that he was no longer the president. The Administrator, under the Defendants' governing documents (including their information memoranda), was said to have entered into an administration agreement with Capital as sub-advisor to the Defendants, pursuant to which the Administrator provided certain administrative services on behalf of the Defendants. The Plaintiff argued that notice to the Administrator constituted notice to the Defendants and Capital or that the evidence

showed that Capital was aware and on notice of the communications from Mr Strachan.

85. The Plaintiff submitted that the documents sent by Mr Strachan at least put Capital and the Defendants on notice of a substantial doubt as to Mr Fritsch's continuing authority to act on behalf of the Plaintiff so that Capital and the Defendants were unable to rely on Mr Fritsch's ostensible authority in relation at least to the second loan note. The Plaintiff also submitted that Capital and the Defendants were unable to rely on Mr Fritsch's ostensible authority in relation to the first loan note since they had or should have received communications from Euro-Dutch before the first loan note was executed that made it clear that they had to verify the authority of anyone purporting to act on behalf of the Plaintiff and that such verification would need to include checking the position with Euro-Dutch. The Plaintiff submitted that both loan notes were signed and had effective dates after Mr Strachan had expressly warned the Administrator on 16 February 2018 that only the Plaintiff's directors should authorise the redemption.

86. The Plaintiff said that it appeared that the loan notes had been agreed between Mr Fritsch and Mr Davidson, who Mr Amron had stated was one of Capital's founding partners and its chairman and chief investment officer and who was personally known to Mr Fritsch. Mr Fritsch in his email dated 16 February 2018 to Mr Leferman had set out what he said was agreed regarding the loans, but the details contradicted the terms of the redemption requests. On 22 February 2018, Mr Fritsch had forwarded the November Resolution together with new wire instructions which were attached to this email (the ***New Wire Instructions***). He also said that, "*the BEF account ending in 9074*", which was the account specified in the Wire Instructions, "*[was] no longer valid*" (the ***Counter Instruction***). This was the same day that Mr Strachan had sent to the Administrator the certified copies of the Plaintiff's registers of directors and officers filed with the Registrar of Companies. Mr Fritsch's email was time-stamped 12:32am. whereas the Administrator's email to Mr Strachan requesting the corporate registers was time-stamped 11:01am. The Plaintiff said that

the Administrator's representative had taken the proper steps regarding the redemptions but had obviously either been overlooked or ignored because by 11:32am the same day he had in hand the certified copies of the corporate registers which would have contradicted the position being advanced by Mr Fritsch. The Plaintiff argued that it appeared that that no one had seen fit to request Mr Fritsch to verify that he was in fact a director of the Plaintiff. Capital had made the first loan notwithstanding the classic red flags of an attempted fraud, namely the undue haste in which the loans had been sought even though the Defendants had by then acknowledged receipt and were processing the redemption requests; the by-passing of the authorised signatory for the investor company; the by-passing of the Defendants' Administrator; the leveraging of a personal relationship with the founder and the last-minute change of bank account details specified in the subscription redemption requests.

The Defendants' submissions in relation to the Disputed Debt

The issues and applicable law

87. The Defendants submitted that there were three real and substantial issues of law and fact in dispute that ought to be tried:

(a). whether Mr Fritsch had actual or ostensible authority to sign the loan notes on behalf of the Plaintiff thereby binding the Plaintiff to the terms of the loan notes in respect of the Plaintiff's redemption proceeds (the ***Authority Issue***).

(b). whether the payment US$3,000,000 from the Spectrum Fund and the Credit Fund amounted to a good partial discharge and satisfaction of the Disputed Debt in (the ***Partial Discharge of Debt Issue***).

(c). whether the persons instructing the attorneys who issued the Writ and the Summons, Mourant, are the true and lawful owners of the Plaintiff's shares (the ***Ownership Issue***).

88. There was no disagreement as to the law governing an application for summary judgment. The Defendants, as well as the Plaintiff, relied on the summary of the law set out by Mr Justice Lewison in his judgment in *Easyair*.

89. The Defendants also relied on the judgment of Chief Justice Smellie in *Tasarruf Mevduati Sigorta Fonu v Merril Lynch Bank and Trust Company (Cayman) Limited* (unreported judgment, 9 June 2009). This was a judgment dealing with an application for leave to appeal against the Chief Justice's earlier judgment granting summary judgment. The Chief Justice had granted summary judgment by way of recognition and enforcement in this jurisdiction of a judgment *in personam* granted against the defendant by a court of competent jurisdiction in Turkey. One of the arguments relied on in support of the application for leave to appeal was that it was wrong on a summary judgment application to seek to resolve disputed issues of foreign law because such issues are issues of fact and so can only properly be resolved after full factual enquiry upon the evidence, and as no such enquiry took place, this Court could not properly have arrived at the decision which it did that the expert evidence was unreliable. In this context, the Chief Justice noted the "*long-standing principle*" that "*it is impossible for the Court to try a question as to foreign law (there the law of New York) on affidavits*" and that "*Expert evidence as to what is the law of a foreign country constitutes a matter of fact for the determination of this Court and dispute over such matters can only properly be resolved after full enquiry, not merely on the basis of untested affidavit evidence.*" Importantly, the Chief Justice had concluded that "*What the cases all have in common, however, is the requirement of the Court to resolve the question whether there is a triable issue involving foreign law and which needs to be resolved at trial by way of evidence*." In *Tasarruf* the Chief Justice decided that far from the defendant's experts in their evidence demonstrating that there was any such triable issue (whether or not under

Turkish law the Turkish judgment was to be regarded as final and conclusive in the Court in which it was given) their joint opinion had confirmed that there was no such issue (since they agreed that the Turkish judgment was final and conclusive).

Mr Fritsch's actual authority derived from his position as the beneficial owner of the Shares – his decision to enter into the loan notes was taken in that capacity and bound the Plaintiff

90. The Defendants' position was that Mr Fritsch had actual and ostensible authority to act on behalf of the Plaintiff at all material times and that the loan notes and payment instruction issued by Mr Fritsch were valid and binding on the Plaintiff.

91. The Defendants submitted that it was common ground that the common law of England, its equitable doctrines and judicial precedents played a significant role in the legal system of the Bahamas and that decisions of the Superior Courts in England, whilst not strictly binding on the Bahamian courts, had persuasive authority.

92. The Defendants said that it was well established that if an agent enters into a contract with actual authority the principal is bound and that such authority can be either express or implied (relying on the well-known judgments in *Hely-Hutchinson v. Brayhead Ltd and another* [1968] 1 Q.B. 549 and *Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) and Another* [1964] 2 QB 480).

93. They also submitted that it was well established that shareholders can bind companies through their actions under the principles of attribution and agency, citing the following passage in *Bowstead and Reynolds on Agency* (23rd ed.) at [1-028]:

> *"Normally, directors and shareholders will have actual authority, as opposed to apparent authority, only when they make their decisions in accordance with the procedures established by the statute and constitution. However, both in relation to directors and shareholders the courts recognised early on that*

> *these groups could also bind their company informally, so long as it could be established that all directors, or all shareholders, as the case may be, assented unanimously to the decision being made on the company's behalf. In respect of shareholders, Lord Hoffmann in the Meridian case approved the formulation of the concept of informal unanimous assent as follows: "… the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company."*

94. The Defendants relied on the judgment of Lord Burrows giving the advice of the Privy Council in *Ciban Management Corp v Citco (BVI) Ltd* [2020] UKPC 21; [2021] A.C. 122 (***Ciban***) (on appeal from the BVI). They submitted that this decision held that the above principles apply in relation to the acts of sole beneficial owners and not just registered shareholders.

95. *Ciban* involved a BVI company (called Spectacular) whose only shares were bearer shares held by a lawyer in Florida, Mr Stollman, on behalf of Mr Byington. Mr Byington was therefore treated as the beneficial owner of the shares and of the company. Citco BVI Ltd (***Citco BVI***) was the company's registered agent and Tortola Corpn Co Ltd (***TCCL***) was its sole (legal) director. Citco BVI and TCCL granted a power of attorney to Mr Delollo (a Brazilian lawyer) under which he was authorised to sell five parcels of land which belonged to, and were the only assets of, the company. In issuing the power of attorney, Citco BVI and TCCL were acting on the instructions of Mr Costa who had been a long-standing friend and business associate of Mr Byington. Mr Costa used the proceeds of sale to pay off debts Mr Costa alleged were owed to him by Mr Byington. The allegation made by the company was that Mr Costa had deceived Mr Byington and that he was able successfully to do so because, while not themselves fraudulent, Citco BVI and TCCL were in breach of the tortious duty of care that they owed to the company. The alleged negligence was in relation to the issuing of the power of attorney. The claim was that TCCL should not have relied on the instructions of Mr Costa in relation to the power of attorney but should have checked with Mr Byington that those instructions were valid. It was alleged that certain red flags, which should have

alerted TCCL to the danger of relying on those instructions, were unreasonably ignored. It was also alleged that proper due diligence was not carried out in relation to the proposed sale. On these facts, the Privy Council held that the company's claim failed. The company was bound by the power of attorney which was in the circumstances to be treated as having been made with the approval of Mr Byington.

96. The Privy Council held that it was an established principle of law that a company was bound by a decision of its shareholders which, though made informally, was *intra vires* the company and which, if there was more than one shareholder, they had all consented to; that the principle was equally applicable where it was the beneficial owners rather than the registered shareholders who had consented and, further, it applied where the consent was given by an agent acting with the ostensible authority of the shareholders or beneficial owners; that, in that latter case, although the principle would not normally apply where the shareholders or beneficial owners had been unaware of what had been happening, in circumstances where in the interests of their own anonymity they had set up a mode of operation whereby a director of the company reasonably relied on instructions from that agent, they would not be allowed to deny that they had consented to the giving of authority to that agent; that it followed that (a) Mr Byington could not be allowed to deny that he had consented to the giving of authority to Mr Costa, (b) Mr Costa's instruction to TCCL to grant the power of attorney was therefore to be attributed to the company itself and (c) TCCL in acting upon that instruction could not be said to have been in breach of duty towards the company; that Citco BVI's duty of care to the company had been limited to the carrying out of those tasks normally carried out by a registered agent of a company, which were less than those of a director, and there were no grounds for impugning the lower courts' decisions that there had been no breach of duty by Citco BVI in relation to those limited services and that, accordingly, neither defendant was liable to the company in respect of the appointment of the fifth power of attorney.

97. The following passages from the judgment of Lord Burrows explain the Privy Council's reasoning (my underlining):

> *"29. As we have seen, the claimant has relied on the "red flags" as showing that TCCL was on notice. Seen through the lens of ostensible authority, this submission amounts to saying that, even if there were a representation by Spectacular that Mr Costa had authority, Citco BVI and TCCL were on notice that he had no such authority—and were therefore acting unreasonably in relying on that authority—so that the doctrine of ostensible authority cannot apply. In East Asia Co Ltd v PT Satria Tirtatama Energindo [2020] 2 All ER 294 , paras 70–95, the Privy Council recently looked at this requirement in the context of ostensible authority and confirmed that the test for whether the representee is entitled to rely on ostensible authority is the objective one of reasonableness (and that it is insufficient to show that the representee has not acted recklessly or irrationally). But, as the lower courts have determined, on the facts of this case, Citco BVI and TCCL were acting reasonably, i e they were not put on notice in the relevant sense.*
>
> *30. Thus far, our reasoning has proceeded by equating the conduct of Mr Byington and the conduct of Spectacular. Yet to afford an excuse to TCCL in relation to the claim by Spectacular, the ostensible authority must be conferred by Spectacular. Similarly, we need to explain why TCCL's reliance was reasonable vis-à-vis Spectacular and not merely vis-à-vis Mr Byington. Put another way still, to decide that there was no breach of a duty of care owed by TCCL to Spectacular, we need to be satisfied that the conduct of Mr Byington can be attributed to Spectacular: we are not concerned with a breach of a duty of care owed to Mr Byington. Although it is tempting to equate Mr Byington with Spectacular, simply because he was the ultimate and sole beneficial owner, one needs a full legal explanation for that. It is here that the Duomatic principle comes in.*
>
> *31. The Duomatic principle is, in short, the principle that anything the members of a company can do by formal resolution in a general meeting, they can also do informally if all of them assent to it. See generally Palmer's Company Law , looseleaf ed, vol 2, paras 7.434–7.449; and Peter Watts, "Informal Unanimous Assent of Beneficial Shareholders" (2006) 122 LQR 15. The principle derives its name from In re Duomatic Ltd [1969] 2 Ch 365 , in which it was encapsulated by Buckley J, at p 373, as follows:*
>
> *"where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."*

……

37. *Applying the Duomatic principle to our case, Spectacular would have been bound had the sole shareholder, Mr Byington, consented to Mr Costa's having authority to give instructions. That informal giving of consent by Mr Byington explains how—and this was not in dispute—Mr Costa had actual authority to give instructions to TCCL (and Citco BVI) in relation to the first four POAs. But in respect of the fifth POA, Mr Byington clearly did not consent by giving Mr Costa actual authority.*

38. *The question therefore becomes whether one can apply the Duomatic principle of informal unanimous shareholder consent to ostensible authority. As a matter of principle, there seems no reason why not. If actual authority can be conferred informally by unanimous shareholder consent the same should apply to ostensible authority. So here Mr Byington's informal consent to the representation by conduct, that Mr Costa had authority to instruct TCCL (and Citco BVI) in relation to the fifth POA, binds Spectacular.*

39. *It is important to add that the Duomatic principle explains why there is also no problem about the informality of Mr Byington's conduct even in relation to section 80 of the IBC. This is because if it was reasonable for TCCL to rely on the instructions of Mr Costa—on the basis that he was conveying the instructions of Mr Byington, the ultimate beneficial owner—there would be no need to go through the formality of a company resolution ratifying the sale. As far as TCCL was concerned Spectacular would have already given its authorisation through Mr Byington. That the Duomatic principle can be applied not merely where the requirement for formal approval derives from the company's articles but also where it derives from statute is demonstrated by, e g, In re Oceanrose Investments Ltd [2009] Bus LR 947, para 23. This will turn on the correct interpretation of the statutory provision in question but in our view (which is consistent with the Court of Appeal's reasoning, at para 69, that "Mr Byington in his capacity as the sole member must be taken to have approved the sale") section 80 of the IBC should not be construed as removing the Duomatic principle.*

40. *Is there any specific objection to applying the Duomatic principle in the context of ostensible authority in the present situation? One recognised qualification—that the transaction must not jeopardise the company's solvency or cause loss to its creditors—does not arise on these facts. But two other recognised qualifications, and one possible qualification, of that principle may here be thought to be problematic.*

…..

43. *The second recognised qualification is that the Duomatic principle cannot be used where there is relevant dishonesty. For example, in Bowthorpe Holdings*

> *Ltd v Hills [2003] 1 BCLC 226, Sir Andrew Morritt V-C said the following at para 50:*
>
> *"the transaction must be bona fide or honest. This, in my view, is demonstrated by the qualification of Viscount Haldane in Attorney General for Canada v Standard Trust [1911] AC 498 , 505 that 'the case was not … a cloak under which a conspiracy to defraud was concealed', by Younger LJ in In re Express Engineering Works [1920] 1 Ch 466 , 471 that 'no fraud is alleged in respect of this transaction', and by Lawton LJ in Multinational Gas v Multinational Services [1983] Ch 258 , 268 that the members must act in good faith. Thus, in In re Duomatic Ltd [1969] 2 Ch 365 , 372 Buckley J cited with approval the view of Astbury J in Parker and Cooper Ltd v Reading [1926] Ch 975 , 984 that the transaction must be both intra vires and honest."*
>
> *This emphasis on honesty lies behind the submission of Mr Hubble, for the claimant, that it would be a "remarkable extension" to the Duomatic principle to apply it to apparent authority so as to allow an agent to commit a fraud against the company and its members.*
>
> *44. Clearly here what was being done in relation to the fifth POA was not outside the powers of the company and neither Mr Byington nor TCCL was acting dishonestly in relation to that POA. Put another way, the Duomatic principle would not be permitting the ultimate beneficial owner or the director to commit a fraud against the company…"*

98. The Defendants argued that, applying these principles, the Plaintiff was wrong to assert that only Mr Inder Rieden (and not Mr Fritsch) had authority to deal with the Defendants in relation to the Plaintiff's investments and that all dealings were conducted by Mr Inder Rieden.

99. The Defendants noted that in his evidence Mr Fritsch had maintained that he continued to be the beneficial owner of the Shares and that neither Mr Inder Rieden, nor the other persons instructing Mourant, were the true owners or had authority to act on behalf of the Plaintiff. The Defendants relied on this evidence. They argued that applying the common law principles of agency and attribution confirmed in *Ciban* Mr Fritsch as the sole ultimate beneficial owner of the Plaintiff had actual authority to act on behalf of the Plaintiff when negotiating and executing the loan notes and that his actions in doing so were to be attributed to the Plaintiff such that it was bound by the terms of the loan notes to which it was a party.

100. The Defendants noted that the Plaintiff had contended that Mr Fritsch had ceased to be the beneficial owner of the Plaintiff before the loan notes were executed by virtue of Assignment Agreement and had relied on the contents of the register of members. The Defendants' position in relation to the alleged change of ownership of the Plaintiff and the register of members was, in reliance on the evidence as to Bahamian law of Ms Cooper Burnside KC, that they did not accept that the Assignment Agreement was valid and effective (they noted that Mr Fritsch's denial in his evidence of the validity of the Assignment Agreement had been responded to in the Plaintiff's reply evidence) or that the register of members was conclusive as to the issue of ownership of the shares in the Plaintiff.

101. Ms Cooper Burnside KC's evidence (in Burnside 1) considered the Assignment Agreement and the Deed of Distribution (which together she referred to as the Purported BEF Share Transfer). In her opinion, the terms of the Richmountain Trust, did not authorise Euro-Durch as trustee to deal with itself in various capacities so that the Assignment Agreement was invalid for that reason. In addition, she considered that as a matter of Bahamian law the Assignment Agreement *prima facie* entailed a breach of the two-party rule as well as the self-dealing rule and was therefore *prima facie* susceptible to being impeached. In her opinion it was *prima facie* void by virtue of the two-party rule and/or voidable under the rule against self-dealing. As Ms Cooper Burnside KC explained (a) the general common law principle often referred to as the two-party rule holds that there must be at least two parties to a contract i.e. a promisor and a promisee and that since there is no valid purchase by the trustee in a case where the two-party rule is infringed, the consequence is that either the purported transaction is completely nugatory, or in the alternative, in the case of a purported purchase of land, there is a valid transfer of legal title but no valid alteration of equitable title - either way, the property which the trustee has purported to purchase will *prima facie* continue to be held on the same trusts as before and (b) the self-dealing rule is that if a trustee sells the trust property to himself the sale is voidable by any beneficiary *ex debito justitiae*, however fair the transaction.

102. Ms Cooper Burnside KC's evidence was set out at [87] - [94] of Burnside 1 as follows:

"87. It will therefore be appreciated that (as defined) the Purported BEF Share Transfer involved the following two steps, namely:

87.1 STEP ONE: Transfer of BEF Shares from (A) Euro-Dutch Bahamas in its capacity as trustee of the Richmountain Trust to (B) Euro-Dutch Bahamas in its capacity as trustee of the Inder Rieden Family Trust (of which Anthony Inder Rieden and his wife Maud InderRieden are beneficiaries). As at the date of the relevant transfer, Mr Inder Rieden was a principal shareholder and the Managing Director of Euro-Dutch Bahamas.

87.2 STEP TWO: Transfer of BEF Shares from (A) Euro-Dutch Bahamas in its capacity as trustee of the Inder Rieden Family Trust (of which Anthony Inder Rieden and his wife Maud Inder Rieden are beneficiaries) to (B) Anthony Inder Rieden and Maud Inder Rieden personally.

……

89. I respectfully note that:

89.1 The purported Assignment Agreement (i) does not purport to constitute a distribution under the Trust (and did not cite/expressly invoke any dispositive trust power) and instead (ii) exclusively purports to constitute an agreement to compromise a debt.

89.2 The purported Assignment Agreement was entered into 14 days after Bernhard Fritsch had been arrested by the FBI according to paragraph 17 of the Inder Rieden Affidavit. This temporal proximity raises the spectre of such arrest having potentially actuated/influenced the Trustee's decision-making vis-a-vis the purported transaction. It was always the duty of the Richmountain trustee to act in the best interests of that trust's beneficiaries. The repayment of the loan immediately following BEF's arrest begs the question what if any benefit could have been thought to accrue to that debtor trust in those circumstances. Indeed, it seems far easier to justify the transaction (and its apparent urgency) based upon one-sided concerns centring on the interests of the creditor trust.

89.3 The purported Assignment Agreement does not condescend to particulars vis-a-vis the alleged original underlying loans. More particularly, it fails to identify precisely the person or persons to whom such loans were allegedly advanced by the Inder Rieden Family Trust (the purported Assignment Agreement expressly does not limit them to Mr Fritsch), the dates of any such advances, whether those advances were memorialized n writing, the material terms of such loans and when any repayment obligations first fell due. Such details are prima facie material because: (a) Even if the original loans in question were advanced by the Inder Rieden Family Trust exclusively/DIRECTLY to the Richmountain Trust

there is a real question as to whether such loans are in fact valid and/or enforceable having regard to the principles discussed above regarding the two-party rule and self-dealing rule. (b) To the extent the loans/advances were made to parties other than the Richmountain Trust, which the purported Assignment Agreement expressly asserts was the case, then in the absence of a tangible contractual connection establishing a debt obligation (e.g. by means of guarantee) -it will be perhaps even more challenging to understand how any binding obligation on the part of the Trustee of the Richmountain Trust is said to have arisen.

89.4 *Having reviewed the Trust Agreement for the Richmountain Trust, I find that it does not contain any provision which serves to authorise the trustee of the Richmountain Trust trustee to deal with itself in various capacities. In saying this, I do acknowledge that the Trust Agreement does contain a power authorising the Richmountain Trust trustee to transfer assets to different trusts, however, this does not provide for and/or permit the transfer of assets by the trustee to itself. For illustrative purposes only, there is reproduced below a precedent deriving from the Encyclopaedia of Forms and Precedents, which makes clear that when a trustee is granted the right to deal with itself that right is expressly stated. What is more, in this instance the problem is significantly compounded by the fact that the same person, Mr Inder Rieden, has an interest in the both the trustee and the recipient trust.*

90. *Without prejudice to the considerations mentioned immediately above, it is my opinion that the Assignment Agreement (and the purported repayment of the aforesaid loans and the assignment purported to be effectuated thereunder) was also prima facie rendered (i) void by virtue of the two-party rule and/or (ii) voidable under the rule against self-dealing.*

91. *The Trust Agreement does contain a power to compromise at the First Schedule, Paragraph (6). However, for the reasons explained above, the Assignment Agreement prima facie entailed a breach of the two-party rule as well as conflicting duties owed by the Trustee. As such, the Assignment Agreement (and any subsequent transactions in reliance thereupon) is prima facie susceptible to being impeached.*

92. *Beyond this, any exercise of the purported power ought to have been carried out in accordance with fundamental principles governing the exercise of fiduciary powers, namely, trustees are required to genuinely and consciously exercise their powers responsibly and in good faith, within the scope of the terms of the power, and only for the purposes for which the discretions were conferred, not for collateral or ulterior purposes…..*

93. *Insofar as the Assignment is void, any purported transfer of those assets to the Inder Rieden Family Trust and/or dealing with those assets on the basis that they*

> *were freed from the trusts of the Richmountain Trust would constitute a breach of trust by Euro Dutch and be void as well. This includes any steps purportedly taken qua shareholder of the Inder Rieden Family Trust to remove the directors or officers of BEF and/or to subsequently transfer BEF's shares to the Inder Rieden's individually. It is therefore my opinion that if the Assignment is void, that would be sufficient to rebut the presumption of the validity of the BEF Share Register to the extent it shows the Inder Riedens rather than the Richmountain Trust as BEF's shareholders, and the presumption of the validity of the BEF register of directors and officers to the extent it shows the Mr Frisch as no longer a director and president of BEF.*
>
> ……
>
> *94. For the reasons set forth above, it is my view that the Purported BEF Share Transfer is liable to be impeached on the basis that it breached the two-party rule and was void and/or breached the self-dealing rule and therefore voidable."*

103. The Defendants also submitted that the fact that Mr Inder Rieden had arranged for the Plaintiff's share register to record the purported change in the capacity in which Euro-Dutch held the Shares (so that from 16 August 2017 it was recorded as holding as trustee for the Inder Rieden Family Trust) did not assist the Plaintiff. In reliance on Ms Cooper Burnside KC's evidence, the Defendants argued that the share register was not conclusive but was only *prima facie* evidence. It was subject to rectification to reflect the true position and would be rectified in this case if, as Mr Fritsch and the Defendants claimed, the Assignment Agreement (and the Deed of Distribution) had been entered into and executed in fraud of the beneficiaries of The Richmountain Trust. Ms Cooper Burnside KC's evidence in Burnside 1 was as follows (my underlining):

> *"59. … section 29(3) of the IBC Act … expressly states that the Share Register constitutes prima facie evidence of the information required or authorized by the IBC Act to be contained therein. Furthermore, section 30 of the IBC Act, expressly empowers the Court to rectify the Share Register in any of the cases therein mentioned, which includes where the information required by section 29 of the IBC Act to be entered into the Share Register is omitted from or inaccurately stated in it.*
>
> *60. It is also well established that in ordering rectification, the Court has power, in a proper case, to fix a particular date at which the registration shall become operative, even to the extent of making it retrospective; but subject, if necessary, to conditions protecting the*

rights of third persons. It is a question for the discretion of the Judge whether the rectification of the Share Register should be granted with retrospective effect.

61. *In the circumstances, it follows that the Share Register is not conclusive evidence of the matters contained in it. As Lord Cairns in Reese River Silver Minina Co Ltd v Smith (1869) LR 4 HL 64 (Pages 185-203) stated:*

> *"...it is perfectly clear, my Lords, that you cannot make the register absolutely conclusive. Many cases can be pointed out, without difficulty, in which the register is not conclusive. It was admitted at the Bar, and must always be admitted, that if names are put upon the register without any authority the owners of those names are in no way responsible. There are also cases...where there has been a default, in the performance, by the executive of the company, of its duty in removing names after the owners of those names have ceased to be shareholders: there again the register is not conclusive. And again, under the same section, there is a class of cases which is thus described, namely, where the name of any person is, without sufficient cause, entered in or omitted from, the register of members of the company; in that case the register is not conclusive."*

62. *In Bland v Keegan [2024] EWCA Civ 934 (Pages 204-224) [Re JDK Construction] Lord Justice Snowden recently confirmed that a person whose name is entered on the Share Register as a member shall be regarded as a shareholder and a member of the company unless and until the Share Register is rectified.*

63. *The issue determined in Bland v Keegan was whether a person whose name was wrongly removed from a company's register of members, by way of the registration of a forged stock transfer form, had the right to vote on a resolution to wind up the company and appoint liquidators……*

64. *At first instance, the judge held that, even on though the stock transfer form was a forgery, the register of members was "conclusive" as to the identity of the members of the company at any particular point in time and as a result, the written resolution was valid and effective. On appeal, the Court of Appeal held, inter alia, that the judge at first instance was right to rely upon the presumed state of the register of members when considering the validity of the resolution. It also clarified and confirmed that unless and until an order for rectification of the register of the company was made, the identity of the members of the company for the purposes of determining the validity of the resolution winding up the company was to be determined by*

the entries in the company's register for members at the relevant time. The Court of Appeal also confirmed that, when making an order for rectification, the court has power (as far as legally possible) to (i) undo the effects of misconduct, (ii) order compensation to be paid or (iii) otherwise determine how losses should be fairly allocated between innocent parties.

65. Notably, the Court of Appeal in Bland v Keegan did not go so far as the Judge at first instance. Lord Justice Snowden did not say that the register of members was conclusive as to the identity of the members of a company. Rather, he stated: "... the entries on the register of members are presumptively valid and the members of a company are taken to be those shown on the register "unless and until the register is rectified."

66. It should also be noted that the circumstances in Bland and Keegan were "unusual". Additionally, the proceedings were unusual. They were brought by the liquidators of the company who sought declarations that their appointment as liquidators was valid and directions from the court. The respondents to the proceedings were Jeanette and the company; and Jeanette issued separate, related proceedings (to which the liquidators were not parties) for the rectification of the register, which were ultimately compromised by a Tomlin Order recording an agreement by which Julie (a) acknowledged not owning Jeanette's transferred shares and (b) agreed to re-transfer them to Jeanette for £1. The decision in Bland and Keegan may be regarded as fact specific."

104. The Defendants argued that in view of this evidence the Ownership Issue could not properly be determined without discovery and a fuller examination of all of the relevant facts at trial, particularly in circumstances involving serious allegations of fraud. The Defendants argued that the following factors also supported the conclusion that the Ownership Issue should not be determined by way of summary judgment: under Bahamian law, the share register was not conclusive of the matters therein; no court approval was sought before the Shares were transferred and Mr Fritsch was not notified of same and no evidence had been adduced as to how the Plaintiff's shares were valued and there were no supporting documents from the Inder Rieden Family Trust to substantiate the loans referred to in the Assignment Agreement.

Mr Fritsch's actual authority derived from his position as a director and president of the Plaintiff

105. The Defendants noted that the Plaintiff claimed that Mr Fritsch was removed as president and director of the Plaintiff on 16 August 2017 so that he ceased to have any authority to

sign the loan notes or issue the payment instruction on behalf of the Plaintiff and that the Plaintiff sought to rely on the contents of the register of directors and register of officers dated 21 August 2017. The Defendants reiterated the arguments made in relation to the grounds for challenging the Assignment Agreement and their claim that if, as they contended, that was void or voidable, the subsequent action to remove Mr Fritsch as a director and president was also invalidated or capable of being set aside as a matter of Bahamian law. The Assignment Agreement, the Defendants argued, was the basis for the purported removal of Mr Fritsch as a director and president of the Plaintiff, so that if it was capable of being set aside the removal of Mr Fritsch could also not stand. Furthermore, the fact that Mr Fritsch had been removed from the registers of directors and officers did not prevent a challenge to that removal.

106. Ms Cooper Burnside KC's evidence on this issue in Burnside 1 was as follows (my underlining):

> *"69. Section 44(5) of the IBC Act… expressly states that the register of directors and officers is prima facie evidence of any matters directed or authorised by IBC Act to be contained therein. Like a Share Register, however, the register of directors will not necessarily be conclusive of the position stated therein. For example, if a person has formally been appointed as a director of a company in accordance with its articles of association, he will be a director whether or not notification of his appointment has been sent to the Registrar of Companies. The same holds true for a person whose name appears on register of directors, i.e., the register of directors constitutes prima facie evidence of their directorship, but it is not conclusive.*
>
> *70. In POW Services Ltd v Clare [1995] 2 BCLC 435 (at Pages 227-246) Jacob J helpfully explained the legal effect of the register of directors. He stated:*
>
> *"The general rule is that the fact of registration or no has nothing whatever to do with whether a person is in fact a director or company secretary. Subject to one exception there is no deeming provision arising from registration. It is the company, acting by the procedures under the articles, which makes or sacks a director or company secretary. There are statutory requirements for registration of the persons whom the company has made a director or secretary with sanctions for non-compliance. It may well be that where a company has permitted registration of a person who is not in fact a director or secretary, the company would be estopped as against a third party who relied upon the registration from denying it,*

> *but that is as far as the matter goes. The only exception relates to the first directors and secretaries.*
>
> .....
>
> *72. There is no express provision in the IBC Act for the rectification of a register of directors and/or officers. However, in my opinion, the Court has power, in an appropriate, case to declare an entry in a company's register of directors and/or officers invalid and may order that the register be corrected accordingly.*
>
> *73. In my opinion, if it can be demonstrated that an entry in the Share Register or register of directors is due to a forgery or is otherwise a fraud, that would constitute sufficient grounds to overcome the rebuttable presumption that the entries set forth in the Share Register and register of directors and officers are valid. A forgery or fraud would also form the evidentiary basis for a declaration of title and if necessary, an application to rectify the Share Register or register of directors."*

Mr Fritsch's apparent authority

107. The Defendants agreed with the Plaintiff that as a matter of Cayman Islands conflicts of law rules the question whether a person had ostensible authority was governed by the law applicable to the contract between the agent and the third party. However, they argued that the relevant agreements were the subscription agreements (which were governed by Cayman Islands law). These were relevant to the relationship between the Plaintiff and Defendants arising out of or in connection with the Plaintiff's investments in the Defendants (including as to ostensible authority of their agents).

108. The Defendants said that apparent or ostensible authority was the authority of an agent as it appeared to others which coincide with actual authority but sometimes exceeds actual authority (see *Hely-Hutchinson* [1968] 1 Q.B. 549 at page 583). It was created by a representation from the principal to the contactor i.e. a third party that the agent had the requisite authority to enter into a contract of a kind within the scope of the authority.

109. The Defendants noted that in *Freeman and Lockyer* Diplock LJ (as he then was) had summarised the four conditions that must be satisfied for the court to hold that the agent or a company has apparent or ostensible authority:

> *"It must be shown: (a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (b) that such representation was made by a person or persons who had " actual " authority to manage the business of the company either generally or in respect of those matters to which the contract relates; (c) that the (the contractor) was induced by such representation to enter into the contract, i.e., that he in fact relied on it; and (d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent. "*

110. The Defendants submitted that these four conditions were satisfied in the present case and that the evidence established that Mr Fritsch had ostensible or apparent authority to enter into to the loan notes and to give the payment instruction on behalf of the Plaintiff:

(a). Mr Fritsch had presented himself as the Plaintiff's ultimate beneficial owner to the Defendants since 2002. This was corroborated Mr Inder Rieden who had expressly listed "*Bernhard E. Fritsch – Entrepreneur*" as the beneficial owner of the Plaintiff in the subscription documents for the Credit Fund. Mr Fritsch's unchallenged affidavit evidence confirmed that he had been in contact with the Capital and the Defendants for "*approximately 18 years and on behalf of the Plaintiff for almost 16 years*" during which time he was aware that it "*was well-known by [Capital and the Defendants]*" that he had "*always been the ultimate beneficial owner of the Plaintiff.*" In this respect Mr Fritsch had directed the placing of the Plaintiff's investment with the Defendants in 2003 and had been managing and monitoring communications with them on behalf of the Plaintiff on a number of occasions, including instances in which he was the sole representative of the Plaintiff.

(b). the Plaintiff by its letters to Capital and the Defendants represented and acknowledged Mr Fritsch as having authority to deal with the Defendants in relation to share redemption for the Spectrum Fund.

(i). in a letter dated 14 November 2002 signed by Mr Inder Rieden on behalf of the Plaintiff it was said that: "*With reference to the telephone conversation between*

our Mr, Bernhard Fritsch and your Mr. Marc Leferman, we hereby request the redemption as of 31 December, 2002 of our entire investment in Wexford Offshore Spectrum Fund."

(ii). in a letter dated 19 November 2002 signed by Mr Inder Rieden on behalf of the Plaintiff it was said that: "*With reference to your recent conversation with Mr. Bernhard Fritsch, we hereby confirm that we would like to amend our attached redemption request, by changing the effective date thereof from 31 December 2002 to 30 November 2002*."

(c). Mr Fritsch's email signature included the title "*President*" of the Plaintiff in correspondence with Capital. Mr Fritsch had confirmed that at the time of signing the loan notes he believed that in any of his "*BEF capacities, including as President of the Plaintiff, sole and ultimate beneficial owner and representative in prior communications (of which Euro-Dutch was aware) [he] had complete and absolute authority to sign for the Plaintiff even apart from the BEF Resolution*."

(d). representations as to Mr Fritsch's authority to act on behalf of the Plaintiff were made with the knowledge of, and in certain instances by, Mr Inder Rieden, who (on the Plaintiff's own case) was one of its directors with authority to manage the business of the Plaintiff generally, or in respect of matters to which the Plaintiff's investment contract relates.

(e). the Defendants had relied on the representations as to Mr Fritsch's authority to act on behalf of the Plaintiff during the loan negotiations (having no knowledge of any alleged change in beneficial ownership of the Plaintiff).

(f). they also relied on the November Resolution which further confirmed to the Defendants that the Plaintiff could enter into a lending transaction and that Mr Fritsch is an authorised signatory for the Plaintiff. Capital had also been notified by email from Mr Fritsch dated 15 February 2018 that going forward all related paperwork and

correspondence regarding his "*investment holding BEF Enterprises Inc*" should be sent directly to him and not to Euro-Dutch as he would take care of everything himself.

(g). the Plaintiff's amended and restated memorandum of association did not restrict the Plaintiff from entering into a bridge loan transaction such as the loan notes or the delegation of that authority to an agent like Mr Fritsch

111. The Defendants submitted that they were not prevented from relying on Mr Fritsch's ostensible authority because of the correspondence and conversations with Euro-Dutch.

112. The Defendants argued that there has been a divergence of approaches adopted by the English courts on the issue of the type of inquiry required by a party contracting with an agent. The Court of Final Appeal of Hong Kong in *Akai Holdings Ltd v Kasikornbank Public Co Ltd* [2010] HKCFA 64 held that reliance on constructive notice in a commercial context had been deprecated and that in commercial cases, absent dishonesty or irrationality, a person should be entitled to rely on what he was told. However, following the Privy Council's decision in *East Asia Co Ltd v PT Satria Tirtatama Energindo* [2019] UKPC 30 (***East Asia***) the Supreme Court has since held in *Philipp v Barclays Bank UK Plc* [2024] AC 346 (***Barclays Bank***) "*the correct test to be that a third party cannot rely on the apparent authority of an agent if it failed to make the inquiries that a reasonable person would have made in all the circumstances to verify that the agent had that authority*."

113. The Defendants submitted that regardless of which test was correct as a matter of Cayman Islands law, the facts of this case were materially different from those in *East Asia* and *Barclays Bank*. In this case the Defendants did not act unreasonably in relying on the representations as to Mr Fritsch's authority to act on behalf of the Plaintiff in the circumstances. In this respect:

(a). there was nothing particularly unusual or untoward about the arrangements under the loan notes. They did not involve the disposal of any of the Plaintiff's asset but simply a mechanism to expedite payment of the redemption proceeds to the Plaintiff in

circumstances where they had been inadvertently delayed by the Administrator's misplacement of the redemption requests. The terms of the loan notes were not prejudicial to the Plaintiff and Capital had in fact agreed to grant the loans on an interest free basis.

(b). the Defendants were satisfied of Mr Fritsch's authority to act on behalf of the Plaintiff given the Plaintiff's numerous representations that he was the "*sole beneficial owner*" of the Plaintiff, the "*over a decade*" long history of Mr Fritsch having dealt with Capital on matters relating to the Plaintiff's investments with the Plaintiff's knowledge and having "*spoken for it in the past.*"

(c). the Plaintiff had previously acknowledged Mr Fritsch's authority to process share redemptions for the Spectrum Fund in 2002. By doing so, the Plaintiff and Euro-Dutch (through Mr Inder Rieden) had represented by conduct to the Defendants that Mr Fritsch had the authority to process the redemption requests.

(d). the Defendants had not been directly contacted by Euro-Dutch or any other parties connected with the Plaintiff to suggest that there was any defect in Mr Fritsch's authority or change in his status. Euro-Dutch had not contacted the Defendants directly until 26 March 2018 (after the loan notes had been signed and the payment instruction executed) to inform the Defendants of the alleged change in Mr Fritsch's status and authority. Whilst the Plaintiff asserted that it had provided copies of the register of directors to the Administrator on or around 22 February 2018, there was no mention in that communication that Mr Fritsch was no longer the beneficial owner of the Plaintiff or of the purported transfer of beneficial ownership to Mr and Mrs Inder Rieden.

(e). the Credit Fund's subscription document expressly required the Plaintiff to "*promptly notify*" it of any change in beneficial ownership, which if done would have put the Defendants on notice.

(f). the change of beneficial ownership was not communicated to the Defendants until mid-2018 after this dispute arose and the actual circumstances surrounding the change of beneficial ownership was not communicated to the Defendants until 30 October 2024 when the Plaintiff filed the Inder Rieden 1.

(g). to the extent that any additional support of Mr Fritsch's authority to enter into the loan notes was reasonably required (which the Defendants did not consider necessary at the time), Mr Fritsch provided the Defendants with the BEF Resolution authorising him to execute transactions of this type as additional supporting documentation. Capital had no way of knowing that, if this is indeed the case, the signatures of Mr Inder Rieden and Ms McCoy were forged as Mr Inder Rieden now claimed. Mr Inder Rieden also claimed that the directors on the BEF Resolution included two people who were not directors, but Capital had no reason to doubt the validity of the BEF Resolution in the circumstances.

(h). as soon as Mr Inder Rieden as the head of Euro-Dutch had alleged that Mr Fritsch did not have authority, the Defendants confirmed that the balance of the redemption proceeds would be placed in an interest-bearing account until the matter was resolved.

(i). the Defendants took the steps that a reasonable person would have taken in the circumstances.

Discussion and decision

The Disputed Debt

The actual authority defence

114. The parties agree that the issue of whether Mr Fritsch had actual authority to cause the Plaintiff to enter into the loan notes and give the new Wire Instructions is governed by Bahamian law. While permission for expert evidence was not specifically granted the parties

have agreed and accepted that the evidence of Mr Paton and Ms Cooper Burnside KC be treated as expert evidence for the purpose of the Application (and Mr Paton and Ms Cooper Burnside KC both confirmed that they regarded themselves as acting as and subject to the duties of an expert in this jurisdiction, with an overriding duty to the Court).

115. The key question is whether the Plaintiff has established that the Defendants' actual authority defence has only a fanciful and no realistic prospect of success: is the Defendants' defence more than merely arguable? The Court must form a view based on the parties' pleadings and the affidavit evidence. Where a fact is asserted by a party in an application to be decided only on affidavit evidence the asserted fact is generally to be accepted by the Court unless it is irrelevant, inherently unreliable by reason of being self-contradictory or clearly inconsistent with other unchallenged evidence. In reaching its conclusion the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

116. The actual authority defence is based on three main grounds. First, Mr Fritsch's decision-making authority and power as a director. Secondly, Mr Fritsch's decision-making authority and power as president. Thirdly, Mr Fritsch's decision-making authority and power as the sole beneficiary of the trust on whose behalf the Shares were held.

117. As regards the first ground, the agreed and unchallenged facts show that on 16 August 2017 the Removal Resolution was signed by the registered shareholder, Euro-Dutch, exercising the power which Euro-Dutch undoubtedly held as shareholder, to remove Mr Fritsch as a director. It might be said that the Removal Resolution was unaffected and could not be impeached by the allegation made by Mr Fritsch in his evidence relating to the Assignment Agreement (and the Distribution Deed). Euro-Dutch was undeniably the registered shareholder with the undoubted right as shareholder to remove a director of the Plaintiff. However, the Removal Resolution was signed by and in the name of *"[Euro-Dutch] as Trustee of the Inder Rieden Family Trust*" (my underlining). It therefore appears that the Removal Resolution was signed and made on the basis that the Assignment Agreement had

been effective to change the capacity in which Euro-Dutch held the Shares, and that Euro-Dutch was acting and permitted to act *qua* trustee of the Inder Rieden Family Trust. This means that it is at least arguable that if the Assignment Agreement was void Euro-Dutch was unable to pass the Removal Resolution in the capacity in which it purported to do so, or that the Removal Resolution was conditional upon or expressed to be effective only if the Shares were held by Euro-Dutch as trustee of the Inder Rieden Trust, so that the validity of the Removal Resolution would be affected.

118. The Defendants submitted that it was at least arguable that the Assignment Agreement was void as a matter of Bahamian law (which is assumed to be the governing law of the agreement). Ms Cooper Burnside KC's opinion was, as I have noted, that the Assignment Agreement (and the purported repayment of the aforesaid loans and the assignment purported to be effectuated thereunder) was *prima facie* rendered void by virtue of the two-party rule (she also considered that in the alternative it was voidable under the rule against self-dealing). Mr Paton did not deal with or challenge this analysis in Paton 2. Ms Cooper Burnside KC accepted that it was only if the Assignment Agreement was void that its invalidity could be said to affect the validity of the Removal Resolution (see Burnside 1 at [93]).

119. Ms Cooper Burnside KC characterised the Assignment Agreement as involving a transfer of the Shares (see [87.1] and [95.1] of Burnside 1) so that to be effective it requires two parties, namely a transferor and transferee. The Assignment Agreement does, on its face, use the language of and refers to an assignment and transfer of the Shares. It states that "*The Richmountain Trust hereby assigns and transfers to the Inder Rieden Family Trust … all right title and interest in [the Shares]*." That must be intended to refer to Euro-Dutch acting as trustee of The Richmountain Trust and as trustee of the Inder Rieden Family Trust. The Assignment Agreement goes on to state that Euro-Dutch is authorised and directed to "*transfer of the [Shares] on the books of [the Plaintiff] out of the name of The Richmountain Trust into the name of The Inder Rieden Family Trust.*"

120. But it seems to me that there is a question mark over the proper characterisation and effect of the Assignment Agreement (I appreciate that on the basis that the Assignment Agreement is governed by Bahamian law, the rules governing its interpretation are a matter of Bahamian law but the expert evidence suggests that those rules are likely to be the same or similar to the rules applied by English and Cayman Islands law). Its effect is to remove the Shares as an asset of The Richmountain Trust and to make them an asset of the Inder Rieden Family Trust. There is no dealing with or transfer of the legal title to the Shares or a change to the identity of the shareholder and member. That remains Euro-Dutch. The change is in identity of the beneficiaries and the beneficial interests in the Shares (and the capacity in which Euro-Dutch acts as member and holds the Shares). There has been a termination of the beneficial interest of the beneficiaries of The Richmountain Trust and the creation of a beneficial interest in the beneficiaries of the Inder Rieden Family Trust by an act of the trustee of both trusts with the result that the Shares cease to be held by Euro-Dutch subject to and as trustee for the beneficiaries of The Richmountain Trust and become held by Euro-Dutch subject to and as trustee for the beneficiaries of the Inder Rieden Family Trust. It seems to me to be strongly arguable therefore that the Assignment Agreement evidences the unilateral act of Euro-Dutch (to which the beneficiaries of the two trusts are not party) rather than a transfer requiring and involving two parties. Euro-Dutch has declared or determined that the Shares are to be held on different trusts. If this is the correct analysis then the two-party rule is not engaged.

121. Ms Cooper Burnside KC also considered that the Assignment Agreement engaged the self-dealing rule. As the passages from *Lewin on Trusts* (20th ed.) to which she refers in Burnside 1 (see [81]) make clear, the rule applies primarily to the purchase by a trustee of trust property and is based on the principle that a trustee must not put himself in a position where there is a conflict between his interest and duty. Ms Cooper Burnside KC cites the section in *Lewin on Trusts* dealing with sales between trusts sharing a common trustee. However, it is clear that the rule also applies to transactions other that the purchase of trust property where there is a dealing with trust property involving the trustee such that a conflict between the trustee's duty and interest arises or may arise. *Lewin* gives as examples loans made by trustees out of trust assets to one of them, leases of trust property by trustees and the exercise

by a personal representative of a power to appropriate estate property in satisfaction of a debt due to the personal representative. I can see that even if the Assignment Agreement does not when properly characterised involve a sale of trust property there is a strong argument that the self-dealing rule applied because of Mr Inder Rieden's position as a (managing) director and principal shareholder of Euro-Dutch and beneficiary of the Inder Rieden Family Trust. But even if the self-dealing rule applies because of the conflict between Mr Inder Rieden's duty as a director of the trustee and his interest as the beneficiary of the trust to whom the alleged debt was owed and which acquired an interest in the Shares, there is no basis for claiming that the Assignment Agreement was void and of no effect. Even where the self-dealing rule applies and is broken, the trustee and his successors in title (other than a bona fide purchaser of a legal estate without notice) take a voidable title and any beneficiary whose claim is not barred by concurrence or delay is entitled to have the relevant transaction set aside ex *debito justiciae*.

122. In addition, Ms Cooper Burnside KC questioned whether Euro-Dutch had power under the trust agreement for The Richmountain Trust to enter into the Assignment Agreement although her analysis and opinion on this issue and the effect of the Assignment Agreement having been entered into where Euro-Dutch did not have the power or proper authority to do so was tentative and incomplete. She also considered that while not required to do so under Bahamian law, Euro-Dutch in the circumstances ought to have obtained the approval of the beneficiaries of The Richmountain Trust or of the Bahamian Court before entering into the Assignment Agreement.

123. It seems to me that, on balance, the Defendants' case that the Assignment Agreement is void (and that as a result the purported removal of Mr Fritsch was invalid and ineffective) withstands the summary judgment challenge. It is more than barely arguable and while subject to serious doubts it cannot be so heavily discounted as to be treated as fanciful and having no realistic prospect of success. It seems to me that a fair and proper determination of this defence requires further evidence which would be available to be adduced at trial both as to Euro-Dutch's powers as trustee of The Richmountain Trust and as to the relevant background facts and factual matrix which will be relevant to the interpretation of the

Assignment Agreement. In addition, in a case where fraud is issue, cross-examination of witnesses is crucial. Cross-examination of Mr Fritsch and Mr Inder Rieden will clearly be necessary and important. Furthermore, while Bahamian law is, as the evidence adduced on the Application demonstrates, similar to Cayman Islands and English law, there is likely to be a need for further Bahamian expert evidence on the voidness defence. On balance, while I can see the prejudice to Mr Inder Rieden and his wife in delaying a determination of this defence it seems to me that the Defendants have passed the threshold on the merits of the defence required to withstand a summary judgment challenge and that a fair disposal of the defence requires a trial.

124. The Assignment Agreement is an unusual document and the circumstances in which it came to be made raise concerns as to its legitimacy and lawfulness. Mr Fritsch has alleged fraud by Mr Inder Rieden, which is obviously a very serious matter. These are matters that justify a trial. Furthermore, the analysis of the proper characterisation and effect of the Assignment Agreement raises a range of difficult questions (the well know case law on the treatment of dispositions of equitable interests in trusts such as *Re Vandervell's Trusts (No 2)* [1974 Ch 269 may be relevant) none of which were canvassed by the parties for the purpose of the Application and which would need to be the subject of full submissions at trial. I do not consider that the Court should make a decision on the legal effect of the Assignment Agreement at the summary judgment stage without the benefit of further Bahamian law expert evidence and full argument from the parties. Further, and importantly, the legal issue of the characterisation and effect of the Assignment Agreement may well depend on how the terms of the agreement is to be interpreted and further evidence could be available and adduced that would be relevant and important on this.

125. For current purposes, it seems to me that the Defendant's case that the Assignment Agreement when properly characterised is to be treated as engaging and breaching the two-party rule (or that it was otherwise beyond Euro-Dutch's powers as trustee of The Richmountain Trust) and as such was void (so that the Removal Resolution was also invalidated and ineffective because it was passed and made by Euro-Dutch in a particular capacity, namely as trustee of the Inder Rieden Trust, in which capacity it was unable to

exercise rights given by the Shares) is, although for the reasons I have given subject to serious doubts, cannot be said to be fanciful and having no realistic prospect of success. The characterisation of the Assignment Agreement and its effect under Bahamian law needs fuller and further argument and may well be affected by further evidence to be adduced during the proceedings, all of which can only be properly considered and assessed at trial.

126. Having said that, the Plaintiff argued that any challenge to the Assignment Agreement was irrelevant for the purpose of the Application in general and in particular deciding whether Mr Fritsch was a director of the Plaintiff on 21 February 2018 (or 22 February 2018 when the New Wire Instructions were given, 8 March 2018 when the second loan note was executed, and 2 April 2018 when, according to the Defence, the loans were paid and advanced). This was because for the purpose of the Application, in the absence of a proper challenge to the removal of Mr Fritsch having been made (in proceedings that had found in favour of Mr Fritsch, or Aron, or were being prosecuted before a court of competent jurisdiction) the position as shown on the register of directors should be treated by the Court as correct (the directors' register recorded that from 21 August 2017 Mr Fritsch had been removed as a director) and it was now not possible for such a challenge to be made. It was no longer possible for Aron or Mr Fritsch to bring proceedings to challenge the Assignment Agreement.

127. The Plaintiff accepted, I think, that it cannot rely on the Bahamian Court Order to preclude the Defendants from defending the Plaintiff's claim on the basis that Mr Frisch's removal as a director (and president) was invalid (because the Assignment Agreement was void and invalid). The Defendants were not parties to the Bahamian Proceedings and so cannot be affected or bound by any preclusive effect of the Bahamian Court Order.

128. There is also a dispute as to the proper characterisation of the Bahamian Court Order and whether it was final judgment on the merits. In particular there is a dispute as to whether the originating summons was dismissed on the ground that that there had been a failure to prosecute the action or that the action was an abuse of process. The parties accept that the preclusive effect of the Bahamian Court Order in these proceedings is governed by Cayman

Islands law. It is well established that the dismissal of an action for want of prosecution is an interlocutory order and does not create a *res judicata* (see *Birkett v James* [1978] AC 297) and that the issue estoppel created by a dismissal is limited to the actual ground on which the existence of a right is negatived. If this cannot be determined, which may because the relevant court has not given reasons for the order it has made, the dismissal will only decide that relief was refused. I accept that the application (the notice of application dated 6 February 2024) pursuant to which the Bahamian Court Order was made is helpful in assessing the reasons why the order was made but in this case two separate grounds were relied on (that the originating summons be struck out due to the claimant's failure to comply with the court's order and/or that the conduct of the claimant is likely to obstruct the just disposal of the proceedings) and the Bahamian Court Order does not specify which ground or grounds were accepted. In any event it seems to me to be likely that since the grounds related primarily to the claimant's failure to take the procedural steps directed to be taken by the Bahamian Court the better view is that the Bahamian Court Order is to be characterised as the dismissal of an action for want of prosecution. I note Ms Cooper Burnside KC's view that therefore Aron is not barred from commencing another action before the Bahamian Court seeking the same or substantially similar relief to that previously sought in the originating summons but it must be the case that the Bahamian Court has the power to refuse to permit a second action on the ground that doing so was an abuse of process, particularly if it can be shown that that the claimant's default and failure to prosecute the first originating summons was deliberate or otherwise contumacious. But the dispute over the proper characterisation and effect of the Bahamian Court Order cannot affect the main point that since the Defendants were not parties they cannot be bound by the order or subject to its preclusive effect.

129. Accordingly, the mere existence of the Bahamian Court Order does not prevent the Defendants from relying in these proceedings on the challenges made in the Bahamian Proceedings to, in particular, the Assignment Agreement and does not mean that it is inevitable or clear that Aron could not commence another action in the Bahamas on the same or similar grounds (although as I have said it is at least arguable that doing so would be an

abuse of process and therefore would be prevented). But two further issues still arise on the Application which need to be considered. First, does the fact that no new proceedings have been commenced to challenge the Assignment Agreement as being void mean that for the purpose of the Application the Court should treat the record in the directors' register as sufficient evidence of Mr Fritsch's removal and secondly, should the Defendants be permitted to rely on a challenge to actions relating to the internal management and governance of the Plaintiff when they have no standing themselves to maintain such a challenge and when the parties who do have standing and who, in Mr Fritsch's evidence are said to maintain these challenges are not parties to these proceedings?

130. In my view there is a distinction between (a) a defence based on the Assignment Agreement being void and of no effect so that in consequence Euro-Dutch was unable as trustee of the Inder Rieden Trust to vote the Shares and sign/pass the Removal Resolution and (b) a defence based on the Assignment Agreement being voidable and capable of being set aside. In the former case, the Defendants are not asserting or relying on a right to set aside the Assignment Agreement. They are claiming that on the facts as proved the Removal Resolution was invalid and of no effect and that Mr Fritsch remained a director (and president) at the relevant time. It seems to me that the Defendants should be permitted to rely on such a defence although they are entirely dependent on Mr Fritsch's evidence in doing so (and my preliminary view is that Mr Fritsch will need to agree with the Defendants that they can have access to all his documents for the purpose of discovery). As Ms Cooper Burnside KC's evidence established, under Bahamian law (and the law of the Cayman Islands) whether a person was a director at a particular time depends on whether he or she was validly appointed or removed, and the register of directors is not determinative. The Court must assess the relevant facts and consider the relevant action taken to appoint or remove a director and determine whether the appointment or removal was valid and effective. The register does though have evidential weight and probative significance, and the Court will have to determine after finding the relevant facts whether the statutory presumption in section 44(5) of the IBC Act has been rebutted.

131. However, in so far as the Defendants seek to rely on the Assignment Agreement being voidable, the position is different. First, this would mean that the Assignment Agreement was effective until set aside so that the action taken by Euro-Dutch in the name and capacity as the trustee of the Inder Rieden Trust, including passing the Removal Resolution, prior to the Assignment Agreement being set aside would be unaffected. Secondly, any application for further relief including relief based on Euro-Dutch being a constructive trustee or for the re-transfer of the Shares with consequential relief to restore the parties to their position before the Assignment Agreement was entered into, would require proceedings to be commenced and a claim made by a party with standing to apply to set aside the Assignment Agreement and seek such relief. No such person is a party to, and no such claim is made in, these proceedings.

132. I have considered whether to direct that Mr Fritsch and Aron be joined as necessary and proper parties to the dispute being litigated in these proceedings. Doing so would ensure that all those affected by a determination of the actual authority issue raised by the Defendants would be given the opportunity to participate and set out their position, and would be required to give discovery and be bound by the Court's decision and order. But it does not seem to me that joining Mr Fritsch and Aron (and any others who have a claim or are affected by the authority defence) should be made a condition to the Defendants being permitted to maintain the actual authority defence based on the claim that the Assignment Agreement was invalid and void, for the reasons I have given (and the Plaintiff has not claimed that they should be joined).

133. It seems to me that the same analysis applies to the Defendants' actual authority defence based on Mr Fritsch having acted for the Plaintiff in his capacity as the Company's shareholder. The Defendants claim that Mr Fritsch was able, as the sole beneficiary of the trust on which the Shares were held by Euro-Dutch at the time that the loan notes were executed to make a decision binding on the Plaintiff to approve the loan notes. The Defendants say that the sole shareholder of the Plaintiff was able to make such a decision binding on the Plaintiff and since the Shares were held by Euro-Dutch on trust for Mr Fritsch, his decision was to be treated as a decision of the shareholder even if only taken informally

without a shareholder resolution approving the loan notes having been passed. The authorities support the proposition that a decision by a beneficial owner of the shares can be treated as a decision of or binding on the legal owner. *Ciban* is, as the Defendants argued, is one such authority. But, for the decision of the beneficial owner (or a beneficiary of the trust for whom the legal owner of the shares holds them as trustee) to be effective as a decision made (and vote cast or resolution passed) by the shareholder the legal owner must be under an obligation and required to act in accordance with the directions of the beneficial owner (or beneficiary) (see Gower, *Principles of Modern Company Law*, 10th ed., at [15-17] citing *Shahar v Tsitsekkos* [2004] EWHC 2659 (Ch) at [67]). The decision of the beneficial owner (or beneficiary) is then treated as including and involving a direction and instruction to the legal owner. In *Ciban* there were bearer shares in the possession of a nominee or bare trustee for Mr Byington. There was no question that Mr Byington was entitled to direct Mr Stollman, his Florida attorney, to exercise the rights as shareholder as he directed. The Defendants will need to adduce evidence to show that Mr Fritsch was, assuming that they can establish that the Assignment Agreement was void, able to give instructions to Euro-Dutch as to how to vote the Shares and that the *Duomatic* principle applied so that an informal approval was sufficient to constitute a binding shareholder decision. This will mean showing that none of the exceptions to the application of the *Duomatic* principle (as explained by Lord Burrows in *Ciban*) applied.

134. Taking into account the evidence adduced on the Application and the evidence that can reasonably be expected to be available at trial, it seems to me that the Defendants' actual authority defence based on first the Assignment Agreement being void and then secondly on Mr Fritsch's asserted right as beneficiary of The Richmountain Trust to make decisions in respect of the Shares which Euro-Dutch as trustee was required to follow or which are to be treated as an effective exercise of the voting rights under the Shares raises an issue which ought to be tried and cannot be treated as having no realistic prospect of success.

135. It seems to me that the Plaintiff's reliance on the entries in the share register (that show Euro-Dutch as trustee of the Inder Rieden Family Trust as shareholder from 16 August 2017) does not provide a complete answer to the Defendants' defence. It is not in dispute that Euro-

Dutch was the shareholder at the relevant times (21 February 2018 when the first loan note was apparently executed, 22 February 2018 when the New Wire Instructions were given, 8 March 2018 when the second loan note was apparently executed and 2 April 2018 when the loans were apparently advanced). The dispute concerns whether at these times Euro-Dutch still held the Shares on and as trustee for The Richmountain Trust so that Mr Fritsch's approval of the loan notes and the loans made pursuant thereto are to be treated as an informal decision by BEF's sole shareholder binding on BEF. I am not satisfied, at least at present in light of the expert evidence adduced on the Application, that the designation in the share register of the capacity in which Euro-Dutch held the Shares is to be treated as definitive. By section 29(3) of the IBC Act the share register is *prima facie* evidence of any matters contained therein to the extent that they are required to be included. It is not clear that the capacity in which the relevant shares are held as contrasted with the identity of the shareholder is such a matter but even if it is the register is only *prima facie* evidence which can be rebutted.

136. Mr Paton relied on Lord Justice Snowden's judgment in *Re JDK Construction* in support of the proposition that as a matter of Bahamian law a person whose name has wrongly been removed from the register of members as a consequence of a forged transfer or other fraud does not retain the status of a member for voting purposes and that the entries on the register of members are presumptively valid and the members of a company are taken to be those shown on the register unless and until the register is rectified. On this basis, the Plaintiff claims that the Defendants' defence based on Mr Fritsch having remained as the beneficial owner (or a beneficiary of a trust) of the Shares is bound to fail. They say that the mere assertion of a claim that the person identified in the register is not the member and that another person has wrongfully been removed from the register based on a wholly invalid and void transfer is insufficient to rebut the record in the register. *Re JDK Construction* is undeniably helpful to the Plaintiff but I am not, at least for present purposes, satisfied that the decision applies in the present case to defeat the Defendants' actual authority defence. First, the Defendants do not challenge Euro-Dutch's position and status as shareholder. They challenge the purported exercise of Euro-Dutch's powers as trustee of The Richmountain Trust to remove the Shares from that trust and declare a trust over the Shares in favour of

the beneficiaries of the Inder Rieden Family Trust. While Aron as the new trustee of The Richmountain Trust will no doubt wish to apply to rectify the register to remove and correct the reference to the capacity in which Euro-Dutch held the Shares on and after 16 August 2017, there is no need to rectify the identity of the shareholder. I am not satisfied on the basis of the expert evidence adduced to date that a statement in the share register of the capacity in which the undisputed shareholder holds the relevant shares is sufficient to require the Court to treat the shareholder as holding in that capacity in the absence of an order rectifying the entry (or possibly an application for such an order). The Defendants in my view have done enough to raise an issue on this point that ought to be tried. Bahamian law on this issue needs further elaboration. Secondly, it is not clear to me that the basis for Lord Justice Snowden's decision *Re JDK Construction* is applicable in relation to international business companies incorporated under and governed by the IBC Act. Lord Justice Snowden's analysis, as the extract from his judgment set out above makes clear, started from and was based on section 112 of the UK's Companies Act 2006 which stipulates that a member of a company is (unless the person was a subscriber) the person "*whose name is entered in its register of members, is a member of the company."* Mr Paton did not explain how this reasoning applied to cases governed by the IBC Act which incorporates a different definition of "*member*" in section 2 (a member "*includes a person or institution who holds shares in a company*"). It is not clear that being registered has the same critical significance under the IBC Act as it does under the Companies Act.

The ostensible/apparent authority defence

137. It seems to me that the Plaintiff has not shown that the Defendants' ostensible authority defence has no realistic prospect of success at trial. The Defendants have shown that there are clearly disputed issues of fact which ought to be tried.

138. As I have noted, the parties agreed that the question whether a person has ostensible or apparent authority is governed by the law applicable to the contract between putative agent and the third party (if the putative agent's authority were established). The Plaintiff argued that the issue of whether Mr Fritsch had ostensible authority to enter into the loan notes and

to give the New Wire Instructions was governed by Cayman Islands law since the governing law of the subscription agreements pursuant to which the Plaintiff made its investments in the Defendants was Cayman Islands law (the Plaintiff also argued that Cayman law governed all questions regarding subscriptions to and the redemption of shares in a Cayman Islands company). The Defendants, as I have noted, also argued that this issue was governed by Cayman Islands law since the relationship between the Plaintiff and the Defendants arising out of or in connection with the Plaintiff's investments in the Defendants was governed by the subscription agreements whose governing law was Cayman Islands law.

139. Dicey & Morris (16th ed.,) Rule 223 (at [32R-318]) states that (my underlining):

> *"(1) The issue whether the agent is able to bind the principal to a contract with a third party, or a term of that contract, is governed by the law which would govern that contract, or term, if the agent's authority were established.*
>
> *(2) The existence and scope of the agent's actual authority to represent the principal, where relevant under the law which applies by virtue of clause (1) of this Rule, are to be determined having regard to the law applicable to the relationship between principal and agent.*
>
> *....*

140. As Dicey & Morris goes on to note at [32-323] (my underlining):

> "*... the extent to which A must be deemed to be authorised by P to enter into a contract to sell property on P's behalf or enter into other contracts, i.e. the definition of A's ostensible authority, is a matter for the law applicable to the contract which A seeks to conclude with T as are the consequences of lack of authority as between P and T and the effect of later ratification. So is the question whether A's authority to bind T has been revoked, whether it is revocable at all, and also, it is submitted, whether it is automatically revoked by the principal's death, bankruptcy or mental disorder, or whether it has expired by lapse of time*

141. The core issue in dispute in these proceedings is whether the Plaintiff is bound by the loan notes. In particular, whether the Plaintiff is bound by and can be said to have agreed to the Repayment Clause (there is also arguably an issue as to whether the Plaintiff is to be treated as having received the loan advances made by Capital). The Defendants rely on Mr Fritsch's

ostensible authority to show that the Plaintiff is bound by the loan notes including the Repayment Clause. As Dicey & Morris Rule 222(1) states "*The issue whether the agent is able to bind the principal to a contract with a third party, or a term of that contract, is governed by the law which would govern that contract, or term, if the agent's authority were established.*" The governing law of the loan notes, as I have noted, was New York law. The debt owing in respect of the loans advanced pursuant to the loan notes was also I assume governed by New York law. But the parties did not adduce evidence as to the applicable New York law.

142. There is a question as to how the Repayment Clause is to be interpreted and how the Defendants' obligations are affected by it. They are not named as parties to the loan notes, but I assume (although I appreciate that in the absence of expert evidence as to New York law I can only offer a provisional view) that the Defendants claim that they are third-party beneficiaries under New York law and so can rely on the loan notes and the Repayment Clause as against the Plaintiff. As regards characterisation, the issue is whether the Repayment Clause is to be treated as giving rise to a multi-party set-off as between the Plaintiff, the Defendants and Capital or as a payment instruction from the Plaintiff to the Defendants to pay Capital and Capital's agreement to accept such a payment in discharge of the Plaintiff's liability in respect of the loans. These are clearly issues of New York law as the governing law of the loan notes.

143. Whatever the precise characterisation of the Repayment Clause, it seems to me that the question of whether the Defendants can rely on Mr Fritsch having ostensible authority to bind the Plaintiff to the loan notes and the Repayment Clause is governed by the law of New York. I do not see that the fact that the relationship between the Plaintiff and the Defendants regarding the former's investments in the latter (including the subscription agreements) is governed by Cayman Islands law displaces this conclusion. The Defendants' liability to repay the Disputed Debt and the Disputed Debt itself are no doubt governed by Cayman Islands law (as being subject to and governed by the subscription agreements and the Defendants' constitutions as Cayman companies) but the relevant choice of law rule as set

out by Dicey & Morris and the authorities does not apply that law to the issue of ostensible authority to enter into a New York law agreement.

144. But, as I have said, none of the parties argued that the ostensible authority issue and the Defendants' ostensible authority defence were governed by New York law and no evidence of New York law has been adduced. In these circumstances, where the parties agree and do not dispute that the issue is governed by Cayman Islands law the right approach is for the Court to proceed to determine the Application on that basis, so that the conditions established under Cayman Islands law with respect to a claim of ostensible authority need to be made out by the Defendants (although, insofar as questions arise as to whether the Defendants can rely on the Repayment Clause even though they are not parties to the loan notes I think that it remains appropriate for me to assume that further evidence will be available at trial as to the applicable New York law, if, as it seems to me it is, it is relevant).

145. Applying Cayman law, it seems to me to be clear that the Defendants have a defence with a realistic prospect of success that raises issues which should go to trial. It seems to me that the evidence shows that it is at least arguable that the Plaintiff held Mr Fritsch out as having authority to act for and bind it in relation to the Plaintiff's investments in the Defendants and that in the circumstances the Defendants or Capital did not act unreasonably when entering into the loan notes.

146. I say Capital or the Defendants because the Defendants are relying on the validity of loan notes and the Repayment Clause therein to establish that the Disputed Debt has been repaid (by their payment to Capital), when they were not signatories or direct parties to the loan notes. Insofar as the Defendants seek to enforce the Repayment Clause and to claim that the Plaintiff is bound by the loan notes because of Mr Fritsch's ostensible authority they must show that there was a holding out to them. The question arises as to how they can do so if they were not named as parties to the loan notes. As I have noted they may well be able to establish that they are third-party beneficiaries and able to enforce the Repayment Clause (this might be an argument open to them even under Cayman law). The question then arises as to whether a holding out to such a third-party beneficiary is sufficient to allow the third

party to rely on ostensible authority. But at least for the purpose of the Application, I assume that Capital would be able to enforce the loan notes and the Repayment Clause at the Defendants' request (for which purpose Capital would probably need to be joined as a party to these proceedings) and that Capital would be able to rely on the same facts as the Defendants have cited in support of the holding out by the Plaintiff and their reasonable reliance in the circumstances on that holding out.

147. As regards a holding out and representations by the Plaintiff that Mr Fritsch had authority to act for it in relation to its investments in the Defendants, it seems to me that there are sufficient facts to raise a realistic and arguable defence. In particular, the following are of particular weight and significance: Mr Fritsch's positions as a duly appointed director and president of the Plaintiff; the reference to Mr Fritsch as the beneficial owner in the Credit Fund subscription agreement; the letters from Mr Inder Rieden referring to Mr Fritsch as having been acting for the Plaintiff in connection with previous redemption requests and the lengthy relationship between the Defendants and Mr Fritsch in which he was permitted to act and take decisions for the Plaintiff. It seems to me that these factors can also be relied on as a holding out and representation that Mr Fritsch had authority to borrow funds on behalf of the Plaintiff, at least for the purpose of arranging for the early payment of redemption proceeds.

148. It also seems to me that the Defendants have adduced evidence of sufficient facts to raise a realistic and arguable defence that they (or at Capital) acted reasonably in relying on these representations and this holding out when agreeing to make the loans and to the Repayment Clause. The apparent purpose of the loans and repayment mechanism established by the Repayment Clause was to facilitate an accelerated receipt of the redemption proceeds and was therefore connected with the redemption process and on the face of it commercially reasonable. Assuming that there were genuine and proper reasons why the redemption proceeds could not just be immediately paid to the Plaintiff, such a mechanism would not on its face and without more appear to raise concerns or suspicions. The evidence does show that before the first loan note was executed and the first loan advanced, Mr Strachan had reminded the Administrator on 16 February 2017 that only the directors could act for the

Plaintiff in relation to redemptions although he did not alert the Administrator to any issue concerning Mr Fritsch's position as a director. Mr Strachan also reminded the Administrator to follow the Wire Instructions. Before the second loan note was executed and the second loan advanced (assuming it was advanced on 2 April 2018) copies of the updated registers of directors and officers, showing that Mr Fritsch was no longer a director or president of the Plaintiff, were sent to the Administrator and it appears that the Administrator had indicated an intention to send these at least to Capital but neither Mr Strachan or Mr Inder Rieden had drawn this critical amendment and fact to the attention of the Administrator (or Capital or the Defendants), nor did they send a copy of the updated share register, and there is a factual and legal issue as to whether the Administrator (Capital or the Defendants) read the registers that were sent to them and whether if they did not do so whether in the circumstances it was reasonable for Capital (and the Defendants) to proceed without having done so. There is also an issue as to whether receipt by the Administrator is to be treated for these purposes as receipt by Capital and the Defendants. It appears that it was only by Mr Inder Rieden's email dated 26 March 2018 that the Defendants were told explicitly that Mr Fritsch had, according to Mr Inder Rieden, been removed as a director and president and had no authority to act for the Plaintiff. On the basis of the facts averred in the Defence, Capital had not advanced the loans at that point although it may well have been committed to do so. If the facts set out in Maples' post-hearing email dated 15 April 2025 are correct, Capital had already advanced both the first loan and the second loan by then. The facts relating to when the loans were actually advanced, what Capital's position was and obligations were at the time and what the representatives of Capital, the Defendants and the Administrator knew at the time all need to be established at trial.

149. There are also factual disputes as to precisely what at the relevant times the representatives of the Administrator, Capital and the Defendants knew as to Mr Fritsch's status and the dispute between Mr Fritsch and Mr Inder Rieden, and what steps they took to confirm Mr Fritsch's authority both after receipt of Mr Strachan's emails in early February and the 22 February 2018 email with the registers of directors and officers and before the first and second loan notes were executed and the loans advanced. There are also factual disputes as to what Mr Inder Rieden knew and did and for example why, when he knew from as early

as 16 February 2018 that Mr Fritsch was having and involved in discussions with the Administrator, Capital and/or the Defendants, he did not immediately notify them that Mr Fritsch had been removed as a director and president of the Plaintiff and that the Shares were no longer assets of the Richmountain Trust. There are also allegations of fraud on all sides particularly in relation to Mr Fritsch and Mr Inder Rieden and as to the circumstances surrounding and the basis of the Assignment Agreement and the making and payment of the loans. Two key factual issues to be determined are whether the loans were diverted by Mr Fritsch and never paid on to or for the benefit of the Plaintiff and whether the New Wire Instructions which did not involve payment to an account in the name of the Plaintiff should have alerted the Administrator, Capital or the Defendants to potential misconduct and put them on inquiry. There is also a dispute as to what if any reliance was and could properly be placed by Capital and the Defendants on the November Resolution. All of these disputes will require a trial in order for them fairly to be resolved and their existence is a classic ground for refusing to grant summary judgment.

150. The Defendants also argued that the Court would not grant summary judgment in a case where there were disputed issues of foreign law and that this was such a case. As I have noted, Chief Justice Smellie in *Tasarruf* held that in order to justify a refusal to grant summary judgment on the ground that there was a dispute as to the applicable foreign law it needed to be shown (based on the relevant expert evidence) that there was a triable issue involving foreign law which needed to be resolved at trial by way of evidence. As my discussion above makes clear, I am satisfied that there are such triable issues which arise in relation to the actual authority defences and also the ostensible authority defence. There are clearly disputes in the expert evidence as to Bahamian law such as those relating to the effect of the registers of directors, officers and shareholders and as to law governing the purported removal of Mr Fritsch as a director and president of the Plaintiff and as to the effect of the Assignment Agreement on the validity of the Removal Resolution and the rights of beneficiaries of The Richmountain Trust. It is also clear to me that while the Defendants' expert evidence has raised and identified triable issues as to the applicable Bahamian law, which can only be resolved at trial, the expert evidence is currently incomplete and in relation to a number of key points the experts have yet to engage directly with the other's opinions

and evidence. It may also be the case, as I have noted, that evidence of New York law is required. In any event, the issues raised by the expert evidence cannot be resolved without further evidence and a trial including the cross-examination of the experts.

The Admitted Debt

151. As I have noted, in the Defence the Defendants aver that *"[they] admit that they (severally) owe the [Plaintiff]*" the Admitted Debt. They also aver (at [13.2]) that they have not previously paid the Admitted Debt "*due to having received inconsistent instructions both purportedly on behalf of the Plaintiff as to how to pay the Admitted Debt.*" But they do not plead and have not sought to strike-out the Writ on the basis, that the Writ has not been filed on behalf of the Plaintiff by a properly authorised person and only go on to state (at [13.3]) that they intended to pay the Admitted Debt into Court upon or shortly after the filing of the Defence. They have not done so. They now, in submissions take the position that they should not be required to pay the Admitted Debt to the Plaintiff until after the trial in these proceedings and until the issue of who is properly authorised to act for and give a good discharge for payments made to the Plaintiff is settled. During his oral submissions, in response to a question from me, Mr La-Roda Thomas accepted that the Defendants could not resist or object to an order that the Admitted Debt be paid into Court or to an account held by attorneys and approved by the Court.

152. The Plaintiff claims that it is entitled to judgment pursuant to GCR O.27, r.3 on the basis of the admission in the Defence. There is no live dispute on the pleadings and the Defendants have no defence.

153. It seems to me that the proper interpretation of the Defence is that the Defendants say that they are willing to pay the Admitted Debt to the Plaintiff upon receipt of instructions from a properly authorised person but that in view of the dispute as to who is such a person, of which they are on notice, and since no such person has been

identified, a payment into Court is the only proper way to protect themselves and the Plaintiff.

154. I agree that this is the right approach. An amount equal to the Admitted Debt should have been paid into Court long ago.

155. I note that the Defendants said some time ago, as I have noted above, that they intended to place such a sum on deposit to earn interest and the Defendants should disclose to the Plaintiff whether they have done so and how much interest has been earned. The Writ includes a claim for interest, and it will be for the Plaintiff to formulate a claim for interest in respect of the Admitted Debt.

156. It is not sufficient in my view for the Defendants just to pay a sum equal to the Admitted Debt into Court. I accept that it is not clear whether Mr Fritsch, Amron or anyone else will seek to challenge the right of Mr Inder Rieden and Ms McCoy to act as directors of the Plaintiff and withdraw the payment into Court but in view of the allegations made by Mr Fritsch in his evidence and the Defendants' averments in their Defence I consider that the proper and appropriate course is to give those who claim to act for the Plaintiff the opportunity to claim the funds and if there are no competing claims or challenge to Mr Inder Rieden's and Ms McCoy's claim to be able to act as directors of the Plaintiff the funds can be paid out to them. If there is a challenge and the challengers are prepared to institute proceedings to make good that challenge (and take on the related cost and other consequences of doing so) then the dispute will need to be litigated and determined before the funds can be disbursed.

157. A process needs to be put in place that will allow those purporting to represent and act for the Plaintiff to seek payment out of these funds. It seems to me that an interpleader summons would be suitable. Alternatively, and this would be my preference, the order to be made on the Application can deal with this and provide for the payment into Court and the procedure for a claim for payment out to be made.

If there is a further dispute as who should be paid and receive the Admitted Debt a proper claim will need to be made by those with standing to represent the Plaintiff (for example by Mr Fritsch if he claims to remain as a director) and the claim will then need to be litigated. It would probably make sense for any such claim to be case managed with and heard at the same time as these proceedings.

158. There is one alternative which the parties may wish to review. I would be prepared to consider making an order for the Admitted Debt to be deposited in an account held by suitable attorneys on terms agreed by the parties and approved by the Court if this would allow the funds to earn a higher rate of interest and so as better to protect the position of the Plaintiff. But I will leave the parties to discuss and consider further this option.

The Hon. Justice Segal
Judge of the Grand Court, Cayman Islands
10 June 2025